

Housing Law Bulletin

Volume 42 • January 2012

Published by the National Housing Law Project
703 Market Street, Suite 2000, San Francisco, CA 94103
Telephone (415) 546-7000 • Fax (415) 546-7007

www.nhlp.org • nhlp@nhlp.org

Table of Contents

	Page
Nonsmoking Policies in Subsidized Housing Present Challenges for Owners, Tenants, and Advocates	1
State Court Invalidates Decision to Release Property from LIHTC Program for Noncompliance	9
Recent Updates Address Protections for Tenants in Foreclosed Properties	11
New Hampshire Supreme Court Finds Evidence Insufficient for Criminal Activity Eviction.....	12
Study: Neighborhood Increase in Voucher Holders Does Not Increase Crime Rates	14
<i>Kilgore</i> and <i>Davis</i> : The Latest Evolution of the “Innocent Tenant” Defense in Ohio	15
Recent Cases	17
Recent Housing-Related Regulations and Notices...	21
Index	25

Cover: Residents of the Shipley Hill neighborhood in Southwest Baltimore clean up and paint vacant houses on a major thoroughfare, as a way to publicize to the larger community their initiative to rid the area of vacant houses and develop a community-based physical plan for the neighborhood. Photo courtesy of Christina L. Schoppert.

The *Housing Law Bulletin* is published 10 times per year by the National Housing Law Project, a California nonprofit corporation. Opinions expressed in the *Bulletin* are those of the authors and should not be construed as representing the opinions or policy of any funding source.

A one-year subscription to the *Bulletin* is \$175.

Inquiries or comments should be directed to Meliah Schulzman, Editor, *Housing Law Bulletin*, at the National Housing Law Project, 703 Market Street, Suite 2000, San Francisco, CA 94103, Tel: (415) 546-7000 or via e-mail to nhlp@nhlp.org.

Nonsmoking Policies in Subsidized Housing Present Challenges for Owners, Tenants, and Advocates*

From prohibiting smoking in common areas to banning all smoking at subsidized developments, nonsmoking policies are becoming more widespread in federally assisted housing.¹ As of January 2011, 230 public housing agencies (PHAs) in 27 states had adopted nonsmoking policies for some or all of their buildings.² While medical experts acknowledge the serious health risks of secondhand smoke exposure for residents living in multi-unit housing, the tension continues between the right of smoking tenants to have the full use and enjoyment of their dwellings and the right of nonsmoking tenants to live in a safe and smoke-free environment. In addition to tenants' rights concerns, nonsmoking policies could bar the homeless and the poor—groups with high smoking rates—from accessing affordable housing.³ This article discusses nonsmoking policies in federal housing programs, Department of Housing and Urban Development (HUD) guidance on the policies, nonsmoking policies and the courts, state and local initiatives to encourage smoke-free housing, the arguments against smoke-free policies, and effective implementation of nonsmoking policies.

HUD Guidance on Nonsmoking Policies

HUD did not issue guidance on nonsmoking policies in subsidized housing until the 1990s. As PHAs instituted nonsmoking policies in their buildings, some consulted HUD about the legality of these policies. In 1996, HUD issued opinion letters to PHAs in Kearney, Nebraska, and Fort Pierce, Florida, addressing the smoke-free policies

*The author of this article is Katie Clark, J.D., a volunteer with the National Housing Law Project.

¹See Katharine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing*, N.Y. TIMES, Dec. 17, 2011, <http://www.nytimes.com/2011/12/18/us/public-housing-authorities-increasingly-ban-indoor-smoking.html?pagewanted=all>.

²*Housing Authorities/Commissions Which Have Adopted Smoke Free Policies*, SMOKE-FREE ENVIRONMENTS LAW PROJECT (updated Jan. 20, 2011), <http://docs.google.com/gview?url=http://www.tcsg.org/sfelp/SFHousingAuthorities.pdf> [hereinafter *Smoke Free Policies*].

³Cheryl Healan & Kathleen Nelson, *Reversal of Misfortune: Viewing Tobacco as a Social Justice Issue*, AM. J. OF PUB. HEALTH, Vol. 94, No. 2 (Feb. 2004), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448227/>. In 2000, Americans living below the poverty line smoked at a rate of 32% in comparison with 23% of those at or above the poverty line. *Tobacco Use and Homelessness*, THE NATIONAL COALITION FOR THE HOMELESS (July 2009), <http://www.nationalhomeless.org/factsheet/tobacco.html>. This 2009 report estimated that 70% to 80% of homeless adults in the United States smoke tobacco in comparison with about 20% of the general population.

in their public housing. The Kearney Housing Authority (KHA) had designated 16 of its buildings as smoke-free, two buildings as smoking and four buildings accessible to persons with disabilities as exempt from a smoking or nonsmoking designation. In addition, KHA's policy placed applicants on a waitlist based on their stated preference for a smoking or nonsmoking unit.⁴ HUD approved this waitlist policy, explaining that a PHA could restrict smoking in its public housing, subject to state and local regulations. HUD's only concern was that KHA's smoking/nonsmoking building designations would illegally discriminate against residents with disabilities, since these residents could not take advantage of the smoke-free housing option offered to residents without disabilities.⁵ In addition, the Housing Authority of the City of Fort Pierce (HACFP) sought HUD approval when it proposed a no-smoking addendum to its lease. HUD's local office in Jacksonville stated that the addendum was permissible as long as HACFP complied with HUD's notice and comment requirements⁶ when adding the addendum to the lease.⁷

