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HJ

HB

84

(FILE 2)

February 23, 1983

Thank you for permitting me to make this presentation in favor of the passage of HB-84.

The Judiciary Committee will be interested in learning of two recent court decisions relating to one aspect of the proposed law as contained in HB-84, that of protecting the non-smoking employee in the workplace:

1. In the first decision (Vickers v. Veteran's Administration, U.S. District Court, Seattle, WA, August 31, 1982), the plaintiff was found by the Court to be protected as a "handicapped person" by provisions of the Rehabilitation Act of 1973 (29 U.S.C. §794). The plaintiff, Mr. Vickers, is an employee hypersensitive to tobacco smoke who brought suit for relief from the smokey office atmosphere in which he worked.

The importance of this decision is the formal declaration by the court of the inclusion of persons hypersensitive to ambient tobacco smoke under the federal law assisting handicapped persons in the workplace.

2. In the second case (Parodi v. Merit Systems Protection Board, 690 F. 2d 731 (1982)), another employee, also hypersensitive to the tobacco smoke in her place of work, had been advised by her physician to retire, since her allergy made it impossible to work in the smokey office to which she had been assigned. The Ninth Circuit Court of Appeals declared that the employee suffers from an "environmental limitation" and has the right to disability retirement benefits, unless her employer can place her in a "safe," "smoke-free" environment in which she can perform her duties.

One important fact about this case is that it was decided by the second highest court in our country. Another is the declaration of the plaintiff as having "environmental limitations;" the law has previously only spoken to assisting workers having physical limitations, such as vision problems, those confined to wheelchairs, and so forth.

To me, the most interesting possible effect of this court decision is as follows: I believe it was the 1964 U.S. Surgeon General's report on smoking which provided the statistic that approximately six percent of the American public is allergic to tobacco smoke. Assuming that the Alaska population follows this norm, it may be that, among employees working for the State of Alaska alone, six hundred (6% of approximately 10,000 state employees) may now be eligible for disability retirement benefits if they cannot be placed into work environments free of smoke. The economics behind such a statistic are very interesting.

Numerous corporations in the United States, taking the above judicial decisions into consideration, have solved the problem by simply taking a poll of employees, and based upon statements of employees regarding their desire to work in or out of a smokey area, have revised floorplans

and work areas, installed improved air circulation systems, smoke-eaters, and so forth.

I strongly urge this Judiciary Committee to recommend passage of HB-84 which will assist in a voluntary implementation of provision of safe working conditions for workers in Alaska. To assist you, copies of the above-referenced decisions are attached for your review.

Thank you.

Marilyn Martin

court adjudicate," *id.*, he or she is not identified, nor is he or she shown to have authorized the Foundation to represent him or her in making such a showing. They simply are not here.

B. *The Legislator Plaintiffs.*

[2] As we have seen, these plaintiffs sue only in their official capacities as members of the Legislature. They do not assert independent claims as individuals. Thus, their specific claims are confined to those under Article IV, Section 4, and the Fifth and Tenth Amendments. But those are claims of the State of California, and there is no allegation that the legislator plaintiffs represent, much less that they have been authorized to represent the house of the legislature of which they are members, the legislature itself, or the State.

For all that appears, the State may not desire to assert the constitutional claims that they make, either because it does not believe that the claims have merit, or for other reasons. In California, the Attorney General is, "[s]ubject to the powers and duties of the Governor, ... the chief law officer of the State." Cal.Const., Art. 5, § 13. He "has charge, as attorney, of all legal matters in which the State is interested ..." (Cal. Government Code § 12511), and "... shall ... prosecute or defend all causes to which the State ... is a party. ..." (*Id.*, § 12512). For whatever reason, he is not here.

In *Mountain States Legal Foundation, supra*, the state was before the court, arguing against the petitioners' claims. Here, it is not present at all. That fact, however, does not, by some alchemy, transfer the state's claims to the plaintiffs, just because the plaintiffs want to assert them. Here again, *Mountain States* is directly in point. See 630 F.2d at 769-771.

If we assume that the allegation that "plaintiffs" are injured by the ban on construction of major sources of pollution is intended to include the plaintiff legislators, it is still insufficient to give them standing. The injury involved, "economic stagnation," or "severe economic dislocation," may or

may not in fact affect any of them, or any of the Foundation's members, supporters, or contributors. It is just the kind of claimed injury the assertion of which is an attempt at having the court adjudicate "'abstract questions of wide public significance' which amount to 'generalized grievances, pervasively shared and most appropriately addressed in the representative branches.'" *Valley Forge College, supra*, — U.S. at —, 102 S.Ct. at 760, quoting *Warth v. Seldin*, 1974, 422 U.S. 490, 499-500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343.

In No. 81-4442, the judgment is affirmed. In No. 81-7060, the petition is dismissed.



Irene C. PARODI, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD and Office of Personnel Management, Respondents.

No. 80-7671.

United States Court of Appeals,
Ninth Circuit.

Argued Feb. 10, 1982.

Submitted April 13, 1982.

Decided Oct. 21, 1982.

Federal employee was denied disability retirement benefits by the Merit Systems Protection Board, and she appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) the Court of Appeals had appellate jurisdiction to review decision, and (2) employee established prima facie case for entitlement to benefits; however, proceeding would be remanded since record was unclear as to whether suitable employment in a safe environment was available.

Reversed and remanded.

1. United States ⇐39(15)

Judicial review of voluntary disability determinations is available where there has been a substantial departure from important procedural rights, misconstruction of governing legislation, or some like error going to heart of administrative determination. 5 U.S.C.A. § 8347(c).

2. United States ⇐39(15)

Disability benefits proceeding in which federal employee claimed that Merit Systems Protection Board misconstrued governing legislation by not finding her "totally disabled" despite her inability to perform her work in her assigned work site was subject to judicial review. 5 U.S.C.A. § 8347(c).

3. United States ⇐39(15)

Party seeking to prove disability meets initial burden of proof by showing that employee is unable, due to disease or injury to perform useful and efficient service in specific position occupied at time proceedings for voluntary or involuntary retirement are instituted by either federal employer or government. 5 U.S.C. (1976 Ed.) § 8331(6).

4. United States ⇐39(15)

Under statute pertaining to disability of federal employees, it is not required that person have serious or permanent physical problem to qualify for disability benefits; law only requires person be unable to perform useful and efficient service because of disease or injury on job last occupied. 5 U.S.C. (1976 Ed.) § 8331(6).

5. United States ⇐39(15)

Statute governing disability of federal employees does not require applicant to prove inability to perform useful service under all circumstances. 5 U.S.C. (1976 Ed.) § 8331(6).

6. United States ⇐39(15)

Once applicant for voluntary disability retirement benefits demonstrates inability to perform useful and efficient service in last job occupied, burden shifts to government to show that appropriate substitute position is available and if government sat-

isfies that burden and offers claimant suitable position, claimant is no longer disabled within meaning of statute but if government cannot find suitable position or refuses to offer one, claimant is then entitled to disability benefits. 5 U.S.C. (1976 Ed.) § 8331(6).

7. United States ⇐39(15)

Federal employee established prima facie case of entitlement to disability retirement benefits due to her inability to continue working in a smoke-filled environment; however, record was unclear as to whether suitable employment in a safe environment was available necessitating remand for further proceedings. 5 U.S.C. (1976 Ed.) § 8331(6).

Paul M. Dubrasich, Browne & Kahn, San Francisco, Cal., for petitioner.

William Kanter, argued, Russell L. Caplan, William Kanter, Washington, D. C., on brief, for respondents.

Appeal from the Merit Systems Protection Board.

Before CHOY, PREGERSON, and POOLE, Circuit Judges.

PREGERSON, Circuit Judge:

Appellant Irene C. Parodi, a federal employee, was transferred to an office in which many other employees smoked. She began experiencing pulmonary difficulties. On her doctor's advice, she took a leave of absence from work. She then applied for employment disability benefits, claiming her reaction to cigarette smoke rendered her disabled. Doctors who examined her on behalf of the government found that she had not suffered physical damage. They did conclude, however, that her hypersensitivity to cigarette smoke prevented her from working in a smoke-filled environment. Appellee Office of Personnel Management (OPM) ruled that her medical condition did not render Parodi disabled within the meaning of the governing statute and denied disability benefits. Appellee Merit

Systems Protection Board (MSPB) affirmed the denial.

Parodi appeals, claiming that appellees, in denying her disability benefits, misconstrued the statutory meaning of "disability." Appellees answer that this court has no jurisdiction to review this case, or, if this court has jurisdiction, that Parodi was not disabled under the applicable statute.

We conclude that this court has appellate jurisdiction to review appellees' decision and that Parodi was disabled. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

Parodi worked for the Defense Logistics Agency for nearly twelve years. In July 1977, the agency transferred her to a new workplace, located in a room occupied by sixty to seventy people, many of whom smoked.

Immediately after the transfer, Parodi began missing work due to pulmonary complications which included continual phlegm production, chest pains, congestion, and difficulty breathing and speaking. A pulmonary specialist, Dr. Donald Ho, diagnosed her as suffering from "asthmatic bronchitis with hyper-irritable airways," and concluded her condition stemmed from her reaction to cigarette smoke. Dr. Ho recommended she take leave from work. She did so and her symptoms subsided. Dr. Ho then recommended she not return to work in a smoke-filled environment. Parodi continued her absence from work and, shortly thereafter, on June 26, 1979, she filed for disability retirement benefits.

Two doctors examined Parodi on behalf of the OPM. Dr. Charles Bass did not perform any objective tests but reported that Parodi did not suffer any short or long term adverse physical effects. Dr. Bass acknowledged that his opinion could change if he saw Parodi's chest x-rays and that Parodi's problem could require "personnel and environmental control." Dr. Robert Fallat, in examining Parodi, exposed her to cigarette smoke and within four minutes she suffered acute pulmonary problems including airway irritation, an increase in air-

way resistance, and a reduction in peak-flow rates. Dr. Fallat concluded that Parodi was hypersensitive to cigarette smoke, and recommended she "not return to employment in the same office where she previously experienced significant symptomatology." Dr. Fallat also stated that requiring Parodi to work in her previous job would endanger her health.

The OPM reviewed the medical evidence and, on September 27, 1979, concluded that Parodi was not totally disabled "within the meaning and intent of the Civil Service Retirement Regulations." Parodi appealed to the MSPB.

In its decision, the MSPB acknowledged the doctors' recommendation that Parodi not return to work in a smoke-filled environment and that her superior officer believed that she could not do her job due to pulmonary problems. The MSPB also recognized that Parodi "might reasonably be concerned with the probable risk to her future health from working in an environment where exposure to cigarette smoke presents a hazard to all employees, and particularly to herself because of her peculiar physical sensitivity." Despite these findings, the MSPB concluded that Parodi was not totally disabled and affirmed the OPM decision.

JURISDICTION

Parodi requests that this court review the MSPB's denial of her disability retirement claim. Our review of this denial is governed by several statutes. At the time Parodi filed her claim, the employee retirement statute provided that "[a]n administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter [5 U.S.C. §§ 8331 et seq.] may be appealed to the Merit Systems Protection Board." 5 U.S.C. § 8347(d). Another statute provided that persons could appeal decisions of the MSPB to the United States Court of Claims or the United States Court of Appeals. 5 U.S.C. §§ 7703(a)(1) and (b)(1). Under section 7703, courts must set aside agency actions found to be "(1) arbitrary, capricious, an

and offers claimant suitable position or refusal to accept same is no longer disabled under the statute but if government is then entitled to deny benefits. 5 U.S.C. (1976 Ed.)

39(15)

employee established prima facie case to disability retirement to her inability to continue to work in a smoke-filled environment; was unclear as to whether government was in a safe environment necessitating remand for further proceedings. 5 U.S.C. (1976 Ed.)

asich, Browne & Kahn, San Francisco, for petitioner.

er, argued, Russell L. Cantor, Washington, D. C., on behalf of appellees.

the Merit Systems Protection Board.

JOY, PREGERSON, and JUDGES.

N, Circuit Judge:

ene C. Parodi, a federal employee, was transferred to an office in which other employees smoked. She began experiencing pulmonary difficulties. On medical advice, she took a leave of absence from work. She then applied for disability retirement benefits, claiming that cigarette smoke rendered her disabled. Doctors who examined her on behalf of the government found that she had suffered physical damage. They concluded, however, that her hypersensitivity to cigarette smoke prevented her from working in a smoke-filled environment. The Office of Personnel Management ruled that her medical condition rendered Parodi disabled within the meaning of the governing statute and that she was entitled to disability retirement benefits. Appellee Merit

abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). The retirement statute, 5 U.S.C. §§ 8331-48, also provided, however, that "[t]he Office [of Personnel Management] shall determine questions of disability and dependency arising under this subchapter. The decisions of the Office concerning these matters are final and conclusive and not subject to review." 5 U.S.C. § 8347(c).¹

The question before us is whether this court may review the MSPB's denial of Parodi's claim, and if so, what standard of review should be applied. Parodi argues that this court should review the MSPB decision pursuant to the standard of review set forth in section 7703(c). Appellees contend that section 8347(c), in mandating that OPM decisions concerning disability and dependency "are final and conclusive and not subject to review," bars any judicial review of Parodi's claim.

With one exception, discussed below, courts have rejected both these positions. Courts have recognized that the "conventional 'substantial evidence'" standard of review—which Parodi seeks to apply—does not apply to disability determinations because section 8347(c) places a "special and unusual restriction on judicial examination," *Scroggins v. United States*, 397 F.2d 295, 297, 298 (Cl.Ct.), cert. denied, 393 U.S. 952, 89 S.Ct. 374, 21 L.Ed.2d 363 (1968).²

Courts have also rejected the contention that section 8347(c) bars all judicial review of OPM disability determinations. That

section specifically limits its effect to questions of "disability and dependency." Thus, courts have interpreted section 8347(c) as barring judicial review only of the evidentiary basis of determinations concerning disability and dependency. See *Scroggins*, 397 F.2d at 298, 299. Courts, however, have allowed judicial review in disability cases "where there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.'" *Scroggins*, 397 F.2d at 297, quoting *Gaines v. United States*, 158 Cl.Ct. 497, 502, cert. denied, 371 U.S. 936, 83 S.Ct. 309, 9 L.Ed.2d 271 (1962). See also *Polos v. United States*, 621 F.2d 385, 391 n.9 (Cl.Ct.1980); *Fancher v. United States*, 588 F.2d 803, 806 (Cl.Ct. 1978); *Allen v. United States*, 571 F.2d 14, 17 (Cl.Ct.1978); *McFarland v. United States*, 517 F.2d 938, 942-43 (Cl.Ct.1975), cert. denied, 423 U.S. 1049, 96 S.Ct. 776, 46 L.Ed.2d 638 (1976); *McGlasson v. United States*, 397 F.2d 303, 307 (Cl.Ct.1968); *Smith v. Dulles*, 236 F.2d 739, 742 (D.C.Cir.), cert. denied, 352 U.S. 955, 77 S.Ct. 329, 1 L.Ed.2d 244 (1956); *Matricciana v. Hampton*, 416 F.Supp. 288, 289 (D.Md.1976); *Cantrell v. United States*, 240 F.Supp. 851, 853 (W.D.S.C.1965), aff'd, 356 F.2d 915 (4th Cir. 1966).³

Thus, under this so-called *Scroggins* rule, courts treat section 8347(c) as limiting, rather than barring, judicial review otherwise provided by section 7703(c). While the *Scroggins* standard of judicial review and the standard of review provided by section 7703(c) are similar—both allow courts to

1. Congress amended section 8347(c) in 1980 to provide for judicial review under 5 U.S.C. § 7703(c) in involuntary disability retirement cases where the employee was found disabled on the basis of his or her mental condition. Pub.L.No.96-500, 94 Stat. 2696 (1980), (codified at 5 U.S.C. 8347(d) (1981)). As the statute went into effect January 1, 1981 and Parodi's claim did not involve an involuntary claim on the basis of her mental condition, the amendment does not control her case. The significance of the amendment is discussed *infra*.

