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Prepared by Edward L Sweda, Jr., Esq

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The following exhibit has several pages of text from a Report. Which is a summary of legal cases regarding smoking in the workplace and other places. This report exceeds the 10-page limit therefore it cannot be scanned. A small portion has been scanned to aid in your research for information. The exhibit is on file at the Montana Historical Society and can be viewed there.

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**SUMMARY OF LEGAL CASES REGARDING
SMOKING IN THE WORKPLACE AND OTHER
PLACES**

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Research Resources

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ruled that she did attempt to resolve the situation, was adversely affected by her environment and had good cause for leaving. Therefore, the Department's ruling was reversed and the claimant is eligible for unemployment benefits.

Lapham v. Commonwealth Unemployment Compensation Board of Review, 103 Pa. Commonwealth Ct. 144, 519 A.2d 1101 (Pa.Cmnwlth., 1987), appeal denied, 515 Pa. 611, 529 A.2d 1084 (1987). An employee who suffered from chronic bronchitis due to exposure to cigarette smoke was relocated to an area 10 to 15 feet from a heavy smoker and 20 feet from a second smoker. The employee resigned and applied for unemployment insurance benefits. The Unemployment Compensation Board of Review ruled that there was no "necessitous and compelling cause" for her resignation and therefore reversed a referee's decision granting her the benefits. On appeal, the Commonwealth Court of Pennsylvania reversed the Board's decision and ruled that the employer's relocation of the employee so close to the smokers was not a "reasonable accommodation" to her and that her resignation was for a necessitous and compelling cause and that she was thus entitled to unemployment compensation.

Quinn, Gent, Buseck & Leemhuis, Inc. v. Unemployment Compensation Board of Review, 606 A.2d 1300, 7.3 TPLR 2.89, 431 C.D. 1990, (Pa. Commonwealth Ct., 1992). A lifelong smoker quit her job after her employer adopted a total ban on smoking indoors at the worksite. She applied for unemployment benefits, claiming that the no-smoking policy was such a severe burden that quitting her job was her only option. The state Bureau of Employment Compensation Benefits and Allowances denied the smoker's claim, but a referee reversed the denial. The Unemployment Compensation Board of Review affirmed the decision. However, the Pennsylvania Court of Appeals ruled on April 8, 1992 that the smoking employee had failed to sustain the burden of showing that "the cause of a necessitous and compelling nature results from circumstances which produce pressure, both real and substantial, to terminate one's employment and which would compel a reasonable person under the circumstances to act in the same manner." The Court noted that she was the only employee to quit her job there because of the new smoking policy.

Gardner v. Hercules, Inc. and Standard Industrial Maintenance, Inc., 1996 Va. App. LEXIS 22, No. 2240-94-3, Va. Ct. of App., (1996). A majority of the Virginia Court of Appeals ruled that there was enough evidence in the record to support a

lower court's determination that the plaintiff did not qualify for unemployment benefits because she voluntarily resigned from her position without good cause. On her first day of work cleaning restrooms, cafeteria and administrative offices, she noticed smoke, told her supervisor that it bothered her and said she wasn't sure she'd be able to handle it. The supervisor said that there was no part of the building where she would not be exposed to smoke. She continued to work for three days and then quit; she did not request a transfer. The majority ruled that she did not make reasonable efforts to resolve the dispute before leaving. The dissent stated that the evidence proved that Gardner did have good cause to leave her employment: The evidence "proved that Gardner suffered ill effects from cigarette smoke and that she informed her supervisor of her problem when she was hired."

Arsenault v. Administrator, Unemployment Compensation Act et al., 2001 Conn. Super. LEXIS 3501. The defendant unemployment administrator denied unemployment benefits to plaintiff employee who claimed that cigarette smoke at her job site worsened her asthma condition. The board of review affirmed the decision. When the employer requested proof of the connection between her tardiness and her asthma, she quit, asserting that the employer was delving into her medical problems. The court considered "whether the Board of Review's decision, concluding that the claimant had voluntarily left work without good cause attributable to the employer is unreasonable, arbitrary or illegal" and concluded that it was not. Arsenault's appeal was dismissed. See "Arsenault v. Administrator, Unemployment Compensation Act," Connecticut Law Tribune, January 28, 2002.

