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Employer Liability for Workplace Environmental Tobacco Smoke: Get Out of the Fog

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I. INTRODUCTION

Approximately fifty million Americans, or twenty-six percent of the United States adult population, smoke. Consequently, virtually every American is likely to be exposed to environmental tobacco smoke (ETS), also known as "second-hand smoke," to some extent. The average person spends almost ninety percent of his or her time either at home or in the workplace, making these the two major sources of exposure to ETS. Considering the amount of time spent at work, it is no wonder that the workplace has become a focal point for the controversy over ETS.

Nonsmokers have complained about being forced to inhale the tobacco smoke of others for centuries. However, the negative physiological effects of...
ETS were not concretely documented until the mid-1980s. In 1986, the National Research Council and the Surgeon General separately issued reports detailing the hazardous effects of ETS. Each of these reports concluded that involuntary smoking can cause diseases, including tissue irritation and lung cancer, in otherwise healthy nonsmokers. More recently, in January 1993, the United States Environmental Protection Agency (EPA) released a report confirming that ETS is causally related to lung cancer. In short, scientific research has shown that ETS may cause illnesses ranging from irritation of the eye, nose, and throat, to lung cancer. The federal and state governments have not acted to effectively prevent ETS exposure from harming individuals in the workplace.


6. For a discussion of the findings of both the Surgeon General Report and the National Research Council Report, see infra notes 43-46 and accompanying text.

7. The term "involuntary smoking" connotes that nonsmokers' exposure is an unavoidable consequence of sharing the same space with a smoker. 1986 Surgeon General Report, supra note 5, at vii. "Passive smoking" and "second-hand smoking" are synonyms for involuntary smoking, and will be used interchangeably throughout this note.


9. EPA Report, supra note 1, at 1-4. The EPA conclusions were based on the analysis of the results of 30 epidemiologic studies which examined the relationship between ETS and lung cancer. Id. at 1-3. See infra notes 47-50 and accompanying text.


11. See infra notes 51-71 and accompanying text for a discussion of government regulation of ETS.

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This data concerning the health risks of ETS provides new ammunition for plaintiffs suing the tobacco companies. However, the tobacco industry is not the primary target for the nonsmoking plaintiff. Rather, the involuntary smoker's employer may face liability for allowing such a health hazard to exist in the workplace.

Both the federal and the state courts have been unable to agree on a method of compensation for employees injured by ETS exposure in the workplace. Further, injured employees have attempted to pursue different theories to obtain remedies, including an employer's common law duty to provide a safe working environment, workers' compensation systems, and the Americans with

12. See generally Bradley M. Soos, Note, Adding Smoke to the Cloud of Tobacco Litigation: A New Plaintiff: The Involuntary Smoker, 23 VAL. U. L. REV. 111 (1988). Cigarette smokers themselves have failed in attempts to hold the tobacco industry liable for injuries caused by smoking. Id. at 111. The smoker traditionally lost the claim when the tobacco company raised the defenses of assumption of the risk, unforeseeable consequences, and, more recently, pre-emption by the Federal Cigarette Labeling and Advertising Act of 1965. Id. However, on March 13, 1996, Liggett Group, America's fifth largest cigarette manufacturer, announced that it agreed to settle a pending class action suit brought by plaintiffs seeking to hold the tobacco manufacturers liable for their addiction to cigarettes. Janet Kidd Stewart, The Smoke Is Shifting, CHI. SUN TIMES, Mar. 24, 1996, at 33. Analysts believe that this settlement will ultimately be voided by one of the tobacco manufacturers. Id. In any event, this settlement has been coined "the first crack in the stone wall of denial" by President Clinton. Id.

13. Paolella, supra note 3, at 591; Nolan, supra note 4, at 563.

14. See infra note 15 for a discussion of cases where employees have attempted to hold their employer liable for injuries resulting from exposure to ETS.

15. Compare Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (finding that tobacco smoke in the workplace may be a breach of an employer's common law duty to provide a safe working environment); McCarthy v. Department of Social & Health Serv., 759 P.2d 351, 353, 356 (Wash. 1988) (concluding that the harms resulting from ETS exposure were not covered under the Worker's Compensation Act, but rather that the employee had a right to bring a cause of action for failure to provide a safe working environment); with Pechan v. Dynapro, Inc., 622 N.E.2d 108, 119 (Ill. App. Ct. 1993) (holding that the employee's injuries from the inhalation of second-hand smoke were within the scope of employment, making the Workers' Compensation Act the exclusive remedy); Schober v. Mountain Bell Tel., 600 P.2d 283, 284-85 (N.M. Ct. App. 1978) (finding that employee's allergic reaction caused by exposure to second-hand smoke was compensable under the Workmen's Compensation Act); Carroll v. Tennessee Valley Auth., 697 F. Supp. 508 (D.D.C. 1988) (holding that a claim for injuries resulting from exposure to second-hand smoke is properly brought under the Federal Employee Compensation Act).


Disabilities Act. These current alternatives are inadequate because they either do not provide compensation to injured workers, or they make it almost impossible for employees to recover. Further, the EPA classification of ETS as a Group A carcinogen has the potential of clogging the court systems with mass ETS litigation. Asbestos, another Group A carcinogen, is an excellent indicator of the potential path of ETS-related claims. A look at the history of asbestos litigation reveals that this path should be avoided by ETS plaintiffs.

This Note will address the issues facing the legal community concerning exposure to ETS in the workplace. This Note proposes a solution to the dilemma facing employers, nonsmoking employees, and the courts by suggesting a model amendment to existing workers' compensation laws. This amendment will provide relief for injured plaintiffs, will lessen the potential for mass ETS-related claims, and will not have any regulatory effect on smoking.

19. See infra notes 155-307 and accompanying text for a discussion of the specific deficiencies of these alternatives.
20. 51 Fed. Reg. 33,992, 33,993 (1986). The EPA has developed “Guidelines for Carcinogen Risk Assessment” to determine risk assessments for suspected carcinogens on a case-by-case basis. Id. at 33,992-93. The Guidelines provide a classification system that describes a substance’s cancer causing potential, considering the overall weight of the evidence. Id. at 33,996. There are five groupings in the classification system: Groups A, B, C, D, and E. Id. Substances in Group A are known human carcinogens: the overall weight of the evidence supports a causal connection between the substance and cancer in humans. Id. at 34,000. Group B substances are probable human carcinogens: some of the evidence sufficiently supports a connection, however some of the evidence demonstrates only a limited connection between exposure and cancer. Id. Group C substances are considered possible human carcinogens: the evidence indicating a relationship between exposure and cancer is minimal. Id. Substances in Group D lack adequate data to determine whether the substances may cause cancer. Id. Group E substances show no causal link between exposure and cancer in humans. Id.
22. See Ross, supra note 5 (comparing asbestos and benzene with ETS to show the similarities and to urge the government to regulate ETS).
23. See infra notes 130-40 and accompanying text for a discussion of the history of asbestos litigation.
24. The purpose of this note is not to support regulation of smoking in the workplace, but rather to provide a remedy for those employees who have been injured as a result of exposure to ETS. The author realizes, however, that it is fair to say that any government action that provides an employee with a remedy and an employer with a cost will have some indirect regulatory effect. That is, it is plausible that if states enact the proposed amendment, employers, in order to avoid future liability, will begin to increase their regulation of smoking. However, the focus of this note will not be on regulating ETS in the workplace, but instead on redressing injuries resulting from ETS exposure.
burden of ETS litigation, and will minimize employers' costs associated with ETS injuries.\footnote{See infra section V for the text of the model amendment.}

Section II of this Note canvasses the evolving background of ETS-related claims, with emphasis on the conclusions concerning the health effects of ETS, statistical information, and governmental regulations.\footnote{See infra notes 30-79 and accompanying text.} Section III then details the problems facing the legal community in addressing ETS-related harms in the workplace, and provides an illustrative example of another Group A carcinogen, asbestos, as a predictive instrument in determining the potential path of workplace ETS claims.\footnote{See infra notes 80-154 and accompanying text.} Section IV discusses the possible alternatives for dealing with workplace ETS claims and demonstrates the lack of an effective remedy in the existing options.\footnote{See infra notes 155-307 and accompanying text.} Finally, Section V offers a solution to the workplace ETS problem by proposing an amendment to the current state workers' compensation laws.\footnote{See infra notes 308-28 and accompanying text.}

Before outlining the problem in redressing ETS-related harms caused by exposure in the workplace, it is necessary to detail the background in which this problem has developed. To do this, the current state of medical evidence concerning the harmful effects of ETS will be discussed. In addition, regulations of ETS by federal, state, and local governments plus employer restrictions currently in effect will be examined.

II. BACKGROUND

A. The Health Effects of Involuntary Smoking

More than one in every six deaths in the United States are attributable to tobacco use.\footnote{EPA REPORT, supra note 1, at 2-1.} Approximately twenty-five percent of these deaths are the result of lung cancer, making tobacco use the largest contributor to lung cancer deaths in the United States.\footnote{Id. Tobacco smoke also impairs the lung functions in others ways, including: phlegm production, wheezing, coughing, and shortness of breath. Id.} In addition, tobacco smoke has been causally related to other forms of cancer, including cancer of the bladder, renal pelvis, pancreas, and upper respiratory and digestive tracts.\footnote{Id. The EPA has estimated that tobacco smoke causes 30,000 deaths annually from cancer at these sites. Id.} Furthermore, tobacco smoke is a cause of chronic obstructive pulmonary disease, which includes emphysema,
and is a major risk factor for cardiovascular diseases.\textsuperscript{33}

The American public was made aware of these risks as early as 1964.\textsuperscript{34} At that time, the federal government began issuing warnings about the health hazards of smoking tobacco.\textsuperscript{35} In the 1980s, however, the medical community switched its focus from the smoker to the nonsmoker and the harmful effects of passive smoking.\textsuperscript{36}

Passive smoking or involuntary smoking occurs when a nonsmoker breathes air that contains tobacco smoke created by another person.\textsuperscript{37} This smoke is termed environmental tobacco smoke, and it consists of two types: exhaled mainstream smoke and sidestream smoke.\textsuperscript{38} Mainstream smoke is that which is inhaled by the smoker and then exhaled into the environment.\textsuperscript{39} Sidestream smoke is released directly into the environment by either end of the burning cigarette when it is smoldering.\textsuperscript{40} Sidestream smoke contains substantially the same elements found in mainstream smoke, which is inhaled by the smoker.\textsuperscript{41} Thus, ETS exposes the nonsmoker to substantially the same risks as the smoker.\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{33} Id. at 2-1. Tobacco smoke is also considered a risk factor for respiratory infections including influenza, bronchitis, and pneumonia. Id. An estimated 20,000 influenza and pneumonia deaths each year result from tobacco smoke. Id.
  \item \textsuperscript{34} Ross, supra note 5, at 713.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Donna S. Stroud, When Two “Rights” Make a Wrong: The Protection of Nonsmokers’ Rights in the Workplace, 11 CAMPBELL L. REV. 339, 340 (1988) (outlining the progress of the studies on the hazardous effects of ETS on the health of nonsmokers).
  \item \textsuperscript{37} EPA REPORT, supra note 1, at 2-1, 2-2.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Id. Sidestream smoke accounts for about one half of the smoke that a cigarette generates. Id.
  \item \textsuperscript{41} The exact composition of tobacco smoke is not known for certain; however, many known or suspected carcinogens have been identified, including benzene, nickel, polonium-210, 2-naphthylamine, 4-aminobiphenyl, formaldehyde, various N-nitrosamines, benz[a]anthracene, and benz[a]pyrene. Id. at 2-1. Many other toxic agents are also found in tobacco smoke, such as carbon monoxide, nitrogen oxides, ammonia, and hydrogen cyanide. Id.
  \item \textsuperscript{42} 1986 SURGEON GENERAL REPORT, supra note 5, at 7. The 1986 Surgeon General Report explained:
    \begin{itemize}
      \item The comparison of the chemical composition of the smoke inhaled by active smokers with that inhaled by involuntary smokers suggests that the toxic and carcinogenic effects are qualitatively similar, a similarity that is not too surprising because both mainstream and environmental tobacco smoke result from the combustion of tobacco.
    \end{itemize}
    Id.
    \begin{itemize}
    \end{itemize}
\end{itemize}
In 1986, the United States Public Health Service (USPHS) issued a report linking ETS to illnesses, including lung cancer, in otherwise healthy nonsmokers. Additionally, the Surgeon General Report concluded that simply separating smokers from nonsmokers in the same air space does not eliminate the problem. Further, in 1992, the American Heart Association (AHA) confirmed the Surgeon General's concerns about the causal relationship between ETS and heart disease. The AHA concluded that ETS is a "major preventable cause of cardiovascular disease and death," accounting for approximately 45,000 deaths annually.

Recently, the EPA reaffirmed beliefs that ETS adversely affects healthy nonsmokers. In January 1993, the EPA released a report on the suspected harmful effects of ETS, concluding that ETS causes approximately 3,000 lung cancer deaths annually in U.S. non-smokers, increases children's' risk of bronchitis and pneumonia, and increases the severity of symptoms in children with asthma. More significantly, the EPA classified ETS as a "Group A" carcinogen, the same grouping as asbestos and arsenic. Substances in Group A are known human carcinogens; that is, the overall weight of the evidence supports a causal link between exposure to these substances and cancer in addition, the scientific evidence has found that the amount of exposure and duration of exposure are relevant factors in determining whether a causal connection exists between an illness and ETS exposure. Collishaw et al., *Tobacco Smoke in the Workplace: An Occupational Health Hazard*, 131 CAN. MED. A.J. 1199 (1984) (concluding that: 

- tobacco smoke, which contains over 50 known carcinogens and many other toxic agents
- is a health hazard for nonsmokers who are regularly exposed to it at work.

Further, each additional exposure adds to the risk of contracting an ETS-related disease, and no safe level of exposure can be determined. Repace, *supra* note 3, at 773-75.

43. 1986 SURGEON GENERAL REPORT, *supra* note 5, at 7. The report also made conclusions concerning the effects of ETS on children: "The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures." *Id.*

44. *Id.*


46. *Id.*

47. See generally EPA REPORT, *supra* note 1.

48. *Id.* at 1-1. The EPA report also concluded that exposure to ETS is "causally associated with increased prevalence of fluid in the middle ear, symptoms of upper respiratory tract irritation, and a small but significant reduction in lung function." *Id.*

49. *Id.* at 1-2, 1-3.
humans.50

In short, ETS exposure causes a variety of serious illnesses in nonsmokers. Considering the weight of the evidence concerning ETS exposure and the seriousness of these ETS-related illnesses, heavy regulation by the government would seem appropriate. However, this has not been the case.

