Jan 2, 2005

## Void Where Prohibited Revisited

For University St Wichesen Library

The

Trickle-

Down

Effect

of

OSHA's

At-

Will

Bathroom-

Break

Regulation

## Marc Linder

Fănpihuà Press Iowa City 2003

Digitized by Google

Original from UNIVERSITY OF MICHIGAN Copyright © by Marc Linder 2003 All rights reserved Printed in the United States of America

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*.

The cartoon by Hekate, "Why Don't They Just Call In?" is reprinted on page 285 with the permission of Hekate.

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

Grad HD 5112 .4561 2003

## 17

## Is At-Will Voiding Now "The Law"?

Needing permission to use the bathroom is a hassle that may not pass after you get a job.<sup>1</sup>

When asked by the UFCW's lawyer at the OSHA hearing in August 2002 whether the practice of tag rotation or mini-breaks in between scheduled breaks had been ended by the side-agreement letter attached to the collective bargaining agreement of a year earlier, Jim Beam's plant manager inadvertently alluded to one of the most important questions concerning labor standards legislation: "That practice had been in effect for a long time, and it did not...end just because we said that it would. I mean...it ended when we implemented the policy and controlled it. ... How does a practice end with a signed piece of paper? No it didn't: it did not end at that time."

What is true of a policy in force at one relatively small workplace and enforcible by managers and/or owners with a pecuniary interest in compliance, is a fortiori true of a regulation theoretically in force at millions of places of employment, but policed by a small number of inspectors alerted to violations by complaints submitted by those (largely union) workers who happen not to be intimidated by the threat of dismissal or other reprisals. To be sure, the mere existence of a piece of paper (or a website), announcing a government agency's interpretation of its own regulation, stating that workers have a right should not give rise to a presumption that they actually do enjoy that right; but, conversely, the existence of a number of violations should also not per se give rise to the opposite presumption. Until more is known about the real world of workplace toilet access, the status of that right must remain indeterminate.

<sup>&</sup>lt;sup>2</sup>Commonwealth of Kentucky, Occupational Safety and Health Review Commission, Administrative Action No. 02-KOSH-0015 KOSH 3681-01, Secretary of Labor, Commonwealth of Kentucky v. Jim Beam Brands Co. at 202 (Aug. 29, 2002) (Jeff Conder, plant manager, Jim Beam Clermont plant).



<sup>&</sup>lt;sup>1</sup>React, July 6-12, 1998, at 5.

The mere fact, however, that no state or federal court has as yet upheld OSHA's interpretation of its toilet standard in no way undermines its validity or legitimacy. The reason that no judge has been called on yet to uphold or invalidate the Memorandum—Jim Beam Brands Company came closest to prosecuting such an appeal—is ambiguous: employers may take its validity for granted, not find compliance burdensome, or regard OSHA's enforcement activity as so feckless and sporadic that they can continue to violate the standard with impunity. Alternatively, OSHA may be choosing its citations very carefully because it would rather not litigate the provision.

Despite the evidence of continuing widespread violations of employers' obligation to make toilets available so that workers can use them when they need to, it is unclear whether noncompliance is so systematic, rampant, and massive, OSHA so deficient in its enforcement initiatives and so unresponsive to workers' requests for intervention, and monetary penalties so inadequate that it would be plausible to argue that the legal rule/right is insufficiently embedded in general public and employers' and workers' consciousness and conscience to have acquired the status of a moral right. In contrast, for example, under the National Labor Relations Act, the "level of employer lawlessness" has become so high and deterrence so meager—for every ten votes for unions in elections in 1985 one illegally discharged worker was reinstated by the National Labor Relations Board worker was reinstated by the National Labor Relations Board that it is plausible to characterize the right to self-organization as having become largely illusory for the workers who most urgently need its support.

If the argument were accepted that because, for example, Jim Beam, Convergys, and Liz Claiborne violated the law and interfered with workers' right to void, what was purportedly a right for workers had been converted into a mere privilege to be dispensed at employers' whim, then by the same logic, it would follow that because many employers violate the Fair Labor Standards Act by failing to pay workers overtime premiums, the right to be paid time and a half had also been turned into a mere privilege. Such a position would create a very high threshold for labor standards; indeed, it would come perilously close to arguing that since all laws are violated, no rights exist. To apply that approach it would be necessary to calculate empirically just how widespread and massive the violations are and how tough and intense the enforcement.

If, to take a hypothetically extreme example, 95 percent of employers employing 99 percent of workers violated the law, paying none of their covered

<sup>&</sup>lt;sup>5</sup>See, e.g., Craig Becker, "Elections Without Democracy: Reconstructing the Right to Organize," New Labor Forum, No. 3, at 97-109 (Fall/Winter 1998).



<sup>&</sup>lt;sup>3</sup>Paul Weiler, Governing the Workplace: The Future of Labor and Employment Law 239 (1990).

<sup>&</sup>lt;sup>4</sup>Weiler, Governing the Workplace at 112.

workers time and a half, and the enforcement agency prosecuted only very few, then it would be meaningful to characterize the right as illusory; but to reach the same conclusion merely because a few employers violated the law (and the workers involved filed complaints with OSHA, which actually cited the employers and brought about, aided by publicity, restoration of the status quo ante) would be premature.

An analysis of almost 75,000 cases brought by the U.S. Department of Labor (DOL) between 1991 and 1995 revealed that at 2.11 "victims" per 100 workers, construction firms recorded the highest rate of failure to pay premium overtime wages. Yet as dismayingly high as one violation for every 50 workers is, it still does not seem rampant enough to warrant regarding the legal right as having been downgraded to a de facto privilege. Perhaps the DOL's finding of overtime payment violations among 83.9 percent of security guard services, 80.9 percent of janitorial services, 69.4 percent of hotels and motels, and 60.6 percent of restaurant employers that it investigated in 1997 and of unpaid hours of work violations in 100 percent of 51 poultry processing plants surveyed in 2000 might justify such a conclusion, but even these levels of illegality might be insufficient if, despite such violations, even these chiselers nevertheless paid most of their workers overtime premiums most of the time.

