Void
Where Prohibited
Revisited

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

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Fănpîhuà Press
Iowa City
2003
Part V

Post-April 6, 1998 Enforcement

OSHA’s focus on this issue has left some people shaking their heads in disbelief.¹

The Few, The Proud, The Citations

One OSHA watcher said this issue was really an eye opener for him. "We talk about implementation of new standards and how important they are for worker safety and pat ourselves on the back for making workplaces safer. But the reality for many people is that it is still the Dark Ages. They work for employers who don't allow them to use the bathroom. They are not accorded even that basic human necessity."¹

Which Is Worse—No Access or No Toilets?

Since OSHA officials themselves freely admit that they do not know whether the Memorandum has had any impact on compliance,² it is necessary to try to piece together disparate indicators in order to gain some empirical sense of the overall national enforcement effort and compliance response. This chapter is devoted to constructing a nationwide statistical overview of the citations that OSHA has issued to employers for restriction of employees’ access to the toilet since April 6, 1998 and trying to explain why the agency has not cited more employers.

Because the OSHA Memorandum securing workers the right to go to the bathroom when they need to is an interpretation of 29 CFR section 1910.141 (c)(1)(i), which on its face requires employers to provide their employees with a certain number of toilets, any citations that the agency issues for violations of this standard are statistically ambiguous: computerized data bases that capture only the subsection of the standard (in this case, 1910.141(c)(1)(i)) that has been violated do not and cannot distinguish between the two distinct concrete violative circumstances—provision of too few toilets and restriction of access to (what may or may


²E.g., telephone interview with John Hermanson, Assistant Regional Administrator for Enforcement Programs, Chicago Region (Nov. 27, 2002).
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not be the proper number of) toilets. So long as these two different kinds of violations share the same standard subsection and summary statistical space, they cannot be sorted out. The only way to segregate one from the other is by examining the actual citations, which do specify the factual details of the violations. The results of that examination constitute the core of this chapter, but an initial review of the larger universe of toilet standard violations will place restrictions of toilet access in a broader context of degraded and degrading working conditions.

Over the three decades of its existence OSHA has issued many thousands of citations for violation of its toilet standard. From July 1972 through the end of 2002, Federal and state OSHA cited employers more than 2,893 times for violating 29 CFR section 1910.141(c)(1)(i)—an imprecision resulting from the fact that only Federal OSHA's computerized records go back to 1972, while those of the state agencies begin in various years from 1979 to 1990. Inclusion of the citations issued by state programs that use different designations in their code of regulations increases the total by at least 1,418.

The fact that the hundreds of citations that OSHA has issued since April 6, 1998 to employers for failure to provide (or even to have) the proper number of toilets are not the focus of this study does not mean that this particular violation is unimportant. Indeed, where, as in many cases, employers failed to provide any toilet at all, the end result for the workers may have been exactly the same as in those workplaces where employers denied their employees access to toilets that did exist. Even where there were toilets in a workplace, but not enough (or properly functioning ones), several OSHA inspectors in Indiana, for example, expressly stated on citations that the possible injuries had been a "urinary tract infection" or "Bladder damage caused by employee not using bathroom facility as needed."

Nevertheless, there are differences between these types of violations. Most strikingly, the failure to provide any toilet at all is not only a blatantly undeniable violation of an unambiguous OSHA standard (and public health laws and ordi-
The Few, The Proud, The Citations

ances), it is also such an outrageous affront to universally accepted standards of hygiene that offending employers would, if their identities were publicly disclosed, be regarded as contemptible pariahs. Their tone was captured by an OSHA inspector, responding to a complaint from workers at a nonunion freight terminal in Secaucus, New Jersey, where “[t]oilets and urinals had been inoperable for several months.” The terminal manager, who admitted to the inspector that “the toilet room had not been in use for about 6 months,” in the presence of other managers responded to the inspector’s “query as to why the toilet room had not been repaired...They (dock workers) are animals.”

Surprising as it may seem in the twenty-first century, OSHA has issued numerous citations to employers for failing to provide any toilet at all. For example, in Kentucky in 2001, a nonunion sawmill manufacturing pallet boards had no restrooms: “The employer said that there was an outhouse out back, but this inspector did not follow-up on this. There is one female employee on site, and she is allowed to go to the McDonald’s restaurant. The employer said that he would get a portable toilet for the employees.” Scarcely better was a nonunion sawmill in El Dorado Springs, Missouri, which was fined $800 (reduced to $120 following a formal settlement), after a Federal OSHA inspector in 2000 found that male and female employees were provided with one ‘outhouse’ for use as a toilet. The facility lacked any type of plumbing or sanitary waste disposal system and consisted of a roofed three-wall building (the door, which would have made up the fourth wall, was missing), an interior wooden floor and a wooden frame constructed over a hole in the ground. The toilet ‘seat’ consisted of two loose boards laying across the otherwise open-top wooden frame. No toilet paper was provided.

Since OSHA had revoked the toilet paper requirement 22 years earlier, the nod to long-gone regulatory sensibilities was, to be sure, a nice inspectorial touch.

A small wood products company in North Carolina that provided no toilets in 2001 told its “employees to go to the woods.” A Kentucky OSHA compliance officer perfected the circumlocution when, responding to a complaint, he cited (but

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9C & F Lumber Co. Inc., Insp. No. 304699440 (Oct. 3, 2001); Narrative furnished by Kentucky OSHA.
10Citation and Notification of Penalty, Superior Lumber Co., Insp. No. 303207062 (issued Dec. 14, 2000).
11See above ch. 4.
12Vickery Farms, Inc., Insp. No. 304278831, Narrative OSHA -1A (Feb. 27, 2001). The employer was fined $150 for a serious violation. http://www.osha.gov/cgi-bin/est/estlvd?30427883101001A
imposed no monetary penalty on) a six-employee, nonunion sawmill, where "no restroom is provided to employees. Employees use the restroom in the woods...."13

The absurdly lenient attitude that some inspectors have adopted toward employers committing such violations can be gauged by the following compliance officer observations in a case, triggered by a complaint, involving numerous safety and sanitation violations by a nonunion metalworking firm with seven employees in a small town in Kentucky:

The building has no running water at all, hence no drinking water, no hand-washing facilities, and no toilet. ... At the present time, the employer allows the employees (usually only two) to go to a filling station approximately one-quarter mile away to use their restroom facilities. On hot days, he supplies gatorade to his employees. While the employer is clearly not in compliance with OSHA Standards, he is not totally unreasonable in his treatment of his employees.14

Nor was the inspector "totally unreasonable in his treatment" of the employer, proposing a zero-dollar penalty.15

On the other hand, even in such workplaces workers may actually face few or no restrictions on their ability to stop work to go find a toilet elsewhere or to void in the open. The cheapness displayed by employers who refuse to pay for the purchase and installation of toilet facilities may be irrationally confined to those sunk costs and not extend to the additional time lost to production while their employees are searching for or walking to remote toilets. ("[D]isgusting" rather than irrational cheapness characterized the practice enforced by the Fairfax County Maryland public works department of requiring the employees who repair its sewer pipes to urinate into buckets, open a manhole cover, and dump the urine into the sewer system "because it would delay work if they went looking for a public restroom.")16 In fact, according to the executive director of the Portable Sanitation Association International, which is charged by the American National Standards Institute with developing its Sanitation in Places of Employment standard, such irrational cheapness is not at all uncommon among smaller nonunion construction employers, who refuse to spend the money to rent portable toilets in spite of being

14CMC Metalworking, Insp. No. 303125017 (Nov. 24, 1999); Narrative furnished by Kentucky OSHA.
15This information, which is lacking on the OSHA website, stems from a computer print-out of citations for violations of 29 CFR 1910.141, which Kentucky OSHA prepared for the author (Sept. 23, 2002).
presented with actual studies proving that the savings in wages that do not have to be paid to workers for driving to and from distant toilet facilities far exceed the rental cost.\textsuperscript{17}

\textbf{There Really Are Violations and Even Some Citations}

When, in the course of interviewing Sheldon Samuels, who for many years had been the energetic and capable director of Occupational Safety, Health, and Environmental Affairs of the Industrial Union Department of the AFL-CIO, the author mentioned that part of the research for this book involved identifying all the OSHA citations that had been issued since 1998 for restricting workers' access to toilets, Samuels's immediate reaction was: "You're not going to find any citations." The basis for his prediction of the lack of any evidence of enforcement was twofold: employers would be too embarrassed to deny access and getting to go to the bathroom was simply not that big a problem.\textsuperscript{18} And yet there are many denials of access by employers and some citations. One of the chief reasons for presenting thickly described narrative accounts of the circumstances surrounding the cited denials of access is to persuade skeptics, including some who should know better, that such implausibly oppressive workplace practices really do exist.

The exposition of the citation statistics begins with the Federal OSHA system, followed by an overview of the state-plan OSHA programs. In the two following chapters, the two state OSHA programs that have most vigilantly enforced the new interpretation embodied in the Memorandum are examined in detail: Iowa's citation of several large animal slaughter plants and Kentucky's citation of Jim Beam Brands, which the media turned into a high-profile case. Special attention is then focused on two additional states, Washington and California, because the former had taken the position before 1998 that denial of access was unlawful and actually

\textsuperscript{17}Telephone interview with William Carroll, executive director, Portable Sanitation Association International, Bloomington, MN (Jan. 17, 2003); Scott Bruce, "Provisions for Sanitation Facilities at Construction Sites" (Aug. 15, 1988) (the studies); Portable Sanitation Association International, "Putting One on the Right Spot" (ca. 2001) (flyer stating that four dollars could be saved for every dollar spent).

\textsuperscript{18}Telephone interview with Sheldon Samuels (Nov. 23, 2002). In 1972, at the principal OSHA public hearings on the future of the toilet standard, Samuels had testified on behalf of the Industrial Union Department of the AFL-CIO: "I have no objection to the proposal on the numbers of toilets.... I'm sorry we have to be so concerned about toilets when we are worried about carcinogens, but we are not really terribly excited about that issue." United States Department of Labor, Occupational Safety and Health Administration, "Hearing on Proposed Revision of Sanitation Standards" at 108 (Nov. 9, 1972, Washington, D.C.).
issued a citation on that basis, whereas the latter is the only state-plan agency that not only has never issued such a citation, but programmatically refuses to do so on the grounds that it is not obligated to enforce the standard as effectively as Federal OSHA does.

The citations that OSHA has issued to employers for having restricted employees' access to the bathroom since April 6, 1998 are summarized in Tables 1, 2, and 3. Tables 1 and 2 present summary information about the nine citations issued by Federal OSHA and 11 state OSHA citations for denial of access, respectively. Since the citation is linked to a violation of standard 1910.141(c)(1)(i) (or the equivalent state OSHA standard), which also encompasses the obligation to provide a certain number of toilets, Table 3 shows both the total number of citations issued by state-plan agencies under this standard and the subset dealing with denial of access. This very small number of access citations over a period of almost five years should be contrasted with the erroneous figure published by the *Wall Street Journal* in its account of the Jim Beam case (which was then repeated by others): “OSHA cites 30 to 50 employers a year for violations.”

Federal OSHA

Half a year after OSHA had promulgated its Memorandum, the author requested information from the agency on the citations it had issued pursuant to the new interpretation; in response, OSHA disclosed that it had issued two such citations for “serious” violations pursuant to complaints made by employees at union-

