

REASONS FOR BANNING SMOKING IN CERTAIN PUBLIC OUTDOOR AREAS*

1. Careful scientific studies – based upon both highly accurate mathematical modeling techniques as well as actual real-life measurements – have shown that concentrations of secondhand tobacco smoke in many outdoor areas are often as high or higher than in some indoor areas^[1] and that the risks posed by such outdoor exposure, while small to most individuals, are well beyond generally accepted norms when large numbers of people are involuntarily exposed.^[2] Indeed, for these very reasons, the State of California – in a report summarizing much of this evidence – was preparing and has now declared OUTDOOR tobacco smoke as a “toxic air pollutant.”^[3]
2. Drifting tobacco smoke, even outdoors, can trigger asthmatic attacks,^[4] bronchial infections, and other serious health problems in nonsmokers.^[5] This is especially true for the almost 100 million Americans who have asthma, chronic bronchitis, chronic sinusitis, emphysema, and other breathing-related conditions which make them especially susceptible to secondhand tobacco smoke.^[6]
3. Even for people without such respiratory conditions, breathing drifting tobacco smoke for even brief periods can be deadly. For example, the Centers for Disease Controls [CDC] has warned that breathing drifting tobacco smoke for as little as 30 minutes (less than the time one might be exposed outdoors on a beach, sitting on a park bench, listening to a concert in a park, etc.) can raise a nonsmoker’s risk of suffering a fatal heart attack to that of a smoker^[7]. The danger is even greater for those who are already at an elevated risk for coronary problems: e.g., men over 40 and postmenopausal women, anyone who is obese, has diabetes, a personal or family history of heart or circulatory conditions, gets insufficient exercise, has high blood pressure, cholesterol, etc.^[8]
4. In cases where drifting tobacco smoke was present and a nonsmoker suffered a heart attack, asthmatic attack, or other similar problems, the municipality which owns and operates the beach, park, playground, etc. could be liable since it was on notice of the known health dangers^[9] but failed to take the “reasonable” step of banning smoking as taken by many other outdoor areas.^[10]
5. Society recognizes that people have a right not to be involuntarily exposed to known carcinogenic substances, even if only to small amounts and for brief periods. That’s why, for example, extensive and very expensive precautions are taken when asbestos is removed from buildings. This insures that people outside are not exposed even to minute amounts as they pass by. Similarly, we would not tolerate someone who filed down old brake drums in a playground, thereby releasing even tiny amounts of asbestos into the air. Secondhand tobacco smoke is officially classified by the federal government as a “known human carcinogen” – exactly the same category as asbestos.^[11]
6. Even aside from health hazards, being forced to breathe tobacco smoke is annoying and irritating to most people,^[12] especially the almost 100 million Americans who have chronic conditions like asthma and bronchitis which make them especially susceptible to tobacco smoke,^[13] and young children who are also especially sensitive.^[14] It should be noted that many activities are banned in public places simply because they are annoying or irritating, even if they do not pose a health hazard.^[15] Common examples are playing loud music on portable radios or boom boxes, engaging in sexually provocative activity, using profanity, dressing in inappropriately scanty attire, drinking alcoholic beverages, etc.
7. Many of the 96 million Americans who have chronic conditions like asthma and bronchitis which make them especially susceptible to tobacco smoke have been held to be entitled to protection under the Americans With Disabilities Act [ADA].^[16] Thus, if their medical conditions mean that they cannot enjoy lying on a blanket at the beach or in a park for a concert where smoking is generally permitted, they may be entitled by law to a reasonable accommodation, presumably one which protects them from drifting tobacco smoke.

* Prepared as a public service by Action on Smoking and Health (ASH), 2013 H St., NW, Washington, DC 20006, (202) 659-4310. ASH is a national tax-exempt legal-action organization concerned with the problems of smoking and protecting the rights of nonsmokers. For more information, please see; <http://ash.org>. Comments and suggestions are appreciated.

8. The reason for banning smoke around building entrances is simple. People should not be forced to be exposed to known carcinogenic substances for even the briefest periods of time, and because even brief exposure can also be annoying and irritating to many people, nonsmokers should not be forced to “run a gauntlet”¹⁷¹ of smokers gathered around the exits and entrances to their workplaces, or other buildings which they are likely to frequent.