The prerequisites for meaningful enforcement of labor protective norms include free and cooperative vigilance by well-informed workers and unions and a government agency staffed by motivated officials who can bring to bear adequate deterrence: "The agency should have a set of thumbscrews so assorted as to fit every unfairly grasping hand." If OSHA rarely if ever looks for toilet-access problems in connection with scheduled inspections, but the vast majority of current employees are too fearful of retaliation to file complaints with OSHA and the complaints of ex-employees will rarely enable OSHA to conduct an on-site inspection, the efficacy of complaint-driven enforcement of workers' right to void when necessary is seriously compromised. Moreover, if OSHA has only once imposed a monetary penalty large enough to make an employer think twice about risking even larger fines for future repeated or willful violations of the

<sup>&</sup>lt;sup>9</sup>"Report of the Standing Committee on Legal Aid Work, Appendix A: First Draft: Of a Model Statute for Facilitating Enforcement of Wage Claims," *Report of the Fiftieth Annual Meeting of the American Bar Association* 323-25 at 325 (1972).



<sup>&</sup>lt;sup>6</sup>G. Zachary, "Shortchanged: Many Firms Refuse to Pay for Overtime, Employees Complain," Wall Street Journal, June 24, 1996, at A1 (Lexis).

<sup>&</sup>lt;sup>7</sup>Brian Tumulty, "Many Low-Wage Workers Getting Shortchanged on the Job," Gannett News Service, Dec. 20, 1997 (Lexis).

<sup>&</sup>lt;sup>8</sup>U.S. Department of Labor, "Poultry Processing Compliance Survey Fact Sheet" (Jan. 2001), on http://www.ufcw.org/pdf/Usdept~1.pdf.

toilet-access standard,<sup>10</sup> firms that systematically restrict access in the belief that they are increasing working time, production, productivity, and profitability, may easily make a cost-benefit calculation indicating that even in the improbable case that one of their (especially nonunion) employees filed a complaint and OSHA actually issued a citation accompanied by a fine, the cumulative financial impact of the unlawful practice would far exceed the cost.

Nor is it likely that these severe agency failings would be overcome by amending OSHA to permit a private right of action so that workers would not be totally reliant on the agency to enforce their rights. Apart from the political implausibility of enactment of such a congressional amendment for the foreseeable future, the prolonged litigation associated with such individual enforcement would, for dealing with the daily problem of getting to go to the bathroom, be a poor substitute for an administrative process that offers workers—provided that they are not under the jurisdiction of Cal/OSHA—a same-day telephone call from OSHA to the employer requiring it to respond within five days and an on-site inspection by OSHA within five days of receiving a rebuttal of the employer's response to the complaint from a union representative or a complaining worker who is a current employee. 11 Introduction of a private right of action would, moreover, be ill designed to eliminate the problem of retaliation: workers who are afraid of jeopardizing their livelihood by filing anonymous complaints with OSHA are not likely candidates to become plaintiffs in federal court, although it might strengthen the enforcibility of the complaints of ex-employees, for whom OSHA can do little. And, finally, as the Cagle's dispute demonstrated, 12 there is no reason to assume that federal judges would be more knowledgeable and insightful (let alone pro-worker) than OSHA inspectors concerning the conflict between the perceived needs of workers to empty their bladders and employers to fill their coffers.

Wide swaths of the working world in the United States are dominated by managements that bully and infantalize workers in the apparent belief that fear gives productivity a fillip.<sup>13</sup> Perversely, but all too predictably, it is precisely workers in such firms who are least likely to feel self-confident and secure enough to risk filing the complaints that are realistically the only method for inducing OSHA to investigate low-priority toilet-access violations. Even in or-

<sup>&</sup>lt;sup>13</sup>E.g., New River Industries, Inc. v. NLRB, 945 F.2d 1290 (4th Cir. 1991).



<sup>&</sup>lt;sup>10</sup>On the \$36,000 penalty that Excel had to pay in addition to a \$25,000 gift to public agencies, see above ch. 12.

<sup>&</sup>lt;sup>11</sup>Email from Elizabeth Slatten, OSHA Assistant Area Director Austin Area Office, to Marc Linder (Dec. 24, 2002): OSHA, Complaint Policies and Procedures, CPL 2.115 (June 14, 1996).

<sup>&</sup>lt;sup>12</sup>See above ch. 13.

ganized settings, some unions report that management periodically or constantly tests workers to see how far they can be pushed. In this context, control over their bladders is only one among many battlegrounds. Some unions have been much more activist and innovative in asserting workers' voiding rights than others. The UFCW, without whose intervention OSHA would never have issued the Memorandum in the first place, has also been the leader, especially through its national occupational safety and health office, in informing its locals' officials and members of their rights.

Whatever positive results the combined efforts of aggressive union monitoring, resistance, and demands and forceful OSHA inspections may have achieved, the great majority of workers in nonunion workplaces do not directly benefit from them. Relatively few nonunion workers are intrepid enough to file complaints with OSHA against their current employer about any health or safety violation, let alone something as intimate as eliminating bodily waste, and those who do may well find themselves disciplined or harassed, if not fired. Nevertheless, even for unorganized workers the potential of government intervention exists and some have availed themselves of the protection: of all citations issued by Federal OSHA for violations of section 1910.141(c)(1)(i) in 2000, 2001, and 2002, 20 percent were triggered by complaints filed by workers in nonunion workplaces, while the corresponding figure for citations issued specifically for restriction of access by Federal and state OSHA programs after April 6, 1998, was 35 percent.<sup>14</sup>

Whether actual experience with OSHA would encourage nonunion workers to be persistent is another matter. Consider, for example, the view of a 28-year OSHA veteran in the Denver Regional Office: A complaint by a worker about toilet access would be considered "too minor" to merit anything but streamlined phone/fax treatment, and only if the worker later called to state that the employer had not abated the problem would OSHA ever do an on-site inspection, and then only as a low-priority matter and much later. In any programmed inspection, the inspector on seeing toilets would assume that workers had access to them and would not interview workers about the matter; perhaps if a union were present and complained, the inspector would look into the matter. Such attitudes may explain why some union occupational safety and health officials who view with skepticism OSHA's (and the Department of Labor's) record of insuring, and capacity and desire to insure, safer and more healthful workplaces, have concluded that OSHA should be more of a back-up for union action than a primary tool for safety and health campaigns.

<sup>&</sup>lt;sup>16</sup>Telephone interview with Jackie Nowell, director of occupational safety and health,



<sup>&</sup>lt;sup>14</sup>See above ch. 11.