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19Carlos Tejada, “Work Week,” *Wall Street Journal*, Aug. 28, 2002, at B3, col. 1. For a similar claim (presumably taken from the *Wall Street Journal*), see Employment Law Report, 6(14):2 (Oct. 2002) (Lexis) (“OSHA cites 30 to 40 employers a year for violations of the ['timely access'] rule”). Tejada’s source, Bill Wright at OSHA’s Office of Public Affairs, emailed him data for violations of 29 CFR 1910.141(c)(1)(i) for fiscal years 1995 through 2002; they totaled 29, 21, 42, 39, 40, 46, 31, and 27 (through Aug. 23, 2002), respectively. Email from Bill Wright, OSHA Office of Public Affairs, to Carlos Tejada, Wall Street Journal, forwarded to Marc Linder (Aug. 26, 2002). Wright later stated that he knew that the data he had given Tejada did not distinguish between failure to provide the proper number of toilets and failure to give prompt access, and that he did not know that, let alone why, Tejada had gotten them wrong. Wright did not himself generate the data—he has access only to OSHA’s public website, which can generate data only for 1910.141 (and not its subsections) and only for the immediately preceding fiscal year—which he obtained from someone at OSHA he did not identify. Telephone interview with Bill Wright (Dec. 23, 2002). The reason for the discrepancy is not clear, but a search of the Lexis-Nexis OSHAIR file found two to three times more citations for these years than those mentioned by Wright, who expressed little interest in the discrepancy.
<table>
<thead>
<tr>
<th>Employer name</th>
<th>Location</th>
<th>Business or occupation</th>
<th>Union status</th>
<th>Inspection type</th>
<th>Violation type</th>
<th>Penalty ($)</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ree’s Contract Service</td>
<td>Kansas City MO</td>
<td>Guard</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious</td>
<td>1,125/562.50</td>
<td>1998</td>
</tr>
<tr>
<td>Steel of W. Virginia</td>
<td>Huntington WV</td>
<td>Steel plant</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious</td>
<td>1,500/750</td>
<td>1998</td>
</tr>
<tr>
<td>SIM &amp; S</td>
<td>St. Louis</td>
<td>Dispatcher</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>1998</td>
</tr>
<tr>
<td>Spectaguard</td>
<td>Jersey City NJ</td>
<td>Guard</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>1999</td>
</tr>
<tr>
<td>Raven Management</td>
<td>Kearneysville WV</td>
<td>Guard</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious</td>
<td>1,250/100</td>
<td>1999</td>
</tr>
<tr>
<td>Summit Security Services</td>
<td>New York City</td>
<td>Guard</td>
<td>Union</td>
<td>Complaint</td>
<td>Other</td>
<td>2,000/800</td>
<td>2000</td>
</tr>
<tr>
<td>Liz Claiborne</td>
<td>Montgomery AL</td>
<td>Clothing distribution ctr.</td>
<td>Union</td>
<td>Complaint</td>
<td>Other</td>
<td>1000/900</td>
<td>2001</td>
</tr>
<tr>
<td>Convergys</td>
<td>Killeen TX</td>
<td>Call center</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Serious/Other</td>
<td>1,125/0</td>
<td>2002</td>
</tr>
<tr>
<td>Securiguard</td>
<td>Kingsland GA</td>
<td>Guard</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious</td>
<td>975/600</td>
<td>2002</td>
</tr>
<tr>
<td>Employer name</td>
<td>Location</td>
<td>Business or occupation</td>
<td>Union status</td>
<td>Inspection type</td>
<td>Violation type</td>
<td>Penalty ($)</td>
<td>Year</td>
</tr>
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</tr>
<tr>
<td>City of S. Tucson Communication Center</td>
<td>Tucson AZ</td>
<td>Police call center</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>1998</td>
</tr>
<tr>
<td>Initial Security</td>
<td>Indianapolis</td>
<td>Guard</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Serious</td>
<td>0</td>
<td>2002</td>
</tr>
<tr>
<td>Excel</td>
<td>Ottumwa IA</td>
<td>Animal slaughter</td>
<td>Union</td>
<td>Complaint</td>
<td>Willful/serious</td>
<td>36,000</td>
<td>1999</td>
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<tr>
<td>John Morrell</td>
<td>Sioux City IA</td>
<td>Animal slaughter</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious/other</td>
<td>2,000</td>
<td>2001</td>
</tr>
<tr>
<td>Swift</td>
<td>Marshalltown IA</td>
<td>Animal slaughter</td>
<td>Union</td>
<td>Referral</td>
<td>Serious/other</td>
<td>1,875/1,000</td>
<td>2000</td>
</tr>
<tr>
<td>Swift</td>
<td>Marshalltown IA</td>
<td>Animal slaughter</td>
<td>Union</td>
<td>Complaint</td>
<td>Repeat</td>
<td>5,000/2,500</td>
<td>2002</td>
</tr>
<tr>
<td>Ardco</td>
<td>Elkton KY</td>
<td>Glass mfr.</td>
<td>Union</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>1998</td>
</tr>
<tr>
<td>CR/PL</td>
<td>Somerset KY</td>
<td>Bathroom partitions</td>
<td>Union</td>
<td>Complaint</td>
<td>Serious</td>
<td>975</td>
<td>1999</td>
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<tr>
<td>Jim Beam Brands</td>
<td>Clermont KY</td>
<td>Bourbon distillery</td>
<td>Union</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>2001</td>
</tr>
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<td>S. Carolina Dept. of Juvenile Justice</td>
<td>Columbia SC</td>
<td>Correction officer</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>2000</td>
</tr>
<tr>
<td>Custom Apple Packers</td>
<td>Quincy WA</td>
<td>Apple packing</td>
<td>Nonunion</td>
<td>Complaint</td>
<td>Other</td>
<td>0</td>
<td>1999</td>
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</table>
Table 3: Citations of Employers for Violating OSHA Toilet Standard 1910.141(c)(1)(i) (or State Equivalent) and Denying Toilet Access in State-Plan States from April 6, 1998 to Fall 2002

<table>
<thead>
<tr>
<th>State</th>
<th>Total Toilet Standard Violations</th>
<th>Of which Access Denials</th>
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</thead>
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<td>Alaska</td>
<td>2</td>
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<td>Arizona</td>
<td>6</td>
<td>1</td>
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<td>California</td>
<td>181</td>
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<tr>
<td>Connecticut</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Hawaii</td>
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<td>0</td>
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<tr>
<td>Indiana</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>Iowa</td>
<td>6</td>
<td>4</td>
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<tr>
<td>Kentucky</td>
<td>14</td>
<td>3</td>
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<tr>
<td>Maryland</td>
<td>13</td>
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<tr>
<td>Michigan</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
<td>0</td>
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<td>Nevada</td>
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<td>New Jersey</td>
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<td>New Mexico</td>
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<td>North Carolina</td>
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<td>Utah</td>
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<td>0</td>
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<td>Vermont</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Virginia</td>
<td>11</td>
<td>0</td>
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<tr>
<td>Washington</td>
<td>21</td>
<td>1</td>
</tr>
<tr>
<td>Wyoming</td>
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<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>329</strong></td>
<td><strong>11</strong></td>
</tr>
</tbody>
</table>
ized workplaces. The first citation was issued in July 1998 to Ree’s Contract Service, Inc., which “provides security services for federal government properties in several states under contracts with the Federal Protective Service of the General Services Administration.” In the course of providing security services at the Bannister Federal Complex in Kansas City, Missouri in June, according to OSHA, “employees were denied necessary use of bathroom facilities. Employees are not able to leave their posts for bathroom access during a four to five-and-half hour shift.” The $1,125 proposed penalty was halved by means of an informal settlement agreement.

The second citation was issued in September 1998 to Steel of West Virginia, a steel minimill, in Huntington, West Virginia, which produces specialty steel products such as I-beams, and in 1997, the year before it was acquired by a larger steel company, had sales of $113 million. Its approximately 500 production workers are represented by Local 37 of the United Steelworkers (USW), which organized the plant in 1937. According to the “instance description” on the inspector’s worksheet: “Company supervisor told an employee who had been having trouble with intestinal problems that he, the employee, could not go to the restroom until he had relief. The employee had to wait at least $\frac{1}{2}$ hour and was not provided with relief. He defecated in his pants.” At the closing conference with OSHA: “The employer representative admitted that he told the affected employee that he could not go to the restroom until he had relief. He gave the employee a directive not to shut the Torrit [waxing] Line down again. This was after the employee had previously shut the line down because he did not have relief to go to the restroom. The torrit line takes 9 employees to operate. Before the incident


Reed v. Kelly and Ree’s Contract Service, Inc. 37 S.W.2d 274, 276 (Mo. App. 2000).


The company was bought up in 1998 by Roanoke Electric Steel Corp. See http://www.swvainc.com.


Telephone interview with Scott Ramey, President, USW Local 37, Huntington, WV (Dec. 16, 2002).
the employee [ ] had shut the line down to go to the restroom. Mr. Dave McMillon, supervisor of the area came by and noted that the line was shut down and not in operation. Several employees told Mr. McMillon that the other employee [ ] was in the restroom and was having intestinal problems. Mr. McMillon started the line up (he was the 9th employee that it takes) and worked it. When [ ] came back from the restroom, Mr. McMillon acknowledged that he told [ ] not to shut the line down again.” The inspector then added this “NOTE: There are two relief people for the line but they provide relief for employees taking [rest] breaks. If the two relievers are relieving and the two employees who were being relieved leave the area, then there is no relief. This is why the employee shut down the line prior to Mr. McMillon coming to the area and re-starting it, and then giving [ ] directive not to shut the line down again unless he had relief.” Finally, the inspector made the following “POINTS- 1. There is not relief for this bathroom emergency. As stated the relievers relieve workers for their breaks. 2. The manager told [ ] he could not leave unless he had relief. 3. Employee stated that because the way he was directed by the supervisor not to shut down the line he feared being charged with insubordination.”

Background information provided by the president of Local 37, who had been head of the grievance committee at the time, sheds considerably more light on the labor-management dynamics prevailing in the plant. According to Scott Ramey, the worker in question is black and the supervisor, who was in fact superintendent of fabrication, “does not like black people,” of whom there are very few in the plant and several of whom have been fired in recent years. Although the president noted that bathroom access had never been a problem before or after this incident—workers also get 15-minute breaks every 90 minutes plus a meal break—he stressed that it fit well within the management’s recent pattern and practice of taking “sadistic glee in dehumanizing people,” which he dated back to the advent of a new vice president for human resources at the beginning of 1998, who boasted of his union-busting career. Unlike reports from the USW in several other steel mills, which stressed that workers’ freedom of access to the bathroom was a function of the fact that they were little supervised and basically ran the operation, Ramey’s account noted that workers at Steel of West Virginia were very closely supervised and frequently harassed by an inefficient overabundance of foremen. He had personally heard them declare their management policy that “you treat a

27Steel of West Virginia, Insp. No. 300460292, Worksheet, OSHA-1B (Sept. 1, 1998). The square brackets [ ] indicate that OSHA deleted the name of the worker. In fact, in two places the FOIA officer neglected to redact the name, but there is no need to divulge it. According to the company’s human resources director, the wax line is really called “torrid” and not “torrit.” Telephone interview with Bruce Groff, Huntington (Dec. 17, 2002).

28See below ch. 16.
guy like crap, he’s gonna work harder.” The president also contested the OSHA finding that the complaining worker had shut down the line: he contended that it was not necessary because other workers could take over the work for a colleague who left the line for a brief toilet break. The worker who had been made to defecate in his pants was a member of the grievance committee, but still chose not to grieve his treatment; instead he filed a discrimination claim with the Equal Employment Opportunity Committee in addition to the OSHA claim.  

The vice president for human resources, Bruce Groff, offered an entirely different view of events. Of central importance was his denial that the worker had ever defecated in his pants: although neither side had proof that he had or had not done so, Groff believed that the employee, whom he described as a disciplinary problem and “disenfranchised guy” who was as “unfortunate” for the union as the company, had simply lied as part of a pattern of causing problems for the company, including the filing of a race discrimination suit. Despite his belief that there was no basis to the citation, the human resources director decided not to contest the citation because the “adverse publicity” and being “dragged through the mud” were not worth the fight. While emphasizing that the company was not at all shy about litigating—in fact, Steel of West Virginia had a “huge” litigation bill, which he attributed to the “Appalachian factor” and an “I’m entitled, I’m entitled” attitude—Groff, when reminded of and furnished additional information about the Jim Beam dispute, expressed both incredulity at that firm’s decision to expose itself to such public ridicule and criticism of a management style that would have prompted such a confrontation in the first place.

This set of events underscores how even at a unionized place of employment, protected by a relatively strong union, individual workers may be subject to unhygienic forms of harassment by supervisors. Ultimately OSHA cited the company on the grounds that: “Employee was not permitted to use the restroom during a period when he was having intestinal problems.” But at the informal conference, at which the $1,500 penalty was halved, the violation language was softened to read: “relief [sic] persons were not readily available.”

In the beginning of 2000, an attorney interested in the problems of toilet access

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29Ramey did not know what had come of the EEOC complaint. Telephone interview with Ramey.

30Telephone interview with Groff. Since it is very unlikely that OSHA would ever appear on the scene quickly enough to be in a position to inspect fresh physical evidence of such alleged defecation, the evidentiary superiority of flinging the freshly sodden pants at a supervisor, whose instinctual imposition of instant discipline would then preclude him from denying the truth of the allegation, is easy to appreciate. For a perhaps unique case, see Marc Linder and Ingrid Nygaard, Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time 166-67 (1998).

The Few, The Proud, The Citations

for the transgendered made a Freedom of Information Act request to OSHA for all citations and settlements based on the April 6, 1998 Memorandum. OSHA replied that a search of its citation database had identified 66 citations issued between April 6, 1998 and December 31, 1999 under 29 CFR section 1910.141(c)(1)(i), but that according to reports from the field offices: “The vast majority of the...citations were issued for lack of any toilet facilities, not having a sufficient number of toilets, being located too far away from the work area, or for not having a door that could be locked when the facilities were shared by males and females. Only...five were found to be responsive to your request.”

Since two of these five had already been disclosed to the author, only three additional citations had been issued during the last quarter of 1998 and all of 1999 (within the Federal OSHA system).

The first of these three involved a non-union employer in the service industry (not otherwise classified) headquartered in “Tallahomo” [sic; should be Tullahoma], Tennessee, but operating in St. Louis, whose “[t]oilet facilities were not readily available for employee(s) who are required to work eight to ten hour shifts and are not allowed to leave their work stations unattended.” For this “other than serious” violation the citation, triggered by a complaint, included no monetary penalty. The citation did not disclose that the employer, SIM & S, Inc. (Systems Integration/Modeling, and Simulation) is “a provider of advanced systems engineering and other information technology solutions.... Although classified as a small disadvantaged 8(a) Business [for Small Business Act purposes], SIM&S believes in open competition.” The inspection took place at 1520 Market Street in St. Louis, the location of the Federal Building and the General Services Administration, for whose satellite communications center SIM&S “provides trained and certified dispatchers and operates an Alarm Monitors Center 24 hours a day, seven days a week....”

