Void
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Revisited

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

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Bourbon and Urine Don’t Mix: 
Jim Beam in Kentucky

"Basically, we’re being asked to train our bladders and other organs to meet their needs, not ours...."1

"The company keeps computer spreadsheets documenting each time we go to the bathroom. It’s like the potty police. It seems like they spend more time monitoring our bathroom time than we actually spend going to the bathroom. They should focus more on the business and less on the toilet"....2

Right now the members are just in shock that we finally won this. Most are grateful enough to curtail unnecessary breaks, but there are still that few.3

Trying to Break the Break Tradition

In the four and half years following the issuance of OSHA’s Memorandum the only case of deprivation of voiding rights to captivate the national (and non-U.S.) news media featured the Jim Beam Brands Company bourbon plant in Clermont, Kentucky.4 Although examination of this media attention is important because that spotlight itself helped shape the outcome of the dispute, of transcending analytic significance is the two-day OSHA appeals hearing, which offered an unprecedented public debate among labor, capital, and the state over the

3Email from Jo Anne Kelley to Marc Linder (Oct. 13, 2002).
4The Canadian press, for example, the Guelph Mercury, carried the AP report on Aug. 28, 2002.
question of workers' right to extricate themselves from employers' control over their time and activities at the workplace and the power of governmental labor standards-setting to override capital's power to prescribe when, how often, and for how long its employees can eliminate waste from their bodies. This political-economic confrontation was all the more valuable for the supporting role played by representatives of medical (urological and urogynecological) science, whose presentations and critiques of each other underscored how malleable scientists' opinions and conclusions can be in the medium of class struggle.

Jim Beam bourbon, the world's best-selling bourbon, generated $350 million in sales in 2001 for its parent company, Fortune Brands, a firm with annual sales of $5.5 billion, which in 1994 had sold off its subsidiary American Tobacco Company. The operating company contribution of its "spirits and wine" segment as a share of net sales of alcoholic products (including whiskey, vodka, and gin) amounted to 22.3 percent in 2001 and 25.2 percent in 2000.5

Jo Anne Kelley, who had been president of UFCW Local 111-D—which in 1995 merged with the Distillery Workers Union, which had had a collective bargaining agreement with the company at that plant since 1947—for six years and worked at the plant for 34 years, explained that under the established practice, which went back 50 years, "everybody got a little break between breaks. It was a benefit."6 These mini-breaks, according to the UFCW's assistant general counsel, Peter Ford, were "a longstanding past practice that the company called 'tag rotation,' under which Bottling Dept. employees essentially relieved each other while they took unscheduled breaks to smoke or hang out in the restroom, cafeteria, etc."7

According to data collected by Jim Beam by monitoring breaks in August 2000 and February 2001, the total average duration of these four mini-breaks taken by bottling-line workers amounted to 25.3 minutes per day.8 Added to the two scheduled breaks of 15 minutes each, these more informal breaks—whose frequency and average duration were confirmed by Kelley9—gave workers about 55 minutes of rest breaks per day (beyond the 30-minute lunch period), or almost

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6 Telephone interview with Jo Anne Kelley, Bardstown, KY (Oct. 4, 2002).
8 Calculated as the average of 9 monitorings that Jim Beam performed on bottling lines D, G, H, and K, and that were submitted as deposition exhibits 3-12 at Dr. James Stivers' deposition on May 7, 2002, plus one of line A in Aug. 2000, a copy of which was furnished by the UFCW. The average daily breaks ranged between 17.56 and 32.4 minutes per worker.
9 Email from Jo Anne Kelley to Marc Linder (Oct. 9, 2002).
seven minutes per hour, which is marginally more than the six-minutes per hour that the UAW, arguably the strongest mass production union in the United States, negotiated with Ford (and GM) in its 1999 collective bargaining agreement. And spread out uniformly throughout the workday, such rest pauses were probably also more beneficial to the Jim Beam workers than the two lumped together in the automobile industry. In any event, Jim Beam management was determined to put an end to this considerable achievement, which it viewed as an "excessive" withdrawal of labor from the task of profit-making.

That firms are driven to eliminate such nonproduction time is made plausible by customer-based market research conducted by Scott Paper Company. In touting to employers its paper towels over hot air dryers, the company stated that workers spent 12 seconds more with the latter: "Twelve seconds doesn’t sound like a lot, but it can add up. The typical employee visits the bathroom 3.3 times daily while at work. If you do the math, it works out to nearly three hours per year per employee of wasted time standing in front of a hot air dryer." If Scott is right in believing that eliminating such relatively small amounts of time that workers spend in the bathroom would appeal to employers, they would be considerably more interested in eliminating those bathroom visits altogether that give rise to hand-drying.

Although disputed by the workers, Beam claimed that it established a new break policy in the fall of 2001 “because some workers abused the privilege of unlimited bathroom breaks....” As Richard Griffith, the company’s lawyer, described it to a television audience at the height of the conflict in August 2002, the workers had “engaged in what is called a tag rotation. In order to fit in four unscheduled breaks a day, they would begin going out in regular patterns...so they could all get their breaks in between the start of the workday and the first scheduled break, between the first scheduled break and lunch, between lunch and the second scheduled break, between the second scheduled break and the end of the work day. [Literally] one would come back, point to somebody and say “it’s now your turn to go,” and that person would go.” The use of “literally” to prompt

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10 In its 1993 agreement with General Motors, the UAW extracted 46 minutes of relief time per eight-hour day, or 5.75 minutes per hour. Agreement Between UAW and the General Motors Corporation 433 (Oct. 24, 1993). In 1999 the UAW-Ford contract provided workers with six minutes per hour. Letter from Rocky Comito, President, UAW Local 862, to Marc Linder (Oct. 17, 2002).

11 Letter from John C. Allen, Jr. to Dr. James Stivers, Mar. 16, 2001, deposition exhibit 2 at Stivers’ deposition of May 7, 2002.

12 R. Dixon Thayer, “Everything You Ever Wanted to Know About Bathroom Habits (but were afraid to ask)” n.d. (ca. mid-1990s).

the audience to share in the employer's alleged disbelief and outrage is amusing since the term and practice of "tag relief" are widespread in industrial relations: it merely designates serial relief as opposed to "mass relief," where the production line is shut down and all workers take a break.  

According to Kelley, there had never been any pretense that workers had been using their mini-breaks exclusively to void; rather, they were rest breaks that also included voiding. Although Jim Beam made elaborate calculations as to how much money it was costing the company to pay "highly paid highly skilled technicians" to relieve bottling-line workers while they were in the bathroom—in fact, the technicians were paid $18.85 per hour, only marginally more than the $17.63 that the machine operators they relieved were paid, while the other bottling-line workers, the general helpers, who were paid $16.60, either did not need to be replaced or were replaced by janitors—the break system, in Kelley's estimation, did not result in loss of production and most of the time the technicians were not actively performing work anyway, since much of their workday was taken up with observing and only in the case of a machinery breakdown did they have to intervene. Kelley recounted that in recent years the company had become more and more obsessed with controlling workers and their time and capturing their movement and actions through various kinds of surveillance such as computers and cameras (but "even this employer wouldn't stoop to putting cameras in the bathrooms").

Jim Beam management contended in a three-page "Summary—Restroom Break Issue" that it gave to the OSHA inspector on October 15, 2001, that it had met with the union executive board once in 2000 and numerous times in earlier years "to discuss addressing the practice of break rotation. The Union would agreed [sic] to 'try' and help reduce the obvious abuses, but clearly saw no problem with the practice. Some improvement would result after the meetings but the practice and abuses would soon return." The company also informed the inspector that during the week ending August 24, 2000 it had conducted a survey of restroom break practices in the distillery industry: "The survey confirmed that the practice of break rotation (outside scheduled breaks) was present in other industry operations to a highly varying degree. Both extremes and all points in the middle appear to exist."

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15 Telephone interview with Kelley.

16 Jim Beam Brands Co., "Summary—Restroom Break Issue." This document was
Jo Anne Kelley, who noted that with one exception all distilleries in Kentucky are unionized, conjectured: "I suppose the reason the practice is so common is because in the past there were so many women who worked in the bottling facilities before all the automation. There were labor laws in the past...which were more liberal with regards to women and breaks before we were all "made equal" on the job. I suppose it had to do with...the way women were viewed as being weak and naturally needing extra breaks. ... Beam began automating and eliminating women's jobs (work traditionally performed by women) about 20 years ago... When I went to work at Beam 34 years ago, there were 400 men and 400, women. Now there are 60 women and 185 men producing twice as much."17

To be sure, Jim Beam did not explain why the producer of the world's bestselling bourbon was so concerned about these breaks when they had been going on for half a century and its competitors also operated with them, but on August 28, 2000 it began "conduct[ing] data surveys to quantify the actual restroom break rotation in terms of how frequent, when, time taken, etc." Use of the expression "conducted data surveys" to cover both undertakings was misleading since what the company did in the second case was to create the data by monitoring its employees' breaks. A week after the monitoring had been completed in February 2001, senior Beam managers met “to consider proper strategy for addressing excessive restroom breaks..." Three months later senior managers met on the same matter again, this time articulating two considerations: "Try to again enlist the Union’s support in ‘managing out’ of an abusive practice or approach the problem through negotiations. It was determined that we may have been asking the Union to do something it could not do. Management decided to address the problem in Contract Negotiation,” which then began in early July and led to adoption of a new break arrangement.18

In March 2001, in support of its plans to restrict toilet access, Jack Allen, Beam’s director of human resources, hired a local Louisville urologist in private practice, Dr. James Stivers, at $250 per hour,19 to learn “what was reasonable in
given to OSHA at the opening conference on Oct. 18, 2001 and was attached to the OSHA Citation.

17 Email from Jo Anne Kelley to Marc Linder (Oct., 13, 2002). According to a Jim Beam Brands executive, tag rotation was the “vestigial” remains of the pre-automated production system when there were fewer skilled workers on the bottling line and workers going to the bathroom could be replaced by a similarly nonskilled co-worker standing next to him or her rather than by skilled workers performing other work. Telephone interview with an executive of Jim Beam Brands Co., Clermont, KY (Nov. 8, 2002).


terms of the needs to urinate in a certain time frame from a medical standpoint," and to comment on data that the company had collected on breaks and smoking in August 2000 and February 2001. Stivers, whom the company later lauded to the OSHA inspector as "a renowned urologist"—an epithet that Professor Ingrid Nygaard, a urogynecologist, professor at the University of Iowa College of Medicine, and co-author of Void Where Prohibited, characterized as "utter nonsense"—included only two publications, neither concerned with voiding, on his curriculum vitae during the more than three decades following his graduation from medical school: one was one page, written with three others in 1973, and the other two pages, written with three others in 1994. Stivers came to Allen’s attention as a result of the intervention of the “company doctor for Jim Beam Corporation,” a “colleague” of Stivers’, whom “we call a [sic] occupational physician.” In a letter to Stivers of March 16, 2001 on “Reasonable Restroom Breaks,” Allen biased his charge to the urologist by transforming workers’ right to void when they need to into a mere “privilege,” which managers, bolstered by physicians, were even entitled to restrict:

As you are aware, the Jim Beam Brands Co. manufacturing operation in Clermont, Kentucky is experiencing what we believe to be an excessive pattern of employees taking restroom breaks. Management has devised a policy regarding ‘break privileges’ that we feel will reduce the abuse of this privilege, while assuring employees with real needs reasonable access to restroom facilities.…. Prior to introducing a change of this nature, we want to be sure as possible that the policy is reasonable from all angles, especially the medical perspective. To that end we asked you to visit the plant, review the draft policy and answer the following questions:

1. Does the policy allow reasonable access to restroom facilities from a medical point of view?
2. What, if any, medical conditions should be considered for additional accommodation above those provided by the policy?
3. What, if any, temporary medical conditions should be considered for temporary accommodation above those provided by the policy?