9. Large buildings ordinarily have air intakes to replace the air which is exhausted by their ventilation systems. Occasionally, the air intake will be located near a doorway to the building, or in some other area where smokers might tend to congregate. Therefore, to prevent this smoke-filled air from entering and being circulated throughout the building where it can create a health risk as well as annoyance and physical irritation, it may be necessary to prohibit smoking outdoors around such air intakes.¹⁸¹

10. Cigarette butts discarded by smokers constitute the overwhelming majority of litter on beaches,¹⁹¹ as well as in many other public places like parks, playgrounds, and sidewalks.²⁰¹ Smoking bans have been shown to substantially reduce the litter and therefore the costs of cleaning up beaches and other outdoor areas,²¹¹ as well as to improve the overall appearance and attractiveness of the area.²²¹

11. Cigarettes are a major source of burns to youngsters, including to their faces, when smokers hold their cigarettes at their sides and young children inadvertently come too close. This can happen easily when children are at play or otherwise distracted on a beach²³¹, waiting on a line while their parents wait to buy tickets, to use an ATM machines, etc. – and once again there may be legal liability;²⁴¹

12. Discarded cigarettes – which are designed to continue to burn for several minutes when dropped and not puffed upon – are also a major fire hazard, threatening piers, boardwalks, and wooden structures in parks and playgrounds, etc.,²⁵¹ as well as outdoor park and recreation areas.²⁶¹

13. Young children playing in the sand at a beach or in playground sandbox may be tempted to put cigarette butts – which contain concentrated amounts of carcinogens and other toxic chemicals trapped from tobacco smoke²⁷¹ – into their mouths, and even older children may touch the cigarette butts and then put their fingers in or near their mouths, eyes, etc.

14. Discarded cigarette butts may also be harmful to birds and other wildlife which nibble on or even swallow them, especially on a beach or park, but also even on a public sidewalk.²⁸¹ Indeed, one of the first domestic bans on outdoor smoking was enacted to protect wildlife rather than human beings.²⁹¹

15. Activities and images which might be inappropriate for young children and/or which might lead them into bad habits are often prohibited in public places, even if they pose no health risk and might even be appropriate in areas visited voluntarily only by adults.³⁰¹ For example, virtually all municipalities have long prohibited consumption of alcoholic beverages in public places like parks and beaches. The purpose is obviously not to prevent drunkenness or driving while intoxicated – since people can easily get drunk drinking in their parked cars, in bars, and at home. Rather, bans are imposed because drinking sets a bad example for young children to see it done openly – even if the same children might see it in their own homes. Similarly, prohibiting smoking in outdoor places frequented by the public – like parks, playgrounds, beaches, etc. – shields young children from seeing smoking as a common adult behavior to be emulated, even if some may observe smoking by the parents and other adults in private homes. Other examples where activities are prohibited in public places because of their possible impact on children include sexually suggestive movements (permitted on dance floors but prohibited in parks and on sidewalks), gambling (permitted in casinos and tracks but not in public places), displays of pictorial nudity (permitted in art galleries but not on sidewalks), etc.

16. In addition to all of the above reasons, it has now become clear that restrictions on smoking are a major factor in helping to persuade smokers to quit, and to help those who want to stop smoking to do so.³¹¹ The result can be an enormous saving of lives, in the prevention of disability, and in a

dramatic reduction in health care costs – most of which are borne by nonsmokers who otherwise are forced to pay higher taxes and inflated health insurance premiums. Smoking bans – including outdoors as well as indoors – encourage and support quitting by making it more inconvenient for a person to remain a smoker. Every ban on smoking also sends a very clear educational message to the smoker that his conduct is not desirable – and indeed is found to be annoying and irritating if not repugnant – by a large majority of others. Finally, smoking bans help those already trying to quit by tending to assure that they will not be tempted by being in the presence of a smoker, smell the “tempting” aroma of tobacco smoke, etc. While not the primary argument or purpose in enacting outdoor smoking bans, this additional significant effect of such bans may well be a factor in deciding to support such public health measures.

