

Jan 2, 2005

# **Void Where Prohibited Revisited**

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**The  
Trickle-  
Down  
Effect  
of  
OSHA's  
At-  
Will  
Bathroom-  
Break  
Regulation**

**Marc Linder**

**Fānpìhuà Press  
Iowa City  
2003**

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UNIVERSITY OF MICHIGAN

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Cover illustration: Schuyler Rahe-Dingbaum

The cartoon by Walter Bartlett on page 263 originally appeared in *The Macon Telegraph* on Mar. 19, 1979, at page 4D, cols. 3-5, and is reprinted with the permission of *The Macon Telegraph*.

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Suggested Library of Congress Cataloging  
Linder, Marc, 1946—

*Void where prohibited* revisited:  
The Trickle-down effect of OSHA's at-will  
bathroom-break regulation/by Marc Linder.

xii, 382 p.; 23 cm.

Includes bibliographical references and index.

ISBN 0-9719594-0-4

1. Rest periods. 2. United States. Occupational Safety and  
Health Administration. 3. Employee rights.

HD5112.L561 2003

331.25'76—dc21

Library of Congress Control Number: 2003090222

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5112  
.L561  
2003

## Part VI

### Human Waste and Capitalist Efficiency

“The current agreement...provides for spacing of rest periods and lunch periods so that 2 to 2½ hours is the maximum work period without a break during an 8-hour work day. ...

“It most certainly is not unreasonable to expect one to learn to regulate and train one’s self [sic] to work periods of 1½, 2, or 2½ hours. This is expected of us from childhood on into school, traveling, meetings, social events, and finally work. Without this minimum discipline, it would be chaos trying to schedule most organizations.”<sup>1</sup>

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<sup>1</sup>Jones Dairy Farm v. Amalgamated Meat Cutters and Butcher Workmen of North America, Local P-1236, 72-2 Labor Arbitration Awards (CCH) ¶ 8639 at 5256 (1973) (company response to union grievance over three-day suspension of worker for making nine emergency-basis bathroom visits over 27 months).



## A Golden Age for the Golden Stream?

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[I]t wouldn't cause problems to let workers go when they have to go. "When workers are adults...they can be trusted to go to the bathroom."<sup>1</sup>

This key question posed by this book, as formulated in its opening sentence, is whether OSHA's issuance of its toilet-standard Memorandum in 1998 has in fact meant that millions of workers whose employers had previously restricted their access to the bathroom can now void when they need to. In lieu of conducting a large-scale national workplace voiding interview survey—which remains a desideratum of empirical research—it is necessary to rely on an array of other information and informants in order to gain a sense of the Memorandum's impact.

The data presented in Part V demonstrate that after the promulgation of the Memorandum, Federal and state OSHA began to cite a few firms whose employees had complained to the agency that their employers were not letting them go to the bathroom. Such enforcement marks a programmatic step forward compared with OSHA's pre-1998 pat response to complainants that they had no such right. Today, as far as can be determined, if a worker—outside of the most populous state, California—who is a current employee files such a complaint, OSHA will at least promptly investigate and, once in a while, even issue a citation, though only Iowa OSHA, galvanized and motivated by an openly pro-labor commissioner, has thus far imposed a monetary penalty that can even arguably be considered a deterrent to a large employer. Based on fragmentary data, Chapter 11 also offered a very tentative estimate of the much larger volume of complaints about restricted toilet access that OSHA might receive annually, but the number of workers who acquiesce in such violations is as unknown as the proportion of the covered workforce that is even aware of the existence of a right to void at work.

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<sup>1</sup>Scott Whisnant, "Hog Plant Union Talks Include Call for Restroom Breaks," *Morning Star* (Wilmington, NC), Aug. 21, 1997, at 1B, 3B (Lexis) (quoting UFCW spokesman Greg Denier).

However, inspections, citations, fines and other formal aspects of enforcement do not exhaust the indicators of the potential dismantlement of employers' autocratic control over working time in general and the duration of and intervals between workers' withdrawal from work in order to empty their bladders and colons. After all, even though much more egregious violations of workers' toilet-break rights remained totally hidden to public view, and even though the Jim Beam citation involved no monetary penalty at all, widespread reporting about that case not only brought the existence of this employer obligation and correlative employee right to the attention of many companies that had either never heard of it or failed to take it seriously, but may even have persuaded them that such colossally bad publicity and corresponding ill will had made voiding rights a distinctly suboptimal field in which to confront labor and labor-protective government regimes. Likewise, awareness of the legal backing furnished by OSHA's new interpretation may have mobilized unions and workers to press employers more aggressively to abandon rigidly held restraints.

Two possible sources of information about this process are labor union and OSHA officials.

### **Unions' Initiatives and Experiences**

An appropriate place to begin an inquiry into the impact of the Memorandum on voiding rights in unionized workplaces is the birthplace of the resistance movement that eventually prompted OSHA to declare at-will bathroom breaks an enforceable right. At the Hudson (now Tyson) poultry slaughter plant in Noel, Missouri, where the UFCW workers took up the struggle against autocratic bans on voiding that led to the first OSHA citation in 1997,<sup>2</sup> Karen Smith, the business agent of Local 2008, reported that bathroom access has not been a problem since. A clear understanding prevails that management has 15 minutes to get a worker relief and if the worker is not promptly relieved, he or she just walks away from the line; when, as sometimes happens, workers do have to exercise that discretion, no disciplinary consequences follow.<sup>3</sup>

A picture-perfect example of how vigorous national and local union action backed up by the OSHA Memorandum can force overreaching employers to drop their plans is offered by Local 2 of the UFCW, which has organized workers in animal slaughter plants in Oklahoma and Kansas. In 2002, Seaboard Farms decided to restrict toilet access at its Guymon, Oklahoma hog slaughterhouse<sup>4</sup> in

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<sup>2</sup>See above ch. 2.

<sup>3</sup>Telephone interview with Karen Smith (Dec. 16, 2002).

<sup>4</sup>On the plant and company, see <http://www.sierraclub.org/factoryfarms/rapsheets/>

order to deal with what it regarded as abuse of restroom breaks. The new rule it devised ordained that, in the absence of a medical excuse, workers would be permitted to go to the bathroom, outside of their 15-minute mid-morning break and 30-minute lunch break, only a couple of times a week. When asked what exactly this latter phrase meant, the union's feisty secretary-treasurer, Martin Rosas, replied, "like once on Monday and Thursday." Rosas informed management that even if it were true that some among the plant's 2,300 workers went to smoke or make phone calls instead of going to the bathroom, the company could not punish all the workers merely to discipline the few abusers.<sup>5</sup> He then asked the national union's occupational safety and health office to fax him a copy of the Memorandum—two years earlier the office had discussed the Memorandum with stewards of the local, at which time Rosas became familiar with it<sup>6</sup>—which he then showed to management. After familiarizing themselves with it, the managers decided that very same day that it was not worth trying to implement the new rule, which they rescinded before it ever went into effect. Unlike the Jim Beam management, Seaboard's did not complain that the OSHA standard interpretation had deprived it of its power to discipline workers; on the contrary, it intended to continue monitoring workers and documenting those who went elsewhere than to the toilet on their bathroom breaks. Rosas also attributed the union's successful counter-attack to the number of relief workers or lead-men (about one per 20 or 40 workers depending on the area of the plant), for the hiring of whom it had recently been able to negotiate. Rosas reported that a successful outcome to a similar confrontation had also taken place at the Excel-Cargill cattle slaughterhouse in Dodge City, Kansas.<sup>7</sup>

At three poultry processing plants organized by UFCW Local 1996, the union was able to turn supervisors' interference with workers' right to go to the bathroom into durable vindications of that right. According to area director Curtis Williams, the union, having learned about the OSHA Memorandum from meetings with the UFCW's occupational safety and health office, filed grievances at Gold Kist in Athens, Georgia, Crider's in Stillmore, Georgia, and Columbia Farms in Columbia, South Carolina, all of which were resolved at the first level with the human resources directors. The upshot has been that workers in those plants just tell the line leader and go; they do not have to wait for the line leader to find a "pee boy" to replace them because that procedure is precisely what led to the problem in the first place. After the successful resolution of those griev-

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oklahoma/seaboard\_guymon.asp.

