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Legal Issues Pertaining to Smoking in Correctional Facilities

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1. Introduction

Tobacco smoking in prisons and jails has been the subject of controversy for some time. As restrictions on tobacco smoking have increasingly been imposed in various states and localities, including restrictions on smoking in public buildings, workplaces, and schools, many similar restrictions have been imposed in federal, state, or local prisons, jails, and other detention facilities.

Some of the impetus for this change has been the filing of lawsuits by nonsmoking prisoners who claim that exposure to second hand or environmental tobacco smoke (ETS) has had a detrimental impact on either their present or future health. In response, correctional officials have adopted a wide variety of policies, ranging from simply designating certain areas of their facilities as non-smoking areas, all the way to making their facility completely smoke-free.

This article examines an important U.S. Supreme Court case which ruled, over a decade ago, that prisoners could assert claims that exposure to high levels of ETS constituted a violation of their Eighth Amendment protection against cruel and unusual punishment, based on either a current adverse impact on their health, or on an unreasonable risk to their future health.

The article also briefly examines decisions by lower courts concerning particular cases in which prisoners have asserted such claims. The focus is on the issue of smoking by prisoners. The issue of smoking by prison staff members, the restriction of smoking among staff members, or collective bargaining by employee unions over the issue are not examined in any detail. The article also does not

discuss in any detail the legal issues concerning smoking of tobacco in connection with inmate religious rituals or practices.

At the conclusion of the article, there is a section with links to some useful and relevant information on the subject available on-line.

2. An Important U.S. Supreme Court Case

The U. S. Supreme Court, in Helling v. McKinney, #91-1958, 509 U.S. 25 (1993), directly addressed the issue of the involuntary exposure of an objecting prisoner to environmental tobacco smoke (ETS) from cigarettes smoked by his cellmate and other inmates.

In this case, a Nevada state inmate sued prison officials, arguing that this involuntary exposure to ETS created an unreasonable health risk, and therefore constituted cruel and unusual punishment in violation of the Eighth Amendment.

A federal appeals court found that the prisoner should have been allowed to prove that the exposure to ETS was serious enough to create a threat to his future health

The U.S. Supreme Court agreed that the prisoner could advance claims based not only on any negative effect that ETS exposure was having to his current health, but also could try to establish a right to a smoke-free environment based on the possible threat to his future health.

The Court ruled that proof that prison officials, acting with deliberate indifference, exposed the plaintiff prisoner to ETS levels posing an unreasonable risk to a prisoner's future health would be sufficient to state a viable Eighth Amendment claim.

Prisoners who prove that they have been subjected to an unsafe, life-threatening condition, the Court reasoned, could not be denied injunctive relief on the basis that nothing "yet" has happened to them. The Court explicitly rejected the argument that only deliberate indifference to inmates' current serious health problems violated the Eighth Amendment.

The Court found that it could not, based on the record to that point, rule that the prisoner could not possibly prove an Eighth Amendment violation based on ETS exposure, and rejected an argument made by the U.S. government that harm to prisoners from ETS was "speculative," with no risk sufficiently serious

to constitute a serious medical need, and with the exposure not in violation of "current standards of decency."

On remand, the Court ruled, the prisoner would have to prove his claims, including both the objective and subjective elements needed for an Eighth Amendment violation.

On the objective factor, the Court stated, the plaintiff would have to prove that he is being exposed to an unreasonably high level of ETS. In the immediate case, the Court noted, the plaintiff might have difficulty doing that, since he had been moved to a new prison, where he no longer had a smoking cellmate. Additionally, a new Nevada prison policy restricted smoking to certain areas in correctional facilities and attempted to mandate reasonable efforts to respect nonsmokers' wishes regarding cell assignments. The plaintiff prisoner would also be required to show that the risk he was complaining about was not one that "today's society" continues to tolerate.

As to the subjective factor—the presence of deliberate indifference—the Court stated, the determination should be made in light of the current attitudes and conduct of prison authorities, which "may have changed" during the course of the litigation. "The inquiry into this factor," the Court noted, "also would be an appropriate vehicle to consider arguments regarding the realities of prison administration."

3. Lawsuits over correctional smoking policies and practices

Following the U.S. Supreme Court decision, there have been a number of lawsuits in which prisoners have attempted to make out viable Eighth Amendment claims based on exposure to second hand tobacco smoke. There have also been some lawsuits in which prisoners who smoke have attempted to challenge efforts to restrict smoking in a facility, or even ban it altogether.

