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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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Reactions to OSHA's New Interpretation

Policies Reflecting Sensitivity to Women's Needs. MMMA [Mitsubishi Motor Manufacturing of America] agrees that it shall create a nursing room where nursing mothers can express milk in private, and shall make certain that its practices with respect to personal and hygienic needs of its female employees are realistic, appropriate and fairly administered in accordance with the April 6, 1998 OSHA interpretation of 29 C.F.R. 1910.141(c)(1)(i).¹

On the day following the issuance of the Memorandum, Deborah Berkowitz, who as the UFCW's occupational safety and health director was chiefly responsible for securing OSHA's attention on the issue of voiding rights, summarized the impact of public pressure on OSHA: "It's a great thing. You moved mountains...and all that publicity you got made it happen."²

What exactly "it" was emerged in a new light during an interview with Richard Fairfax, OSHA's deputy director of compliance (who was reputed to be one of the agency's most pro-labor officials) on April 9, 1998, to determine what constituted a "reasonable" delay in making toilets available to workers. In response to a question as to whether making assembly-line workers wait 30 minutes was reasonable, Fairfax, instead of using a bureaucrat's standard evasion that he could not reply without additional information about the circumstances, answered flat out, Yes—provided that: the workers did not have a medical problem; the employer stated that it was too expensive to hire more relief workers; and the company policy was general rather than a special policy of a particular supervisor. He was neither swayed by the response that making people wait 30 minutes might in the long run cause a medical problem nor in the slightest amused by the rhetorical question as to whether he had to wait for 30 minutes

¹Equal Employment Opportunity Commission v. Mitsubishi Motor Manufacturing of America, Consent Decree, ¶44(e) (C.D. Ill. June 11, 1998), on <http://www.eeoc.gov/docs/mmma.html> (settling a class action sex discrimination suit).

²Email from Deborah Berkowitz to Marc Linder (Apr. 8, 1998).

with his hand raised until his boss gave him permission to go to the toilet.³ (Almost five years later, John Miles, who as Director of Compliance had issued the Memorandum and been Fairfax's boss, went much farther, declaring in an interview not only that it was okay to require an assembly-line worker to wait 30 minutes, but that in general "what we had in mind back then was every 2-3 hours—that's what's normal.")⁴ In the real world of industrial relations, a quarter-century earlier an arbitrator had sustained a grievance submitted by the United Steelworkers alleging that an employer had violated their collective bargaining agreement by failing to provide adequate relief to workers "tied to" an assembly line inasmuch as these employees "had to wait as long as 30 and 45 minutes after requesting relief before it was provided." Remarkably, the excessiveness of a 30-minute wait was so self-explanatory that the arbitrator did not even bother to justify this part of his decision.⁵

News coverage of OSHA's new interpretation was extensive locally and nationally, including, for example, National Public Radio's morning news program, though reporters were not always able to recognize that the notion of toilet "privileges" had become an anachronism.⁶ Much of that reporting, not unexpectedly, was a mixture of amusement and bemusement, revealing less interest in the oppressive employer practices to be remedied than in the opportunity to joke about bodily waste elimination and government intervention in this semi-taboo area. On Friday April 10, according to a national labor reporter, "[t]he story was all over the place—on the AP wire and CBS radio news."⁷ The Associated Press article of April 9⁸—which repeated some of the material in the AP

³Telephone interview with Richard Fairfax (Apr. 9, 1998). Deborah Berkowitz and Jackie Nowell, directors of the occupational safety and health department of the UFCW, characterized Fairfax as unusually prolabor.

⁴Telephone interview with John Miles, OSHA Dallas Regional Administrator (Nov. 12, 2002).

⁵Mor-Flo Industries, Inc., 62 Labor Arbitration Reports (BNA) 398, 399 (1974). Although the arbitrator wasted no time on the quantitative issue, he derived the employer's contractual responsibility to provide relief from a clause on incentive pay requiring the company to base its production standards on the full use of the employee's time minus various rest periods including "personal allowances." *Id.* at 399. The union itself had declined to suggest a remedy.

⁶Brian Tumulty, "Workers Get 'Timely Access' to Bathrooms," *Detroit News*, Apr. 10, 1998, at A7 (Westlaw); Brian Tumulty, "Ruling Makes Federal Case of Workers' Toilet Times," *Des Moines Register*, Apr. 9, 1998, at 3A, col. 2 at 4.

⁷Email from Brian Tumulty, Gannett workplace reporter, to Marc Linder (Apr. 10, 1998).

⁸The piece by Lawrence Knutson, "U.S. Backs Workers' Restroom Rights," went out on the AP wire on April 9 at 13:28 EST.

article of March 12—as it ran in the next day's *Wall Street Journal* under the title, "Employers Must Provide Workers Access to Restrooms," stated: "There's no problem for most of the nation's workers. But in some jobs, such as food processing, assembly lines and telemarketing, meeting a simple human need can involve pleading and even the risk of losing a job."⁹ Even the press in New Zealand reported it.¹⁰ The author was journalistically dubbed "the nation's leading authority on restroom access in the work-place...a.k.a. 'Dr. Toilet.'"¹¹ In a widely syndicated article distributed by the Gannett News Service, he was quoted as saying that "the interpretation was not as specific as he had hoped. 'I'm in no way saying it's bad, but they gave themselves too much wiggle room. Say you're on an assembly line and it takes a half-hour to get relief, are they going to cite the employer or not? They are just fudging here.'"¹² That the reference to 30 minutes was not hypothetical, but a real answer from OSHA's Compliance Directorate was, to be sure, lost, but the prospect of future disputes over subjective assessments of what "prompt access" means was nevertheless raised.

The labor reporter for *The New York Times*, who for months had been promising to write an article about the problem of workplace toilet access, but ultimately never did,¹³ cautioned at one point early on that he might have problems getting the story past his editor for reasons of social propriety and squeamishness.¹⁴ In the end, the national newspaper of record failed to report on the matter until it was forced to do so after OSHA had acted on April 6, 1998 and its journalistic competitors had covered the story. But the colleague to whom the labor reporter had hurriedly handed off the assignment was not familiar with the subject¹⁵ and the uncritical article suspiciously resembled an OSHA press release. Since Katharine Seelye's only acknowledged source was in fact OSHA's spokesman—who unintentionally exposed OSHA's history of failure to enforce em-

⁹"Employers Must Provide Workers Access to Restrooms," *Wall Street Journal*, Apr. 10, 1998, at B8, col. 6.

¹⁰Email from Geoffrey Palmer, former New Zealand prime minister, to Marc Linder (Apr. 19, 1998).

¹¹Michael Biesecker, "Hold It? Workplaces Are Required to Have Toilets, But Employee Access Is Sometimes Limited," *Winston-Salem Journal*, Apr. 26, 1998, at 19, on <http://www.journalnow.com>.

¹²Brian Tumulty, "Workers Get 'Timely Access' to Bathrooms," *Detroit News*, Apr. 10, 1998, at A7 (Westlaw).

¹³Email from Steven Greenhouse to Marc Linder (Jan. 5, 1998, Apr. 8, and Apr. 10, 1998).

¹⁴Various telephone interviews with Steven Greenhouse (1997).

