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

Marc Linder

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Iowa City
2003

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Groups of Workers Not Even Covered by OSHA's Toilet Standard

> It's remarkable how basic and persistent and extreme some deprivations of human rights are, while most of us rant about far more rarefied details of law and life.[1]

The applicability of OSHA's toilet access regulation is very broad. As the agency itself declares in an interpretive regulation: "The legislative history...clearly shows that every amendment or other proposal which would have resulted in any employee's being left outside the protection afforded by the Act was rejected. The reason for excluding no employee, either by exemption or limitation on coverage, lies in the most fundamental of social purposes of this legislation, which is to protect the lives and health of human beings in the context of their employment."[2] Nevertheless, OSHA's reach in general and that of its toilet standard in particular (and hence of the right to void at work) is not universal. It does not extend to: domestic household workers (who are without protection);[3] with some exceptions, state and local government workers in the 26 states in which Federal OSHA (which excludes public employees) has jurisdiction;[4] federal workers (except congressional employees covered by the Congressional Accountability Act of 1995[5] and postal workers); agricultural workers (who are covered by a set of field sanitation standards);[6] railroad train crews; or construction workers (who are covered by a less stringent set of standards).[7]

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[1]Email from Prof. Michael Saks, Arizona State University College of Law, to Marc Linder (Mar. 24, 1998).

[2]29 CFR sect. 1975.3(a) (2002).

[3]29 CFR sect. 1975.6.

[4]29 USC sect. 652(5) (2000).

[5]2 USC sect. 1341.

[6]29 CFR sect. 1928.110. For the text, see below App. III.

[7]29 CFR sect. 1926.51. For the text, see below App. IV.

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State and Local Government

Occupational safety and health obligations in the public sector are, as in other areas of the law in the United States, dysfunctionally balkanized. When Congress enacted OSHA in 1970, it excluded all Federal, state, and local governments from the definition of covered "employer."[8] At the same time, Congress authorized the Secretary of Labor to approve state plans for the development and enforcement of occupational safety and health standards that would "preempt applicable Federal standards."[9] One of the central conditions for approval of such state plans is that the standards themselves as well as their enforcement "be at least as effective in providing safe and healthful employment and places of employment" as Federal OSHA's standards.[10] In one respect, however, Congress required as a condition of approval that the state plans be more "effective" than Federal OSHA by mandating that such a plan in the judgment of the Secretary of Labor "contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan."[11] Consequently, while the 21 state-plan states (Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming)[12] and the three states (Connecticut, New Jersey, and New York) with approved public-sector programs only,[13] cover their government employees, the 26 states under Federal OSHA's jurisdiction—which excludes the governmental sector at all levels—are not required to have such coverage and many do not.

An evaluation performed in 2000 by the Office of Audit of the Office of Inspector General of the U.S. Department of Labor of this "hodgepodge system"[14] underscored that "the public sector poses the same or even greater overall risk of

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[8]29 USC sect. 652(5) (2000). On unsuccessful attempts to amend OSHA to cover state and local government employees, see *Occupational Safety and Health Law* 66-67 (2d ed.; Randy Rabinowitz ed. 2002).

[9]29 USC sect. 667(b).

[10]29 USC sect. 667(c)(2). See also 29 CFR sect. 1902.

[11]29 USC sect. 667(c)(6).

[12]29 CFR sect. 1952.

[13]29 CFR sect. 1956.

[14]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 8 (Rep. No. 05-00-001-10-001, Feb. 9, 2000), on http://www.oig.dol.gov/public/reports/oa/2000/05-00-001-10-001.pdf.

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workplace injury and illness as the private sector." The reason is that, contrary to popular misperception, the public sector does not consist only of desk jobs; large numbers of public employees work in hospitals, as police and fire fighters, corrections officers, vehicle mechanics, and wildlife workers, exposed to many hazards.[15] Whether this structural similarity in exposure to health and safety hazards also applies to toilet access is not clear. On a semi-anecdotal level, the chief legal counsel to the Arkansas Department of Labor reported that she has received about one call per week for 20 years from workers in the private sector wanting to know whether they have a right to go to the bathroom, but did not recall ever having received such an inquiry from a public-sector employee.[16]

The "Audit" concluded that nine of the Federal OSHA states (Arkansas, Illinois, Kansas, Maine, New Hampshire, Ohio, Oklahoma, Rhode Island, and Wisconsin), "had in place the staffing and legislation which contained the basic elements for a viable OSHA program...."[17] To be sure, in its response OSHA

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[15]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 11.

[16]Telephone interview with Denise Oxley, Chief Legal Counsel, Ark. Dept. of Labor (Oct. 25, 2002).

[17]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 7. The audit in fact referred to 12 states, including Florida, New Jersey, and Guam, which are disregarded here because Guam is not a state, in the interim Florida abolished safety inspections for public employers (1999 Fla. Laws ch. 240, sect. 14 at 2148, 2165; 2001 Fla. Laws ch. 65, sect. 9 at 610, 612), and New Jersey's public sector program has been approved by Federal OSHA. The inclusion of Arkansas is inappropriate in the present context. First, according to the agency's chief legal counsel, the Arkansas Department of Labor's public employee safety and health program lacks a toilet standard that it could apply to county and local government employees (including teachers); and second, even with regard to state employees, the department is limited to enabling aggrieved workers to file grievances within a state grievance system. The state's non-codified industrial sanitation code for manufacturing does, however, contain potentially expansive access provisions. Telephone interview with Denise Oxley (Oct. 31, 2002); Ark. Code Ann. sect. 11-2-110 (2002); Ark. Dept. of Labor, Safety Code #6: Safety Code for Industrial Sanitation, sect. 6 (n.d.), on http://www.state.ar.us/labor/pdf/code6_industrial_sanitation.pdf. Finally, an older workplace safety and health law, empowering the department to make inspections, does not apply to the section on the provision of toilets, which is focused on separate facilities for men and women, not on the number of toilets, let alone access. Ark. Code Ann. sects. 11-5-107, 11-5-112. The Supervisor of Arkansas Occupational Safety and Health (AOSH) conceded that since AOSH lacks the power to cite employers for violating federal OSHA standards, since the American National Standards Institute toilet standard has not adopted

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commented that it was "very concerned" that the audit's use of the word "acceptable" to describe the programs in these states "that may not fully meet or even come close to meeting the State plan approval requirements is inappropriate. Although there may be some awareness and some formal attention directed to the hazards these workers face in such States, the word 'acceptable' gives an impression that the programs are better than they may in fact be."[18] Unlike these nine states, of the remaining 17 Federal OSHA jurisdictions, Alabama and Delaware had no program, while the others (Colorado, the District of Columbia, Georgia, Idaho, Louisiana, Massachusetts. Mississippi, Missouri, Montana, Nebraska, North Dakota, Pennsylvania, South Dakota, Texas, and West Virginia), were deficient in one or more of the following areas: legislative or gubernatorial authority for a program; occupational safety and health standards equivalent to those of OSHA; methods for compelling compliance with those standards; a review system for contested cases; and/or adequate staffing.[19] In addition, seven states in this latter group (Colorado, Georgia, Louisiana, Mississippi, Missouri, Texas, and West Virginia) cover only state employees, but not local government workers.[20]