<sup>5</sup>Telephone interview with Martin Rosas (Dec. 13, 2002).

<sup>6</sup>Email from Jackie Nowell, Director, Occupational Safety and Health Office., UFCW, Washington, D.C., to Marc Linder (Dec. 15, 2002).

<sup>7</sup>Telephone interview with Rosas.

ances, workers in those plants have not reported any further problems. Significantly, Williams observed that the union keeps the workers informed of their right to go to the bathroom because it is “one of the few positive things we have in those plants.”<sup>8</sup>

UFCW Local 1149, which represents the 950 workers at the IBP-Tyson hog slaughter plant in Perry, Iowa (all of whose output is exported to one company in Japan), achieved a similar success. In 2001, according to Jim Olesen, the president of the local, some supervisors initiated “goofy shit” such as threatening to limit unscheduled bathroom breaks to once a week or to demand that workers go to a doctor at their own expense to determine what was allegedly wrong with them medically.<sup>9</sup> After a worker made a complaint to Iowa OSHA, the agency conducted an inspection of the plant, but failed to issue a citation to IBP-Tyson.<sup>10</sup> Nevertheless, according to Olesen, who attended the closing conference,<sup>11</sup> the inspector put the company on notice that future violations would be cited—a warning “put the clamp on it right away.” Since then the company has agreed that supervisors will provide relief within 15 minutes of being asked for it; the union has told its members to wait 15 minutes and then to go, and if there are any disciplinary consequences, the union will back them up. As an example of the company’s compliance following the OSHA warning, the union president observed that when a supervisor on his own began monitoring the number and duration of workers’ bathroom breaks, the union complained to upper manage-

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<sup>8</sup>Telephone interview with Curtis Williams, Area Director, UFCW Local 1996, Sewanee, GA (Dec. 26, 2002).

<sup>9</sup>Telephone interview with Jim Olesen, President, UFCW Local 1149, Perry, IA (Dec. 16, 2002).

<sup>10</sup>IBP-Tyson, Insp. No. 304790884 (complaint filed Apr. 22, 2002; case closed May 9, 2002). <http://www.osha.gov/cgi-bin/est/est1xp?i=304790884>. The case file was subject to an open records request, but because of an “extensive” backlog, Iowa OSHA was unable to redact and make the records available in time for publication. Email from Mary Bryant, Administrator, Iowa OSHA, to Marc Linder (Jan. 8, 2003).

<sup>11</sup>Olesen stated that the inspector did not explain at the conference why Iowa OSHA decided not to issue a citation. Telephone interview with Jim Olesen (Jan. 8, 2003). In response to an inquiry as to why Iowa OSHA was giving IBP-Tyson two bites at the enforcement apple (email from Marc Linder to Byron Orton, Jan. 8, 2003), Byron Orton, using what may have been bureaucratic understatement to express the same warning mentioned by Olesen, explained: “A citation was not issued in this instance because the CSHO did not have sufficient evidence showing a violation of the sanitation standard. During the closing conference the CSHO made some observations intended to assist the employer in continued compliance with the standard and my interpretation issued in Jan. '98.” Email from Byron Orton to Marc Linder (Jan. 14, 2003).

ment, which ordered the supervisor to stop monitoring.<sup>12</sup>

At the Swift slaughter plant in Marshalltown, Iowa, to which OSHA had issued two citations for denial of access in 2000 and 2001,<sup>13</sup> the secretary-treasurer of UFCW Local 1149, Ross Boyer, emphasized that the April 6, 1998 Memorandum “really helped us” because it “gave us clout to force the employer to give breaks.” Boyer, who began working at the plant in the 1960s, noted that during the time from then until the 1980s, when the union was much stronger, workers would simply shut down the line in mass and go to the toilet. However, as the strength of the union declined, workers lost not only that informal power, but also their scheduled mid-afternoon break; consequently, they had (and have) no scheduled break during the three hours following their 30-minute lunch, although about three-fourths of the workers have to use the bathroom during that time. The advent of the OSHA Memorandum marked a turning point, enabling the union to force Swift to take corrective action before the union had to file a formal complaint with OSHA. Nevertheless, Swift has not totally abandoned its hard-line position: at the end of September 2002, it began to station an employee in the hall in front of the bathrooms near the kill floor all day long whose sole task was to ask workers their names and to write down the time they entered and left the bathroom. The company maintained this monitoring for a couple of months, presumably, in Boyer’s view, to let workers know that it was keeping an eye on them. To be sure, Boyer conceded that a small proportion (perhaps one-tenth) of the workers “abuse” breaks (for example by staying in the bathroom 25-30 minutes), “screwing things up” for the other workers, who not only get to go to the toilet less often, because supervisors say there are not enough relief workers to go around, but must also in many cases do those workers’ jobs for them until they return.<sup>14</sup>

At the John Morrell hog slaughter plant in Sioux City, Iowa, which employs 1,200 workers, of whom about 80 percent are Hispanic, Bill Buckholtz, the secretary-treasurer of UFCW Local 1142, who has worked there for 22 years, observed that the root cause of the denials of access that had led to the OSHA citation in 2001<sup>15</sup> was the foremen’s totally ignoring workers’ requests to use the toilet—to the point that workers urinated in their pants. This illegality, in his view, was and is fostered by upper management’s having given too much power to supervisors. Interestingly, at the time, he had not even been aware of the OSHA Memorandum: he filed a complaint with OSHA simply because he did not know what

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<sup>12</sup>Telephone interview with Olesen (Dec. 16, 2002).

<sup>13</sup>See above ch. 12.

<sup>14</sup>Telephone interview with Ross Boyer, secretary-treasurer, UFCW Local 1149, Marshalltown, IA (Oct. 3 and Dec. 30, 2002).

