

Smoking Discrimination in the Workplace: On and Off the Clock

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SMOKING DISCRIMINATION IN THE WORKPLACE:

ON AND OFF THE CLOCK

I. Historical, Regulatory, and Statutory Context

On February 24, 1998, the Assistant Secretary for the Occupational Safety and Health Administration ("OSHA") of the U.S. Department of Labor testified, in part, as follows as about the impacts from exposure to environmental tobacco smoke ("ETS").

The best scientific studies show that restrictions on secondhand smoke reduce the risk of death and injury to non-smokers, including the hundreds of thousands of children with asthma and other respiratory illnesses, and lead many smokers to quit the habit. Federal tobacco legislation should include provisions to restrict smoking in workplaces and other public facilities of the kind found in the president's recent Executive Order on tobacco smoke in Federal facilities.

ETS contains over 4,000 chemical compounds, including such poisons and irritants as carbon monoxide, formaldehyde, ammonia, nitrogen oxides, and hydrogen cyanide. It contains at least 43 known or suspected carcinogens, including benzene, nickel, 2-naphthylamine, and polonium-210. Exposure to ETS has been associated with many adverse health effects on non-smokers, including lung cancer, heart disease, asthma, reproductive effects, and mucous membrane irritation. Of the more than 70 million employees working indoors, OSHA estimates that 21 million are exposed to ETS at work. Among non-smoking American workers exposed to ETS, OSHA's preliminary estimate is that there will be up to 700 cases of lung cancer per year and between 2,000-13,000 deaths from heart disease per year.

This significant health risk of exposure to ETS led OSHA to commence rulemaking efforts.

(Statement of Charles N. Jeffress, Assistant Secretary for Occupational Safety and Health Administration, U.S. Department of Labor, before the Senate Committee on labor and human resources, February 24, 1998, OSHA archive on OSHA website <http://www.osha.gov/pls/oshaweb>)

The rulemaking efforts of OSHA failed. A February 24, 2003, memorandum from OSHA's Director of Enforcement Programs to the regional administrators state plan designees, relates the following, in part, on OSHA policy and indoor air quality: Office Temperature/Humidity and Environmental Tobacco Smoke.

Because the organic material in tobacco doesn't burn completely, cigarette smoke contains more than 4,700 chemical compounds. Although OSHA has no regulation that addresses tobacco smoke as a whole, 29 C.F.R. 1910.1000 *Air contaminants*, limits employee exposure to several of the main chemical components found in tobacco smoke. In normal situations, exposures would not exceed these permissible exposure limits (PELs), and as a matter of prosecutorial discretion, OSHA will not apply the General Duty Clause to ETS.

(February 24, 2003, Memorandum from Richard Fairfax, Director Enforcement Programs for Regional Administrators State Plan Designees, found at OSHA website <http://www.osha.gov/pls/oshaweb>).

As a result, as of today, OSHA has no indoor air quality standards. Instead, OSHA provides guidelines about the most common IAQ workplace complaints. (<http://www.osha.gov/SLTC/indoorairquality/faqs.html>)

Examples of such guidelines include the EPA Building Air Quality Action Plan of June 1998, DHHS (NIOSH) Publication No. 98-123. In this publication, employers are encouraged to institute a smoking policy "that prohibits smoking or restricts smoking to areas that are separately ventilated, maintained under negative pressure and directly exhausted to the outside." *Id.* at 16.

In the cited June 1998 Building Air Quality Action Plan, a proposed smoking policy for tenants states as follows:

5. Smoking

A. Smoking is prohibited in all portions of this building, including tenant-occupied space.

OR

B. If smoking is permitted in the building, all smoking areas are exhausted directly to the outside, or maintained under negative pressure relative to adjacent space, and are with 60 CFM per occupant of make-up air (can be supplied by transfer air).

Building Air Quality Action Plan June 1998, Verification Checklist, at p. 26, Building Air Quality Action Plan Verification Checklist, citing as guidance "what you can do about secondhand smoke." EPA 1993 and ASHRAE Standard 62-1989 (see Appendix 3, p. 30). Years later, OSHA reaffirmed that while it does not have a general IAQ standard; it provides guidelines addressing the most common workplace complaints about IAQ,

including those caused by smoking. Indoor air quality in commercial and institutional buildings, OSHA 3430-04 2011 at p. 9. Therefore, while no specific regulations address or impose an IAQ standard, including with respect to smoking, the agency reaffirms that under the Occupational Safety and Health Act of 1970, §5(a) (1), known as the General Duty Clause, employers must "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employee." In addition, §5(a) (2) imposes the duty on employers to "comply with occupational safety and health standards promulgated under this Act." OSHA, Indoor Air Quality In Commercial and Institutional Buildings at p. 9, and citing OSHA standards contained in 29 C.F.R. 1904, recording and reporting occupational injuries and illnesses; 29 C.F.R. 1910.94, ventilation; 29 C.F.R. 1910.1000, air contaminants; 29 C.F.R. 1910.1048, formaldehyde; 29 C.F.R. 1910.1450, occupational exposure to hazardous chemicals and laboratories.

The Centers for Disease Control and Prevention issued a current intelligence bulletin #54 titled "Environmental Tobacco Smoke in the Workplace: Lung Cancer and Other Health Effects," found at DHHS (NIOSH) Publication No. 91-108, <http://www.cdc.gov/niosh/docs/91-108/>. In its June 1991 publication, the CDC provided the following summary of its analysis regarding ETS and its accompanying workplace hazards:

The National Institute for Occupational Safety and Health (NIOSH) has determined that environmental tobacco smoke (ETS) is potentially carcinogenic to occupationally exposed workers. In 1964, the Surgeon General issued the first report on smoking and health, which concluded that cigarette smoke causes lung cancer. Since then, research on the toxicity and carcinogenicity of tobacco smoke has demonstrated that the health risk from inhaling tobacco smoke is not limited to the smoker, but also includes those who inhale ETS. ETS contains many of the toxic agents and carcinogens that are present in mainstream smoke, but in diluted form. Recent epidemiologic studies support and reinforce earlier published reviews by the Surgeon General and the National Research Council demonstrating that exposure to ETS can cause lung cancer. These reviews estimated the relative risk of lung cancer to be approximately 1.3 for a non-smoker living with a smoker compared with a

non-smoker living with a non-smoker. In addition, recent evidence suggests a possible association between exposure of non-smokers to ETS and an increased risk of heart disease.