Among the nine Federal OSHA states classified by the "Audit" as maintaining OSHA-viable public employee programs, Wisconsin has enacted a statute that gives public employees rights equivalent to those provided by OSHA[21] and requires the Department of Workforce Development to adopt standards that provide protection at least equal to that provided to private-sector employees by OSHA.[22] The Ohio Public Employment Risk Reduction statute mandates adoption of Federal OSHA standards;[23] the statute does permit exceptions, but the

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OSHA's Memorandum, and since the state's "antiquated" industrial sanitation code does not apply to state workers, he would lack the power to cite, for example, school districts for not letting teachers go to the bathroom when they need to, in spite of his personal knowledge that many an elementary school teacher is a "prisoner" in her classroom. Telephone interview with Michael Watson (Oct. 29, 2002).

[18]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 17.

[19]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 9, 25-27.

[20]U.S. Dept. of Labor, Office of Inspector General, Office of Audit, "Evaluating the Status of Occupational Safety and Health Coverage of State and Local Government Workers in Federal OSHA States" at 13-14.

[21]Wisconsin Statutes Annotated sect. 101.055(1 (2001).

[22]Wisconsin Statutes Annotated sect. 101.055(3).

[23]Ohio Revised Code ch. 4167.07 (2001).

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state agency has in fact adopted OSHA's section 1910.141 (with one modification not pertinent here).[24] In Illinois, pursuant to the state occupational health and safety law applicable to state employees,[25] the state agency has adopted OSHA's general health and safety standards including Part 1910.[26] Maine,[27] Oklahoma,[28] and Rhode Island[29] have adopted or incorporated by reference Part 1910. In Rhode Island each state and local subdivision agency head is responsible for establishing and maintaining an "effective and comprehensive occupational safety and health program" and providing safe and healthful places and conditions of employment.[30] New Hampshire has adopted a code provision essentially identical to Federal OSHA's general industry sanitation standard.[31]

Finally, under a Kansas state law empowering the secretary of human resources to enter any workplace, including state agencies and public works, to investigate sanitary conditions and methods of protecting workers from dangers, the secretary can order the employer to make changes to protect workers endangered by conditions injurious to workers' health.[32] Although the law provides for assessment of penalties, the agency has not adopted rules for invoking them, apparently because, according to the head of the Industrial Safety and Health Unit of the Division of Workers Compensation, which is charged with ensuring public employees with a safe and healthy work environment: "Public sector employers have always voluntarily abated identified hazards." He also stated that, although he had never heard of OSHA's 1998 toilet standard Memorandum: "If a public sector employee (school teacher) were to bring a complaint (inadequate toilet facilities or breaks) to this section, an investigation would be conducted which would include employee and management interviews. 29 CFR 1910.141(c)(1)(i) could be cited and abatement required. This may or may not include the provision which you reference. Verification of the correction would be required and the employee could be contacted to assess the adequacy of the fix. No monetary penalty would be assessed." He suggested that a school could set up a system under which the principal or assistant principal or some other person would enter

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[24]Ohio Adm. Code ch. 4167-3-01(A) and (L) (2001-2002).

[25]820 Illinois Comp. Stat. Ann. sect. 225/2 (1999).

[26]Code of Illinois Rules tit. 56, pt 350, sect. 280 (2002).

[27]Maine Rev. Stat. Ann. Tit. 26 sect. 561, 563 (1988); Code of Maine Rules 12 179 002-2 (2001).

[28]40 Okla. Stat. Tit. 40 sect. 401-25 (2001); Okla. Adm. Code sect. 380:40-1-2(a) (1999).

[29]Code of R.I. Rules sect. 16 050 002-4 (1999).

[30]R.I. Gen Laws sect. 28-20-10 (2000).

[31]N.H. Rev. Stat. Ann. ch. 277 (1999); Code of N.H. Rules, Labor 1403.76(a) (1998).

[32]Kansas Stat. sect. 44-636(a) (2000).

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the classroom for a teacher who had to void, just as there are systems in place to substitute for a teacher who has to leave for any emergency.[33]

Although their programs are deficient in important ways, West Virginia[34] and the District of Columbia[35] have also adopted or incorporated by reference Part 1910, while Nebraska has created a Workplace Safety Consultation Law, which covers public and private employers subject to the state workers compensation statute, which empowers the state Department of Labor to "conduct workplace inspections...to determine whether employers are complying with" Federal OSHA standards.[36] However, as the manager of the program commented, the department lacks the power to fine an employer for violation of an OSHA standard; all it can do is attempt to persuade the employer to comply and, if the latter refuses, in the case of a public employer, to repeat the effort at persuasion at the next higher political level. Since state and local public employers are not subject to Federal OSHA jurisdiction, the department cannot even, as it can with private employers, refer the case to OSHA. Although he had never heard of OSHA's 1998 toilet standard Memorandum and repeatedly stated that he found it unbelievable that schoolteachers had toilet access problems, he declared that the next time a school was inspected—which does not occur often since inspections tend to focus on more hazardous workplaces—toilet access would be checked into.[37]

This reference to schoolteachers, some of whom may be required to remain with their elementary school pupils as long as three and a half hours without a break,[38] is important because they face special access problems and their medical consequences. A study by the authors of *Void Where Prohibited* of teachers in two school districts (Des Moines and Iowa City) revealed that 21.2 percent of those who made a conscious effort at work to drink less to decrease their voiding frequency reported a urinary tract infection during the preceding 12 months compared to only 9.9 percent among those who did not restrict their fluid intake.[39]

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[33]Telephone interview with Rudy Leutzinger, head of Industrial Safety and Health Unit, Kansas Department of Human Resources, Topeka (Oct. 17, 2002); the quotations are taken from emails from Leutzinger to Marc Linder (Oct. 21 and 22, 2002).

[34]W.Va. Code Ann. sect. 21-3A-7 (1996); W.Va. Code of State Rules sect. 42-15-4.1 (1998).

[35]D.C. Code Ann. Sect. 32-1101 (2001); Code of D.C. Municipal Regulations tit. 7 sect. 2003.1(d) (1999).

[36]Neb. Rev. Stat. sect. 48-443(1), 446(2) (2001).

[37]Telephone interview with Bill Taylor, Workplace Safety Consultation Program Manager, Lincoln, NE (Oct. 17, 2002).

[38]Brian Tumulty, "Teachers Wrestle With Issue of Bathroom Breaks: OSHA Might Come to Rescue," Gannett News Service, Apr. 1, 1998 (Westlaw).

