



ACTION ON SMOKING AND HEALTH
2013 H Street NW • Washington DC 20006-4207 • (202) 659-4310
<http://ash.org>

Dr. James M. Simmons, President
Lamar University
4400 MLK Blvd., P.O. Box 10009
Beaumont, TX 77710

August 3, 2006

BY OVERNIGHT DELIVERY

RE: **Legal Actions For Discriminating Against Pregnant Disabled Employee**

Dear President Simmons:

I am writing because Action on Smoking and Health (ASH) – which serves as the legal-action arm of the antismoking community, and has filed numerous successful complaints and other legal actions on behalf of nonsmokers [see, e.g., <http://ash.org/victories.html>] – has been asked to file legal actions against you individually and personally, as well as against your university, for seriously endangering the health of a pregnant employee with disabilities, as well as the health of her unborn child.

Prior to filing any complaints on her behalf, I wanted to be sure that you were fully aware of the situation and the probable consequences of refusing to provide any protection whatsoever for her or her unborn child, and to respectfully request that you take what we believe is both the moral and legally correct action of allowing her to work in an office without smoking office mates.

In making this request, please be advised that individual administrators who participate in decisions to violate the rights of employees may be individually liable for monetary damages, attorneys fees, and other remedies, as well as to the normal burdens of being a named defendant/respondent in a legal proceeding. Indeed, you may wish to note that my very recent threat to file only one legal action against a single administrator at my own university immediately forced that much larger institution to agree to post signs limiting smoking outdoors. ^{1}

Please note that, as with many of my other legal actions, I will also not hesitate to share with the media your refusal to take even the simplest action to protect a pregnant disabled employee – the easily-ascertained fact that Google has more than a quarter million listings for me and my many activities provides clear evidence that my attempts to publicize this matter will be equally successful.

¹ See, e.g., [Giving In at George Washington U.](#), *Inside Higher Ed* (“George Washington University has agreed to actively discourage smoking around the entrances to all buildings on its campus — a change of heart for which a law professor who threatened to sue a university administrator takes credit.”) <http://insidehighered.com/news/2006/04/25/smoke> See also [Thank You for Not Smoking](#), *Inside Higher Ed* (“Given how freely and frequently John F. Banzhaf III files lawsuits — one of the courses he teaches at George Washington University’s law school is nicknamed “Suing For Credit” — it’s almost remarkable that it took him this long to take direct aim at his employer. But Banzhaf, a professor of public interest law at George Washington for more than 30 years and a crusader against smoking and unhealthy fast food around the world, has turned his anti-smoking campaign on his own institution. And he’s doing so in a way that would hold an individual administrator at GW personally liable, which he asserts could break new legal ground.”) <http://insidehighered.com/news/2006/04/14/smoke> emphasis added.

Please be further advised that, should you and your institution fail to take appropriate action in response to this letter, you may expect the filing of:

(A) A formal legal complaint for workplace discrimination under the Americans With Disabilities Act (ADA) (which provides for the award of attorneys fees as well as monetary damages), and applicable state anti-discrimination statutes;

(B) A formal legal complaint under the federal Occupational Safety and Health Act; a complaint which by law triggers an investigation of your institution;

(C) A formal legal complaint with the Office of Federal Contract Compliance, Employment Standards Administration, U.S. Dept. of Labor, for violation of Sec. 503 of the Federal Rehabilitation Act (which may impact all federal funding your institution now receives);

(D) Legal actions in appropriate courts of law.

FACTUAL BACKGROUND

Ms. XYZ has been employed since about September 1, 2005 as a Tech Support Analyst in the department of University Advancement. Until very recently she worked in Room XXX where she had no problems – and made no complaints – with regard to any health problems.

