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2
3 UNITED STATES OF AMERICA
4 EQUAL EMPLOYMENT OPPORTUNITY
5 COMMISSION

6 ----- X
7 IN RE: THE MATTER OF:)
8 ~~LAUREN~~)
9 ~~LAREN~~ HALL) CASE NO. EEOC
10 and) 054-086-X0097
11 THE VETERANS)
12 ADMINISTRATION)
13 ----- X

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V O L U M E I

This Matter came on to be heard before
the Honorable Martin K. Magid, Hearing Examiner,
at Room 1304, MacNamara Building, Detroit,
Michigan, on Thursday, September 4, 1986,
commencing at 8:00 a.m.

APPEARANCES:

On Behalf of Complainant:

Pro Se

On Behalf of Respondent:

Mr. Franklin Winslow

Also Present:

Mr. Joseph Wiley, Observer

Carlin Associates

Suite 426 -

12900 Lake Avenue

Ann Arbor, Michigan 48106

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WITNESSES

<u>Name</u>	<u>Dir.</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Hall	11	42	-	-
D'Aoust	79	174	218	226
Aguirre	237	244	-	-
Rodowski	262	281	297	300

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E X H I B I T S

<u>Examiners</u>	<u>Marked</u>	<u>Admitted</u>
1	9	-
2	263	263
<u>Complainant's</u>		
1	24	-
2	24	-
3	24	-
4	24	-
5	24	-
6	24	-
7	24	28
8	24	29
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13	24	-
14	24	-
15	24	-
16	24	-
17	24	34
18	24	34
19	24	-
<u>Agency</u>		
1	80	80
2	82	83
3	89	93
4	137	138
5	137	138
6	138	138

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1 P R O C E E D I N G S

2 Morning Session
3 8:30 a.m.

4 EXAMINER MAGID: I declare this
5 hearing open. ^{It is} ~~The~~ September 4, 1986. My name is MKU
6 Martin K. Magid. I have been assigned by the EEO
7 Commission to conduct a hearing on the complaint
8 of discrimination, filed by the Complainant ^{Lauren} ~~Laren~~ MKU
9 L. Hall against the Veterans Administration;
10 Formal Complaint Number 054-086-X0097. The date
11 of the Formal Complaint is April 17, 1985.

12 The Complainant is appearing on her
13 ^{own} ~~one~~ behalf without representation. Appearing on MKU
14 behalf of the Agency is Franklin Winslow.

15 This hearing is a continuation of the
16 investigatory process. The purpose of the hearing
17 is to give the Complainant an opportunity to be
18 heard on her complaint and to supplement the
19 investigative record through the examination and
20 cross-examination of witnesses.

21 To balance the record, the Agency is
22 also afforded an opportunity to examine and
23 cross-examine witnesses.

24 My function is to serve as presiding
25 officer and to assure that an equitable, orderly

1 and expeditious hearing is conducted which
2 produces all relevant facts necessary to resolve
3 this Complaint in a fair and impartial manner.

4 A pre-hearing conference was
5 conducted on August 27, 1986. At that time the
6 parties discussed settlement of the complaint.
7 However, that discussion did not result in a
8 settlement. Also, at the pre-hearing conference
9 the parties discussed the issues to be heard at
10 the hearing, the witnesses approved to testify and
11 the procedures to be followed at the hearing.

12 The issue to be heard is defined as
13 follows:

14 Was the Complainant discriminated
15 against on the basis of a physical handicap,
16 obstructive lung disease, when the Agency failed
17 to provide her with a smoke-free work area.

18 On May 23, 1986, the Agency submitted
19 a request for hearing witnesses to the Examiner.
20 That request included five witnesses who would
21 testify about one subject and three witnesses to
22 testify about a second subject.

23 On May 27, 1986, the Examiner
24 responded to the Agency's request by requesting
25 that the Agency either select one witness from

1 each group as a proposed hearing witness or else
2 justify why more than one from each group was
3 necessary.

4 On June 5, 1986, the Agency modified
5 its witness request and requested only two
6 witnesses and they were both approved. They are
7 Ronald D'Acoust, that's D ' A-o-u-s-t, one of the
8 alleged discriminating officials, and Martin W.
9 Aguire, A-g-u-i-r-e.

10 The Complainant requested no
11 witnesses and, therefore, she will be restricted
12 to her own testimony.

13 Also, at the pre-hearing conference,
14 the parties were notified as they had been
15 notified in writing in the past, that the Examiner
16 deemed this case was probably appropriate for a
17 bench decision, since it appeared to meet the
18 criteria under the EEOC regulations.

19 Also, following the pre-hearing
20 conference, at the request of both parties, the
21 Examiner viewed Complainant's work place in the
22 ^{McNamara}~~MacNamara~~ Federal Building. MKM

23 At this time I will provide each
24 party an opportunity to comment on my summary of
25 the pre-hearing conference and an opportunity to

1 object for the record to any of the rulings made
2 at the pre-hearing conference.

3 MS. HALL: No comments.

4 EXAMINER MAGID: Mr. Winslow?

5 MR. WINSLOW: I don't know if
6 you made a ruling regarding the policy at TACOM at
7 the time or not, but you did indicate you planned
8 to introduce that as evidence and also to consider
9 it.

10 EXAMINER MAGID: Right, I was
11 going to come to that.

12 MR. WINSLOW: That was not
13 ruled on at the time. I'm going to object.

14 EXAMINER MAGID: Any other
15 objections?

16 MR. WINSLOW: No, thank you.

17 EXAMINER MAGID: Before we
18 proceed to opening statements, I want to state on
19 the record that Mr. Joseph Wiley is present in the
20 hearing room. Mr. Wiley is the District Director
21 of the Detroit Office of the Equal Employment
22 Opportunity Commission and is here today as an
23 observer.

24 It is now time for opening
25 statements. The Complainant will be given the

1 opportunity to proceed first and the Agency will
2 give its statement.

3 Ms. Hall?

4 MS. HALL: I would again
5 like to open by apologizing. I'm not going to be
6 good at this. This is my first EEOC hearing, and
7 I really don't know exactly how the proceedings
8 go. So, I hope you're all very patient.

9 The only opening statement I can
10 think of to make is that cigarette smoke is a
11 hazard both to the people who smoke and to the
12 people who have to breathe the by-product of it.

13 There is a wealth of information on
14 cigarette smoke available to the V.A.

15 I think the V.A. has the opportunity
16 and the know-how and the ability to make changes
17 in the work place to benefit their employees, and
18 they failed to do this.

19 And, I simply can't breathe where I
20 have to work. And I think the V.A. should do
21 something about it.

22 That's it.

23 EXAMINER MAGID: Okay, thank you.

24 Mr. Winslow?

25 MR. WINSLOW: I think I'll

1 waive opening statement.

2 (Whereupon, Examiner's Exhibit 1 was marked
3 for identification and entered into the
4 record)

4 EXAMINER MAGID: All right.

5 At the pre-hearing conference, I gave
6 the parties copies of the document that I had
7 received from an installation of the Department of
8 the Army, and this is three-page directive to all
9 Army installations throughout the country
10 initiating its no smoking policy in both civilian
11 and non-civilian areas in both Army-owned
12 installations and installations in which
13 Department of the Army personnel were working in
14 GSA quarters.

15 I told the parties at that time that
16 my intent was to offer it as an Examiner's
17 exhibit, and I gave it to them at the pre-hearing
18 conference so they would not be surprised by the
19 document and so they could prepare any objections
20 to its admission.

21 I'm now marking it as proposed
22 Examiner's Exhibit 1, and I'm going to ask
23 Ms. Hall if she has any objections to its
24 admission?

25 MS. HALL: No.

1 EXAMINER MAGID: Mr. Winslow?

2 MR. WINSLOW: Yes, the V.A.

3 would have an objection to that as an Exhibit, and
4 we have a policy on that question in the Veterans
5 Administration on that issue, and we feel that
6 it's inappropriate and irrelevant what the Army
7 should establish as their policy on smoking.

8 EXAMINER MAGID: Are you going to
9 offer such policy into evidence?

10 MR. WINSLOW: Yes, indeed.

11 EXAMINER MAGID: All right, then,
12 I'll hold off on ruling on Examiner's Exhibit 1
13 until such time as the Agency offers its own
14 policy or at the conclusion of the hearing if the
15 Agency does not offer such a policy.

16 So, a ruling on proposed Examiner's
17 Exhibit 1 is deferred at this time.

18 All right, it is now time for the
19 presentation of testimony of witnesses.

20 As I mentioned at the pre-hearing
21 conference, Ms. Hall, the Complainant goes first.

22 Do you wish to testify in this
23 matter?

24 MS. HALL: Is this the time
25 when I should enter any written evidence?

1 EXAMINER MAGID: Are you going to
2 testify?

3 MS. HALL: I assumed he
4 would just ask me questions.

5 EXAMINER MAGID: The reason I'm
6 asking is if you are going to offer any testimony
7 orally, you have been sworn as a witness.

8 Is it your intention to offer sworn
9 testimony?

10 MS. HALL: Yes.

11 LAREN HALL,
12 having been first duly sworn, was
13 examined and testified as follows:

14 EXAMINER MAGID: All right,
15 Ms. Hall, you may proceed to offer testimony.

16 MS. HALL: I don't really
17 have that much testimony to offer except that I
18 hired in at the V.A. about two years ago under its
19 disability program, assuming that they were, in
20 fact, an equal opportunity employer, and I was put
21 in a room where I ended up being discriminated
22 against.

23 Cigarette smoke causes me extreme
24 physical and emotional stress.

25 EXAMINER MAGID: How soon after

1 you were hired did the atmosphere in the room
2 begin to affect you?

3 MS. HALL: The day I
4 started.

5 EXAMINER MAGID: What day after
6 you started did you first call the Agency's
7 attention to your problem?

8 MS. HALL: The day I
9 started.

10 EXAMINER MAGID: Who did you talk
11 to on that first day?

12 MS. HALL: In personnel I
13 had talked to them prior to this about the fact
14 that I needed a non-smoking work atmosphere. I
15 hired in as a disabled person with obstructive
16 lung disease.

17 I was amazed that they would put me
18 in with, I think it was, three smokers.

19 EXAMINER MAGID: Who did you talk
20 to in personnel about your problem before you
21 hired in?

22 MS. HALL: Bob Rudowski.

23 EXAMINER MAGID: Bob Rudowski?

24 MS. HALL: Yes.

25 EXAMINER MAGID: Is he the

1 Personnel Manager?

2 MS. HALL: He was the head
3 of vocational rehabilitation hire-ins. I don't
4 know what his exact title would be.

5 EXAMINER MAGID: He was the
6 personnel officer?

7 MS. HALL: He was the head
8 personnel officer.

9 EXAMINER MAGID: Excuse me,
10 Mr. Winslow, would you please not shake your head
11 to the witness.

12 MR. WINSLOW: Oh, I'm sorry.

13 EXAMINER MAGID: She is not a
14 litigator, and she does not know how to respond to
15 something like that.

16 All right, Ms. Hall.

17 MS. HALL: He was in charge
18 of vocational rehabilitation hiring, I was under
19 the impression. He was the one I dealt with
20 exclusively in seeking employment with the V.A.
21 He was the one who interviewed me and tested me
22 before I got an appointment to be interviewed by
23 Beverly Keith who was the supervisor in the typing
24 pool.

25 EXAMINER MAGID: Beverly Keith is

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the supervisor to whom you were assigned?

MS. HALL: Yes, and she was the one I complained to on the first day of my employment when they put me in the pool of a whole batch of smokers.

EXAMINER MAGID: Had you spoken to her prior to your employment?

MS. HALL: She interviewed me, yes.

EXAMINER MAGID: Did you tell her about your obstructive lung disease?

MS. HALL: No.

I assumed Personnel would take care of this. She was just another person I dealt with. I just assumed they had lines of communications that were adequate.

EXAMINER MAGID: Go on.

When you complained on your first day, what was the result of your complaints?

MS. HALL: She moved my desk, or moved me to another desk, and she said something about, "Oh, boy, are you in the wrong place." Either she said that or Donna said it.

EXAMINER MAGID: Who is Donna?

MS. HALL: Donna was an

1 assistant supervisor.

2 EXAMINER MAGID: What was the
3 result of your move? Did it help the situation?

4 MS. HALL: Not really
5 because the room is not well ventilated and if
6 someone lights a cigarette in a far corner, within
7 about sixty seconds, you're going to get hit with
8 the fumes.

9 EXAMINER MAGID: After your first
10 day, did you make other complaints?

11 MS. HALL: I made
12 complaints the whole two years that I worked there
13 to no avail.

14 I have complained to Bruce, who was
15 the team leader, to Donna who was the assistant
16 supervisor, to Beverly, to Ron D'Aoust, who is
17 Beverly's supervisor, to Mr. Rudowski, to
18 Mr. Ciach.

19 EXAMINER MAGID: When was the
20 first time you made a request for a smoke-free
21 work area?

22 MS. HALL: Exactly in those
23 words?

24 EXAMINER MAGID: Well, tell me
25 when you think the first time was that you made

1 that request?

2 MS. HALL: Right after I
3 started, I told them this was severely affecting
4 me. It affects not just my health, but my work
5 performance is badly affected by it.

6 And, I made many, many requests that
7 they accommodate me in some manner, and they never
8 even took me seriously in my opinion.

9 EXAMINER MAGID: Why do you
10 believe they didn't take you seriously?

11 MS. HALL: Because nothing
12 was ever done.

13 It seemed like they just kept putting
14 me off. They just kept telling me, "We're going
15 to do something; just be patient," and nothing
16 would be done.

17 So, I don't think it was even taken
18 seriously until I filed an EEOC complaint and even
19 then very little was done.

20 EXAMINER MAGID: There is
21 evidence in the complaint file in Affidavits and
22 other documents that the Agency made some attempt
23 to have its employees voluntarily stop smoking.

24 How serious were those efforts?

25 MS. HALL: I really don't

1 have a lot of firsthand information on that
2 because all the meetings were held were held when
3 I was either absent or on leave. I was never
4 privy to any of the meetings, and I understand
5 there were several. I don't know how it was
6 presented.

7 I know what the reaction was by
8 fellow employees. It was extremely negative.

9 EXAMINER MAGID: What do you mean
10 by "extremely negative"? Do you mean there was
11 hostility?

12 MS. HALL: A great deal of
13 hostility toward me.

14 EXAMINER MAGID: By everyone or
15 just the smokers?

16 THE WITNESS: Just the general
17 atmosphere.

18 It's like when you are in a boat with
19 20 people and you're the one rocking it. The
20 other 19 people aren't going to be too thrilled
21 with you.

22 It's difficult to explain, but just
23 the general attitude toward me was very often
24 negative.

25 EXAMINER MAGID: Did anybody say

1 anything?

2 I'm sorry, I didn't hear that last
3 comment.

4 MS. HALL: It was very
5 often negative, especially after I would hear
6 rumors that there had been a meeting. I wasn't
7 even supposed to know these meetings were going
8 on, I guess.

9 EXAMINER MAGID: They never
10 informed you of those meetings?

11 MS. HALL: No.

12 EXAMINER MAGID: When these
13 meetings took place on days that you were not at
14 work, were you aware prior to your leave that
15 those meetings were going to take place?

16 MS. HALL: Once I was.

17 I heard my supervisor, Beverly Keith,
18 say that she was going to have -- she was going to
19 have a meeting. It was right around the time I
20 filed another complaint about the smoking.

21 She said to another employee
22 something about, "I have to have a meeting this
23 afternoon, and if you don't stop acting like that,
24 I'm going to have to get everyone and have it
25 now."

1 I heard that there had been another
2 meeting, and I think it was about smoking. I got
3 mostly secondhand information. So, it's difficult
4 for me to put my finger on exactly what goes on up
5 there. The only other information I had about
6 meetings were from EEOC counselors.

7 EXAMINER MAGID: That was after
8 you saw an EEO Counselor?

9 MS. HALL: Yes, sir.

10 EXAMINER MAGID: Other than the
11 meeting that you knew was going to take place, how
12 many other staff meetings on smoking were there
13 that you found out after the fact?

14 MS. HALL: I can't say for
15 sure. My supervisor, Beverly Keith, told me that
16 she had met with the smokers on another occasion.
17 So, I knew about that and I saw her meeting with
18 them.

19 EXAMINER MAGID: You were hired
20 in as a GS-3; is that correct?

21 MS. HALL: That's correct.

22 EXAMINER MAGID: Are you a GS-4
23 now?

24 MS. HALL: That's correct.
25

1 (Whereupon, a short recess was
2 taken off the record)

3 EXAMINER MAGID: Between the time
4 of your hiring and the time you filed your EEO
5 complaint with the EEO Counselor, had you been
6 evaluated as to your performance?

7 MS. HALL: I really don't
8 recall. When was my complaint filed? Do you have
9 that? You said the original Complaint was
10 April 17?

11 EXAMINER MAGID: Well, your
12 complaint was filed April 17, 1985, so you saw the
13 Counselor at some day prior to that.

14 Do you know when you received your
15 first performance evaluation?

16 MS. HALL: I think it was
17 after that, but I'm not really positive.

18 EXAMINER MAGID: Prior to that
19 date, April 17, 1985, did your supervisor or any
20 other management employee comment on your
21 performance?

22 MS. HALL: I don't recall
23 offhand.

24 EXAMINER MAGID: Did anyone ever
25 complain about your work performance?

1 MS. HALL: In an official
2 capacity, I don't believe so. There were some
3 comments made as to my error rates.

4 EXAMINER MAGID: Were you
5 promoted to GS-4 at the earliest possible time
6 that you could have been promoted to a GS-4 so far
7 as you know?

8 MS. HALL: As far as I
9 know.

10 EXAMINER MAGID: Go ahead.

11 Did you have anything else to offer?

12 MS. HALL: Not really.

13 EXAMINER MAGID: You mentioned
14 prior to going on the record that you had some
15 documents that you wished to introduce.

16 Do you wish to introduce them?

17 MS. HALL: If they're
18 appropriate. I would like to introduce some
19 documents on the effects of secondhand smoke.

20 Should I be commenting on them at
21 all?

22 EXAMINER MAGID: The procedure is
23 to offer them into evidence and allow Mr. Winslow
24 the opportunity to object to their admission and
25 then if they're admitted, then you can make some

1 comments about them.

2 MS. HALL: These are some
3 studies on the effects of cigarette smoke and
4 secondhand cigarette smoke, and I would like to
5 have them admitted.

6 EXAMINER MAGID: You have not
7 made copies of these; is that correct?

8 MS. HALL: That's correct.

9 EXAMINER MAGID: Is this the
10 entire package that you wish admitted?

11 MS. HALL: These are little
12 news things that have information that I was going
13 to comment on. I don't know if they should be
14 admitted or not.

15 EXAMINER MAGID: It's up to you.
16 If you want to offer them into evidence, you can
17 offer them. And, then, we'll have to wait for a
18 determination to see if they're admitted.

19 MS. HALL: If I hang onto
20 them -- if I want to make comments on the effects
21 of secondhand smoke, is this the time I should do
22 it, or should I be skipping it entirely?

23 EXAMINER MAGID: The appropriate
24 time, I would believe, would be for you to make
25 those comments as a part of a closing statement.

1 The purpose of your testimony is to
2 offer facts into evidence. Now, you can testify
3 as to the effects of the smoke in your work area
4 on you. If you wish to offer evidence as to the
5 effects of secondary smoke in general, you may be
6 challenged on your competence to do so, since
7 you're not a physician or physiologist.

8 MS. HALL: Would I be
9 challenged if I were quoting from studies or, say,
10 the Surgeon General?

11 EXAMINER MAGID: You could quote
12 from those studies if those documents are admitted
13 as evidence, or if they are generally recognized
14 as authoritative in the field; and that would have
15 to be determined by you making an offer as to
16 their authenticity and as to the expertise behind
17 them.

18 I would have no problem, and I don't
19 believe that Mr. Winslow would have any problem,
20 although I can't speak for him, if you were to
21 comment in general as part of a closing statement
22 on the effects of secondary smoke.

23 MS. HALL: I should hang
24 onto these?

25 EXAMINER MAGID: That's up to

1 you.

2 If you wish to offer them as
3 evidence, I will accept them as a proposed
4 exhibit, and we will deal with them as a proposed
5 exhibit.

6 MS. HALL: I think I want
7 to hang onto these.

8 EXAMINER MAGID: I'm going to
9 mark these documents.

10 You don't have any objection to that,
11 do you?

12 MS. HALL: No.

13 (Whereupon, Proposed Complainant's Exhibits
14 1 through 19 were marked for identification
and entered into the record)

15 EXAMINER MAGID: All right, I
16 have marked these documents PCE-1 through 19. PCE
17 will be the designation for Proposed Complainant's
18 Exhibits. And, they are proposed Exhibits 1
19 through 19, and as soon as I get them into order,
20 I'm going to allow Mr. Winslow to view them.

21 MS. HALL: I have one
22 other.

23 EXAMINER MAGID: One other
24 document?

25 MS. HALL: It's a copy of a

1 performance standard for my job.

2 Is that already a part of the record,
3 or should I ask that it be --

4 EXAMINER MAGID: Let's let
5 Mr. Winslow start dealing with these other
6 documents, 1 through 19, and while he is
7 reviewing, then you can make a search through the
8 file to see if that document is in there.

9 Look at Exhibit C-8 and C-9 and see
10 if that is what you're asking?

11 MS. HALL: Yes, that's it.

12 EXAMINER MAGID: Is it Page 4 and
13 5?

14 MS. HALL: The line count
15 is different, but it's not relevant to this.

16 MR. WINSLOW: I would object
17 to all of these--the proposed exhibits--except
18 Number 8 on the grounds that there has been no
19 foundation laid for the opinion that is given in
20 those documents, and they're not relevant to the
21 question of whether an accommodation had been
22 attempted which is reasonable in this particular
23 case.

24 They deal entirely with a matter
25 which is highly controversial and in the public

1 sector, the press. And, it seems to me they don't
2 actually bear on the question involved in this
3 case which is a question of discrimination.

4 EXAMINER MAGID: Thank you,
5 Mr. Winslow.

6 The Proposed Complainant's Exhibit 1
7 is a pamphlet of the American Lung Association
8 regarding secondhand smoke. There is no
9 indication on the document as to the author of the
10 document or the background data or research which
11 goes into the material contained in the pamphlet.

12 I'm going to sustain the objection to
13 proposed Complainant's Exhibit 1.

14 Proposed Complainant's Exhibit 2 is
15 another pamphlet of the American Lung Association,
16 and I'm going to sustain the objection on the same
17 grounds.

18 Proposed Complainant's Exhibit 3 is
19 an article from the proceedings of the Third World
20 Conference on Smoking and Health, the 1975
21 conference. The author is identified is Director
22 of an allergy clinic the Saint Joseph Hospital in
23 Toronto, Ontario. The author is Norman Epstein,
24 M.D.

25 I'm unfamiliar with Doctor Epstein

1 and with his allergy clinic and the hospital.
2 There being no other information to support the
3 expertise, I'm going to sustain Mr. Winslow's
4 objection.

5 Proposed Complainant's Exhibit 4 is a
6 paper, entitled "Passive Smoking and Lung Cancer,"
7 by Tachisi Kuriama, M.D., the Epidemiology
8 Division, National Cancer Research Institute of
9 Tokyo. I am unfamiliar with Doctor Kuriama and
10 with the organization to which he belongs. I do
11 not know where his article appeared. I'm going to
12 sustain Mr. Winslow's objection.

13 Proposed Complainant's Exhibit 5 is
14 an article, entitled "The Effects of Tobacco Smoke
15 on the Non-smoking Cardiopulmonary Public,"
16 published by Charles F. Tate. It is undated and
17 there is no indication as to what publication this
18 appeared in. Charles F. Tate is identified as an
19 M.D. from the University of Miami School of
20 Medicine. I'm going to sustain Mr. Winslow's
21 objection on Proposed Complainant's Exhibit 5.

22 Proposed Complainant's Exhibit 6 is a
23 document, a four-page document which contains
24 graphs and tables indicating the amount of
25 pollution in public buildings.

1 It is not stated where this document
2 appeared. It's apparently put out by an
3 organization called Action on Smoking and Health,
4 Washington, D. C. It is copyrighted by James L.
5 Repace. I'm unfamiliar with the organization and
6 with Mr. Repace. I'm going to sustain Mr.
7 Winslow's objection on 6.

8 Proposed Complainant's Exhibit 7 is a
9 document, entitled "Health Consequences of
10 Smoking, Chronic Obstructive Lung Disease," a
11 report by the Surgeon General 1984.

12 It's a publication of the United
13 States Department of Health and Human Services.
14 And, the document-- the part that Ms. Hall has
15 offered as an exhibit is entitled, "Chapter 4,
16 Passive Smoking." I think reports of the Surgeon
17 General are generally accepted is authoritative.

18 I'm going to overrule Mr. Winslow's
19 objection, and Proposed Complainant's Exhibit 7 is
20 admitted.

21 (Whereupon, Complainant's Exhibit 7, having
22 been previously marked, was admitted into
 evidence)

23 EXAMINER MAGID: Mr. Winslow has
24 no objection to Proposed Complainant's Exhibit 8.
25 Therefore, it is admitted. It is a fact sheet of

1 the EEOC on procedures for filing a discrimination
2 complaint. The form of the document is OPA-4/84.

3 There being no objection, Proposed
4 Complainant's 8 is admitted.

5 (Whereupon, Complainant's Exhibit 8, having
6 been previously marked was admitted into
evidence)

7 EXAMINER MAGID: Proposed
8 Complainant's Exhibit 9 is apparently several
9 documents.

10 The first page is entitled,
11 "Executive Director's Report," and apparently this
12 also is a publication of the organization Action
13 on Smoking and Health. The second page is a
14 reprint of an article from the New York Times of
15 Saturday, November 3, 1984, entitled, "EPA Study
16 Links Deaths of Non-smokers to Cigarettes."

17 Starting with the third page, is a
18 draft of May 1, 1984, of an article apparently
19 written by James L. Repace and Alfred H. Lowrey;
20 subtitle "A Quantitative Assessment is Made of
21 Non-smokers Lung Cancer Risks from Breathing
22 Ambient Tobacco Smoke."

23 I do not know where this article
24 finally appeared, if ever, and, again, I do know
25 Mr. Repace nor do I know Mr. Lowery, who is

1 identified as a Ph.D. in the naval research
2 laboratory, and this document is a draft.

3 I'm going to sustain Mr. Winslow's
4 objection to Proposed Complainant's Exhibit 9.

5 Proposed Complainant's Exhibit 10 is
6 four page document and apparently it appears to be
7 a press release of an organization called Action
8 on Smoking and Health, acronym ASH, entitled,
9 "Smoking Should Be Restricted in Public Places."

10 I'm going to sustain Mr. Winslow's
11 objection on the grounds of lack of
12 authoritativeness of this document.

13 Proposed Complainant's Exhibit 11 is
14 a copy of Public Law 91-596, the Occupational
15 Safety and Health Act 97, and a copy of at least
16 some of the legislative history of Public Law
17 91-596. These documents being a matter of record
18 from the Congress of the United States, I'm going
19 to overrule Mr. Winslow's objection and
20 Complainant's Exhibit 11 is admitted.

21 (Whereupon, Complainant's Exhibit 11,
22 having been previously marked, was admitted
into evidence)

23 EXAMINER MAGID: Proposed
24 Complainant's Exhibit 12 is a document from the
25 New England Journal of Medicine, March 27, 1980,

1 entitled, "Small Air Ways Dysfunction in
2 Non-smokers Chronically Exposed to Tobacco Smoke,"
3 an article by James R. White, Ph.D. and Herman F.
4 Probb, M.D.

5 The Examiner will take notice that
6 the New England Journal of Medicine is one of the
7 most authoritative medical publications in the
8 United States.

9 I'm going to overrule Mr. Winslow's
10 objection and Proposed Complainant's Exhibit 12 is
11 admitted.

12 (Whereupon, Complainant's Exhibit 12,
13 having been previously marked was admitted
into evidence)

14 EXAMINER MAGID: Proposed
15 Complainant's Exhibit 13 is a copy of an article
16 by Norman Epstein, entitled "The Effect of Tobacco
17 Smoke Pollution on the Eyes of the Allergic
18 Non-smoker."

19 There is a notation that states it
20 was distributed by the Action on Smoking and
21 Health, or ASH. There is no indication where this
22 article was published and, again, I'm not familiar
23 with Norman Epstein.

24 I'm going to sustain Mr. Winslow's
25 objection regarding Proposed Complainant's Exhibit

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Proposed Complainant's Exhibit 14 is a special report, entitled "The Health Risks of Passive Smoking: It's a Growing Case for Control Measures in Closed Environment," by Neville M. Lefcoe, M.D., Mary Jane Ashley, M. D., Linda L. Peterson, Ph.D., and John J. Keays, Bachelor of Science and Masters of Public Health.

All of these persons are identified with a Canadian organization or universities. And, I am unfamiliar with them and with their organization and there is no other evidence as to -- I'm sorry there is some indication that this article was published in a journal called Chest on July 1, 1983. I'm not familiar with the journal called Chest and whether or not it's a jury publication.

I'm going to sustain Mr. Winslow's objection to Proposed Complainant's Exhibit 14.

Proposed Complainant's Exhibit 15 is a paper presented by James L. Repace of the U. S. Environmental Protection Agency presented to the Fifth World Conference on smoking and health in Winnipeg, Canada, from July 10 through 15, 1983.

I have indicated before, I'm

1 unfamiliar with Mr. Repace and I am unfamiliar
2 with his work.

3 I'm going to sustain Mr. Winslow's
4 objection on Proposed Complainant's Exhibit 15.

5 Proposed Complainant's Exhibit 16 is
6 one page from part of May 8, 1984, Detroit Free
7 Press, which includes a question and answer in the
8 column, "Today's Q and A" regarding air pollution
9 in a building.

10 I'm going to sustain Mr. Winslow's
11 objection as to the lack of authoritativeness on
12 Proposed Complainant's Exhibit 16.

13 Proposed Complainant's Exhibit 17 is
14 a one-page document which lists examples -- it's
15 apparently a listing of court cases in which there
16 are examples where smoking is not a job
17 requirement matter.

18 It also contains some editorial
19 matter on the subject of smoking as a job
20 requirement and some conclusions as to whether
21 smoking should or should not be allowed on the
22 job.

23 I'm going to accept both
24 Complainant's Exhibit 17 for the sole purpose of
25 the listing of court cases; and for that purpose

1 it will be accepted. I will state on the record I
2 do not necessarily accept the conclusions of the
3 editorial list of whoever the editorial list may
4 be on this document.

5 So, Complainant's Exhibit 17 is
6 admitted in part; the part that I've stated.

7 (Whereupon, Complainant's Exhibit 17,
8 having been previously marked, was admitted
into evidence)

9 EXAMINER MAGID: Proposed

10 Complainant's Exhibit 18 is three pages from the
11 Journal of the American Medical Association,
12 May 19, 1978, an article entitled, "Non-smokers'
13 Rights: A Public Health Issue."

14 The article is by Jeffrey E. Green,
15 M.D. of the Georgetown Emergency Medical Center.
16 I'm going to accept Proposed Complainant's Exhibit
17 18 into evidence. The Examiner will take notice
18 the Journal of the America Medical Association is
19 generally regarded as an authoritative publication
20 in its field.

21 Complainant's Exhibit 18 is admitted.

22 (Whereupon, Complainant's Exhibit 18,
23 having been previously marked, was admitted
into evidence)

24 EXAMINER MAGID: Proposed

25 Complainant's Exhibit 19 is a two page article

1 reprinted from the International Journal of
2 Cancer, entitled, "Lung Cancer and Passive
3 Smoking."

4 Apparently, the article was published
5 in 1981. I'm unfamiliar with the International
6 Journal of Cancer, and I'm unfamiliar with the
7 authors of the article itself, who are Dimitrios
8 Trichopoulos, Anna Kalandidi, Loukas Sparros and
9 Brian MacMahon.

10 Proposed Complainant's Exhibit 19 is
11 denied admission, and I'm sustaining Mr. Winslow's
12 objection.

13 At the appropriate time when we have
14 an opportunity, we'll make copies of the exhibits
15 which have been admitted into evidence for the
16 parties.

17 All right, Ms. Hall, you may
18 continue.

19 MS. HALL: What's next?

20 EXAMINER MAGID: Do you have
21 anything else that you would like to say?

22 MS. HALL: May I comment on
23 your objections?

24 EXAMINER MAGID: No.

25 We are now back in the mode where you

1 are to give testimony as to factual matters.

2 Let me ask an you couple of
3 questions, Ms. Hall, and maybe it will prompt some
4 comments of your own.

5 Did anybody at the Veterans
6 Administration ever tell you that they would
7 consider changing the configuration of the walls
8 in the typing pool to accommodate you?

9 MS. HALL: Ron D'Acoust told
10 me that they would not.

11 EXAMINER MAGID: When did he tell
12 you that?

13 MS. HALL: I don't
14 remember; quite awhile ago.

15 EXAMINER MAGID: Did he tell you
16 why they wouldn't?

17 MS. HALL: It was a
18 budgetary concern; the reason why they wouldn't.

19 EXAMINER MAGID: Do you remember
20 the exact words that he said to you when he told
21 you that?

22 MS. HALL: Not offhand.

23 EXAMINER MAGID: Did he name a
24 dollar amount that was involved?

25 MS. HALL: No.

1 He told me it was something about
2 that these budgets were made far, far in advance;
3 that it simply wasn't in the budget and there were
4 "X" number of dollars and that was it; it simply
5 wasn't in the budget.

6 EXAMINER MAGID: Did anyone else
7 ever mention the changing of the walls to you?

8 MS. HALL: Not that I can
9 recall, no.

10 EXAMINER MAGID: So, that was the
11 only time that the changing of the walls was
12 discussed with you?

13 MS. HALL: Yes.

14 EXAMINER MAGID: Did you suggest
15 that to Mr. D'Aoust, or did he bring it up to you?

16 MS. HALL: He brought it up
17 to me.

18 EXAMINER MAGID: In what context?

19 MS. HALL: I believe it was
20 in the context of why nothing was being done.

21 EXAMINER MAGID: Did anyone ever
22 tell you that one the reasons that -- let me back
23 up a minute.

24 Did you ever suggest to any of your
25 supervisors or anybody in managment that they

1 should ban smoking altogether in the typing room?

2 MS. HALL: Yes.

3 EXAMINER MAGID: What was their
4 response?

5 MS. HALL: I have had many
6 responses to that.

7 EXAMINER MAGID: Tell us all that
8 you can remember.

9 MS. HALL: Okay, when I
10 brought it up to Mr. D'Aoust, he said something to
11 the effect that what I wanted was change and that
12 was the problem and that change came slowly.

13 I can remember bringing it up to
14 Beverly, and she said that she couldn't do that.
15 At one point she promised to crack down and when
16 nothing happened, I asked her what happened with
17 the crack down, and she said, "Well, if Ron
18 couldn't stop them, you should never expect me to
19 be able to do it."

20 EXAMINER MAGID: Before we leave
21 Beverly, did she tell you why she couldn't do it?

22 MS. HALL: No.

23 EXAMINER MAGID: She gave you no
24 reason?

25 MS. HALL: No.

1 EXAMINER MAGID: Go ahead to the
2 next person.

3 MS. HALL: I believe I
4 talked to Mr. Clach about it, and his response was
5 that nothing would be done to ban smoking in the
6 near future, and I should perhaps be looking
7 elsewhere to work, perhaps in the private sector,
8 and that they are weren't going to do anything and
9 that I shouldn't expect that anything would be
10 done at any time.