Workers' Compensation

See Bocamazo, S., "Workers' Comp for Second-Hand Smoke," Lawyers Weekly USA, November 18, 1996, i, 11.

Schober v. Mountain Bell Telephone, 96 N.M. 376, 630 P.2d 1231, (1980). After remand, 93 N.M. 337, 600 P.2d 283, the District Court awarded partial temporary disability benefits. The Court of Appeals held that the worker who, following his collapse at work due to an allergic reaction to tobacco smoke, was unable to obtain a job which would utilize his electronic skills due to his allergic reaction to tobacco smoke was disabled for purposes of the workmen's compensation law.

Iacovelli v. New York Times Company, 124 A.D.2d 324, 507 N.Y.S.2d 922 (A.D. 3 Dept. 1986). A worker lit a cigarette at lunchtime on the company's premises. Within seconds, her dress became a sheet of fire. She suffered severe first, second and third degree burns over 50% to 60% of her body and was prevented from working for six months. The court ruled that the company failed to rebut the presumption that her lighting of the cigarette arose out of and in the course of employment because it could be inferred that her eating of lunch in a place provided by the employer and smoking of a cigarette there, as was her custom, were activities consistent with the purposes of the area. Therefore, the injuries were compensable under the Worker's Compensation Law.

Matter of Mack v. County of Rockland, 71 N.Y.2d 1008, 530 N.Y.S.2d 98, 525 N.E.2d 744 (1988), affirming 128 A.D.2d 922, 512 N.Y.S. 2d 732, (1987). A psychiatric social worker asserted a claim for occupational disease, claiming that, as a result of exposure to cigarette smoke in a close working area over a two-year period, her eyes had become irritated to the point she was unable to perform her duties. A workers' compensation judge had determined that the worker had established that she suffered from an occupational disease but the Workers' Compensation Board reversed the decision. The Supreme Court, Appellate Division affirmed. On appeal, the Court of Appeals held that the aggravation of a preexisting eye disorder as a result of exposure to cigarette smoke in a poorly ventilated room was caused solely by environmental conditions of the workplace, not by any distinctive features of her occupation as a psychiatric social worker and, thus, was not an "occupational disease" for purposes of the Workers' Compensation Law.

Mittan v. Eastern Airlines et al., Florida Dept. of Labor & Employment Security, Div. of Workers' Compensation, Claim No. 150-40-1829 (1986). A nonsmoking flight attendant was exposed to secondhand smoke on the job for 13 years and had an underlying pre-existing allergic condition aggravated. The Deputy Commissioner of the Workers' Compensation Division ruled that "a causal relationship between her disability, inability to continue flying as a flight attendant and her prolonged exposure to smoke while working as a flight attendant for the employer." Therefore, Mittan was entitled to the benefits.

Matter of Johannesen v. Department of Housing Preservation and Development, 154 A.D.2d 753, 546 N.Y.S.2d 40, 5.1 TPLR 2.12 (A.D. 3 Dept. 1989). The Workers' Compensation Board awarded

benefits to a woman who sustained bronchial asthma as a result of her exposure to tobacco smoke and dust in a crowded office where she worked for New York City's Department of Housing Preservation and Development. The Board ruled that she had sustained an occupational injury as a result of the repeated trauma of exposure to cigarette smoke in her office. The New York Supreme Court's Appellate Division affirmed the Board's decision, ruling that it was supported by substantial evidence that the office was severely over-crowded, lacked adequate ventilation, that there were many smokers in the immediate vicinity of Johannesen's work station and that, within one week, she had suffered two severe asthma attacks which required her to be taken to the local hospital's emergency room.