[39]I. Nygaard and M. Linder, "Thirst at Work—an Occupational Hazard?" *International Urogynecology Journal* 8:340-43 (1997).

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This linkage was also confirmed by the president of the Houston Federation of Teachers, who has had to defend teachers disciplined for leaving their class to use the bathroom.[40] Public school teachers nevertheless have less legal protection than most workers because of the aforementioned exclusion of the public sector from Federal OSHA.[41]

Federal Government

Congress excluded the United States government from the definition of "employer" under OSHA,[42] but it did charge the head of every Federal agency (except the Postal Service)[43] with establishing and maintaining "an effective and comprehensive occupational safety and health program" and providing "safe and healthful places and conditions of employment, consistent with the standards set under section 655,"[44] which include OSHA's toilet standard. OSHA has itself promulgated regulations reinforcing that agency heads "shall comply with all occupational safety and health standards issued under section 6[55]...."[45] Moreover, a presidential Executive Order from 1980 requires agency heads to "[a]ssure prompt abatement of unsafe or unhealthy working conditions,"[46] but, while empowering the Department of Labor to conduct inspections,[47] it fails to provide for any enforcement such as monetary penalties or judicially enforcible abatement orders. Nevertheless, despite the lack of such enforcement procedures, according to Tom Marple, Director of OSHA's Office of Federal Agency Programs, since "everyone's working for the same boss," OSHA has other tools at its disposal; although theoretically this alternative enforcement path leads all the way to presidential intervention, such recourse has never proved necessary, and discussions at the deputy assistant secretary level of any federal department have

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[40]L.M. Sixel, "Raise Your hand If You Need Relief," *Houston Chronicle*, Sept. 11, 1998, at 1 (Westlaw).

[41]Carrie Mason-Draffen, "Bad News: Bathroom Breaks Can Be Withheld," *Newsday*, Aug. 13, 2000, at F10 (Lexis), erroneously informed public school teachers complaining that they sometimes could not go to the bathroom for four hours that since New York State does not regulate public employees and defers to federal regulations, teachers have no rights.

[42]29 USC sect. 652(5).

[43]On the recent extension OSHA coverage to the U.S. Postal Service, see below ch.. 16.

[44]29 USC sect. 668(a)(1).

[45]29 CFR sect. 1960.16.

[46]Exec. Order No. 12196, sect. 1-201(c) (1980).

[47]Exec. Order No. 12196, sect. 1-401(i).

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always proved sufficient to secure compliance.[48]

Agriculture

After what the D.C. Circuit Court of Appeals called OSHA's "disgraceful chapter of legal neglect"—14 years of "intractable...resistance to issuing" sanitation rules to protect farmworkers[49]—OSHA finally issued a field sanitation standard in 1987.[50] Because this standard is codified separately from the general industry sanitation standard, it is not covered by the 1998 interpretive Memorandum. And although it contains certain protective elements lacking in the industry toilet standard,[51] it is also subject to two serious limitations: it does not require employers to provide toilets to workers who work fewer than three hours per day[52] (two hours under Cal/OSHA[53] and without limits under Washington OSHA[54]) and applies only to an "agricultural establishment where eleven...or more employees are engaged on any given day in hand-labor operations in the field"[55] (five or more workers in California[56] and one or more in Washington[57]). Congress and OSHA withheld protection from these workers not because they were deemed invulnerable to health risks associated with urinary or fecal retention, but merely to benefit certain agricultural employers at the expense of their workers.

In the words of the Reagan administration OSHA:

> The requirement to provide toilets and handwashing facilities applies to all farmworkers covered under the scope of this standard, with one notable exception. The sanitation facilities need not be provided, under paragraph (c)(2)(v), to "employees who perform field work for a period of 3 hours or less (including transportation time to and from the field) during the workday." This exemption is limited to the provision of toilets and handwashing facilities and does not extend to drinking water. (Employers must provide drinking water, as specified in paragraph (c)(1), to all employees regardless of the length of their workday).

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[48]Telephone interview with Tom Marple, Washington, D.C. (Oct. 21, 2002).

[49]Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 614 (D.C. Cir. 1987).

[50]29 CFR sect. 1928.110. For the full text, see below Appendix III.

[51]See below ch. 6.

[52]29 CFR sect. 1928.110(c)(2)(v).

[53]8 Cal. Code of Regulations sect. 3457(c)(2)(A) (2002).

[54]Wash. Adm. Code sect. 296-307-095 (2002).

[55]29 CFR sect. 1928.110(a).

[56]8 Cal. Code of Regulations sect. 3457(c)(2)(A).

[57]Wash. Adm. Code sect. 296-307-09503.

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The Migrant Legal Action Program, asserting that workers can be seriously infected from human feces or poisoned by pesticide residues even if they work for only one or two hours per day, opposed the proposed, or any exemption based on the number of hours worked.... Another farmworker representative pointed out that if an exemption based on time were allowed, it should include travel time to and from the fields, especially as the travel almost always is over rural, isolated roads that do not have rest stations.... Agricultural trade associations generally support this provision, arguing that requiring employers to provide toilet and handwashing facilities for part-time employees would be burdensome and unnecessary.... Moreover, OSHA's expert witness on urinary tract infections, Dr. Anemias [sic; should be Ananias] C. Diokno testified that, from a medical point of view, 3 hours was about the average safe amount of time urine could be withheld before bacteria multiply and blood flow decreases due to pressure from the overstretched bladder....

Consequently, OSHA has concluded that an exemption for part-time work is appropriate, because the risks are less to employees and because, under the circumstances, requiring provision of the facilities would be unnecessarily burdensome to employers. Nevertheless, the Agency believes that the time should be strictly limited in order to adequately protect farmworkers. OSHA's 1976 field sanitation proposal exempted field work of two hours or less (41 FR 17576). The 1984 proposal raises the period to three hours per work day, but adds the requirement that travel time to and from the field be included in the total (49 FR 7605), which assures farmworkers that they will not be away from facilities for more than three hours.[58]

In fact, OSHA misstated the history of the standard. In 1976, when OSHA Administrator Morton Corn was animated by the recognition both that farm workers "have the same physiological and hygienic needs, and are exposed to similar health hazard risks as are their industrial counterparts" and that Congress intended "to bring agricultural employees into the mainstream of the American labor force,"[59] he proposed exempting field work lasting less than two hours including travel time to and from the workplace.[60] The claim by the Reagan administration OSHA in 1984 that exempting work lasting three hours or less was appropriate "since there is little need for most workers to relieve themselves at the worksite when the work is for very short time periods and when facilities presumably are available before and after work"[61] was and is simply factually incorrect. Even if there is no reliable medical evidence that waiting three hours to urinate causes increased bacterial loads (and thus urinary tract infections), it may still cause pain, painful urgency, or urinary incontinence.[62] Indeed, even

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[58]*Federal Register* 52:16050-96 at 16090 (1987).

