

Can You Be Sued for Secondhand Smoke? Where There's Smoke, There's Fire – (Maybe) by Andy Hull, Attorney

An issue becoming more common involves smokers and nonsmokers and readers should be aware of some of the current trends.

Smokers are not a protected class, so management can restrict smoking to the common areas and not inside the apartment. Some landlords even set aside a building for nonsmokers only. The extra time and material it takes to paint and attempt to remove the smoke smell is reason more communities are going smoke free.

The real issue arises when you have a nonsmoker who resides next to a smoker. Residents have sued their landlords claiming secondhand smoke affected them in some way and management took no steps to resolve the problem. Renters have taken legal action under common law remedies, state and local health and safety codes and fair housing laws.

In all states, landlords are responsible that residential rental properties are fit for human occupancy, even if they are not at fault for a problem. Management, in effect, makes a "warranty of habitability" to the resident for the life of the lease. The plaintiff in a secondhand smoke case would argue that the presence of secondhand smoke renders his or her residence unfit for habitation and constitutes a breach of the lease. The more secondhand smoke exposure affects the plaintiff, the stronger the argument that secondhand smoke is a breach of the warrant of habitability.

States may also apply nuisance law to the issues of secondhand smoke infiltration. Under common law, a nuisance is anything that substantially interferes with the enjoyment of life or property. The state of Utah explicitly lists secondhand smoke as a nuisance by statute. All other states decide issues of whether secondhand smoke constitutes a nuisance on a case-by-case basis.

Some states have codes or ordinances that either limit smoking or have a "catch-all" clause that permits local authorities to remedy unlisted health problems.

A resident who is sensitive to tobacco smoke may be able to use the Federal Fair Housing Act (FHA) to obtain relief from secondhand smoke infiltration. The FHA prohibits discrimination in housing against among others, persons with disabilities including persons with severe breathing problems exacerbated in secondhand smoke.

Nevertheless, simply showing an adverse health reaction to secondhand smoke is insufficient. To use the FHA, the affected person must prove such adverse health reaction substantially limits one or more major activities. To be "substantial," the impairment must be severe and long-term. A substantial impairment could include difficult breathing or other ailments – such as cardiovascular disorder – caused or exacerbated by exposure to secondhand smoke.

For a person who suffers from such health effects, secondhand smoke may pose a great barrier to access or use of housing as a flight of stairs poses to a person in a wheelchair.

A person who finds secondhand smoke merely irritating, distasteful or discomforting would probably not obtain protection under the FHA.

EXAMPLE

Residents Luck E. Strike and Mar Burro rent a unit at the Smokey Mountain Apartments. Luck E Strike and Mar Burro, who are both nonsmokers, live next to T. Baco, who does smoke. They complain to manager Sig R. Ette and requests he tells T. Baco not to smoke inside the apartment. T. Baco refuses, so Luck E. Strike and Mar burro serve Sig R. Ette a five-day health

and safety noncompliance notice to correct the problem. They also refuse to pay rent until T. Baco complies.

Attorney Virginia Slims takes Luck E. Strike and Mar Burro to court for non-payment. Judge Cam Els rules that being irritated by a smoker is not grounds to give a health and safety notice or refuse to pay rent.

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