On appeal, the decision was affirmed on June 21, 1994 at 615 N.Y.Supp.2d 336, 638 N.E.2d 981, 84 N.Y.2d 129, 9.3 TPLR 2.73. The court ruled that "substantial evidence supports the Board's determination that claimant's disabling and aggravated asthmatic condition, caused by prolonged exposure to secondhand tobacco smoke in her confined employment workplace, constituted an accidental injury within the meaning and intent of the Workers' Compensation Law. The award should be upheld." See Spencer, G., "Secondhand Smoke Cause of Work Injury; Compensation Award Sustained on Appeal," *New York Law Journal*, June 22, 1994, 1; Woolstley, "N.Y. Court Awards Work Comp Benefits for Illness Tied to Second-hand Smoke," *Business Insurance*, June 27, 1994, 1; and Sablone, K., "Note: A Spark in the Battle Between Smokers and Nonsmokers: *Johannesen v. New York City Dept. of Housing Preservation & Development*," 36 *Boston College Law Review* 1089, September 1995.

Thorensen v. U.S. Air, No. 09521885, (Mass. Dept. of Industrial Accidents 1989). A flight attendant who developed pulmonary difficulties, including multiple bouts of bronchitis, also suffered pleurisy. On a 1985 flight on which smoking was permitted, she began feeling sharp chest pains and breathing difficulties, which necessitated her hospitalization. An examining physician opined that Ms. Thorensen's health was normal but "her history suggested an irritation of the mucous membrane, likely stemming from tobacco smoke and ozone." The Administrative Judge found that "the Employee sustained a personal injury arising out of and in the course of employment with U.S. Air," and, thus, was entitled to disability benefits.

ATE Fixture Fab v. Wagner, 559 So.2d 635, 5.3 TPLR 2.110 (Fla.App.1 Dist. 1990). A judge

issued to a nonsmoking workers' compensation claimant an award of "permanent total disability benefits for acceleration or aggravation of his obstructive lung disease due to inhalation of secondary tobacco smoke present in his work environment"; the employer appealed. The appellate court ruled that, while "aggravation of pre-existing emphysema can be caused by work-related exposure to secondary tobacco smoke," the award in this case had to be reversed because more specific evidence needed to be introduced on the causal connection between this employee's condition and his exposure to secondhand smoke on the job.

Kufahl v. Wisconsin Bell, Inc., 6.2 TPLR 8.23, No. 88-000676, (Wisconsin Labor and Industry Review Commission 1990). An nonsmoking accountant who worked for Wisconsin Bell from 1978 to 1987 alleged that her exposure to secondhand tobacco smoke at her workplace caused a series of ailments that led her to miss work and contributed to her being fired. A judge in May 1990 ruled that, as the allergist to whom Wisconsin Bell had referred her had concluded, Kufahl had developed a permanent sensitization because of that exposure to smoke on the job. The judge ruled that, therefore, she was entitled to workers' compensation. The State of Wisconsin's Labor and Industry Review Commission on December 11, 1990 affirmed the judge's ruling and awarded Kufahl \$23,400, concluding that her "ability to move up into higher-paying positions is affected negatively by her permanent sensitization to smoke, and she has lost significant opportunities with the employer." Wisconsin Bell declined to appeal the commission's ruling. Gunn, E., "Secondhand Smoke Harmed Worker: Panel," Milwaukee Journal, January 22, 1991, 6.

Ubhi v. State Compensation Insurance Fund, Cat'n Fiddle Restaurant, No. SFO-0341691 (California Workers' Compensation Appeals Board, 1990). A vegetarian, nonsmoking waiter in California received a \$10,000 settlement for a heart attack he suffered after five years of working in a smoke-filled bar. Also as part of the settlement, the Board agreed to cover the waiter's medical bills, which amounted to about \$85,000.

Kellogg v. Mayfield, 595 N.E.2d 465, 72 Ohio App.3d 490 (Ohio Ct. App. 1991) No. CA90-03-061. The Plaintiff worked as a typist at the Ohio Bureau of Workers' Compensation for five years. She had a history of chronic pulmonary conditions, bronchitis, allergies and bronchiectasis when she contracted a pulmonary infection (pneumonia) due to cold drafts and cigarette smoke in her workplace. She

applied for workers' compensation benefits; a district hearing officer considered the matter both an injury and an occupational disease claim and concluded that she did not sustain an injury or contract an occupational disease in the course of, and arising out of, her employment. The trial court granted summary judgment to her employer. The Court of Appeals for the 12th Appellate District of Ohio affirmed the ruling, stating that her condition was just as likely to result from conditions outside the workplace.