<sup>&</sup>lt;sup>15</sup>Telephone interview with Cindi Cross, Duty Officer, Denver Regional OSHA Office (Oct. 23, 2002).

Indeed, under the unabashedly pro-employer George W. Bush administration, OSHA might be more likely to withdraw the Memorandum altogether than to secure enforcement of workers' right to void at will. The chief constraint on such withdrawal may be recent rulings by the federal appellate courts (especially the D.C. Circuit) that once an agency has interpreted a regulation, it can substantially change its interpretation only in the same manner that it can change the regulation itself—by notice and comment rulemaking.<sup>17</sup> But just as the Clinton administration avoided (or, perhaps, evaded) notice and comment in order to deprive employers of a forum in which to attack the newly conferred right, so, too, the Bush administration would presumably have little interest in giving workers and unions a forum in which to attack the termination of such a right. As the Jim Beam episode demonstrated, it is imaginable that even employers themselves might prefer continuation of OSHA's sporadic and low-intensity enforcement of their obligation not to interfere with workers' right to void to a highly publicized and embarrassing national debate over their demand for the restoration of their power to discipline workers for being human beings.

Short of such outright withdrawal or revocation of the toilet-access standard interpretation, what some employers (like Jim Beam) demand is guidelines setting out what kinds of counter-measures they may lawfully take to deal with workers who "abuse" their new right to void when they need to. This issue is of special significance in nonunion workplaces in which OSHA-imposed at-will bathroom breaks (supported by a statutory prohibition of retaliation and provision for reinstatement with back pay)<sup>18</sup> represent a salient inroad against employer-imposed at-will employment regimes. Thus even if it is unlawful for an employer to eliminate unscheduled breaks for everyone just to punish the small number of "abusers," a question still remains as to what extent an employer retains its pre-statutory power to discipline such workers, whose existence even union officials, both on and off the record, concede—that small proportion of workers who "abuse" breaks and make workplace life harder for everyone else.<sup>19</sup>

<sup>&</sup>lt;sup>19</sup>See above ch. 16 (telephone interviews with Boyer, Best, LeGrande, Rosas, and Olesen and one UFCW local president who stated "off the record" that worker abuse once in a while was the only bathroom problem).



UFCW, Washington, D.C. (Oct. 18, 2002).

<sup>&</sup>lt;sup>17</sup>Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579, 586 (D.C. Cir. 1997); Alaska Professional Hunters Ass'n v. Federal Aviation Adm., 177 F.3d 1030, 1034 (D.C. Cir. 1999); Shell Offshore, Inc. v. Babbitt, 238 F.3d 622, 629 (5th Cir. 2001). For the view that because the Administrative Procedure Act exempts from notice-and-comment rulemaking a document that actually does interpret a regulation, "the Supreme Court may eventually overrule *Alaska Hunters*, but the case will impact OSHA in the meantime," see *Occupational Safety and Health Law* 504 (2d ed. Randy Rabinowitz ed. 2002).

<sup>&</sup>lt;sup>18</sup>29 USC sect. 660(c) (2000).

It is noteworthy that employers' claims about abuse are generalized and invariant across labor standards protections. At the same time, for example, that Jim Beam was complaining that it was powerless to defend itself against abuse of toilet breaks, employers reacted similarly to legislation enacted in California in September 2002 providing workers with six weeks of paid leave annually funded by an increase in employees' contributions to the State Disability Insurance Fund. Contrasting this pioneering regime with the federal Family and Medical Leave Act, which offers no compensation, Randel Johnson, the vice president for labor policy at the U.S. Chamber of Commerce, lamented: "Paid family leave presents more room for employee misuse of the time off than the unpaid option.... With the leave prescribed under the FMLA...employees are not paid so they are less likely to take the leave under false pretense. 'When it's paid leave, there is going to be more incentive for an employee to abuse the leave....' Johnson also complained that the California leave law does not give employers enough control over when and why workers can take family leave. He contends that if the leave is being subsidized, employers should have more say in how it is used."20 This same logic underlay the aforementioned fee-to-pee regimes imposed by several Canadian employers designed to make workers less likely to use toilet breaks and more likely to abuse their bladders.<sup>21</sup>

In the initial analysis of the Memorandum in Chapter 6, the issue of abuse was raised, but not resolved, in connection with identifying the model created by OSHA as an "at-will voiding regime" that is subject to a substantively and temporally limited employer veto in those cases in which (1) an employee's immediate departure for the bathroom would disrupt operations unacceptably and (2) requiring the employer to employ sufficient relief workers to enable workers to leave immediately would be economically too burdensome for the firm. Acknowledgment of such a limited veto power had also appeared in union settings before OSHA issued its Memorandum. For example, the Steelworkers, in a dispute over an employer's failure to give workers "tied to" an assembly line adequate relief, did "not argue that power belt employees should have a right to go to the bathroom whenever they choose. It recognizes the necessity of a relief system."<sup>22</sup>

The issue of burdensomeness might then arise at the intersection of OSHA and the Americans with Disabilities Act. As the Director of Legal Support at Virginia OSHA, who astutely pointed out that employers' polices of limiting bathroom access to specified times will make some people so anxious about having

<sup>&</sup>lt;sup>22</sup>Mor-Flo Industries, Inc., 62 Labor Arbitration Reports (BNA) 398, 400 (1974).



<sup>&</sup>lt;sup>20</sup>Simon Nadel, "New California Law, Other Proposals Intensify Argument Over Paid Family Leave," *U.S. Law Week* 71(15):2259-61 at 2259-60 (Oct. 22, 2002).

