Arbitrator Rules for Nonsmoking Employee

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An arbitrator has determined that Orange County, California, violated the terms of employment by not providing sufficient protection to a nonsmoking employee. He ruled that—

- Exposing her to smoke was "dangerous to her health or safety."
- She "is entitled to work in an immediate work area which is free of tobacco smoke."
- She "is entitled . . . to be assigned to a no-smoking work area which insulates her from exposure to tobacco smoke while she is in the no-smoking area."

The grievance, *Shattuck* v. *County of Orange*, Case Number 72-30-0031-83, decided 12/21/83, involved Ann Shattuck, who alleged that smoke made her ill and caused her upper respiratory infections, bronchitis, and other pulmonary symptoms. She charged that exposing her to smoke at her work station violated her union-negotiated agreement that provided that "no employee shall be required to work under conditions dangerous to the employee's health or safety," and that "the County shall make every reasonable effort to provide and maintain a safe place of employment."

The county attempted to provide some accommodation to her condition, but the arbitrator found that this was not sufficient and that it should be required to do more. First, the arbitrator determined that "whether a condition is dangerous to health is to be determined by reference to the individual's unique circumstances, and not by reference to a general standard which ignores individual circumstances." Thus the test is not whether the amount of tobacco smoke falls above or below a level generally regarded as safe, but rather whether it adversely affects the individual employee. Thus, he said, "the County required the grievant to work under conditions dangerous to her health by placing her in an environment where she could not avoid exposure to tobacco smoke."

The arbitrator also found that the county did not make "every reasonable effort to provide and maintain a safe place of employment" for her. "There is evidence that a minor reconfiguration of the smoking and no-smoking bays at the grievant's former work site, and the erection of a ceiling height partition between her former work bay and any smoking bay would provide a relatively smoke-free work environment for the grievant." Furthermore, "the county could assure compliance [with the union agreement by assigning her to] a no-smoking area whose air-conditioning unit does not also serve a smoking area and by separating the no-smoking area from smoking areas by ceiling level partitions. There is no showing that the implementation of such an arrangement would be financially or administratively unfeasable.

ASH attorneys suggest that this decision could be an important precedent on several major points. First, it helps to establish that a clause, standard in many work agreements, providing for a safe workplace may be used by a sensitive nonsmoker. Second, it determines that the test is the effect on the individual employee, not whether the smoke level meets some arbitrary standard. Third, it provides some general guidelines for compliance: floor-to-ceiling partitions, and an air-conditioning system separate from that serving the smokers.