Bena v. Massachusetts Turnpike Authority, 7.1 TPLR 8.1, No. 03922088 (Massachusetts Department of Industrial Accidents 1991). A pack-and-one-half per day smoker who had smoked for 30 years quit smoking in 1981. She was an employee of the MTA and worked in its Weston office between 1980 and 1986. She testified that she had no respiratory or pulmonary symptomatology when she quit smoking in 1981 but, by 1988, had developed chronic obstructive lung disease (COPD). In 1986 she had been transferred to a small, smoke-filled trailer in Auburn; her symptomatology became so severe that she was forced to leave work on May 6, 1988. She applied for workers' compensation benefits. An administrative judge of the DIA found on October 2, 1991 that "the employee was capable of gainful employment with the restrictions that . . . she not be exposed to smoke in her work environment" and that "the employee's disability bears a direct, causal relationship to her heavy passive smoke inhalation over a number of years . . . which had served to aggravate her underlying condition of COPD." The judge also found that "passive smoking played a 'large' role in the employee's disability" and awarded her benefits. See "MTA Worker to Get Benefits with Secondhand Smoke Ruling," Worcester (MA) Telegram & Gazette, December 9, 1991, A3; "Smoke Victim Eligible for Benefits," Athol (MA) Daily News, December 6, 1991, 8; "Attorney: Passive-Smoke Award Is a First," Massachusetts Lawyers Weekly, December 23, 1991, 27; and "2nd-hand Smoke Claims a Price," Worcester (MA) Sunday Telegram, February 16, 1992, 1.

Setwari v. The Child Center, 7.1 TPLR 8.6, No. 112490 (Worker's Compensation Board of Indiana, 1992). A hearing officer for the Workers' Compensation Board ruled that an employer must pay three weeks of disability and most of the medical bills of a nonsmoking worker who suffered health problems after breathing secondhand tobacco smoke on the job. The worker, an administrative assistant, suffered a severe asthma attack and lung infection in 1990 that hospitalized her for five days. See "Firm Told to Pay Health Bills in Secondhand Smoke Case," Louisville Courier-Journal, January 10, 1992, B2.

Riddle v. Ampex Corp. et al., 839 P.2d 489, (Colo. App. 1992), 7 IER Cases 525, 7.2 TPLR 2.72, Colo. App. 91CA1058. A worker who had been smoking for 24 years claimed that her employer's smoking ban at its electronics manufacturing plant left her unable to work due to mental stress. She was diagnosed as suffering from depression, nicotine dependence and post-traumatic stress disorder. So, she applied for workers' compensation benefits. The Colorado Court of Appeals rejected her claim and noted that "... smoking restrictions are a common fact in today's life, not only in the workplace but in social and commercial environments as well." See Sanko, J., "Smoker Who Quit Job over Ban Loses Aid," Rocky Mountain News (Denver, CO), March 20, 1992; and Pankratz, H., "Smoking Ban Not Grounds for Disability Pay," Denver Post, March 20, 1992, 1B and 4B.

Eastern Airlines, Inc., and GAB v. Crittenden and Travelers Insurance Co., 596 So.2d 112 (Fla. App.1 Dist. 1992). An employer and an insurance carrier appealed the decision of a Judge of Compensation Claims, awarding benefits to a flight attendant who suffered a bronchial condition caused by multiple exposures to cigarette smoke during her work as a flight attendant. She had successive periods of disability during which she did not work and her condition would improve, whereupon she would return to work and her condition would worsen as a result of new exposure. Travelers was the carrier at risk until February 1, 1987, when GAB assumed the risk. After she returned to work on February 19, 1987, she sustained additional injurious exposures. She was awarded benefits for her disabilities both before and after February 19, 1987. The judge ruled that GAB would be solely responsible for all of the benefits. The District Court of Appeal reversed, ruling that Travelers should be responsible for the benefits which were awarded for the prior period of time and GAB responsible for the later period.