<sup>&</sup>lt;sup>21</sup>See above ch.9.

to void at other times that they will actually have to void more often, observed, at the extremes, workers who need to go to the bathroom at much shorter intervals than other workers may well raise an issue under the ADA that would require a decision as to whether the employer must accommodate the worker's disability or whether the burden to the employer in terms of lost output is excessive.<sup>23</sup>

To be sure, OSHA's at-will rule is definitionally coupled with the need to void; consequently, if workers, under the guise of exercising their right to void, in fact engage in other activities not covered by the Memorandum, employers presumably retain whatever powers they possessed before April 6, 1998 to discipline them for "stealing time" (the expression of choice at United Parcel Service, Wal-Mart, and other firms, for taking unauthorized breaks).<sup>24</sup> With regard to bathroom access in the unionized setting, labor arbitrators, even after the advent of OSHA (though before the issuance of the Memorandum), did not rule that employers lacked the means under collective bargaining agreements—which overall confer greater rights on employees than OSHA does—to detect abuse; on the contrary, they declared that, corroborated by written records of relief requests (and the time taken) that "would have the effect of discouraging any tendency to abuse," "individual abuse can be dealt with individually, if necessary, through disciplinary procedures."25 Elsewhere, too, workers and their union, far from "blam[ing] the Company for wanting to curb the wasteful practices of a small number of loiterers" in the bathrooms, "demonstrated that they [would] cooperate in proven cases of loitering."26

The Memorandum would be of no help to an employee who, instead of going to the bathroom, went to the cafeteria to make a telephone call or outside to smoke. Employers could, in these situations, detect such detours and frolics without engaging in non-traditional surveillance, and would, therefore, have no basis for accusing OSHA of making it impossible for them to punish abuse. A related, but somewhat more complicated situation would arise if employees did in fact go to the bathroom, but, instead of voiding, smoked, read, talked to others, or (in the age of cellphones) made telephone calls.

Can employers lawfully emulate Henry Ford's "Ford Service," his plant po-

<sup>&</sup>lt;sup>26</sup>Schmidt Cabinet Co., 75 Labor Arbitration Reports (BNA) 397, 400 (1980).



<sup>&</sup>lt;sup>23</sup>Telephone interview with Jay Withrow, Director, Office of Legal Support, Virginia OSHA (Oct. 31, 2002).

<sup>&</sup>lt;sup>24</sup>E.g., United Parcel Service v. Administrative Review Bd., 1998 U.S. App. Lexis 24979 (6th Cir.) (Lexis); Cline v. Wal-Mart, 144 F.3d 294 (4th Cir. 1998). See generally, Laureen Snider, "Crimes Against Capital: Discovering Theft of Time," *Social Justice* 28(3):105 (Sept. 2001) (Lexis).

<sup>&</sup>lt;sup>25</sup>Mor-Flo Industries, Inc., 62 Labor Arbitration Reports (BNA) at 400-401. See also United-Carr Tennessee, 59 Labor Arbitration Reports (BNA) 883, 888 (1972).

lice? "Servicemen were used to check on the men constantly.... How thorough a job they did is indicated by the fact that employees were even routinely followed to the toilets." To the extent that supervisors can detect such OSHA-unauthorized activities without engaging in what would otherwise be an actionable invasion of privacy, there can be no valid complaint that the Memorandum has interfered with the exercise of any pre-existing managerial powers. A complication might arise if an employee simultaneously engaged in OSHA-authorized and -unauthorized activity. However, unless the latter prolonged the former—a risk factor that could be reduced, for example, by prohibiting smoking—an employer would, again, have no valid basis to complain about OSHA's interference with management's disciplinary powers.

Employers' real complaint relates not to detecting abuse among workers who go somewhere other than the bathroom or who do go there but engage in easily detectable OSHA-unauthorized activities. Rather, employers such as Jim Beam demand that OSHA tell them what lawful means are available to them to determine whether workers who go to the bathroom more frequently (or, secondarily, spend more time there) than management deems 'normal,' but who do not go so frequently that they need a doctor's note, are really voiding.

The Iowa Labor Commissioner, Byron Orton, as already noted, declared early on that since OSHA does not deprive employers of their normal powers of discipline, if workers use their right to void for other purposes, employers are free to discipline them.<sup>28</sup> Asked, however, whether an employer could station a monitor in the bathroom or position a camera to determine whether certain employees who exercise their right to go to the bathroom more often than others, without purporting to have a medical condition or doctor's explanation, are in fact voiding, Orton observed that those methods were probably illegal.<sup>29</sup> Asked what methods would then be available to employers, he replied that that was employers' problem—OSHA lacks the power to tell employers how to run their businesses and they "just gotta deal with it."<sup>30</sup> Voicing similar skepticism, one state labor standards official suspected that it is very unlikely that workers who abuse bathroom breaks are otherwise stellar employees: since this kind of behavior is probably correlated with other deficiencies, employers would be in a position to

<sup>&</sup>lt;sup>30</sup>Telephone interview with Byron Orton (Oct. 17 and 18, 2002). Nevertheless, Orton did state, for example, when asked whether Iowa OSHA would cite school districts if elementary school teachers were unable to go to the bathroom for three hours, that he viewed a school like an assembly line and that a relief worker system (if necessary involving the administrative staff) would be an appropriate method of abatement.



<sup>&</sup>lt;sup>27</sup>Harry Bennett, Ford: We Never Called Him Henry 58 (1987 [1951]).

<sup>&</sup>lt;sup>28</sup>See above ch. 3.

<sup>&</sup>lt;sup>29</sup>Telephone interview with Byron Orton (Oct. 17, 2002).

discipline such workers with poor overall records.<sup>31</sup>

Orton may or may not be right that a camera in a panopticonic bathroom would constitute an unlawful invasion of privacy,32 but, as the questioning of UFCW Local 111-D President Jo Anne Kelley at the Jim Beam hearing revealed, posting a human attendant or monitor in the bathroom to determine whether workers are engaged in OSHA-unauthorized activities may well be lawful.<sup>33</sup> It is difficult to discern the possible basis of an employee's alleged reasonable expectation of privacy exclusively vis-à-vis the employer's attendant in a bathroom used by many other co-workers simultaneously, all of whom can see and hear exactly the same acts of the employee that the attendant can.<sup>34</sup> It seems implausible that courts would accept the argument that the employee has a reasonable expectation that—despite the fact that all of his co-workers can watch him—the employer's attendant not see, for example, that in addition to urinating for two minutes, the employee also used his OSHA-mandated voiding break to comb his hair, chat, make cell-phone calls, read, or smoke for five minutes, for which time the employer is legally obligated to compensate him. For the same reasons, however, the reasonable expectation of privacy would apply to any time that the employee spent within a toilet stall—which OSHA requires to be surrounded by "a door and walls or partitions between fixtures sufficiently high to assure privacy."35

The upshot of these considerations is that, Jim Beam's complaints to the contrary notwithstanding, it may be legally permissible for employers to mount

<sup>&</sup>lt;sup>35</sup>29 CFR sect. 1910.141(c)(2)(i).