Prisoners who have challenged the authorities of correctional officials to regulate or even ban smoking have not fared very well in the courts.

In Call v. Ohio Dept. of Rehabilitation & Corrections, No. 06AP-1057, 2007 Ohio App. Lexis 2451 (10th Dist, Franklin County), a court ruled that an Ohio state statute allowing correctional officials to designate "at least" one tobacco-free housing area within a correctional facility also allowed them to declare the entire facility tobacco-free. The defendants also had authority to discipline the plaintiff prisoner for violating a ban on smoking, so doing so did not constitute impermissible "harassment" or "retaliation." See also Washington v. Tinsley, U.S. Dist. Ct., S.D. Tex., No. 92-2039, Dec. 16, 1992, 61 U.S.L.W. 2451, 52 CrL 1321

(Feb. 2, 1993), (pre-trial detainees constitutional rights were not violated by a city's ban on smoking in all public buildings which amounted to a ban on smoking by all prisoners), and Doughty v. Bd. of Co. Com'rs for Co. of Weld, 731 F.Supp. 423 (D. Colo. 1989) (no-smoking policy at county jail did not constitute cruel and unusual punishment).

In another case, a prisoner's federal civil rights lawsuit claiming that prison's non-smoking policy was unconstitutional was found to be barred by his failure to exhaust available administrative remedies before filing suit, as required under the Prison Litigation Reform Act, 42 U.S.C. Sec. 1997e(a). Harmon v. Gallegos, No. 05-3209, 158 Fed. Appx. 87 (10th Cir. 2005).

Another prisoner's suit claiming that a prison's restrictions on inmate smoking were "cruel and unusual punishment" was frivolous, one federal appeals court ruled. Beauchamp v. Sullivan, 21 F.3d 789 (7th Cir. 1994). See also Reynolds v. Bucks, 833 F.Supp. 518 (E.D. Pa. 1993), (prison's policy of prohibiting all smoking by inmates was not in violation of their constitutional rights; prison could legitimately distinguish between inmates and employees in allowing smoking by employees in designated areas). Also of interest is Austin v. Lehman, 893 F.Supp. 448 (E.D. Pa. 1995), holding that a failure to provide free cigarettes to prisoner in disciplinary custody did not constitute cruel and unusual punishment, violation of due process, or a violation of equal protection.

In Brashear v. Simms, 138 F. Supp. 2d 693 (D. Md. 2001), a state prison ban on smoking, sale of tobacco products, and possession of tobacco by inmates was found not to violate an inmate's equal protection rights or constitute "disability discrimination" against smokers; a federal court dismissed the lawsuit as "frivolous."

Following the U.S. Supreme Court's decision in Helling, lower federal courts found that the proposition that exposure to unreasonably high levels of environmental tobacco smoke could constitute an Eighth Amendment violation had become "clearly established law," sufficient to deny prison officials qualified immunity on such claims, and sufficient to allow plaintiff inmates pressing such claims at least a chance to have their day in court to attempt to prove such claims. See Warren v. Keane, No. 98-2997, 196 F.3d 330 (2nd Cir. 1999), ruling that prisoners' right to be free from unreasonable levels of exposure to second-hand tobacco smoke was "clearly established" in 1993, so that prison officials were not entitled to qualified immunity from liability for alleged health problems caused by having allowed smoking in certain areas of a New York prison. In Johnson v. Pearson, 316 F. Supp. 2d 307 (E.D. Va. 2004), the court ruled that prison officials involved in refusing to agree to prisoner's request that he be assigned to a non-smoking cell were not entitled to qualified immunity from his claim that this subjected him to a risk of serious damage to his future health, as well as present

aggravation of respiratory problems. The prisoner's right, under these circumstances, not to be subjected to these risks was clearly established, and there was evidence that the prisoner was confined nineteen hours a day in a small, enclosed cell with a habitual smoker of cigars.

Some courts even found that such claims were clearly viable before the U.S. Supreme Court's decision. See Warren v. Keane, 937 F.Supp. 301 (S.D.N.Y. 1996), ruling that correctional officials were not entitled to qualified immunity from claim that they failed to remedy dangerous level of second-hand tobacco smoke; federal court rules that failure to do so, as early as date of 1986 Surgeon General's report on second-hand smoke, could not be objectively reasonable.

In a number of cases, despite initially allowing prisoners to proceed with their claims, courts ultimately found that the plaintiffs had not sufficiently shown that their exposure had been to levels of environmental tobacco smoke sufficiently high to violate their constitutional rights or adversely impact on their current or future health.