Organizations advocating for smoke-free affordable housing also have sought guidance from HUD regarding nonsmoking housing policies. In July 2003, in response to a letter from the Center for Social Gerontology,⁸ HUD's chief counsel issued a memorandum addressing whether nonsmoking policies in HUD-assisted housing developments were permissible.⁹ HUD explained that project owners may implement reasonable nonsmoking policies subject to state and federal law. In addition, the memo stated that there was no protected right to smoke or not smoke. The letter did impose the following conditions upon project owners who had smoke-free policies: (1) any nonsmoking policy had to meet the standard for normal house rules;¹⁰ (2) any lease conditioned upon a nonsmoking policy had to have HUD approval;¹¹ and (3) current

smoking residents had to be grandfathered in so that they were not bound by the nonsmoking policy.¹²

In 2006, the surgeon general released a report about the serious health risks of secondhand smoke exposure, particularly in multiunit housing.¹³ In response, HUD issued notices to PHAs and owners and operators of HUD housing programs suggesting that they institute nonsmoking housing policies. HUD's Office of Public and Indian Housing issued a notice to PHAs in July 2009 strongly encouraging them to implement nonsmoking policies in their public housing units.¹⁴ The notice cited the health risks of smoking for smokers and nonsmokers, the problem of secondhand smoke in multiunit housing and the increased health risks of secondhand smoke exposure to children and the elderly. HUD also emphasized the economic benefits of the policies, including lower maintenance and turnover costs and lower insurance premiums.¹⁵ The notice gave PHAs the discretion to implement nonsmoking policies, subject to state and local law, and provided sample nonsmoking policies that had been implemented by some PHAs.¹⁶ In addition, HUD directed PHAs to update their PHA plans¹⁷ so as to reference new nonsmoking policies and encouraged PHAs to consult with their resident boards before adopting nonsmoking policies.¹⁸

In September 2010, HUD's Office of Housing released a notice on nonsmoking policies for its multifamily housing programs.¹⁹ This notice encouraged owners and operators of subsidized projects to implement smoke-free policies.²⁰ Like the notice issued to PHAs, the notice to owners and operators outlined the health risks associated with exposure to secondhand smoke and the fire hazards associated with smoking in residences. HUD instructed owners and operators choosing to implement smoke-free

prescribed by HUD, and changes to the model lease may be only for documented state or local laws, or a management practice generally used by management entities of assisted projects. Before implementing lease changes, owners must obtain written approval from HUD or a contract administrator.)

¹²HUD Letter, *supra* note 9.

¹³Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General—Executive Summary (2006), available at <http://docs.google.com/gview?url=http://www.surgeongeneral.gov/library/secondhandsmoke/report/executivesummary.pdf>.

¹⁴Non-Smoking Policies in Public Housing, PIH 2009-21 (HA) (July 17, 2009) [hereinafter Notice PIH 2009-21].

¹⁵*Id.* at 2.

¹⁶*Id.*

¹⁷42 U.S.C. § 1437c-1 (requires PHAs to submit annual and five-year plans informing HUD, the residents and the public of its mission and strategy for serving the needs of low-income families).

¹⁸Notice PIH 2009-21, *supra* note 14.

¹⁹Optional Non-smoking Housing Policy Implementation, H 2010-21, at 2 (Sept. 15, 2010) [hereinafter Notice H 2010-21]. The programs listed in the memo are Section 8, Rent Supplement, Section 202/162 Project Assistance Contract, Section 202 Project Rental Assistance Contract (PRAC), Section 811 PRAC, Section 236, Rental Assistance Payment (RAP), and Section 221(d)(3) Below Market Interest Rate (BMIR).

²⁰Notice H 2010-21, *supra* note 19.

⁴Memorandum from Robert S. Kenison, HUD Associate General Counsel, to Deborah J. McKeone, Chief Counsel, Nebraska State Office (June 27, 1996).

⁵*Id.*

⁶24 C.F.R. § 966.3. ("Each PHA shall provide at least 30 days notice to tenants and resident organizations setting forth proposed changes in the lease form used by the PHA, and providing an opportunity to present written comments. Subject to requirements of this rule, comments submitted shall be considered by the PHA before formal adoption of any new lease form.")

⁷Letter from Paul K. Turner, Jacksonville Area Office of Public Housing, to Linda Dusanek, Interim Executive Director, Housing Authority of the City of Pierce (July 9, 1996).

⁸The Center for Social Gerontology, a nonprofit organization which advocates on behalf of the elderly, is a vocal proponent of limiting smoking in multiunit housing. See <http://www.tcs.org/>.

⁹Letter from Sheila Y. Walker, HUD, to James A. Bergman, Center for Social Gerontology (July 18, 2011) [hereinafter HUD Letter].