<sup>&</sup>lt;sup>31</sup>Telephone interview with Richard Ervin, Employment Standards Manager, Washington Dept. of Labor and Industry, Olympia, WA (Oct. 21 and Nov. 1, 2002).

<sup>&</sup>lt;sup>32</sup>"It is unlawful for any employer or the agent or representative of an employer, whether public or private, to operate any electronic surveillance device or system, including, but not limited to, the use of a closed circuit television system, a video-recording device, or any combination of those or other electronic devices for the purpose of recording or monitoring the activities of the employees in areas designed for the health or personal comfort of the employees or for safeguarding of their possessions, such as rest rooms, shower rooms, locker rooms, dressing rooms and employee lounges." W. Va. Code sect. 21-3-20(a) (2002). See also Conn. Gen. Stat. sect. 31-48b(b) (2001). But the NLRB has ruled merely that installing a surveillance camera in a restroom is a mandatory bargaining subject, not that it is per se unlawful. Colgate-Palmolive Co., 323 NLRB 515 (1997).

<sup>&</sup>lt;sup>33</sup>See above ch. 13.

<sup>&</sup>lt;sup>34</sup>As an arbitrator noted in a case involving an employer-imposed rule establishing maximum permissible personal relief time and requiring workers to register with their foremen: "Employees of either sex who...avail themselves of the prerogatives of personal relief to an unusual degree or with unprecedented frequency may be observed by their fellow workers and may even become the target for scatological comment." Detroit Gasket & Mfg. Co., 27 Labor Arbitration Reports (BNA) 717, 721 (1956).

effective searches for evidence of employees' fraudulent use of OSHA-mandated toilet breaks. In fact, employers' real concern may not be the lawfulness of such monitoring at all, but rather its counter-productive impact on workers' morale: the blatant lack of trust symbolized by the bathroom monitor could hardly be expected to engender or sustain a spirit of cooperativeness in a workforce resentful of being treated like wayward elementary school pupils.<sup>36</sup> And even if employers could ignore such problems with impunity, they may not be able to disregard other costs. As an arbitrator noted with regard to a pre-OSHA employer-imposed monitoring program:

The prospect of employees and their supervisors spending substantial amounts of time in rehearsing the details of an employee's washroom habits is not to be faced with equanimity or indifference. Indeed, the more diligently the foremen seek to administer the program, the more searching will be their questions, the more time may be taken from productive activities and the more likely will personal irritations be provoked.<sup>37</sup>

If for no other reason, the question of the legality of employers' efforts to detect abuse should be clarified because it will eventually be raised in litigation, as it would have been had Jim Beam not dropped its appeal. If an employer could show that it was bereft of any plausible means of determining whether its employees were in fact voiding during OSHA-mandated compensable bathroom breaks, it might be able to persuade the Occupational Safety and Health Review Commission or a federal appeals court (or their state counterparts) that a regulation that left it no way to protect itself against fraudulent use of the right to void was arbitrary and capricious and thus invalid.

Like Orton, John Miles, the former OSHA Director of Compliance, rejected such complaints of employer defenselessness, but his reasoning bodes ill for advocates of urinary freedom: Not only do employers, in his opinion, retain control of the situation, but since someone going to the bathroom every 30 minutes or every hour is not normal—Miles added that OSHA has doctors on staff whom he spoke to about the issue while preparing the Memorandum—if such em-

<sup>&</sup>lt;sup>37</sup>Detroit Gasket & Mfg. Co., 27 Labor Arbitration Reports at 720.



<sup>&</sup>lt;sup>36</sup>At a unionized plant where workers "enjoyed the right to leave their work area (at times other than their rest periods) to avail themselves of the restrooms," an arbitrator upheld a rule that the employer imposed requiring workers to check out and in, but nevertheless added that "it does not appeal to the Arbitrator as being a particularly sound method for correcting abuses while retaining employee morale...." Elgin Instrument Co., 37 Labor Arbitration Reports (BNA) 1064, 1066 (1961). For numerous examples of bathroom pass systems that doubtless do prepare children for life at workplaces unconstrained by the OSHA Memorandum while helping teachers identify "bogus potty breaks," see http://www.teachnet.com/how-to/manage/cantwait 011399.html.

ployees did not have a medical excuse, an employer could lawfully exercise its disciplinary powers in such a case.<sup>38</sup>

Since employers are concerned primarily with abuse by individual workers rather than with some concerted class-struggle time-war by many or all the workers in a plant using bathroom breaks to resist what they regard as an unacceptable length or structure of working hours and/or intensity of labor, the problem may be less intractable than employers believe with a partial solution coming from unexpected quarters.<sup>39</sup> Workers at most workplaces know what the custom is and who is taking more than his or her fair share of breaks. Jo Anne Kelley, the president of the union at Jim Beam, offered this perspective:

I do believe that everyone knew who was taking more than their "fair share." The question was not so much "fair share," but sometimes what they were doing when they took a break. It would have been a rare instance if someone took a break more than 1 time between scheduled breaks. Some may have stayed away from the line longer than they should, but the majority of the time that was handled "in house." Example, the person relieving them might say, "If you want me to relieve you again, you'd better not stay so long unless you've got something wrong with you." That usually took care of the problem.<sup>40</sup>

To be sure, Kelley herself recognized that certain employers might still demand a quantifiable precision and uniformity that human variability makes unattainable: "I also believe that the company was looking for the union, OSHA or someone to tell them exactly how many times is reasonable. Unfortunately we were unable to do that. Everyone is different. That's what makes us human beings. We are not machines."<sup>41</sup>

An even more striking illustration of "in-house" handling of abuse ratified by OSHA that undercuts employers' objection of defenselessness comes from the

<sup>&</sup>lt;sup>41</sup>Email from Jo Anne Kelley to Marc Linder (Oct. 6, 2002).



<sup>&</sup>lt;sup>38</sup>Telephone interview with John Miles (Nov. 12, 2002).

<sup>&</sup>lt;sup>39</sup>In proposing "an at-will voiding regime," *Void Where Prohibited* conceded that its adoption "might prompt some workers to dissimulate." However, the book went on to argue that if workers engaged in "pseudo-excretory guerrilla warfare" as resistance against what they perceived as employers' illegitimate appropriation of their time and energy, a resolution of the conflict had to be sought in new norms of work and non-work rather than in sharper disciplinary intervention. Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 160 (1998). Although this macrosocietal analysis remains valid, it manifestly transcends the current and fore-seeable political-economic horizon and would not be applied by OSHA or the courts. The discussion in the text is an attempt to provide an analysis that could plausibly be adopted by agency administrators and judges to bolster at-will voiding breaks.