<sup>15</sup>See above ch. 12.

else to do. Buckholtz noted that at the closing conference it was made clear to management that in the future when workers on the chain asked to go to the toilet, if the company could not provide relief within 10-15 minutes, the workers could just walk off the line. In order to facilitate relief, the union has told management that it will waive the collective bargaining agreement's strict ban on management's performing bargaining unit work; thus with the need to go to the bathroom treated as an emergency, supervisors can replace workers when no relief worker is promptly available. These bathroom breaks are vital because workers have only a 15-minute break in the morning and 30 minutes for lunch, with no afternoon break except on days when they work overtime. Since some workers have to spend as much as 10 minutes doffing and donning protective equipment and getting to and from the toilets, and the bathrooms at break times are so crowded that they also often have to wait in line, rest is one thing that they do not get during their 15-minute mid-morning rest breaks.<sup>16</sup>

In spite of these understandings, the year 2002 witnessed yet another violation when a (female) supervisor told a worker who said she needed to go to the bathroom to deal with menstrual bleeding that she did not need to go; after the worker bloodied her clothing, Buckholtz told the plant manager that he was going to file another complaint with OSHA; the manager pleaded with Buckholtz not to do so, offering to remove the offending supervisor, who Buckholtz assumed was transferred to quality control, if she still works there at all. Buckholtz believed that OSHA's citation—backed up by extensive and embarrassing local media attention—has “carried a lot of weight” in keeping the company compliant. However, he said that he would be very surprised if toilet access problems did not flare up again because management was constantly testing and feeling out the union on all issues to see how far it could push its powers. Although the local did inform workers of their rights after OSHA issued the citation—Buckholtz had apparently been unaware of Orton's memorandum of January 21, 1998 until the author mentioned and faxed it to him—with 20 to 30 new workers hired weekly and an annual turnover approaching 100 percent, the union did not and could not inform workers every day; consequently many workers, especially those from Latin America, may be unaware of their right to void when they need to and may not complain when supervisors prohibit them from leaving the line.<sup>17</sup>

A more differentiated picture of developments at the John Morrell plant in Sioux City emerged from the remarks of Ron Derochie, president of UFCW Local 1142. Derochie, who has worked there since 1959, observed that until the late 1980s, the custom had always been that someone working on the chain who

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<sup>16</sup>Telephone interview with Bill Buckholtz, secretary-treasurer, UFCW Local 1142, Sioux City, IA (Oct. 16, 2002).

<sup>17</sup>Telephone interview with Buckholtz.

needed to go to the toilet would shout to the foreman that he needed relief and the foreman would send a spell-out man; if the spell-out man did not come soon, the worker would shout again that he needed relief and would just go. Since the late 1980s, however, as the union's strength waned, it has been a constant struggle because young foremen, trying to make a name for themselves, periodically refuse to let workers go, some of whom have urinated on themselves. Although the OSHA Memorandum has helped, Derochie noted that the union had to "jump on" upper management every once in a while to rein in these foremen. To be sure, Derochie could not say for certain whether the foremen were operating on their own when engaging in such unlawful practices.<sup>18</sup>

In spite of the \$36,000 penalty that Iowa OSHA assessed against the Excel plant in Ottumwa,<sup>19</sup> the prospects of future compliance by the employer seemed dim in light of the policy remarks made by the corporate spokesperson. Denying that there had been any further problems, Mark Klein stated that employees with medical notes could go to the bathroom whenever they needed to; asked about toilet access for those without medical notes, he commented that they could go during breaks, which he incorrectly asserted were three in number—mid-morning, lunch, and mid-afternoon. In fact, unless there is overtime, workers have no afternoon break and must work three hours straight after lunch. In response to a question as to whether such workers could go to the bathroom between breaks, Klein stated that the supervisor would let them go "if they really have to." When the author expressed mystification as to how anyone (including a supervisor) could possibly know when another human being "really had to" void, Excel's spokesperson pooh-poohed this skepticism, asserting that perhaps it would be difficult to know in the abstract, but in actual circumstances "common sense tells you" whether someone "really" has to go. The crucial point here is not that Klein was unwilling (and presumably unable) to specify those circumstances, but that the corporate media representative of the huge Excel-Cargill food processing empire felt no compunction about telling a university researcher who purported to be an expert on the subject that the corporation had implemented a policy that Klein should have known (if he did not know) was blatantly unlawful under OSHA, which accords the employer no power to await the results of the deployment of a urinary divining rod or lie-detector test before letting employees go to the bathroom.<sup>20</sup>

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<sup>18</sup>Telephone interview with Ron Derochie, president, UFCW Local 1142, John Morrell plant, Sioux City (Hinton, IA, Oct. 12, 2002).

<sup>19</sup>See above ch. 12.

<sup>20</sup>Telephone interview with Mark Klein, Minneapolis (Oct. 15, 2002). When the author called the Excel plant, Ken Larson, the assistant director of human resources, referred him to "corporate" and specifically Klein, whose title he characterized as "media." Tele-

That Excel may in fact use precisely such methods of harassment to deter workers from exercising their right to answer nature's call when they need to was made plausible by an interview with Ron Brown, the president of UFCW Local 230 in Ottumwa, who remarked that it was "funny" that the author had called to interview him about bathroom breaks at Excel because at that very moment he was dealing with an incident that had just occurred the previous week. Brown related that workers' access to the toilet had improved since Iowa OSHA had cited Excel and that the union had discussed workers' right to go to the bathroom in its newsletter. As a result of the resolution of the citation, management and the union had reached an understanding that there would be a three-step process in the future when a worker needed to go: he or she would tell a supervisor, who would have five to ten minutes to find a replacement; if no supervisor were available, the employee would wait five to ten minutes for a utility person; if no utility were available, the worker would just tell the person next to him or her and go. Although this system generally functioned, Brown was aware of cases where workers had to wait as long as 90 minutes. During the previous week, a woman on the evening shift had gone to the bathroom to deal with heavy menstruation flow; on discovering that she lacked a quarter to buy a hygienic pad in the machine in the bathroom, she returned to the line to borrow the coin, but the supervisor, doubting her statement, told her that she had already spent enough time away from the line and ordered her to get back to work. The worker, going over the head of this supervisor—who was a relatively new assistant supervisor, who, as is often the case with novice straw bosses, was trying to establish his authority—repeated her request to the next higher supervisor, who at first asked her whether she was perhaps talking about "hog" blood she might have picked up on the line or her own blood. Since by this time she had already bloodied her clothes, he relented, letting her go home to change her clothes.<sup>21</sup> Brown reported that toward the end of 2002 another worker had filed a bathroom access complaint with OSHA, which then did an inspection, but because he had not yet had the time to read the letter that OSHA had sent the union about it, he did not know the details of the complaint or the outcome.<sup>22</sup> In fact, OSHA had been "unable to establish that any employees had been denied a restroom break or punished as the result of using the restroom."<sup>23</sup>

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phone interview with Ken Larson (Oct. 15, 2002).

<sup>21</sup>Telephone interview with Ron Brown, president, UFCW Local 230, Ottumwa, IA (Oct. 14, 2002). Byron Orton, who was aware of the incident, expressed hope that the case could be resolved amicably. Telephone interview with Byron Orton (Oct. 18, 2002).

<sup>22</sup>Telephone interview with Ron Brown (Dec. 30, 2002).