11 I brought it up to Mr. Clowney--his
12 first name is Gordon--and he said he felt the
13 whole issue had been blown out of proportion and
14 that they had to consider the rights of the
15 smokers because they were under terrible pressure
16 these days and that things shouldn't be made more
17 difficult for them.

18 EXAMINER MAGID: Who was he
19 referring to that were under considerable
20 pressure?

21 MS. HALL: Smokers.

22 EXAMINER MAGID: Smokers were
23 under considerable pressure?

24 MS. HALL: That's correct.

25 EXAMINER MAGID: So, he did not

1 want to increase the pressure on them; is that the
2 inference?

3 MS. HALL: Apparently so.

4 EXAMINER MAGID: Is he a smoker?

5 MS. HALL: No, he is not.

6 EXAMINER MAGID: Did he explain
7 or did you ask what he meant by "you shouldn't
8 increase the pressure on them"?

9 MS. HALL: I think he meant
10 that there was pressure by society because of the
11 fact that there was smoker -- I'm not entirely
12 sure on that. I'm trying to remember the entire
13 conversation. That is the best I can do right
14 now.

15 EXAMINER MAGID: Did you discuss
16 a smoking ban with anyone else?

17 MS. HALL: With team
18 members, counsel supervisors.

19 EXAMINER MAGID: Did they act as
20 a supervisor or supervisors at the time?

21 MS. HALL: To a limited
22 degree.

23 EXAMINER MAGID: All right, well,
24 tell me about the team leader.

25 MS. HALL: Both team

1 leaders are non-smokers, and I discussed these
2 issues with them.

3 EXAMINER MAGID: What are their
4 names?

5 MS. HALL: Donna. I don't
6 know Donna's last name. She is now a supervisor
7 who took over Beverly Keith's place. And Bruce.
8 There was another team leader named JoAnne and
9 awhile back, I used to discuss it with her.

10 EXAMINER MAGID: JoAnne?

11 MS. HALL: That's correct.

12 EXAMINER MAGID: What did your
13 conversations with them involve?

14 MS. HALL: They had
15 problems with the smoke too. They simply said
16 nothing would ever change and everyone was
17 basically powerless to do anything about it, and
18 that was about it.

19 EXAMINER MAGID: Okay, did
20 anybody ever bring up Martin Aguire and his
21 handicap as a reason for not accommodating you?

22 MS. HALL: No.

23 I learned about that when I received
24 this document.

25 EXAMINER MAGID: None of your

1 supervisors ever brought that up to you?

2 MS. HALL: No.

3 EXAMINER MAGID: Do you know
4 Martin Aguire?

5 MS. HALL: Yes.

6 EXAMINER MAGID: Does he smoke
7 constantly?

8 MS. HALL: He smokes very
9 heavily. I don't know if I would call it
10 "constantly."

11 EXAMINER MAGID: Did you ever
12 have a conversation with him about your problem?

13 MS. HALL: No.

14 EXAMINER MAGID: All right, is
15 there anything else that you would like to say
16 before I allow Mr. Winslow to cross-examine you?

17 MS. HALL: No.

18 EXAMINER MAGID: All right,
19 Mr. Winslow, cross-examination.

20 CROSS-EXAMINATION

21 BY MR. WINSLOW:

22 Q. I believe you stated that you had
23 told Bob Rudowski that you would require a smoke
24 free area to work in; is that a correct
25 understanding of what you testified to?

1 A. I informed Mr. Rudowski that I had
2 obstructive lung disease and that I had to avoid
3 any kind of toxic substance, including cigarette
4 smoke.

5 Q. That was before you were hired?

6 A. That's correct.

7 Q. Did you tell him the degree to which
8 you were allergic or affected by such smoke?

9 A. I told him I had obstructive lung
10 disease and that I needed to avoid it.

11 Q. Was it to the extent of the
12 description that you gave him of the severity of
13 your problem?

14 A. Yes.

15 He didn't question me any further so
16 I didn't elaborate.

17 Q. Had you had any difficulty in
18 previous places of employment where you have
19 smokers?

20 A. Yes.

21 Q. Where?

22 A. I had a problem with Deaconess
23 Hospital.

24 Q. What were the circumstances there?

25 A. By virtue of the air I was breathing,

1 I worked in a small room where there were many
2 smokers, and I developed a lung problem.

3 Q. What was the outcome of that
4 situation?

5 A. What type of outcome?

6 Q. Well, did they resolve the problem
7 for you?

8 A. They fired me.

9 Q. And, did you take any action
10 regarding the way in which they handled the
11 problems you faced?

12 A. Yes.

13 Q. What was that?

14 A. I filed a Worker's Compensation
15 claim. I filed for unemployment, and I filed what
16 I think is called either a civil or probate suit.
17 I don't know what the technical terminology would
18 be.

19 Q. You filed a lawsuit against them?

20 A. That's correct.

21 Q. How did the lawsuit come out?

22 A. Which one?

23 Q. The lawsuit against Deaconess
24 Hospital.

25 A. The compensation case?

1 Q. No, the hospital?

2 A. They're both the same.

3 Q. Did you go through a administrative
4 proceeding with the Worker's Compensation case and
5 did that same case go into the courts?

6 A. That's correct.

7 Q. All right, what was the final outcome
8 of the case?

9 A. There was a jury trial and they found
10 in my favor.

11 Q. Did you recover any money damage for
12 the injuries you received?

13 A. Yes, I did.

14 Q. Did you tell Mr. Rudowski or Beverly
15 Keith when they interviewed you that you had this
16 problem and you had been able to recover any such
17 damages for any injuries suffered at Deaconess
18 Hospital?

19 A. Do you mean did I walk in and tell
20 them I sued an employer?

21 Q. Yes.

22 A. No, I didn't.

23 Q. You indicated that you filed a
24 Worker's Compensation claim and also that you sued
25 on that claim.

1 Did you also sue on other questions
2 regarding the work place and your civil rights in
3 court; the contract of employment that you had?

4 A. Do you mean other lawsuits?

5 Q. Well, as part of that lawsuit, were
6 those issues as well?

7 Was there a civil rights count in
8 your court complaint; if you know?

9 A. I think there was.

10 Most of the lawsuit was thrown out.
11 I couldn't tell you exactly what was and what
12 wasn't.

13 Q. Did you mention any of these problems
14 that you had faced -- did you have this same
15 problem at any other place of employment that you
16 worked?

17 A. Do you mean suing and getting fired
18 and stuff?

19 Q. I'm talking about problems with
20 toxicity and smoke inhalation?

21 A. Not to the degree that I had at
22 Deaconess or that I have had here.

23 Q. Again, did you have any problems of
24 this kind at any other place you've worked?

25 In other words, did the smoking of

1 other employees bother you at any other place you
2 worked?

3 A. The bothered me some at IRS, but it
4 was a different situation because it was a
5 warehouse with a 30-foot high ceiling, and it was
6 about a quarter of a block long and it wasn't the
7 same situation.

8 Q. Did you complain there?

9 A. Yes.

10 Q. To whom?

11 A. My supervisor.

12 Q. Did they resolve the problem for you?

13 A. Somewhat.

14 They would slow down for awhile and
15 they start up again and I would complain, and they
16 would slow down.

17 It was only a temporary position,
18 though, so I was doing my level best to get out of
19 there anyway. It wasn't the same situation as the
20 V.A. It was also a place where I wasn't at a
21 particular work station. I could leave the area.
22 I could go to different areas in the warehouse and
23 still work.

24 Q. When you came to work are for the
25 V.A., did you see the place you were going to work

1 before you were hired?

2 A. Sort of. Like, just walked in the
3 door, sat down with my back to the room. I got a
4 quick glance is about all.

5 Q. I'm sorry?

6 A. I got a quick glance.

7 Q. How long did this quick glance take?

8 A. The amount of time it takes to walk
9 in the door and sit with your back to the room.

10 Q. To a woman? Is that what you said?

11 A. I sat with my back to the room during
12 my interview.

13 Q. What woman are you talking about?

14 A. Back to the room.

15 Q. At the time that you were that you
16 were being interviewed, did you know that that was
17 the room you were going to be working in?

18 A. I believe I assumed it was; I
19 probably assumed it was.

20 Q. Who did you talk to in that room?

21 A. Beverly Keith.

22 Q. And, how long did the interview take?

23 A. I don't know; maybe ten minutes.

24 Q. Were there other employees working at
25 the time in the room besides Beverly Keith?

1 A. Yes.

2 Q. Were any of them smoking?

3 A. I don't know. I wasn't facing the

4 room.

5 Q. Was there any reason that you

6 couldn't turn around and look?

7 A. Yes, I was being interviewed and

8 trying to get a job.

9 Q. Did Ms. Keith tell you to look at

10 her?

11 A. No, but she was talking to me and I

12 was reading the requirements of the job during the

13 interview, and when I talk to someone, I face

14 them.

15 Q. Did you finish your answer to the

16 question?

17 A. Yes.

18 Q. Were there any interruptions during

19 that conversation when Beverly left you?

20 A. Not that I can recall.

21 Q. Did you talk to anyone else in the

22 room at the time?

23 A. Not that I recall.

24 Q. Where were you seated at that time?

25 A. Next to Beverly Keith's desk.

1 Q. How did you enter the room? In other
2 words, how did you get in the room when you came
3 in? What route did you take?

4 A. I believe I came in through the front
5 door.

6 Q. Is the front door the door that
7 enters into the mailing area that leads to
8 Mr. D'Aoust's office?

9 A. Yes, I believe that is the door I
10 came in.

11 Q. That's the door you came in?

12 A. I think so.

13 Q. So, when you entered the room, you
14 actually were facing the people working in the
15 room, were you not?

16 A. Yes.

17 Q. Did you notice anyone smoking at that
18 time?

19 A. No, I didn't.

20 Q. If you had had the experiences that
21 you have already recounted regarding your problem
22 with smoking at Deaconess Hospital and at the IRS,
23 why did you not consider the circumstances under
24 which you were being hired?

25 A. I did consider them.

1 Q. Same subject I'm talking about?

2 A. I did.

3 Q. Did you? What did you decide?

4 A. Well, I saw the computer terminals
5 and I assumed there is never any smoking around
6 computer terminals as far as I know, and I just
7 assumed that there was no smoking. You can't
8 smoke and type. It doesn't work. It's just why
9 would they have smoking in there? It just didn't
10 make sense. It didn't occur to me that there
11 could be smoking in there.

12 Q. When you say "computer terminals,"
13 are you talking about word processing equipment?

14 A. Yes.

15 Q. Are you telling me that you assumed
16 from the fact that people were using word
17 processing equipment that they would not be
18 smoking while they were using it?

19 A. Yes.

20 That is pretty unusual to allow
21 smoking around any kind of computer equipment.

22 I have taken computer classes and
23 we're never allowed to smoke around our computer
24 terminals.

25 Q. Where have you taken classes?

1 A. Wayne State University.

2 In the IRS building, I took a class
3 on computer terminals where they had a room in
4 computer terminals, and you weren't allowed to
5 smoke in there because of the computer terminals.

6 Q. In the employment that you have had,
7 did any employer allow smoking at a computer
8 terminal and at a word processing terminal?

9 A. No.

10 Q. Have you worked in areas before where
11 there were word processing terminals?

12 A. No.

13 In the IRS, I'm pretty sure they
14 don't allow it around the computers. That's my
15 answer.

16 Q. Are you identifying a computer and a
17 word processor as the same thing?

18 A. Yes.

19 Q. You don't recognize any difference
20 between those?

21 A. Not really.

22 It is the same equipment I used at
23 IRS when I took their course and they didn't allow
24 smoking around it, except that theirs is called
25 Commodore and yours is I.B.M.

1 Q. This is on a training course you're
2 talking about; is that correct?

3 A. No.

4 Q. This isn't where you worked?

5 A. That's correct, but it was not a
6 training room. It was a room -- it might have
7 been a training room, but it was a room where
8 people worked also.

9 Q. Did you observe a word processor in
10 the personnel office while you were interviewed by
11 Mr. Rudowski?

12 A. No, I didn't.

13 Q. Did you notice anyone smoking in that
14 room?

15 A. I don't recall anyone smoking, no.
16 I just dealt with Mr. Rudowski. I
17 don't recall. It was a long time ago, but I don't
18 recall dealing with anybody but Mr. Rudowski.

19 Q. Do you have any grounds for feeling
20 that the Personnel Service would tell Beverly that
21 you had a disability of this nature and this
22 severity before you were hired?

23 Q. I'm sorry, I didn't hear the
24 question.
25

1 BY MR. WINSLOW:

2 Q. What I'm trying to find out is:

3 Did anyone give you any indication
4 for your belief or any -- what basis do you have
5 for your belief or speculation that someone in
6 personnel told Beverly about your disability and
7 the severity of it before you were hired? That's
8 what I'm trying to find out.

9 EXAMINER MAGID: I don't believe
10 she has ever testified that she knew that she was
11 told. She speculated that Beverly had access to
12 the records and, therefore, I think that was the
13 nature of her testimony.

14 MR. WINSLOW: I thought the
15 testimony--and if I'm wrong, we'll pursue it a
16 different way--but I thought her testimony was
17 that she thought that Personnel must have told
18 Beverly about it and it was speculative matter on
19 her part.

20 EXAMINER MAGID: Let's ask
21 directly.

22 Do you believe that Personnel told
23 Beverly Keith about your disability?

24 MS. HALL: I don't know. I
25 would have no way of knowing.

1 I would just assume that they would
2 be competent enough not to put someone in a
3 position that physically they couldn't do. They
4 wouldn't hire a blind person and say, "Here, read
5 this and type it."

6 EXAMINER MAGID: I don't think
7 that was the question.

8 The question was whether you did
9 assume that Ms. Keith was told?

10 MS. HALL: Yes, that is
11 absolutely correct. I did assume.

12 EXAMINER MAGID: What is the
13 basis for your assumption?

14 MS. HALL: The basis for my
15 assumption is that I dealt with the disability
16 coordinator in the office--the vocational
17 rehabilitation disability coordinator--whose job
18 it is to place disabled people in jobs they are
19 capable of doing. I assume he was competent in
20 doing this.

21 EXAMINER MAGID: So, you assumed
22 that as part of his job, he would have told the
23 prospective supervisor about it's disability; is
24 that correct?

25 MS. HALL: Yes, that there

1 was a disability that would possibly affect the
2 job performance. I would assume he would be
3 responsible for telling that supervisor that
4 before.

5 I also had no knowledge of who
6 actually did the hiring and who actually made
7 determinations. So, I didn't know the role, and I
8 I still don't know, the role that Beverly may or
9 may not have played in hiring me.

10 BY MR. WINSLOW:

11 Q. I'm not sure if I asked this before,
12 but I want to make sure at least that I understand
13 your answer to it.

14 What, specifically, if anything, did
15 he tell Mr. Rudowski about your disability beyond
16 the fact that you had obstructive lung disease and
17 that you needed to avoid inhaling toxic substances
18 including cigarette smoke?

19 Just how much further than that did
20 you describe your disability?

21 A. He didn't ask anything more and I
22 didn't tell him anything more. I stated I had
23 obstructive lung disease, and what I've already
24 told you.

25 Q. You didn't tell him anymore

1 voluntarily and he didn't ask?

2 A. That's correct.

3 Q. Why do you say that you feel that
4 your supervisors, and I guess it was particularly
5 Mr. D'Aoust, never took you seriously when you
6 complained about your problem?

7 You stated that they told you, "We're
8 going to do something," but you really didn't
9 think they were going to do anything.

10 What basis do you have for feeling
11 that way?

12 A. Because they kept saying, "Yes, we're
13 going to do something," and they kept not doing
14 anything.

15 Q. When you say "they didn't do
16 anything," what do you mean "they didn't do
17 anything"? What did they not do that you felt
18 they should have done?

19 A. I felt they should have stopped the
20 smoking in the work area.

21 Q. Did they do anything else?

22 A. They did things that in my opinion
23 made it look like they were doing things, but in
24 actuality they weren't doing anything.

25 They tended to do things around times

1 when they -- they did nothing at all, basically,
2 until the EEOC complaint was filed. Then, they
3 proposed doing several things none of which they
4 did.

5 Q. Did what? I'm sorry. I missed what
6 you said.

7 A. They proposed doing several things
8 none of which they did.

9 I was told by the EEOC Counselor that
10 they were going to stop the smoke in the work area
11 and they didn't.

12 Q. Who told the EEO Counselor that that
13 happened happen?

14 A. She told me that Ron D'Aoust was
15 going to have the smokers sign statements to the
16 effect that they wouldn't smoke in the work area;
17 that it was going to be in writing that they
18 wouldn't smoke in the work area.

19 I later found out that this was
20 supposed to be a voluntary thing. So it had no
21 effect at all.

22 They had already been asked not to
23 smoke there, and it had no effect at all.

24 If anything, to retaliate, usually
25 after these meetings, they would come in and smoke

1 more.

2 Q. Who?

3 A. The people who were smoking in the
4 room. Many of them tended to come in and smoke
5 more.

6 Q. I'm asking the question, who?

7 A. I can't give the names off the cuff
8 right now. That was a long sometime ago. This
9 thing has been going to for two years.

10 Q. Were the supervisors aware that they
11 smoked even more after those meetings?

12 A. Yes.

13 Beverly Keith made the comment that
14 she was -- I said to her, I believe it was after
15 the meeting -- they had a meeting with Ron -- I
16 said to her they were smoking even more, and she
17 said, "Yes, they are."

18 There was a memo circulated by
19 Mr. Clowney stating to please use courtesy when
20 using tobacco substances, as others may not be
21 able to tolerate them as well and as she
22 distributed it, there were a group of smokers in
23 the back of the room who were laughing and joking
24 about it.

25 She said that was just a joke to

1 them, and that they were smoking even more in
2 retaliation.

3 In addition, I have had many
4 instances where people would walk by my desk.
5 They would go out of their way to walk by my desk
6 with lit cigarettes, and my supervisors were made
7 aware of that also.

8 Q. Your supervisors were what?

9 A. Made aware of that also.

10 Q. Who was made aware of that?

11 A. Beverly Keith and Ron D'Aoust and
12 Donna.

13 Q. Did they do anything about it?

14 A. They would meet with people, but it
15 really wouldn't do any good. They might stop for
16 a day or two, but then it would start happening
17 again. There was an actual no smoking sign posted
18 near the entrance to where one of the last places
19 they moved me and this was also disregarded by
20 smokers.

21 BY MR. WINSLOW:

22 Q. I'm sorry, what did you say was put
23 there?

24 A. Ron D'Aoust after another ESOC
25 complaint was filed outside the reproduction area

1 they moved me.

2 They had me surrounded by about three
3 or four smokers at one point and they moved me to
4 the back which was then two desks away from one
5 smoker and three desks way from another or
6 something like that.

7 And the entrance near the back, they
8 posted a no smoking sign because people would
9 continually go back and forth to my desk. Even
10 though it's out of their way to go back there,
11 even though it's out of their way to go back in
12 the hall way, they would go back and forth by my
13 desk, people would congregate and meet out in the
14 hallway, which was maybe seven or eight feet from
15 my desk and they would stand there and talk and
16 smoke.

17 The repairmen in the hallway would
18 smoke while they were working. That was like
19 five, ten, fifteen feet away from my desk.

20 Q. What repairmen?

21 A. I don't know; just the people working
22 in the building.

23 Q. Maintenance people?

24 A. Right, but it was largely
25 disregarded.

1 BY MR. WINSLOW:

2 Q. Do you mean the sign?

3 A. Yes.

4 Q. I believe you indicated that
5 Mr. Clowney had told you that he didn't want to
6 put any more pressure on the smokers in the pool
7 than they already had because they were already
8 under considerable pressure, and you felt that was
9 pressure by society.

10 What do you mean by the "pressure by
11 society"?

12 A. I don't mean anything about it. I
13 think that is what he meant by it.

14 Q. What did you conclude that he was
15 talking about?

16 A. Just what I said. I concluded that
17 he didn't say society as such. He just said
18 smokers were under so much pressure as it was. He
19 didn't want to put any more pressure on them,
20 and that he felt the whole issue had been
21 overblown.

22 Q. Did he say that?

23 A. Yes, he did.

24 MS. HALL: Do you remember
25 you were asking me what I felt or what they had

1 done to accommodate me?

2 EXAMINER MAGID: Yes.

3 MS. HALL: The other claim
4 they were making is that they would put fans in
5 there. I don't know why fans is to be considered
6 an accommodation. It just blows air around.

7 But, they said they bought fans
8 specifically for my use, and I'm not aware of
9 having any right to use these fans to begin with.

10 One of them was specifically
11 designated as JoAnne's fan. She was a team
12 leader, and I wasn't allowed to touch it. The
13 other was in the back of the room and everybody
14 used it and there were virtually verbal
15 knock-down-drag-outs about the fan.

16 People would threaten to beat each
17 each other up and stuff over it. Now, there is
18 one fan right now in the back that blows smoke at
19 me, not away from me.

20 The fans are put away for the winter.
21 The the last time Beverly Keith went through the
22 room, and she grabbed the fan from the back and
23 said, "This is winter. You don't use any
24 goddamned fans in the winter." She grabbed it and
25 put it somewhere.

1 EXAMINER MAGID: Was it worse
2 than when the fans were not there?

3 MS. HALL: The fans blow
4 the smoke around. I suppose that helps sort of.
5 It doesn't make any appreciable difference that I
6 can discern at all. You feel just as lousy. You
7 tend to be a little cooler at least.

8 BY MR. WINSLOW:

9 Q. In the wintertime did you need the
10 fan to keep cool?

11 A. No.

12 In the wintertime, the temperature
13 varies a great deal in there. Sometimes it's very
14 hot and sometimes it's very cold. The heating
15 system and cooling system don't seem to be
16 functioning all the time.

17 Q. Do they adequately remove the smoke
18 from the air?

19 A. No.

20 Q. Where in other parts of the building
21 are you affected by the smoke?

22 A. Yes.

23 Q. Restrooms? Cafeteria?

24 A. Restrooms. I stay in the non-smoking
25 section of the cafeteria.

1 Q. Are there people smoking in the
2 cafeteria?

3 A. In the smoking section.

4 Q. Does that bother you too?

5 A. A little. It's again a different
6 type of area. It's not enclosed the way the pool
7 is. The ceiling is very high and it's very large.

8 EXAMINER MAGID: Do you feel
9 better in the cafeteria in the non-smoking
10 section?

11 MS. HALL: Yes.

12 BY MR. WINSLOW:

13 Q. Do you feel anyone has a right to
14 smoke?

15 A. I don't believe that legally there is
16 a "right to smoke."

17 Q. Do you have any Court cases or
18 arbitration cases or any other documentation that
19 states that in federal buildings, there is no
20 right to smoke?

21 A. In the Federal Building?

22 Q. Yes.

23 A. I'm not a lawyer.

24 Q. Do you know if any of the cases
25 mentioned in Complainant's Exhibit 17 deal with

1 federal employees and smoking in federal
2 buildings? Do you know (handing document.)

3 A. No, there is nothing there that I
4 could recognize.

5 EXAMINER MAGID: I notice,
6 Mr. Winslow, that one of the cases mentioned on
7 this page is Dephenthal vs. CAB, 681 Fed. 2d. at
8 Page 1039 (1982) case. I'll be curious to see
9 that case since the CAB is a federal Agency.

10 BY MR. WINSLOW:

11 Q. Is it your position that all work
12 places should be smoke free; all federal work
13 places should be smoke free?

14 EXAMINER MAGID: Mr. Winslow, I
15 don't think we have to get into her philosophy as
16 to all other federal installations and work
17 places.

18 I think we're dealing with a specific
19 situation here.

20 BY MR. WINSLOW: The reason I
21 asked that question is, I gather this is a matter
22 somewhat of principle with her and that she feels
23 that this is not just a personal problem but a
24 matter of a cause, so to speak.

25 EXAMINER MAGID: It may be true

1 that she feels that way, Mr. Winslow, but the
2 relevance of her opinion on that subject is not
3 connected to this case.

4 This case is dealing with matters
5 relevant to whether the Agency accommodated her
6 handicap if she is, indeed, a qualified
7 handicapped person, and we're dealing with this
8 work place.

9 MS. HALL: In answer to--

10 EXAMINER MAGID: I raised my own
11 objection to his question.

12 MS. HALL: --your question
13 about the cases.

14 EXAMINER MAGID: Oh, about the
15 case? Go ahead.

16 MS. HALL: I'm not aware
17 and I don't know for sure, but I think there was
18 Pletton versus Department of the Army.

19 EXAMINER MAGID: That was a
20 federal court case?

21 MS. HALL: Yes, I believe
22 it was an EEOC case that I believe the EEOC
23 determined that there was a failure to accommodate
24 them by the Department of Army, and I don't know
25 if they made any sort of statement on the

1 so-called right of smoking.

2 EXAMINER MAGID: "Do you have the
3 citation for that case?

4 MS. HALL: What is a
5 citation?

6 EXAMINER MAGID: Do you have the
7 numbers that will indicate where I could find that
8 case in a law book?

9 MS. HALL: Not offhand.
10 I might be able to get it for you,
11 but I think that that's what you introduced into
12 evidence. I think that may be a result of that
13 case. I'm not sure.

14 EXAMINER MAGID: Go ahead.
15 Mr. Winslow, go ahead. You may continue with your
16 questioning.

17 BY MR. WINSLOW:

18 Q. Have you attempted to find a job in
19 this Agency or in this building where you would
20 find the conditions which you feel are necessary
21 to protect your health?

22 A. Yes, I have.

23 Q. What have you done?

24 A. I was on their placement list because
25 I had a far exceed. I was in the far exceed

1 category.

2 I was on a special placement list
3 where you could qualify for 5, 7 line positions.
4 I also requested to be put on their clerical list
5 and I have been through several interviews with
6 the V. A. I've been through several interviews
7 with the V. A. Hospitals and with the post office.

8 Q. Have you found any of those positions
9 would provide you with a smoke free environmental
10 work place?

11 A. No.

12 I was told outright that because of
13 the smoke, I would not be hired in some of those
14 positions. The other ones, I just wasn't hired
15 for. I was questioned extensively about the
16 smoking problem on virtually all the interviews
17 with the V.A. positions and I did not get any of
18 the jobs.

19 Q. Did the people who were interviewing
20 know that you had this problem at the time?

21 A. I'm pretty sure they did.

22 Q. Were they people with the V.A.?

23 A. Yes.

24 Q. All of them?

25 A. No.

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Q. Are you just talking about the applications you had for jobs working at the V.A.?

A. Right.

Q. Then they would all be V.A. people. Was that before you got this job?

A. No.

This is transfer attempts that I have made since. I also tested for a border guard job where I would be working pretty much by myself but they said I was too old.

BY MR. WINSLOW:

Q. You were too old?

A. Too old.

So, if you don't smoke and you're not 25, you can't get a job.

I have checked for some other positions too. I have tested and qualified for air traffic controller position and I never heard from them and now I'm too old.

Q. Do they have smoke free areas?

A. Probably not, but no worse than the pool.

Q. Do you consider the pool to be a worse area than, let's say, other areas in the V.A. that be an ideal place to work?

1 A. It has been in the past.

2 There have had up to as many as eight
3 smokers which was just horrendous. In addition,
4 it's attached to the main room where Ron D'Aoust's
5 office is that has another at one time, I think,
6 eight smokers which is attached to another room
7 that has about 20 smokers.

8 So, it's hard to say which place is
9 worse, but at one point the pool was pretty close
10 to the worst.

11 Q. How is it now?

12 A. I don't know. I haven't been to
13 other places in the V.A. recently very much.

14 Q. How is the pool now as far as
15 smoking?

16 A. It's bad.

17 It just takes one cigarette in the
18 place, and the whole room fills up and there is
19 just no ventilation.

20 I suspect it has something to do with
21 those machines. I don't know why but the smoke
22 stays there and it's almost like it attracts it.

23 You watch the smoke and it's just
24 drifts right toward you. I don't know what sort
25 of electrical things happen with machinery and

1 ventilation and air exchanges and smoke and all
2 that.

3 I know that I have read some articles
4 about it, but I'm not a scientist any more than
5 than I'm a lawyer. When somebody lights up,
6 within 60 seconds, you can be in the far corner of
7 the room and you're getting hit with it, and it's
8 devastating right now; far worse than it was when
9 I started there.

10 I don't even know if I could get a
11 job anyplace else right now.

12 MR. WINSLOW: I'm all done.

13 EXAMINER MAGID: Do you have any
14 other testimony you wish to offer yourself,
15 Ms. Hall?

16 MS. HALL: No.

17 EXAMINER MAGID: Let me see if I
18 have any questions I have to ask.

19 All right, I have no questions to
20 ask.

21 Thank you for your testimony,
22 Ms. Hall.

23 All right, now it's time for the
24 Agency to present witnesses. Would it be
25 appropriate and useful to take a five-minute break

1 while you get your first witness, Mr. Winslow?

2 MR. WINSLOW: Yes, sir.

3 (Whereupon, a short recess was taken
4 off the record).

5 EXAMINER MAGID: Back on the
6 record, I do have one or two questions that I
7 would like to ask you, Ms. Hall.

8 Are you a member of a labor Union in
9 your employment at the V.A.?

10 MS. HALL: Yes, I am.

11 EXAMINER MAGID: What Union is
12 that?

13 MS. HALL: The V.A.
14 Union.

15 EXAMINER MAGID: Have you spoken
16 with a Union representative or steward about your
17 problem?

18 MS. HALL: Yes.

19 EXAMINER MAGID: What has been
20 the Union's response?

21 MS. HALL: Well, I was told
22 that it's pretty much an inactive Union.

23 EXAMINER MAGID: It's what?

24 MS. HALL: It's not a very
25 active Union.

1 If the Union made a move to help me,
2 the smokers would object and regardless of what
3 they did, if management didn't want to do
4 something about a situation, they wouldn't do it.
5 It simply wasn't that active a Union.

6 EXAMINER MAGID: Did you seek to
7 file a grievance regarding the smoking problem in
8 the office?

9 MS. HALL: I think I did,
10 and I was told that if you filed a grievance, I
11 couldn't go with the EEOC and I think--

12 EXAMINER MAGID: Who told you
13 that?

14 MS. HALL: I think the
15 Union president.

16 EXAMINER MAGID: So, the Union
17 declined to accept your grievance?

18 MS. HALL: I did file
19 something with them. I don't know if I actually
20 filed an official grievance, but the Union
21 president is the one that negotiated the
22 non-smoking sign outside of reproduction.

23 EXAMINER MAGID: Did anybody in
24 the Union ever tell you that smokers have the
25 right to continue smoking under the Union

1 agreement?

2 MS. HALL: No.

3 EXAMINER MAGID: Are you familiar
4 with the contract?

5 MS. HALL: No.

6 EXAMINER MAGID: Have you ever
7 looked into it to see if it mentions anything
8 specifically about smoking?

9 MS. HALL: I think I asked
10 about it. I believe the EEOC Counselor told me
11 that the V.A. simply didn't have a policy on
12 smoking.

13 EXAMINER MAGID: That's what the
14 EEO Counselor told you?

15 MS. HALL: I believe that
16 is what she told me, yes.

17 EXAMINER MAGID: Do you have any
18 questions on that, Mr. Winslow?

19 MR. WINSLOW: No.

20 EXAMINER MAGID: Do you have
21 anything you would like to add yourself regarding
22 the testimony you've just given about the Union
23 and smokers rights under the Union contract, if
24 any?

25 MS. HALL: No.

1 EXAMINER MAGID: Mr. D'Aoust,
2 state your name, please?

3 THE WITNESS: Ronald J.
4 D'Aoust, D'A-o-u-s-t.

5 EXAMINER MAGID: Mr. D'Aoust, are
6 you aware that you have been named as an alleged
7 discriminating official in this matter?

8 THE WITNESS: Yes, I am.

9 EXAMINER MAGID: As an alleged
10 discriminating official, you have certain rights
11 in this matter. You have the absolute right to
12 testify today and you also have the right to be
13 accompanied during your testimony by a
14 representative of your own choice.

15 Now, you came into the hearing room
16 unaccompanied by anyone who was not previously
17 here. Shall I assume from that that you waive
18 your right to representation during your
19 testimony?

20 THE WITNESS: Yes, I do.

21 EXAMINER MAGID: You have been
22 called as a witness by the Agency to offer
23 testimony regarding matters raised by the
24 Complainant in her discrimination complaint
25 against the Agency.

1 You are here on official duty. And
2 you are assured by EEOC regulations of freedom
3 from a reprisal for your testimony.

4 We do require that you testify either
5 under oath or affirmation. Do you have any
6 objection to taking an oath?

7 THE WITNESS: No, I don't.

8 RONALD J. D'AOUST,
9 having been first duly sworn, was
10 examined and testified as follows:

11 EXAMINER MAGID: State your full
12 name, please?

13 THE WITNESS: My full name is
14 Ronald John D'Aoust.

15 EXAMINER MAGID: Are you employed
16 by the Veterans Administration?

17 THE WITNESS: Yes, I am.

18 EXAMINER MAGID: In what
19 capacity?

20 THE WITNESS: I'm the Chief of
21 the Administrative Division.

22 EXAMINER MAGID: All right,
23 Mr. Winslow?

24 Before you begin your testimony,
25 Mr. Winslow, let me ask the witness if he recalls

1 giving an Affidavit in this matter and as
2 identified as Exhibit B-4 of the Complaint file.

3 Let me show it to you, Mr. D'Aoust.

4 THE WITNESS: Yes.

5 EXAMINER MAGID: Do you recall
6 giving that affidavit?

7 THE WITNESS: I do, yes.

8 EXAMINER MAGID: Have you
9 reviewed it recently?

10 THE WITNESS: I looked at it
11 yesterday.

12 EXAMINER MAGID: At the time you
13 gave the affidavit, was everything that you stated
14 in it true and correct to the best of your
15 knowledge and belief?

16 THE WITNESS: Yes, it is.

17 EXAMINER MAGID: In looking at it
18 yesterday, is it still the case that everything
19 you said in it is true and correct to the best of
20 your knowledge and belief?

21 THE WITNESS: Yes, it is.

22 EXAMINER MAGID: Now, you may
23 proceed, Mr. Winslow.

24 MR. WINSLOW: I want to
25 clarify one thing if I may.

1 EXAMINER MAGID: Excuse me,
2 before you get into the substance, Mr. Winslow,
3 are you going to offer that as an exhibit?

4 MR. WINSLOW: Yes, I am.

5 (Whereupon, Proposed Agency Exhibit
6 1 was marked for identification and entered
into the record).

7 EXAMINER MAGID: Proposed Agency
8 Exhibit 1, it's a one-sheet on both sides,
9 Veterans Administration, Circular 00-79-3,
10 February 1, 1979, entitled "V. A. Smoking Policy."
11 It's signed at the end by Rufas H. Wilson, Deputy
12 Administrator.

13 Ms. Hall, I'm going to show this--

14 MR. WINSLOW: I gave her a
15 copy.

16 EXAMINER MAGID: Ms. Hall, do
17 have any objection to the admission of Proposed
18 Agency Exhibit 1?

19 MS. HALL: No.

20 EXAMINER MAGID: All right, there
21 being no objection, Agency Exhibit 1 is admitted.

22 (Whereupon, Agency Exhibit 1, having been
23 previously marked, was admitted
into evidence)

24 BY MR. WINSLOW:

25 Q. Can you tell me whether this, to the

1 best of your knowledge, constitutes the V.A.
2 Policy on smoking in the work place?