¹⁵The questions she posed to the author while they interviewed each other late in the afternoon as her deadline loomed revealed her limited comprehension of the issues. Telephone interview with Katharine Seelye (Apr. 9, 1998).

employers' obligation to provide toilets by conceding that he did not know how widespread complaints were and that denial of access was a subject which OSHA had been merely "hearing anecdotally...about"—it was hardly surprising that she neglected to provide any account of the responsibility that the agency bore for years of inaction and irrational regulatory interpretation and non-enforcement.¹⁶

Ironically, the closest the refined *Times* came to touching on the subject before the Memorandum had been issued was tangentially to its reporting on other newspapers' reporting on "Paula Jones and her failed lawsuit against the President of the United States": interviewing a schoolteacher visiting Washington on April 2 about her reactions to the sight of "dozens of morning newspapers from across the nation, all screaming a chorus of headlines," the journalist commented that she "zeroed in on her kind of story, under a far more modest headline, announcing Federal action on the problem teachers have in obtaining enough bathroom breaks." Taking heart from the teacher's observation, "[n]ow there's a serious story," the reporter regarded her point as "such a morning-after refreshment today inside the Washington Beltway, that there is more to life than Paula Jones, come-hither looks and distinguishing characteristics."¹⁷ (Ironically, public school teachers are excluded from the Federal OSHA program.)¹⁸

Reactions to OSHA's intervention were largely predictable, with employers "assail[ing] the interpretation as unnecessary and beyond the scope of OSHA's authority,"¹⁹ and unions such as the United Automobile Workers applauding the action.²⁰ The UFCW, which had been far and away the dominant force in the labor movement pushing for workplace voiding rights, "hailed" OSHA's step as "a victory for human dignity." The union's president, Doug Dority, conjured up the tension between profits and people, while nevertheless vastly underestimating the universe of the affected "people":

Human dignity doesn't end at the door. Tens of thousands of poultry and other food processing workers are subjected to the indignity of being arbitrarily denied the use of

¹⁶Katharine Seelye, "Newest Right: A Restroom Break," *N.Y. Times*, Apr. 10, 1998, A13, col. 1 (nat. ed.).

¹⁷Francis Clines, "Testing of a President: The Capital: On the Morning After, Spring-time Inside the Beltway," *N.Y. Times*, Apr. 3, 1998, at A23, col. 1 (Lexis). The article to which the reporter was referring was presumably the Gannett News Service piece by Brian Tumulty, which was published in the Washington, D.C. area, without a byline, as "OSHA Fights for Teachers' Bathroom Rights," *Potomac News* (Woodbridge, VA), Apr. 2, 1998 (Lucre Press Clippings).

¹⁸See above ch. 5.

¹⁹Powers, Kinder & Keeney, "Inspectors Must Check Access to Toilets," *Rhode Island Employment Law Letter* 3(9) (Oct. 1998) (Lexis).

²⁰E.g., "Need to Go to the Bathroom?" *Solidarity*, Aug.-Sept. 1998, at 7.

bathroom facilities. ... Maintaining ever-increasing line speeds to fatten the already bloated profits of the industry leaves no room for consideration of the human beings who operate the lines and produce the profits. Denying workers the right to go to the bathroom is just part of the dehumanization of the poultry workforce.²¹

In contrast, an employer-side labor law firm, reminiscing in a newsletter about a quip by Ronald Reagan in 1978 to the effect that it was amazing that people had known how to climb ladders before OSHA had issued its “144 rules and regulations on ladder-climbing,” was typical in admitting that “it’s hard not to stifle at least a chuckle at one of OSHA’s latest pronouncements.”²² Another employment law newsletter cautioned: “Many employers have had complaints from their employees in the past, ranging from reasonable to harassing. It remains to be seen whether the new interpretation of reasonableness will ease the problems of employers and employees...or whether it will cause a nightmare of complaints to OSHA from employees.”²³

Baruch Fellner, a Washington, D.C. corporate lawyer and former OSHA attorney,²⁴ asserted that the agency was “stretching its interpretation of the standard.” Moreover, he claimed, without revealing the empirical basis of his claim, that “[t]he denial of employee restroom breaks is not a commonplace occurrence and should not be such a public issue. ‘In the millions of workplaces in American there are more ubiquitous and more important safety and health concerns.... It causes one to wonder about OSHA’s priorities....’”²⁵ Asked four years later for the basis of his claim that denial of access was not commonplace, Fellner admitted that he had merely been engaged in “speculation” based on the fact that his employer-clients had never brought to his attention any complaints on this point by their employees, who, Fellner asserted, were not shy about making complaints; he asserted, however, that OSHA knew no more about the frequency of such denials than he did. Asked how to reconcile his assertion that employers do not stop workers from going to the bathroom when they need to with OSHA’s finding

²¹“Union Charges at Poultry Plant Bring New Policy in Workplace Bathroom Rights,” U.S. Newswire, Apr. 14, 1998 (Westlaw).

²²Powers, Kinder & Keeney, “Inspectors Must Check Access to Toilets.”

²³Armstrong, Teasdale, Schlafly & Davis, “OSHA Update,” *Missouri Employment Law Letter*, July 1998 (Lexis).

²⁴“Fellner served for eight years in the Solicitor’s Office of the Department of Labor as Counsel in the Occupational Safety and Health Division. In those capacities, he was in charge of all litigation before the Occupational Safety and Health Review Commission and before the Courts of Appeals.” <http://www.gdclaw.com/insidgcd/whoswho/bio/?contactId=129>.

²⁵“OSHA Issues Interpretation Letter for Standard on Bathroom Facilities,” *Daily Labor Report*, Apr. 13, 1998, at 70 d10 (Lexis).

that access was a problem in the chicken slaughter industry,²⁶ Fellner allowed as how he was not familiar with those circumstances, but urged caution given the source of such allegations in connection with organizing efforts by the UFCW. He also argued that the standard did not imply any obligation to provide access, though like OSHA lawyers before 1998, he conceded that locking bathrooms and not permitting use would mean that those toilets had not been “provided” within the meaning of the regulation.²⁷

Just days before OSHA acted, on April 1, 1998, an event occurred at the United Parcel Service facility in Winston-Salem, North Carolina, that gave added urgency to the need for implementation of the new approach, but at the same time demonstrated that progress would not be without setbacks. According to the grievance complaint that he filed the next day, James Jenkins, a part-time sorter on the 4 to 8 a.m. shift (who also worked part time as a driver),²⁸ working under a Teamsters Union contract that provides for no breaks for four-hour shifts:²⁹

was denied access to use of a restroom. When I finished sorting a trailer I told...supervisor...I was going to the restroom. She told me I could not go. I explained I couldn't wait any longer and started toward the restroom. I was met by [another supervisor] who also said I couldn't go to the restroom and falsely accused me of walking off the job. I at that time went to the restroom and returned to the sort afterward.

On Thursday morning [April 2] at the end of the sort I was told by [the second supervisor] I was being issued a warning letter and a three day suspension for walking off the job. After that meeting I wasn't allowed time to talk with shop steward []. I was told to clock out and so I did. Before leaving I stopped to ask [another] shop steward [] a few questions. At that time [the second supervisor] walked up and ordered me to leave the property. After exiting the building she sent a police officer to escort me off the property.³⁰

Under the rubric “Remedy Requested” Jenkins wrote: “I’m filing against prejudice, harassment, discrimination, slander, libel and defamation of character.

²⁶The problem is, moreover, not confined to the United States. In Britain, a caller to the Trades Union Congress “‘bad bosses’ hotline reported that her employer, a poultry producer selling to major high-street stores, required workers to put their names on a waiting list to go to the loo—making them wait up to two hours to be allowed to go.” “So You Want to Go to the Loo? Tough, Say P-Taking Bosses,” *T & G Workplace Record* (undated) (furnished by Transport and General Workers Union).

