Torts—Nonsmokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area. *Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Super. Ct. Ch. Div. 1976).

Donna Shimp, who was allergic to cigarette smoke,[1] sought an injunction to require her employer, New Jersey Bell Telephone Company, to prohibit on-the-job smoking by her fellow employees.[2] In *Shimp v. New Jersey Bell Telephone Co.*[3] the Superior Court of New Jersey, Chancery Division, granted the injunction based upon the employee's common law right to a safe work environment.[4] The court held that this common law right included the right to breathe smoke-free air. Therefore, the court required the New Jersey Bell Telephone Company to prohibit smoking in the work area and to restrict smoking to designated nonwork areas.[5]

In reaching this holding, the court addressed a novel issue: whether a nonsmoker has a right to breathe air uncontaminated by cigarette smoke in his place of work. Resolution of this issue was founded upon a recognition of an employer's common law duty to provide his employees with a safe working environment.[6] As a defense to the application of this duty, the employer asserted that the employee assumed the risk of any allergic reaction as an incident of her employment: she should have known of the likelihood that some of her fellow employees would smoke.[7] The court rejected this

1. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 410 (Super. Ct. Ch. Div. 1976). The court termed Shimp's complaint "a legitimate grievance based upon a genuine health problem. She is allergic to cigarette smoke. Mere passive inhalation causes a severe allergic reaction which has forced her to leave work physically ill on numerous occasions." *Id.* Affidavits of attending physicians detailed her symptoms. They also noted that remission of these symptoms occurred when she remained in a smoke-free environment and that even one smoker adjacent to Shimp could cause a severe allergic reaction. *Id.*

2. *Id.* at 409-10.

3. *Id.* at 408.

4. *Id.* at 410-13. The court used the general duty clause of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654(a)(1), and the Cigarette Smoking Act of 1970, 15 U.S.C. § 1331, to bolster its decision.

5. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 415-16 (Super. Ct. Ch. Div. 1976).

6. *Id.* at 410. To substantiate this duty, the court listed, but did not discuss, New Jersey cases that recognized the employer's common law duty to provide his employees with a safe place of employment. *Id.*

7. *Id.* at 411. The employer based this contention on Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411 (App. Div. 1951), *cert. denied*, 7 N.J. 77, 80 A.2d 494 (1951), which held that the plaintiff could not recover damages for an illness allegedly contracted from the inhalation of cellulose acetate dust because the dust was a nontoxic result

contention for two reasons. First, the court reasoned that the employee could not have assumed the risk of allergic reaction because cigarette smoke was not a natural by-product of the employer's business.[8] Second, in accordance with affidavits of medical experts submitted by the employee, the court held that cigarette smoke endangered the health of smokers and nonsmokers alike.[9] For these two reasons, the court held that cigarette smoke is a preventable hazard[10] and thus required the employer to eliminate it from the work area.[11] Concomitant with this duty to eliminate cigarette smoke was the need to balance the respective interests of smokers and nonsmokers. The court resolved this balance by relegating smoking to designated areas away from the work area, which protected the interests of both smokers and nonsmokers.[12]

To support its conclusion that the employer's common law duty to furnish a safe working environment included the duty to keep the work area free from cigarette smoke, the court referred to the Occupational Safety and Health Act of 1970 (hereinafter referred to as OSHA).[13] The court made express reference to OSHA's general duty clause,[14] which it interpreted as imposing upon the employer the duty to eliminate all foreseeable and preventable hazards.[15]

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of the manufacturing process. Canonico v. Celanese Corp. of America, 11 N.J. Super. 445, 78 A.2d 411, 416 (App. Div. 1951), *cert. denied*, 7 N.J. 77, 80 A.2d 494 (1951).

8. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 410, 411 (Super. Ct. Ch. Div. 1976).

9. *Id.* at 413. The Court decided the *Shimp* case upon the briefs of counsel and affidavits of medical experts. The court heard no oral testimony. *Id.* at 410.

10. *Id.* at 411-16. To find that cigarette smoke was hazardous to a nonsmoker's health and that cigarette smoke was a hazard that could be prevented, the court took judicial notice of several reports relating the hazards of cigarette smoke to health. These reports were congressional findings; facts formulated by the Department of Health, Education, and Welfare; reports of the Surgeon General of the United States; and affidavits of medical experts submitted by the employee. Because a national policy existed to recognize and warn the public of the danger of cigarette smoke, and the general public also accepted the hazards of cigarette smoke, the court determined that judicial notice could be taken on these facts. *Id.*

11. *Id.* at 416. For precedent to issue an injunction to eliminate cigarette smoking from the work area, the court relied on prior cases establishing that New Jersey courts have long been receptive to the idea of protecting employee's rights by injunction, so long as the court's power had not been specifically curtailed by legislative withdrawal of a specific labor area from the court's jurisdiction. The court also determined that an injunction would not interfere with the function of the Workman's Compensation Act; the court interpreted that Act to apply only when an employee seeks monetary damages for an actual injury. *Id.* at 412.