3 A. Yes.

4 To my knowledge, this is the last
5 official document that V.A. has put out on the
6 smoking policy of the Agency.

7 Q. In other words there has been nothing
8 further published on this question?

9 A. No.

10 Q. Does it represent the practice in the
11 Agency?

12 A. Yes, it does.

13 Q. Tell me what that policy is as you
14 interpret this document?

15 EXAMINER MAGID: Excuse me,
16 Mr. Winslow, won't this document speak for itself?

17 MR. WINSLOW: Well, if I may,
18 I want to direct the Examiner's attention to
19 Subparagraph Four under Paragraph 3 on the reverse
20 side, and the rest of these are all in two pages
21 because that's the way I reproduced it.

22 At the top, there's a couple of lines
23 that are opposite Subparagraph Four, and I just
24 want of the call the Examiner's attention to that
25 statement, and if I may read it to the witness:

1 "In establishing and continuing a
2 smoking policy in work areas under their
3 jurisdiction, supervisors should strive to
4 maintain an equitable balance between the rights
5 of smokers and non-smokers."

6 Is that your understand of the V.A.
7 policy, Mr. D'Aoust?

8 A. Yes, it is.

9 (Whereupon, Proposed Agency Exhibit 2 was
10 marked for identification and entered into
the record)

11 EXAMINER MAGID: Proposed Agency
12 Exhibit 2 was just handed to me by Mr. Winslow.

13 It's a Veterans Administration memo
14 of June 12, 1985, directed to all employees from
15 the Director; Subject: Information update, and
16 includes several subjects. One of them is smoking
17 and I assume that that's the relevant part that
18 Mr. Winslow is interested in.

19 Do you have copy of this document,
20 Ms. Hall?

21 MS. HALL: Yes.

22 EXAMINER MAGID: Do you have any
23 objections to the admission of Proposed Agency
24 Exhibit 2?

25 MS. HALL: No.

1 EXAMINER MAGID: There being no
2 objections, Agency Exhibit 2 is admitted.

3 (Whereupon, Agency Exhibit 2, having been
4 previously marked, was admitted
into evidence)

5 BY MR. WINSLOW:

6 Q. Can you tell me, Mr. D'Acoust, who
7 prepared this memorandum?

8 A. The Director prepared the memorandum.

9 EXAMINER MAGID: What Director is
10 that? In Washington, D. C?

11 THE WITNESS: No. Gordon
12 Clowney, the Regional Director.

13 BY MR. WINSLOW:

14 Q. Does this set forth the policy of the
15 Regional Office on this question as far as you
16 know?

17 A. Yes, it does.

18 Q. Do you have any personal knowledge of
19 the reason that this memorandum or, let's say, the
20 paragraphs on "quit smoking policy" are set forth
21 in this memo?

22 A. The Director periodically puts out
23 information and up date memoranda to all employees
24 and this one, for example, has a paragraph on
25 productivity and effectiveness on the savings

1 bonds campaign and on smoking.

2 The reason he puts out memoranda is
3 just to let the people know what's going on, what
4 are the issues in the office and his feelings on
5 them.

6 At the time, June 12, '85, I was in
7 the pool asking people to try to the limit their
8 smoking, and the Director thought it might be a
9 good idea to spread this sort of word throughout
10 the office to give a sort of Regional Officewide
11 information update on that.

12 Q. Was this an effort on his part to
13 support you in your efforts to reduce the smoking
14 in the pool, if that is what you were doing?

15 A. I believe it was, yes.

16 Q. What role did you play in the hiring
17 of Laren Hall?

18 A. As a Division Chief, I had the
19 responsibility to -- well, I have the request to
20 fill the vacancies, and I give to the personnel
21 division a list of people based on rosters of
22 individuals who we have interviewed and I
23 recommend that we pick the top two or three
24 candidates, depending on how many openings we
25 have.

1 I take the recommendations of my
2 typing pool supervisor as to who she believes are
3 the best candidates off the personnel management
4 roster that we get to interview.

5 Q. Do you make any conscientious effort
6 or not to hire people who are handicapped?

7 A. I try to pick the best person to fit
8 the job we have available.

9 I do try to, when I can, pick
10 Veterans Readjustment Act; VRA eligible; Viet Nam
11 Veteran Unemployed, handicapped. But, basically,
12 it is the best qualified person who comes up on
13 the list.

14 Q. When Ms. Hall was hired, what
15 personal role did you have in her selection?

16 A. I would have carried the
17 recommendation of the CTA supervisor; that
18 Ms. Hall was the best person to pick off the
19 register of the Centralized Transcription
20 Activity, CTA. The typing pool.

21 EXAMINER MAGID: That's
22 supervisor--

23 THE WITNESS: I have three
24 subordinate supervisors and from the typing pool,
25 I see about a seventy-five percent turnover every

1 year, and I don't have the time or the expertise
2 to figure out who is the best candidate for the
3 typing pool.

4 I let the supervisor make her own
5 selections and unless I see something real strange
6 in the application, I go along with the
7 recommendation.

8 BY MR. WINSLOW:

9 Q. Is it your testimony, Mr. D'Aoust,
10 that that's what happened in the hiring of
11 Ms. Hall, or is that your general procedure?

12 A. It's my general procedure, and it's
13 what happened.

14 Q. You do have a specific recollection
15 in the hiring of Ms. Hall?

16 A. No, not really particularly. I would
17 have done it the same way I've done all the rest
18 of them.

19 Q. Let me ask the question this way:
20 Did you interview Ms. Hall
21 personally?

22 A. No, I didn't.

23 Q. How is this interviewing normally
24 conducted?

25 A. I request to fill a vacancy. The

1 personnel division goes the office of personnel
2 management for a list of eligibles.

3 They send out letters to the
4 eligibles, asking them to come in for an
5 interview. The personnel division normally gives
6 them a sort of "this is who we are" kind of
7 interview, saying this is the Veterans
8 Administration Regional Office. The job we have
9 is a typing pool job. For this job, we would like
10 you to take a timed test for speed and accuracy.

11 Once they finish the test, the
12 employee would then be referred to the division or
13 divisions who have vacancies for that sort of a
14 job.

15 When people come down for interviews
16 for typing pool jobs, personnel takes them
17 directly to the typing pool and the interviews are
18 conducted in the pool by the typing pool
19 supervisor.

20 After they're done with the typing
21 pool, if there is another division looking for
22 clerical help, they might be routed over to that
23 other division for interviews there, but normally
24 that is our last contact with the potential
25 employees.

1 Q. What opportunity does the employee
2 have to see and observe conditions in the pool
3 under which they will be working?

4 A. Well, normally, the typing pool
5 supervisor always interviews these candidates at
6 her desk in the typing pool. And this probably
7 lasts five, ten, fifteen minutes at the most,
8 mostly, to get a feel for the person to see if
9 they would fit into that type of work, if they're
10 interested in the production kind of typing that
11 the typing pool is required to do.

12 EXAMINER MAGID: Who was that
13 supervisor?

14 THE WITNESS: The supervisor
15 at the time was Beverly Ann Keith.

16 EXAMINER MAGID: Where is Beverly
17 now?

18 THE WITNESS: Beverly is
19 retired. At home.

20 BY MR. WINSLOW:

21 Q. When did you first learn that Laren
22 Hall has a problem that was exacerbated by the
23 smoke in the typing pool?

24 A. I believe about three to four weeks
25 after she hired on, Beverly Keith came to me and

1 said that Laren was complaining that there was too
2 much smoke in the pool, and she was having
3 problems breathing because of it.

4 Q. Was any action taken to deal with
5 this complaint on the part of Beverly?

6 A. At the time we asked the smokers in
7 the pool to see if they could cut down on their
8 smoking and we positioned Laren's desk as close as
9 we could to the front door of the typing pool.

10 Q. Do you have a layout of that room by
11 chance?

12 A. I just happen to.

13 (Whereupon, Agency Exhibit 3 was
14 marked for identification and entered
into the record)

15 EXAMINER MAGID: I was handed
16 Proposed Agency 3, which appears to be an office
17 layout.

18 Ms. Hall, do you have any objections
19 to the admission of proposed Agency Exhibit 3?

20 MS. HALL: Yes, I do.

21 I can't tell anything about what it
22 is. I can't tell anything about the measuring.

23 I would suspect this would be a
24 diagram of what the teletype area is now; not what
25 it was like at the time we are discussing.

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EXAMINER MAGID: All right, I'm going to let Mr. Winslow lay a foundation for the admission of this document by engaging in some voir dire of Mr. D'Aoust.

BY MR. WINSLOW:

Q. All right, Mr. D'Aoust, first of all, the heavy lines on this layout appear to have been added from some other document.

What was the other document?

A. No other document. What we have done with this -- just to layout.

EXAMINER MAGID: Explain how this document came to be and what it is.

THE WITNESS: I have blueprints of our building. The grids on this floor map are five-foot squares. The portion of this floor that I photocopied here is the portion of the floor that includes the typing unit, the publications unit, the teletype unit and the entrance to the typing unit from the mail room.

EXAMINER MAGID: The typing unit is identified as CTA?

THE WITNESS: Right, CTA.

BY MR. WINSLOW:

Q. Where is the mail room?

1 A. The mail room would be the lower
2 right corner of the map.

3 Q. You don't have that marked; is that
4 correct?

5 A. I don't.

6 What we have plotted with these heavy
7 lines are the current locations of the desks, the
8 typing desks in the typing pool.

9 Laren's right. They have changed
10 slightly over -- they change all the time, but
11 they have changed since her hiring on but not
12 significantly. Just a couple fewer desks now than
13 there were then.

14 EXAMINER MAGID: I was in this
15 office at the invitation of the V. A. and Ms. Hall
16 on the August 27, Mr. D'Aoust. Have they changed
17 the since then?

18 THE WITNESS: No.

19 EXAMINER MAGID: At that time I
20 observed that the desks were not 90 degrees to the
21 wall. This document shows that the desks are 90
22 degrees?

23 THE WITNESS: I just sort of
24 penned in this as approximately where all these
25 desk are.

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EXAMINER MAGID: This document also shows the desks are five feet long. Are the desks five feet long?

THE WITNESS: No, 39 inches for the most part.

BY MR. WINSLOW:

Q. Are you saying this is not a scale document as far as the desk locations are concerned?

A. They're approximate locations. The desks would be within the five foot square that the desk is actually located.

EXAMINER MAGID: What is the purpose of your offering this into evidence?

MR. WINSLOW: All I'm trying to do is lay some foundation for the discussion as to where Ms. Hall and the other people were located as he is describing the movement of these people around in this area.

He spoke, for example, of the front of the room and the front door. It's not clear to me which is the front door and which is the front of the room.

I think if he describes while using such a diagram, where these places are, it would

1 be a lot easier for everybody.

2 EXAMINER MAGID: If we were
3 required to use the Federal Rules of Evidence, I
4 would be required to deny the admission of this
5 document for failure to lay a proper foundation.

6 However, since we're not required to
7 comply with those rules I'm going to accept it
8 into admission although it may not be an exact
9 replica and it may be used for Mr. D'Aoust's
10 testimony and the testimony of others.

11 Agency Exhibit 3 is admitted.

12 (Whereupon, Agency Exhibit 3, having been
13 previously marked, was admitted into
evidence)

14 BY MR. WINSLOW:

15 Q. Now, will you tell us where the front
16 door is?

17 A. We consider the front door of the
18 typing pool to be at the lower right-hand corner.
19 This is the front door. (Indicating on document)

20 The supervisor's desk is immediately
21 to the left on entering the front door of the
22 typing pool.

23 Q. Now, you indicated where you had
24 moved Ms. Hall when you first received word that
25 she was having trouble with the smoking in the

1 area.

2 I want you to tell or show us where
3 she was placed in this room at that time?

4 A. Laren's desk was here.

5 EXAMINER MAGID: You will have to
6 describe it verbally, so the court reporter can
7 take it down.

8 THE WITNESS: It's about 20
9 feet inside the door slightly on the left of the
10 front entrance to the typing pool.

11 BY MR. WINSLOW:

12 Q. Was this where she was originally
13 located when she was hired or was this where she
14 was moved to?

15 A. I'm not sure.

16 EXAMINER MAGID: Point to it
17 again.

18 THE WITNESS: This position.

19 BY MR. WINSLOW:

20 Q. You are pointing to the desk that
21 appears directly above the supervisor's desk on
22 the sheet, right?

23 A. Right.

24 I'm not sure if that was the first
25 desk she was ever assigned, but that's where Laren

1 spent her first several months in the typing pool.

2 Q. Why did you put her there?

3 A. Normally, when a new employee is
4 hired, we try to cluster them around the
5 supervisor just because the new employee has many
6 more questions to be answered by the supervisor;
7 format, forms, whatever.

8 Then, after the smoking question was
9 raised, we kept her in that position and attempted
10 to move the smokers to the opposite corner of the
11 room.

12 Q. You're pointing again. I would like
13 you to describe where this corner is?

14 A. Laren's desk is in the lower
15 right-hand corner, and we moved the smokers to the
16 upper left-hand corner.

17 Q. Is that the so-called back of the
18 room?

19 A. Back of the room, yes.

20 Q. And, there is a door on that wall and
21 when I say, "that wall," I'm talking about the
22 so-called back of the room.

23 EXAMINER MAGID: Excuse me, when
24 you're talking about who was at the back of the
25 room, was it Laren at the back of the room or the

1 smokers?

2 THE WITNESS: The smokers were
3 in the back corner.

4 MS. HALL: May I interject
5 something?

6 EXAMINER MAGID: You'll have an
7 opportunity.

8 MS. HALL: I think it's
9 more accurate if we hold it up side down.

10 EXAMINER MAGID: You will have an
11 opportunity to cross-examine.

12 BY MR. WINSLOW:

13 Q. In other words, the smokers were in
14 the upper -- if you are holding the thing so you
15 can read the printing on it in the upper left-hand
16 corner.

17 A. Right.

18 Q. Is that correct?

19 A. That's correct.

20 Q. And, the door that goes into the
21 publication from the pool is in the upper
22 right-hand corner; is that correct?

23 A. Yes, it is.

24 Q. Now, at the time that Laren was
25 hired, were there two supervisors desks near the

1 so-called front door on the opposite side of the
2 room?

3 A. Right.

4 Q. Whose desks were they?

5 A. What supervisors?

6 Q. What supervisors.

7 A. Supervisor Beverly Keith, and next to
8 her would have been the group leader, Donna
9 Shephard.

10 Q. When these prospective employees are
11 interviewed, how do they normally enter the room?

12 A. They would normally come in through
13 the front entrance.

14 Q. Can they see the other typist when
15 they come in?

16 A. Yes, it is one open room.

17 Q. How big is this room; not square
18 feet?

19 A. How big.

20 EXAMINER MAGID: You said each
21 square is five feet.

22 THE WITNESS: It's 2,900
23 square feet. It's fifty-five feet long by
24 fifty-five feet wide and there is a little cut out
25 out of it.

1 BY MR. WINSLOW:

2 Q. When you moved the smokers up in
3 the upper left-hand corner, did that solve the
4 problem?

5 A. No, it didn't, not to Laren's
6 satisfaction.

7 EXAMINER MAGID: Let's ask your
8 opinion about it. In your opinion did it solve
9 the problem?

10 THE WITNESS: I saw it as a
11 way to help.

12 EXAMINER MAGID: That wasn't the
13 question, Mr. D'Aoust. The question was whether
14 it cured the problem?

15 THE WITNESS: I thought it
16 did.

17 EXAMINER MAGID: You thought that
18 there was no longer any smoke getting near
19 Ms. Hall?

20 THE WITNESS: I thought it was
21 as good a cure as I could come up with at the
22 time.

23 BY MR. WINSLOW:

24 Q. Was there anything further done then
25 at that point that apparently did not satisfy

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Ms. Hall?

A. Well, several weeks later, maybe a couple months later, I'm not quite sure of the time, Laren again complained that although we had asked, people hadn't quite stopped smoking in there.

I called all the smokers in my office and asked them personally to try to limit their smoking as much as possible. Some did and some didn't. Then there was a lot of smoke coming in from the mail activity, the mail room, coming in at the front door.

Q. At this meeting?

A. No, subsequent to this.

We asked and she said there might be less smoke in the back because smoke doesn't normally come in from publications.

The publications area is a large room, probably twice the size of the typing pool. It had stacks and stacks of forms and pamphlets, papers stock, in general.

We don't allow smoking in the paper stock area. So, we ended up moving Laren's desk to the rear of the room.

EXAMINER MAGID: Excuse me, why

1 don't you allow smoking in there?

2 THE WITNESS: Because of a
3 fire hazard.

4 EXAMINER MAGID: Do employees
5 work in there?

6 THE WITNESS: Yes, they do.

7 EXAMINER MAGID: So, those
8 employees who do work in there are not permitted
9 to smoke in there?

10 THE WITNESS: That's correct.

11 EXAMINER MAGID: Because of the
12 hazard of fire?

13 THE WITNESS: Right.

14 EXAMINER MAGID: And, fire would
15 obviously be a danger to their health and safety;
16 is that correct?

17 THE WITNESS: And to the
18 building safety also, yes.

19 BY MR. WINSLOW:

20 Q. Let me ask this:

21 Do I understand that there is no
22 smoking allowed at all in the publications area or
23 that the no smoking ban is limited to the stacks
24 where the forms are stored?

25 A. At the time it was limited to the

1 stacks to the forms area itself. There was
2 smoking permitted and done near the photocopy
3 machine, at the desk of the two employees who
4 worked in that unit.

5 Q. You say "at the time."

6 Has that policy been changed?

7 A. Yes, it has.

8 Q. What is the change?

9 A. Around last Christmastime, the GSA
10 authorized new wall covering on the fourteenth
11 floor in the corridor area.

12 Laren was already sitting in the back
13 of the room by the publications door.

14 The the guy who put up this wall
15 paper was smoking one of the most outrageous
16 cigars I had ever smelled. Laren mentioned
17 between that guy's cigar and the glue they were
18 using to put the wallpaper up, she was having
19 problems breathing.

20 We then made it a policy that there
21 was no smoking in the corridor area leading into
22 the publications unit and no smoking in
23 publications at all.

24 We cleared this with the employees
25 who worked there. Neither of them smoked.

1 Occasionally, their visitors would. But we put an
2 ash tray outside the door leading to the
3 publications area and put signs up saying "Smoking
4 Prohibited in this Publication Reproduction Area."

5 EXAMINER MAGID: In order to
6 implement that policy, was the Union consulted?

7 THE WITNESS: Yes, they were.

8 EXAMINER MAGID: What was the
9 nature of the consultation?

10 THE WITNESS: I wasn't part of
11 the conversation, but the Director, Mr. Clowney,
12 and Artie Pierce, who was the Union president, got
13 together and decided that this was something that
14 we could do to accommodate Laren and it wouldn't
15 inconvenience the Union members who were involved
16 in this.

17 EXAMINER MAGID: Because they
18 didn't smoke?

19 BY MR. WINSLOW:

20 Q. Whose idea was it, if you know?

21 A. I'm not sure whose idea. I think it
22 may have been Artie's idea.

23 EXAMINER MAGID: When you say
24 "whose idea," what idea are you talking about?

25 THE WITNESS: The idea to post

1 the "No Smoking" signs leading into publications.

2 EXAMINER MAGID: -- " You're
3 testifying it was the Union's idea to post no
4 smoking signs?

5 THE WITNESS: I think it was.

6 EXAMINER MAGID: Whose idea was
7 it to bring in the Union in the first place?

8 THE WITNESS: I don't know.

9 EXAMINER MAGID: Was there any
10 written agreement with the Union which permitted
11 the Agency to change this past practice by making
12 a new no smoking order?

13 THE WITNESS: I don't believe
14 there is, no.

15 EXAMINER MAGID: All right,
16 Mr. Winslow?

17 BY MR. WINSLOW:

18 Q. Was not part of this proposal or was
19 a part of this proposal the idea of putting an ash
20 stand immediately next to the door running into
21 the publications area underneath the sign that
22 we're talking about?

23 A. Yes.

24 The lead clerk in the publications
25 unit is the Union steward for the fourteenth

1 floor. It may have been his idea originally to
2 Artie that he wouldn't mind and Stan wouldn't
3 mind--

4 Q. Who is Stan?

5 A. Stanley Odomshik is the other person
6 who works in the publications room.

7 Q. You have two?

8 A. Two.

9 Q. I want to back track if I may one
10 step.

11 You stated that ordinarily new
12 employees, such as Laren, would be positioned near
13 the supervisors so that they could ask questions
14 and they would have more occasion to do so than
15 more seasoned employees.

16 Is there any other reason why you
17 would place a new employee or certain specific
18 employees in that particular spot?

19 A. Well, there is:

20 On the left side of the room, the
21 window side of the room, is wired for our word
22 processing system and normally it takes awhile
23 before a new employee is familiar enough with what
24 we do to get any kind of extra production done by
25 putting them on a word processor.

1 Other than that, no.

2 The reason for keeping them in that
3 lower right-hand quadrant would be to keep them
4 near the supervisors for questioning and
5 answering.

6 Q. If an employee were not working at a
7 level that you felt was adequate, would you
8 conclude that it could be desirable to have them
9 in that spot?

10 A. Yes.

11 Q. Why?

12 A. Normally, if someone is not
13 performing adequately, if they have problems
14 either with the quantity of work or the quality of
15 of work, the quantity of work produced depends a
16 lot on how much time you spend at your desk.

17 So, we try to keep them, if quantity
18 is the problem, under the eyes of the supervisor
19 and make sure they're not out roaming around and
20 not typing.

21 If quality is the problem, we need
22 them there to ask the group leader, "Should this
23 be done; should this verb be third person
24 singular; how do you spell something; those kinds
25 of questions."

1 Q. Have you ever had any problems in
2 either of those respects with Laren's work?

3 A. No.

4 Laren is one the best typist I have.

5 Q. So far, I think we have Laren up
6 someplace near the door at the back of the room in
7 an effort to try to isolate her from the smokers
8 if I understood what you said.

9 Where were the smokers, then, at that
10 point?

11 A. The typing pool ranges from have 18
12 to 25 people in it. I do have a high turnover in
13 the typing pool. The number of smokers in the
14 pool ranges from 5 to 8. It just depends on who
15 we hire and who happens to smoke.

16 I can't be positive of who was
17 sitting where at any given time because people
18 move around; you know, reassigned duties on word
19 processors. Certain kinds of jobs needed to be
20 pushed out, and you have to rearrange some of the
21 seating arrangements.

22 But, in general, we have had smokers
23 at the back corner desk, the upper left corner
24 desk, the desk next to that.

25 Elaine smokes not normally on the job

1 in the position below that. Occasionally, back
2 here in the third position over. Right now, we
3 have a typist sitting right here who smokes, but
4 normally they would be grouped in this area.

5 Q. Do you have any problems in
6 relocating these people?

7 A. I have problems in relocating the
8 word processing qualified typists and we have a
9 few people and probably right now I've got seven
10 word processors sitting there--word processing
11 terminals--and I think I have eight people who
12 know how to use them; eight production typists.

13 The group leaders and supervisors
14 know how to use them but they don't.

15 So, I'm somewhat limited on who I can
16 move out of that corner or that two line strips.

17 Q. Is that where the word processors are
18 located?

19 A. Yes.

20 Q. Along the windows?

21 A. Along the windows and ten feet in
22 from the windows.

23 The way the building is set up the
24 wire trenches run north and south in the middle of
25 the five-foot grids. So, I've only got wires

1 strung from the word processors down from these
2 two lines.

3 Q. If you hire new people, do you
4 consider whether they smoke or they don't smoke
5 when you hire them?

6 A. No, we don't.

7 Q. Why not?

8 A. I'm looking for the person who can
9 kick out work. I think we're pretty blind to
10 other characteristics. I want someone who can
11 type a lot of lines and can type them accurately.
12 We don't ask people if they smoke or not smoke.

13 Q. If you ban smoking in that area--and
14 I think this is an obvious answer--could you hire
15 the best qualified individual?

16 A. I don't believe we could, no.

17 EXAMINER MAGID: Do you have any
18 basis for that belief other than conjecture?

19 THE WITNESS: The best typists
20 I have smokes right now. He was hired subsequent
21 to Laren.

22 EXAMINER MAGID: I don't
23 understand your answer. Do you have any basis for
24 believing?

25 THE WITNESS: That I couldn't

1 get the best qualified typists if I banned
2 smoking?

3 EXAMINER MAGID: Yes.

4 For example, what makes you think
5 that that best typist would not have accepted the
6 job in the work area?

7 THE WITNESS: I have no way of
8 knowing if they would or would not have accepted
9 the job. All I'm saying is that I have a
10 potential of losing a good candidate. It depends
11 on the individual.

12 EXAMINER MAGID: If you have a
13 seventy percent turnover, you have a potential for
14 losing a lot of good and poor candidates, smoking
15 and non-smoking, don't you?

16 THE WITNESS: I do.

17 EXAMINER MAGID: Do you have any
18 basis for believing if you ban smoking in that
19 area that people would refuse the job because of
20 that?

21 THE WITNESS: I have no way of
22 knowing that.

23 EXAMINER MAGID: All right.

24 BY WINSLOW:

25 Q. Have some of the employees who smoke

1 indicated that they feel that they have a right to
2 smoke?

3 A. Yes, smokers' rights have been a
4 question.

5 Q. How serious a question?

6 A. In the statement given to the EEO
7 investigator, Mr. Drawn--

8 EXAMINER MAGID: Are you going to
9 talk from hearsay now, from what you read in the
10 complaint file?

11 THE WITNESS: From what I read
12 in the complaint file.

13 EXAMINER MAGID: I think
14 Mr. Winslow is asking you from personal knowledge.

15 THE WITNESS: I've never asked
16 individuals if not smoking would create a big
17 problem with that. I've never gone to any
18 individual employee and said, "If we stopped
19 smoking, would you die?" I've never come out and
20 said that to anyone.

21 EXAMINER MAGID: You have not?

22 BY MR. WINSLOW:

23 Q. Have you had any problem in convincing
24 these people that they should voluntarily quit
25 smoking?

1 A. Yes, I have.

2 I have had several of the smokers in
3 my office more than a couple of times asking them
4 to cut down on their smoking.

5 Laren has occasionally mentioned
6 either directly to me or through the supervisor to
7 me that an employee was wandering around with a
8 cigarette lit coming by her desk.

9 I'll call that employee in and say,
10 "Look, we have tried to ask you to limit your
11 smoking to your desk area if you can."

12 Because the nature of their jobs,
13 it's tough to keep them tied to their desks all
14 the time. They have to get up and get forms which
15 are in the rack at one of the back walls. They
16 have to get up and ask questions of the
17 supervisors and group leader about format.

18 And, people have indicated to me,
19 yes, they would have problems, but they don't
20 think about it when they stand up from their
21 desks, and they you walk around with it.

22 Q. Have you had any occasion that they
23 deliberately resented or harassed Laren by walking
24 by her desk unnecessarily with a cigarette in
25 their hands; that they have been resistive to your

1 efforts to get them to confine their smoking if
2 that's is what you've done?

3 A. I don't think resistive, no. I would
4 relate it more to not thinking before they stand
5 up and walk.

6 Q. I will ask the question a different
7 way.

8 Do you think they were cooperative?

9 A. Yes, I do think they have have
10 cooperated in general.

11 Q. So far, we have Laren up in the what
12 I call the right rear corner of the room. I would
13 like for you to tell me what next was done to try
14 to alleviate this problem?

15 I'm assuming it was not resolved. If
16 that's not true tell me it was solved?

17 A. No, it wasn't solved by that move.

18 We purchased a couple of window fans
19 in an attempt to blow the smoke away from Laren.

20 Q. Let me interrupt you. When you say
21 window fans, do you mean you put fans in the
22 window?

23 A. No, 19-inch square fans that you
24 normally see in windows. The windows in the
25 building don't open; so we have them sitting on

1 desks and cabinets to try to blow the smoke away.

2 EXAMINER MAGID: You were talking
3 about the 19-inch fans that you purchased and what
4 you did with them.

5 THE WITNESS: We put the fans
6 in the room, turned them on, hoping they would
7 improve the situation around Laren's desk and try
8 to keep the smoke in one area.

9 BY MR. WINSLOW:

10 Q. Were the fans directed at Laren?

11 A. No, I think away from Laren, blowing
12 away from her desk.

13 Q. So, you think. Why do you say you
14 think?

15 A. I didn't watch the placement of fans
16 every day, and they do get moved around
17 periodically but for the most part, they would
18 have been pointing towards the smokers.

19 EXAMINER MAGID: If they were
20 brought in to solve the problem regarding
21 Ms. Hall, why were they moved every day?

22 THE WITNESS: The fans
23 presented a problem in themselves. They did blow
24 paper around and the typing pool is a mass of
25 paper. They got in the way with certain people.

1 It depends on who was at their desk that day. You
2 wouldn't want the fans blowing directly on to
3 someone.

4 The typing pool has a high absentee
5 rate, higher than anywhere else, and often there
6 is someone missing and you would move the fan onto
7 that desk for that day.

8 Q. Is that because of sick leave that
9 you have a high absentee rate?

10 A. Sick leave, annual leave, leave
11 without pay.

12 Q. Is that sick leave due to an excess
13 amount of smoke in the room?

14 EXAMINER MAGID: If you know.

15 THE WITNESS: No, not
16 generally.

17 BY MR. WINSLOW:

18 Q. Have any of the employees complained
19 about the way in which they have been obliged to
20 take sick leave because of the fans themselves?

21 A. No.

22 Q. Have any of them complained that they
23 were cold as a consequence?

24 A. Yes, they complain, "The fan is
25 blowing on me and I'm in a draft. Repoint the

1 fan; turn it off."

2 Q. In other words, the need for shifting
3 the fans around was, one, somebody might be using
4 the desk that the fan was sitting on so you would
5 put it on the a desk where there was nobody
6 stationed on the day in question; and, two, on the
7 need to keep the fan from blowing on someone who
8 might be directly in front of it. Is that what
9 you're telling us?

10 A. Right.

11 Q. How did that work?

12 A. It worked all right during the summer
13 months when it was hot and stuffy in the building.

14 In the winter when it got cold is
15 when the complaints about the blowing draft really
16 started to come up.

17 Our building tends to be hot in the
18 summer and cold in the winter, and when it's cold
19 several people complained about the added coldness
20 of having air being blown over the tops of their
21 heads.

22 Q. What control do you have personally
23 or do the supervisors have over the air
24 conditioning and heating system in the building?

25 A. We have no control over it.

1 Q. Why not?

2 A. Our building is GSA leased space.

3 GSA regulations require that the
4 temperature be in a certain range. I believe it's
5 up to 85.

6 I'm not real sure, but there is a
7 maximum range for the summer and a minimum range
8 for the winter and GSA is the one who supposedly
9 adjusts the thermostats as to maintain the
10 building at that range.

11 They also have control over the air
12 circulation in the building. The building is on
13 for the most part a closed air system. In the
14 summer, the reason GSA uses a closed air system is
15 so they don't have to cool outside air and in the
16 winter so they don't have to heat outside. They
17 just move the air that's in the building already.

18 Q. If there is smoke in the building in
19 any location would it be circulated into the
20 typing pool?

21 A. Yes, it would be.

22 Q. Is there any difference between the
23 air conditioning or air handling in the typing
24 pool than that elsewhere in the building?

25 A. Not generally.

1 Most places in the building depend on
2 air circulating through the plenum which is the
3 space between the ceiling panels and the floor
4 above. There is about a five-foot space up there
5 where the air sits and moves whenever they turn on
6 the blowers.

7 Q. Where does it come out?

8 A. The comes out along the cracks along
9 the window ledges and through the ceiling trenches
10 like this one up here. (Indicating.)

11 Q. Does this in any way limit the
12 arrangements that you could have in the typing
13 pool, for example, to provide a separate enclosed
14 space for an individual?

15 A. Yes, it does.

16 Unless you install a separate air
17 conditioning system in a room, you're tied to the
18 building's air conditioning system, and the
19 building's air conditioning system reuses the same
20 air over and over again, blowing from one side of
21 the building to the other.

22 So, anywhere on the fourteenth floor
23 is going to receive air from the window cracks and
24 ceiling vents the same as anywhere else on the
25 fourteenth floor.

1 Q. Have you considered the possibility
2 of putting a separate walled area area around
3 Laren's desk?

4 A. No, we haven't.

5 Q. When I say that, I don't mean has
6 this been done. I'm asking have you considered
7 the possibility?

8 A. We considered it.

9 On the floor map again if you would
10 look at it, there is a tiny little room and it's
11 marked as Room 1444 on this floor map.

12 Q. Why don't you point to it if you
13 will?

14 A. It's in the lower right-hand corner.
15 That room contains our old dictation system which
16 we replaced in the last two years.

17 The room is relatively empty now,
18 although we have now installed some printers in
19 there for a new computer system we have. For a
20 few weeks we tried to station Laren's desk in
21 there in that room.

22 EXAMINER MAGID: Excuse me,
23 Mr. D'Acoust, I think the question asked was
24 whether you considered adding walls.

25 THE WITNESS: Right.

1 EXAMINER MAGID: In essence, a
2 private office for Ms. Hall.

3 THE WITNESS: Not seriously,
4 no.

5 BY MR. WINSLOW:

6 Q. Why not seriously?

7 A. For one thing it would require GSA's
8 approval to change walls and open space. It would
9 require funding from V.A. Central Office in
10 Washington to the rent clause and the idea of a
11 centralized transcription activity, part of that
12 idea is to have all of your typists in view of the
13 supervisor so she can control their activities.

14 We really just didn't have the money,
15 and a separate office wouldn't help because she
16 would be getting the same air from the vent that
17 she would be getting on the floor.

18 EXAMINER MAGID: You say you
19 haven't had the money. How much money?

20 THE WITNESS: Installing two
21 walls and a door would probably cost seven or
22 eight thousand dollars.

23 BY MR. WINSLOW:

24 Q. How do you know?

25 A. The reason for the complete square in

1 the typing pool is because we moved this wall out
2 five feet and erected a little partial wall and
3 put in a door. And that move there cost six
4 thousand dollars to install one wall and a door.

5 EXAMINER MAGID: You never got an
6 estimate for putting walls up for Ms. Hall; is
7 that correct?

8 THE WITNESS: No.

9 EXAMINER MAGID: So, you don't
10 know how much it cost?

11 THE WITNESS: That's correct.

12 As part of my duties as Chief of the
13 Administrative Division, I'm in charge of space
14 and I'm also in charge of funding those kinds of
15 moves.

16 And, we have had walls moved and
17 installed in other places; some of them we pay
18 for, some of them, private agencies. We also
19 provide space or service organizations.

20 Paralyzed Veterans had a wall moved
21 recently and they paid for it, and the price tends
22 to be in that range.

23 EXAMINER MAGID: But you never
24 specifically got a bid or an estimate regarding
25 putting up walls for Ms. Hall, nor did you ever

1 make a request funds or that purpose; is that
2 correct?

3 THE WITNESS: That's correct.
4 I said we hadn't seriously considered it.

5 EXAMINER MAGID: It crossed your
6 mind, but it never got much further than that; is
7 that correct?

8 THE WITNESS: Actually, it
9 crossed my mind and I don't believe that would
10 help.

11 EXAMINER MAGID: You didn't
12 persue it because you didn't believe it would
13 help?

14 THE WITNESS: Right.

15 BY MR. WINSLOW:

16 Q. Was that belief also based on your
17 experience with the cost of such projects in other
18 areas where you had to remove a wall?