Although these data were not gathered in an occupational setting, ETS meets the criteria of the Occupational Safety and Health Administration (OSHA) for classifying substances as potential occupational carcinogens [Title 29 of the Code of Federal Regulations, Part 1990]. NIOSH therefore recommends that ETS be regarded as a potential occupational carcinogen in conformance with the OSHA carcinogen policy, and that exposures to ETS be reduced to the lowest feasible concentration. Employers should minimize occupational exposure to ETS by using all available preventive measures.

Centers for Disease Control and Prevention Current Intelligence Bulletin 54, Abstract, <http://www.cdc.gov/niosh/docs/91-108/>.

As part of its recommendations, the CDC stated that "[e]mployers should therefore assess conditions that may result in worker exposure to ETS and take steps to reduce exposures to the lowest feasible concentration." *Id.* at Recommendations.

The sea change on the federal regulatory landscape happened when the Food and Drug Administration (FDA) issued its final rule on May 10, 2016. Federal Register, Vol. 81, No. 90, Rules and Regulations, 28974. In that final rule, which relates to 21 CFR 1100, 1140, and 1143, the FDA determined cigarettes, cigarette tobacco, roll-your-own tobacco, and smokeless tobacco were immediately covered by the FDA's tobacco product authorities codified in Food, Drug, and Cosmetic Act when the Tobacco Control Act went into effect. 21 U.S.C. §387-387u. Under the same final rule, the FDA also concluded that all cigars are covered as a "tobacco product." The agency also deemed that products that meet the statutory definition of "tobacco product," and are items other than accessories of the newly deemed items qualifying as a "tobacco product," are covered by the FDA's authorities under Chapter IX of the Food, Drug, and Cosmetic Act, 21 U.S.C. §321(rr) as amended by the Tobacco Control Act. Products now covered by the cited law include not only products that contain tobacco like cigarettes, but also dissolvables not already regulated by the FDA, gels, waterpipe tobacco, ENDS including e-cigarettes, e-hookah, e-cigars, vape pens, advanced refillable personal vaporizers, electronic pipes, cigars, and pipe tobacco. This regulatory action is why the FDA is in the process of reviewing vape pens and other tobacco regulated technologies. This final

rule is also being challenged by various groups of vape stores as unconstitutional, specifically that the FDA employee who issued the final rule lacked the required authority under the Appointments Clause of Article II of the U.S. Constitution because no authority was vested in the FDA employee by Congress. The vape store litigation also asserts that the final rule violates the First Amendment by allegedly imposing limitations on truthful speech regarding modified risk tobacco products. In August 2017, the Trump Administration extended the timeline to submit tobacco product review applications. In November 2017, the Trump Administration issued Guidance on the extension of various tobacco product compliance deadlines largely to various specified dates that will occur later in 2018. Moreover, on March 15, 2018, FDA Commissioner Scott Gottlieb, M.D., issued a statement that discussed the issuance of an advance notice of proposed rulemaking to explore a standard to lower nicotine in cigarettes to minimal or non-addictive levels. The next day, the FDA issued an advance notice of proposed rulemaking in order to obtain data for use in evaluating and developing a tobacco standard that sets the maximum level of nicotine for cigarettes. One of the issues to be covered by the administrative comment process is the scope of the products to be covered by any considered potential product standard. The comment period ends on June 14, 2018. Federal Register, Vol. 83, No. 52, March 16, 2018, Proposed Rules at 11818.

The States can take extra safety measures than the federal government to ensure worker safety in compliance with the doctrines governing federal law and the U.S. Constitution. For example, the State of California has promulgated a process whereby complaints alleging ETS exposure in workplaces that are covered by state or local anti-smoking laws or ordinances can be telephonically referred to the District Manager of the Division of Occupational Safety and Health of the State of California. (State of California, Division of Occupational Safety and Health Policy and Procedures Manual, Indoor Air Quality, P&P C-48, issued 6/30/94, revised 8/1/94 at Procedures I. B. IAQ Complaints and Referrals, 2. Complaint Referrals.) The cited policy provides for instances of investigations and inspections, including where violations are found, the issuance of citations.

New Jersey has its own indoor air quality standard, N.J. A.C. 12:100-13 (2007) which details standards for maintenance of indoor air quality in existing buildings occupied by public employees during their regular working hours. The cited New Jersey Act provides for a compliance program, controls of specific contaminant sources, and air

quality standards during renovation and remodeling, and imposes recordkeeping requirements and employer obligations to respond to signed public employees Occupational Safety and Health Act complaints. *Id.*

Federal regulation of smoking has continued to progress on other fronts. Federal law bars smoking on all domestic commercial flights, and all foreign commercial flights subject to any objection by a specific foreign government. 49 U.S.C. §41706. In addition, smoking is barred on most non-chartered motor common carriers transporting passengers in interstate commerce. 49 C.F.R. §374.201. Moreover, in 1997, President Clinton issued an executive order that prohibits smoking in all indoor government locations subject to the Executive Branch. Exec. Order No. 13058, 62 Fed. Reg. 43, 451, 1997 WL 457789 (August 9, 1997).

State and local governments have also taken action. Presently, over 40 states have enacted laws that restrict smoking in public places. About half of all states enacted laws that restrict smoking in private work locations. See, E. G., Conn. Gen. Stat. Ann. §19a-342 (West 2003); Nev. Rev. Stat. §202, 2491 (2004); N.M. Stat. Ann. §24-16-4 (Michie 2003); R.I. Gen. Laws §23-20.6-2 (2004); S.D. Codified Laws §22-36-2 (Michie 2003); V.T. Stat. Ann. Tit. 18, §§1742-44 (2003).

