

Jan 2, 2005

Void Where Prohibited Revisited

For University of Michigan
Library



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

Marc Linder

**Fānpìhuà 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
.L561
2003

Iowa OSHA Anticipates Federal OSHA

I wonder how Iowa survived 150 years of statehood without bathroom break regulation.¹

Meanwhile, in Iowa, a state-plan state, Byron Orton, the Labor Commissioner, who has oversight over the state OSHA program, acted in advance of and more resolutely than federal OSHA. The immediate background of this action went back to 1995 when, following up on a telephone conversation, the author wrote a letter to Mary Bryant, the Iowa Occupational Safety and Health Administrator, asking for the (then) Department of Employment Service's "official position on whether employees in Iowa are entitled to use the bathroom at work." The letter went on to ask: "If, as you have already indicated, you take the position that OSHA's requirement that employers provide toilets does not imply that they also permit employees to use those toilets, could you please also explain what the purpose is of the toilet provision if the law does not require employers to permit workers to use them."² Bryant's official reply was only partially responsive, yet expressed the official position with all imaginable clarity: "Although the OSHA standards require that an employer provide toilet facilities, they are silent on the issue of allowing workers to use them. Therefore, we have no regulation to force them to do so and could not issue a citation for their not allowing it."³ It was in no small part Deborah Berkowitz's submission of this letter to Federal OSHA in 1997 that prompted that agency to change its interpretation of the law.

In 1996, Charles Whisenand, who was working as an assistant manager of a Holiday "convenience" store in Ames, Iowa, was diagnosed with congestive heart failure requiring him to take medicine that made him urinate often. As he later described his situation: "We were asked to work alone for eight to 10 hours a

¹Letter from Iowa State Senator Steve King to Labor Commissioner Byron Orton (Apr. 26, 1998). Orton made available to the author a copy of his correspondence with King.

²Letter from Marc Linder to Mary Bryant (Oct. 31, 1995).

³Letter from Mary Bryant to Marc Linder (Nov. 17, 1995).

day without relief. When I asked about their policy and the scheduling that caused me such pain, they did not think it was such a problem. I was told that if I could not handle such a job then I had the privilege of working somewhere else.” Instead of getting a relief worker, Whisenand was fired. The company purportedly provided breaks only in states that mandated them by law, of which Iowa was not one. Whisenand then contacted his state senator, Johnie Hammond,⁴ who on March 3, 1997,⁵ introduced a bill in the Iowa Senate, which resembled a unique law enacted in Minnesota in 1988.⁶ Though inadequate in general and probably of limited help to Whisenand, the Iowa bill did provide that: “An employer shall allow an employee...a paid fifteen-minute rest break during every consecutive four-hour period of work. To implement this requirement, an employer shall provide an employee, at the worksite, with reasonable access to restroom facilities.” Civil penalties ranged from \$1,000 for violations to \$3,000 for repeated violations demonstrating “a pattern of abusive employment practices.”⁷ Despite its relatively restrained intervention, the bill “was killed in the Business and Labor Committee...by, as Whisenand put it, ‘my fellow Republicans who think it’s overregulating businesses.’”⁸

In October 1997 Orton’s involvement was triggered by a column about bathroom access published in the *Des Moines Register*, the state’s leading newspaper, and widely syndicated throughout the United States.⁹ Serendipitously, the columnist, Rekha Basu, had heard about *Void Where Prohibited* before its publication from her mother, who was friends with Dr. Bernard Lown,¹⁰ who had written a blurb for the book. When she mentioned that the state OSHA administrator had written the author stating that the law imposed no obligation on employers to let workers use the toilet, but that an OSHA attorney whom Basu had interviewed stated that ““Our position would probably be that an employer needs

⁴Rekha Basu, “Progress on Bathroom Breaks,” *Des Moines Register*, Apr. 12, 1998, at 6AA, col. 3-5.

⁵On <http://www2.legis.state.ia.us/GA/77GA/BillHistory/SF/00200/SF00267.html>.

⁶See Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 63 (1998).

⁷Iowa Senate File 267, sects. 2 and 4, on <http://www2.legis.state.ia.us/cgi-bin/Legislation/Bill.pl>.

⁸Basu, “Progress on Bathroom Breaks.”

⁹See, e.g., Rekha Basu, “Restroom Privileges Restricted,” *Great Falls Tribune* (Nov. 7, 1997); idem, “Many Employees Forbidden to Answer Nature’s Call,” *Herald-Dispatch* (Huntington, WV), Nov. 8, 1997.