2. The statute was amended since *Scroggins*. The change—substituting the OPM for the Civil

Service Commission in subsection 8347(c) and the MSPB for the Civil Service Commission in subsection 8347(d)—was a technical amendment and does not affect the *Scroggins* doctrine. See *Chapman v. Office of Personnel Management*, MSPB No. DA 831609003 (May 28, 1981), slip op. :

3. Congress did not explain the purpose of section 8347(c). See *Matricciana v. Hampton*, 416 F.Supp. 288, 289 n.1 (D.Md.1976). (After an exhaustive search, counsel was unable to come up with an explanation of the purpose of section 8347(c) in the legislative history.)

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8 Cl.Cl. 497, 502, cert.
83 S.Ct. 309, 9 L.Ed.2d
Polos v. United States,
9 (Cl.Cl.1980); *Fancher*
8 F.2d 803, 806 (Cl.Cl.
ted States, 571 F.2d 14,
McFarland v. United
38, 942-43 (Cl.Cl.1975),
S. 1049, 96 S.Cl. 776, 46
; *McGlasson v. United*
303, 307 (Cl.Cl.1968);
; F.2d 739, 742 (D.C.Cir.),
S. 955, 77 S.Cl. 329, 1
; *Matricciana v. Hamp-*
288, 289 (D.Md.1976);
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overturn decisions based upon improper
procedures or misconstruction of the law—
the *Scroggins* standard of review is narrow-
er. Courts reviewing agency decisions under
section 7703(c) overturn decisions not
supported by substantial evidence whereas,
courts reviewing decisions controlled by sec-
tion 8347(c), as construed by *Scroggins*, may
not reexamine the evidentiary basis for an
agency's disability determination.

This construction of section 8347(c),
which limits rather than bars judicial re-
view, is consistent with the presumption
favoring judicial review of agency actions.
"Only upon a showing of 'clear and convinc-
ing evidence' of a contrary legislative intent
should the courts restrict access to judicial
review." *Abbott Laboratories v. Gardner*,
387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18
L.Ed.2d 681 (1967), cited in *Dunlop v. Ba-*
chowski, 421 U.S. 560, 567, 95 S.Ct. 1851,
1857-58, 44 L.Ed.2d 377 (1975). The lan-
guage of section 8347(c) does not provide
clear and convincing evidence of a congress-
sional intent to bar all judicial review of
disability determinations. The statute only
evinces a congressional intent to bar judi-
cial review of factual questions concerning
disability and dependency.⁴

The Eighth Circuit recently became the
first court to reject the Court of Claims'
Scroggins rule by holding that courts lack
jurisdiction to review voluntary—i.e., em-
ployee-initiated—disability retirement deci-
sions. *Morgan v. Office of Personnel Man-*
agement, 675 F.2d 196 (8th Cir. 1982). The
Morgan court asserted that the 1980
amendment to the disability statute, Pub.
L.No. 96-500, 94 Stat. 2696 (December
1980), indicates that Congress recognized
that section 8347(c) mandates a total bar on
judicial review of voluntary disability deci-
sions. The 1980 amendment, however,
made involuntary—i.e., agency-initiated—
disability retirement determinations based
on an employee's mental condition subject

4. Had Congress wished to preclude judicial re-
view of both factual and legal questions, Con-
gress could have so provided. See 38 U.S.C.
§ 211(a) as it read prior to its 1970 amend-
ment. ("[D]ecisions of the Administrator on
any question of law or fact concerning a claim

to judicial review pursuant to the provisions
of 5 U.S.C. § 7703, rather than the narrow-
er provisions of section 8347(c).

According to *Morgan*:

this amendment expressly providing for
judicial review under § 7703 would have
been redundant if § 8347(c) had already
provided for judicial review under
§ 7703. The 1980 amendments are spe-
cific. Had Congress intended to provide
for judicial review of all disability deter-
minations and not just agency-initiated
involuntary disability retirement determi-
nations based in whole or in part upon
mental condition, Congress could have so
provided.

Morgan, 675 F.2d at 200 (emphasis original).

We disagree with the *Morgan* analysis.
The argument that the 1980 amendment
would have been redundant if section
8347(c) had provided for judicial review un-
der section 7703 is irrelevant for the simple
reason that section 8347(c), as construed by
Scroggins, does not provide for review un-
der section 7703. Rather, as noted above,
Scroggins teaches that section 8347(c) limits
the review provided by section 7703(c). The
1980 amendment gave courts power to re-
view the facts underlying an MSPB decision
involving an involuntary disability determi-
nation based on mental condition—a power
courts do not possess, under *Scroggins*,
when reviewing a MSPB decision involving
a voluntary disability application. Thus,
there is no conflict or redundancy between
Scroggins' interpretation of section 8347(c)
and the 1980 amendment. The amendment,
rather than duplicating *Scroggins*, expands
judicial review beyond that provided for by
Scroggins for involuntary disability retire-
ment determinations based on mental con-
dition.

The *Morgan* court also misread the legis-
lative reports accompanying the 1980
amendment. *Morgan* contends that the re-

for benefits or payments under any law admin-
istered by the Veterans' Administration shall be
final and conclusive and no other official or any
court of the United States shall have power or
jurisdiction to review any such decision."

ports refer to a bar on all judicial review. The House Report, however, in discussing the problem Congress intended the amendment to remedy, pointed to three cases that did not allow "judicial review" to show that the amendment was necessary. H.Rep.No. 1080, 96th Cong., 2d Sess. 4 (1980). All three cases—*Scroggins v. United States*, 397 F.2d 295 (Cl.Cl.), cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 263 (1968), *McGlasson v. United States*, 397 F.2d 303 (Cl.Cl.1968), and *McFarland v. United States*, 517 F.2d 938 (Cl.Cl.1975)—held that under section 8347(c), courts could not review the factual findings that underlie an agency's disability and dependency determinations, but that limited judicial review, i.e., review under the *Scroggins* rule, is appropriate. Thus, the bar on judicial review referred to by the reports precludes only judicial review of factual findings.

The legislative history of the 1980 amendment also indicates that Congress amended the statute based, in part, on the OPM's representation that section 8347(c) already allowed limited judicial review of all disability proceedings. As *Morgan* notes, Congress passed the 1980 amendment to prevent involuntary disability retirement proceedings from being misused to force employees out of active service for reasons of mental competency. *Morgan*, 675 F.2d at 200. See also S.Rep.No.1004, 96th Cong., 2d Sess. 2, reprinted in 1980 Code Cong. & Ad.News 5986, 5987. At the time the initial House version of the amendment was passed, the OPM objected that the proposed standard of judicial review—*de novo* review of the evidence—was too broad. See letter of Alan K. Campbell, Director, OPM, May 14, 1980, H.R. 96-1080, at 8. The OPM, however, did not argue that judicial review

was not otherwise available. In fact, the OPM took a position opposed to that which it now takes before this court by admitting that judicial review exists for all disability retirement decisions and that the *Scroggins* rule was appropriate for reviewing voluntary disability determinations. The Director of the OPM wrote Congress:

We believe it is reasonable and proper to restrict *expanded* judicial review to involuntary disability retirements. An employee who voluntarily applies for disability retirement seeks to establish title to a benefit granted by law; the Office of Personnel Management is the administrative agency charged under the law with the managerial function of adjudicating disability retirement claims. *It is appropriate, therefore, that OPM decisions on voluntary applications be conclusive, reviewable only to determine whether there has been a substantial procedural error, a misconstruction of governing legislation, or some like error going to the heart of the administrative determination.*

H.R. 96-1080 at 8 (emphasis added).⁵

Thus, we disagree with the Eighth Circuit's conclusion that the 1980 amendment indicates that section 8347(c) forecloses all judicial review.⁶ Rather, the history and language of the 1980 amendment indicate Congress merely wished to expand judicial review for involuntary disability retirement determinations based on an employee's mental condition, not that Congress believed the law barred all judicial review of disability determinations.

[1] Therefore, we decline to follow the *Morgan* decision and agree with the prior consistent judicial opinions that section 8347(c) does not bar all judicial review.⁷

5. A similar letter accompanies S.R. 96-1004, but is not reprinted in the Congressional & Administrative News. The letter may be found in the 1980 Senate Reports, on microfilm in the Library of the United States Court of Appeals for the Ninth Circuit.

6. "Although we look to the reasoning of other circuits and district courts for guidance, we are bound only by decisions rendered in this circuit." *Gunther v. County of Washington*, 623

F.2d 1303, 1319 (9th Cir. 1979), *aff'd*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981).

7. Appellees also assert that the Supreme Court's decision in *United States v. Erika, Inc.*, — U.S. —, 102 S.Ct. 1650, 72 L.Ed.2d 12 (1982), precludes judicial review of voluntary disability decisions.

Erika addressed the question whether the Court of Claims has jurisdiction to review determinations by private insurance carriers of

Cite as 690 F.2d 731 (1982)

available. In fact, the court opposed to that which this court by admitting exists for all disability cases and that the *Scroggins* rule for reviewing voluntary terminations. The District Court wrote Congress: "It is reasonable and proper to afford judicial review to involuntary retirements. An employee who voluntarily applies for disability benefits to establish title to a position by law; the Office of Personnel Management is the administrative agency charged under the law with the function of adjudicating employment claims. It is appropriate that OPM decisions on disability determinations be conclusive, rather than determining whether there is a substantial procedural error, a misapplication of governing legislation, or an error going to the heart of the substantive determination." (emphasis added).⁸

in accordance with the Eighth Circuit's decision that the 1980 amendment to section 8347(c) forecloses all judicial review. Rather, the history and the 1980 amendment indicate that Congress intended to expand judicial review of voluntary disability retirement determinations based on an employee's disability, not that Congress intended to preclude all judicial review of such determinations.

We decline to follow the majority and agree with the prior dissenting opinions that section 8347(c) bars all judicial review.⁹

(8th Cir. 1979), *aff'd*, 452 U.S. 2242, 68 L.Ed.2d 751 (1981).

We assert that the Supreme Court in *United States v. Erika, Inc.*, 402 U.S. 1650, 72 L.Ed.2d 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 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[4] Both contentions suffer the same flaw—they impose on claimants seeking disability benefits certain requirements beyond those imposed by section 8331(6). As to appellees' first contention, section 8331(6) does not require that a person have a serious or permanent physical problem to qualify for disability benefits.¹¹ The law only requires the person be unable to perform useful and efficient service, because of a disease or injury, in the job last occupied.

[5] Appellees' second contention—that Parodi is physically able to perform her job—is also irrelevant. Section 8331(6) does not require an applicant to prove an inability to perform useful service under all circumstances. While Parodi could perform her previously assigned job in an area with less smoke, as stated above, all she must show under section 8331(6) is an inability, due to an injury or disease, to perform the job she occupied at the time she applied for disability benefits. *Cerrano*, 339 F.2d at 931. She has done so.¹²

While Parodi's condition presents a prima facie case for disability benefits, we recog-

nize that her claim is unusual. Most disability claims involve a physical or mental limitation that prevents a claimant from performing his or her job. Parodi has an environmental limitation. Unlike a person with a physical limitation, a person with an environmental limitation can physically perform the assigned work in a proper environment. Here, Parodi could perform the work assigned to her if she were placed in a smoke-free environment. Parodi cannot, however, perform her job due to its location in a smoke-filled office. She is as disabled for her job at her assigned worksite as she would be had she actually suffered permanent and severe chronic bronchitis or another physically disabling disease. She cannot perform her job, not due to choice or bad habits, but due to a disease which limits the environment in which she can work.

smoke. The question whether she could work in a location containing less cigarette smoke or whether she requires total isolation from cigarette smoke is not relevant here as the government did not offer Parodi employment in any location containing less smoke than a previous place of employment.

Section 8331(6) does not exclude environmental limitations from forming the basis of an employee's disability. Appellees have not cited any authority or justification for precluding victims of environmental limita-

1973), *aff'd*, 317 A.2d 26 (Del.1974), the claimants worked in an environment of high lead concentration. When the lead level in their blood reached a certain point, they were transferred to less remunerative jobs in lead-free environments. They applied for and received partial disability benefits. The employer appealed claiming that disability requires physical incapacity as well as loss of wages. The court rejected this argument and affirmed the award. While this case involved the Delaware workers' compensation statute, the principle that a finding of disability does not require a physical impairment applies to this case.

11. Section 8331(6) makes no reference to "severity" or "seriousness" of the injury or disease. Had Congress intended "seriousness" to be a prerequisite to recovering benefits, it could have explicitly required a showing of seriousness. The federal disability insurance benefits statute, for example, defines disability as:

(i) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

42 U.S.C. § 423(d)(1)(A). This definition requires the claimant to prove a serious medical problem before receiving benefits. No such requirement exists under section 8331(6).

Further, disability does not always involve a physical impairment. For example, in *Globe Union, Inc. v. Baker*, 310 A.2d 883 (Del.Super.

12. Under similar disability statutes, courts have held that one's ability physically to perform a job does not necessarily render the person ineligible to receive disability benefits. For example, in *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978), the claimant suffered a heart attack on the job and filed for benefits under the Longshoreman's Compensation Act. The Benefits Review Board found him totally disabled. The employer appealed. The court, in affirming the award, noted that one can be disabled "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." 577 F.2d at 1006.

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tions from receiving disability benefits.¹³
As noted above, to qualify for disability
benefits applicants must demonstrate an in-
ability, due to a disease or injury, to per-
form useful and efficient service at the last
job occupied. The nature of the disease or
injury, unless it involves vicious habits, in-
temperance, or willful misconduct, is irrele-
vant.

In sum, Parodi's lack of a serious or per-
manent medical incapacity and her ability
to perform her job in another location are
immaterial to the primary question concern-
ing disability—whether she could perform
the job she last occupied. She could not.

The finding that she could not perform
the job she last occupied, however, does not
conclusively decide this case. Under the
facts presented here, Parodi would not be
disabled if the government offered her suit-
able employment—employment at the same
grade or position in a location appropriate
for Parodi's physical condition—because if
such employment were offered, Parodi
would be able to perform useful and effi-
cient service. We must decide who carries
the burden of proving whether suitable em-
ployment is available to Parodi.