20 Deposition of Stivers at 11.
21 “Summary—Restroom Break Issue”
22 Email from Ingrid Nygaard to Marc Linder (Oct. 9, 2002).
23 Curriculum vitae James R. Stivers, M.D., submitted at his deposition on May 7, 2002.
In addition, we provided you with data demonstrating the current patterns of restroom break activity. From your knowledge of human bodily functions, what conclusions, if any, can you draw from this data?25

A mere 11 days later, Stivers wrote two one-page letters to Allen. In one, Stivers seemed almost to be accusing the company of offering overly generous breaks: “It appears despite the opportunity to use the facility before and after work that there are two scheduled breaks, as well as mid-day lunch break.” If these interruptions were not bad enough, Stivers observed that “almost every employee takes an additional break prior [sic] and following the morning and mid afternoon scheduled breaks. ... The average time of these breaks varies from line to line and the average duration...ranged from slightly more than five to as high as nine minutes.” Stivers then asserted, without disclosing his source or that these averages included walking time to and from the toilet, that: “Normal voiding would be less than three minutes.” Again, without revealing his sources, he asserted: “It is generally assumed that a normal person at a moderate temperature with average fluid intake would void between three and six times per 24 hours.” Consequently: “The data does not seem to indicate a normal physiological response and it appears that the break pattern is not motivated by urination or defecation, but is most likely driven by smoking habits and other external factors.” Since (the company had told him that) 60 percent of the employees smoked, Stivers suggested that a smoking cessation program might be of use to them. Although he was ignorant of OSHA’s ruling that employers are obligated to make toilets available to workers so that they can use them when they need to, he offered his suspicion that “OSHA regulations are slowly marching in the direction of [sic] smoke free workplace.”26 Why the company never proposed solving the problem of smoking in the bathroom by prohibiting it,27 Stivers failed to explain.28 In turn, to OSHA during its inspection in October Jim Beam characterized what had merely been Stivers’ speculation about what the workers were really doing in the bathroom as “his professional opinion....”29

In his other one-page letter of March 27, 2001, Stivers, charging $250/hour for a work product replete with incoherent syntax, misspellings, and typos, bolstered his opinion by noting that he had “reviewed OSHA regulations reference

26Letter from James R. Stivers to Jack Allen, Jr. (Mar. 27, 2001), deposition exhibit at Stivers’ deposition of May 7, 2002. In fact, Beam’s monitoring included “the amount of time employees spend away from lines.” Untitled data set furnished by UFCW (Mar. 18, 2002).
28Deposition of Stivers at 49-50.
29Jim Beam Brand Co., “Summary—Restroom Break Issue”
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[sic] agricultural workers, were [sic] a three hour availability for remote agricultural workers is the standard.” Making explicit what he had implied in the other letter, Stivers asserted that the break “policy...seem [sic] to be more than reasonable and adequate.” The medical conditions that “should be consider [sic] for additional accommodations on a permanent basis” included spina bifida, paraplegia, “[f]emales in the last half of a pregnancy,” and “[o]lder men with prostate conditions.” Other medical conditions that “can effect [sic] the need to urinate, especially more frequently,” included medications, radiation treatment, and chronic infections. Finally, Stivers mentioned as temporary medical conditions that “should be considered for ‘temporary accommodation [sic]’ transient urinary or gastrointestinal infections, but not menstruation.30

Three times during Kelley’s six-year presidency the company requested that she ask the workers not to use the mini-breaks for activities other than voiding; she did ask the workers to comply, and, by and large, she believed that they had complied.31 Jim Beam proposed during contract negotiations in 2001 that the past practice of unrestricted restroom breaks on a regular basis be eliminated: “After much discussion the union agreed that we would no longer have the regular rotating cycles of breaks with the assurance that no one would be denied access to toilet facilities if needed, and we took that proposal to the membership and the membership agreed to it.”32 Kelley reported that 99 percent of the workers accepted the change because they would still be able to use the toilet.33

The collective bargaining agreement between UFCW Local 111-D and Jim Beam Brands Company that went into effect on August 16, 2001 provided:

After a two (2) hour working period in the morning and in the afternoon, there shall be a fifteen (15) minute rest period. This will not affect any existing practices with regard to break periods. These periods shall not be deducted from the regular lunch or deducted from the day’s wages. If overtime is for more than an hour, a fifteen minute break will be granted at the end of the hour and at two hour intervals thereafter.34

But the “past practice” of mini-breaks was eliminated in negotiations by a side letter35 of August 16, 2001, which provided: “Effective September 1, 2001, the

30Letter (# 2) from James R. Stivers to Jack Allen Jr. (Mar. 27, 2002), submitted as deposition exhibit at Stivers’ deposition of May 7, 2002.
31Telephone interview with Kelley.
32“Transcript of Hearing” at 84 (Aug. 29, 2002).
33Telephone interview with Kelley.
35Email from Ford to Linder (Sept. 30, 2002).
practice of taking unscheduled restroom breaks in a regular rotating cycle in the Clermont Bottling Department will be discontinued. Unscheduled restroom breaks will be allowed, but on an as needed basis only, with notice. Employees requiring medical consideration will be accommodated [sic]. Abuse of restroom privileges [sic] will be managed.36

The union discovered what the company's real intentions were "when supervisors started explaining the new policy to employees around the 1st of September." In its introduction of the policy, according to Kelley, Jim Beam stated that the month of September would be "a breaking in period to allow you to adjust (your bladders, I guess) to the new policy."37

At this time Jim Beam created an internal document entitled, "Administrative Controls on Restroom Breaks," which revealed the bureaucratic solemnity that the company bestowed on its new restrictive policy, which an outsider might have been excused for imagining applied to a prison or kindergarten:

I recommend a Supervisors [sic] daily log be maintained for a period of two months. This will assure an accurate and timely documentation of the transition from "Tag Rotation" to the negotiated "As needed" method of securing restroom relief.

September will be a transition month. During the transition month, employees who take two or more unscheduled restroom breaks in a day will be counseled about the new expectations, but will not receive discipline. Starting in October, employees who have received two or more counseling's [sic] in September, will be issued a Verbal Warning on the next abuse of privilege, ... those with one counsel in September will be issued a second counsel.... And so on.

At the end of each shift, each Supervisor will turn in their daily log to the Bottling Dept Secretary. Early the next workday, the Clerk will review the slips, note employees with two or more unscheduled breaks and report the information to the Human Resources Assistant...

Human Resources will maintain a RR Breaks Disciplinary Spreadsheet. The HR Assistant will check the RR Breaks Disciplinary Spreadsheet to determine if counseling or discipline is required. She will fill out a counseling slip or disciplinary notice for employees as needed. RR Break notices will be walked down to the Bottling Department to be distributed and issued.

The slips and notices will be issued to the supervisor assigned to supervise the employee. The Supervisor will verbally counsel the employee, sign the slip and send it to the Human Resources Department. Disciplinary Notice will be processed in the standard manner.38

37 Email from Jo Anne Kelley to Marc Linder (Oct. 5, 2002).
38 "Administrative Controls on Restroom Breaks" is included in the OSHA Citation, where it bears the handwritten notation: "10/30/01 confirmed as policy by Jeff Conder."
The semi-public version of this policy was presented on August 27, 2001 (without disclosing the monitoring routine) as department managers’ and supervisors’ “bench talk” to employees who were likely to be assigned to the bottling department. Like other Jim Beam Brands Company pronouncements on the subject, it too transmogrified workers’ voiding rights into a mere privilege revocable on management’s terms. Cloaked in the neutral-sounding title, “Changes in Restroom Relief Procedures,” and pretending that management too (“we all”) would be subjected to the new regime, it announced a veritable revolution in the structure of time-control that the union workers had secured over a half-century:

**Beginning the first week of September**, the practice of taking unscheduled restroom breaks in a regular rotation cycle will be discontinued.

Unscheduled restroom breaks will be allowed, but on an “as needed basis” only, with notice. Most of the times a supervisor will be available to notify in advance and help arrange cover, if needed. If a supervisor is not available, go ahead, (get cover if needed), then notify the supervisor when you return. **You do need to notify a supervisor, one way or the other.** Failure to notify will be treated just as serious as abusing the privilege.

Two or more unscheduled breaks in a day will be considered abusing the privilege. Anyone having a medical condition causing increased restroom needs may talk with Human Resources about arranging an accommodation.

Through September, while we all get used to the new procedure, Supervisors will only counsel those who take two or more unscheduled breaks a day, but no discipline will be issued.

Starting in October, employees who abuse the privilege will be subject to the standard discipline.

*(Verbal, Written, Final Warning, Termination)*

In preparation for putting the restrictive policy into effect, Jim Beam management issued to its supervisors a Bottling Department Restroom Break

Conder is the plant manager, who attended the OSHA closing conference on that date. According to Jo Anne Kelley, this document, which was the work of Jack Allen, the human resources director, was not shared with the union until she demanded to see all documents pertaining to the bathroom break policy. Email from Jo Anne Kelley to Marc Linder (Oct. 13, 2002).


40Jim Beam Brands Co., “Supervisor’s Bench Talk: Bottling Operations: Change in Restroom Relief Procedures” (Aug. 27, 2001), submitted as documents at Stivers’ deposition. Attached to the one-page document was a sheet with signature lines, which “each employee was required to sign indicating they were aware of the new policy.” Email from Jo Anne Kelley to Marc Linder (Oct. 13, 2002).
Implementation Procedure, which included a “talk sheet” for first and second counselings and “standard disciplinary” forms for warnings. All of these documents, which uniformly speak of “privileges” rather than rights, poignantly convey the disciplinary system’s military-type command structure, infantilization of the workers, and characterization of normal human voiding as medical abnormalities:

1st CONTACT - 2 or more UNSCHEDULED BREAKS

Employee, yesterday, you were excused twice for unscheduled restroom breaks. We can and do consider one unscheduled break as reasonable, but I need to tell you that a pattern of two or more such breaks is seen as abusing the privilege. If you believe there is a medical issue that would call for an accommodation, you can talk with HR,...otherwise, you need to comply with the standard of no more than one unscheduled break in a day.