¹⁰HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS, at 6.1.3.9(A)(2) (stating that the decision about whether to develop house rules for a property rests solely with the owner, and HUD's review or approval is not required, but the rules "must be reasonable, and must not infringe on tenants' civil rights") [hereinafter HUD HANDBOOK 4350.3].

¹¹*Id.* at 6.1.3.4(B),(D) (Owners must use one of the four model leases

policies to update their house rules.²¹ Unlike the guidance for PHAs, the multifamily notice gave detailed instructions for implementing smoke-free housing policies according to HUD regulations and state and local laws. Specifically, HUD listed practices that were impermissible, including: (1) denying occupancy to anyone based on their smoking status if they were otherwise eligible for admission; (2) asking housing applicants whether they smoked; and (3) maintaining separate waitlists based on smoking status.²² HUD further reversed the position it took in 2003 and did not require owners to grandfather in current smoking tenants. However, owners and operators still had the option of doing so.²³ In addition, owners and operators were required to provide the house rules and the smoke-free policies to new tenants. Owners also had to notify existing tenants of modifications to the house rules 30 days before implementing the policies, in accordance with HUD Handbook 4350.3. Furthermore, the notice stated that owners and operators could evict tenants for repeated violations of nonsmoking policies pursuant to procedures in the HUD Handbook.²⁴

Nonsmoking Policies and the Courts

Since the advent of nonsmoking regulations, there have been challenges to those regulations in court. This section discusses cases restricting smoking and upholding smoking bans. These cases are relevant to nonsmoking policies in federally subsidized housing because the case law forms the foundation for housing providers, both private and public, to restrict smoking in multiunit dwellings where secondhand smoke may harm others. The following subsections discuss regulation of smoking in the home through custody orders, cases in which nonsmoking regulations were challenged on constitutional grounds, the case law discussing reasonable accommodation for nonsmokers disabled by secondhand smoke, and common law claims available to tenants harmed by secondhand smoke.

Regulating Smoking in Homes

Government regulation of smoking practices in the home is relatively rare and quite controversial. In the 1990s, family courts began regulating smoking in the home in the context of custody disputes. Given the detrimental health effects of secondhand smoke exposure on children, nonsmoking parents began asking the courts to reconsider custody decisions that placed their children in the care of smoking parents. These custody cases²⁵ are important to the issue of nonsmoking policies in federally subsidized housing because they are examples of instances when the

law has regulated the private conduct of smokers in their homes to protect others. The cases do not attempt to force smoking parents to quit smoking entirely, but only regulate when and where they can or cannot smoke.²⁶ In the same way, PHAs that institute smoke-free policies in their buildings have stressed that the policies are not designed to penalize tenants for smoking but to keep tenants safe from exposure to secondhand smoke.

In several cases, the courts removed children with asthma or other respiratory problems from the home of a parent who continued to smoke in the presence of the child knowing that it compromised the child's health.²⁷ During a custody hearing in 2002, the Court of Common Pleas of Ohio, Juvenile Division, raised *sua sponte* a question of first impression: whether parents should be restricted from smoking in the presence of their children, regardless of whether the children suffer from respiratory problems.²⁸ After detailing the major health risks secondhand smoke poses to children, the court found that "the involuntary nature of children's exposure to secondhand smoke crystallizes the harm as egregious" and "the state has a duty of the highest order to protect the child."²⁹ In addition, the court deemed that a family court, which failed to restrain people from smoking in the presence of children under their care, was failing the children whom the law has entrusted to its care.³⁰ The court issued an order restraining both parents from allowing any person, including themselves, to smoke anywhere in the presence of the child.³¹

No Constitutional Protection for Smokers

Smokers have challenged nonsmoking policies on constitutional grounds in the contexts of employment and public spaces. However, courts have held that smoking is not a fundamental right protected by the Constitution, and smokers are not a protected class.³² In *Grusendorf v. City of*

²⁶See *id.*

²⁷See, e.g., *Daniel v. Daniel*, 509 S.E.2d 117 (Ga. Ct. App. 1998) (affirming a superior court ruling transferring custody of a child with severe asthma from mother, who smoked, to father); *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (Family Ct. Fulton Co. 1994) (granting father custody of two children, one healthy and one suffering from respiratory ailments, where mother and stepfather continued to smoke in the child's presence despite the warning that it endangered his life); *Unger v. Unger*, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994) (modifying a custody consent order so that mother must ensure that there is no secondhand smoke in her home or automobile within 10 hours of the children being present); *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097 (Ala. Civ. App. 1999) (removing child from mother's custody and calling mother's actions no less than child abuse where mother continued to smoke in the presence of the child despite the child's severe respiratory problems).

²⁸In *re Julie Anne, a Minor Child*, 780 N.E.2d 635 (Ohio Misc. 2002).

²⁹*Id.* at 652.

³⁰*Id.* at 641.

³¹*Id.* at 659.

³²See Public Health Institute Technical Assistance Legal Center, *There Is No Constitutional Right to Smoke* (Feb. 2004), www.phi.org/pdf-library/talc-memo-0051.pdf; Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783 (Jan. 1998).

²¹*Id.*

²²*Id.* at 4.

²³*Id.*

²⁴See HUD HANDBOOK 4350.3, *supra* note 10, Ch. 8.

