Void
Where Prohibited
Revisited

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

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Chapter 10

Oui Oui to Wee Wee:
The Freedom to Go to the Bathroom As a
Fundamental Human Right in France

[H]e's the kind of boss...who never left his shop without first going around to see
that all the lights were out. ... The same man who knows how many minutes a
day his workers spend in the toilet.¹

It is instructive to contrast the highest-profile dispute over workplace voiding
rights in the United States—Jim Beam’s offensive strategy, the UFCW’s resis­tance, and OSHA’s enforcement²—with a similar campaign in France in 1995-96
at the slaughterhouse of Bigard et Compagnie in Quimperlé in Brittany, in the
northwestern part of the country. Bigard was the second largest meat company
in France, employing 3,000 people (1,200 at Quimperlé), with sales of six billion
francs, and ranked “the most profitable company in its sector. In terms of modern
management methods, Bigard is exemplary.”³ On July 28, 1995, management at
SA Groupe Bigard—which employed nearly a third of Quimperlé’s total working
population⁴—established new schedules for its deboning operations, which im­
posed three fixed five-minute toilet breaks; workers who went to the bathroom
outside of these three periods were subject to wage docking of 50 francs (about
$10) for “‘abandoning their post.’” Immediately upon being informed of the new
work rule, the communist-led union CGT (Confédération Générale du Travail)
protested.⁵

¹Arthur Miller, All My Sons, in Three Plays About Business in America 187-266 at
240 (Joseph Mersand ed. 1968 [1947]).
²See below ch. 13.
³France: Quest for Improved Productivity Behind Dispute at Bigard,” Reuter Textline:
⁴Andrew Jack, “French Factory Workers Flushed with Victory,” Financial Times,
⁵Lamouroux v. SA Groupe Bigard, No. 9500433-436, slip op. at 2 (Conseil de
The following week witnessed a three-day strike by 250 beef-deboning and hog-cutting workers in protest against having to “faire pipi à heure fixe” such as 8:05 a.m., 11:20 a.m., and 2:05 p.m. Beginning on Friday August 4 and continuing on Monday and Tuesday, the workers marched in the streets of Quimperle slowing lunch-time traffic. The CGT requested that the state factory inspectors investigate the new work rule, which the union believed violated Article L. 122-35 of the Code du Travail, which prohibits work rules that place restrictions on the rights of persons and individual and collective liberties that would not be justified by the nature of the task to be accomplished or proportionate to the goal sought. In view of the determination of both sides and the workers’ sense that their dignity had been deeply wounded, the country’s leading newspaper, *Le Monde*, predicted that only the state factory inspectors’ intervention could resolve the conflict.6

According to CGT shop steward Alain Lamouroux (who would soon become the lead plaintiff), the “dispute sounds like something from the 19th century. We are demanding to go to the toilet according to each person’s needs, not at the blow of a whistle. This should be a human right.” The strike ended when the owner, Lucien Bigard, abandoned the plan of docking 50 francs per day from a worker’s holiday bonus for spending too much time in the bathroom or going there at the wrong time; nevertheless, he still insisted on fixed breaks, outside of which “workers would need special permission from bosses.” Bigard’s justification was that they “were spending too long socialising at the toilets,” while the unions argued that he was “trying to boost productivity at an already profitable and expanding business.” Thus despite the initial compromise, Lamouroux speculated that they might still “have to end up in court.”7 In general “the CGT feared especially that ‘the search for productivity at any price would lead heads of businesses to harden the rules.’ The union judges the Quimperle affair as so much the more serious as it is not the deed of a small employer taken by whim, but the decision of a group that employs a total of 2,500 people.”8

Unlike the non-analytic reporting of the Jim Beam dispute by the press in the United States, *Le Monde* devoted a serious 2000-word article to analyzing the roots of the problem. Basically the newspaper saw Bigard’s toilet rule as “the


8Lecluse, “‘Acte unilateral de l’employeur.’”
outcome of a frantic race for productivity," while social legislation "remains mute on the problem of toilet breaks." The article began dramatically with the symbols of the sea change in French class struggle:

Each era has the seminal conflict it deserves. In 1973 the workers at Lip, in Besancon, inaugurated twenty years of struggle for employment. In 1995, in Quimperle (Finistère), the Bigard workers defended the right to go to the toilet freely! Don’t laugh! This affair of pauses-pipi at fixed times imposed by the management...is not, alas, ridiculous. It is neither a blunder of backward enterprise nor a resurgence of the 19th century. But the logical outcome of a disturbing evolution. A conflict of productivity. A conflict of this end of the century.