[59]*Federal Register* 41:17576-79 at 17577 (1976).

[60]*Federal Register* 41:17578 (29 CFR sect. 1928.110(d)(iv)).

[61]*Federal Register* 49:7589, 7600 (1984).

[62]Email from Dr. Ingrid Nygaard to Marc Linder (Jan 10 and 13, 2003). For medical

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OSHA's expert witness from the 1980s, Dr. Ananias Diokno, agreed in retrospect that, despite his testimony about bacterial infections,[63] if workers have to go more often than every three hours, "we should not corral them...they should be allowed to go."[64] And although expensive medications with side effects could possibly reduce voiding frequency, it is unclear why workers should be forced to bear that double burden instead of being permitted to urinate when they need to.[65]

Moreover, OSHA statements from the 1980s to the contrary are suspect because they were made in connection with the Reagan administration's systematic refusal to issue any field sanitation standard at all. Typical of the reasons or excuses that OSHA offered up in its last-ditch effort in 1985 were the following: "whatever risk that is present from lack of adequate sanitation in fields where people work (with the exception of heat stroke) is extremely difficult to separate from the risk present from non worksite conditions of these same workers"; "[i]t is injudicious to take inspectors out of high-hazard worksites and put them in farmer's [sic] fields":"private-sector market incentives also operate to promote improved public health."[66]

The efficacy of market incentives has apparently left something to be desired: OSHA has cited agricultural employers 1,836 times for failing to provide toilet and/or handwashing facilities since the field sanitation standard went into effect,[67]

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sources, see below ch. 13.

[63]Diokno's testified at the OSHA hearing in the mid-1980s that "[i]t is expected that a normal person in general should void approximately four to six times a day to avoid [bladder] overdistension." Ananias Diokno, "Urinary Tract Infection" at 6 (n.d. [ca. 1984]), in OSHA, Docket No. H-308, Doc. No. 23 (copy furnished by OSHA). Dr. Nygaard testified at the Jim Beam OSHA hearing in 2002 that she was not familiar with any study showing as few as three to six voids per day. See below ch. 13.

[64]Telephone interview with Dr. Ananias Diokno, Chief of Urology, William Beaumont Hospital, Royal Oak, MI (Jan. 16, 2003).

[65]Email from Dr. Ingrid Nygaard to Marc Linder (Jan. 17, 2003). Diokno—who in 2003 was not familiar with the latest and most reliable urinary frequency study by FitzGerald et al. (see below ch. 13), which challenges the received wisdom—expressed the opinion that urinating every 3-4 hours is normal except among people with very small bladders (under 300 cc); he regarded more frequent urination as "disruptive," mentioning in particular problems that arise when people are out shopping and have to know where all the bathrooms are and especially for women, who, with all the "contraptions," might take 15 minutes to urinate. He recommended that such frequent urinators see a doctor for drugs or behavioral therapy to reduce their frequency; although he conceded that the medication has side effects, he did not believe that it was doing people a favor to let them continue to urinate frequently.

[66]*Federal Register* 50:15086-92 at 15090, 15092 (1985).

[67]Lexis-Nexis OSHAIR file search ("19280110 c02 i") conducted on Dec. 31, 2002.

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with an additional 728 citations issued by Cal/OSHA since 1992.[68]

Another legal disability to which farmworkers are subjected is time and distance. The field sanitation standard provides: "Toilet and handwashing facilities shall be accessibly located and in close proximity to each other. The facilities shall be located within a one-quarter-mile walk of each hand laborer's place of work in the field."[69] California[70] and Washington[71] have created the alternative of five minutes. Federal OSHA had originally proposed a 5-minute rule as well, but eventually dropped it in favor of the quarter-mile rule.[72]

OSHA was well aware of the negative impact of distance on use. In promulgating the field sanitation standard in 1987 that established the quarter-mile walk standard, the Reagan administration OSHA expressly stated that distance was "a major concern of both employers, who often deal with perishable crops, and farmworkers, who usually are paid on a piece-work basis."[73] This lumping together of employers and farmworkers is curious since a maximum legal distance of a quarter-mile imposes no restriction on employers, which are free to buy or rent more toilet facilities and to space them closer than a quarter-mile away if they wish. In contrast, farmworkers who fear losing piece wages if they have to take a long walk to urinate are powerless to engage in self-help by acquiring additional toilet facilities and positioning them closer.

Although it might seem plausible that agricultural employers paying hand harvesters on a piece rate might be indifferent to how often workers stop to void, New Mexico OSHA and Cal/OSHA reported that farm labor contractors often do not permit workers to walk across the field to a port-a-potty because they insist on finishing the harvesting in that field by a certain time.[74] According to the litigation director of California Rural Legal Assistance: "As with many of these farm labor issues, lack of access to the toilets is usually less a function of direct refusal to allow a worker to use them (when they are there) and more an issue of the pressures of piece rate, etc creating a situation where workers fear they will lose pay or preferential work assignments if they take breaks for anything."[75]

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[68]Lexis-Nexis OSHAIR file search ("3457 c02 a") conducted on Dec. 31, 2002.

[69]29 CFR sect. 1928.110(c)(2)(iii) (2002).

[70]8 Cal. Code of Regulations sect. 3457(c)(2)(D) (2002) (whichever is shorter).

[71]Washington Adm. Code sect. 296-307-09506 and 296-307-09518(8) (2002).

[72]*Federal Register* 41:17576-79 at 17578 (29 CFR sect. 1928.110(d)(2)(i)); *Federal Register* 52:16050-96 at 16090 (1987).

[73]*Federal Register* 52:16090.

[74]Telephone interview with George Vigil, program manager for statistics section, New Mexico OSHA, Albuquerque (Sept. 20, 2002); telephone interview with Susana Freund, Cal-OSHA, Ventura (Oct. 30, 2002).

[75]Email from Cynthia Rice, CRLA, San Francisco, to Marc Linder (Dec. 12, 2002).

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Toilet access is a problem, for example, in California's Central Valley, where employers "often don't provide enough toilets for farm workers" or ones that are so dirty that workers try not to void during nine-hour shifts. As one female field worker put it: "'It was either cover your nose and mouth and go in there, or have people looking at me sitting in the field.'"[76] The lack of toilet facilities for farmworkers is common in West Texas, too.[77] During a United Farm Workers organizing campaign at a mushroom farm in Quincy, Florida, the employer instituted a procedure of counting bathroom breaks weekly as a disciplinary measure designed to discourage workers from backing the union.[78]

In Washington State one problem for farmworkers, according to one of their public interest lawyers, is the practical unavailability of toilets. Whereas some farmers provide portable toilets that they move within a field or apple orchard, thus complying with state OSHA's five-minute walk or quarter-mile rule, others have toilets that are in one point in the field or orchard. If, as the farmworkers work, they move farther from the toilet, often more than five minutes or a quarter-mile, they "merely relieve themselves in the fields." This problem is exacerbated when workers are doing piece work: because "a break is on their dime,...few will use facilities if they are too far away. I noted in [the] harvest this year that when workers are not making minimum wage while working piece rate, the employer fires them. Once farmworkers are aware...that they will be discharged under such circumstances, how far/close a facility is may be moot as they will relieve themselves in the orchard/field to make minimum wage and save their jobs."[79]

To be sure, farmworkers are not the only group of employees whose voiding

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[76]"Bathroom Access Causes Work Troubles," *Des Moines Register*, Mar. 13, 1998, at 2M, col. 2.