²⁷Telephone interview with Baruch Fellner, Washington, D.C. (Sept. 17, 2002).

²⁸Telephone interview with James Jenkins, Winston-Salem (Dec. 3, 2002).

²⁹Telephone interview with Donny Brown, business agent, Teamsters Local 391, Goldsboro, NC (Oct. 30, 2002).

³⁰Teamsters Local Union No. 391, “Complaint” (4-2-98) (copy furnished by Donny Brown, Local 391 business agent).

I'm seeking immediate termination for flagrant and damaging misuse of authority, compensation for lost time and damages suffered."³¹ Jenkins, who had been working at UPS since 1990, reported later that before this incident there had never been any problems going to the bathroom; he conjectured that the new manager, like many in her position, was trying to show who was boss.³²

In the wake of the publicity surrounding OSHA's about-face three weeks earlier and also as a result of the efforts of Jenkins' outraged co-workers who were seeking to bring his victimization to public attention,³³ in late April the editorial page of the Sunday edition of the *Winston-Salem Journal* carried a long and thoughtful piece ("Hold It?") on Jenkins' experience that added more context to the dispute:

James Jenkins was about two hours into a five-hour [sic] shift sorting packages when nature called.

Actually, nature had been calling for quite a while. But Jenkins, who'd worked for the United Parcel Service in Winston-Salem for nine years, had held out until he'd finished unloading a truck. When he had a moment to spare, he asked his supervisor if he could go relieve himself.

She said no. She told him to hold it.

Jenkins told her he'd been holding it for an hour already and that he really, really needed to go.

She said no; he'd have to wait.

Jenkins told her it was an emergency and that he'd be right back. He says he went to the restroom and was gone for no more than three or four minutes....

Though there are often at least two accounts of an incident between an employer and an employee, the basics of Jenkins' account were confirmed by UPS....³⁴

UPS's fanatic struggle to control its employees' time was vividly on display in the denouement: reinstated after his union grieved, Jenkins was fired on April 22 for "stealing time" after he had been put on an unfamiliar truck route and finished late because he had difficulty finding several addresses.³⁵ The journalist editorialized: "You'd think that along with life, liberty, and the pursuit of happiness someone would have made voiding your bladder an unalienable right. ... Adults should be able to go when they feel they need to go. It should be a basic

³¹Teamsters Local Union No. 391 "Complaint" (4-2-98).

³²Telephone interview with Jenkins.

³³Telephone interview with Jenkins.

³⁴Michael Biesecker, "Hold It?" *Winston-Salem Journal*, Apr. 26, 1998, at 19 (<http://www.journalnow.com>).

³⁵Telephone interview with Jenkins.

civil and human right.”³⁶ Three days after the editorial appeared, the union requested Jenkins’ reinstatement, which it secured, but without pay.³⁷

A week earlier another North Carolina newspaper had reported that North Carolina OSHA—with which, in the wake of the fire at the Imperial Food Products, Inc. plant that had killed 25 workers, Federal OSHA had terminated its operational status agreement in 1991 and temporarily resumed concurrent jurisdiction³⁸—which at the time of the issuance of the Federal OSHA Memorandum had “never cited an employer for failing to give employees access to restrooms,” had also never received a formal complaint about the problem, though it had received anonymous phone calls. Presumably workers in one of the least organized and most antiunion states, no less than their counterparts elsewhere,³⁹ were apprehensive about losing their jobs after filing the signed complaints required to trigger on-site investigations.⁴⁰ The *Winston-Salem Journal*, too, had reported that North Carolina OSHA had “never issued a citation to an employer for not allowing workers to use the toilets the law says they must provide.”⁴¹ At the same time, another part-time UPS worker in Winston-Salem wrote a letter to the editor noting that after the Jenkins incident he saw “a supervisor writing something when someone asked to go to the restroom. When I asked, ‘What are you doing?’ I was told that names were recorded along with how long it took them to use the restroom.”⁴²

Teamsters Local 391 representative Claude Gray telephoned a complaint to North Carolina OSHA on April 24, 1998. Although four years later he recalled distinctly that his complaint dealt with UPS’s treatment of Jenkins,⁴³ according to the agency’s written version of the oral complaint that it sent to the complainant for his confirming signature, he alleged that there had been only three toilets for more than 100 employees and that the bathroom had been dirty because the toilets had overflowed. The extant complaint file contains, in addition to the returned and signed form, a separate sheet of paper with the names of two em-

³⁶Biesecker, “Hold It?”

³⁷Teamsters Local Union No. 391, Complaint (Apr. 29, 1998) (copy furnished by Donny Brown).

³⁸*Federal Register* 56:55192 (Oct. 24, 1991).

³⁹See below ch. 11.

⁴⁰Shannon Buggs, “Your Innate Right: You Can’t Be Stopped from Going,” (Raleigh *News & Observer*, Apr. 19, 1998, at E1 (Westlaw).

⁴¹Biesecker, “Hold It?”

⁴²Glenn C. Fields, “Restroom Time Checked” (undated newspaper clipping, later than April 11; copy faxed by Donny Brown).

⁴³Telephone interview with Claude Gray, vice president, Teamsters Local 391 (Oct. 28 and Dec. 4, 2002).

ployees stating: "These two employees have been disciplined for going to the bathroom."⁴⁴ The Health Compliance Officer visited the workplace on May 21 and substantiated the complaint about an inadequate number of toilets; although UPS asserted to OSHA that these workers could also use other toilets if the ones in their area were being used or dirty, in fact five workers complained that they had not been allowed to use any others and one employee had received a warning letter for using a bathroom other than the designated one; UPS sought to justify the letter on the grounds that the toilet had not been dirty. Interestingly, despite the inspector's failure even to raise the issue of Jenkins' having been suspended for going to the bathroom, at the closing conference on June 8 the official asked UPS's District Health and Safety Manager whether he had been "aware of the recent interpretation issued by OSHA concerning bathroom availability," and he responded that "he had read a letter concerning this issue."⁴⁵ Four days later OSHA issued a citation (without imposing a monetary penalty) for failure to provide the proper number of toilets.⁴⁶

Oddly, however, despite the complaint concerning suspension of the two employees for having gone to the bathroom, the OSHA citation said nothing about

⁴⁴This information comes from Complaint No. 200073849, which was still on file at the North Carolina OSHA Winston-Salem office, although the complete case file had been transferred to the state headquarters in Raleigh. The complaint was signed on May 7 and received on May 11. A supervisor in the office read the relevant information from the complaint to the author over the telephone without disclosing any names. Since these names would be redacted even if the agency made the complaint available under a Freedom of Information Act request, the identity of the second suspended worker—Jenkins being the first—would still remain unknown. Telephone interview with Nelson Edwards, North Carolina OSHA, Winston-Salem (Dec. 9, 2002). Whereas Edwards had assumed that the complainant Gray had submitted this additional sheet, after being informed of OSHA's final letter, alluded to below, which does not mention the suspension, another compliance officer and former supervisor opined that it was equally plausible that the OSHA intake officer had created that sheet based on information obtained from Gray. Asked why the officer would have done that, the official speculated that the sheet meant that the complaint was to be referred to the North Carolina Workplace Retaliation Discrimination Office, which she suggested contacting. Telephone interview with Roseanne Morgan (Dec. 13, 2002). However, the administrator of that agency stated that neither Jenkins' nor Gray's name appeared on its computer and that in the ten years of the agency's existence he had never received such a complaint for retaliation for bathroom use. Telephone interview with Skip Easterly, Administrator, Employment Discrimination Bureau, Raleigh (Dec. 13, 2002).