B. Regulation of Exposure to Environmental Tobacco Smoke

Until recently, the federal government has not adequately regulated ETS exposure.51 Presently, the federal government has restricted smoking in transportation systems52 and government buildings,53 but no regulation of the private sector workplace has yet been enacted.54 The federal government recognized the seriousness of the 1986 reports issued by the Surgeon General and the National Research Council by introducing almost 100 bills in Congress by the end of 1987.55 However, the first major action to protect nonsmokers from ETS exposure did not occur until 1988, when the federal government banned smoking aboard domestic airline flights less than two hours in duration.56 Since then, the federal government has banned smoking on other transportation systems.57

Most recently, the federal government has taken action to regulate ETS

50. 51 Fed. Reg. 33,992, 33,999 (1986). The guidelines used in determining the classification of a carcinogen establish that:

1. There is no identified bias that could explain the association; and
2. The possibility of confounding has been considered and ruled out as explaining the association; and
3. The association is unlikely to be due to chance.

Id.

51. Nolan, supra note 4, at 583. This is probably due to both the strong lobbying power of the tobacco industry and the federal government’s unwillingness to interfere with one of the country’s largest industries. Id. at 584.


55. See 1986 SURGEON GENERAL REPORT, supra note 5, at 266; 1986 NATIONAL RESEARCH COUNCIL REPORT, supra note 5; Ross, supra note 5, at 714.


through the Occupational Safety and Health Administration (OSHA). On April 5, 1994, OSHA published proposed rules for public comment addressing indoor air quality in general, with a special focus on workplace smoking. The proposed rules would require all non-industrial employers to design and implement plans to protect employees from indoor air contaminants. The OSHA proposal would require the six million employers under its jurisdiction to either ban smoking altogether or limit smoking in their buildings to enclosed rooms that are directly ventilated outside. On February 9, 1996, OSHA closed the public hearings on the proposed rules in which it received over 110,000 comments. Strong opposition to the proposal was received and OSHA does not expect to take action on the proposed rules during 1996.

Absent federal regulation, the major governmental response to ETS exposure has taken place at the state and local levels. More than forty states and the District of Columbia have regulated smoking in at least one public area. Also, several states have enacted some form of an indoor air quality

59. Id.
60. Id. Some critics of the proposed OSHA regulations claim that requiring employers to provide separately ventilated rooms is too costly and is not justified by the evidence. Research on Effects of Second-Hand Smoke Said Too Tentative to Justify Rule, Employment Pol'y & L. Daily (BNA), Sept. 13, 1994, at 1 [hereinafter Too Tentative].
61. Philip Morris Files 5,000 Pages Opposing Smoke Ban, CHICAGO SUN TIMES, Feb. 10, 1996, at 30 [hereinafter 5,000 Pages] (reporting that Philip Morris, "[t]he world’s largest tobacco company sent the government almost 5,000 pages of arguments Friday, the last day of the official comment period for a federal proposal to eliminate smoking in 6 million workplaces."). See also Employers Are Advised to Use OSHA’s ETS Proposal for Guidance, Job Safety & Health (BNA) No. 444, at 3 (Dec. 6, 1994) (noting that OSHA opened the public hearings on the proposed rule and invited anyone interested to comment).
62. 5,000 Pages, supra note 61, at 30. John C. Fox, An Assessment of the Current Legal Climate Concerning Smoking in the Workplace, 13 ST. LOUIS U. PUB. L. REV. 591, 592-93 n.2. (1994). Some commentators believe that OSHA should separate the ETS regulation from the indoor air quality rules. Too Tentative, supra note 60, at 1. A recent article has suggested that the change in Congress may put the proposed OSHA Indoor Air Quality Act on hold or out of existence. OSHA ’95: Facing Political Realities, Job Safety & Health (BNA) No. 447, at 1 (Jan. 17, 1995). Some senators are suggesting that these proposed rules constitute overzealous regulation and are too costly.
Id.
63. 1986 SURGEON GENERAL REPORT, supra note 5, at 266-67.
act, similar to that proposed by OSHA, which regulates ETS along with other


indoor air pollutants. However, as of 1993, only fourteen states had enacted legislation specifically directed at regulating smoking in the workplace. Notwithstanding their differences in scope and application, essentially all of these workplace regulations share the following elements: (1) none ban smoking on the job entirely; (2) most permit smoking in designated areas; and (3) nearly all provide exceptions for private offices.

Where state legislatures have not addressed the issue of ETS in the workplace, municipalities have often stepped in to regulate second-hand smoke. Numerous local governments have taken measures to protect nonsmokers from ETS exposure. Typically, these laws place restrictions on smoking in places of entertainment, restaurants, public transportation, and some workplaces.

Recently, employers have increasingly taken measures to regulate smoking in the workplace. This trend is probably motivated by complaints of nonsmokers, recent government action, and increasing awareness of potential risks of liability. A 1985 Bureau of National Affairs (BNA) survey found

66. Nolan, supra note 4, at 583. Twelve states, including California, Florida, Idaho, Illinois, Indiana, Montana, Nebraska, New Hampshire, New Mexico, Oregon, and Pennsylvania, have such acts. Id. at 584 n.163. In addition, Oklahoma has enacted the Smoking in Public Places Act, and Rhode Island has a Workplace Smoking Pollution Control Act. Id.


68. Id. at 32. The problem with only designating smoking areas was pointed out in the Surgeon General’s Report: “The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.” 1986 SURGEON GENERAL REPORT, supra note 5, at 7.

69. Loewy et al., supra note 67, at 34 (explaining that: “In California, sixty-six cities and counties have passed ordinances requiring private employers to adopt a smoking policy identifying non-smoking areas.”).

70. See generally Nancy A. Rogotti & Chris L. Pashos, No-Smoking Laws in the United States: An Analysis of State and City Actions to Limit Smoking in Public Places and Workplaces, 266 JAMA 3162 (1991) (concluding that because most of the smoking restrictions are from the local levels of government, the effectiveness of such regulations in preventing ETS exposure is difficult to determine).

71. Id.


73. See generally Economic & Court Decisions Leading to Smoke Free Workplaces, 55 OCCUPATIONAL HEALTH & SAFETY 24, 27 (1984) (arguing that momentum created by the courts, legislatures, public opinion, and awareness of economic risks relating to smoking in the workplace will eventually lead to a preference for no-smoking policies).
that over thirty-three percent of the 662 employers surveyed were regulating smoking, while two percent were currently developing regulations.\textsuperscript{74} Another twenty-one percent had taken regulations into consideration.\textsuperscript{75} The BNA updated its study in 1991 and found that the number of employers with smoking restrictions in effect had grown to eighty-five percent.\textsuperscript{76} Furthermore, the number of employers voluntarily going smoke-free is likely to increase in light of the recent EPA classification of ETS as a Group A carcinogen.\textsuperscript{77}

Even if the federal government or all of the state governments regulate ETS to protect employees from the harmful effects of passive smoking, such regulations will not redress the injuries of those employees who have already been harmed by previous exposure to ETS. For the same reason, employer regulations will not solve the problem either. While regulations by either government or employers will definitely prevent future injury to employees, neither will redress the injuries of those employees already exposed.

In summary, the harmful health effects of ETS exposure have been well documented, and the government has failed to regulate ETS exposure to protect nonsmokers in the workplace.\textsuperscript{78} In addition, employers have only recently undertaken the responsibility to protect nonsmokers from ETS exposure in the workplace.\textsuperscript{79} The next section carefully analyzes the existing ETS cases which show that the courts have been unable to agree on a theory to compensate ETS victims. Further, the following section demonstrates that court systems are not capable of efficiently redressing the potentially massive number of ETS claims.

III. A LOOK AT WORKPLACE ETS - TODAY AND TOMORROW

No effective and efficient remedy exists for nonsmokers who are exposed to second-hand smoke in the workplace and suffer injuries therefrom. Both state and federal courts have attempted to address workplace ETS injuries by considering a diverse group of remedies.\textsuperscript{80} Likewise, plaintiffs have asserted

\textsuperscript{74} BUREAU OF NATIONAL AFFAIRS, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 12 (1986).
\textsuperscript{75} Id.
\textsuperscript{77} Mark A. Gottlieb et al., Second-hand Smoke and the ADA: Ensuring Access For Persons With Breathing and Heart Disorders, 13 ST. LOUIS U. PUB. L. REV. 635, 636 (1994). See supra note 20 and accompanying text (discussing the EPA classification system for carcinogens).
\textsuperscript{78} See supra notes 51-71 and accompanying text.
\textsuperscript{79} See supra notes 72-77 and accompanying text for a discussion of employer regulations of smoking.
\textsuperscript{80} See supra note 15 for a discussion of cases illustrating this disarray of methods of recovery.
a variety of different causes of action, including claims under the Americans with Disabilities Act (ADA), workers' compensation statutes, and an employer's common law duty to provide a safe working environment. In addition to the mounting confusion on how to pursue or remedy an ETS-related claim, both the recent EPA classification of ETS as a Group A carcinogen, and the extremely large number of employers that have not regulated smoking in the workplace may result in an onslaught of litigation based on ETS exposure in the workplace. Before discussing the effects of the EPA report on ETS claims, an analysis of the existing state of ETS litigation is necessary.

A. Where is the Relief?

Individuals exposed to ETS in the workplace can find no single cause of action as the clear choice for pursuing a remedy for injuries. Since the injuries occur at work, the workers' compensation laws should be the exclusive remedy for plaintiffs. Some courts have recognized this and allowed recovery under the workers' compensation laws. In Schober v. Mountain Bell Telephone, a New Mexico appellate court, relying on a previous liberal construction of "accidents" compensable under its Workmen's Compensation Act, found that the plaintiff could recover for her illness caused by constant ETS exposure. A more recent case, Johannesen v. New York City Department of Housing Preservation & Development, granted relief to a plaintiff under

82. See supra note 17 for a list of cases where plaintiffs have pursued compensation under the workers' compensation laws.
84. See supra notes 72-77 and accompanying text discussing employer regulations.
86. The cases mentioned in this section, as examples of ETS litigation, will be examined more fully in section IV infra.
87. See generally Gideon Mark, Issues in Asbestos Litigation, 34 HASTINGS L.J. 871, 875-78 (1983); JEFFERY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 85-90 (1987). Under the typical workers' compensation statute, an employer, in exchange for paying compensation regardless of fault, receives immunity from an employee's suit in tort. Id. at 85. If a claim is granted under the workers' compensation laws, it is deemed the exclusive remedy for the employees against their employer. Id.
88. These states include New Mexico, New York, Wisconsin, and Illinois. See Fox, supra note 62, at 610-11.
90. Id. at 284. The plaintiff worked in a large area where a majority of the other employees smoked. Id. The plaintiff made requests to be removed from the area, and the employer refused. Id.
91. 638 N.E.2d 981 (N.Y. 1994).
workers' compensation based on a claim that her bronchial asthma condition was aggravated by constant exposure to ETS in the workplace.\textsuperscript{92} However, not every state has utilized the workers' compensation systems to compensate employees injured by ETS exposure in the workplace.

Some courts have not recognized workers' compensation laws as the exclusive remedy for ETS-related injuries. In \textit{Shimp v. New Jersey Bell Telephone Company},\textsuperscript{93} the court allowed recovery for ETS-related injuries under an employer's common law duty to provide a safe working environment.\textsuperscript{94} The court recognized the harmful effects that ETS had on the plaintiff and granted the plaintiff's request for an injunction.\textsuperscript{95} In a more recent example, \textit{McCarthy v. Department of Social and Health Services},\textsuperscript{96} the court found that the plaintiff's pulmonary lung disease did not result from an industrial injury, nor did it constitute an occupational disease within the contemplation of the Washington Workers' Compensation Act.\textsuperscript{97} The court reasoned that because the plaintiff's injury was not covered by the workers' compensation act, her private cause of action could not be barred.\textsuperscript{98}

Adding to the existing confusion are claims that have been or are being filed under the Rehabilitation Act of 1976\textsuperscript{99} and the Americans with Disabilities Act.\textsuperscript{100} In \textit{Vickers v. Veterans Administration},\textsuperscript{101} the plaintiff brought suit under the Rehabilitation Act seeking monetary damages and injunctive relief to

\textsuperscript{92} \textit{Id.} at 985-86. The plaintiff, one of a minority of nonsmokers, worked in a crowded area that lacked adequate ventilation. \textit{Id.} at 982. The court noted that the plaintiff had no alternative but to breathe the smoke-filled air and determined that this was an unusually dangerous situation. \textit{Id.} at 984.


\textsuperscript{94} \textit{Id.} at 415-16. The plaintiff in \textit{Shimp} claimed that passive smoking was hazardous to her health, and thus her employer's refusal to ban smoking created an unsafe working environment. \textit{Id.} at 409-10.

\textsuperscript{95} \textit{Id.} at 416. The plaintiff was not seeking a total ban on smoking, only a ban on smoking in the area in which she worked. \textit{Id.}

\textsuperscript{96} 759 P.2d 351 (Wash. 1988).

\textsuperscript{97} \textit{Id.} at 353. The plaintiff was seeking compensation for her development of chronic obstructive pulmonary disease, which eventually prevented her from performing the duties of her employment. \textit{Id.} at 352.

\textsuperscript{98} \textit{Id.} The Washington Act had an exclusive remedy provision, but the court interpreted the provision to mean that it was exclusive only when the injuries were covered by the Act. \textit{Id.} at 353-54. The court reasoned that a quid pro quo exists in workers' compensation systems, in which the employee relinquishes his right to sue in exchange for certain and immediate payment. \textit{Id.} Therefore, if the employer is not required to pay for employees' injuries, then the employees could not be asked to give up their rights to sue. \textit{Id.}


\textsuperscript{101} 549 F. Supp. 85 (W.D. Wash. 1982).
remedy his illnesses caused by his hypersensitivity to tobacco smoke.\textsuperscript{102} The court found that the plaintiff was "handicapped," and that his employer had a duty to reasonably accommodate his disability.\textsuperscript{103} More recently, in \textit{Harmer v. Virginia Electric \& Power Company},\textsuperscript{104} a plaintiff brought an action under Title I of the ADA claiming that his employer's refusal to provide him with a smoke-free workplace constituted discrimination.\textsuperscript{105} Although the plaintiff lost the suit on summary judgment because his employer had reasonably accommodated him, the court did note that the ADA protects the plaintiff from discrimination due to his disability.\textsuperscript{106}

In summary, courts disagree on how to redress injuries from ETS exposure. Consequently, the wide assortment of available causes of action is somewhat bewildering to plaintiffs who have suffered injuries from ETS exposure in the workplace. Adding to the already mounting complexity is the new EPA classification, which has the potential of creating an unmanageable number of ETS cases.