[77]Email from Polly Bone, Branch Manager, Texas Rural Legal Aid, Plainview, TX, to Marc Linder (Dec. 17, 2002).

[78]Rebecca Schleifer, Review of *Void Where Prohibited*, in *University of Pennsylvania Journal of Labor and Employment Law* 2:603-608 at 607 (2000).

[79]Email from Patrick Pleas, Northwest Justice Project, Wenatchee, to Marc Linder (Dec. 11, 2002). Under the Fair Labor Standards Act it is unlawful to dock a worker's wages for breaks less than 20 minutes—but only to the extent that the worker's wage is pressed below the minimum wage or time and a half for overtime over an entire pay period. Although in general it would be lawful for an employer to fire an at-will employee who failed to reach the minimum wage on a piece rate (provided that the employer paid him the minimum wage for however long he had worked), it would be unlawful retaliation if the reason for not having achieved the minimum wage were the worker's having exercised his right under OSHA to go to the toilet (just as it would be unlawful to press the wage below the minimum by docking wages). 29 USC sect. 660(c)(1); see below ch 17.

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frequency is adversely affected by the piece-rate form of compensation. As a recent study of women workers at a large pottery manufacturing plant revealed, even where 85 percent of respondents reported that the bathroom was easily accessible, 83 percent that there was no time limit on bathroom breaks, and 87 percent that they did not have to ask permission to take a break to go to the toilet, nevertheless 87 percent also reported "waiting until the last minute to go to the bathroom," and only 78 percent went to the bathroom even three or four times—that is, at least one time in addition to the scheduled 20-minute lunch and 10-minute break—during an eight hour day The authors conjectured that the piecework-bonus incentive wage system "may have contributed to a reluctance to take rest breaks in order to increase production...."[80] In other words, some firms may be in a position to undermine the effectiveness of OSHA's imposition on employers of an obligation to let workers go when they need to go by making workers internalize the compulsions of uninterrupted production and by shifting to them the responsibility for not exercising their right to void.

Railroads

Special voiding problems of railway train crews surfaced after *Void Where Prohibited* went to press. Most prominent was the "'disgusting and barbaric'"[81] toilet system that the Norfolk Southern Railway maintained in its locomotives. In 1997 a class action was filed on behalf of 5,000 train crew members (over whom OSHA does not exercise jurisdiction)[82] seeking monetary damages and an

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[80]Sheila Fitzgerald, Mary Palmer, Victoria Kirkland, and Leslie Robinson, "The Impact of Urinary Incontinence in Working Women: A Study in a Production Facility," *Women & Health* 35(1):1-16 at 5, 8-9 (quote), 13 (quote) (2002). On especially hot summer days the workers were given one additional 10-minute rest break. *Id.* at 5. Although the published article does not specify this detail, Fitzgerald stated that the survey asked only whether respondents voided 1, 2, 3, or 4 times daily; 68.1 percent of those who answered voided 3 or 4 times. Email from Sheila Fitzgerald to Marc Linder (Oct. 3, 2002). Although the questionnaire asked respondents how often they voided, the article referred to the number of times; when asked how the authors converted the data, Fitzgerald replied: "We did not do any conversions and now that I think about it the information is probably useless. The better question is 'how many times do you use the BR at work?'" Email from Sheila Fitzgerald to Marc Linder (Oct. 4, 2002).

[81]Christopher Dinsmore, "Norfolk Southern Crew Members Sue the Railroad Over Commodes," (Norfolk) *Virginian-Pilot*, Aug. 27, 1997, at D1 (Lexis) (quoting lawsuit).

[82]OSHA does not "apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 USC 653(b)(1). The Federal

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end to the use of bags that line a commode and that are afterwards placed in a bucket, to be disposed of later. The Norfolk Southern is the only railroad that does not provide chemical or flush toilets on long-haul service locomotives, which were not required by federal law to have toilets[83] until the Federal Railroad Administration of the Department of Transportation promulgated a regulation in 2002 phasing in conforming toilets.[84]

Construction

Because the construction industry is not covered by the general industry sanitation standard, it is also not subject to Federal OSHA's Memorandum embodying workers' right to void at-will. Many construction workers complain that they "are subjected to the lack of facilities, or disgusting portable toilets that they are compelled to use, often without toilet paper, and almost always the stench is unbearable."[85] The special OSHA standard for the construction industry provides that toilets at construction jobsites "shall be provided for employees" according to a table mandating at least one toilet for 20 or fewer employees, one toilet seat and one urinal per 40 workers for 20 or more workers, and one toilet seat and one urinal per 50 workers for 200 or more workers. Jobsites lacking a sanitary sewer "shall be provided with one of the following toilet facilities unless prohibited by local codes": privies or chemical, recirculating, or combustion toilets. However, these requirements "shall not apply to mobile crews having transportation readily available to nearby toilet facilities."[86]

Railroad Administration (FRA) has such statutory authority, 49 USC sect. 20101 (2002), and in 1978 it published a policy statement declaring that it was exercising such authority, thus preempting OSHA. However, the FRA also stated that since OSHA's general industry sanitation standard was generally applicable to railroad workplaces, a certain overlap existed, as a result of which consultation between the agencies concerning sanitation in rolling stock was called for. 43 *Federal Register* 10583-90 at 10588-89 (1978). It is this state of affairs that prompted OSHA's jurisdiction expert to characterize the likelihood of preemption as a "resounding maybe." Telephone interview with John Solheim, Washington, D.C. (Dec. 12, 2002). Nevertheless, under a recent U.S. Supreme Court decision, the FRA appears to have validly triggered the statutory preemption of OSHA. Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002).

[83]Dinsmore, "Norfolk Southern Crew Members Sue the Railroad Over Commodes."

[84]67 *Federal Register* 16032 (2002); 49 CFR 229.137 (2002).

[85]Susan Lippman, Book Review of *Void Where Prohibited*, *NY Hard Hat News*, Apr. 2001, at 7.

[86]29 CFR sect. 1926.51(c)(1), (3), and (4) (2001). For the full text, see below Appendix IV.