See Beasley v. Arizona Dept. of Corrections, No. 05-17079, 2007 U.S. App. Lexis 27771 (9th Cir.) (prisoner who claimed that he was exposed to ETS in violation of his constitutional rights failed to allege facts sufficient to create a triable issue as to whether the levels of ETS were unreasonable, or whether the defendants knowingly disregarded the risk of harm to him from the exposure), Giddens v. Calhoun State Prison, No. 07-11988, 2007 U.S. App. Lexis 25248 (11th Cir.) (a Georgia prisoner failed to present sufficient evidence from which a jury could find that he was deliberately exposed to an unreasonable level of environmental tobacco smoke (ETS). He also failed to refute the diagnosis, by a prison doctor, that he did not suffer from a serious respiratory or cardiovascular medical problem that would result in him being at particular risk from ETS); and Lee v. Young, No. 02-cv-281, 2007 U.S. Dist. Lexis 74259 (S.D. Ill.) (an Illinois prisoner failed to show that his rights were violated in connection with his exposure to second-hand tobacco smoke. The prisoner suffered from asthma, which allegedly worsened during his incarceration. In granting summary judgment to prison officials, the court found that the prisoner had been granted access to doctors, an asthma clinic, and his prescribed medications, and that he was moved to a non-smoking cell when he requested it, and to the medical wing when his prison doctor recommended it. Under these circumstances, prison officials did not act with deliberate indifference. Even if an Eighth Amendment violation were to be found, the defendant officials would be entitled to qualified immunity because they would not have known, at the time, that they were violating his rights).

Other cases rejecting pleas for damages or other relief sought by non-smoking inmates include Henderson v. Sheahan, #98-2964, 196 F.3d 839 (7th Cir. 1999). (pre-trial detainee allegedly subjected to second-hand smoke for 4-1/2 years in county jail could not recover damages from county officials for either present or

future health problems when his present health problems were not sufficiently serious and there was no objective certainty that future health problems would occur).

Brief or incidental exposure to ETS will also ordinarily not suffice to make out a claim for violation of constitutional rights. See Bacon v. Taylor, No. CIV.A. 02-431, 414 F. Supp. 2d 475 (D. Del. 2006), (prisoner's allegations concerning smoking by correctional officers on several occasions were insufficient to state a claim for a violation of his Eighth Amendment rights by exposing him to environmental tobacco smoke. These individual incidents did not demonstrate exposure to an unreasonably high level of such smoke). See also Kelley v. Hicks, #04-14276, 400 F.3d 1282 (11th Cir. 2005), holding that mere negligence at times in enforcing county correctional facility's no-smoking policies, even if true, was insufficient to impose liability on warden and assistant warden for deliberate indifference to prisoner's alleged excessive exposure to second-hand tobacco smoke. Also of interest in this regard is Moorer v. Price, No. 03-1429, 83 Fed. Appx. 770 (6th Cir. 2003), in which prison officials who supervised residential unit were found to be entitled to qualified immunity from liability on prisoner's claim that they improperly exposed him to second-hand tobacco smoke when smoking was prohibited but non-smoking policy was "imperfectly" enforced.

Since the legal standard for liability for unreasonable exposure to ETS is deliberate indifference, the adoption of remedial measures, such as adopting a policy restricting smoking, moving non-smoking prisoners out of cells or housing units with smoking prisoners, etc., may be sufficient to defeat such lawsuits. See Jordan v. N.J. Dept. of Corrections, 881 F.Supp. 947 (D.N.J. 1995), ruling that despite the fact that right to be free from harmful effects of excessive second-hand smoke was "clearly established" before an inmate filed suit over being housed with a series of tobacco smoking cellmates, prison officials were entitled to summary judgment since they adopted a new smoking policy within eleven months of U.S. Supreme Court decision on issue, which showed they were not "deliberately indifferent" to the problem.

Similarly, in Crowder v. Kelly, 928 F.Supp. 2 (D.D.C. 1996), a federal court enjoined a D.C. correctional facility's non-enforcement of its own non-smoking policy; ruling that the plaintiff non-smoking inmates were "highly likely" to prevail on claim that their constant exposure to second-hand tobacco smoke "violates contemporary standards of decency."