For example, in 2003, New York State enacted certain provisions of its Clean Indoor Air Act as amendments that barred smoking in virtually all indoor places in New York State where people work or socialize. N.Y. Pub. Health Law §§1399-n et seq. See also New York City Smoke-Free Air Act, N.Y. C. Admin. Code §§17-501. Moreover, many states have enacted laws prohibiting smoking in the indoor portions of bars or restaurants. *Id.* See also Cal. Labor Code §6404.5 (Derring 2004); Del. Code Ann. Tit. 16 §§2903 & 2904 (2004); Fla. Stat. Ann. §386.204 & 386.2045 (2003); Me. Rev. Stat. Ann. Tit. 22, §1542 (2003); Utah Code Ann. §26-38-3 (2003).

Furthermore, with the development of e-cigarette and other technologies to use for consuming tobacco and/or nicotine, there may also be State laws or definitions to consider. See Maine Revised Statutes, 22 M.R.S. §1560-B, Liquid Nicotine; Louisiana Revised Statutes, La. Rev. Stat. 17:240, Prohibition against use of tobacco in schools with broad definition of products covered by term "smoking"; MD Code, Bus. Reg. §16.7-101 on licensing that covers electronic nicotine delivery systems.

State privacy laws have also, however, flourished. Such acts have also been initially or later conceived as state smoker protection laws that seek to cover an employee's use of a lawful product away from work. See Cal. Labor Code §§96(k) & 98.6; Colo. Rev.

Stat. §24-34-402.5; Conn. Gen. Stat. §31-40s; D.C. Code §7-17-3.03; 820 ILCS 55/1 et seq.; Ind. Code §§22-5-4-1 to -3; Ky. Rev. Stat. Ann. §344.040; La. Rev. Stat. Ann. §23:966; Me. Rev. Stat. Ann. Tit. 26, §597; Minn. Stat. §181.938; Miss. Code Ann. §71-7-33; Mo. Rev. Stat. §290.145; Mont. Code Ann. §§39-2-313 to -314; Nev. Rev. Stat. §613.333; N.H. Rev. Stat. Ann. §275:37-a; N.J. Stat. Ann. §§34:6B-1 to -4; N.M. Stat. §§50-11-1 to -6; N.Y. Lab. Law §201-d; N.C. Gen. Stat. §95-28.2; N.D. Cent. Code §§14-02.4-01 to -09; Okla. Stat. Tit. 40, §500; Or. Rev. Stat. §659A.315; R.I. Gen. Law §23-20.10-14; S.C. Code Ann. §41-1-85; S.D. Codified Law §60-4-11; Tenn. Code Ann. §50-1-304; Va. Code Ann. §2.2-2902; W.Va. Code §21-3-19; Wis. Stat. §§111.31-.322; Wyo. Stat. Ann. §§27-9-101 to -106.

Using Illinois as an example, such state laws typically designate as unlawful actions by an employer that constitute a refusal to hire an individual, or that result in discharging an individual or disadvantaging the individual in compensation terms, conditions, or privileges of employment because the individual uses lawful products off the premises of the employer during non-working hours. 820 ILCS 55/5(a). The Illinois Right to Privacy in the Workplace Act exempts nonprofit organizations that have as one of its primary purposes discouraging the use of one or more lawful products by the general public. 820 ILCS 55/5(b). Moreover, the Illinois law does not encompass an employee's use of lawful products that impair the ability of an employee to perform his or her assigned job duties. *Id.* Moreover, the Illinois law does not prevent an employer from offering, imposing, or implementing a health disability or life insurance policy that distinguishes between employees for types of coverages, or the price of coverages, based on an employee's use of lawful products provided that the differential premium rates charged reflect the differential cost to the employer. The employer must also provide employees with a statement that details the differential rates used by the employer's insurance carriers. 820 ILCS 55/5(c)(1), (2). If Illinois employees or applicants for employment allege that they have been denied their rights under the Act, they can file complaints with the Illinois Department of Labor. The Illinois Department of Labor then investigates the complaint and has the authority to request the issuance of search warrants and subpoenas to inspect employer files, and files of prospective employers, if necessary. If conciliation and mediation fail, the Illinois Department of Labor can commence an action in the circuit court to enforce the Act. 820 ILCS 55/15(b). In addition, an employee or applicant for employment also has the option to file an action in Illinois Circuit Court to enforce the Act where mediation and conciliation

efforts have failed, and the Illinois Department of Labor has not filed its own suit. 820 ILCS 55/15(c). If an employer or prospective employer fails to comply with a court order, it can be held in contempt and the court may award actual damages plus costs, and for willing violations, be found liable for a range of \$200 to \$500 plus costs, reasonable attorney's fees, and actual damages. 820 ILCS 55/15(d)(1),(2),(3). Moreover, an employer or prospective employer or its agent who violates the Act can be found guilty of a petty offense. 820 ILCS 55/15(e). The Act also prohibits retaliatory actions by an employer against an applicant or employee who has made a complaint to the employer or the Director of Labor or an authorized representative. Unlawful retaliation also encompasses employers taking action against employees or applicants who have initiated an action under the Act. Employers, prospective employers, officers, or agents can be held guilty of a petty offense for such retaliatory actions. 820 ILCS 55/15(f). Of interest, under the Illinois Act, the Director of the Illinois Department of Labor or any Court is directed to summarily dismiss any suit alleging a violation of the Act which states as its sole cause that the employer offered a health disability or life insurance policy that distinguishes between employees for the types of coverages or prices of its coverages based on the employees' use of lawful products. 820 ILCS 55/20.

II. Case Law Involving Smoking in the Workplace

1. *Maple v. Knauf Insulation GMBH*, 2011 WL 4349401 (S.D. Ind. Sept. 15, 2011) (Case No. 1:09-cv-01304-SEB-DML).