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According to labor union officials, the problem that construction workers face is not—in the union or nonunion sector for that matter—so much denial of permission to stop work to urinate, as is the case in manufacturing or some service industries. Rather, it is the lack of a toilet altogether and the lack of handwashing facilities, especially after defecation. According to Stephen Cooper, who was international safety director of the Ironworkers Union and a member of OSHA's Advisory Committee on Construction Safety and Health (ACCSH) from 1976 until his retirement in 2001, most of the larger construction employers do provide adequate port-a-potties, but almost none provides handwashing facilities—which OSHA does not require on-site except for workers applying "paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees"[87]—which he estimated would cost about $300

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[87]29 CFR sect. 1926.51(f)(1). Subsection (f)(3) does state that "[l]avatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph." It then goes on to provide that "[e]ach lavatory shall be provided with hot and cold running water, or tepid running water." In fact, however, OSHA does not enforce this provision; instead it in effect applies the "transportation readily available to nearby washing facilities" exception to all construction sites, despite the fact that in a standard interpretation antedating the adoption of the lavatory provision OSHA had already expressly found that, with regard to the provision of toilets, "'mobile crews' job functions require continual or frequent movement from jobsite to jobsite on a daily or hourly basis. Such is not the normal situation for work crews involved in housing construction." OSHA, Standard Interpretation, 1926, Letter from Roy Gurnham, Director, Office of Construction and Maritime Compliance Assistance, to William Carroll (Apr. 19, 1993), on http://www.osha.gov. OSHA created this nonenforcement mode by means of a standard interpretation declaring that subsections (f)(2)-(4) "only apply to permanent places of employment. The general scope statement (1910.14(a)(1)) [of the general industry sanitation standard] limiting the application of these provisions was inadvertently omitted in the June 30 [1993] Federal Register publication. The Office of Construction and Civil Engineering Safety Standards is in the process of correcting this statement." OSHA, Standard Interpretation 1926.51 (Feb.10,1994), on http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p. In fact, OSHA has never corrected the situation, in part because correction would require amending the standard by opening it for notice and comment. Because new construction sites are, virtually by definition, nonpermanent, OSHA now treats virtually all new construction sites as nonpermanent places of employment, and the lavatory standard is a nullity. Telephone interview with Calvin Branch, Occupational Safety and Health Specialist, Construction Standards and Guidance, OSHA, Washington, D.C. (Jan. 13, 2003). OSHA has issued only 19 citations for violations of section 1926.51(f)(3)(ii), of which only three were issued by Federal OSHA after 1993. Search ("19260052 f03 ii")

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per week for a self-contained trailer with its own (non-running) water supply and hot water. Among smaller construction employers, including those in the union sector, failure to provide the required number (or even any) toilets is common. Since many construction workers defecate during the workday and the increasing number of female workers change sanitary napkins without being able to wash their hands, feces- and blood-borne pathogens pose a significant health risk for workers when they eat or smoke. These circumstances do give rise to the one instance in which employers do deny permission to stop work to void: if workers needing to defecate have no toilet altogether and decide to drive (as far as 10 to 25 miles and back) to a gas station or convenience store, employers may fire them.[88]

Yet here, too, strong unions and worker militance can make a difference. The business manager of Local 948 of the International Brotherhood of Electrical Workers in Flint, Michigan reported that if the on-site port-a-potties are filthy, some members will tell the employer that they are not going to put up with the conditions and then drive to the closest public bathroom, even though they are paid by the hour, and the employer will not even attempt to dock their wages. Conversely, he observed that workers paid on a piece-rate in the nonunion construction sector would definitely be discouraged from voiding by the loss of wages.[89]

Cooper's view notwithstanding, however, when the ACCSH—with which OSHA, by its own procedural rule, is required to consult in issuing, modifying, or revoking a construction industry standard[90]—discussed this very issue on

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in Lexis-Nexis OSHAIR file (Jan. 13, 2003). In late 2002 the Cal/OSHA Standards Board adopted a proposal to require at least one washing station per 20 employees in construction; the stations have to be located so that workers can readily wash in connection with using a toilet; mobile work crews having available transportation to such facilities are excluded. "An Ironworker's Success: Construction Hand Washing Proposal Adopted by Cal-OSHA Standards Board," *Cal-OSHA Reporter* 29(46) (Nov. 29, 2002) (Lexis).

[88]Telephone interview with Steve Cooper (Sept. 18, 2002).

[89]Telephone interview with Charles Marshall, business manager, IBEW Local 948, Flint, MI (Oct. 29, 2002).

[90]29 CFR sect. 1911.10(a) (2002). Pursuant to OSHA: "An advisory committee may be appointed by the Secretary to assist him in his standard-setting functions under section 6 of this Act. Each such committee shall consist of not more than fifteen members and shall include as a member one or more designees of the Secretary of Health, Education, and Welfare, and shall include among its members an equal number of persons qualified by experience and affiliation to present the viewpoint of the employers involved, and of persons similarly qualified to present the viewpoint of the workers involved, as well as one or more representatives of health and safety agencies of the States. An advisory

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January 29, 1999, it decided to include a provision requiring employers to let workers go to the toilet "on an as-needed basis" in the draft proposal to revise OSHA's sanitation standard for construction. The crucial colloquy took place between two members, Larry Edginton, the Director of Safety and Health of the International Union of Operating Engineers, and the chairman of the ACCSH, Stuart Burkhammer, Vice President and Manager of Safety and Health Services, Bechtel Corporation:

MR. EDGINTON: [T]he other issue I had again has to do with access to the facilities. And I don't think we need to be talking about access to facilities under limited access work sites. We need to be thinking about it in terms of all work sites.... And perhaps, under table D-2, we should add language that says that employees shall be allowed to use the facilities on an as-needed basis. We should not restrict this question of use to simply mobile sites. It should be treated as all sites.
CHAIRMAN BURKHAMMER: Maybe, I'm naive and I haven't been in this business very long. But I have never, ever, ever heard an employer tell an employee they can't go to the bathroom. If you got to go, you've got to go, you know. I mean, I --
MR. EDGINTON: I used to think that, too, Mr. Chairman, until I had people start telling me it was so.
CHAIRMAN BURKHAMMER: It's a sad world we live in. All right. Where would you like to put that, Larry?
MR. EDGINTON: Under table D-2. Perhaps, this could be a 1926.51(c)(2). ...
CHAIRMAN BURKHAMMER: And what's your wording?
MR. EDGINTON: Employees shall be allowed to use toilet facilities on an as-needed

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committee may also include such other persons as the Secretary may appoint who are qualified by knowledge and experience to make a useful contribution to the work of such committee, including one or more representatives of professional organizations of technicians or professionals specializing in occupational safety or health, and one or more representatives of nationally recognized standards-producing organizations, but the number of persons so appointed to any such advisory committee shall not exceed the number appointed to such committee as representatives of Federal and State agencies." 29 USC sect. 656(b). Furthermore, 29 CFR sect. 1912.3(a) provides: "This part applies to the Advisory Committee on Construction Safety and Health which has been established under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333), commonly known as the Construction Safety Act. The aforesaid section 107 requires the Secretary of Labor to seek the advice of the Advisory Committee in formulating construction standards thereunder. The standards which have been issued under section 107 are published in Part 1926 of this chapter. In view of the far-reaching coverage of the Construction Safety Act, the myriad of standards which may be issued thereunder, and the fact that the Construction Safety Act would also apply to much of the work which is covered by the Williams-Steiger Occupational Safety and Health Act of 1970, whenever occupational safety or health standards for construction activities are proposed, the Assistant Secretary shall consult the Advisory Committee."

