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Void Where Prohibited Revisited

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

Marc Linder

**Fānpìhuà Press
Iowa City
2003**

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Part III

Promulgation: Voiding on the Man's Time

[W]hat I remember about the shithouses at the General Dynamics shipyard is that that's where we did most of our organizing.... For a long time, the women were better organized than the men, but then GD...hired a female foreman so they had someone to raid the women's shithouse. Your work will help people spend more time hanging out in bathrooms talking trouble.¹

¹Email from Prof. James Pope, Rutgers-Newark Law School, to Marc Linder (Apr. 27, 1998).

OSHA Comes to Its Senses

Marc Linder is eagerly awaiting what Uncle Sam plans to do in the bathroom.¹

Present Federal law requires that the employers provide bathrooms, but they don't actually have to let employees go to the bathroom. No shit. (So to speak.)²

Finally, on April 6, 1998, in the wake of the avalanche of embarrassing media coverage of OSHA's scandalous administrative failure to uphold and enforce workers' right to void at work unearthed by *Void Where Prohibited*,³ John B. Miles, Jr., the Director of the Directorate of Compliance Programs in OSHA's national office, issued a Memorandum to regional OSHA administrators and state-plan OSHA agencies explaining its

interpretation that this standard requires employers to make toilet facilities available so that employees can use them when they need to do so. The employer may not impose unreasonable restrictions on employee use of the facilities. OSHA believes this requirement is implicit in the language of the standard and has not previously seen a need to address it more explicitly. Recently, however, OSHA has received requests for clarification of this point and has decided to issue this memorandum to explain its position clearly.⁴

This approach contrasts with that adopted for the field sanitation standard for agricultural worker by OSHA during the Reagan administration. Whereas the

¹"Bathroom Access Causes Work Troubles," *Des Moines Register*, Mar. 13, 1998, at 2M, col. 2 (State Edition; NewsBank).

²David Stevens, "The Right to Pee Lazy: Class Struggle in the WC" (Mar. 22, 1998), on <http://x10.dejanews.com/getdoc.xp?...NTEXT=892134249.116654116&hitnum=1>.

³"[A]fter the book was issued, a wave of press interest ensued that brought pressure on OSHA." Book Review, [National Employment Law Project,] *Update*, Summer 1998, at 14.

⁴OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities For the full text, see below Appendix II.

Memorandum takes as its point of departure the employer's obligation to let workers go when they need to go and applies a reasonableness requirement as a negative constraint on the restrictions that employers are permitted to place on workers' freedom to stop work immediately, the field sanitation standard is based on a reasonableness approach paired with a quasi-paternalistic regime under which employers are assigned the task of introducing their charges to the precepts of modern personal hygiene:

Reasonable use. The employer shall notify each employee of the location of the sanitation facilities and water and shall allow each employee reasonable opportunities during the workday to use them. The employer also shall inform each employee of the importance of each of the following good hygiene practices to minimize exposure to the hazards in the field of heat, communicable diseases, retention of urine and agricultural residues:

(i) Use the water and facilities provided for drinking, handwashing and elimination;

...

(iii) Urinate as frequently as necessary.⁵

The 1998 Memorandum then went on to offer the following medical rationale for OSHA's interpretation:

The sanitation standard is intended to ensure that employers provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them. Individuals vary significantly in the frequency with which they need to urinate and defecate, with pregnant women, women with stress incontinence, and men with prostatic hypertrophy needing to urinate more frequently. Increased frequency of voiding may also be caused by various medications, by environmental factors such as cold, and by high fluid intake, which may be necessary for individuals working in a hot environment. Diet, medication use, and medical condition are among the factors that can affect the frequency of defecation.

