MINUTES OF THE MEETING
PUBLIC HEALTH, WELFARE AND SAFETY COMMITTEE
MONTANA STATE SENATE

MARCH 22, 1983

The meeting of the Public Health, Welfare and Safety Committee was called to order by Chairman Tom Hager on Tuesday, March 22, 1983 in Room 415 of the State Capitol Building.

ROLL CALL: All members were present. However, Senators Marbut and Jacobson arrived late. Woody Wright, staff attorney was also present.

Many visitors were also in attendance. (See attachments.)

CONSIDERATION OF HOUSE BILL 445: Representative Bob Ellerd of House District 45, the chief sponsor of House Bill 445, gave a brief resume of the bill. This bill is an act to require a nonsmoking area to be designated in all enclosed public places; removing the option of designating the entire area of a public place as a smoking area.

Mr. John McBride of Butte stood in support of the bill. He is employed as the Senior Scientist at the National Center for Approriate Technology. He has been involved in air pollution related research most of his life. Smokers in the United States consumed a total of 615 billion cigarettes in 1978. Smoke from these cigarettes is a mixture of gases and small particles. Each cigarette smoked has the potential to produce 5 trillion particles and each particle can contain any combination of over 2,000 chemical pounds that have been identified in tobacco smoke. Many of these compounds are known cancer causing agents. Mr. McBride handed in written testimony to the committee for their review. See exhibit 1.

Stan Frasier of Helena stood in support of the bill. Mr. Fraiser statd that every person should have the choice of working or eating in a clean smoke free atmosphere. This is a bill that will harm no one. "This bill can make life more pleasant for the majority of us who do not smoke". Mr. Frasier handed in written testomony for consideration by the committee. See exhibit 2.

Vern Sloulin of the Department of Health, stood in support of the bill. He stated that under the present law there have not been any citations issued.

Wade Wilkinson, LISCA and all senior citizens stood in support of the bill. He stated that many senior citizens do not eat out because of the smoke in the establishments.

Kathleen Smith of Helena stood in support of the bill. She stated that passage of this bill will show the respect to all Montana residents and visitors which they have a right to. If this bill is passed, smokers will still be able to smoke and non-smokers will not be required to do so.

Kathy Stahl, herself as a smoker, stood in support of the bill. She stated that this bill will not harm anyone.

Dr. Sidney Pratt, chief of the Clinical Programs Bureau of the Division of Health Services and Medical Facilities of the State Department of Health and Environmental Sciences, stood in support of the bill. Dr. Pratt stated that the department would like to go on the record as being in favor of the bill. Dr. Pratt offered written testimony to the committee. See exhibit 3.

Mary Gettel of Great Falls stood in support of the bill. She stated that this bill is long overdue. Mrs. Gettel was working for a firm last fall and felt forced to quit because of the smoke, which created a hazzard to herself and her unborn child. When supervisors tell employees to put up or shut up, the employees will have the law to turn to if this bill is passed. Having no where to turn, she quit, and is unable to receive unemployment benefits for she is unable to prove that the smoke was a health hazard. It is time that the filthy habits of some, do not interfere with the rights of all others.

Earl W. Thomas, executive director of the American Lung Association of Montana, stood in support of the bill. He stated that the harmful effects of second-hand smoke are well documented in the "Surgeon General's Report on Smoking and Health". This bill asks only that people be given a choice of smoking or non-smoking areas. Anyone who travels by commercial airlines is well aware of the choice people make, when given the choice. Mr. Thomas handed in written testimony to the committee. See exhibit 4.

Linda Sletten, intern for the Montana Medical Association, stood in support of the bill. Miss Sletten handed in written testimony to the committee for their consideration. See exhibit 5 and 6.

Shirley Thennis of the Montana Nurses' Association, stood in support of the bill. She stated that in the interest of good health and prevention of the many diseases that are associated with cigarette smoke, and smoking the Montana Nurses' Association supports HB 445.

Doug Olson, attorney, representing the Montana Senior's Advocacy Assistance, stood in support of the bill. He stated that the primary concern of his group is restaurants. Many senior citizens suffer from lung diseases which can be aggravated from exposure to tobacco smoke. Mr. Olson handed in written testimony to the committee for their consideration. See exhibit 7.

A letter was presented from Debra A. Reiter of Billings with a list of other concerned citizens from her area in support of the bill. See exhibits 8 and 9.

With no further apparent proponents the chairman called on the opponents.

Tom Maddox, representing the Montana Association of Tobacco and Candy Distributors, stood in opposition to the bill. Mr. Maddox stated that that this bill is excessive and should be killed. He handed in many pieces of written testimony to the committee for consideration and also a newspaper article regarding the same. See exhibits 10 and 11.

Don Larson, representing the Montana Taverns Association, stood in support of the bill. He stated that it seems that in every legislative session they must defend themselves against bills such as this which do nothing more than give government another opportunity to interfere with the conduct of their business and their relationship with the customers. Mr. Larson's family has been in business in Helena for 33 years. He handed in written testimony for the committee to consider. See exhibit 12.

Paul Erb, owner of Howard's Pizza in Great Falls, stood in opposition to the bill.

Don Pratt, representing the Montana Restaurant Association, stood in opposition to the bill. He stated that as the law is written it is vague. Where does one draw the line. Mr. Pratt spoke against the mandatory section. He then urged the COmmittee to vote against this bill.

Blake Wordahl, representing the Montana Hardware and Implement Association which is a trade association composed of retail hardware and farm implement dealers, spoke against the bill. A retail hardware or farm implement store is not an establishment where customers are sedate or stay in one place. It does not make economic sense to set up separate display areas for smokers and non-smokers. Nor is it feasible to enforce a non-smoking prohibition as a customer moves from shovels to rakes. Many businessmen and women now prohibit smoking in their stores by choice. Mr. Wordal handed in written testimony to the committee for their consideration. See exhibit 13.

Representative Ellerd stated that Dr. Robert Shepard had arrived late and would like to speak as a proponent if the chairman was willing. The chairman stated that this would be premissible, however, the opponents would be given equal time.

Dr. Robert Shepard of Helena spoke in support of the bill. He stated that the real issue is those people who are highly alergic to sigarette smoke. Do people have a right to smoke at the expense of the lives of other people. Seventy percent of the non-smokers show irritation to cigarette smoke. Children are very sensitive to cigarette smoke. People deserve an effort for clean air.

Don Pratt spoke for the opponents and stated that this bill does not help the problem to which Dr. Shepard addressed, as there would still be smoke in the air for the people to inhale. He asked for the committee to not concur in this bill.

Representative Ellerd closed. He stated that everyone has a right to clean air. There are many things to be considered in this bill. Smokers enfringe on the rights of non-smokers. He stated that in small establishments perhaps one booth or stool could be marked "non-smoking area" to show that the people are trying to comply with the law. He asked the comittee for favorable consideration on this bill.

The meeting was opened to a question and answer period from the committee.

Senator Hager asked Mr. Larson about the air cleaning equipment which he purchased after passage of the smoking bill last session.

Senator Marbut asked how much area of an aircraft is reserved for non-smokers. At the present time 2/3 percent is reserved for non-smoking and 1/3 is for smoking.

Senator Marbut asked how much of an establishment would have to be reserved for non-smokers. Representative Ellerd stated that this had not been decided in the bill.

Senator Stephens asked if this bill would also deal with banquets. Representative Ellerd stated that at banquets all that would have to be done would be to set aside a small area or table or two with signs marked "non-smoking".

Senator Hager who would police this. Representative Ellerd stated that the fine is against the owner of the establishment and not the smoker.

Senator Norman asked about taking the fine off of the bill.

Senator Stephens asked about the compliance issue and the department trying to enforce this.

DISPOSITION OF HOUSE BILL 322: This bill sponsored by Representative Metcalf is an act involving emergency medical services.

A motion was made by Senator Marbut that the bill be amended on page 1, line 19, strike: "but not limited to" and strike the word "air".

Senator Christiaens stated that be feels that this bill is necessary for the training of the people.

A vote was taken on the motion of Senaor Marbut. Motion failed with everyone voting"no"except Senator Marbut.

A motion was made that the bill BE CONCURRED IN as amended by Senator Christiaens. Motion failed with everyone voting "no"except Senator Christiaens. See Roll Call Vote.

The chairman asked if the vote could be reversed, everyone felt that this would be permissible. Therefore, HB 322 would receive a recommendation of BE NOT CONCURRED IN as amended recommendation.

DISPOSITION OF HOUSE BILL 604: This bill intorduced by Representative Wallin is in regards to the rights of patients.

A motion was made by Senator Norman that the bill receive a recommendation of BE NOT CONCURRED IN as this is already being done because of a federal mandate. Motion carried.

DISCUSSION ON HOUSE BILL 708: House Bill 708 was introduced by Representative Quilici is in relation to low-energy income assistance.

Senator Himsl asked Judy Carlson of the department of SRS if the department feels that this bill is needed. Ms. Carlson stated that the department did not feel that this bill is needed that the HRDC would be able to keep working as they have in the past.

ANNOUNCEMENTS: The next meeting of the Public Health, Welfare, and Safety Committee will be held on Wednesday, March 23, 1983 in Room 410 of the State Capitol Building to consider HB 279, HB 312, and HB 360.

ADJOURN: With no further business the meeting was adjourned.

SENATOR TOM HAGER, CHAIRMAN

eg

ROLL CALL

PUBLIC HEALTH, WELFARE, SAFETY COMMITTEE

48th LEGISLATIVE SESSION -- 1983 Date 3/22/8

NAME	PRESENT	ABSENT	EXCUSED
SENATOR TOM HAGER	✓		
SENATOR REED MARBUT	late		
SENATOR MATT HIMSL	✓		
SENATOR STAN STEPHENS	✓		
SENATOR CHRIS CHRISTIAENS	✓		
SENATOR JUDY JACOBSON	late		
SENATOR BILL NORMAN	✓		

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Mary Kettel	Self	445	✓	
Shirley A Thennis	Montana Nurses Assn	445	✓	
Kathleen Smith	Self	445	✓	
Thomas W. Maddox	MT. Assn. of Tobacco, Candy	445		✓
Stan Frasier	Self	445	✓	
Earl W. Thomas	Montana Lung Assn	445	✓	
Blake J. Wordal	MT Hardware & Implement Assn	445		✓
Doug Olson	MT Senior Advocates	445	✓	
D. W. Larson	M.T.A.	445		✓
John McBride	self	445	✓	
Bob Durkee	Mont Tavern Assn	445		✓
Vernon E. Sloulin	Dept. of Nat. Res.	445	✓	
Wade Wilkison	LISCA	445	✓	
Paul Cole	Howard's Pizza	445		✓
Roland D Platt	MT Restaurant Assoc	445		✓
Maureen Doyle	self	445	✓	
Kathy Stays	"	445	✓	
L.E. Mancio	Mtn Bell	445		
S. C. Pratt, MD	DHES	445	✓	
Carol Fraser	417 N. Warren	445	✓	
Linda Sletten	Legislative Intern Montana Medical Assoc	445	✓	
Jean T Rundorf	Mt. Medical Assn	445	✓	
Gene Solomon	Mt	—	✓	
Chele Waltermire		445	✓	
Christy Bitz		445	✓	
Julie Murphy	Self	445	✓	

(Please leave prepared statement with Secretary)

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Karrie Simic		445	✓	
Mona Halmar	self	445	✓	
[illegible]	self	445	✓	
[illegible]	[illegible]	445	✓	
[illegible]	[illegible]	[illegible]	✓	
Rep. Jim Jensen	self	445	✓	
Phil Stroope	Mont Innkeepers	445		✓

(Please leave prepared statement with Secretary)

Exhibit 1

Mr. Chairman, Members of the Committee:

My name is John R. McBride. I reside at 3111 Carter Street in Butte. I am employed as the Senior Scientist at the National Center for Appropriate Technology. I have been involved in air pollution related research for most of my adult life. In my position at NCAT, I am currently preparing a consumer oriented manual on indoor air pollution, particularly as it relates to energy conservation and reducing air infiltration in houses. However, today I am on vacation and speaking as a private citizen.