Arriving at Quimperle, one expects Zola. One finds a laboratory. ...

According to all the criteria of modern management, [Bigard] is an exemplary success. ...

Bigard can also boast of a sophisticated social management. The wages are above the average for the sector, the restaurant of the enterprise is as modern as the workrooms, where hygiene, cold (7 [degrees centigrade] maximum), and automation prevail. Five years ago the former head of personnel was replaced by a young director of human resources imbued with all the techniques of management. Flexibility, schedules à la carte, skillful use of all the resources of the law and massive recourse to temps—everything has been placed in the service of productivity.

A little too much, precisely. In its desperate race for competitiveness, Lucien Bigard has forgotten that his employees are humans. Modernization at a forced march of the business has been done at their expense. ...

Not that the tasks here are more arduous than elsewhere, but the ambience is execrable, the tension permanent, the rhythms infernal. ...

The new technologies are supposed to make work easier. ... But the modern material increases the rhythms and the stress, hence the accidents, explains a cutter. 240 work accidents in 1994...for 1,200 employees. ...

...Constraints of delivery compel, the chopped-meat departments felt compelled to work the weekend, at first overtime hours then at normal rates, thanks to the progress of social legislation in the matter of flexibility. ... Summer vacations have been limited to two weeks. ...

...A system of financial penalties punishes every absence or lateness, even for sickness, at the rate of 50 francs per day....

The introduction, this summer, of toilet breaks at fixed times in certain departments, coupled, here too, with financial penalties in the case of infractions, was, by this logic, only one additional small step. Designed officially to sanction established abuses and, secondarily, to increase productivity, which, according to management, is said to have dropped 10% in six months.

One step more. One step too many. In Quimperle, it is said with humor, the toilet-break affair was the drop of water that made the vase overflow.

...But the affair has not ended. The toilet breaks at fixed times are going to be experimented with for a month in two workrooms, and one will see where things stand. ...

Management has not even realized that this decision constituted a social regression
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and a first in France. ...

Lucien Bigard is not a social employer. Far from it. ... All he is doing is pushing to its conclusion the logic of productivity, forced by international competition and the demands of the market always to do more. An extreme case. Nothing more. ... Secretly, the other employers are applauding.9

Lamouroux, the representative of the CGT, the strongest union at Bigard, declared: "'On the eve of the year 2000, it seems aberrant to us to become robots required to go to the toilets at fixed times.'"10

On October 5, Lamouroux and four others filed suit in county court (Tribunal de Grande Instance) seeking a temporary injunction requiring Bigard to withdraw its new work rule (under penalty of delay of 50,000 francs per day based on Article 809 of the New Code of Civil Procedure) and to pay each of the petitioners 2,000 francs (based on Article 700). They argued that the rule derogated from the worker’s private life and his physical integrity and contravened a simple natural law. They also brought to bear the aforementioned breach of the Labor Code.11 But the civil chamber of the court, agreeing with the employer’s arguments, declared its incompetence to hear the case and referred the plaintiffs to the Conseil des Prud’hommes.12

The Conseil, the world’s oldest system of labor courts, dating back to 1806, specializes in conciliation of individual labor disputes.13 Each sitting Conseil


10Jack, "French Factory Workers Flushed with Victory."

