

DRAFT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2003-SC-000990-I
2003-SC-000978-T

LEXINGTON-FAYETTE COUNTY
FOOD AND BEVERAGE ASSOCIATION,

APPELLANT

v.

AMICUS CURIA BRIEF
OF LEXINGTON HEALTH UNITED
IN SUPPORT OF APPELLEES

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT, et al.,

APPELLEES

* * * * *

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CERTIFICATION

I hereby certify that on this ____ day of January, 2004, a true and correct copy of the foregoing Amicus Curia Brief of Lexington Health United in Support of Appellees was served by first class mail, U.S. postage prepaid, to: George M. Geoghagen, III, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9230, the Honorable Laurance B. VanMeter, Fayette Circuit Court Judge, 566 Robert F. Stephens Courthouse, 120 N. Limestone Street, Lexington, KY 40507; Clerk, Fayette Circuit Court, Robert F. Stephens, John W. Walters and Michael T. Davis, Golden & Walters, PLLC, Corporate Plaza, 771 Corporate Drive, Suite 905, Lexington, KY 40503, Leslye M. Bowman and Theresa L. Holmes, Lexington-Fayette Urban County Government, 200 E. Main Street, Lexington, KY 40507, and Phillip D. Scott, Margaret A. Miller and David A. French, Greenebaum Doll & McDonald PLLC, 300 W. Vine Street, Suite 1100, Lexington, Kentucky 40507. I further certify that the Record on Appeal was not removed from the Clerk of the Fayette Circuit Court.

COUNSEL FOR AMICUS CURIA

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INTRODUCTION

Amicus Curiae Lexington Health United, a group of hospitals, government agencies and businesses that promotes regional healthcare and economic development in Lexington-Fayette County, presents this brief to contribute to the Court's understanding that the Smoking Ban Ordinance is a reasonable exercise of police power that will improve the health of the citizens of Lexington-Fayette County by reducing exposure to deadly secondhand smoke.

STATEMENT OF THE CASE

In briefs filed with the Circuit Court, the Court of Appeals and those filings made to date with this Court, the principal parties to this appeal have adequately set forth the factual and procedural history of this particular matter and thus these matters will not be restated. The purpose of this Brief is to urge the Court to consider the broad public health consequences of precluding the Lexington-Fayette Urban County Government (“LFUCG”) from implementing the Smoking Ban Ordinance, which was intended to reduce exposure of the citizens of Lexington-Fayette County to the hazards of secondhand smoke.

Secondhand smoke, also known as secondary tobacco smoke, environmental tobacco smoke, or passive smoke, is a combination of two forms of smoke from burning tobacco products: (1) smoke emitted when a smoker exhales and (2) smoke emitted by a burning cigarette, pipe or cigar between puffs. In an effort to prevent the diseases, illnesses and deaths caused by secondhand smoke, LFUCG adopted the Smoking Ban Ordinance. Because secondhand smoke causes diseases, illnesses and death, the Fayette Circuit Court properly held that “the Smoking Ban Ordinance is directly related to public health, and is not an reasonable exercise of the LFUCG’s power to promote and safeguard public health.” (November 21, 2003 Opinion and Order, p. 12).

ARGUMENT

THE SMOKING BAN ORDINANCE PROTECTS THE HEALTH OF THE CITIZENS OF LFUCG BY PROVIDING PROTECTION FROM A RISK OF DEATH, DISEASES AND ILLNESSES CAUSED BY EXPOSURE TO SECONDHAND SMOKE.

The medical and scientific evidence establishing the substantial and immediate public health hazard created by secondhand smoke is no longer disputed. Secondhand smoke is classified as a known human carcinogen by the United States Department of Health and Human Services:

Environmental tobacco smoke (ETS) is known to be a human carcinogen based on sufficient evidence of carcinogenicity from studies in humans that indicate a casual relationship between passive exposure to tobacco smoke and human lung cancer (IARC 1986, EPA 1992, CEPA 1997. Studies also support an association of ETS with cancers of the nasal sinus. (CEPA 1997).

(“Tenth Report on Carcinogens,” Introduction, 2000.)