Medical studies show the importance of regular urination, with women generally needing to void more frequently than men. Adverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections (UTIs), which can lead to more serious infections and, in rare situations, renal damage (see, e.g., Nielsen, A. Waite, W. [sic; should be Walter, S.], "Epidemiology of Infrequent Voiding and Associated Symptoms," *Scand J Urol Nephrol Supplement* 157). UTIs during pregnancy have been associated with low birthweight babies, who are at risk for additional health problems compared to normal weight infants (see, Naeye, R.L., "Causes of the Excess [sic; should be Excessive] Rates of Perinatal Mortality and the [sic] Prematurity in Pregnancies Complicated by Maternity [sic; should be Maternal] Urinary[-]Tract Infections," *New England J. Medicine* 1979; 300(15); 819-823). Medical evidence also

⁵29 CFR 1928.110(c)(4) (2002).

shows that health problems, including constipation, abdominal pain, diverticuli, and hemorrhoids, can result if individuals delay defecation (see National Institutes of Health (NIH) Publication No. 95-2754, July 1995).

OSHA's field sanitation standard for Agriculture, 29 CFR 1928.110, based its requirement that toilets for farmworkers be located no more than a quarter mile from the location where employees are working on similar findings. This is particularly significant because the field sanitation standard arose out of the only OSHA rulemaking to address explicitly the question of worker need for prompt access to toilet facilities.⁶

OSHA then bolstered its new interpretation with these semantic and policy arguments:

The language and structure of the general industry sanitation standard reflect the Agency's intent that employees be able to use toilet facilities promptly. The standard requires that toilet facilities be "provided" in every workplace. The most basic meaning of "provide" is "make available." See Webster's New World Dictionary, Third College Edition, 1988, defining "provide" as "to make available; to supply (someone with something);" *Borton Inc. v. OSHRC*, 734 F.2d 508, 510 (10th Cir. 1984) (usual meaning of provide is "to furnish, supply, or make available"); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1978) (same); *Secretary v. Baker Concrete Constr. Co.*, 17 OSH Cas. (BNA) 1236, 1239 (concurring opinion; collecting cases); *Contractors Welding of Western New York, Inc.*, 15 OSH Cas. (BNA) 1249, 1250 (same). Toilets that employees are not allowed to use for extended periods cannot be said to be "available" to those employees. Similarly, a clear intent of the requirement in Table J-1 that adequate numbers of toilets be provided for the size of the workforce is to assure that employees will not have to wait in long lines to use those facilities. Timely access is the goal of the standard.

The quoted provision of the standard is followed immediately by a paragraph stating that the toilet provision does not apply to mobile work crews or to locations that are normally unattended, "provided the employees working at these locations have transportation immediately available to nearby toilet facilities which meet the other requirements" of the standard (29 CFR 1910.141(c)(1)(ii)) (emphasis supplied). Thus employees who are members of mobile crews, or who work at normally unattended locations must be able to leave their work location "immediately" for a "nearby" toilet facility. This provision was obviously intended to provide these employees with protection equivalent to that the general provision provides to to [sic] employees at fixed worksites. Read together, the two provisions make clear that all employees must have prompt access to toilet facilities.⁷

OSHA was able to furnish only limited precedent to support its new position by reference to a couple of its older opinion letters that dealt with the related physical-spatial issue of "unobstructed free access":

⁶OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

⁷OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

OSHA has also made this point clear in a number of letters it has issued since the standard was promulgated. For example, in March 1976, OSHA explained to Aeroil Products Company that it would not necessarily violate the standard by having a small single-story building with no toilet facilities separated by 90 feet of pavement from a building that had the required facilities, so long as the employees in the smaller building had “unobstructed free access to the toilet facilities.” Later that year, it explained again, in response to a question about toilet facilities at a U-Haul site, “reasonableness in evaluating the availability of sanitary facilities will be the rule.” Again in 1983, OSHA responded to a request for a clarification of the standard by stating, “[i]f an employer provides the required toilet facilities...and provides unobstructed free access to them, it appears the intent of the standard would be met.”⁸

OSHA then concluded its discussion by observing:

In light of the standard’s purpose of protecting employees from the hazards created when toilets are not available, it is clear that the standard requires employers to allow employees prompt access to sanitary facilities. Restrictions on access must be reasonable, and may not cause extended delays. For example, a number of employers have instituted signal or relief worker systems for employees working on assembly lines or in other jobs where any employee’s absence, even for the brief time it takes to go to the bathroom, would be disruptive. Under these systems, an employee who needs to use the bathroom gives some sort of a signal so that another employee may provide relief while the first employee is away from the work station. As long as there are sufficient relief workers to assure that employees need not wait an unreasonably long time to use the bathroom, OSHA believes that these systems comply with the standard.⁹

The regime established by the Memorandum is thus a hybrid. On the one hand, in principle it creates the right to take voiding breaks at will. (The notion of an “at-will voiding regime” had been introduced in *Void Where Prohibited*.¹⁰ At the Jim Beam Brands Kentucky OSHA appeals hearing in 2002, the book’s co-author, Dr. Ingrid Nygaard, called it “the policy of choice” and “the most medically tenable policy for voiding,”¹¹ prompting the employer’s lawyer, to whom it was anathema, to add that the Secretary of Labor had “taken the same posi-

⁸OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

⁹OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

¹⁰Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 160 (1998).

¹¹Commonwealth of Kentucky Occupational Safety and Health Review Commission, Administrative Action No. 02-KOSH-0015, Secretary of Labor Commonwealth of Kentucky v. Jim Beam Brands Co., KOSHRC #3681-01, “Transcript of Administrative Hearing” at 73, 86 (Aug. 28, 2002) (“Transcript of Hearing”).

tion”—that “a void-at-will policy is the right policy.”¹²) Thus the Memorandum states that “this standard requires employers to make toilet facilities available so that employees can use them *when* they need to do so.”¹³ Indeed, the Memorandum does not even explicitly require workers to ask for, let alone obtain, the employer’s permission to go to the bathroom, though employees may need to inform employers of medical conditions requiring especially frequent and/or lengthy bathroom breaks.¹⁴ Such permission would, arguably, be required only where the employee’s absence would be “disruptive”; and even where disruption is possible, once the relief worker appears, the sole condition for taking the break would be fulfilled and permission would not be required.

On the other hand, although the Memorandum confers no power on an employer to test the veracity of a worker’s statement that he or she has to void, let alone to test the genuineness of the physical need before or after the fact, OSHA does craft a reasonableness criterion that immunizes employers from being cited for (or even committing) a violation of the standard for briefly delaying the beginning of the worker’s bathroom break. (In addition, the Memorandum may leave intact whatever a particular employer’s otherwise lawful powers may be to determine whether employees, instead of voiding, are engaged in other activities—such as smoking, telephoning, reading, talking, or resting—and to discipline them for such ‘abuse’; but even in such cases, the employer’s remedy might include termination, but not preemptive flat prohibitions on going to the bathroom.)¹⁵ However, this reasonableness criterion is very narrow in the sense that, at the moment the worker needs to void, it is confined solely to the employer’s objective assessment of the disruptive impact of the break on its operations. In turn, even this disruption is never permitted to trump the worker’s need to void in any absolute sense, and the employer itself is impliedly required to temper the disruption by hiring additional relief workers or perhaps otherwise restructuring operations to enable workers to go to the bathroom, although this duty to avoid chronic understaffing presumably must have some economic limits. Finally, the disruption defense would be nullified altogether in cases in which employer-imposed waiting caused workers to void on themselves or to be otherwise harmed.

In sum, then, the Memorandum has fashioned the right to at-will bathroom breaks subject only to the possibility of the employer’s brief, temporary veto, which the employer can justify, if at all, exclusively by reference to the necessity of preventing unacceptable disruption, which the employer itself is obligated to

¹²“Transcript of Hearing” at 103 (Aug. 29, 2002) (Rick Griffith, Jim Beam’s attorney).

¹³See below Appendix II (italics added).