11Lamouroux v. Bigard at 3. Article 809 states: “Le président peut toujours, même en présence d'une contestation sérieuse, prescrire en référe les mesures conservatoires ou de remise en état qui s'imposent, soit pour prévenir un dommage imminent, soit pour faire cesser un trouble manifestement illicite. Dans les cas où l'existence de l'obligation n'est pas sérieusement contestable, il peut accorder une provision au créancier, ou ordonner l'exécution de l'obligation même s'il s'agit d'une obligation de faire.” Article 700 states: “Comme il est dit au I de l'article 75 de la loi n° 91-647 du 10 juillet 1991, dans toutes les instances, le juge condamne la partie tenue aux dépens ou, à défaut, la partie perdante à payer à l'autre partie la somme qu'il détermine, au titre des frais exposés et non compris dans les dépens. Le juge tient compte de l'équité ou de la situation économique de la partie condamnée. Il peut, même d'office, pour des raisons tirées des mêmes considérations, dire qu'il n'y a pas lieu à cette condamnation.”


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consists of four lay judges, two each from the employees’ and employers’ side.\textsuperscript{14} If the Conseil is equally divided in a case, the matter is remanded to the same Conseil, this time presided over by a professional judge from a civil court of first instance.\textsuperscript{15}

On October 25, 1995, the petitioners referred the matter to the Conseil des Prud’hommes\textsuperscript{16} requesting withdrawal of the employer’s measures, and the parties convened a hearing for November 17, at which the plaintiffs, basing themselves on the aforementioned Article 122-35 of the Labor Code, requested both that the principle putting in place the obligatory toilet breaks be declared unlawful and a declaration that, in so far as necessary, the employees’ freedom to go to the toilet could not be restricted or subject to the foreman’s authorization, except to sanction abuses duly established. For its part, Bigard, calling attention to the new measures taken following the meeting of the works committee on October 31, 1995, argued that the employed had the possibility of leaving after having informed the foreman; consequently it requested that the Conseil declare that the system of toilet breaks at fixed times with deviations did not constitute an attack on the workers’ individual liberties. At a proceeding on November 23, the Bureau de Judgment (judgment board), declared itself equally divided, as the two employee members opposed and the two employer members favored Bigard’s new rule, and remanded the matter for a Départage hearing on January 15, 1996, at which the independent judge would resolve the stalemate between the two groups of lay judges.\textsuperscript{17}

At that hearing, the workers, “conscious of the responsibilities weighing on them and of organizing production for the best,” made the following proposal to management: 1. the three five-minute breaks would be retained, but they would

\textsuperscript{14}Code du Travail Art. 512-1.
\textsuperscript{15}Code du Travail Art. 515-3.
\textsuperscript{16}According to Article 422.1.1: “Si un délégué du personnel constate, notamment par l’intermédiaire d’un salarié, qu’il existe une atteinte aux droits des personnes ou aux libertés individuelles dans l’entreprise qui ne serait pas justifiée par la nature de la tâche à accomplir ni proportionnée au but recherché, il en saisit immédiatement l’employeur.

“L’employeur ou son représentant est tenu de procéder sans délai à une enquête avec le délégué et de prendre les dispositions nécessaires pour remédier à cette situation.

“En cas de carence de l’employeur ou de divergence sur la réalité de cette atteinte et à défaut de solution trouvée avec l’employeur, le salarié, ou le délégué si le salarié concerné averti par écrit ne s’y oppose pas, saisit le bureau de jugement du conseil de prud’hommes qui statue selon les formes applicables au référé.

“Le juge peut ordonner toutes mesures propres à faire cesser cette atteinte et assortir sa décision d’une astreinte qui sera liquidée au profit du Trésor.”