19 A. Not so much the cost as the fact that
20 it wouldn't change the way the air moves.

21 Q. Whether or not, what I'm trying to
22 find out is--and I gather that you've more or less
23 answered this--in your job you have experience
24 with the cost of establishing this kind of
25 arrangement; is that correct?

1 A. Yes.

2 Q. And, you have a pretty go feel just
3 from your own experience as the person responsible
4 for establishing space of what this would cost?

5 A. Yes, I have.

6 Q. Is that correct?

7 A. Yes.

8 EXAMINER MAGID: Do you have any
9 idea what the effect would be if you did put up
10 such walls for an essentially private office for
11 Ms. Hall?

12 Do you know whether a separate
13 ventilation system or air filters, those types of
14 machines that stand, alone and don't depend on the
15 building ventilation, do you have any idea what
16 the cost, if any, of those would be?

17 THE WITNESS: If you created a
18 small office, and you want to move the air at all,
19 you would almost need to install a separate air
20 moving system.

21 On this floor there is a small office
22 over here that doesn't have contact with the
23 windows, and because it doesn't have contact with
24 the windows, it misses that air incoming flow.
25 It's probably the stuffiest room we have.

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EXAMINER MAGID: The question
that I'm asking, Mr. D'Aoust, is whether in your
consideration as to whether new walls would help,
did you quarter that you could have put in air
filters to interrupt the natural flow so that the
air that does flow into that little office would
be filtered? Did you ever consider that?

THE WITNESS: No, I didn't
consider that.

EXAMINER MAGID: Okay.

THE WITNESS: In keeping with
building a new office, no.

BY MR. WINSLOW:

Q. Do you understand you to say that if
you would have enclosed the area that Ms. Hall
occupied, it would be not only necessary to erect
walls but also to provide an entirely separate
heating and ventilating and cooling system to
serve that office and that in conjunction with
that you probably would put in some type of
filtering system to filter out the smoke that
might come through the normal system, or through
system, because somewhere you would have to have
the air coming from.

A. Yes, you would have to do that.

1 Q. I think you would have to have
2 someplace.

3 EXAMINER MAGID: Excuse me,
4 Mr. Winslow.

5 You're coming awfully close to
6 testifying yourself and if not testifying, you're
7 coming awfully close to presenting leading
8 questions of your own witness.

9 MR. WINSLOW: I'm trying to
10 clarify for my mind and your mind what it is going
11 to entail.

12 EXAMINER MAGID: My mind is
13 clear, Mr. Winslow.

14 If yours is not, please ask questions
15 that are not so leading.

16 BY MR. WINSLOW:

17 Q. Would a filter solve the problem? If
18 you were to erect a separate office, is that all
19 you would need to do?

20 A. I'm not sure a filter would be all
21 you would need. You would also need an air
22 circulation system.

23 Q. That is my question.

24 That is exactly what I'm trying to
25 get out.



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EXAMINER MAGID: Mr. Winslow, are
you getting close to the end of your examination
or shall we break for lunch?

Let's go off the record.

---o0o---

(Whereupon, a short discussion
was held off the record)

---o0o---

(Whereupon, the morning session
was adjourned at 12:05 p.m.)

---o0o---

1 station, there again trying to get around the
2 system as a computer terminal operator at the same
3 time keeping her as far as we could from the
4 smoking computer operators in the back of the
5 room.

6 So, this is Laren's current desk
7 here, lower left-hand corner.

8 Q. Let me ask a question:

9 There is one desk that is in the--or
10 at least something is indicated there I assume
11 it's a desk--in the very lower left-hand corner;
12 yet, when I observed you pointing, you seemed to
13 be pointing to a desk that was in front of that
14 one?

15 A. Yes.

16 Q. And, that that was Laren's desk: Who
17 sits at the one in the very lower corner?

18 A. The one at the lower corner is
19 actually the system control unit. It is the main
20 display that controls the entire computer system
21 for the V.A.

22 There are actually 21 terminals
23 scattered through four floors, and that terminal
24 is the controlling terminal for all of them.

25 We use it for training in parts of

1 the day, but in the beginning of the day and end
2 of the day, we have to use it for control
3 purposes.

4 There is no desk attached to that
5 terminal. It's just a terminal all by itself.

6 Q. What else was done, if anything, to
7 try to accommodate Laren's lung problem?

8 A. In March of '85, which is about the
9 time Laren was filing the EEO complaint
10 originally, we had one of our teletypists get
11 promoted.

12 Teletype is also under my control.
13 It's a separate unit. They're in this room below
14 the typing pool. Sonya was the teletypist, Grade
15 4 teletypist, and she got promoted to the
16 Personnel Division Secretary position. At that
17 time I had an opening in teletype.

18 The reason we thought to try to cross
19 train Laren over there was the teletype room has a
20 separate air conditioning system. We installed
21 two, one and a half ton air conditioners in the
22 ceiling of that room to ensure that that air in
23 that room met the criteria for the computer
24 equipment that is in there.

25 We have a system known as Vadats.

1 Vadats is our teletype contact with all the other
2 V.A. Agencies. Our data processing direct link is
3 through Vadats.

4 We also have in that room the central
5 processing unit for the computer system. That is
6 an I.B.M. 5520 system and it requires cooling not
7 to exceed 75 degrees.

8 We can't guarantee that in our
9 building because GSA lets the heat get higher than
10 that in here. So, we had to install these air
11 conditioners in the ceiling.

12 Once Sonya left that position, the
13 other two employees who were in that room didn't
14 smoke. So, we had no one smoking in a room with
15 three tons of air conditioning in the ceiling.
16 It's an enclosed room.

17 Laren cross trained there for a
18 couple of weeks, a few hours a day, and on
19 April 25--I happened to have kept records of some
20 this stuff because it was an issue at the time.

21 EXAMINER MAGID: When did you
22 review those records?

23 THE WITNESS: Yesterday.

24 EXAMINER MAGID: Do you have
25 copies of those records?

1 THE WITNESS: I do.

2 EXAMINER MAGID: All right, at an
3 appropriate time, we will need to see a copy of
4 those records.

5 THE WITNESS: On April 25, I
6 called Laren in my office to give her the letter
7 from the Director saying we acknowledge receipt of
8 the EEO complaint.

9 At that time, I asked her, "How about
10 going in teletype? What do you think of that
11 job?"

12 At the time Laren was noncommittal.
13 She really didn't see herself as a teletypist.
14 She didn't think it had the promotion potential
15 that the typing pool positions have.

16 I explained to her it was a lateral;
17 they were both Grade 4 positions because by that
18 time we had promoted Laren to the target grade in
19 the pool which is a Grade 4 typist.

20 Laren came in September of '84 and
21 this is March of '85; so she had her six months
22 and was eligible for the grade increase.

23 EXAMINER MAGID: Was she promoted
24 as soon as she was eligible for that grade
25 increase?

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THE WITNESS: Yes.

She trained a few more hours in teletype through the next couple of weeks and on May 2 we talked again; and on May 2, she declined my offer of a lateral transfer saying it wasn't the job she wanted to do. She felt it didn't have the promotional potential the typing pool had.

I explained that several people had been promoted out of teletype to Grade 5 positions in other positions, but she didn't see that as the tact to go.

Subsequent to that, we tried to make an opening in the finance division not a division under my control and in the voucher audit section, and we detailed Laren over there.

It's a bigger room, hopefully with fewer smokers, but I'm not sure that that's true. She was over there for a few weeks, maybe even a month and the detail ended, and she came back to the typing pool.

Then, the next action was to be moved up to the front to be on the computer equipment.

BY MR. WINSLOW:

Q. What documentation do you have?
A. I have reports of contact.

1 I usually jot down notes to myself
2 after talking to employees; otherwise I forget
3 what I said and what they said. So, I usually do
4 them within a day or two, usually the same day
5 though.

6 Q. Are those the notes?

7 A. Yes, here's the two that I mentioned,
8 the April 25 note and the May 2 note.

9 Q. Does the other document relate to
10 something else?

11 A. Yes, the other document is dated
12 July 2, '85.

13 EXAMINER MAGID: Is that the day
14 she declined the job?

15 THE WITNESS: No, she declined
16 on May 2. On July 2, Laren had just come back
17 from being off for a couple of days. Her lung
18 condition was bothering her and she had gone to
19 personnel to file a Worker's Compensation claim,
20 and she stopped to let me know she had done that.

21 At the same time she stated that I
22 should fire her or transfer her to some location
23 where she would not be affected by the smoking
24 typists.

25 I explained that I did not want to or

1 have any reason to fire her, and that I had no
2 typist position that was not exposed to cigarette
3 smoke because by this time we had filled the
4 vacancy in teletype that had existed and offered
5 her the lateral.

6 Q. Are the skills the same, basically,
7 in a teletype job is in the typing pool?

8 A. Yes, there is a lot of transfer
9 skill.

10 The teletypist works at a computer
11 key board, typing on a visual display terminal.
12 The basic difference as a typist you're typing
13 text documents, narration from dictation.

14 The teletypists pieces are
15 transferring written code sheets, alpha numeric
16 strings of information onto a computer scan and
17 transmitting it.

18 EXAMINER MAGID: That is what the
19 teletypists are doing?

20 THE WITNESS: They're both
21 basically data transcription proceedings. They're
22 taking data from one and putting it onto something
23 else.

24 EXAMINER MAGID: One is jibberish
25 and the other is intelligible information.

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THE WITNESS: That's right.

Knowing our dictators, they could both be jibberish, but the jobs are very similar.

Normally, two of the current teletypists came from the typing pool originally. It's a lateral move. It has been a path between those two. In fact, I have considered in the past and still may detail people out of the typing pool. They can become a teletypist within a day or two.

EXAMINER MAGID: Is it within your authority to unilaterally transfer people back and forth?

THE WITNESS: I can detail people for a period not to exceed two weeks.

EXAMINER MAGID: But you can't transfer them without their permission?

THE WITNESS: No.

I can detail them without their permission.

BY MR. WINSLOW:

Q. Are both jobs basically typing jobs?

A. Both jobs basically are typing jobs. You're dealing with a typing key board with both jobs.

1 MR. WINSLOW: Do you want us
2 to introduce them?

3 EXAMINER MAGID: I'd like to see
4 them, please.

5 These are the notes that you reviewed
6 prior to your testimony; is that correct?

7 THE WITNESS: Yes.

8 EXAMINER MAGID: You gave
9 testimony today based on the material in these
10 notes; is that correct?

11 THE WITNESS: I just did now,
12 right.

13 EXAMINER MAGID: Were these
14 written by you on the dates indicated?

15 THE WITNESS: Yes, they were.

16 EXAMINER MAGID: Ms. Hall, I'm
17 going to show you these documents and allow you to
18 review them. If you wish them admitted into
19 evidence, let me know.

20 MS. HALL: I have a
21 somewhat different version of the conversations.

22 EXAMINER MAGID: Notwithstanding
23 that, would you like any of those three documents
24 admitted into evidence?

25 MS. HALL: Do you mean it's

1 up to me?

2 EXAMINER MAGID: If you wish to
3 offer them as a Complainant's Exhibit for some
4 reason that you believe is relevant, you have the
5 right to offer them.

6 MS. HALL: Fine.

7 EXAMINER MAGID: You do wish them
8 admitted?

9 MS. HALL: Yes.

10 EXAMINER MAGID: Mr. Winslow, do
11 you have any objection to the admission of these
12 documents?

13 MR. WINSLOW: I'm a little
14 confused. I thought they were going to be our
15 exhibits.

16 EXAMINER MAGID: Well, let's make
17 them joint exhibits then.

18 MR. WINSLOW: I take it, Ron,
19 you don't have any objection or you want to have
20 them introduced; is that correct?

21 EXAMINER MAGID: Wait a minute.
22 It is not up to Mr. D'Aoust.

23 MR. WINSLOW: I know, but I
24 want to find out from him so I know what position
25 I should take.

1 EXAMINER MAGID: Mr. D'Aoust, do
2 you have any personal objection to the admission
3 of these documents?

4 MR. WINSLOW: I don't see
5 anything wrong with them. I would like to have
6 them entered.

7 EXAMINER MAGID: All right, I'm
8 going to put them in as to date order.

9 It was your intent to offer them.
10 Would you desire them to be marked as Agency
11 Exhibits?

12 MR. WINSLOW: Yes.

13 EXAMINER MAGID: Agency Exhibit 4
14 is a report of contact signed by Mr. D'Aoust on
15 April 25, 1985. The person contacted was Laren
16 Hall. That is Agency Exhibit 4 and it is
17 admitted.

18 (Whereupon, Agency Exhibit 4 having
19 been previously marked, was admitted into
evidence)

20 (Whereupon, Agency Exhibit 5 was marked
21 for identification and entered into the
record)

22 EXAMINER MAGID: Agency Exhibit 5
23 is a report of contact signed by Mr. D'Aoust, the
24 person contacted, Laren Hall. The date of the
25 contact May 2, 1985.

1 Ms. Hall has stipulated to its
2 admission also so it is admitted.

3 (Whereupon, Agency Exhibit 5, having been
4 previously marked, was admitted into
evidence)

5 (Whereupon, Agency Exhibit Number 6 was
6 marked for identification and entered into
the record)

7 EXAMINER MAGID: Agency Exhibit 6
8 is report of contact signed by Mr. D'Aoust; person
9 contacted, Laren Hall; date of contact July 2,
10 1985. And, this document is also admitted. We'll
11 have copies made as soon as possible.

12 (Whereupon, Agency Exhibit Number 6, having
13 been previously marked, was admitted into
evidence)

14 EXAMINER MAGID: You may use
15 them, Mr. Winslow, if you wish.

16 MR. WINSLOW: No.

17 BY MR. WINSLOW:

18 Q. Let me backtrack a minute:

19 Mr. D'Aoust, did you have Laren
20 herself attend any of these meetings where you
21 spoke to the employees about the problems with
22 smoking in the typing pool?

23 A. Not the ones in my office because we
24 were all smoking, but we made a few announcements
25 in the pool jointly with the the supervisor,

1 Beverly Keith and I.

2 We made a couple of requests to all
3 the employees that we have an employee with a lung
4 problem, and if we could limit smoking it would be
5 appreciated.

6 Q. What form did these take, these
7 announcements? Was this verbal, written, what?

8 A. Verbal announcements.

9 Q. Are you saying that you just stood up
10 and hollered at everybody or what did you do?

11 A. CTA is a big room. We usually call
12 people to the front for passing out information in
13 general; we have a new form we have to type or a
14 new format, our letterhead has changed.

15 It was one of those sorts of
16 meetings. I think a couple of those meetings.

17 Q. Were you there?

18 A. Yes.

19 Q. How many times?

20 A. I believe I was in two of them?

21 Q. Was Laren there?

22 A. I believe so.

23 Q. You spoke of having called in those
24 who smoked on some occasions. I would like to
25 know how many times?

1 A. I think it was twice.

2 Q. Was that in your office?

3 A. In my office.

4 Q. Was Laren at those?

5 A. No, she wasn't.

6 Q. Why?

7 A. Well, I was addressing myself to the
8 smokers, asking them as a personal request from me
9 to them. You know, "I can't tell you not to smoke
10 but I can ask you not to."

11 I even suggested that if they needed
12 a cigarette, to come in my office and smoke it, go
13 to the rest rooms and smoke.

14 I told them, "I realize you're under
15 pressure and sometimes under pressure people want
16 to smoke a cigarette and we can't stop you from
17 doing that, but all I asked is that they try to
18 limit it as much as they could."

19 Q. Did you observe anything that was
20 said or done that their reaction was extremely
21 negative or there was a spirit of hostility and
22 perhaps Laren was believed to have been rocking
23 the boat; that was a general attitude of these
24 people?

25 A. No, I don't think so.

1 Their attitude was more, "I'll do
2 what I can to help."

3 I try to run my division on kind of a
4 friendly basis, and this was a friendly request
5 from me to them. And, I think they took it that
6 way too. It wasn't anything that I was trying to
7 force them to do; just be real nice if we could.

8 Q. Did you indicate to Winnie Busby that
9 you were going to put out something in writing to
10 inform your employees in the pool that they were
11 not to smoke?

12 A. No, I didn't.

13 Q. Did you put anything out to that
14 effect?

15 A. Not in writing, no.

16 Q. Did you put out anything otherwise,
17 verbally that told them they could not smoke?

18 A. No.

19 Q. Why not?

20 A. Because I felt that it was the right
21 of the smokers to continue to smoke if they wanted
22 to. I didn't feel that I had it within my power
23 to stop them from smoking.

24 Q. Why not?

25 A. It's always been policy that people

1 can smoke at their desks throughout the Regional
2 Office. It's also been that way.

3 EXAMINER MAGID: When you say
4 "it's always been that way," do you mean that that
5 activity has always taken place, or there has
6 always been a written or spoken policy to that
7 effect?

8 THE WITNESS: There has always
9 been a written or spoken policy that smoking is
10 allowed at your desk.

11 EXAMINER MAGID: Do you think
12 there may be a written policy to that effect?

13 THE WITNES: There is an
14 exhibit that we entered earlier about the V.A.
15 smoking policy, which indicates that both
16 management has to balance the rights of the
17 smokers and the rights of the non-smokers.

18 EXAMINER MAGID: Is it your
19 testimony that this Agency Exhibit 1 is the last
20 policy statement that you have seen on the
21 subject?

22 THE WITNESS: That is the last
23 Agency policy I've seen, right.

24 EXAMINER MAGID: Is it your
25 testimony that it is the last Agency policy?

1 THE WITNESS: As far as I
2 know, yes.

3 EXAMINER MAGID: Are you aware
4 that Item Number 7 on the Agency Exhibit 1 says
5 "This circular expires June 30, 1980"?

6 THE WITNESS: Yes, I am aware
7 of that.

8 EXAMINER MAGID: Then, this
9 Agency exhibit expired by it's own terms on that
10 date, didn't it?

11 THE WITNESS: Yes, it did.

12 EXAMINER MAGID: Does that mean
13 there is no Agency policy on smoking?

14 THE WITNESS: It could mean
15 that.

16 BY MR. WINSLOW:

17 Q. Has there been any change in the
18 practice?

19 A. No, no change in practice.

20 Q. From 1980 to the present?

21 A. No.

22 Q. Was the practice the same prior to
23 1980 as it is his now?

24 A. Yes, it is.

25 Q. Suppose you've indicated to the

1 people in the pool that they couldn't smoke, what
2 would you have to do to accomplish that?

3 A. Well, it would be a change in
4 practice and a change in policy which would have
5 to be cleared through the Union because we would
6 be changing part of the way we have always done
7 it; customary practice.

8 Q. Would this be a change in working
9 conditions?

10 A. It would be a change in working
11 conditions.

12 Q. Does a change in the working
13 conditions have to be reviewed with the Union?

14 A. Yes, a change in working conditions
15 is a grievable decision under the Union contract.

16 EXAMINER MAGID: Do you have a
17 copy of the Union contract?

18 THE WITNESS: I could get one.

19 EXAMINER MAGID: Were you
20 intending to offer it into evidence, Mr. Winslow?

21 MR. WINSLOW: I will introduce
22 testimony of Mr. Rodowski regarding these matters
23 at the stage where I question him.

24 EXAMINER MAGID: Is it your
25 testimony that you are going to present Mr.

1 Rodowski?

2 MR. WINSLOW: If I may.

3 EXAMINER MAGID: You will have to
4 make a request for it and then state what he is
5 going to rebut.

6 MR. WINSLOW: Right.

7 EXAMINER MAGID: Regardless of
8 whether he is approved as a rebuttal witness, I
9 would like a copy of the Union contract.

10 There has been enough discussion
11 about it that I would like to see it.

12 BY MR. WINSLOW:

13 Q. Let me ask a couple of questions:

14 Do you know whether a change in
15 working conditions is required by federal law to
16 be brought to the attention of the Union and
17 failure to do so will constitute an unfair labor
18 practice as opposed to a grievance?

19 A. I'm not really expert this that part,
20 but I would imagine.

21 EXAMINER MAGID: Your answer is
22 you don't know?

23 THE WITNESS: I don't know.

24 BY MR. WINSLOW:

25 Q. Did you consult with the Union on

1 this question by the way?

2 EXAMINER MAGID: Which question?

3 MR. WINSLOW: On the question
4 of whether smoking could be banned in that room.

5 THE WITNESS: I didn't
6 personally.

7 When Laren first brought up the
8 question, I referred her immediately to the Union
9 because what she was asking was a change in
10 practice, and we would be changing the bargaining
11 unit employees; the conditions of the bargaining
12 unit employees that the Union employees were
13 working under, trying to get it out of my
14 jurisdiction.

15 I asked the Union to try to solve it
16 for me.

17 EXAMINER MAGID: You didn't
18 yourself after having been requested to provide a
19 no smoking area try to approach the Union and try
20 to get its concurrence; is that correct?

21 THE WITNESS: Actually, it
22 didn't work out that way.

23 EXAMINER MAGID: Well, do you
24 have an answer to that question, Mr. D'Aust?

25 THE WITNESS: What was the

1 question?

2 EXAMINER MAGID: Would you read
3 the question?

4 (Previous question read back)

5 THE WITNESS: That's correct.

6 I called Artie Pierce, and I laid out
7 to Artie what the situation was:

8 " I have an employee who wants to make
9 the pool a non-smoking area. I don't think I can
10 do it."

11 EXAMINER MAGID: Is that what you
12 told--?

13 THE WITNESS: That's what I
14 told Artie.

15 EXAMINER MAGID: You told him you
16 didn't feel you had the authority to do it?

17 THE WITNESS: Yes, and I asked
18 him to see what he could do.

19 The Union and management work
20 relatively well together; but on issues like
21 this, Artie didn't seem to have an answer either
22 because he was weighing the rights of the smoking
23 members and the non-smoking members at the same
24 time.

25 EXAMINER MAGID: He was weighing

1 the numbers. Is that what he told you?

2 THE WITNESS: I don't know if
3 he was weighing the numbers. He called back and
4 said, "Hey, Ron, there is not much I can do. I
5 have smokers to consider and I've got non-smokers
6 to consider."

7 EXAMINER MAGID: What is his
8 title with the Union?

9 THE WITNESS: He is actually
10 the V.A. National Council President.

11 EXAMINER MAGID: What is he
12 locally?

13 THE WITNESS: He is also the
14 local union president.

15 BY MR. WINSLOW:

16 Q. Do you have any other employees who
17 you have hired in your time in this job who are
18 handicapped?

19 A. We have several handicapped people,
20 yes.

21 Q. Do you have any who are suffering
22 from some type of respiratory disease?

23 A. None that I know of.

24 Q. Have you made any effort to
25 accommodate the handicapped or the individual when

1 you've hired someone?

2 A. Yes, we have.

3 Q. If you hire someone, how do you
4 evaluate whether or not you're going to need to
5 accommodate that individual's handicap?

6 A. It would depend on the handicap
7 and what limitations it places on their
8 employment.

9 Q. When you hired Laren, did you know
10 the extent or nature of the handicap with which
11 she came to work?

12 A. No, I didn't.

13 EXAMINER MAGID: Did you ask?

14 THE WITNESS: No.

15 MR. WINSLOW: Why not?

16 EXAMINER MAGID: Did you know
17 that she was hired under a severely handicapped
18 program?

19 THE WITNESS: No, I didn't.

20 What we get from personnel on an
21 interviewee is a copy of their SF-171, the
22 application for federal employment and eventually,
23 not on the day of the interview, I get to see the
24 typing test results and that is all I saw.

25 The 171, the form I got didn't

1 indicate it was under any special hiring chapter
2 or hiring restriction. She was one of several
3 typists interviewed that day; potential typists
4 interviewed that day. All I saw was the
5 application itself.

6 BY MR. WINSLOW:

7 Q. How would you know if the person had
8 a handicap?

9 A. Some of the of them are easy. The
10 blind typists, for example, but unless they come
11 up and tell me this is a problem, I really don't
12 have any way of knowing that they need
13 accommodation.

14 Q. If you were to ask an individual if
15 they had a handicap, would this in your mind at
16 least raise a possibility of a discrimination
17 complaint if you should fail to hire that
18 individual?

19 A. Yes.

20 I could see us running into trouble
21 if we ask off the top, "Do you have a handicap?"
22 And, then, for some reason or other the tests
23 results or for any other reason didn't hire them,
24 I could see us the recipient of a lawsuit on that
25 issue.

1 Q. Do you smoke?

2 A. Yes, I do.

3 Q. A lot?

4 A. I don't think so.

5 EXAMINER MAGID: Would you quit
6 if there was a no smoking policy inaugurated?

7 THE WITNESS: Yes, I would.

8 EXAMINER MAGID: Would you quit
9 your job?

10 THE WITNESS: Would I quit my
11 job?

12 EXAMINER MAGID: Yes.

13 THE WITNESS: No. I only
14 smoke on my job. I don't smoke at home, I don't
15 smoke in my car. In fact, when I took this job, I
16 didn't smoke.

17 BY MR. WINSLOW:

18 Q. Why do you smoke now?

19 A. It kind of relaxes me. I believe it
20 helps me calm down sometimes.

21 Q. In other words, you attribute your
22 smoking basically to your job pressure?

23 A. Yes.

24 EXAMINER MAGID: Has any
25 physician attributed your need to smoke to the job

1 pressure?

2 THE WITNESS: No.

3 My doctor would like me to quit also.

4 BY MR. WINSLOW:

5 Q. Now, is this, at least in part, the
6 reason you feel that if you were to ask the
7 employees in the typing pool to discontinue
8 smoking that that would increase the pressure on
9 some of the these people from the work that
10 they're trying to do?

11 A. I believe so, yes.

12 EXAMINER MAGID: I'm sorry, I
13 don't know what it is that you believe.

14 THE WITNESS: I believe that
15 if we made the typists who do smoke in the work
16 place stop, that would increase the pressure on
17 them more. They wouldn't be as relaxed. They
18 might not be able to produce as good a quality of
19 work that they do now.

20 EXAMINER MAGID: Isn't that
21 conjectural?

22 THE WITNESS: Yes, it is.

23 EXAMINER MAGID: Isn't it also
24 conjecture that if you did put a ban on smoking
25 that the productively of the other employees, of

1 the non-smokers, might increase and thereby
2 balance it all out?

3 THE WITNESS: That's possible.

4 EXAMINER MAGID: But you really
5 don't know, do you?

6 THE WITNESS: Right.

7 BY MR. WINSLOW:

8 Q. This conjecture is based in part on
9 your own experience?

10 A. Yes.

11 Q. Do you really feel that Laren has a
12 genuine health problem?

13 A. Yes, I do.

14 Q. If you had known of the degree of
15 severity of this problem when she was hired, how
16 would that have affected your decision?

17 A. (No Response)

18 Q. That is a tough question and I'm
19 asking that so you will give me a good answer.

20 A. If I knew that her lung condition was
21 so severe that she couldn't handle the working in
22 the pool, I would have probably have asked
23 personnel if there is a way we could get out of
24 hiring her, yes.

25 EXAMINER MAGID: I think the

1 question was, if you had known what her lung
2 condition was at the time, would you have hired
3 her?

4 Would you have hired her if you knew
5 that she had a disease such as obstructive lung
6 disease, and you did not know she would perform as
7 a performer, would you have hired her?

8 THE WITNESS: I really don't
9 know. It's something that I will never see.

10 EXAMINER MAGID: If you had known
11 at the time of her hiring that she did have
12 obstructive lung disease, and, yet, she would
13 become one of your top typists, as you've
14 testified she is, would you have hired her with
15 that knowledge?

16 THE WITNESS: Yes.

17 EXAMINER MAGID: So, you would do
18 it all over again?

19 THE WITNESS: Yes, I would.

20 BY MR. WINSLOW:

21 Q. If you had been aware of the severity
22 of her problem--physical problem--and I believe
23 you said you would not have hired her, or at least
24 you would have gone to personnel and tried to
25 figure out a way to get out of it, and you would

1 not have hired her, would you have then been in a
2 position where you would have been faced with an
3 EEO complaint?

4 EXAMINER MAGID: Faced with what?

5 BY MR. WINSLOW:

6 Q. Would you have been faced with an EEO
7 complaint under those circumstances?

8 A. I believe we would have been liable
9 for discrimination, yes, in our hiring practices.

10 EXAMINER MAGID: I don't
11 understand the relevance of that, since he already
12 is faced with an EEO complaint.

13 MR. WINSLOW: We're caught
14 either way. That's the point I'm trying to make.

15 EXAMINER MAGID: By failing to
16 accommodate?

17 MR. WINSLOW: Yes.

18 EXAMINER MAGID: You can be
19 caught either way, by an applicant or employee,
20 but I don't see the relevance of it.

21 MR. WINSLOW: Let me go a step
22 further with that question:

23 BY MR. WINSLOW:

24 Q. Is there some point at which the
25 seriousness of such a problem--physical

1 problem--would overcome all other considerations,
2 such as, the ability of the individual to do well
3 as a typist and perform in a highly satisfactory
4 manner on the job?

5 A. Yes, I believe there are disabilities
6 that would prevent people from doing that type of
7 job.

8 Q. Under those circumstances is what I'm
9 asking; under the circumstances you have in the
10 pool.

11 A. Right.

12 Q. Okay, does this really get down to
13 the question, then, of whether the individual is
14 qualified to do the job by reason of their health?

15 A. Yes, it does.

16 I think that the applicant knows
17 better than the interviewer what limitations they
18 have. We have a five, ten, fifteen minute
19 interview and a typing test and a form that says
20 what you've done before to go by in picking
21 people.

22 In the typing pool we pick ten or
23 fifteen new people a year at least. It is my
24 feeling that applicants know better whether or not
25 they can handle that job than I do.

1 If they can't spell, if they can't
2 type fast enough, we won't pick them and I won't
3 feel we're discriminating. If they are blind--we
4 have two blind typists in the pool--and I have
5 altered slightly the kind of work they do.

6 They transcribe hearings, mostly
7 because it's straight typing, there are not a lot
8 of paragraphs involved. It's nothing that they
9 have to use their eyes for.

10 If someone came into the typing pool
11 deaf and blind, I would be a little hurt because
12 although I could hire a deaf typist, and have them
13 transcribe a written work sheet, I couldn't have
14 them do a full range of duties.

15 In fact, I couldn't have them doing
16 anything because they couldn't take data from one
17 medium and put it in another. It's really up to
18 the applicant to say--and we happen to do it all
19 the time--I can't stand to sit in a room and all
20 day and type; it's not the kind of job I want.

21 And they turn us down. I've lost
22 some very good typists.

23 EXAMINER MAGID: Let's go off the
24 record for a moment.

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(Whereupon, a short discussion was held off the record.)

BY MR. WINSLOW:

Q. Is there anything else that you feel that you could reasonably have done to accommodate Laren's physical disability problem?

A. No, not a reasonable accommodation.

Q. What do you mean reasonable?

A. Not the accommodations that I have control over. I can't stop people from smoking. I can't build a new room. I can't.

Q. Why not?

A. Why not?

I have three thousand dollars in '86 to use or construction funds. To build a room, I would have to go in and get Central Office permission.

EXAMINER MAGID: Did you try?

THE WITNESS: I don't think it's a reasonable accommodation.

EXAMINER MAGID: You don't think trying to get Washington's approval -- do you think trying to get Washington's approval is beyond your ability or beyond a reasonable thing to do?

1 THE WITNESS: I think it's
2 beyond a reasonable accommodation as I saw the
3 problem.

4 EXAMINER MAGID: Do you mean
5 trying to get approval for a separate room would
6 be beyond reason?

7 THE WITNESS: Yes, sir.

8 EXAMINER MAGID: The mere
9 attempt? What you're saying is the mere attempt o
10 get headquarters approval for another room is
11 unreasonable? Is that what your testimony is?

12 THE WITNESS: Yes.

13 EXAMINER MAGID: Why?

14 THE WITNESS: Opinion. This
15 is my opinion.

16 EXAMINER MAGID: Well, if that is
17 what it's based on, let's have it.

18 THE WITNESS: The Regional
19 Office has 320-some employees. If we built a room
20 for someone, I can see maybe five or six other
21 people coming up with the same complaint.

22 EXAMINER MAGID: Other people
23 with obstructive lung disease?

24 THE WITNESS: Obstructive lung
25 disease allergic to cigarette smoke,

1 hypersensitivity to smoke. Many conditions
2 could -- I don't like the way my neighbor chews
3 his gum -- if you are taking it to the that
4 extreme.

5 EXAMINER MAGID: Do you
6 think that the National Headquarters of the
7 V.A. would look at a request to accommodate
8 somebody with obstructive lung disease in the same
9 way than it would be at the request to accommodate
10 somebody who doesn't like their neighbor chewing
11 gum?

12 THE WITNESS: No, but I don't
13 feel that that's within our realm to ask.

14 EXAMINER MAGID: In your personal
15 realm or your office's realm, or what

16 THE WITNESS: Certainly not
17 within my realm.

18 EXAMINER MAGID: Would it be
19 within your realm to suggest to your boss that a
20 request should be made to Washington for
21 construction funds to accommodate this handicapped
22 employee?

23 Would that be within your realm?

24 THE WITNESS: That would be
25 within my realm.

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EXAMINER MAGID: Did you do that?

THE WITNESS: No.

EXAMINER MAGID: Why not?

THE WITNESS: In my opinion it is not the way to go.

EXAMINER MAGID: Why didn't you do it?

THE WITNESS: Because I don't want to be building separate rooms for people.

EXAMINER MAGID: If that is the only solution, why not?

THE WITNESS: Well, I had hoped that some of these other solutions would work. I don't think that is the only solution.

EXAMINER MAGID: What was the simplest lowest cost solution that you know would cure Ms. Hall's problem?

THE WITNESS: Transfer to teletype.

EXAMINER MAGID: I'm not talking about transferring her to another job because you can't do it without her permission.

What would be the simplest, lowest cost solution to cure her problem as a clerk typist who has obstructive lung disease?

1 THE WITNESS: End smoking in
2 the building.

3 EXAMINER MAGID: Did you
4 recommend to your boss that that be done; not in
5 the building, but in the V.A.?

6 THE WITNESS: Well, I think
7 you would have to do it in the building.

8 EXAMINER MAGID: I'm asking you,
9 Mr. D'Aoust-- don't spar with me, please -- did
10 you ask your boss to do it?

11 THE WITNESS: No, I didn't.

12 EXAMINER MAGID: Go on,
13 Mr. Winslow.

14 BY MR. WINSLOW:

15 Q. Is the budget under which Veterans
16 Administration Regional Office operates a
17 consideration to you in the recommendations that
18 you might or might not make regarding the
19 construction of a room?

20 A. Yes, it is.

21 Q. Why is it?

22 A. Regional Office funds are limited.

23 Q. How are they limited?

24 A. They're very limited.

25 Prior to becoming Chief of Admin, I

1 was the station budget officer.

2 We have 320-some employees, we are
3 given an allocation from Central Office based on
4 the congressional allocation for the Agency.
5 Ninety-five percent of our station allocation of
6 funds goes into salary.

7 For fiscal year '86, we have a
8 station allocation of 9.6 million dollars of which
9 525 or 526 thousand dollars was all the money we
10 had that was not earmarked directly for salary and
11 fringes, payroll costs.