The only case discussing this issue is *Cer-
rano v. Fleishman*, 339 F.2d at 925. There,
the Bureau of Customs involuntarily retired
Cerrano. The administrative board found
Cerrano disabled for "useful and efficient
service" in his position. He claimed he was
not disabled for service in other positions in
the same grade or class. The Second Cir-
cuit held that the Civil Service Commission,
before involuntarily retiring someone, need

13. Analogous areas of law provide that persons
suffering from environmental limitations (gen-
erally referred to as non-exertional limitations)
may be considered disabled. Social Security,
for example, provides disability benefits where
environmental restrictions result in an "inabil-
ity to tolerate some physical feature(s) of work
settings that occur in certain industries or
types of work." 20 C.F.R. Subpart P, App. 2,
Rule 2000.00(e). See also *Gagnon v. Secretary
of Health, Education, and Welfare*, 666 F.2d
662 (1st Cir. 1981). Workers' Compensation
cases have also recognized environmental limi-
tations as disabling. See generally 2 A. Larson,
The Law of Workmen's Compensation, § 57.61,
(1981).

not "search the entire galaxy of Civil Ser-
vice jobs, either in the same grade or the
same class, to determine whether or not
there was some such position between Alas-
ka and Florida or Hawaii and Maine, which
the appellant, in spite of his disability, could
fill." *Id.* at 931. The court also suggested
that an employee applying for voluntary
disability benefits would not have to prove
"he was unable to perform any of the jobs
which for administrative convenience are
put in the same grade or class and in which,
at the time, there might be an opening."
Id.

[6, 7] We agree that an employee should
not have to prove the availability of an
appropriate job. The government is in a
better position than the claimant to provide
evidence of the availability of suitable em-
ployment, particularly the availability of
employment in a safe environment. There-
fore, we hold that once an applicant for
voluntary disability retirement benefits
demonstrates an inability to perform useful
and efficient service in the last job occu-
pied, the burden shifts to the government
to show that an appropriate substitute posi-
tion is available.¹⁴ If the government sat-
isfies this burden and offers the claimant a
suitable position, the claimant is no longer
disabled within the meaning of section
8331(6). If, however, the government can-
not find a suitable position or refuses to
offer one, the claimant is then entitled to
disability benefits. In the instant case,
Parodi is willing and able to work if a
position in the same grade or class located

14. This test is similar to that employed in de-
termining Social Security disability. When ap-
plying for Social Security disability, a claimant
carries the initial burden of establishing that he
is unable to perform his previous work. Once
the claimant has made such a showing, the
burden shifts to the Secretary of HEW to estab-
lish that there is other substantial gainful em-
ployment which the claimant can perform.
Hall v. Secretary of HEW, 602 F.2d 1372, 1375
(9th Cir. 1979). The test we adopt is also
similar to the test employed in connection with
the Longshoremen's Compensation Act. See
*Bumble Bee Seafoods v. Director, Office of
Workers' Compensation Programs*, 629 F.2d
1327 (9th Cir. 1980).

in a safe environment is available. Therefore, unless Parodi's environmental limitation is accommodated within 60 days by an offer of suitable employment in a safe environment,¹⁵ Parodi is eligible for disability benefits. For good cause shown to the district court, this period could be extended.

The record is not clear whether suitable employment in a safe environment is available. If it is, and if the government does not offer Parodi such employment, she is eligible for disability retirement benefits in an amount to be determined through regular proceedings.

This panel will retain jurisdiction over further proceedings in this appeal if any are necessary subsequent to remand.

REVERSED and REMANDED for further proceedings in accordance with the foregoing opinion.



Milton VENTURA, Plaintiff-Appellant,

v.

Hoyt C. CUPP, Superintendent, Oregon State Penitentiary, Defendant-Appellee.

No. 81-3598.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 5, 1982.

Decided Oct. 21, 1982.

Petitioner appealed from an order of the United States District Court for the District of Oregon, Robert C. Belloni, J., denying a petition for habeas corpus. The Court of Appeals held that although the failure to exhaust state remedies was suggested by the record, it was not possible to

15. In this case, the government could simply remove the environmental barriers or offer Par-

determine whether the failure to exhaust was properly excused in whole or in part or whether any state remedy still existed, and therefore, appeal from denial of petition for habeas corpus would be dismissed and cause would be remanded for determination of whether any state remedies remained available to petitioner, whether any previously available state remedies were not exhausted, and whether failure to have employed available state remedies was either a deliberate bypass or a situation in which there was no cause of the failure to have employed state remedies.

Dismissed and remanded.

1. Habeas Corpus ⇐ 45.3(1)

Requirement of exhaustion of state remedies may not be waived by state unless the interest of justice so requires.

2. Habeas Corpus ⇐ 113(13)

Although the failure to exhaust state remedies was suggested by the record, it was not possible to determine whether the failure to exhaust was properly excused in whole or in part or whether any state remedy still existed, and therefore, appeal from denial of petition for habeas corpus would be dismissed and the cause would be remanded for a determination of whether any state remedies remained available to petitioner, whether any previously available state remedies were not exhausted, and whether failure to have employed available state remedies was either a deliberate bypass or a situation in which there was no cause of the failure to have employed state remedies.

Hollis K. McMilan, Eugene, Or., for plaintiff-appellant.

Virginia L. Linder, Asst. Atty. Gen., Salem, Or., for defendant-appellee.

Appeal from the United States District Court for the District of Oregon.

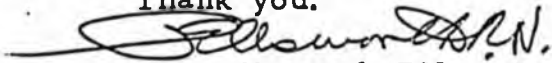
odi a job in an area containing less smoke.

Feb. 14, 1983

To: The Honorable Sponsors of HB. No. 84

I would like to see passage of the above---especially as related to the "close work area". Many workers are exposed, to "smokers," who have allergy/respiratory problems and should be allowed to have a smoke-free work place.

Thank you.



Pat Ellsworth RN
Health Unit, Fed. Bldg.
Bx 378
Juneau, Alaska 99802

February 14, 1983

Dear Hearing Officer,

I support House Bill No. 84, which if enacted would prohibit smoking in public places and work area. As a nonsmoker, I am concerned about the injurious effects of secondary smoke to my health.

I believe my desire for a smoke free environment can be achieved, and that smokers may continue to smoke, by providing for designated smoking areas and segregating work areas into smoking and nonsmoking areas.

I am also concerned that the tobacco industry, by spending large amounts of money, may sway the apparent consensus of the group presenting testimony. I hope that you will seek information from the interested public beyond the short sighted profit motive of the tobacco companies.

Sincerely,

Eugene E. Miller

Eugene E. Miller
17040 Glacier Highway
Juneau, AK 99801

cc: Representative Mike Miller
Representative Jum Duncan
Senator Bill Ray

BARTLETT MEMORIAL HOSPITAL

P. O. BOX 3-3000 • JUNEAU, ALASKA 99801 • TELEPHONE (907) 586-2611
MILE 3 — GLACIER HIGHWAY

February 11, 1983

HOUSE BILL 84 "SMOKING IN PUBLIC PLACES"

Traditionally, smokers have enjoyed the freedom to smoke when and where they choose. In recent years, research has shown that second hand smoke can have harmful effects on non-smokers. Non-smokers are no longer a silent majority, they mind if you smoke and are speaking up.

Tobacco smoke contains hazardous compounds; tar, nicotine, carbon monoxide, cadmium, nitrogen dioxide, ammonia, benzene, formaldehyde and hydrogen sulfide. Two-thirds of the smoke from the burning cigarette goes into the environment. The smoke from the burning end of the cigarette has the highest concentration of these pollutants.

Being in a room with smokers can significantly increase the carbon-monoxide levels in non-smokers. The half-life of carbon-monoxide is over 5 hours and with prolonged repeated exposure a non-smoker may have a carbon-monoxide level as high as someone that smokes. This carbon-monoxide has a higher affinity for hemoglobin in the blood than does oxygen and causes a decrease in the ability of the blood to transport oxygen thru out the body. This can lead to impaired performance and physiological stress to vital organs.

Persons exposed to second hand smoke experience an increase in the likelihood of developing; bronchitis, emphysema, lung cancer and persons with existing lung disease such as asthma who are sensitive to tobacco smoke are compromised.

Nonsmokers have the right to breath clean air, free from harmful and irritating tobacco smoke. I support House Bill 84 and encourage the legislature to take action on their behalf.

Sincerely,

Gary Dunne RRT
Gary Dunne RRT

COPY

To: All Members of the State Affairs, Resources & Judiciary Committee

From: Anna von Reitz, State Employee, Alaska Veteran

Dear Committee Members,

I urge you to support and pass the proposed House Bill 84, "An Act Relating to Smoking in Public Places and Vehicles." The health hazards of smoking and of ambient smoke inhalation are well documented; the correlation between exposure to tobacco smoke and incidence of heart and lung diseases is too strong to ignore. In the best interests of public health, it is your responsibility to take action against this ubiquitous menace.

There are some special areas of concern that I urge you to consider with exceptional care -- those being the provisions to protect young children, the elderly and non-smoking members of the work force.

As you are probably well aware, the elderly and young children are especially susceptible to lung damage and impaired vascular performance, which is further complicated by exposure to ambient smoke. Non-smoking members of the work force deserve special consideration because their abstinence from smoking is a contributing factor toward greater productivity, lower insurance rates and lower work site maintenance costs.

A final urgent concern is for the establishment of an effective and comprehensive educational program for the general population concerning the dangers to public and personal health, and the very real social costs, that are associated with smoking and inhalation of ambient smoke.

Support House Bill 84!

Box 981
Juneau, Alaska 99802
February 9, 1983

The Honorable Mitchell F. Abood, Jr.
Chair. State Affairs Committee
Alaska State House of Representatives
Pouch V State Capitol Building
Juneau, Alaska 99811

Dear Mr. Abood:

Re: HB #84 SMOKING IN PUBLIC PLACES

I encourage you to work toward passing HB #84 out of your committee with a unanimous "Do Pass."

Medical studies show that exposure to tobacco smoking among healthy non-smokers significantly reduces small airway function. In people who are allergic to smoke, it can cause headaches, elevated blood pressure and heart rate, coughing and even asthma attacks. Prevent discrimination against non smokers, by providing public places where they can do their grocery shopping etc, without being subjected to the passive act of smoking against their own choosing.

I think people in general are considerate of others, when it is pointed out that their actions can harm others. This is demonstrated by the way people obey the no smoking signs in hospital rooms and in elevators.

HB # 84 can be used to let smokers know that non smokers have the right not to be subjected to their side smoke.

Sincerely,

Nina L. Brown, R.N.
Nina L. Brown, R.N.

CC: Milo Fritz
Mike Miller

Juneau, Alaska
February 10, 1983

The Honorable Mitchell E. Abood, Jr.
Alaska State House of Representatives
Pouch "V" State Capitol Building
Juneau, Alaska 99811

Dear Sir:
RE: HB 84 Smoking in Public Places

As a respiratory Therapist in an acute care facility I see the ravages of smoking every day. Men and women who were once active and healthy now are reduced to no better than cripples by the self destructive act of smoking.

As Chairman of the State Affairs Committee, I encourage you to work toward passing this bill out of your committee with a unanimous "Do Pass." It will protect the non-smokers from the exposure to smoke in the air from smokers. Cigarette, cigar and pipe smoke does not heed "No Smoking Signs" it drifts as it pleases. Smoke assaults the lungs, sometimes only as unseen particles of all people, smokers and non smoker alike.

Smoking is an active habit done by conscious choosing, unfortunately non-smokers are subjected to the passive act of smoking against their own choosing. Passive smoking by non-smokers causes some people great distress, in the form of headache, nausea, itchy eyes and sore throats. In some cases it can trigger shortness of breath, elevated blood pressure and heart rate, coughing and even asthma attacks in some individuals. The worst result of passive smoking is the effect on infants and little children and the elderly who have minimal reserves to combat the ill effects.

Non Smokers deserve equal rights, provide them with public places where they will be free from passive smoking.

PLEASE SUPPORT H.B. #84 SMOKING IN PUBLIC PLACES.

Sincerely,



Sandra N. Gast, R.T.
6310-22 Glacier Hwy
Juneau, Alaska 99801

(Bartlett Memorial Hospital)

CC: Milo Fritz
Mike Miller



SOHIO ALASKA PETROLEUM COMPANY

3111 "C" STREET
ANCHORAGE, ALASKA

TELEPHONE (907) 276-5111

MAIL: POUCH 6-612
ANCHORAGE, ALASKA 99502

February 14, 1983

Representative Milo Fritz
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Milo:

As the Alaska Medical Director for Sohio Alaska Petroleum Company, I am personally committed to the preservation and maintenance of good health and safe working conditions.

The most serious preventable hazard to an individual's health is the danger from cigarette smoking and/or inhalation of second hand smoke.

I strongly encourage you to ~~co~~-sponsor and support passage of House Bill 84.

It is indeed a matter of life and health versus sickness and infirmity.

Sincerely,

Robert W. Rigg, M.D.
Alaska Medical Director

RWR:jsr

*Will see you next week -
Regards.*

VI. LITIGATION

A. Private Actions to Prohibit or Restrict Smoking in Private Places of Work

1. Shimp v. N. J. Bell Telephone Co.,
368 A 2^d 408 (N.J. Sup. Ct. 1976):

In the single case in which a court has found an employee has a right to a smoke-free work environment, a New Jersey court prohibited smoking in all work areas of a company office. Alleging a severe allergic reaction to cigarette smoke, the plaintiff Shimp sued her employer to compel it to provide her a no-smoking work area. This case was not actively defended by N.J. Bell Telephone.

2. Mitchell v. Bell Telephone Co.,
C-4159-76 (N.J. Sup. Ct. 1978):

This was another case in which the plaintiff, an employee of the defendant and allegedly allergic to tobacco smoke, sought an injunction compelling the defendant to provide him with a smoke-free place of work. The court dismissed the case, in response to the defendant's motion which was based on preemption grounds. Mitchell, which was actively defended, was brought by the same attorney who represented Shimp and the dismissal was entered by the same judge.

3. Gordon v. Raven Systems and Research, Inc.,
14092-79 (D.C. Sup. Ct. 1981):

Plaintiff sought reinstatement and damages from her former employer, alleging that she was fired when she insisted that she be provided with a smoke-free environment because of her allergy to tobacco smoke. The court dismissed the case, finding that defendant had no contractual or legal obligation to accede to plaintiff's demands. The court expressly declined to follow Shimp, discussed above, and observed that "neither statute, regulation, nor principles of common law required the Raven Corporation to furnish the plaintiff with the kind of smoke-free workplace she demanded."