Palmer v. Del Webb's High Sierra, 838 P.2d 455, 8.1 TPLR 2.174, No. 20338, Nevada Sup. Ct. (Nev. 1992). A nonsmoking worker developed coughing and breathing problems while employed at a casino. His doctors diagnosed him as suffering from reactive airways disease, severe bronchitis and asthma, caused or aggravated by the smoke-filled environment at the casino. The casino rejected his worker's compensation claim. A hearing officer found that, while his illness was caused by exposure to smoke at work, Palmer had not suffered a compensable occupational disease because, according to the Nevada Occupational Disease Act (NODA), lung diseases were restricted to firefighters and police officers. A state

district court also concluded that the disease was not incidental to the character of the business and, thus, was not compensable. Affirming the trial court's decision, the Nevada Supreme Court ruled that "secondary smoke is a hazard to which workers, as a class, may be 'equally exposed outside of the employment.'"

Poston v. Smith, 666 So.2d 833 (Ala. Civ. App. 1995). A claimant sought workers' compensation benefits alleging an injury or occupational disease she sustained due to exposure to cigarette smoke in the workplace. The employer filed a motion to dismiss for failure to state a claim. The trial court granted the motion after hearing arguments of counsel and other matters outside the pleading without treating the motion as a motion for summary judgment. The Court of Civil Appeals of Alabama found that this was prejudicial error because both parties would be given ten days' notice and be allowed to submit affidavits to argue for or against the motion. Thus, the judgment of the trial court was reversed and the case was remanded for further proceedings.

In re: Wiley, 10.8 TPLR 2.295, No. A9-365951 (Ind. 1995). A nurse who worked at a psychiatric unit at a Veterans' Administration hospital died of lung cancer. Her widower was awarded death benefits. See Geylin, M., "Widower Wins Death Benefits in Case Over Second-Hand Smoke in Workplace," Wall Street Journal, December 13, 1995, B6; "Secondhand Smoke Blamed," Richmond Times-Dispatch, December 16, 1995, 1A; "Workers' Comp for Cancer Triggered by Second-Hand Smoke," Lawyers Weekly USA, January 15, 1996, 3, 4; and Shoop, J.G., "Widower Gets Death Benefits in Secondhand Smoke Case," Trial, March 1996, 14, 78.

Stanton v. State of Illinois Dept. of Lottery, Ill. Ind. Com., Nos. 94 WC 45643, 97 IIC 2054 (1997). The nonsmoking claimant worked in the defendant's building from 1983 to 1987 and then moved to a new building, having suffered from nasal swelling, coughing and tightening and pain in her chest, caused by exposure to secondhand smoke. Since moving into the new building, she still had problems with smoke. In August, 1990, smoking by her colleagues was confined to a smoking area; she felt much better but became more sensitive to perfume and lotion smells. An arbitrator denied workers' compensation benefits for Stanton, finding that the risk of exposure to perfume and various other odors was not particular to her employment and that her employment did not increase the risk of such exposure. The Commission affirmed and adopted the decision of the arbitrator. See "Commission Denied Benefits to

Claimant Who Alleged She Suffered Disability Due to Exposure to Second-hand Smoke," Illinois Workers' Compensation Law Bulletin, February 2, 1998.

Keck v. New York State Division of Substance Abuse Services, et al., 675 N.Y.S.2d 400, 1998 N.Y.App.Div. LEXIS 8142. A state worker filed a claim for workers' compensation benefits after she was exposed for approximately five weeks to smoke from the pipe of a co-worker. She claimed that the exposure exacerbated her multiple chemical sensitivities condition causing her to suffer from sore throats, difficulty in breathing, headaches and nausea. The Workers' Compensation Board denied the claim, ruling that Keck had not sustained an accidental injury in the course of her employment. The Appellate Division of the New York Supreme Court affirmed, noting that there was evidence from a physician that Keck's pulmonary impairment could be explained by her own six-year history of smoking two packs of cigarettes per week.