⁴⁵United Parcel Service, Inc., Insp. No. 301931424, Narrative, OSHA-1A (June 9, 1998), and Worksheet, OSHA-1B (June 11, 1998) (quote at 2).

⁴⁶United Parcel Service, Inc., Insp. No. 301931424, on <http://www.155.103.6.10/cgi-bin/est/est1xp?i=301931424>.

denial of access. Instead, it merely stated that toilets had not been provided in accord with table J1 “for the male employees who worked in preload and reload, and for the male mechanics who were required to use the men’s bathroom in the mechanics area.” It then went on to note that the violation could be abated by marking the bathrooms in that area unisex, furnishing them with a lock, and insuring that they be used only by one employee at a time.⁴⁷ More mysterious still is that the final letter that was sent to the complainant on June 12, 1998, also failed to mention at all the third complaint item—that two workers had been disciplined for going to the bathroom. On the contrary, it expressly stated that the complaint encompassed only the two aforementioned items.⁴⁸

In interviews both Jenkins and Gray were just as surprised to learn that OSHA had not cited UPS for having denied Jenkins access to the toilet as they were that the company wound up being cited for an issue that they contended had not been a problem.⁴⁹ To be sure, since the violation had occurred five days before the issuance of the Memorandum, which did not state that it had retroactive force, North Carolina OSHA could have declined to enforce the new interpretation. However, since Federal OSHA itself had anticipatorily enforced the interpretation in the Hudson Foods citation⁵⁰ almost nine months before issuing the Memorandum—which, moreover, asserted that the interpretation had always been implicit in the standard—it would in any event have been open to North Carolina

⁴⁷United Parcel Service, Inc., Insp. No. 301931424 (issued June 12, 1998). UPS refused to provide any information concerning the matter. Telephone message left by Terry Thomas, UPS safety manager for Western North Carolina, in Charlotte, who stated that this refusal was a corporate decision (Dec. 3, 2002). Thomas had been present in 1998 when the OSHA inspector visited the facility.

⁴⁸Letter from Roseanne Morgan, Re OSH Complaint # 200073849, OSH Inspection No. 301931424, to [] (June 12, 1998) (redacted and faxed to author by NC OSHA)..

⁴⁹Telephone interview with Jenkins; Telephone interview with Gray (Dec. 4, 2002). Although Jenkins stated that OSHA had never interviewed him, it appears that it did. Telephone interview with Edwards. The shop steward named in the Inspection Narrative as present at inspection could not explain why the OSHA record did not mention Jenkins’ suspension. Telephone interview with Chris Plemmons, Clemmons, NC (Jan. 2, 2003). Ironically, believing that OSHA had actually cited UPS for having denied Jenkins access, Gray, the business agent who had processed Jenkins’ grievance and is now a vice president of Local 391, which had been aware of the Memorandum, was of the opinion that OSHA’s enforcement has been effective in the sense that UPS has not denied toilet access to workers at Winston-Salem since. Telephone interview with Gray. Donny Brown, the current business agent, confirmed this statement. Telephone interview with Brown (Oct. 30, 2002).

⁵⁰See above ch. 2.

OSHA to apply it as well.⁵¹

In the midst of processing the UPS complaint, North Carolina OSHA issued an internal Standards Notice, effective May 4, 1998, explaining the Federal OSHA Memorandum. The state agency paraphrased Federal OSHA's reasoning somewhat cryptically: "Along with the requirement to 'provide' toilets came the assumption that employees would be able to access toilets as needed or with reasonable restrictions." Remarkably, however, North Carolina OSHA also went beyond the April 6 Memorandum by extending its applicability to the construction industry.⁵² The Notice may have been issued promptly, but its effective dissemination to and actual impact on inspectors were haphazard. As the OSHA official in charge of statewide Education and Training observed, once the Notice got that far, it was in the compliance officers' "lap to familiarize themselves with" such documents.⁵³ Some did while others did not.

Even four and a half years later, one compliance officer (who as District Health Compliance Supervisor had assigned the UPS complaint to an inspector and signed the citation) with almost two decades of OSHA experience not only was not familiar with the Memorandum, but stated affirmatively that what the agency had to follow in this matter was North Carolina labor law and specifically wage and hour law.⁵⁴ Indeed, several days later, even after having discussed the matter with colleagues who were familiar with the Memorandum, this same official insisted, in response to a hypothetical question, that if a worker, instead of obeying an order not to go to the bathroom and urinating in her pants, were fired for disobeying an order not to go to the bathroom, there would be nothing for OSHA to do because the agency cannot get her her job back and her only recourse would be filing a discrimination complaint with another state agency.⁵⁵

⁵¹North Carolina OSHA might also have availed itself of another basis for inaction—that the denial had merely been a one-time incident attributable to a low-level supervisor—but its legitimacy would have been undermined by the fact that the incident had had such drastic consequences (suspension) for the worker.

⁵²North Carolina Department of Labor, Division of Occupational Safety and Health, Standards Notice 58A (May 4, 1998) (fax furnished by N.C. DOL).

⁵³Telephone interview with J. Edgar Geddie, Health Standards Officer, North Carolina OSHA, Raleigh (Dec. 9, 2002).

⁵⁴Telephone interview with Roseanne Morgan, compliance officer and former supervisor, North Carolina OSHA, Winston-Salem (Dec. 9, 2002).

⁵⁵Telephone interview with Morgan (Dec. 13, 2002). When the author, in an effort to draw out the logic of this approach and its disastrous consequences for deterrence, asked whether OSHA would stand idly by while an employer discharged all its employees for disobeying orders forbidding them to go to the bathroom, Morgan accused him of putting words in her mouth, but she never retracted her original claim. In fact, OSHA is empowered to seek reinstatement and back wages for workers who have been fired for

In contrast, another official stated that he would have cited an employer for not letting workers go to the bathroom even before April 6, 1998, although he had not issued any such citations and was not aware of any that his agency had issued.⁵⁶ The compliance officer who had conducted the inspection at UPS in Winston-Salem also noted almost five years later that he had never come across a denial of access case and had never heard co-workers mention one in the course of their frequent case discussions.⁵⁷

North Carolina OSHA's timid enforcement activities can perhaps be understood in a related context. Within two weeks of Federal OSHA's announcement of the Memorandum, Representative Cass Ballenger, the North Carolina Republican chair of the House subcommittee that oversees OSHA, stated that he wanted "the new standard tested in three or four workplaces before deciding whether it's an effective way to address the problem. 'We've got to see how they will enforce it. The words "prompt," "restrictive" and "reasonable" could very well cause an OSHA inspector to go off the deep end.'" Ballenger's solicitousness on behalf of employers was not merely representational: he himself owned a factory in North Carolina that manufactured—irony of ironies—plastic bags for adult diapers. He preferred the free-market alternative to mandatory labor norms: "Ballenger says the current economy may correct the problem without government interference. 'With such low unemployment, you better take care of your employees in every possible way.... You can't get away with not letting your employees go to the bathroom. People will quit and go somewhere else.'"⁵⁸ To be sure, Ballenger failed to explain the free-market solution in periods of high unemployment or how he personally was able to "get away with" this regime at his factory: "What we do in my company, is people go when there's a set-up on the machines; sometimes you can go five or six hours without a set-up," the congressman said.⁵⁹

Editorial reaction to OSHA's action was largely positive, waxing sarcastic over the discovery of the infantilizing treatment to which employers subject

exercising their rights under the Act. 29 USC sect. 660(c)(1) and (2) (2000).