Employer fired employee for smoking in violation of company rules. Employee believed he was fired because of his age, 63, at the time of termination, and male gender. Employee filed suit against employer claiming violations of the Age Discrimination and Employment Act ("ADEA"), 29 U.S.C. §621 et seq. and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The employer's motion for summary judgment was granted in part and denied in part. The employer urged that the employee had admitted to smoking in a warehouse. The court found that the plaintiff's deposition testimony showed that he denied that his smoking occurred in the warehouse. Instead, the employee asserted that he was smoking in a facility known as the "old receiving department." The issue was whether the employee was properly terminated for smoking in a warehouse area or whether he should have been subjected to progressive discipline for smoking in a non-warehouse. The employer had maps of its facilities. The court viewed the testimony and personnel

action forms as indicating that the plaintiff admitted smoking in an area identified as an old receiving area on the map, but that the plaintiff was denying that the old receiving department was a "warehouse." The employer prohibited smoking on site except for specifically designated areas of the plant. The collective bargaining agreement permitted the employer to implement reasonable work rules. The employer created penalties for smoking in different areas of the facility that resulted in different levels of discipline. The employer distinguished between smoking in warehouse areas versus smoking in non-warehouse areas. Employees caught smoking in a non-warehouse area were subject to a four-step progressive disciplinary procedure under which an employee received up to three warnings, with the fourth offense resulting in a seven-day suspension. The warehouse areas were treated differently. If an employee was caught smoking in a warehouse facility, the employer had a strict policy of immediate termination. Employer distinguished smoking in a warehouse based on business and safety principles. The warehouse areas contained high concentrations of flammable materials much more prone to fires than non-warehouse areas. As a result, a warehouse fire could cripple the employer's operations financially. The warehouse areas contained the entire stock of the employer's finished product.

The employee in *Maple* testified that he was smoking in the old receiving department formerly known as the receiving department. The employee asserted that the facility was not a warehouse. The employee also asserted that the employer had very little product in that area and that what product was stored there was flame resistant. In addition, the employee referenced three other employees, all younger, who were caught smoking in an area similar to the old receiving department and none of them were terminated. The employer urged that two of the three comparative employees were reinstated pursuant to offers that plaintiff rejected. Plaintiff disagreed and asserted that the offers made to the reinstated employees occurred after three weeks whereas he had already been terminated for over four months. Moreover, all the comparative employees were substantially younger than plaintiff and thereby created a material issue of fact for his ADEA age discrimination claim. Plaintiff's sex discrimination complaint failed since all the comparative employees were males. Nevertheless, the court found that the plaintiff presented sufficient facts from which a jury could conclude that he was not terminated for smoking in a warehouse area but because of his age because the

employer could not have believed that the old receiving department was a warehouse. In addition, the area where two of the comparative employees were caught smoking were non-warehouse areas and they were treated more favorably.

2. *Melland v. Napolitano*, 2012 WL 1657067, Case No. 10-cv-804-bbc (W.D. Wis. May 10, 2012).

The court granted the employer's summary judgment motion and rejected plaintiff's Title VII claims of gender discrimination and retaliation. The uncontradicted evidence showed that the defendants reprimanded plaintiff and ultimately terminated her employment because her supervisors believed she was dishonest, and that plaintiff had violated security policies of the defendants. Plaintiff worked as a security officer for the defendant Transportation Security Administration at a Wisconsin airport for seven years. The tipping point situation leading to her termination started with a January 2008 smoking investigation. Plaintiff traveled with a supervisory transportation security officer from the airport in Wisconsin to Chicago for training. Following the trip, the supervisor told an assistant federal security director that the plaintiff had smoked four or five cigarettes in the car despite her warnings that it was against defendant's policy to smoke in a government vehicle. Plaintiff was also reported to use a scented spray to disguise the smell of smoking in the vehicle. The incident was reported to the federal security director at the airport. An employee who used the vehicle the next day stated the car did not smell like smoke but did have an odor of someone spraying scented air freshener in the vehicle. The plaintiff was summoned to a supervisor. Plaintiff denied smoking inside the vehicle and accused the reporting individual of making up the allegations. Plaintiff was encouraged to tell the truth. Plaintiff then prepared two separate statements. In the first statement, the plaintiff denied smoking in the vehicle. In the second statement, the employee asserted that while she did not recall smoking a cigarette in the vehicle, she apologized if she did so because that was not her intent. In the second statement, the plaintiff also affirmed that the supervisor traveling with her commented about the defendant's policy against smoking inside a government vehicle. Plaintiff then stated that the comment may have been made by her co-traveling supervisor because smoke entered the car when plaintiff was smoking outside the vehicle and recalled that she stated she would try to fix it with body spray that she was carrying with her. Then in a third statement plaintiff provided, she claimed that her memory of the Chicago

trip was impaired because of an accident. Plaintiff recanted her allegations against her co-traveling supervisor, and related that she would not dispute the smoking allegations. The investigation resulted in finding that plaintiff had smoked in the government vehicle after being warned about the defendant's policy, and then tried to cover up her misconduct by spraying scent inside the vehicle, and then lied about her ability to remember whether she had smoked. The plaintiff's behavior was found specifically serious because of her accusation that another employee fabricated her description of the event. The plaintiff then sustained a formal reprimand due to her status as a supervisory security officer. Plaintiff received a formal letter of reprimand for violating defendant's policy by smoking in a government vehicle and failing in being forthcoming about her reasons. The resulting impact of the smoking incident letter of reprimand led to a series of events where plaintiff's evaluation and employment were impacted, and a series of other events and incidents that led to her termination. As the court summarized, "[i]f defendant issued the letter of reprimand and took the subsequent related adverse employment actions against plaintiff because it 'honestly believed' she had smoked in the government vehicle and lied about it, plaintiff loses." Plaintiff lacked any evidence to dispute the smoking allegations. Her subjective belief that those involved in the investigation should have treated her less harshly was not found to constitute evidence that her reprimand was pretextual. As a result, since plaintiff could not produce evidence showing that the nondiscriminatory explanation for her letter of reprimand over the smoking incident, and her subsequent letter of counseling, were based on lies, the defendants prevailed on their motion for summary judgment.