I believe that both Montana's and our National air pollution control strategies are seriously flawed. Nationally we have spent billions, and in Montana, millions of dollars controlling outdoor air pollution. Yet until recently, we have completely ignored the indoor air that we breathe for 90% of the day. We have assumed that when a person is indoors he is protected from air pollution. That assumption is absolutely false. For many pollutants indoor air pollution levels are actually higher than outdoor levels. One of the main offenders in this regard are the pollutants from tobacco smoke.

Smokers in the United States consumed a total of 615 billion cigarettes in 1978. Smoke from these cigarettes is a mixture of gases and small particles. Each cigarette smoked has the potential to produce 5 trillion particles and each particle can contain any combination of the over 2,000 chemical compounds that have been identified in tobacco smoke. Many of these compounds are known cancer causing agents.

Particulate matter is usually classified by size. The size fraction of particulate matter that can be inhaled and retained in the lungs is called respirable particulate. This size fraction is also of greatest health concern. The major source of exposure of the general public to respirable

particulate matter is not industrial pollution, it is probably indoor tobacco smoke. Even "adequate" ventilation cannot be counted on to control tobacco smoke. Scientific studies have demonstrated that under the normal range of ventilation rates and building occupation densities, the particulates generated by smokers overwhelm the effects of ventilation and inflict a substantial air pollution burden on the non-smoking public. These same scientific studies demonstrate that respirable particulate levels in places where tobacco is smoked greatly exceed levels found in no-smoking areas indoors and the ambient outdoor air. In one restaurant studied in the Washington, D.C. area, the smoking section, with only one person smoking out of an average of thirty occupants, had a 70% higher respirable particulate level than the no-smoking section of the same restaurant. Respirable particulate levels measured in bars, lodge halls, bingo games, cocktail parties and other areas where smoking is prevalent all had respirable particulate levels substantially higher than the worst levels recorded in the outdoor air in either Helena or Missoula this past winter. Repeated exposure to indoor tobacco smoke exposes non-smokers to pollution levels that exceed the primary National Air Quality Standard for particulate matter.

Our society has a long record of limiting involuntary exposure to pollutants. We have thoroughly regulated industrial air pollution. We have limited exposure to cancer causing agents such as asbestos, and to substances that have caused cancer in laboratory animals such as formaldehyde and cyclamates. We must now turn our attention to a glaring oversight in environmental protection: indoor air quality.

In my judgement unregulated smoking in public places is one of the most serious environmental conditions in Montana today. Thus, I strongly support Representative Ellerd's bill to provide no-smoking areas in public places. This legislation will have substantial positive impact on Montana's environment, and the health of those citizens who wish not to pollute themselves with tobacco smoke.

C K Exhibit 2

HOUSE BILL NO. 445

A PERSONAL VIEW IN SUPPORT OF CLEAN AIR

The requirement of NO SMOKING areas in public places is long overdue.

Every person should have the choice of working or eating in a clean smoke free atmosphere.

This is most true of the work place. No one should be subjected to unpleasant and unhealthy air because they must work to earn a living.

We heard the argument when this bill was in the House, that "this should not be legislated, but should be left to common courtesy". We all know that in most cases this does not work. Smokers who seem to have so little regard for their own health cannot be expected to show much concern for the health and comfort of others.

When opponents to this bill speak, you may hear a lot of moaning about all the trouble and expense restaurants will have to go to in order to comply with such a law. If they have complied with the law passed two years ago and have posted a sign on the door which says "THERE ARE NO DESIGNATED SMOKING AREAS IN THIS BUILDING", they need go to no further expense.

We may hear that restricting smoking will hurt a restaurants business. My family would eat out more often if we could do so free from smoke.

We may hear about the rights of smokers. Do these rights include the right to foul the air we all must breathe?

I cannot believe that any smoker could not go without, for the short time it takes to eat a meal.

This is a bill that will harm no one. This bill can make life more pleasant for the majority of us who do not smoke.

Submitted by,

Stan Frasier
417 North Warren
Helena, MT 59601
March 22, 1983

cdf

rm CS-34
9

NAME Kathleen Smith BILL No. 445

ADDRESS POBox 413 Hlna 59624 DATE 3/22/83

WHOM DO YOU REPRESENT Self

SUPPORT V OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

I feel strongly that the passage of HB445 will show the respect to all Montana residents & visitors which they have a right to. If the bill is passed, smokers will still be able to smoke & non-smokers will not be required to.

Thank you for your time & efforts!

exhibit 2

TESTIMONY BEFORE THE SENATE COMMITTEE
ON PUBLIC HEALTH WELFARE AND SAFETY
March 22, 1983

Mr. Chairman and Members of the Committee: For the record, I am Dr. Sidney Pratt, Chief of the Clinical Programs Bureau of the Division of Health Services and Medical Facilities of the State Department of Health and Environmental Sciences. I am here representing the State Department of Health and Environmental Sciences in order to enter into the record the statement that the Department is supporting HB445.

From a public health viewpoint, this is an appropriate amendment to Section 50-40-104, the Montana Clean Indoor Air Act.

Thank you.

rm CS-34
9

NAME Mary Gettel BILL NO. 445

ADDRESS 802 30 Th ST. NO: DATE 3/22

WHOM DO YOU REPRESENT self

SUPPORT ✓ OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: Hello, I am Mary Gettel, I came from G.F. today rep. myself an unemployed elementary teacher. Working for a firm last fall I felt forced to quit ~~job~~ ~~this last fall~~ because of the smoke, ~~[redacted]~~ which created a health hazard to myself & my unborn child. When supervisors tell employees to put up ~~[redacted]~~ & shut up, the employees will have the law to turn to if this bill is passed. Having no where to turn, I quit, & am unable to receive unemployment benefits for I can not prove that the smoke was a health hazard. This bill is over due! It is time that the filthy habits of some, do not interfere with the rights of us all.

Exhibit 4

AMERICAN LUNG ASSOCIATION OF MONTANA

Christmas Seal Bldg. — 825 Helena Ave.
Helena, MT 59601 — Ph. 442-6556

EARL W. THOMAS
EXECUTIVE DIRECTOR

March 22, 1983

To: Members of the Senate Public Health Committee

From: Earl W. Thomas, Executive Director of
AMERICAN LUNG ASSOCIATION OF MONTANA

Subject: HB445, which will require that most public places have a designated "no smoking" area

The harmful effects of second-hand smoke are well documented in the "Surgeon General's Report on Smoking and Health," yet I feel that is hardly the issue with HB445.

The bill asks only that people be given a choice of smoking or non-smoking areas. Anyone who travels by commercial airlines is well aware of the choice people make, when given the choice.

Please give non-smokers a choice by giving a "do pass" recommendation to HB 445.

Thank You.

NAME: Linda Sletten DATE: 3-21-83

ADDRESS: Helena MT

PHONE: 442-5089

REPRESENTING WHOM? Montana Medical Association

APPEARING ON WHICH PROPOSAL: HB 445

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENTS: See Attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

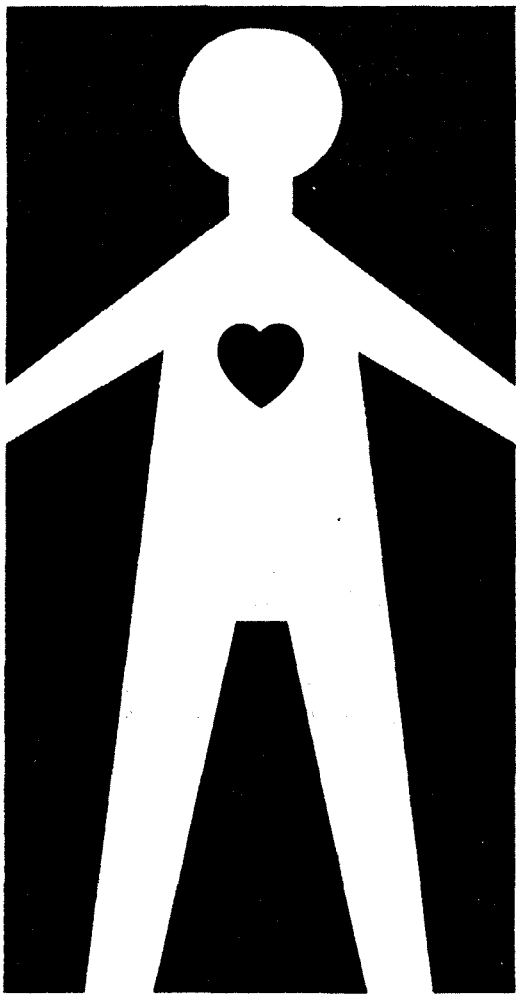
Exhibit 3

Mister chairman, members of the committee, for the record, my name is Linda Sletten. I am employed at a local medical clinic and a part-time student at Carroll College, currently enrolled in the legislative internship program as an intern to the Montana Medical Association. I'm sure you are all well aware of the health hazards associated with cigarette smoking and of the hazards presented to non-smokers who are confined in areas with smokers, however also of great significance are the costs associated with cigarette smoking. Since the Surgeon General's report in 1964, warning of the hazards of smoking, studies have shown that the incidence of many serious and costly diseases such as cancer of the lungs, chronic bronchitis, emphysema, and atherosclerotic heart disease are much greater in smokers than in non-smokers. A pamphlet distributed by the American Heart Association states that in studies of various population groups it was found that the average increase in death rates from heart attacks in men was 70% higher among cigarette smokers than among non-smokers. In the latest issue of the New England Journal of Medicine, Dr. Weldon Walker states: "Ischemic heart disease remains America's leading cause of death and is the area of most rapidly escalating health care costs." Coronary artery bypass graft surgery, first reported in 1968, has revolutionized the treatment of atherosclerotic heart disease. These advances in medicine along with [redacted] consumer expectations for easy cures without self-denial have contributed to steadily increasing costs in health care. Surgical cures are more acceptable than exercising self-control. An article in the American Journal of Nursing, July 1982, issue states; "In 1980 an estimated 100,000 coronary artery bypass graft operations were performed at an average cost of $12,500 per patient, resulting in a total cost of approximately 1.3 billion, not an insignificant portion of our national health care expenditures. Based on trend analysis, the number of bypass operations performed annually since 1971 has increased at a rate of 15 to 25 percent per year." Cigarette smoking has in this one instance contributed significantly to escalating health care costs. A program that will stimulate a more healthful life style remains our major challenge. HB 445 requiring a designated non-smoking area in all enclosed public places is a step toward recognition of consumer responsibility in this very important area of preventative medicine.