SUMMARY

More than 350 jurisdictions have successfully prohibited smoking in outdoor areas – such as beaches, parks, playgrounds, near building entrances, while waiting in lines, etc. – without legal challenges, problems of enforcement, loss of patronage or taxes, etc. Such bans appear to be so successful that more jurisdictions are sure to be added. Indeed, as smoking is being banned in an ever growing number of indoor areas, people are beginning to expect freedom from these toxic fumes, and to expect air unpolluted by tobacco smoke wherever they may congregate.^[32]

Very strong recent evidence of this trend is the overwhelming vote by the citizens of the State of Washington to ban smoking not only in all bars and restaurant, but to also require that building entrances be smokefree, and to prohibit smoking within 25 feet of doorways, windows, and ventilation ducts of smokefree establishments. This vote comes on the heels of a poll by the New York State Health Department which showed that the public support for banning smoking in many outdoor areas is even stronger than similar support for a 2003 bill banning indoor smoking.^[33]

NOTES

1. See, e.g., Klepeis NE, Ott WR, Switzer P. Real-Time Monitoring of Outdoor Environmental Tobacco Smoke Concentrations: A Pilot Study. Stanford University Department of Statistics, Sequoia Hall, Stanford, California 94305-4065. University of California, San Francisco Contract Number 3317SC, March 1, 2004; Repace, Measurements of Outdoor Air Pollution From Secondhand Smoke on the UMBC Campus, <http://www.repace.com/pdf/outdoorair.pdf>; Repace, Indoor and Outdoor Carcinogenic Pollution on a Cruise Ship in the Presence and Absence of Tobacco Smoking, Presented at the 14th Annual Conference of the International Society of Exposure Analysts, Oct. 17-21, 2005, Philadelphia, PA.; Near-Source Ambient Air Monitoring of Nicotine as a Marker for Environmental Tobacco Smoke, California Environmental Protection Agency, <http://repositories.cdlib.org/context/tc/article/1173/type/pdf/viewcontent/>
2. See, e.g., CARB (2003) "Technical Support Document for the Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant: Part A," Technical Report. California Environmental Protection Agency, California Air Resources Board, Office of Environmental Health Hazard Assessment, Chapter 5, pp. V6-V19; Repace JL. Banning outdoor smoking is scientifically justifiable. *Tobacco Control* 9:98 (2000).
3. See Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant, California Environmental Protection Agency Air Resources Board, <http://ash.org/CAEPAProposal.pdf> and <http://www.arb.ca.gov/newsrel/nr012606.htm>.
4. See, e.g., "As an example, Dr. Muller, a physician, brought up the case of a resident with asthma who often had to cross the street to avoid smokers. Otherwise, Dr. Muller said, 'he would get smoke in his face. He would start coughing and it might set off an asthma attack.'" Maryland Village Endorses A Ban on Outdoor Smoking, *New York Times*, November 25, 2000.
"I guess [legislator] has never witnessed an asthmatic child struggling to breathe because of nearby smokers at Moonlight Beach. I have, and I can tell you that it is more than a danger, it is a tragedy." Letter to the Editor, *San Diego Union-Tribune*, April 28, 2004.
5. See, e.g., "[S]moking bans are justified for health reasons in those outdoor environments which are similar to indoor environments in terms of their exposure to environmental tobacco smoke (ETS)." Bloch & Shopman, Outdoor smoking bans: more than meets the eye, *Tobacco Control*, 9:99, March 2000.
6. See Vital and Health Statistics: Current Estimates From the National Health Survey (1994).
7. See Secondhand Smoke Poses Heart Attack Risk, CDC Warns, *Washington Post*, April 23, 2004: "The CDC disclosed its new advisory in a commentary to a study published in the British Medical Journal yesterday, saying doctors need to warn people with heart problems that secondhand smoke can significantly increase their risk of a heart attack. The agency said that **as little as 30 minutes' exposure can have a serious and even lethal effect.**" [emphasis added]
Similarly, the *St. Louis Post-Dispatch* warned that: "The U.S. Centers for Disease Control and Prevention cautioned that secondhand smoke greatly increases the **risk of heart attack** for those with heart disease. For such people, **even 30 minutes' exposure can be lethal**, the government warns. Smoking Gun, April 28, 2004. [emphasis added]
These and similar reports in dozens of major newspapers were based upon an article by Terry F Pechacek, associate director for science, and Stephen Babb, coordinator, secondhand smoke work group, CDC: How acute and reversible are the cardiovascular risks of secondhand smoke?, *British Medical Journal*, BMJ 2004;328:980-983 (24 April), doi:10.1136/bmj.328.7446.980, in which they reported in part:
"Could eating in a smoky restaurant precipitate an **acute myocardial infarction** in a non-smoker? As unlikely as this sounds, a growing body of scientific data suggests that this is possible. In this context, the results of the observational study in Helena, MT are provocative: hospital admissions for acute myocardial infarction declined by about 40% during the six months in which a comprehensive

local ordinance on clean air was in effect, and rebounded after the ordinance was suspended. . . .”