⁵⁶Telephone interview with Edwards.

⁵⁷Telephone interview with Pat O'Brien, compliance officer, North Carolina OSHA, Winston-Salem (Dec. 10, 2002).

⁵⁸Shannon Buggs, "Your Innate Right: You Can't Be Stopped from Going," (*Raleigh News & Observer*, Apr. 19, 1998, at E1 (Westlaw)). Deborah Berkowitz disagreed with the author's criticism of Ballenger's proposed intervention: "It's almost seems like your [sic] trying to trap the agency into being exactly what the republicans say it is--nitpicking big brother. I know your heart is in the right place--a little unrealistic and overzealous maybe--but in the right place. OSHA cannot do it all--it [sic; should be "if"] it could we wouldn't need you or me or unions." Email from Deborah Berkowitz to Marc Linder (Apr. 20, 1998).

⁵⁹Tumulty, "Bathroom Breaks on OSHA's Agenda."

workers. The *Chicago Daily Herald* commented: "Who knew when they were interviewing for a job that they should ask about restroom privileges when they discussed the company's benefits? ... Who knew that the practice of raising your hand in the classroom to go to the restroom might be relived later in life?"⁶⁰ The Newark *Star-Ledger* sounded a similar theme:

When you're a kid in school, you have to ask the teacher for permission to go to the bathroom. It is routinely granted. Believe it or not, some grown-up workers have to ask for permission and it is not always granted. ... The Occupational Safety and Health Administration has long required that toilet facilities "be provided in all places of employment" for all workers, but the regulation says nothing about giving workers access to them. Employers looking for an edge noticed.⁶¹

A few weeks after OSHA had acted, the governor of Vermont on April 27, 1998 signed into law a bill under which: "An employer shall provide an employee with reasonable opportunities during work periods to eat and to use toilet facilities in order to protect the health and hygiene of the employee."⁶² In "one of the eternal mysteries of the legislative process,"⁶³ the predecessor bills had required employers to provide not reasonable opportunities to use the toilet, but "a reasonable break to permit attendance at religious services."⁶⁴ The statute, is, in the words of the general counsel of the Vermont Department of Labor and Industry, "not a break law." It "was originally introduced as a law requiring periodic breaks during the work day but was drastically amended to the form that passed."⁶⁵ Although "at least some of the sponsors of the early bills were aware that toilet access was a problem at some worksites,...that particular issue did get an increased amount of press attention in 1997. In earlier sessions, sponsors believed that a broader work break bill would also solve toilet access issues. Lobbying by Associated Industries of Vermont, the Chamber of Commerce, and particularly transportation concerns (who argued that any type of fixed break provision would interfere with service) defeated the earlier versions. Those

⁶⁰"Workers Have Right to Go," *Chicago Daily Herald*, Apr. 11, 1998, at 6 (editorial) (Lexis).

⁶¹"The Right to Go," Newark *Star-Ledger*, Apr. 14, 1998, at 12 (editorial) (Westlaw).

⁶²1 Vermont Stat. Ann. Sect. 304.

⁶³Email from J. Stephen Monahan, General Counsel, Vermont Dept. of Labor and Industry, Montpelier, to Marc Linder (Dec. 10, 2002).

⁶⁴Vermont Legislature, 1995-96 Sess., H.220, on <http://www.leg.state.vt.us/docs/1996/bills/intro/H-220.HTM>; Vermont Legislature, 1993-94 Sess., H.44, on <http://www.leg.state.vt.us/docs/1994/bills/intro/H-044.HTM>.

⁶⁵Email from J. Stephen Monahan, General Counsel, Vermont Dept. of Labor and Industry, Montpelier, to Marc Linder (Dec. 9, 2002).

groups were unable to provide a convincing rationale for opposing the language offered for toilet access, so that is what passed. S.130 language was amended to the version that passed, by the Senate in March of 1997 a year before O.S.H.A. issued its memorandum.”⁶⁶ As enacted, the law “primarily addresses complaints that certain employers were denying employees access to the bathroom, because they believed that it either slowed down production and/or was being used as a break.” In the years since enactment, however, the department has not needed to define what “reasonable opportunities” means because it has not cited any employers for violations and the few complaints it has received were resolved by a call to the employer.⁶⁷

Interviewed more than four years later, the project manager of Vermont OSHA, who had worked for OSHA for more than two decades and whose agency had received no complaints about, and issued no citations for, denial of toilet access, recalled that when the OSHA Memorandum first came out, “we all thought it was a joke”: employers were always complaining that OSHA was unnecessary because employers did what was right, and “here OSHA had to regulate something as” basic as urinating.⁶⁸

In September 1998, a research analyst in the Pennsylvania Legislative Research Office wrote a memo requesting that the Legislative Reference Bureau draft legislation on behalf of Representative Sue Laughlin that was to have included the following provision:

All employees...within the Commonwealth shall be afforded at least one opportunity during every two hour period of employment to use toilet facilities. The time afforded for employee breaks may not be cumulated and expire at the end of each two hour period. The employee shall have sole authority over the timing of toilet breaks while being expected to recognize reasonable accomodation [sic] to workplace needs. Toilet breaks shall not be accounted as concurrent with daily meal breaks.... Employees whose temporary illness requires more frequent toilet breaks shall be accomodated [sic] or provided with a paid sick day. After three days of such illness, or more than two episodes in one month, an employer may require physician confirmation of the illness and a report of its prog-

⁶⁶Email from Monahan to Linder (Dec. 10, 2002).

⁶⁷Email from Monahan to Linder (Dec. 9, 2002). According to Joanna Goodrich, the Wage and Hour Program Coordinator, the agency has received no complaints about toilet use. Telephone message from Joanna Goodrich (Dec. 9, 2002).

⁶⁸Telephone interview with Bob McCloud, Project Manager, Vermont OSHA (Sept. 20, 2002). He was far from being alone in voicing that sentiment. Another OSHA official, for example, recalled that when the Memorandum reached her office she thought it odd that employers had to be told something as commonsensical as that they had to let workers use the toilets that firms were required to provide. Telephone interview with Cheryl Gray, Safety and Health Assistant, Omaha Area OSHA Office (Jan. 2, 2003).

nosis. Toilet breaks shall not be subtracted from an employee's time worked when calculating wages. ...

Failure to provide toilet breaks...as required...shall result in a minimum fine of \$200 per employee for the first citation, \$300 per employee for the second citation, and \$1,000 per employee for the third and subsequent citations. ...

Employers found in a court of law to have retaliated against employee filing complaints under this Act shall be liable for treble damages for wages lost....⁶⁹

Although even this carefully crafted proposal fell far short of the medically indicated standard of permitting healthy workers to urinate more often than once every two hours, which was arguably already in force under OSHA, it was nevertheless too radical even to be filed as a bill. Especially unorthodox was its conferral of discretion on workers to determine when to go and its inversion of OSHA's reasonableness criterion, pursuant to which in Pennsylvania workers would have been expected to accommodate the needs of production.