What everyone should know about

smoking and heart disease

American Heart Association



orm CS-34
79

NAME Shirley A. Theonis BILL No. 445

ADDRESS Helena, Mt. DATE 2/22/83.

WHOM DO YOU REPRESENT Montana Nurses Assn.

SUPPORT ✓ OPPOSE AMEND

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

In the interest of good health & prevention of the many diseases that are associated with cigarette smoke, & smoking, the Montana Nurses Association supports HB 445. -

MONTANA SENIORS' ADVOCACY ASSISTANCE

P.O. Box 232 • Capitol Station • Helena, Montana 59620
(406) 449-4676

DOUGLAS B. OLSON, Attorney

March 22, 1983

Senators,
Senate Public Health Committee
48th Legislative Session
Capitol Station
Helena, Montana 59620

re: House Bill 445

Dear Chairman Hager and Committee Members:

Montana Seniors' Advocacy Assistance (MSAA) would like to go on record as supporting House Bill 445 sponsored by Rep. Ellerd of Bozeman. This bill would amend the Montana Clean Indoor Air Act to require that every enclosed public place subject to the Act provide a place for the non-smoking public, who statistics have shown are a majority of Montanans.

Of primary concern to senior citizens are restaurants. Many senior citizens suffer from lung diseases which can be aggravated from exposure to tobacco smoke. As the attached article from the April 29, 1982, Great Falls Tribune, page 6A, states, non-smokers do suffer injury to their health from smoke-filled air. The article cites studies reported in the well-respected New England Journal of Medicine that show that,

> "'passive smoking,' or being forced to inhale the air polluted by smokers, does significantly affect the lung function and the decreased lung function can be measured."

The traveling public is often forced to decide whether to eat in a restaurant with no provisions for the nonsmoker or not to eat at all. House Bill 445 will help remedy this dilemma by requiring that some provisions be made for nonsmokers. This bill does not ban smoking in restaurants and other enclosed public places but rather requires the managers of these places to be considerate of the majority of our citizens who do not smoke and who do not want their health endangered as a result of those who choose to do so. "Passive smoking" is a public health problem that this bill will enable the public to avoid. I strongly encourage your committee's and the full Senate's passage of this bill. Thank you for an opportunity to address this issue.

Sincerely,

Douglas B. Olson

Douglas B. Olson
Attorney

attachment

Nonsmokers do suffer from smoke-filled air

By MONTE GAGLIARDI
Montana Extension Service

If you are a nonsmoker, do you need to be concerned about being exposed to tobacco smoke? Is it an unnecessary hazard to your health?

Compared to the smoke inhaled, there is twice as much tar and nicotine from the burning end of a cigarette, five times as much carbon monoxide, and 46 times as much ammonia. There are approximately 4,000 compounds generated by burning tobacco.

Studies have shown that newborn children of smoking parents are twice as likely to develop pneumonia or bronchitis in the first year of life.

Studies of the respirable suspended particulares (RSP) in indoor and outdoor environments in relation to smoking by the Environmental Protection Agency showed that "under the practical range of ventilation conditions and building occupation densities, RSP levels generated by smokers overwhelm effects of ventilation and inflict significant air-pollution burdens on the public."

In an independent investigation from the University of California, reported in the "New England Journal of Medicine," Doctors J.R. White and H.F. Frobe wrote, "We conclude that chronic exposure to tobacco smoke in the world environment is deleterious to the nonsmoker and significantly reduces small airways function." The investigators demonstrated conclusively that "passive smoking," being forced to inhale the air polluted by smokers, does significantly affect the lung function and the decreased lung function can be measured.

Many of the studies of the harmful effects of passive smoking are based on studying healthy people. The harmful effects of secondhand tobacco smoke can be much greater on those who have some illness.

Dr. W.S. Aronow of the Long Beach Veterans Administration Hospital has studied the influence of passive smoking on men who have coronary artery disease and develop angina pain during exertion.

He had men sit in a room with smokers and then tested them to determine how much exercise they were able to do before developing heart pain. Exposure to a room with smokers significantly decreased the amount of exercise the men could do before the pain started.

He also noted an increase in blood pressure and irregular heartbeats after the patients were exposed. The irregular heartbeats could be serious, as such beats in heart patients may be the beginning of a serious and sometimes fatal heart irregularity.

Obviously the patient who has a pulmonary disease, such as asthma or chronic bronchitis, should not have the added burden of exposure to air polluted with tobacco smoke.

March 18, 1983

Senate Public Health, Welfare and Safety Committee
Senator Tom Hager, Chairman
Montana State Senate
Capitol Station
Helena, MT 59620

Dear Senator Hager and Members of the Committee:

I would like to voice my support for House Bill 445 which will be coming before you Wednesday, March 23rd. This bill is sorely needed as a measure of preventive health. Studies show that exhaled smoke, (especially that inhaled by non-smokers who otherwise do not smoke) is more damaging than the initial smoke inhaled by the smoker alone.

I also feel strongly that when dining in a restaurant I should not have to smell cigarettes, pipes and/or cigars while I am trying to enjoy my meal. It appears curious to me that it should be any problem at all to section off areas in restaurants to accomodate both smoking and non-smoking patrons.

Thus, my urging for this committee's support of HB 445. For the sake of good health---please!

Sincerely,

Debra A. Reiter

Debra A. Reiter
1643 Yellowstone Avenue
Billings

cc:
Senator Reed Marbut
Senator Chris Christiaens
Senator Matt Hinsl
Senator Judy Jacobson
Senator Bill Norman
Senator Stan Stevens

p.s. Please distribute the enclosed copies

OTHER CONCERNED CITIZENS IN SUPPORT OF HB 445

NAME	ADDRESS
Gayle M. Webel	4744 Box Canyon Rd Blgs
Barbara Sunderland	603 Starlight Dr. Blgs, Mt
David C. Vance	P.O. Box 21201 Billings, Mt
Jane Lambrow	2114 Glasser Place Blgs
Lenice Byrd	3531 Kingswood Billings, Mt
Virginia Bell	2391 Ave C #7 Blgs, MT 59102
Ron Arneson	1431 Concord Dr. 59101
Ragnar Hartman	901 Ave B Billings 59102
Karen McStelle	2524 Lou... Blg 59102
Bill McCormick	1928 Lake Elmo Blgs Mt.
Tom Haugeberg	124 No. 24th #33 Blgs MT
Jim Van Buskirk	38 Ave C Blgs
Randy Nelson	617 25th st West Blgs mt
Robert A. Saiko	408-13th St West Blgs Mont
DEBBIE MCKEEN	127 Wyoming #3 Blgs MT
Arnold Reiter	1643 Yellowstone Ave 59102

Exhibit 10

WITNESS STATEMENT

Name Thomas W. Maddox Senate Committee On Public Health

Address P.O. Box 123 HELENA MT 59624 Date 22 March 1983

Representing Montana Association of Tobacco and Candy Distributors Inc. Support

Bill No. 445 Oppose HB445

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. In 1973 the legislature received HB157 and rejected it as being excessive. HB173 stated, "Smoking shall be prohibited in all places of public resort, accommodation or amusement.... capable of accommodating more than 30 persons, or restricted to a specific well ventilated area within the public place." HB445 is equally excessive and should be killed. A copy of this bill is attached.
2. In the decade of enactment of similar bills across the United States, experience has been that excessive acts have been tested in courts and antismokers have been told they do not have inherent constitutional rights against cigarette smokers. See court cases, copy of which have been submitted to the Committee for its records.
3. There are penalties for violation of HB445 if enacted. Beyond specific fines, does not 50-40-108 invoke all powers of the local and state health departments? Their laws call for help of the sheriff, constable or peace officer to assist health inspectors, and authorize health department funds for employing special prosecution. (50-2-120-124. (50-1-103 - 104)
4. In holding an act like HB445 unconstitutional in Illinois, the court held such law "shall not be vague, indefinite or uncertain; additionally, it must provide sufficient standards to guide policing agencies and the courts in the administration.... (Acts) which are so incomplete, vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application are unconstitutional as denying due process... under out state and national constitutions." HB445 is lacking in reasonable understanding of segregation numbers, space, conditions, for the public place owner or manager, or the policing health employees.
   The Virginia Supreme Court ruled a bill like HB445 unconstitutional, as "an unconstitutional exercise of police power." A copy of this decision is submitted with testimony
5. In these hard times, enactment of HB445 would be anti-recovery, anti-economy action. It would be impossible to comply with for large business conventions and banquets, and for our smaller restaurants.

Note below:

NOTE: Available in Montana Law Library: Cites on constitutional rulings adverse to thrust of HB445: Kensell vs. Oklahoma governor et al CIV -81-786-T (W. D. OK 1982);

Itemize the main argument or points of ~~your testimony. This~~ will assist the committee ~~secretary~~ with her minutes.

Gasper vs. Louisiana Stadium and Exposition Corporation Cite 418-F-SUPPL. 716 (E. D. LA '76 affirmed F. 2D897 (5th U. S. Circuit 1978); Cert. denied 439 U. S. 1079 (1979);

Alford vs. Newport News, Va. Record No. 790-322, Circuit Court, Newport News, Virginia

FORM CS-34
1-83

6. The present act is working. See copy of American Lung Association survey story.

43rd Legislative Assembly 1973

HOUSE BILL NO. 157

INTRODUCED BY Holmes - ENG Bennetts
Stog Watt HAINES MARBUT

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROHIBIT OR RESTRICT SMOKING IN PUBLIC PLACES." Hal Harper

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. Smoking shall be prohibited in all places of public resort, accommodation, assemblage or amusement, as defined by section 64-302(5), capable of accommodating more than thirty (30) people or restricted to a specific well-ventilated area within the public place.

-End-

KILLED —

INTRODUCED BILL

To: Forty-eighth Session, Montana Legislature

Re: Opposing comments on HB445; mandatory segregation of public places.