3. *Wang v. Visiting Nurse Service of New York*, 2011 NY Slip. op 32837, Index No. 107086/10 (N.Y. Sup. Ct. October 24, 2011).

Plaintiff sued the defendant for discrimination and retaliatory discharge under New York state law. Plaintiff is a registered nurse that was hired to work as a nurse consultant. The year after she was hired, plaintiff was diagnosed with Lupus and suffered swelling, spotting, and the formation of lesions on her hands when exposed to secondhand smoke. At that time, plaintiff was assigned to care for two patients who were heavy smokers. Plaintiff's rheumatologist wrote a letter stating that the plaintiff should be accommodated so that she would not receive any exposure to secondhand smoke. The doctor testified at her deposition that she wrote the letter

based on plaintiff's representation that exposure to cigarette smoke triggered her symptoms. The doctor, however, lacked any evidence to make that connection. The doctor testified that the intent of her letter was to forward a request that the plaintiff's working environment be completely smoke-free. Plaintiff, with her physician's letter, sought to have the employer screen the patients to confirm that the homes of the patients were considered smoke-free and to assign any smoker patients to other nurses. Employer determined there was no way it could control the homes of patients or guarantee that the homes, lobbies, building hallways, and building exteriors would be smoke-free. In addition, the employer found that it could not confirm that patients would properly report the conditions in their apartments. As a result, the employer rejected the plaintiff's proposed accommodation and placed the employee on unpaid leave pending determination of a workable accommodation that would comply with the physician's letter and the requirements of plaintiff's job.

The employer then offered the plaintiff the option of continuing as a nurse consultant and wearing a face mask while tending the patients in smoking environments. The plaintiff rejected the proposed accommodation. The employer next offered to interview the plaintiff for the positions of clinical evaluation manager and home care consultant. Subsequently, the employer offered the plaintiff the home care consultant position. Plaintiff rejected that offer feeling that it was a demotion because it involved less patient contact and did not interest her. Plaintiff also declined to interview for a clinical evaluation manager position based on her decision to return to school, because an academic schedule would conflict with a full-time job. Plaintiff filed her suit while still an employee of the defendant. The plaintiff's physician then wrote that the plaintiff could work as a nurse consultant in a home care environment with minimal exposure to cigarette smoke. The employer offered a home care position to the plaintiff. The plaintiff rejected the proposal because she wanted to work part-time. The employer opted to create a position to fit the plaintiff's schedule and wrote her a letter stating that if she did not accept the offer within a set time period of roughly two weeks, the employer would conclude that she had decided to resign from her employment. Upon not hearing from plaintiff, the employer served its motion to dismiss her claims for employment discrimination and retaliation.

The court found that the employer established that the plaintiff's first proposal for a strictly smoke-free environment was impossible to implement. As a result, the burden then shifted to plaintiff to rebut that position. The court found that plaintiff had failed in that effort. The court stressed that even when plaintiff provided her physician's revised recommendation; the employer offered an opportunity to return her to a position which she declined. The court also found no retaliation occurred because the plaintiff was employed when she filed suit and by the time of her termination, she had refused an offer to return to a position that was presented as a reasonable accommodation.

4. *Abels v. Dish Network Service, LLC*, 2012 WL 6183558, 116 Fair Empl. Prac. Cas. (BNA) 1626, Case No. 12-1291 (3rd Cir. Dec. 12, 2012).

Plaintiff sued employer alleging age discrimination. Employer moved for summary judgment which was granted by the trial court. The U.S. Court of Appeals, Third Circuit, affirmed the summary judgment granted to the employer. While employed by defendant as an inventory specialist, plaintiff complained frequently about co-workers smoking too close to the warehouse door. Though smoking did not render plaintiff ill, it upset him that co-workers violated the smoke-free policy of the employer. In reply to plaintiff's numerous complaints, employer created a designated smoking area. The employer sent e-mails to the employees detailing the use of the designated smoking area. The employer issued additional reminders to the employees during meetings about being caught smoking outside of the designated area and informing the employees to smoke only within the designated area. In addition, the employer placed a no smoking sign outside the warehouse door. Employer also bought a receptacle for cigarette butts and placed it away from the warehouse door. Plaintiff complained that the alleged accommodations accomplished nothing, and he continued to complain about the smoking issue. Plaintiff got into an argument with a quality assurance specialist who walked into the warehouse with a cigarette. During the argument, the plaintiff yelled at the other employee and used profanities while calling him names. The employer had received numerous complaints about the plaintiff's poor attitude and hostile, belligerent, and gruff conduct. Within this series of events, an occurrence involved plaintiff leaving the premises during the middle of a shift without permission. Plaintiff claimed he went to the office of his supervisor to complain that his computer access had been limited. Plaintiff claimed that the responses he received from the supervisor were

dishonest, that he felt ill, and that he was going home for the day. On the way out of the warehouse, he told another supervisor he was ill and would go home early. That supervisor responded "Okay, see you tomorrow." However, plaintiff admitted that he never sought permission to leave early from either supervisor with whom he interacted. After he left, the managerial supervisors held a meeting. A decision was reached by the employer to treat the plaintiff's conduct as a voluntary resignation. The Appellate Court found plaintiff's statement about being "ill" irrelevant based on the employer treating the incident as a voluntary resignation based on plaintiff departing from work early without permission. The court focused on the lack of evidence creating a disputed material issue of fact over whether or not plaintiff requested permission to leave early from supervisory personnel before he departed. Moreover, under the ADEA, the court underscored that it was irrelevant whether the beliefs of any specific supervisor were correct or mistaken as long as the motivations for the actions taken by the employer did not involve age-based discrimination. Indeed, the record accurately reflected that the plaintiff left work without permission which was a basis for treating his departure from work as a voluntary resignation.

5. *Tzannetakis v. Seton Hall University*, 344 F.Supp.2d 438 (D.N.J. 2004).