¹⁴See below ch. 13.

¹⁵On the issue of so-called abuse, see below ch. 17.

mitigate so as not to interfere unreasonably with the worker's right to void when he or she needs to. However, since the Memorandum gives the employer no means by which to gauge how urgently the employee has to void—and presumably there is no practical way for anyone other than the would-be voider to measure that urgency—this element of reasonableness is not within the employer's discretion to apply; rather, only OSHA, after the fact, may be able to determine whether any given delay was reasonable, and perhaps even then only in instances in which unreasonableness was palpably demonstrated by the worker's having voided in his or her clothing or on the floor. Thus a labor reporter fundamentally misconceived the structure of labor standards regulation in general and of the Memorandum in particular by asserting: "Federal work rules on the issue are murky.... What exactly timely access constitutes has largely been left to companies to interpret."¹⁶ Because no labor department is omnipresent, employers may in the first instance "interpret" or even intentionally violate any regulation; but only a regulatory agency and/or court can authoritatively interpret, that is, enforce, a rule.

The reasonableness criterion thus has three dimensions, relating to: (1) the impact of the delay of the onset of the break on the worker; (2) the disruptiveness of the break to the employer; and (as a sub-element of (2)) (3) the burden to the employer of having to hire relief workers or to restructure its operations. If the Memorandum gives OSHA "too much wiggle room"¹⁷ in declining to cite an employer for violating the standard, that discretion derives from these reasonableness criteria, which over time will have to be fought over by labor and capital at the workplace as well as in administrative and judicial processes. Nevertheless, despite the employer's limited temporal veto power, the decision to take a bathroom break in principle remains at the employee's will.¹⁸

Finally, OSHA informed regional and state enforcement agents that they were to use the following criteria in determining whether to issue a citation:

¹⁶Carol Kleiman, "Restroom Off Limits? Workers Merit a Break," *Chicago Tribune*, Nov. 10, 2002, Business Sect. At 5 (Lexis).

¹⁷"Ruling Makes Federal Case of Workers' Toilet Time," *Des Moines Register*, Apr. 9, 1998, at 3A, col. 2 (quoting Marc Linder).

¹⁸The legitimacy of retaining the term "at-will bathroom break" despite the fact that it is subject to a constraint is made plausible by the following analogy: Even in a pure at-will regime a worker would still be an at-will employee in spite of the fact that, though free to terminate her employment contract at any time, she might conceivably still be subject to the constraint of liability for damages (if only in tort) if she knowingly (albeit unintentionally) set in train the destruction of machinery or raw materials by quitting (without any provocation by the employer) in the midst of some production process without notifying any supervisor that she was walking out so that someone else would be assigned to take her place immediately.

Employee complaints of restrictions on toilet facility use should be evaluated on a case-by-case basis to determine whether the restrictions are reasonable. Careful consideration must be given to the nature of the restriction, including the length of time that employees are required to delay bathroom use, and the employer's explanation for the restriction. In addition, the investigation should examine whether restrictions are general policy or arise only in particular circumstances or with particular supervisors, whether the employer policy recognizes individual medical needs, whether employees have reported adverse health effects, and the frequency with which employees are denied permission to use the toilet facilities. Knowledge of these factors is important not only to determine whether a citation will be issued, but also to decide how any violation will be characterized.¹⁹

Initially, OSHA decided, presumably because of the potentially disruptive reaction of employers, but also to insure some consistency in interpreting a performance standard,²⁰ to centralize decisionmaking:

It is important that a uniform approach be taken by all OSHA offices with respect to the interpretation of OSHA's general industry sanitation standard, specifically with regard to the issue of employee use of toilet facilities. Proposed citations for violations of this standard must be forwarded to the Directorate of Compliance Programs (DCP) for review and approval. DCP will consult with the Office of Occupational Medicine. DCP will approve citations if the employer's restrictions are clearly unreasonable, or otherwise not in compliance with the standard.²¹