<sup>23</sup>Fax letter from Mary Bryant, IOSH Administrator, to Marc Linder (Dec. 31, 2002). Iowa OSHA did however cite Excel for several violations of the standard governing

UFCW Local 222, headquartered in Sioux City, Iowa—and reputed to be the strongest at any IBP plant<sup>24</sup>—reported that at the Tyson-IBP cattle slaughter plant across the Missouri River in Dakota City, Nebraska, it had taken a while after 1998 to deal with bathroom access problems, but that union officials had pushed hard. The company, especially after Tyson acquired IBP, has been well aware of the import of the OSHA ruling. The informal rule at the plant—whose 3,800 employees have the lowest annual turnover rate (4 percent) in the IBP system—according to local union president, Marv Harrington, is that workers have to ask a supervisor for permission, but if they do not receive permission within five minutes or no supervisor is available for five minutes, they are free to leave the line. Since the company employs no utility or relief workers, a foreman or extra gang member takes the worker's place.<sup>25</sup>

But, as Chuck Clayton, Local 222's business agent, conceded, it is easy for full-time union officials like himself to tell workers that if they have to go to the bathroom, they should tell their supervisors and, if the latter do not provide relief, go straight to the bathroom and come straight back without any detours (a trip which, including doffing and donning protective clothing, takes about five minutes); many line workers, however, justifiably fear that supervisors will hassle them later for this act of independence.<sup>26</sup> This fear accounted for the fact that sometimes foremen made workers wait as long as an hour. Harrington explained that the residual root problem is a "power thing" on the part of individual foremen; nevertheless, although upper management does reprimand foremen who violate the foregoing procedure, the president believed that the company was in fact complicit. When asked whether management could really regard such harassment as a means of increasing worker productivity, Harrington replied that, with a large pool of job applicants at its disposal, the company probably did not think about that issue one way or the other. During 2002 several workers who had been made to wait defecated in their pants, one of whom was too embarrassed to let the union file a complaint with OSHA. At the very end of 2002 two more workers whose supervisors had made them wait an hour defecated on themselves; after going to the bathroom to clean themselves off, they went home

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controls of hazardous energy. Excel Corp., Insp. No. 305712721 (Dec. 12, 2002). Because the complaint file was not yet closed, Iowa OSHA was unable to provide additional information as to why it had been unable to confirm a violation. Email from Mary Bryant to Marc Linder (Jan. 8, 2003).

<sup>24</sup>Telephone interview with Jackie Nowell, UFCW, Washington, D.C. (Dec. 13, 2002).

<sup>25</sup>Telephone interview with Marv Harrington, President, UFCW Local 222, Sioux City, IA (Dec. 17, 2002).

<sup>26</sup>Telephone interview with Chuck Clayton, Business Agent, UFCW Local 222, Sioux City, IA (Dec. 13, 2002).

because they were so upset. The company then terminated them for leaving the plant, and the cases went through the grievance process to pre-arbitration. In none of these instances, however, did the union file a complaint with OSHA.<sup>27</sup> If a succession of such complaints had been filed and if OSHA had issued a citation, the basis would have been laid for imposing much costlier monetary penalties for willful and/or repeated violations<sup>28</sup> in addition to reinstatement and back pay for having discharged employees for exercising their right to go to the bathroom when they needed to under OSHA.<sup>29</sup> One possible reason for the union's reluctance to file complaints may be its belief that, because the company tells workers that they are free to go to the bathroom with relief, it might be complicated to prove violations to OSHA.<sup>30</sup>

The president of UFCW Local 431, which has organized the IBP plant in Waterloo, the Oscar Mayer plant in Davenport, and the Hormel plant in Knoxville, Iowa, explained that it has not had any toilet access problems. It printed the new OSHA rule in its newsletter once, and has informed the workers and management.<sup>31</sup>

Some sense of the difference that the OSHA Memorandum has meant can also be gleaned from an account given by Gary Best, the very articulate secretary-treasurer of UFCW Local 227 in Kentucky, which has a total membership of 20,000, many of them employed in chicken and hog slaughter plants. Best recounted that the significant toilet access problems that had prevailed at these plants (such as Tyson, Cagle's, and Keystone) before April 6, 1998, were greatly diminished by a combination of union aggressiveness, which included distributing handbills with the text of the Memorandum, and increased compliance by employers, which had learned of their new obligation independently. But he emphasized that this positive impact was confined to unionized plants; at unorganized plants, such as Perdue, the freedom to void remains a problem, and workers who complain about it are simply fired.<sup>32</sup> Unsurprisingly, toilet access has also played a role in organizing drives. During Local 227's campaign to organize the Cagle's-Keystone Foods poultry plant in Albany, Kentucky in 2000, one of the huge number of unfair labor practice charges contained in the complaint

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<sup>27</sup>Telephone interview with Harrington (Dec. 17, 2002 and Jan. 8, 2003). In one instance the company admitted its responsibility and paid for the worker to go home and change her pants. Telephone interview with Clayton.

<sup>28</sup>29 USC sect. 666(a).

<sup>29</sup>29 USC sect. 660(c).

<sup>30</sup>Telephone interview with Clayton.

<sup>31</sup>Telephone interview with John Honeycutt, President, UFCW Local 431, Davenport, IA (Dec. 16, 2002).

<sup>32</sup>Telephone interview with Gary Best, Louisville, KY (Oct. 2, 2002).

that the National Labor Relations Board filed against the company was threatening employees that they would get only two bathroom passes per week if they voted for the union.<sup>33</sup> However, later that year the workers voted overwhelmingly in favor of union representation<sup>34</sup> and bathroom access has not been a problem since.<sup>35</sup>

From a broader perspective, Best frankly admitted that members sometimes are just “goofy,” abusing bathroom breaks by making telephone calls, smoking, and even leaving the plant. In turn, however, employers are also at times “goofy”: although they clearly have the right to discipline workers for such violations, instead of doing so, they have issued blanket bans on unscheduled toilet breaks for everyone, as Jim Beam did. The OSHA memo was especially important in putting an end to such employer tactics, and if the ultimate outcome in the Jim Beam case had been to vindicate such measures, the UFCW would, in his view, have been in real trouble. Best also noted that during boom times, a unionized employer could not get away with banning toilet access—workers would just say “fuck you” and leave for another job. Moreover, he insisted that for himself personally, if a boss in a unionized workplace told him to wait 30 minutes to use the toilet, he would either systematically ask permission 30 minutes early or find one way or another to take back the 30 minutes. Best doubted very much that employers would prefer a rule requiring them to let workers use the toilet every x minutes: employers can live with the reasonableness standard and adjust production. To buttress this claim of flexibility, he pointed to plants organized by Local 227 in which workers finish their work after six hours and go home and get paid for eight hours. If employers tried to give them additional work to fill up eight hours, they would soon discover that it took workers nine hours to do.<sup>36</sup>

The Communications Workers of America, which has organized about 10 percent of call-center workers—one of the fastest growing occupational groups with an estimated 3.5 to seven million workers<sup>37</sup>—on whom even union employers have imposed very tight toilet access restrictions, quickly informed employers of the OSHA Memorandum. Dave LeGrande, the union’s director of oc-

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<sup>33</sup>Joseph Gerth, “Labor Board Lists 153 Charges Against Cagle’s,” *Courier-Journal* (Louisville), June 28, 2000, on <http://www.courier-journal.com/localnews/2000/0006/28/000628chik.html>.

<sup>34</sup>“Cagle-Keystone Workers Stand Up for a Voice on the Job,” U.S. Newswire, Dec. 8, 2000 (Lexis).

<sup>35</sup>Telephone interview with Gary Best (Jan. 22, 2003).

<sup>36</sup>Telephone interview with Gary Best (Oct. 2, 2002).