Other high-profile cases of denial of toilet access after the OSHA Memorandum went into effect included the Freshwater Farms catfish processing plant in the very impoverished community of Belzoni, Mississippi. On November 16, 1998, 68 of the exclusively black and largely female workers, whose wages hovered over the minimum wage and whose shifts were not pre-determined but lasted until management said there was no more fish to process that day, protested the company's failure to deal with their demands seriously by standing outside rather than entering the plant and were fired for violating the no-strike clause in the collective bargaining agreement with UFCW Local 1529, which did not support their demands:

A major concern is the company's refusal to allow adequate time for workers to use the bathroom. Their workstations are between 400 and 500 feet from the restrooms. Only seven minutes are allowed for bathroom breaks, three times a day. "By the time you get your gear off and get to the wash room, the seven minutes is practically gone," [worker Joann] Hogan said. "Then you have to get sanitized and redressed up before you can go back to your work station." If they take longer than seven minutes, workers must clock out or they will be written up.⁷⁰

Though the union later stated that it would take their grievance to arbitration, some of the workers instead formed the Catfish Workers of America.⁷¹

⁶⁹Memo from Dave Callen to Rep. Laughlin (Sept. 18, 1998).

⁷⁰Susan Lamont and Ronald Martin, "Catfish Workers Fight for Dignity," *The Militant*, Jan. 18, 1999, on http://www.themilitant.com/1999/632/632_17.html.

⁷¹Ved Dookhun, "Mississippi Actions Back Catfish Workers' Fight," *The Militant*, Apr. 26, 1999, on http://www.themilitant.com/1999/6316/6316_5.html. See also Howard

Some management publications took the book and problem seriously, calling the former, for example, “a significant contribution to the literature on a little discussed, but important workplace issue.”⁷² *CIO*, a magazine for corporate chief information officers, went so far as to offer this “solution” to the problem: “Lock stingy employers in a conference room for a few hours with a big pot of coffee. We think the sympathy will flow.”⁷³ By the end of 1998, a monthly publication for small business was warning its readers:

Have you ever grown weary of watching your employees trotting off to use the facilities every hour on the hour? Ever considered cracking down on what you suspect to be bogus breaks? You’d better proceed with caution, lest you inadvertently drive your health care spending higher.

According to a new book...*Void Where Prohibited ...*, companies that regulate controls on bathroom visits run the risk of major illness. That could eventually lead to higher health care premiums, to say nothing of the possible exposure to legal liability.⁷⁴

A comprehensive and probing interview with the author also appeared, appropriately enough, in *Corporate Crime Reporter*, a Naderite publication.⁷⁵

Not everyone, however, appreciated an excremental vision of the workplace. The Princeton University Industrial Relations Section may have included *Void Where Prohibited* on its “distinguished list”⁷⁶ of 16 noteworthy books in industrial relations and labor economics for 1998,⁷⁷ but the discipline’s leading journal in the United States, *Industrial and Labor Relations Review*, declined to publish a review of the book on the grounds that the journal’s screener had been offended by the title, while six reviewers, possibly offended by the subject as well, had turned it down.⁷⁸ These scholar-censors were reminiscent of the city councillors

Rambsy, “Fired Catfish Workers Start Their Own Union,” *The Progressive*, 5(63):16 (May 1, 1999) (Lexis)..

⁷²Mark Lengnick-Hall, Book Review, *Personnel Psychology* 52(10):218-21 at 221 (Spr. 1999). See also Mary-Kathryn Zachary, “OSHA Provides Interpretations of Its Bathroom Break Standards,” *Supervision* 59(8):20 (Aug. 1998) (Westlaw).

⁷³Christopher Koch, “Give Me a Break,” *CIO*, sect. 2, at 16 (Aug. 15, 1998).

⁷⁴John Ettore, “Let My People Go,” *Small Business News Cleveland*. Nov. 1998.

⁷⁵“Interview with Marc Linder,” *Corporate Crime Reporter* 12(34):11-16 (Sept. 7, 1998).

⁷⁶Letter from Prof. Orley Ashenfelter, Director, Industrial Relations Section, to Marc Linder (Aug. 5, 1999).

⁷⁷Princeton University, Industrial Relations Section, “Selected References,” No. 289 (Apr. 1999).

⁷⁸Email from Barbara Lanning, ILRR office manager, to Marc Linder (Mar. 15, 1999); email from Frances Benson, Editor-in-Chief, ILR Press of Cornell University

of Kansas City whom George Bernard Shaw, after they had thwarted performance of his play *Mrs Warren's Profession* by offering the performers "the alternative of leaving the city or being prosecuted" under a local by-law against indecency, characterized as possibly "simply stupid men who thought that indecency consists, not in evil, but in mentioning it."⁷⁹

Ironically, familiarity with the book's critique at times outran knowledge of OSHA's about-face even in left-wing circles with a specific interest in the lack of workplace rights.⁸⁰ Newspaper legal advice columnists, too, were eventually enabled to answer questions about workplace toilet access correctly. In late 1999 a reader who asked the *Houston Chronicle* whether it was legal for a supervisor to write up a worker who, unable to hold it in any longer, had gone to the toilet without having found a replacement, was, under the headline, "Law Doesn't Entitle You to a 'Potty Break' at Work," misinformed by Professor Richard Alderman, that, unless a worker is disabled, "your employer can set the conditions of taking a 'potty break.' You agreed to his terms and now you must adhere to them. If you are dissatisfied with the terms of employment you can either try to have them changed or look for another job."⁸¹ After being informed that he

Press, to Marc Linder (Mar. 15, 1999). Ultimately the journal did publish a book review, but only because the author shamed the editors into doing so and furnished a list of reviewers who would not be "offended." Email from Marc Linder to Barbara Lanning (Mar. 15, 1999).

⁷⁹Bernard Shaw, "Preface" to *Mrs Warren's Profession*, in idem, *Plays Unpleasant: Widowers' Houses, The Philanderer, Mrs Warren's Profession* 181-212 at 209 (1976 [1894]). Although all of the author's previous books published in the United States had been reviewed in *Choice*, which quickly reviews books for college librarians, this one was not. The editor of the ILR Press found it "a puzzle. ... I do think it's odd they haven't reviewed yours." Email from Frances Benson to Marc Linder (June 1, 1999).

⁸⁰For example as late as June 1999, Barbara Ehrenreich, writing in *In These Times*, was still citing *Void Where Prohibited* as documenting the lack of a "federal guarantee of the right" "to pee." Barbara Ehrenreich, "The Lexus and the Right to Pee," *In These Times*, June 13, 1999, at 9 (Lexis). The record was set straight in Marc Linder, "Bathroom Breakthrough," *In These Times*, Aug. 2, 1999, at 2, col. 1 (letter to editor). But see Barbara Ehrenreich, "Nickel-and-Dimed: On (Not) Getting By in America," *Harper's Magazine*, Jan. 1999, at 37-52 at 48 n.6 ("Until April 1998, there was no federally mandated right to bathroom breaks"), and idem, *Nickel-and-Dimed: On (Not) Getting By in America* 37 (2001).