\textbf{B. The Potential Future of ETS Litigation: An Alarming Prospect}\textsuperscript{107}

1. EPA's Classification of ETS as a Group A Carcinogen

The final nail in the coffin for ETS liability is the 1993 EPA Report which concluded that ETS is a Group A carcinogen.\textsuperscript{108} The findings of this report may significantly impact litigation by nonsmokers claiming damages from ETS

\textsuperscript{102} \textit{Id.} at 85. In addressing the plaintiff's claim for injunctive relief, the court stated that the issue was not whether all federal employees were entitled to work in a smoke-free environment, but merely whether this particular employee was entitled to that remedy. \textit{Id.} at 86.

\textsuperscript{103} \textit{Id.} at 85-86. However, the court found that the Veterans' Administration had adequately accommodated the plaintiff and held that the plaintiff had not been discriminated against within the meaning of the Rehabilitation Act. \textit{Id.} at 89.

\textsuperscript{104} 831 F. Supp. 1300 (E.D. Va. 1993).

\textsuperscript{105} \textit{Id.} at 1304. The plaintiff sought an injunction that would require her employer to provide a completely smoke-free working environment. \textit{Id.} at 1306.

\textsuperscript{106} \textit{Id.} In an attempt to accommodate the plaintiff, the employer increased the space between smokers and nonsmokers, prohibited smoking in the rest rooms, hallways, and conference rooms. \textit{Id.} at 1303.

\textsuperscript{107} \textit{See generally} Nolan, \textit{supra} note 4. "[A disastrous] pattern for ETS litigation has already emerged in Australia, where in May 1992 a jury ordered the New South Wales Department of Health to pay $85,000 to an employee who claimed workplace smoke had exacerbated her asthma and caused her to develop emphysema." \textit{Id.} at 563.

\textsuperscript{108} David B. Ezra, "Get Off Your Butts:" The Employer's Right to Regulate Employee Smoking, 60 TENN. L. REV. 905, 915 (1993). "The findings in the EPA report make it difficult for smokers and tobacco companies to successfully argue that ETS is a 'fairly trivial issue.'" \textit{Id. See also} EPA REPORT, \textit{supra} note 1, at 1-3.
Employers have realized that this report has the potential of creating an onslaught of civil litigation. In addition, the EPA report has created a high degree of public awareness about the negative health effects of ETS. Some lawyers believe this will make it easier to link second-hand smoke to lung cancer in the public's mind.

Even the tobacco industry has, if only inadvertently, recognized the importance of the EPA's classification and its potential consequences. Members of the tobacco industry, including Phillip Morris Incorporated and R.J. Reynolds Tobacco Company, have filed suit against the EPA claiming that the EPA did not use proper methods in classifying ETS. However, one commentator suggests that the tobacco industry's attacks on the scientific studies are of no consequence to employers because in a typical suit, employees need only prove their case by a preponderance of the evidence.

109. U.S. Environmental Protection Agency Science Advisory Board Approves ETS Risk Assessment, 1 TOBACCO CONTROL 166-67 (1992). Ezra, supra note 108, at 912 (stating that "the greatest threat of liability to employers will likely come from the recent discovery that ETS may be killing thousands of nonsmoking Americans each year").

110. Stuart Silverstein & David R. Olmos, Smoldering Legal Issues, Facing Lawsuits, Employers Are Embracing Restrictions, L.A. TIMES, Mar. 31, 1994, at 1. A representative of the California Restaurant Association said, "it's not just one lawsuit you might be exposed to, it might be six or seven." Id.

111. Id.; Ezra, supra note 108, at 906-07 (claiming that nonsmokers' "enthusiasm" for a smoke-free workplace has been heightened by the recent medical reports); Blum, supra note 21, at 12.

112. Blum, supra note 21, at 12. An attorney interviewed by Blum is currently suing the tobacco industry for his client's illnesses caused by ETS exposure. Id. This attorney believes that the medical testimony coupled with the EPA report will make it easier to convince a jury of a causal relationship between his client's cancer and ETS. Id.


114. Id. The tobacco industry is alleging that the EPA, in its research and conclusions, manipulated and 'cherry-picked' data, ignored critical statistical studies and chemical analyses, failed to account for confounding factors and sources of bias, violated basic statistical principles designed to minimize the possibility that an apparent association is due to chance, and generally altered EPA's usual models, assumptions, and methodologies when their use would not support the Agency's desired conclusions. Id. at 1140. The industry is also claiming that the EPA overstepped its authority by attempting to use its report in a regulatory manner. Id. Currently, the suit is pending in the Middle District of North Carolina, Winston-Salem Division (Tobacco Country), and the tobacco industry has withstood a 12(B)(6) motion. 857 F. Supp. 1137 (M.D.N.C. 1994).

115. Ezra, supra note 108, at 916 n.67. "The reality for employers is that many nonsmokers feel that they are unfairly subjected to health hazards when forced to inhale the smoke of others. It is this perception of ETS and its related health risks, not the scientific reality, that makes employer liability to nonsmokers a serious issue." Id. at 915-16. Ezra makes the point that the scientific community's studies must be scientifically conclusive, while the legal community must only meet the preponderance of the evidence standard, that is, it is more likely than not to have caused the injury. Id. at 916 n.67.
If employers want to escape "the ETS coffin," they should take heed of the EPA report.\textsuperscript{116} The classification of ETS as a known human carcinogen gives plaintiffs substantial ammunition against employers who have allowed exposure to ETS in the workplace.\textsuperscript{117} Therefore, it is probable that the EPA classification will spark suits against employers.\textsuperscript{118} The similarities between ETS and asbestos, another known human carcinogen, makes an analysis of the asbestos experience relevant in indicating the likely path of ETS claims.

2. An Illustrative Example: Asbestos, Another Group A Carcinogen

Asbestos is a general term given to naturally occurring fibrous mineral silicates\textsuperscript{119} which have been used mainly in the construction industry since the late 1800s.\textsuperscript{120} Public awareness about the risks of inhaling asbestos dust came about as early as 1924.\textsuperscript{121} Exposure to asbestos dust causes two major health hazards: mesothelioma and asbestosis.\textsuperscript{122} Mesothelioma is a cancer of the lung, heart, and abdomen that is normally manifested ten to twenty-five years after exposure to the asbestos dust.\textsuperscript{123} Asbestosis is a pulmonary fibrosis, an

\textsuperscript{116} Joseph F. Mangan, Extinguishing Claims From Passive Smokers, BEST'S REV., May 1993, at 72 ("Plaintiff's attorneys already have indicated that litigation will expand beyond tobacco manufacturers to employers . . . ."). See also Rice, supra note 85; Blum, supra note 21.

\textsuperscript{117} Mangan, supra note 116, at 72. See supra notes 47-50 and accompanying text for a discussion of the conclusions of the EPA Report.

\textsuperscript{118} Rice, supra note 85, at 4 (arguing that employers may be liable in mass tort suits if they do not regulate smoking); see also Blum, supra note 21.

\textsuperscript{119} Mark, supra note 87, at 872. Asbestos is a strong, flexible, fire resistant fiber that is an excellent insulator. JAMES S. KAKALIK ET AL., COSTS OF ASBESTOS LITIGATION 3 (1983). There are several different types of asbestos fibers, the most common are crocidolite (blue asbestos), amosite (brown asbestos), and chrysotile (white asbestos). Nancy Campbell Brown, Predicting the Future: Present Mental Anguish for Fear of Developing Cancer in the Future as a Result of Past Asbestos Exposure, 23 MEM. ST. U. L. REV. 337, 340 (1993). These asbestos fibers vary in size, structure, length, and shape. Id. These features determine what the asbestos is used for. Id.

\textsuperscript{120} Ross, supra note 5, at 716. Asbestos was also commonly used in brake linings, roofing products, flooring products, and cement piping. KAKALIK ET AL., supra note 119, at 3.

\textsuperscript{121} Ross, supra note 5, at 716-17. However, other dates have been suggested. BARRY I. CASTLEMAN, ASBESTOS: MEDICAL AND LEGAL ASPECTS 1 (1984) ("[t]he earliest recorded historical recognition of the hazards of asbestos go back to the time of Christ").

\textsuperscript{122} Ross, supra note 5, at 717. These asbestos-related diseases will cause an estimated 74,000 to 265,000 deaths over a period of 30 years (1982-2012). KAKALIK ET AL., supra note 119, at 3. Another estimate puts the number at 200,000 excess deaths by the end of the century. Id. at 9. Still another estimate projects between 154,000 and 450,000 deaths by the year 2015. Id.

\textsuperscript{123} Suzuki, Pathology in Human Malignant Mesothelioma, 8 SEMINARS IN ONCOL. 268 (1981). Mesothelioma occurs with greater frequency in the lung than the abdomen, and rarely occurs in the heart. Id. Symptoms of mesothelioma include chest pain, breathlessness and loss of appetite. Id.

Half of the patients diagnosed with mesothelioma die within 12 months of diagnosis, and few live for more than two years. W. MORGAN & A. SEATON, OCCUPATIONAL LUNG DISEASE 364 (1975).
increase in fibrous tissue in the lungs, which later spreads down the lung to affect the functioning of the air sacs. As with ETS, no level of exposure to asbestos is believed to be safe, and human tissue reaction to exposure progresses slowly. Further, as with ETS, each incidence of asbestos exposure increases the risks of contracting an exposure-related disease. Thus, as with ETS, an affected individual's condition may be the result of years of multiple exposures to asbestos. Sensibly, it may become impossible to determine which exposure contributed to the individual's illness.

In the 1950s, many asbestos plaintiffs pursued remedies through state workers' compensation laws. However, the laws at that time proved to be ineffective in compensating victims of asbestos exposure. In 1970, with the passage of the Occupational Safety and Health Act, compensation through the tort system became the main method of remedying asbestos exposure injuries. Thus, the 1970s marked the beginning of a deluge of asbestos

124. Mark, supra note 87, at 873 n.15. Symptoms of asbestosis are progressive breathlessness, dry cough, rales (crackling sounds heard in the lungs), and clubbing of the fingers and the toes. W. PARKES, OCCUPATIONAL LUNG DISORDERS 255-56 (2d ed. 1982).

Asbestosis compromises the functioning of the lung to such an extent that victims are especially susceptible to respiratory infections. CASTLEMAN, supra note 121, at 31. Thus, even a moderate case of asbestosis could be life threatening because of the heightened risk of contracting pneumonia and ordinary chest colds. Id.

125. Loewy et al., supra note 67, at 29. Scientific studies have shown that exposure to asbestos dust for a mere seven hours causes cancer in laboratory animals. CASTLEMAN, supra note 121, at 239.

126. CASTLEMAN, supra note 121, at 31.

127. Loewy et al., supra note 67, at 29. "The most important variable determining the incidence of [disease] among various populations is the product of the level and duration of asbestos exposure experienced by the workers." Mark, supra note 87, at 874. In most cases, the disease continues to develop even after exposure has ceased. Id.

128. Ross, supra note 5, at 717.

129. Id. at 718 (citing Borel v. Fibreboard Paper Products, 493 F.2d 1076, 1083 (5th Cir. 1973)).

130. Brown, supra note 119, at 342.

131. Mark, supra note 87, at 875-78. Many obstacles to previous workers' compensation laws existed. CASTLEMAN, supra note 121, at 171-75. First, restrictive statutes of limitations barred claims of employees who discovered their illnesses too late. Id. at 175. Second, early workers' compensation laws had limits on the amount of medical coverage that could be paid for each claim. Id. Third, many states required the employee to have worked a minimum number of years in the state before a claim could be filed. Id. at 174-75. Finally, many early workers' compensation acts did not provide any compensation unless the person was totally disabled from working. Id. at 175. Thus, an employee who was dying from asbestosis or mesothelioma, but could still work a desk job, could not receive any compensation. Id.

Claims under the workers' compensation acts eventually became more successful when states amended their laws to deal with asbestos injuries. Mark, supra note 87, at 875-78. Today, all states cover asbestosis under their workers' compensation laws. Id. at 875.

132. Brown, supra note 119, at 342 n.34; CASTLEMAN, supra note 121, at 175.
litigation, which eventually clogged court systems throughout the country.\textsuperscript{133} Since the early 1970s, thousands of individuals have brought suit seeking relief from asbestos related injuries, and the number of cases continues to grow.\textsuperscript{134} These cases constitute both the largest and potentially most costly class of tort claims ever to confront American courts.\textsuperscript{135}

The cost of asbestos litigation has been estimated to range anywhere from thirty-nine to seventy-four billion dollars over the next twenty-five years.\textsuperscript{136} The majority of these costs go to legal fees, not to compensating the victims.\textsuperscript{137} In addition to the costs associated with asbestos litigation, the plaintiffs must be considered. The typical asbestos plaintiff usually waits years and spends large sums of money to receive relief.\textsuperscript{138} Some plaintiffs never receive relief because they die from an asbestos-related disease before a final verdict is reached.\textsuperscript{139} In summary, the operation of the asbestos-compensation tort system has failed in two ways: (1) it functions neither efficiently nor effectively; and (2) its economic costs are a waste of society's resources.\textsuperscript{140}

\textsuperscript{133} Brown, \textit{supra} note 119, at 343; Ross, \textit{supra} note 5, at 717. In jurisdictions where there was a high concentration of asbestos workers, asbestos claims constituted 10 to 20\% of the civil caseload. DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS - THE CHALLENGE OF MASS TOXIC TORTS vii. (1985). In addition, [b]ecause asbestos injuries are medically complex, individual worker histories are difficult to assemble, and each claim involves a large number of parties, pretrial preparation of these cases was more costly and time-consuming than for more routine personal injury claims. These same features also complicated and delayed the disposition of asbestos cases.