“Even without future studies or replications of these findings, **the data are sufficient to warrant caution regarding exposure to secondhand smoke.** Clinicians should be aware that such exposure can pose acute risks, and **all patients at increased risk of coronary heart disease or with known coronary artery disease** should be advised to avoid all indoor environments that permit smoking. Additionally, the families of such patients should be counselled not to smoke within the patient's home or in a vehicle with the patient. In addition to its impact on heart disease, exposure to secondhand smoke causes **lung cancer** in non-smokers, **respiratory infections** and **asthma** in children, and even **death** in exposed infants. [emphasis added]

See also, Glantz, *Even a Little Secondhand Smoke is Dangerous*, *Journal of the American Medical Association, JAMA*. 2001; 286: 462-463: “The article by Otsuka and colleagues in this issue of THE JOURNAL adds substantially to the case that **short-term passive smoking adversely affects endothelial function in ways that immediately compromise the cardiovascular system.** The investigators demonstrated that, in healthy young volunteers, **just 30 minutes of exposure to secondhand smoke compromised the endothelial function in coronary arteries of nonsmokers in a way that made the endothelial response of nonsmokers indistinguishable from that of habitual smokers.** [emphasis added] The article referred to was: Otsuka R, Watanabe H, Hirata K, et al. Acute effects of passive smoking on the coronary circulation in healthy young adults. *JAMA*. 2001;286:436-441.

A study in Helena, Montana found that a ban on smoking in public places resulted in a 40% reduction in hospital admissions for heart-related illnesses during the six months in which a public smoking ban was in place. Sargent, R.P., Shepard, R.M., Glantz, S.A. “Reduced incidence of admissions for myocardial infarction associated with public smoking ban: before and after study.” *BMJ* 2004 ;328: 977-80.

Another study found that heart attack rates in Pueblo, Colo. dropped by 27% in the 18 months after a smoking ban was imposed in bars, restaurants and other public places. But, in a nearby county without a smoking ban, the number of heart attacks held steady during the same period. “Study, Heart Attacks Drop With Smoking Ban,” *Washington Post*, November 14, 2005. (“I was probably skeptical that such an ordinance would have such a rapid effect,” said the study's leader . . . [b]ut he noted that other research has shown that exposure to secondhand smoke can cause adverse cardiovascular effects within minutes – and that the latest survey seems to bear that out.”)

A thorough review of the published medical literature reveals that: “The effects of **even brief** (minutes to hours) **passive smoking are often nearly as large** (averaging 80% to 90%) **as chronic active smoking.**” Cardiovascular Effects of Secondhand Smoke - Nearly as Large as Smoking, *Circulation*, 2005;111:2684-2698.

8. Persons with heart problems and asthma, bronchitis or other lung ailments are particularly at risk when exposed to secondhand smoke. See Pechacek, and Babb, “How acute and reversible are the cardiovascular risks of secondhand smoke?” *BMJ* 2004;328:980-983. See also “The Health Consequences of Smoking: A Report of the Surgeon General.” U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004; Ventura, S.J., Mosher, W.D., Curtin, S.C., Abma, J.C., Henshaw, S. “Trends in pregnancies and pregnancy rates by outcome: Estimates for the United States,” 1976–96. National Center for Health Statistics. *Vital and Health Statistics* 2000;21(56).

It appears that about 96 million Americans have conditions such as chronic bronchitis, asthma, hay fever or allergic rhinitis without asthma, chronic sinusitis, deviated nasal septum, chronic disease of tonsils or adenoids, emphysema – not to mention many common allergies – which make them especially susceptible to drifting tobacco smoke, *Vital and Health Statistics: Current Estimates From the National Health Survey* (1994).

9. The many media reports of studies and finding by major governmental bodies, as well as scientific and medical organizations, regarding secondhand tobacco smoke have put everyone on legal notice of the health risks of tobacco smoke pollution. It should also be noted that, in an

increasing number of situations, and under a variety of legal theories, entities which permit smoking have been held legally liable for health problems caused to nonsmokers.

For example, in Olympic Airways v. Husain, 124 S. Ct. 1221, 157 L. Ed. 2d 1146 (2/24/04), the U.S. Supreme Court upheld a verdict holding an airline liable for the wrongful death of a passenger found to have been killed by drifting tobacco smoke.