²⁵See text accompanying note 27, *infra*.

Oklahoma City, the Tenth Circuit held that the Oklahoma City Fire Department's total ban on smoking for first-year trainees on and off duty did not violate smoking employees' constitutional rights.³³ Greg Grusendorf, a firefighter trainee who was fired because he smoked a cigarette on his unpaid lunch break, argued that both his liberty interest and his privacy interest under the Fourteenth Amendment had been violated by the smoking ban. Although the court agreed that the ban infringed upon Grusendorf's privacy, it held that smoking was not a fundamental right protected by the Constitution. Therefore, the city only needed to show that it had a rational basis for the ban.³⁴ The court deemed that the fire department's legitimate interest in having physically fit and healthy trainees was a rational basis for the smoking ban.³⁵

In 1995, the Supreme Court of Florida upheld the constitutionality of the city of North Miami's policy of requiring job applicants to refrain from smoking for one year before employment.³⁶ The city had refused to hire Arlene Kurtz because she could not sign an affidavit swearing that she had not used tobacco for at least one year. Kurtz challenged the policy in court, arguing that the nonsmoking requirement impermissibly infringed upon her privacy rights under both the Florida Constitution and the U.S. Constitution. The court deemed that under the Florida Constitution, Kurtz had no legitimate expectation of privacy in revealing that she was a smoker, because smokers were often required to reveal that they smoked within greater society.³⁷ The court further held that smoking was not a fundamental interest protected by the implicit privacy provision in the U.S. Constitution.³⁸

Lower courts across the country also have rejected arguments asserting constitutional protections for smokers in public spaces. A New York federal district court rejected a smokers' rights organization's argument that state laws banning smoking in any place open to the public violated the Equal Protection Clause of the Fourteenth Amendment.³⁹ The court found that smokers were not part of a protected class under the Equal Protection Clause because they lacked "characteristics such as an immutable trait, the lack of political power, and a 'history of purposeful unequal treatment.'"⁴⁰ In a similar case, another smokers' rights organization challenged the constitutionality of the Putnam County, Ohio, board

of health's nonsmoking regulations under the Equal Protection Clause, the Commerce Clause and the Contracts Clause.⁴¹ There, a federal district court found no constitutional violation, emphasizing that smoking is not a protected right. According to the court, minimizing nonsmokers' exposure to secondhand smoke was a rational basis for the regulations and outweighed any personal interest in smoking in public.⁴²

Similarly, in 2001, the Arizona Court of Appeals considered constitutional challenges to a Tucson ordinance banning smoking in restaurants.⁴³ After a Tucson restaurant owner was cited and fined for allowing patrons to smoke in her restaurant, the owner challenged the ordinance's legality. The court rejected the owner's First Amendment argument, holding that there was no generalized right of social association such that a government regulation of smoking in a common meeting place would violate the First Amendment.⁴⁴ The court also rejected the owner's Equal Protection argument because the ordinance was rationally and reasonably related to furthering the legitimate government interest of protecting the health of restaurant customers.⁴⁵

Reasonable Accommodation for Tenants Disabled by Secondhand Smoke Exposure

Federal Statutes

If a person is disabled by exposure to secondhand smoke because of a severe sensitivity or because secondhand smoke aggravates an existing disability, federally subsidized housing providers have a duty to provide a reasonable accommodation to that person.⁴⁶ The Fair Housing Act (FHA) prohibits housing discrimination against anyone who is disabled. The FHA defines "handicap" discrimination to include refusal to "make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."⁴⁷ Section 504 of the Rehabilitation Act further requires that all programs receiving federal funding, including

⁴¹*Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health*, 866 F. Supp 1059 (S.D. Ohio 1992).

⁴²*Id.* at 1067.

⁴³*City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001).

⁴⁴*Id.* at 681.

⁴⁵*Id.*

⁴⁶24 C.F.R. § 966.7 ("A PHA must provide reasonable accommodation to applicants and tenants with disabilities in every aspect of occupancy, as needed to ensure that every tenant has an equal opportunity to use and occupy the property."). For guidance on reasonable accommodation in HUD-assisted housing programs, see HUD HANDBOOK 4350.3, *supra* note 10, at 2.4. For information on the Fair Housing Act and its application to secondhand smoke, see The Center for Social Gerontology, Inc., *The Federal Fair Housing Act and the Protection of Persons Who Are Disabled by Secondhand Smoke in Most Private and Public Housing* (Sept. 2002), www.tcsg.org/sfelp/fha_01.pdf.

⁴⁷42 U.S.C. § 3604.

³³*Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987).

³⁴*Id.* at 541-543.

³⁵*Id.*

³⁶*City of North Miami v. Kurtz*, 653 So.2d 1025 (Fla. 1995).

³⁷*Id.* at 1028.

³⁸*Id.* at 1029.

³⁹*NYC CLASH, Inc. v. City of New York*, 315 F. Supp. 2d 461 (S.D.N.Y. 2004).