12. *Id.* at 416.

13. *Id.* at 410, *citing* 29 U.S.C.A. §§ 651-78 (1970).

14. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 410 (Super. Ct. Ch. Div. 1976), *citing* 29 U.S.C.A. § 654(a)(1) (1970).

15. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 410 (Super. Ct. Ch. Div. 1976). The cases cited by the court were California Stevedore & Ballast Co. v.

Although the nonsmoking employee was successful in the *Shimp* case, the issue of whether an employee can prevent cigarette smoking in the work area is still new to American jurisprudence. Because very few cases have been litigated in the courts on nonsmokers' rights, the methods by which a nonsmoking plaintiff may seek relief are not defined clearly. A nonsmokers' rights case urging constitutional violations by the proximity of smokers to nonsmoking plaintiffs was not successful.[16] In *Gaspar v. Louisiana Stadium and Exposition District,*[17] the plaintiffs sought to use the first, fifth, ninth and fourteenth amendments[18] to prohibit smoking in the Louisiana Superdome. However, the court held that these constitutional amendments could not be stretched to remedy every alleged

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Occupational Safety & Health Review Comm'n, 517 F.2d 986, 988 (9th Cir. 1975); National Realty & Contr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265-67 (D.C. Cir. 1973).

16. Gaspar v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976). This suit was brought pursuant to the provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The plaintiffs alleged that the state, by allowing smoking in the Louisiana Stadium & Exposition District arena, violated their constitutional rights to breath smoke-free air while in a state building.

17. Gaspar v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716 (E.D. La. 1976).

18. *Id.* at 716-21. The nonsmoking plaintiffs in the *Gaspar* case argued that "the existence of tobacco smoke in the Superdome creates a chilling effect upon the exercise of their first amendment rights, since they must breathe that harmful smoke as a precondition to enjoying events in the Superdome." *Id.* at 718. The court termed this a unique argument but then declared that this claim "has no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates first amendment rights of those who refuse to attend events where alcoholic beverages are sold." *Id.*

Fifth and fourteenth amendments protections arguably are applicable to guarantee a smoke-free environment because the penumbrae of the fifth and fourteenth amendments include the right to a clean environment. *Id.* at 718-21. Also, it has been argued that since the fifth and fourteenth amendments protect life, liberty and property, these amendments should be extended to protect the nonsmokers' right to a smoke-free environment because cigarette smoke is harmful to health and a person's health sustains the life protected by these amendments. Note, *Toward Recognition of Nonsmokers' Rights in Illinois,* 5 LOY. CHI. L.J. 610, 615 (1974).

The plaintiffs in *Gaspar* also argued that the ninth amendment was applicable to nonsmokers' rights because the ninth amendment guarantees fundamental rights not enumerated in the Constitution, and one of these unenumerated rights is the right to enjoy a smoke-free environment. Gaspar v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 721-22 (E.D. La. 1976).

However, an allegation that a smoke-filled environment presents violations of the ninth amendment raises serious proof problems. The plaintiff "must demonstrate that the ninth amendment does constitute a basis for asserting rights not enumerated in the Constitution, that the right to a decent environment is one of those protected but unenumerated rights, and that this right has been violated in the particular case before the court." Note, *Toward Recognition of Nonsmokers' Rights in Illinois,* 5 LOY. CHI. L.J. 610, 615 (1974).

wrong; that if these amendments were so interpreted as to protect nonsmokers' rights, the Constitution would be interpreted too broadly; and, that remedies for alleged wrongs of this nature are best left to the state legislature.[19] In contrast to the *Gaspar* court's rejection of constitutional arguments, the result in *Shimp* suggests that the employer's common law duty to provide a safe working environment can be successfully argued in other courts.[20] Also, two other avenues of relief remain as possibilities for the aggrieved nonsmoker, but neither has been as yet the basis for a court decision in the employer-employee relationship. These two theories of relief are the general duty imposed upon the employer by OSHA to maintain a safe place of employment[21] and state anti-smoking legislation.[22]

The first of these theories, the duty of the employer to furnish a safe working environment for his employees, is based on a common law tort duty recognized in many jurisdictions.[23] Although Texas courts have enforced this general duty,[24] it has not yet been used to establish nonsmokers' rights. Theoretically, a nonsmoking plaintiff first must show that the presence of cigarette smoke in his work area made that environment unsafe. Then, a nonsmoking employee in Texas could seek to prove a breach of the common law duty to provide a safe work area by showing that the employer has permit-

19. Gaspar v. Louisiana Stadium & Exposition Dist., 418 F. Supp. 716, 722 (E.D. La. 1976).

20. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (Super. Ct. Ch. Div. 1976).