A 1997 California Environmental Protection Agency report entitled “Health Effects of Exposure to Environmental Tobacco Smoke” found that “ETS exposure is casually associated with a number of health effects . . .including fatal outcomes such as sudden infant death syndrome and heart disease mortality, as well as serious chronic diseases such as childhood asthma.” (Executive Summary, p. 1).

The American Lung Association states that secondhand smoke contains over 4,000 chemicals, including 200 known poisons, such as formaldehyde and carbon monoxide, as well as 43 carcinogens. The American Lung Association also notes:

Secondhand smoke causes lung cancer and other health problems. The EPA estimates that secondhand smoke causes approximately 3,000 lung cancer deaths and 35,000 heart disease deaths in nonsmokers each year.

“American Lung Association Fact Sheet: Secondhand Smoke,” Nov. 2003.

On July 30, 2000, the Board of Directors of the American College of Occupational and Environmental Medicine (ACOEM) approved a position statement entitled, "Epidemiological Basis for an Occupational and Environmental Policy on Environmental Tobacco Smoke." This position statement provides a succinct summary of the scientific and medical evidence supporting the regulation of environmental tobacco smoke in the workplace and in places of public accommodation.

The introductory paragraph to this statement provides in part:

There is currently little doubt that ETS is an important and avoidable health hazard. Unfortunately, ETS is frequently encountered in the work place -- where it is no safer than in other environments and where it presents hazards to exposed workers and others Implementation of policies to prevent workplace ETS can be highly effective, entailing low costs and yielding primary and secondary benefits to employers and employees. ACOEM strongly supports an increase in the scope and effectiveness of policies and efforts to protect against exposure to ETS in the workplace and elsewhere. To that end, ACOEM supports voluntary, regulatory and legislative initiatives to eliminate ETS from the workplace, including public spaces such as bars, casinos, restaurants, schools, daycare centers, and public transportation.

The above-cited studies and reports are but an example of the growing body of scientific and medical knowledge that undeniably establishes that exposure to secondhand smoke increases nonsmokers' risks for lung cancer and heart disease. Among children, secondhand smoke is associated with serious respiratory problems including asthma, pneumonia, and bronchitis. Researchers are continuously discovering new dangers associated with secondhand smoke.

Unfortunately, for the many people who are forced to work in environments filled with tobacco smoke, the effects of secondhand smoke are inescapable. At particular risk are bar and restaurant employees who have a 50 percent increase in lung cancer risk because of the high concentration of smoke permeating their workplaces. Siegel, M., "Involuntary smoking in the

restaurant workplace. A review of employee exposure and health effects," *Journal of the American Medical Association*, Vol. 270, No. 4, pp. 490-493 (July, 1993).

On July 25, 2001, the *Journal of the American Medical Association* published a report entitled, "Acute Effects of Passive Smoking on the Coronary Circulation of Healthy Young Adults." The researchers conducting this study found that secondhand smoke can "immediately compromise the cardiovascular system." Although the tobacco industry claims that a non-smoker would have to sit in a smoky environment for "hours and hours" to sustain the immediate damaging effects of smoking one cigarette, these researchers concluded that it only takes 30 minutes in a smoky environment for the endothelial function of a non-smoker to "be temporarily compromised to the level of a pack-a-day smoker." (Otsuka, R., Watanabe, H., Hirata, K., Tokai, K., Muro, T., Yoshiyama, M., Takeuchi, K., Yoshikawa, J., *Journal of the American Medical Association*, Vol. 286, No.4, pp. 436-441). Thus, the health benefits to employees of escaping a workplace filled with smoke are immense.