The Supreme Court has also held that subjecting a prisoner to drifting tobacco smoke may constitute “cruel and unusual punishment”; Helling v. McKinney, 509 U.S. 25, 33 (1993) (“We affirm the holding of the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS [Environmental Tobacco Smoke] that pose an unreasonable risk of serious damage to his future health.”).

In Schiller v. Los Angeles Unified School District PAS656, PAS 1750, LA 607109, Calif. Workers’ Comp. Appeals Board 3/20/92, a school board was ordered to pay \$29,999 to compensate a teacher when tobacco smoke drifting up from a first-floor smoking area into her second-floor classroom triggered chronic lung disease. See generally, Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990); McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991); Helling v. McKinney, 509 U.S. 25 (1993); Lizzio v. Lizzio, 162 Misc. 2d 701 (Fam. Ct. Fulton Cty. Ga. 1994); Warren v. Keane, 196 F.3d 330 (2d Cir. 1999); Alamin v. Scully, 2000 U.S. Dist. LEXIS 13143 (S.D.N.Y.); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. Wis. 2001); Service v. Union Pac. R.R. Co., 153 F. Supp. 2d 1187 (E.D.Cal. 2001).

10. Under common principles of negligence law, a public or private entity can be held liable for injuries caused on its property, provided that it knew (and/or was on notice) of the danger. This is true even if the most immediate cause was another person (here, the smoker) – so long as the entity could reasonably have anticipated that the “intervening cause” would occur.

Of course, the law of negligence requires only that the entity take steps which a court deems to be “reasonable,” since entities cannot effectively guard against all foreseeable harms, nor will the law require them to go to extremes and spend enormous amounts of money. However, now that more than 350 jurisdictions have banned smoking in one or more outdoor areas, such smoking bans are clearly “reasonable.” For a list of just some of the beaches that have banned smoking, go to <http://ash.org/beachordinances>.

11. Secondhand tobacco smoke has been determined to be a “known human carcinogen” in the same category as asbestos, benzene, and Polonium 210, and there is no safe lower level below which exposure has been shown not to cause cancer in humans. Thus, both prudence and elementary fairness dictate that people – especially young children – should not be exposed at any level to such chemicals, and that the same strict policy of limiting even momentary exposure to asbestos should likewise apply to drifting tobacco smoke.

See generally, 10th Report on Carcinogens, U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, [<http://ehp.niehs.nih.gov/roc/toc10.html>]; Environmental Tobacco Smoke in the Workplace, Current Intelligence Bulletin 54, **National Institute for Occupational Safety and Health (NIOSH)**; Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects, **National Research Council of the National Academy of Sciences** (1986); Environmental Tobacco Smoke, Report of the Scientific Committee on Tobacco and Health, Great Britain (3/20/98); Health Effects of Exposure to Environmental Tobacco Smoke, **California Environmental Protection Agency** (9/97); The Health Effects of Passive Smoking, **National Health and Medical Research Council**, Australia (11/97); Tobacco Use: A Public Health Disaster, **World Health Organization (W.H.O.)**, <http://www.who.int/ntday/ntday97/ta3e.htm>; “Respiratory Health Effects of Passive Smoking: Lung Cancer and other Disorders.” **Environmental Protection Agency, Office of Research and Development**, Washington, D.C. EPA/600/6-90/006F. 1992.

Even the major tobacco companies have stipulated – and now publicly admit on their web sites and in widely-broadcast television ads – that secondhand tobacco smoke is linked to a wide variety of serious medical problems including cancer in nonsmokers; see, e.g., Decision of Note: Nonsmoking Flight Attendant Is a Winner In Secondhand Smoke Case, *Product Liability Law & Strategy*, July 2002.

12. Most New Yorkers favor banning smoking completely in outdoor areas like parks and beaches, according to a just-released survey sponsored by the New York State Health Commission. According to the survey, 76% favor laws banning smoking in front of public-buildings and workplace entrances, and 52% want smoking banned in public areas like parks and beaches. Millgrim, *Outdoor Smoking Has Few NY. Allies*, Ottaway News Service, November 4, 2005. <http://www.recordonline.com/archive/2005/11/04/smoke04.htm>

“According to a local public opinion survey conducted by the San Dieguito Alliance for Drug-Free Youth, 91 percent of local beachgoers support smoke-free beaches and parks.” *Opinion, San Diego Union-Tribune*, April 29, 2004. “Ogden [of the Tobacco Manufacturer's Association] admitted that second-hand smoke can be 'annoying and irritating' to non-smokers.” King, Don't Stub Us Out of Business, *Daily Record*, March 16, 2005 [emphasis added].