21. 29 U.S.C. § 654(a)(1) (1970).

22. Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 618 (1974). It has also been suggested that nuisance law could be utilized as a basis for asserting nonsmokers' rights. *Id.* at 618-22. However, a nonsmoking plaintiff relying on nuisance law will encounter several problems:

(1) Private nuisance law has generally been applied to protect the rights of a property owner to have the air over his property free from pollution, which does not bear on the question of nonsmokers' rights. *Id.* at 619-20.

(2) A private nuisance must interfere with some right not common to the public and the right to breathe clean air is a right of the public, not of a privileged few. *Id.* at 620.

(3) In some jurisdictions statutes define what shall be included as a public nuisance and it is highly unlikely that any of the enumerated statutes will concern nonsmokers' rights. *Id.* at 620-21.

(4) A reluctance on the part of courts to recognize public nuisance actions other than those enumerated by statute may be encountered. *Id.* at 621.

(5) Remedies provided for a public nuisance may not be helpful in the assertion of nonsmokers' rights. *Id.*

23. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 526 (4th ed. 1971).

24. *See, e.g.*, Fort Worth Elevator Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397, 401 (1934).

ted fellow employees to smoke in the work area.[25] However, the positive duty of the employer to furnish a safe place to work has limits. Under Texas law, this duty is confined to the safe construction of, or provision for, the working area; it does not include operations or use of the work area.[26] Thus, the employer violates this duty only when the negligent act resulting in injury pertains to the place of work, in contradistinction to the use of the place.[27]

Although the duty of the employer to furnish a safe place of employment has its roots in the common law, it has been codified and given federal sanction through the passage of OSHA.[28] The stated purpose of OSHA is "to assure as far as possible every working man and woman in the nation safe and healthful working conditions."[29] To accomplish this purpose, OSHA imposes two basic duties on employers. First, employers must comply with occupational safety and health standards established under the Act.[30] Second, in situations not covered by specific standards established under the Act, employers must furnish to each employee a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[31] This requirement, commonly referred to as the general duty clause, is the section of OSHA that could be utilized to impose a duty on

25. *Id.*

26. Coca-Cola Co. v. Williams, 209 S.W. 396, 397 (Tex. Comm'n App. 1919, jdgmt adopted). The court continued the discussion of the employer's duty by asking the question:

> Was the duty one having to do with the preparation, construction, or maintenance of the place, or one pertaining to the operation or conduct of the business in or the use of the place? If the former, the master has breached his positive and nondelegable duty, and is liable for an injury resulting therefrom, whether the negligence be that of a vice principle or of a fellow servant; if the latter, though he may be liable, his liability does not arise from failure to furnish or maintain a safe place.

Id. at 397.

27. *Id.* at 398. The court further stated that if the employer is not liable under the common law duty to furnish a safe place to work, the employer may be liable to the employee for damages for negligent use of, or operation in the safe place of employment furnished. *Id.* To state a cause of action under this theory of liability, the employee would have to allege and show that the employer knew or should have known of the reason or condition that made the place of employment unsafe. The employee would also have to show that the employer was possessed of this knowledge in time to abate the unsafe condition. Gonzales v. Lubbock State School, 487 S.W.2d 815, 817 (Tex. Civ. App.—Amarillo 1972, no writ). See note 65 *infra.*

28. 29 U.S.C. §§ 651-78 (1970).

29. 29 U.S.C. § 651 (1970); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970,* 86 HARV. L. REV. 988 (1973) [hereinafter referred to as Morey].

30. 29 U.S.C. § 654(a)(2) (1970); Morey, *supra* note 29, at 989.