Nevertheless, "[s]hortly after the interpretation was issued, it was decided that review and approval was to be at the Regional Office level, but that copies of any citations issued based on the April 6, 1998 interpretation should still be sent to DCP. This topic continues to generate interest from the public. Early this year we had a Freedom of Information Act (FOIA) request for copies of citations issued. Therefore, please continue to send copies of any citations issued pursuant to the 1998 interpretation to the National Office."²²

Finally, Federal OSHA, reinforcing one of the statutory conditions of Federal

¹⁹OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities

²⁰Telephone interview with Dale Cavanaugh, safety engineer, OSHA Seattle Regional Office (Dec. 2, 2002).

²¹OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

²²This memorandum was issued by Richard Fairfax, Miles's successor, on Aug. 11, 2000. OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities. Nevertheless, two years later Fairfax, in response to the author's request for copies of citations issued for denial of access, wrote that the OSHA National Office "does not maintain records that are responsive to your request." Letter from Richard Fairfax to Marc Linder (Oct. 29, 2002).

approval of a state OSHA plan,²³ instructed the state-plan states that they “are not required to issue their own interpretation in response to this policy, however they must ensure that State standards and their interpretations remain ‘at least as effective’ as the Federal standard.”²⁴ By not requiring the state programs to inform Federal OSHA as to how they intended to go about enforcing the new interpretation—as, for example, the National Office does with regard to certain important matters²⁵—the Directorate of Compliance Programs made thorough familiarity with the new obligation/right and vigorous state-plan enforcement less probable.

It is instructive to compare the April 6, 1998 Memorandum with the much briefer draft from July 1997, which had been written just before OSHA issued the first citation for lack of toilet access against Hudson Foods and in parts is verbatim identical with the Iowa OSHA Memorandum of January 21, 1998.²⁶ To begin with, it contained a straightforward derivation of the right to access from the requirement that a certain number of toilets be provided, which is lacking in the final version:

It would be a clear violation of the standard if the employer failed to have in the workplace the necessary number of toilets, or, if having installed the necessary toilets, the employer kept them locked. If, however, an employer does not let the employees use the toilets that are in the workplace, the employer is also not “providing toilet facilities” as required by the standard. When an employer does not let the workers use the toilets, the effect is the same as if the employer had locked them.²⁷

Second, whereas the published Memorandum merely refers to existing relief systems and states that they comply with the standard,²⁸ the draft conferred a quasi-prescriptive character on them:

²³29 USC sect. 667(c)(2) (2000).

²⁴OSHA, Interpretation of 29 CFR 1910.141(c)(1)(i): Toilet Facilities.

²⁵For example, in a memorandum concerning congressional enforcement exemptions and limitations, the OSHA Administrator declared: “The States shall respond via the two-way memorandum to the Regional Office as soon as the State’s intention regarding the enforcement activity limitations and exemptions is known....” OSHA, CPL 2-0.513 - Enforcement Exemptions and Limitations Under the Appropriations Act (Jan. 2, 2002), on http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1.

²⁶See above ch. 3. The Iowa OSHA version was derivative.

²⁷John B. Miles, Jr., Memorandum (July 3, 1997). Stamped “DRAFT” and computer dated July 3, 1997, it bore the handwritten message “Confidential Do not circulate,” but was nevertheless faxed to the UFCW.

²⁸Miles, Memorandum (Apr. 6, 1998).