<sup>37</sup>“Telephone Call Centers: New Factory Floors,” on <http://www.workindex.com/editorial/whar/whar0207-01.asp>; [http://www.cwa-union.org/workers/customer/call\\_center.asp](http://www.cwa-union.org/workers/customer/call_center.asp); Stephanie Luce, “Stress in the Call Center” (Oct. 16, 2002), on <http://www.fguide.org/Bulletin/callcenter.htm>.

cupational safety and health, praised it for having given the union greater “leverage,” as a result of which the newly interpreted standard has been “really great in bringing employers up to speed.”<sup>38</sup>

Nevertheless, when informed later that OSHA had cited the Convergys call center for having restricted toilet access,<sup>39</sup> LeGrande was surprised. Having assumed at the time the Memorandum was issued that OSHA would apply its new interpretation only to assembly-line-type settings, he had not imagined that the agency would enforce the standard if it meant interfering with the kind of employer-imposed workplace structures that, for example, dictated work routines in call centers. To be sure, LeGrande’s skepticism had in part been shaped by the union’s experience with a complaint that it had filed with Maryland OSHA in the period before the Memorandum was issued. When that state-plan program refused to cite an employer in Baltimore based on the position—which OSHA in general took at that time—that section 1910.141(c)(1)(i) did not confer power on OSHA to deal with the intervals at which employers permitted workers to go to the bathroom, LeGrande spoke to the then (Clinton-administration) administrator of Federal OSHA, who stated that state-plan states were free to interpret such provisions totally independently of Federal OSHA. After having been apprised of the OSHA action against Convergys, however, LeGrande was persuaded that that citation could play a part in future organizing campaigns of call-center workers at Convergys or elsewhere.<sup>40</sup>

That the presence of a union can radically improve access was shown in the case of Faneuil, a 300-employee call center, where before the advent of the UFCW, “you went into break mode to go to the bathroom.” After the union was elected as the workers’ representative, they gained “the freedom to go to the bathroom anytime.”<sup>41</sup>

Nevertheless, suppression of voiding rights remains an acute problem even for unionized call center workers. A survey of stress among call center workers in Detroit, Boston, New Jersey, and Ohio, conducted on behalf of the Utility Workers Union in the summer of 2002, elicited these open-ended comments:

The supervisors that have no work to do will see you leave your desk to go break or bathroom + they’ll make a point to let you see them look at their watch noting the time you left (like we don’t watch our break times). Supervisors...will follow you into the bathroom to check on you.

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<sup>38</sup>Telephone interview with Dave LeGrande, director of occupational safety and health, Communications Workers of America, Washington, D.C. (Oct. 3, 2002).

<sup>39</sup>See above ch. 11.

<sup>40</sup>Telephone interview with Dave LeGrande (Nov. 14, 2002).

<sup>41</sup>“Little Things Lead to Big Change,” *Union*, September 2002, at 15.

You are timed to the second for everything you do. You can't even go to the bathroom without being timed. There is entirely too much pressure and something needs to be done.

What upsets me is the fact that we have to be on the phones 7 hours and 15 minutes out of a 7 ½ hour day. We also have to sign off the phones with a special code for the bathroom. They call it a bio break. I personally have to go to the bathroom 3-4 times a day. This kills about 15-20 minutes a day. So you see this already puts me below the time I'm supposed to be on the phone.

More, more, more...faster, faster, faster.... and whatever you do, don't drink a lot or you will have supervisors coming in the bathroom after you.

We may as well be chained to our desks for any kind of freedom to move around & even go to the bathroom.

Only have 14 minutes to go to restroom - what if I am ill?<sup>42</sup>

The managerial mindset facing workers and unions seeking less stressful working conditions in this industry is illustrated by letters from two companies to OSHA in response to complaints of restriction of toilet access. Amusingly, in spite of the seamlessly oppressive control that call centers impose in large part by virtue of the very computers that the employees use, one company sought to disarm OSHA by explaining: "The Omaha workplace is that of a typical large open office space. No manufacturing operations occur at this office location. No chemicals are used in this office setting. Employees sit at desks and use telephones and computers, much like the activities that occur in OSHA's own offices."<sup>43</sup> The other took the opposite approach, virtually boasting to OSHA of the all-encompassing technological surveillance it was creating in response to a complaint of access:

[W]e are implementing another AUX Code in the Customer Service Center that would allow the employee to hit a button on their phone and it would log them off the system and identify that they were using the restroom. ... This offers a second AUX Code from

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<sup>42</sup>These comments were collected in connection with Stephanie Luce and Tom Juravich, "Stress in the Call Center: A Report on the Worklife of Call Center Representatives in the Utility Industry," Report submitted to the Utility Workers Union of America (August 29, 2002). The comments were emailed to the author by Stephanie Luce, who also gave permission to use them (Dec. 20, 2002). The study itself can be read at <http://www.uwua.org/callcenter.htm>.

<sup>43</sup>Letter from Denise Serrett, Human Resources Manager, APAC Customer Services, Inc., Omaha, NE, to Duty Officer, U.S. Department of Labor, Omaha (June 17, 2002), in OSHA, APAC Customer Service [sic], Complaint No. 203761291 (May 31, 2002).

the current AUX Code 1 that only identifies when you are on a break. In doing so, this will allow us to track usage of the restroom and create a bell curve for average usage and abnormal usage and lengths of bathroom breaks needed for employees. With this statistical information we will have a better handle on employees going to the restroom or on their assigned breaks as agreed to, through their labor contract.<sup>44</sup>

Further confirmation of the effectiveness of the Memorandum as a threat came from Mike Wright, the director of Occupational Safety, Health, and Environment at the United Steelworkers, who observed that frequently during organizing drives, especially at smaller firms in little-unionized industries in which employers do deny access to the toilet, the union has been able to give workers a sense of entitlement by telling them about the OSHA Memorandum. Even where the union eventually did not succeed in winning a representation election, Wright stated that the workers nevertheless felt more empowered to demand and gain access.<sup>45</sup>

Interestingly, local officials of the Steelworkers reported that bathroom access has not been a significant problem in unionized steel plants because many of the jobs are “overstaffed”; consequently, individual workers are not indispensable and if a worker has to void, a co-worker can perform his job.<sup>46</sup> Terry Davidek, the hourly safety coordinator (a new full-time position bargained for by the union) at an Allegheny Ludlum steel plant went so far as to say that, if, for example, the operator of a line suddenly had diarrhea and had to go to the toilet immediately, he could just shut down his line and if there were others working on it, they could do clean up or some other work—“there’s always something to do”—for the few minutes until the operator returned. Because the unionized workers more or less “run the plant,” they do not need to ask a supervisor’s permission to go to the bathroom. In 29 years at the plant, Davidek had never heard of a worker’s not being allowed to go to the bathroom.<sup>47</sup>

The American Postal Workers Union, whose members obtained OSHA coverage on September 28, 1998, when, thanks largely to lobbying by UPS and Federal Express—of which OSHA has to date conducted a total of 2,735 and 443

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<sup>44</sup>Letter from Aquila Networks, Lincoln NE, to OSHA, Omaha (Aug. 12, 2002), in OSHA, Aquila, Complaint No. 203761739 (July 17, 2002).

<sup>45</sup>Telephone interview with Mike Wright, Director of Occupational Safety, Health, and Environment, United Steelworkers, Pittsburgh (Oct. 10, 2002).

<sup>46</sup>Telephone interview with Jim Blainiar, Hourly Safety Coordinator, Allegheny Ludlum, West Leechburg, PA USW Local 1138 (Oct. 30, 2002).