The second citation, also triggered by a complaint from a nonunion workplace, was issued to Spectaguard, Inc., another guard service, in New Jersey, which “did not provide toilet facilities that were accessible without restrictions for employees required to guard outside parking lot stations/posts.” The violation was classified as other than serious and OSHA imposed no monetary penalty. The employer abated the problem—which had arisen from the fact that an employee needing to void had contacted the security station at the hospital where a shuttle driver was dispatched to relieve the officer—by adding a parking lot supervisor as a relief person, thus reducing response time to one or two minutes.

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32Letter from Richard Fairfax, Director, Directorate of Compliance Programs, OSHA, to Phyllis Randolph Frye (Mar. 9, 2000).
33S.I.M. & S., Inc., Insp. No. 302253919 (Dec. 2, 1998). The employer was located in Tennessee, but the inspection site was located in St. Louis.
The third and final citation involved Raven Management Corporation, a firm with an office in Dunn, North Carolina, which had been providing security services for entry control and monitoring monitors and alarm systems at an Internal Revenue Service facility in Kearneysville, West Virginia, where security was so tight that it took two hours for the OSHA inspector to obtain the IRS’s okay to enter the building: the IRS “was at a level 5 alert status (because of the conflict overseas and a concern for terrorism).”36 The workers were represented by Local 170 of the United Plant Guard Workers of America, which is not affiliated with the AFL-CIO. The “primary concern” of all the employees interviewed by the inspector was that “since day one” they had “not been allowed to leave their work stations to use the rest room when they need to do so.” They went on to explain that “it’s common knowledge that they know that if they leave their command post without properly being relieve[d], then the IRS security could pull their security clearance, and they would lose their job. Each employee stated that they had request[ed] to go to the restroom several times, but were never sent any relief by their company, so they could go. ... Several employees stated that their [sic] had been times that they wanted to go but they had to wait until after their shift....” Raven’s supervisor informed the inspector that after employees had on numerous occasions addressed this concern to her, she informed the company president, who told her that “he wasn’t going to pay for an extra person. She also stated that she had taken the issue to the union, which said it could not do anything about it and “that they should notified [sic] OSHA.” The supervisor also contacted the General Services Administration (the government agency that administers such government contracts), which stated that it was Raven’s “responsibility...to provide a way for its employees to go to the restroom when they need to, without any unreasonable restrictions on the employees to use the facilities.” The IRS’s concern was that it gave Raven “a large sum of money for providing service, and that they the sub-contractor should be able to pay for extra employees.”37

The company president’s recalcitrance was poignantly on display during the telephonic closing conference when he expressed the view that “OSHA was siding more with the employee, and was not taking into consideration that the reason why this complaint was filed was because the employees did not want to take a lunch break during their shift. The employer felt that if the employee told [sic; must be took] a lunch break, then they would be able to use the restroom then, and there would not be a problem with someone having to relieve the guards. The employer also stated that he had corrected the problem when he let a guard come in and work the day shift (on their day off) [to give relief]. CSHO [Compliance Safety and Health Officer] explained to the employer that this was not a solution, and the

36Raven Management, Insp. No. 116520800, Safety Narrative, OSHA-1A (May 13, 1999).
employer stated that this is the way it was going to be handled."\(^{38}\)

In the end, OSHA cited the company for failing to “provide an effective relief worker system that allowed employees prompt access to the toilet facilities, without imposing unreasonable restrictions on the employee use of the facilities…” OSHA imposed a $1,250 penalty for this “serious” violation, but reduced it to a mere $100 through an informal settlement agreement, which also stipulated that if the employer, which was no longer at “this IRS facility,” returned there, it agreed to insure effective relief facilities.\(^{39}\)

Thus all five citations issued during the first 21 months the Memorandum was in effect were generated by complaints at relatively small and little known employers (except Steel of West Virginia), four of which were in service industries, and three of which were unionized. Two of the citations were issued in Missouri, where OSHA had also issued its first (pre-Memorandum) citation for denial of access to Hudson Foods, and two in West Virginia. Nevertheless, the Assistant Regional Administrator for Federal and State Operations in the Kansas City office confirmed that those were the only two such citations and that inspectors in that region “very, very, very infrequently” received complaints about the issue.\(^{40}\) Overall, then, OSHA’s enforcement effort was purely reactive and geographically narrowly based. In contrast, in fiscal year 2001, only 26 percent of all 35,897 Federal OSHA inspections were generated by complaints (or accidents), while 50 percent were high-hazard targeted inspections; the corresponding figures for the 55,948 state-plan state inspections were 27 percent and 59 percent respectively.\(^{41}\)

Pursuant to another FOIA request submitted by the author on September 9, 2002, Federal OSHA identified 74 citations that it had issued from January 1, 2000 until October 24, 2002 for violations of section 1910.141(c)(1)(i) (one of which was misidentified, leaving a total of 73).\(^{42}\) The author then requested and collected all the citations issued by Federal OSHA from January 1, 2000 to the fall of 2002, and also identified an additional 11 cases, which the OSHA national office had

\(^{38}\)Raven Management, Insp. No. 116520800, Closing Conference Notes, OSHA-1A (May 13, 1999).

\(^{39}\)Raven Management, Insp. No. 116520800 (June 4 and 29, 1999). The company apparently no longer exists, but according to the person who answered the phone at the building where the firm used to be located, it had provided contract security services to the government, including the IRS in Kearneysville; a partner in Raven Management had also been a partner in the CPA firm now located there. Telephone interview with Rivenbark CPA firm, 1207 W. Cumberland, Dunn, NC (Dec. 2, 2002).

\(^{40}\)Telephone interview with Steve Carmichael (Nov. 27, 2002).

\(^{41}\)http://www.osha.gov/as/opa/oshafacts.html.

\(^{42}\)One citation was for violation of 1910.141(c)(1)(iii) involving sewage disposal endangering employees’ health. Mansion Memorial Park, Insp. No. 303155824 (2000).
omitted because the cases had not yet been closed, bringing the total to 84. Only four of the 84 citations can arguably be regarded as having been issued for restriction of access; two of these employers were private guard companies.

Perhaps the most blatant violation was committed by one of the largest corporations to which OSHA issued a citation under the toilet standard. Liz Claiborne, Inc., a clothing and accessories firm with more than $3 billion in sales in 2001, stood accused in the 1990s of producing its commodities in sweatshops in the Northern Mariana Islands, Honduras, and El Salvador. Stung by the adverse publicity, the firm purported to adopt a “workplace code of conduct,” which constituted “a comprehensive human rights and workplace safety policy”:

No Harassment or Abuse. All employees shall be treated with respect and dignity. No employee shall be subject to any physical, sexual, psychological or verbal harassment or abuse. ... Health and Safety. Employers shall provide a safe and healthy working environment to prevent accidents and injury to health arising out of, linked with, or occurring in the course of work or as a result of the operation of employer facilities.

Whether or not Claiborne has complied with this code in the Third World, its disrespect for its employees’ bladders and dignity at its Montgomery, Alabama distribution center for women’s clothing would have seemed quite familiar to workers in Third World sweatshops. It may have “[h]ired a Salvadoran personnel manager with an OSHA background” in its sweatshop in El Salvador, but it was not enamored of OSHA personnel in Alabama, preferring instead off-duty police. According to the then president of Local 310 of the Union of Needle and Industrial Trades Employees who had worked there for about eight years, in 2001 the company, which previously had not prevented workers from using the toilets outside of fixed breaks, began locking the bathroom doors outside of the scheduled breaks (15 minutes in the morning and afternoon and 30 minutes for lunch) on the grounds that employees were going too often and staying too long. After about a month of this regime, the union filed a complaint with OSHA, prompting an

45http://www.lizclaiborne.com/lizinc/lizworks/workers/conduct.asp
46Linder and Nygaard, Void Where Prohibited at 3-4.
48Telephone interview with Bernard Burton, former president of UNITE Local 310, Montgomery, AL (Nov. 22, 2002).
inspection by the Mobile Area Office in August. The problem, in the words of the OSHA citation, was: "Throughout the facility: The restroom facilities were locked and were not available for immediate use by employees, except during breaks and lunch periods." Managers kept the bathrooms locked at all other times because "they had a serious problem with theft and that was the only way they could eliminate some of the theft." Claiborne, according to the inspector's opening conference notes, "used off-duty Montgomery Police Dept. personnel to monitor the area to reduce the problem the company had with theft. The MPD personnel were required to unlock the restrooms during the morning, afternoon breaks and lunch." (The union president denied the allegation of theft, expressing wonderment at how workers would have been able to steal clothing in the bathroom.) The workers, according to the inspector's closing conference comments, "would have to go to their supervisors to get a written permission slip when they had to use the restrooms. The slip was given to the security personnel at the main entrance as that was the only restroom which could be used when all other restrooms were locked." Although the company official at the closing conference "was not pleased that the restroom would have to be left open for the employees," she stated that "they would have to make arrangements to keep the restroom doors unlocked." The inspector found that the workers were "exposed to long periods of time without being using [sic] the restrooms located adjacent to the work area," thus creating the possibility of bladder infections. The inspector imposed a monetary penalty because the lack of other opportunities to use the toilet created a problem when approximately 300 employees had to stand in line during the entire break and lunch period to go to the restrooms. Several of the female employees were pregnant and required frequent use of the restrooms but had to get written permission from the supervisors in order to do so, which caused a potential health problem. On one occasion, an employee was dismissed from her job because management determined she had gotten too many restroom passes, which took time away from her job.

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50Liz Claiborne, Inc., Inspection No. 304455629, Safety Narrative, OSHA-1A (Nov. 20, 2001)
51Telephone interview with Burton. The state director of UNITE for Alabama confirmed that the company had at first made that allegation, but she added that it was untrue and that later the company had shifted its position, claiming that workers had been spending too much time in the bathroom. Telephone interview with Willie Jones, Montgomery, AL (Nov. 25, 2002).
52Liz Claiborne, Inc., Inspection No. 304455629, Worksheet, OSHA-1B (Nov. 20, 2001). There is an error in the inspector's written comments as to the identity of the company official, but, based on information from the union president, it appears to have
Management, according to the union president, complied with the OSHA abatement order during the year following the issuance of the citation.\textsuperscript{53} Whether the $900 penalty (reduced from the proposed $1,000)\textsuperscript{54} would have continued to deter a $3 billion corporation from reverting to the deployment of police to interdict its workers' responses to the call of nature is speculative: Claiborne permanently closed the Montgomery distribution center on October 6, 2002.\textsuperscript{55}

OSHA also found a violation at a call center operated by Convergys Corporation in Killeen, Texas. Convergys, which declares that “[w]e’re the global leader in integrated billing and customer care services, and employee care services,” “employs more than 44,000 people in our contact centers, data centers and offices in the United States, Canada, Latin America, Europe, the Middle East, and Asia. ... Revenues in 2001 topped $2.32 billion.”\textsuperscript{56} Although it advertises to potential customers that “Convergys can improve your employee satisfaction,”\textsuperscript{57} not all of its own employees were satisfied with the company’s bathroom access policy. In April 2002 the Austin Area Office of OSHA issued a citation proposing a penalty of $1,125 for a “serious” violation of the toilet standard on the grounds that: “Mens [sic] and womens [sic] restrooms are not effective in that employees are not allowed to use the facilities when needed.”\textsuperscript{58}

Convergys, none of whose call centers is unionized,\textsuperscript{59} employed 442 workers at its Killeen location, one of whom called the Austin OSHA Office to file a complaint about not being permitted to use the bathroom. The Assistant Area Director, Elizabeth Slatten, offers what may well be the best hope for rigorous enforcement that can be expected from this agency. This 14-year OSHA veteran and former compliance officer is knowledgeable, competent, energetic, frank, and forceful. Yet, echoing the it-all-comes-out-in-the-wash self-doubts that have troubled labor-standards enforcers throughout the ages, even she wondered aloud whether vigorous enforcement of employers’ obligation to let workers go to the bathroom might prompt some firms to eliminate some or all scheduled breaks to the extent that they are not mandated by state or federal labor standards laws. She underscored that when the April 6, 1998 Memorandum reached her office, it was read attentively and immediately recognized as marking a change in di-

\textsuperscript{53}Telephone interview with Burton.

\textsuperscript{54}Liz Claiborne, Inc., Inspection No. 304455629.

\textsuperscript{55}Telephone interviews with Burton and Jones.

\textsuperscript{56}http://www.convergys.com/company_overview.html.

\textsuperscript{57}http://www.convergys.com/employeecare.html

\textsuperscript{58}Convergys Corp., Insp. No. 304389711 (Apr. 17, 2002).

\textsuperscript{59}Email from Dave LeGrande, director of safety and health, CWA, to Marc Linder (Nov. 7, 2002).
rection for enforcement activity; for that reason it was discussed at a staff meeting. Whereas prior to April 6, 1998, she and others gave callers who complained about being denied breaks the "pat" answer that breaks of any type were not part of OSHA law, now the office was ready to investigate complaints about denial of bathroom access. Apart from the U.S. Postal Service, a few of whose mail sorters have called OSHA, the focus of such complaints in the Austin Area was call centers, which have been a frequent source of violations and complaints elsewhere in the United States as well.