VI. LITIGATION

4. Kensell v. State of Oklahoma et al.,
Civ. No. 81-786-T (W.D. Okla. 1982):

The plaintiff, an employee of the Oklahoma Department of Human Services, filed suit in U.S. District Court against his employer, the State of Oklahoma and numerous state officials and employees, contending, inter alia, that their refusal to provide him with a smoke-free workplace violated his rights under the First, Fifth, Ninth and Fourteenth Amendments. Citing FENSR and Gasper, discussed below, the court dismissed the plaintiff's suit, concluding that "[f]or the Constitution to be read to protect non-smokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of." Like the court in Gasper, the Kensell court noted that the results sought by the plaintiff might better be accomplished through the legislative process.

5. Vickers v. Veterans Administration,
No. (81-85V) (W.D. Wash., August 31, 1982):

A U.S. District Court in Washington State ruled that a federal employee who is hypersensitive to tobacco smoke is "handicapped" within the meaning of the Rehabilitation Act, 29 U.S.C. §794. The court, however, found that the supervisor's reasonable efforts in this case to accommodate the employee's handicap satisfied the Act's requirement that federal agencies not discriminate against handicapped persons. No damages were awarded to the plaintiff.

6. Smith v. Western Electric Company,
No. 44286 (Mo. Ct. of Appeals, Sept. 14, 1982):

The Missouri Court of Appeals held that an employer's common law duty to provide a reasonably safe workplace might include an obligation to ensure a smoke-free environment for employees sensitive to burning tobacco. The court did not base its decision on any statute but rather on the "well-settled" law that employers must protect employees from avoidable perils. Western Electric had contended that the federal Occupational Safety & Health Act preempted any state action on this issue. This decision will allow plaintiff the opportunity to prove his allegation at a trial.

VI. LITIGATION

7. Parodi v. Merit Systems Protection Board,
80-7671 (9th Cir., Oct. 21, 1982):

The U.S. Court of Appeals for the 9th Circuit ruled a government employee with a hypersensitivity to cigarette smoke must be given a smoke-free office within 60 days or be granted disability payments. While acknowledging that most disability claims involve a physical or mental limitation, the court stated that an "environmental limitation", such as Parodi's hypersensitivity to smoke, may form the basis for an employee's disability.

8. Hentzel v. The Singer Co.,
(Calif. Ct. of Appeals, Dec. 20, 1982):

The California Court of Appeals found that an employee allegedly fired for insisting on a smoke-free workplace has the right to sue his former employer for damages. The decision, reversing a trial court's dismissal of the Hentzel complaint, emphasized the need to protect employees who voiced dissatisfaction with allegedly hazardous working conditions.

B. Private Actions to Prohibit or Restrict Smoking in Public Places

1. Gasper v. Louisiana Stadium and Exposition District
418 F. Supp. 716 (E.D. La. 1976), aff'd,
F.2d 897 (5th Cir. 1978), cert. denied,
439 U.S. 1079 (1979):

Plaintiffs sued to compel the authorities who manage the Louisiana Superdome to prohibit smoking in the Superdome during sporting and other public events. In support of this request, the plaintiffs claimed a constitutional right to a smoke-free environment, relying on the First Amendment (freedom of speech), Fifth and Fourth Amendments (due process right to life and liberty) and Ninth Amendment (which protects so-called unspecific but "fundamental" rights). The district court unequivocally rejected each of these claims. The court of appeals affirmed this decision in all respects, while noting that the legislature, as opposed to a court, would have broad power to regulate smoking in public places. The Supreme Court denied the plaintiff's petition for review of the lower courts' decisions.

2. Federal Employees for Non-Smokers Rights (FENSR) v. United States, 446 F. Supp. 181 (D.D.C. 1978), aff'd, 598 F. 2d 310 (D.C. Cir.), cert. denied, 444 U.S. 926 (1979).

Several anti-smoking organizations, whose members included federal employees, sought to compel the federal government to prohibit smoking in federal facilities except in designated smoking areas. Plaintiffs asserted a private right of action under the Occupational Safety and Health Act (OSHA), a deprivation of their First and Fifth Amendments rights (freedom of speech and right to due process) and a common law right to a smoke-free workplace. The district court, relying on the decision in Gasper, rejected the constitutional claims, held that OSHA implies no private cause of action and found that it had no jurisdiction to consider the common law claim advanced by the plaintiffs in support of their demands. The court of appeals affirmed the district court decision and the Supreme Court refused to review the case.

3. Church v. Brown, et. al., Civ. No. 78-4073 (S.D. Ill. 1979):

The plaintiff, an employee of Scott Air Force Base, brought this action in U.S. District Court alleging that the commander of the base and the United States had a duty, under both the common law and OSHA, to provide him with a smoke-free working environment. Accepting "wholeheartedly" the analysis of the court in FENSR, the Church court found that it had no jurisdiction to consider the common law claim propounded by the plaintiff and rejected his OSHA claim, finding "that no private implied cause of action exists under OSHA..."

4. GASP v. Mecklenburg County, 256 S.E. 2d 477 (N.C. 1979):

An anti-smoking group sought an injunction forcing county authorities to prohibit smoking in all county public buildings and places of work, relying, like the plaintiffs in FENSR and Gasper, on an alleged constitutional right to a smoke-free environment. The North Carolina Court of Appeals, citing FENSR and Gasper, held that no such constitutional right exists and dismissed the plaintiff's suit.

VI. LITIGATION

C. Other Decisions

1. Stevens v. Employment Security Commission
(Iowa, Nov. 1976):

An Iowa state court ruled eligible for unemployment benefits a woman whose health required that she accept a job only in a smoke-and-dust free environment. Suffering from asthma, the plaintiff quit her job because the cigarette smoke in her office allegedly aggravated her illness. Unable to find a job that met the conditions required by her health, she applied for unemployment benefits. The Employment Security Commission said her restrictions on possible employment had made her unavailable for work and ineligible for benefits. But a District Court in Iowa disagreed, saying her limitation was not so great as to to remove any possibility of employment. The court compared her situation to the cases where benefits were granted to persons limited to "light work".

2. Ellen L. Meyer v. C.P. Clare & Co.,
(Idaho Industrial Comm., Nov 1978):

Unemployment benefits were also granted to an Idaho worker who had quit because two cigar smokers were transferred into her work area. She could have been given a leave of absence until a suitable position opened, but no one told her of this option. According to the state industrial commission, her limited choice "would compel a reasonable person to leave her employment." Thus she had good cause for quitting and was eligible for benefits.

3. Alexandria Volunteer Fire Dept. v. City of Alexandria, (E.D. VA, Dec. 13, 1982):

A federal district court rejected a lawsuit by Alexandria volunteer firefighters which challenged a regulation requiring volunteer firefighters to meet city fire department standards, including no smoking. No violations of the due process or equal protection clauses were found in the requirement that the volunteers meet the same physical, mental and training standards that the professional firefighters must meet.

VI. LITIGATION

4. San Mateo County Fire Fighters, Local 2400 v. City of San Mateo, No. 268890 (Calif. Sup. Ct. Dec. 16, 1982):

Stating the city may have violated a state law that requires local officials to negotiate working conditions, a superior court temporarily barred the city of San Mateo from enforcing a no-smoking policy for rookie firefighters. Under the court order, the city may continue to require fire department applicants to sign the no-smoking pledge, however, it would be unenforceable unless the temporary injunction is overturned at trial.

MEMORANDUM

TO: [REDACTED]
Director

DATE: June 2, 1982

THRU: [REDACTED]

FILE NO:

TELEPHONE NO: [REDACTED]

FROM: Roberta Banko
[REDACTED]

SUBJECT: Cigarette Smoke

For some time we have noticed a severe problem with the amount of cigarette smoke in the air of [REDACTED]. As you know, the Surgeon General of the United States as well as many studies on the subject are linking the effects of passive smoking with lung cancer and other related diseases. Fellow workers have expressed concern about the health hazards, discomforts and inconvenience experienced as a result of the smoke in the air. Although some efforts have been made to improve the situation by moving workers' work stations around, installing large "smoke-eaters" and providing fans to recirculate the smoke, these efforts are not effective. As stated in the APEA contract (Article 3, Section 1 b, pp. 8-9) one of the purposes of our contract is "to promote fair and reasonable working conditions." These conditions should apply equally to all members.

We are confident that all reasonable efforts can be made to promote the welfare and champion the rights of non-smokers as well as those of smokers. [REDACTED] to move to a new building, we feel that now is the best time to address the problem and, if necessary, institute some regulations correcting the situation. The following are suggestions for dealing with the situation:

1. "NO SMOKING" in all areas except those designated and agreed upon by all workers as smoking areas.
2. All smokers who wish to smoke at their desks should provide, at their expense, desk-type "smoke-eaters".
3. Smokers should refrain from walking around others' work areas with lighted cigarettes.
4. Install more large, room-size "smoke-eaters" so that a modicum of efficiency might be achieved or otherwise provide for an air exchange or proper ventilation (this should be undertaken in addition to the above regulations.)

Additional information can be provided on the subject of the harmful effects of passive or "side-stream" smoking on health if you find it necessary in order to address this problem. We are looking forward to your reply and to working with you in solving this problem.

cc:

[REDACTED]
Leo Kay, Alaska Lung Association
Joe Cladaunos, Environmental Health/Environmental Conservation
Raymond Jorgenson, OSHA
Dr. Erwin Rabeau, Director Public Health/Health & Social Services
Dr. Helen Byrne, Commissioner, Health & Social Services
John Cenoweth, Ombudsman, Governor's Office
Dianne Corso, APEA

MEMORANDUM

State of Alaska

TO: Roberta Banko

DATE: June 8, 1982

FILE NO: [REDACTED]

TELEPHONE NO: [REDACTED]

FROM: [REDACTED]

SUBJECT: Smoking Prohibitions

Director

This will acknowledge your memo of June 2, 1982, concerning "Cigarette Smoke" and set forth the policy of this Division with regard to restricting smoking.

It is the policy of this Division to adhere strictly to Alaska Statute 18.35.300 and Chapter 55 Alaska Administrative Code Section 18 AAC 55.010- AAC 55.060.

AS 18.35.300(3) states, "smoking is prohibited in a public school; or in a room, chamber, place of meeting or public assembly under the control of the state, or a department or agency of the state, while a public meeting held under auspices of the state, or a department of the state, is in progress". This section will be adhered to and all rooms accommodating public meetings will be posted as a no smoking area while the meeting is in progress.

AS 18.35.300(6) states, "smoking is prohibited in a place of business in which the owner, manager, proprietor, or other person who has control of the premises posts a sign conveying the message that smoking is prohibited by law". Although this section refers specifically to businesses it may be interpreted to mean state office buildings serving the public. In any case it is my decision to not exercise this questionable prerogative and restrict smoking in all or any portion of office space housing the [REDACTED] Division. Chapter 55 Alaska Administrative Code Section 18 AAC 55.900(c)(3) states in part ". . . in a state office building "other person who has control" means a division director who has authority over the office or his designee". This places the responsibility and authority to restrict or not restrict smoking, for those areas not specifically restricted by the law, in this office. Therefore, no areas housing [REDACTED] staff will be restricted to smoking without my expressed approval.

Although this policy may seem harsh to those of you who wish to limit smoking, it is my belief that if we are to promote fair and reasonable working conditions for all employees, our policy concerning this subject should be no more or no less restrictive than the law.

The new office building to which we are moving does have an air circulating system. Hopefully, this will help provide a work environment in which we can all achieve our goals in pleasant and comfortable surroundings. If specific problems with ventilation do occur, please inform this office through your supervisor.

Attached is a copy of the pertinent statute and Administrative Code for your perusal.

cc: Central Office Supervisors
Regional Managers

Attachment

CHAPTER AND VERSE:

Public Smoking

I. THE ISSUE

Does other people's smoke cause disease in nonsmokers?

Is the presence of tobacco smoke in the atmosphere cause for alarm?

In the continuing national dialogue on the various issues raised by cigarette smoking, these questions have now come to the forefront.

It has been called the issue of "second hand smoke," "public" or "involuntary" smoking.

Unfortunately, as with most controversial scientific issues, there has been a great deal of misinformation and unsubstantiated allegations made about the effect of other people's smoke on nonsmokers.

Because of this misinformation, a majority of both smokers and nonsmokers have come to believe erroneously that second hand smoke has been shown to be harmful to the normal nonsmoker. This perception is apparently the underlying basis for widespread efforts to prohibit smoking in public places.

The fact is: other people's smoke has not been shown to cause disease in nonsmokers.

Because we believe that public policy should be debated and determined on the basis of proven facts, rather than false

perceptions, we have prepared this document summarizing what is known at this time on the question of second hand smoke.

II. WHAT ARE THE FACTS?

Numerous scientists, physicians, government officials and health experts have studied the effect of environmental smoke on nonsmokers. None of these studies has been able to prove that other people's smoke causes disease in nonsmokers.

- A joint study conducted in 1971 by the Federal Aviation Administration (FAA), the U. S. Department of Health, Education and Welfare (HEW) and the National Institute of Occupational Safety and Health (NIOSH) examined the health aspects of smoking on passenger aircraft. The report of this study stated: "...it is concluded that inhalation of the by-products from tobacco smoke generated as a result of passengers smoking aboard commercial aircraft does not represent a significant health hazard to non-smoking passengers." (1)

- In 1977, after studying a proposed rule on prohibiting airline pilots from smoking in the cockpit of commercial planes, the FAA stated: "...with respect to the alleged deleterious effects of carbon monoxide upon the performance of the smoking pilot, the FAA believes that the information presented is too inconclusive to warrant the issuance of the requested rule at this time." (2)

- The U.S. Interstate Commerce Commission (ICC), in a 1971 decision upholding the right to smoke on interstate buses, stated. "We agree with the examiner's conclusions that petitioner has failed adequately to demonstrate the deleterious effects of

second-hand smoke upon the health of motorbus passengers." (3)

- In 1974, Dr. R. Rylander, the Swedish medical researcher, and other leading medical experts organized an international workshop, attended by scientists from all over the world, to consider the health consequences of atmospheric tobacco smoke. They concluded: "For the majority of the population the average exposure burden due to environmental tobacco smoke is probably much lower than that due to industrial air pollutants and in many cases also environmental air pollution or the lung burden due to dust clouds or other indoor air pollutants." (4)

- The Bavarian Academy of Industrial and Social Medicine sponsored a symposium on smoking in the workplace in 1977 in Munich, attended by eminent German scientists, lawyers and government leaders. In a closing statement, the symposium's chairman, Professor Doctor H. Valentin of the University of Erlangen-Nuremberg, said: "In conclusion, with regard to medical and legal facts of passive smoking at the work place, the following must be considered. Under our present day work place conditions, no clear and significant untoward health effects from passive smoking have been shown." (5)

- R.S.F. Schilling and a group of co-researchers, thinking that children of smoking parents might contract respiratory symptoms or disease due to their close proximity to smoking family members, determined exactly the opposite after a study.

In 1977, they reported in the American Journal of Epidemiology:
"We have found no significant relation between parents' smoking
and respiratory symptoms or lung function in their children."
They added: "We conclude that exposure to low levels of smoke
produced by cigarette smokers does not result in chronic
respiratory symptoms or loss of lung function among children
nor among adults." (6)

III. SUPPORTING OPINIONS

Others who have studied the effects of smoking on nonsmokers have confirmed these findings.