¹⁰A professor emeritus of cardiology at the Harvard School of Public Health, Lown had received the Nobel Peace Prize in 1985 on behalf of International Physicians for the Prevention of Nuclear War.

to make sure they allow the employee to use it,” Basu asked: “So which is it?”¹¹

In order to gauge the embarrassment engendered by this column, the author made numerous telephone calls to Iowa OSHA officials and asked Mark Smith, the president of the Iowa Federation of Labor, to speak to Orton about changing the agency’s position. But when Smith called Orton, the commissioner told him that he had already met with his staff to change the policy, some of whom had informed the author that they still asserted that the employer’s obligation to provide a toilet did not require the employer to let workers use it. This confusion prompted Byron Orton to intervene. In the version of his letter to the editor that the *Des Moines Register* published on November 2, 1997, Orton—who had been an administrative law judge in the state unemployment compensation system and Industrial Commissioner in charge of the state workers compensation system before being appointed Labor Commissioner in 1995¹²—observed that although OSHA standards “are silent on the issue of allowing employees to use” toilets, those standards “are to be construed with a view of promoting their intended purpose and achieving reasonable results.” Consequently, “consistent with pronouncements from federal OSHA,” Orton, who was doubtless alluding to the Hudson Foods case, stated that Iowa OSHA “takes the position that the employer’s obligation to provide toilet facilities includes the obligation to allow employees to use the toilet facilities.” Although he had no doubt that most employers in Iowa treated their employees “with respect and dignity” concerning toilet access, “based upon my 23 years in state government, I...know that some employers deny restroom privileges to employees except during designated breaks with the threat that an individual’s employment will be terminated if he or she violates such a rule.” Orton nevertheless then concluded:

Such a draconian rule unnecessarily exposes employees to health hazards, callously tramples on the dignity of employees and jeopardizes the public policy of this state to encourage harmonious labor-management relations. [I]n those instances where employees are denied timely restroom privileges, Iowa OSHA is prepared to act by way of citations and penalties.¹³

¹¹Rekha Basu, “Give Employees a Break,” *Des Moines Register*, Oct. 19, 1997, at 6AA, col. 3. Although the Iowa OSHA administrator Mary Bryant wrote the letter to Marc Linder on Nov. 17, 1995, stating that the agency had no power to cite employers who denied employees bathroom breaks, as late as August 1998 Cynthia Tofflemire, an Iowa State Labor Commission attorney, denied that such a statement had ever been made. “Accommodating Bathroom Use Challenges Employers,” *Successful Job Accommodation Strategies* 4(4) (Aug. 1998) (Lexis).

¹²Byron Orton, Iowa Labor Commissioner, “Biographical Information” (undated).

¹³Byron Orton, “OSHA Silent on Potty Breaks,” *Des Moines Register*, Nov. 2, 1997, at AA7:1.

Why, after stating that the employer's obligation to provide toilets included the obligation to allow employees to use them, Orton nevertheless referred to workers' "privileges" rather than rights to void, is unclear. But in a section of the letter that the newspaper cut, Orton made the important point that: "The call of nature is not controlled by the time clock and does not always wait for coffee and lunch breaks. I am aware of situations where employees have remained at their work stations and unceremoniously soiled themselves, even vomited, because they had been told that to leave their work station to answer a call of nature would result in discharge from employment."¹⁴

On January 21, 1998, Orton issued a memorandum to all Division of Labor staff, the Iowa Federation of Labor, the UAW, the Iowa Association of Business and Industry, and the National Federation of Independent Business, on the "Interpretation of 1910.141(c) Toilet Facilities." Orton's memorandum in part tracked the federal OSHA draft of July 1997, which will be discussed later.¹⁵ Noting that it was important for Iowa OSHA to take a uniform approach with regard to the general industry sanitation standard and especially regarding employees' use of employer-provided toilets, he requested that the new "guideline" be used in dealing with this issue. Of the standard's requirement that employers provide a sufficient number of toilets, Orton's memorandum stated: "If an employer failed to have in the workplace the necessary number of toilets, or if the employer kept them locked, it would be a violation of the standard. Similarly, an employer restricting the employees' use of toilets in the workplace is not providing toilets and thus is in violation of the sanitation standard." After pointing to one dictionary definition of "provide" as to "supply or make available (something wanted to needed)," Orton formulated the new guideline:

Use of toilet facilities is, therefore, a necessary component to the "providing toilet requirement." To comply with the sanitation standard, employers must allow employees to use toilet facilities when employees need to use the facilities. Exactly how employers insure employees' access to the toilet facilities will depend on the conditions at each place of employment and may vary from workplace to workplace. For example, in assembly line production settings, many employers establish some kind of signaling and relief system for workers. Employers who have not made such arrangements, or who have made inadequate arrangements, are not in compliance with the standard. Failure to comply shall result in citations and penalties.¹⁶

¹⁴Letter from Byron Orton to Des Moines Register, Oct. 22, 1997.

¹⁵See below ch. 6.

¹⁶Byron Orton, Memorandum Re: Interpretation of 1910.141(c) Toilet Facilities (Jan. 21, 1998); published in Iowa Federation of Labor, *Political Action Update*, 98-06 (Feb. 20, 1998).