31. 29 U.S.C. § 654(a)(1) (1970); Morey, *supra* note 29, at 989.

an employer to provide his employees with a work area free from cigarette smoke.[32] But before this clause can be invoked to impose any duty on the employer, cigarette smoke must be found to constitute a "recognizable hazard" as that term is defined by OSHA.[33]

For the hazard to be recognizable and thus fall within the proscription of the Act, the hazard must meet four criteria.[34] The first criterion requires that the hazard arise out of a condition present during an employer-employee relationship. A hazard faced by even one employee can trigger the employer's duty;[35] however, the employer is under no duty to any third party non-employee.[36]

The second criterion demands that the condition be recognized as a hazard by the industry as a whole. It is immaterial[37] that an individual employer may be ignorant of the hazard or of its capacity for harm if the industry as a whole recognizes the condition to be a hazard.[38] An employer is responsible for the hazard if he knows or, with the exercise of reasonable diligence, should have known of the condition.[39]

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32. 29 U.S.C. § 654(a)(1) (1970); Morey, *supra* note 29, at 989.

33. Morey, *supra* note 29, at 995-96.

34. The four criteria are: (1) The hazard must arise out of a condition of employment; (2) The hazard must be recognized as a hazard; (3) The hazard must cause or be likely to cause death or serious physical harm. Morey, *supra* note 29, at 992. (4) The hazard must be a preventable hazard. National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973).

35. Morey, *supra* note 29, at 994.

36. *Id.*

37. *Id.* at 995; Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 464 (8th Cir. 1974). *See also* CCH, GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH ¶ 206-07 (1974).

38. Morey, *supra* note 29, at 1002; National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973). The court in *National Realty* quoted Representative Daniels, the congressman who proposed the amendment that became the general duty clause of OSHA, as follows:

> A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it.

Id. See also CCH, GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH ¶ 206 (1974).

39. 29 U.S.C. § 666(J) (1970); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975). The test to determine whether a hazard is a "recognizable hazard" has not been precisely defined. One definition is a condition recognized as a hazard by "safety experts who are familiar with the circumstances of the industry or the activity in question." National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265 n.32 (D.C. Cir. 1973). Another definition is a condition recognized as a hazard by the "standard of knowledge in the industry." J. ROBERTS, OSHA COMPLIANCE MANUAL 28 (1976) [hereinafter referred to as Roberts]. The Chairman of the OSHA Review Commission,

The third criterion for liability under OSHA requires that there be a causal connection between the alleged hazard and the likelihood of death or serious physical harm to the employee.[40] This causal connection is one of plausibility, not probability.[41] If reasonably foreseeable circumstances could lead to the perceived hazard causing death or serious physical harm, the connection has been made.[42] Only the possibility of death or serious physical harm need be present for this third criterion to be met—no actual injury need occur.[43]

When these first three criteria are present, the applicability of OSHA is still limited by its purpose. This purpose imposes upon the employer only a duty to provide a safe work environment; there is no question of strict liability because the employer has no duty to eliminate other than preventable hazards.[44] Thus, a determination that a hazard is preventable is the fourth prerequisite to liability under the Act.[45] However, after this determination is made, the

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commenting on what constitutes a recognizable hazard, stated "that the hazard (1) can be readily detected with the use of only the basic human senses, and (2) would be recognized by all 'reasonable prudent people' as a hazard likely to cause death or serious physical harm." *Id.*

> The OSHA Field Operations Manual says that a hazard is:
> recognized if it is a condition (1) of common knowledge or general recognition in the particular industry in which it occurs, and (2) detectable (a) by means of the senses (sight, smell, touch, or hearing), or (b) is of such wide, general recognition as a hazard in the industry that, even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence that the employer should know about.

Id., quoting the OSHA Field Operations Manual. 5 U.S. DEPT. OF LABOR, OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA FIELD OPERATIONS MANUAL, viii-2 (1974).

40. Morey, *supra* note 29, at 997. At n.43, Morey quotes the OSHA definition: "a part of an internal bodily system would be inhibited in its normal performance to such a degree as to shorten life or cause a reduction in physical or mental efficiency; *e.g.*, lung impairment causing shortness of breath." *Id.* at 997 n.43.

41. Morey, *supra* note 29, at 997-98; Miller, *The Occupational Safety and Health Act of 1970 and the Law of Torts*, 38 LAW & CONTEMP. PROB. 612, 627 (1973-74) [hereinafter referred to as Miller].

42. National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265 n.33 (D.C. Cir. 1973); Morey, *supra* note 29, at 997.

43. American Smelting & Ref. Co. v. Occupational Safety & Health Review Comm'n, 501 F.2d 504, 515 n.21 (8th Cir. 1974); REA Express, Inc. v. Brennan, 495 F.2d 822, 825 (2d Cir. 1974); Brennan v. Occupational Safety & Health Review Comm'n, 494 F.2d 460, 463 (8th Cir. 1974).

44. Morey, *supra* note 29, at 992; Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n, 528 F.2d 564, 568 (5th Cir. 1976).