Other lawsuits have also raised claims based on alleged failure to enforce smoking restrictions which were previously adopted. See Weaver v. Clarke, 45 F.3d 1253 (8th Cir. 1995), ruling that prison officials were not entitled to qualified immunity in a suit brought by a prisoner alleging that they deliberately failed to enforce a smoking ban on his cell which they had previously ordered in response

to his grievance that his roommate's smoking was detrimental to his current medical condition,

In a subsequent proceeding in that same case, a prisoner was awarded attorneys' fees of $8,346.35 and $2,952.82 in expenses as prevailing party despite a trial court's rejection of damage claims against individual correctional officials and rejection of his claim for injunction against prison smoking; the appeals court upheld a finding that the prisoner's lawsuit was a factor in the adoption of a no-smoking policy. Weaver v. Clarke, 96-2952, 120 F.3d 852 (8th Cir. 1997).

In a federal prisoner's lawsuit claiming that Bureau of Prisons (BOP) personnel did not enforce anti-smoking policies restricting smoking to certain designated areas, a federal trial court ruled that BOP staff had discretion, under the policies and regulations, concerning carrying out the policies. The court therefore dismissed the complaint based on the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. Sec. 2680(a). Reed v. U.S., No. 06-CV-096, 2006 U.S. Dist. Lexis 90547 (E.D. Ky.).

Objective evidence concerning the quality of prison air may also be used in lawsuits over exposure to ETS. In Day v. Snider, No. 101,374, 125 P.3d 1229 (Okla. Civ. App. Div. 3 2005), the court found that an inmate failed to show that exposure to second-hand tobacco smoke violated his Eighth Amendment rights when the prison showed that it complied with contemporary standards of the American Corrections Association concerning prison air quality, quantity, and ventilation, and the prisoner also failed to provide evidence that he suffered exposure to unreasonably high levels of smoke.

Reasonable attempts to respond to the needs of non-smoking prisoners, even those with very serious health problems, will sometimes be enough to avoid possible liability. In Taylor v. Boot, #02-1683, 58 Fed. Appx. 125 (6th Cir. 2003), the court found that a prisoner with high blood pressure was not subjected to cruel and unusual punishment by being housed in the same cell with smokers, particularly since prison officials twice transferred him to other cells upon his request, when it was proven that his cellmates were in fact smokers.

Additionally, the issue of whether prisoners have been exposed to unreasonable levels of ETS is ordinarily one which requires that plaintiff prisoners provide individual proof of any harm from such exposure. See McIntyre v. Robinson, 126 F. Supp. 2d 394 (D. Md. 2000), ruling that prisoners claiming that excessive exposure to second hand tobacco smoke constituted deliberate indifference to their existing medical conditions and disability discrimination have to provide individual proof; and that correctional officials who took some steps to restrict smoking were entitled to qualified immunity from damages for allegedly exposing prisoners to a risk of future harm.

Housing a non-smoking inmate in a cell with a smoking prisoner did not violate his Eighth Amendment rights when non-smoker did not show a serious medical condition or high level of second-hand smoke which would cause serious medical problems in the future. Jackson v. Berge, 864 F.Supp. 873 (E.D. Wis. 1994). Similarly, a prisoner who failed to show actual injury from exposure to secondhand tobacco smoke did not show a violation of his Eighth Amendment rights; the prison was not deliberately indifferent to impact of tobacco smoke when it made some effort to isolate smoking areas. Simmons v. Sager, 964 F.Supp. 210 (W.D. Va. 1997).

The severity of a prisoner's medical condition, not surprisingly, may lead to a different result as to whether exposure to ETS violated their rights. In Oliver v. Deen, #94-4012,77 F.3d 156 (7th Cir. 1996), the court ruled that prison officials did not engage in "deliberate indifference" to serious medical need by housing prisoner with "mild" asthma with smokers in protective custody unit, federal appeals court rules. On the other hand, in Alvarado v. Litscher, #00-3959, 267 F.3d 648 (7th Cir. 2001), the court found that a prisoner suffering from severe chronic asthma stated a claim for deliberate indifference to his serious medical needs by alleging that he was exposed to high levels of environmental tobacco smoke. See also Jackson v. Commissioner of Correction, 39 Mass. App. Ct. 566, 658 N.E.2d 981 (1995), in which the court reinstated a lawsuit by a nonsmoking inmate with coronary and respiratory problems alleging that prison officials' repeated celling of him with smoking inmates constituted deliberate indifference to his serious medical problems.

Courts have recognized that accommodating the wishes and needs of non-smoking prisoners is not the only problem correctional administrators are confronted with. In Bartlett v. Pearson, No. 1:04CV1293, 406 F. Supp. 2d 626 (E.D. Va. 2005), the court ruled that a prisoner suffering from asthma failed to show that prison officials acted with deliberate indifference to either his request for non-smoking housing or to his asthma itself. The court noted that prisoner was provided with the option of residing in special or segregated housing, and was moved to non-smoking housing after being housed with smokers for a period of 17 weeks. This was not unreasonable, the court found, given crowding problems at the facility and the fact that safety issues had to take precedence over a prisoner's smoking preferences.