\textit{Id.}

\textsuperscript{134} Ross, \textit{supra} note 5, at 718; Mark, \textit{supra} note 87, at 871. One estimate puts the number of asbestos claims filed between 1972 and 1985 at 30,000. HENSLER ET AL., \textit{supra} note 133, at v.\textsuperscript{135} Mark, \textit{supra} note 87, at 871.

\textsuperscript{136} Schechter, \textit{Untangling the Asbestos Mess}, 51 OCCUPATIONAL HEALTH \& SAFETY 30, 31, 39 (Feb. 1982). This is a modest estimate. Another observer has estimated these costs at about $100 billion. \textit{Toxic Time Bombs}, 67 A.B.A. J. 139, 159 (1981).

\textsuperscript{137} KAKALIK ET AL., \textit{supra} note 119, at v. (finding that "of the total compensation paid by defendants and insurers, 41\% was used by plaintiffs for their legal fees and other litigation expenses").

\textsuperscript{138} HENSLER ET AL., \textit{supra} note 133, at 112-13. Because of the nature of asbestos litigation only a small portion of the cases progress at the same pace as other personal injury cases. \textit{Id.} at 112. Further, an optimistic outlook for an asbestos plaintiff is five years after the claim is filed. \textit{Id.} at 113. Unfortunately, many asbestos cases progress at such a slow pace that a reasonable estimate of when the plaintiff will be compensated cannot be determined. \textit{Id.}

The average cost for a plaintiff who has suffered an injury from asbestos exposure to bring a claim to final disposition is $25,000, which equals 71\% of the net compensation paid to the plaintiff. KAKALIK ET AL., \textit{supra} note 119, at vii.

\textsuperscript{139} \textit{See} Borel v. Fibreboard Paper Products, 493 F.2d. 1076 (5th Cir. 1973).

\textsuperscript{140} \textit{See} KAKALIK ET AL., \textit{supra} note 119, at vii. As of 1982, an estimated $1,006,000,000 was spent by asbestos defendants and their insurers on asbestos claims. \textit{Id.} at vi. Only $236,000 of that was paid to the plaintiffs as compensation. \textit{Id.}
Striking similarities exist between ETS and asbestos. First, both asbestos and ETS have been classified by the EPA as Group A carcinogens, known causes of human cancer. Second, similar to asbestos, a person can be exposed to ETS in a variety of settings, including the workplace, home, or almost anywhere. Thus, the workplace is not the exclusive location for contracting these exposure-related diseases. Third, like asbestos, there is no known safe level of exposure to ETS, and the risk of disease increases with each exposure. Lastly, the injuries sustained from exposure to asbestos are similar to those suffered from exposure to ETS, including lung cancer and other lung-related diseases. These illnesses normally take a long time to manifest themselves, thus making the identification of a certain period of exposure as the cause of the injury virtually impossible.

142. CASTLEMAN, supra note 121, at 363. Families of asbestos workers have been exposed to asbestos dust brought home by the workers' clothes, shoes, hair, and lunch boxes. Id. Dr. Paul Katin of Johns-Manville gave a vivid description of the hazards presented by asbestos exposure in the home:

I would suggest, however, that once asbestos gets into the home, carried home by workmen, which in itself is a tragedy, it shouldn't happen, it is asbestos that is there virtually permanently—it gets into the rugs, into the carpets, it gets suspended by movement and actually you are getting 24 hour/day exposure, relatively speaking, rather than a partial exposure. But even worse than that is the fact that you are exposing the population of the family which includes the very young and very old. And in the induction of cancer, it is the very young that are always the most susceptible . . . .

Id. at 365.

The broad use of asbestos in structures since the 1940s and its presence in brake linings and other products, combined with its natural presence in the environment, has resulted in the release of asbestos fibers into urban air . . . . Since asbestos is a material that occurs naturally in rock formations, it is virtually everywhere—in the air, in the water, and in the food chain. In fact, asbestos fibers are released into the atmosphere virtually every time an automobile or train applies its brakes. These fibers become airborne and are inhaled by urban and suburban dwellers on a daily basis. It is not surprising, therefore, that studies have found asbestos levels in natural dustfalls along roadways to occur in concentrations in excess of OSHA regulations for the workplace.

Id. at 1141-42.
144. Id. at 1141; CASTLEMAN, supra note 121, at 363.
145. Loewy et al., supra note 67, at 29; Brown, supra note 119, at 337. “Soon, technology proved that even casual exposure to asbestos could be very dangerous.” Id. at 343.

See EPA REPORT, supra note 1, at 4-1 (stating that there is no threshold level of exposure in the relationship between lung cancer and the amount of ETS exposure).
146. See supra notes 30-50 and accompanying text discussing ETS-related injuries and notes 121-29 and accompanying text discussing asbestos-related injuries.
147. See supra notes 42, 122-23 and accompanying text.
The government reaction to ETS has been somewhat similar to its reaction to asbestos. The health hazards of asbestos were known in the mid-1920s and were documented by the United States Public Health Service (USPHS) in 1938.\textsuperscript{148} However, by 1968 the government had still failed to regulate these serious health risks to the American public.\textsuperscript{149} A similar time line can be drawn with regard to ETS. The negative health effects of ETS were known as early as 1970,\textsuperscript{150} and the USPHS documented these risks in 1986 in a Surgeon General’s Report.\textsuperscript{151} However, the government has failed to adequately regulate the health hazards associated with ETS exposure in order to protect nonsmokers from exposure.\textsuperscript{152}

Based on the strong similarities between ETS and asbestos, it is reasonable to assume that without intervention ETS litigation will take a similar path as asbestos litigation.\textsuperscript{153} It would be prudent to forestall ETS claims from following this path.\textsuperscript{154} To make the most informed decision regarding ETS litigation, all potential alternatives for ETS-related injuries should be explored.

IV. A CRITICAL ANALYSIS OF EXISTING REMEDIES

A. Litigious Alternatives

1. Tort Theories - Battery

Although no case has been brought against an employer asserting battery for exposure to ETS, some commentators have advocated the use of battery as a vehicle for ETS claims.\textsuperscript{155} The essence of a battery claim is an offense to

\textsuperscript{148} PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ASBESTOS, AN INFORMATION RESOURCE 1-2 (1981) [hereinafter PUBLIC HEALTH SERVICE]. The USPHS strongly recommended that asbestos exposure in the workplace be limited. \textit{Id.} at 5.

\textsuperscript{149} Ross, supra note 5, at 717. In 1970, the federal government enacted the Occupational Safety and Health Act which created a workplace safety regulatory agency, the Occupational Safety and Health Administration (OSHA). Seigel, \textit{supra} note 143, at 1140. In 1970, OSHA began regulating the use of asbestos. \textit{Id.}

\textsuperscript{150} Davis & Brownson, \textit{supra} note 5, at 750.

\textsuperscript{151} 1986 SURGEON GENERAL REPORT, \textit{supra} note 5, at 1-3.

\textsuperscript{152} \textit{See supra} notes 51-71 and accompanying text (discussing government regulation of ETS).

\textsuperscript{153} Ross, \textit{supra} note 5, at 715. \textit{See supra} notes 130-40 and accompanying text (discussing the deficiencies in asbestos litigation).

\textsuperscript{154} Justice Cardozo best expressed the idea that we need to learn from history when he said, “I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.” BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 53 (1921).

\textsuperscript{155} \textit{See} David B. Ezra, \textit{Smoker Battery: An Antidote to Second-Hand Smoke}, 63 S. CAL. L. REV. 1061 (1990); Christopher J. McAuliffe, \textit{Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort}, 20 B.C. ENVTL. AFF. L. REV. 265 (1993); Cindy L. Pressman,
bodily integrity and physical security.\textsuperscript{156} In order for plaintiffs to present a prima facie case of battery, they must establish: (1) a harmful or offensive contact that was (2) intended by the defendant; and that (3) the harm or offense actually occurred.\textsuperscript{157} The first two elements of battery are of primary significance in ETS-related claims.

First, the plaintiff must establish a harmful or offensive contact or touching.\textsuperscript{158} This touching can be of two types: (1) direct physical contact between the defendant and the plaintiff, or (2) indirect physical contact between an extension of the defendant and the plaintiff.\textsuperscript{159} It appears from this definition that the "contact" element of battery can easily be met in ETS exposure cases.\textsuperscript{160} The smoke from tobacco contains particulate matter that, by nature, comes into contact with nonsmokers sharing the same air with a smoker.\textsuperscript{161} ETS comes into contact with an individuals' respiratory tracts when they are compelled to breathe in air.\textsuperscript{162} This "contact" is likely to be

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Although other tort actions, including products liability, are advocated, they will not be considered in this note. Obviously, product liability claims are designed to be asserted against the manufacturer of a product. The focus of this note is not to hold the tobacco industry liable under this theory. Therefore, such a cause of action will not be evaluated.

157. Id. Intent in a battery cause of action has a dual meaning: (1) that the defendant actually intended the harm, or (2) that the defendant was "substantially certain" that the harm would occur. Garrat v. Dailey, 279 P.2d 1091 (Wash. 1955).
158. KEETON ET AL., supra note 156, at 39.
159. Id. at 39-40. "This touching may be either direct physical contact between the plaintiff and the defendant or indirect physical contact between the plaintiff and an instrumentality controlled by the defendant." McAuliffe, supra note 155, at 285. Keeton illustrates what has constituted a touching in the past:

[Contact with the plaintiff's clothing, or with a cane, a paper or any other object held in the plaintiff's hand, will be sufficient; and the same is true of the chair in which the plaintiff sits, the horse or the car the plaintiff rides or occupies, or the person against whom the plaintiff is leaning.


160. Ezra, supra note 155, at 1091. Notably, employers are not making a direct contact through the cigarette smoke because they are usually not the individuals smoking. Rather, the fellow employees are typically the smokers who create the ETS exposure. However, the theory of respondeat superior makes the employer vicariously liable for the employee's actions. KEETON ET AL., supra note 156, at 502.
161. Ezra, supra note 155, at 1091, 1093. This particulate matter causes irritation to the eyes, nose, and throat in addition to coughing and headaches. 1986 SURGEON GENERAL REPORT, supra note 5, at 229-39.
162. Ezra, supra note 155, at 1093. Under this theory, the tobacco smoke is treated as an extension of the defendant, similar to clothing or a stick. Id.
considered offensive by most nonsmokers. Thus, it seems logical that exposure to ETS will meet the first element of a battery claim.

However, after examining the intent element, it becomes obvious that a cause of action for battery is not a viable method of providing relief for ETS injuries in the workplace. To satisfy the intent element, a plaintiff must show that the defendant actually intended the harm or acted in such a way that it was substantially certain to bring about an injury. This burden will be difficult to meet in most cases because the employer is not actually taking any action and, therefore, cannot intend anything. One observer has asserted that this element could be fulfilled by “an intent not to act.” However, no cases have allowed such a theory.

In addition to the intent obstacle, courts are reluctant to recognize battery

\[\text{In text}\]

163. James L. Repace, *The Problems of Passive Smoking*, 57 BULL. N.Y. ACAD. MED. 936, 939 (1981) (reporting that a study of over 10,000 nonsmoking office workers showed that over 50% of the nonsmokers had trouble working in close proximity to a smoker. In addition, 36% of the nonsmokers reported that they moved away from their desks because of ETS exposure); AMERICAN LUNG ASSOCIATION, SECONDHAND SMOKE 3, 5 (1985) (discussing a study that showed that 70% of nonsmokers suffer eye irritation, while another 30% experience headaches and nasal irritation when exposed to ETS).

164. McAuliffe, * supra* note 155, at 285-86. A battery cause of action does not depend on the method of contact, but instead only on the harmful or offensive nature of the touching. *Id.* Thus, this element of battery would seem to be easily satisfied. *Id.*

165. *Keeton et al.*, * supra* note 156, at 34-35 (stating that the defendant must also have the “intent” state of mind at the time the act occurs).

166. Employers are usually not the smokers in the workplace. Employers are usually not imputed with the employees’ “intent” to cause harm unless it is done in a manner that is meant to further the employer’s business. *Keeton et al.*, * supra* note 156, at 503.

“[M]erely allowing an ETS-polluted area to exist is probably not enough in the way of culpability to make most employers or managers liable under an assault or battery theory.” Larry Kraft, *Smoking in Public Places; Living with a Dying Custom*, 64 N.D. L. REV. 329, 368 (1988).

Rather, the fellow employees are causing the plaintiff to involuntarily breathe second-hand smoke. Thus, it is much more plausible to charge a fellow employee with battery. Ezra, * supra* note 155, at 1090. “[S]mokers who know the smoke they create will spread throughout the room to reach nonsmokers would have the required intent.” *Id.*

167. McAuliffe, * supra* note 155, at 287. McAuliffe points to a case where an employer failed to hire a specialist to clean up a toxic spill, and instead had his employees do the job. *Id.* Gulden v. Crown Zellubach Corp., 890 F.2d 195 (9th Cir. 1989), * cited in* McAuliffe, * supra* note 155, at 287. In *Gulden*, the court decided that the employer had an opportunity to make a choice from several alternatives. *Gulden*, 890 F.2d at 196-97. Thus, the court concluded that a jury could reasonably find that the employer “possessed the requisite intent for the battery cause of action when he chose not to hire experts.” *Id.* at 197. However, the court did not conclude that the employer could be held liable by an intent to act, but rather his action in making his choice could constitute the needed intent. McAuliffe admits this: “[T]here are no cases on point” that hold that a defendant’s intent not to act establishes the basis for a battery cause of action. *McAuliffe, supra* note 155, at 273.

as a viable cause of action.\textsuperscript{169} Also, as mentioned previously, no cause of action based on battery for injuries sustained from ETS exposure has been filed against an employer to date.\textsuperscript{170} Therefore, it is apparent that battery is not an effective choice to redress ETS injuries in the workplace. Alternatively, recognizing the problem with the element of intent in a battery cause of action, negligence, a non-intentional tort, has been suggested as a possible vehicle to remedy injuries resulting from ETS exposure.

2. Tort Theories - Negligence

The heart of a negligence suit is the breach of a duty owed by the defendant to the plaintiff.\textsuperscript{171} To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached this duty; (3) that the breach of duty caused\textsuperscript{172} the harm suffered; and (4) that the plaintiff actually suffered harm or damage.\textsuperscript{173} Plaintiffs will usually not face many problems establishing the first two elements of a negligence cause of action.\textsuperscript{174} The difficulty arises when the plaintiff must satisfy the causation element of negligence.\textsuperscript{175}

\textsuperscript{169} \textit{Id.} at 286. However, McAuliffe advocates that despite the lack of cases utilizing battery as the cause of action, the traditional tort is well suited for this type of litigation because it provides liability "any time an actor intentionally causes another to come into contact with an offensive foreign substance." \textit{Id.}

\textsuperscript{170} \textit{See supra} notes 168-69 and accompanying text.