12 Of that 524 thousand dollars, I
13 control 95 percent of it as the Chief of Admin.
14 Other than that, I have to pay a quarter of a
15 million dollars a year in telephone costs.

16 That leaves me with about 250
17 thousand dollars to spend on supplies, maintenance
18 agreements, repairs agreements, minor
19 construction, training, leasing of vehicles, just
20 a myriad of small expenses, but they all add up to
21 where I end up pinching money at the end of each
22 quarter. There is not really enough to do the
23 things we have to do.

24 We have to clear any requests for
25 funds with Central Office. If I work the typing

1 pool overtime, a couple of hours on a Wednesday
2 night, that is if I work ten people, that is ten
3 times two, that is twenty hours of work at an
4 average overtime rate of 14 dollars an hour, we
5 would have to go into Central Office to request
6 that 280 dollars.

7 EXAMINER MAGID: Mr. D'Aoust, is
8 it your testimony that you didn't believe there
9 was any money in the budget to accommodate?

10 THE WITNESS: There is no
11 money in the budget.

12 BY MR. WINSLOW:

13 Q. Apart from that, assume you were to
14 propose that a room be built without using money
15 that you have budgeted, ask for extra money, what
16 chances do you think you would have?

17 EXAMINER MAGID: Don't you think
18 that is conjecture?

19 MR. WINSLOW: I don't think
20 so.

21 EXAMINER MAGID: Let's get his
22 qualifications for answering that.

23 Who would that request have to go to,
24 Mr. D'Aoust?

25 THE WITNESS: The request

1 would have to be made by the Director to the
2 Deputy Chief Benefits Director for field
3 operations and in that section of Central Office.
4 It would be the space and supply management
5 division of the Deputy Chief Benefits Director's
6 Office.

7 EXAMINER MAGID: What is is your
8 knowledge of that organization that would allow
9 you to give an informed estimate of the
10 probability of them approving the request? What
11 do you know about the organization that gives you
12 the ability to accurately predict how they will
13 act on any individual item?

14 THE WITNESS: Up until August
15 of this year, there was a real good chance that
16 the V.A. as an Agency was going to take up to ten
17 days of furlough time because there wasn't enough
18 money in the congressional--

19 EXAMINER MAGID: I don't think
20 you're answering the question, Mr. D'Aoust.

21 I'm aware of the furlough times by
22 Agencies, but I don't think you're answering my
23 specific question about a request for construction
24 funds to accommodate a handicapped employee and
25 the probability of its being approved.

1 What do you know about the
2 organization in Washington that would allow you
3 give an accurate opinion?

4 THE WITNESS: I only know that
5 they were very short on money.

6 BY MR. WINSLOW:

7 Q. Have you had occasions when such
8 requests have been made? Do you know of other
9 instances where similar requests for extra money
10 have been made as the budget man on your prior job
11 here from what you know now?

12 EXAMINER MAGID: Are you speaking
13 of other requests to accommodate handicapped
14 employees?

15 MR. WINSLOW: Not specifically
16 handicapped employees, but any other requests for
17 additional money that would fall within this
18 general area of extra expense.

19 THE WITNESS: Yes. We
20 have gone to Central Office to ask them for
21 additional minor construction funds for certain
22 projects.

23 EXAMINER MAGID: Would those
24 be construction funds that would be required
25 because of some regulatory provision requiring the

1 Agency to provide a certain service that was
2 necessary?

3 THE WITNESS: Yes.

4 We would have to submit a cost
5 benefit analysis showing how perhaps not in that
6 fiscal year but in a reasonable pay back time,
7 this change that we're requesting would end up
8 saving the Agency money.

9 EXAMINER MAGID: Have you ever
10 had a situation, Mr. D'Aoust, where you've had to
11 send in a request to the National Headquarters
12 that said the Veterans Administration has a
13 handicapped employee on its hands.

14 . That handicapped employee requires
15 certain accommodations in order to accommodate
16 that employee. We must see spend one thousand
17 dollars or any number you please. We, therefore,
18 request approval for that one thousand dollars.

19 Have you ever had such a situation?

20 THE WITNESS: No, we have not.

21 BY MR. WINSLOW:

22 Q. Now, have you ever had special
23 requests that I have described denied by Central
24 Office?

25 A. No.

1 Once they leave here, they're pretty
2 much in final form, and we talked them through the
3 Central Office, and they have already pretty much
4 agreed with the principle.

5 Several of them have been delayed a
6 couple of fiscal years because of lack of funds,
7 but ultimately they do tend to get done.

8 Q. What would you do with this office if
9 Laren Hall left, if one was available?

10 A. I have no idea.

11 EXAMINER MAGID: You're speaking
12 of the separate room such as has been suggested

13 MR. WINSLOW: Yes.

14 THE WITNESS: Well, if we
15 built one for Laren, we would probably have to
16 build it around a word processing terminal because
17 that's where she gives me my best production. I
18 would probably have to put someone in that room
19 just so that terminal would be used.

20 BY MR. WINSLOW:

21 Q. Would the room have any purpose at
22 that point?

23 A. No.

24 Q. Is there a possibility that she could
25 get another better job?

1 A. I would think Laren has a good chance
2 of getting a better job, yes.

3 EXAMINER MAGID: What would
4 happen if one of your blind typists left, and you
5 had some equipment that was used to accommodate a
6 blind person and you hired a sighted person.

7 Would you send the equipment back?

8 THE WITNESS: There are
9 provisions to do that. We haven't done any
10 equipment changes for the blind typists.

11 EXAMINER MAGID: Do you provide
12 special equipment for them?

13 THE WITNESS: No.

14 Actually, they use a Sony hearing
15 conference recorder. In fact, I have two blind
16 typists and a sighted typist doing the same sort
17 of work using the same equipment. The
18 accommodations that were made for them is Christine
19 gets to take extra breaks with her dog so we don't
20 problems with our carpet. And, I changed their
21 work rate standards because they can't quite type
22 as fast as a sighted typist can.

23 EXAMINER MAGID: So, you
24 accommodate them by allowing to lower production?

25 THE WITNESS: Yes.

1 BY MR. WINSLOW:

2 Q. You indicated that you were
3 responsible for space?

4 A. Yes, I am.

5 Q. And for estimating the costs of
6 setting up enclosures; walls?

7 A. Yes.

8 Q. And, as a consequence of that
9 position, that responsibility in your job, that
10 you have a pretty fair idea of what it would
11 cost--and I'm going to ask you for a ballpark
12 figure of what it would cost to provide the kind
13 of room that Mr. Magid has described.

14 You haven't said it, but I assume in
15 order to get adequate supervision, it would have
16 to be a glass enclosure with adequate ventilation,
17 heating and whatnot.

18 What would you estimate that would
19 cost? Just a ballpark figure. I realize that you
20 haven't gotten an estimate.

21 A. Well, if I could build it against an
22 existing wall, better against a pair of existing
23 walls, I would only need two walls and a door.

24 Q. Do you have a place where it could be
25 put in that kind of a location where there is a

1 word processor because, remember, you have to have
2 a word processor?

3 A. I would probably have to build three
4 walls, using the window as a fourth wall and a
5 door. Probably about seven thousand dollars for
6 the room.

7 To provide a separate air system,
8 assuming we made the room a reasonable size, not
9 so small she couldn't turn around in, probably a
10 10-foot square room, I would probably need about a
11 half ton air conditioner in the ceiling.

12 That would cost about 15 hundred
13 dollars to install, probably a maintenance
14 contract for about a hundred dollars a year.

15 EXAMINER MAGID: So, the total
16 was 85 hundred dollars; is that correct?

17 THE WITNESS: Yes.

18 BY MR. WINSLOW:

19 Q. You think you could provide her with
20 a room for 85 hundred dollars?

21 A. I could try. I have no way of
22 knowing.

23 Q. This is a ballpark figure?

24 A. I send a request to GSA with my price
25 estimates and they always kick it up 20 or 30

1 percent.

2 Q. That's why I say, what do you think
3 it would cost?

4 EXAMINER MAGID: Didn't you state
5 it would cost 85 hundred dollars?

6 THE WITNESS: Probably.

7 EXAMINER MAGID: This is all
8 conjecture because you did not get prices?

9 THE WITNESS: Yes.

10 BY MR. WINSLOW:

11 Q. Do you think you would have any
12 chance of getting that kind of approval from
13 Central Office?

14 EXAMINER MAGID: Didn't we go
15 through that?

16 This is as to his competence to
17 determine what the National Office is going to do
18 on any particular incident involving a request to
19 accommodate a handicapped employee.

20 MR. WINSLOW: We didn't have
21 any number.

22 EXAMINER MAGID: He has no
23 history of having made such a request.

24 MR. WINSLOW: I understand.

25 EXAMINER MAGID: Go on,

1 Mr. D'Aoust.

2 MR. WINSLOW: Are you going to
3 let me ask that question?

4 EXAMINER MAGID: Go ahead; ask
5 it.

6 THE WITNESS: No, I don't
7 think they would under the current funding
8 situation.

9 MR. WINSLOW: I have nothing
10 further.

11 EXAMINER MAGID: Okay,
12 Cross-examination, Ms. Hall?

13 Why don't we take a five-minute
14 break.

15 (Whereupon, a short recess
16 was taken off the record)

17 EXAMINER MAGID: Back on the
18 record, cross-examination, Ms. Hall?

19 MS. HALL: Okay, on Agency
20 Exhibit 3 there were several additional desks
21 initially that are not shown on here.

22 How do I add those in?

23 EXAMINER MAGID: I think the
24 proper thing to do is ask him if he remembers that
25 there were other desks in there and if he

1 doesn't--if he affirms the authenticity of Agency
2 Exhibit 3--it's up to you to provide rebuttle
3 testimony at the close of scheduled witnesses.

4 Do you remember, Mr. D'Aoust, if
5 there are other desks that should be there?

6 THE WITNESS: We took a six
7 position cut in the pool and ended up moving out
8 six desks over the last fiscal year.

9 The extra desks there would have been
10 one here and there would have been another one
11 here.

12 EXAMINER MAGID: We really need
13 to know where they are for the record.

14 Let's go off the record.

15 (Whereupon, a short discussion was
16 held off the record)

17 EXAMINER MAGID: State what you
18 told me off the record, Ms. Hall, and ask
19 Mr. D'Aoust if that is true.

20 CROSS-EXAMINATION

21 BY MS. HALL:

22 Q. Mr. D'Aoust, you had several other
23 desks that were close to my desk; at least three?

24 None of these were anywhere near the
25 left side of the room. Most of whom had smoking

1 employees at them at various times during the
2 entire two years of my employment at the V.A. Is
3 that true, Mr. D'Aoust?

4 A. Yes, somewhat.

5 As we hired new typists in, we tried
6 to group them up towards the front and some of the
7 new typists we hired were smokers. I know Javan
8 was sitting there for awhile and she smoked.

9 EXAMINER MAGID: All right, he
10 has answered your question. Now, do you have any
11 other questions?

12 BY MS. HALL:

13 A. Is Jackie Pfiser a new person?

14 A. No.

15 Q. Yet, she was not in the left-hand
16 corner.

17 EXAMINER MAGID: Ms. Hall, you
18 can only ask questions now. You can't engage in
19 any discussion with the witness. You will have
20 another chance at rebuttal.

21 BY MS. HALL:

22 Q. How many desks away from me was
23 Jackie Pfiser when she was sitting in the seat
24 closest to the door that you proceeded to put me
25 in after she left? Do you remember.

1 Would you like me to show you?

2 A. Sure. (Indicating on diagram)

3 Q. Was she new?

4 EXAMINER MAGID: Excuse me when
5 you talk about "here" and "there," there's going
6 to be nothing on the transcript.

7 THE WITNESS: When we moved
8 you to the upper, right-hand corner I believe
9 Jackie Pfiser was over in here somewhere?

10 MS. HALL: No, she was
11 here. She was at the desk closest to the door
12 leading to reproduction is which nowhere near the
13 left-hand corner of the room as you stated.

14 EXAMINER MAGID: Ms. Hall do you
15 have a question?

16 BY MS. HALL:

17 Q. You talked in your statement that I
18 had received details ahead of other people who
19 should have these details because of seniority.

20 Which details were these?

21 EXAMINER MAGID: What is the
22 relevance of that?

23 MR. HALL: There were
24 several details into other areas that I never had
25 any access to. They were also details into the

1 reproduction area which is a non-smoking area that
2 people with less seniority were given.

3 EXAMINER MAGID: Should she have
4 gotten detailed because of her seniority into the
5 publications area that she did not get?

6 THE WITNESS: No.

7 Publication employees are a different
8 position classification.

9 EXAMINER MAGID: So, she could
10 not have been detailed into that area?

11 THE WITNESS: No. Those
12 aren't typist positions.

13 BY MS. HALL:

14 Q. What about Ted? He is a typist in a
15 pool?

16 A. Do you mean, the one or two days that
17 he went in there?

18 Q. He disappeared for substantial
19 periods of time and part of that time he was in
20 reproduction.

21 A. Ted was a temporary employee we
22 hired.

23 EXAMINER MAGID: He was not in
24 her category?

25 THE WITNESS: No.

1 Laren is a career conditional typist.
2 Ted was a temporary employee. I had him in the
3 pool, I had him in--

4 EXAMINER MAGID: We can deal with
5 others, Ms. Hall, if they were similarly situated
6 with you; if they are other typists. We have to
7 compare you to similarly situated people.

8 MS. HALL: The fact that he
9 was a typist but not career conditional? That is
10 the difference?

11 EXAMINER MAGID: Yes.

12 BY MS. HALL:

13 Q. This is Agency Exhibit 1.

14 It says here "In a V.A. the Agency's
15 objective will be accomplished through two program
16 efforts; an Agencywide educational program."

17 What educational program has the
18 Agency had about smoking?

19 A. This is a 1979 circular.

20 Q. You stated this.

21 A. There may may have been -- when the
22 Agency talks about educational programs--

23 EXAMINER MAGID: Can you answer
24 her specific question, please? Do you recall what
25 it is?

1 THE WITNESS: I would imagine,
2 at the time they probably sent posters around.

3 EXAMINER MAGID: Is it your
4 testimony that you don't know the answer?

5 THE WITNESS: I don't know the
6 answer.

7 EXAMINER MAGID: It's okay to say
8 you don't know the answer, Mr. D'Aoust, if you
9 don't.

10 BY MS. HALL:

11 Q. Okay, it says, "Employees should have
12 the opportunity to attend voluntary smoking
13 cessation programs."

14 What voluntary smoking cessation
15 programs have been offered by the V.A.?

16 A. We have contracted out that kind of
17 thing, and it's an employee counseling service and
18 the employee's health service that do run the
19 program on the eleventh floor for employees
20 throughout the building.

21 Q. You have never used American Lung
22 Association or American Cancer Society like it
23 says here?

24 A. Not that I know of.

25 Q. No other Government agencies?

1 A. The other Government Agency would be
2 the Employee Counseling Service that the HEW
3 Department of Health, Education and Welfare.

4 Q. What would have they done; do you
5 know?

6 A. You see their notices on the bulletin
7 board periodically they're having weight control,
8 drinking problems, they had a smokers program last
9 year, I believe.

10 Q. "The facilities Director will issue
11 instructions implementing smoking policy
12 appropriate to the facility."

13 What policies have been implemented,
14 if any, since this expired in 1980?

15 A. I don't know.

16 Q. It says, "Establishment of no smoking
17 areas should be investigated. Plan more space for
18 employees who desire no smoking areas to be
19 accommodated."

20 What investigation was there?

21 A. I don't know of any.

22 EXAMINER MAGID: There was no
23 investigation as far as you know?

24 THE WITNESS: As far as I
25 know. When the circular came out, I was pretty

1 far removed from management.

2 BY MS. HALL:

3 Q. It says "Efficiency of work unit
4 should not be impaired."

5 In the exhibits that I put into
6 evidence earlier there are several paragraphs
7 indicating the effects of both direct smoking and
8 passive smoking.

9 MS. HALL: Shall I read
10 them into the record?

11 EXAMINER MAGID: No, I don't want
12 them read into the record. They will stand by
13 themselves. They will be read.

14 BY MS. HALL:

15 Q. They indicate the cost of smoking to
16 both those who do it and those who breath it by
17 way of other people smoking is quite high.

18 How would the efficiency of the work
19 unit be impaired by eliminating the sick leave
20 caused by these illnesses that are specifically
21 evidenced by the Surgeon General and the various
22 other agencies?

23 A. I don't know.

24 Q. It says, "An equitable balance should
25 be maintained between the rights of smokers and

1 non-smokers."

2 This policy--the V.A. smoking
3 policy--doesn't state a specific right to smoke.

4 Is there a law or a policy somewhere
5 that says so-and-so has the right to smoke? What
6 legal foundation is there for that; do you know?

7 A. No.

8 I would imagine it's customary
9 practice.

10 EXAMINER MAGID: So, as far as
11 you know, that is the answer; customary practice?

12 You do not know of any specific
13 policy; is that correct?

14 THE WITNESS: Right.

15 BY MS. HALL:

16 Q. It says, "Management officials
17 responsible for implementing this policy shall
18 inform employees in writing of provisions
19 applicable to them."

20 What have you submitted in writing to
21 employees to make them aware of this policy or the
22 policy of the V.A. to try to accommodate employees
23 who "desire no smoking areas"?

24 A. I personally have not issued any
25 policy statements. The Director's information

1 memo addresses it somewhat.

2 Q. But he never--

3 A. Actually, the circular is rescinded.

4 I don't have a copy of this. The
5 first time I saw it was yesterday. My manual is
6 relatively current but rescinded material, I don't
7 keep.

8 EXAMINER MAGID: And you do not
9 have anything comparable in your manual; is that
10 correct?

11 THE WITNESS: That's correct.

12 BY MS. HALL:

13 Q. Were their others on the floor who
14 complained about the smoke?

15 A. Complained? No.

16 There were other people who mentioned
17 it. There were no others that complained about
18 the smoke. There are a couple of people who have
19 mentioned it, but as far as complaints, no.

20 EXAMINER MAGID: When you say
21 that there were no complaints, what are you
22 referring to by "complaints"? What does one have
23 to do in order to consider that a complaint is
24 filed or a complaint is registered?

25 THE WITNESS: They could come

1 into my office and ask me or mention it to me. It
2 hasn't been done.

3 EXAMINER MAGID: What do you call
4 those situations where people have mentioned it to
5 you?

6 You did say several people did
7 mention it to you, and you don't consider those
8 complaints. Do you consider those a round of
9 approval?

10 THE WITNESS: No.

11 EXAMINER MAGID: What is a
12 complaint?

13 THE WITNESS: There were no
14 formal complaints.

15 EXAMINER MAGID: You mean nothing
16 was submitted to you writing?

17 THE WITNESS: Right.

18 EXAMINER MAGID: But, people did
19 mention several times that they did not like
20 smoking. They did not like the atmosphere?

21 THE WITNESS: Right.

22 BY MS. HALL:

23 Q. Do you remember JoAnne?

24 A. Yes.

25 Q. Do you remember quite a few instances

1 for her where she had problems with smoke?

2 A. I never heard it from JoAnne.

3 Q. Do you remember her when she and
4 Jackie Pfiser got into a knock-down-drag-out
5 between her and Jackie Pfiser between smoking and
6 the fans? Would you consider that a complaint on
7 the part of JoAnne?

8 A. I remember the fight, but I didn't
9 realize it was over smoking. I thought it was a
10 personality clash between two individuals.

11 Q. Did Beverly Keith ever mention to you
12 that I had been threatened with physical harm by
13 another employee because of my objections to him
14 smoking?

15 A. No, I hadn't heard that.

16 Q. You said that you couldn't change
17 things without Union consent?

18 A. Yes.

19 Q. In this folder here there is a
20 critical element for the typing pool. There is
21 now a new set of critical elements that are
22 different from that.

23 Did you get consent of the Union
24 before you changed those?

25 A. I did, but I don't need the Union's

1 approval to change production standards. I need
2 the Union's approval to change work environment.

3 If I tell you you have to type eight
4 hundred lines a day and I raise it to nine
5 hundred, I can do that.

6 The Union could grieve. They could
7 grieve it but I have the right to do that
8 unilaterally although I do consider the Union.

9 EXAMINER MAGID: Wouldn't the
10 same be true of no smoking?

11 Let's assume arguendo you do have the
12 right to put up a no smoking area and then their
13 recourse is to grieve the issue, isn't it?

14 THE WITNESS: The Union
15 contracts says that production requirements and
16 performance standards are not grievable under
17 unfair labor laws. That is a management decision.

18 I need "X" number of lines per
19 typist, but a change in working conditions
20 themselves--dimming the lights, making a
21 non-smoking area--that is considered a change in
22 work policy, work practice, as opposed to
23 performance.

24 EXAMINER MAGID: What sort of
25 action must be taken by management before that is

1 done?

2 According to the Union contract,
3 what does the Union contract say specifically?
4 Does it say we must meet and confer before it's
5 done? Does it say we must get the Union's okay?
6 Does the Union have veto power? What does it say?

7 THE WITNESS: The Union
8 doesn't have veto power.

9 I believe we are required by the
10 contract to inform them of changes.

11 EXAMINER MAGID: So, if you sent
12 a note to the Union saying, "We're going to put up
13 on a No-smoking area," and you put up a no smoking
14 area, that would satisfy the Union contract; is
15 that correct?

16 THE WITNESS: I think so.

17 MR. WINSLOW: I would like to
18 object to this line of questioning because I don't
19 think the witness is qualified to really answer
20 the question.

21 If we're going to deal with personnel
22 and contract questions, we need a personnel man in
23 here.

24 EXAMINER MAGID: I think you
25 brought up the Union contract on direct

1 examination, Mr. Winslow, and I think
2 cross-examination by Ms. Hall and supplemental
3 examination by me are appropriate.

4 So, I'm going to overrule your
5 objection.

6 BY MS. HALL:

7 Q. You stated that a few weeks after I
8 started, you met with smoking employees.

9 Would that have been after I
10 approached you and asked you to meet with them
11 stating that I thought you were legally required
12 to do so and that was only six months later?

13 A. The first time met with them was very
14 shortly after you were hired--the first time I
15 heard that you had a lung problem--and I said that
16 the air in the pool was just too bad. I met with
17 them then; that would have been October or
18 November '84 the first time.

19 Q. You said it would be an inconvenience
20 for the smokers to ban smoking in the room. You
21 said that you could ban it in reproduction because
22 the employees were approached and it was not an
23 inconvenience. You had their consent; is that
24 correct?

25 A. Right.

1 It came from the Union and the Union
2 was agreeing that no one in there had a complaint
3 that stopping smoking would cause the any
4 problems.

5 Q. Did you ask all the employees
6 affected using the hallways that you banned it in
7 for their permission to ban it in the hallway?

8 A. Employees using the hallway?

9 Q. Yes. It's a main hallway coming in
10 and out.

11 Did you ask everyone's consent to ban
12 it there?

13 A. No, because the employees shouldn't
14 be going in there.

15 EXAMINER MAGID: The answer is
16 "no," you did not ask all employees who used the
17 hallway as a regular practice whether you should
18 ban smoking?

19 THE WITNESS: Right.

20 I should say, I didn't ban smoking in
21 the hallway. I banned it in the publications
22 reproduction area.

23 BY MS. HALL:

24 Q. I thought you stated earlier that it
25 was banned also in the hallway?

1 A. No, we put an ashtray out in the
2 hallway.

3 EXAMINER MAGID: It was my
4 understanding too by your testimony that you did
5 ban it in that part of the hallway.

6 Are you changing that? Do you recall
7 giving that testimony?

8 THE WITNESS: If I said that,
9 I didn't mean that they banned it in the hallway.
10 The hallway going into publications is kind of a
11 little offshoot hallway. It's this doorway here
12 that we're talking about (indicating on diagram).

13 EXAMINER MAGID: The doorway in
14 the--

15 THE WITNESS: The doorway
16 going into the publications unit.

17 They placed an ashtray here and the
18 sign that says, "You're entering publications
19 reproduction area. There is no smoking in this
20 area."

21 I didn't mean we banned it in the
22 whole hallway.

23 EXAMINER MAGID: Did other
24 employees besides the employees who regularly work
25 in the publications area go into the publications

1 area to get publications and/or to transact other
2 business?

3 THE WITNESS: Yes, they would
4 go in there to pick up forms.

5 EXAMINER MAGID: And, some were
6 smokers and some were not smokers?

7 THE WITNESS: Yes.

8 EXAMINER MAGID: And, those who
9 were not smokers, were not asked; is that correct?

10 THE WITNESS: That's right.
11 We put up a sign asking that they put out their
12 cigarettes before they go in.

13 BY MS. HALL:

14 Q. Did I complain to you about
15 retaliation after that happened?

16 A. Into publications?

17 Q. After you banned the smoking in the
18 reproduction area?

19 A. I don't recall.

20 Q. Do you recall me specifically
21 mentioning that people were walking up to my desk
22 and going, "Oops" with a with cigarette and
23 running back away and that she would run by with
24 it behind her back, and that still at the end of
25 the evening people would congregate down there,

1 three or four smokers at the time, still even with
2 this no smoking area?

3 A. Yes, I remember that.

4 I called Deborah to my office after
5 you mentioned that she was doing that. She said,
6 "I don't think about it. I get up and when I do
7 remember, I go back and try to put out my
8 cigarettes."

9 Q. Does that account for the ooing and
10 giggling?

11 A. Yes.

12 Q. Have I complained to you also that
13 this situation had continued throughout the month;
14 that she is still coming around my desk?

15 A. We have talked about it, probably
16 even last month, when she was visiting with Betty.
17 Betty's desk is two or three desks away from
18 yours.

19 Q. Betty's desk is the desk next to
20 mine, about three feet from my desk?

21 A. Yes.

22 And after he you mentioned it to me I
23 talked to Deborah again. I told her, "If you are
24 going to visit Betty, leave your cigarette at your
25 desk."

1 Q. But, you don't think there is any
2 continuing hostility or mood changes by other
3 employees or any hostility directed toward me or
4 ridiculing or anything of that nature?

5 A. I haven't seen that.

6 Q. You don't consider any of that to be
7 ridicule or harassment at all?

8 A. I don't think it is intentional on
9 their part.

10 Q. You don't?

11 A. I don't think they're trying to
12 ridicule you or anything like that. I think
13 they're just trying to do their job, take their
14 breaks and do their usual things.

15 Q. And standing at Betty's desk--

16 EXAMINER MAGID: Just ask
17 questions, okay?

18 He doesn't have to agree with you
19 regarding the hostility. You may think it was
20 hostility. He doesn't have to agree.

21 BY MS. HALL:

22 Q. Is it part of Deborah Jordan's job on
23 work time to stand next to Betty's desk to smoke?

24 A. Not during work time.

25 Q. Is it necessary on break time when in

1 the memo from the Director, he specifically asked
2 employees who smoke to do so on lunch time and
3 during breaks?

4 EXAMINER MAGID: You're speaking
5 of Agency Exhibit 2?

6 MS. HALL: That's correct.

7 BY MS. HALL:

8 Q. Do you feel that smokers observe that
9 in the pool?

10 A. Well, right now, there are at least
11 three typists who only smoke on their breaks and
12 lunch. Elaine Johnson.

13 EXAMINER MAGID: What was the
14 question? Could we have that read back?

15 (Previous question read back)

16 EXAMINER MAGID: Can you answer
17 that specifically?

18 THE WITNESS: Some do. I
19 think three out of our current six smokers do.

20 BY MS. HALL:

21 Q. Who would be the other two besides
22 Elaine?

23 A. Sue Lesko. These are brand new
24 employees.

25 EXAMINER MAGID: Just try to

1 answer the question, Mr. D'Aoust.

2 THE WITNESS: Sue Lesko and
3 Jan Alfred, I think her name is.

4 BY MS. HALL:

5 Q. And, the other three who don't?

6 A. And the other three Lori Fletcher and
7 Deborah Jordan and Martin Aguirre.

8 Q. You stated some smokers need to be
9 positioned nearer to me because they work on the
10 5520.

11 Is Lori Fletcher a 5520 operator?

12 A. No, Lori Fletcher is not on the 5520.

13 Q. Yet, she is only two desks away. Why
14 is that necessary?

15 A. Lori Fletcher has job performance
16 problems. I have asked her to consult with Judy
17 Sutterer. Judy has about a zero percent error
18 rate as far as making typographical mistakes.

19 Lori Fletcher's rate is about
20 forty-some percent. I have asked Lori and Judy to
21 sit right next to each other. I have asked Lori
22 to check when she is not sure if a word should be
23 pluralized.

24 Q. Is Judy a 5520 operator?

25 A. Judy was trained but not now because

1 she is pregnant.

2 Q. She is on another typewriter, right?

3 A. Yes.

4 Q. And, Lori Fletcher couldn't be
5 situated nearer to one the team leaders, say
6 Shavan, who doesn't have a problem with cigarette
7 smoke, since Judy isn't even a team leader.

8 EXAMINER MAGID: You're asking
9 many questions about where people sit. Let me ask
10 you a question.

11 Do you believe that any seating
12 arrangement will resolve your problem?

13 THE WITNESS: Probably not.

14 EXAMINER MAGID: What is the
15 relevance of the seating arrangement?

16 MS. HALL: Because they're
17 claiming it's an accommodation.

18 I don't feel, number one, that it is
19 an accommodation and better than that, they
20 haven't made the so-called accommodations they're
21 claiming they did.

22 EXAMINER MAGID: Go ahead.

23 BY MS. HALL:

24 Q. You said the pool has an absenteeism
25 rate.

1 In view of that high absenteeism
2 rate, have you ever looked into how many illnesses
3 might be lung or pulmonary related; therefore
4 possibly related to cigarette smoke such as
5 bronchitis?

6 A. Yes.

7 The leave usage in the pool isn't
8 primarily sick leave. It's annual leave for many
9 reasons.

10 EXAMINER MAGID: Mr. D'Aoust, did
11 you hear the question?

12 THE WITNESS: I don't think
13 it's due to bronchitis.

14 EXAMINER MAGID: The question was
15 whether you've done a survey?

16 THE WITNESS: No, I haven't
17 done a survey.

18 BY MS. HALL:

19 Q. When you run out of sick leave, you
20 go into leave without pay. So, some of that leave
21 without pay that you're talking about--

22 EXAMINER MAGID: I'm going to
23 rule that we don't need anymore questions on sick
24 leave and annual leave, since he has made no
25 survey and he doesn't know the answer.

1 BY MS. HALL:

2 Q. You made mention of the budget
3 before, and I didn't really understand most of it.
4 So, this may be a totally irrelevant question.

5 Do you remember a conversation with
6 me about a year ago when you mentioned that you
7 were way under budget for that year. It was right
8 before the new machines came in, and you said you
9 were going to get the more expensive one because
10 you were so far under budget?

11 A. Which machine? The new dictation
12 system that we got. I had proposed to Central
13 Office a dictation system made by Sony, and
14 originally, they had allocated 65 thousand dollars
15 for this dictation system.

16 We went out and got bids. The low
17 bid was from Lanier and their bid was only 28
18 thousand dollars. But, Central Office makes the
19 choice on what system to get and their choice was
20 take the low bidder and it was never funds that
21 the station actually had. It was just money
22 allotted to that purchase.

23 Q. You made mention of a small room on
24 your diagram that you attempted to put me in.

25 Is that commonly referred to as "the

1 closet"?

2 A. The equipment room, right.

3 Q. The closet.

4 As it used to store old things you
5 don't use; empty boxes, things like that

6 A. Yes.

7 Q. When was my desk moved into there?

8 A. I don't really remember. It wasn't
9 in there very long.

10 Q. You would have had to have someone
11 take and move the desk which would have meant
12 allocating funds?

13 Do you have something that says you
14 allocated this labor to move this desk into that
15 room?

16 A. No.

17 Q. Would it be accurate to say that my
18 typewriter was put on a table and there was a
19 chair put in there and a tiny little fan?

20 A. Yes, that's what we did.

21 Q. There was no desk?

22 A. No.

23 Q. You made mention that there is a
24 small room on this floor with no ventilation and
25 it is the stuffiest room in the entire V.A.

1 How would you think the closet would
2 compare, airwise?

3 A. Probably about the same. Any small
4 room that you make in the building has a problem.
5 Even this room gets probably much warmer than the
6 open areas on either side of it.

7 Q. Did it also have open electrical
8 circuits on the walls from the machinery?

9 A. Yes.

10 Q. So, it's extremely hot in there; is
11 that correct?

12 A. Yes.

13 Q. Do you recall me complaining that
14 people were going by and pointing and laughing
15 because I was in the, quote, closet? Do you
16 remember me complaining to you about that?

17 A. I don't remember.

18 Q. Can you explain why several people
19 were put on 5520 training with less seniority than
20 me ahead of me?

21 EXAMINER MAGID: Is that relevant
22 to this case?

23 MS. HALL: I think so.

24 EXAMINER MAGID: In what way?

25 MS. HALL: When you go into

1 the pool, that is the eventual goal to get off the
2 typewriter on the more advanced work. As you
3 become better at your job, you qualify to go on
4 the 5520.

5 EXAMINER MAGID: What does that
6 have to do with whether the Agency accommodated
7 your handicap?

8 MS. HALL: Because I feel I
9 was discriminated against in terms of my work
10 load. I was given harder work.

11 EXAMINER MAGID: Your option at
12 point was to raise the issue at that point, to
13 file a complaint about it. If it took place more
14 than 30 days ago and if you've not raise a
15 reprisal complaint in connection with this case,
16 it's not relevant.

17 BY MS. HALL:

18 Q. Okay, in the teletype room you said
19 you installed separate air conditioners to meet
20 the computer requirements.

21 Why is it that you can install a
22 machine for a computer requirement but not for
23 people requirements?

24 A. No offense, but the computers are the
25 way that we transmit data and if our Vadats

1 equipment shuts down our station would be out of
2 touch with the rest of the Agency.

3 We wouldn't be able to get data to
4 the benefits payments computers in lines.

5 EXAMINER MAGID: Is it your
6 testimony, Mr. D'Aoust, that the machines are more
7 than people? Is that what you're trying to say?

8 THE WITNESS: In this case,
9 yes. We need to have those machines work.

10 EXAMINER MAGID: And, you can get
11 along without the people?

12 THE WITNESS: I don't think we
13 can get along without the people, but in order to
14 move data, we need those machines running.

15 BY MS. HALL:

16 Q. Okay, you said that I approached you
17 about not taking the job in teletype.

18 Do you recall that I told you about a
19 conversation that Beverly Keith and I had in which
20 she told me that prior to this point she had not
21 done anything about the smoking in the pool, and
22 that if I would consider staying there, she would,
23 in fact, crack down on the smokers and that that
24 is why I opted to to remain in the pool?

25 I had been promised. Do you recall

1 telling you that I had been promised this remedy?

2 A. I don't really recall that.

3 Q. You don't recall that?

4 A. No.

5 Q. Do you recall me also stating that I
6 took the typist job specifically to get 5520
7 training?

8 A. Yes, you did mention that.

9 Q. How many word processors are there in
10 the rest of the V.A.?

11 A. Fifteen.

12 Q. So, they're kind of all over.

13 How many positions have teletype
14 machines at them?

15 A. None.

16 Q. None?

17 A. None.

18 Q. Does the teletype machine involve a
19 lot of -- memorizing of codes and things to get
20 it to work?

21 A. No.

22 It's pretty much -- There are canned
23 forms and after you draw up the format then, it's
24 a matters.

25 Q. But you to learn the format?

1 A. Yes.

2 Q. And, they're pretty abstract. There
3 not stuff that is just common sense? There is
4 specific machine language formats?