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basis.
CHAIRMAN BURKHAMMER: Shall be allowed. Is that what you said, shall be allowed? Steve, do you accept that recommendation in the motion?
MR. COOPER: Yes.[91]

The well-informed *Occupational Safety and Health Reporter* quoted a National Institute for Occupational Safety and Health representative as saying that "'unbelievable as it may be,' there are still some employers who have toilet facilities for their employees but are unwilling to let their employees take time out to use them. This practice is 'unacceptable and must be stopped,' ACCSH members contended."[92]

Despite the fact that ascertaining whether a construction employer has a toilet on the construction site or not would appear to be the easiest imaginable inspection action, advocates such as Jane Williams assert that OSHA refuses to enforce the standard and has failed to issue any citations for violations for ten years. It seeks, in her view, to justify its inaction on the grounds that it has higher enforcement priorities in the construction industry devoted to avoiding serious injuries and deaths, neither of which results from a lack of toilets.[93] Contrary to Williams's claim, however, OSHA has issued 845 citations in the years after 1992 for violations of the construction sanitation standard requiring the provision of a prescribed number of toilets.[94]

For a number of years, the OSHA ACCSH has been proposing stricter sanitation standards. In 1997 it set up a subcommittee to consider the need for restrooms and washing facilities, the absence of which, according to Cooper, its chair, bordered on third-world conditions.[95] It called for a revision of the sanitation standard "because too many construction workers are denied basic sanitation

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[91]Transcript, U.S. Department of Labor, OSHA Advisory Committee on Construction Safety and Health , Vol. 2, January 29, 1999, on http://www.osha.gov/doc/accsh/transcripts/jan29-99.html. Although the Comments on Draft Sanitation Standard occupy pages 304-85 according to the index, the website version contains no pagination.

[92]"Workers to Use Toilet Facilities as Needed Under New Proposed OSHA Sanitation Rule," *Occupational Safety and Health Reporter* 28(34):1076 (Feb. 3, 1999).

[93]Telephone interview with Jane Williams, OSHA Advisory Committee on Construction Safety and Health, Scottsdale, AZ (Sept. 18, 2002). In contrast, it is true, as noted above, that OSHA has effectively nullified its lavatory standard for the construction industry.

[94]Search ("date is aft 1992 and 19260051 c01") in Lexis-Nexis OSHAIR file (Dec. 29, 2002). A small proportion of these cases was opened before 1993 and perhaps some of the citations were issued then as well, though the cases were not closed until after 1992.

[95]"OSHA Group Mulls Restrooms, Decon," *Impact on Construction Safety and Health* 15(2):2 (Sept. 1997).

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rights."[96] On Oct. 7, 1998, the ACCSH unanimously voted to "recommend to OSHA that revision of 29 CFR 1926.51 be placed on the Agency's regulatory agenda for rule making in 1999."[97]

The ACCSH draft sanitation standard of January 1999, which was approved by a vote of 11-1 and which the OSHA Directorate of Construction agreed to "take...and put...through the normal process, and come back to the ACCSH with the OSHA version,"[98] would have required one toilet facility for the first nine employees and one toilet seat and one urinal for each additional 10 workers. In addition, it would have included the aforementioned provision, which was similar to, but not quite so expansive as the OSHA Memorandum of April 6, 1998: "Employees shall be allowed to use the toilet facilities on an as needed basis." Finally, for limited access worksites, it would have required employers to "ensure transportation is available to toilet/wash facilities when facilities are unavailable at the site." The ACCSH would also have required for the first time that hand washing facilities (including hot potable water where practicable) be provided in near proximity to the toilets.[99]

From November 1999 through May 2001, the Department of Labor in the Clinton and Bush administrations stated four times in its semi-annual regulatory agendas that it believed that the proposal recommended by the ACCSH on October 7, 1998 "raises important issues regarding the type of sanitation facilities needed for construction workers. OSHA intends to issue an ANPRM [Advance Notice of Proposed Rulemaking] to consider revisions to the sanitation standard that would include washing facilities, gender-separate and lockable toilet facilities, and (where other OSHA standards require change rooms), gender-separate and lockable change facilities."[100] At the end of 1999, when OSHA placed the proposed sanitation standard on its regulatory agenda for long-term action (meaning that publication of a proposed or final rule would not occur for at least a year), Williams and Cooper, the co-chairs of the ACCSH, told OSHA administrator Charles Jeffress that providing sanitary washing facilities that are accessible to construction workers was "more important than any ergonomics, noise, or

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[96]"Workers to Use Toilet Facilities as Needed."

[97]Transcript, OSHA, Advisory Committee on Construction Safety and Health, October 7, 1998, on http://www.osha.gov/doc/accsh/transcripts/oct7-98.html; ACCSH, Minutes of October 7-8, 1998, Meeting, on http://www.osha.gov/doc/accsh/meeting minutes/oct98.html.

[98]ACCSH, Minutes of Jan. 28-29, 1999, Meeting, on http://www.osha.gov/doc/accsh/meetingminutes/jan99.html.

[99]ACCSH, OSHA Regulations (Standards - 29 CFR 1926.51 - Sanitation) (Jan. 1999) (copy furnished by Jane Williams).

[100]*Fed. Reg.* 66:25724 (2001). See also *Fed. Reg.* 64:64669 (1999);*Fed. Reg.* 65:23061, 74109 (2000).

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chromium standard" and that none of the other standards mattered if OSHA was not able to resolve this one quickly.[101] Already by the end of the Clinton administration, however, progress toward codification had been halted because, as Cooper observed, OSHA's "'attitude seems to be that it's not a priority because it doesn't save lives'"[102]—a position that, as seen earlier, OSHA officials use to justify the higher priority they accord the prevention of falls, dismemberments, and electrocutions over the enforcement of the general industry sanitation standard.