Orton's approach was somewhat more rigorous—or, as he himself put it, “a bit stronger”¹⁷—than that of the July 1997 Federal OSHA draft or the final interpretation of April 6, 1998,¹⁸ because it was not hedged in by repeated references to a reasonableness criterion, which might eventually be interpreted by pro-employer administrative or judicial officials as authorizing firms to require workers to wait extended periods of time. In the draft of his letter to the editor of the *Des Moines Register*, Orton had threatened OSHA action “where employees are exposed to health hazards associated with being denied timely restroom privileges,”¹⁹ but no such condition appeared in his memorandum because the author had, through Smith of the Iowa Federation of Labor, persuaded him to drop it lest employers contest the legitimacy of the policy on the grounds that there was no medical evidence of a health hazard linked to a limited number of denials of the right to void. As the Associated Press noted: “In part because of Linder's research, Iowa in January became only the second state to explicitly protect workers' legal rights in this area.”²⁰

In response to Iowa OSHA's interpretive action, Steve King, the vice chair of the Business and Labor Committee of the Iowa state Senate and well-known anti-labor right-wing Republican, inaugurated a belligerent correspondence with Orton. One week after Orton had issued his memorandum, King opined that “reasonable people ought to be able to work out reasonable policies without federal or state intervention,” adding that he did “not believe that a case can be made that the regulatory intent was consistent with your interpretation.”²¹ In reply, Orton declared that he was “at a complete loss as to how there could be any reasonable interpretation of the sanitation standard other than the interpretation I announced. ... The position that the requirement to provide toilet facilities does not encompass the requirement to allow employees to use toilet facilities is unconvincing to me. OSHA standards are to be construed with a view of promoting their intended purpose and achieving reasonable results. [A]ny other interpretation would not only defeat the intended purpose of the OSHA sanitation standard, it would clearly fly in the face of reasonableness and common sense.”²²

¹⁷Telephone interview with Byron Orton (Oct. 18, 2002).

¹⁸See below ch. 6.

¹⁹Letter from Orton to *Des Moines Register* (Oct. 22, 1998).

²⁰“Bathroom Access Causes Work Troubles,” *Des Moines Register*, Mar. 13, 1998, at 2M, col. 2 (State Edition; NewsBank). Minnesota had enacted a statute in 1988 that offered workers inadequate protection by requiring employers to let them go to the restroom once every four hours. See Linder and Nygaard, *Void Where Prohibited* at 63-64.

²¹Letter from Steve King to Byron Orton (Jan. 28, 1998). In 2002 King was elected to the U.S. House of Representatives.

²²Letter from Byron Orton to Steve King (Feb. 9, 1998).

Undaunted—and taking umbrage at Orton’s “insinuation that my interpretation...was unreasonable and lacked the mark of common sense”—King asked Orton what “the standard for Iowa workplaces concerning restroom usage” should be and specifically: “How one would deal with a person who habitually abuses the privilege of having a restroom facility which they are permitted to use at their leisure?”²³

Apparently having forgotten that he had himself used the very same term in his letter to the *Des Moines Register*, Orton took issue with King’s “characterization of a restroom facility as a ‘privilege’ for working Iowans. Pursuant to OSHA law, employees have a legal right to restroom facilities in the workplace; pursuant to the laws of biology and a civilized society, restroom facilities are a human necessity.” Recasting King’s question in terms of employees’ “abus[ing] their rights...by utilizing restroom facilities for reasons other than their intended purpose, e.g., sleeping, illegal activity, etc.,” Orton observed that “employers already have the ability and authority to discipline workers.... My interpretation provides them no protection. Rather, current OSHA law would...shield employers from citations and penalties. As with any OSHA standard, OSHA law provides the affirmative defense of ‘employee misconduct.’” Of overriding practical significance was Orton’s statement: “Please understand that the frequency of use, standing alone, does not establish ‘employee misconduct’ so long as the employee is using the restroom facility for its intended purpose.” Orton also bolstered his view that it would serve no purpose to require employers to provide toilets “if employees are not allowed to use them when needed” by reference to two similarly structured OSHA provisions that require employers whose employees are exposed to potentially injurious corrosives shall “provide suitable eye wash facilities for quick flushing or washing” and that require them to “provide” respirators under certain conditions. Though neither says anything about allowing workers to use eye wash or respirators, it would be unreasonable to interpret them as conferring no “legally protected right” to use them. Orton was even able to boast that the Iowa Association of Business and Industry had expressed to him “their appreciation for clarifying an issue in a fashion that now provides solid guidance for their members.”²⁴

Soon the corporate animal slaughter plants in Iowa would have little for which to express their gratitude to Orton.

²³Letter from Steve King to Byron Orton (Apr. 6, 1998).

²⁴Letter from Byron Orton to Steve King (Apr. 21, 1998).