2nd CONTACT - 2 or more UNSCHEDULED BREAKS

Employee, this is the second time I have had to speak with you regarding restroom privileges. My job is to clearly communicate what is expected, and yours is to comply, unless there is a medical reason preventing you from compliance. ... If not, I must warn you, continuing a pattern of two or more unscheduled breaks out side of your scheduled breaks will be cause for disciplinary action in the form of a documented Verbal Warning.41

The disciplinary forms seemed almost like self-caricatures modeled after organized religion’s efforts at extirpating ‘self-pollution’:

(Name) was counseled regarding the abuse of restroom privileges on at least two occasions. On (____date____) he/she again abused the privilege. A recurrence of this abuse will be cause for further disciplinary action up to a Written Warning.42

Firing workers who made one unauthorized bathroom trip on each of six days over the course of one year was redolent of the Stalinist labor regime implemented in the Soviet Union in 1938-39, under which manual workers and white-collar employees who left 20 minutes early for, or returned 20 minutes late from, their meal break three times within a month or four times over two months were

41 Jim Beam Brands Co., “Bottling Department Restroom Break Implementation Procedure” (undated), submitted as deposition exhibit at Stivers’ deposition.

to be fired for truancy.\textsuperscript{43}

On October 1, 2001, Beam put in place a new policy, which applied to about 100 bottling-line workers at the plant, which produces more than 5 million cases of bourbon annually. The new policy limited breaks of any type to scheduled halting of the line for 15 minutes at 10 a.m. and 2 p.m. and 30 minutes for lunch at noon in addition to one single unscheduled bathroom break.\textsuperscript{44} Under the new policy, a worker was not required to ask permission to take her or his one unscheduled break, but if the supervisor was present, she or he had to notify him; if he was not there, the worker had to tell him when he returned. Failure to tell the supervisor was also subject to discipline. The same rule applied to workers with medical accommodations who were permitted to go to the bathroom as often as was necessary. At one point the union did consider having every single worker obtain a doctor’s statement, but was concerned because the company had a history of not permitting employees to work if they were not 100 percent physically able to perform all available jobs, even if they would not be performing more than one job.\textsuperscript{45} Finally, if workers had to work overtime on a bottling line and had already used up their one scheduled break, they had to work from 2 p.m. until 5 p.m. without a break.\textsuperscript{46}

\textbf{The UFCW Calls In OSHA}

Kelley herself was well acquainted with the OSHA memorandum because two years earlier at Beam’s distillery and warehouse in Boston, Kentucky (which

\textsuperscript{43}Donald Filtzer, \textit{Soviet Workers and Stalinist Industrialization: The Formation of Modern Soviet Production Relations, 1928-1941}, at 310-11 n. 3 (1986); Solomon Schwarz, \textit{Labor in the Soviet Union} 102-103 (1952). From 1940 on, instead of being fired, workers were sentenced to corrective labor at their workplace for up to six months at as little as three-fourths of their pay for the crime of any unauthorized loss of work time in excess of 20 minutes, including returning from lunch break 20 minutes late even once. Schwarz, \textit{Labor in the Soviet Union} at 106-109; John Hazard, \textit{Law and Social Change in the U.S.S.R.} 175-76 (1953); Filtzer, \textit{Soviet Workers and Stalinist Industrialization} at 233-53; Donald Filtzer, \textit{Soviet Workers and Late Stalinism: Labour and the Restoration of the Stalinist System After World War II} 160-63 (2002).


\textsuperscript{45}Email from Jo Anne Kelley to Marc Linder (Oct. 6, 2002). Individual workers also testified at the hearing about their fears about their qualifications for holding or obtaining certain positions if they had sought a medical accommodation. See below.

\textsuperscript{46}Email from Jo Anne Kelley to Marc Linder (Oct. 7, 2002).
Local 111-D has also organized) the company disciplined a worker for interrupting work to drive back from the warehouse, which lacked a toilet, to the main building to urinate. Kelley told the employer that it was violating OSHA by interfering with his right to void, and the company ultimately agreed to comply with the OSHA standard by installing a port-a-potty in the warehouse so that the worker would not have to waste so much company-paid time traveling back and forth. She was therefore well-prepared to inform Beam at Clermont in the fall of 2001 that its new policy violated OSHA’s Memorandum. The company insisted that it had consulted a urologist and OSHA, an official of which, however, had merely sent Beam a copy of the Memorandum without confirming that the policy was in conformance.47

Jim Beam, however, had not needed that copy of the Memorandum: A company executive had received it at the time it was issued and had read and been aware of its contents. He assumed that his counterparts at other large firms had as well.48

Although the policy of permitting only one unscheduled toilet break per day implemented on October 1, 2001 breached the side letter agreement of August 16, 2001, which provided that “unscheduled restroom breaks will be allowed, but on an as needed basis only, with notice,” the local did not grieve the breach because, as president Kelley put it: “The union chose to file a complaint with OSHA thinking that OSHA would cite the Co. and they would remove the policy. No one ever dreamed it would go this far. And frankly, I have more faith in OSHA than I do in arbitrators. Also, at the same time, I was in the process of filing two unfair labor practice charges, one was for failure to bargain in good faith as a result of the newly signed contract. This is not the only change the company implemented that was not agreed to in negotiations.”49

As soon as the new policy went into effect on October 1, Kelley filed a complaint with the Kentucky Occupational Safety and Health Program of the Kentucky Labor Cabinet (Kentucky OSHA) on October 2, 2001. After conducting an inspection on October 15 and a closing conference with the company and union on October 30, the compliance safety and health officer (CSHO) wrote a report recommending issuance of a citation. The officer’s observations attended closely to the intent of Federal OSHA’s Memorandum: “The employees are limited to the number of times the restroom facilities may be used during the shift, and the number of times of voiding and/or defecation are determined by the employer, not the employee. The times chosen by the employer may also be changed arbitrarily by the employer. This does not allow for prompt access to the

47Telephone interview with Jo Anne Kelley.
48Telephone interview with an executive of Jim Beam Brands (Nov. 8, 2002).
49Email from Jo Anne Kelley to Marc Linder (Oct. 5, 2002).
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restroom facilities." The CSHO's internal "Instance Description" continued in a similar vein, cogently pointing out that:

By allowing employees to access the restroom facilities only at those times scheduled by the employer for breaks and lunch, the restrooms are not available, but are indeed denied, to the employee at times other than the scheduled break rooms. It is unreasonable to expect an individual to require restroom facilities at times deemed by another party, or at times good for the production line. The length of delay in some instances could reach one hour in duration. The employee may be allowed to leave the line if necessary; however, disciplinary action may then be taken. In these instances, prompt and unrestricted access to restroom facilities is not provided.

In incidents that exquisitely capture the precise way in which the employer insisted on treating the workers like children, the CSHO also related: "Employees in interviews revealed that some supervisors have, at times since the policy was enacted, refused to allow employees to use the restroom although the production line was stopped. Additional employees stated they were not allowed to use the restroom on the way to meetings, although they passed the restroom on the way to the meeting. The reason given to the employees for the denial to use the restroom was that it was not the employee's break time." Although President Kelley did not hear the employees make these statement to the OSHA officer, some employees told her that "when they were moved from one line to another line they were told not to stop by the bathroom without telling the supervisor so that he could write it down. Some employees ignored this and rushed into the bathroom and voided as fast as possible and rushed back out without even washing their hands so as to avoid getting caught. This was referred to as a 'free pee.'" Kelley believed that employees in their statements to OSHA were making reference to Jim Beam's "claim that going to the restroom hurt production. Obviously, if the line is stopped anyway, production is not affected."

Then on November 19, 2001, the agency issued this Citation and Notification of Penalty:

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50 Kentucky Labor Cabinet, Occupational Safety and Health Program, Federal Inspection # 304292311, Jim Beam Brands Co., CSHO/Optional Report # H0052/001-02, at 8 (n.d. [ca. Nov. 2002]).

51 Kentucky Labor Cabinet, Occupational Safety and Health Program, Federal Inspection # 304292311, Jim Beam Brands Co., CSHO/Optional Report # H0052/001-02, at 11-12.

52 Kentucky Labor Cabinet, Occupational Safety and Health Program, Federal Inspection # 304292311, Jim Beam Brands Co., CSHO/Optional Report # H0052/001-02, at 11.

53 Email from Jo Anne Kelley to Marc Linder (Oct. 9, 2002).
29 CFR 1910.141(c)(1)(i): Toilet facilities were not provided in accordance with Table J-1 of this Section:

a) In that a newly enacted administrative policy limits the number of times an employee may use the restroom and determines the interval of time between restroom breaks at this facility. The employer may change the interval between restroom breaks arbitrarily. One unscheduled restroom break is allowed; however, any additional unscheduled restroom breaks result in disciplinary action, up to, and including, termination of employment.

b) In that some supervisors refused to allow employees to use the restroom during production shutdown because it was not the scheduled break time.\(^{54}\)

Kentucky OSHA gave Beam until December 7 to abate the violation, but proposed no monetary penalty.\(^{55}\) The failure to impose a penalty was based on the statutorily prescribed method of considering the gravity of the violation and then applying the penalty adjustment factors—the (small) size of the employer’s business, its good faith, and its history of previous violations.\(^{56}\) The most important factor, the gravity, is, in turn, determined as a combination of the severity and probability assessment.\(^{57}\) The severity was deemed minimal because “the injury or illness most likely to result would probably not cause death or serious physical harm. The most serious injury or illness which is reasonably predictable as a result of an employee’s exposure to this hazard would be: Increased frequency of urinary tract infections.” The probability was deemed to be lesser on the grounds that the likelihood of an injury or illness was relatively low because: “An adequate number of restroom facilities are available, and in proximity to the working area; allowances are made for those with disclosed medical conditions requiring frequent use of restroom facilities.”\(^{58}\) To be sure, by this logic, as the

\(^{54}\)Kentucky Labor Cabinet, Occupational Safety and Health Program, Citation and Notification of Penalty, Jim Beam Brands Co., Clermont, KY, Inspection No. 304292311, 11/19/2001.

\(^{55}\)Kentucky Labor Cabinet, Occupational Safety and Health Program, Citation and Notification of Penalty, Jim Beam Brands Co., Clermont, KY, Inspection No. 304292311, 11/19/2001.

\(^{56}\)29 USC sect. 666(j). The term “penalty adjustment factors,” application of which may reduce the “gravity-based penalty” by as much as 95 percent, is explained in OSHA, OSHA Field Inspection Reference Manual CPL 2.103, sect. 8, ch. IV, C.2.i. (1994), on http://www.osha.gov/Firm_osha_data/100008.html.

\(^{57}\)OSHA, OSHA Field Inspection Reference Manual CPL 2.103, sect. 8, ch. IV, C.2. Even an other than serious violation can be assessed a $1,000 to $7,000 fine if it is “determined to be appropriate to achieve the necessary deterrent effect.” Id. at C. 2. g. (5).

\(^{58}\)Kentucky Labor Cabinet, Occupational Safety and Health Program, Federal Inspec-
Void Where Prohibited Revisited

inspector herself conceded, it is difficult to imagine how a monetary penalty would ever be imposed in a citation for denial of access\(^9\) or how this result would be compatible with the monetary penalties assessed in 12 other cases, including one in Kentucky.\(^6\) The failure to fine the company is especially remarkable in light of the fact that of all the employers cited for restricting access, Jim Beam had implemented the most highly formalized policy, which was written, general, and issued by the top of the corporate hierarchy—expressly mentioned by the citation policy in the OSHA Memorandum as an exacerbating factor.\(^6\)

While creating no financial deterrence, the citation was significant for consciously extending the reach of the law beyond the grotesque but obvious situations, in which an employer’s denial of access causes a worker to void herself, to the empirically much more prevalent situations in which workers are ‘merely’ disciplined for going to the bathroom or deterred from going when they


\(^{60}\) See above ch. 11.

\(^{61}\) See below Appendix II.
need to go. OSHA’s declaring unlawful this particular form of autocratic managerial control over workers’ bodies and time was doubtless considerably more worrisome to some employers than the prospect of any trivial monetary penalty.

However, why, in spite of having—given its preferred management style—good reason for regarding this kind of government intervention as anathema, Jim Beam decided to contest this non-monetary citation on December 10 and gave the UFCW to understand that it was determined to litigate the interpretation of the OSHA toilet standard to the highest court, remains unclear. In retrospect, the company conceded that it had been “asking for trouble” in contesting a zero-dollar citation. Even though this dispute was to be conducted within the Kentucky OSHA system and any administrative or judicial decision would therefore be of no direct precedential value for any other state-plan program or Federal OSHA, the UFCW was nevertheless correct in asserting: “If Jim Beam wins the right to restrict workers’ access to the restroom, the OSHA regulations protecting that right will be challenged. Millions of workers across the country could be affected.”

The texture of labor-management relations at the Jim Beam plant at this juncture was captured by Kelley’s later testimony that she had posted on the union bulletin board a copy of the citation, of Beam’s appeal, and of a letter stating that the union had requested third-party status to represent workers, but that Jack Allen, the human resources director, had unlocked it and removed the copies, telling her that it had no place on the union bulletin board and that from then on she was not to post anything without his permission.