⁴⁰*Id.* at 482. The case cited the Supreme Court's language for what traits or characteristics are usually present in order for a class to be considered a protected class under the Equal Protection Clause. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-43 (1985).

housing programs, give participants with disabilities the right to request and receive reasonable accommodations at no cost to participants.⁴⁸ Therefore, tenants with disabilities participating in federally subsidized housing programs have the right to seek reasonable accommodations from their housing providers.⁴⁹

Furthermore, the Americans with Disabilities Act (ADA) affords the same protections as Section 504 of the Rehabilitation Act to persons with disabilities in the context of discriminatory state and local government action.⁵⁰ Tenants with disabilities seeking reasonable accommodations must be able to show that (1) they have a disability as defined by the law; (2) the accommodation is related to the disability; (3) the accommodation is reasonable and does not put an undue financial or administrative burden on the landlord; and (4) the accommodation is necessary for the tenant to be able to use and enjoy the dwelling.⁵¹

In 1992, HUD's general counsel issued an opinion stating that Multiple Chemical Sensitivity Disorder (MCS) and Environmental Illness (EI) could constitute disabilities under the FHA if they substantially limit a major life activity.⁵² A hypersensitivity to secondhand smoke can be considered an MCS and/or an EI if it causes difficulty in breathing or substantially impairs a person's ability to function.⁵³ The HUD opinion cited *Vickers v. Veterans Administration*,⁵⁴ a federal district court case holding that a Veterans Administration (VA) employee who was hypersensitive to tobacco smoke was disabled under the Rehabilitation Act.⁵⁵ However, because Vickers' supervisor was required to comply with a national VA policy that allowed smoking in the workplace, the court also held that the employee was not entitled to a totally smoke-free work environment as a reasonable accommodation. Contravening a national policy allowing employees to smoke in the workplace would place an undue burden on the VA.⁵⁶ According to the court, the supervisor had done everything he reasonably could do to accommodate Vickers' handicap.⁵⁷

⁴⁸29 U.S.C. § 794.

⁴⁹For more information, see National Housing Law Project, Reasonable Accommodation in Federally Assisted Housing Outline, <http://nhlp.org/node/452> [hereinafter Reasonable Accommodation Outline].

⁵⁰42 U.S.C. § 12132.

⁵¹For a more detailed analysis, see Reasonable Accommodation Outline, *supra* note 49.

⁵²Multiple Chemical Sensitivity Disorder and Environmental Illness as Handicap, Legal Op.: GME-0009, HUD (Mar. 5, 1992) [hereinafter HUD Opinion].

⁵³*Id.* at 3. The opinion is careful to distinguish MSC and EI from ordinary allergies, explaining that there is a difference between reaching for a tissue and having to call an ambulance because you cannot breathe. Symptoms must be severe to qualify as MCS or EI.

⁵⁴*Vickers v. Veterans Administration*, 549 F. Supp. 85 (W.D. Wash. 1982).

⁵⁵HUD Opinion, *supra* note 52, at 6 (citing *Vickers*, 549 F. Supp. at 86-87).

⁵⁶*Vickers*, 549 F. Supp. at 89.

⁵⁷*Id.*

State Statutes

In comparison with federal antidiscrimination statutes, many state statutes contain equal or greater protections for persons with disabilities. For example, California's Fair Employment and Housing Act (FEHA) mirrors federal antidiscrimination legislation requiring reasonable accommodations in both housing and employment settings.⁵⁸ In *County of Fresno v. Fair Employment and Housing Commission*, the Fair Employment and Housing Commission (FEHC) deemed that hypersensitivity to tobacco smoke that severely limits a person's ability to breathe is considered a disability in California. In 1991, the FEHC found that the County of Fresno discriminated against two employees who were hypersensitive to tobacco smoke by failing to provide them with a smoke-free work environment as a reasonable accommodation under FEHA.⁵⁹ The county took several steps to accommodate the two employees' smoke sensitivity, including instituting some nonsmoking policies within the office building and relocating the women to their own private office with special ventilation. However, the FEHC found that the county had failed in its efforts because there was evidence of substantial secondhand smoke in the employees' new workspace.⁶⁰

On appeal, a California court affirmed FEHC's findings. The court distinguished the county's efforts with the efforts of the VA in *Vickers*, where the employer did everything it reasonably could do to accommodate Vickers' disability without contravening the VA's national policy allowing smoking in the workplace.⁶¹ Unlike *Vickers*, there was no large-scale policy that would have made it impossible for the county to enforce a smoking ban as a reasonable accommodation to the employees' disability.⁶² Therefore, the county reasonably could have instituted a ban on smoking to accommodate the employees' disability.

FEHA's antidiscrimination provisions apply to both housing and employment.⁶³ Because there is case law defining hypersensitivity to tobacco smoke as a disability, California courts could extend the reasonable accommodation protection from *County of Fresno* to the housing sector under FEHA. This means that California landlords may be held liable for not providing tenants who are hypersensitive to tobacco smoke with reasonable accommodations through nonsmoking policies.⁶⁴ Similarly,

⁵⁸Cal. Gov't Code § 12940, *et seq.*

⁵⁹*County of Fresno v. Fair Employment & Hous. Comm'n*, 226 Cal. App. 3d 1541 (1991).

⁶⁰*Id.* at 1555.

⁶¹*Id.*

⁶²*Id.* at 1554.