45. National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Because this determination can be extremely difficult, it is made from the informed judgment of safety experts. For example, a problem can arise when an employee causes the hazardous condition. In such a case, "hazardous conduct is not

hazard must be entirely excluded from the work area.[46] The duty to eliminate preventable hazards is absolute, and the employer will be held liable for employee caused hazards.[47] Thus, such common law doctrines as assumption of the risk and contributory or comparative negligence serve as no defense to an enforcement action under OSHA.[48]

Just as the federal government through OSHA has codified the common law duty of the employer to provide a safe work environment for employees, some states have codified this duty in state occupational safety and health acts.[49] If these state statutes have been approved under OSHA,[50] they could be effective in providing relief to nonsmoking employees because any rules promulgated under such acts must be at least as effective as the federal OSHA standards in protecting the safety and health of employees.[51] Texas has codified this common law duty of the employer in the Texas Occupational Safety Act.[52] However, the Texas Act has not been approved by OSHA and, for this reason, would be ineffective in

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preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program." *Id.*

46. *Id.* at 1267.

47. See note 45 *supra.*

48. National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1266 n.36 (D.C. Cir. 1973). *See also,* Morey, *supra* note 29, at 1003-05; Miller, *supra* note 41, at 616-17; Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975) ("[I]f an employee is negligent or creates a violation of a safety standard, that does not necessarily prevent the employer from being held responsible for violations."); REA Express, Inc. v. Brennan, 495 F.2d 822, 825 (2d Cir. 1974) ("[W]e cannot accept the proposition that common law defenses such as assumption of the risk or contributory negligence will exculpate the employer who is charged with violating the Act.").

49. *See, e.g.,* 8 ARIZ. REV. STAT. ANN. § 23-401 (West Supp. 1957-77); 13A MINN. STAT. ANN. § 182.65 (West Supp. 1977).

50. 29 U.S.C. § 667(b) (1970).

51. 29 U.S.C. § 667(c) (1970).

52. 15 TEX. REV. CIV. STAT. ANN. art. 5182a (1971). Section 1 of the Texas Occupational Safety Act declares it to be the policy of the State of Texas to protect the health and welfare of working men and women and to encourage the correction of unsafe and hazardous working conditions. *Id.* at § 1.

Section 3 of the Act states the duties of employers:

> Every employer shall furnish and maintain employment and a place of employment which shall be reasonably safe and healthful for employees. Every employer shall install, maintain, and use such methods, processes, devices and safeguards, including methods of sanitation and hygiene, as are reasonably necessary to protect the life, health, and safety of such employees, and shall do every other thing reasonably necessary to render safe such employment and place of employment.

Id. at § 3(a).

providing relief for the nonsmoking employee.[53]

If unable to seek relief through a state occupational safety and health act, the nonsmoking employee may be able to restrict smoking in the work area by invoking the provisions of a state anti-smoking statute;[54] however, these state anti-smoking statutes have limited use. Most state anti-smoking statutes, such as the Texas statute,[55] have no applicability to an employer-employee relationship; they impose sanctions only for smoking in public places.[56] Because of this limitation, nonsmoking employees generally must look elsewhere for relief from smoking in the work area.

The court in *Shimp* held that the employer's common law duty to provide a safe place of employment requires that the working environment be free from cigarette smoke.[57] This holding is the first judicial recognition of a right in nonsmoking employees to get relief from a smoke-filled work area. *Shimp* may provide the nonsmoker a realistic alternative to quitting his job. State anti-smoking statutes are, with few exceptions,[58] unsatisfactory for the nonsmoking

53. Currently, activities under this statute are reduced to those of a mere advisory capacity. Since this statute has not been approved by OSHA, the standards established by the federal OSHA are the standards that Texas employers must meet. See CCH, GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH ¶ 1102 (1974).

54. 11 MINN. STAT. ANN. §§ 144.411-.417.(West Supp. 1977). The purpose of the statute was to "protect public health, comfort and environment by prohibiting smoking in public places and at public meetings except in designated smoking areas." *Id.* at 144.412. The statute defined a public place as "any enclosed, indoor area used by the general public or serving as a place of work . . . ." *Id.* at 144.413.

The Act prohibited smoking in a public place or at a public meeting except in designated areas. The Act exempted places of work not usually visited by the public except "that the department of labor and industry shall . . . establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to health and comfort of nonsmoking employees." *Id.* at § 144.414.

The Act also provided that "any affected party" may seek an injunction to "enjoin repeated violations." Id. at § 144.417(3).