**Dueling Urinary Scientists**

As the appeal got underway, Dr. Stivers, at his deposition, taken by the UFCW on May 7, 2002, went so far as to call Beam’s new, much more restrictive toilet access policy “more than physiologically adequate to accommodate a nor-

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62An abbreviated version of the inspection report is available on the federal OSHA website: http://155.103.6.10/cgi-bin/est1xp?i=304292311 as well as in the Lexis-Nexis OSHAIR file.

63Telephone interviews with Ana Avendano and Peter Ford of the UFCW general counsel’s office and Robyn Robbins, assistant director, UFCW Occupational Safety and Health Office during the spring and summer of 2002.

64Telephone interview with a Jim Beam executive (Nov. 8, 2002).


66“Transcript of Hearing” at 88-90 (Aug. 29).
mal person”—indeed, even “physiologically and medically excessive.”\(^{67}\) Stivers then asserted, based on no research or review of the medical literature, that since “we know that a normal person most likely does not have to get up to go to the bathroom while they’re sleeping unless they’ve ingested excessive amounts of fluid with or without alcohol...as the benchmark you can say that six to eight hours a person can go without having to urinate.”\(^{68}\) (In fact, an important study of 300 asymptomatic women—i.e., those without urinary tract symptoms—in the process of being published as he was being deposed revealed that 44 percent voided during the night.)\(^{69}\)

Stivers testified that on average people produce one quart of urine daily (within a range of three-fourths to one and one-third quarts); with an average bladder capacity of 250 to 500 cubic centimeters, he reckoned that a normal person “should urinate between three and six times in a 24-hour period....”\(^{70}\) Not only did Stivers not take menstruation into account, but he asserted that it was “[n]ot likely” that a menstruating woman would use the bathroom for a longer time than a non-menstruating woman because younger women tend to use tampons, while older women tend to use sanitary napkins and when they urinate, they would probably change their napkin but not a tampon.\(^{71}\) Stivers also admitted that his claim that normal voiding took less than three minutes did not take into account walking to or from the bathroom, waiting in line, undressing or dressing, menstrual needs, bowel movements, or hand washing.\(^{72}\)

Stivers’ total inadequacy as an expert on whom Beam could have reasonably relied to help formulate an appropriate workplace voiding policy was underscored by his admission that he had reviewed OSHA’s field sanitation standard, despite the fact that it was not relevant, because “there weren’t any OSHA regulations that applied to people on assembly lines in terms of voiding breaks.”\(^{73}\) Moreover, Stivers’ inability to understand the crux of the problem generated by the employer’s unilaterally fixed voiding breaks was painfully on display in his admission that he did not “think that an individual is assigned a time to go to the bathroom. It’s not like every day at 10:15 you take a break and every day at 2:15 you take a break....” Nor had Beam ever told him whether the company or the worker

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\(^{67}\) Deposition of Stivers at 13.

\(^{68}\) Deposition of Stivers at 15.


\(^{70}\) Deposition of Stivers at 15.

\(^{71}\) Deposition of Stivers at 40-41.

\(^{72}\) Deposition of Stivers at 44-45.

\(^{73}\) Deposition of Stivers at 54.
chose the time.\textsuperscript{74}

On June 19, Jim Beam’s lawyer telephonically deposed Dr. Ingrid Nygaard, who set out six separate grounds showing that the company had failed to permit reasonable access:

First, many healthy women who have no bladder complaints need to void more frequently than every two hours during the daytime. Second, women who have bladder complaints comprise a sizable minority of the population of women, and those women have to void more frequently even than asymptomatic women who don’t have bladder complaints. Third, delaying the urge to urinate predisposes women to urinary tract infections, painful urgency and urinary incontinence. Fourth, voiding infrequency predisposes women to recurrent urinary tract infections. Fifth, menstruating women require restroom breaks to change menstrual hygiene products that may not be at every two-hour cutoff, and finally women with urinary incontinence who require the use of protective pads also require restroom breaks that may be outside of the every two-hour interval to change those pads to avoid problems from the pads.\textsuperscript{75}

Nygaard also rebutted Stivers’ testimony by citing the results of the theretofore most reliable study\textsuperscript{76} revealing that the median number of voids during waking hours among 300 asymptomatic women was eight with a range of four to 18 and 95 percent of the women voiding fewer than 13 times; thus more than half of the women voided more than eight times.\textsuperscript{77} To present a more concrete picture, Nygaard also observed that studies have shown that 20 to 50 percent of women fall into her second category of those with bladder complaints, which include urinary incontinence, urinary frequency, and overactive bladder.\textsuperscript{78} In addition, menstruating women in her fifth category may have to change their hygiene products as frequently as every 30 minutes on the first day of their period and up to every

\textsuperscript{74}Deposition of Stivers at 58.
\textsuperscript{75}Commonwealth of Kentucky, OSH Review Comm., Secretary of Labor, Commonwealth of Kentucky vs. Jim Beam Brands Co., Deposition of Dr. Ingrid Nygaard 34-35 (June 19, 2002). See also letter from Dr. Ingrid Nygaard to Ana Avendano Denier, assistant general counsel, UFCW (June 21, 2002).
\textsuperscript{77}Deposition of Nygaard at 37-38.
\textsuperscript{78}Deposition of Nygaard at 49-50. One study of women between the ages of 16 and 64 revealed that the incidence of urinary incontinence ranged between 10 and 30 percent; another study of women 18 to 44 years of age found a prevalence of 24.5 percent, with 6.6 percent of respondents reporting incontinence daily. Sheila Fitzgerald, Mary Palmer, Susan Berry, and Kristin Hart, “Urinary Incontinence: Impact on Working Women,” AAOHN Journal 48(3):112-18 at 113.
eight or 12 hours on later days; the most typical range is every one to three hours. Nygaard testified that she had not seen any study showing an average of as low as three to six voids per day, as Stivers had asserted; and in contrast to his claim that the average voiding volume amounted to three-fourths to one and one-third quarts per day, Nygaard reported that studies in fact showed the much higher range of 1,332 to 1,759 cubic centimeters (whereby a quart equals about 946 cubic centimeters).

In a follow-up letter two days later to the UFCW’s assistant general counsel (a copy of which was also given to Jim Beam’s counsel), Nygaard significantly expanded her analysis, explaining why recent cutting-edge urological research bolstered scientific support for an at-will workplace voiding regime:

Until recently, the symptom of urinary frequency has been defined as voiding eight or more times in a 24 hour period. This cut-off is based on one study, done in Scandinavia in 1988 in which 151 white women with no bladder complaints completed a bladder diary (a prospective record of all voids) for 48 hours. The number of voids per 24 hours ranged from 3-11 and 92% of women voided fewer than eight times daily. Of note, in the 65 women who reported one working and one free day, voiding frequency was higher during work days (6.2 vs 5.8).

Since that study, there have been fewer than a dozen studies identified in the English language medical literature that address the question of how often women without symptoms of bladder dysfunction void. Interpretation of these studies is problematic for one of several reasons: the number of women queried was small, the population was not typical of the population in general (for example, some studies queried hospital employees only), the age range of the participants was limited to mainly one age bracket, or the participants were not residing in North America, and thus not representative of women here.

Because of the limitations in the medical literature, FitzGerald, Stablein, and Brubaker recently conducted a study to assess voiding habits in asymptomatic women residing in the U.S. This study was presented at the 2002 American College of Obstetrics and Gynecology meeting. The researchers recruited 300 ambulatory non-pregnant women with no bladder complaints. Women were excluded from participating if they had any symptoms of urinary incontinence (urinary leakage) or voiding difficulty, pelvic organ prolapse or pelvic pain, current or past use of medications with anticholinergic effects (which can affect the bladder), neurological disorders that could affect the bladder, prior

79 Deposition of Nygaard at 58-59.
80 Deposition of Nygaard at 72-76.
surgery for incontinence or prolapse, or worked primarily at night. Thus the results of this study can be generalized to a healthy population of women of various ages and ethnic backgrounds. (Women with urinary incontinence and pelvic organ prolapse are likely to void more often than women without these conditions.) In this study the median age was 40 years, with a range of 18-91. Self-assigned race was 39% African-American, 39% Caucasian, 12% Hispanic and 9% Asian. The median number of voids during waking hours was 8 (range 4-18). 95% of the women voided fewer than 13 times. The number of voids increased with age and fluid intake and did not differ according to race, weight, or having borne children or having had a hysterectomy. The volume that women voided in a 24 hour period averaged 1759 cc, which is not considered abnormal according to the International Continence Society, which defines polyuria (excessive urine output) as > 2.8 liters of urine per 24 hours in adults.83

Based on these results, the use of fewer than 8 voids to indicate a normal voiding pattern is inappropriate.84

In clinical practice, a common method used to describe a reference value (also known as “normal” values) for a test or characteristic is to use the interval that embraces 95% of the observations. A minimum of 300 subjects is recommended to describe this interval.85

As noted, the FitzGerald study included asymptomatic women. However, a large number of women in the U.S. general population suffer from either urinary incontinence or overactive bladder syndrome, conditions that generally increase the need to void. Studies from many different populations of healthy community-dwelling women found prevalence rates of urinary incontinence ranging from 20-50%.86 Wide ranges are found

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84 See M. FitzGerald, N. Butler, S. Shott, and L. Brubaker, “Bother Arising from Urinary Frequency in Women,” *Neurourology and Urodynamics* 21(1): 36-40 (2002), discussion at 41: “We reviewed records of 200 women who had completed 24-hour frequency-volume charts, and had indicated their degree of bother with urinary frequency.... The degree of bother was correlated with daytime and nighttime voiding frequency, maximum functional capacity, mean voided volume, and demographic variables. Among 200 women, 180 (90%) indicated at least a minor degree of bother with urinary frequency. A voiding frequency of eight or more times in 24 hours was reported by 166 (83%) of women. Among the 34 women voiding fewer than eight times/24 hours, 26 (76%) reported bother with urinary frequency. There was large variation in the degree of bother reported at a given voiding frequency. Our study suggests that the currently utilized cutoff value of eight daily voids to define urinary frequency may not be helpful in the management of women in this country. A racially diverse study of the voiding habits of asymptomatic North American women is mandated.”

85 J. Henry, Todd-Sanford-Davidsohn, *Clinical Diagnosis and Management by Laboratory Methods* 53 (17th ed. 1984).

because of diverse definitions of incontinence, differing research designs and population samples and a variety of often unvalidated measurement instruments. In women with urinary urge incontinence, two studies reported an average number of voids per 24 hours of 9.5 (the 95% interval ranging from 5.5 to 14.0 voids per 24 hours)\textsuperscript{87} to 10.6 (daytime voids averaging 8.8).\textsuperscript{88} In treatment studies of individuals with overactive bladder syndrome, the mean number of voids in the 1529 participants was roughly 11 (10.9-11.3 in each of three treatment groups at baseline), with a range of 2.0-51.3 voids per day.\textsuperscript{89} Thus, if about a third of women have a bladder condition and half of them have overactive bladders, then about one in six are likely to void more frequently. In a large population-based study of people in six European countries, 16.6% of 16,776 individuals ages 40 and over had overactive bladder symptoms (frequency, urgency or urge incontinence).\textsuperscript{90}

Thus, the new company policy is detrimental to the physiologic need to void in both healthy women and a large number of women with bladder complaints.

Further, while exceptions to Jim Beam’s policy may be requested for pregnancy, women in the early stages of pregnancy may not be aware that they are pregnant or may want to keep this information confidential. However, 40% of young women (median age 23 years) in early pregnancy (median 11 weeks) needed to void more than 7 times during the daytime in one study.\textsuperscript{91} Since urinary frequency increases before women are visibly pregnant, should they be forced to choose between losing their job over frequent bathroom breaks and telling the doctor and thus the boss that they are pregnant in order to receive an accommodation?