- Dr. D.M. Aviado, a Professor of Pharmacology at the University of Pennsylvania for almost 30 years, said in a statement before the Council of the District of Columbia Committee on Transportation and Environmental Affairs in 1976: "On the basis of existing scientific evidence, tobacco smoke constitutes no health hazard to nonsmokers in public places." (7)

- In a statement in 1977 before the New Jersey Public Health Council, Dr. Walter M. Booker, Emeritus Professor of Pharmacology of Howard University, said: "As a scientist, I am interested in actual data which demonstrate whether a non-smoker absorbs tobacco smoke and, if so, whether the amount is sufficient to cause adverse physiological effects. The literature simply does not support the theory that a nonsmoker absorbs amounts which can cause harm." (8)

- Pathology Professor Dr. Edwin R. Fisher of the University of Pittsburgh, appearing before the same New Jersey group in 1977 said: "My careful review of the literature, confirming the conclusions based upon my own experimental data and the related work discussed above, reveals a lack of scientific information which would allow me to conclude that atmospheric tobacco smoke or its constituents represent a health hazard in nonsmokers." (9)

- Writing in the San Francisco Examiner in 1977, medical researcher Dr. C. H. Hine said: "The medical literature to date does not indicate any significant health risk to the nonsmoker from environmental tobacco smoke normally encountered in day-to-day situations." (10)

- Appearing before the New Jersey Public Health Council in 1977, Dr. Charles L. Waite, Retired Rear Admiral of the U. S. Navy Medical Service, Medical Director of The Tobacco Institute, and Fellow of the American College of Physicians, made the following statement: "In my opinion, there is no convincing evidence to support the hazards claimed by some to the effect that cigarette smoke threatens the health of the average well nonsmoker. On the basis of existing scientific evidence, I can only conclude that tobacco smoke constitutes no health hazard to nonsmokers in public places." (11)

- And, in 1977 Dr. W. Klosterkotter, of the Hospital of the University of Essen, W. Germany, said: "So far passive smoking has not proven to be health-hazardous in healthy adults. Thus an important condition for a legal smoking ban, e.g. at places of work, remains unfilled." (12)

Opponents Of Smoking Agree

Even the most avowed critics of smoking acknowledge that smoking has not been established as a cause of disease in nonsmokers.

Some of them include:

● The then U.S. Surgeon General, Jesse Steinfeld, who stated after issuing the 1972 Public Health Service Report on Smoking: "We cannot say with certainty that exposure to tobacco smoke is causing serious illness in nonsmokers..." (13)

X ● Dr. Jonathan Rhoads, Chairman of the National Cancer Advisory Board, said in 1975 that to his knowledge "it is not, in fact, actually harmful." (14)

X ● Dr. E. Cuyler Hammond of the American Cancer Society was reported to have said in 1974 that there "was no shred of evidence" that a nonsmoker can get cancer from "second hand" smoke and that there is a lot of evidence that he cannot... He added that to suggest passive smoking could cause cancer is dishonest, and that he would be prepared to testify as much in a court. (15)

● The "Expert Group" appointed by the British organization, Action on Smoking and Health (ASH), headed by Dr. Charles Fletcher of the British Royal College of Physicians, concluded in 1973 that: "There is no evidence that other people's smoke is dangerous to healthy nonsmokers..." (16)

X ● American Cancer Society official Lawrence Garfinkel said in 1976: "... (T)here is no evidence, however, that nonsmokers who are constantly exposed to cigarette smoke have a higher incidence of bronchial carcinoma." (17)

● Great Britain's Foreign Minister Dr. David Owen, while serving as Minister of Health in 1975 said: "No clear

evidence has yet been published to show that tobacco smoke is harmful to normally healthy nonsmokers or that a heavily tobacco-smoke laden atmosphere has other than a transient effect." (18)

- In a 1977 television appearance in Washington, D.C., on WTOP-TV (CBS) Dr. Gio Gori stated: "I would say that the evidence that we have today, scientific evidence, something that we can prove, or normal smoking conditions that you may have a couple of people smoking in a regular size room, the health effects connected with that are probably going to be minimal." (19)

- Three spokesmen for the Naylor Dana Institute for Disease Prevention of the American Health Foundation, including Dr. Ernst L. Wynder, concluded that: "Specifically, we know of no data suggesting that passive inhalation of cigarette smoke increases the risk of developing lung cancer." In addition, they reported: "On the basis of available epidemiological evidence, it appears that passive inhalation of tobacco smoke by nonsmokers or smokers does not increase their risk for chronic illnesses such as cancer of the respiratory tract, emphysema, or cardiovascular disease." (20)

IV. REFUTING FALSE CLAIMS

Although there is no convincing evidence to date to show that other people's cigarette smoke causes disease in nonsmokers, a number of false allegations bearing on this subject have been widely published. Some of the more common claims are listed below accompanied by the facts:

Claim: Smoking causes chronic degenerative diseases in nonsmokers.

Fact : There is no scientific basis for such claims. An American Cancer Society epidemiological study in 1976 found no evidence that nonsmokers constantly exposed to tobacco smoke have increased risk of lung cancer. (21)

Claim: Atmospheric tobacco smoke causes or contributes to the development of atherosclerosis (a disease characterized by inelasticity and thickening of arterial vessel walls) in nonsmokers, as a result of carbon monoxide.

Fact : Early studies conducted on animals chronically exposed to carbon monoxide and fed a high cholesterol diet compared with animals not so exposed showed that these animals had arterial changes which duplicated early atherosclerosis. (22)

However, the experimenter, P. Astrup, has recently admitted that he and others have been unable to reproduce his previous experiment and that his "present study suggests that applying the generally accepted criteria for intimal (membrane or lining of an organ) damage, no

direct toxic effect of CO can be demonstrated." Dr. Astrup added that "CO exposure is probably a very weak stimulus on the aortic wall, compared with hypercholesterolemia induced by cholesterol feeding." (23) In addition, the CO claim ignores observations in bridge and tunnel workers which showed that those persons, also chronically exposed to carbon monoxide, did not have any increased incidence of atherosclerosis. (24)

Claim: Parental smoking causes respiratory illness in children.

Fact : A group of researchers studied respiratory symptoms, diseases and lung function in 37 families with 816 children in three towns and "found no significant relation between parents' smoking and respiratory symptoms or lung function in their children." They concluded that "exposure to low levels of smoke produced by cigarette smokers does not result in chronic respiratory symptoms or loss of lung function among children nor among adults." (25)

Another recent clinical study confirms the same findings. The study determined that: "Smoking and nonsmoking parents have about the same proportion of children with respiratory symptoms. The number of cigarettes smoked by the parents has no influence on respiratory symptoms in their children..." (26)

Claim: Cigarette smoke causes respiratory allergies.

Fact : Claims about tobacco allergy stem primarily from the many studies in which extract from tobacco leaf has been tested and found to cause allergic response in people who are otherwise allergic. (27) However, these tobacco leaf extract studies do not resolve the issue, and despite the claims of one researcher, the work of others to date has not found any allergens in tobacco smoke. (28) Work is still being done in this area.

Claim: Asthmatics are believed to be particularly vulnerable to tobacco smoke.

Fact : A recent study failed to find any significant changes in the lung function of asthmatics who had been exposed to cigarette smoke for two hours in a small test chamber. (29)

VI. CARBON MONOXIDE AND OTHER ENVIRONMENTAL FACTORS

Some nonsmokers have expressed concern over the presence of tobacco smoke in the atmosphere.

Studies measuring tobacco smoke constituents in the atmosphere under realistic conditions have not found levels of carbon monoxide sufficiently high to justify such concern. The level set by the U.S. Occupational Safety and Health Administration (OSHA) as the limit for industrial exposure over an eight-hour period is 50 parts per million (ppm). The combined results of studies on the amount of carbon monoxide in the atmosphere from smoking indicate that, under realistic conditions, carbon monoxide in the atmosphere from smoking will rarely exceed 10 ppm. (30)

One exception was reported in a study of a sports arena which permitted smoking but was not air conditioned, causing the carbon monoxide level to reach 25 ppm, a level which was not considered to be hazardous. (31) Other exceptions were studies performed in taverns and nightclubs where carbon monoxide levels as high as 42 ppm were recorded. (32) However, these studies were conducted with an instrument that is known to exaggerate the level of carbon monoxide in the presence of alcohol vapors. (33)

Combined results of studies of COHb* levels in smokers and in nonsmokers exposed to tobacco smoke indicate that, under realistic smoking conditions, smokers will rarely experience COHb levels greater than ten percent and the levels in nonsmokers

* Carboxyhemoglobin, the combination formed by carbon monoxide and red blood pigment

usually will not exceed two to three percent. And, even these relatively low levels of COHb will drop within a few hours after the cessation of exposure to smoke. (34)

Some nonsmokers also complain about the alleged buildup of carbon monoxide in offices and other places where smoking is allowed. Yet, one recent study showed that the COHb levels of office workers were higher when they came to work than when they left at the end of the day, even though they were exposed to cigarette smoke throughout the day. (35) Clearly, the real concern should be for the outdoor levels of carbon monoxide from car exhaust and other sources to which nonsmokers are exposed on their way to work.

No one has ever established that the health of normal nonsmokers is adversely affected by even the small amount of carbon monoxide that might be in the atmosphere due to cigarette smoke. CO is a natural body constituent which is present in the blood without any exposure to CO in the atmosphere, and the body can and does eliminate CO by various means. Persons with COHb levels of 15 percent or less rarely even suffer any of the first symptoms of CO difficulties such as headaches and nausea. (36)

A claim frequently made about exposure to low levels of CO is that it affects certain performances, such as the ability to distinguish between short intervals of time or to solve mathematical problems. But there is still scientific disagreement about whether such performances are affected by COHb measurements in the neighborhood of ten percent or less. Some studies indicate that these levels of CO will affect such performance (37), while

other studies do not so indicate. (33) This area requires additional research.

It also has been alleged that persons with severely compromised cardiovascular systems are adversely affected by environmental tobacco smoke, especially carbon monoxide.

This belief stems largely from Aronow's studies of angina patients in which he used "pure" carbon monoxide, as well as tobacco smoke, to elevate their COHb levels. He found that a certain COHb level obtained by exposure to "pure" carbon monoxide caused certain changes in cardiac function, but that the same COHb level obtained from tobacco smoking did not result in such changes. (39) The reason for these differences in cardiovascular function are as yet unknown. Whatever the reasons for these findings, this study raises a substantial question about the relevancy of "pure" carbon monoxide type studies to the nonsmokers' situation. This is another area where further research is needed.

Studies of other tobacco smoke constituents indicate that smoke's contribution to atmospheric levels of these compounds is minimal. (40) Such studies are usually conducted as the result of a claim about the danger of exposure to some compound attributable to tobacco smoke. One such study of "volatile" organic compounds recently concluded that the amount of such compounds added to the atmosphere as a result of cigarette smoking is "insignificant." (41)

As to nicotine, research shows that low atmospheric levels result from cigarette smoke. (42) No scientist has suggested that

the minuscule amount of nicotine that might be absorbed by a nonsmoker has anything to do with the production of human disease. In fact, a recent study monitoring heart rates of nonsmokers exposed to cigarette smoke under laboratory conditions concluded that the amount of nicotine inhaled by nonsmokers under their rigorous test conditions was too small to alter heart rate. (43)

VI. THE ANNOYANCE FACTOR

All of the foregoing establishes, in our judgment, that there is no physiological basis for claiming that other people's smoke causes disease in the nonsmoker.

Despite that fact, it is clear that cigarette smoke does annoy some people. Tobacco smoke may "drift" into the eyes or nose of the nonsmoker who may be annoyed by the smell. In places that are poorly ventilated, high concentrations with other environmental impingements may cause eye or nasal irritation.

At least one scientist, Dr. Gary Huber, suggests that the odor of smoke components "may trigger emotional responses not yet well understood." (44) Support for this theory was found in a recent study in which college students were first characterized as to their attitudes concerning tobacco smoke and then were exposed to such smoke. (45) The heart rates of those who "disliked" smoke were much higher than those who were "indifferent" to smoke. There was no way to determine from the data whether initially the "dislike" group had a higher heart rate or whether the anticipation of sitting and inhaling the "disliked" cigarette smoke caused an increased heart rate.

Yet some studies suggest that the vast majority of smokers and nonsmokers are not usually annoyed by public smoking. For example, a recent U.S. survey conducted by Response Analysis in Princeton, N.J., found that when people were asked about the kinds of things that annoyed or irritated them in their everyday lives,

only about two percent of the annoyances mentioned were related to smoking. (46)

The American Express Company found little interest in nonsmoking travel tours (47), and a Seattle, Washington, restaurant reported that there were only seven requests for seating in the nonsmoking section during a three-month period when they served 30,000 customers. (48)

All of this suggests that the issue of other people's smoking really falls into the category of annoyances -- akin to other everyday annoyances, such as barking dogs, loud music, personal eating habits, etc.

Smoking is like any other habit or practice with the potential of annoying others. In our society, such annoyances are alleviated through the traditional rules of common courtesy. The "second hand" smoking problem addressed in this paper would surely begin to disappear if smokers were more sensitive to the feelings of nonsmokers and practiced simple rules of courtesy in dealing with the problem.

One fact is clear: Although atmospheric tobacco smoke may be annoying to some people, it has not been proven to cause disease in nonsmokers.

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MEMORANDUM

TO: Rep. Bussell, Chairman, House Judiciary Comm.

TOPIC: Suggested Amendments, Deletions to HB 84 as per Committee Discussions at prior hearing, Feb. 23, 1983

FROM: Joe Brewer

Date: March 28, 1983

1st suggested amendment:

Page 3, line 19--

(d) A smoking section may not be designated under (a) of this section in an area or vehicle unless the area or vehicle meets the minimum ventilation and air quality standards adopted by the Department of Environmental Conservation. is sufficiently well ventilated by natural or mechanical means.

2nd suggested amendment: (add authority)

Page 3, line 27--

"Smoking Prohibited by law"[.], per AS 18.35.300.

3rd suggested amendment: (deletion)

p. 4, delete entire Section 6, lines 4 through 10.

4th suggested amendment: (delete words) (Dist. Ct. has no injunctive

p. 4, line 12:

powers; unless this Committee gives it such by this language in this limited area).

Sec. 18.35.346. INJUNCTIONS. The commissioner of environmental conservation or any affected party may institute an action in the dis-trict court or the superior court to enjoin repeated violations of AS 18.35.300- 18.35.360.

p. 2, memo on changes suggested for HB 84.

5th suggested change, or addition. (Statutory authority needed so act would not wind up in temporary acts and fail to be in permanent statutes)

p. 4, line 21--

Sec. 9. AS 18.35 is amended by adding a new section to read:

Sec. 18.35.360. PUBLIC EDUCATION. The Commissioner of environmental conservation shall take appropriate measures to inform the public of their rights under this Act.

(Note:

Then, the last section in the statute, as it exists now, AS 18.35.360, would have to be renumbered, as shown. I don't know if this should be included as an amendment or leave it up to the Revisor of Statutes. (?)