\textsuperscript{17}Lamouroux v. Bigard slip op. at 3-5; Jack, “French Factory Workers Flushed with Victory.”
not be called toilet breaks and could be used for any reason other than going to the toilet; 2. recognition of the employee’s absolute freedom to go to the toilet outside of those breaks, in case of necessity; 3. informing the foreman of the fact that the employee has to leave the chain to go to the toilet; and 4. possible sanction of abuses that could be verified in conformity with the work rules. In support of their demands the workers alleged that going to the bathroom did not cause any disruption in the deboning department inasmuch as a co-worker could take over the work. At the hearing the workers recognized that the employer’s position had become somewhat more flexible in that they were permitted to go to the bathroom outside of the breaks after having informed their supervisor. However, this permission was subject to the work rules, which provided that in operations requiring a continuous presence, the worker was not permitted to leave his post without making sure that his replacement was present; if such was not the case, he had to alert his supervisor and remain at his post for the time it took the latter to organize the work. Thus the workers argued that according to the work rules, even a momentary absence was subject to the supervisor’s authorization and to the condition that a replacement be found. The workers argued that this system was unlawful with respect to the guarantee in Article 9 of the Civil Code that everyone has a right to respect of his private life and to the aforementioned Article L. 120-2 of the Labor Code, inasmuch as subjecting workers’ freedom to go to the bathroom to a supervisor’s authorization was in principle contrary to the employee’s fundamental rights. Indeed, they regarded it as not only a restriction, but “a suppression pure and simple” of that freedom, adding that “the necessities of production cannot in any case permit establishing such a regime that interferes with the employee’s physical integrity.” Indeed, they went so far as to assert that alone the name “toilet breaks” was an assault on their dignity.18

In response, Bigard defended its break system on the grounds that it was situated within the framework of the normal exercise of the employer’s power in that it had to rationalize the absences of workers going to the bathroom with respect to the imperatives of production. Bigard also pointed out that it was entitled to organize these breaks since they were part of compensated work time. The employer also stated that it did not understand why the workers violently rejected the term “toilet breaks” in contrast to other terms such as meal and snack breaks. The employer also argued that if there was any affront to rights and individual liberties, it was “justified by the necessities of the work on the chain and completely proportional to the goal pursued.” Bigard asserted that by virtue of the interdependence of the various work stations, the sudden absence at one station disorganized the functioning of the chain downstream.19

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18Lamouroux v. Bigard, slip op. at 5-7.
19Lamouroux v. Bigard, slip op. at 7-8.
At this point, the Conseil, agreeing with the parties that their positions were drawing closer, proposed another hearing for February 19, 1996, but the parties were given until January 25 to negotiate; however, they reached no agreement. On January 24 Bigard made the following proposal: 1. institution of three paid five-minute collective breaks for recuperation and satisfaction of physiological needs; 2. the employees have the freedom to go to the bathroom outside of these breaks if necessary; 3. employees leaving their work station outside of the breaks have to inform their supervisor so that replacement of the worker can be effected beforehand if that turns out to be necessary; and 4. management reserves the possibility of penalizing possible abuses. If the plaintiffs did not accept the proposal, Bigard requested that Madame le Juge Départiteur declare it satisfactory.\textsuperscript{20}

Taking exception to point 3, the workers on January 25 counter-proposed the additional clause that "the freedom to go to the bathroom cannot be conditioned on the replacement of the worker leaving his station." To be sure, the workers also proposed another provision requiring Bigard to replace workers immediately. On January 29 Bigard undertook to do what was necessary to make the replacement of workers possible, but the employer insisted that any agreement was applicable only to the beef deboning department. It then made its final offer, which centered on this provision: "In order to permit the replacement of employees before leaving their work station momentarily outside of the breaks," Bigard would put in place a crew of four employees. Bigard also proposed putting this plan into effect for six months during which the parties could return to the Conseil if it proved difficult to apply. On the same day, the workers, insisting that Bigard’s plan continued to infringe on their liberty, proposed that workers should be free to go to the bathroom outside of breaks, subject only to informing their supervisor and penalization of possible abuses. In addition, they accepted Bigard’s proposal of putting in place a crew of replacements. Importantly, the workers also stressed "the fact that it behooves the employees involved to make proper use of this freedom in connection with a corollary—the sanctioning of possible abuses. The sanctioning of these abuses constitutes a sufficient guarantee for the Bigard Company.” Having fallen short of accepting the company’s position, the workers then asked the Conseil to resolve the litigation.\textsuperscript{21}

In handing down its decision on March 18, 1996, the Conseil observed that agreement between the parties had stumbled over the word “beforehand,” which expressed the employer’s intent to organize the conditions of the exercise of the worker’s freedom to go to the bathroom outside of breaks. The Conseil observed that “the fact of going to the bathroom responds to a physiological need that only the individual is in a position to judge. It is indeed a question of a fundamental

\textsuperscript{20}Lamouroux v. Bigard, slip op. at 8-9.