\textsuperscript{171} \textit{KEETON ET AL., supra} note 156, at 164-65. In the absence of some special duty, the duty is normally defined as a duty of reasonable care. \textit{Id.} at 173-74.

\textsuperscript{172} Causation has two sub-elements: cause in fact and proximate cause. \textit{Id.} at 164-65. "[C]ause in fact embraces all things which have so far contributed to the result that without them it would not have occurred." \textit{Id.} at 265. The test commonly used for determining cause in fact is the "but for" or "\textit{sine qua non}" test. \textit{Id.} at 266. It may be stated as follows: "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would not have occurred without it." \textit{Id.}

However, a defendant is not liable in negligence unless both cause in fact and proximate cause are shown. \textit{Id.} at 165. ‘Proximate cause’... is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct... As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. \textit{Id.} at 264.

\textsuperscript{173} \textit{Id.} at 164-65.

\textsuperscript{174} \textit{See Soos, supra} note 12, at 111.

\textsuperscript{175} \textit{Id.} at 131.
Due to the cumulative effects of ETS and the nature of related diseases, such as lung cancer, the causation burden is almost insurmountable in ETS-related claims. Moreover, lung cancer takes substantial time to manifest itself, thus requiring a plaintiff to meet an even larger burden. Although it has been clearly established that passive smoking causes lung cancer, this does not mean that every incidence of lung cancer is the result of passive smoking.

The difficulty with the causation element alone is enough to make negligence an unwise choice for a plaintiff seeking redress for ETS-related harms. Adding to the plaintiff's burden are the typical defenses to negligence actions including contributory negligence, assumption of risk, and the fellow servant doctrine. Before the enactment of workers' compensation laws, employers frequently and effectively asserted these defenses to avoid liability. Thus, under theories of contributory negligence and assumption of the risk, an employer could claim that its employees were aware of the risk associated with passive smoke, and that they either contributed to their injuries by not avoiding the danger or assumed the risks associated with ETS exposure.

176. Id. at 132. However, scientific evidence can be used to demonstrate the probable cause of the cancer. Id. Further, Soos argues that a relaxed standard of causation should be used that would allow for the use of circumstantial evidence. Id. at 133. Soos explains:

Circumstantial evidence would lead a reasonable juror to conclude either that the plaintiff's prolonged exposure to passive cigarette smoke was a substantial factor in bringing about cancer of the lung, or that there is a greater probability that the lung cancer was due to the prolonged exposure to passive smoke than to other factors.

177. Id. at 130; see infra note 290 and accompanying text for a discussion of the latency period of lung cancer.

178. Soos, supra note 12, at 132. Numerous risk factors, including diet, age and genetic makeup, are sometimes responsible for lung cancer and other diseases caused by ETS exposure. Id.


180. Id. Assumption of the risk also has its origins in the English Common law. "[T]he servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself ...." Id. (citing Priestly v. Fowler, 3 M. & W. 1, 150 Reprint 1030 (1837)). The defense was established in the United States in the late 1800s. Id.

181. Id. The fellow-servant exception to the general rule of a master's vicarious liability was invented in 1837 in Britain. Id. This exception was adopted in the United States in an 1842 case that granted a railroad immunity from liability to one of its engineers for an injury caused by the switchman. Id. (citing Farwell v. Boston & Worcester R.R., 4 Met. 49 (Mass. 1842)).

182. KEETON ET AL., supra note 156, at 569. The defenses were so effective that only 15% of employees who suffered injuries were awarded damages, while 75% of the injuries were due to the employers' fault. JAMES WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE 1900-1918 41 (1968).
exposure. Furthermore, the fellow servant doctrine provided a defense for employers by asserting that employees were responsible for their co-workers' negligence because the employee failed to correct their co-workers' bad habits. The fellow servant doctrine is an obvious defense for employers, as it is usually an employee's fellow servant who subjects the employee to ETS. In fact, the use of these defenses prompted the adoption of workers' compensation systems.

In summary, negligence, like battery, is not a sensible choice for a plaintiff injured by ETS exposure. This is due to the almost insurmountable causation standard and the potentially successful defenses raised by employers prior to the enactment of workers' compensation statutes. Another litigious remedy that has been pursued by injured employees is the employer's common law duty to provide a safe working environment.

3. Employer's Common Law Duty to Provide Safe Working Environment

An employer's common law duty to provide a safe working environment has been successfully used to grant relief to an individual harmed by ETS exposure on the job. In Shimp v. New Jersey Bell Telephone Company, the plaintiff, who was allergic to tobacco smoke, sought to have smoking banned in her workplace. The plaintiff was a secretary whose desk was situated in

183. WEINSTEIN, supra note 182, at 41-42.
184. KEETON ET AL., supra note 156, at 571. Several reasons given for the existence of the fellow servant doctrine are as follows:

[T]he plaintiff upon entering the employment assumed the risk of negligence on the part of his fellow servant, and the master did not undertake to protect against it; that he was likely to know of their deficiencies and to be in a position to guard against them as his employer; and that it would promote the safety of the public and of all servants to make each one watchful of the conduct of others for his own protection.

Id. As Keeton points out, these are not realistic justifications in large industries where the plaintiff may not know his fellow servant. Id.

185. LARSON, supra note 179, § 4.30; KEETON ET AL., supra note 156, at 573. Prior to the enactment of the state workers' compensation laws, the fellow servant doctrine was restricted in a number of ways. Id. at 572. First, the fellow servant doctrine did not apply to the negligence of a servant who represented the employer, i.e., management. Id. Second, the employer could not delegate a duty to a servant that was imposed by the common law, and then raise the fellow servant rule as a defense when the duty was performed negligently. Id.

188. Id. at 409. The plaintiff's allergic reactions included, "severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes which has resulted in corneal abrasion and corneal erosion, headaches, nausea and vomiting." Id. at 410. The court noted that these symptoms dissipated when the plaintiff was in a smoke-free environment. Id.
an area where other workers were allowed to smoke. The plaintiff alleged that due to her allergy, her employer's failure to ban smoking in the workplace put her in an unsafe working environment. The plaintiff followed the grievance procedures established by the governing collective bargaining agreement to no avail. In its opinion, the court took judicial notice of the harmful effects of ETS. The court then ordered the defendant to provide a safe working environment for the plaintiff by restricting smoking to non-work areas.

Following Shimp, the state of Washington next recognized the potential for relief for ETS-related injuries under an employer's common law duty to provide a safe working environment. In McCarthy v. Department of Social & Health Services, the plaintiff brought a common law action for her injuries after being denied workers' compensation benefits. The Washington Supreme Court suggested that the plaintiff could bring a private cause of action for ETS-related injuries under an employer's common law duty to provide a safe working environment.

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189. Id. at 409. The court noted that the presence of even one smoker evoked severe allergic reactions in the plaintiff. Id. at 410.

190. Id. The plaintiff submitted affidavits in which her attending physicians confirmed her alleged severe reactions to ETS exposure, which forced the plaintiff to leave work ill on many occasions. Id.

191. Shimp v. New Jersey Bell Tel. Co., 368 A.2d 408, 410 (N.J. Super. Ct. Ch. Div. 1976). The employer had a collective bargaining agreement with the employees' union. Id. Negotiations between these two parties resulted in the installation of a fan; however, this did not alleviate the plaintiff's symptoms. Id.

192. Id. at 414. "[This court] take[s] judicial notice of the toxic nature of cigarette smoke and its well known association with emphysema, lung cancer and heart disease." Id. The court went on to note:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs. The portion of the population which is especially sensitive to cigarette smoke is so significant that it is reasonable to expect an employer to foresee health consequences and to impose upon him a duty to abate the hazard which causes the discomfort.

Id. at 415-16.

193. Id. at 416. The court prohibited smoking in the offices and the adjacent customer service area and suggested that the employer restrict smoking to the lunch rooms. Id.


196. Id. at 356. However, one critic of McCarthy argues that this was not the case, claiming that only four justices supported this position. Fox, supra note 62, at 619. Fox argues:

Antismoking advocates have mistakenly cited a Washington Supreme Court decision, McCarthy v. Department of Social & Health Services, as support for a common law right to a smoke-free workplace. However, only four justices, a minority of the court,
The certainty of a cause of action under an employer's common law duty to provide a safe working environment is questionable.\textsuperscript{197} Shimp is the only case to grant relief to a plaintiff under this theory.\textsuperscript{198} Perhaps a more obvious sign of the demise of a Shimp cause of action is a case decided by the Superior Court of New Jersey questioning the integrity of Shimp. In \textit{Smith v. Blue Cross & Blue Shield of New Jersey},\textsuperscript{199} the plaintiff, like the plaintiff in Shimp, claimed hypersensitivity to ETS and requested the court to order the employer to implement smoking restrictions in the workplace.\textsuperscript{200} In denying the plaintiff relief, the court addressed the Shimp decision as follows:

Insofar as the Shimp case is read by some as requiring an employer to institute Draconian measures to smoking employees I think it has to be viewed somewhat skeptically and cautiously. . . . I must say it seems to me that some of the prohibitions contained in the Shimp case are too sweeping and go well beyond what is necessary to ensure a safe working environment.\textsuperscript{201}

Thus, the only court that granted relief to an ETS victim under this theory later questioned the validity of the decision.

In addition to the uncertainty surrounding a cause of action for a safe working environment, these cases also share a unique fact. In each case, the employees complained to their employers regarding the adverse health effects prior to bringing suit giving their employers an opportunity to remedy the situation.\textsuperscript{202} This implicit requirement of notice is troublesome because

\textit{Id.} \textsuperscript{197} John D. Blackburn, \textit{Legal Aspects of Smoking in the Workplace}, 31 LAB. L.J. 564, 568 (1980). Blackburn states:

One can perceive, then, that Shimp is made up of many important facts, the absence of any of which could persuade a court to find differently. Further, this is not the Supreme Court in New Jersey, nor has the decision been followed by any other courts in New Jersey or elsewhere.

\textit{Id.} \textsuperscript{198} Fox, \textit{supra} note 62, at 616. In McCarthy v. Department of Health & Social Services, 759 P.2d 351 (Wash. 1988), the court did not grant the plaintiff relief under this theory, but merely stated that the plaintiff's common law action was not barred by the workers' compensation laws. \textit{Id.} at 354.


\textit{Id.} \textsuperscript{200} \textit{Id.}


employees may be unaware of the negative health effects caused by ETS exposure.\textsuperscript{203} Many of the diseases associated with ETS exposure, especially lung cancer, take years to manifest themselves.\textsuperscript{204} Therefore, it would be virtually impossible for employees to recognize these physiological changes in order to register a complaint in sufficient time for their employers to take steps to prevent the exposure.

Finally, pursuing a battery, negligence or common law cause of action is also subject to the same downfalls associated with all litigious remedies.\textsuperscript{205} As illustrated by the asbestos example, pursuing litigious remedies is extremely costly and time consuming.\textsuperscript{206} Further, considering the extraordinary sum being spent on litigation expenses coupled with the minimal compensation paid to injured employees, it is apparent that the money spent on litigation is spent inefficiently.\textsuperscript{207} Moreover, pursuing an ETS claim in the courts is subject to the same judicial inefficiency as the asbestos cases.\textsuperscript{208} Thus, substantial downfalls in bringing massive claims in the courts is an additional reason not to use these methods to remedy ETS-related injuries. To wisely avoid the courts, administrative alternatives need to be explored.

\textbf{B. Administrative Alternatives}

1. Americans with Disabilities Act (ADA) and Related Statutes

The Americans with Disabilities Act\textsuperscript{209} was passed in 1990 with the intention of providing disabled individuals equal access to major life activities.\textsuperscript{210} Title I of the ADA requires employers with fifteen or more employees\textsuperscript{211} to provide reasonable accommodations to otherwise qualified

\textsuperscript{203} PETER S. BARTH, WORKERS’ COMPENSATION AND WORK-RELATED ILLNESSES AND DISEASES 62-63 (1980). Even if the employer and employees know that the substance is hazardous, the employees do not necessarily know that the substance is causing them harm. \textit{Id.} at 63.

\textsuperscript{204} See supra notes 30-50 and accompanying text for a discussion of the health effects of ETS exposure.


\textsuperscript{206} See supra notes 135-36 and accompanying text.

\textsuperscript{207} See supra notes 136-39 and accompanying text.

\textsuperscript{208} See supra notes 135, 139-40 and accompanying text.


\textsuperscript{210} Gottlieb et al., supra note 77, at 637. Discrimination under the ADA includes the failure to provide reasonable accommodations for the physical or mental limitations of an individual unless the accommodation would impose an undue hardship on the employer’s business. 42 U.S.C. § 12112(b)(5)(A) (1990).

\textsuperscript{211} 42 U.S.C. § 12111(5)(A) (1990). Prior to July 26, 1994, the ADA applied to employers with 25 or more employees. \textit{Id.}
individuals who have disabilities but who can still perform the essential functions of their particular jobs.\textsuperscript{212} A "disability" is defined as a "physical or mental impairment\textsuperscript{213} that substantially limits one or more of the major life activities of [the] individual."\textsuperscript{214} In promulgating the rules that implement Title III of the Act, the Department of Justice clearly stated that sensitivity to ETS does not automatically constitute a "disability" under the ADA.\textsuperscript{215} Further, the Justice Department declared that a case-by-case determination considering all the circumstances should be used.\textsuperscript{216}

In 1993, the first ETS cases brought under the ADA were filed, but to date only one case has been decided.\textsuperscript{217} In \textit{Harmer v. Virginia Electric & Power Company},\textsuperscript{218} the plaintiff suffered from asthma and alleged that his employer had discriminated against him under the ADA by failing to provide a smoke-free working environment.\textsuperscript{219} The plaintiff sought a total ban on smoking in his

\textsuperscript{212} 42 U.S.C. § 12112(a) (1990). "Otherwise qualified" individuals are people who are qualified to perform the job except that, because of their disability, they need a reasonable accommodation to perform the job. 29 C.F.R. § 1630.9(1992).

Reasonable accommodations under the ADA are defined as follows:

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.