As Slatten explained the pattern at Convergys (which was not unique), in the abstract it might be difficult to convince an administrative law judge that an employer that offered one hour and 11 minutes of breaks—30 minutes for lunch, two 15-minute fixed breaks, and 11 minutes of discretionary break—was denying workers access. However, since, in her view, OSHA cannot directly cite employers for the number of minutes workers have to wait between bathroom visits—and, again, she fears that if OSHA did prescribe a fixed ceiling, the result might be that some employers would eliminate some of the rest breaks they voluntarily afford employees—the real defect in Convergys's policy lay in imposing bans on breaks during certain times. Slatten reported that the Austin Office had investigated other complaints from call centers, which, however, were resolved through the phone-fax procedure without issuing citations.

As the inspector's internal inspection narrative noted:

Complaint is employees not allowed to use restrooms—the mens and women are more than adequate for the number of employees and are very clean and had paper towels and waste cans and hot and cold water.

The problem is that the employees have quota of phone calls and minutes on the phone in their 8 and one-half hour shift. They get two fifteen minutes break[s] and a 30 minute lunch with so called 11 minutes of extra personal minutes. But according to the employees interviewed different team leaders schedule and allow these breaks. Often the first break is one hour after the employees' shift begins. So then they have to work 3 straight hours and get placed on a written development plan if they exceed their allowed minutes off/away.

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60 Telephone interview with Elizabeth Slatten, Assistant Area Director, OSHA Austin Area Office (Nov. 7 and Dec. 24, 2002). For a more detailed account of the complaints, see below this chapter.


62 Telephone interview with Slatten. For further discussion of these other call center complaints, see below this chapter.

The inspector went on to note: “Team Leaders on Saturday and Monday, which are the busiest days will not allow employees the time to use restroom when the urge strikes and many employees have been put on disciplinary development plans for using restroom.” Pointing to the realm of the possible, the inspector added that “urinary and fecal matter in and on employees and chairs and clothing could cause HEP B.”64 Although a penalty of $1,125 was proposed for a serious violation, at an informal settlement conference OSHA changed the citation to an other-than-serious violation and eliminated the monetary penalty altogether in exchange for fast abatement. The agreement required Convergys to retrain its team leaders on its policy of allowing employees to use the bathrooms as well as on its enforcement of their implementation of that policy, of which the company was required to give OSHA a copy.65 In its abatement letter the employer summarized the policy for the agency as containing these points: “Employees are not to be restricted from restroom use and team leaders should not state that an employee is not free to use the restroom when needed. Team leaders should notify Human Resources in any situation where an employee suggests that a more frequent use of the restroom is causing the employee not to meet weekly performance variance requirements. Further, team leaders will discontinue performance discussions on variance in that situation. ... Human Resources and Operations will continue to work with employees to insure that they feel free to use the restroom while assisting employees in meeting their performance goals.”66 In particular this final aspect of the policy, while vague and ambiguous, is nevertheless inconsistent with the rigid rule governing the proportion of the workday that workers have to spend on the telephone that, according to the Senior Human Resources Manager, was in effect half a year later.67 Having filed away this policy statement and informed the

64 Convergys Corp., Insp. No. 304389711, Worksheet, OSHA-1B (Apr. 15, 2002) (copy furnished by Austin OSHA). Slatten explained that the reference to possible hazards did not mean that fecal material had been observed on chairs. Email from Elizabeth Slatten to Marc Linder (Dec. 23, 2002).


67 The employer’s senior human resources manager, though eager, after gaining approval from the corporate legal department, to offer the company’s version of events, failed to present a coherent counter-account. Apart from denying that managers—at least to her knowledge or with her approval—instructed employees not to leave the phones to go to the bathroom, she did not mention the 11 minutes of extra personal time (in addition to the 60 minutes of lunch and rest breaks). Instead, she spoke of 55 (which she thought might also be only 45) minutes of time the workers were permitted away from the phones, which were calculated on the basis of workers’ being required to spend 88 percent (of which she was also not absolutely certain) of their working hours on the phone (12 percent
complainant of the outcome, OSHA, pursuant to its normal protocol, conducted no follow-up inspection to determine whether the problem still existed—although the informal settlement agreement obligated the employer to give OSHA access to the workplace to confirm compliance—trusting, instead, that the original complainant would be intrepid enough to call back if Convergys denied access yet again.68

Three citations that Federal OSHA issued for violation of section 1910.141 (c)(1)(i) copies of which could not be acquired were issued by its Manhattan Area Office, located at 6 World Trade Center, which was totally destroyed on September 11, 2001.69 One of them was a denial of access case.70 This citation was, coincidentally, issued for violations committed at 2 World Trade Center. According to the summary inspection report available on the OSHA website, a complaint involving unionized guards71 prompted OSHA to conduct an inspection in June of 450 minutes, which equal an eight-hour day minus the two 15-minute rest breaks, equals 54 minutes). Management monitored this 88-percent work effort on a daily basis, but workers who failed to sustain it were given the opportunity to achieve it over a week; she believed but was, again, not sure, that a computer program now made it possible for workers to track the percentage themselves. She did not clarify the exact scope of purposes to which these minutes could be put: they could, for example, be spent on such work-related activities as walking across the room to ask a question concerning a customer, but they could also be used to go to the bathroom; although she did not make clear how much of this time could be used for voiding, she did state expressly that workers were not free to use the full 55 minutes and that they were not permitted to use the time for breaks, and if supervisors “catch someone on a break,” disciplinary consequences would follow. Finally, despite the fact that OSHA had not divulged the name of the employee who filed the complaint, she believed that she knew who that person was. Telephone interview with Terry Hall Senior Human Resources Manager, Convergys, Killeen, TX (Dec. 3, 2002).

68Telephone interview with Slatten.
69Letter from Richard Mendelson, Area Director, OSHA Manhattan Area Office, to Marc Linder (Nov. 18, 2002).
70Of the other two, one employer, after denying that there had been any problem or that OSHA had issued a citation, explained that the violation had been failure to have separate toilets for men and women. Telephone interview with unidentified person at Clarion Design Jewelry, 15 W. 46th Street, New York, NY (Nov. 15, 2002); Inspection No. 302944921 (2001). The proposed penalty was reduced from $450 to $250. The other employer’s telephone number had been disconnected or was no longer in service without any indication of a new number. 99 Excel Fashion Inc., 658 62nd Street, Brooklyn, NY, (718) 567-8266 (Nov. 15, 2002); Inspection No. 302941661 (2000) ($0 penalty). The inspector confirmed that it was not a denial of access violation; to the best of her recollection the employer had not provided the proper number of toilets. Telephone interview with Laverne Ogiest, OSHA Manhattan Area Office (Nov. 25 and Dec. 2, 2002).
71According to the inspector’s Narrative, the union was the Allied International
160 Void Where Prohibited Revisited

2000, to find a violation of section 1910.141(c)(1)(i), and to impose a monetary penalty of $2,000 against Summit Security Services, Inc., which contested the citation; a formal settlement agreement then reduced the penalty to $800.72

Private security guards, who have figured so prominently in OSHA's marginal enforcement of its Memorandum, are by no means a quantitatively small category of the labor force; they constitute a large and low-paid group of workers: in 2001 the median hourly wage among 995,560 such guards was only $8.94.73 At 83.4 percent, the industry also recorded the highest proportion of firms with violations of the premium overtime requirement of the Fair Labor Standards Act

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72 Summit Security Services, Inc., Insp. No. 302941315 (Lexis and http://www.osha.gov/cgi-bin/est/est1xp?i=302941315). According to the inspection report, the complaint was filed on Jan. 5, 2000, but it was five months before an inspection took place. It is impossible to explain this extraordinary delay from the surviving report: OSHA's "customer service goal is to inspect an establishment within 5 days of receiving a formal written complaint from a current employee." Email from Elizabeth Slatten, Assistant Area Director, OSHA Austin Office, to Marc Linder (Nov. 28, 2002).

73 http://www.bls.gov/oes/2001/oes339032.htm. When Summit Security Services was hired by the Port Authority to provide security service at the World Trade Center in 1996, its $7 an hour wages were about one-half that of the workers they replaced who had been earning $13. Juan Gonzalez, "PA's New Trade Center Bomb," Daily News, Feb. 13, 1996, at 11 (Lexis). According to the general counsel of SEIU Local 32-BJ, which had organized the guards who had worked for Burns, the previous employer, a prolonged and complex legal dispute with the Port Authority arose over the successorship contract, which was not resolved until 2000. Telephone interview with Larry Engelstein (Nov. 27, 2002).
uncovered by U.S. Department of Labor investigations in 1997 among seven "problem industries." The crux of their bathroom access problem is that some employers fail to establish the relief systems needed to enable guards who are forbidden to leave their posts to take the time to go to the bathroom.

In spite of the destruction of OSHA’s Manhattan Area Office, because Federal OSHA had required Area Offices to secure the Regional Office’s approval to issue a citation for restriction of access, an official in the New York Regional Office, which was not located at the World Trade Center, happened to have kept a partial case file, including the inspector’s Narrative and Worksheet, which have more detail than the citation. According to this work product, which was based on interviews with 41 employees of the 383 employed by Summit Security Services at the World Trade Center, the guards, whose collective bargaining agreement afforded them a 30-minute lunch break but no other breaks, had filed a complaint with OSHA stating that they were not being provided bathroom breaks. The inspection determined not only that the guards had been “advised by management that they are not to abandon their post under any circumstance,” but that even if they had been free to go whenever the pleased, physical access would still have been a problem:

The CSHOs [Compliance Safety and Health Officers] observed that there were also no bathroom facilities readily available/provided to the employees. During the inspections the CSHOs observed the employer unlock the bathroom facilities and indicated to CSHOs that employees could use the public toilet facilities in the WTC. Employees working inside the WTC informed the CSHOs that they would ask the nearby stores in the WTC mall to use their toilet facilities. These stores would sometimes deny outside employees the usage of their toilet facilities and the WTC mall public toilet facilities would have long waiting lines. Employees in the WTC and on street locations informed the CSHOs that the work place toilet facilities were kept locked and therefore were not accessible to them.

When the inspectors asked the resident manager of the security firm where the toilets used by employees were located, he told them that the guards could use

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75See above ch. 6.
77Summit Security Services, Inc., Insp. No. 302941315, Worksheet, OSHA-1B (June 28, 2000). The second inspector had coincidentally accompanied the inspector to the inspection site, which was very close to the OSHA office. Telephone interview with OSHA employee who did not identify herself (Nov. 14, 2002).
the public bathrooms in the World Trade Center mall; the manager also told the
inspectors that although the toilets had been locked because employees had van-
dalized the walls, the keys were kept with the dispatcher or receptionist, and that
there was also a sign-out log. However, when they asked her for the keys, the
dispatcher/receptionist neither had nor knew anything about the keys; they were
also unable to find a log. The manager's statement to the OSHA officials that the
employees had access to toilets on level B-1 also foundered when they found
those facilities locked.78

By the same token, even if the toilets had not been locked, the guards

were not given prompt access to toilet facilities. Employees radioed the dispatcher for a
Post Relief and would be told to 'standby' for hours before receiving relief or they would
not be relieved at all. As a result, some employees have urinated and defecated on them-
selves. [T]he employer used Post Reliefs to work various post [sic] when there is a short-
age in staff, therefore eliminating the post relief person(s).79

A somewhat different account emerged from an interview with an official of
the security company who expressed understanding for the guards' voiding needs
and laughed in disbelief on hearing that prior to 1998 OSHA had taken the posi-
tion that employers were not obligated to let workers use the toilets they were
required to provide. For years, according to him, the firm had had an elaborate
relief worker system in place, under which 10 to 15 relief guards relieved the up
to 113 guards on duty in 2 World Trade Center so that they could take breaks in-
cluding toilet breaks. Despite this relief arrangement, it still sometimes took too
long for a relief guard to reach guards who needed to go to the bathroom, as the
company official himself admitted, although he insisted that real security issues
were the primary factor in the delay since guard posts could not be left unat-
tended. The problem in his view was that the toilets available to the guards were
located in the company's offices in the sub-basement of the tower, to which they
had to take an elevator no matter how high up in the building they were patrolling,
because there were no toilets on those floors to which they had access: either they

78Summit Security Services, Inc., Insp. No. 302941315, Worksheet, OSHA-1B (June

79Summit Security Services, Inc., Insp. No. 302941315, Worksheet, OSHA-1B (June.
had read the worksheet before the citation had been issued, kept a copy of the worksheet,
of which he gave a copy to the inspector, Laverne Ogiest. Simpson laughed briefly when
he read to the author on the telephone the sentence about guards' voiding on themselves.
Telephone interviews with Simpson and Ogiest (Nov. 25 and Dec. 2, 2002).
were located in tenants’ offices or required keys (in part as a result of heightened security after the bombing in 1993). After the inspection, OSHA reached an agreement with the employer that the latter would in the future guarantee that it would provide relief within 15 minutes of a guard’s calling in.80

Interestingly, Summit Security did not even allude to what the Area Director of the OSHA Manhattan Area Office, based on his involvement with the case two years earlier, called the employer’s main defense—namely, that the Port of New York Authority had refused in its contract with Summit to pay for the additional relief guards necessary to make it possible for guards to get to go to the bathroom promptly. To be sure, because OSHA did not deem the Port Authority to be a joint employer and it is the employer’s obligation to shoulder the expense of complying with the standard, the agency considered the defense invalid. Even if OSHA had considered the Port Authority a joint employer, as a governmental agency it is not covered by Federal OSHA; and although it is covered by the New York State OSHA program and Federal OSHA has given thought to doing enforcement actions on a multiple-employer cross-agency basis, the Manhattan Area Director was quite certain that OSHA would not use the toilet standard as a test case.81

The last of the four citations for restriction of access was issued in 2002 to Securiguard Inc., which provides security guards at the Kings Bay Naval Submarine Base in Kingsland, Georgia. One employee told the OSHA inspector that the guards sometimes had to wait 45 minutes for relief and that requesting relief was “an aggravating experience”; another employee reported that men “take pee cups with them in case relief doesn’t arrive in time.” Facing what he perceived as a lack of “hard evidence,” the inspector could not verify the complainant’s account that he had had to wait two hours, but “even the employer’s initial investigation determined that relief did not reach the guard for 50 minutes.”82 In the Notice of Alleged Safety or Health Hazards, the inspector informed the employer: “On 3/26/2002, between 11:00 a.m. and 1:00 p.m., one of your employees requested to be relieved to go to the bathroom. Relief came after two hours, and at that time the employee had already defecated on himself/herself. After two hours, the affected employee went to the bathroom and discarded her/his underwear. On a prior occasion, another employee had to urinate

80 Telephone interview with an official of Summit Security Services, Inc. (Nov. 15 and 19, 2002). The interviewee’s statement that no monetary penalty had been imposed is contradicted by the inspection report and other OSHA-system data.