Recently, she was abruptly ordered by her supervisor XXX – solely for Ms. XXX’s administrative convenience, according to her damaging email – to move to Room XXX. Also assigned to work in Room XXX is ABCDEFG, an employee who smokes outside frequently during the day, and therefore has on his person and clothing throughout the entire work day the clearly discernable residue of tobacco smoke and the many toxic chemicals it contains. ^{2}

Ms. XYZ has severe documented allergies to tobacco smoke, and is also pregnant – a condition which heightens her severe allergies to these chemicals, and also means that exposure endangers not only her own health, but also the health of her defenseless unborn child. Indeed, she has two letters from prominent local doctors clearly attesting to her condition. SEE IMMEDIATELY BELOW:

² Tobacco smoke contains more than 40 chemicals which have independently determined to cause cancer in human beings, and has therefore been officially classified as a “**known human carcinogen.**” 10th Report on Carcinogens, U.S. Department of Health and Human Services, Public Health Service, National Toxicology Program, Pursuant to Section 301(b) (4) of the Public Health Service Act as Amended by Section 262, PL 95-622 [<http://ehp.niehs.nih.gov/roc/toc10.htm>]. See also Environmental Tobacco Smoke in the Workplace, Current Intelligence Bulletin 54, National Institute for Occupational Safety and Health (NIOSH); Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects, National Research Council of the National Academy of Sciences (1986); Environmental Tobacco Smoke, Report of the Scientific Committee on Tobacco and Health, Great Britain (3/20/98); Health Effects of Exposure to Environmental Tobacco Smoke, California Environmental Protection Agency (9/97); The Health Effects of Passive Smoking, National Health and Medical Research Council, Australia (11/97); Tobacco Use: A Public Health Disaster, World Health Organization (W.H.O.), <http://www.who.int/ntday/ntday97/ta3e.htm>

The U.S. Surgeon General has just conclusively demonstrated and authoritatively reported, based upon the most comprehensive study of the issue ever undertaken – **a copy of which is hereby incorporated by reference** – that there is NO risk-free level of exposure to the chemicals in secondhand smoke, with even brief exposure adversely affecting the cardiovascular and respiratory system. Executive Summary, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General, at 12, <http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf>

*“XYZ is currently under my care for her pregnancy. She is extremely sensitive to the chemicals in tobacco smoke and her breathing is adversely affected in the presence of someone who has recently smoked and has the tobacco smoke residue on his clothing. The smoke residue lingers on a person’s clothing long after they have finished smoking. Smoking and second hand smoke has known effect on the placenta that carries nourishment to the baby. Therefore, **to protect her health and the health of her baby, she should not be assigned to an office with someone who smokes during the workday, even if that person doesn’t smoke in that room.**” Dr. XXX.*

*“Ms.. XYZ is so extremely sensitive to chemicals in tobacco smoke that her breathing is adversely affected in the presence of someone who has recently smoked. Her sensitivity is also to the tobacco smoke residue on the person or clothing of a smoker, not just the smoke in the air. Therefore, **to protect her health, especially during her pregnancy, she should not be assigned to an office with someone who smokes during the work day.**” Dr. XXX.*

Although Ms. XYZ has complained several times that this new arrangement threatens her health and that of her child, her supervisor has been unwilling even to discuss the matter. Indeed, in a very telling email, she termed the new arrangement “an official directive not open for discussion.”

Moreover, we understand that you and your office also refused, through your secretary, Ms. HGD, to even discuss this problem with her, as did Ms. QRS of your university’s human resources office, who told her – incorrectly and contrary to the clear law – that she would have to work out the matter with her supervisor (who may well be unaware of the legal requirements).

Needless to say, you and your institution’s failure not only to make a reasonable accommodation to an employee whose extreme sensitivity to tobacco smoke residue qualifies her (as well as her unborn child) for protection under the ADA, but to also refuse even to discuss the matter and seek to work out a mutually satisfactory accommodation (as the law requires) compounds the problems, and makes your conduct and that of your institution even more egregious.

In any event, Ms. XYZ has now exhausted her legal and administrative remedies, and has fully and forcefully brought this matter to the attention of all relevant administrative officials. This letter puts you on clear legal notice of these facts and requests immediate action.