55. TEX. PENAL CODE ANN. § 48.01(a) (Supp. 1976-77). For example, the Texas statute makes smoking a misdemeanor "in a facility of a public primary or secondary school or an elevator, enclosed theater or movie house, library, museum, hospital, transit system bus, or interstate bus, . . ., plane, or train which is a public place." *Id.*

56. Several other states have anti-smoking statutes that are similar to the Texas anti-smoking statute and, for the most part, restrict smoking only in public places. *See, e.g.*, 11 ARIZ. REV. STAT. ANN. § 36-601.01 (West 1974).

57. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 416 (Super. Ct. Ch. Div. 1976).

58. Minnesota is an example of a state that does have a statute providing protection to nonsmoking employees. See note 54 *supra.* States that have adopted occupational safety and health acts that have been approved under OSHA, 29 U.S.C. § 667(b) (1970), might also be included along with Minnesota as providing protection for the nonsmoking employee because,

employee because they do not apply to the work area.[59] To provide protection for the employee, state statutes such as the Texas statute[60] must follow the example set by Minnesota[61] and specifically extend the anti-smoking statute's protection to places of employment. Equally important is that the statute must be enforceable by an individual employee. An effective statute should provide the nonsmoking employee with more than a method by which he can petition a state agency to conduct an investigation. The statute must allow the employee to seek direct court intervention.[62] But, even this would not be sufficient if the statute is to adequately protect the nonsmoking employee. An effective anti-smoking statute must subject employers who allow violations in the work area to a fine substantial enough to encourage employer compliance.[63]

Therefore, if there is not an effective state anti-smoking statute, a nonsmoking employee's most likely source of relief from the hazards of fellow employees' cigarette smoke is the common law duty of the employer to furnish a safe place of employment. In Texas, in order to establish that his employer has breached this common law duty, the employee must establish that the smoking in the work area relates to the "place of work in contradistinction to the use of the place."[64] The employee can argue that an employer has failed to provide a safe place of employment because the preparation, construction, or maintenance of the place does not provide

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for a state plan to be approved by OSHA, the state plan must incorporate standards established by OSHA or must promulgate a standard at least as effective as the standard established by OSHA. 29 U.S.C. § 667(c)(2)(1970). Therefore, if cigarette smoke pollution in the work place is found to violate the maximum allowable standards for toxic substances established by OSHA, the state occupational safety and health act would be violated. Illinois has had such a state plan adopted, ILL. ANN. STAT. ch 48, § 137.1 (Smith-Hurd 1969), and it has been suggested that this plan could be used by a nonsmoking employee to seek relief from a smoke-filled work area. Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 625-29 (1974).

59. See notes 55-56 *supra*.

60. TEXAS PENAL CODE ANN. § 48.01 (Supp. 1976-77). The Texas anti-smoking statute is not applicable to most places of employment, *Id.* at § 48.01(a), and a violation of this Act is punishable as a Class C misdemeanor. *Id.* at § 48.01(f). Conviction for a Class C misdemeanor carries a fine not to exceed $200. TEXAS PENAL CODE ANN. § 12.23 (1974).

61. See note 54 *supra*.

62. See note 54 *supra*.

63. Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 630 (1974). It would seem that for the punishment to be a true deterrent, the punishment must provide for a continuing fine in the case of repeated violations and continuing noncompliance.

64. Coca-Cola Co. v. Williams, 209 S.W. 396, 397 (Tex. Comm'n App. 1919, jdgmt adopted).

adequate ventilation to remove the smoke. Also, the nonsmoking employee could establish that the arrangement of the employees' work stations does not provide adequate space between the stations to free the nonsmoker from the smoker's polluting smoke. This would be a violation of the employer's duty to prepare and maintain a safe place of employment.[65]

If an employee does not choose to seek relief under the common law duty of the employer to furnish a safe place to work, a nonsmoking employee could seek to invoke the protections afforded by OSHA. Since its inception, OSHA has been primarily concerned with preventing safety hazards, but, in 1976, the Assistant Secretary of Labor for OSHA declared a policy shift intended to emphasize chemicals and other agents that affect employees' health.[66] This tends to indicate that OSHA will be more receptive to the idea of using the general duty clause of the Act to impose a duty on employers to prohibit cigarette smoking in the work area.