Montana House Bill 445 should not be enacted for many reasons. Ten of these reasons why HB445 should be killed are summarized here, with supporting detail in ensuing pages:

1. Understanding the history of the subject supports a vote that HB445 do not pass. Over 10 years the Montana legislature has rejected the more excessive proposals in a series of such bills.

2. Federal, state and district court case law have ruled such acts unconstitutional. Study the attached summary of cases.

3. HB445 is patently excessive; to a degree that the state would be vulnerable to challenge in court, with probability of costly defeat.

4. HB445 is anti-economy, anti-recovery legislation in hard times.

5. HB445 is vague in requirements for compliance and in instructions to operators of public places and to potential of violations by citizens -- basic points in unconstitutional rulings by courts.

6. HB445 would impose such exercise of Big Government police action as to invite court challenge.

7. HB445 provides no enforcement funding, subjecting government to contempt for imposing law without enforcement.

8. HB445 is creeping legislation--part of a longrange scheme to outlaw tobacco smoking; to adjust individual behaviour,liberties.

9. HB445 is counterproductive to the administration's state building program (HB511), and other legislative expressed goals.

10. The present Montana Clean Indoor Air Act is working, reasonable, acceptable to a majority, and without risk of court challenge.

Please see ensuing pages of material supporting digested comments. More detail, facts, texts and references are available on request. Thank you.

Tom Maddox, Executive Director, Montana Association of Tobacco and Candy Distributors, P. O. Box 1 2 3, Helena MT 59624
Telephone (406) 442 - 1582

To the Hearing Committee:

My name is Tom Maddox. I have worked with the Montana legislature each session since 1953; the past 20 years as executive director for the Montana Association of Tobacco and Candy Distributors. Members of this association are among the hearing observers. They have requested me to convey their opposition to HB445, and to recommend that the Montana Clean Indoor Air Act continue in its present form as provably workable

1. Brief history. Montana's legislature considered a bill to prohibit cigarette smoking in all public places in 1973 (HB157). A copy of that bill is attached for your study. That bill 10 years ago proposed excessive police state action, and with all other bad features of HB445, the legislature wisely rejected that bill.

Each session since then, an antismoking bill has been proposed. A bill was finally enacted which provided the title, "Montana Clean Indoor Air Act"; without penalty for violation; without funding for enforcement, although appropriation was requested by counties' and the state health employees; and the bill redundantly called for no smoking or restricted smoking in elevators, hospitals and other areas--some of which had been covered in other Montana statutes for years. In 1979 the act was amended to require public places (except taverns) to post signs at entrances to inform the public whether the premises provided nonsmoking or smoking areas or was not so segregated. In 1981 the act was amended again, to clarify application to food service areas with service of alcoholic beverages in conjunction with an exempt tavern.

Each amendment over the years fell short of original excessive demands in introduced bills. Over 10 years the legislature has listened carefully to the problems of antismokers, and of compliance among many kinds of businesses, weighed the costs of compliance versus the benefits, costs of enforcement, the overall impact on the public, and ultimately rejected more excessive demands, and respected the right of consumers to influence mutual courtesy. The educational process works.

2. Tests of time. Over the 10 years antismoking laws enacted in some states began to be tested in the courts, and be thrown out as unconstitutional.

Three federal trial court judges and courts in two states --- in a total of four states and the District of Columbia --- have ruled against antismokers' claims of constitutional rights. Montana's 1972 constitution is in strong agreement with the Federal Constitution.

In Louisiana U. S. District Judge Jack Gordon ruled that "to hold that the First, Fifth, Ninth and Fourteenth Amendments recognize as fundamental the right to be free from cigarette smoke would mock the lofty purposes of such amendments." This case involved antismokers' suit against the Superdome in New Orleans. They claimed constitutional right to attend events in the facility was violated by smokers.

Judge Gordon rejected their claim. They appealed. The United States Supreme Ccurt refused to overturn Judge Gordon's decision.

(Please see page 3: More Federal case law)

Federal case law was articulated by Judge Gordon. His ruling declared in part that if the judiciary were to prohibit smoking, It would be creating a legal avenue, heretofore unavailable through which an individual could attempt to regulate the social habits of his neighbor.

"This court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behaviour and liberties."

Consistent with the developing Federal case law in this subject area, Federal District Court Judge Ralph Thompson ruled that the state of Oklahoma to deny an employee a smoke free work area "hardly constitutes a violation of constitutional magnitude."

Judge Thompson's ruling declared, "The Constitution simply does not provide a judicial remedy for every social and economic ill."

The Oklahoma Federal court ruling that there is no constitutional right to a smoke free environment was against the plaintiff Anthony Kensell, employed 11 years by the Oklahoma Department of Human Services. In 1981 Kensell sued the state, Oklahoma's governor and state officials for $12 million. Kensell's lawyers claimed the defendants were guilty of "pulmonary trespass of tobacco smoke pollution."

In legal briefs, lawyers claimed unsuccessfully that the state's refusal to provide a "smoke free" work place violated Kensell's rights under the First, Fifth, Ninth and Fourteenth Amendaments to the Constitution. Kensell claimed respiratory and cardiovascular problems, headaches, eye irritation and mental suffering because he had to work near smokers. He asked $10.5 million, and got nothing. Enactment of HB445 in Montana would subject the state of Montana to possible court action,with expense of time, dollars and adverse public relations, even without some court judgment.

Federal Judge Thompson's decision states:

"For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of.

"The Constitution simply does not provide a judicial remedy for every social and economic ill."

A THIRD FEDERAL COURT RULING dismissed a suit against the federal government by Federal Employees for Nonsmokers Rights (FENSR) and by GASP or Group Against Smokers' Pollution. In Washington, D. C., they claimed "protection" against tobacco smoke under the Occupational Safety and Health Act (OSHA), and under the First and Fifth Amendments to the U. S. Constitution, and the common law.

Federal Judge Charles R. Richey's dismissal of these claims was affirmed by the U.S.Court of Appeals for the District of Columbia. The United States Supreme Court refused to overturn lower court rulings that the government is not required to segregate smokers and nonsmokers in work areas.

(Please see page 4: On two states' case law)

VIRGINIA SUPREME COURT held unconstitutional an antismoking act which mandated restaurants to have a non-smoking section.

Mrs. Phyllis Alford refused to provide a no-smoking area in her Newport News, Virginia, restaurant. She contended government had "no right to tell me where to seat my customers." She called it "a foolish law" and the state supreme court concurred.

Virginia Supreme Court justices ruled the act "an unconstitutional exercise of police power."

The justices concluded:

"The requirement to designate one of several dining tables located in the same room as a nonsmoking area hardly limits the amount of smoke in the air."

THE ILLINOIS 17TH JUDICIAL CIRCUIT COURT ruled unconstitutional an act to require designated smoking areas in restaurants.

A restaurant owner claimed the act violated equal protection and the due process provision of the Constitution, and the court upheld this claim.

Quoting from the Illinois court memorandum of decision on due process, it stated that law "shall not be vague, indefinite or uncertain; additionally, it must provide sufficient standards to guide policing agencies and the courts in the administration...."

Such segregation acts, the decision stated, "which are so incomplete, vague, indefinite, and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application are unconstitutional as denying due process . . . under our state and national Constitutions."

HB445 as introduced is vague as to application, area size, percentage of premises, other specifics.

3. HB445 IS EXCESSIVE in requirements --- excessive above and beyond the original Montana 1973 bill (HB157)attached . Many business places would be unable to comply; others perhaps at exhorbitant cost. Segregation of city, county, state government buildings could be provided at heavy costs to taxpayers. Courts have held that segregation in the same room or hall without wall divisions is no solution to controlling ambient smoke. Worse than the 1973 bill, the 1983 HB445 provides no option for declaring a whole premise as a no-smoking area. Current law provides options to respond to the consuming public who, in the final analysis, has the last word to select the businesses or places they will support or patronize. (In Montana, hundreds of public places on federal reservations --- (the Indians, military and Veterans Hospital -- and other federal (places or offices -- would be exempt.)

(Please see page 5: Other reasons why HB445 should be killed)

4. HB445 is antibusiness, at a time when our Montana economy needs all help it can get---not "roadblocks" of unwarranted expense and threats of police action. As an example: Montana is seeking conventions -- regional and national. Convention centers' space limits make impossible compliance of segregating 600, 500 or so for a banquet, or convention proportion business conference. HB445 would dictate restaurants to assign waitresses to segregated areas, which would inevitably incur little occupancy during some shifts, yet IRS assesses waitresses income tax on tips, as a percentage of gross restaurant income, whether such amount of tips, is collected or not, making possible a charge of discrimination if HB445 is enacted and enforced.

5. Vagueness of HB445 would leave the sensitive determination of satisfactory compliance in the hands of possibly unsympathetic government employees. Case law has held that legislation which is too vague and not sufficiently instructive is not satisfying constitutional requirements for due process.

6. The law and Big Government can not legislate courtesy and good manners, yet HB445 would attempt to do this for a relatively few offensive smokers. In "counting" the majority involved or trying to determine the balance of citizens affected, we remind that the figures of 60% nonsmokers, 40% smokers among our adults have been bandied about, with no real basis in fact for Montana; or similarly figures such as two-thirds vs. one-third. Moreover, common sense tells us that whatever the percentage of nonsmokers, in this group there is a relatively small per centage of antismokers, versus the heavily-taxed tobacco smokers, heavily taxed persons who enjoy smokeless tobacco and nonsmokers who tolerate or enjoy the aroma of good tobacco.

7. In the past the state Health Department employees and county health employees have asked for more appropriation to fund policing such a bill as HB445. No fiscal impact note for HB445 has been provided. The media reports the State Health Department director has already complained against a proposed 20 per cent cut in his agency budget, including reduction in state health services, and in legal services. Law imposed without provision for honest enforcement subjects government, and legislators to erosion of respect from citizens.

8. HB445 falls in the pattern of "creeping legislation", in line with our alert to the legislature in 1973 and in 1977. Testimony on March 3, 1977 stated that the 1977 HB174's poor construction laid the groundwork for demands for more "teeth", more enforcement, more enforcement affecting more people, affecting more businesses and public places, and asking more taxpayers' dollars for funding. HB445 is riding on the same level of support, and emotional testimony that prevailed in the early 1970s. Current law is provably adequate for the majority, without unnecessary costs of compliance and policing or administration.