81 Telephone interview with Richard Mendelson, Area Director OSHA Manhattan Area Office (Dec. 4, 2002).

82 Securiguard, Inc., Insp. No. 30371547, Worksheet, OSHA-1B (May 17, 2002).
in a trash can, because timely relief was not provided.\footnote{Securiguard, Inc., Insp. No. 303771547, Notice of Alleged Safety or Health Hazards, OSHA-7 (Apr. 29, 2002).} In the sanitized final report, the employer was ultimately cited because the unionized guards “have not been relieved in a timely manner hindering access to sanitary facilities.” For this serious violation OSHA fined the employer $975, which was reduced to $600 following an informal settlement.\footnote{Securiguard, Inc., Insp. No. 303771547 (May 22, 2002).} Offered an opportunity to explain the employer’s version of the incident to the author, the firm’s director of human resources refused to discuss the facts of the case.\footnote{Telephone interview with Ms. Howard, Securiguard, Inc., McLean, VA (Dec. 2, 2002). The CEO of the company, Patrician DeL. Marvil, is a member of the executive committee and treasurer of the Hispanic Business Roundtable. http://hbrt.org/exec.htm.}

In addition to the aforementioned citations, the atypical facts of two other cases make them difficult to classify, but suggest quasi-restriction of access. Skill Staff is a private profit-making employment agency in Kansas City, Missouri that recruits day laborers for employers. The OSHA inspector’s Worksheet described the hazard this way: “Between 50 to [sic] 80 employees are present at the site between 05:00 to [sic] 08:00 and at other times during the day to accept temporary work assignments. Employees are not allowed reasonable access to a toilet facility. ... Employees (and others) are exposed to health risks from having to urinate and/or defecate in a public alley while awaiting a work assignment.” The inspector also noted that the “[e]mployer had been advised of violative condition when referral-based non-formal investigation was initiated” four months earlier.\footnote{Skill Staff, Insp. No. 303307708, Worksheet, OSHA-IB (Aug. 1, 2000).} The inspector’s Health Narrative observed that “it became apparent that the respondent provided false information in responding to the investigation. Mr. Thornton [the regional vice president] alleged ‘verbal permission’ from another employer in the neighborhood that would allow Mr. Thornton’s employees access to their restrooms. However, CSHO called the other employer who denied ever having had a conversation with anyone regarding the issue. Also, other business owners in the proximity to this establishment continued to express concern about the situation. Decision to inspect was based on the apparent factual misrepresentation coupled with the continued concern of other business owners in the neighborhood.”\footnote{Skill Staff, Insp. No. 303307708, Health Narrative, OSHA-1A (Aug. 1, 2000).} OSHA cited the employer because “[m]ale and female employees required to be at employer’s facility to accept a temporary work were not provided with reasonable access to toilet facilities,” and fined it $1,800 for this “serious” violation, which it reduced to $900 for an other
than serious violation at an informal conference.88

The problem, according to the Skill Staff officer manager, was that she did not want the day laborers wandering around the building lest they impair the staff's safety. Therefore, any day laborer who wanted to use the bathroom had to be accompanied by a staff member who would make sure that he or she went to the bathroom and not elsewhere; the manager characterized this system as providing "limited access." Since the staff also had their regular clerical work to do, the staff member often told a day laborer that he or she would have to wait until that work had been completed. Since the bathroom was only for one person at a time, several day laborers might be waiting. Although the manager alleged that the day laborers, who had "gotten smart to systems that interrupt the business," had complained to OSHA out of spite over a personal dispute with the company's driver, in fact the inspection was prompted not by a complaint, but a referral. Since she admitted that the health department had also inspected the office (and among other things told her she would have to get an industrial-type toilet paper holder), it is possible that the health department had referred the case to OSHA. Since one toilet would clearly be inadequate for the number of day laborers waiting in the office at peak times in the morning, the author asked whether OSHA had discussed this matter and/or the broader issue of whether the day laborer job applicants, whose time at the office while they were waiting to see whether they would be hired each day was presumably not compensable under the Fair Labor Standards Act (FLSA),89 were employees or customers and thus whether OSHA or the public health department had jurisdiction over the number and condition of the toilets, but she admitted that her memory had become blurry as to which agency had said and done what.90 Since the definition of "employee" under the FLSA is broader than under OSHA, it is unclear how the workers could have been covered by OSHA and thus entitled to bathroom access when they needed to go if they were not, at the time, (some employer's) employees for purposes of the FLSA and thus not entitled to the minimum wage for their waiting time.91

89See Sakas v. Settle Down Enterprises, 90 F. Supp2d 1267, 1279 (N.D. Ga. 2000): "Defendants contend Plaintiffs are not entitled to compensation for the time they were on the premises prior to being notified that work was available. On this much the parties can agree...." See also GAO, Worker Protection: Labor's Efforts to Enforce Protection of Day Laborers Could Benefit from Better Data and Guidance 24 (GAO-02-925, 2002).
90Telephone interview with Heather Moyer, Office Manager, Skill Staff, Kansas City (Dec. 2, 2002).
91See Marc Linder, "Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness,"
The alleged violation description on another citation (imposing no monetary penalty) involving a Springfield, Missouri, unit of Git N Go, a chain of convenience stores/gas stations, also gave rise to some ambiguity: “The employer did not effectively communicate to each employee its policies and provisions for ensuring employees, including those working alone, had prompt access to toilet facilities in accordance with the standard.” The employee’s complaint to OSHA had read: “Personnel not allowed to use restrooms.” The inspector’s findings stated: “Employer states they have a policy that employees working alone can lock the door when no customer’s [sic] are in the store if they need to use the restroom. There is no written policy. Policy not effectively communicated to each employee and no provisions for employees to be relieved during times of steady customer traffic in the store.” According to the company’s human resources director, a “disgruntled” female employee had made the complaint to OSHA. The firm’s policy was to tell employees working alone to lock the door and put up a sign saying that he or she would be back in five minutes before using the toilet, which was located 15 feet from the counter. The director added that, for the sake of safety and protection of corporate assets, this policy did not apply so long as the employee was waiting on a customer. When asked what would happen if there was a line of customers, the director, in effect confirming OSHA’s finding, replied that the employee would have to wait until all the customers had been served and left, although he contended that employees know when the busy times are and can use “common sense” to plan accordingly. Thus, like the OSHA citation, this interview left unanswered the question as to whether any employee had in fact been denied access. The night employee at the Git N Go store to which the citation had been issued stated that she had no problem going to the bathroom, did hang up such a sign, and had never heard of the OSHA inspection, although she had been working there at the time.

The group of 84 employers cited for having violated some provision of the toilet standard in 2000-2002 can be statistically compared with that of the nine employers cited for restricting workers’ access from 1998 to 2002 (four of which are included in the 84). Of the 84 citations that Federal OSHA issued under section

parative Labor Law & Policy Journal 21(1):187-230 at 196 (Fall 1999); IBP, Inc. v. Herman, 144 F.3d 861, 865 (D.C. Cir. 1998).


Git N Go, Insp. No. 304304900, Safety Narrative, OSHA-1A (Nov. 8, 2001).

Telephone interview with Russell Estes, Corporate Human Resources Director, Git N Go, Tulsa, OK (Dec. 3, 2002).

1910.141 (c)(1)(i), 67 (80 percent) involved unionized employers and only 17 (20 percent) nonunion employers. In contrast, two-thirds of the employers restricting access were unionized and only one-third nonunion. In terms of the type of inspection, 58 (69 percent) of the 84 were triggered by complaints from workers; the other inspections were programmed/planned (7), referrals (7), related to other inspections (4), done in connection with fatalities (4) or accidents (2), unprogrammed-related (1), or planned (1). In contrast, 100 percent of the inspections leading to citations for restricting access were triggered by complaints. Geographically, 26 (31 percent) of the toilet standard citations were issued to workplaces located in the South, that is, the seven states of the Confederacy covered by Federal OSHA (Arkansas, Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, plus one federal citation in the state-plan Tennessee program), with Texas alone accounting for 15 of them. Outside the South, the states with the largest number of citations were New York (12), New Jersey (8), Ohio (7), Pennsylvania (6), and West Virginia (5). (In addition, three citations were issued to clothing sweatshops in the Northern Mariana Islands.) In contrast, one-third of the workplaces where employers restricted access were located in the South.

With regard to monetary penalties, 53 (63 percent) of all toilet standard citations imposed none, while 31 (37 percent) did, whereby two of these were later reduced to zero. In contrast, 67 percent of the restriction-of-access citations imposed monetary penalties (excluding one reduced to zero). The initial penalties in the larger group ranged from a high of $2,500 to a low of $150, while the highest final penalty was $1,250. The mean initial penalty of these 31 was $919, while the mean final amount for the 29 employers with penalties was $575. Averaged over all 84 cited employers, these total penalty amounts were $339 and $199, respectively. Among the employers cited for denial of access, initial penalties ranged between $2,000 and $975, while the highest final penalty was $900; the mean initial penalty was $975 and the mean final amount averaged among all nine employers was $412. Similarly, only 16 (19 percent) of all citations were “serious,” while five (6 percent) fell into the “repeat” category. In contrast, 56 percent of the denial-of-access citations were classified as “serious” (but one was changed to “other than serious” by an informal agreement, lowering the overall proportion to 44 percent). The specific nature of employers’ violation of the toilet standard can be categorized as follows: 27 (32 percent) provided no toilets; 24 (29 percent) failed to provide the required number of toilets; eight provided toilets that were broken or not working; seven did not provide or make toilets available; five provided toilets that could not be locked; four denied employees access to toilets; two locked the toilets; two failed to provide the required number of toilets for each sex; two provided a toilet with a broken seat or no seat; one provided a port-a-potty; and one provided an outhouse. Finally, in terms of industrial or occupational focus: 15 cited firms were in manufacturing; five citations were issued to the U.S. Government (including the U.S. Postal Service); four involved security guards:
four were issued to sawmills; four involved a single taxi company at four locations; and three were issued to call centers or telemarketers. In contrast, among the nine employers that restricted access, five employed guards, one a dispatcher, and one operated a call center. Interestingly, four of the guard companies performed services for the Federal Government, while one did so for the Port of New York Authority.