[Sec. 18.35.360] Sec. 18.35.365. Regulations. The Department of Environmental Conservation may adopt regulations to implement the provisions of AS 18.35.300 -- [18.35.350] 18.35.360.



Alaska Public
Employees Association **APEA**

State Headquarters: 340 N. Franklin, Juneau, AK 99801 (907) 586-2334

Representative Bussell, Chairman
House Judiciary Committee

FROM: Cherie Shelley
APEA Executive Director

SUBJECT: Smoking Survey

DATE: March 25, 1983

APEA recently mailed a smoking survey to our membership.
Forty-four percent or 3,628 of the members responded

<u>QUESTIONS</u>	<u>PERCENT OF AFFIRMATIVE RESPONSES</u>	<u>PERCENT OF NEGATIVE RESPONSES</u>	<u>PERCENT OF NO RESPONSES</u>
Do you smoke?	26	70	4
Do you have a medical condition which is affected by smoke?	24	74	2
Is there adequate venti- lation in your office?	40	58	2
Is your worksite enclosed by walls?	61	38	1
Is your worksite open- concept with dividers?	36	61	3
Has the issue of "smoking" interfered with your office operations?	36	61	3
Do you believe it would be possible to reach a mutually agreeable solution within your office regarding "smoking"?	68	26	6
Have any arrangements been made in your office to separate smokers from non-smokers or to provide proper ventilation?	29	61	10

Fairbanks Field Office
825-D College Road
Fairbanks, AK 99701
Telephone: (907) 456-5412

Anchorage Field Office
833 Gambell Street, Suite A
Anchorage, AK 99507
Telephone: (907) 274-1688

Juneau Field Office
227 4th Street
Juneau, AK 99801
Telephone: (907) 586-6305

AMENDMENT

OFFERED IN THE HOUSE:

By: Rep. John Lindauer

To: House Judiciary Committee HOUSE BILL No. 84

SENATE BILL No. _____

PAGE: _____

LINE: _____

To be added on line 26 of page 1:

elevator, or intra-state commercial airline flights of duration of two hours or less.

To be added on line 4 of page 4:

hire, or intra-state commercial airline flights of duration of two hours or less.

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FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington

AUG 31 1982

BRUCE RISKIN, Clerk
By: [Signature] Deputy

FILED
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RECEIVED
AUG 31 1982
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY _____ DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

LANNY L. VICKERS,)	
)	
Plaintiff,)	No. C81-85V
)	
vs.)	MEMORANDUM DECISION
)	
THE VETERANS ADMINISTRATION,)	
et al.,)	
)	
Defendants.)	

From the credible evidence presented at the trial of this case, the Court now renders the following decision:

1. The issues before this Court are these:
 - (a) Does the plaintiff have a cause of action against his superior, David Radke, Chief of Supply Service at the Veterans Administration Medical Center in Seattle, Washington?
 - (b) Does the plaintiff have a cause of action against the Veterans Administration under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, for money damages or for equitable relief?

2. This is not an action to determine whether all government employees have a right to work in offices which are free from tobacco smoke. It is an action solely to determine whether this one plaintiff has the right to work in an

Copy to Carol

52

1 environment wholly free from tobacco smoke.

2 3. Plaintiff is entitled to recover damages of and from
3 David Radke only if plaintiff established by a preponderance of
4 the evidence that David Radke, in his actions relative to
5 plaintiff, violated a clearly-established statutory or
6 constitutional right of plaintiff. Harlow v. Fitzgerald,
7 50 U.S.Law Week 4815, June 22, 1982.

8 4. From the evidence in this cause the Court is unable to
9 find that David Radke did in fact at any time violate any
10 clearly-established right of plaintiff. The complaint of
11 plaintiff against David Radke must in consequence be dismissed
12 with prejudice.

13 5. The question then remains as to whether plaintiff is
14 entitled to any kind of relief against the Veterans Administra-
15 tion as a handicapped person under the Rehabilitation Act of
16 1973, as amended, 29 U.S.C. § 794. The Court ruled prior to
17 trial that § 794 does permit a private right of action for
18 damages or for equitable relief.

19 6. The Court finds that plaintiff is a handicapped person
20 within the meaning of the term "handicapped person" as defined
21 in 29 U.S.C. § 706(7)(B). That subsection provides that any
22 person is a "handicapped" person within the contemplation of
23 29 U.S.C. § 794 if that person has a physical impairment which
24 substantially limits one or more of his or her major life
25 activities. It appears from the evidence in this cause that
26 plaintiff is unusually sensitive to tobacco smoke and that this
27 hypersensitivity does in fact limit at least one of his major
28 life activities, that is, his capacity to work in an environ-
29 ment which is not completely smoke free.

30 7. The finding by the Court that plaintiff is a handi-
31 capped person within the meaning of the Act does not, however,

1 dispose of this matter. In order for the Court to find that
2 plaintiff is entitled to recover money damages from the Veterans
3 Administration or that plaintiff is entitled to some kind of
4 equitable relief, the Court must find that the Veterans
5 Administration discriminated against plaintiff by reason of his
6 handicap.

7 8. 29 U.S.C. § 794 provides as follows:

8 "No otherwise qualified handicapped individual
9 in the United States, as defined in Section 706(7)
10 of this title, shall, solely by reason of his
11 handicap, be excluded from the participation
12 in, be denied the benefits of, or be subjected
to discrimination...under any program or activity
conducted by any Executive agency or by the
United States Postal Service."

13 9. In his trial brief plaintiff asserts that because of
14 plaintiff's complaints and this lawsuit, Mr. Radke has
15 indicated resentment and anger toward plaintiff by means of
16 non-verbal expressions of animosity towards plaintiff, by
17 statements made to other employees about plaintiff and the
18 smoking issue, and by efforts to limit work assignments to
19 plaintiff and to prevent his promotion. The Court found no
20 credible evidence in the record to sustain any one of these
21 contentions.

22 10. The Court finds further no evidence in the record that
23 plaintiff has in any way been discriminated against in terms of
24 work assignments, pay or promotions by reason of his hyper-
25 sensitivity to tobacco smoke, by reason of his complaining to
26 his superiors about the presence of tobacco smoke in his work
27 environment, or by the commencement of this action. Plaintiff
28 has regularly received high performance ratings for his work
29 and has been awarded at least three incentive awards, which
30 have resulted in higher pay for him.

31 11. The Court is unable to find in the words of § 794 that

1 plaintiff has been, solely by reason of his handicap excluded
2 from the participation in or denied the benefits of any program
3 or activity conducted by the Veterans Administration.

4 12. Plaintiff asserts, however, that he has been dis-
5 criminated against because of the failure of the Veterans
6 Administration "to make reasonable accommodations to his
7 physical handicap by providing a work environment that is free
8 of tobacco smoke."

9 13. Plaintiff has failed to cite any authority from the
10 decided cases to the effect that the Veterans Administration
11 was under a duty to make "reasonable accommodations" to
12 plaintiff's sensitivity to tobacco smoke. Assuming, but not
13 deciding, that the Veterans Administration was under such a
14 duty, the Court finds from the evidence that the Veterans
15 Administration did make reasonable efforts to accommodate to
16 plaintiff's handicap.

17 14. Plaintiff is employed in the Purchasing and Contracts
18 Section of the Supply Service Department at the Veterans
19 Administration Medical Center. The employees in that section
20 have their desks in Room 105-C in Building 15. This building
21 is a temporary one. It is contemplated that within two years
22 all of the Supply Service employees will be moved out of that
23 building and into new quarters in a building now under
24 construction. Ten employees have their desks in Room 105-C.
25 Some of them smoke; some do not. Room 105-C is relatively
26 quite crowded as there are more desks and more employees in
27 that room than the available space can comfortably accommodate.
28 In that room are seven windows, which can be opened and closed,
29 and one double door. This double door may be opened or
30 "cracked" to admit fresh air. Two rather large circulating
31 fans are located in this room.

1 15. Immediately adjacent to Room 105-C is Room 105-D in
2 which are located those employees who are in the Personal
3 Property Management Section of the Supply Service Department.
4 There are eight employees in this section. Some of these
5 employees smoke; some do not.

6 16. In February, 1979 the Deputy Administrator of the
7 Veterans Administration at the direction of the Administrator
8 promulgated a nationwide policy relative to smoking at the
9 facilities of the Veterans Administration. One of the
10 provisions of that policy was as follows:

11 "In establishing and continuing a smoking
12 policy in work areas under their jurisdiction,
13 supervisors should strive to maintain an
equitable balance between the rights of
smokers and nonsmokers."

14 17. In February, 1980 the Director of the Veterans
15 Administration Medical Center in Seattle promulgated a policy
16 relative to smoking in the facility. That policy provided that
17 smoking was to be permitted in office areas. By virtue of that
18 promulgated policy employees were permitted to smoke in Rooms
19 105-C and 105-D.

20 18. From time to time plaintiff has made known to his
21 superiors his sensitivity to tobacco smoke and has urged that
22 action be taken by them to make it possible for him to work in
23 a smoke-free environment.

24 19. In an effort to accommodate to plaintiff's handicap
25 the following has been done by the Veterans Administration:

- 26 (a) After plaintiff's initial complaint the
27 desks of smokers were physically separated
28 in the office from the desks of the nonsmokers.
29 (b) Thereafter Mr. Radke sought and was able to
30 secure a voluntary agreement by those who
31 work in the same office as plaintiff (Room
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1 105-C) not to smoke at any time in that room.

2 (c) Later, Mr. Radke sought and was able to secure
3 a voluntary agreement by those who work in
4 Room 105-D, the office adjacent to Room 105-C,
5 that they would not smoke at any time in that
6 room.

7 (d) Mr. Radke submitted a requisition for an
8 exhaust system to be installed in Room 105-C
9 in the hope that this system would remove
10 whatever tobacco smoke might drift into
11 Room 105-C from rooms where smoking was
12 still permitted. This request was, however,
13 turned down by the Engineering Department
14 because its cost was considered to be excessive
15 in light of the fact that Building 15 was only a
16 temporary building and the employees in Supply
17 Service were to be transferred from that building
18 to a new building.

19 (e) Mr. Radke was able to have two vents installed
20 in the ceiling of Room 105-C in an effort to
21 withdraw from that room any tobacco smoke that
22 might drift into it from other areas.

23 (f) Mr. Radke purchased at his own expense an air
24 purifier in an effort to alleviate the effects
25 of his smoking in his own private office,
26 Room 105-B.

27 (g) Mr. Radke offered to have a partition
28 constructed around plaintiff's desk. This
29 partition would have extended from floor to
30 ceiling and have a door.

31 (h) Plaintiff was given the opportunity to move
32

1 his desk farther away from the door leading
2 from Room 105-C to 105-D and closer to a window.

3 (i) Plaintiff has been offered an outside maintenance
4 job by defendant Veterans Administration.

5 20. The voluntary action by the smokers in Rooms 105-C
6 and 105-D has significantly reduced the presence of tobacco
7 smoke in plaintiff's work space in Room 105-C.

8 21. At the time plaintiff complained to his supervisor
9 about the adverse effects of tobacco smoke upon his health, Mr.
10 Radke was faced with the problem of trying to accommodate the
11 desires of plaintiff with the desires of the smokers whose
12 desks were in Rooms 105-C and 105-D. It appears from the
13 testimony of plaintiff that some of those individuals were
14 "heavy" or "very heavy" smokers. Under the national policy of
15 the Veterans Administration he was under a duty to "strive to
16 maintain an equitable balance between the rights of smokers and
17 nonsmokers." In light of the policy promulgated by the
18 Director of the Veterans Administration Medical Center in
19 Seattle that smoking was to be permitted in offices, Mr. Radke
20 could not have ordered that there be no smoking in Rooms 105-C
21 and 105-D without running into the objection by the smokers in
22 those rooms that they were permitted by the Director's policy
23 to smoke at their desks and that Mr. Radke did not have the
24 authority to override that policy. He was faced, too, with the
25 problem that some of the employees in Room 105-C wanted to
26 have the windows open; some insisted that they be closed. Some
27 wanted the temperature of the room relatively high; some wanted
28 it relatively low. These opposing attitudes made it, of
29 course, difficult to arrive at a mutually satisfactory arrange-
30 ment with respect to whether the windows would be open or closed.

31 22. The only tobacco smoke to which plaintiff is now

1 exposed is that which may at times drift into Room 105-C from
2 Room 105-A or 105-B. This drifting in of smoke is not a
3 constant phenomenon and, when it does occur, the smoke is
4 normally not heavy in concentration. At the time of the
5 voluntary commitments by the smokers in Rooms 105-C or 105-D,
6 and as an accommodation to them in exchange for their agreeing
7 not to smoke at their desks, Mr. Radke gave them permission
8 to smoke in Room 105-A, the office of the Assistant Chief of
9 Supply Service, or, when on business, to smoke in his own
10 office, Room 105-B.

11 23. In light of all of the foregoing the Court finds
12 that the Veterans Administration did make a reasonable effort
13 to accommodate to plaintiff's handicap while at the same time
14 attempting to accommodate to those who felt the need to smoke
15 during working hours.

16 24. Plaintiff would like to have everyone in Supply
17 Service be forbidden to smoke in order that he would not be
18 exposed at any time to tobacco smoke. The Director of the
19 Medical Center has not, however, banned smoking in any of
20 the office spaces of the Center. The Veterans Administration
21 has not adopted a policy against smoking in any of its offices.
22 Congress has not enacted any legislation which forbids smoking
23 in office working spaces in any of the office buildings owned
24 by the United States.

25 25. Had Congress enacted legislation or the Veterans
26 Administration adopted a policy or the Director of the Medical
27 Center promulgated a directive forbidding the smoking of
28 tobacco in any office space, this Court would readily enforce
29 that ban. In the absence, however, of a statute or regulation
30 forbidding the smoking of tobacco in government office spaces
31 those Supply Service employees who smoke have certain rights

1 which must be balanced against the desire of plaintiff that his
2 working environment be completely free of tobacco smoke. Until
3 and unless Congress enacts a statute banning the smoking of
4 tobacco in government offices or the Veterans Administration
5 promulgates a policy against smoking in its offices, the
6 desires of those employees who wish to smoke cannot be
7 disregarded.

8 26. In order to minimize the effect of tobacco smoke upon
9 himself, plaintiff must himself take action to avoid his
10 exposure to tobacco smoke. It appears that plaintiff can at
11 any time close the door which separates Room 105-C from 105-D
12 and that this would have the effect of preventing the entrance
13 into Room 105-C of any smoke which might drift out of Rooms
14 105-A or 105-B. Although it is somewhat of an inconvenience
15 and perhaps a nuisance to close that door, it appears to the
16 Court that plaintiff would choose to do that rather than to
17 have himself exposed to the tobacco smoke to which he is
18 sensitive. There is no prohibition against the closing of
19 that door, and the Chief of the Purchasing and Contracts
20 Section testified that it was immaterial to him whether that
21 door was kept in a closed or an open position.