<sup>47</sup>Telephone interview with Terry Davidek, hourly safety coordinator, Allegheny Ludlum, Brackenridge, PA (Nov. 1, 2002). To be sure, this description contrasts sharply with that given by the president of the Steelworkers local at Steel of West Virginia, which OSHA cited for not permitting an employee to go to the bathroom. See above ch. 11.

inspections, respectively<sup>48</sup>—Congress enacted the Postal Employees Safety Enhancement Act, which amended OSHA,<sup>49</sup> reported that before that time, when federal workers were formally covered by 29 CFR section 1960, which conferred no enforcement powers, inside workers were often not permitted to go to the toilet by individual supervisors. After postal workers became covered by OSHA, the union's occupational safety and health director, Corey Thompson, using the April 6, 1998 Memorandum, pressed the U.S. Postal Service to comply, and he reported that the problem has largely been resolved.<sup>50</sup> In fact, although OSHA has issued at least two citations to the USPS in recent years for failing to provide the proper number of toilets,<sup>51</sup> none has been issued for denying access to toilets. However, OSHA's Austin Area Office noted that it has received several toilet-access complaints from postal workers that were resolved short of an inspection,<sup>52</sup> and the Omaha Area Office received one in 2002,<sup>53</sup> while a safety engineer with the OSHA regional office in Seattle reported that in the period after April 6, 1998, while he was an area director in Bellevue, Washington, he received a complaint from a worker at a USPS sorting facility about a supervisor who clocked workers' bathroom visits and followed them to the bathroom. As a result of OSHA's intervention requesting that the USPS deal with the union on this issue, the Postal Service issued an apology to the workers and a written statement declaring that the workers had the right to go to the bathroom. The OSHA official, who was in frequent contact with the union, never heard of problems again.<sup>54</sup>

Local 100 of the Transport Workers Union in New York City reported that bus drivers often have two-hour routes during which they cannot leave the bus; and even if they could, there is often no bathroom they can use.<sup>55</sup> Alternatively, they may have a five-minute break at the end of a run, but may have to walk a half-mile to find a toilet. Some drivers have been reduced to urinating into a bottle, a stratagem not readily available to female drivers, many of whom suffer

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<sup>48</sup><http://www.osha.gov/cgi-bin/est/est1>.

<sup>49</sup>Postal Employees Safety Enhancement Act, Pub. L. 105-241, 112 Stat. 1572 (1998), codified at 29 USC sect. 652(5). For a condensed legislative history, see *Occupational Safety and Health Law* 53-55 (2d ed.; Randy Rabinowitz ed. 2002).

<sup>50</sup>Telephone interview with Corey Thompson, Washington, D.C. (Oct. 7, 2002).

<sup>51</sup>U.S. Postal Service, Insp. No. 301505343, Big Rock, TN (2002) (toilet out of service for 10 days); U.S. Postal Service, Insp. No. 300675501, Albuquerque, NM (2000) (insufficient number of toilets).

<sup>52</sup>Telephone interview with Elizabeth Slatten, Asst. Area Dir., OSHA Austin Area Office (Nov. 7, 2002).

<sup>53</sup>See above ch. 11.

<sup>54</sup>Telephone interview with Dale Cavanaugh, OSHA Regional Office, Seattle (Dec. 2, 2002).

<sup>55</sup>Rob Ortiz, Safety Dept., TWU Local 100, New York (Oct. 22, 2002).

from urinary tract infections and related illnesses. Although the union had been unaware of the OSHA Memorandum, a vice chairperson of its Transit Authority Surface division was intrigued by the suggestion that the union file complaints with OSHA, especially in conjunction with the fall 2002 round of collective bargaining.<sup>56</sup> Local 100 also reported a further practice clearly at odds with employers' obligation to let workers urinate when they need to: employees working in subway token booths may be stuck there for four or even eight hours if their relief person is sick and no one comes to relieve them, because they are forbidden to leave the booth where they are required to guard \$10-12,000.<sup>57</sup>

At the Retail, Wholesale, and Department Store Union, which is affiliated with the UFCW, the Health and Safety Department has created a fact sheet explaining that reasonable access is a right and not merely a privilege, and that employers "cannot dictate how often employees can use bathroom facilities during a work day."<sup>58</sup> (To be sure, instead of underscoring the OSHA Memorandum's injunction that "employers...make toilet facilities available so that employees can use them when they need to do so,"<sup>59</sup> it overcautiously admonishes RWDSU members that "OSHA regulations do not authorize employees to go to the bathroom whenever they please.")<sup>60</sup> In addition to posting an excellent explanation of the Memorandum on its website,<sup>61</sup> the union has recently begun vigorously propagandizing its locals on the matter.<sup>62</sup>

The RWDSU has organized three chicken processing plants in Georgia, owned by Tyson, Cagle's, and Equity-Keystone. According to the union's energetic and articulate International Representative in Atlanta, Edgar Fields, bathroom access became a problem in 2001-2002, as employers made workers wait for as long as 30 minute to leave the line, in large part because the companies had not hired enough relief workers. The situation in chicken processing plants is of particular interest because, according to Fields, a worker's leaving the line before a relief worker arrives generally does not inflict any economic or material damage on the employer: it is not the case that any machinery or product would be damaged let alone destroyed; and because three or four workers generally per-

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<sup>56</sup>Telephone interview with Lloyd Archer, vice chairperson, TA Surface, TWU Local 100, New York (Oct. 23, 2002).

<sup>57</sup>Telephone interview with George McDonald, TWU Local 100, New York (Oct. 21, 2002).

<sup>58</sup>RWDSU, "Gimme a Break: Access to Bathroom Facilities at Work" (n.d.).

<sup>59</sup>See below Appendix II.

<sup>60</sup>RWDSU, "Gimme a Break: Access to Bathroom Facilities at Work" (n.d.).

<sup>61</sup>[http://www.rwdsu.org/health\\_safety.html#bathroom\\_breaks](http://www.rwdsu.org/health_safety.html#bathroom_breaks)

<sup>62</sup>Telephone interview with Steve Mooser, director of safety and health, RWDSU, New York City (Oct. 7, 2002).

form the same work as the (would-be) urinator, they can do his or her share for the few minutes he or she is away.<sup>63</sup> Since no material detriment accrues to the employer and the crux of the dispute is merely the employer's desire to retain unilateral control over workers' time, the employer cannot adduce any objective disruptive impact on its operations that would reasonably justify delaying the onset of the worker's bathroom visit.<sup>64</sup> At the Equity plant in Camilla, Georgia, the employer fired a worker who had left the line before the employer had granted him relief because he urgently had to void. The union filed a grievance over the dismissal (and the worker was reinstated after two weeks with back pay), but then, after Fields spoke to the author, it decided to file its first OSHA complaint as well.<sup>65</sup> Instead, however, choosing to rely on its own power and resources, the RWDSU embarked on its enforcement campaign at the three Georgia poultry plants. It distributed the aforementioned factsheet, "Gimme a Break: Access to Bathroom Facilities at Work," to the members and informed the managements that in the future workers would be adhering to this procedure taken from the factsheet, which in turn is in conformity with the OSHA Memorandum:

Going to the bathroom when you need to is not a privilege. IT IS A RIGHT! Follow this procedure for using the bathroom facilities:

- \*Ask your supervisor for permission to go to the bathroom.
- \*If you are told to wait, ask when you will be able to go.
- \*If that waiting time is unreasonable for you, tell your supervisor you must go sooner.
- \*If your supervisor still says no, go ahead and use the bathroom.
- \*Your union will protect you in any disciplinary action.<sup>66</sup>

As of the beginning of 2003, management was still complying with the RWDSU's straightforward interpretation of the Memorandum. This success, Fields stressed, has been due in part to the union's firm and aggressive stance, but above all to the concerted day-to-day enforcement by well-informed shop stewards against supervisory recidivism, for which self-defense there is no substitute. Fields astutely pointed out that although supervisors' petty interference with workers' biological needs sometimes appears to be driven by ego trips, it should also never be forgotten that these lower-level bosses—who of course have no union to protect them—are under constant pressure to produce more with what they regard as understaffed production lines; when their bosses tell them that they will simply have to make do with the workers they have, they react by trying to

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<sup>63</sup>Telephone interviews with Edgar Fields, Atlanta (Oct. 7, 2002 and Jan. 7, 2003).