In this regard it should be noted that activities are often prohibited in public places simply because they may be annoying and irritating, even if they cannot be shown to cause any significant harm. For example, going topless, engaging in lewd and lascivious behavior, playing music very loudly, and other bothersome behaviors are often prohibited even though they pose no recognized health hazard.

13. Persons with heart problems and asthma, bronchitis or other lung ailments are particularly at risk when exposed to secondhand smoke. See Pechacek, and Babb, “How acute and reversible are the cardiovascular risks of secondhand smoke?” *BMJ* 2004;328:980-983. See also “The Health Consequences of Smoking: A Report of the Surgeon General.” U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2004; Ventura, S.J., Mosher, W.D., Curtin, S.C., Abma, J.C., Henshaw, S. “Trends in pregnancies and pregnancy rates by outcome: Estimates for the United States,” 1976–96. National Center for Health Statistics. *Vital and Health Statistics* 2000;21(56).

It appears that about 96 million Americans have conditions such as chronic bronchitis, asthma, hay fever or allergic rhinitis without asthma, chronic sinusitis, deviated nasal septum, chronic disease of tonsils or adenoids, emphysema – not to mention many common allergies – which make them especially susceptible to drifting tobacco smoke, *Vital and Health Statistics: Current Estimates From the National Health Survey* (1994).

14. Children's lungs are still developing and are highly susceptible to damage from toxins and contaminants, particularly those found in cigarette smoke. Tobacco smoke has been found to contribute to SIDS, and asthma and other respiratory problems. See “Morbidity and mortality in children associated with the use of tobacco products by other people,” JR DiFranza and RA Lew, *Pediatrics*, April 1, 1996, 97(4): 560-568; Tobacco and children. An economic evaluation of the medical effects of parental smoking, C. A. Aligne and J. J. Stoddard, *Arch Pediatr Adolesc Med*, Jul 1997; 151: 648-653.

15. “Communities also have the right to ban nuisances - things that are generally offensive, though not necessarily harmful - so long as fundamental individual liberties are preserved.” Bloch & Shopman, Outdoor smoking bans: more than meets the eye, *Tobacco Control*, 9:99, March 2000.

16. Courts and agencies have found that persons with many different medical conditions are especially sensitive to tobacco smoke, and therefore may be entitled to protection as handicapped or disabled persons: See, e.g., County of Fresno v. Fair Employment and Housing Commission, Ct of App. State of California, Fifth App. Dist, 266 Cal. App. 3d 1541 (1991) (severe respiratory problems); Flaniken v. Office of Personnel Management, U.S. Merit Systems Protection Board, Dallas Field Office. No. DA831L10001. (1980) (chronic laryngitis); Harmer v. Virginia Electric & Power Co., 831 F. Supp. 1300 (E.D. VA 1993) (bronchial asthma); Hinman v. Yakima School Dist., 850 P.2d. 536 (1993) (asthma); Homeier v. Tulchin, 91 F.3d 959 (7th Cir. 1996) (rhinitis and sinusitis); Parodi v Merit Systems Protection Board, 690 F2d 731 (9th Cir. 1982) (general sensitivity to tobacco smoke); Staron v. McDonald's, 51 F.3d.353 (2nd Cir. 1995) (asthma and lupus); Vickers v. The Veterans Administration, 549 F. Supp 85 (1982) (sensitivity to tobacco smoke); Weir v. Office of Personnel Management, (Merit Systems Protection Board, Dallas Regional Office, Docket No. DA 831L8610314, 1986) (severe asthma attacks); White v. United States Postal Service, (Equal

Employment Opportunity Commission, Appeal No. 01853426, 1987) (rhinitis sinusitis and tracheitis).

17. See, e.g., “employees shouldn't have to run a gauntlet of smoke just to go to work,” Tegen, Protect Non-smokers, *USA Today*, Nov. 4, 2005; “walking the gauntlet of smokers at the entrance of most buildings,” Lentz, Health Trumps Polluters' Rights, *Toronto Star*, Dec. 17, 2004; “I have to run gauntlets at the entrances to buildings where smokers hang out,” Kastens, A Ban on Smoking, *Courier-Journal (Louisville, KY)*, May 12, 2003.