Plaintiff alleged he was discriminated or retaliated against when he was denied the position of chairperson of the economics department in 1996, after serving in that post for 20 years, and when he was sanctioned for smoking in his office in 1999. Plaintiff claimed national origin and religious discrimination. Before the smoking incident occurred, the EEOC had issued a determination letter concluding that the employer's actions over the plaintiff's position of chair established reasonable cause that a violation of Title VII had occurred. One month later, plaintiff was accused by a fellow professor of smoking in his office in violation of the employer's non-smoking policy. The incident resulted in the plaintiff having a verbal confrontation with the other professor who had a respiratory problem leaving her sensitive to secondhand smoke. The complaining professor took her concerns to the Dean. The Dean dispatched an Associate Dean who reported that he did smell smoke outside the plaintiff's office. The Dean sent the plaintiff a memorandum detailing the continual violations of the anti-smoking policies committed by the plaintiff based on a history of prior incidents. The plaintiff was sanctioned by being directed to vacate his

offices, to not enter a specified hall unless it was to teach a class, and to hold office hours somewhere on campus other than a specified hall or building.

The court rejected the plaintiff's retaliation claim premised on the smoking incident. Plaintiff stressed the closeness in timing between the EEOC issuing its determination letter in August 1999 and his punishment for violating the non-smoking policy the following month. The court underscored that plaintiff lacked any evidence demonstrating that the people involved in the smoking incident and the later sanctioning of plaintiff for his violations were even aware of the EEOC's determination at the time of the smoking incident. As a result, there was a lack of evidence showing that the Dean or others were motivated to create a "sham" incident over his violations of the smoking policy for retaliatory purposes. Moreover, even if the plaintiff had overcome such evidence, the court viewed the employer's reasoning for sanctioning the plaintiff extremely plausible based on his repeated violations of the no smoking policy. The record showed that it was undisputed that the Dean had received numerous complaints about the plaintiff smoking in the building before August 1999, and that the Dean had spoken to the plaintiff about such complaints and the school's policy several times since the Fall of 1998. Indeed, during one of these interactions when the Dean approached the plaintiff as he was leaving his office, he had a pipe in his shirt pocket that was still producing smoke. The September 1999 incident constituted one more of many complaints about plaintiff's violations of the anti-smoking policy and there was no evidence that the Dean's sanctioning of the plaintiff was for any reason other than his multiple violations of the no smoking policy.

6. *McNeil v. Charlevoix County*, 772 N.W.2d 18 (Mich. 2009).

The Michigan Supreme Court held that a local health department's regulation, issued pursuant to authority granted under state law, properly provided employees with certain specified rights to a smoke-free environment. Based on the public policy of minimizing the effects of smoking as evidenced by various acts passed by the state legislature, the County Health Board's issuance of a regulation that restricted the general right to discharge an at will employee for exercising his or her right to a smoke free environment afforded by the regulation was permissible under state law. The court rejected the plaintiff's claim that the prohibitions contained in the regulations violated public policy. As a result, the regulations were held to be valid. The regulations also provide the employees with a private right of action that fits

within the public policy exceptions to Michigan's at will employment doctrine. The regulation prohibits an employer from discharging or refusing to hire or otherwise retaliating against an employee for exercising his or her right to the smoke free environment afforded by the regulation.

Case law that discusses the constitutionality of state and local governmental smoking restrictions include: *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F.Supp.2d 461, 497 (S.D.N.Y. 2004) ("The Court finds that the New York State and City legislators had a rational basis to enact the Smoking Bans and such enactments were a valid exercise of the State's police powers over the health and welfare of its citizens."); see also *Long v. Ballard*, 2013 WL 999600, Case No. 1:12-cv-00569-JMS-DML (S.D. Ind. March 13, 2013); *Gallagher v. City of Clayton*, 2011 WL 6140905, Case No. 4:11-cv-392 CAS (E.D. Mo. Dec. 9, 2011), *affirmed* 699 F.3d 1013 (8th Cir. 2012) (holding no fundamental right to smoke outdoors on public property exits, and that smoking is not part of any existing fundamental right to bodily integrity, and finding that smokers do not qualify as a suspect or quasi-suspect class). The constitutionality of anti-smoking laws: *Wymyslo v. Bartec, Inc.*, 970 N.E.2d 898 (Ohio 2012), *reconsideration denied*, 971 N.E.2d 962 (Ohio 2012); *American Legion Post #149 v. Washington State Department of Health*, 192 P.3d 306, 324 (Wash. 2008) ("Consequently, no fundamental rights are implicated in this case by prohibiting smoking in a private facility that is a place of employment.")

7. *Wilhelm v. CSX Transportation, Inc.*, 169 F.Supp.2d 755 (N.D. Ohio 2001), *reversed*, 65 Fed. Appx. 973 (6th Cir. 2003).

Plaintiff, a former smoker diagnosed with asthma, claimed that the employer failed to enforce its anti-smoking policy in certain areas of the workplace. Plaintiff claims he suffered injury from secondhand smoke while employed on the premises and sought recovery under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §59, et seq. Plaintiff also claimed handicap discrimination pursuant to Ohio law. The court granted the employer's motion for summary judgment. In 1996, the employer adopted an anti-smoking policy barring smoking in all buildings in a specific terminal except for certain designated areas. In 1998, the employer extended its no smoking policy to a full ban on smoking in all buildings in the terminal and in 1999, prohibiting smoking in all locomotive cabs. Plaintiff claimed that since February 1998, the employer failed to enforce its no smoking policy in the locomotive cabs and company-controlled vehicles and that as a result, he was subjected to

secondhand smoke in the workplace on a daily basis. Plaintiff alleged that he sustained two asthma attacks requiring emergency medical care in 1998 and 1999 due to the employer's failure to enforce its no-smoking policy. The court found that plaintiff failed to show that the secondhand smoke created a health hazard covered by FELA. The court explained that plaintiff could meet his burden by either submitting direct evidence about unsafe air quality at the terminal or asking the court to take judicial notice of the hazardous nature of secondhand smoke. Plaintiff failed to take either course of action. As a result, the court granted the employer's summary judgment motion on the plaintiff's FELA claim. On the state law disability discrimination claim, the court found that the employer did not fail to enforce its smoking ban because of the plaintiff's handicap, and furthermore, that any managerial ostracism or co-worker shunning of plaintiff did not constitute an adverse employment action under Ohio disability discrimination law. The Sixth Circuit of the Court of Appeals reversed finding that material issues of fact arose over whether the employer failed to reduce or eliminate secondhand cigarette smoke in the workplace that aggravated the employee's existing lung disease.