Keck had also filed a federal lawsuit under the Americans With Disabilities Act (ADA) alleging that she had been unlawfully discriminated against because of a disability, her sensitivity to tobacco smoke. In *Keck v. New York State Office of Alcoholism and Substance Abuse Services*, 10 F. Supp.2d 194, 1998 U.S. Dist. LEXIS 9778 (N.D.N.Y. 1998), the U.S. District Court (Kahn, J.) granted the defendant's motion for summary judgment. Keck had argued that a reasonable accommodation to her handicap would be for her to be allowed to work after regular hours and be assured that no persons will be smoking in her work area. The court ruled that Keck "has made no showing that she was discriminated against because of how she was regarded or because of her record of disability," and that she "failed as a matter of law to demonstrate that her ability to breathe is substantially impaired under the ADA." Finally, the court ruled that Keck did not prove that she was otherwise qualified to perform the job in question since her proposed "accommodation would require that she be allowed to work on a solitary, unsupervised basis" and that the lack of supervision was not reasonable. See Demare, C., "State Worker Sues for \$12 Million over Secondhand Smoke. She Says Supervisors' Smoking Worsened Her Health and Made Her Unable to Keep Her Job," Times Union (Albany, NY), November 8, 1994, B5.

Magaw v. Middletown Board of Education, New Jersey Department of Labor, Division of Workers' Compensation, Claim Petition No. 95-005466 (1998). A physical education teacher's tonsillar cancer was caused by secondhand smoke, according to a worker's compensation judge (Boyle, J.). On July 23, 1998, the

judge awarded Magaw \$45,000 in temporary disability benefits and also ordered the Middletown Board of Education to pay outstanding medical bills, provide future treatment and restore sick time that he had used up. The judge ruled that "I am satisfied that [the petitioner] has proven even beyond the preponderance of credible evidence that [his] tonsillar cancer was caused by exposure to second-hand smoke during the twenty-six years that he shared an office with a co-employee who was a chain-smoker." See Ackermann, M., "Second-Hand-Smoke Injury Yields Worker's Comp Award," New Jersey Law Journal, August 10, 1998; and "Second-Hand Smoke Award Leaves School District Fuming," Your School and the Law, October 2, 1998.

On July 2, 1999, a state appeals panel, at 323 N.J. Super. 1, 731 A.2d 1196, 14.7 TPLR 2.424. 1999 N.J. Super LEXIS 253 (A-1384-98T3F, Superior Ct. of N.J., Appellate Div.), upheld Magaw's monetary award but ruled that he would have to go back to the school board to seek reimbursement for the sick leave time he used up. See Tabachnik, S., "Teacher Who Sar by Smoker Wins Suit," Asbury Park Press (Neptune, NJ), July 3, 1999, A1. On November 5, 1999, the New Jersey Supreme Court, at 744 A. 2d 1208, 162 N.J. 477, 1999 N.J. LEXIS 1522, refused to hear the school district's second appeal, thus letting the lower court ruling stand. Magaw was awarded about \$53,000 for medical costs and \$20,000 for legal costs. See Ginsberg, T., "A Big Victory for Nonsmoker Made Ill by Coworker's Cigarettes," Philadelphia Inquirer, November 13, 1999.

McCabe v. Workers' Compensation Appeal Board (Department of Revenue), No. 3207 C.D. 1998, Commonwealth Court of Pennsylvania, 1999 Pa. Commw. LEXIS 694. Ms. McCabe had done telephone work for the Department of Revenue. She alleged a disability due to the aggravation of her asthma caused by secondhand smoke in her work environment. In November 1994, she developed a cough; she worked until April 4, 1995 when she stopped due to shortness of breath, wheezing and a severe, loud cough. She returned after May 24, 1995, worked until July 12, left until July 21, when she returned and worked until September 8, 1995, when she was no longer able to work due to the cough and shortness of breath. The Workers' Compensation judge ordered that Ms. McCabe receive total disability benefits from April 4, 1995 to May 24, 1995 and from July 12, 1995 until July 21, 1995 and ongoing from September 8, 1995. The employer appealed to the board, which affirmed the judge's award for the earlier dates but reversed the grant of ongoing benefits from September 8 and thereafter. On August 26, 1999, the

Commonwealth Court of Pennsylvania ruled, at 738 A. 2d 503, 1999 Pa. Commw. LEXIS 694, that the Compensation Appeal Board had erred in reversing the judge's ongoing award of benefits because there had been nothing in the judge's factual findings to support the contention that Ms. McCabe's aggravation of asthma had resolved itself. The Commonwealth Court ruled that the board should have remanded the case to the judge "for him to explicitly address the evidence" regarding Ms. McCabe's physical condition and to make further factual findings based on that evidence. See *Pennsylvania Law Weekly*, September 20, 1999, 17.

