



LGIT'S COMMANDER'S LOG **SEPTEMBER 2006**

INMATE'S EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE (ETS) AS A BASIS OF LIABILITY UNDER 42 U.S.C. § 1983

QUESTION: Can an inmate pursue a claim under 42 U.S.C. § 1983 based upon exposure to environmental tobacco smoke during his period of incarceration?

ANSWER: If the inmate alleges that prison authorities acted with deliberate indifference in exposing him to levels of ETS that pose an unreasonable risk of serious damage to his future health, the inmate generally will be allowed to proceed with his suit.

CASE: *TUDOR V. HARRISON (WARDEN)* (Unpublished)
No. 05-7604, United States Court of Appeals for the Fourth Circuit
Decided August 23, 2006

In a recent unpublished opinion, the United States Court of Appeals for the Fourth Circuit, the federal circuit which encompasses Maryland, reviewed a prisoner's suit filed under 42 U.S.C. § 1983 in which the prisoner alleged federal constitutional violations arising from his current conditions of confinement in South Carolina. The prisoner sued the warden of the Kershaw Correctional Institution, the Director and Assistant Director of the State's Department of Corrections, the Associate Warden of the correctional institution, and one other defendant. Specifically, the prisoner alleged that prison authorities, acting with deliberate indifference, had exposed him to levels of environmental tobacco smoke (ETS or "secondhand smoke") that posed an unreasonable risk of serious damage to his future health.

At the trial court level, the case was tried before a judge without a jury. The court heard voluminous testimony from prisoners, lay witnesses, and prison employees. The court also considered the prison records and the result of a court-ordered examination of the premises as to the quantity of the ETS, as well as reports and letters from various witnesses, including experts. At the conclusion of the trial, the prisoner released all defendants from liability except the warden of Kershaw Correctional Institution. Concerning the warden, the court found in his favor with respect to all claims except for a period of time from February 1999 until November 2001, a period of about 32 months. The court further found that the prisoner had not shown a shortened life span, permanent disability, or extreme discomfort, had not shown exposure to ETS during the daylight hours, and had only shown that he suffered from ETS in the late afternoon and evening hours which required the use of his inhaler.

The trial court based its finding against the warden on largely on the prison's failure to "either adequately enforce the non-smoking policy or at least make an attempt to develop a screening process which would restrict placing smokers with nonsmokers who have a medical need . . ."

The fact that the prisoner was asthmatic and thus more susceptible to injury or discomfort from

tobacco smoke weighed heavily in the decision of the trial court. As a result, the court awarded the prisoner \$100 a month in damages for the 32-month period, or a total of \$3200.

On appeal, the Fourth Circuit affirmed the judgment entered by the trial court. It did so on the ground that the findings of the trial court were “almost entirely factual” and, as a result, were not “clearly erroneous”. Thus, in the absence of any reversible error, the judgment against the warden was upheld.

NOTE: In 1993, in the case of *Helling v. McKinney*, 509 U.S. 25 (1993), the Supreme Court paved the way for inmate suits based upon exposure to ETS. As can be seen from the *Tudor* case, however, the burden of proof on the inmate is high and requires not only evidence of high levels of exposure, but also competent evidence concerning the impact on the inmate’s health. The exposure of correctional officials to liability can be dramatically reduced if the correctional institution enforces its existing non-smoking policy, or adopts such a policy if one doesn’t already exist. It is also incumbent upon correctional officials to be aware of which inmates may be particularly susceptible to exposure to ETS and to take the necessary steps to reduce exposure. This may be done through screening new detainees as to their smoking histories and, also, any potential medical problems that could result from exposure to ETS.

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