5 A. Yes.

6 Q. So, you would have to specifically
7 learn those?

8 A. Yes.

9 Q. And, in the pool, is it a little bit
10 more that if you have basic grammar and spelling,
11 you type. As Mr. Magid mentioned, jibberish
12 versus intelligible information?

13 A. That's true but the teletype formats
14 are less complex than the 5520 operating
15 instructions.

16 The 5520 is a word processor. In
17 order to turn out reasonable work, you've got to
18 do a lot more than teletype.

19 EXAMINER MAGID: Just answer the
20 questions that are asked, please.

21 BY MS. HALL:

22 Q. Does the person who was to train in
23 the on the teletype a smoker?

24 A. Yes, she was.

25 Q. And, she was allowed to smoke in the

1 room?

2 A. It is my understanding that she
3 didn't smoke in the room while she trained you.

4 Q. Do you know why the ashtray was
5 there?

6 A. Sonya used to take breaks in the
7 teletype room.

8 Q. So, people not only work in the
9 teletype room smoking but they take breaks in the
10 teletype room as well?

11 A. I think it would have only been
12 Sonya.

13 Q. Then, it wouldn't have been a very
14 non-smoking area?

15 EXAMINER MAGID: Are you
16 testifying now about the teletype room at the time
17 that Ms. Hall agreed to try it out?

18 THE WITNESS: Yes.

19 EXAMINER MAGID: It was staff
20 training person was a smoker who did smoke in the
21 room?

22 THE WITNESS: No.

23 Sonya had been promoted to the
24 division secretary position in personnel but Sonya
25 was also the most experienced teletypist we had;

1 so when we brought Laren in to learn how to use
2 the system, Sonya would come down and show her the
3 format.

4 But, the agreement I had with Sonya
5 was that she wouldn't smoke while training Laren.

6 EXAMINER MAGID: And, is it your
7 testimony that she did not smoke while training
8 her?

9 THE WITNESS: As far as I
10 know, yes.

11 EXAMINER MAGID: Did you observe
12 her in there with Laren?

13 THE WITNESS: Yes, I did, and
14 she wasn't smoking at the time.

15 BY MS. HALL:

16 Q. But you don't know why the ashtray
17 was in there, if there was no smoking?

18 A. Right.

19 Q. The next person you put in there on
20 detail was Jackie Pfiser who was also a smoker.

21 Do you recall my specifically asking
22 you if you would make the teletype room a
23 non-smoking area?

24 EXAMINER MAGID: Is her
25 preliminary question contained within her question

1 correct; that Ms. Pfiser was assigned to the
2 teletype room and Ms. Pfisher was a smoker and did
3 smoke in the teletype room?

4 THE WITNESS: After Laren
5 declined, we hired from the outside a woman who
6 came in and didn't work out at all, and we
7 terminated her.

8 Then, I detailed Jackie Pfisher from
9 the typing pool into teletype and Jackie Pfiser is
10 a smoker and did smoke in the teletype room.

11 EXAMINER MAGID: She did smoke in
12 the teletype room in the presence of Ms. Hall?

13 THE WITNESS: Laren had opted
14 out already.

15 EXAMINER MAGID: There was no
16 overlap between Ms. Hall and Ms. Pfiser?

17 THE WITNESS: No.

18 BY MS. HALL:

19 Q. Then, anyone could have been detailed
20 for any one of these jobs in there that was a
21 smoker, and I would have been in the same
22 position.

23 EXAMINER MAGID: Ms. Hall,
24 anything is possible, but that didn't happen, did
25 it?

1 BY MS. HALL:

2 Q. Do you recall me asking you to make
3 it a non-smoking area?

4 A. No, I don't remember.

5 Q. You don't recall that?

6 You said that to have people not
7 smoke in the room would add to their job pressure.

8 How do do you think the people--I
9 don't know if I can say this--Beverly made a
10 statement that ten different people had made a
11 statement objecting to smoke.

12 Do you feel that their being around
13 the smoke added pressure to their job as much or
14 possibly even more so than the smokers not smoking
15 might have had pressure?

16 A. It's possible. I don't know.

17 Q. Did you consider that at all when
18 they were ten people who complained?

19 A. I don't know of ten people
20 complaining. I know that you mentioned it. Bruce
21 had mentioned it.

22 EXAMINER MAGID: The information
23 that is in the file someplace is that prior to Ms.
24 Hall, ten people had complained about the smoking
25 in the typing pool.

1 THE WITNESS: I don't know.

2 EXAMINER MAGID: You weren't
3 aware of that?

4 THE WITNESS: No.

5 BY MS. HALL:

6 Q. You said any kind of physical change
7 in the room would have to pay for itself.

8 I don't know if this is repetitive,
9 but do you think in view of the information on
10 passive smoke and in view the information that has
11 been readily available for years on smokers and
12 the relationship to their smoking and the amount
13 of time off on jobs, do you think that 'banning
14 smoke in the pool might pay for itself eventually?
15 Do you think it would pay for itself in terms of
16 the health of your employees?

17 A. I don't know.

18 Q. How much would it cost you to ban
19 smoke in the pool?

20 A. I have no way of knowing.

21 It would cost me potential unfair
22 labor practice suits, potential EEO complaints
23 from people who hired in knowing the--

24 EXAMINER MAGID: What would be
25 the out of pocket cost if you banned smoking?

1 THE WITNESS: No out of pocket
2 costs.

3 EXAMINER MAGID: No out of pocket
4 costs. Thank you.

5 BY MS. HALL:

6 Q. Can you tell me why you can
7 accommodate Mr. Aguirre's disabilities but not
8 mine?

9 A. The accommodations I give for his
10 disabilities cost me nothing.

11 All we do for Marty is change his
12 lunch hour when he is at an AA meeting. He is not
13 gone any extra time.

14 Q. Have I missed a lot of sick time
15 because of cigarette smoking?

16 A. I believe you have, yes.

17 Q. Does that cost you?

18 A. It costs me lost production, yes.

19 Q. And, you stated that out of pocket
20 expenses for not having smoking in the room would
21 be nothing?

22 A. Out of expenses, yes. We might have
23 to put some signs up but that's it.

24 MS. HALL: That's it.

25 EXAMINER MAGID: That is all you

1 have?

2 All right, I have a few questions,
3 Mr. D'Aoust.

4 Do you remember your testimony that
5 as far as you could tell, there was no hostility
6 to Ms. Hall after you met with the smokers in your
7 office; do you recall your testimony?

8 THE WITNESS: Yes.

9 EXAMINER MAGID: Agency Exhibit
10 2, which is the Director Clowney's memorandum
11 acknowledging that there was laughter and
12 belittlement by smokers against those with
13 respiratory ailments of which there was one in
14 your unit; is that correct?

15 THE WITNESS: Yes.

16 EXAMINER MAGID: How is it that
17 Mr. Clowney knew about those actions and you did
18 not?

19 THE WITNESS: I believe Laren
20 brought it up in her conversation with the
21 Director.

22 EXAMINER MAGID: And, he believed
23 her; is that correct?

24 THE WITNESS: Yes.

25 EXAMINER MAGID: And, she had not

1 brought it up to you?

2 THE WITNESS: Not that I can
3 recall.

4 EXAMINER MAGID: In your
5 Affidavit, Exhibit B-4 of the Complaint File,
6 Mr. D'Aoust, you stated that changes in past
7 practice would require the approval of the Union.

8 Do you recall giving that affidavit
9 testimony?

10 THE WITNESS: Yes.

11 EXAMINER MAGID: Yet, you have
12 testified here today of changes that you have made
13 in the smoking conditions in a couple of
14 situations.

15 And, you've also testified that the
16 Union's approval was not required; that the Union
17 did not have veto power but that they simply had
18 to be informed.

19 How do you reconcile the difference
20 between your testimony today and what you stated
21 in your affidavit?

22 THE WITNESS: Well, I'm not
23 well versed on what is allowed and what is not
24 allowed by the Union.

25 EXAMINER MAGID: You made a

1 statement here which at the top of the hearing
2 today you said was true then and is true now
3 regarding what is required and there is a
4 difference in your affidavit testimony and your
5 testimony before us here today.

6 THE WITNESS: I believe that
7 changing past practice would require the Union's
8 approval to avoid an unfair labor suit.

9 EXAMINER MAGID: To avoid a
10 grievance?

11 THE WITNESS: No, to avoid an
12 unfair labor practice action.

13 EXAMINER MAGID: Would require
14 their concurrence? Does that mean the Union does
15 have a veto?

16 MR. WINSLOW: I would object.
17 The witness is not qualified to answer these
18 questions.

19 EXAMINER MAGID: Well, the
20 witness has made testimony regarding what the
21 Union contract does require, and I'm probing the
22 previous testimony on that.

23 You're objecting to that,
24 Mr. Winslow? I'm overruling your objection.

25 THE WITNESS: No, I think that

1 changing something that is a work practice leaves
2 the Agency open to an Unfair Labor Act violation.

3 EXAMINER MAGID: But leaves the
4 Agency open to a charge; is that correct?

5 THE WITNESS: That's correct.

6 EXAMINER MAGID: And a charge is
7 not necessarily a loss, is it?

8 THE WITNESS: Not necessarily.

9 EXAMINER MAGID: Doesn't every
10 Union have the ability to file a charge if they
11 wish to do so or a Complaint in Court?

12 THE WITNESS: Yes, they do.

13 EXAMINER MAGID: And, that does
14 not necessarily mean they're correct; isn't that
15 right?

16 THE WITNESS: That's true.

17 EXAMINER MAGID: Doesn't the mere
18 fact that they can file a charge mean that
19 anything that management does leaves them open to
20 a charge being filed?

21 THE WITNESS: No.

22 There are things that are covered
23 under the Union Contract and there are other
24 things that the Union contract specifically says
25 the Union has no discussion in this.

1 EXAMINER MAGID: Did you consult
2 with your labor relations people regarding
3 Ms. Hall's request to you to make the work area a
4 no smoking area?

5 THE WITNESS: No. We really
6 don't have labor relations people.

7 EXAMINER MAGID: You do somewhere
8 in this Agency, don't you?

9 THE WITNESS: I talked to
10 Personnel; I talked to the Director.

11 EXAMINER MAGID: Did you consult
12 with whoever it is that gives you guidance on
13 labor relations matters?

14 THE WITNESS: Yes, I did.

15 EXAMINER MAGID: Who was that?

16 THE WITNESS: The personnel
17 officer and the Director.

18 EXAMINER MAGID: What did they
19 advise?

20 THE WITNESS: To do what we
21 have done; to take the actions we have taken.

22 EXAMINER MAGID: Did you talk
23 with them specifically about making the area a no
24 smoking area?

25 THE WITNESS: Yes, and it was

1 decided, no, that this wasn't something that we as
2 an Agency was going to do. And, when we did make
3 publications a non-smoking area, that was an
4 agreement between the Union and us saying they had
5 no problems with us making a non-smoking area out
6 of publications. In fact, they suggested that we
7 make an announcement.

8 EXAMINER MAGID: I have it in my
9 notes, Mr. D'Aoust, that you thought it would be
10 unreasonable to ask your boss about banning
11 smoking.

12 Now, I may be incorrect in my notes,
13 but it seems to me if you did, indeed, say that
14 earlier today that that contradicts what you have
15 just said that you did request your boss to make
16 that a no smoking area.

17 Now, what is true?

18 THE WITNESS: Mr. Clowney and
19 I talked about eliminating smoking in the pool. I
20 never specifically said to him, "I want to make
21 that a non-smoking area."

22 EXAMINER MAGID: Why not?

23 THE WITNESS: Because I feel
24 that smokers have rights.

25 EXAMINER MAGID: Because you're a

1 smoker?

2 THE WITNESS: No. I think in
3 general that smokers have rights too.

4 EXAMINER MAGID: And, you have
5 not been able to us so far where these rights are
6 enumerated and what those rights are, have you?

7 THE WITNESS: No, I haven't.

8 EXAMINER MAGID: Can you
9 recollect at this moment where those rights are
10 stated as to what the smokers rights are, or where
11 I may find them? Do you believe there is a
12 constitutional right to smoke?

13 THE WITNESS: I don't know.
14 I doubt very seriously if smoking is mentioned in
15 the Constitution.

16 EXAMINER MAGID: Are you familiar
17 with the cost of accommodations to other
18 handicapped people in the Agency? In the Regional
19 Office, that is.

20 THE WITNESS: Not really, no.

21 EXAMINER MAGID: For example,
22 your earlier testimony was that accommodating
23 Ms. Hall by way of making a separate room for her
24 for proper ventilation would cost at the minimum
25 85 hundred dollars?

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THE WITNESS: Yes.

EXAMINER MAGID: Could you compare that with the cost of other accommodations that have been made?

THE WITNESS: No, I've never compared against the cost of any other accommodations.

EXAMINER MAGID: All right, I have no more questions, Mr. D'Aoust, at this time. Do you have any more redirect?

MR. WINSLOW: Yes, I would like to.

REDIRECT EXAMINATION

BY MR. WINSLOW:

Q. There was a reference made somewhere in the cross-examination about a survey. I don't remember what it was.

Can you refresh my memory as to why there was no survey? Well, you didn't answer whether there was a survey -- the reason for not making a survey.

What I'm trying to find out is, what was that question; what did that question relate to when Laren asked it.

A. I believe she asked if we had ever

1 conducted a survey as to determine how much of
2 other sick leave was due to bronchitis.

3 Q. Well, that was one where she asked
4 about a survey, but she you had also asked about
5 another survey.

6 EXAMINER MAGID: Excuse me, let's
7 go off the record.

8 (Whereupon, a short discussion was
9 held off the record)

10 EXAMINER MAGID: Back on the
11 record.

12 BY MR. WINSLOW:

13 Q. When you considered Ms. Hall for the
14 job in the teletype room, did you actually make a
15 offer of that job to her?

16 A. We began by cross training her.

17 Q. Just answer my question.

18 A. And then I did ask her if she would
19 like to take that job.

20 Q. Was that an offer?

21 A. Yes.

22 EXAMINER MAGID: If she had said
23 "yes," she would have been processed and would
24 have become a teletypist?

25 THE WITNESS: Yes, it's on one

1 of those reports of contact.

2 BY MR. WINSLOW:

3 Q. It was a bona fide offer as far as
4 you're concerned?

5 A. Yes.

6 Q. Now, she has raised the question of
7 what is to stop you from putting somebody that
8 smokes in the teletype room when you had another
9 opening.

10 My question is: What is to stop you
11 from putting someone in the teletype room where
12 there is another opening?

13 A. Nothing is to stop me, other than I
14 might take Laren into consideration when filling
15 that position. But I would probably take the best
16 qualified, smoker or non-smoker.

17 Q. Would that fall within the ambience
18 of smokers rights?

19 A. I believe so.

20 Q. If you had attempted to solve her
21 problem by putting her in the teletype room, how
22 do you feel -- would this have been one of your
23 main considerations in deciding who to place in
24 there with her to work?

25 A. Yes.

1 I was offering it to Laren
2 noncompetitively as a straight lateral transfer.

3 Q. You're talking about if you had to
4 put somebody else in there later?

5 A. If I had to put somebody else in
6 there later?

7 Q. Yes.

8 Would you ever consider the fact that
9 this was the only way you would have been able to
10 solve this problem for her when you made the
11 choice, "Well, I'm going to have to put somebody
12 else in there. Shall I put a smoker in there?"

13 A. If there were two candidates and one
14 of them smoked and one didn't, I would pick the
15 non-smoker.

16 EXAMINER MAGID: Let me ask you a
17 couple of questions about that.

18 The teletype room has space for two
19 operators; is that correct?

20 THE WITNESS: Three.

21 EXAMINER MAGID: At the time you
22 were considering putting Ms. Hall in, would she
23 have been the second or third?

24 THE WITNESS: The third.

25 EXAMINER MAGID: And, the other

1 two were non-smokers; is that right?

2 THE WITNESS: Right.

3 EXAMINER MAGID: Could you have
4 made that a non-smoking area just as you did in
5 publications? Then, if a smoker had applied,
6 would you then have turned down a smoker for the
7 next teletype position?

8 THE WITNESS: Possibly.

9 BY MR. WINSLOW:

10 Q. I will show you two exhibits, one of
11 which carries a date of 1980 when it was to be
12 rescinded automatically.

13 Is that still station policy as far
14 as you know?

15 A. Yes, it is.

16 EXAMINER MAGID: Are you talking
17 about Agency Exhibit 1?

18 MR. WINSLOW: I'm talking
19 about the memo now, Exhibit 2, the Director's
20 memo.

21 BY MR. WINSLOW:

22 Q. Was that still policy as far as you
23 know?

24 A. Yes.

25 Q. Does that recognize the rights of an

1 individual employee to smoke as you read it?

2 A. Yes, I believe it acknowledges the
3 right of people to smoke.

4 Q. If there is a change in policy--and
5 again looking at this from your job as Chief of
6 Administration, responsible for publishing policy
7 statements and distributing those that come from
8 Central Office, if there is a change in policy,
9 would it be in writing?

10 A. Yes, it would be.

11 Q. If Exhibit 1 terminated, as
12 Mr. Magid has indicated it states that it would,
13 on June 30, 1980, and there has been no written
14 statement to supersede it, do you consider it to
15 be still in effect?

16 A. I really don't know. I think it's an
17 historical document at this point.

18 EXAMINER MAGID: Does that mean
19 you think it's not in effect?

20 THE WITNESS: If a survey team
21 came in from Central Office and cited the Director
22 for not following this rescinded circular it
23 wouldn't hold up, but I don't think the Agency
24 policy has changed any since the circular was
25 issued.

1 BY MR. WINSLOW:

2 Q. That was my next question.

3 If, in fact, it is not an effective
4 document but you have no document that would
5 supersede it, then does it actually state what the
6 policy is at the present time even though
7 unpublished.

8 EXAMINER MAGID: Is that a legal
9 question that you're asking him?

10 MR. WINSLOW: I think it is.
11 I want him to tell me what the policy is at the
12 V.A.

13 EXAMINER MAGID: We can listen to
14 what he thinks it is, but I think you're asking
15 legal policy, and I don't he is a lawyer.

16 THE WITNESS: Can we go off
17 the record for a minute?

18 EXAMINER MAGID: For what
19 purpose?

20 THE WITNESS: It's about the
21 rescinded sick leave. There is a circular that is
22 self rescinding that we are to be courteous to our
23 clientele. We all were amused when the thing self
24 rescinded, but I don't think that that means that
25 we were not longer required to be courteous to the

1 people we serve.

2 I think the same thing holds true for
3 this. I think the Agency would come out with a
4 new policy statement if the intent of this was no
5 longer in effect.

6 EXAMINER MAGID: It may be that
7 the intent of the document may still be in effect,
8 but when the document itself says this circular
9 expires June 30, 1980, isn't that a self recession
10 statement?

11 THE WITNESS: Yes, it is.

12 BY MR. WINSLOW:

13 Q. Does the policy have to be in
14 writing?

15 A. I don't think the policy has to be in
16 writing, no.

17 Q. That is what I'm trying to get
18 through.

19 A. The policy doesn't have to be in
20 writing.

21 Q. Then, do you think that what is said
22 here is now still unwritten policy regarding
23 smoking and non-smoking in the V.A.?

24 A. Yes, I do.

25 Q. Is that opinion based on your

1 experience as Chief of the Administrative Division
2 from what you know about the way the Veterans
3 Administration is established and maintained?

4 A. Yes. It is a qualified "yes."

5 No one is ever going to be able to
6 hold anything on that circular if it is rebutted.

7 Q. That isn't my question.

8 A. Circulars are self rescinding all the
9 time, and the action which initiated the
10 promulgation of that circular in 1979 is probably
11 still in effect.

12 Yes, I think this is still the
13 Agency's policy.

14 MR. WINSLOW: That's all I
15 wanted to know.

16 No further questions.

17 EXAMINER MAGID: Ms. Hall, do you
18 have anything further?

19 MS. HALL: Yes.

20 RE CROSS EXAMINATION

21 BY MS. HALL:

22 Q. If this is still the Agency's policy
23 did you have -- when I questioned you before you
24 said "no," as to most of these, or "I don't know."

25 Do you know why it's such an

1 unfamiliar document to everyone and why most of
2 this stuff isn't even recognized as something or
3 done?

4 A. I don't know.

5 I hadn't seen the circular until
6 yesterday. I didn't realize the V.A. had a
7 written policy at any time about what the V.A.'s
8 policy on smoking and someone smoking is.

9 As far as what the Circular in '79
10 requires people to do, if it wasn't put into some
11 other circular or put into a manual someplace, I
12 doubt seriously if anyone is doing what those
13 circulars require.

14 Q. One more question:

15 You stated that you had consulted
16 with the Director and personnel about what could
17 or could not be done to accommodate me, and you
18 basically followed their advice?

19 A. I followed their advice.

20 Q. Did you have things that you proposed
21 to them that they overruled that might accommodate
22 me, such as putting me in other more acceptable
23 areas like reproduction or places like that?

24 A. No.

25 When you worked overtime, I think we

1 put you back in pub just to get you out of the
2 smoke filled typing pool. But, no, they didn't
3 overrule me.

4 It was a group discussion: What
5 should we do? No, we don't want to do that. It
6 wasn't anything that I said, "Let's do this" and
7 they said, "no."

8 Q. Did you ever propose that I be moved
9 to reproduction to alleviate the problem?

10 A. No, because I don't need any extra
11 help in reproduction most of the time. You would
12 be working out of your classification.

13 Q. I'm mean move me, still typing back
14 there, like you did on overtime?

15 A. We talked about it one time, but we
16 were limited because of the old Lanier dictation
17 system which was tied to the floor and in order to
18 move you, we would would have had to rewire.

19 Q. Did any of the people you consulted
20 actually have the final word, say, the Director or
21 personnel people? Did they actually say, "Yes, we
22 can or will do that," or "No, we can't or will not
23 do that"?

24 A. I followed what the Director
25 determined our Regional Office actions would be.

1 Q. What was that? On the particular
2 question I asked you as to moving me to
3 reproduction issue, what did the Director or
4 personnel man tell you that you could do or could
5 not do?

6 A. Actually, I never proposed that as
7 something we could do.

8 Again, with publications, you would
9 be well out of sight of supervision of CTA.
10 There would be no one to ask questions of. At the
11 time we considered that, we would have had to
12 somehow pipe dictation to you which we couldn't do
13 because of the limitation of the Lanier loop
14 system.

15 No, it was never seriously
16 considered.

17 Q. Is there a transcription machine in
18 the closet?

19 A. Probably. There is one now.

20 Q. Was there a transcription machine for
21 me to do dictating off of when you put me in the
22 closet?

23 A. I think there was. I don't know,
24 Lari. It was only a couple of days and I wasn't
25 even in there.

1 Q. Do you recall whether or not I was
2 even on dictation when you put me in the closet?

3 A. No.

4 EXAMINER MAGID: No more
5 questions?

6 I just have a couple, Mr. D'Aoust.

7 At the time that Director Clowney the
8 memorandum which is Agency Exhibit 2, he was
9 familiar with the obstructive lung disease that
10 Ms. Hall; is that correct?

11 THE WITNESS: Yes.

12 EXAMINER MAGID: Was he also
13 aware at the same time of Mr. Aguirre's smoking
14 tendencies?

15 THE WITNESS: No.

16 I think we hired Marty after June of
17 '85.

18 EXAMINER MAGID: When was he
19 hired?

20 THE WITNESS: I really don't
21 know.

22 MR. WINSLOW: May I have a
23 couple more questions?

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FURTHER
REDIRECT EXAMINATION

BY MR. WINSLOW:

Q. What kind of employee is Mr. Aguirre?

A. Right now Marty is kicking out more lines than anyone else.

Q. Top producer?

A. I think in several months of late, he has been the top producer.

Q. How is he as far as accuracy; do you know?

A. He does a very nice job.

Q. When you refer to this smoke filled typing pool, are you telling me that this area is worse than other areas of a similar nature in the building?

A. No.

I don't believe the typing pool would be any worse than most areas in the building.

Q. Did you consider the V.A. Regional Office to be smoke filled?

I mean I'm questioning your use of that term.

A. I said "smoke filled"?

Q. You said "smoke filled typing pool."

1 A. No, we were talking about ambient
2 smoke? There is smoke in this room right now
3 simply because of its being pumped in by the
4 building air system.

5 I don't mean "smoke filled" in the
6 sense that there is a blue cloud rolling out of
7 the typing pool every day.

8 Q. That's why I'm asking. That was the
9 impression I was getting. Is that the impression
10 you wanted to give?

11 A. No.

12 EXAMINER MAGID: Anything based
13 on his questions, Ms. Hall?

14 MS. HALL: One quick
15 question.

16 FURTHER
17 RE-CROSS-EXAMINATION

18 BY MS. HALL:

19 Q. Do you recall me saying to you on
20 many occasions that smoke was affecting my
21 production negatively? It caused me to have
22 excessive error rates and made me sick?

23 A. Yes, I do.

24 Q. Can you tell me why that has less an
25 effect on me than Mr. Aguirre's need to smoke in

1 order to maintain his the top production?

2 A. In order to satisfy you, I would have
3 to do things I can't do. Your production and your
4 quality of work is very good, and you're not near
5 being considered for termination because of
6 failing to meet production or quality goals.

7 From my point as a manager, I'm
8 willing to live with your above average
9 performance and Marty's excellent performance.

10 I'm not sure because I know right now
11 that you are doing 118 percent of goal and Marty
12 is doing 132 percent of goal. But, I'm not sure
13 that if we stopped smoking completely that you
14 would go up to 132 percent, and Marty would only
15 drop to 118. I'm not sure.

16 Q. Are you sure I wouldn't go to 132.

17 A. No.

18 MS. HALL: That's all.

19 EXAMINER MAGID: Thank you for
20 your testimony, Mr. D'Aoust.

21 Now, as an alleged discriminating
22 official, I'm going to allow you at this point to
23 offer anything that you think would be useful to
24 our determination here that you think you have not
25 been asked.

1 Now, I realize you have an affidavit
2 on file and you can testify for some several hours
3 and, yet, there may be something that you wish to
4 appear in the record that you have not been asked.

5 This is your opportunity to put
6 anything you wish concerning this matter into the
7 record.

8 THE WITNESS: I really don't
9 have anything to add. I think we have covered
10 just about everything.

11 My personal feeling on this is that I
12 don't believe we have discriminated against Lari.
13 We hired her, we promoted her on time with the
14 minimum--exact minimum--waiting period. We have
15 given her choices of assignments. I've tried to
16 talk to the other people who are affecting her,
17 but even if we stopped smoking in the pool, I
18 really don't think it would clear the air enough
19 to help her condition.

20 I think this building has one air
21 system, as I mentioned before, and you didn't want
22 me to say it, but I if we would have to ban
23 smoking in the pool, we would have to ban smoking
24 in the whole building because the whole building
25 shares the same air space because of GSA's heating

1 and cooling idea that its' cheaper to reheat used
2 air and recool used air.

3 I look for the day that GSA will
4 probably ban smoking in all of its buildings, and
5 that would solve this problem. But, until that
6 happens I think that we tried to accommodate Lari.
7 I don't think I have discriminated against her,
8 and I didn't think the Agency really has.

9 That's all I have to say.

10 EXAMINER MAGID: Thank you,
11 Mr. D'Aoust, and I caution you not to discuss your
12 testimony outside of this hearing room.

13 (Witness Excused)

14 EXAMINER MAGID: Mr. Aguirre, my
15 name is Martin K. Magid. I've been assigned by
16 the EEOC to conduct a hearing in this case.

17 You have been called as a witness
18 regarding testimony regarding matters raised by
19 the Complainant in her Discrimination Complaint
20 against the Agency.

21 You are here on official business,
22 and you are assured by EEOC regulations of freedom
23 from reprisal for your testimony.

24 We do require you testify either
25 under oath or by affirmation. Do you have any

1 objections to taking an oath?

2 THE WITNESS: No.

3 EXAMINER MAGID: All right, would
4 you stand and raise your right hand, please?

5 MARTIN AGUIRRE,
6 having been first duly sworn, was
7 examined and testified as follows:

8 EXAMINER MAGID: State your full
9 name, please?

10 THE WITNESS: My name is
11 Martin William Aguirre.

12 EXAMINER MAGID: Are you employed
13 by the V. A.?

14 THE WITNESS: Yes, I am.

15 EXAMINER MAGID: In what
16 capacity?

17 THE WITNESS: Clerk typist.

18 EXAMINER MAGID: Okay,
19 Mr. Aguirre, do you recall giving the EEO
20 investigator an Affidavit in this case?

21 THE WITNESS: Yes, I do.

22 EXAMINER MAGID: Have you
23 reviewed that affidavit lately?

24 THE WITNESS: No, I have not.

25 EXAMINER MAGID: At the time that

1 you gave that affidavit, which is Exhibit B-11 in
2 the complaint file, was everything that you stated
3 in it true and correct to the best of your
4 knowledge and belief?

5 THE WITNESS: Yes, it was.

6 EXAMINER MAGID: Do you recall
7 what is in it?

8 THE WITNESS: Yes, I do.

9 EXAMINER MAGID: To the best of
10 your knowledge and belief today, is everything
11 that is contained in that affidavit true and
12 correct?

13 THE WITNESS: Yes.

14 EXAMINER MAGID: All right, thank
15 you very much.

16 Mr. Winslow?

17 DIRECT EXAMINATION

18 BY MR. WINSLOW:

19 Q. How long have you worked in the
20 typing pool?

21 A. One year as of the Third of
22 September.

23 Q. Do you remember being called in to
24 Mr. D'Aoust's office with the other people that
25 smoked in the pool to discuss the possibility of

1 restricting the amount of smoking that was done in
2 the pool?

3 A. Not while I've been here, I don't
4 recall.

5 Q. Do you remember any such similar
6 meeting that was held on that same subject with
7 Beverly Keith, the supervisor in the pool?

8 A. Yes.

9 She had asked us -- well, actually
10 she hadn't asked us -- she told us not to go by
11 Lari's desk with lit cigarettes and to keep our
12 smoking at our own desks.

13 Q. Do you smoke?

14 A. Yes, I do.

15 Q. How does cigarette smoking affect
16 your health?

17 A. Well, my understanding is that
18 cigarette smoking is not good for one's health.
19 However, my reason for smoking is linked to my
20 alcoholism.

21 Smoking is an addiction. It's a very
22 difficult one to break. I have tried and was
23 unable to due to the fact that because I'm an
24 alcoholic, cigarettes give me, I guess, a--what is
25 the word--

1 Q. Release?

2 A. Well, I use it basically as a
3 relaxant. When I get nervous or tense, it helps
4 me to relax or when I'm anxious or things of that
5 nature, I will smoke to help myself calm down and
6 relax.

7 Q. Did drinking do the same thing for
8 you?

9 EXAMINER MAGID: What was that?

10 BY MR. WINSLOW:

11 Q. Does drinking do it the same thing
12 for you?

13 A. That was basically the excuse for
14 drinking was to, I guess, numb the fears of
15 day-to-day living and anxiety, anger, things of
16 that nature, just by drowning it with alcohol and
17 then you don't feel any more.

18 In terms of my alcoholism, when I do
19 get anxious or fearful, tense, at those times
20 quite often the compulsion to drink does arise and
21 smoking helps in one sense to calm me down.

22 I'm a very nervous person by nature
23 and it also helps to relieve that compulsion to
24 drink.

25 Q. Were you hired as a handicapped

1 person with this problem?

2 A. Yes, I was.

3 Q. Did you tell anyone that you had the
4 problem when you came to apply for the job?

5 A. Yes.

6 EXAMINER MAGID: The handicap was
7 alcoholism?

8 THE WITNESS: Yes.

9 BY MR. WINSLOW:

10 Q. Did you open the subject matter on
11 that subject, or did the person who interviewed
12 you open it?

13 A. It was on my application.

14 I don't recall if it was brought up
15 in my interview, either with the personnel office
16 or with the supervisor. I don't think it was but
17 I'm not sure.

18 Q. Were you hired under any of the
19 special programs for hiring of the handicapped?

20 A. No.

21 Q. You expressed the opinion in your
22 affidavit before the investigator that Lari's desk
23 was located where there was the best circulation
24 available.

25 Why did you feel that way or what

1 basis do you have for making that statement?

2 A. Her desk was by an open door--between
3 two doors of the office--and to me I believe that
4 is the best place of getting cross circulation
5 between the two doors in the room.

6 Q. Is that when Lari's desk was at the
7 back of the room near the door to publications?

8 A. Yes.

9 Q. Is she there now?

10 A. No.

11 A. So, that would no longer be true as
12 far as you're concerned?

13 A. Right.

14 Q. Do you know why she isn't there
15 anymore?

16 A. Because she was put on the 5520 word
17 processor and they are situated on the other side
18 of the room.

19 Q. If you were to quit smoking--for
20 example, if smoking were banned in the typing
21 pool--and you continued to work there, are you
22 afraid that you might resume your drinking or
23 wouldn't it make any difference?

24 A. I could not say definitely. It's a
25 very strong possibility as far as I'm concerned.

1 I smoke a lot. I think it would very
2 difficult for me to get by on a detail basis of
3 not smoking in the office. There are times when
4 the work does get frustrating.

5 The first thing I do is to light a
6 cigarette and calm down and get my work done the
7 best I can. At times--and I never know when--the
8 compulsion to drink does come; and, again, if I
9 had to deal with trying not to smoke at the same
10 time, I think that would be extremely difficult
11 for me. I don't know if I could handle that on a
12 daily basis.

13 And, the attempts that I have tried
14 to quit smoking since I've been in the program has
15 proven to me that it is not so easy and, in fact,
16 as I stated on my statement to the investigator,
17 many people in the program who have tried who have
18 a lot more years of sobriety than I were forced to
19 resume smoking because of the fact the tension
20 builds up, they were not able to cope, I guess,
21 with the withdrawal from cigarettes and got to the
22 point where it was becoming a threat to their
23 sobriety because the compulsion continued to
24 increase with every frustrating day.

25 So, they were strongly advised that

1 if it came down to a choice sobriety and smoking
2 that they had better start smoking again.

3 Q. Did you try to comply with the
4 request of Beverly Keith to avoid going near
5 Lari's desk with a cigarette in your hand?

6 A. Yes, I have.

7 Q. Have you done anything else to try to
8 alleviate the smoke that Lari might be subjected
9 to in the pool?

10 A. Yes.

11 When I noticed that she is coming
12 back, because my desk is right in front of the
13 files for form letters and forms that we use, and
14 I have caught myself on several occasions when she
15 has come -- I've noticed her walking toward the
16 back, and I was just about to light a cigarette, I
17 will wait until she has gotten her forms and left
18 before I'll light my cigarette.

19 If I already have one lit, and she
20 comes back, I just try not to puff on it while she
21 is there and blow smoke around.

22 Q. Have you noticed or heard of any or
23 has anyone made any comments or have you made any
24 comments or done anything that would show
25 animosity toward Lari because of this limitation

1 and this request to curtail or limit the smoking
2 in that area?

3 A. No, absolutely not.

4 Q. I know I sympathize with her problem
5 as well as I feel anxious of my own in having to
6 deal when what could be -- in fact, we have met at
7 the elevator and chatted and I have no animosity
8 toward her whatsoever.