<sup>&</sup>lt;sup>40</sup>Email from Jo Anne Kelley to Marc Linder (Oct. 6, 2002).

Bridgestone/Firestone Tire plant in Des Moines, Iowa, where workers work a 12hour day (during alternating three- and four-day weeks) with breaks every two hours of 10, 10, 20, 10, and 10 minutes. According to the vice president of Local 310 of the Steelworkers (with which the Rubber Workers merged) and the safety chairman, Dennis Green, the production process there is sufficiently different from an automobile assembly line that workers can go to the bathroom when they need to. One worker, who frequently and publicly verbalized her position that the workers there worked too hard and too much and that she was going to take more breaks, went to the bathroom every odd hour for 10 to 15 minutes all day long for two to three years. Since her co-workers, who did not take these unscheduled breaks, had to fill in for her, they did not appreciate her absences. In 2002 the company began disciplining and ultimately fired her for taking excessive breaks. The union did file an (apparently halfhearted) grievance on her behalf, which turned out to be indefensible in light of the worker's documented statements of her real purpose in taking unscheduled breaks. The employee herself filed a complaint with OSHA, 42 which carried out an inspection, but decided not to issue a citation.<sup>43</sup> The inspector's narrative report explained that documentation furnished by the employer

shows that the employee that states she was not able to take bathroom breaks was asking other employees to take multiple bathroom breaks during off times. I spoke to the employee that had been disciplined for excessive breaks. She stated that she takes breaks to sit down. That if she has to go to the bathroom, she feels she shouldn't have to do it on break time. She further states that it takes her 8 minutes to walk to the bathroom that she likes to use. Her breaks are only 10 minutes. Not much time to "rest" afterwards. The employee also stated to...(IOSH's clerical staff) that she was not going to be forced to take bathroom breaks on her sit breaks. This is not an isolated incident that she needed to use the restroom facility and was denied. There is [sic] several signed statements from coworkers stating that she has asked them to slow their work down.<sup>44</sup>

One conclusion to be drawn from such a case is that where co-workers' interests are impaired by a worker the frequency and/or length of whose bathroom breaks systematically exceed the workplace norm by a wide margin and are unsupported by any medical basis, "abuse" appears to be an apt characterization of that worker's behavior. To be sure, any employer systems for ferreting out abuse would, to pass muster, have to be created in good faith in order to detect abuse

<sup>&</sup>lt;sup>44</sup>Excerpt from Bridgestone/Firestone Tire, Insp. No. 304792542 (furnished by fax by Mary Bryant, IOSH Administrator, Oct. 30, 2002).



<sup>&</sup>lt;sup>42</sup>Telephone interview with Dennis Green, vice president, USWA Local 310, Des Moines (Oct. 14, 2002).

<sup>&</sup>lt;sup>43</sup>Bridgestone/Firestone Tire, Insp. No. 304792542 (Mar. 1, 2002).

and not to create burdens on—or obstacles for the worker to overcome that might have the effect of substantially or unnecessarily burdening—the worker's right to void when the worker needs to go. And, as the real world of arbitration demonstrates, the evidentiary barriers facing employers are hardly insurmountable. For example, in the pre-OSHA era at one meat processing plant, where the United Packinghouse Workers had negotiated a 10-minute break in the morning and afternoon in addition to an hour for lunch, the company, after warnings and "as an example to all workers that this abuse could not be countenanced any longer," fired two workers who, to a greater extent than the other workers, had persistently and regularly taken four 12- to 15-minute mini-breaks in the "ladies room." The arbitrator had no difficulty finding the bathroom visits too regular to "be justified as...necessary, natural, and unavoidable"; on the contrary, "betoken[ing] a determination to disregard one's duty to the job and the legitimate need for cooperation with management," they constituted proper cause for discharge. 45

Employers' animus against OSHA's loose-fitting performance standard may be rooted in the recognition that the 'you-gotta-let-'em-go-when-they-gotta-go' rule creates an unwelcome forum for contests over control of working time. For reasons that OSHA presumably never contemplated, let alone intended, a performance standard is much more conducive to such struggles than a fixed or quantitative standard—which some employers, such as Jim Beam, seem, at least rhetorically, to prefer to a reasonableness standard—framed in terms of breaks at set intervals. Since fixed breaks might create a windfall for workers who do not need to void that frequently—for them the additional breaks would constitute rest periods, which OSHA could mandate, albeit not under a sanitation standard—employers' disenchantment with the flexible performance standard that OSHA created hardly means that they would welcome a rigid system requiring a fixed number of breaks of fixed length. 46

If employers nevertheless insisted on some quantification of OSHA's reasonableness standard, then OSHA's Memorandum could be amended to require management and workers/unions to form a committee to formulate a specific workplace rule. One possible rule might empower workers to use the toilet once an hour on an ongoing basis, no questions asked. If on more than an occasional

<sup>&</sup>lt;sup>46</sup>As an Iowa OSHA official put it, whichever method OSHA chose, at least half of employers would complain. Telephone interview with Rich Calonkey, Senior Industrial Hygienist, Iowa OSHA, Des Moines (Oct. 7, 2002).



<sup>&</sup>lt;sup>45</sup>Nevertheless, he recommended that the employer "give earnest consideration" to rehiring them if they gave assurances that they would "not abuse the privileges to which workers are entitled and which the company is cheerfully willing to grant." Boston Sausage & Provision Co., 2 Labor Arbitration Reports (BNA) 128, 129 (1946). Despite certain similarities, these mini-breaks differed from those at Jim Beam because they were not an employer-acknowledged universal practice of tag-relief.

basis (triggered, for example, by diarrhea or heavy menstruation), a worker went to the bathroom more than once an hour, she or he would either have some explaining to do or be required to submit a doctor's note.<sup>47</sup> The committee would also have to establish a framework for determining the maximum period of time that the employer was permitted to require a worker to wait before stopping work when immediate departure would be too disruptive. Once the committee defined a presumptively unreasonably long waiting period, it could determine how many relief workers would be necessary. Employers might find that their complaints about the cost of additional relief workers would be met with complaints about the cost, in terms of health and comfort, to the workers of not hiring them. Such a democratic process could easily make an employer appreciate the virtues of the reasonableness standard.