18. Even the American Society of Heating, Refrigeration, and Air Conditioning Engineers, the independent trade organization for the ventilation industry, has admitted that “the only way to effectively eliminate health risk associated with indoor exposure [to secondhand tobacco smoke] is to ban smoking activity.” In other words, once the toxic chemicals in tobacco smoke get into a building and its ventilation system – whether from smoking within the building or from being drawn into the ventilation system through the air intake – even the best filters, electrostatic precipitators, etc. cannot make the air safe for persons in the building.
<http://www.ashrae.org/template/AssetDetail/assetid/46296>.

19. See, e.g., “The Youth Tobacco Prevention Corps swayed the Solana Beach Council with a sample of the 6,300 cigarette butts the group gathered in one hour last fall, along the city's 1.5 mile stretch of sand. In another cleanup, on Sept. 21, half the 230 pounds of debris plucked from the beach consisted of cigarette butts.” Carney, Smoking Bans Catching on at California Beaches, *Boston Globe*, April 19, 2004 [emphasis added].

“Figures published by the Marine Conservation Society show that last year there was a 25 per cent rise in the number of discarded butts collected by its volunteers,” Doward, Beach Smoking Ban Urged to Protect Sealife, *The Observer*, May 23, 2004.

“Spent cigarettes are the single largest source of litter on America's beaches, according to The Ocean Conservancy. . . Last year, cigarettes accounted for one in every three pieces of litter picked up in The Ocean Conservancy's annual cleanup of Florida's shores.” Mussenden, Some Fume Over Smoking on Beaches, *Orlando Sentinel Tribune*, October 15, 2003 [emphasis added].

“[B]utts accounted for 42% of all items collected.” (citing the Lake Michigan Federation), Wisby, Lake Group Seeks Smoking Ban, *Chicago Sun-Times*, September 18, 2003 [emphasis added].

20. See, e.g., “School officials say landscapers who should be planting flowers and pruning shrubs are spending time instead picking up butts on the 15,000-acre campus: Some 13 landscapers spend 10 hours a week picking up discarded cigarettes at an estimated cost of \$150,000.” Penn State Cigarette Litter Costs, *Philadelphia Daily News*, March 27, 2000.

“[S]ince the city enacted the state's first tobacco-free parks policy in May, the ground and the air have cleared, said Steve Rymer, the city's parks and recreation director.” Powell, Park Ban on Butts Working, *Saint Paul (MN) Pioneer Press*, November 7, 2003.

“Cigarette butts -- 140 million of which are flicked on to Texas roadways each year -- can take up to a decade to decompose.” Hingorani, The Cost of Litter: What is Litter?, *News 8 Austin*, May 19, 2003. [emphasis added]

21. “Cigarette butts...cost taxpayers countless dollars for cleanup,” (citing Stephanie Smith of the Lake Michigan Federation) . . . “One of the things I've been trying to deal with is the humongous amount of money unnecessarily used to clean beaches.” (Quoting Alderman May Ann Smith of the Chicago City Council), Wisby, Lake Group Seeks Smoking Ban, *Chicago Sun-Times*, September 18, 2003 [emphasis added].

22. “Cigarette butts on the beach are unsightly to tourists and residents alike,” (citing Stephanie Smith of the Lake Michigan Federation) Wisby, Lake Group Seeks Smoking Ban, *Chicago Sun-Times*, September 18, 2003.

23. See, e.g., “I remember as a little kid running along the beach - actually it was the boardwalk next to the beach, but close enough - and stepping on a lighted butt left by an inconsiderate smoker.

For a youngster I did a pretty good job of swearing like a seasoned trooper because there is nothing quite like a cigarette butt burn on the sole of your foot to make your day. . . . I also recall the same thing happening to my young daughter many, many years later and if anything my anger and frustration with smokers was even greater.” Vernon, “Fine way to kick butts,” *Gold Coast Bulletin*, May 20, 2004.

Young children are also vulnerable to cigarette burns, especially when distracted by play on the beach, and especially if they come near a smoker who is holding a cigarette at his side as smokers frequently do. This concern was one of the factors which led to smoking bans in some jurisdictions while people are waiting in line, where children have also been burned by cigarettes held at the side of a smoker – and often at the eye level of a young child.

24. See earlier notes. Actually, the case for liability is even stronger when the persons placed at risk by a practice – here, permitting smoking – are children; children who are often too young to recognize or appreciate the danger and take steps to avoid it. In short, the standard of care is higher when the potential plaintiffs are children, and juries are more likely to find liability in such cases, even if the carelessness of the smoker and/or the adult watching the child were also major factors.