⁶³Cal. Gov't Code § 12940, *et seq.*

⁶⁴Housing advocates have explored the possibility of bringing a reasonable accommodation claim on behalf of a tenant whose disability makes it difficult for him to keep from smoking. For example, if a tenant is facing eviction based on his noncompliance with nonsmoking policies due to his mental illness, an advocate could argue that the landlord or PHA must make a reasonable accommodation in enforcement of the

advocates in other jurisdictions should consider whether state antidiscrimination laws apply when assisting tenants with hypersensitivity to tobacco smoke.

Common Law Claims in Multiunit Dwellings That Allow Smoking

Residents harmed by secondhand smoke in their homes have brought common law claims against their landlords and their smoking neighbors for damages. To combat excessive tobacco smoke, tenants have used claims of nuisance⁶⁵ and breach of the warranty of habitability⁶⁶ against landlords. Residents also have sued for breach of the covenant of quiet enjoyment, battery, trespass, constructive eviction, harassment and negligence due to excessive secondhand smoke seepage.⁶⁷ Tenants in public housing who are suffering from exposure to secondhand smoke should follow the grievance procedure referenced in their lease agreement with the PHA before bringing a claim in state court.⁶⁸ Tenants in privately owned subsidized housing do not have a right to the same grievance procedures as tenants in public housing, but they may bring common law claims against private landlords or smoking neighbors in state court. As an alternative to bringing a common law claim, Section 8 voucher holders and project-based Section 8 tenants may request that their local PHA perform a Housing Quality Standards (HQS)

policy for this tenant based on his disability. Advocates who attempt this kind of argument must be prepared to overcome the landlord's "direct threat" defense to the duty to reasonably accommodate, which says that landlords are not required to make a dwelling available to an individual whose tenancy would constitute a direct threat to the health and safety of others. *See* 42 U.S.C. § 3604(f)(9). *See also* *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 286-88 (1987) (defining the inquiry the court should use when considering whether granting the plaintiff's request for a reasonable accommodation would constitute a direct threat to the health and safety of others where the direct threat is the plaintiff's susceptibility to a communicable disease).

⁶⁵*See, e.g.,* *Babbit v. Superior Court*, 2004 WL 1068817 (Cal. App. Dist. May 13, 2004) (holding that the trial court erred by dismissing the plaintiff's nuisance claim because drifting cigar smoke could constitute a nuisance if it rose to the level of a substantial or unreasonable invasion, and the plaintiff should have a chance to submit evidence supporting this claim).

⁶⁶*See, e.g.,* *Heck v. Whitehurst*, 2004 WL 1857131 (Ohio Ct. App. 2004) (affirming a trial court's finding that landlord breached his warranty of habitability to tenant and ordering landlord to make repairs and pay back where tenant complained to landlord for several months that smoke was seeping into his apartment and landlord did nothing).

⁶⁷*See* Technical Assistance Legal Center, *Legal Options for Tenants Suffering from Drifting Tobacco Smoke* (Apr. 2007), <http://www.phlpnet.org/tobacco-control/products/legal-options-tenants>. For a case that discusses each of these common law claims, see *DeNardo v. Cornelop*, 163 P.3d 956 (Alaska 2007). In *DeNardo*, a tenant alleged that cigarette smoke from a neighboring apartment was making him ill and brought claims against his landlord and neighboring tenant for breach of the warranty of habitability, negligence, breach of the covenant of quiet enjoyment, nuisance, trespass and battery. The Supreme Court of Alaska upheld dismissal of all causes of action on the basis that the tenant failed to state a claim.

⁶⁸24 C.F.R. §§ 966.50-966.57.

inspection.⁶⁹ One of the "performance requirements" covered by the HQS is indoor air quality.⁷⁰ If a PHA inspector finds the indoor air quality to be sub-standard, it must issue a correction notice to the owner.⁷¹ Failure to comply with the notice could result in owner sanctions.⁷²

State and Local Initiatives Limiting Smoking in Multiunit Dwellings

Although smoke-free housing advocates are working around the country to encourage local regulations requiring nonsmoking policies in multiunit housing, California is the only state where such ordinances have been widely adopted. In California, as of October 2010, 34 municipalities instituted smoke-free housing regulations limiting smoking in multiunit dwellings.⁷³ Contra Costa County updated its secondhand smoke ordinance in 2010 to prohibit smoking in all new housing developments with four or more units.⁷⁴ The Sebastopol City Council went even further by adopting an ordinance in August 2010 to prohibit smoking in *all* multiunit housing complexes in the city, including smoking in indoor and outdoor common areas of such complexes, beginning in November 2011.⁷⁵ Furthermore, some ordinances require multiunit complexes to designate a percentage of their units as smoke free. For example, the Rohnert Park City Council adopted an ordinance in 2009 that required newly erected apartment buildings to designate 75% of units as nonsmoking and existing apartment buildings to designate 50% of units as nonsmoking.⁷⁶ Most of the ordinances contain enforcement provisions for administrative fines ranging from \$100 to \$500, and some allow private individuals to enforce the ordinances through legal action against violators. In addition, the California state legislature recently passed a law that allows landlords to prohibit smoking anywhere on rental properties, including inside dwelling units.⁷⁷ The state law does not preempt local initiatives limiting smoking in multiunit dwellings.⁷⁸ The law will go into effect January 1, 2012.