The Smoking Ban Ordinance advances LFUCG's objective of protecting its citizens from the risk of death, diseases and illnesses caused by exposure to secondhand smoke. A secondary benefit of the Smoking Ban Ordinance, though, is the economic benefit to employers of healthier employees who miss less work because of illness, are more productive employees, and spend less on health care costs that are often paid by the employer. Moreover, another risk that employers could avoid by implementing smoke-free workplaces is the future workers' compensation claims as well as personal injury and wrongful death liability claims brought by employees or administrators of the estates of employees who became ill as a result of exposure to secondhand smoke while working. With the ever-mounting evidence of the toxic effects of secondhand tobacco smoke,

numerous courts have begun to recognize that employees have a valid cause of action against their employers for their secondhand smoke-induced illnesses. *See Service v. Union Pac. R.R. Co.*, 153 F. Supp. 2d 1187 (E.D. Cal. 2001) (holding that an employee could maintain an action under the ADA against his employer based upon his severe asthma attacks, which were induced by exposure to secondhand smoke at work); *Homeyer v. Stanley Tulchin Assoc.*, 91 F.3d 959 (7th Cir. 1996) (permitting an employee the opportunity to prove her ADA cause of action against her employer based upon her claim that she suffered chronic severe allergic rhinitis and sinusitis, which she claimed was aggravated by environmental tobacco smoke at work); *Matter of Johannesen v. New York City Dept. of Hous. Pres. and Dev.*, 638 N.E.2d 981 (N.Y. 1994) (holding that exposure in the workplace to secondhand smoke, to the extent injuries occur, is properly a workers' compensation matter); *Eastern Airlines, Inc. v. Crittenden*, 596 So.2d 112 (1st Dist. App. Fl. 1992) (affirming a flight attendant's award of workers' compensation benefits as a result of her bronchial condition caused by exposure to secondhand smoke and holding both the employer and the insurer responsible for the workers' compensation benefits); *King v. Bangor Fed. Credit Union*, 568 A.2d 507 (Sup. Jud. Ct. Maine 1989) (holding that an employee could maintain, in addition to her workers' compensation claim, a Human Rights Act claim against her employer for failing to reasonably accommodate her pulmonary condition by implementing a total smoking ban); *McCarthy v. Dept. of Social & Health Serv.*, 759 P.2d 351 (Wash. 1988) (finding an employee who developed pulmonary disease as a result of her work environment which constantly exposed her to cigarette smoke could maintain a cause of action against her employer for negligence); *Lapham v. Commonwealth, Unemployment Comp. Bd. of Review*, 519 A.2d 1101 (Pa. Commw. 1987) (upholding prior employee's right to recover unemployment benefits when he was forced to resign as a result of his allergic bronchitis

caused by exposure to cigarette smoke in his work area); *Smith v. Western Electric Co.*, 643 S.W.2d 10 (1982) (holding that an employer breached its duty to provide a reasonably safe workplace by failing to exercise control and assume responsibility to eliminate the hazardous condition created by tobacco smoke); *Schober v. Mountain Bell Tel.*, 630 P.2d 1231 (N.M. App. 1980) (affirming award of partial temporary disability caused by employee's exposure to cigarette smoke); *Shimp v. New Jersey Bell Tel. Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (holding that it was reasonable to impose a duty upon an employer to abate the health hazard created by secondhand cigarette smoke).

In light of the health risks and the potential employer liability resulting from exposure to secondhand smoke, the Smoking Ban Ordinance is a reasonable exercise of the police power to protect public health. As the Fayette Circuit Court noted in its November 21, 2003 Opinion and Order, "no one can seriously contend but that there is a direct connection between (a) the Ordinance -- banning smoking in buildings open to the public -- and (b) preservation of public health -- reducing exposure to second hand smoke." (p. 11). Under Kentucky law, this causal relationship is more than sufficient to make the Smoking Ban Ordinance a reasonable exercise of the police power to promote the public health. "A municipal corporation, under its police power, has wide latitude to pass ordinances promoting the health, safety, morals or general welfare of the people." *U.S. Mining and Exploration Natural Resources Co., Inc., v. City of Beattyville, Ky.*, 548 S.W.2d 833, 834 (1977). This police power extends not merely to regulate but even to prohibit certain businesses – if the prohibition is necessary "for the health, safety or general welfare of the people." *Id.* A regulation is unreasonable only if it is an "exercise of authority so arbitrary or unreasonable

as virtually to transcend the authority conferred . . .” *Graybeal v. McNevin*, Ky., 439 S.W.2d 323, 326 (1969).

CONCLUSION

Based upon the foregoing, Lexington Health United respectfully submits that the decision of the Fayette Circuit Court should be affirmed.

Respectfully submitted,

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