A non-smoker who fails to avail himself of readily available opportunities to avoid exposure to ETS may find the courts unsympathetic to his subsequent claims for relief. In Rivera v. Marcoantonio, No. 04-2030, 153 Fed. Appx. 857 (3rd Cir. 2005), the court found that even if the exposure of a civilly committed sex offender to environmental tobacco smoke in a treatment facility caused respiratory distress and aggravated his tuberculosis, he did not show a violation of his Eight

Amendment rights, because he admitted that he was able to escape from the smoke by going to his room.

Without attempting to discuss the issue in any depth, it is worth noting a recent state appeals court decision that viewed the need to restrict tobacco smoking as outweighing any religious freedom right involved in the use of tobacco. In Roles v. Townsend, No. 28073, 64 P.3d 338 (Idaho App. 2003), the court found that a correctional rule prohibiting the smoking of tobacco did not violate a Native American prisoner's right to practice his religion despite his belief that the smoke carries his prayers and would purify his body and spirit. There was an overriding compelling interest in eliminating tobacco in prisons, related to promoting health, reducing litigation, reducing medical costs, and maintaining internal security, the court found. Whether other courts will agree remains to be seen.

In an indication of how far the push for restrictions on smoking in correctional facilities may go in the future, at least one federal appeals court recently ruled that perhaps a prisoner should be allowed to assert a claim for exposure to ETS even without a claimed serious health hazard resulting from the exposure. The court held that a trial court should have allowed the plaintiff prisoner to amend his complaint to assert that his confinement to a cell in which smoking was allowed constituted cruel and unusual punishment even if he could not show that it constituted a serious health hazard. "Maybe there's a level of ambient tobacco smoke that, whether or not it creates a serious health hazard, inflicts acute discomfort amounting, especially if protracted, to punishment." The prisoner allegedly suffered discomfort with cellmates that were heavy smokers for 48 days. Powers v. Snyder, No. 04-1961 2007 U.S. App. Lexis 10327 (7th Cir.).

4. Relevant Resources

The federal Bureau of Prisons has adopted regulations concerning the designation of non-smoking areas in federal correctional facilities. See 28 C.F.R. Secs. 551.160, 551.161, and 551.162. The Bureau has also adopted a more detailed Program Statement on Smoking/No Smoking Areas, 1640.04, last revised on March 15, 2004, which includes provisions concerning the providing of various programs and aids to assist prisoners to stop smoking. The Program Statement includes the providing of nicotine replacement therapy, such as nicotine patches, to inmates, following a medical assessment. Federal prisons became largely smoke free in July of 2004.

For a recent article concerning “why and how” to help prison inmates, correctional officers and staff “break free from nicotine, smoking and tobacco,” see “Prison Smoking Cessation, Tobacco Cessation and Nicotine Cessation,” by John R. Polito. The article reports that, as of January 1, 2008, 24 states will have

100% smoke-free indoor areas, including three (Arkansas, Nebraska, and South Carolina) requiring that the entire prison be smoke free.

A fact sheet concerning current smoking/non-smoking policies at U.S. correctional facilities may be found at http://www.no-smoke.org/pdf/100smokefreeprisons.pdf, and includes links to smoke-free resolutions adopted by a number of correctional organizations, and smoking policies of a number of states.

For a discussion of the negative health impact of secondhand smoke, see U.S. Environmental Protection Agency, Setting the Record Straight: Secondhand Smoke is a Preventable Health Risk, last updated August 23, 2007, and Centers for Disease Control and Prevention (CDC), Fact Sheet, Secondhand Smoke, updated September 2006.

According to the CDC Morbidity and Mortality Weekly Report, MMWR Weekly, March 17, 2006, the prevalence of cigarette smoking for both men and women in the population of those who had ever spent 24 hours on the streets, in a shelter, or in a jail or prison was "more than twice that observed among the overall adult population."

Also of interest is "Relationship Between Smoking Status and Oral Health in a Prison Population," by Karen L. Cropsey, PsyD, Karen M. Crews, DMD, and Stephen L. Silberman, DMD, DrPh, 12 Journal of Correctional Health Care, No. 4, pgs 240-248 (2006), which found that prisoners who smoked or used other tobacco products also had the worst dental health.

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