A fixed standard would, moreover, also have to specify how long people 'normally' stay in the bathroom (excluding the walking time to and from the toilet). At such decision points, however, the problems inherent in a numerical standard become so glaring that even advocates could be tempted to retreat to a reasonableness standard. President Kelley, for example, guessed that five minutes would, barring any problems, represent the average duration of a bathroom visit, but she added perspicaciously: "How do you regulate that without invading someone's privacy? I have personally been through enough problems that I don't care to know the details about why someone might need extra time. It would certainly be a challenge to come up with a rule that did not require an employee to report all the details."<sup>48</sup>

One low-tech tactic that might suit certain employers as a way of deterring "abusers" (as well as rightful users) from going to the bathroom is some version of the Canadian fee-to-pee system.<sup>49</sup> John Miles himself conjectured, when asked, that it might be lawful for an employer to charge workers to use the toilet<sup>50</sup>—a practice that OSHA expressly prohibits in agriculture.<sup>51</sup> He regretfully felt constrained to mention this possibility as the potential consequence of an adverse decision of the Occupational Safety and Health Review Commission, which held unreasonable OSHA's interpretation of a standard stating that certain per-

<sup>&</sup>lt;sup>51</sup>29 CFR sect. 1928 110(c) (2002).



<sup>&</sup>lt;sup>47</sup>Calling the once-an-hour regime a "very liberal rule," Jo Anne Kelley commented: "Even the 6 times a day which the Co. claimed to provide would have been quite adequate if you were allowed to go when you needed to go and not when the Co. said you could go, at least for the majority of employees." Email from Jo Anne Kelley to Marc Linder (Oct. 6, 2002).

<sup>&</sup>lt;sup>48</sup>Email from Jo Anne Kelley to Marc Linder (Oct. 6, 2002).

<sup>&</sup>lt;sup>49</sup>See above ch. 9.

<sup>&</sup>lt;sup>50</sup>Telephone interview with Miles.

sonal protective equipment "shall be provided" as requiring that the employer must also pay for it.<sup>52</sup>

A related tactic that employers might try to adopt to discipline "abusers" (as well as others) would be to require assembly-line-type workers to go off the clock while exercising their right to void. Off the top of his head, John Miles felt that this measure was "probably legal," though he hastened to add that he did not know enough about wage and hour law to know whether taking employees off the clock was unlawful, which he thought it might be.<sup>53</sup> However, even if OSHA refused to declare such a practice unlawful on the grounds that it unduly deterred workers from exercising their right to void, the Federal Wage and Hour Administrator has adopted a position clearly inconsistent with such pay-docking. According to a long-standing interpretive regulation issued under the Fair Labor Standards Act: "Rest Periods of short duration, running from 5 to about 20 minutes,...must be counted as hours worked. Compensable time of rest periods may not be offset against other working time...."54 If there had been any doubts as to whether a toilet break is included under the category of rest breaks, a series of opinion letters dealing with smoking breaks issued by the Wage and Hour Division of the U.S. Department of Labor during the 1990s dispelled them by concluding that "it is immaterial with respect to compensability of such breaks whether the employee drinks coffee, smokes, goes to the restroom, etc." Moreover, "if the employer allows affected employees to work beyond their shifts to make up the time, the employer is incurring additional liability for such makeup time under the FLSA."55 In one place of employment workers were allowed to leave their work stations to smoke for three to four minutes at a time for up to 15 minutes per day; this break time exceeded that allowed other employees. Even where the four smoking breaks totaled 40 minutes daily, the agency declared them compensable.<sup>56</sup> More systematically the Wage and Hour Administrator opined in response to a query from another employer:

Employees have always taken short work breaks, with pay, for a myriad of non-work

<sup>&</sup>lt;sup>56</sup>Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter 1994 WL 1004839 (Westlaw) (June 16, 1994). See also Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter 1996 WL 1004840 (Westlaw) (June 16, 1994).



<sup>&</sup>lt;sup>52</sup>Union Tank Car Co., 18 OSHC (BNA) 1067 (1997) (Lexis). Instead of litigating the interpretation, OSHA chose to engage in rulemaking. "OSHA to Change Rule, Not Appeal Protective Equipment Payment Decision," *Daily Labor Report*, Dec. 17, 1997, 1997 DLR 242 d12 (Lexis); *Federal Register* 62:15402 (1999).

<sup>&</sup>lt;sup>53</sup>Telephone interview with Miles.

<sup>&</sup>lt;sup>54</sup>29 CFR sect. 785.18 (2001).

<sup>&</sup>lt;sup>55</sup>Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter 1995 WL 1032460 (Westlaw) (Jan. 25, 1995).

purposes—a visit to the bathroom, a drink of coffee, a call to check the children, attending to a medical necessity, a cigarette break, etc. The Department has consistently held for over 46 years that such breaks are hours worked under the FLSA, without evaluating the relative merits of an employee's activities. This position, found at 29 C.F.R. 785.18, is based squarely in the premise that short breaks are common in industry, promote the efficiency of employees and are customarily treated as work time by employers.

The compensability of short breaks by workers has seldom, if ever, been questioned. Any modification of the Department's long held position to accommodate your request would require a series of tests to evaluate the relative benefit provided to employee and employer and the impact on employee efficiency of each and every small work break ever taken by any employee.

We believe that such tests would be an undesirable regulatory intrusion in the workplace with the potential to seriously disrupt many employer-employee relationships. Further, it would be difficult, if not impossible, to design practical tests applicable to all workplace circumstances.

While we fully appreciate the extraordinary difficulties presented to employers by smoking in the workplace, we believe that the government should not be in the business of determining what employees do on short work breaks, much less attempting to evaluate which short breaks merit or do not merit compensation. We strongly believe that employers and employees are best served by the bright line time test currently provided in Section 785.18.