Voiding infrequently or restricting voiding when voiding is desired increases the risk of urinary tract infections. Urinary tract infections (bladder or kidney infections) are


\textsuperscript{88} H. Van Melick, K. Gisolf, M. Eckhardt, “One 24-Hour Frequency-Volume Chart in a Woman with Objective Urinary Motor Urge Incontinence Is Sufficient,” \textit{Urology} 58:188-92 (2001). By showing that one voiding diary for one day was reproducible, the study also undercuts possible criticism of the FitzGerald et al. study on the grounds that measuring urine only for one day is insufficient.


\textsuperscript{90}I. Milsom, P. Abrams, L. Cardozo, et al., “How Widespread Are the Symptoms of an Overactive Bladder and How Are They Managed? A Population-Based Prevalence Study,” \textit{BJU Int} 87:760-66 (2001). This study, which was funded by a drug company, used as the definition of frequency >8, which Nygaard believes encompasses some women who are normal. On the other hand, only five percent of the respondents had only frequency, with no other symptom (thus, about 12% had frequency plus urgency and/or incontinence). Therefore the proportion with bladder disorder is still high. The authors note that the definition of >8 voids was chosen arbitrarily, based on the Larsson study.

common in women and affect 20% to 50% of women. Women who void infrequently have a higher risk of having recurrent urinary tract infections. In a study which queried asymptomatic women (as opposed to those seeking care for infections), women who voided infrequently were more likely to have three or more urinary tract infections per year than women who voided more frequently (6.2% vs 1.6%).

Delaying voiding or drinking less to avoid having to void also increases the number of women who suffer from urinary tract infection. A study of public school teachers found that 21.2% of women who reported making a conscious effort at work to drink less had a urinary tract infection in the preceding year, compared to 9.9% of women who drank as much as they wanted to. In one study, 61% of young women with recurrent urinary tract infections gave a history of deferring voiding for periods of one hour or longer (i.e., not urinating when they felt the need) compared with 11% of women without recurrent infections.

The average volume that asymptomatic women urinate over 24 hours ranges from


93T. Hooton, D. Scholes, J. Hughes, “A Prospective Study of Risk Factors for Symptomatic Urinary Tract Infection in Young Women,” *New England J. Med.* 335:468-74 (1996). The study found that among 348 healthy university women (mean age 23) the incidence of urinary tract infection (culture confirmed) per person-year was 0.7 and in a healthy HMO cohort (age 29) 0.5. At baseline, 28% and 58% respectively had at least one urinary tract infection and 14% and 38% had two or more. In the six months of the study, 98 urinary tract infections occurred in the 348 university women and 82 in the HMO women. Thus in a group of 100 working women, in the course of a year the group will have had 50-70 urinary tract infections (the lower number being more probable among Jim Beam workers); thus the odds are high that at any given time, someone has urinary tract infection symptoms since they usually last three to seven days.

94A. Nielsen and S. Walter, “Epidemiology of Infrequent Voiding and Associated Symptoms,” *Scand. J. Urol Nephrol* 157:49-53 (suppl.) (1994). The cut-off point of three voids or fewer per day was chosen arbitrarily and it is impossible to tell from the data whether there are differences in women who voided more than three times but less often than some other arbitrary number. The population was large (1048) but limited to Danes under age 46; the data were collected by questionnaire and not by prospective recording. Of interest, the number of urinary tract infections in the last year (21% among women voiding three or fewer times and 10.4% among those voiding four or more times) is very similar to the finding in I. Nygaard and M. Linder, “Thirst at Work—An Occupational Hazard?” *Int Urogynecol* 8:340-43 (1997).

95 Nygaard and Linder, “Thirst at Work—An Occupational Hazard?”

1332cc (+/- 59 cc)\(^{97}\) to 1759 cc (+/- 797 cc) in the large study of American women by FitzGerald et al. Thus, normal women void more than "a quart of urine" per day, as stated by Dr. Stivers (one quart being equivalent to 946 cc).\(^{98}\)

As a urogynecologist, Nygaard was not prepared to deliver a professional opinion on men's urinary problems; despite being a urologist, Stivers failed to deal with them. In order to present a more comprehensive view of the voiding needs of a labor force consisting of males and females, it is crucial to point out that many, especially older, men also have special urination problems that may require frequent bathroom visits during the workday. According to one British study, more than one-half of men over the age of 50 have enlarged prostates (benign prostatic hyperplasia or BPH), as a result of which a significant proportion of male workers must also urinate more often than do men without prostate problems:

As the prostate grows and BPH begins to restrict urine flow, men may experience the following symptoms: weak flow; a need to push or strain to start urine flow; intermittent urine stream (starts and stops several times); difficulty stopping urination; "dribbling" or leakage after urination; a feeling of being unable to empty the bladder completely.

As the bladder muscle works to push urine through a narrowed urethra, the bladder wall thickens and is less able to stretch. As a result, the bladder can't hold as much, causing a need to urinate more often. These symptoms can include:

frequent urination, especially at night, disrupting sleep; an urgent need to urinate that can't be postponed; urge incontinence: an inability to get to a bathroom in time when the urge to urinate occurs.\(^{99}\)

According to a large study of more than 1,000 men at autopsy, the prevalence of BPH rises from five percent among men under 30 years of age, to 23 percent between the ages of 41 and 50, 42 percent between 51 and 60, and 71 percent

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\(^{97}\)Y. Homma, O. Yamaguchi, S. Kageyama, S. Nishizawa, M. Yoshia, and K. Kawabe, "Nocturia in the Adult: Classification on the Basis of Largest Voided Volume and Nocturnal Urine Production," *J. Urology* 163:777-79 (2000). Although the mean number of voids (8) was similar to that found in FitzGerald et al., the small numbers (32 women) studied and the non-generalizable population (Japanese) did not make it sufficiently scientifically valid to support the FitzGerald study. It is nevertheless included here as one of the few to report the 24-hour voided volume. Despite being the lowest reported voided volume, it was still higher than Dr. Stivers' estimate.

\(^{98}\)Letter from Dr. Ingrid Nygaard to Ann Avendano Denier (June 21, 2002).

\(^{99}\)http://www.prostatecanceruk.org/bhp.html
Bourbon and Urine Don’t Mix

among those 61 to 70 years old. Another study of men age 50 to 78 found that men with moderate and severe symptoms of BPH voided 2.0 and 2.5 times more per day, respectively, than those without symptoms.

The Hearing Begins

Shortly before the Kentucky Occupational Safety and Health Review Commission administrative hearing, at which Jim Beam contested issuance of the citation, the Kentucky Labor Cabinet filed a motion with the hearing officer to exclude Beam’s medical experts’ testimony on the grounds that the employer was trying to “relitigate medical issues that have been fully researched and addressed in the promulgation of standard 29 CFR 1910.141(c)(1)(i).” The Labor Cabinet therefore requested that the hearing officer “take judicial notice...that it is generally known that no one can ascertain with complete accuracy when each and every individual will have the sense of urgency to void. Therefore there is no factual issue to be addressed. Medical testimony is not needed to appreciate that ‘when you gotta go, you gotta go!’” Although it is difficult to imagine how this fundamental fact of exclusive sensory self-perception could possibly be refuted, the hearing officer summarily rejected the request.

On August 28, as the two-day hearings got underway, the Wall Street Journal’s closely watched weekly “Work Week” column unleashed a flood of media attention by devoting most of the piece to the Beam dispute. The reporter, Carlos Tejada, quoting Jack Allen, Beam’s director of human resources as bemoaning that “‘[t]here’s not a lot of guidance to go by with regards to what’s reasonable and what’s not,’” portrayed the hearing as possibly giving “both workers and companies a better sense as to how much employers can control bathroom access.” Despite this lack of guidance and specificity, Allen was certain that Beam’s policy “fits the bill.” Tejada then quoted the author in refutation: “‘Peo-


103 Commonwealth of Kentucky, Occupational Safety and Health Review Commission, Adm. Action No. 02-KOSH-0015, Motion in Limine and to Take Judicial Notice on Behalf of the Secretary of Labor (Aug. 15, 2002).

104 Email from Peter Ford to Marc Linder (Aug. 23, 2002).
pie's bladders don't operate on clock time."

In the same vein, later that day the Associated Press quoted President Kelley capturing the essence of Beam's policy: "They're saying you go to the bathroom when we say it's time to go to the bathroom, not when your body says it's time to go to the bathroom. It's like training kindergarten kids to get onto a schedule." Kelley also explained how workers tried to cope with the six-step termination process: while some workers "urinated on themselves because they were afraid to leave the line" and others began wearing protective undergarments, still others "feigned illnesses to go home and avoid getting violations." By the time of the hearing, 40 workers had been counseled, five warned, and one was one violation short of being fired. That employee, Krystal Ditto, a 36-year-old single mother of two children who was healthy and therefore had not sought a medical waiver, confirmed the kindergarten analogy when she told the AP that a Beam official had "suggested she practice going to the bathroom every two hours at home to get into the habit."

Since no other employer in the United States had proceeded so far in the appeal of a citation for having denied workers permission to stop work to go to the bathroom, the provocative questions posed by lawyers for OSHA, Jim Beam, and the UFCW and the hearing testimony they elicited represent by far the most extensive public discussion of OSHA's intervention. The broad array of witnesses included the OSHA inspector, Jim Beam's plant manager and human resources director, the president of the union, several workers who had been adversely affected by the policy, two local urologists hired by Jim Beam, and Dr. Ingrid Nygaard, junior author of Void Where Prohibited, who traveled to Kentucky to testify on behalf of the union and workers.

The Kentucky Occupational Safety and Health Review Commission hearing took place in the Bullitt High School Auditorium in Shepherdsville, Kentucky, a town of 6,000, 30 minutes south of Louisville and just a few miles from Fort Knox and the Jim Beam plant in Clermont. The brief but pithy opening statement of Karen Triplett, counsel for the Kentucky Labor Cabinet, aptly expressed OSHA's aggressive biology-based enforcement position: "Utilizing a toilet is not a privilege: it is a physical necessity."

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106 "Jim Beam Workers Turn Sour Over Bathroom Break Limit."
107 Peter Ford, assistant general counsel of the UFCW, entered the litigation late, having replaced his colleague, Ana Avendano.
Jim Beam’s attorney, Richard Griffith, sought to radicalize the proceedings with hyperbole calculated to convince the world that OSHA had rendered employers powerless to deal with workers who fraudulently availed themselves of the Memorandum’s mandate to taunt management by spending more time in the bathroom than working: “The Secretary of Labor has taken the very extreme position that employees have the absolute statutory right to use the restroom any time they want and that any restriction on that is a violation of OSHA standard [sic]. That position has been taken despite a very clear history of abuse of restroom breaks at the bottling line.... The position has been taken despite a complete absence of published regulatory or medical support for it. The position has been taken though neither the Secretary of Labor nor the expert witness that the union has hired to support it’s [sic] position in this case, has offered any suggestion of any reasonable alternatives that might be available to restrict access to restrooms. ... The regulation does not speak to what we will do if the employee simply says they need to go every five...minutes. I need to go a hundred times a day, what would you do?”

Griffith went on to claim that the union had “conceded in negotiations” that in the days of tag rotation: “people went sometimes and didn’t need to go. ... Nine...times in an eight and half hour...period they were having access to restroom facilities. [B]ecause it had been a longstanding practice or for whatever other reasons, it [the company] didn’t change the practice....”