8. *Pechan v. DynaPro, Inc.*, 622 N.E.2d 108 (Ill. Court App. 2nd Dist. 1993).

Plaintiff pursued an injury claim against her former employer for injuries allegedly sustained due to secondhand cigarette smoke at the employer's facility. Plaintiff alleged that her employer was notified of the smoking problem in a petition she and other employees presented requesting a smoke free working environment in addition to written memos issued to employer's officials. Furthermore, the governing county health department had sent a letter informing the employer that his facility was violating the Illinois Clean Indoor Air Act, 410 ILCS 80/1 et seq. Furthermore, plaintiff submitted letters from her treating allergist in which requests were made for plaintiff to work in a smoke free environment. Plaintiff also claimed that the employer had attempted to ostracize her because of her complaints about its handling of the smoking policy by eliminating regular job reviews, pay increases, avoiding verbal contact, and generally discriminating against her for exercising her claimed right to breathe clean air. While many of plaintiff's causes of action failed, the summary judgment on her claim of statutory discrimination under the Illinois Clean Indoor Air Act, 410 ILCS 80/9, was reversed. The Illinois Appellate Court found that the employer's alleged act of discriminating against the plaintiff for exercising her rights under the Clean Indoor Air Act of Illinois were intentional. The

court also found that the Illinois Worker's Compensation Act did not bar her claim of statutory discrimination under the Illinois Clean Indoor Air Act.

9. *Bond v. Sheahan*, 152 F.Supp.2d 1055 (N.D. Ill. 2001).

The court denied the employer's motion for summary judgment upon finding that material issues of fact existed over whether the plaintiff was substantially limited in the major life activity of breathing, and whether the employee was a "qualified individual" under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 et seq. Moreover, the court read the record as indicating that the employee informed the employer of her asthma and made repeated requests to work in a smoke free workplace. The plaintiff also provided sufficient evidence to show that the Cook County Sheriff's Department at the Cook County Department of Corrections failed to engage in an interactive process with her in an attempt to identify reasonable or appropriate accommodations for her asthma such as a transfer to a county hospital.

10. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, 983 N.E.2d 414 (Ill. October 18, 2012, rehearing denied January 28, 2013).

Plaintiff alleged that the former employer invaded her privacy by intruding upon her seclusion. The former employer counterclaimed alleging that the plaintiff breached her fiduciary duty while an employee. Both parties prevailed in the trial court on their respective claims. The plaintiff received an award of \$65,000 in compensatory damages and a punitive damage award of \$1.75 million after a jury trial. The former employer was awarded \$78,781 in compensatory damages and \$551,467 in punitive damages during a contemporaneous bench trial. The trial court reduced the punitive damages awarded by the jury to \$650,000. The Appellate Court affirmed the jury's verdict on plaintiff's intrusion claim and reinstated the \$1.75 million punitive damages award. The Illinois Supreme Court affirmed the trial court's judgment that modified and reduced the punitive damage award, and further modified the reduction in the punitive damage award from \$650,000 to \$65,000. The former employer had begun an investigation to determine if the former employee had violated a non-competition agreement. A private investigation firm was retained. Plaintiff's personal information was used to obtain her personal phone records on her home and cell records for certain periods during 2005. Plaintiff claimed that the intrusion upon her seclusion constituted tortious conduct based upon a "pretexting scheme" in which someone pretended to be her in order to obtain private phone records without her permission from her telephone carriers.

While the described conduct is extreme, the case constitutes a reminder about the limits tort law places on prying into the off-work activities of current or former employees.

11. *Coats v. Dish Network, L.L.C.*, 2015 CO 44, 350 P.3d 849, 31 A.D. Cases 1289 (Colo. 2015).

Plaintiff claimed his use of medical marijuana was protected by the Colorado Lawful Activities Statute and rendered his termination over a positive marijuana test unlawful. *Id.*, at ¶¶1-5 citing 24-34-402.5, C.R.S. 2012. The problem for plaintiff was that at the time of his discharge, federal law barred all marijuana use. 21 U.S.C. sec. 844(a); *Gonzales v. Raich*, 545 U.S. 1, 29 (2005)(state law allowing one to possess and cultivate marijuana did not overrule federal law prohibiting marijuana use and possession); *Ross v. RagingWire Telecommunications, Inc.*, 174 P.3d 200, 204 (Cal. 2008)(“No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users.”). Specifically, the *Coats* court focused on the need for the plaintiff’s use of medical marijuana to be lawful under both state and federal law, in order for such activity to qualify as lawful for the protections and anti-discrimination provisions provided by the Colorado Lawful Activities Statute. *Id.*, at ¶¶14-18. 350 P.3d at 852. Because the medical use of marijuana was subject to and prohibited by federal law, the plaintiff’s use of medical marijuana failed to qualify as a “lawful activity” otherwise protected under Colorado law.

“Coats does not dispute that the federal Controlled Substances Act prohibits medical marijuana use. See 21 U.S.C. §844(a). The CSA lists marijuana as a Schedule I substance, meaning federal law designates it as having no medical accepted use, a high risk of abuse, and a lack of accepted safety for use under medical supervision. *Id.* at §812(b)(1)(A)-(C). This makes the use, possession, or manufacture of marijuana a federal criminal offense, except where used for federally-approved research projects. *Id.* at §844(a); see also *Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). There is no exception for marijuana use for medicinal purposes, or for marijuana use conducted in accordance with state law. 21 U.S.C. §844(a); see also *Gonzales*, 545 U.S. at 29, 125 S.Ct. 2195 (finding that ‘[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail,’ including in the area of marijuana regulation).”