Cantalope v. Veterans of Foreign Wars Club of Eureka, South Dakota, 2004 S.D. 4, 674 N.W. 2d 329, 2004 S.D. LEXIS 1 (2004). A woman who worked as a bartender/manager of a VFW facility was working on September 19, 1997 when in addition to cigarette smoke there was a heavy concentration of cigar smoke. The woman, who had been asthmatic since grade school, experienced an abrupt attack of constricted breathing and the inability to swallow. She was taken to an emergency room and hospitalized overnight. Upon her release, her physician ordered eight weeks of bedrest; she never returned to work for the VFW. She sued for workers' compensation benefits; the circuit court awarded her temporary total disability and permanent partial disability benefits. The VFW appealed, arguing that her decision to work in a smoke-filled environment with her asthmatic condition constituted willful misconduct and that she had self-inflicted her injury by smoking cigarettes. The Supreme Court of South Dakota upheld the award, ruling that "Jennifer's injury happened while at work at VFW. Her physician stated that the environment at work was a major contributing factor. VFW offered no evidence to contradict her physician's opinion. Because there is no genuine issue of material fact, summary judgment was appropriate." See Kafka, J., "Smoking Injury Lawsuit Headed Back to Circuit Court," *Aberdeen (S.D.) News*, January 8, 2004.

Anderson v. Anixter, Inc., et al., 2004 UT App. 12. Anderson's complaint alleges that the appellees' willful failure to maintain a safe working environment caused cellular damage due to his exposure to secondhand smoke. The appellees sought dismissal on the grounds that his claims are barred by the exclusivity provisions contained in the Utah Workers Compensation Act (UWCA), that there is no statutory or common law cause of action for the failure to maintain a safe work environment and that Anderson did not allege actionable harm. The Utah Court of Appeals ruled that "the district court correctly concluded that the exclusive remedy for the alleged

harm from workplace exposure to cigarette smoke would be under the UWCA or UODA [Utah Occupational Disease Act]." The district court's dismissal of the complaint is affirmed. See "Employee Doesn't Get Benefits for Secondhand Smoke," *Workers' Compensation Monitor*, March 5, 2004.

Disability Benefits/Pension Plans

Parodi v. Merit Systems Protection Board, 690 F.2d 731 (CA 9 1982), as amended, 702 F.2d 743 (CA 9 1983). The U.S. Circuit Court of Appeals for the Ninth Circuit ruled that a Government worker who is hypersensitive to smoke is "environmentally disabled" and thus eligible for disability benefits, when working in a smoke-filled environment. Her employer was ordered either to provide her with a smoke-free work environment or to pay her disability benefits. See "U.S. Worker Wins Right to Smoke-Free Area," *New York Times*, October 23, 1982, sec. 1, page 6. [Ed. note: In 1984, Parodi received an out-of-court settlement that provided for full disability retirement pay of \$500 per month and a \$50,000 lump-sum payment.]

Sharpe v. Board of Trustees, Maine State Retirement System, Civil Action No. CV82-57, Superior Court of Maine, Kennebec County, 1982 Me. Super. LEXIS 34. The Board of Trustees denied a disability pension to a woman who asserts that her disability is the result of aggravation of heart and lung conditions caused by a work environment polluted by tobacco smoke. The Board ruled that she had not proven that her heart and lung problems were caused by her work environment. A Justice of the Superior Court (Alexander, J.) sustained Ms. Sharpe's petition for review, ruling that the Board of Trustees "erred as a matter of law in its consideration of the causation question. Ms. Sharpe worked in a small, congested office where the windows were kept shut as a matter of office policy and where the "air in this room during working hours was smoky, heavy and foul smelling. There was no fresh air; the air in the room was continually recirculated." The court recognized that "the danger of cigarette smoke to nonsmokers is a significant health problem." The court also cited the "fallacy of the Board's all or nothing approach to causation determinations" and recognized "the substantial likelihood that the petitioner may be able to make a presentation which will demonstrate that her working conditions precipitated her disability, even if they did not create the medical problems which ultimately led to her disability."