22 27. In addition the desk of plaintiff is located but
23 one desk away from the door which separates Rooms 105-C and
24 105-D. Plaintiff was advised that he could move his desk
25 farther away from that door and closer to a window if he
26 desired to do so, but he has chosen to have his desk remain
27 in its present position. The Court is of the opinion that
28 moving his desk would undoubtedly reduce his exposure to smoke.

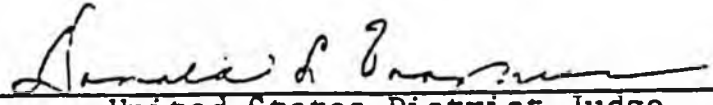
29 28. By reason of the foregoing the Court finds that
30 plaintiff is not entitled to injunctive relief nor to damages
31 as against defendant Veterans Administration.

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29. This Memorandum Decision will be in lieu of formal findings of fact and conclusions of law.

The Clerk of this Court is instructed to send uncertified copies of this Memorandum Decision to all counsel of record and to prepare and enter a judgment reflecting this decision.

DATED this 31st day of August, 1982.


United States District Judge

62-73

ANSI B 194.1-1977



ASHRAE STANDARD

Standards for NATURAL AND MECHANICAL VENTILATION

Approved by the American Society of Heating, Refrigerating and Air-Conditioning Engineers Inc. Standards Committee January 28, 1973, and Board of Directors by Letter Ballot February 16, 1973.

ASHRAE Standards are updated on a five-year cycle; the date following the Standard number is the year of approval. The latest copies may be purchased from the ASHRAE Circulation Sales Department, 345 East 47th Street, New York NY 10017.

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345 East 47th Street, New York, N.Y. 10017

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FOREWORD

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CONTENTS

Section	Page
1 Purpose and Scope	3
2 Definitions	3
3 Acceptable Ventilation Air Quality	4,5
4 Ventilating Systems—General Requirements	5
5 Recirculation	5
6 Ventilation Requirements	5-17

STANDARDS FOR NATURAL AND MECHANICAL VENTILATION

SECTION 1.0 PURPOSE AND SCOPE

This standard* defines ventilation requirements for spaces intended for human occupancy and specifies minimum and recommended ventilation air quantities for the preservation of the occupants' health, safety, and well-being.

Good ventilation practice exists when clean ventilation air is provided in sufficient quantities to maintain the required oxygen, carbon dioxide, and other air quality levels in the space under consideration.

The standard does not specify the air quantities required for the control of temperature and humidity or the exhaust quantities required for source control of domestic or industrial wastes. The specifications are based on the current state of knowledge and acceptable practice related to air filtration, odor control and environmental physiology.

*Replaces the ventilation section of ASA Standard A53.1 dated May 23, 1946.

SECTION 2.0 DEFINITIONS (SEE FIG. 1)

2.1 AIR CLEANER: a device capable of removing airborne impurities such as dusts, gases, vapors, fumes and smokes.

2.2 AIR CONDITIONING: the process of treating air to meet the requirements of the conditioned space by controlling simultaneously its temperature, humidity, cleanliness, and distribution.

2.3 AIR, EXHAUST: air removed from a space and not reused.

2.4 AIR, OUTDOOR: air taken from outdoors and therefore not previously circulated through the system.

2.5 AIR, RECIRCULATED: return air again supplied to a space.

2.6 AIR, RETURN: air removed from a space and recirculated or exhausted.

2.7 AIR, SUPPLY: that air delivered to each or any space in the system, or the total delivered to all spaces in the system, which is used for ventilation, heating, cooling, humidification, dehumidification, distribution, etc.

2.8 AIR, VENTILATION: that portion of supply air which comes from outside (outdoors) plus any recirculated air that has been treated to maintain the desired quality of air within a designated space. (See Section 3.0).

2.9 EXFILTRATION: air flow outward through cracks and interstices, around windows and doors, and through floors and walls of a space or building.

2.10 INFILTRATION: the inward air leakage through cracks and interstices, around windows and doors, and through floors and walls of a space or building.

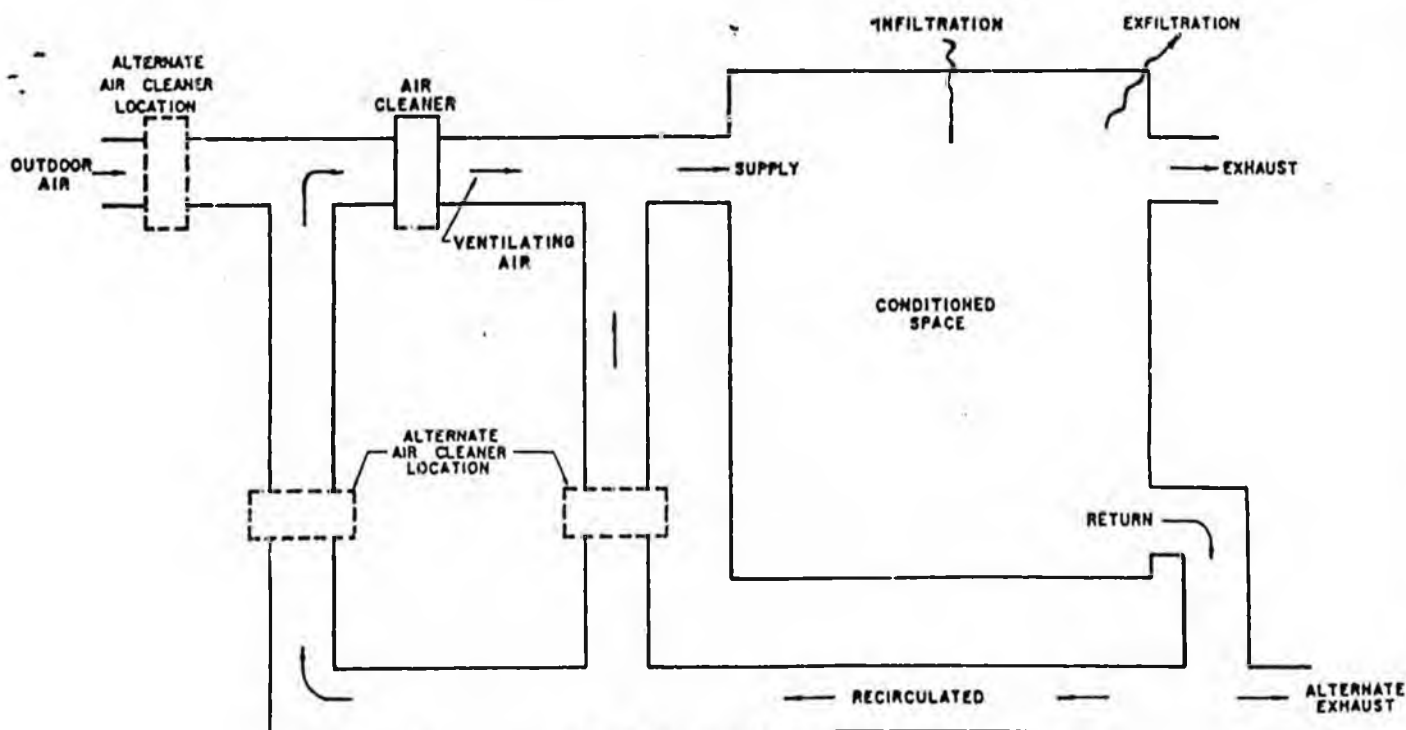


Fig. 1 Diagram of Definitions

2.11 MECHANICAL EXHAUST SYSTEM: a system for removing air from a room or space by mechanical means.

2.12 MECHANICAL SUPPLY SYSTEM: a system for forcing air into a room or space by mechanical means.

2.13 NATURAL VENTILATION: the movement of air into and out of a space through intentionally provided openings, such as windows and doors, or through non-powered ventilators.

2.14 VENTILATION: the process of supplying ventilation air to any space by natural or mechanical means. (Provision must be made for simultaneous removal of air from the space.)

SECTION 3.0. ACCEPTABLE VENTILATION AIR QUALITY (SEE BIBLIOGRAPHY)

3.1 TABLE I lists the maximum allowable pollutant concentrations in ventilation air commensurate with the ventilation requirements set forth in Section 6.0 of this Standard. In addition ventilation air shall conform to the limiting conditions given in Section 3.3.

3.2 OUTDOOR AIR shall be considered of that quality which meets or exceeds the criteria of Table I if one of the following conditions is met:

3.2.1 Monitoring Data of governmental pollution-control agencies such as the National Air Pollution Control Administration show that the air quality of the community in which the ventilation system is located meets the requirements of Table I;

3.2.2 The Community in which the ventilation system is located is similar in population, geographic and meteorological setting and industrial pattern to a community having acceptable air quality as determined in paragraph 3.2.1;

3.2.3 The Community in which the ventilation system is located has a population of less than 20,000 people, and no nearby substantial contamination source;

3.2.4 Air Monitoring, for three consecutive months, as required for inclusion in the NAPCA-SORAD System, shows that the air quality meets the requirements of Table I.

3.3 AIR shall be considered unacceptable for ventilation use in accordance with this standard if it contains any contaminant in a concentration greater than one-tenth the Threshold Limit Value (TLV) currently accepted by the American Conference of Governmental Industrial Hygienists. Where there is reasonable expectation that the air is unacceptable, as indicated above, sampling and analysis shall be carried out by qualified personnel in accordance with procedures and equipment acceptable to the American Conference of

Table I
Maximum Allowable Contaminant Concentrations
for Ventilation Air

Contaminant	Annual Average (Arithmetic Mean) $\mu\text{g}/\text{m}^3$	Short-Term Level (Not to be exceeded More than once a Year) $\mu\text{g}/\text{m}^3$	Averaging Period (hr)
Particulates	60*	150*	24
Sulfur Oxides	80	400	24
Carbon Monoxide	20,000	30,000	8
Photochemical Oxidant	100	500	1
Hydrocarbons (not including methane)	1,800	4,000	3
Nitrogen Oxides	200	500	24
Odor	Essentially Unobjectionable**		

*Federal criteria for U.S. by 1975.

**Judged unobjectionable by 60% of a panel of 10 untrained subjects.

The levels listed are met by ambient outdoor air in many major cities, or will be met by such outdoor air when passed through minimal air treatment systems (containing suitable combinations of heaters, coolers, humidifiers, etc., and including roughing particulate filters). Conformity of users' local air to these concentrations may be determined by reference to the Storage and Retrieval of Aerometric Data System (SORAD) of the National Air Pollution Control Administration, and by other means, as listed in Section 3.2.

Governmental Industrial Hygienists, the American Industrial Hygiene Association or the Occupational Health Section of the U.S. Public Health Service.

3.4 IF OUTDOOR AIR of the quality specified by Sections 3.1 and 3.3 is not available, filtration or other treatment devices shall be used to bring its quality to or above the minimum level defined by Sections 3.1 and 3.3.

3.5 ACCEPTABLE VENTILATION AIR may contain a mixture of suitably treated recirculated air and outdoor air such that the mixture meets or exceeds the quality limits stated in 3.1 and 3.3 (See Section 5.0).

SECTION 4.0. VENTILATING SYSTEMS—GENERAL REQUIREMENTS

4.1 VENTILATING SYSTEMS shall be provided with adequate openings for supply, return and exhaust air to obtain the required circulation.

4.2 OUTDOOR AIR INLETS shall be located to minimize or eliminate possible contamination.

4.3 EXHAUST DISCHARGES shall be located so that the air exhausted to the outside does not create a nuisance or contaminate outdoor air near outdoor air inlets.

4.4 VENTILATING SYSTEMS shall be designed and installed so that the air coming in contact with occupants is at a temperature, velocity and quality not to constitute a health hazard or discomfort.

4.5 VENTILATING DUCTS shall be constructed entirely of incombustible, nonporous materials. Their construction shall comply with the standards of air conditioning and ventilating systems of the National Fire Protective Association (Pamphlets NFPA No. 90A and NFPA No. 90B).

4.6 OCCUPIED SPACES shall be provided with means of supplying sufficient ventilation air for the maximum number of persons for which such spaces are designed.

4.7 THIS STANDARD assumes that contaminants from concentrated sources which can be a potential hazard or nuisance (heat, smoke, fumes, etc.) are collected as close as possible to the source by exhaust systems separate from the space ventilating system.

4.8 WHEN SPECIAL EXHAUSTS are used (as in the kitchen), consideration must be given to provide adequate supply air to the space to replace the exhaust air.

SECTION 5.0. RECIRCULATION

The requirements for ventilation quantities given in Section 6.0 are for 100% outdoor air when the outdoor air meets the specifications for air quality given in Section 3.0. Except for areas where recirculation is prohibited by other codes or standards having precedence, the outdoor air requirements may be reduced to 33% of the specified required ventilation air quantity if adequate temperature control is provided, in addition to filtering equipment, so that the maximum allowable concentration of particulates entering the space is less than that specified in Table 1. If, in addition, high efficient adsorption or other odor and gas removal equipment is employed, so that the air entering the space has been purified to meet the requirements of Sections 3.1 and 3.3, the outdoor air requirement may be reduced to 15% of the specified required ventilation air quantity. *In no case shall the outdoor air quantity be less than 5 cfm per person.*

SECTION 6.0. VENTILATION REQUIREMENTS

The required air quantities are for outdoor air meeting the requirements of Section 3.0 or for a combination of acceptable outdoor air and recirculated air in accordance with Section 5.0. Minimum and recommended values are given to provide different quality levels in recognition of the need to provide choices of environmental performance for different classes of projects. In either case the designer is encouraged to use his experience and judgment in the application of this Standard as long as the minimum requirements are satisfied.

In many cases the required ventilation air quantities for spaces with positive exhaust systems, such as toilets, baths, lobbies, corridors, and kitchens, may be supplied from adjacent spaces. The sum of the ventilation requirements for the space and the adjacent space shall be provided.

Estimated persons/ 1000 sq ft floor area. Use only when design oc- cupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
	Minimum	Recommended	

6.1. RESIDENTIAL
(Private dwelling places,
single or multiple units)

Single Unit Dwellings				
General Living Areas, Bedrooms	5	5	7-10	•
Kitchens	—	20	30-50	•
Baths, Toilet Rooms	—	20	30-50	•
Basements, Utility Rooms	—	5	5	
Multiple Unit Dwellings				
General Living Areas, Bedrooms	7	5	7-10	•
Kitchens	—	20	30-50	•
Baths, Toilet Rooms	—	20	30-50	•
Basements, Utility Rooms	—	5	7-10	
Garages	—	(1.5)	(2.0)-(3.0)	••
Mobile Homes	7	5	7-10	

* Installed capacity for intermittent use.
** cfm per sq ft of floor area.