<sup>64</sup>For an explanation of this interpretation, see above ch. 6.

<sup>65</sup>Telephone interviews with Edgar Fields.

<sup>66</sup>RWDSU, "Gimme a Break: Access to Bathroom Facilities at Work" (n.d.).

cover themselves by extracting every second of working time they can from every employee present. One of the consequences of these production campaigns is that it becomes very easy for harried supervisors to presume, if they did not already believe it, that workers who request permission to stop working in order to go to the bathroom do not “really” need to void.<sup>67</sup>

This account of the RWDSU’s successes in the southern chicken-slaughter plants should be tempered by the attitude of and position taken by the chairman and chief executive officer of one of these companies. The CEO of Cagle’s, the eighth biggest producer in the United States,<sup>68</sup> who instantly recalled the details of the dispute over bathroom breaks at the Macon plant a quarter-century earlier,<sup>69</sup> stated in 2003 that he had never heard of the OSHA Memorandum. The practice in his firm’s plants was that workers can go to the bathroom outside of scheduled breaks (mid-morning, lunch, and mid-afternoon if the line operates more than 2.5 hours in the afternoon) as long as their relief person is not relieving someone else. Estimating that one relief worker was employed for about 25 production workers, he insisted that even if four workers performed the same task next to one another, the pace was such that three could not fill in for one who went to the toilet even for just a couple of minutes.<sup>70</sup> If any employee sought relief more often than the others, the relief worker would note this fact and report it. If employees are sick, they are allowed to go to the bathroom more often—but only until they can “clear up” their health problem.<sup>71</sup>

To be sure, not all unions have aggressively pushed for bathroom rights, and the members of the weak ones that have not may have benefited as little as unorganized workers.<sup>72</sup> The United Auto Workers is an interesting example of a strong union with a remarkable system of collectively bargained-for regulation of hours that nevertheless appears unaffected by the OSHA Memorandum. In the summer of 1997—on precisely the same day that Federal OSHA was issuing its first toilet access citation to Hudson Foods—the union had struck the General Motors parts plant in Warren, Michigan, where the company’s failure to replace

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<sup>67</sup>Telephone interview with Edgar Fields (Jan. 6 and 7, 2003).

<sup>68</sup>Gary Thornton, “Acquisitions, Restraint Key Factors in 2001,” *Watt Poultry USA*, Jan. 2002, at 26A-F, on <http://www.wattnet.com/Archives/Docs/0102wpA.pdf>.

<sup>69</sup>See above ch. 13.

<sup>70</sup>Alma Oliver, who worked at the Cagle’s Macon plant for 37 years, observed that for most jobs co-workers performing the same job could also do the job of someone who leaves the line for about five minutes; a relief person is necessary only for those jobs that are done by one person or when someone needs to use the bathroom for more than five minutes. Telephone interview with Alma Oliver, Macon (Jan. 29, 2003).

<sup>71</sup>Telephone interview with Doug Cagle, Atlanta (Jan. 28, 2003).

<sup>72</sup>Telephone interview with Robyn Robbins, Asst. Dir., Occupational Safety and Health, UFCW, Washington, D.C. (Oct. 3, 2002).

retiring workers for two years had led to a shortfall of hundreds of workers. One result was that assembly line workers were “waiting an average of 30 to 45 minutes to urinate....”<sup>73</sup>

What was an abuse provoking a successful strike—G.M. quickly agreed to hire 420 additional workers<sup>74</sup>—is the bureaucratically sanctioned norm at the Ford assembly plant in Louisville, Kentucky, where the five-day week/ten-hour day has been in effect for about 25 years and workers are entitled to six minutes of break time per hour; this time, however, must be taken in two blocks of 40 minutes in the morning and 20 minutes in the afternoon. These two rest periods are taken, beginning one hour after the start of the workday and one hour after the lunch break, in (tag) rotation as one worker is relieved by a relief worker and then returns and the next worker leaves. If a worker needs to void between breaks, a “quality upgrader” can relieve him or her, but Ford has up to 40 minutes to provide this relief. The author’s suggestion to the president of UAW Local 862 that a 40-minute wait would be unlawful under OSHA’s sanitation standard and that the union might want to consider filing a complaint failed to elicit a direct response.<sup>75</sup>

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<sup>73</sup>Robyn Meredith, “Strike Closes Parts Factory in Job Dispute,” *N.Y. Times*, July 24, 1997, at A12, col. 6 (Lexis) (quoting Ronald L. Campbell, Jr., a paint inspector). The version of this article now available on Lexis lacks this part, as does the edition of the *Times* on microfilm and Proquest, in all of which the article appears in section D.

<sup>74</sup>“Union Approves Deal with G.M. to End Strike,” *N.Y. Times*, July 28, 1997, A9, at col. 1 (Lexis).

<sup>75</sup>Telephone interview with Rocky Comito, president, UAW Local No. 862, Louisville, KY (Oct. 7, 2002). The local contract includes a letter of understanding pertaining to a “relief ratio” varying according to job classification; converted into minutes, these ratios provide for as much as a 10-minute per hour break for paint sprayer to 8 minutes for welder arc, acetylene and gas. *Local Agreements, Letters of Understanding and Rates Between Local 862 UAW and the Ford Motor Company Louisville Assembly Plant Agreement Dated October 29, 1999* at 152. The maximum 40-minute waiting time for bathroom relief is not set out in the national or local agreements, but Comito explained that it has been in effect for as long as he can remember and derives from the 40 minutes that the relief person is occupied giving scheduled relief in the tag rotation system. Telephone interview with Comito (Oct. 22, 2002). According to the latest collective bargaining agreement between the Ford Motor Co. and the UAW: “On line operations relief men will be designated to make relief available at all times and in a ratio to provide each employee with at least 24 minutes of actual personal relief per 8 hour shift.” The agreement permits details to be worked out at the local level. In addition, by agreement of Sept. 18, 1964, “an additional relief allowance of 12 minutes per eight-hour shift, for a total of 36 minutes, will be provided to those employees on operations where their manual operations are continuous and cannot be left unattended and for which tag relief is furnished....” By agreement of Dec. 7, 1970, workers received an additional relief al-

In spite of such OSHA violations, the staff of the UAW's Health and Safety Department reported that they were unaware of any toilet access problems in auto plants under contract.<sup>76</sup> The director of the department stated that bathroom access for auto workers "is not perceived by anybody as a problem." Moreover, although it was unclear who at the UAW would even have a national overview of the state of bathroom access in the industry, "anybody who'd know wouldn't talk to a law professor" because the UAW "isn't going to admit" that members have problems getting to go. Nevertheless, he did stress that the issue of staffing levels, which do have a crucial impact on a broad variety of working conditions including breaks, overtime, and vacations, is a significant problem.<sup>77</sup>

In contrast, the Canadian Auto Workers (CAW) have achieved a break system that its director of Work Organization and Training was willing to discuss. At Daimler-Chrysler, for example, where workers work 7.5 hours (for 8 hours' pay) and get 45 minutes of mass breaks (11 minutes during first half of shift, 24 minutes of a meal break, and 10 minutes in the second half):

In addition to this negotiated relief there is also emergency relief. An example: In the chassis operations where there are 240 workers 3 emergency relief workers are available to cover them for first aid, pass and pee. Usually a worker is readily accommodated. There are no time requirements in our agreement. As the plant chairperson puts it: "When you have to pee you have to pee."