The essential functions of a job are those which are fundamental rather than marginal. 29 C.F.R. § 1630.2(n) (1991). Factors used to make this determination are an employer's judgment and a written job description. \textit{Id.}; 42 U.S.C. § 12111(8) (1990).

213. A physical impairment has been further defined as any physiological condition or disorder affecting one of the major body systems: neurological, respiratory, and cardiovascular. 29 C.F.R. § 1630.2(b)(1) (1991).


216. Fox, \textit{supra} note 62, at 599.

217. Gottlieb et al., \textit{supra} note 77, at 642.


219. \textit{Id.} at 1302. In addition, the plaintiff claimed that his employer retaliated against him because of his repeated requests for a ban on smoking. \textit{Id}. The plaintiff claimed that his employer reduced his authority and failed to promote him in retaliation of his requests. \textit{Id}. The plaintiff requested injunctive relief against further retaliation and monetary damages for past and future wages and benefits that he would have received absent the discrimination. \textit{Id}.
employer's building.220 Prior to trial, the defendant banned smoking in all of the buildings where it had not installed separate ventilation systems in smoking rooms.221 The court, in dismissing the plaintiff's claim, held that the ADA protected the plaintiff from discrimination due to his "disability," but found that the defendant had reasonably accommodated him.222

Under a similar disability provision of the Rehabilitation Act,223 courts have found that individuals with sensitivities to ETS are disabled under the Act.224 In Pletten v. Merit Systems Protection Board,225 the Sixth Circuit held that a federal employee's asthmatic condition was a handicap under the Rehabilitation Act.226 However, the court found no duty on the part of the

220. *Id.* The plaintiff had bronchial asthma, for which he was dependent on medication. *Id.* His doctor concluded that "a smoke-free environment was necessary to minimize [the plaintiff's] need for medication and that exposure to tobacco smoke seriously impair[ed] his respiratory status and therefore, cause[d] him to have to use medications with increased side effects." *Id.* at 1303 n.2.

Accordingly, the plaintiff and other employees submitted a petition to management to have smoking banned on the floor on which they worked. *Id.* at 1303. In response to the employees' petition, the manager had an air quality study conducted. *Id.* The study indicated that the concentrations of carbon monoxide were below "the recommended maximum." *Id.* However, the report concluded that the smoking policy needed to be a management decision because the exact amount of ETS could not be measured. *Id.* Management formed a committee to propose a smoking policy. *Id.* at 1304. The committee recommended that smokers use smokeless ashtrays and that high oxygen output plants be strategically placed throughout the floor. *Id.* Management followed the suggestions of the committee; however, the plaintiff was not satisfied with these accommodations. *Id.* The plaintiff then requested a building-wide smoking ban. *Id.*

221. *Id.* However, the court determined that this action did not moot the issue because the Virginia Power Company could change its smoking policy at will. *Id.* at 1302 n.1.

222. *Harmer v. Virginia Elec. & Power Co.*, 831 F. Supp. 1300, 1306 (E.D. Va. 1993). The court reasoned that the plaintiff was not entitled to complete accommodations because he could perform the essential functions of his job with reasonable accommodations. *Id.* The court noted that no evidence had been produced to show that the plaintiff's productivity was lessened by the presence of ETS. *Id.* In addition, the court dismissed the plaintiff's retaliation claims for lack of proof. *Id.* at 1307-10.


226. *Id.* at *2. The plaintiff worked in an environment where many fellow employees smoked. *Id.* The plaintiff's physician found that the plaintiff's condition required a completely smoke-free environment. *Id.* The plaintiff's employer offered the plaintiff a smoke-free private office. *Id.* However, this was not satisfactory, and the plaintiff was placed on leave because his employer could not reasonably accommodate his medical condition. *Id.*
employer, the U.S. Army, to provide a smoke-free working environment.227 Similarly, in Vickers v. Veterans' Administration,228 the plaintiff filed suit against his employer seeking monetary damages or equitable relief, claiming that he was unusually sensitive to tobacco smoke.229 The court found that he was handicapped under the provisions of the Rehabilitation Act, but that his employer had made reasonable efforts to accommodate his handicap; and thus, dismissed the plaintiff's claim.230

However, other courts have rejected claims that sensitivity to ETS is a handicap.231 In Gupton v. Commonwealth of Virginia,232 the plaintiff asserted that she was allergic to or irritated by exposure to ETS.233 Her employer, in an effort to accommodate her, designated an office wing as nonsmoking.234 Nonetheless, the plaintiff left her job and filed suit under the Rehabilitation Act.235 The court found that she had not demonstrated that she had a disability within the meaning of the Act.236

227. Id. at *3.
228. 549 F. Supp. 85 (W.D. Wash. 1982).
229. Id. at 86. The plaintiff also claimed that his supervisor retaliated against the plaintiff in response to his complaints about ETS. Id. at 87. However, the court found no evidence in the record that plaintiff has in any way been discriminated against in terms of work assignments, pay or promotions by reason of his hypersensitivity to tobacco smoke, by reason of his complaining to his supervisors about the presence of tobacco smoke in his work environment, or by the commencement of this action.
230. Id. at 89. The court noted that there were not any cases that would put the employer under a duty to make reasonable accommodations to the plaintiff's sensitivity to tobacco smoke. Id. at 87. The court assumed, but did not decide, that the employer was under such a duty in order to determine whether the employer made reasonable accommodations. Id.
232. 14 F.3d 203 (4th Cir. 1994).
233. Id. at 204. The plaintiff contended that her allergy to ETS was a disability that prevented her from enjoying one of her major life activities, working. Id. at 205.
234. Id. at 204. The plaintiff was assigned a cubicle in the wing that was at least 60 feet from the nearest designated smoking area. Id. However, the plaintiff asserted that this office arrangement exposed her to ETS that irritated her. Id. In addition, the plaintiff's employer later offered to transfer the plaintiff to another office that was smoke-free. Id. at 205. The plaintiff never responded to the offer. Id.
235. Gupton v. Commonwealth of Virginia, 14 F.3d 203, 204 (4th Cir. 1994). In Gupton, the plaintiff sought a completely smoke-free environment. Id. The plaintiff also asserted that her employer deprived her of her rights to due process and equal protection under 42 U.S.C. § 1983. Id. The court found this argument to be completely without merit. Id. at 204 n.1.
236. Id. at 205-06. The court reasoned that the plaintiff needed to show that her allergy prevented her from working in the field, and proof of her inability to work in this particular job was insufficient. Id.
Several potential problems exist for plaintiffs seeking relief under either the ADA or the Rehabilitation Act. First, no definite relief is provided under the ADA because sensitivity to ETS is not automatically considered a disability. Rather, courts use a case-by-case analysis to determine if a person's condition constitutes a disability. Second, and more significantly, plaintiffs who do not have a particular sensitivity to ETS appear to be excluded. Thus, an individual who has developed lung cancer as a result of passive smoking on the job would not be disabled under the Acts. Therefore, an entire class of plaintiffs would be left without relief if these Acts were chosen as the vehicles to redress ETS-related injuries. Finally, the relief granted under the ADA and the Rehabilitation Act is equitable in nature. Therefore, plaintiffs may not be able to obtain damages under the acts.

In summary, the ADA and similar acts are inadequate to redress injuries caused by ETS exposure in the workplace. These acts do not provide compensation to injured employees, and further, exclude employees who suffer long-term injuries as a result of ETS exposure. However, another administrative alternative, state workers' compensation laws, warrants examination.

237. See supra notes 215-16 and accompanying text for a discussion of the Justice Department's standing on sensitivity to ETS as a disability.

238. See supra note 216 and accompanying text.

239. These acts define a disability as a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(A) (1990). Thus even though lung cancer may be a physical impairment because it affects the respiratory system, lung cancer does not necessarily limit one or more of the major life activities.

240. See supra note 239.

241. Even if employees could show that their lung cancer limits a major life activity, they would also need to show that their employer discriminated against them based on their disability. 42 U.S.C. § 12112(a) (1990); Molly Cochran, The Worker's Right to a Smoke-Free Workplace, 9 U. DAYTON L. REV. 275, 281 (1984).

242. The Rehabilitation Act and the ADA require only that an employee be provided reasonable accommodations. Cochran, supra note 241, at 280 (discussing the limitations of the Rehabilitation Act in providing employees injured by ETS exposure with relief); 42 U.S.C. § 12112(a) (1990). This equitable remedy is itself limited if it places an undue burden on the employer's business. Cochran, supra note 241, at 282; 42 U.S.C. § 12112(b)(5)(A) (1990).

243. In order for employees to receive monetary damages under these acts, they must show not only that they are "disabled," but also that they have been discriminated against. Cochran, supra note 241, at 281; Gottlieb et al., supra note 77, at 637. In addition, if damages are awarded, they are based on the discrimination which may include back pay and benefits, but would not include medical expenses. See Vickers v. Veterans' Admin., 549 F. Supp. 85, 87 (W.D. Wash. 1982).

In order to adequately remedy an injury caused by ETS exposure, monetary damages are needed. The injured employee will inevitably have medical expenses and will miss work and therefore lose pay.
2. Current Workers' Compensation Laws

The need for a workers' compensation system arose in the early twentieth century when the Industrial Revolution brought a sharp increase in workplace accidents.244 Also during this time, three employer defenses developed against employee claims: the fellow-servant doctrine, assumption of the risk, and contributory negligence.245 These defenses effectively prohibited recovery for employees injured on the job.246 In response to the disastrous results of these defenses, legislators took action.247

The first workers' compensation law was enacted in New York in 1910.248 Since that time every state has enacted a workers' compensation statute to provide a remedy for employees injured on the job.249 The cornerstone of every workers' compensation system is that the employee is guaranteed compensation for injury without showing negligence or fault on the employer's part.250 The employee does pay a price for this guaranteed compensation, insofar as the workers' compensation statutes set the amount of compensation below that which the employee would likely recover in a tort suit.251

Workers' compensation statutes are vehicles to provide cash-wage benefits and medical care to victims of occupationally related injuries.252 The usual workers' compensation act has the following central features: (1) employees are automatically entitled to benefits when they suffer personal injuries by accident or occupational disease; (2) in exchange for the immediate entitlement,

244. NACKLEY, supra note 87, at 1; LARSON, supra note 179, § 4.00.
245. See supra notes 179-85 and accompanying text for a discussion of the fellow servant doctrine, contributory negligence, and assumption of risk.
246. LARSON, supra note 179, § 4.30 (concluding that the opportunity for employee recovery was almost nonexistent).
247. Id. § 4.50; DAN B. DOBBS, TORTS AND COMPENSATION 870 (2d. ed. 1993).
248. DOBBS, supra note 247, at 870. The law was later deemed unconstitutional because it imposed liability on the employer without requiring fault to be established, which the court considered to be a taking of property without due process of law. See Ives v. South Buffalo Ry. Co., 94 N.E. 431 (1911). In response to the Ives decision, the state of New York passed a constitutional amendment to permit such a compensation system. LARSON, supra note 179, § 5.20. In 1917, the new law was deemed constitutional by the United States Supreme Court. See New York Central R.R. Co. v. White, 243 U.S. 188 (1917), cited in LARSON, supra note 179, § 5.20.
249. Mark, supra note 87, at 875.
250. DOBBS, supra note 247, at 870-71. The test used to determine compensation does not focus on fault, but instead on the relationship of the event to the employment. LARSON, supra note 179, § 2.10. "The essence of applying the test is not a matter of assessing blame, but of marking out boundaries." Id.
251. McAuliffe, supra note 155, at 286.
252. LARSON, supra note 179, § 1.00. The costs of these cash-wage benefits, usually insurance premiums, are passed on to the consumer through the cost of the product. Id.
employees give up their right to sue their employers for any damages covered by the act; and (3) the employers are required to insure the employees' entitlement through state-funded insurance, private insurance, or selfinsurance. In addition, most workers' compensation statutes also abolish the traditional defenses used by employers to defeat employee claims. Furthermore, administration and enforcement of workers' compensation systems take place at the agency level, leaving the courts with a very limited role in the typical workers' compensation system, except for their appellate authority.

Current workers' compensation laws are inadequately designed to provide an effective remedy for ETS-related injuries in three primary ways. First, the definition of "harms" under the acts does not cover ETS-related injuries. Second, the applicable causation standards prevent employees from receiving benefits under the acts. Finally, the time limitation placed on an injured party to file a claim may preclude many employees' claims.

A case that illustrates the definitional problem with seeking relief for ETS-related injuries under current workers' compensation systems is McCarthy v. Department of Social & Health Services. In McCarthy, the plaintiff was required to work in an area in which she was constantly exposed to second-hand smoke. The plaintiff voiced complaints about the adverse effects the second-hand smoke was having on her health; however, her employer failed to correct the situation. As a result of her constant exposure to tobacco smoke,

253. *Id.* § 1.10. Workers' compensation systems are the exclusive remedy. However, an employer's immunity from suit is not absolute. NACKLEY, *supra* note 87, at 85. Under certain circumstances this immunity is not applicable, including: "Injuries not covered by workers' compensation; injuries sustained by an employee of a noncomplying employer; [i]njuries caused by the employer's intentional act; [i]njuries sustained while the employer and employee entered into a separate relationship . . . ." *Id.*

254. DOBBS, *supra* note 247, at 870-71. See *supra* notes 179-85 and accompanying text for a discussion of these defenses and their effects on injured employees' claims.

255. DOBBS, *supra* note 247, at 870-71. The rules of evidence, procedure, and conflicts of law which are generally applicable in a court proceeding are relaxed in the agency setting to facilitate the achievement of the purpose of the legislation. LARSON, *supra* note 179, § 1.10.


257. 759 P.2d 351 (Wash. 1988).

258. *Id.* at 352. The court took notice of the harmful effects of ETS: The hazardous nature of cigarette smoke to nonsmokers is well established. In 1972, the Surgeon General indicated that a smoke-filled room often exceeds the legal limit for maximum air pollution and presents a possible health hazard to exposed persons. *Id.* at 355.

259. *Id.* at 352. The court noted that the Washington legislature has recognized the harmful effects of ETS: The legislature recognizes the increasing evidence that tobacco smoke in closely confined places may create a danger to the health of some citizens of this state. In order
smoke in the workplace, [the plaintiff] developed 'chronic obstructive pulmonary disease, with broncho-spasm and diminished pulmonary function with sensitivity to tobacco smoke.'