We are unwilling, for these reasons cited above, to modify the existing position. The FLSA does not require an employer to provide its employees with rest periods or breaks. If the employer decides to permit short breaks, however, the time is compensable hours worked. Even if the employees agree to forego compensation for the break time, the time is still compensable, because employees may not waive their statutory rights through an agreement with the employer. If the employer permits its employees to take a series of short smoke breaks, the employees must be compensated for their time.<sup>57</sup>

The cri de coeur that Jim Beam's management uttered over the alleged disappearance of its power to police and punish fraudulent urinators might also galvanize employers' interest in hi-tech solutions. It is, as its author, sociologist Gary Marx, noted, "an interesting commentary on our society," that when he published the following satirical piece in the *Los Angeles Times* on April Fools Day 1987, "many readers thought it was real and some even wrote and asked where the system could be purchased." Though in part blatantly in violation of OSHA since April 6, 1998, the proposal would presumably trigger the same responses today:

<sup>&</sup>lt;sup>57</sup>Wage and Hour Div., U.S. Dept. of Labor, Opinion Letter 1996 WL 1005233 (Westlaw) (Dec. 2, 1996).



TO: ALL EMPLOYEES

FROM: EMPLOYEE RELATIONS DEPARTMENT

SUBJECT: RESTROOM TRIP POLICY (RTP)

An internal audit of employee restroom time (ERT) has found that this company significantly exceeds the national ERT standard recommended by the President's Commission on Productivity and Waste. At the same time, some employees complained about being unfairly singled out for ERT monitoring. Technical Division (TD) has developed an accounting and control system that will solve both problems.

Effective 1 April 1987, a Restroom Trip Policy (RTP) is established.

A Restroom Trip Bank (RTB) will be created for each employee. On the first day of each month employees will receive a Restroom Trip Credit (RTC) of 40. The previous policy of unlimited trips is abolished. Restroom access will be controlled by a computer-linked voice-print recognition system. Within the next two weeks, each employee must provide two voice prints (one normal, one under stress) to Personnel. To facilitate familiarity with the system, voice-print recognition stations will be operational but not restrictive during the month of April.

Should an employee's RTB balance reach zero, restroom doors will not unlock for his/her voice until the first working day of the following month.

Restroom stalls have been equipped with timed tissue-roll retraction and automatic flushing and door-opening capability. To help employees maximize their time, a simulated voice will announce elapsed ERT up to 3 minutes. A 30-second warning buzzer will then sound. At the end of the 30 seconds the roll of tissue will retract, the toilet will flush and the stall door will open. ...

To prevent unauthorized access (e.g., sneaking in behind someone with an RTB surplus, or use of a tape-recorded voice), video cameras in the corridor will record those seeking access to the restroom. However, consistent with the company's policy of respecting the privacy of its employees, cameras will not be operative within the restroom itself.

Management recognizes that from time to time employees may have a legitimate need to use the restroom. But employees must also recognize that their jobs depend on this company's staying competitive in a global economy. These conflicting interests should be weighed, but certainly not balanced. The company remains strongly committed to finding technical solutions to management problems. We continue to believe that machines are fairer and more reliable than managers. We also believe that our trusted employees will do the right thing when given no other choice. 58

An April Fools joke—and yet the endless possibilities for electronic surveillance and control at the workplace have made such great technological advances in recent years that (Gary) Marx's nightmarish scenario has become only all too

<sup>&</sup>lt;sup>58</sup>Gary Marx, "Raising Your Hand Just Won't Do," on http://web.mit.edu/gtmarx/www/raising.html. Marx's website privacy policy states that his "interest is in giving away ideas and in encouraging/provoking thought...."



possible.<sup>59</sup> For example, employers (or at least those unfettered by the aforementioned interpretation of the FLSA) can take solace that, while brutally intrusive managerial methods survive for verifying employees' claims of being humans with bodily needs,<sup>60</sup> at least one meat factory in the United Kingdom, where employees have to go through a turnstile to get to the toilet, has issued them "smart cards which deduct their pay for the time they're away from the factory floor."<sup>61</sup>

Having survived *Das Kapital*, World War I, the Bolshevik Revolution, the Great Depression, World War II, and the Chinese Communist Revolution, capitalism seems unlikely to be toppled by at-will bathroom breaks. After all, many employers in the United States do not interfere with the frequency and duration of their employees' acts of waste elimination, and there are even rumored to be whole capitalist countries in Europe in which workplace voiding freedom is taken for granted. And yet, firms' accumulation- and profit-driven tendency to secure and retain as much unilateral control over working time as possible will presumably continue to manifest itself in myriad ways that conflict with workers' own conceptions of individual and collective autonomy, self-development, and codetermination. Consequently, even reformist struggles over the need to stop work in order to attend to other needs—including voiding—will continue to test capitalism's compatibility with the most elementary dictates of humanity.

<sup>&</sup>lt;sup>61</sup>Billy Paterson, "Have a Break and a Quick C\*\*\*: New Staff Motto After Bosses Dock Them £1000 a Week for Toilet Time," *Sunday Mail*, Jan. 5, 2003, at 21 (Lexis) (discussing Brown Brothers Manufacturing Ltd. in Kirkconnell, Scotland). Inspired by the campaign launched by *Void Where Prohibited*, Rory O'Neill, the editor of the British occupational safety and health magazine *Hazards*, prompted the TUC to initiate a campaign on Feb. 21, 2003 to outlaw such practices. "Give Us a Break!" *Hazards*, No. 81 at 18-19 (Jan. - Mar. 2003).



<sup>&</sup>lt;sup>594</sup>'A new high-tech watchdog may soon monitor the personal hygiene habits of health care, food service and other workers every time they use the bathroom at work. The first system of its kind, dubbed Hygiene Guard, was installed at the Tropicana Casino and Resort in Atlantic City yesterday to track whether 20 chefs, dishwashers and waiters use soap dispensers and wash their hands after using the toilet. Under the system, employees will be required to wear a battery-powered 'smart badge.' The badge communicates with sensors in the bathroom that are connected to a computer in a manager's office. It also beeps periodically to remind employees to wash their hands. Unless an employee uses the soap dispenser and stands for a required amount of time in front of a sink with running water, an infraction will be recorded on the computer." Robert O'Harrow Jr., "Big Brother in Workplace Bathrooms?" Washington Post, Aug. 30, 1997, at A1 (Lexis).

<sup>&</sup>lt;sup>60</sup>Thus, at one of Levi Strauss's "hired factories" in Indonesia a "contractor...was found strip-searching female workers to determine whether they, as they claimed, were menstruating—and thus entitled to a day off with pay, according to the law of that Muslim country...." G. Zachary, "Exporting Rights: Levi Tries to Make Sure Contract Plants in Asia Treat Workers Well," Wall Street Journal, July 28, 1994, at A1 (Westlaw).