BRIEF LEGAL ANALYSIS

Many courts and agencies have found, often in legal proceedings initiated or assisted by ASH, that persons who are especially sensitive to tobacco smoke and its many constituent chemicals are entitled to protection as handicapped or disabled persons, provided that the sensitivity and exposure significantly affects their breathing – a “major life activity.”^{3}}

³ See, e.g., County of Fresno v. Fair Employment and Housing Commission, Ct of App. State of California, Fifth App. Dist, 266 Cal. App. 3d 1541 (1991) (severe respiratory problems); Flaniken v. Office of Personnel Management, U.S. Merit Systems Protection Board, Dallas Field Office. No. DA831L10001. (1980) (chronic laryngitis); Harmer v. Virginia Electric & Power Co., 831 F. Supp. 1300 (E.D. VA 1993) (bronchial asthma); Hinman v. Yakima School Dist., 850 P.2d. 536 (1993) (asthma); Homeier v. Tulchin, 91 F.3d 959 (7th Cir. 1996) (rhinitis and sinusitis); Parodi v Merit Systems Protection Board, 690 F2d 731 (9th Cir. 1982) (general sensitivity to tobacco smoke); Staron v. McDonald's, 51 F.3d.353 (2nd Cir. 1995) (asthma and lupus); Vickers v. The Veterans Administration, 549 F. Supp 85 (1982) (sensitivity to tobacco smoke); Weir v. Office of Personnel Management, (Merit Systems Protection Board, Dallas Regional Office, Docket No. DA 83IL8610314, 1986) (severe asthma attacks); White v. United States

As such, the law requires their employer to make a reasonable accommodation to their condition so that they can continue working without adversely affecting their health. An accommodation is unreasonable only if it would impose an "undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A) – something which clearly is not the case in the instant situation.

Please note that it is well established that persons who are sensitive to the residue of tobacco smoke, as well as to tobacco smoke itself, are entitled to protection and to a reasonable accommodation, and that employers who fail to provide it can be held liable for damages and attorney fees. See, e.g., Service v. Union Pacific Railroad Company, 153 F. Supp. 2d 1187 (E. Dist. CA 2001).

The law provides that formal legal complaints may be filed under the “general duty clause“ of the OSHA Act [29 USC § 654(a)(1)] which requires that “each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees,” and OSHA’s regulations provide that an inspection must be made if a valid complaint is received. [CPL 02-00-140].

In literally dozens of legal proceedings, both public and private entities have been found liable for medical problems caused by creating, maintaining, or permitting conditions which exposed nonsmokers to the chemicals in tobacco smoke,^{4} often even when the amounts of exposure were minimal.^{5} Indeed, the U.S. Supreme Court has upheld a wrongful death verdict in favor of the estate of a nonsmoker exposed for only several hours to drifting tobacco smoke.^{6} Several courts have held that knowingly causing the exposure of another to tobacco smoke can constitute the intentional tort of battery,^{7} thereby opening the door to potential punitive damage awards, and possibly removing any qualified immunity for state employees.

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

⁴ See, e.g., Clemmons v. Bohannon, 918 F.2d 858 (10th Cir. 1990); McKinney v. Anderson, 924 F.2d 1500 (9th Cir. 1991); Helling v. McKinney, 509 U.S. 25 (1993); Lizzio v. Lizzio, 162 Misc. 2d 701 (Fam. Ct. Fulton Cty. Ga. 1994); Warren v. Keane, 196 F.3d 330 (2d Cir. 1999); Alamin v. Scully, 2000 U.S. Dist. LEXIS 13143 (S.D.N.Y.); Alvarado v. Litscher, 267 F.3d 648 (7th Cir. Wis. 2001); Service v. Union Pac. R.R. Co., 153 F. Supp. 2d 1187 (E.D.Cal. 2001).