The plaintiff was denied workers' compensation benefits because the court found that her illnesses were not covered by Washington's workers' compensation statute, the Washington Industrial Insurance Act. The court went on to find that the plaintiff could pursue a private cause of action because the exclusive remedy provision of the Workers' Compensation Act barred private actions only when the Act covered the injury sustained. Similarly, in Mack v. County of Rockland, the New York Court of Appeals denied an employee workers' compensation benefits, reasoning that the aggravation of a pre-existing eye disorder caused by exposure to ETS was not an occupational disease. The court held that for a disease to be compensable under the act it must be one which "derives from the very nature of the employment." More recently, in Palmer v. Del Webb's High Sierra, the court denied the plaintiff's workers' compensation claim because the plaintiff's lung disease caused by ETS exposure in the workplace could not be considered an occupational disease. The court reasoned that the
to protect the health and welfare of those citizens, it is necessary to prohibit smoking in public places except in areas designated as smoking areas.

Id. at 355 (citing WASH. REV. CODE § 70.160.010 (1992)).

260. Id. at 352. The plaintiff's doctor informed her that she was not capable of working unless her employer provided her with a smoke-free working environment. Id.

261. McCarthy v. Department of Social & Health Serv., 759 P.2d 351, 352 (Wash. 1988). The Washington Industrial Insurance Act, which is typical of most workers' compensation schemes, provides for compensation if the plaintiff's injury falls under one of the following definitions:

'Injury' means a sudden and tangible happening of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

... ‘Occupational disease' means such disease or infection as arises naturally and proximately out of employment under mandatory or elective provisions of this title.

WASH. REV. CODE §§ 51.08.100, 51.08.140 (1990).

262. McCarthy, 759 P.2d at 354. The court noted that this possible duty is limited to "the precautions that an ordinarily prudent person in similar circumstances would take to prevent the harm caused by tobacco smoke." Id. at 356.

263. 525 N.E.2d 744 (N.Y. 1988).

264. Id. at 744. The plaintiff claimed that her constant exposure to ETS on the job irritated her eyes to such an extent that she could no longer perform her duties. Id.

265. Id. The court reasoned that "[b]ecause claimant's injury was caused solely by the environmental conditions of her work place, not by any distinctive feature of the occupation of a psychiatric social worker, [her claim could be denied]." Id.


267. Id. at 437. The Nevada statute provides in part that the disease must be "a natural incident of the work as a result of the exposure occasioned by the nature of the employment." NEV. REV. STAT. § 617.440 (1991).
plaintiff's disease was not incidental to his job in a casino. The court further noted that the Nevada workers' compensation statute excluded from coverage any disease which a person could be easily exposed to outside the workplace. Therefore, the court found that because ETS is practically everywhere, ETS-related injuries would be excluded, as a matter of law, from coverage under the workers' compensation statute.

In short, the typical workers' compensation law defines a compensable injury as a disease arising out of and in the course of employment, and excludes ordinary diseases of life to which the general public is exposed outside of the employment. The problem with this definition is obvious: an employee can be exposed to ETS almost anywhere, and therefore would be excluded from obtaining relief under the typical workers' compensation act. The courts that have allowed plaintiffs to recover for ETS-related injuries under workers' compensation laws have stretched the meaning of a compensable injury beyond recognition.

268. Palmer, 838 P.2d at 437. The court further noted that even though it is common for ETS to be present in bars and casinos, it "is not a natural incident of these businesses." Id.

269. Id. (citing NEV. REV. STAT. § 617.440 (1991)). See infra note 271 for a discussion of the typical definitions of harms under state workers' compensation laws.

270. Palmer v. Del Webb's High Sierra, 838 P.2d 435, 437 (Nev. 1992). The court concluded that as a matter of law, illnesses caused by exposure to ETS on the job could not be considered an occupational disease under the workers' compensation statute. Id.

271. IND. CODE ANN. § 22-3-7-10(a) (West 1976). See WASH. REV. CODE § 51.08.140 (1985). "Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title." Id. In Department of Labor & Industries v. Kinville, 664 P.2d 1311 (Wash. Ct. App. 1983), the court interpreted this clause narrowly to mean that an injury "naturally & proximately" arises out of the employment if the disease is inherent in the claimant's particular occupation. Id. at 311. See also MINN. STAT. ANN. § 176.011 (West 1993) (excluding from coverage "Ordinary diseases of life to which the general public is equally exposed outside of employment . . . ."); OHIO REV. CODE ANN. § 4123.01(F) (Anderson 1995) (providing that coverage of a disease exists when the employment creates a "risk of contracting the disease in greater degree and in a different manner from the public in general"); PA. STAT. ANN. tit. 77 § 27.1(n) (1992) (defining the scope of coverage as "[D]iseases (1) to which the claimant is exposed by reason of his employment, and (2) which are causally related to the industry or occupation, and (3) the incidence of which is substantially greater in that industry or occupation than in the general population."); S.C. CODE ANN. § 42-11-10(4) (Law. Co-op. 1985) (excluding from coverage "ordinary diseases of life to which the general public is equally exposed . . . .").

272. See supra notes 257-71 and accompanying text for a discussion of these cases.

273. These cases are typically cases in which courts try to fit an employee's illness into the "accident" definition. See Schober v. Mountain Bell Tel., 600 P.2d 283 (N.M. Ct. App. 1978) (holding that even though the plaintiff's illness was caused by gradual exposure to ETS on different occasions, it was an "accident" nonetheless); Johannesen v. New York City Dep't of Hous. Preservation & Dev., 638 N.E.2d 981 (N.Y. 1994) (finding that the plaintiff's injury, that developed over a four year period, was an "accidental injury").
Other courts have denied employees’ workers’ compensation claims based on a finding that the employees failed to establish that their illnesses were caused by ETS exposure in the workplace. In ATE Fixture Fab v. Wagner, the plaintiff was forced to work in a twelve foot by twelve foot room with two chain smokers. The Florida Court of Appeals concluded that the evidence could support a causal connection between the plaintiff’s condition and ETS exposure on the job. However, the court remanded the case for further proceedings, noting that it was difficult to show that the plaintiff’s exposure to ETS on the job, instead of some other element, was the cause of his illness.

Another case that clearly illustrates the causation problem with current workers’ compensation laws is Appellant v. Respondent. In this case, the claimant worked for her employer from 1968 until 1991, a period of twenty-three years. The claimant, a nonsmoker, worked in a large room with about forty or fifty other employees, approximately sixty percent of whom smoked. The claimant was diagnosed with inoperable lung cancer on December 18, 1992 and on April 1, 1993 was informed that the probable cause was exposure to ETS in the workplace. The following expert medical testimony was offered as evidence: two doctors concluded that her lung cancer


276. Id. at 636. The plaintiff was later moved to a larger office, but was still forced to work in close proximity to other smokers. Id. at 637.

277. Id. at 638. The plaintiff had a pre-existing lung condition that he claimed was aggravated by his exposure to ETS on the job. Id. at 637. The plaintiff offered evidence that when he took a two week vacation from his job, his symptoms dissipated. Id.

278. Id. at 638. The court ultimately decided that the plaintiff’s evidence did not amount to a disability as required under the statute. Id.


280. Id. at *1. The claimant began working for her employer as an assembler, and after two years she was made an administrator for her employer and was moved to several different locations during the rest of her employment. Id.

281. Id. The employer instituted a no-smoking policy for the work area, but allowed smoking in the break rooms and conference rooms. Id. at *2. Although this eliminated the smoke in her immediate work area, the claimant was still exposed to ETS because the designated smoking area had an open wall where the smoke could escape. Id. Other employees and supervisors testified that the percentage of smokers ranged anywhere from 20% to 60%. Id. at *2-3.

282. Id. at *1. The claimant and her husband of 26 years had never smoked, neither of her parents had ever smoked, and the claimant never lived with anyone who smoked. Id. The claimant estimated that 95% of her exposure to ETS came from the workplace. Id. Further, the claimant testified that no one in her immediate family has had any type of cancer. Id. The claimant died before the case was brought in front of the Texas Workers’ Compensation Commission. Id.
was caused by her exposure to ETS;\textsuperscript{283} one doctor found that a high probability existed that her lung cancer was caused by her ETS exposure;\textsuperscript{284} and one doctor concluded that her cancer was not caused by her ETS exposure but could not identify its source.\textsuperscript{285} In the face of this weighty evidence, the court upheld the hearing officer’s finding that the claimant had not shown by a preponderance of the evidence that her ETS exposure in the workplace caused her lung cancer.\textsuperscript{286}

In addition to the definition and causation problems under current workers’ compensation laws, the latent nature of some of the injuries associated with ETS cause workers seeking relief for the more serious ETS injuries to also face a time limitation problem.\textsuperscript{287} Workers’ compensation statutes normally have a time restriction on when a plaintiff can bring a claim.\textsuperscript{288} The typical workers’ compensation statute requires a claim to be filed within two to four years after

\textsuperscript{283} Appellant v. Respondent, No. 93744, 1993 WL 406384, at *4 (Tex. Work. Comp. Com. Oct. 1, 1993). One of these doctors, Dr. K, M.D., Ph.D., practices oncology, hematology, and immunology, and is board certified in immunology. Id. at *5. Dr. K. stated that “[i]n my medical opinion [the claimant’s cancer] was probably related to the extensive secondhand cigarette smoke [the claimant] was exposed to at work.” Id. In addition, Dr. K found that the claimant was exposed to no other known risk factors. Id. The second doctor, Dr. B, was:

board certified in internal medicine, pulmonary medicine, and in critical care medicine.

Since 1975, he has been involved in authoring, editing, and reviewing Surgeon General reports on the health effects of smoking. . . . He was also a consultant to the 1992 EPA report on the respiratory health effects of passive smoking.

\textsuperscript{284} Id. at *6. Dr. B concluded that the claimant’s lung cancer was caused by her ETS exposure, and the claimant would not have gotten lung cancer if she had not been exposed to ETS. Id.

\textsuperscript{285} Id. at *7. Dr. C opined that although the cause of the claimant’s condition was unknown, there was a high probability that ETS could have caused the claimant’s lung cancer. Id. at *7-8.

\textsuperscript{286} Id. at *8. Dr. D is board certified in internal medicine, pulmonary medicine, and critical care medicine. Based on statistical information and medical literature, Dr. D found that the claimant’s cancer was unrelated to ETS. Id. Dr. D concluded that the claimant’s cancer was caused by “unidentifiable risk factors.” Id.

\textsuperscript{287} Id. at *11. After reviewing the record, “we are unable to conclude that the evidence is insufficient to support . . . the decision that the claimant did not establish that she contracted lung cancer as a result of her job.” Id.

\textsuperscript{288} See Barth, supra note 203, at 62-70. Barth separates the latency problem into three prongs: (1) the long latency period always occurs between exposure and the manifestation of the disease; (2) the period of latency for many diseases is substantial; and (3) these long latency periods create the problem of the legal identification of the source, which is complicated by the scientific ignorance regarding the cause of the disease. Id. at 62-63. However, state judiciaries have yet to address long-term injuries from ETS exposure in the working environment.

\textsuperscript{289} See Nackley, supra note 87, at 99-108 for a listing of the individual state’s time limitations.
The average period for manifestation of lung cancer is eighteen years. Therefore, time limitations set by these statutes can easily be exceeded before lung cancer is detected, thereby cutting off an injured employee’s remedy.

Some other states use the discovery rule to limit an employee time for filing a claim. Normally under a discovery rule, an employee must file a claim within one to three years of discovery of the injury. However, the discovery rule has been interpreted to have several different meanings. These include: discovery of an illness, discovery of the cause of the illness, or discovery of the connection with employment. Because of this ambiguity, the use of the discovery rule usually results in litigation over the point when the employee discovered the injury. In short, plaintiffs who suffer long-term injuries as a result of ETS exposure have to deal with the time lapse and the effects it will have on filing a claim.

289. Id. However, many states provide exemptions to these limitations for special diseases. The Indiana statutes provide for exceptions to this rule, including one for asbestos. See IND. CODE ANN. § 22-3-7-9(F)(5) (West 1991). “[E]xcept for the following: In all cases of occupational disease caused by the inhalation of asbestos dust . . . no compensation shall be payable unless disablement . . . occurs within thirty-five (35) years after last day of exposure.” Id.

290. BARTH, supra note 203, at 64. Other estimates have put the manifestation period between 15 and 21 years. Id. at 65.

291. Id. at 274. In criticizing the time limitations with regard to occupational diseases, Barth states:

In view of the knowledge about the latency period of diseases, such limitations are inequitable. When states set arbitrary limits that can easily be exceeded before many diseases and/or ensuing disabilities are manifested, it only supports the contention that the injured worker is not the primary beneficiary of the compensation system.

292. NACKLEY, supra note 87, at 99-108; Mark, supra note 87, at 876 n.33 (stating that 26 states use some type of discovery rule).

293. NACKLEY, supra note 87, at 99-108 (listing the different limitations on filing a claim in the 50 states).

294. BARTH, supra note 203, at 124 (stating that the use of the discovery rule “creates a whole set of new issues”).

295. Id. Barth points out the ambiguous nature of the discovery rule by asking a series of questions:

What if the worker is advised by a company’s physician that his hearing loss problem could not have been due to his work, but learns eight years after retirement from another doctor that the first physician was wrong? What if the worker knows that he has a work-related impairment but does not realize that the disease has also disabled him until several years later?

296. Id. at 63. First, due to the long latency periods of some of the ETS-related illnesses, the employee, the employer, and the physician may miss the connection between the harmful exposure and the employee’s illness. Id. Second, “[t]he passage of time handicaps the employee . . . in [the employee’s] search for necessary evidence regarding the exposure to a hazard, the dose involved . . . .” Id.
After an examination of the above alternatives, it is evident that no effective vehicle currently exists to redress work-related ETS injuries. First, battery is not a viable cause of action for employees injured by ETS exposure because employers cannot be held to the requisite level of culpability. Second, the almost insurmountable causation burden and the traditional defenses used by employers effectively block recovery under a negligence claim. Third, an employer's common law duty to provide a safe working environment is not a sensible choice. This cause of action has only been successfully pursued in one case and has only been recognized by a New Jersey trial court. Further, this case has been questioned by the New Jersey courts and thus, the future of this cause of action is uncertain. In addition to the individual drawbacks of each of these alternatives, each is subject to the substantial downfalls of the court system that caution against pursuing ETS claims in the courts.