The first witness was Dr. Nygaard, who declared unequivocally that “an at-will policy is the most medically tenable policy for voiding.” Under questioning by Peter Ford, counsel for the complainant representing UFCW Local 111-D, she laid out a statistical overview of the distribution of conditions affecting frequency of urination among women:

If you started with that hypothetical group of a hundred women, or just a hundred employees, then based on over all [sic] weights of conditions, we would assume that about...20% of them or...20 women have incontinence or an over active [sic] bladder, abnormal bladder. That about...3% of them would have a recurrence of bladder infections. That about one of them would be pregnant. If we assume that half of those hundred are before menopause, then we assume that while normal menses is about five days, that the heavier flow might be just for the first two days. And on any given day about...3 women are menstruating. Then if we assume that about...5% of them have medical problems that cause needing more frequent bathroom access like diabetes or high blood pressure, they are on medications for those conditions. We add all those together, we come up with...about...64 people that are left healthy, no bladder problems, no medical com-

110“Transcript of Hearing” at 17-18 (Aug. 28).
111“Transcript of Hearing” at 86 (Aug. 28).
plaints. And then we know that half of those people need to urinate more often than an average of every two hours. So when we put all that together, it’s only about a third of [women] that would not be affected on a daily basis by this bathroom policy.\(^{112}\)

Nygaard went on to discuss the results of the aforementioned study by FitzGerald et al.—in her opinion the heretofore most reliable investigation of the frequency of female urination—which found that half of women without medical problems had to urinate more than eight times during waking hours: “And that finding didn’t surprise me because it agrees with my clinical practice. When I ask people how often they urinate...it’s generally somewhere between every one hour to every three hours and these are healthy women without problems.”\(^{113}\)

Finally, Nygaard stressed that urinary retention leads to distension of the bladder wall, while blood vessels become so thinned out they no longer supply blood to bladder, resulting in infections. If the bladder does not empty completely, bacteria can grow leading to infection.\(^{114}\)

In cross-examining Nygaard, Jim Beam’s lawyer sought to buttress its claim that workers do not need to urinate more often than every three hours by reference to OSHA’s field sanitation standard for farmworkers, which does not require employers to provide toilets to workers who work fewer than three hours.\(^{115}\)

However, Griffith undermined his own position by telling Nygaard, literally in the same breath, that OSHA also excluded from its protection workers on farms with fewer than 11 employees.\(^{116}\) Yet Congress and OSHA chose to exclude such workers not because they are somehow biologically immune to medical problems related to retention of urine, but, as already explained,\(^{117}\) in order to benefit certain farm employers at the expense of their workers. And regardless of the political background of OSHA’s pretextual claim in the 1980s that there was no need to impose financial burdens on agricultural employers for the sake of farm workers’ health, because fixed-site industrial employers do not provide short-term toilets, no analogous financial burden could apply to them to justify depriving workers of voiding rights for periods of less than three hours.

Jim Beam’s lawyer then attempted to manipulate Nygaard into acquiescing in his campaign to characterize Void Where Prohibited as authority for Jim

\(^{112}\)“Transcript of Hearing” at 38-39 (Aug. 28).
\(^{113}\)“Transcript of Hearing” at 41 (Aug. 28).
\(^{114}\)“Transcript of Hearing” at 43-44 (Aug. 28).
\(^{115}\)29 CFR sect. 1928.110(c)(2)(v).
\(^{116}\)“Transcript of Hearing” at 65 (Aug. 28); 29 CFR sect. 1928.110(a) (“This section shall apply to any agricultural establishment where eleven...or more employees are engaged on any given day in hand-labor operations in the field”).
\(^{117}\)See above ch. 5.
Beam’s policy of toilet breaks every two hours:

Q. The book that you...co-authored...with Professor Lender [sic].... Would it be fair to say that he has been very well published and outspoken about his strong conviction that workers’ need to have strong rights to get to go to the restroom whenever they want to?
A. I think that’s clear from his writing in the book. You have to ask him otherwise.
Q. And you wrote some parts of this book?
A. I wrote the chapters that specifically dealt with the medical aspect of waiting. It’s a small part of the book.
Q. Your book is called “Void Where Prohibited. Rest Breaks and the right [sic] to Urinate on Company Time: by Mark [sic] Linder and Ingrid Nygaard. Before the book was published and was put out with your name on it, did you have the opportunity to read the book and assess whether there was anything you thought medically was not valid?
A. I did not read the whole book. I read the parts that were related to medicine and skimmed other parts but I certainly didn’t check the whole book.
Q. I’m not trying to trap you in any way but I just don’t understand what your participation was. You had the opportunity to read all of this, and...if there was something that is medically incorrect, you would have had the opportunity to correct it?
A. I would hope that I had that.
Q. There’s a statement in the book where the authors, and perhaps this was Professor Linder who was writing the bulk of this, is arguing for regular restroom breaks, mandated statutory restroom breaks. And in it, he proposes that there be allowed a...12 minutes [sic] break every two hours so you can go to the restroom. Do you recall that argument by him that that would be good social legislation?
A. As opposed to having no breaks, yes.
Q. What he said is quote “...48 minutes of rest per...8 hour work day could for example be taken as four 12-minute blocks every two hours.” Do you recall that statement in the book?
A. I recall that statement in the book.
Q. And you didn’t object that such a policy adopted by legislation would allow twelve-minute restroom breaks every two hours?
A. Yeah, if you read the book he made it clear that at-will voiding is the policy of choice.
...
Q. But you don’t dispute the book which advocates strongly the workers’ right to urinate proposed in this and its possible legislative remedy,...12 minute breaks every two hours. You don’t dispute that that’s what it says.
A. I don’t dispute that that’s what it says.118

In fact, whether Griffith, carried away by an advocate’s zeal, negligently misread the passage or intentionally misled and deceived the witness and the hearing officer, his claim that the book “proposes that there be allowed a...12 minutes [sic] break every two hours so you can go to the restroom” is a complete fabri-
cation. The proposal has absolutely nothing to do with "the restroom" and everything to do with rest: this part of the tripartite proposal (the introduction of meal breaks and rest breaks under the Fair Labor Standards Act and at-will urination under OSHA) deals with rest breaks, not toilet breaks:

Workers’ needs for rest, nutrition, excretory autonomy and well-being, and free time for self-development and community activities should be addressed by a comprehensive re-orientation of the national wage and hour statute. [T]he FLSA should be amended to create a framework for setting minimum standards for the duration and scheduling of meal and rest periods and voiding breaks. ...

Grounded on the fundamental nonwaivable and nonpurchasable right to restore their physical and mental powers through rest, the statute should at a minimum entitle workers to a forty-five-minute meal period and the equivalent of six minutes of freedom from work per hour. ... The forty-eight minutes of rest per eight-hour workday could, for example, be taken as four twelve-minute blocks every two hours. Employers who failed to provide hourly rest breaks would be prohibited from disciplining worker who had to use the toilet more frequently than during the scheduled breaks. ...

As coordinated measures, the OSHA general sanitation regulations should also be amended to make express the employer’s duty to permit workers to urinate as often as necessary, while the ADA regulations should incorporate a threshold for urinary disability in terms of voiding frequency.119

Having scored his fraudulent debating point, Griffith then shifted his focus, suggesting that OSHA’s directive rendered employers helpless to detect fraudulent urinators:

Q. In accessing [sic] that concept of at-will voiding, have you taken into consideration at all, what could be done? In your consultation with Professor Linder, what could be done if, in fact, an employee wished to claim that he or she needed to go when, in fact, he or she really didn’t need to go? How do you deal with that as an employer? ... Let’s say hypothetically...an employee wishes not to work any particular day so every...20 minutes they say they need to go to the bathroom. Would you agree with me that because you’re not going to go into the stall with the person, there’s really no way to regulate or deal with that risk....

After failing to prompt Nygaard to concede that the book had failed to “factor into your position...the risk of any sort of abuse of restroom privileges if you have an at-will rule,”121 Griffith unsuccessfully sought to induce Nygaard to abandon her criticism of the inadequacy of Jim Beam’s medical accommodation:

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120 “Transcript of Hearing” at 74 (Aug. 28).
121 “Transcript of Hearing” at 75 (Aug. 28).
A. [Y]ou told me that if somebody with...leakage of urine...takes it upon herself to go to a physician and get a letter, and then share that letter with her supervisors, in essence opening herself up to embarrassment and ridicule, that person can be accommodated. Now, that same person who has urinary leakage or painful urgency, under a system at which she can void at will, can self accommodate....

Q. And what you’re arguing is the reason why a void-at-will is better [sic] way to go than some other alternative?

A. It is a better way to go because the line between healthy and illness is very, very...blurred. And for urinary incontinence, part of what keeps people from being healthy...is specifically that they can’t get to the bathroom. So, simply by providing the bathroom, they can remain healthy.122

Nygaard thus objected to Beam’s medical accommodation policy because it required workers to come forward and tell “[a]bout embarrassing medical problems and...it becomes a medical problem only when they are denied bathroom access. Otherwise it may not be a medical problem.”123

If the weakness of Jim Beam’s case was reflected in the lack of expertise of the expert medical witnesses it hired, its predicament may have been dictated by the possibly limited universe of qualified physicians willing to testify on behalf of an employer’s profit-driven preference for a more restrictive urination policy than that mandated by the national occupational safety and health agency. Its first witness, Dr. Tamara James, who declared three times that Beam’s policy of letting workers void every two to three hours was “reasonable” and “adequate,”124 admitted under cross-examination that prior to reviewing the literature that Nygaard had cited in her deposition she had never read it because her work was “purely clinical”—she did not keep up with research in the areas of workplace urination or urinary incontinence: “That is not my forte.”125 Her dogmatism and closed-mindedness was vividly on display in her statement that, despite Nygaard’s deposition and hearing testimony that some women need to change their feminine hygiene products more often than every two hours, reasonable minds could not differ on the issue that if “someone needs to change their tampon every hour to hour and a half they need to be evaluated” and could therefore get a medical accommodation to use the bathroom more often.126

Kentucky OSHA’s only witness was the officer who had conducted the inspection at Jim Beam, Diane Marraccini, an industrial hygienist in the agency’s compliance division, with almost ten years of experience there.127 She testified that

122“Transcript of Hearing” at 76-77 (Aug. 28).
123“Transcript of Hearing” at 78 (Aug. 28).
125“Transcript of Hearing” at 112-13 (Aug. 28).
127“Transcript of Hearing” at 126-27 (Aug. 28).
she had determined that Beam had violated the OSHA standard because, "by allowing the employees to frequent the restroom only during scheduled breaks, that were determined by the employer and not the employee...at the times other than those scheduled breaks, the employer was, in fact, denying access to the restroom...." In other words, the policy limited employees not only in the number of times they could frequent the bathroom, "but at pre-determined intervals that were determined by the employer and not the employee."128

Marraccini explained that she had classified the violation as "other than serious" "[b]ecause the...most likely resulting injury or illness would not result in permanent disability, death or serious physical harm to the employee." The severity assessment was "minimal," while the probability assessment was that the most likely injury or illness was a urinary tract infection. The assessment of no monetary penalty was based on the table in OSHA’s field operations manual with predetermined base-penalty amounts arrived at through a combination of severity/probability; the probability was "lesser" because "they did have an adequate number of water closets available, and they did allow the exemption for those with medical conditions."129

Just as Griffith and his client remained impervious to the fact that workplace voiding was a right and not merely a privilege, it was not clear that he understood that Marraccini was correcting his misunderstanding of the wording and meaning of the regulation itself, which had served as the crucial basis for Federal OSHA’s expansive Memorandum. When he asked Marraccini: "The sanitation standard explicitly says that the employer has to have an adequate number of toilet facilities based upon the number of employees, correct?" she replied: "It indicates that they need to provide employees with those facilities."130 On the other hand, Griffith was able to make one point—that the only medical article cited by the OSHA Memorandum as support for the argument that involuntary urine retention may lead to urinary tract infection defined infrequent voiding as three or fewer voids per day.131 The claim, as Nygaard later remarked, "is true, and...is a problem for the scientific basis of the opinion."132 What this gap also reveals is that a study of urinary tract infections using a higher threshold of voids is an important occupational health research desideratum.