6.2. COMMERCIAL

General Requirements—Merchandising (Apply to all forms unless specially noted)				
Sales Floors and Showrooms (Basement and Street Floors)	30	7	10-15	
Sales Floor and Showrooms (Upper Floors)	20	7	10-15	
Storage Areas (Serving Sales Floors and Storerooms)	5	5	7-10	
Dressing Rooms	—	7	10-15	
Malls and Arcades	40	7	10-15	
Shipping and Receiving Areas	10	15	15-20	
Warehouses	5	7	10-15	
Elevators	—	7	10-15	
Food Markets, Supermarkets, etc. Meat Processing Rooms	10	5	5	•

* Spaces maintained at low temperatures (-10 to 50 F) are not covered by these requirements unless the occupancy is continuous. Ventilation from adjoining spaces is permissible. When the occupancy is intermittent, infiltration will normally exceed the ventilation requirement. (See Chapter 23, Refrigeration Load, ASHRAE Handbook of Fundamentals, 1972).

Drug Stores				
Pharmacists' Work Rooms	10	20	25-30	
Specialty Shops				
Pet Shops	—	(1.0)	(1.5)-(2.0)	•
Florists	10	5	7	••
Greenhouses	1	5	7-10	••, •••

* cfm per sq ft of floor area
** Maximum allowable concentration (MAC) for sulfur dioxide = 30 µg/cu m
*** Ventilation to optimize plant growth, temperature, humidity, etc., will almost always be greater than shown.

	Estimated persons/ 1000 sq ft floor area. Use only when design oc- cupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Banks (see sales floors and offices)				
Vaults	—	5	5	
Food Services				
Dining Rooms	70	10	15-20	
Kitchens	20	30	35-35	•
Cafeterias, Short Order, Drive-Ins, Seating Areas, and Queuing Areas	100	30	35-35	
Bars (Predominantly Stand-up)	150	30	40-50	
Cocktail Lounges	100	30	35-40	
*Exhaust to outside; source control as required.				
Hotels, Motels, Resorts				
Bedrooms (Single, Double)	5	7	10-15	
Living Rooms (Suites)	20	10	15-20	
Baths, Toilets (attached to bedrooms)	—	20	30-50	•
Corridors	5	5	7-10	
Lobbies	30	7	10-15	
Conference Rooms (Small)	70	20	25-30	
Assembly Rooms (Large)	140	15	20-25	
Public Rest Rooms	100	15	20-25	
Cottages (treat as single- unit dwellings)	—	—	—	
(See also Food Services, Industrial, Merchandising, Barber and Beauty Shops, Garages for associated Hotel/Motel Services)				
*Installed capacity for intermittent use.				
Dry Cleaners and Laundries				
Commercial	10	20	25-30	•••
Storage/Pickup Areas	30	7	10-15	
Coin-operated	20	15	15-20	••
*Exhaust to outside; source control as required. **Installed equipment must incorporate positive exhaust and control (as required) of undesirable contaminants (toxic or otherwise).				
Barber, Beauty and Health Services				
Beauty Shops (Hair dressers)	50	25	30-35	
Reducing Salons (Exercise Rooms)	20	25	30-35	
Sauna Baths and Steam Rooms	—	5	5	
Barber Shops	25	7	10-15	
Photo Studios				
Camera Rooms, Stages	10	5	7-10	•
Darkrooms	10	10	15-20	
*Thermal effects probably determine requirements.				
Shoe Repair Shops (Combined Workrooms/ Trade Areas)	10	10	15-20	

	Estimated persons/1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Jarages, Auto Repair Shops, Service Stations				
Parking Garages (enclosed)	—	(1.5)	(2.0)-(3.0)	•
Auto Repair Workrooms (general)	—	(1.5)	(2.0)-(3.0)	•, ••
Service Station Offices	20	7	10-15	
*cfm per sq ft of floor area				
**Stands where engines are run must incorporate systems for positive engine exhaust withdrawal				
Theatres				
Ticket Booths	—	5	7-10	
Lobbies, (Foyers and Lounges)	150	20	25-30	
Auditoriums (in Motion Picture Theatres, Legitimate Theatres, Lecture, Concert and Opera Halls—no smoking)	150	5	5-10	
Auditoriums (smoking permitted)	150	10	10-20	
Stages (with proscenium and curtains)	70	10	12-15	•, ••
Green Rooms and Workrooms	20	10	12-15	
Public Rest Rooms	100	15	20-25	
*Thermal effects probably determine requirements				
**Special ventilation will be needed to eliminate stage effect contaminants				
Ballrooms				
Public	100	15	20-25	
Bowling Alleys (Seating Area)	70	15	20-25	
Gymnasiums and Arenas				
Playing Floors—minimal or no seating	70	20	25-30	
Locker Rooms	20	(30)	(40)-(50)	•
Spectator Areas	150	20	25-30	
Ramps, Foyers, and Lobbies	150	10	15-20	
*cfm/locker				
Pool Rooms	25	20	25-30	
Amusement Parlors	25	20	25-30	
Tennis, Squash, Handball Courts (indoor)	—	20	25-30	
Swimming Pools (indoor)	25	15	20-25	•
*The same for air-supported structures				
Ice-skating and Curling Rinks	70	10	15-20	•
*The same for air-supported structures				
Roller Rinks	70	10	15-20	•
*The same for air-supported structures				

	Estimated persons/1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Transportation				
Waiting Rooms	50	15	20-25	
Garages	-	(1.5)	(2.0)-(3.0)	•
Ticket and Baggage Areas, Corridors and Gate Areas	50	15	20-25	
Control Towers	50	25	30-35	
Hangers	2	10	15-20	••
Public Rest Rooms	100	15	20-25	
Platform	150	10	15-20	
Concourses	150	10	15-20	
Repair Shops	-	10	15-20	
*cfm per sq ft of floor area				
**Special solvent and exhaust problems handled separately				
Offices				
General Office Space	10	15	15-25	
Conference Rooms	60	25	30-40	
Drafting Rooms, Art Rooms	20	7	10-15	
Doctor's Consultation Rooms	-	10	15-20	
Waiting Rooms (Doctors, Em- ployment Agencies, etc.)	30	10	15-20	•
Lithographing Rooms	20	7	10-15	•
Diazo Printing Rooms	20	7	10-15	
Computer Rooms	20	5	7-10	
Keypunching Rooms	30	7	10-15	
Public Rest Rooms	100	15	20-25	
*Installed equipment must incorporate positive exhaust and control (as required) of undesirable contaminants (toxic or otherwise).				
Communication				
TV/Radio Broadcasting Booths, Radio Studios	20	30	35-40	•
Motion Picture and TV Stages	20	30	35-40	
Pressrooms	100	15	20-25	
Composing Rooms	30	7	10-15	
Engraving Shops	30	7	10-15	
Telephone Switchboard Rooms (Manual)	50	7	10-15	
Telephone Switchgear Rooms (Automatic)	-	7	10-15	
Teletypewriter/Facsimile Rooms	-	5	7-10	
*Thermal effects probably determine requirements				

6.3. INDUSTRIAL

Occupational safety laws in the various states usually regulate the ventilation requirements. Almost always, these are far in excess of the ventilation requirements for the occupants. The following list gives the requirements for the occupants only, assuming that the ventilation air is of a quality equal to or exceeding the limits listed in Section 3.0.

Estimated persons/1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
	Minimum	Recommended	
Mining and Rock Products*			
Underground Mine Shafts	—	20	25-30
Underground Mine Faces (non-Toxic Materials)	—	35	40-45
Underground Mine Faces (Toxic Materials: Beryl, Uranium and other radioactive rocks; radon emanators)		35	40-45
Underwater Tunneling	—	35	40-45
Control Cabs for Rock-Handling Machinery	—	20	25-30
Control Rooms (for Lime and Cement Kilns, Crushers, Tipples, Weighing stations, etc.)		15	20-25
Stonecutting Rooms	—	36	40-45
Areas Serving Cement Kilns, Crushers, etc.	—	35	40-45
*Special contaminant control systems may be required			
Metallurgy*			
Control Rooms	—	15	20-25
Crane Cabs	—	20	25-30
Halls Containing Cupolas, Melting Furnaces, Oxygen Furnaces, Pot Lines, etc.	—	35	40-45
*Special contaminant control systems may be required			
Metalworking and Metal Finishing*			
Foundry Mold, Core Making and Shakeout Areas	—	35	40-45
Halls Housing Heavy Metalworking, such as Foundry Pouring Rooms, Drop Forges, Scarfing and Rolling Stands, Cast Iron Machining	—	35	40-45
Halls Housing Medium Metalworking, such as Finish and non-Ferrous Machining, Punch Press and Brake Operations, Spot-welding, Extruding	—	35	40-45
Gas- and Arc-Welding Booths	—	35	40-45
Halls Housing Light Metalworking: Appliance, Aircraft, Automotive and Machine Assembly (Excluding 3.3.7)	—	20	25-30
Automotive Engine Test, Drive-Away Areas in Automotive Assembly Plants	—	—	..
Paint Spray Booths	—	—	..
Pickling, Etching, and Plating Lines	—	—	..

	Estimated persons/1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Degreasing Booths, Steam Cleaning Booths	-	-	--	••
Sandblasting Booths, Frit Spraying Booths	-	-	-	••
Rooms Serving Porcelain Enamel and Heat-Treating Furnaces	-	-	--	••
Grinding and Polishing Rooms	-	30	35-40	••
*Special contaminant control systems may be required				
**Special exhaust systems required				
Chemicals and Pharmaceuticals Rooms Containing Grinders, Mullers, Blenders, Pulverizers, Pelletizers Sieving and Other Dusty Operations	-	30	35-40	•
Rooms Containing Reaction Vessels, Stills, Contactors, Extractors, Evaporators and Other Potential Gas Emitters	-	20	25-30	•
Rooms Containing Drying Ovens	-	15	20-25	•
Fermentation Rooms	-	15	20-25	•
Pillmaking and Capsule Filling Booths	-	10	15-20	•
Packaging Areas	-	10	15-20	•
Utility Rooms (Refrigeration Plants, Heating Plants)	-	7	10-15	
Control and Computer Rooms	-	7	10-15	
*Special contaminant control systems may be required				
Textiles, Clothing Manufacture Carding Rooms; Nonwoven Fabric Production and Pile Fabric Shearing Areas	-	15	20-25	
Spinning Rooms (Natural and Staple Fibers)	-	15	20-25	
Spinning Rooms (Synthetic Continuous Fiber Production)	-	15	20-25	
Yarn Rewinding, Warping Rooms	-	15	20-25	
Yarn and Cloth Dyeing and Coating; Cloth Printing Rooms	-	15	20-25	
Weaving and Knitting Rooms	-	15	20-25	
Cutting and Sewing Lofts	-	15	20-25	
Plastics and Rubber Processing* Rooms Containing Mixing and Compounding Operations (dry or liquid)	-	15	20-25	
Rooms Housing Thermoplastic Thermosetting Forming Operations (Extrusion, Injection Molding, Bead Molding, Vacuum Forming, etc.)	-	15	20-25	

	Estimated persons/ 1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Foam-moulding Rooms (especially Urethane)	-	15	20-25	
Glassfiber Reinforced Plastic Layup Rooms	-	15	20-25	
Trimming, Grinding and Polishing Rooms	-	25	30-35	
Vacuum-Coating Rooms	-	15	20-25	
Painting, Printing and Adhesive Assembly Operations	-	15	20-25	
Rubber Calendaring Rooms	-	15	20-25	
Moulding, Vulcanizing, Lamination Rooms	-	15	20-25	
*Special contaminant control systems may be required				
Electrical Electronics and Aerospace Semiconductor Processing Rooms	-	10	15-20	
Circuit Board Etching, Soldering Rooms	-	20	25-30	
Magnetic Tape Production Areas	-	10	15-20	
Clean Rooms (Class 100)	-	10	15-20	
Clean Rooms (Class 10,000)	-	10	15-20	
Clean Rooms (Class 100,000)	-	10	15-20	
Encapsulation Operations (Plastic, Glass and Ceramics)	-	10	15-20	
Coil Winding Capacitor, Relay and Transformer Manufacturing Areas	-	10	15-20	
Lamp and Tube Manufacture	-	10	15-20	
TV Picture and Image Tube Manufacturing Areas	-	10	15-20	
Magnet, Magnetic Core Manufacturing Areas	-	10	15-20	
Wood Products, Papermaking Sawmills, Lumber Planing and Sanding, Wood Turning, Shaping, Drilling and Routing Operations, Veneer Making Areas	-	20	25-30	•
Glueing and Plywood Manufacturing Areas	-	20	25-30	•
Chipboard, Bagasseboard and Hardboard Manufacturing Areas	-	20	25-30	•
Rubbing, Staining, Varnishing and Painting Rooms	-	20	25-30	**
Crate and Pallet Making, Building Prefabrication (Nailing Operations) Areas	-	20	25-30	
Lumber and Panel Warehouses	-	20	25-30	
Chipping, Barking and Grinding Operations Areas	-	20	25-30	•
Pulping Operations, Digesters, Bleachers	-	10	15-20	•

	Estimated persons/1000 sq ft floor area. Use only when design occupancy is not known	Required ventilation air, cubic feet per minute per human occupant, (when the number is bracketed, refer to the notes).		Comments
		Minimum	Recommended	
Papermaking Operations (Beaters, Fourdrinier machines, dryers, creped wadding machines, calenders)	—	10	15-20	•
Winding, Slitting, Curing, Envelope Making Rooms	—	10	15-20	
Paper Warehouses	—	20	25-30	
Corrugated Board Honeycomb Manufacture, Boxmaking room	—	20	25-30	••
Coating Rooms	—	20	25-30	••
*Special contaminant control systems may be required				
**Special solvent and exhaust problems handled separately				
Brewing, Distilling, Wineries, Bottling**				
Grain Mixing and Handling Areas	—	20	25-30	•
Yeast Production Areas	—	20	25-30	•
Fermentation Areas	—	20	25-30	•
Distillation Rooms	—	20	25-30	•
Fruit Handling, Crushing Areas	—	20	25-30	•
Caves	—	20	25-30	
Warehouses	—	20	25-30	
Filtration Rooms, Blending Rooms	—	20	25-30	
Bottling Areas	—	20	25-30	
Soft-Drink compounding Areas	—	20	25-30	
Carbonation Areas	—	20	25-30	
*Special solvent and exhaust problems handled separately				
**Spaces maintained at low temperatures (-10 to 50 F) are not covered by these requirements unless the occupancy is continuous. Ventilation from adjoining spaces is permissible. When the occupancy is intermittent, infiltration will normally exceed the ventilation requirement. (See Chapter 23, Refrigeration Load, ASHRAE Handbook of Fundamentals, 1972).				
Food Processing****				
Fruit and Vegetable Sorting and Cleaning Areas	—	20	25-30	
Cutting, Chopping, Shredding, Crushing, Squeezing Areas	—	20	25-30	•
Canning Operations	—	20	25-30	•
Bakeries, Cereal Processing, Candymaking	—	20	25-30	•
Fish Processing	—	20	25-30	••
Meat Curing, Canning	—	20	25-30	•
Dairies (Fluid Milk Operations)	—	20	25-30	
Cheesemaking, Yogurt	—	20	25-30	
Flour Milling, Bagging, etc.	—	30	35-40	•••
Sugar Purification and Salt Purification	—	20	25-30	
Control Rooms for Coffee Roasting, Grinding	—	10	15-20	
Vacuum Drying Operations	—	10	15-20	