The current administrative alternatives do not fare much better. The ADA and similar statutes do not provide adequate compensation to injured employees. Rather, they merely require the employer to provide reasonable accommodations to “disabled” individuals. Further, a class of employees injured by ETS may be barred from recovery because the ADA and similar acts are only used to prevent discrimination based on a disability. Thus, even though employees may have a fatal ETS-related disease, such as lung cancer, they would be unable to recover unless their illnesses prevented them from performing a major life activity, and their employer discriminated against them based on their illnesses.

Further, the current workers’ compensation laws are inadequate for three reasons. First, the definition of harms under the typical workers’ compensation statute does not cover ETS-related injuries. Second, many workers’ compensation laws create a substantial causation burden, similar to common law negligence, that employees must meet in order to recover. Finally, statutes of limitation currently in effect do not give employees adequate time to discover their injuries, let alone file their claim. However, current workers’ compensation laws provide the most feasible structure in which to make

297. See supra notes 155-70 and accompanying text.
298. See supra notes 171-85 and accompanying text.
300. See supra notes 199-201 and accompanying text.
301. See supra notes 135-54 and accompanying text.
302. See supra notes 209-43 and accompanying text.
303. See supra notes 239-41 and accompanying text.
304. See supra notes 239-41 and accompanying text.
305. See supra notes 256-73 and accompanying text.
306. See supra notes 274-86 and accompanying text.
307. See supra notes 287-96 and accompanying text.
changes. An amendment to the current workers’ compensation laws can remedy the existing problems.

V. MODEL AMENDMENT TO CURRENT WORKERS’ COMPENSATION LAWS:
A SENSIBLE SOLUTION

Courts have used various methods to compensate ETS-related injuries caused by exposure in the workplace. This has placed ETS-litigation in a state of disarray. Further, current alternatives are not adequately addressing the problem. \(^{308}\) Administrative remedies do not provide coverage for all injured employees. Nor do they provide adequate compensation. \(^{309}\) Litigious remedies are not viable methods of redressing ETS injuries caused by exposure in the workplace. In addition, the problems associated with ETS exposure in the workplace must be addressed quickly to prevent another tort disaster similar to the asbestos cases. \(^{310}\) Therefore, a statutory scheme, which would relieve the courts of the burden of handling a potentially massive ETS case load, should be implemented to handle ETS claims resulting from exposure on the job.

Workers’ compensation laws provide the appropriate framework to handle these claims for several reasons. First, the workers’ compensation laws are designed to operate quickly. Second, more employees will be compensated, and their awards will be more uniform instead of potentially unpredictable jury awards. Third, employers’ costs will be lower through workers’ compensation insurance than their costs of defending civil suits, as demonstrated by the asbestos example. Finally, these injuries will avoid the court system, thereby saving substantial amounts of money in litigation expenses for the states, the employees, and the employers. However, current workers’ compensation laws must be amended to cover ETS-related injuries effectively. An amendment can correct the definition, causation, and time limitation problems found in current workers’ compensation statues. Thus, amending the current workers’ compensation laws to provide a remedy for employees injured by ETS exposure on the job is the most effective method to deal with the problem.

\(^{308}\) See supra notes 155-304 and accompanying text for a discussion of the current alternatives.

\(^{309}\) The author realizes that most state workers’ compensation statutes do not cover all employers, but instead cover employers with a minimum number of employees, typically 15. NACKLEY, supra note 87, at 4-5. However, amending the workers’ compensation laws to cover all employees is beyond the scope of this note.

\(^{310}\) See supra notes 119-54 and accompanying text (discussing the asbestos litigation disaster and comparing it with ETS).
A. Model Amendment

1. Example of Typical Current Workers' Compensation Laws

The typical workers' compensation statute provides the following: 311

As used in this chapter, "occupational disease" means a disease arising out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where such diseases follow as an incident of an occupational disease as defined in this section. 312

A disease arises out of the employment only if there is apparent to the rational mind upon consideration of all the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workers would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence. 313

As used in this chapter, "disablement" means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims compensation or equal wages in other suitable employment, and "disability" means the state of being so incapacitated. 314

311. This example is taken from Indiana; however, either other statutes have similar provisions, or other states' provisions have been interpreted to have the same effect as the Indiana statute. In addition, only the sections relevant to providing coverage for ETS-related harms are discussed here. For a more in depth look, refer to the Indiana Code, Title 22.

312. IND. CODE ANN. § 22-3-7-10(a) (West 1976). See supra note 271 for a discussion of statutes having similar provisions.

313. IND. CODE ANN. § 22-3-7-10(b) (West 1976).

314. Id. § 22-3-7-9(e). The Indiana code also provides that the employer who last exposed the employee to the hazardous substance shall be the one liable. Id. § 22-3-7-33. "The employer liable for the compensation provided in this chapter shall be the employer in whose employment the employee was last exposed to the hazards of the occupational disease claimed upon regardless of the
For purposes of this chapter, no compensation shall be payable for or on account of any occupational diseases unless disablement... occurs within two (2) years after the last day of the last exposure to the hazards of the disease... .

2. Providing Coverage for ETS-related Injuries

The following model amendment will demonstrate how states should change existing workers' compensation laws to allow recovery for ETS injuries.

§ 1 Scope of Coverage: Illnesses caused by exposure to ETS in the workplace will be compensable under this Act when the duration of exposure and the intensity of exposure is such that the employee's injury was caused by the workplace environment.

Comments: This provision of the model amendment can be treated as an exception to the definition of an occupational disease under most workers' compensation laws. In doing so, it merely recognizes the fact that, although ETS exposure may not be exclusive or incidental to the employment, this does not mean that the employment did not cause the employee's injuries. In addition, this provision also recognizes the scientific evidence that provides that the two important factors in determining a causal relationship between ETS and an illness are duration of exposure and intensity of exposure. By including these two factors in the formula, this provision is better able to accurately determine if the employee's illness was caused by ETS exposure on the job.

In addition, there will be a definite answer for both the legal community and the employees seeking compensation. Also, by providing coverage under the workers' compensation laws, the states will avoid the potential onslaught of future ETS litigation because workers' compensation statutes will provide the exclusive remedy for these claims. Thus, the amendment prevents ETS from following the asbestos path of wasteful expenditures of time and money.

§ 2 Standard of Causation: A claimant must be able to show that, but for the exposure to ETS on the job, the claimant would not have

length of time of the last exposure... ." Id. Most states have some provision similar to this, holding the last employer liable. NACKLEY, supra note 87, at 29-30. Therefore, this question will not be addressed in the model amendment because the states have a viable method of compensating employees who have been exposed at more than one job.

In addition, most states provide payments for partial disability as well as total disability. Id. at 31. Thus, even if employees, injured by ETS exposure, are able to work, they will still receive compensation. Id. Therefore, this point will also not be addressed by the model amendment because the states have a viable method of handling the issue.

315. IND. CODE ANN. § 22-3-7-9(F) (West 1976).
suffered the harm of which he or she complains.

(a) Method of Proof: A party may introduce expert or scientific evidence in the form of reports, studies, findings, or individual case analyses to establish causation. In addition, circumstantial evidence may be taken into account.

(b) Standard of Proof: The standard of proof for proving causation is a preponderance of the evidence; that is, it must be more likely than not that the claimant’s illness was caused by ETS exposure on the job.

(c) Reward Reduction Based on Causation: Once the claimant has shown by a preponderance of the evidence that the illness was due to ETS exposure on the job, the employer may introduce evidence that a certain percent of the complainant’s exposure to ETS was received outside of the employment. If the employer can show by a preponderance of the evidence that a portion of the claimant’s exposure was independent of employment, the employer is entitled to have the claimant’s reward reduced by an amount proportional to the independent exposure.

Comments: This causation standard will alleviate many of the problems that injured employees face in seeking compensation for ETS-related injuries. The employee has the burden of proof in showing causation. However, employees will only have to establish that the ETS exposure on the job was the cause in fact of their injuries, that is, but for the exposure on the job, the employee would not have suffered the injury. This will ensure that the employers are compensating employees only for illnesses that genuinely occur in the workplace.

The proximate cause element of the traditional negligence action is left out intentionally. The proximate cause requirement is not needed because once an employee has met the “but for” test, the employee has fulfilled the only requirement for workers’ compensation benefits: the injury was caused in the workplace. Further, proximate cause cuts off liability as a means of social justice. However, workers’ compensation laws provide that an employer shall be liable for an employee’s injury on the job regardless of fault. Thus, there is no need for a social policy such as those professed for proximate cause. In addition, by removing the proximate cause requirement, the employee’s burden of proving causation is lessened, thereby correcting the causation problem with current workers’ compensation laws.
In keeping with the theory of agency law, this provision provides for liberal methods of proof. In allowing the claimant to introduce circumstantial evidence to prove causation in an ETS action, the trier of fact can use common sense and reasonable judgment to determine whether the employee has met the causation standard. Further, the burden of proof is by a preponderance of the evidence. The preponderance of the evidence standard is in line with the current civil burden of proof. It is used here because the workers' compensation laws provide monetary compensation, which is a civil remedy.

Once the employee has met the causation burden, the burden shifts to the employer to refute the employee's evidence. However, the employer does not have to completely refute the evidence. Instead, the employer need only show by a preponderance of the evidence that a percentage of the employee's exposure occurred outside the workplace. The employer may use the normal discovery methods to introduce evidence concerning the employee's exposure outside the workplace. Ultimately, the causation question will be determined by the trier of fact. If the employer can establish that the employee was exposed to ETS outside the workplace, the employee's reward will be reduced by that percentage.

§ 3 Limitations on Filing: In all cases of occupational disease caused by the inhalation of environmental tobacco smoke, no compensation shall be payable unless disablement occurs within twenty-five (25) years after the last day of the last exposure.

Comments: This provision can also act as an exception to the general time limitations placed on claims.\textsuperscript{316} This will alleviate the exclusion from coverage of employees who discover that their exposure to ETS on the job caused them a serious injury several years before. Twenty-five years is the longest latency period currently associated with ETS-related harms. Thus, this time limitation should not exclude even the most severely injured employee.

B. General Policy Justifications for Model Amendment to Workers' Compensation Laws

1. Why should employers bear the cost of these injuries?

Employers should bear these costs because, although the effects of ETS were not concretely documented until the mid-1980s,\textsuperscript{317} employers became

\textsuperscript{316} States provide similar exceptions for other exposure related diseases, such as asbestos. See IND. CODE ANN. § 22-3-7-9(F)(3) (West 1976).

\textsuperscript{317} See 1986 SURGEON GENERAL REPORT, supra note 5.
aware of the risks associated with ETS as early as 1970. This is evident by the early clean indoor air acts of the 1970s. However, some employers ignored these health hazards. These employers knew or should have known of the injuries related to ETS exposure and failed to act accordingly to protect their employees. Therefore, the employers' liability is justified based on their failure to act.

However, the most significant justification for holding employers liable is found in the workers' compensation systems themselves. The purpose of the workers' compensation laws is to compensate workers injured during the course of their employment with a timely award, regardless of employer fault. That is, the employer's culpability is of no consequence in awarding workers' compensation benefits. The only requirement employees must meet in order to receive compensation is to show that their injury arose out of and in the course of employment.

2. Judicial and Economic Efficiency

There are several efficiency justifications for this amendment. First, the court system will benefit from the proposed amendment because it will not have to deal with the potential onslaught of ETS litigation. Based on the similarities between asbestos and ETS, the asbestos experience illustrates the horrible wastes that will occur with ETS litigation. The wasteful expenditure of money in litigation expenses coupled with the relatively low levels of compensation paid to the injured employees should not be repeated in ETS cases. In addition, the states' costs associated with handling ETS claims through the court system will be similar to the asbestos experience, which has not been cost effective by any measure. By enacting this model amendment, ETS claims will be kept out of the court systems, and there will not be an onslaught of litigation, similar to the asbestos disaster. Further, this amendment will allow

318. Davis & Brownson, supra note 5, at 750.
319. Id.
320. See supra notes 72-77 and accompanying text.
321. See Larson, supra note 179, § 2.
322. See McAuliffe, supra note 155, at 282.
323. Larson, supra note 179, § 2.20 (stating that “let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of employment, the employee receives his award.”).
324. See supra notes 107-54 and accompanying text.
325. It is true that the workers' compensation systems will have to bear a potentially heavy burden, however this can be remedied by providing for extra resources to handle the expected increase in ETS claims in the model amendment. The state could provide an additional number of employees to handle these claims along with additional funds to ensure that the ETS cases will not clog the workers' compensation systems.
the courts to deal with other claims more effectively by removing the burden of ETS litigation.

Second, employers must realize that there are costs associated with ETS. However, under workers' compensation schemes, the amount paid to plaintiffs is substantially lower than that paid to plaintiffs under the tort system. In some states, employers will have to pay for insurance on these claims, but these costs are inconsequential compared to potential costs associated with ETS litigation. In short, employers' costs will rise but this amendment will keep that increase to a minimum.

Finally, this amendment uses societal resources in the most efficient, effective way. Workers' compensation laws provide more injured employees with compensation. These awards are more uniform than those normally awarded by juries. Thus, the money is being used to compensate more victims in a more just manner.

VI. CONCLUSION

The negative effects of ETS on nonsmokers can no longer be denied. The courts are attempting to remedy ETS-related injuries using a variety of methods. This is causing confusion for employees seeking relief. Further, ETS litigation has the potential of creating a massive class of cases for the court system to handle. Moreover, the current methods of redressing ETS-related workplace injuries are inadequate. Therefore, the need to provide these injured individuals with an efficient and just remedy has arrived. In addressing this concern, all potential effects any remedial action will have on society as a whole should be considered. Amending the current workers' compensation laws to include a remedy for ETS harms will minimize the burden on the courts, will lessen the employers' costs, and will provide injured employees an effective remedy.

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326. McAuliffe, supra note 155, at 282.
327. See Larson, supra note 179, § 1.10.
328. Id. See supra notes 135-40 and accompanying text. To defray the employers' costs, the enactment of this model amendment should be accompanied by a method of supplementing the workers' compensation funds. Depending on the type of funding currently in place, a state could provide for a government subsidy of a percentage of the employers' insurance costs, paid directly to the insurance companies in order to minimize premiums. This subsidy could possibly be funded through an excise tax on the sale of tobacco or through some other method. The idea behind workers' compensation is to spread the costs. Thus, if the citizens of the state have to pay higher taxes to pay for these injuries, so be it, but the cost should not be placed on the employers' shoulders alone.