There are times—maybe 10-12 times a year with a plant workforce of about 5200—when a worker is not relieved in time and has to walk off[f] the job to go to the bathroom. In these situations management always starts to discipline the worker but the union is successful in most cases of getting the discipline buried.<sup>78</sup>

Evidence for the vitality of the OSHA Memorandum can also be drawn from the negative example of UNITE (Union of Needletrades and Industrial, and Textile Employees). Asked whether OSHA's action had had any impact on the

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lowance of eight minutes per eight-hour shift, for a total of 44 minutes. *Agreements Between UAW and the Ford Motor Company* 1:18, 362, 365 (Oct. 9, 1999). The author originally heard about the 40-minute wait at the Ford plant from Jo Anne Kelley, the president of UFCW Local 111-D, who, at the height of the Jim Beam publicity, received many calls from workers about bathroom-break practices, including this one.

<sup>76</sup>Telephone interview with Peter Dooley, Occupational Safety and Health, UAW, Detroit (Oct. 21, 2002); telephone interviews with Sylvia Johnson, Occupational Safety and Health, UAW, Detroit (Oct. 2002).

<sup>77</sup>Telephone interview with Dr. Franklin Mirer, Director, Health and Safety Dept., UAW, Detroit (Oct. 22, 2002).

<sup>78</sup>Email from David Robertson, Director, Work Organization and Training, CAW, to Marc Linder (Oct. 17, 2002).

membership's access to toilets, its director of occupational safety and health explained that complaints about bans on voiding would rarely come to his attention because most workers do not regard the problem as one of safety and health, but of human dignity. Just as his interlocutor was about to ask him whether it was not the union's obligation to bring to its members' attention—as the UFCW and CWA had done in systematic campaigns—the fact that the issue was both one of dignity and occupational health and that since 1998 the government agreed that workers have a right to void at work when they have to, the director self-critically observed that perhaps he should have done so earlier and that perhaps he would do so now.<sup>79</sup>

Surprisingly, the director of safety and health at the Service Employees International Union, which has organized tens of thousands of low-paid unskilled workers, knew of no problems with bathroom access; he suggested (partly in jest) that the workers who might be most exposed to such treatment, janitors, worked in bathrooms and therefore presumably had adequate access.<sup>80</sup> Similarly, the director of occupational safety and health at the American Nurses Association observed: "I know that many nurses don't get to the bathroom as often as they need or like—sometimes throughout their whole shift. However, ANA hasn't specifically asked this question on any of our recent on-line surveys. To be honest, I was not actually aware of this memorandum from OSHA."<sup>81</sup> Despite the fact that Teamsters locals have filed numerous OSHA complaints about denial of access, the international's director of safety and health stated that he was unaware of any problems.<sup>82</sup> The safety and health director at the American Federation of Teachers, who was very well aware of anecdotal information about teachers' access problems, was, after she had been informed of the survey that the authors of *Void Where Prohibited* had conducted of teachers' toilet access problems, eager to replicate the study, on a larger scale, with the AFT's membership.<sup>83</sup>

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<sup>79</sup>Telephone interview with Eric Frumin, director of occupational safety and health, UNITE, New York City (Oct. 10, 2002).

<sup>80</sup>Voice mail message from Bill Borwegen, director of occupational safety and health, SEIU, Washington, D.C. (Oct. 3, 2002).

<sup>81</sup>Email from Karen Worthington, director of occupational safety and health, American Nurses Association, to Marc Linder (Oct. 16, 2002).

<sup>82</sup>Telephone interview with Chris Madar, director of occupational safety and health, International Brotherhood of Teamsters, Washington, D.C. (Oct. 8, 2002). On the OSHA complaints, see above ch. 11.

<sup>83</sup>Telephone interview with Daryl Alexander, director of occupational safety and health, American Federation of Teachers, Washington, D.C. (Oct. 15, 2002). According to the industrial hygienist of the United Federation of Teachers in New York City: "While this is not one of the top ten problems our staff face it is one that comes up." Email from Ellie Engler to Marc Linder (Oct. 25, 2002).

### Opinions of the Authors of the Federal and Iowa OSHA Memorandums

The views of John Miles, who as Director of Compliance Programs issued the Memorandum in 1998 and since then has had the opportunity to observe its enforcement as Regional Administrator of OSHA's Dallas Region, merit special attention. Miles ventured his "gut feeling" almost five years later that, even if the agency has not issued many citations for restriction of access, the Memorandum's greatest impact has probably been raising employers' awareness. That OSHA presumably did not anticipate that that impact would be very great emerges from Miles's astounding remark, concerning frequency of voiding, that "what we had in mind back then was every 2-3 hours—that's what's normal." However, in effect advising workers to engage in guerrilla warfare against his interpretation of his own interpretation, he added that, knowing that he has to void every two hours, if he were a worker whose employer made him wait 30 minutes to go to the bathroom, he would simply signal an hour and a half before he had to go.<sup>84</sup>

As author of the January 21, 1998 Iowa OSHA Memorandum that anticipated Federal OSHA's action ten weeks later, Iowa Labor Commissioner Byron Orton has, as already noted, actively intervened in the state's enforcement of workplace voiding rights.<sup>85</sup> Orton reported that overall he was "pleased" with the results of the aforementioned enforcement actions against slaughter plants: there had been no repeat complaints, the situations had become "much more workable," and "management is making a good-faith effort" to comply.<sup>86</sup> Orton stressed that, since "news travels fast in the employer community," as part of his overall enforcement and compliance strategy, he had made sure at the time that the Excel case, and especially the "painful" monetary penalty, got publicized.<sup>87</sup> While recognizing that employer intimidation does deter workers in unorganized workplaces from filing complaints with OSHA, Orton conjectured that, as a result of nonunion employers' fear of being inspected—though programmed inspections would be very unlikely—even in such settings the situation was "not totally hope-

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<sup>84</sup>Telephone interview with John Miles (Nov. 12, 2002). The same questions posed to Miles's successor elicited a response three weeks later that answers would be drafted by staff and possibly reviewed by the Solicitor's Office and would take about 60 days. Email from Marc Linder to Richard Fairfax (Dec. 10 and 25, 2002); email from Helen Rogers to Marc Linder (Dec. 30, 2002); letter from Richard Fairfax to Marc Linder (Dec. 31, 2002). No such answer had been received as of Mar. 6, 2003 when the page proofs were returned to the printer.

<sup>85</sup>See above ch. 12.

<sup>86</sup>Telephone interview with Byron Orton, Iowa Commissioner of Labor, Des Moines (Oct. 17, 2002).

<sup>87</sup>Telephone interview with Byron Orton (Oct. 18, 2002).

less.”<sup>88</sup> The fact, however, that Orton spoke prematurely—that even the unionized companies that Iowa OSHA had fined have proved to be recidivist and continue to test workers’ determination to defend their right to void—strongly suggests that Orton may well have been overly optimistic about the nonunion sector.

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<sup>88</sup>Telephone interview with Orton (Oct. 18, 2002).