⁵ See, e.g., Schiller v. Los Angeles Unified School District PAS656, PAS 1750, LA 607109, Calif. Workers’ Comp. Appeals Board 3/20/92 (Smoke drifting up for a first-floor smoking area into a second-floor classroom was enough to trigger chronic lung disease in a teacher who was awarded \$29,999).

The **U.S. Surgeon General** has just conclusively demonstrated and authoritatively reported, based upon the most comprehensive study of the issue ever undertaken – a copy of which is incorporated by reference – that there is NO risk-free level of exposure to the chemicals in secondhand smoke, with even brief exposure adversely affecting the cardiovascular and respiratory system. See footnote 2.

⁶ Olympic Airways v. Husain, 540 U.S. 644 (2004).

⁷ See, e.g., Leichtman v. WLW Jacor Comm., 1994 WL 19097 (Ohio App. 1994); Richardson v. Hennly, 434 S.E.2d 772 (Ga. App. 1993); Portenier v. Republic Hogg Robinson Inc., BC028990, Los Angeles Sup. Ct.; See also Pechan v. Dynapro. Inc., 190 Ill. App.3d 1072 (2d Dis. IL 1993) (battery by secondhand smoke possible); McCracken v. Sloan, 252 S.E.2d 250 (N.C. 1979) (defendant would be liable for battery if he had known of harmful effect of ETS); Richardson v. Hennly, 434 S.E.2d 772, 775 (Ga. Ct. App. 1993), rev'd on other grounds, 444 S.E.2d 317 (Ga. 1994) (tobacco smoke can cause battery).

In a recent law suit which has already resulted in a \$300,000,000 settlement, ^{8} the major tobacco companies have stipulated – and now publicly admit on their web sites and in widely-broadcast television ads – that secondhand tobacco smoke and the many chemicals in it are linked to a wide variety of serious medical problems including cancer in nonsmokers; a concession – and now common knowledge – which plaintiffs/complainants can rely upon in any legal action.

RELIEF RESPECTFULLY REQUESTED FOR Mrs. XYZ

For all of the reasons set forth above, it is respectfully requested that Lamar University take one of the two very simple and reasonable actions suggested below:

1. Immediately transfer Ms. XYZ to an office to which a smoker who smokes during the day is not also assigned. Room XXX, where she worked initially, appears to be satisfactory.
2. Immediately transfer Mr. ABCDEFG, a male employee who smokes outside frequently during the day, to an office other than the one to which Ms. XYZ is also assigned.

Since Ms. XYZ's original transfer, according to her supervisor's email, was made solely for the administrator's convenience, it appears virtually certain that Lamar University cannot claim – much less establish – that either step would impose an "undue hardship." Indeed, under all the circumstances – and express requests by two eminent local physicians that, to protect her health, she be assigned to an office without a smoker – either action would seem to be a most reasonable accommodation, especially for her brief remaining period of employment prior to giving birth.

Please be reminded that failure to take very prompt action in response to this letter will result in legal action and adverse publicity. It may also make the university liable not only for her own health problems caused and/or exacerbated by on-the-job exposure to the chemicals in tobacco smoke, but also for any birth defects, premature and/or underweight birth, etc. of her soon-to-be-born child.

We thank you for your cooperation, and trust that we will receive a very prompt written response.

Yours truly,

Law Professor John F. Banzhaf III
Executive Director and Chief Counsel
<http://banzhaf.net>

CC: Annette Thompson, Assoc. VP for Human Resources; Brian Sattler, Director, Public Relations; John Whittle, Director, Risk Management – Lamar University

Charles R. Matthews; Chancellor; Dr. Fernando Gomez, Esq., Counsel; Dr. Charlotte A. Sullivan, Special Assistant to the Chancellor; Peter Graves, Assoc. Vice Chancellor for Contract Administration – Texas State U.

⁸ See, e.g. Decision of Note: Nonsmoking Flight Attendant Is a Winner In Secondhand Smoke Case, *Product Liability Law & Strategy*, July 2002.