9 And, I have not noticed any animosity
10 toward her from anyone else.

11 MR. WINSLOW: That's all.

12 EXAMINER MAGID: Cross-
13 examination, Ms. Hall?

14 CROSS-EXAMINATION

15 BY MS. HALL:

16 Q. You said that smoking was probably
17 not good for your health and your smoking would
18 create a hazard for you, do you think?

19 A. See, the problem with smoking as
20 being not good for my health, I have a serious
21 choice that I have to make in the matter because
22 of my alcoholism.

23 If it's a matter of giving in to one
24 addiction to avoid falling pray on the other, then
25 I'm forced to do that, because at this point I

1 cannot quit smoking and not being able to smoke at
2 will, because when I get the urge to smoke or when
3 I get up-tight, then I smoke to calm my nerves and
4 if I had to deal with that problem on top of my
5 alcoholism, it presents quite a problem there.

6 Q. Do you think that while smoking is
7 the lesser of two hazards for you, that it might
8 be a very great hazard to someone who might be
9 around you in a work place?

10 A. It could, yes.

11 I don't understand the nature of your
12 disability, though; so I can't say for a fact.

13 EXAMINER MAGID: You think it's
14 possible that it might be harmful?

15 THE WITNESS: I could imagine so.

16 MS. HALL: This might be
17 out of line; I don't know.

18 EXAMINER MAGID: Do you want to
19 have the witness leave the room while we talk
20 about it?

21 MS. HALL: No, I'll ask, I
22 guess.

23 BY MS. HALL:

24 Q. Are you aware of any studies linking
25 cigarette smoking to alcoholism and, in fact,

1 studies that indicate that smoking precedes and
2 encourages other addictions, alcohol being one of
3 them?

4 A. No.

5 Q. Do you have any doctors' statements
6 saying that your use of tobacco is helping you
7 physically to keep from falling pray to your
8 alcohol problem?

9 A. No, only the experience of alcoholics
10 in the AA Program.

11 A. And, other alcoholics advised you to
12 keep smoking?

13 A. Yes.

14 Q. Not a doctor?

15 A. Right.

16 Q. Is there a doctor -- have you
17 submitted any doctors' statements saying that you
18 are disabled because of the addiction that you
19 have tobacco smoke?

20 A. No.

21 Q. Have you submitted any statements
22 from doctors saying that tobacco smoke is good
23 for you because it keeps you off of alcohol?

24 A. No.

25 Q. Then, you haven't officially applied

1 for any sort of accommodation because of your
2 smoking disability or addiction?

3 A. No.

4 Q. At any level?

5 A. No.

6 Q. Can you tell me why you smoke during
7 virtually all six of your breaks and lunch periods
8 in the typing room?

9 A. I can only explain that by saying I'm
10 addicted to cigarettes and I smoke at will. I do
11 smoke a lot, and I smoke all day and all night
12 until I go to bed.

13 Q. Is there any reason during these
14 times when you're not allowed to work that you
15 can't leave the room to smoke?

16 A. No.

17 Q. Can you tell me why you don't?

18 A. It hadn't crossed my mind actually to
19 leave the room to smoke during breaks or during
20 those times that I could leave to smoke.

21 Q. There is a memo from the Director,
22 Exhibit Number 2.

23 EXAMINER MAGID: Do you want him
24 to see a copy of this?

25 MS. HALL: Yes, please.

1 BY MS. HALL:

2 Q. The fourth paragraph, starting with
3 the words, "I would hope," could you possibly read
4 that and comment as to whether you knew anything
5 about this, whether anybody has ever asked you to
6 comply with this and, if so, why you feel you
7 don't need to?

8 A. Well, the memorandum is dated
9 June 12, 1985.

10 I began working in October of 1985,
11 and I was not made aware of this, no. I did not
12 know. Otherwise, I would have complied.

13 EXAMINER MAGID: You would have
14 complied?

15 THE WITNESS: Yes.

16 EXAMINER MAGID: Nobody has ever
17 asked you to?

18 THE WITNESS: No, sir.

19 BY MS. HALL:

20 Q. Neither Beverly nor Ron nor anyone
21 ever mentioned to you about smoking on breaks?

22 A. No. I was totally unaware of that
23 memo.

24 MS. HALL: That's it.

25 EXAMINER MAGID: Mr. Aguirre, how

1 old were you when you started smoking?

2 THE WITNESS: I had
3 my first cigarette when I was in the fifth grade,
4 but I didn't begin smoking regularly until my
5 teens. I'm not exactly sure. I would say maybe
6 around 14 or 15.

7 EXAMINER MAGID: When do you feel
8 you became an alcoholic?

9 THE WITNESS: I think I have
10 been an alcoholic all my life. My first drunk was
11 as a child, after a wedding reception for my
12 brother. And, as I recall, it was all my first
13 blackout.

14 I believe I was born with this
15 disease but again as a child, that was my first
16 drunk and my first blackout.

17 EXAMINER MAGID: When do you
18 think you became addicted to alcohol?

19 THE WITNESS: The addiction
20 has always been there, but I didn't begin drinking
21 regularly until my teens when I was in high
22 school, I believe the ninth grade.

23 EXAMINER MAGID: So, your smoking
24 preceded your drinking habit; is that correct?

25 THE WITNESS: Yes.

1 EXAMINER MAGID: Now, you
2 testified that you did try to comply with requests
3 not to go near Ms. Hall's desk while you were
4 smoking.

5 How about others in the group?
6 Did they also try to comply?

7 THE WITNESS: Yes.

8 EXAMINER MAGID: Everyone?

9 THE WITNESS: To the best of
10 my knowledge, yes.

11 EXAMINER MAGID: Did you ever see
12 anyone deliberately not comply or go out of their
13 way to go near her with cigarettes?

14 THE WITNESS: No.

15 EXAMINER MAGID: If the Agency
16 banned smoking in the work area, would you quit?

17 THE WITNESS I would have to
18 see how it would affect me.

19 EXAMINER MAGID: You would first
20 try to comply?

21 THE WITNESS: Yes.

22 EXAMINER MAGID: Anything else on
23 direct, Mr. Winslow?

24 MR. WINSLOW: No, I don't
25 think so.

1 EXAMINER MAGID: Do you have
2 anything?

3 MS. HALL: No.

4 EXAMINER MAGID: All right, we
5 thank you for your testimony, Mr. Aguirre, and I
6 caution you not to discuss your testimony outside
7 the hearing room.

8 (Witness Excused)

9 EXAMINER MAGID: That concludes
10 the testimony of the approved witnesses.

11 Are there requests for rebuttal
12 witnesses?

13 MR. WINSLOW: Yes, Your Honor.
14 I would like to call Bob Rogowski.

15 EXAMINER MAGID: What testimony--

16 MR. WINSLOW: To testify
17 regarding the pre-hiring interview that was
18 conducted with Ms. Hall, as well as the policy of
19 the V.A. with respect to smoking, with respect to
20 handicapped people-- hiring handicapped people--
21 with respect to EEO questions.

22 He is the only individual that I know
23 of in personnel who would be able to testify on
24 those questions, and the only individual other
25 than Beverly Keith who would be able to testify

1 regarding the information provided by the
2 Complainant at the time of her employment
3 interview. I would like to call the personnel
4 officer who is Bob's boss.

5 EXAMINER MAGID: What is his
6 name?

7 MR. WINSLOW: His name is
8 Kenneth Ciacivch because Bob isn't familiar with
9 the Union contract with the V.A. and Federal
10 regulations on unfair labor practice issues or
11 federal statutes covering those, and you've asked
12 a number of questions regarding unfair labor
13 practices and grievances. Those really fall
14 within the bailiwick of Ken Ciacivch.

15 Finally, I would like to call the
16 Director of the Regional Office, George Clowney,
17 who is the one who is actually the third alleged
18 discriminating official, Mr. Ciacivch being
19 another one, because there has been testimony
20 offered by the Complainant to the effect that she
21 discussed this matter with Mr. Clowney, and he
22 made certain responses which I would like to
23 question him about as well as is the testimony of
24 Mr. D'Aoust of his conversations with him
25 regarding possible other areas where relief could

1 be granted; what other means might be used to
2 solve Laren's problem.

3 EXAMINER MAGID: Is that it?

4 MR. WINSLOW: That was
5 basically what I wanted to get out of each of
6 those people.

7 EXAMINER MAGID: Ms. Hall, do you
8 have a request for rebuttal witnesses?

9 MS. HALL: No.

10 EXAMINER MAGID: All right, with
11 respect to Bob Rogowski and your proposed rebuttal
12 testimony regarding the policy regarding smoking,
13 it is the Agency which presented the evidence
14 regarding the Agency's policy on smoking. There
15 is evidence in the file.

16 Ms. Hall did not present any evidence
17 regarding what the Agency's policy is. Therefore,
18 there is nothing to rebut regarding the Agency's
19 policy. The evidence is in the file and I'm going
20 to deny your request for Mr. Rodowski for the
21 purposes of providing testimony regarding smoking
22 and the Agency's policy.

23 Regarding your proposal for him to
24 provide rebuttal testimony regarding the Agency's
25 policy on the handicapped and on EEO questions,

1 those are requests could have been made months ago
2 if you desired to have testimony to that effect.

3 Also, I'm not aware of any
4 information that Ms. Hall gave regarding the
5 Agency's policy on the handicapped and on EEO
6 questions. Therefore, I'm going to deny your
7 request for rebuttal testimony by Mr. Rodowski on
8 those matters.

9 However, I will approve Mr. Rodowski
10 for the sole purpose of providing rebuttal
11 testimony regarding the pre-hiring interview which
12 Ms. Hall had with him, since she did testify as to
13 the contents of that interview. I will allow you
14 to question him on that subject and that subject
15 alone.

16 With regard Kenneth Ciacivch and your
17 request for him to testify regarding unfair labor
18 practices and grievances, I'm aware that there has
19 been some testimony all of it by Agency witnesses
20 regarding the prospect of unfair labor practices
21 and grievances.

22 There has been no testimony from
23 Ms. Hall regarding those subjects, or the prospect
24 of unfair labor practices or grievances and
25 occurring. Therefore, I'm going to deny your

1 request for Kenneth Ciacivch.

2 With respect to your request for
3 Director Clowney as a rebuttal witness, you
4 requested that he would provide rebuttal testimony
5 regarding conversations with Witness D'Aoust.

6 D'Aoust is an Agency witness, and it
7 would be inappropriate for you to provide rebuttal
8 testimony that would contradict testimony by one
9 of the Agency's other witnesses regarding the
10 conversations they may have had. I'm going to
11 deny your request for rebuttal testimony by
12 Clowney regarding conversations he had with
13 D'Aoust.

14 Now, I would like you to tell me
15 specifically, Mr. Winslow, the subject matter of
16 the conversations between Clowney and Hall that
17 you wish Mr. Clowney to rebuts?

18 MR. WINSLOW: First of all,
19 she stated that Mr. Clowney had told her that the
20 problem, if you want to call at that--I'm not sure
21 what words she used--has been blown all out of
22 proportion, and the were smokers were under
23 considerable pressure, and he didn't feel that he
24 wanted to increase the pressure on them.

25 Then, she expressed the opinion that

1 what he was saying was that he was under some kind
2 of pressure by "society" and that he had stated
3 that the whole issue had been overblown.

4 I think he is entitled to express and
5 clarify what he meant if that is what he said and
6 whether he was under pressure by his employees
7 vis-a-vis the society, or whether he was talking
8 about pressure some other society or just exactly
9 what he meant, if that is what he said, when he
10 made that comment.

11 He is one of the people that she
12 charges with discrimination. I would also calling
13 your attention to the fact that two of the
14 witnesses that we initially had requested called
15 that we be allowed to call were Mr. Clowney and
16 and Mr. Ciacivch.

17 Our request in that letter was that
18 these people would testify as to what
19 accommodations had been made or attempted by
20 Management as well as the conditions in the
21 Complainant's work area. Inasmuch as they are
22 charged with discrimination, it seems to me they
23 ought to be given a chance to respond to those
24 charges and to explain how they feel we have
25 attempted to accommodate her and how they feel

1 working conditions have been in that area, but
2 certainly in the case of Mr. Clowney especially,
3 he is the, if I may say, ultimate authority.

4 The final decision is his and he
5 also, I think, is in a position to indicate
6 whether he feels that he would consider the
7 request to Central Office for additional money to
8 build a room around Laren that has been raised.

9 It seems to me also that much of the
10 testimony that Mr. D'Aoust gave with respect to an
11 unfair labor practice as to the procedure to be
12 followed on a grievance and what those things are,
13 is most confused, and I raised the objection
14 several times that Mr. D'Aoust wasn't qualified to
15 testify on those matters and I was overruled.

16 I feel that Mr. Ciacivch could
17 clarify that for Your Honor, and I feel Mr.
18 Clowney could clarify what he was saying to
19 Laren's and about about which she testified.

20 EXAMINER MAGID: With respect to
21 that testimony of Ms. Hall in which she gave the
22 opinion as to when Mr. Clowney was referring to, I
23 rule that it's not necessary to rebut that opinion
24 testimony, since it is nothing more than that,
25 simply her opinion, and it's not necessary to

1 rebut it, since it is her opinion and presumably
2 her opinion won't change. I state this is merely
3 her opinion and not an authoritative.

4 With respect to the other matters
5 which I requested the other matters that Ms. Hall
6 raised regarding her conversations with Director
7 Clowney, I find that those matters are somewhat
8 collateral to the main proceeding here.

9 The main purpose of this proceeding
10 which is to determine whether the accommodations
11 attempted to be made by the Agency were
12 sufficient, and I find them too collateral to
13 require rebuttal testimony.

14 With respect to his status as an
15 alleged discriminating official and the right to
16 testify, that is correct; the alleged
17 discriminating officials do have the right to
18 testify. However, their presence as hearing
19 witnesses must be requested just as it must be
20 requested for my other witnesses and the Agency
21 failed to request him when it had the opportunity
22 to do so.

23 It is true that he was requested as a
24 witness in the Agency's letter to me of May 23 and
25 in my response to that request, I asked the Agency

1 to either state why they were all necessary or to
2 justify their appearance individually even though
3 they were to testify to the same items.

4 At that time if the Agency had said,
5 "Despite the fact that they they will testify the
6 same thing, they are alleged discrimination
7 officials, and we renew the request," I would have
8 approved the request. However, you did not do so.

9 You just merely selected one person
10 from each of the two groups. You did not renew
11 the request for Mr. Clowney. Therefore, on those
12 bases, I'm going to deny your request for Mr.
13 Clowney as a rebuttal witness.

14 I'm going to request that when we
15 come back with Mr. Rodowski that you do provide
16 copies of the Union agreement that was in effect
17 at the time that of Ms. Hall's began to make her
18 complaints about the smoking, and I will offer it
19 for admission as an Examiner's Exhibit.

20 MR. WINSLOW: I have already
21 told them to bring a copy.

22 EXAMINER MAGID: All right, let's
23 take a brief recess until such time as we can call
24 Mr. Rodowski as a witness along with the Union
25 Agreement.

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EXAMINER MAGID: Off the record.

(Whereupon, a short recess was
taken off the record)

EXAMINER MAGID: Back on the
record, would you state your name, please?

THE WITNESS: Robert Francis
Rodowski.

EXAMINER MAGID: Mr. Rodowski,
you have been called as a witness by the Agency to
offer certain testimony in the relative to
Complainant's discrimination complaint against the
Agency.

You're here on official duty and you
are assured by EEOC regulations of freedom from
reprisal for testimony.

We do require that you testify either
oath or affirmation. Do you have any objection to
taking an oath?

THE WITNESS: No, I don't.

ROBERT RODOWSKI,
having been first duly sworn, was
examined and testified as follows:

EXAMINER MAGID: Be seated,
please.

EXAMINER MAGID: State your full

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name?

THE WITNESS: Robert Francis
Rodowski.

EXAMINER MAGID: Mr. Rodowski, do
you recall making an Affidavit in this case?

THE WITNESS: Yes, I do.

EXAMINER MAGID: Have you
reviewed that affidavit lately?

THE WITNESS: I reviewed it
yesterday evening.

EXAMINER MAGID: At the time you
gave that affidavit, which is Exhibit B-5 in the
complaint file, were all the facts that you stated
in it true and correct to the best of your
knowledge and belief?

THE WITNESS: Yes, they were.

EXAMINER MAGID: Reviewing it
yesterday after some time has passed, are all the
facts contained in the affidavit still true and
correct to the best of your knowledge and belief?

THE WITNESS: Yes, they are.

EXAMINER MAGID: Thank you very
much. Are you a V.A. employee?

THE WITNESS: Yes, I am.

EXAMINER MAGID: In what

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capacity?

THE WITNESS: I'm a personnel management specialist.

EXAMINER MAGID: What grade is that?

THE WITNESS: Grade 11 position.

EXAMINER MAGID: Do you know what grade Mr. D'Aoust is?

THE WITNESS: He is a Grade 11 as well.

EXAMINER MAGID: All right, Mr. Winslow, you may examine Mr. Rodowski along the guidelines that we discussed earlier.

DIRECT EXAMINATION

BY MR. WINSLOW:

Q. Did you bring with you the Union contract that was in effect when Laren Hall was hired?

A. Yes.

This is a Master Agreement with the American Federation of Government Employees.

EXAMINER MAGID: May I have it, please?

THE WITNESS: And I believe

1 the ratification date is August 1982, and Ms. Hall
2 was hired in 1984 and that contract had been in
3 effect continuously since that date.

4 EXAMINER MAGID: This is a copy I
5 might have?

6 THE WITNESS: Yes, it is.

7 EXAMINER MAGID: I'm going to
8 mark this Master Agreement is Post Examiners
9 Exhibit 2.

10 Mr. Winslow, any objections to its
11 admission?

12 MR. WINSLOW: No.

13 EXAMINER MAGID: Ms. Hall, any
14 objection to its admission?

15 MS. HALL: No.

16 EXAMINER MAGID: All right,
17 Examiner's Exhibit 2 is admitted. All right, Mr.
18 Winslow.

19 (Whereupon, Examiner's Exhibit 2, having
20 been marked for identification was admitted
into evidence)

21 EXAMINER MAGID: All right, Mr.
22 Winslow?

23 DIRECT EXAMINATION

24 BY MR. WINSLOW:

25 Q. Are you familiar with the contents of

1 that contract in detail?

2 EXAMINER MAGID: Excuse me, would
3 you leave the room for one moment, Mr. Rodowski

4 THE WITNESS: Sure.

5 EXAMINER MAGID: The only purpose
6 for which Mr. Rodowski was approved as a rebuttal
7 witness was to provide testimony regarding the
8 pre-hiring interview with Ms. Hall.

9 He was not approved for discussions
10 about the agreement or anything within the
11 agreement unless it pertains to the pre-hiring
12 interview.

13 MR. WINSLOW: Okay.

14 Again, I'm going to object on this
15 ground; that it seems to me that we have inquired
16 into at some length the question of whether or not
17 the Agency had any obligation to the Union, how
18 the Union was involved in this whole question.
19 The contract covers that.

20 We have never be able up this point
21 to introduce any evidence regarding what is in
22 that contract, or whether it even bears on that
23 question.

24 And, it seems to me that either
25 Mr. Rodowski or Mr. Tiatizth should be allowed to

1 testify regarding just how the Union should be, or
2 is, involved in this entire question; and that a
3 simple reading of the contract is not going to be
4 enlightening because it's my opinion--and haven't
5 read the contract but I'm under the
6 impression--there is nothing in there about
7 smoking.

8 There may be something in there about
9 an unfair labor practice, what constitutes an
10 unfair labor practice, and when management is
11 obliged to consult with the Union and I have to
12 assume that the Examiner does not have the
13 necessary background to deal with those questions.

14 Now, it may well be that you do. I'm
15 inclined to think you're well versed in this whole
16 matter, but inasmuch as V.A. statute--well, it's
17 actually a federal personnel manual and V.A.
18 personnel manual that is involved, as well as
19 federal statutes, it seems to me that would be
20 helpful for someone to at least get that part of
21 the picture clarified.

22 I appreciate and I asked him to bring
23 the contract down with the thought in mind that
24 that's why you wanted it.

25 If, on the other hand, there is

1 nothing in the contract about smoking and if there
2 is nothing in there grievances, which I'm sure
3 there is, and there is nothing in there about
4 unfair labor practices, when management has to
5 consult with the Union, then obviously the
6 Contract serves no purpose.

7 But, it seems to me it would be
8 helpful to yourself to understand how all these
9 rules and manual provisions in the Contract
10 relate. That is the reason for my having them
11 bring the Contract.

12 I don't feel that we can jump to the
13 conclusion that there isn't anything in the
14 Contract that we're not obliged to do certain
15 things.

16 I explained that Mr. D'Aoust was not
17 qualified to give that kind of testimony. I'm not
18 sure that Bob is. That's why I want to talk to
19 him. But, in any event, that is my reason for
20 bringing it up.

21 EXAMINER MAGID: My request for
22 the Union agreement was made some time ago at
23 almost a first mention of the provisions of the
24 Union contract at the time when Mr. D'Aoust first
25 mentioned that the Union agreement was a stumbling

1 block to ordering a smoke free work environment.

2 That is when I requested the Union
3 agreement. I want to see what is in it. It's not
4 connected at all with Mr. D'Aoust's failure to be
5 more knowledgeable; it's about the Union agreement.

6 Mr. D'Aoust testified that he
7 believed that the Union contract, certain
8 provisions in it, I can find for myself whether
9 those provisions are there. What it said about
10 past practice and so forth.

11 That is the reason that I wanted the
12 agreement so I can read the actual language and as
13 you point out I am capable of reading the
14 agreement.

15 Perhaps I don't know all the
16 interpretations; however, I will leave it to you,
17 Mr. Winslow, to provide any possible favorable
18 interpretations of the Contract as may exist
19 concerning smoking in the work place, whether they
20 be arbitrator's decisions stemming off the Union
21 contract or court decisions, or whatever.

22 I believe you are capable of finding
23 those and if there are there, I suspect you will
24 provide them to me either by way of closing
25 arguments, by way of citation or providing the

1 actual cases.

2 In any case, that is the reason I
3 requested the Union agreement and the reason I
4 approved Mr. Rodowski's presence as a rebuttal
5 witness was for an entirely different reason.

6 MR. WINSLOW: I understand.

7 EXAMINER MAGID: So, your
8 objection is noted, and it will, of course, be
9 part of the record.

10 And, let us proceed with
11 Mr. Rudowski. I will call him in.

12 (Witness enters conference room)

13 BY MR. WINSLOW:

14 Q. All right, Mr. Rodowski, what role
15 did you play in in the hiring of Laren Hall?

16 A. As I indicated before, I'm a staff
17 member in the personnel division. And, at the
18 time in question, roughly the fall of 1984, I had
19 the responsibility for our staffing program which
20 meant that I was responsible for recruiting and
21 placement of individuals and bringing them on
22 board.

23 And, I was the individual that was
24 her initial contact. I initially reviewed her
25 application that we received, contacted her, asked

1 her if she wanted to be considered for the job,
2 invited her for an interview, initially
3 interviewed her for the position prior to
4 referring her to the supervisor which is an
5 ordinary practice.

6 And, then, in addition, on Ms. Hall's
7 first day on the job, I would have been the
8 individual who also conducted the orientation
9 interview, indicating conditions of employment,
10 salary, benefits, going over health benefit
11 options and routine processing matters on the
12 first day of employment.

13 Q. Did you interview her more than once
14 prior to her employment?

15 A. I talked to her briefly on the phone,
16 asking her again if she wanted to come in for an
17 interview, and on the day she came in for an
18 interview, talked to her, I imagine, for fifteen
19 or twenty minutes.

20 Q. What was discussed at that time?

21 A. Typically, I follow very specific
22 patterns of questions when I talk to anybody
23 regarding employment matters.

24 Again, we have a sort of a two-step
25 interview process in our Agency.

1 The individual first comes to the
2 personnel division, and we typically discuss
3 things like salary and benefits.

4 We typically review their history of
5 employment. If there is something unusual on
6 there, we ask the employee about it, but we don't
7 ask a lot of background questions.

8 We sort of give them some background
9 about the place that they will be referred to and
10 then refer them to the supervisors.

11 Basically, most decisions in our
12 Agency as to who to hire rests on supervisor's
13 recommendations. So, our discussion in personnel
14 is relatively limited.

15 Maybe I should back up just a little
16 bit and talk about how I obtained Laren's
17 application which is a little bit different than a
18 typical application because it may have relevance
19 here.

20 There are two basic ways of hiring an
21 individual in federal employment: One is through
22 what we call the competitive process. We get a
23 Civil Service register, and we interview
24 candidates off that register.

25 A second major category, though, is

1 a non-competitive appointment. There are a group
2 of individuals that are appointed, such as
3 handicapped employees, severely handicapped
4 employees; for example, disabled veterans, Viet
5 Nam air veterans, reinstatement eligibles,
6 transfers eligibles. That is pretty much the
7 range for people eligible for non-competitive
8 appointment.

9 That means our Agency or any Federal
10 Agency could consider their employment without
11 having them take a Civil Service examination.

12 In our particular Agency, we maintain
13 applicant supply files of people with respect to
14 eligibility. So, we have an applicant supply file
15 for Viet Nam vets for individuals certified as
16 severely handicapped and that sort of thing.

17 At the time we had a vacancy in our
18 centralized typing unit, and we requested the
19 Office of Personnel Management registers which
20 would have competitive eligibles, but we also
21 checked our inventory of possible candidates
22 with what we call these special status
23 appointments.

24 I'm not sure when Laren would have
25 sent her application in, but I would imagine a

1 couple of months or a couple of weeks prior to
2 when this vacancy occurred.

3 She sent an SF-171 to our Agency and
4 attached to the application, there was a letter
5 from the Michigan Rehabilitation Service
6 indicating that she was classified as severely
7 handicapped under the law and that she was
8 eligible for a clerk typist position and could
9 perform this particular position without hazard to
10 herself or other individuals.

11 There is a standard form that we have
12 provided that indicates that this person has a
13 particular disability.

14 Again, typically, for the affirmative
15 action reasons, one other reason we look at other
16 sorts of candidates in addition to the competitive
17 registers that we have available.

18 In this particular case, I reviewed
19 the application and it indicated that she was
20 working at the Internal Revenue Service and that
21 she was a clerk typist and she had typing skills.

22 So, I called her up and asked her
23 would she like to be considered for a permanent
24 appointment at our Agency. She was on a temporary
25 appointment at IRS, and she indicated that she

1 did.

2 Q. She did what?

3 A. Was interested in being considered
4 for the position.

5 So, we set up an appointment and,
6 again, at that particular appointment, we
7 discussed the items that you would discuss in any
8 interview.

9 Usually, the interview is somewhat
10 structured because we want to have uniformity in
11 terms of what we ask people and what we tell
12 people, and again just to make sure we don't
13 eliminate any important items.

14 Q. Was she considered then because she
15 was handicapped.

16 A. In the sense we considered her
17 because she was a qualified clerk typist and she
18 was eligible for a non-competitive appointment.

19 Q. Because of the handicap?

20 A. That was the basis of her
21 non-competitive eligibility was her being
22 classified as a severely handicapped.

23 Q. What was actually said by you to
24 Laren about her handicap?

25 A. Again, I referenced this attachment

1 that comes with the 171 initially. That had no
2 indication on it what her specific disability was.

3 Later on, we got some more specific
4 information; but on this particular letter, there
5 was no specific indication of what her particular
6 disability was.

7 Typically, when we interview a
8 disabled veteran or handicapped individual, we ask
9 them questions about their handicap in terms of
10 how it would affect their performance of a
11 particular job.

12 So, I asked Ms. Hall if she would
13 tell me what her disability was. She indicated
14 she had a stomach condition and also indicated
15 that she had some respiratory problems.

16 I asked her if she thought that would
17 cause any problems in performing the duties of the
18 job that I discussed.

19 I discussed again, in brief, what the
20 job involved and told her that the supervisor
21 would go into much more detail about the
22 day-to-day activities, and she indicated she
23 didn't anticipate any problems performing that
24 work.

25 Q. Did you tell her the nature the area

1 in which she would work?

2 A. I explained to her that we were
3 considering her for a clerk-typist job
4 specifically in our centralized typing unit, and
5 she would be talking with the supervisor in that
6 particular unit.

7 Q. At the time that you had the
8 interview with her, did you have her medical
9 history from the Michigan Rehabilitation Services?

10 A. No, we didn't.

11 Q. Did you tell her that she would be
12 working in a room with a number of other people?

13 A. I can't remember specifically
14 mentioning that. It was sort of like an obvious
15 fact.

16 For one thing, most of our spaces are
17 open work spaces, and we don't tell people,
18 "You'll be in a large office." It wouldn't be an
19 item discussed.

20 Q. Did she tell you she would be obliged
21 to worked in a smoke free work area?

22 A. No, she didn't.

23 EXAMINER MAGID: Did you tell her
24 that smoking was permitted? Did you tell her what
25 the working conditions were in general?

1 THE WITNESS: In general or do
2 you mean specific to smoking?

3 EXAMINER MAGID: In general with
4 specific respect to whether you have to wait until
5 break before you smoke or what?

6 THE WITNESS: No, that wasn't
7 discussed.

8 EXAMINER MAGID: You didn't go
9 into that?

10 THE WITNESS: No.

11 BY MR. WINSLOW:

12 Q. Why wasn't it discussed?

13 A. Again, typically, the interviews that
14 I have are very structured.

15 There are certain items that I
16 discuss and then I ask people do they have any
17 questions, for example, and, obviously, if you're
18 a candidate for a job and have a particular
19 question about an area, they want me to expand on
20 and provide specific information.

21 But, the topic of what are the
22 smoking regulations at the Veterans Administration
23 never came up.

24 Q. Have you hired any other employees or
25 do you know whether V.A. has any other employees

1 who suffer from respiratory problems?

2 A. The V.A. maintains self
3 identification system for handicapped individuals.
4 Our employees when they first come on board, I
5 give them basically a form that they code.

6 And, there are a number of
7 disabilities listed on there, and they code the
8 disabilities that they have. Again, as part of
9 the file yesterday I was reviewing it, and I
10 noticed that we have ten other individuals that
11 have pulmonary respiratory conditions at our
12 Agency.

13 Q. Have you been involved in the hiring
14 of any of those people?

15 A. Not that I am aware of.

16 Q. Have these people been able to
17 successfully cope with the smoke if there is smoke
18 in the areas where they work?

19 A. There have been several situations --
20 I've been in personnel for four an a half years,
21 and I would say on two or three occasions I've
22 been aware of individuals complaining that maybe
23 someone was smoking a cigar next to his desk or
24 was a heavy smoker.

25 And, I'm not even sure if it was

1 somebody specifically with a disability or someone
2 that was just bothered by the smoke. But, there
3 was a complaint to supervision and accommodations
4 were made by switching desks around, or moving the
5 person away from being right next to the person
6 that smoked.

7 Q. Did that solve the problem?

8 A. As far as I know because none of
9 those situations ever evolved beyond the complaint
10 not being resolved by moving the desks or
11 switching the assignments where people wouldn't be
12 sitting next to each other.

13 Q. Are you saying there was never an EEO
14 Complaint or grievance filed on that question?

15 A. Again, I have been in personnel for
16 four and a half years and this is the only EEO
17 complaint that I have -- we have only had two
18 complaints, and this is the one that has ever been
19 on the basis of handicap specifically.

20 Q. Have you ever had any other employee
21 who seemed to have the degree of disability or
22 inability, let's put it that way, to tolerate
23 cigarette smoke that Ms. Hall apparently parents
24 has?

25 A. I would say, no.

1 Q. Is that the reason you didn't ask
2 specifically about whether she could work in a
3 pool area where there were smokers?

4 A. I believe at the time I asked
5 Ms. Hall the question of whether or not -- people
6 are very sensitive about their handicaps, and I
7 don't typically ask probing questions about their
8 condition.

9 Q. Why not?

10 A. I feel that if they can perform the
11 job and they feel confident that they can perform
12 the job, the nature of their disability is not
13 really relevant.

14 For example, if you will recall, one
15 of Ms. Hall's conditions was a stomach condition.

16 I asked the question, "Is that going
17 to cause any problems in your performing your
18 duties?"

19 Potentially, I guess, it could. The
20 condition might be so severe that she may need
21 some sort of -- she may need, for example, to
22 leave the work site on a constant basis.

23 But, I asked the question, and she
24 said, "No."

25 Q. You asked her what question?

1 A. I asked the question, "Does your
2 disability pose any problems in performing the
3 duties of a clerk typist's job. And, when she
4 said, "No," I felt there was no need to ask any
5 more questions.

6 Q. Would one of the considerations
7 against asking such a question be the fact that if
8 the individual were not hired, he then would have
9 some basis possibly for filing an EEO complaint
10 based on the fact that the reason they weren't
11 hired was because they have is disability or
12 handicap?

13 A. Again, we are hiring based on bona
14 fide qualifications. If the disability doesn't
15 affect the individual's ability to perform a
16 particular job, it doesn't become relevant.

17 So, I'm not going to ask questions
18 that are irrelevant. I ask them can they perform
19 the job, and they give me their assurance that
20 they can.

21 Again, we have a statement from the
22 Michigan Rehab Service indicating that, yes, she
23 could perform the duties of a clerk-typist, then
24 I'm going to be reasonably sure she can perform
25 those particular duties and not go into asking

1 questions in detail.

2 I wouldn't say it's necessarily
3 because we're afraid of an EEO complaint, but I
4 would say it's because we just don't feel it's
5 relevant, and it's not a bona fide occupational
6 qualification not to have any handicap.

7 So, we have no right to ask those
8 questions. We only ask questions as they relate
9 to their ability to perform the duties that will
10 be assigned to them.

11 EXAMINER MAGID: I think you have
12 been straying a bit from the proof of examination.

13 MR. WINSLOW: Actually, I
14 don't have anything else that I want to ask
15 Mr. Rodowski.

16 EXAMINER MAGID: Ms. Hall,
17 Cross-Examination?

18 CROSS-EXAMINATION

19 BY MS. HALL:

20 Q. You said there are three or four
21 others that had a similar problem with cigarette
22 smoke.

23 Did you ever look into how much sick
24 time they use possibly with their lung problem due
25 to the cigarette smoke?

1 A. No.

2 Q. Were they non-smokers, I would
3 assume?

4 A. I assume that if they were
5 complaining about smoke, they were non-smokers,
6 but I don't know that for a fact.

7 Q. Did any of them ever have to take
8 early retirement or go on disability leave?

9 A. No.

10 Q. You said that you asked me about my
11 stomach condition; if that would be a problem, and
12 I said, "No."

13 A. Yes.

14 Q. But, you didn't ask me about my lung
15 condition.

16 A. I didn't ask specifically for each
17 disability. I asked what your disabilities were
18 and if those disabilities would cause any problems
19 in performing the duties of the job?

20 Q. Did you ask me, then, about my
21 stomach condition specifically or not?

22 A. Well, specifically in the sense that
23 I referred to your disabilities and asked if you
24 had any problems, but I didn't refer to each
25 disability separately.

1 I believe I asked -- you indicated
2 what your disabilities are. Do your disabilities
3 cause any problems performing the duties as I have
4 outlined.

5 Q. Do you remember me stating that I had
6 an ileostomy?

7 MR. WINSLOW: I'm sorry, I
8 didn't hear the last--

9 MS. HALL: I asked him if
10 he remembered me stating that I have an ileostomy.

11 THE WITNESS: I can't recall.

12 To the best of my recollection, it
13 was a stomach condition, but I don't remember your
14 referring to it by the medical term.