California and Maine also offer incentives to developers to designate a high percentage of the units in developments as nonsmoking by giving them an advantage when applying for Low-Income Housing Tax Credits

⁶⁹§ 982.401.

⁷⁰HUD HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 7420.10G, at 10.2.

⁷¹*Id.*

⁷²*Id.*

⁷³*See* The Center for Tobacco Policy and Organizing, *Matrix of Local Smokefree Housing Policies* (Oct. 2010) <http://www.center4tobacco.org/localpolicies-smokefreehousing>.

⁷⁴*Id.* at 2.

⁷⁵*Id.* at 3.

⁷⁶*Id.* at 9.

⁷⁷S. 332, 2011-2012 Sess. (Cal. 2011).

⁷⁸S. 332.

(LIHTC).⁷⁹ LIHTC applicants must complete a competitive application process in which they are awarded points for complying with various policies.⁸⁰ The California Tax Credit Allocation Committee offers a “smoke-free point” to developers of LIHTC properties that designate 50% to 100% of units in their properties as smoke-free. In Maine, developers must designate 100% of units as smoke-free to receive the smoke-free point.⁸¹

Procedural Issues with Nonsmoking Policies

When implementing and enforcing smoke-free policies in federally subsidized housing, there is the potential for procedural abuses. HUD’s notices explain how PHAs and owners should implement such policies. As with any change in practice or policy, HUD housing programs must comply with the agency’s regulations and guidelines.

PHAs adopting a nonsmoking public housing policy may do so through a change in their lease agreement. When implementing a new nonsmoking regulation or policy through a lease change, PHAs must abide by notice and comment rules promulgated by HUD. Tenants and tenant organizations must be given 30 days to review and comment on any changes to the lease, and the PHA must consider these comments before adopting the change.⁸² If the nonsmoking policy becomes a part of the lease agreement such that the PHA may evict a tenant for noncompliance, PHAs must follow the termination of tenancy and eviction procedures set forth in the regulations.⁸³ PHAs may terminate a tenancy only for “serious or repeated violation of material terms of the lease” and must provide 30-day written notice of a lease termination.⁸⁴

Owners participating in HUD’s multifamily housing programs must adopt nonsmoking policies by changing their house rules, which are an attachment to the lease.⁸⁵ HUD Handbook 4350.3 requires that owners give tenants written notice 30 days before implementing new house

rules.⁸⁶ Because repeated violations of house rules can be considered material noncompliance with lease requirements, tenants who do not comply with the nonsmoking policies included in the house rules may be evicted.⁸⁷

Arguments Against Nonsmoking Policies

As more PHAs and privately owned housing developments have implemented nonsmoking or smoke-free policies, reactions to the policies have varied. While most tenants seeking market-rate housing may shop around for rentals, tenants in subsidized housing often have few other housing options. Therefore, some housing advocates argue that smoke-free policies in subsidized housing are unfair to smoking tenants who cannot afford to relocate to buildings where smoking is allowed.⁸⁸ In addition, advocates argue that regulating private conduct in a dwelling opens the door to greater privacy infringement in the future.

Housing advocates also fear that the policies will lead to evictions of smokers due to noncompliance.⁸⁹ In 2009, when the Portland (Oregon) Housing Authority banned smoking on all of its properties, there were concerns that the smoke-free rule would create barriers to the city’s 10-year plan to end homelessness.⁹⁰ The plan has focused on a “housing first” philosophy in which housing is used to create stability before participants are expected to conform to model tenant behavior.⁹¹ Smoke-free subsidized housing contradicts this philosophy by requiring the homeless, a population with smoking rates as high as 80%, not to smoke on the property.⁹²

Tenant reactions also have varied.⁹³ According to several statewide surveys, around 78% of tenants would choose to live in a smoke-free complex if given the choice.⁹⁴ One survey of tenants in public housing in Portland, Oregon, found that a majority of tenants supported a recently implemented smoke-free policy. According to this survey, 74% of all tenants were “very happy” or “somewhat happy” with the policy. Unsurprisingly, numbers varied

⁷⁹Jack Nicholl, *California Tax Credit Agency Supports No-Smoking Rules in Affordable Housing*, LIHTC MONTHLY REPORT, Vol. XVIII, Issue XI (Nov. 2007) available at <http://www.scanph.org/node/278>.

⁸⁰*Id.*

⁸¹*Id.*

⁸²24 C.F.R. § 966.3.

⁸³§ 966.4. See also HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK (2003).

⁸⁴24 C.F.R. § 966.4(I)(3)(C) (except that if a state or local law allows a shorter notice period, such shorter period shall apply).

⁸⁵In a letter to the operator of five Section 811 housing projects in Grand Rapids, Michigan, a local HUD office denied a requested no-smoking modification to the PRAC lease because the model lease should not be changed unless it is necessary to comply with state law or address an issue that was customary in the real estate industry. Letter from HUD Grand Rapids Area Office to Ingrid Weaver, V.P. of Operations, Porter Hills Presbyterian Village, Inc. (July 6, 2004), available under “Related HUD Letters” section at <http://www.tcsg.org/sfelp/home.htm>. See also Notice H 2010-21, *supra* note 19 (stating that owners and operators of private subsidized housing projects must update their House Rules when adopting nonsmoking policies, but saying nothing about changes to the model lease).