A particularly valuable colloquy unfolded between Jim Beam’s lawyer and Marraccini concerning the logic of the at-will voiding regime created by the Memorandum and employers’ power lawfully to police the truthfulness of workers’

128 "Transcript of Hearing" at 144-46 (Aug. 28).
129 "Transcript of Hearing" at 146-48 (Aug. 28).
130 "Transcript of Hearing" at 157 (Aug. 28) (italics added).
131 "Transcript of Hearing" at 162-63 (Aug. 28). The article is Nielsen and Walter, "The Epidemiology of Infrequent Voiding and Other Symptoms."
132 Email from Ingrid Nygaard to Marc Linder (Oct. 6, 2002).
claims that they need to void:

Q. What I’m understanding your testimony to be is that any restriction by an employer where an employer says there is a specific part of the day that you can’t go...that would be a violation of the OSHA standard, correct?
A. What I am saying is that if the employer denies them going to the restroom when they have a physical need to go to the restroom, yes, that is a violation of the standard.
Q. Okay, then what if they say they’ve got a physical need. Is it your interpretation of the standard that a simple statement, I have the urge to go gives them the regulatory, statutory right to go to the restroom...?
A. I know of no other way to determine if that’s a true statement or not. So, yes, I would have [to] say they would have to accept it at face value.
Q. ...So, if a person were to say every half hour they need to go to the restroom...—and they tell their employer that and they really mean it—I really need to go. I don’t have a medical condition, I just need to go every half hour, I really need to go all day. There is no way an employer could address that use, correct? ... Your position would be that someone...saying they needed to go every half hour, whether or not they needed it, that that would be a protected activity under OSHA...?
A. If they have a need to use the restroom and indicate that to the employer then yes, they must be allowed access to the restroom.133

To be sure, in her final response, Marraccini sidestepped the crucial issue by assuming what presumably was the principal question—namely, whether workers “need” to void or are merely saying that they do.134

In responding to a hypothetical question posed by Griffith, Marraccini stated that if an employer gave an employee access to the bathroom 20 times a day but dictated each of those times, it would be necessary to look at the question on a case by case basis because it is possible that those 20 breaks might include times when the employee might actually need to use bathroom. Griffith then asked: “So, is there a number where it becomes reasonable for an employer to set a number and say you can only go this many times?” To which Marraccini replied: “Twenty...may not be okay in some instances. I don’t think that question is answerable.”135 Marraccini also undermined Jim Beam’s effort to inflate the number of toilet breaks it provided by observing that, since the employer has no control over employees’ going to bathroom immediately before and after shift and therefore is “at that point providing them no access,” it was not relevant to the reasonableness of the policy from OSHA’s perspective that, including those two times, workers could go to the bathroom six times in 8.5 hours.136

133“Transcript of Hearing” at 166-67 (Aug. 28).
134For further discussion of the issue of abuse, see below ch. 17.
135“Transcript of Hearing” at 169 (Aug. 28).
136“Transcript of Hearing” at 180-81 (Aug. 28).
The remainder of the first day of the hearing was devoted to testimony by two female bottling-line employees. The first, Krystal Ditto, 36 years old, who had worked at Jim Beam for seven years, testified that she considered herself “normal” and urinated 10-15 times during waking hours. Because she had just undergone a full physical examination and been found normal and healthy, she did not want to apply for a medical accommodation; she was also reluctant to state to management that she was not 100 percent able to work because the company “can send you home until you are....” The only employee to have received a final warning and thus to have been facing termination the next time she exceeded her one daily discretionary bathroom break, she wrote on that warning that she disagreed with it because she had been “using the restroom to relieve myself when needed and nothing more. Why is it not stated on this warning that I’m using the restroom instead of excessive personal needs time.” When she received her final warning she met with Jack Allen, the human resources director, and the bottling manager, who “asked me if when I went home at night, and on the weekends did I try using the restroom every two hours.” She said no and asked him whether he did and he said no. Later, when one day she had already used up her one unscheduled break and still had to go to bathroom, she had to ask to be permitted to go home early to use the bathroom, and she lost pay for the time. She stressed that it was humiliating to have to “justify the need that you had to use the restroom” to a supervisor; or to sit here at hearing and “discuss...your period....”

Ditto’s experience in leaving early for the day to avoid termination was not unprecedented. Thirty years earlier, just as OSHA was being established, a meat-processing firm in Wisconsin entered into an agreement with the Amalgamated Meat Cutters and Butcher Workmen (which later became part of the UFCW) under which unscheduled bathroom relief breaks were granted on an “emergency” basis only. At the arbitration of its grievance over the employer’s overly strict interpretation of this standard, the union argued that the company was actually causing more absenteeism: some employees “requested the rest of the day off and went home on the premise of being ill rather than taking the few minutes to engage in an emergency relief period with the result of being written up....”

Margaret Boone, a Class B technician who had worked at the plant for 34 years, testified that she sometimes had a “urination bladder problem” and seepage, and urinated 10-12 times during waking hours: “I had some seepage problems before the policy and I still have them. I don’t think I’m ill. I have been to the doctor, and I think I’m just a normal fifty-four year old woman. My bladder is

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137“Transcript of Hearing” at 186-87 (quote), 198 (quote) (Aug. 28).
139“Transcript of Hearing” at 199 (Aug. 28).
140“Transcript of Hearing” at 200-201, 203 (quote) (Aug. 28).
141Jones Dairy Farm, 72-2 Labor Arbitration Awards (CCH) ¶8639 at 5256 (1973).
fifty-four years old just like the rest of my body. ... It’s somewhat humiliating to have to ask a young male supervisor if I can go to the bathroom. ... It makes me feel like I’m back in grade school.” The first day’s hearing ended with Boone’s testimony that on days when it was “just sprung on” workers at 3:00 or 3:30 in the afternoon that they were being “drafted” for three hours of overtime, they would have no scheduled break between 2:00 and 5:00; thus, if they had already used their one discretionary bathroom break that day, they would have to wait three hours to void.

Half-Time Media Events

Midway through the hearings, Richard Griffith, Beam’s lawyer for the OSHA appeal, told a Louisville television station that “‘[a] reasonable restriction on the use of a restroom is perfectly appropriate. And what you cannot have is a restriction that leads to extended delays.’” He was not even completely correctly interpreting the Memorandum in the abstract, but he totally failed to explain how Beam could possibly have satisfied that reasonableness criterion by permitting workers to void when they did not have to and prohibiting them from (or sanctioning them for) voiding when they did have to.

As the tide of print, radio, and television attention—excluding the national newspaper of record, whose labor reporter had deemed it newsworthy to mention that foremen in clothing sweatshops in the Northern Mariana Islands “often limit the number of bathroom breaks” or that immigrant workers speak up “about not being allowed to take bathroom breaks” at an AFL-CIO forum, but not to report...

142“Transcript of Hearing” at 205, 207 (quote), 212 (quote), 216 (quote) (Aug. 28).
143“Transcript of Hearing” at 221-23 (quote at 222) (Aug. 28).
145See above ch. 6.
146Beam’s impermissible fixed-break system is scarcely unique; indeed, it is not even the worst of its kind. For example, according to an informant, at the unionized Austrian-owned MIBA bearings plant in McConnelsville, Ohio, the one unscheduled break was merely at the supervisor’s discretion. Moreover, the fixed-breaks were shorter—only 20 minutes for lunch and 10 minutes for the two rest breaks; since it took four minutes to go back and forth to the bathroom, the 100 men on each shift could not all use it during the six minutes remaining. Email from Colette Carr, Columbus, OH to UFCW (Aug. 29, 2002).
148Steven Greenhouse, “Immigrants Flock to Union Banner at a Forum,” N.Y. Times,
on a dispute as mundane as the one at Beam—rose on August 28, Beam’s public relations department was forced to issue a “Media Statement” that afternoon:

Early in 2001, and in prior years, Jim Beam and the Union recognized there was a problem with too many people taking too many unscheduled breaks. Their discussions did not correct the problem. Jim Beam was charged with finding a solution to the problem.

The new break policy is fair, reasonable and respectful to the 150 employees who work on the bottling line...; we do care about their safety and comfort in the workplace.

The break policy allows for four breaks each day, or about one every two hours: in the morning, during the lunch hour and after lunch. One other break may be taken anytime during the day. Employees with medical conditions are immediately granted special accommodations and are allowed to take as many breaks as they need. Everyone seeking accommodation has been granted it.

It is important to understand that a bottling line is a unique work setting that requires a more formal, organized procedure for taking breaks than most other work settings. Upon leaving the line to take a break, the employee’s position on the line must be replaced in order to allow everyone to effectively perform his or her job.

Before implementing the policy, we consulted with doctors and sought guidance from OSHA and other experts. We believe the policy balances the needs of our employees with the need to get our work done properly.

Beam’s use of the passive construction—“was charged with finding a solution”—left readers with the impression that the union had agreed to give the employer unilateral control of formulating a voiding policy. Beam also misled the public by calling its bottling line “a unique work setting,” whereas in fact thousands of assembly-line factories do or must implement relief systems, as even OSHA’s Memorandum observed. Since Beam already had a relief system in place, when it asserted that its restrictive “policy balances the needs of our employees with the need to get our work done properly,” by “properly” it meant not


When the newspaper did mention the humiliation felt by workers in a foundry “forced to urinate in their pants,” it linked the oppressive policy to a whole series of such practices at “one of the most dangerous employers in America....” David Barstow and Lowell Bergman, “At a Texas Foundry, An Indifference to Life,” N.Y. Times, Jan. 8, 2003, at A1, col. 1-2, at A14, col. 2 (nat. ed.).

After being quoted in the Wall Street Journal, the author himself was called that day by several newspaper reporters, was interviewed live on a New York City radio program (which in keeping with the tone set by discussions in the media, played a flushing toilet in the background), and received an inquiry from CNN.


that unscheduled voiding caused bottling-line stoppages, but that profits were reduced by the need to pay the workers giving relief. As the plant manager, Jeff Conger put it: "Obviously, breaks cost money." The costs of not taking breaks, being borne by the workers and thus 'obviously' not appearing on Beam's income statement, needed no discussion.

On the second day of the hearing, August 29, Harry Groth, vice president of Jim Beam Brands Company, issued a memorandum to all employees at Clermont and Boston, which was a variation of the "Media Statement" and the core of which read:

I know that many of you feel this is a sensitive issue and are not interested in talking publicly about it. I certainly want to respect that. However, since there has been so much media attention and numerous factual inaccuracies, I want to be sure you understand our perspective.

Early in 2001, and in prior years, Jim Beam recognized there was a problem with people abusing the established break practice. Jim Beam completed over a year of research in developing what we believe is an appropriate policy, which was implemented in October 2001.

We believe this new break policy is fair, reasonable and respectful to all of you who work in the bottling department. As you know, a bottling line requires formal training and an organized procedure for taking breaks. Our policy allows for four breaks each day, or about one every two hours: in the morning, during the lunch hour and after lunch. One other break may be taken anytime during the day. Employees with medical conditions are immediately granted special accommodations and are allowed as many breaks as they need. One-hundred [sic] percent of those seeking accommodations have received it.

The obfuscatory effect that such corporate public relations can exert was dismayingly on display in the following editorial from the Iowa State University student newspaper, which contained almost as many factual and logical errors—virtually all of them identified elsewhere in this book—as it had assertions and in its densely uncritical acceptance of a powerful entity's self-interested press release bodes ill for the powers of discernment of the next generation of journalists and editors:

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153 Beam calculated the yearly “Cost of Hours Off Line” based on the amount of time that “both the mechanic and sanitation person spent relieving for restroom breaks,” the “estimated hours spent away from the line,” and the employees’ hourly pay rate plus benefits. Jim Beam data, faxed by UFCW to author (Mar. 18, 2002).