25. “[S]till-burning cigarette butts roll between the planks and ignite debris wedged there, and several damaging fires had to be doused last year.” Carney, *Smoking Bans Catching on at California Beaches*, *Boston Globe*, April 19, 2004, quoting Santa Monica Councilman Herb Katz on reasons for enacting a beach smoking ban [emphasis added].

26. See, e.g., *Yarnell Man Faces Charge of Starting Wildfire with Cigarette*, *Prescott (AZ) Daily Courier*, June 30, 2004.

“A man who lied to investigators about smoking on a trail where a devastating wildfire began was sentenced Friday to two years of probation and 200 hours of community service.” *Ariz. Man Gets Probation in Wildfire*, *AP*, May 21, 2004.

“After accidentally starting a massive wildfire with a cigarette, Mike Barre says he rushed from door to door, frantically trying to help with the start of an evacuation that eventually forced thousands from their homes.” *Local Man Admits Accidentally Sparking Massive B.C. Wildfire with Cigarette*, *Canadian Press*, August 11, 2003.

“Two teens whose smoking started a wildfire that forced the evacuation of 1,000 people last summer were sentenced to two years probation on Tuesday. No homes were destroyed in the fire near the Bailey area, but firefighting costs were estimated at \$2.7 million.” *Teens Get Probation for Starting Wildfire*, *AP*, April 29, 2003.

Careless Smoker Started 670-Acre Tahoe Wildfire, *AP*, July 6, 2002.

27. “Once the filters, which are designed to absorb some of the tar and chemicals found in cigarettes, reach the sea, they leach the toxic chemicals into the water. One cigarette butt can contaminate three litres of water, according to the [Marine Conservation] society.” Doward, *Beach Smoking Ban Urged to Protect Sealife*, *The Observer*, May 23, 2004. See 10th Report on Carcinogens, U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, Pursuant to Section 301(b) (4) of the Public Health Service Act as Amended by Section 262, PL 95-622 [<http://ehp.niehs.nih.gov/roc/toc10.html>]. Also see the following footnote.

28. “Wildlife groups say the butts, containing a form of plastic called cellulose acetate, can last for up to 100 years and **pose serious risks to animals.**” Doward, *Beach Smoking Ban Urged to Protect Sealife*, *The Observer*, May 23, 2004. “Cigarette butts have been found in the guts of whales, dolphins, seabirds and turtles where they can leach toxic chemicals, cause inflammation of the animal’s digestive system and, if they trigger a blockage of the gut, lead to death., Ibid., quoting the Marine Conservation Society. See also <http://www.earthresource.org/campaigns/smoke-free/overview.html>.

29. Hanauma Bay, Oahu, Hawaii. “[c]oncerned that cigarette butts washing into the water might pose a threat to fish and turtles, they have restricted smoking to the parking lot overlooking the bay.” “News, Tips and Bargains: Smoking Banned on Hawaiian Beach,” *Los Angeles Times*, Jan. 1, 1995.

30. “Most non-smokers and smokers agreed that outdoor public places frequented by children should be designated as non-smoking areas.” Wong, Outdoor Smoking May be Next on Restricted List, Researchers Say, *University of Toronto News*, March 19, 2003.
31. See, e.g., Do Smoking Bans Really Get People to Quit?, *ABC News*, Nov. 8, 2005, <http://abcnews.go.com/WNT/QuitToLive/story?id=1292456>.
32. “New signs notify visitors of the law, and lifeguards here say they've encountered little resistance. Nobody has been cited since the ban went into effect, and lifeguards say they have had to warn only about one lawbreaker a day. ‘Even smokers themselves have been pretty positive about this, said Solana Beach Fire Chief David Ott, who oversees the city's lifeguards.” Fuchs, Backers Call Smoking Bans Along Beaches Healthy Move, *San Diego Union-Tribune*, Sept. 12, 2004. For this and many other news articles on beach smoking bans, go to www.ash.org/beaches.
33. 76% of adult New Yorkers – including 54% of smokers – favor a law banning smoking in front of public-building and workplace entrances, and a majority also favor a ban on smoking in public areas such as parks and beaches. Milgrim, Outdoor Smoking has Few N.Y. Allies, *Ottaway News Service*, Nov. 4, 2005, <http://www.recordonline.com/archive/2005/11/04/smoke04.htm>