⁸⁶HUD HANDBOOK 4350.3, *supra* note 10, at 6.1.

⁸⁷Notice H 2010-21, *supra* note 19, at 5; HUD HANDBOOK 4350.3, *supra* note 10, at 8.3 (outlining the procedure for eviction due to material noncompliance with the lease in Chapter 8).

⁸⁸Peter Korn, *Smokin’ Them Out*, PORTLAND TRIB. (May 12, 2009), http://www.portlandtribune.com/news/story.php?story_id=123680931473925000.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Id.*

⁹²The National Coalition for the Homeless, Tobacco Use and Homelessness (July 2009), <http://www.nationalhomeless.org/factsheet/tobacco.html>.

⁹³See, e.g., Seelye, *supra* note 1; Lynne Peeples, *Should Public Housing Go Smoke-Free?*, CNN.COM, June 16, 2010, <http://www.cnn.com/2010/HEALTH/06/16/smoke.health/index.html>; Emily Bazar, *Public Housing Kicks Smoking Habit*, USATODAY.COM, Apr. 4, 2007, http://www.usatoday.com/news/nation/2007-04-04-public-housing-smoking_N.htm.

⁹⁴National Center for Healthy Housing, *Reasons to Explore Smoke-Free Housing* (Fall 2009), <http://www.nchh.org/Training/Green-and-Healthy-Housing.aspx>.

drastically based on smoking status: 30% of current smokers were happy with the policy, compared with 85% of former smokers and 92% of those who had never smoked.⁹⁵ The same survey found that 62% of smokers reported that they did not comply with the policy five months after implementation. The primary objection by smokers participating in the survey was that the policy was unfair and infringed on their right to privacy in their home.⁹⁶

Effective Policy Implementation⁹⁷

Some housing advocates worry that smoke-free policies in HUD housing programs will act as a barrier to affordable housing. PHAs and housing providers adopting nonsmoking policies in their public or subsidized housing should consider several factors to mitigate this possibility. Although some PHAs are dedicated to achieving a 100% smoke-free environment in their public housing, many have recognized the pitfalls of immediately instituting total bans on smoking. If smoking residents see the policy as unfair, they may be less likely to comply. PHAs that implement nonsmoking policies gradually and with the support of the majority of residents may have more success. When advocating for nonsmoking policies, PHAs have found it helpful to stress the economic and health costs of smoking, while emphasizing that the policy is “not about not smoking, it’s about not smoking here.”⁹⁸ In other words, smokers may still live in the complex and continue to smoke as long as they comply with the nonsmoking policies that permit smoking in designated areas.

Advocates of smoke-free policies in multiunit housing have stressed the importance of implementing the policies in a non-punitive manner that will not stigmatize residents and will minimize the chance that residents will be evicted for non-compliance.⁹⁹ PHA and subsidized housing staff must be appropriately trained regarding

these policies so that tenants’ procedural rights are protected. Housing staff should be clear about any change in policy and should notify tenants when they are suspected of violating the policy. These notices to tenants should also state the consequences of repeated noncompliance. PHAs and other subsidized housing programs that implement nonsmoking policies should also offer access to smoking cessation resources for residents who are interested in quitting.¹⁰⁰ This effort could include handing out literature on smoking cessation and partnering with local smoking cessation programs to offer classes on-site. ■

⁹⁵Linda L. Drach et al., *The Acceptability of Comprehensive Smoke-Free Policies to Low-Income Tenants in Subsidized Housing*, PREVENTING CHRONIC DISEASE: PUBLIC HEALTH RESEARCH, PRACTICE, AND POLICY, Vol. 7: No. 3 (May 2010), available at www.cdc.gov/pcd/issues/2010/may/09_0209.htm.

⁹⁶*Id.*

⁹⁷The Association of Washington Housing Authorities has prepared a “Housing Authority No Smoking Policy Work Plan” that PHAs may find useful when deciding whether and how to implement nonsmoking policies on their properties. The plan includes conducting surveys to determine the extent of smoking practices, creating a proposed plan that may be reviewed by residents, staff and agency leadership, and following HUD guidance on implementation of the final policy. Pacific Northwest Regional Council of the National Association of Housing and Redevelopment Officials & The Association of Washington Housing Authorities, *No Smoking Policy Plan Options & Talking Points for Housing Authorities* (June 30, 2011), <http://www.smokefreehousinginfo.com/pages/Public%20and%20Affordable%20Housing.index.html>.

⁹⁸*Id.* at 10.

⁹⁹National Center for Environmental Health, *Healthy Homes Manual: Non-Smoking Policies in Multiunit Housing 12*, <http://www.cdc.gov/healthyhomes>.

¹⁰⁰For a list of smoking cessation resources, see Centers for Disease Control and Prevention, *Smoking and Tobacco Use: How to Quit*, http://www.cdc.gov/tobacco/quit_smoking/how_to_quit/index.htm.