⁸¹Richard Alderman, "Law Doesn't Entitle You to a 'Potty Break' at Work," *Houston Chronicle* (undated clipping, ca. early Nov. 1999). Alderman is the incumbent of the Dwight Olds Chair in Law at the University of Houston and two-time recipient of "the highest honor given by the American Bar Association and the State Bar of Texas for his work in educating the public about the law." <http://www.law.uh.edu/faculty/>.

had disseminated false advice,⁸² Alderman published a correction, emphasizing that “employers must make restroom facilities available to all employees, and must allow prompt access to such facilities.”⁸³

The need for OSHA’s new approach to toilet access became all the more manifest when, following the book’s publication, the author became aware of a profession many of whose practitioners were urinarily perhaps even more oppressed than chicken processing workers—pharmacists, especially those working long shifts in single-pharmacist pharmacies within supermarkets or department stores of chains such as Wal-Mart.⁸⁴ A 1998 study of about a thousand pharmacists in New York State revealed that 44 percent worked in chain stores, which “tend to be where employment opportunities are now available.”⁸⁵ Overall, 33 percent of pharmacists worked 11-12 hours shifts and 6 percent 13 or more hours; chain-store pharmacists accounted for 70 percent and 68 percent, respectively, of these two groups working long shifts.⁸⁶ Respondents reported that 60 percent of all pharmacists, 75 percent of employees of chain employees, and 85 percent of all pharmacists working shifts of 13 or more hours disagreed with the statement: “I am usually able to take a rest or bathroom break when needed.”⁸⁷ Indeed: “A majority of pharmacists report that they cannot leave their posts, even for a few minutes....” In addition, 76 percent of all pharmacists, 85 percent of chain-store employees, and 95 percent of pharmacists working shifts of 13 or more hours disagreed with the statement: “I am usually able to take meal breaks of sufficient duration.”⁸⁸

Wal-Mart in particular has been engaged in such a ruthless struggle to control time at the workplace—two recent lawsuits filed by 1,100 pharmacists against Wal-Mart for failure to pay overtime revealed that some worked 70 hours a week “without even a bathroom break”⁸⁹—that it fired a diabetic pharmacist for closing the pharmacy to take an uninterrupted lunch during his 10-hour shifts to

⁸²Email between Marc Linder and Richard Alderman (Dec. 7, 1999).

⁸³Richard Alderman, “Collector Rings Up Debtor—Repeatedly,” *Houston Chronicle*, Dec. 15, 1999, at 13, col. 1, 3.

⁸⁴See Diane Lewis, “A 15-Minute History: Book Takes a Look at Troubles of Many Workers, Firms Over Bathroom Breaks,” *Boston Globe*, Nov. 29, 1998, at F4

⁸⁵Pharmacists Society of the State of New York, *1998 Workplace Survey* 3 (June 1998).

⁸⁶Pharmacists Society of the State of New York, *1998 Workplace Survey* at 9.

⁸⁷Pharmacists Society of the State of New York, *1998 Workplace Survey* at 17.

⁸⁸Pharmacists Society of the State of New York, *1998 Workplace Survey* at 16.

⁸⁹John Accola, “Judge Rules Against Wal-Mart: Pharmacists Shorted on Overtime Pay,” *Rocky Mountain News*, Sept. 24, 1998, at 1B (Lexis). See *In re Wal-Mart, Fair Labor Standards Act Litigation*, 58 F. Supp.2d 1219 (D. Colo. 1998).

eat a special diet after his noon-time insulin injection.⁹⁰ In spite of such practices, Wal-Mart felt no compunctions about asserting: ““We look at them [pharmacists] as professional people who can make responsible decisions, and they can take bathroom breaks or lunch breaks as they deem appropriate.””⁹¹

Society may take an interest in pharmacists' problems and override employers' working-time obsessions, but only once it uncovers the externalities of that autocratic system: after evidence surfaced that “overworked” pharmacists were making mistakes in filling prescriptions that proved fatal to patients, pharmacy officials in North Carolina began “trying to force drug stores to cut back on pharmacists' hours and to require lunch and bathroom breaks in an effort to improve safety.”⁹² When that state's Board of Pharmacy proposed a rule prohibiting employers from requiring pharmacists to work more than 12 hours a day and mandating rest breaks, large pharmacy chains, in the face of pharmacists' complaints that “they cannot even take bathroom breaks”⁹³ and of a study showing that 91 percent of pharmacists in North Carolina favored breaks,⁹⁴ opposed the intervention on the grounds that their employees ““don't want rules mandated to them. That would change the flexibility of the profession.””⁹⁵ Fortunately for employers alleging that pharmacists ““set their own hours,””⁹⁶ the Rules Review Commission ruled that Board's proposal was not reasonably necessary. At the end of 2002 the Board's judicial appeal was still pending.⁹⁷

Other, less systematic reports revealed theretofore unpublicized extreme abuse of other white-collar workers, which had become blatantly unlawful under the OSHA Memorandum. For example, train dispatchers worked an eight-hour shift without toilet or meal breaks; though they could and did eat at their work

⁹⁰Orr v. Wal-Mart Stores, Inc., 2002 U.S. App. Lexis 14659 (8th Cir. 2002).

⁹¹RuthAnn Hogue, “No Relief in Sight,” *The Arizona Daily Star*, Apr. 11, 1999, at 1D, col. 2, at 4D, col. 3-4 (quoting Jessica Moser, Wal-Mart company headquarters spokeswoman).

⁹²Sheryl Stolberg, “The Boom in Medications Brings Rise in Fatal Risks,” *N.Y. Times*, June 3, 1999, at A1, col. 1 (Lexis).

⁹³Aissatou Sidime, “Pharmacists Cite Workload in Suit,” *Tampa Tribune*, June 19, 1999, at 1 (Lexis).

⁹⁴Carol Ukens, “Patrons and Pharmacists Like Breaks, Study Finds,” *Drug Topics* 144(16):32 (Aug. 21, 2000) (Lexis).

⁹⁵Don Patterson, “Time for a Break: Retail Pharmacists Who Work Long, Busy Days May Put Patients at Risk,” *News & Record* (Greensboro), Feb. 9, 1999, at D1 (Lexis) (quoting CVS spokesman).

⁹⁶Sabrina Jones, “Pharmacists Could Use a Break a Day,” *News and Observer* (Raleigh), Mar. 28, 1999, at E1 (Lexis) (quoting CVS spokesman).

⁹⁷Carol Ukens, “North Carolina Board Sues to Keep 12-Hour Rule on Work Shifts,” *Drug Topics*, July 19, 1999, at 20 (Lexis); <http://www.ncbop.org/news.htm>.

stations, they had to run to the toilet and void “as quickly as” possible because they “remain responsible for all actions on their territory.”⁹⁸ A woman who worked at a Space Operations Center Computer Operations room in New Mexico which under company rules could not be left unattended even for a moment, was often not relieved for eight hours in order to be able to go to the bathroom. Moreover, the employer told her that “male employees did not have that problem and that she should relieve herself in a trash can or she could pull up a floor tile.” As a result she developed severe septicemia and had to be taken by ambulance to the hospital.⁹⁹ And OSHA’s new approach also gave hope to transgendered workers, who are sometimes barred from using any bathroom at work.¹⁰⁰

Reports of additional blue-collar occupations facing toilet access problems also surfaced after the Memorandum was issued. Crane operators in aluminum smelters may work up in their cabs for as long as four consecutive hours; climbing down and up, doffing and donning protective equipment, and walking to and from the bathroom alone may take as much as 10 minutes; and although they are technically free to go after they have disposed of a load, they are under pressure from workflow, management, and their own co-workers not to leave.¹⁰¹

Another group of workers especially cut off from toilet access are employed by utility companies to install or repair electrical lines. For example, in California, according to a professor who was a consultant to a firm marketing urination/defecation bags to utility companies, linemen have such heavy work loads that they do not have the time to come down from their cherry pickers to go urinate in the woods. Instead, many urinate into the cherry picker basket, and in at least one instance a worker was reported to have been electrocuted while standing in his own urine.¹⁰² One week before Federal OSHA issued its Memo-

⁹⁸Email from Steve Popkin to Marc Linder (Jan. 11, 1999). Popkin, who worked for the engineering-consulting firm Foster-Miller, was working on a project studying the workload, stress, and fatigue of train dispatchers.