In addition to the general duty clause of OSHA, an employer may be subject to other sections of the Act that could be used to force the employer to prohibit cigarette smoking in the work area. Under OSHA, standards have been developed to govern the amount

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65. *Id.* at 398. If it is impossible for the employee to effectively argue that the work place is made unsafe because of its preparation, construction or maintenance, the employee in Texas would have no cause of action for breach of duty to furnish a safe working environment. However, remedies under ordinary negligence law are a further possibility. The employee could try to establish that the employer was guilty of the "negligent use of, or operation in the safe place furnished." *Id.* To establish that the employer was negligent in permitting smoking in the work area, the nonsmoking employee must prove two elements: (1) "Reason to anticipate the injury, and (2) failure to perform the duty arising on account of that anticipation." Cabrera v. Delta Brands, Inc., 538 S.W.2d 795, 798-99 (Tex. Civ. App.—Texarkana 1976, writ ref'd n.r.e.). See note 27 *supra.*

Another theory that a nonsmoking employee might consider is a cause of action based on the theory of *respondeat superior,* holding the employer responsible for the acts of his employees. However, it is not clear in Texas whether smoking will be considered as an act within the scope of an employee's duty. In McAfee v. Travis Gas Corp., 137 Tex. 314, 153 S.W.2d 442 (1941), the employer was held responsible for damage resulting from the employee's smoking. But, in Dobson v. Don January Roofing Co., 392 S.W.2d 153 (Tex. Civ. App.—Tyler), *aff'd per curiam,* 394 S.W.2d 790 (1965), the employer was not held responsible for damage resulting from the employee's smoking.

66. NATION'S BUS., May 1976, at 19.

> [T]he agency will be as deeply involved in on the job health inspections as it is today in safety.
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> . . . .
>
> Currently, OSHA standards pertain almost entirely to safety hazards. In recent months, emphasis has swung strongly toward consideration of standards on chemicals and other agents that may effect health in the work place.

Id. at 19.

of toxic and hazardous substances allowable in the work area.[67] Cigarette smoke contains many of these same toxic and hazardous substances.[68] Depending upon the circumstances, the level of these toxic and hazardous substances in cigarette smoke can exceed the maximum allowable levels established by OSHA.[69] If a violation of OSHA is established when the level of one of these hazardous substances exceeds the statutory standard, a strong argument could be made that an employer violates the Act when he permits smoking in the work area. This is because the cigarette smoke releases hazardous substances that pollute the air in levels that also exceed the established OSHA standards.[70] If the employee chooses to seek relief from a smoke-filled work environment under OSHA, he must do so indirectly. There is no provision under OSHA for the initiation of enforcement proceedings by an employee; the employee must follow the procedures established by the Act for requesting that OSHA

67. 29 C.F.R. § 1910.1000 (1976). Standards have been established for the following toxic and hazardous substances: ammonia, acetonitrile, acrylonitrile, benzene, carbon dioxide, dimethylamine, endrin, ethylamine, furfural, hydroquinone, menthyl alcohol, methylamine, pyridine, cadmium fume, and formaldehyde.

68. See U.S. DEPT. OF H.E.W., PUBLIC HEALTH SERVICE & MENTAL HEALTH ADMIN., THE HEALTH CONSEQUENCES OF SMOKING—A REPORT OF THE SURGEON GENERAL, at 144-45 (1972), for toxic and hazardous substances contained in cigarette smoke. The substances mentioned in that report may be compared with the hazardous substances for which standards have been established by OSHA as listed in 29 C.F.R. § 1910.1000. Some of the substances that appear in both sources are: ammonia, acetonitrile, carbon dioxide, dimethylamine, ethylamine, hydroquinone, methyl alcohol, benzene, formaldehyde, and pyridine. See note 67 *supra*.

69. Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 611-13 (1974). For example, this article points out that, among other substances:

> Cigarette smoke contains 250 parts per million (ppm) of nitrogen dioxide while concentrations as low as 5 ppm are considered dangerous. Long-term exposure to hydrogen cyanide above 10 ppm is considered dangerous, but cigarette smoke contains 1600 ppm of hydrogen cyanide. Concentrations as high as 100 ppm of carbon monoxide often occur in tunnels and garages. This is a small concentration compared to the 42,000 ppm of carbon monoxide found in cigarette smoke.

Id. at 611. *See also* U.S. DEPT. OF H.E.W., PUBLIC HEALTH SERVICE & MENTAL HEALTH ADMIN., THE HEALTH CONSEQUENCES OF SMOKING—A REPORT OF THE SURGEON GENERAL, at 121-25 (1972); Hostelter, *Tobacco Pollution and the Nonsmokers' Rights*, 4 ENVT'L LAW 451 (1973-74); SCI. DIG., Dec. 1974, at 34-39.