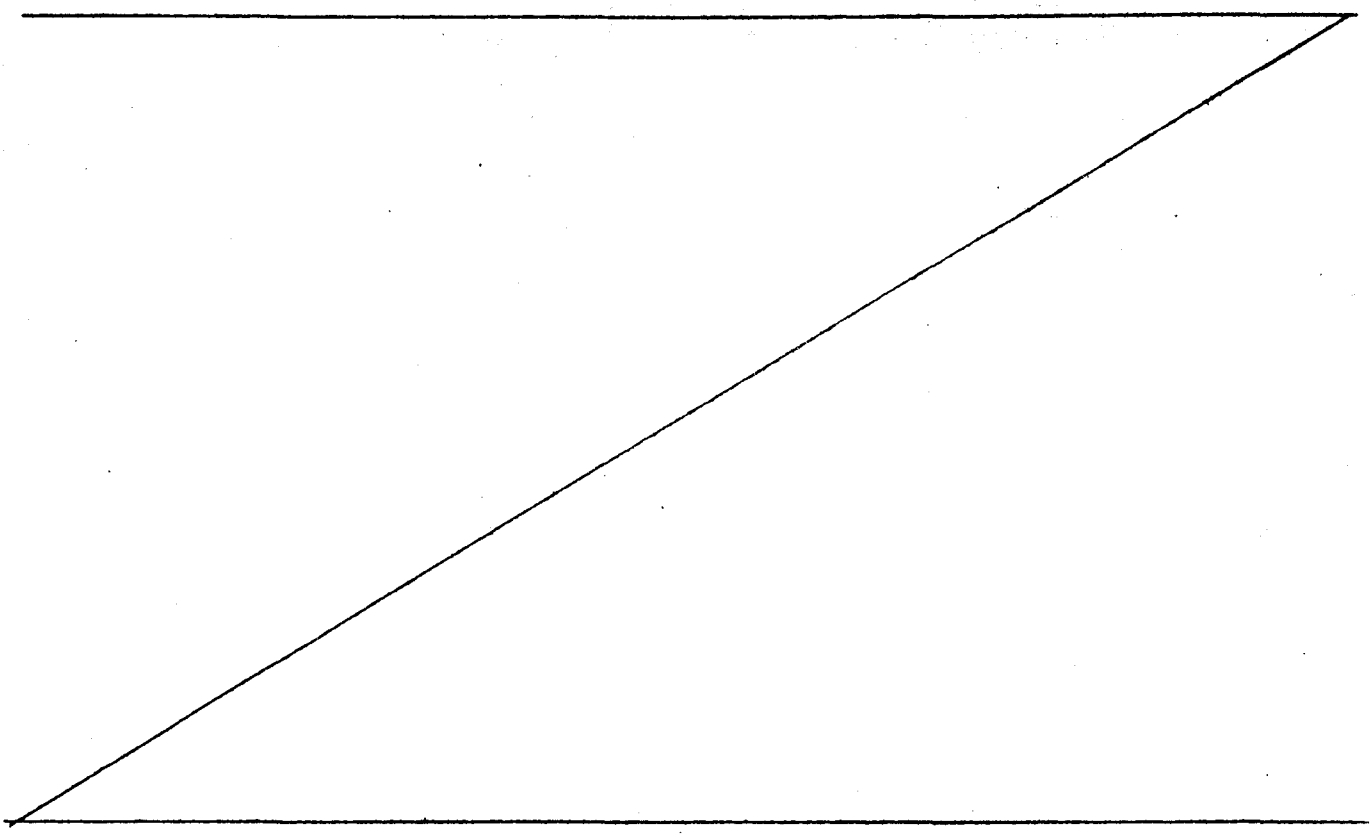
(Please see page 6: More reasons why HB445 should be killed.)

9. HB445 IS COUNTERPRODUCTIVE. HB445 represents ambivalence among legislators within parties, among the administrative leaders and staff personnel.

Thinking behind HB445 is not in harmony with state executive leadership goals and goals of individuals among legislators. The impact of HB445 would be to reduce state revenues in cigarette sales taxes due to restrictions among cigarette users. The administrative leadership, and legislative supporters of administration bills have made public concessions that it is counting heavily upon collecting more cigarette sales taxes (HB511) for long years to dedicate our state's assets for long-range construction of more state buildings. HB445 is counterproductive to these state building goals.

10. Voluntary compliance to the problems of antismokers and more courtesy among cigarette smokers in some 15 months of operation under the 1981 Montana Clean Indoor Air Act amendments is improving the over-all conditions. Many restaurants now are equipped with expensive clean or fresh air filters and removal systems for foul air --- smoke and other foul air. More and more restaurants are volunteering offers to arriving customers of tables or booths in nonsmoking sections. These continuing efforts work because it is good business, and because the consuming public has the final word on the success or failure of business which is dependent upon consumers' approval in the long run.

IN CONCLUSION, we recommend that the committee table HB445.



UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KENNETH O. GASPER, ET AL — CIVIL ACTION

versus — NO. 75-3732

LOUISIANA STADIUM AND EXPOSITION DISTRICT, ET AL — SECTION "I"

Jacob J. Meyer, Esq., Coleman, Dutrey, Thomson, Meyer & Jurisich, New Orleans, Louisiana

For the Plaintiffs

Harry McCall, Jr., Esq., Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, Louisiana

and

Kendall Vick, Esq., Assistant Attorney General, Department of Justice, State of Louisiana, New Orleans, Louisiana

For the Defendant

J. Harrison Henderson, III, Esq., New Orleans, Louisiana

For American Lung Association of Louisiana, Inc.

GORDON, J., District Judge

This action is brought pursuant to the provisions of 42 U.S.C., § 1983, and 28 U.S.C., § 1343, in an attempt by the named plaintiffs to enjoin the Louisiana Stadium and Exposition District from continuing to allow tobacco-smoking in the Louisiana Superdome during events staged therein. The Louisiana Superdome is an enclosed arena located in New Orleans, Louisiana, owned and maintained by a political subdivision of the State of Louisiana known as the Louisiana Stadium and Exposition District (hereinafter referred to as "LSED"). The building is a public, multipurpose facility, and, since its completion, has been used for many events ranging from concerts to Mardi Gras parades.

The plaintiffs, Kenneth O. Gasper, Allen C. Gasper, Beverly Guhl, Dorothy L. Smira, Edward Smira, Albert E. Patent, and David A. Patent, individually and as representatives of other nonsmokers who have attended, or who will attend, such functions in the Louisiana Superdome, challenge LSED's

permissive attitude toward smoking as being constitutionally violative of their right to breathe smoke-free air while in a State building. In support of their complaint, the plaintiffs aver that by allowing patrons to smoke in the Louisiana Superdome, LSED is causing other nonsmokers involuntarily to consume hazardous tobacco smoke, thereby causing physical harm and discomfort to those nonsmokers, as well as interfering with their enjoyment of events for which the have paid the price of admission, all in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

The defendants have filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, contending the plaintiffs have failed to state claims upon which relief can be granted, in that nothing in the United States Constitution grants unto plaintiffs the rights they claim to have been violated.

In considering the merits of a Rule 12(b)(6) motion to dismiss, the Court must view the complaint in the light most favorable to the complainants and must regard all alleged facts as true. Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969), vacated on other grounds, Askew v. Hargrave, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Hence, although plaintiffs contend that a motion to dismiss is inappropriate, this Court is of the opinion that the Constitutional issues raised could never be more squarely presented than in the motion to dismiss now before the Court.

The plaintiffs have brought this action pursuant to Title 42, § 1983, of the United States Code. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two essential elements of a cause of action under § 1983. First, the conduct complained of must have been done by some person acting under

FPI—88—4-12-76—5000—1001

color of state law and, second, such conduct must have deprived the plaintiff of rights, privileges or immunities secured by the Constitution and laws of the United States. Adickes v. S. H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970); Needleman v. Bohlen, 386 F.Supp. 741 (D.Mass., 1974). The absence of either of these elements is fatal to a cause of action under 42 U.S.C., § 1983, and it is the defendants' position that neither element exists in this lawsuit. By way of response, the plaintiffs contend that state action is established by the State's permitting smoking in the Superdome and by the selling of tobacco products therein, and further alleges that such state action violates the First, Fifth, Ninth and Fourteenth Amendments to the Constitution. This Court does not believe that it is necessary to decide whether the complained-of conduct is or is not state action as required by § 1983, since the Court is of the opinion that there clearly has been no violation of plaintiffs' constitutional rights. Each of the alleged violations will now be considered.

First Amendment

Just as the First Amendment protects against the making of any law which would abridge the freedom of speech or of the press, it also protects against any law or activity which would interfere with or contract the concomitant rights to receive those thoughts disseminated under the protection of the First Amendment. As the Court in Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) said, "Without those peripheral rights the specific rights would be less secure." See also, Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

It is this peripheral right to receive others' thoughts and ideas that the plaintiffs herein contend is being subverted by the State's condoning tobacco-smoking in the Louisiana Superdome. The nonsmokers argue that the existence of tobacco smoke in the Superdome creates a chilling effect upon the exercise of their First Amendment rights, since they must breathe that harmful smoke as a precondition to enjoying events in the Superdome. In support of

this rather unique argument, the nonsmokers cite Lamont v. Postmaster General of the United States, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965). In Lamont, the plaintiff was the subject of a rule imposed by the Postmaster requiring a written statement evidencing the undersigned's desire to receive communist propaganda literature. In the absence of this written request, the literature, although properly addressed, would not be delivered. The United States Supreme Court held that this was an unconstitutional infringement on the recipient's First Amendment rights, citing several other cases where licensing and taxing had been employed by federal agencies to regulate the flow of information. The Court reasoned:

> "Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail." (Lamont, supra, at 1496.)

The Court in Lamont was understandably concerned with the apparent attempts of the Postmaster General to either identify or harass those individuals who wished to receive communist propaganda through the mail. The laudable purpos of the Lamont decision was to prohibit unfettered regulation of the free exchange of information and ideas. Unlike the Lamont case, the instant case contains no facts even remotely indicating an attempt by the State of Louisiana to restrict anyone's right to receive information or entertainment. Other than making periodic requests that patrons of the Louisiana Superdome voluntarily refrain from smoking, the State has adhered to the tenet of not interfering with the manner in which spectators watch events for which they have paid.

To say that allowing smoking in the Louisiana Superdome creates a chilling effect upon the exercise of one's First Amendment rights has no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold. This Court is of the opinion that the State's permissive attitude toward smoking in the Louisiana Superdome adequately preserves

the delicate balance of individual rights without yielding to the temptation t intervene in purely private affairs. Hence, this Court finds no violation of the First Amendment to the United States Constitution.

