

GASP can help you assert your right to smoke free places.

GASP helps people convert work places, restaurants, homes in multi-family dwellings, and other places to smoke free environments. Requests to help make apartments and condominiums smoke free is the fastest growing type of request GASP receives.

Rental leases and condominium by-laws have provisions to protect residents from toxic tobacco smoke. There is also a Federal law (the ADA) that protects people with any type of disability that is made worse when forced to breathe secondhand smoke. In addition, there are state laws that offer protection as well.

If you are bothered by toxic tobacco smoke pollution, please call Mark Welsch, GASP President, 402-558-0463 or write President@SmokeFreeNebraska.ORG so we can help you clear the air.

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<http://www.tobacco.neu.edu/ETS/adainfo1.htm> on November 26, 2002.

THE AMERICANS WITH DISABILITIES ACT (ADA): HOW IT CAN PROTECT YOU FROM SECOND-HAND SMOKE

You may have the right to a smoke-free workplace and smoke-free access to restaurants, stores, and offices if you have a serious medical condition caused or aggravated by tobacco smoke. If you suffer from such conditions, you may qualify to assert rights under the Americans with Disabilities Act (ADA) or your state's anti-discrimination statute.

What Does the ADA Have to do with Second-Hand Smoke?



Enacted by Congress in 1990 and taking effect in 1992, The Americans with Disabilities Act requires that employers with at least 15 employees, and proprietors of places of public accommodation, not discriminate against disabled individuals. Employers and people who operate places where the public is invited (like stores, offices, and restaurants) must do what they reasonably can to provide opportunity and access to jobs and public places. For someone who simply cannot tolerate tobacco smoke because of a medical condition, a reasonable response to comply with the ADA would be to implement a smoke-free policy so that person can work or shop or eat like anyone else.



The ADA is not a terribly long or complex document with thousands of specific details. Rather, it sets out some general definitions and a mandate not to discriminate which, if interpreted and followed in good faith, holds the key to access for people with disabilities as well as providing businesses with valued employees and customers.

What is a Disability?

Disability is defined as:

(1) a physical ... impairment that substantially limits one or more of the major life activities of [an] individual;

(2) a **record of such an impairment**; or

(3) being regarded as having such an impairment.

The term *physical impairment* includes:



Any physical disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive...

The next definition is that of ***substantial limitation***. Remember, not all conditions producing limitations of major life activities are disabling. There is no firm delineation of substantial and non-substantial limitations. Federal regulations used to enforce the ADA cite three factors which should be considered in addressing this issue. These are:

(1) the nature and severity of the impairment;

- (2) the duration or expected duration of the impairment; and
- (3) the permanent or long term impact, or the expected permanent or long term impact of, or resulting from, the impairment.

Temporarily disabling conditions will not qualify as a disability under ADA. Severe angina or asthma are clearly distinguishable from temporarily disabling conditions such as bronchitis following the flu, because they are chronic, continuously underlying conditions.

The last aspect of the ADA's definition of disability to examine is *major life activity*. Under the pertinent federal regulations, such activities include **breathing**, walking, working, learning, seeing, and hearing. In the case of second-hand smoke, the major life activities to focus on are breathing, and, in some cases, working or walking. The physical impairments that are subject to protection could include severe asthma, severe tobacco-related allergies, chronic obstructive pulmonary disease, cardiovascular disease, and others.

These major life activities must be *substantially limited* for the protections of the ADA to apply. If breathing is limited to the point where hospitalization or other medical attention can become necessary, chances are good that this major life activity has been limited substantially. If angina pain prevents the individual from walking or working, likewise, the odds are that this limitation is substantial. If tobacco smoke causes these symptoms, then a smoke-free policy might very well be both reasonable and necessary.

Disability Discrimination:

If an individual has a disability meeting the definition, the ADA protects him or her from discrimination related to the impairment. The most basic form of discrimination for our purposes is defined as a *failure to make reasonable accommodations* in the workplace or a *failure to make reasonable modifications in policies and procedures* in public areas.

Some states have anti-discrimination statutes and administrative remedies which should be considered in addition to or instead of the ADA.

Where Does the ADA Provide Protection from Second-Hand Smoke?

Title I of ADA covers the workplace. If you are qualified to do the job but cannot do (or apply for) a job because of smoking in the workplace, and you are a disabled person under the ADA, you may ask the employer to provide a reasonable accommodation (e.g., a smoke-free workplace policy). However, even if you can

demonstrate the need for a smoke-free workplace, an employer can still claim that a smoking ban would impose an *undue hardship*. Under the ADA, the determination of what constitutes an *undue hardship* is to be made on a case-by-case basis, with careful consideration to be given to the nature and cost of the accommodation sought plus the overall financial resources of the employer. It is, of course, possible that some unique workplaces may be able to show that banning smoking would cause them an undue hardship. However, in many industries, businesses have gone smoke-free and have prospered. So it may be difficult for an employer to meet its burden and prove that a smoke-free policy would be an undue hardship.

Title III of ADA covers what are known as *public accommodations*. These include virtually all places where the public is invited, such as:

Establishments serving food or drink; places of lodging; places of exhibition or entertainment; places of public gathering; sales or rental establishments; commercial services including law offices and health care providers; specified transportation facilities; places of public display or collection; places of recreation and leisure; places of education; social services (non-governmental); places of exercise and physical recreation; and privately owned commercial facilities whose operations affect commerce including factories, warehouses, offices not open to the general public.

If a policy of permitting smoking has a discriminatory effect on someone with a tobacco smoke-related disability by effectively denying that person access to a facility's goods, services, or benefits, the owner or manager of that public accommodation must provide a *reasonable modification of policies and procedures* to allow access. A smoke-free policy and procedures for enforcement of the policy would eliminate the discriminatory effect.



If the public accommodation can demonstrate that such a policy change would fundamentally alter the nature of the services it provides, it may be excused from making such a policy change. One could imagine a tobacconist shop where tobaccos are sampled as being a place where a smoke-free policy could fundamentally alter the nature of the services it provides. But smoke-free restaurants would not likely fundamentally alter the nature of their business of selling meals. In fact, it is hard to think of any other obvious public accommodations which would be excused from making a reasonable modification in policies and procedures to provide access to a person with a tobacco smoke-related disability.

Can the ADA Protect ME from Second-Hand Smoke?

Before seeking the protection of ADA from second-hand smoke, ask yourself the following three questions:

☐1. Am I probably disabled under the ADA, that is, do I suffer from a physical impairment that *substantially* limits one or more major life activities such as breathing, walking?

☐2. Have I been discriminated against by an employer (or potential employer) within the past 6 months, or by a state or local government (i.e., access to services); or by a manager or owner of a public accommodation due to a smoking policy that exposes me to ETS?

☐3. Have I brought my disability to the attention of the entity, asserted rights provided by the ADA, and attempted to negotiate a resolution including reasonable accommodation or reasonable modification of policies or practices?

If you have answered "yes" to these three questions and you are still being denied a reasonable accommodation or policy modification, you may wish to consider asserting your rights to smoke-free air under the Americans with Disabilities Act or state disability anti-discrimination statute.

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