The proliferation of government contracts with private firms to provide security guards for Federal building and facilities, including a submarine base of the United States Navy, which presumably does not suffer from a lack of trained armed personnel, is said by insiders to date back to efforts by the Clinton administration to be able to claim that it had shrunk government, if only by virtue of having effectively transferred its employees onto private firms’ payrolls.96 Under these circumstances it should, as one OSHA official suggested, at the very least, be incumbent on the Federal Government to include the need for extra relief guards in the contracts for which it solicits bids from private employers.97 That bathroom access for guards is a widespread problem was confirmed by a public-interest labor lawyer in San Francisco, who reported that virtually all of the low-wage workers on whose behalf he had intervened with employers in this matter were guards.98

State-Plan States

In the year 2000, when more than 100 million workers employed by 6.5 million employers were covered by federal and state OSHA programs,99 the federally approved OSHA programs in the 21 state-plan states (plus three states—Connecticut, New Jersey, and New York—with approved programs for public employees only) covered a total of 53,211,536 employees employed by 3,288,028 employers; of these, 44,742,525 employees were employed by 3,183,572 private-

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97 Telephone interview with Cheryl Gray, Safety and health Assistant, OSHA Omaha Area Office (Jan. 2, 2003). Efforts to find the Federal Government officials responsible for contracts with private security guard companies proved inconclusive. The official at the General Services Administration in Fort Worth who was in charge of the master contract took no part in the actual bidding process, which was the responsibility of the individual departments and agencies for whose buildings the firms provided guards, and did not know the names of any of the departmental officials who were involved in the process.
98 Telephone interview with Mike Gaitley, Employment Law Center, San Francisco (Dec. 2, 2002).
sector employers, while 8,469,011 employees were employed by 104,456 public-sector employers.\textsuperscript{100} In the state-plan states, the number of citations issued for violations of section 1910.141(c)(1)(l) (or the corresponding state version) and, as a subset thereof, the number of citations for restriction of toilet access in cases opened after April 6, 1998 are presented in Table 3.\textsuperscript{101}

Of the 329 citations issued for violations of the toilet standard by the state OSHA agencies—of which California alone accounted for 55 percent—only 11 dealt with restriction of access. These 11, however, were not evenly distributed: Iowa and Kentucky, with four and three respectively, accounted for 58 percent of them, while Arizona, Indiana, South Carolina, and Washington issued one each. None of the other state programs (including those approved only with respect to the protection of public employees) issued any.

These 11 are summarized in Table 2. All 11 citations were triggered by complaints (except for one referral), of which seven came from unionized places of employment. In six cases the agency imposed no monetary penalty; the principal exception was Iowa OSHA, which initially classified all four violations as serious, repeat, or willful and fined all four cited employers amounts ranging from $1,000 to the national record of $36,000 (Excel Corporation). In terms of industry composition, all four Iowa cases involved animal slaughter plants, while all three Kentucky employers were manufacturers. Of the four remaining cases, three involved guards or police.

The combined Federal and state OSHA data for all 20 citations for restriction of access reveal that all were triggered by complaints (except for one referral), 65 percent of which were filed at unionized workplaces. Forty-five percent of cited employers were ultimately not assessed a monetary penalty, which averaged $2,309 for all 20 employers or, excluding the outlier Excel, $536.

Narratives of the cases are presented below except: the four Iowa cases, discussion of which occupies chapter 12, the Kentucky Jim Beam case, which forms the subject of chapter 13, and the Washington case, which is dealt with in chapter 14.

In what may have been the first case to have arisen in the United States after


\textsuperscript{101}In a few instances it was not possible to verify the precise basis for issuance of a citation for violation of the toilet standard because the paper file had been lost or purged after expiration of the retention period. Virginia OSHA lost the file of Tarmac America, Inc., Insp. No. 301817383 (Oct. 30, 1998). Telephone interview with Jay Withrow, Director, Office of Legal Support, Virginia OSHA (Oct. 31, 2002). Cal/OSHA lost 20 case files. For the methodology and sources used in compiling the data in this table, see below Appendix V.
April 6, 1998, Kentucky OSHA on April 25, 1998 received a complaint from workers, members of the Teamsters Local 236, at Ardco, Inc., a plant with 290 employees manufacturing industrial refrigerator glass doors, in Elkton, a small industrial town. The workers’ allegation read: “Employees must sign a sheet to get to the bathroom or use the phone, etc. You may be placed on a waiting list with 20-225 [sic; must be 25] people before you are issued a bathroom pass, sometimes may take an hour or more for your turn. ... Sixty-five...people share 2-one stall bathrooms.” Based on a remarkably thorough and insightful (though syntactically shaky) inspection report, the inspector cited (but did not impose a monetary penalty on) the employer despite the workers’ having had four daily bathroom breaks in addition to three scheduled breaks:

The company has stated that in the contract with the union there are two ten minute breaks and a half hour lunch. ... The employer also stated that the employee [sic] are given four extra additional breaks in the day to go to the bathroom and use the phone. ...

There can be as many as seventy employees in any one area, if the two water closets in the area are occupied then the employees may have to walk up to three hundred feet to the next restroom. The company allows so many bathroom passes per five percent...of the employees in the area. For example if there are 50 employees in the area, the employer will have two to three passes for that group. Employees place there [sic] name on a list to receive the next pass, once receiving the pass they must place the time they leave and the return time from the restroom. If the time exceeds 9 minutes then the employees get a verbal or written warning. If there [are] several write ups then the employee is suspended.

The Federal Occupational Safety and Health Administration issued an interpretation concerning 29 CFR 1910.141(c)(1)(i) dated April 6, 1998. In that interpretation letter it basically states that the employer can not place unreasonable restrictions on employees who need to use the restroom. Each individual is different in how often we expel waste from our bodies, medications and medical conditions can alter that mechanism and increase the frequency and during [sic; must be duration] of ridding waste from our bodies. The employer was also informed in times of heat extremes that increase of liquids is vital to prevent heat related illnesses. By the addition of liquids, increased rest breaks and restroom breaks can be encountered.

The policy of the company that places a time limited [sic] and frequency [sic] of restroom breaks on the employees, without the consideration that employees who are on medications that require them to urinate or defecate more frequently, prevent[s] the employee from using the restroom until their turn is available. This policy is therefore considered unreasonable and thus is considered to be a violation of 29 CFR 1910.141 (c)(1)(i). The issue concerning telephone usage is not an occupational issue.102

102Ardco In., Insp. No. 302081336 (July 21, 1998); Inspection Outline furnished by Kentucky OSHA.
This zero-dollar admonition was presumably not the reason that Ardco, Todd County’s largest factory, shut the plant down in January 2001.103

In 1999, following a complaint, this time by Teamsters Local 651, Kentucky OSHA cited for a “serious” violation and imposed a $975 penalty on CR/PL, a manufacturer, ironically enough, of bathroom partitions and toilet bowls, in Somerset. The company, which owned Crane Plumbing, was one of the largest manufacturers and distributors of plumbing fixtures and specialty plumbing products in the United States, and employed 281 employees in this plant.104 OSHA found that employees “were denied the ability to use the rest room until other employees returned with the pass.” After the inspection the employer revised the policy so that “employees will have the amount of time away from their work station tracked, but they will not be denied the availability of the rest room.”105

Arizona OSHA has issued only one citation to an employer for restricting access. Although it classified the violation as “nonserious” and imposed no monetary penalty, in 1998 the agency, responding to a complaint, cited the City of South Tucson’s nonunion Communications Center (Police) because: “Communication employees were not afforded unrestricted use of toilet facilities in that relief for their position was often not made available causing them to wait for extended periods of time, thereby subjecting the employees to adverse health effects and serious infections.”106 Despite the lack of a monetary penalty, the city contested the citation, which was upheld by an administrative law judge.107

In the one Indiana case, in which the injury/illness was specified as “Bladder damage,” the lack of a toilet merged with denial of access (“No toilet available”). The employer, Initial Security, a security guard company, is owned by the ominously named Rentokil Initial, a British-headquartered international business services firm with 94,000 employees. Ironically, the parent company’s hygiene division provides industrial bathroom supplies and specialist cleaning of washrooms.108 For the nonunion employees posted at a guardhouse of a UPS facility
in Indianapolis in 2002, there was no restroom to use “unless they call for someone to relieve them.” On the first shift “there is no extra person to relieve and employees sometimes have to wait several hours for someone to get there to relieve them. Employees have to call dispatch and then wait for someone to show up. One employee had used the bushes in the past.” Even when a relief worker did show up, since there was no toilet on site, the employees had to walk over 150 yards to use another firm’s (UPS’s) toilet. Although Indiana OSHA deemed this violation of section 1910.141(c)(1)(i) “serious,” it assessed no monetary penalty.109

South Carolina, too, has issued only one citation for restricting access. In 2000, responding to a complaint at a nonunion workplace, state OSHA issued a citation, without a monetary penalty, to the South Carolina Department of Juvenile Justice because “Juvenile correction officers were not provided immediate access to restroom” at two units of a correctional facility.110 The basis for the citation was ambiguous because it was unclear whether the employer refused to permit the workers to go or whether the toilets were physically inaccessible or both. However, since the inspector’s own Worksheet notes referred to the OSHA Memorandum (a copy of which was also appended to the report) in connection with the amount of time it took to give the employees relief, it may well qualify as a restriction of access citation. The employer was cited because “Juvenile correction officers not provided immediate access to restroom” in the building unit to which they were assigned. However, a more detailed Hazard Description stated: “Employees have limited access to restroom facilities located in the units due to them being locked when social worker is away from office and on weekends. Employees have been informed to use Omega Dorm however they are not allowed to leave co-workers alone in the units. Management has been informed to no avail.” Employees stated that they could use the restroom when the social workers were in the office, but after that office was locked, they had to call the supervisor to come open it or relieve them so they could go to a bathroom in another building. “Some employees are on medication which causes them to use the restroom more often. Takes supervisor 40-50 min[ute]s to come and open restroom door. See interpretation letter dated 4-6-98.” Management stated that

109Initial Security, Insp. No. 305200115, Worksheet, OSHA-1B (July 19, 2002); provided by Indiana OSHA. At the same time, however, the firm was fined $3,150 (reduced by informal agreement to $1,170) for lack of potable water. http://www.osha.gov/cgi-bin/est/est1xp?l=305200115. The branch manager declined to be interviewed about the case until he received corporate approval, which he purported to seek but apparently did not obtain. Telephone interview with Jerry Peyton, Indianapolis (Dec. 26 and 31, 2002 and Jan. 10, 2003).

110Insp. No. 3020442108 (Sept. 18, 2000); Citation and Notification of Penalty furnished by South Carolina OSHA.
The Few, The Proud, The Citations

it had "had to lock the restroom doors located in the social workers area and take keys away from the officers because the doors were being left unlocked and juveniles were entering the area. They can call their supervisor and they will come and allow them to go and use the restroom."\textsuperscript{111}

Despite having issued this one citation, South Carolina offers some sense of the lax enforcement that certain state OSHA's have engaged in with regard to toilet access. An OSHA standards officer and former inspector there knew, based on her own experience, that most citations under the toilet standard were for lack of a sufficient number of toilets. She was aware of one case, in 1999-2000, when she was monitoring, in which an employer refused to let workers go to the bathroom except at fixed times. She merely suggested that the employer, a processing business, provide relief workers, but did not issue a citation; the employer's "compliance" took the form of merely letting supervisors give relief.\textsuperscript{112} Yet ironically, the very same day this officer was interviewed, the receptionist who answered the phone in the office, priding herself on hailing from a more civilized state (New Jersey), revealed that just the previous day at intake a case had been discussed concerning a factory worker who had been denied access, which prompted the receptionist to wonder out loud why things were so backward in South Carolina.\textsuperscript{113}

Possible Explanations of the Small Number of Complaints and Citations

The number of citations issued by OSHA to employers for restricting workers' access to the bathroom may not be indicative of the extent of the violations because many (especially nonunion) workers are too intimidated or inhibited to complain about anything, let alone about a matter as personal and intimate as eliminating waste from their bodies. For that reason all enforcement and compliance officials interviewed agreed that no conclusions about the prevalence of toilet access could be drawn from the number of complaints filed.\textsuperscript{114} One long-time OSHA official who had been an iron foundry manager before working for the state of Tennessee observed that unskilled workers do not complain about anything, including safety

\textsuperscript{111}South Carolina Dept. of Juvenile Justice, Insp. No. 302442108, OSHA Worksheet, DOSH-C 1A (Oct. 12, 2000).
\textsuperscript{112}Telephone interview with Gwen Thomas, South Carolina OSHA (Sept. 20, 2002).
\textsuperscript{113}Telephone conversation with unidentified receptionist, OSHA office, Columbia, South Carolina (Sept. 20, 2002).
\textsuperscript{114}E.g., Telephone interview with George Vigil, Program Manager for Statistics Section, New Mexico OSHA, Albuquerque (Sept. 20, 2002); email from Lee Ann Campbell, Labour Services Branch, Whitehorse, Yukon. to Marc Linder (Sept. 12, 2002).
and health violations.\textsuperscript{115} Enforcement must remain inadequate as long as inspections are triggered chiefly by (unionized) employees’ complaints. That the vigor with which OSHA may be prosecuting even union complaints may leave much to be desired was suggested by one OSHA official’s question as to why unions were not able to deal with bathroom breaks on their own, and why, if they were not, it was any of OSHA’s business.\textsuperscript{116} Even OSHA officials who took the problem of denial of bathroom access seriously and acknowledged the injuries that it inflicts on workers’ health and dignity tempered that sympathy with the admonition that the higher priority of preventing workers from being electrocuted or losing limbs crowds out enforcement activity to compel compliance with the sanitation standard in a chronically underfunded and understaffed agency.\textsuperscript{117}

Interviews with officials in all ten Federal OSHA Regional Offices, many Federal OSHA Area Offices, and all 21 state-plan programs leave no doubt that they regard both employers’ violations of their obligation to make toilet facilities available to employees when they need to use them as a low-priority issue and the perceived small volume of worker complaints as therefore appropriate. For example, the director of the Federal OSHA Denver Area Office, who has worked for the agency for 25 years, stated that toilet access complaints were very rare.\textsuperscript{118} The Regional Administrator for the Denver Region, encompassing Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming, reported that there had been very little activity, even of an informal nature, averaging perhaps one or two complaints per area office annually, all of which were resolved by the phone-fax procedure with the employers, dispensing with the need for on-site inspections.\textsuperscript{119} Neither the Acting Regional Administrator for the Boston Re-

\textsuperscript{115}Telephone interview with Mike Maenza, Manager for Standards and Procedures, Tennessee OSHA (Sept. 23, 2002).
\textsuperscript{116}Telephone interview with Maenza.
\textsuperscript{117}Telephone interviews with Maenza and Mary Bryant, Administrator, Iowa OSHA, Des Moines (Sept. 25, 2002). Maenza’s good faith was underscored by an anecdote he related about why he had decided years earlier to leave his job as a foundry supervisor: One day while he was standing in the cafeteria line he distinctly smelled human feces; seeing that the seat of the pants of the worker in front of him was soiled, Maenza tapped him on the shoulder and asked him to step outside to talk. When Maenza asked him whether he realized that he had defecated in his pants, the man replied that he had, but that his job did not permit him to prevent it or do anything about it. Maenza told him to go home, wash, change his pants, and return to the foundry, and that he would be paid for the time.
\textsuperscript{118}Telephone interview with Herb Gibson, director, Denver Area OSHA Office (Oct. 31, 2002).
\textsuperscript{119}Telephone message from Adam Finkel, OSHA Regional Administrator, Denver Region (Dec. 9, 2002).
nor the Deputy Regional Administrator for the Philadelphia Region was aware of any change in the volume of complaints since the Memorandum had been issued. Moreover, the Philadelphia Regional official asserted apodictically that she did not think that the small and unchanged volume of complaints could be explained by workers’ being unaware of their right to go to the bathroom, at least not in her region. Rather, she was “willing to bet” that the problem was centered in the southern states, though, revealingly, she immediately slipped back into speaking of the problem as a lack of bathrooms altogether (and not denial of access).