In order to accommodate various work situations in which workers are on continuous production/assembly lines, employers may have to establish some type of signaling and relief system for workers as well as provide backup workers to relieve the line workers as needed. If the employer in such a situation does not allow reasonable use, it is in effect “locking” the workers at their workstations.”²⁹

That OSHA ultimately refrained from mandating any specific system for insuring access may, on the macro-political level, have been rooted in trepidations similar to those expressed by a labor arbitrator who had been called on a quarter-century earlier to adjudicate a United Steelworkers’ grievance over an assembly-line relief system under which workers had to wait 30 and 45 minutes to go to the bathroom. After sustaining the grievance on the grounds that the employer had violated its contractual duty to provide adequate relief, the arbitrator, noted labor law professor William Murphy, paused to air his own doubts as to how to fashion an appropriate remedy, especially since the union had declined to suggest one. In addition to “the difficulty that there is no one clear and obvious way of dealing with the problem, as for example, reinstatement with or without just cause,” he observed that “any way of dealing with the problem is intimately related to personnel and production policy and the general exercise of supervisory authority. An arbitrator should be wary of an award which interferes with or unduly restricts the exercise of legitimate and necessary management authority.” Like OSHA 25 years later, he confined himself to mentioning the various possibilities that the employer had already tried, including leadman and relief worker systems and combinations of the two, adding only that the company could “insist[], as it apparently has not heretofore insisted, that the leadmen diligently effectuate their relief duties,” and/or build more toilets closer to the conveyor belt.³⁰

Finally, the July 1997 OSHA draft contained much greater specificity about what is reasonable and unreasonable:

Reasonableness in allowing employees the use of the toilet facilities is the rule. When employers deny employee requests to use the bathroom, except during scheduled breaks, it may or may not be reasonable, depending upon the factual situation of each workplace. Every 30 minutes may not be [un?]reasonable, while every 90 minutes may. Some examples, however, of unreasonableness would be an employer requirement or suggestion that employees “hold it,” or “don’t drink fluids,” or “wear adult diapers.” These are not

²⁹Miles, Memorandum (July 3, 1997).

³⁰Mor-Flo Industries, Inc. 62 Labor Arbitration Reports (BNA) 398, 401 (1974). Murphy, who had previously worked at the U.S. Department of Labor and the NLRB, taught at the University of North Carolina. Association of American Law Schools, *Directory of Law Teachers* 1973, at 479.

reasonable solutions to a worker's need to use toilet facilities.³¹

The dilution of the interpretation on its way to promulgation may in part be a function of objections raised by poultry companies. When asked five years later whether OSHA had received protests from any employers when the Memorandum was released, John Miles stated that the poultry industry had become "concerned" following issuance of the citation to Hudson, but that he had "shared" the draft with the industry, which saw that it "could live with" the interpretation.³²

As interventionist as OSHA's interpretation is, because it confers circumscribed discretion on employers to act as gatekeepers and, in that role, to place "reasonable" restrictions on the promptness with which they permit employees to stop working in order to go to the bathroom, as a pragmatic safety and health measure it lacks the broad and absolutist human rights approach of a 1996 French labor court ruling that as "a fundamental human freedom...the right to go to the toilet cannot be subject to authorization by a third person."³³

³¹Miles, Memorandum (July 3, 1997).

³²Telephone interview with John Miles, OSHA Dallas Regional Administrator (Nov. 12, 2002). In 1997 OSHA undertook a cooperative program with the Wage and Hour Division of the Labor Department to conduct a special study of 51, mainly southern, poultry slaughter plants. "Poultry Study Finds PSM Violations, Falls, Cuts Outweigh Repetitive Motion," *Occupational Health & Safety Letter* 28(8) (Apr. 13, 1998). In that connection Miles did inform management of the impending Memorandum. Telephone interview with Benjamin Ross, Assistant Regional Administrator for Compliance Programs, OSHA, Atlanta (Dec. 18, 2002). Senate Majority Leader Trent Lott and other senators had tried to pressure the Secretary of Labor not to initiate the project on the grounds that routine inspections had failed to document any need for it. Letter from Trent Lott et al. to Alexis Herman (May 21, 1997) (copy faxed to author by UFCW, June 20, 1997).

³³Lamouroux v. SA Groupe Bigard, No. 9500433-436, slip op. at 13, 15 (Conseil de Prud'hommes de Quimper, Mar. 18, 1996). See below ch.10.