Due Process of Law

In further support of his argument that the State is violating Title 42, § 1983 of the United States Code, the plaintiffs cite the Fifth and Fourteenth Amendments to the Constitution, alleging that the State of Louisian is unlawfully depriving those nonsmoking patrons of the Louisiana Superdome of their life, liberty and property without due process of law. The plaintiffs contend that the penumbral protection of the Fifth and Fourteenth Amendments includes the right to be free from hazardous tobacco smoke while in State buildings, and cites Pollak v. Public Utilities Commission of the District of Columbia, 191 F.2d 450 (D.C. Cir., 1951), reversed, 343 U.S. 451, 72 S.Ct. 8 96 L.Ed. 1068 (1952), as authority for such an argument. In Pollak, the Capita Transit Co. (Capital) operated streetcars and buses in the District of Columbia pursuant to Congressional authorization. Such authorization came in the form of a Joint Resolution of Congress, giving Capital not only a franchise, but a virtual monopoly of the entire local business of mass transportation in the District of Columbia area.[1/]

In 1948, Capital entered into a contract with Washington Transit Radio, Inc. (Transit Radio), wherein Transit Radio agreed to install and maintain loudspeakers in all vehicles owned by Capital and to provide broadcasting for at least eight hours each day. The programming of such broadcasts included music, announcements and advertisements and would be transmitted irrespective of the wishes of passengers. To sell advertising spots in these programs, Capital would assure prospective buyers that their advertisements would reach a guaranteed or captive audience since Capital knew that most commuters were compelled to begin or complete their trips into or out of the District of Columbia by using buses or streetcars owned by Capital.

1/ Act of March 4, 1925, 43 Stat. 1265; Joint Resolution of Jan. 14, 1933, 47 Stat. 752.

The plaintiffs brought suit alleging that because they were obliged to use the buses and streetcars of Capital in connection with the practice of their profession, they were being forced to listen to the allegedly obnoxious broadcasts against their will. They further alleged that this "forced listening" amounted to an infringement of their constitutionally protected rights in that they were being deprived of liberty without due process of law. The District Court granted the defendant's motion to dismiss the petition as not stating a claim upon which relief could be granted, and the case was appealed. The United States Court of Appeals, District of Columbia Circuit, reversed, holding that the broadcasts were in violation of the Fifth Amendment. The Supreme Court, finding no such violation, reversed and remanded the case back to the District Court.

The plaintiffs in the case now before this Court rely primarily upon the Circuit Court's opinion in Pollak, stating in memorandum that the case was reversed by the United States Supreme Court on grounds other than those for which they now cite the Circuit Court opinion. This Court cannot agree with the plaintiffs' argument.

In a section of its opinion entitled "No Violation of the Fifth Amendment," the Supreme Court recognized, but did not agree with, the Circuit Court's conclusion that if one passenger objects to the programming in question as an invasion of his constitutional right of privacy, the use of radio broadcasting on those public vehicles must be discontinued. The Court said:

> "This position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. Streetcars and buses are subject to the immediate control of their owner and operator and, by virtue of their dedication to public service, they are for the common use of all of their passengers. The Federal Government in its regulation of them is not only entitled, but is required to take into consideration the interests of all concerned.
>
> * * * *

> "The liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others." Public Utilities Commission v. Pollak, supra, 343 U.S. at 464, 465. (Emphasis added.)

Even if this Court were to consider only the Circuit Court's opinion in Pollak, there are material factors in that case which distinguish it from the case presently at bar. First, the Circuit Court did not have occasion to weigh or balance an individual's "right" to bring a radio on the bus or streetcar for his own pleasure against the "right" of others to remain in silence. To the extent the Circuit Court found in favor of those who wished to remain free of forced listening, as opposed to those who wished to listen to the broadcasts provided by Transit Radio, the Court was specifically reversed. The question remains whether the Circuit Court's decision in Pollak would have been the same if a private citizen, rather than the transit company itself had been permitted to bring and play a radio on the bus or streetcar. This latter factual situation would be analagous to that before this Court, as opposed to that which the Circuit Court had before it in Pollak.

More important, however, is the fact that the passengers in Pollak, unlike the spectators in this case, were "a captive audience." Put another way those commuters in Pollak were forced to listen to the broadcasts in question because they were forced to ride the transit system. There was no other alterna tive to taking the bus or streetcar. In fact, because Capital was the only transit company authorized by Congress to operate in the District of Columbia, it had a virtual monopoly of the entire local business of mass transportation.

The gravamen of the Circuit Court's opinion in Pollak was the fact that the Capital Transit Company was bombarding passengers with sound they coul not ignore in a place where they had to be.

This case differs greatly from the scenario in Pollak since those wh attend events in the Louisiana Superdome are in no way compelled to use the facility. On the contrary, they are free to attend or not attend as they see

fit, and consequently the most important premise upon which the Pollak decision rests is absence in the case *sub judice*.

This Court is of the further opinion that the process of weighing one individual's right to be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of Government. For this reason, the rationale of Tanner v. Armco Steel Corporation, 340 F.Supp. 532 (S.D. Texas 1972) is more persuasive to this Court. In Tanner, the plaintiffs brought suit to recover for injuries allegedly sustained as a result of the exposure of their persons to air pollutants emitted by defendant's petroleum refineries and plants located along the Houston Ship Channel. As in the instant case, the plaintiffs in Tanner cited a potpourri of federal constitutional and statutory provisions to establish jurisdiction. The Court found both "state action" and "constitutional deprivation" lacking.

After the Court acknowledged a recent boom of claims asserting the right of the general populace to enjoy a decent environment, it explained,

> ". . . the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of 'government by lawsuit' in the midst of a statutory vacuum.
>
> * * * *
>
> "No legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the federal Constitution." Tanner v. Armco Steel Corp., supra, 340 F.Supp. at pp. 536, 537.

Accord, Hagedorn v. Union Carbide Corp., 363 F.Supp. 1061 (N.D. West Va., 1973); (holding that plaintiff's allegations that emissions from Union Carbide Corporation's plant in West Virginia were fouling the air did not present a controversy

arising under the Fifth, Ninth or Fourteenth Amendments to the Constitution); see also, Doak v. City of Claxton, Georgia, 390 F.Supp. 753 (S.D. Ga. 1975.)

This language accurately reflects the fact that the courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments. It is well established that the Constitution does not provide judicial remedies for every social and economic ill. Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed. 36 (1972). Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties.

Fundamental Rights

Citing the Ninth Amendment to the United States Constitution and Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the plaintiff finally argues that the right to breathe clean air is a fundamental right, although not specifically enumerated in the Bill of Rights, and is thus protected by the Constitution. The Ninth Amendment reads,

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.C.A. Const. Amend. 9.

The Ninth Amendment renaissance began with Griswold v. State of Connecticut, supra, wherein the Court recognized that the right of privacy in a marital relationship is a fundamental right protected by the Constitution. The plaintiffs herein contend that the right to be free from hazardous smoke fumes caused by the smoking of tobacco is as fundamental as the right of privacy recognized in the Griswold decision. This Court does not agree. To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigaret smoke would be to mock the lofty purposes of

such amendments and broaden their penumbral protections to unheard-of boundari

The jurisprudence bears this out. In Ely v. Velde, 451 F.2d 1130 (4th Cir. 19 the Court considered a suit brought by residents of the Green Springs area of Louisa County, Virginia, to halt the proposed funding and construction in thei neighborhood of a Medical and Reception Center for Virginia prisoners. With regard to the § 1983 action against the State Director of the Department of Welfare and Institutions for the State of Virginia, the Court said,

> "An ancillary argument of the complaining parties, not vigorously pressed, is that apart from NHPA and NEPA, the federal Constitution was violated by Brown's 'unreasonable and arbitrary action' in placing the proposed Center in Green Springs. We decline the invitation to elevate to a constitutional level the concerns voiced by the appellants. While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so.
>
> "Appellants baldly attempt to stretch rights, protected by law against infringement by federal agencies only, to cover the states and their officers in disregard of the plainly limited character of the legislation. They make their assertion without citation of a single relevant authority and with no attempt to develop supporting reasons. The general concept of conservation and protection of the environment has, in the recent past, made vast advances, prompting the adoption of NHPA,NEPA and other legislation. But without any showing whatever, we are not free to lay upon the State of Virginia new obligations on constitutional grounds.
>
> "Neither the statutes nor the Constitution confers rights on the appellants which are enforceable *vis-a-vis* the State of Virginia under 42 U.S.C. § 1983." Ely v. Velde, supra, at 1139.

Accord, Hagedorn v. Union Carbide Corp., 363 F.Supp. 1061 (N.D. West Va., 1973) see also, Doak v. City of Claxton, Ga., 390 F.Supp. 753 (S.D. Ga. 1975).

In another case, Environmental Defense Fund, Inc. v. Corps of Eng. of the U. S. Army, 325 F.Supp. 728 (E.D. Ark. 1970), the plaintiff filed suit against the Corps of Engineers of the U. S. Army and others, seeking to enjoin the making of any contract or the doing of any work in furtherance of the plan of the defendants to construct a dam across the Cossatat River in Arkansas. Although denying on other grounds several motions to dismiss filed by the defendant, the Court explained,

> "The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century. But the Court concludes that the plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights as alleged in the seventh cause of action in their complaint. The Court's decision on this point gives further emphasis to its statement, supra, that final decisions in matters of this type must rest with the legislative and executive branches of government." Environmental Defense Fund, Inc. v. Corps of Eng. of the U. S. Army, supra, at 739.

This Court feels that, unlike the right of privacy as it relates to the institution of marriage, the "right" to breathe smoke-free air while attending events in the Louisiana Superdome certainly does not rise to those constitutional proportions envisioned in Griswold v. State of Connecticut. To hold otherwise would be to invite government by the judiciary in the regulation of every conceivable ill or so-called "right" in our litigious-minded society. The inevitable result would be that type of tyranny from which our founding fathers sought to protect the people by adopting the first ten amendments to the Constitution.

Conclusion

Pretermitting the issue of state involvement, this Court is satisfied that the plaintiffs herein have failed to allege a deprivation of any right secured by the United States Constitution and, hence, have failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983. It is worth repeating that the United States Constitution does not provide judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.

Since this Court has concluded that the plaintiffs have asserted no claim to sustain federal jurisdiction, there can be no jurisdiction in this Court for the alleged "pendent" state claims asserted in the complaint by plaintiffs. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Accordingly,

IT IS ORDERED that the defendants' motion to dismiss the plaintiffs' complaint be and is hereby GRANTED.

New Orleans, Louisiana, this 8 day of September, 1976.

Edwin Gordon

UNITED STATES DISTRICT JUDGE

Montana Association of

Tobacco and Candy Distributors

1777 LeGrande Cannon Blvd., P.O. Box 1 2 3, Helena, MT 59601 Telephone (406) 442-1582

Tom Maddox,
Executive Director

SENATE COMMITTEE ON PUBLIC HEALTH

COMMITTEE ON HUMAN SERVICES
HOUSE OF REPRESENTATIVES

R E : H B 4 4 5

CITES ON CONSTITUTIONAL RULINGS, ADVERSE TO THE THRUST OF HB445, ARE:

#1 OKLAHOMA CASE

Kensell vs. Oklahoma, governor et al — CIV—81—786—T (W. D. OK 1982)

#2 LOUISIANA CASE

Gasper vs. Louisiana Stadium, and Exposition Corporation — 418-F- SUPP. 716 (E. D. LA 1976)

AFFIRMED

F. 2D 897 (5th Circuit 1978)

CERT. DENIED.