By the latter part of 2001, the Bush administration announced that "OSHA is withdrawing this entry from the agenda at this time due to resource constraints and other priorities."[103] And a revised sanitation standard "probably won't make the regulatory agenda," as the *Occupational Safety and Health Reporter* observed, since OSHA itself had stated that the focus of the new Bush appointee as administrator would be "on putting things on the regulatory agenda that can be accomplished quickly."[104] *The Building Tradesman*, the organ of the Michigan construction unions, added that with the proposed standard "dead in the water," building trades workers "have the unfortunate distinction among nearly all U.S. industries...that their employers are not required to provide them with even the most rudimentary method to wash their hands. On some smaller construction sites, employers are not required to provide any bathroom facilities at all. The closest fast food restaurant, or more likely, the nearest ditch or behind the nearest tree, sometimes are the only facilities available."[105]

When OSHA finally took a step toward creating parity with workers covered by the general industry sanitation standard, it was obviously guided by the principle enunciated in the April 6, 1998 Memorandum, from which entire paragraphs were taken verbatim. On June 7, 2002 it issued an opinion letter in response to a request for an interpretation of "nearby" in the aforementioned exception for mobile crews "having transportation readily available to nearby toilet facilities." OSHA's response first defined mobile crews as consisting of "[w]orkers who continually or frequently move from jobsite to jobsite on a daily or

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[101]"OSHA Should Make Sanitation Standard Top Industry Priority, ACCSH Members Say," *Daily Labor Report*, Dec. 13, 1999, at A-8 (Lexis).

[102]Marty Mulcahy, :Sanitation Standard Moves Slowly, But, Now, Not-So-Surely," *The Building Tradesman*, Dec. 22, 2000, on http://www.detroitbuildingtrades.org/newspapr/dec222000.html.

[103]*Fed. Reg.* 66:61884 (2001).

[104]Taashi Rowe,"Lack of Modern Field Sanitation Rule Affects Health of Women in Building Trades," *Occupational Safety and Health Reporter* 32(330:787-88 (Aug. 15, 2002).

[105]Marty Mulcahy, "Could Michigan OK a Better Sanitation Rule in 2002?" *The Building Tradesman* 51(12):1 (June 7, 2002).

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hourly basis," but excluding those "who report to a conventional construction project, where they work for more extended periods of time (days, weeks, or longer)...." The opinion letter then went on to focus on the key issue common to both standards: "for purposes of this standard, 'nearby' means prompt access--sufficiently close so that employees can use them when they need to do so." The only relevant change that the opinion letter made to the language of the April 6, 1998 Memorandum reflected the chief difference in obstacles to access between general industry and construction: instead of focusing on the unavailability as a function of the length of time during which workers are not allowed to use the toilets, the construction standard declared: "Toilets that take too long to get to are not 'available.'"[106] Whereas the general industry sanitation standard mandates that members of mobile crews "must have transportation immediately available to nearby toilet facilities,"[107] the June 7, 2002 opinion letter concludes that "in general, toilets would be considered 'nearby' if it would take less than 10 minutes to get to them,"[108] without explaining how it arrived at this fixed standard.

Jane Williams has argued that "[t]he flaw in this letter is captured by '10 minutes or less'; specifically it does not state that public facilities, such as those in a Burger King cannot be substituted for the employer's duty to provide same as 'permission' for substitution is not obtained...."[109] Although Williams's criticism concerning the deficiencies of non-dedicated public toilets is well-taken, it bears no logical relationship to the adequacy of the 10-minute rule.[110]

Women construction workers have special access problems. One especially poignant case involved Karen Olson, who worked as a flagger on outdoor construction projects, standing for long hours directing traffic without access to a toilet, although the employer, Propheter Construction, was required under the union contract to provide toilet facilities or to make arrangements for bathroom breaks. When the employer told flaggers to void outdoors or in the bushes, Olson, the company's only female flagger, "refused to use anything but a bathroom." The bursting of her bladder on June 25, 1999 caused Olson to leave the

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[106]Letter from Russell Swanson, Director, Directorate of Construction, to Nicholas Mertz, Re: sanitation, mobile crews, 1926.51(c)(4) (June 7, 2002) (furnished by Noah Connell, director of OSHA's Office of Construction Standards and Compliance Assistance, OSHA, who stated that the letter was in the process of being posted on the OSHA website).

[107]29 CFR sect. 1910.141(c)(1)(ii).

[108]Letter from Swanson to Mertz.

[109]Fax from Jane Williams to Marc Linder (Oct. 2, 2002).

[110]For an overview of Williams' critique of the history of OSHA's failure to "promulgate effective language or enforcement directives so as to accomplish their charter as regards [construction] Sanitation," see [Jane Williams?], "A10-25: Sanitation in Construction Activity Report Index" at 3 (July 2002) .

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jobsite to go to the emergency room. Despite Olson's having notified her employer that she had to leave for emergency medical treatment, Propheter fired her that very day for insubordination. Her lawsuit was grounded on the claim that the injury to her bladder "was related to the infrequent use of the bathroom and...'holding' her urine for extended periods of time."[111]

Although the Seventh Circuit Court of Appeal's earlier ruling in 2000 in *DeClue v. Central Illinois Light Co.*[112] prompted a federal trial judge in Illinois to dismiss Olson's hostile workplace environment claim, the lower court did refuse to dismiss her disparate impact claim, eventually prompting a settlement. In rejecting Propheter's motion for summary judgment on Olson's disparate-impact claim, the judge declared:

> Defendant seems to believe that providing some restroom facility somewhere on the construction site, approximately 4.5 miles from plaintiff, is per se sufficient to satisfy *DeClue*. However, this court believes that a reasonable factfinder could determine that defendant's conditions were the sort that could deter women, but not men, from seeking construction jobs with defendant. Walking 9 miles (4.5 miles to the restroom facilities and 4.5 miles back to the job position) would certainly deter most people from using any restroom facilities which were technically available, such that a reasonable jury could find that there was an "absence"of facilities at defendant's site. Furthermore, plaintiff has come forward with evidence suggesting that cars were not readily available to take flaggers to and from restroom facilities.[113]

The employer's cavalier attitude toward its workers' hygiene was underscored by its lawyer's statement that "the company makes it clear to all employees that it generally does not provide portable bathrooms. Instead, Propheter directs its employees who need a bathroom break to ask a co-worker to step in for them while the employee uses a nearby restroom."[114]

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[111]Olson v. Propheter Construction Equipment Inc., Complaint, 00 C 839 (N.D. Ill, 2000). See generally, Molly McDonough, "Title VII and the Bathroom Break," *National Law Journal,* Sept. 25, 2000, at B5 (Lexis).

[112]DeClue v. Central Illinois Light Co., 223 F.3d 434 (7th Cir. 2000). For a discussion, see below ch. 8.

[113]Olson v. Propheter Construction Co., Denial of Defendant's Motion for Summary Judgment (N.D. Ill., Apr. 18, 2001).

[114]Ted Gregory, "Lawsuit Raises a Flag About Roadwork," *Chicago Tribune*, Sept. 5, 2000, at 1 (Lexis).

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