15 BY MS. HALL:

16 Q. An ileostomy is not a stomach
17 condition.

18 EXAMINER MAGID: Ms. Hall, just
19 keep asking him questions. Your time for
20 testimony is past.

21 BY MS. HALL:

22 Q. If I mentioned my stomach condition,
23 can you tell me why you think I wouldn't have
24 mentioned my lung condition?

25 A. You did mention both conditions. I'm

1 sorry, you did mention that you had two
2 disabilities; one was a stomach condition and the
3 other was a respiratory condition.

4 Q. Okay, is there any reason why someone
5 with a lung condition can't type?

6 A. None whatsoever.

7 Q. Is there any job requirement in the
8 list of job requirements saying that you must be a
9 smoker to be a typist in the typing pool at the
10 V.A.?

11 EXAMINER MAGID: Is there any
12 allegation to that effect, Ms. Hall?

13 THE WITNESS: The position
14 descriptions are absent discussion on any kind
15 of -- they don't say anything even about seeing.
16 We have two blind transcriptionists; so it doesn't
17 mention smoking/non-smoking, sighted/non-sighted.

18 Basically, the position descriptions
19 describe the duties of the position that are to be
20 performed and nothing else.

21 Q. Do you recall me asking you why you
22 hired me to begin with with the obstructive lung
23 disease in view of the smoking in the pool?

24 A. I don't remember any questions.

25 The first time I remember discussing

1 the disability with you in any kind of specificity
2 was I would say three or four weeks after you came
3 on board at the V.A.--I think there was a
4 discussion we had in the hallway outside
5 Personnel--you indicated that you were having some
6 problems with smoke, and I mentioned that I would
7 talk to the supervisor, Ron D'Aoust or Beverley
8 Keith and see what they could do to rearrange the
9 desks, and I think perhaps getting some fans in
10 the area.

11 Q. Do you remember saying to me, "Well,
12 it's such a big room, I didn't think there would
13 be a problem"?

14 A. No, I don't remember that.

15 Q. If you have ten people with a
16 pulmonary respiratory problem, and three or four
17 individuals had made complaints about this problem
18 and you knew I had a lung condition before hiring
19 me, can you tell me why you wouldn't mention --
20 were you aware that the potential for this problem
21 was there?

22 A. Again, three or four complaints over
23 the period of three or four years is one
24 complaint a year that was resolved with just some
25 basic informal reorganization of a particular

1 unit--moving a desk or so--and I guess wasn't
2 heightened to the fact that at a problem could
3 have basically gotten to the level it has gotten
4 in your particular situation.

5 Q. You don't recall me at any time
6 saying to you that I had to avoid toxic substances
7 including cigarette smoke?

8 A. After hiring, I know we have had
9 several discussions regarding the fact that you
10 should avoid smoke, and we've done several things
11 to try to accommodate, I believe.

12 EXAMINER MAGID: The question was
13 whether you recall her stating that to you before
14 she was hired; during the interview?

15 THE WITNESS: I believe during
16 the interview, she indicated that she was bothered
17 by the smoke, and I indicated that they again had
18 a situation once or twice in the past and that in
19 those particular cases, we had moved some desks
20 around.

21 BY MS. HALL:

22 Q. Do you typically go into how you
23 alleviate situations with people you haven't even
24 hired yet?

25 A. It doesn't typically come up in the

1 interviews that I conduct, but there are all kinds
2 of situations that people might bring to an
3 interview.

4 You know, they might say, "I need to
5 get off work early for this reason or that
6 reason," and I might tell them how we could handle
7 that particular situation in our organizational
8 structure.

9 I don't ever remember specifically
10 having a conversation, though, about how we would
11 specifically accommodate a disability with an
12 individual.

13 We have hired since I've been here
14 people without, for example, arms or they have
15 some sort of paralysis and that sort of thing, and
16 they might indicate that they need to get up more
17 often.

18 Typically, what I tell them is that
19 we have a policy of trying to accommodate people
20 as much as possible and they don't anticipate that
21 as a problem. We don't anticipate that to be a
22 problem.

23 Again, we have a very large
24 handicapped work force and, again, no problems at
25 all ever filed at all in a formal or informal

1 capacity about non-accommodation of a handicapped;
2 very severe handicaps involved.

3 We look sometimes the other way in
4 terms of performance standards and quality of work
5 expected because we realize have people have
6 handicaps that need to be overcome.

7 MS. HALL: That's it.

8 EXAMINER MAGID: Mr. Rodowski,
9 are you the handicap coordinator?

10 THE WITNESS: No.

11 I believe that our Operation Manual
12 indicates that the personnel officer for the
13 station is specifically designated as the
14 selective placement handicap coordinator.

15 EXAMINER MAGID: Who would that
16 be?

17 THE WITNESS: Ken Ciach.

18 EXAMINER MAGID: Was he the
19 handicap coordinator at the time Ms. Hall was
20 hired?

21 THE WITNESS: Yes, he was.

22 EXAMINER MAGID: Did you have any
23 familiarity with the EEOC regulations on
24 accommodating handicapped applicants or employees?

25 THE WITNESS: Some

1 familiarity.

2 EXAMINER MAGID: What is your
3 familiarity?

4 THE WITNESS: Again, there are
5 manuals and regulations, a book that the Office of
6 Personnel Management puts out about selective
7 placement of handicapped individuals and that is a
8 policy guideline that I obviously read and am
9 familiar with and have referred to during my
10 tenure.

11 EXAMINER MAGID: You have read it
12 and you've referred to it because during the
13 course of your employment you do interview
14 handicapped applicants and deal with handicapped
15 employees; is that correct?

16 THE WITNESS: That's correct.

17 EXAMINER MAGID: Would it be
18 accurate to say that at some point in your career
19 you have read the EEOC regulations on
20 accommodations of handicapped?

21 THE WITNESS: I don't believe
22 I've ever read them.

23 EXAMINER MAGID: Okay.

24 Did you ever see the medical
25 documentation that was sent in by the Michigan

1 Rehabilitation Service?

2 THE WITNESS: Approximately I
3 believe a week before Ms. Hall actually came on
4 board, I prepared a letter for the personnel
5 officer's signature to the Michigan Rehab Service
6 asking for specific medical documentation
7 concerning her handicap.

8 That is a requirement of law. The
9 Office of Personnel Management has some guidelines
10 about what you need in an accepted appointment
11 folder.

12 Again, as I said, this was an
13 accepted appointment outside of the regular Civil
14 Service register, and we have to set up a special
15 file, and part the documents in that particular
16 file requires a statement from the Michigan Rehab
17 Service which is a little bit more specific as to
18 the nature of the person's disability.

19 EXAMINER MAGID: Did you ever see
20 those medical documents?

21 THE WITNESS: Approximately a
22 week or two weeks after Ms. Hall came on board,
23 they responded and it was incorporated in the
24 file.

25 EXAMINER MAGID: Her hiring,

1 then, was not dependent on yours or anyone in the
2 Agency's reviewing those documents; is that
3 correct?

4 THE WITNESS: Her hire was
5 only dependent upon her being certified as a
6 severely handicapped individual.

7 EXAMINER MAGID: It was not
8 dependent on any limitations that was stated in
9 the response from Michigan Rehabilitation
10 Services?

11 THE WITNESS: No.

12 EXAMINER MAGID: And, you did ask
13 in your letter for Michigan Rehabilitation
14 Services to comment on any limitations or any
15 special requirements of hers, didn't you?

16 THE WITNESS: That is one of
17 the items that we request.

18 EXAMINER MAGID: And their
19 response came in after she was hired; is that
20 correct?

21 THE WITNESS: Yes.

22 EXAMINER MAGID: At the time the
23 response came in, was Ms. Hall in a probationary
24 period?

25 THE WITNESS: I'm trying to

1 think because she was on a temporary appointment.
2 I would have had to review it, but there different
3 probationary requirements for different kinds of
4 appointments.

5 I'm almost certain there is a
6 probationary period for the handicap employment
7 program.

8 EXAMINER MAGID: For the severely
9 handicapped?

10 THE WITNESS: Although, I'm
11 not sure because there is an temporary appointment
12 that federal agencies can use, called the seven
13 hundred hour temporary appointment.

14 EXAMINER MAGID: Yes, I'm aware
15 of that.

16 THE WITNESS: Because of that
17 particular provision, I think there might be an
18 indication that there isn't a probationary period
19 for the handicapped.

20 EXAMINER MAGID: Before you refer
21 to that -- I'll ask you to refer to it if I want
22 you to -- my familiarity with other cases
23 involving the severely handicapped at other
24 agencies, leads me to believe that there is a
25 probationary period under the handicapped program

1 that might be twice as long as the probation
2 period for regular career conditional employees.

3 Are you familiar with that?

4 THE WITNESS: I think I'm
5 familiar with what you're talk about, but it's not
6 a probationary period.

7 If I could discuss a little bit.

8 EXAMINER MAGID: Yes.

9 THE WITNESS: There is a
10 special seven hundred hour temporary appointment
11 for handicapped individuals under the severely
12 handicapped program.

13 This allows the Agency to hire
14 somebody seven hundred hours for approximately or
15 four months and, basically, gives the Agency an
16 opportunity to look to see if their handicap
17 causes them any kind of accommodations problems.

18 Then, if it does, basically, the
19 appointment runs out and it's sort of an easy way
20 to get an individual off the rolls that that have
21 problems accommodating those particular
22 handicapped.

23 There is also an authority that
24 allows to you to select the handicapped individual
25 on a permanent basis, sort of side stepping this

1 initial period.

2 In Ms. Hall's case, she was on seven
3 hundred hour at IRS at the time we contacted her
4 and it was our impression that since she was
5 already serving sort of a temporary appointment at
6 IRS that there was no need to offer her a
7 temporary employment; we would offer her a
8 permanent position basically to her advantage
9 because you get full benefits if she she doesn't
10 get a temporary appointment.

11 There is a two-year period, once
12 you're hired as a permanent employee where you're
13 still considered an accepted appointee.

14 After two years, they convert it to
15 what they call clear conditional status. The only
16 real effect of that is that it gives her a greater
17 reinstatement eligibility right at some point in
18 the future. I think it might give her greater
19 protection during her accepted appointee, but it's
20 not a probationary period.

21 In a probationary period, you're able
22 to separate somebody without certain due process
23 obligations that you have once somebody completes
24 the probationary period, and there is nothing
25 similar to that.

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EXAMINER MAGID: What is the reason that you selected Ms. Hall rather than the use of a competitive system for hiring?

THE WITNESS: Typically, we use the systems simultaneously so that the job Ms. Hall was considered for in the typing pool at the time we might have thirty employees, lots of turnover.

 It's like a basic entry level position; so we may fill 15 or 20 positions a year in that particular typing pool.

EAMINER MAGID: So, you fill from both?

THE WITNESS: Right -- I don't recall in this particular situation -- what we do, as you are probably aware, on a Civil Service register, there are certain limitations as to who you can hire. Basically, you have to hire the top three.

 Now, we can give our supervisors the top three off the list and also invite, say, Veterans, Viet Nam vets, disabled vets and handicapped individuals. It works to our benefit in a few ways.

 First of all, you get more candidates

1 to consider, and the more candidates, the better
2 chance that we'll select a better candidate. And,
3 second of all, we have certain affirmative action
4 goals that we're aware of and by looking at these
5 alternative recruitment sources, we can meet those
6 EEO goals as well.

7 EXAMINER MAGID: Do you have
8 affirmative action requirements with respect to
9 hiring the handicapped?

10 THE WITNESS: Yes, we do.

11 EXAMINER MAGID: Did Ms. Hall's
12 hiring satisfy the Agency's obligation to meet
13 those affirmative action requirements?

14 THE WITNESS: We don't have
15 any specific goals. As part of our handicapped
16 supporting plan, we indicate where we are, for
17 example, as compared to the Agency in the federal
18 work force.

19 Currently, we're about sixteen
20 percent handicapped identified again through the
21 self identification system which I talked about
22 earlier and, again, we have about four percent
23 individuals referring to themselves as severely
24 handicapped.

25 We do have a goal for severely

1 handicapped individuals.

2 EXAMINER MAGID: So, the answer
3 to my question is "no," she did not she did not go
4 toward meeting an Agency goal for hiring.

5 THE WITNESS: Not for the
6 specific goal but, again, a general goal of having
7 more handicapped people on board, yes.

8 EXAMINER MAGID: Any redirect,
9 Mr. Winslow?

10 REDIRECT EXAMINATION

11 BY MR. WINSLOW:

12 Q. When the state responded to your
13 letter, did they indicate to you that Ms. Hall
14 would require any special adaptation of the work
15 place in order to accommodate her handicap?

16 A. I believe it said avoid smoking
17 areas.

18 EXAMINER MAGID: Isn't their
19 response in the complaint file?

20 THE WITNESS: I don't believe
21 it's in the complaint file, but there was a file
22 that I brought earlier today, documenting her
23 appointment.

24 I referenced earlier a file that we
25 have to maintain, and I believe the response is in

1 that particular file.

2 EXAMINER MAGID: I show you
3 Exhibit C-5 of the complaint file, Mr. Rodowski.

4 Is that the response from Michigan
5 Rehabilitation Services that you are speaking of?

6 THE WITNESS: This is the
7 response.

8 EXAMINER MAGID: Would you look
9 through it and see if there are specific
10 limitations that are listed. Look on Page Four of
11 that exhibit under IV.

12 THE WITNESS: It says "avoid
13 dusty, smokey work setting."

14 EXAMINER MAGID: And, that was
15 the recommendation from the Michigan Agency; is
16 that correct?

17 THE WITNESS: That's correct.

18 MR. WINSLOW: What was the
19 date of that?

20 THE WITNESS: October 3, 1984,
21 letter.

22 EXAMINER MAGID: Yes, that is the
23 date the cover letter of Exhibit C-5.

24 BY MR. WINSLOW:

25 Q. Had Ms. Hall been hired at that

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point?

A. Yes, Ms. Hall was hired, I believe, September 24, 1984, was the date.

Q. Did you consider the typing pool to be a dusty, smokey work setting?

A. Dusty, I would say, no. Smokey, I guess I really didn't have any opinion as to whether it was smokey.

My only familiarity with the typing pool would be to occasionally walk a person over to it for a job interview. But, typically, that is done by the secretary. I really have very little reason to go onto the typing pool; very seldom do.

I have never been aware when I walked in, like, there is a lot of smoke there. I never had that kind of an impression.

Q. That is what I'm asking. Did you consider the pool to be a smokey area?

A. No.

EXAMINER MAGID: Do you smoke?

THE WITNESS: No, I don't.

BY MR. WINSLOW:

Q. Does Mr. Clowney smoke?

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A. No.

Q. Does Mr. Tiatizth smoke?

A. Mr. Tiatizth smoked until about six months ago and he took my advice and gave it up.

MR. WINSLOW: I have nothing further.

EXAMINER MAGID: Ms. Hall, anything further?

RE CROSS EXAMINATION

BY MS. HALL:

Q. Do you recall telling me that you hired me as a Schedule A with a special two-year probationary period?

A. I don't remember specifically discussing your appointment although it probably came up, and I believe -- let me take that back if I may -- as part again of this orientation process that I mentioned on the first day, we do discuss the nature of the appointment, and I did discuss with you that it was a Schedule A appointment and that there would be conversion to a career conditional appointment after two years.

Q. Can you tell me why people coming off the roster have a one-year probation and disabled people have a two-year probation?

1 A. I never said that you have a two-year
2 probation period. Again, it's called a conversion
3 to career conditional status, which only affects
4 your eligibility for reinstatement should you
5 leave the federal government at that point.

6 But a probationary period speaks to
7 something different and at maximum, a one-year
8 probationary period is the maximum in any federal
9 government position.

10 And I believe, although I would have
11 to refer to something else before I could tell
12 with any complete confidence, that the seven
13 hundred hour temporary appointment then precludes
14 your use of the probationary period because it
15 basically uses the substitute for probationary
16 period.

17 Q. Do you have a copy of what Schedule A
18 is that would state how long the probationary
19 period is?

20 A. May refer to this?

21 EXAMINER MAGID: All she asked
22 you is whether you have it?

23 THE WITNESS: I believe I have
24 in our now office what Schedule A is and also as
25 part of the documentation file there is that

1 particular chapter the OPM manual. There's a
2 photocopy in there.

3 BY MS. HALL:

4 A. Could a photocopy be provided of
5 Schedule A?

6 EXAMINER MAGID: No.

7 You have had plenty of opportunity to
8 request documents such as that and you've not
9 requested it up until now.

10 MS. HALL: Okay, that's it.

11 EXAMINER MAGID: I have no other
12 questions.

13 Thank you for coming and offering
14 your testimony, Mr. Rodowski, and I will caution
15 you not to discuss your testimony outside the
16 hearing room.

17 THE WITNESS: Okay, thank you.

18 (Witness Excused)

19 EXAMINER MAGID: Is there
20 anything else before we go into closing
21 statements?

22 MS. HALL: No.

23 MR. WINSLOW: I don't think
24 so, no.

25 EXAMINER MAGID: All right, let's

1 go into closing statements.

2 Ms. Hall?

3 MS. HALL: Are there are
4 any restrictions about closing statements that I
5 should know about?

6 EXAMINER MAGID: There are very
7 few restrictions on closing statements, and if we
8 come to them, they're easily recognized,
9 and Mr. Winslow will challenge you.

10 MS. HALL: I wanted to
11 mention some cases that might be helpful.

12 EXAMINER MAGID: All right, I
13 would appreciate it. Jacobson versus Michigan
14 Mental Health Department. The number is 276 MW
15 2(d) 627.

16 The next one is Gus versus Jack Tar
17 Management Company, 407 F.(2) 9859.

18 EXAMINER MAGID: Wait a minute.
19 407 F.(2) and then what?

20 THE WITNESS: 9859.

21 EXAMINER MAGID: I think you had
22 better show me what you have because you're giving
23 me an invalid number.

24 MS. HALL: That's what I
25 have.

1 EXAMINER MAGID: Could it be that
2 that the 9 after the (2) is a (d).

3 MS. HALL: Banzhaf versus
4 The FCC, 405 (f)(d) 1082. I think you might want
5 to a page 1097 on that. Austin versus Tennessee,
6 179 U.S. 343; and Golden versus Comtech, Number 36
7 ETD 35095.

8 I came to the V.A. simply hoping to
9 find gainful employment. I had previously been
10 involved in a lawsuit as you mentioned with
11 Deaconess Hospital and anyone who has been
12 involved in lawsuits will do just about anything
13 to steer clear of getting into another one.

14 So, I specifically mentioned when I
15 came to V.A. that I had this problem. I
16 specifically mentioned that I had to avoid smoke.

17 And, I remember leaving feeling
18 relieved that this was out the way and they hadn't
19 just said, "Well, get out, because we can't use
20 you."

21 I then came here in good faith,
22 quitting the position that I was in and found a
23 bunch of cigarette smoke which began physically
24 affecting me immediately.

25 I made those effects known to

1 management on many different occasions, and their
2 response was basically to tell me that nothing was
3 going to change and that I should just try to move
4 on, which I tried to do.

5 I took every test I could. I was
6 told I was either too old or because I couldn't
7 tolerate smoke that I couldn't be hired.

8 I tried at the V. A. Medical Center
9 Ann Arbor, I tried at the V. A. Medical Center in
10 Allen Park, I tried the Post Office; I tried every
11 different department within the V. A.

12 They offered me a position in the
13 teletype room. They said that it was for training
14 only. At the point where I signed up for it, I
15 was told that they couldn't out-and-out offer me
16 the position, and later on in testimony they're
17 claiming that they could have offered me the
18 position.

19 I don't know really know whether they
20 could have or not, but I wasn't aware that I had
21 to take that position. If I had, I probably would
22 have taken it.

23 I was given an out by my supervisor
24 who said up until that time she had not done
25 anything about the smoke and that I was a good

1 transcriptionist and if I would stay there, she
2 would do something.

3 I said, "Good because I don't want to
4 go there. I'd rather stay here. I want to learn
5 the 5520."

6 My supervisor and I discussed the
7 fact that the teletype room was not as good a job
8 as running the 5520.

9 So, I stayed in the pool, assuming
10 that accommodation was going to be maintained.
11 Beverly was the sort of person that if she said
12 she was going to do something, unless she was told
13 not to by someone, her supervisor, she would have
14 probably been able to pull it off.

15 I think I worked very hard to prove
16 that I could do that job if I just given a chance.
17 I do just about everything twice because the smoke
18 affects me so badly, which means I work twice as
19 hard as everybody else. I stay late night and
20 proofread--I used to stay late at night
21 proofreading that stuff--because there were so
22 many errors I would have to do things over and
23 over again.

24 I worked through all my lunch breaks
25 and regular breaks when I started there,

1 proofreading because that was the only time when
2 there were enough people out the room that I could
3 concentrate because the smoke would be a little
4 bit less.

5 So, I worked very hard trying to make
6 it on the job, and it's pretty much been to no
7 avail because no accommodations have been made. I
8 suspect they thought I would just away. I tried
9 to but I couldn't. There was no place to go.

10 Mr. D'Aoust said he wasn't aware of
11 anyone else having problems. There is testimony
12 here by Beverly Keith--I would assume you got a
13 copy of this--stating there were ten people that
14 complained, Pat Barton and Pat Norton specifically
15 complained about it; yet he still maintain that he
16 is not aware that anybody in the room has a
17 problem but me. I find that hard to believe.

18 Mr. D'Aoust also said that I had
19 great promotion potential. I would like to see
20 what he bases that on since I've tried in every
21 department but one in the V.A. and been turned
22 down by all of them.

23 If he builds me an eight thousand
24 dollar room, there is still going to be no place I
25 can go because nobody else will build me an eight

1 thousand dollar room. I will be in the typing
2 pool just like I would have been in the closet if
3 I would have let him put me in there for the rest
4 of my life, if I live. It's going to be a short
5 life, the way that smoking is going.

6 There has been a lot of concern over
7 the rights of smokers, and none as far as I can
8 see of the rights of non-smokers. There has been
9 a lot of tension and anxiousness and anxiety that
10 not smoking causes smokers, and I haven't heard
11 anybody mention anything about the tension and
12 anxiety and the fear I experience when I have to
13 go down the clinic because I can't breath anymore.

14 When I have pleuracy attacks because
15 of the cigarette smoke that is so severe I think
16 they offered to send me to a hospital.

17 Nobody seems to be concerned about
18 that, and I don't quite understand why when
19 solution doesn't cost them a penny.

20 There is no job requirement that I be
21 a smoker, and I obviously am a smoker from the
22 many, many lung ailments that I keep coming down
23 with as I work at the V.A.

24 I still haven't found anything saying
25 specifically that the pool is a smoking area nor

1 have I seen anything that guarantees to a smoker
2 the constitutional or legal right to smoke in the
3 pool or in finance where there are about probably
4 20 smokers altogether or in loan guarantee or
5 anyplace else.

6 I don't know quite what this
7 statement is supposed to contain, but I can't
8 think of anything else to say except that I hope
9 EEOC can remedy this situation because I really
10 need to keep this job, and I don't have a lot of
11 other places to go.

12 Obviously, the many applications that
13 I've turned in would tend to verify that, I think.
14 That's pretty much it. I don't have anyplace to
15 go but the typing pool. So that's it.

16 CHAIRMAN MAGID: Mr. Winslow?

17 MR. WINSLOW: Ms. Hall knew
18 she had this condition when she came.

19 She did not tell anyone the severity
20 of the condition when she was hired. She knew
21 because she had the problem at Deaconess Hospital,
22 and she received a substantial sum of money as a
23 consequence of her Worker's Compensation claim and
24 also as a consequence of her lawsuit.

25 She also had the same problem at the

1 IRS where she didn't come here ignorant of the
2 problem. In spite of all that, she just said
3 nothing other than, "smoke bothers me."

4 It seems to me that if the problem
5 was that serious, that she had an obligation to
6 explain how serious it was and to consider the
7 conditions under which she would be working when
8 she was given the opportunity to look at them.

9 She admitted she was shown the area,
10 she was interviewed in the area, apparently spent
11 five, ten or fifteen minutes in the area, and it
12 seems to me that she had an ample opportunity to
13 observe the conditions where she was going to be
14 working.

15 Yet, not one word was said at least
16 to indicate that this kind of an environment would
17 bother her.

18 We have a lot of employees--ten of
19 them--who have respiratory problems who for the
20 most part are able to get along fine in the
21 working areas that are provided for them and which
22 contain smoking people.

23 And there was no testimony, as I
24 understand it, that there was three or four of
25 those people who complained. It is my

1 understanding from Mr. Rodowski's testimony that
2 there were three or four complaints, but that they
3 were various individuals not necessarily the 10
4 people who have the respiratory problem.

5 When the problem became known to the
6 Agency, and the severity of it became known to the
7 Agency, the same attempts were made to resolve the
8 problems as has been made for other employees who
9 presented with the same difficulties, but who
10 apparently were able to tolerate the situation in
11 the place they worked, simply by having their
12 desks relocated.

13 The Agency went a step further in
14 that and attempted to isolate those who smoked
15 from those who did not smoke and particularly from
16 Ms. Hall, but they have some very severe
17 limitations, one being that that word processing
18 equipment is located on one side of the room as
19 far as wiring, that some employees needed more
20 supervision than other employees, that new
21 employees need to be where they can be given
22 assistance by the supervisor.

23 And, these attempts to relocate the
24 employees were not made without considerable
25 difficulty. It seems to me that Ms. Hall fails to

1 recognize how hard it was to try to do these
2 things for her and on her behalf, especially when
3 she says that nobody cared, and I think the people
4 did care.

5 An effort was made to try to find a
6 place where there was no smoking. Unfortunately,
7 the room turned out to be worse than the pool area
8 as far as ventilation and stuffiness were
9 concerned.

10 Fans were installed. There is a
11 conflict as to whether the fans blew the smoke
12 toward her or whether they blew the smoke away
13 from her. It makes no sense to provide fans to
14 blow smoke toward her, so I would assume that the
15 smoke was blown away from her, at least insofar as
16 the other employees would tolerate the breeze and
17 the discomfort from the cold air blowing on them.

18 She was offered a job in the teletype
19 unit. The intent was that there would be no one
20 in that area smoking. But the other two people in
21 that room did not smoke. The room was air
22 conditioned and air handling was such as to
23 provide probably one of the best smoke free, if
24 you will, environments that could be found in the
25 building.

1 Mr. D'Aoust had called the smokers
2 into his office on at least two occasions
3 • according to his testimony, telling them as well
4 as her supervisor that Laren had a problem and
5 they had a need to try to cooperate by reducing
6 and eliminating the smoke as far as possible and
7 refrain from cigarette smoking when they were near
8 her desk.

9 I don't know how she could conceive
10 that her immediate supervisor would have more
11 clout with the employees than the chief of the
12 division.

13 Mr. D'Aoust is the chief of the
14 division and if he asks the employees to
15 cooperate, I find it a little bit hard to figure
16 out why she would think Beverley Keith who is a
17 unit supervisor a couple of steps down would be
18 able to enforce any rules regarding smoking any
19 more than Mr. D'Aoust had already attempted had.

20 I can't give you off the top of my
21 head a Federal law on unfair labor practices, but
22 one of the provisions is that if you change the
23 working conditions in a work place you are obliged
24 to consult--and I use the word "consult" because
25 that is the word that is used in the code--with

1 the Union.

2 You're not obliged to get the Union's
3 concurrence, but you are required to at least ask
4 them what they think about the proposed change.

5 If you fail to do that, the Union or
6 the employee can file an unfair labor practice
7 charge which results in a proceeding to try to
8 correct the problem with respect to the Union and
9 a failure to comply with the law.

10 If the Agency were to unilaterally
11 decide, or decide with the concurrence or at least
12 after having consulted with the Union, that
13 smoking either should be reduced or eliminated in
14 the typing pool, it would subject the Agency to a
15 grievance by any employee who felt that he had a
16 right or she had a right to smoke.

17 You have up to, it was testified,
18 five to eight people who smoke. The Agency has
19 the choice of changing its policy on smoking
20 locally and face a grievance from many of those
21 people which again would entitle considerable
22 expense and considerable and prolonged
23 proceedings.

24 And, it was felt that its policy which
25 had been established in 1979 had never been

1 changed even though the written policy, as such,
2 had been allowed to terminate or lapse by the
3 terms of the circular itself, but to the best of
4 your knowledge--and I have been here almost 25
5 years--there has never been a policy against
6 smoking in the Veterans Administration.

7 The policy in that circular and the
8 policy that was provided to me that was offered as
9 Exhibit 2, the memorandum from the Director, were
10 given to me yesterday by Mr. Rodowski after we
11 inquired about any written policy that might exist
12 on smoking. I don't think it was well known that
13 such a policy existed.

14 It was pretty apparent that one of
15 the things that was done to try to alleviate the
16 problem for Laren was to put out that memorandum
17 and the Director undertook in her behalf to help
18 resolve the problem by encouraging the employees
19 who worked with her to cooperate.

20 Again, I think the concerns of top
21 management is quite evident from that action.

22 The statement was made to me by the
23 Director that when Artie Pierce, who was the
24 President of the Union, was approached on this
25 subject and suggested that ash stand and the sign

1 outside the publications unit door, that was the
2 about the only time he ever saw Artie Pierce
3 happy, really expressing an enthusiasm, or
4 pleasure, about a problem that had been presented
5 to him because he felt that he had finally found
6 the solution to Laren's difficulty.

7 Again, I think that illustrates that
8 the Union president was sympathetic with her
9 problem and that he was attempting through his
10 office to find a solution for her problem.

11 As far as promotion possibilities are
12 concerned, testimony was offered that there have
13 been a number of people who have worked in that
14 teletype unit in the room that was offered to
15 Laren and those people were promoted out of that
16 unit without any difficulty, without any feeling
17 that they couldn't do some other job.

18 As a matter of fact, the secretary to
19 the personnel office came from that unit, and
20 she presently performs much the same functions she
21 did when she was in the pool and also a similar
22 job, all of which involves typing in the teletype
23 room.

24 The simple answer, I suppose, to the
25 problem that might be, "Why don't you enclose the

1 area that Laren occupies?"

2 I discussed that with Mr. Clowney, I
3 discussed several other possible solutions with
4 Mr. Clowney, and his response to that is much the
5 same as Mr. D'Aoust has indicated; that if we do
6 it for one, we're going to be faced with trying to
7 do it for others, and inasmuch as there ten people
8 with respiratory problems, and the two people that
9 don't have any respiratory problems in the
10 District Council's, who have also complained about
11 smoking.

12 And, I might add, I don't like
13 smoking either because I don't smoke, and I don't
14 like to have to sit and smell somebody's smoke.

15 I suppose if this was the issue
16 involved, that we would have to lot of people
17 who would complain that they needed a private
18 office.

19 I don't think that is the issue. I
20 think the issue is did we, in fact, make a
21 reasonable effort to accommodate this employee's
22 handicap.

23 And what is reasonable under these
24 circumstances? We have one employee in that pool
25 who would be just as seriously and adversely

1 affected if smoking were banned as Laren is with
2 smoking existed.

3 I don't think the issue in this case
4 is whether smoking, per se, is discriminatory. I
5 think that there has been no evidence offered that
6 is of a very conclusive nature which shows that
7 smoking is harmful to the health of individuals.

8 There have been many articles
9 written, there has been a lot in the press, there
10 have been a lot of studies done, and there are a
11 lot of reports which have been published alleging
12 that smoking harmful, but I would suggest that
13 there are many that also suggest that that is not
14 really true. And, I don't think that is the issue
15 here.

16 I would strongly urge the Examiner on
17 that point. The issue is: Did we do what we
18 could reasonably do to accommodate Laren's
19 disability or handicap?

20 She has offered nothing whatever as
21 far as I can see to show that what was done was
22 not, in fact, a sincere effort to deal with the
23 problem; that all these things they were done were
24 pretext.

25 I think she has the burden of showing

1 that what we've done is, in fact, or was, a
2 pretext. I don't think she has proven anything on
3 that.

4 She is offered no other reason for
5 all the moves that were made. She has offered no
6 other reason for them to try to stick her away in
7 the teletype room.

8 And just to boil it down, Laren has a
9 serious problem. I'm sympathetic with it; I think
10 all the people that are charged with
11 discrimination are sympathetic with it. We don't
12 have any answer.

13 If we provide her with an answer,
14 it may, in fact, mean that if she leaves the
15 employment of the Agency and any money that was
16 spent was lost.

17 I think that if we had known the
18 severity of her disability and the severity of her
19 lung problem, that there would have been some real
20 question as to whether or not she could, in fact,
21 do this job under these circumstances.

22 I think that remains of the problem.
23 We wrote to her doctor and asked him to tell us,
24 in fact, whether she could successfully work under
25 the conditions in that room; and we never received

1 a clear cut response to that letter.

2 She filed another on EEO complaint on
3 that because she feared she would be fired.

4 Nobody is trying to fire her.

5 What we're trying to do is to somehow
6 accommodate her respiratory illness. And it is
7 not easy to do.

8 I don't think we have an obligation
9 to go beyond what we have already done.

10 I think if there is any fault to be
11 found in the way this whole thing has been
12 handled, it's on Laren's, not on the Agency's
13 shoulders.

14 I really don't have any cases that I
15 can cite to the Examiner which uphold our
16 position. There are ample cases--there are
17 a lot of cases--they all hinge on a particular
18 fact in a particular case, but it is well
19 recognized in the case law that smokers have
20 rights too, and that unless there is a policy
21 established by an Agency of the government, such
22 as the one established by TACOM, that you can't
23 just arbitrarily tell employees that they can't
24 smoke.

25 Your V.A. has no such policy. If we

1 had such a policy, it would be published. As a
2 matter of fact, the practice, all the time I've
3 been with the V.A. has been that people who want
4 to smoke can smoke; people that don't want to
5 smoke don't have to smoke.

6 EXAMINER MAGID: Is that it,
7 Mr. Winslow?

8 MR. WINSLOW: That's it.

9 EXAMINER MAGID: I have not
10 yet ruled on my Proposed Examiners Exhibit 1,
11 and I will sustain Mr. Winslow's objection,
12 and I will not admit it on the grounds that he
13 stated; that the Department of the Army is another
14 Agency. It is not the V.A. Conditions may be
15 different.

16 There is no evidence in this case at
17 this time as to the conditions at either TACOM or
18 any other Armyarm installation.

19 I will not admit Exhibit 1.

20 At this time, I will go off the
21 record and make my determination as to whether
22 this case does meet the criteria of issuance of a
23 bench decision.

24 And, when we reconvene, I will
25 inform the parties of what that decision is and if

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I have decided that this case does meet the
criteria for a bench decision, I will issue it at
that time.

We will adjourn at this time until
8:30 tomorrow morning.

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(Whereupon, the proceedings were
adjourned at 6:00 p.m.)

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C E R T I F I C A T E

I, Norma J. Carlin, a duly
qualified and practicing stenotypy court
reporter, do hereby certify that the foregoing
is a true and accurate transcript of
proceedings taken before me in the presence
of all witnesses and subsequently transcribed
out of the presence of the witnesses; and
that I am a neutral party in these proceedings
and have no interest whatsoever in their
eventual outcome.

IN WITNESS WHEREOF, I have hereunto
set my hand this 16th day of September, 1986,
A.D., Cleveland, Ohio.

CARLIN ASSOCIATES

Norma J. Carlin