Of greatest interest is the response of OSHA’s Assistant Regional Administrator for Compliance Programs for the Atlanta Region, who reported that his area offices in Alabama and Georgia used to receive a considerable volume of complaints from poultry processing workers, but no longer did. He and two assistants even jumped from the perceived absence of complaints to the conclusion that the problem itself had “gone away.” Asked to speculate on the possible reasons, he suggested, in addition to the Memorandum (of which poultry management had been well informed and to which it had not objected), the impact of the UFCW’s organizing activities directly on the plants that it has organized and indirectly on others that may need to offer equivalent working conditions to fend off unionization.

To be sure, representatives of the UFCW itself did not seem quite so sanguine about the alleged disappearance of the problem, at least not in nonunion plants, let alone its cause, but the Area Director for Local 1996, which has organized a dozen poultry plants, reported significant progress in several unionized plants. Rick Brown, the executive assistant to the president of UFCW Local 1996, emphatically denied that bathroom access was no longer a problem in nonunion poultry plants; on the contrary, the prospect of being “able to take a pee can make a difference” during an organizing drive. Brown also dismissed the notion that an absence of complaints could be sensibly interpreted as an absence of violations. A huge proportion of the poultry plant labor force consisting of recent

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120 Telephone interview with K. Frank Gravitt (Nov. 27, 2002).
121 Telephone interview with Marie Cassady (Nov. 27, 2002).
122 Telephone interview with Benjamin Ross (Dec. 18, 2002). Two of Ross’s subordinates, team leader Bill Fulcher and senior industrial hygienist Jim Drake, who also participated in the interview by way of speaker-phone, agreed with Ross’s account.
123 Telephone interview with Robyn Robbins, Assistant Director, Occupational Safety and Health Dept., UFCW, Washington, D.C. (Dec. 18, 2002); email from Jackie Nowell, Director, Occupational Safety and Health Dept., UFCW, to Marc Linder (Dec. 19, 2002).
124 Telephone interview with Curtis Williams, Sewanee, GA (Dec. 26, 2002). For further details, see below ch. 16.
immigrants, many of whom lack proper documents, would, in his experience, "certainly not call a government agency of any sort to report that they didn't get a bathroom break." Edgar Fields, the International representative of the Retail, Wholesale, and Department Store Union, which is affiliated with the UFCW and has organized three poultry plants in Georgia, pointing out that workers at the unionized plants still had to deal with unlawful restrictions, scoffed at the suggestion that bathroom access was no longer a problem in the 80 percent of plants there without a union. As an example, Fields mentioned the Cagle's plant in Perry, Georgia—at which the union had recently lost an election—where denial of access had gone to the point at which one worker urinated in his pants.

Despite these qualitative assessments by management-level OSHA officials who may be too far removed from the area offices' daily intake routine to be intimately familiar with the volume and composition of telephone complaints, it is possible that the actual universe of toilet-access complaints may be considerably larger than they imagine. Indeed, there is good reason to believe that no single person in an OSHA office would be in a position to furnish an accurate answer without doing a tedious hands-on review of the complaint records.

OSHA's recordkeeping and retention procedures generally make it impossible to determine how many toilet-access-restriction complaints OSHA has received nationally that were resolved short of the stage of on-site inspection and citation. As one state-plan official observed: "When we receive complaints that are handled via telephone, facsimile or letter and resolution of alleged conditions occurs, those activities are not tracked as inspections. Therefore, this issue may be the subject of more complaints that find their resolution without initiation of an inspection. An exact number of such complaints is not available nor is it easily derived." Although Federal OSHA offices retain such complaint records for three years, they are generally filed under the name of the employer and cannot be accessed by standard number, even in their abbreviated computerized form.

125 Telephone interview with Rick Brown, Executive Asst. to the Pres., UFCW Local 1996 (Jan. 8, 2003).
126 Telephone interview with Edgar Fields, International Representative, RWDSU, Atlanta (Jan. 6, 2003).
127 Email from Elizabeth Slatten to Marc Linder (Dec. 30, 2002).
128 Telephone interview with Byron Orton, Iowa Labor Commissioner, Des Moines (Oct. 18, 2002).
129 Email from Chris Ottoson, Health Analyst, Enforcement Policy Section, Oregon OSHA, to Marc Linder (Sept. 24, 2002).
130 Telephone interview with Elizabeth Slatten (Nov. 7, 2002); email from Slatten to Marc Linder (Dec. 17, 2002).
However, at least one Federal OSHA Area Office has created a computer program that does make it possible to access informally resolved phone-fax complaints and to identify the corresponding paper files by standard (though not by subsection). By examining all the section 1910.141 complaint files for fiscal year 2002 (running from October 1, 2001 to September 30, 2002), the Omaha Area Office identified seven (out of a total of 358) telephone complaints dealing with restriction of toilet access.\(^{131}\) Despite the additional work caused by purely hand retrieval, a review of the paper files was also performed in the Federal OSHA Austin Area Office, which determined that in fiscal year 2002, of a total of 644 complaints that it received, including those addressed through an on-site inspection, those investigated by phoning and faxing a letter to the employer (which does not usually progress to an inspection),\(^{132}\) and those referred to another agency or dismissed for lack of jurisdiction, 11 dealt with restriction of toilet access. Of a total of 134 complaints that the Austin office received during the first quarter of fiscal year 2003, three involved bathroom access, making a total of 14 during those 15 months. In addition, the office in fiscal year 2002 conducted one inspection based on a restriction of access complaint that did not result in a citation.\(^{133}\)

If the Austin and Omaha Area Offices are typical—and there is no obvious reason, in terms of the demographic base and employment composition of the geographic area they cover, to think otherwise—the 85 Federal OSHA Area Offices could be receiving almost 800 restriction of toilet access complaints annually. If the parallel state-plan OSHA system, which has jurisdiction over an approximately equal number of workers, receives an equivalent volume of complaints, the annual nationwide total might be more than 1,500. This number would by no means be trivial, especially when it is considered that for every complaint filed an indeterminate number of workers may be suffering a denial of access in silence.

Even if this quantitative extrapolation turned out to be excessive, an examin-

\(^{131}\)Telephone interview with Bonita Winningham, Assistant Area Director and Duty Officer, Omaha Area Office (Dec. 17, 2002); telephone interview with Cheryl Gray, Safety and Health Asst. and Duty Officer, Omaha Area Office (Jan. 2, 2003); letter from Bonita Winningham to Marc Linder (Jan. 3, 2003).


\(^{133}\)The initial hand count, which retrieved all the bathroom complaints, was later supplemented by a report of the total number of complaints. Email from Elizabeth Slatten to Marc Linder (Jan. 31, 2003). One of the complaints in fiscal year 2003 was filed against a construction company regarding work at a construction site and was presumably subject to the construction industry sanitation standard, which is not subject to the April 6, 1998 Memorandum. Complaint, Wilson Construction, Austin (2002).
tion of these complaints that OSHA declined to process to the point of on-site inspections can shed light on the question of why OSHA has issued so few citations. In Nebraska, six of the seven employers were well-known national or regional companies, including the U.S. Postal Service,\textsuperscript{134} two home improvement and/or lumberyard chains (Lowe’s\textsuperscript{135} and Menard’s\textsuperscript{136}), APAC Customer Services,\textsuperscript{137} Aquila (electric and gas utility),\textsuperscript{138} and Carneco Foods, an animal slaughter plant, which is a joint venture between Tyson and Lopez Foods Inc., one of the country’s largest Hispanic-owned businesses.\textsuperscript{139} Two of the complaints concerned guards (Menard’s and Visinet, Inc., a business that provides monitors who accompany parents during court-supervised child visitations),\textsuperscript{140} whose complaints echoed those already discussed—namely, lack of a relief guard enabling them to leave their post). Two (APAC and Aquila) involved the by now familiar complaints of call-center workers that they are not allowed to stop answering the telephone to go to the bathroom outside of fixed breaks.\textsuperscript{141}

The information that several of these employers furnished OSHA in response to the complaints should at the very least have raised some suspicions at the agency, prompting it to explain employers’ obligations under the Memorandum to the firms in greater detail. That it did not, may in part have resulted from the fact that the information received, though revealing of potentially deep-seated problems with the employer’s policy, was merely incidental to resolving the specific allegations of the complaint, on which OSHA was exclusively focused. For example, Carneco Foods’ human resources director wrote:

Going back a few months, it was common practice for a group of employees to leave the production floor for the restroom whenever their production line went down. Numerous times the line would come back up while the employees were still away from their work stations. When supervision would go looking for the employees, they would be found visiting in the hallway as opposed to returning to the work station. Therefore, a

\begin{itemize}
\item \textsuperscript{134} OSHA, U.S. Postal Service, Complaint No. 203760798 (Apr. 26, 2002).
\item \textsuperscript{135} OSHA, Lowe’s, Complaint No. 203760392 (Apr. 1, 2002).
\item \textsuperscript{136} OSHA, Menards, Complaint No. 203762422 (Sept. 18, 2002).
\item \textsuperscript{137} OSHA, APAC Customer Service, Complaint No. 203761291 (May 31, 2002).
\item \textsuperscript{138} OSHA, Aquila, Complaint No. 203761739 (July 17, 2002).
\item \textsuperscript{139} http://www.estradusa.com/mr/camr/21500.htm; http://www.hispanicbusiness.com/research/500/view.asp?companyid=849
\item \textsuperscript{140} OSHA, Visinet, Inc., Complaint No. 203761036 (May 15, 2002).
\item \textsuperscript{141} Information furnished by Cheryl Gray (Jan. 2 and 3, 2003). Gray noted that guards at Menard’s had complained several times before; although their pay checks come from a private security company, OSHA regards them as employed by Menard’s because Menard’s controls all their conditions of employment, monitors them, and tells them what to do.
\end{itemize}
"pass system" was implemented. A meeting was held with employees...at which...employees were advised of the 'pass system'. When an employee requested to use the restroom facility, they would be given a pass to leave the production floor and use the restroom. Upon their return, someone else may take the pass and use the restroom. This "pass system" was not very well accepted by the employees. They were told restroom privileges were being abused and until they improved, we would use the "pass system".

During our investigation today, I was advised by the supervisors, the "pass system" is no longer being used. Employees have been very cooperative and not abusing the use of restrooms.142

Here the employer revealed above all that it had still not grasped that, pursuant to the OSHA Memorandum, workers have a right to void when they need to, not merely "restroom privileges," to be revoked at the employer's discretion. Exacerbating this unlawful approach was the practice of punishing all employees for what the company claimed was "abusing" behavior by some employees (although even according to the firm's own account it is not clear that it had informed those employees how long the downtime would be). And finally, the pervasive paternalism and correlative infantilization that culminated in the introduction of the ""pass system""—the human resources director's use of distancing quotation marks hinting that even the company was somewhat embarrassed by its adoption—mimicking the regime imposed on schoolchildren should have given OSHA pause about the firm's limited attitudinal capacity for voluntary unassisted compliance.

In the Austin area, more than half of the employers about whom workers made toilet-access complaints were large national or Texas companies, including the U.S. Postal Service (two complaints), Southwest Airlines (reservations call center), Nationwide Insurance (claims call center), MCI Worldcom, Best Buy, Corrections Corporation of America, and the H.E. Butt Grocery Company (H-E-B supermarket chain).