439 U. S. 1079 (1979)

#3 ALFORD vs. Newport News, Virginia

Record number

790 - 322, Circuit Court of Newport News, Virginia

NOTE: All available in Montana Supreme Court Law Library.

Summary of these and other cases, bearing on constitutional questions on HB445, included in presentation by Tom Maddox February 11, 1983

ISSN 0041-8137

journal

DECEMBER 13, 1979 Vol. 207—No. 19

Virginia court kills antismoke law

RICHMOND (ARP): People in an open room can be segregated, but smoke cannot.

That was the grounds on which the Virginia Supreme Court recently struck down a Newport News antismoking ordinance. A city may enact bans against smoking in public places, the court said, but it must do so in a reasonable manner.

Under the Newport News law, restaurants had to set aside one or more tables as no-smoking areas, and had to post signs at their entrances calling attention to the smoking ban.

Phyllis Alford, who runs the dining room in the Warwick Hotel, refused to set aside a table as the law required. She was fined $10, and appealed, saying the law was unconstitutional.

The court agreed, but only because the law didn't do what it had set out to do.

"The requirement to designate

(Continued on page 8)

Virginia court kills antismoke law

(Continued from page 1)

one of several dining tables, located in the same room, as a non-smoking area, hardly limits the amount of smoke in the air," the court said.

"If smoke exhaled in such an environment is toxic, its harmful effects are ambient. Yet the ordinance requires posting a sign, which leads the non-smoking diner to expect that the place he has chosen to patronize is a wholly-protected environment. By relying on the sign, he will be exposed to the toxic effect from which the ordinance purports to protect him," the court added.

"Whether or not tobacco smoke is toxic may be arguable," Justice Richard H. Poff wrote in his opinion, "but that question is one for the legislature, and not for the courts."

Legislatures, the judge added, have the power to "abate" whatever they may find to be injurious to public health.

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT

COUNTY OF WINNEBAGO

GREATER ROCKFORD FOOD SERVICE, ETC.,
Plaintiff,

vs

JOSEPH ORTHOEFER, ETC, ET AL,
Defendants.

NO. 76-2447

MEMORANDUM OF DECISION

The plaintiffs claim the Ordinance in question is invalid, in that it violates the equal protection provision of the Constitution and also violates the due process provision.

I conclude the County at the request of the Health Department has a right to pass Ordinances for the protection of public health; but such Ordinances must apply equally and uniformly to all persons similarly situated. The County in the so-called "Smoking Ordinance" has classified restaurants and cafeterias as a group (which is proper); however, I say it is unreasonable to discriminate within that group in the application of thelaw. If there is a smoking health hazard in restaurants over 50 seats, certainly there is a health hazard

in restaurants or cafeterias with less than 50 seats. Therefore, I conclude the Ordinance is unconstitutional as it applies to restaurants and cafeterias, in that it denies equal protection.

Any further rulings on the Ordinance are somewhat moot; however, the plaintiffs have raised the issue that the Ordinance violates the due process sections of the Constitution. I feel this should be considered.

Due process requires that an Ordinance shall not be vague, indefinite, or uncertain; additonally, it must provide sufficient standards to guide policing agencies and the Courts in the administration of the Ordinance - plus guiding the citizen in obeying the Ordinance. Ordinances, which are so incomplete, vague, indefinite, and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application are unconstitutional as denying due process.

The plaintiffs claim a portion of the Ordinance violates the above concepts of due process. The portion is as follows: "Properly designated smoking area means any area, set aside specifically for those who wish to smoke, the location and ventilation of which will keep the non-smoking area free from ambient smoke".

The word "ambient" as used is an adjective the dictionary defines as: "to go around, surround, encompass, surround on all sides"; hence the Ordinance intended to prevent the smoker's smoke from going around or encompassing the non-smoker for health protection. Most of us have had the experience (even in a ten seat restaurant) of having person next to us inadvertently blow tobacco smoke in our faces -- now that's ambient smoke -- no doubt about it. However, how far away must a non-smoker be, so ambient smoke is not a health hazard? (Health protection is the basis for the Ordinance.) This is the true problem. Common sense tells us there are several factors, such as ventilation, speed of air current, number of smokers, humidity, etc.

As the Ordinance reads, the restaurant owner must consider all of the factors in setting up the designated smoking areas. Then the smoker (who is liable under the Ordinance) must gamble that the restaurant owner has properly set up the area. If a Health or Police Officer disagrees, the Judge must then decide guilt or innocence - did the owner and the smoker make the right decisions?

Looking back to the statement regarding due process, I can only conclude there are too few guide lines, too many

variables, no standards, indefinite and uncertain words and phrases; so I conclude this Ordinance is unconstitutional, in that it violates the requirement of due process under our State (and National) Constitution.

The Motion of the plaintiff is granted, in that the Court finds the Ordinance violates the Section of the Constitution regarding due process and equal protection under the law.

JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

L. ANTHONY KENSELL,)
)
Plaintiff,)
)
vs.) NO. CIV-81-786-T
)
STATE OF OKLAHOMA: OKLAHOMA)
DEPARTMENT OF HUMAN SERVICES,)
et al.,)
)
Defendants.)

FILED

FEB 17 1982

HERBERT D. HOPE
CLERK, U. S. DISTRICT COURT

ORDER

Plaintiff, L. Anthony Kensell, instituted this action against the State of Oklahoma, the Oklahoma Department of Human Services and numerous state officials and employees, contending they violated his First, Fifth, Ninth and Fourteenth Amendment rights by refusing to provide him with a smoke-free workplace and retaliating against him for requesting the elimination of smoke from his work area. Plaintiff alleges that the Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 and pendant jurisdiction over plaintiff's state claims. Defendants have filed a Motion to Dismiss on the ground that the complaint fails to state a claim upon which relief can be granted.

The Supreme Court in Gomez v. Toledo, 446 U.S. 635 (1980) held that a plaintiff, to state a cause of action under 42 U.S.C. § 1983, must allege that some person, acting under color of state or territorial law, has deprived him of a federal right. Providing an employee a smoke-free workplace may be a desirable policy, but denial of such a benefit hardly constitutes a violation of Constitutional magnitude.[1] Federal Employees for Non-Smokers' Rights (FENSR) v. U.S., 446 F. Supp. 181

1/ Though not raised by the defendants, another basis exists for dismissing the State of Oklahoma and plaintiff's damages claims. The Eleventh Amendment bars suits brought in federal court against an unconsenting state by her own citizens. The suit may be barred even though the state is not a named party when the action in essence seeks to recover money from the state. Edelman v. Jordan, 415 U.S. 651 (1974).

(D.D.C. 1978); aff'd, 598 F.2d 310 (D.C. Cir. 1979); cert. denied, 444 U.S. 926 (1979); Gasper v. Louisiana Stadium & Exposition District, 418 F. Supp. 716 (E.D. La. 1976), aff'd 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979). For the Constitution to be read to protect non-smokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of. If that type of adjustment of individual liberties is to be made, it is better left to the people acting through legislative processes. Gasper v. Louisiana Stadium & Exposition District, supra. The Constitution simply does not provide a judicial remedy for every social and economic ill. Lindsey v. Normet, 405 U.S. 56 (1972).

Accordingly, recognizing that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to recover, Walker Field, Colo., Public Airport v. Davis, 606 F.2d 290 (10th Cir. 1979), the Court finds that plaintiff has failed to allege a violation of a constitutional right[2] and defendants' motion to dismiss shall be and is hereby granted.

IT IS SO ORDERED this 17th day of February, 1982.

UNITED STATES DISTRICT JUDGE

Entered in judgment docket Feb. 17, 1982

2/ Though it appears plaintiff eliminated his pendant state claims when he amended his complaint, in the absence of a federal claim the Court lacks jurisdiction over any remaining state causes of action. Mine Workers v. Gibbs, 383 U.S. 715 (1966).

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

L. ANTHONY KENSELL,)
)
Plaintiff,)
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vs.) NO. CIV-81-786-T
)
STATE OF OKLAHOMA: OKLAHOMA)
DEPARTMENT OF HUMAN SERVICES,)
et al.,)
)
Defendants.)

FILED

FEB 17 1982

HERBERT D. HOPE
CLERK, U. S. DISTRICT COURT

O R D E R

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Montana Association of

Tobacco and Candy Distributors

1777 Le Grande Cannon Blvd., P.O. Box 123, Helena MT 59624 Telephone (406) 442-1582

Tom Maddox,
Executive Director

10 March 1983

Dr. Bill Norman,
State Senator, District 47,
Capitol Post Office Station,
Helena MT 59624

Reference:
HB445 - segregating public places with penalties

Dear Senator:

If there are penalties involved, you indicated you would vote against HB445 which, if enacted, would require managers and operators of all indoor public places, under threat of penalties, to prohibit patrons from tobacco smoking for whole areas, or to offer nonsmoking area (albeit without description). (Taverns would be exempt.)

There are penalties.

HB445 would make excessively stringent demands on business, and directly amend the present act, 50-40-101 through 108 inclusively. This act's last section, 50-40-108 is:

"50-40-108. Enforcement. The provisions of this part shall be supervised and enforced by the local (city and county) boards of health under the direction of the (Montana) department (and Board of Health and Environmental Sciences)." (Parenthetical matter inserted for clarity.)

Thus, all of the powers of enforcement are invoked under the following sections:

Local — city, county, city-county, or district enforcement:

50-2-115. ... The county attorney shall represent the local board in those matters relating to the functions, powers and duties of local boards.

50-2-116. ... Local boards shall: .... (i) bring action necessary to restrain the violation of public health laws or rules.... (2) With approval of the department, local health officers may forbid persons to assemble in a place if the assembly endangers public health (Author's note: Presumably the thrust of HB445 if not complied with to the satisfaction of the local or district or state health personnel.)

50-2-120. Assistance from law enforcement officials. A state or local health officer may request a sheriff, constable, or other peace officer to assist him in carrying out the provisions of this chapter. If the officer does not render the service, he is guilty of a misdemeanor and may be removed from office.

(continuing on page 2 re: Penalties for violations)

50-2-124. Penalties for violations. (1) A person who does not comply with rules adopted by a local board is guilty of a misdemeanor. On conviction, he shall be fined not less than $10 or more than $50.

(2) Except as provided in subsection (1) of this section and 50-2-123, a person who violates the provisions of this chapter or rules adopted by the department under the provisions of this chapter is guilty of a misdemeanor. On conviction, he shall be fined not less than $10 or more than $500, imprisoned for not more than 90 days, or both.

(3) Each day of violation constitutes a separate offense. (Our underlining.)