\textsuperscript{21}Lamouroux v. Bigard, slip op. at 10-12.
freedom of the human being. The principle therefore is that of everyone's freedom to exercise the right to go to the bathroom solely at his convenience. Nevertheless, it is appropriate to admit that certain circumstances (trips, lack of public toilets...) constitute momentary constraints, independent of the will of the affected person but equally independent of the will of a third party." The Conseil however noted that the dispute before it did not fit within that framework because it was the employer, to which the worker is subordinated, that intends to organize the conditions of exercising the right to go to the bathroom. It is based on its power of organization and management. Even under its revised proposal, Bigard "intends to arrogate to itself the right to decide that the employee should or should not, according to the circumstances (necessity of replacement), defer the exercise of this right...." The Conseil concluded that it could not consider that such an affront to a fundamental right, even if it were justified by the nature of the task, would be proportional to the goal sought. Moreover, "the employer’s power of management cannot extend to governing a fundamental right pertaining to the employee’s private life. To admit the lawfulness of such an intrusion into private life would certainly open the door to abuses of every sort and more particularly of the ‘little bosses’ with regard to employees vis-à-vis whom they could be opposed with respect to a disputed matter of whatever nature." And in this regard the fact that Bigard took every measure for providing a rapid replacement of the employee could not justify validating its proposal.22

Thus the Conseil, agreeing with the workers, declared that the obligatory toilet breaks were unlawful, that “the right to go to the bathroom cannot be subject to authorization by a third party or prior replacement of the parties concerned,” and that the workers’ final proposal was satisfactory and in conformity with the law.23 Two days later Le Monde observed that the tribunal’s ruling had adjudged the employer’s effort at “taylorisation de la pause-pipi” as based on an unlawful practice, which, the newspaper added, was “above all profoundly humiliating and stupid.”24

The French resolution of the conflict was thus both more principled and more radical than OSHA’s method. As is only appropriate for an agency charged with protecting workplace safety and health, OSHA felt that it was constrained to root its policy of insuring urinary well-being in clinical urological findings concerning urinary tract infections and other adverse health effects associated with excessive urine retention. And even within this strictly medical framework, OSHA shunned an absolutist approach, grafting, instead, on to at-will bathroom breaks a reasonableness criterion that conferred some discretion on employers to give limited

22Lamouroux v. Bigard, slip op. at 12-14.
23Lamouroux v. Bigard, slip op. at 15.
weight to their own economic interests by interposing reasonable delays before workers could stop work to go to the bathroom.\textsuperscript{25} In contrast, the Conseil des Prud’hommes deprived the employer of any right to determine when and how often workers go to the bathroom; instead, it focused the resolution of the dispute on the workers’ absolute and fundamental moral and human rights of autonomy in their private lives, even when they were living those lives at the workplace and on the employer’s clock. The Conseil merely accorded the employer, as the workers themselves had already done, a subsidiary, after-the-fact, role in punishing abuses.

To be sure, no U.S. court has issued a decision that even remotely combines this expansive practical and moral sweep. Nevertheless, at least one federal judge in 1997 made a start with regard to a state tort claim for intentional infliction of emotional distress brought by a cashier against an electric utility company. In spite of a letter from her physician to the employer stating that her medication for Major Affective Disorder might make her need to go to the bathroom more often than usual, the company systematically denied her requests for an accommodation; instead, it permitted her to go the bathroom only twice a day. In denying the employer’s motion for summary judgment, the court declared that it “realize[d] that using the restroom is a basic human function and to limit it in an unreasonable way would be to deny an individual’s ‘humaness,’ and is an outrageous restriction on human rights thus raising it to a level of being ‘utterly intolerable in a civilized community.’”\textsuperscript{26}

\textsuperscript{25}See above ch. 6 and below Appendix II.