Remarkably, under OSHA procedures, employers do not have a heavy burden to carry in providing the type of "adequate response" that shifts the burden to the worker to dispute it.143 Although some of the employer responses were detailed, others merely denied the truth of the complainant's account; in the most extreme example, it sufficed that the employer merely conclusorily summarized its alleged investigation by declaring the worker's complaint "unsubstantiated"
(underlined three times). Even this minimalist response prevailed because the worker failed to respond, let alone to dispute it; in fact, non-response was the norm. In Texas, in 12 of the 14 cases OSHA never heard from the worker again; and even in the other two cases, the additional OSHA involvement did not proceed to the point of inspection. In Nebraska, none of the complainants responded to the employer’s response.

In fact, OSHA officials agree that silence is the overwhelmingly typical response of complainants. The Assistant Area Director in the Omaha Area Federal OSHA Office estimated that 99 percent of telephone complaints come from ex-employees and that 99 percent of complainants drop the matter at the time that OSHA requests a response from them to the employer’s denial of their allegations. This pattern of abandonment prevails despite (or perhaps in part because of) the fact that some OSHA offices inform ex-employee complainants at the outset that if the employer denies their allegations and refuses OSHA permission to enter the premises to perform an inspection, it is very unlikely that OSHA would be able to obtain a judicial warrant to enter based solely on an ex-employee’s statement. In this sense, it may hardly matter at all whether the ex-employee responds to an employer’s denial or not. At the same time, the official conjectured that the vast preponderance of telephone complainants are ex-employees because current employees may fear for the security of their jobs.

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144 The employer was Bryan Centex Countertops.
145 Telephone interviews with Slatten and Cheryl Gray.
146 Telephone interview with Bonita Winningham, Asst. Area Director, Omaha (Dec. 30, 2002). In fact, there is no principled impediment to obtaining a warrant based on an ex-employee’s statement: “Central Mine argues that, under the Act, whenever probable cause is asserted on a basis other than a general administrative plan, it must be founded upon information supplied by someone currently employed by the employer. Section 8(a) of the Act contains no such restriction upon OSHA’s authority to inspect. Section 8(f)(1) merely describes the procedures to be followed when an employee does complain of a safety or health standard violation. Probable cause to issue an administrative search warrant under the Fourth Amendment may be established upon information from any reasonably reliable and credible source.” In the Matter of the Inspection of Central Mine Equipment Co., 1978 WL 18636 at 8-9 (E.D. Mo. 1979). The issue is more that of the staleness or recency of the ex-employee’s information. Telephone interview with Stephen Reynolds, attorney, Solicitor’s Office, OSHA Kansas City Regional Office (Jan. 27, 2003). The Assistant Regional Administrator for Federal and State Operations, OSHA Kansas City Regional Office, which oversees the Omaha Area Office, agreed with Reynolds and was unaware of any practice of informing ex-employee complainants that ultimately there was little OSHA could do if the employer denied the agency access. Telephone with Steve Carmichael (Jan. 27, 2003).
147 Telephone interview with Winningham. Elizabeth Slatten, the Asst. Area Director of the Austin Area Office, agreed that the vast majority of complainants are ex-employees,
Although another OSHA official in Omaha, who as duty officer took complaint calls two weeks of every month, estimated the proportion of telephone complaints coming from ex-employees at 20-25 percent, she believed current employees accounted for one-third, and others, including customers, spouses, and mothers, for the largest share. In addition, she estimated that one-third of all calls were made by people who declined to identify themselves at all, some of whom explained their caution by expressly stating that if they were to take the process to the next higher level, “they’re going to know it’s me.”

One actual example of a worker’s abandonment of a complaint may illustrate the typical process. In 1999 a legal services organization complained to OSHA on behalf of a former employee that workers at a frozen foods plant in South Texas worked 12-hour shifts with only one 10-minute break in the morning and one in the afternoon and no meal period: “Employees are not allowed any other restroom break throughout the shift. There is no relief personnel for employees taking breaks to the restroom. If they need to use the restroom more than twice per day they are assumed to be sick and must have a doctors [sic] excuse.” Instead of conducting an on-site inspection, OSHA relayed this complaint to the employer, requesting a reply within four days. The employer then denied all accusations, asserting in particular that: “There is no limit on the number of restroom breaks taken as long as it is not abused or excessive.” Based on this reply, OSHA informed the complainant that “OSHA feels the case can be closed on the grounds that the hazardous conditions have been corrected (or no longer exist),” and gave the complainant six days to inform OSHA of any disagreement. Because the worker no longer worked there and would not have been able to offer additional information or informants, OSHA, in the absence of a reply disputing the employer’s claim, took no further action.

These patterns suggest that even workers who have had the fortitude to file a complaint may lack the wherewithal for further confrontation with what they perceive to be a hostile and determined employer that might, after the next round of exchanges, be able to identify the anonymous complainant (and/or blacklist an ex-employee) if it has not already done so. A major research project in its own right would be needed to determine the range of reasons causing so many complaints to be abandoned.

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148 Telephone interview with Cheryl Gray.
150 Letter from R.L. Mike Hunter, OSHA Area Director, Corpus Christi, to Jose Torres, Texas Rural Legal Aid (Mar. 30, 1999); email from Larry Norton, Texas Rural Legal Aid, to Marc Linder (Oct. 23, 2002).
plainants to abandon their claims. The point here, however, is merely that, whether for a good or bad reason, the enforcement process has been terminated without OSHA's having acquired sufficient information to be able to make an independent judgment as to whether the employer violated a standard—and denial of toilet access is no exception—because the agency either lacks the resources for, or has decided to allocate its resources in such a way as to preclude, following up complaints that it has categorized as unpromising.

Finally, even when the rare employer concedes that there was some validity to the complaint and promises to undertake what OSHA calls "corrective action," the agency will never know with certainty whether the employer actually implemented such action if the complainant never calls back.151 Thus, for example, in response to a complaint that employees at the gas station at H.E.B. in Pflugerville were not given restroom, water, or lunch breaks in a timely manner, the employer declared that all of management agreed that a better effort was required to meet the needs of "our partners" including giving them relief when they have to go to the bathroom.152

The formal criteria that OSHA has developed for closing complaints may have warranted its inaction in some of these cases, but the peculiar facts in a number of these cases, which differ from those discussed elsewhere in the book, may have raised difficult questions concerning the intersection of OSHA law and wage and hour and/or labor-management relations law that agency officials may have wished to avoid having to resolve. For example, in the Southwest Airlines reservations call center case, the complainant stated that, because of bathroom renovations, workers having to wait to use the toilet had been penalized for taking too few calls.153 A complaint directed against an Austin post office stated that management had refused to authorize time for letter carriers to take bathroom breaks while on a delivery route and had consequently written them up for using unauthorized overtime. In response, the employer countered: "Management does not and will not refuse an employee the right to take a bathroom break while on a delivery route. However, if a carrier's authorized overtime is extended, management has the responsibility of ascertaining the reasons for the overtime. If the supervisor has reason to know that an employee while 'on the clock performed

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151 Although none of the seven employers whom complainants accused of restricting bathroom access conceded that there was truth to the complaints, the Omaha Area Office Duty Officer estimated that, in her experience, overall about half of employers admit that there is something to the charges and state that they have taken corrective action. Telephone interview with Cheryl Gray.

152 Complaint, H.E.B. Pflugerville (Apr. 19, 2002).

Similarly, at the Nationwide Insurance Claims Call Center in San Antonio, which employed 400 workers, the complainant stated that the employer was restricting the employees' use of the bathroom to 15 minutes every four hours, and that employees with medical conditions requiring frequent access to the bathroom had been disciplined. The employer, agreeing that it gave workers two 15-minute breaks, responded that employees could divide up these breaks into whatever segments they wished. In addition, the company declared to OSHA that it had rescinded two disciplinary actions that it had taken against employees with medical conditions and had initiated a process for obtaining in the future medical considerations under the Americans with Disabilities Act. OSHA felt warranted in closing this complaint because the employer had taken corrective action dealing with the complainant's specific complaint. Nevertheless, had OSHA been in the habit of vigorously enforcing workers' right to go to the bathroom when they need to, it would have noticed that the employer's response was, on its face, a clear admission of an unlawful policy: even if the employer did permit employees to divide up their 15-minute break during each four-hour period so that they could go to the bathroom several times, the employer was conceding that once workers had used up their 15 minutes, they would, unless they had some type of medical excuse, presumptively be subject to discipline for going to the bathroom when they needed to do so. This particular OSHA office was especially remiss because its intake officers already knew that call centers were the focal point of complaints about restrictions on bathroom use. Here OSHA's acquiescence in the employer's unlawful policy failed to enforce the letter or spirit of the Memorandum and therefore violated the agency's own directive that "[t]he complaint shall not be closed until OSHA is certain that the hazard has been eliminated/abated."

To be sure, OSHA does require the employer to post a copy of OSHA's letter detailing the nature of the alleged hazard mentioned in the complaint and to certify to OSHA that it has posted it. But if current employees are too intimi-
dated to file complaints, there is little reason to assume that workers’ continued silence following this posting signals their agreement with the employer that no hazard exists or that it has been abated.

Even if workers have filed more complaints about toilet access than some OSHA officials realize, one possible reason for the meager enforcement of OSHA’s Memorandum of April 6, 1998 was suggested by a state OSHA official: Perhaps no one at OSHA read it. Pointing to the hundreds of memoranda that state-plan officials receive every year, he asserted that if they read all of them, they would have no time to do anything else all day. Moreover, he noted, for really important directives (of which he said there had been ten in 1998), OSHA had established a two-way fax procedure, which serves to downgrade the significance of the memoranda not subject to the procedure.160

To be sure, OSHA’s website lists 137 standard interpretations that were issued in 1998, but only the toilet standard memorandum of April 6 was an interpretation issued not as an opinion letter in response to a question from an employer, employee, union, legislator, or State OSHA official (although it was in reality a response to a request from the UFCW for clarification), but as a “memorandum,” directed to the Federal OSHA regional offices and state-plan states, and admonishing the latter that their interpretations had to remain “at least as effective as” the Federal OSHA standard.161 Nevertheless, the manager of one Cal/OSHA district office ventured the opinion that Federal OSHA had not been very serious about the Memorandum if it did not devise some more effective method of bringing it to the attention of the state-plan states.162

In contrast, John Miles, who as Director of Compliance Programs had issued the Memorandum in 1998, noting that the fax-fax procedure is used only for new standards, stressed that since the Memorandum had been a “hot potato” accompanied by a great deal of media attention, there was little likelihood that OSHA officials around the country had been unaware of it, especially since OSHA had discussed it repeatedly at various meetings. To be sure, when informed that some state-plan state officials were still unaware of it in 2002, he acknowledged that

Letters. The Austin Area Office also requires employers to post their response to OSHA. Telephone interview with Slatten (Dec. 30, 2002).

Telephone interview with Maenza.


Telephone interview with Luis Mireles, Manager, San Diego District Office of Cal/OSHA (Nov. 11, 2002).
attrition and the advent of new personnel could explain such ignorance.  

A revealing statement by Federal OSHA’s Manhattan Area Director—echoed by other OSHA officials—provides yet another possible reason for lack of effective enforcement: he doubted very much whether any inspector in the course of interviews conducted during a programmed inspection would ask employees whether their employer was not letting them go to the bathroom. Indeed, one official observed that since many employees were reluctant to answer any questions, in part because they were not sure whether OSHA inspectors were associated with the employer, asking about something as intimate as voiding would, to say the least, not be productive. Similarly, while not at all pooh-poohing the hazard associated with involuntary suppression of the bladder, one state-plan inspector observed that during the limited time available to inspectors for interviews with employees during planned inspections, they would simply be forced to focus on other more immediately life-threatening hazards. The Manhattan Area Director’s observation that the agency has also not advertised to employers the existence of their new obligation finds confirmation in some large firms’ ignorance. For example, in responding to a complaint of denial of restroom access, a store manager of Lowe’s—a Fortune 100 company with 110,000 employees and $22 billion in revenue operating 800 stores in 43 states—faxed OSHA three pages on breaks from the corporate Human Resources Management Guide, which includes in tabular form information on state statutory requirements. Though revised more than a year after the issuance of the Memorandum, the Guide expressly states that “the Company is not required by Federal law to provide breaks....”

Overall, then, OSHA’s timid and purely reactive approach to enforcement of and compliance with voiding rights is not geared toward changing the status quo.

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163 Telephone interview with John Miles, OSHA Dallas Regional Administrator (Nov. 12, 2002).
164 E.g., telephone interview with Mike Rohde, Research Analyst, WISHA, Olympia (Sept. 25, 2002).
165 Telephone interview with Richard Mendelson.
166 Telephone interview with Mike Maenza, Manager for Standards and Procedures, Tennessee OSHA, Nashville (Sept. 23, 2002).
168 Telephone interview with Mendelson.
169 http://www.lowes.com
170 Lowe’s Human Resources Management Guide, Policy No. 312 (5/15/99), in OSHA, Lowes [sic], Complaint No. 203760392 (Apr. 1, 2002). The firm nevertheless “supports work breaks to maintain alertness and energy resulting in better customer treatment, satisfaction and employee safety.”