Additionally, 50-40-108 invokes the full powers of the Montana Department and Board of Health and Environmental Sciences, with concluding words, "The provisions of this part shall be ... under the direction of the department". We have conferred with the appropriate state health officers and they concur with this understanding, and that if HB445 administrative rules would need to be promulgated, inasmuch as local health officers have been asking for guidance under the present act, and would be under greater pressure enforcing HB445, if enacted.

The state department code is in 50-1-101-104, 201-206, with pertinent sections as follows:

50-1-102. ... If the county attorney fails to act and with the approval of the attorney general, the department may retain special counsel and compensate him from appropriations to the department.

50-1-103. Enforcement of public health laws. (1) Either the county attorney of a county where a cause of action arises or the department may bring an action to abate, restrain, or prosecute the violation of public laws.

50-1-104. General penalty. Anyone who violates a rule adopted by the board or department for which no penalty is specified is guilty of a misdemeanor.

Inspections and investigations are authorized in several sections.

Thus, if enacted HB445 would invoke far reaching enforcement powers of a law of questionable constitutional existence. One court has held that legislation which is too vague and not sufficiently instructive is not satisfying constitutional requirements for due process. The Illinois 17th Judicial District Court ruled unconstitutional an act to require designated smoking areas in restaurants. The restaurant owner-plaintiff claimed the act violated equal protection and the due process provision of the Constitution, and the court upheld this claim, stating:

Law "shall not be vague, indefinite or uncertain; additionally, it must provide sufficient standards to guide policing agencies and the courts in the administration".

HB445 provides no guidelines nor standards of compliance for setting aside any defined area for nonsmokers.

Such segregation law, the Illinois decision states, "which are so incomplete, vague, indefinite, and uncertain that men of ordinary intelligence must necessarily guess at their meaning and differ as to their application are unconstitutional as denying due process .... under our state and national Constitutions".

A similar bill was introduced in the 1973 Montana legislature (HB157, copy attached). This called for barring tobacco smoking in all indoor public places. The legislature rejected this legislation as excessive in its requirements. Each regular session since then, antismokers have introduced creeping legislative proposals, i.e., first getting enacted a title, "Montana Clean Indoor Air Act", then in another session enacted a bill requiring posting of signs which provided business some choice or option to accommodate patrons.

Customers have the ultimate say to judge whether business complies with their standards — ultimately to judge whether a business succeeds or dies. This is the way it should be.

Virginia State Supreme Court justices ruled an act to require a no-smoking area in Mrs. Phyllis Alford's Newport News restaurant "an unconstitutional exercise of police power". These justices concluded, "The requirement to designate one of several dining tables located in the same room as a nonsmoking area hardly limits the amount of smoke in the air". Mrs. Alford was thus upheld in her contention that the government has "no right to tell me where to seat my customers". She called it "a foolish law" and the Virginia Supreme Court concurred.

Three federal trial court judges, and appelant courts and courts in two states — in a total of four states and the District of Columbia — have ruled against antismokers' claims of constitutional rights. Montana's 1972 Constitution is in strong agreement with the Federal Constitution.

In articulating federal case law, U. S. District Judge Jack Gordon's decision was upheld by the United States Supreme Court. In New Orleans (Case cite 76-3748, U. S. Court of Appeals, Fifth Circuit, August 1, 1978), his ruling stated in part: If the judiciary were to prohibit smoking, it would be creating a legal avenue heretofore unavailable through which an individual could attempt to regulate the social habits of his neighbor. The judge continued, "This court is not prepared to accept the proposition that life tenured members of the federal judiciary should engage in such basic adjustments of individual behaviour and liberties."

In another federal case, (cite No. CIV-81-786-T; February 17, 1982), U. S. Judge Ralph Thompson ruled in part, "The Constitution simply does not provide a judicial remedy for every social and economic ill".

Legislators similarly should not interfere with legal individual behaviour and liberties, nor legislate courtesies.

The present act is adequate, pending possible attack in the court system. It works for most. The legislature cannot solve the problems of every individual.

Please allow the present act to continue to have its impact in reminding us all to be courteous in public contacts and social functions.

Please vote that HB445 do not pass.

Sincerely,

Tom Maddox

Tom Maddox, Executive Director,
Montana Association of Tobacco and Candy Distributors

43rd Legislative Assembly 1973

House BILL NO. 157

INTRODUCED BY Holmes - ~~Engle~~ Bennett Stay Watt Haines MARBUT Hal Harper

A BILL FOR AN ACT ENTITLED: "AN ACT TO PROHIBIT OR RESTRICT SMOKING IN PUBLIC PLACES."

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. Smoking shall be prohibited in all places of public resort, accommodation, assemblage or amusement, as defined by section 64-302(5), capable of accommodating more than thirty (30) people or restricted to a specific well-ventilated area within the public place.

-End-

KILLED

INTRODUCED

Helena in forefront of smoking compliance

[illegible] restaurants [illegible] A [illegible] signs [illegible] restaurants and other public [illegible] survey shows [illegible] about half the [illegible] restaurants surveyed by the American Lung Association of Montana recently are complying with the 1979 Clean Indoor Air Act.

The law requires restaurants to post [illegible] signs [illegible] smoking [illegible] is available.

They are not required to set aside a non-smoking area, but pending legislation, House Bill 445, would require that. The measure passed the House and will be heard March 22 by the Senate Public Health Committee.

In Lewis and Clark County, the compliance rate with the 1979 Clean Indoor Air Act is 80 to 90 percent, said Stan Walthall [illegible] County Health Department sanitarian.

He said a half dozen of an estimated 20 Helena restaurants have voluntarily set aside nonsmoking sections.

Business owners who don't comply with the 1979 law may be ignoring the wishes of the majority of their potential customers. The survey shows 62 percent of the public favors the law.

Thirty percent hold the law in disfavor and the other 8 percent aren't accounted for.

The survey was conducted in Montana's [illegible] sanitarian districts by the Christmas Seal organization and the State Food and Consumer Safety Bureau.

Sixty-four percent of the sanitarians said regular efforts are made to [illegible] urge compliance, but only half of them believe the posting of signs is adequate to protect non-smokers.

Exhibit 12

HOLIDAY

MOTEL - RESTAURANT - LOUNGE
COMPLETE BANQUET AND CONVENTION FACILITIES
1720 ELEVENTH AVENUE PHONE 442-6380
HELENA, MONTANA 59601

STATEMENT IN OPPOSITION TO HB445 AT THE HEARING BEFORE THE HOUSE HUMAN SERVICES COMMITTEE, FRIDAY, FEBRUARY 11, 1983.

Ours is a family-owned enterprise. We have been a part of the business community in Helena for almost 33 years. If we are recognized as having gained a measure of success, it must be attributed in great part to the fact that we strive to maintain a sincere concern for the customers who have patronized our place of business over the years.

Yet it seems that in every session of the Legislature lately we must defend ourselves against bills such as this which do nothing more than give government another opportunity to interfere with the conduct of our business and our relationship with our customers.

Governor Schwinden is quoted in this morning's papers as saying that current economic conditions are the most troublesome since 1961. I don't think anyone in business would argue with that. This is the time when government should be giving some encouragement to those of us who have been able to keep our doors open and keep people on a payroll, not throwing more obstacles in our path.

HB445 makes state government a partner of ours. We neither need nor want another partner, particularly the State of Montana. We neither need nor want another unenforceable, harassing law on the books.

Our customers are going to tell us whether they want segregation in our establishment, and we'll respond to them because we value their patronage and we need it to survive, as any business person must recognize.

The American public has been trying to get this message across: "Government, get off our backs." We hope this committee will give realistic consideration to the countless problems bills such as this create and recommend that HB445 be soundly rejected by this Legislature.

Donald W. Larson

DONALD W. LARSON
Owner-Manager

EXHIBIT 13

MONTANA
HARDWARE &
IMPLEMENT
ASSOCIATION

3087 N. Montana Avenue
P.O. Box 4459
Telephone 406/442-1590
Helena, Montana 59604

e advocate for Montana and Northern Wyoming retail hardware and farm implement dealers

TESTIMONY ON HOUSE BILL 445

Mr. Chairman and members of the Senate Public Health, Welfare and Safety Committee, I am Blake Wordal representing the Montana Hardware and Implement Association which is a trade association composed of retail hardware and farm implement dealers.

Although we are sympathetic to many of the goals contained in Representative Ellerd's bill, I must appear in opposition to this legislation as written on practical grounds.

A retail hardware or farm implement store is not an establishment where customers are sedate or stay in one place. I am sure you will agree that it does not make economic sense to set up separate display areas for smokers and non-smokers. Nor is it feasible to enforce a non-smoking prohibition as a customer moves from shovels to rakes. Many businessmen and women now prohibit smoking in their stores by choice. Enactment of this legislation would force them to prohibit smoking simply because separate areas are not feasible. We feel that they should continue to have a choice.

This bill would be more practical if limited to establishments serving food and publicly owned enclosed areas. We urge your consideration of amending HB445 to this purpose.

STANDING COMMITTEE REPORT

MARCH 22, 19 83

MR. PRESIDENT:

We, your committee on PUBLIC HEALTH, WELFARE AND SAFETY

having had under consideration HOUSE Bill No. 322

METCALF (HAGER)

Respectfully report as follows: That HOUSE Bill No. 322

blue copy be amended as follows:

1. Page 1, line 24.
Following: "public;"
Insert: "AND"

2. Page 2, lines 2 and 3.
Strike: "; and (d) hospital emergency rooms"

And as so amended,
~~DO PASS~~ BE NOT CONCURRED IN

SENATOR TOM HAGER Chairman.

STATE PUB. CO.
Helena, Mont.

SENATE COMMITTEE PUBLIC HEALTH, WELFARE, AND SAFETY

Date MARCH 22, 1983 HOUSE Bill No. 322 Time 2:10

NAME	YES	NO
SENATOR TOM HAGER		✓
SENATOR REED MARBUT		✓
SENATOR MATT HIMSL		✓
SENATOR STAN STEPHENS		
SENATOR CHRIS CHRISTIAENS	✓	
SENATOR JUDY JACOBSON		
SENATOR BILL NORMAN		✓

Elaine Crawley
Secretary

Tom Hager
Chairman

Motion: A motion was made by Senator Christiaens that HB 322 BE CONCURRED IN as amended. Motion failed.

(include enough information on motion--put with yellow copy of committee report.)

STANDING COMMITTEE REPORT

MARCH 22, 19 83

MR. PRESIDENT:

We, your committee on PUBLIC HEALTH, WELFARE AND SAFETY

having had under consideration HOUSE Bill No. 604,

WALLIN (NORMAN)

Respectfully report as follows: That HOUSE Bill No. 604

~~DO PASS~~ BE NOT CONCURRED IN

SENATOR TOM HAGER Chairman.

STATE PUB. CO.
Helena, Mont.