Coats v. Dish Network, LLC, 2015 CO 44, at ¶19, 350 P.3d at 852.

The *Coats* decision serves as a reminder of the limits federal law imposes on state privacy laws that protect the consumption or use of lawful products away from the workplace. After the Colorado Supreme Court issued its opinion in *Coats*, a Massachusetts Court also found that its state laws providing for a cause of action alleging a wrongful termination in violation of public policy did not protect an employee using medical marijuana from discharge for positive drug test result showing use of marijuana. The same court also declined to find an implied right of action in the Massachusetts medical marijuana law. However, the Massachusetts court did find that the plaintiff could proceed with a handicap discrimination claim upon finding that allowing for the employee's continued use of medical marijuana was not unreasonable on its face and deferring for later possible summary judgment proceedings whether doing so would place an undue burden on the employer. *Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456, 78 N.E.3d 37, 41-51 (Mass. 2017).

12. *Saad v. Village of Orland Park*, Case No. 11 C 7419, 2012 BL 168720, 2012 WL 2721942 (N.D. Ill. July 9, 2012).

In regulatory licensing dispute, a significant discussion by the court stresses that making classifications through a municipal ordinance for selling tobacco products furthers the legitimate governmental purpose of discouraging tobacco use. The court cites Congressional and Illinois legislative findings about the consensus that tobacco products are inherently dangerous and can cause cancer, heart disease, and other serious negative health conditions. *Id.* at *5, *citing* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §2 (2), 123 Stat. 1776 (2009) & Smoke Free Illinois Act, 410 ILCS 82/5. The overwhelming contrary codified policies led to the court dismissing the plaintiffs' class-of-one equal protection claim. *Id.* at *6.

13. *Reid v. Sleepy's, LLC*, No. 3:14-CV-2006, 2016 BL 192711, 2016 WL 3345521 (M.D. Pa. June 16, 2016).

The court granted the employer's motion for summary judgment and entered judgment against plaintiff on her claims of hostile work environment, sex discrimination, and retaliation claims pled under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the Pennsylvania Human Relations Act, 43 P.S. §951 et seq. Plaintiff claimed that a male employee similarly violated a workplace

policy regarding smoking. The court found that plaintiff lacked evidence to suggest that a supervisor used a smoking policy as an excuse to discriminate against plaintiff because of her sex. *Id.* at *23. Moreover, plaintiff also was unable to explain how a male comparator employee who conversed about smoking, and was not caught smoking like plaintiff, was similarly situated to her. Furthermore, a different manager or supervisor's treatment of a male employee under the smoking policy did not show whether a different supervisor, who used the smoking policy against plaintiff, was motivated by a discriminatory intent. *Id.* at 19.

14. *Thursby v. City of Scranton*, No. 3:CV-02-2355, 2006 BL 63480, 18 AD Cases 21, 2006 WL 1455736 (M.D. Pa. May 25, 2006).

The court denied the employer's motion for summary judgment, thereby allowing plaintiff to proceed with her claims under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq., and the Pennsylvania Human Relations Act, 43 P.S. §951 et seq. A former police officer, plaintiff claimed that the employer failed to accommodate her allergy to tobacco smoke. The court found enough evidence to support a jury finding that plaintiff was substantially limited in her ability to breathe because of her allergy to tobacco products, rendering an inquiry into whether she was also limited in her ability to work unnecessary. *Id.* at *5. The court also viewed the evidence on whether plaintiff could perform her duties in regular working rooms of the department where smoking occurred, including in the roll call room and vehicles, enough to sustain a finding that she was not reasonably accommodated. *Id.* at *6. The court also noted that nothing in the collective bargaining agreement entitled the other officers to smoke at work and stated that implementing a no-smoking policy would not necessarily require collective bargaining by the employer. Moreover, there was no evidence that the city had tried to negotiate a no-smoking policy with the police union, while it had negotiated no-smoking policies with other unions with members who worked in city hall. Therefore, as a matter of law, the court found that it could not find that implementing a no-smoking policy qualified as an unreasonable accommodation. *Id.* at **6-7.

15. *Whitmire v. Wal-Mart Stores Inc.*, 359 F.Supp.3d 761 (D. Arizona 2019) – Court found implied private cause of action for violations of the Arizona Medical Marijuana Act anti-discrimination statute. Employer obtained summary judgment on plaintiff employee's state law regarded-as disability discrimination claim based on

impairment, specifically the effects of medical marijuana use, being temporary and with minor effects that did not meet the standard of what the law required in order to establish standard as disabled. The court also entered summary judgment against the plaintiff's state law retaliation claim that relied on the workers' compensation laws.

16. *Sec. U.S. Dept. of Labor v. American Future Systems, Inc.*, 873 F.3d 420 (3rd Cir. 2017). The Third Circuit affirmed a summary judgment granted to the Secretary of Labor. Flex-time policy that permitted employees to log off their computers during their 8:30 a.m. to 5 p.m. workday at any time, for any reason and for any length of time, but under which employee was only paid if logged-off time did not exceed 90 seconds violated FLSA regulations that require employer to pay employees for breaks of 20 minutes or less. The court rejected the argument that because the FLSA did not require an employer to provide breaks made such logged-off time non-compensable. Court afforded deference to regulation codified at 29 C.F.R. §785.18 and applied its mandate that break periods of 20 minutes or less are compensable.
17. *Duryea v. MetroCast Cablevision of New Hampshire, LLC*, 17 ADD ¶17-151 (April 21, 2017, D. New Hampshire).

Court found enough evidence existed to require a trial on the claim of a pattern of disability-related harassment during term of employment. Plaintiff employee was permitted to proceed to trial on claim of ADA hostile work environment claim over alleged responses by employer to her asthma and breathing problems at call-center workplace. Employer obtained summary judgment on employee's claims of ADA discrimination and retaliation and FMLA retaliation claims.



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