70. CCH, GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH ¶ 310 (1974). The standards established for the toxic substances found in cigarette smoke are termed horizontal standards, which are standards of broad application applicable to diversified employments. *Id.* at ¶ 301. This presents a problem for employers in determining whether a standard applies to his place of employment: There does not appear to be any determinative test that an employer may utilize to insure compliance with a standard that might be applicable to his operation or place of employment. "What the employer is faced with is the need to evaluate carefully the usual and ordinary duties his employees carry out. If these duties expose his workers to hazard . . ., the standard applies and must be observed." *Id.* at ¶ 302.

conduct an investigation.[71]

A court attempting to fashion relief for a nonsmoking employee will be faced with many competing considerations, not the least of which is the need to balance the respective interests of all parties. In the *Shimp* case, the New Jersey court balanced the interests of smokers and nonsmokers and allowed smoking in nonwork areas.[72] Virtually ignored were the interests of the defendant-employer.[73] Texas courts should carry this balancing process a step further and consider the impact on the employer. Restriction of cigarette smoking to nonwork areas may impose considerable burdens on employers; for example, when faced with enforcement of a Minnesota antismoking statute,[74] the Pillsbury Company estimated that it would cost $500,000 annually to allow employees to leave their posts to smoke.[75] However, the question of cost to an employer in eliminating smoking from the work area should not control whether relief is granted but should be considered in determining the type of relief and the extent to which relief is granted.

The hazardous nature of cigarette smoke has been repeatedly recognized.[76] State[77] and federal statutes[78] attempt to control the

71. 29 U.S.C. § 657(f) (1970). "Any employees or representatives of employees who believe a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary . . . ." *Id.*

Imminent danger is defined as "any condition or practice found in the workplace which is such that a danger exists which could reasonably be expected to cause death or serious physical harm, either immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the Act." CCH, GUIDEBOOK TO OCCUPATIONAL SAFETY AND HEALTH ¶ 429 (1974).

72. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 415, 368 A.2d 408, 416 (Super. Ct. Ch. Div. 1976).

73. *Id.* at 416.

74. 11 MINN. STAT. ANN. §§ 144.411-.417 (West Supp. 1977). The Pillsbury Company was being forced to act pursuant to the Minnesota Clean Indoor Air Act. See note 54 *supra* for a discussion of this Act.

75. NEWSWEEK, Dec. 8, 1975, at 35. Business is also faced with another dilemma. If the smokers get time off for smoke breaks, will it be discriminatory not to allow nonsmokers an equal amount of time off? *Id.* at 35.

76. *See, e.g.*, U.S. DEPT. OF H.E.W., PUBLIC HEALTH SERVICE & MENTAL HEALTH ADMIN., THE HEALTH CONSEQUENCES OF SMOKING—A REPORT OF THE SURGEON GENERAL, at 125-29 (1972); Hostelter, *Tobacco Pollution and the Nonsmokers' Rights*, 4 ENVT'L LAW 451 (1973-74). The court in *Shimp* held that the national policy to warn the public about the dangers of cigarette smoking had made that fact so well known that the court took judicial notice of the toxic nature of cigarette smoke and its affect on health. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408, 413-14 (Super. Ct. Ch. Div. 1976).

77. See notes 53-56 *supra.*

78. For example, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331-40 (1970), was passed to warn the public of the danger of and to discourage the smoking of cigarettes.

health hazard posed by cigarette smoke, and perhaps the decision in *Shimp v. New Jersey Bell Telephone Co.*[79] will extend to a nonsmoker the right to be free from cigarette smoke pollution in his work area. However, if nonsmokers choose to enforce their rights in the work area through judicial or administrative remedies, the specter of increased judicial and governmental regulation of every day activities is unavoidable. For this reason, employees or employee unions should utilize self-help or available grievance procedures to provide a means of seeking relief. The anti-smoking campaigns of government and private organizations can help motivate employers to voluntarily prohibit smoking in the work place or at least to establish procedures by which a nonsmoking employee may seek relief from cigarette smoke. Regrettably, it is doubtful if popular support for anti-smoking campaigns has enough political and economic strength to force employers to establish such self-help remedies on a wide-scale basis.[80] If employers do not establish these procedures themselves, the only option left to nonsmoking employees, besides suffering in silence, is to seek judicial or governmental enforcement of their rights.

Larry Bracken

79. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (Super. Ct. Ch. Div. 1976).

80. For instance, in spite of the massive advertising campaigns to warn the public of the dangers of smoking, a significant number of people still smoke and, the incidence of smoking continues to rise. *See generally*, AMERICAN CANCER SOCIETY, INC., CIGARETTE SMOKING AND LUNG CANCER (1974).