⁹⁹*Sanchez v. PRC, Inc.*, First Amended Complaint for Damages (D. N.M., CV 96 1093, Feb. 5, 1997).

¹⁰⁰Email from Prof. Phyllis Randolph Frye, Thurgood Marshall School of Law, to Marc Linder (Jan. 29, 2000); Phyllis Randolph Frye, “The International Bill of Gender Rights vs. The Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They Are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, Their Right to Marry, and the Very Definition of Their Sex,” *William and Mary Journal of Women and the Law* 7:133-216 at 182-88 (Fall 2000).

¹⁰¹Telephone interview with Donny Lawrence, president, United Steelworkers Local No. 4895, Alcoa plant, Rockdale, TX (Oct. 10, 2002).

¹⁰²Telephone interview with Paul Holt, Carlsbad, CA (Oct. 21, 2002); *Corporate Crime Reporter*, Sept. 7, 1998, at 13. Holt had heard this account from many in the utility industry, but could not confirm it independently. American Innotek, for which he had

randum, Cal/OSHA informed the firm that the toilet requirements of the state's construction safety order "are not specific enough to preclude the use of the 'Brief Relief/Disposable John & Portable Tent System,'" but that the device "is not a viable alternative in lieu of the facilities required" by the General Industry Safety Orders." Consequently, the agency concluded that the product "would be a valuable asset for those employees, employers and persons engaged in certain activities where standard facilities are not readily available. Mobile crews...and construction cites...are two examples."¹⁰³

The unusual problems of this occupational group also shed light on the special problems of women workers, which OSHA could deal with after April 6, 1998. When the Central Illinois Light Company's sole female lineman sued her employer for sexual harassment on the grounds that it had failed to provide her with restroom facilities, Richard Posner, the most intellectually diversified judge in the United States, who prides himself on being a tough realist, had no compunctions about depicting the male workers as unconcerned about their working conditions:

Linemen work where the lines are, and that is often far from any public restroom; nor do the linemen's trucks have bathroom facilities. Male linemen have never felt any inhibitions about urinating in the open, as it were. They do not interrupt their work to go in search of a public restroom. Women are more reticent about urinating in public than men. So while the defendant's male linemen were untroubled by the absence of bathroom facilities at the job site, the plaintiff was very troubled and repeatedly but unsuccessfully sought corrective action, for example the installation of some sort of toilet facilities in the linemen's trucks.¹⁰⁴

Speaking on behalf of the Seventh Circuit Court of Appeals in 2000, Posner agreed that a reasonable person would think an absence of bathroom facilities in

been a consultant, had heard the same accounts, but could also not confirm them. Telephone interview with Bruce Salerno (Oct. 23, 2002); fax from Terry Cassidy to Marc Linder (Oct. 23, 2002).

¹⁰³Letter from Frank Ciofalo, Deputy Chief, California Div. of Occupational Safety and Health, to Bob Locher, American Innotek, Inc. (Mar. 30, 1998). The company markets its product to employers on these grounds: "Corporate liability and image, work site health and safety risks, job site down time and the risk of having your employees caught on film are all issues that need to be addressed when determining the personal sanitation needs of your employees. Is 'holding it' part of your corporation's safety policy? The risks associated with 'delayed voiding' or 'holding it' are not worth the reward. Just take a look at some of the many diseases associated with unsanitary lavatory facilities and poor sanitation practices." <http://www.briefrelief.com>.

¹⁰⁴DeClue v. Central Illinois Light Co., 223 F.3d 434, 436 (7th Cir. 2000).

most workplaces an “intolerable working condition”; he also agreed that if such an absence deterred women, but not men, from seeking or holding a type of job, that absence may be a form of actionable sex-based discrimination if “those facilities can be made available to the employees without undue burden to the employer.” He also emphasized that “women are not ‘unreasonable’ to be more sensitive about urinating in public than men; it is as neutral a fact about American women, even though it is a social or psychological rather than physical fact, as the fact that women’s upper-body strength is on average less than that of men, which has been held in disparate-impact litigation to require changes in job requirements in certain traditionally male job categories.” But the federal appeals court rejected the plaintiff’s claim because she brought it based not on disparate impact, but on hostile work environment or sexual harassment, which requires a showing that co-workers or supervisors sought to make the workplace intolerable or “severely and discriminatorily uncongenial” to women. Posner conceded that since the chief defense to such a charge is that the employer had done all that he could to prevent the harassment, “as a purely semantic matter it might be possible to argue that an employer who fails to correct a work condition that he knows or should know has a disparate impact...is perpetuating a working environment that is hostile to that class.” But the court rejected that argument on the grounds that it would make the two types of discrimination one.¹⁰⁵

The dissenting judge, Ilana Rovner, took a step toward adopting for the workplace the substantive rather than merely formal equality for women that legislators had created outside the workplace.¹⁰⁶ Legislatures have been much more solicitous of the bladders of the (female) public outside of the workplace than of workers’ toilet access. For example, Wisconsin’s contribution to the potty-parity movement explicitly stresses “speed of access”:

The owner of a facility where the public congregates shall equip and maintain the restrooms in the facility where the public congregates with a sufficient number of permanent or temporary toilets to ensure that women have a speed of access to toilets in the facility where the public congregates that equals the speed of access that men have to toilets and urinals in that facility where the public congregates when the facility where the public congregates is used to its maximum capacity.¹⁰⁷

Rovner went beyond Posner in rooting the heavier burden women bear in voiding outdoors not simply in reticence: “The fact is, biology has given men less to do in the restroom and made it much easier for them to do it. If men are less

¹⁰⁵DeClue v. Central Illinois Light Co., 223 F.3d at 436-37.

¹⁰⁶See Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 154-56 (1998).

¹⁰⁷Wisc. Stat. Ann. sect. 101.128(2)(a) (1997).

reluctant to urinate outdoors, it is in significant part because they need only unzip and take aim," whereas women face "a more cumbersome, awkward, and time-consuming proposition." Rovner was also willing to find hostile-environment discrimination where an employer fosters it by failing to respond to complaints calling for corrective action of conditions that he knows have a disparate impact in light of prior reported judicial decisions revealing that "some employers not only maintain, but deliberately play up, the lack of restroom facilities...as a way to keep women out of the workplace." Rovner was able to reach this conclusion with even greater cogency because the employer had in fact been able to provide toilet facilities: the company had given the plaintiff use of a port-a-potty for two weeks, and, after she had filed a complaint with the Equal Employment Opportunity Commission, the Central Illinois Light Company (which had otherwise merely offered her the stigmatizing use of a truck to drive 10 to 20 miles to the nearest restroom) "began providing 'Brief Reliefs' (disposable urine bags) and privacy tents for DeClue and the other [male] lineworkers to use at jobsites."¹⁰⁸

¹⁰⁸DeClue v. Central Illinois Light Co., 223 F.3d at 438-39.