154 "Jim Beam Workers Turn Sour Over Bathroom Break Limit."

A Jim Beam bourbon distillery plant in Clermont, Ky., is under fire because of a policy that limits the number of trips an employee can make to the restroom.

The policy helps maximize quality control and productivity while allowing employees a reasonable amount of restroom breaks.

Workers on the bottling line are restricted to four trips per 8 and a half hour work shift. Three of the breaks are scheduled and the fourth can be taken at any time. Additional trips may lead to reprimands and after six violations employees may be fired.

Workers are allowed to use the restroom about every two hours and never have to wait more than three hours.

The local union, United Food and Commercial Workers, is complaining on behalf of about 100 employees who find the restrictions to be outrageous.

The union claims some of the employees have been incontinent in fear of being punished for leaving the line, whereas others wear protective undergarments, similar to diapers, to avoid leaving the line at all.

Union representatives are calling it a "shame" to make people choose between soiling themselves or securing their job. But the union has failed to mention what might cause a company to implement such a policy -- workers abusing unlimited bathroom breaks.

The policy was put in place last October as a solution. It is the only policy of its kind in the company, so it is fair to say the workers brought this upon themselves. Those who did not abuse the original system should be upset with those who did, not management.

The policy sounds as if the company is causing harm to people's bodies as an effort to increase already outrageous profits. There was a problem. In the business world when there is a problem, it has to be fixed.

And four trips to the restroom is plenty. The company consulted a urologist before putting the policy into effect. If an employee has a medical condition they can exempt themselves with a note from a physician.

There is not a good reason people should be urinating themselves or wearing diapers. If it is that bad, they can get out of it.

The workers and the union are simply complaining over something they need not complain about. The company has a reasonable policy and tolerates a number of violations.

Grade school teachers get even less of an opportunity to use the restroom at work, yet teachers wetting themselves is not a common occurrence, at least not to the point where it requires a national news story.

Perhaps name recognition is playing a bigger role in this complaint then anyone cares to mention. If Jim Beam were not Jim Beam, there would be no issue at all.156

The Hearing Ends

The second day of hearings on August 29 saw testimony from four additional employees (including the union president), the employer's paid urologist, Dr. Stivers, and its plant manager and human resources director. Patricia Culver, who

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had worked at the plant for 23 years, was a Technician B. She considered herself “[perfectly] normal” and urinated 8-10 times during waking hours. After her first counseling she reduced her intake of water and called in sick three times while having her period, losing wages. The policy had been “humiliating.... I feel like I’ve been stripped of privacy.” She did not apply for a medical accommodation because she feared she would be disqualified from her job, which is “the highest paying ladies job at Jim Beam. I was afraid that they say okay you need these special accommodations so we’re going to put you over here...where it doesn’t take someone to replace you to use the facilities.” But she did get a medical note (despite being healthy and normal) because “us females have other needs, special needs.”

Bobby Hill, a 44 year-old general helper who had worked at the plant for 10 years and considered himself “normal,” urinated 10-12 times during waking hours. He had received two counselings and an oral and written warning, but did not believe he needed to have the medical accommodation form filled out “because I’ve been using the restroom ever since I was born, and nobody’s told me when I needed to go. I know when I need to go to the restroom....”

Angela Mattingly, a 25 year old who urinated 8-10 times during waking hours, had received two counselings and an oral and written warning. She wrote on her warning that she had been told to get a doctor’s note because of using the bathroom too much: “I didn’t know that mother nature was a medical problem. ... It just irritates me to have to get a paper to use the rest room and it bothers me to be told to go to Human Resources when I’m on my period.” Mattingly went to a nurse practitioner, who did a urinalysis, which was clear. She tried to explain to the nurse that “sometimes when I go it just don’t land on break time. ... I was trying to explain to her that I just can’t time myself to wait until 9:30.” The nurse filled out her accommodation as “overactive bladder.”

Jo Anne Kelley had worked at Beam for 34 years, the last six of which as president of UFCW Local 111-D, which represented 248 workers at the Jim Beam plants in Clermont and Boston—200 of those employees working in Clermont, including 100 on the bottling line. Kelley testified that the past practice of taking unscheduled restroom breaks on a regular basis had been in effect at least as long as she had been working there. During collective bargaining negotiations in 2001 Jim Beam had proposed that it be eliminated: “After much discussion the union agreed that we would no longer have the regular rotating cycle of breaks with the assurance that no one would be denied access to toilet facilities if needed, and we took that proposal to the membership and the membership agreed to it, that regular

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157“Transcript of Hearing” at 8 (quote), 14-15, 17, 18 (Aug. 29).
158“Transcript of Hearing” at 29, 32, 37 (quote) (Aug. 29).
159“Transcript of Hearing” at 42, 44, 48, 49, 51, 52 (Aug. 29).
160“Transcript of Hearing” at 59, 61 (Aug. 29).
cycle of rotating unscheduled breaks is longer in place.”

The union, however, did not agree to the new bathroom restriction policy. Kelley testified that if Jim Beam had wanted to discipline workers for “taking unauthorized rest breaks when they did not actually need to use the restroom,” it could have had recourse to three rules set out in the collective bargaining agreement, which had probably been in effect for 50 years. Two warranted discharge without notice: “Absence from duty without notice to and permission from Supervisor or Manager” and “Changing working places without orders or prowling around the works away from assigned places.” Warranting discharge with notice was a violation of the rule that: “All employees shall, during working hours, devote themselves diligently to their assigned duty.”

Returning to his favored theme of OSHA’s deprivation of employers of their power to discipline slackers, Griffith engaged Kelley in the following dialog on cross-examination, which Kelley adroitly and playfully turned against her inquisitor:

Q. [Y]ou testified there was a long-standing practice...concerning taking unscheduled breaks. [T]he way it worked, was that employees took typically four unscheduled breaks a day, isn’t that true?
A. That probably the way it worked the majority of the time.

Q. [I]f...an employer were to have a void-at-will policy, you heard that term, did you not when you heard Dr. Nygaard testify?
A. Yes

Q. She said she thought a void-at-will policy is the right policy. Secretary of Labor has taken the same position. If an employer has a void-at-will policy, wouldn’t you agree that there is no way to monitor whether any given employee is taking unnecessary trips to the restroom?
A. I would say that I have no knowledge of any way to monitor.

Q. So, if in fact someone were doing that, there is no way for Jim Beam to discipline any such employee in the contract...isn’t that true?
A. No, that’s not true.

Q. Well, they have to know that the person had actually gone unnecessarily in order to be able to do it, isn’t that true?
A. Well----.

Q. Isn’t that true?
A. Not necessarily.

Q. They could discipline them, even though they did not know whether the person needed to go...is that your testimony?

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161 “Transcript of Hearing” at 83, 84 (quote) (Aug. 29).
162 “Transcript of Hearing” at 85 (Aug. 29) (question by Peter Ford).
163 “Transcript of Hearing” at 86 (Aug. 29) (Kelley citing Agreement, Article XXX Supplement ‘B’ Working Rules H, J, and 1).
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A. Not necessarily.
Q. That’s a very unresponsive answer in my judgment, Ms. Kelley.
A. I could elaborate if you wish.
Q. You go ahead.
Q. Alright. Under the collective bargaining agreement, the employer can and does, too frequently in my opinion, discipline individuals for things they may not necessarily have done, and at that point it’s the union’s place to grieve, and try to prove that they did not do that.
Q. So, your position would be that the employer would have the ability to speculate that the person, when they said they were going to the restroom really wasn’t going...?
A. They do have that, and they do do that.164

Picking up Griffith’s theme and seeking to undermine the company’s claim that the OSHA Memorandum deprived the employer of its power to discipline—which a Beam executive stated was not the purpose or intent but might be the outcome of the OSHA Memorandum165—the union’s lawyer elicited from Kelley on re-examination that nothing in the collective bargaining agreement would prevent the employer from requiring an employee to undergo medical evaluation if the employer contended that he was using bathroom too often or from announcing its intent to ban smoking in the restroom.166

Q. If the company wanted to monitor just what was going on inside the restroom, is there anything in the contract...that would prohibit them from at least attempting to monitor what goes on inside the restroom, try for example, having an attendant in the restrooms?
A. Contractually, I see no reason why that they couldn’t have a monitor. I see other legal ramifications for having surveillance cameras or something of that nature, but I think they probably could, and have had monitors in the restroom.167

Nor, Kelley testified, would the contract prohibit the company from requiring workers to notify their supervisor when they go on and return from unscheduled bathroom breaks.168

At this stage in the proceedings, before calling its star urological witness, Jim Beam moved for summary judgment on the grounds that “the Secretary of Labor failed to prove the existence of [sic] unsafe condition that would give this court jurisdiction to hear this case under the OSHA statute. And also it’s failed to prove violation of any OSHA Standard.” However the hearing officer found that there were sufficient factual disputes between the parties to preclude granting such a

164“Transcript of Hearing” at 102-105 (Aug. 29).
165Telephone interview with a Jim Beam Brands executive (Nov. 8, 2002).
166“Transcript of Hearing” at 106-107 (Aug. 29).
motion: “I think I have enough testimony that if I accept as true would be sufficient to support Labor’s case: therefore I’m going to overrule the motion for summary judgment.”

Despite the debacle of his deposition testimony, which had revealed Dr. Stivers to be both dogmatic and ignorant of fundamental aspects of urination, Jim Beam chose to give him an opportunity to rehabilitate himself and to take the risk of exposing him to withering cross-examination. Stivers, who had retired from active practice earlier that year, told Griffith that when Jim Beam had initially contacted him, the company doctor had asked him whether he would talk to management and how much he would charge. A Jim Beam official then came to Stivers’ office, talked to him about “what they perceived to be a problem situation,” and asked him to come to the plant and “try to educate them as to what was reasonable, what was medically necessary, what was physiologically normal in terms of urination.”

Stivers then testified that the first paragraph of his (aforementioned) letter to Jim Beam “indicated that we did review what existing OSHA regulations were present, and they were for agricultural workers, and it recommended...3 hours as a time that people should not exceed in terms of having access to a bathroom.” To be sure, as already noted, that policy decision was rooted not in medicine, but in farmers’ lobbying power, but Stivers nevertheless tried using it to lend credence to his “conclusion that...3 to...6 voidings is what we would call normal in a...24 hour period. [T]hat conclusion is derived from the fact that almost every study of medication that’s used to treat conditions that are associated with frequent urination uses the bottom level of acceptance into a study of a medication to alter urination [a]s...8 voids per...24 hours.” While one or two would be “very rare,” 3-6 was “in the range for [sic] normal person.... And therefore it seemed that the...4 scheduled breaks would be more than adequate to address ninety to ninety-five percent of employees.”

Commenting later in the year on this testimony, Dr. Nygaard stated that Stivers’ claim about medication studies “is true: the recent very large drug company studies done to evaluate and promote drugs for ‘overactive bladder’ tend to use >8 voids as an acceptance criterion into the study. This was chosen based on the Larsson study and because it makes way more people look like they have overactive bladder which drives the stock prices up of the new drugs. This in no way relates to the next sentence which, obviously from my deposition, I disagree

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169 “Transcript of Hearing” at 109-10 (Aug. 29)
170 “Transcript of Hearing” at 112 (Aug. 29).
172 “Transcript of Hearing” at 118 (Aug. 29).
173 See above ch. 5.
174 “Transcript of Hearing” at 118-19 (Aug. 29).
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... with.175

Asked for his professional opinion on Nygaard's testimony (based on FitzGerald at al.'s study) that in her judgment a normal healthy woman could be expected to void as many as 12 times a day, Stivers, without explaining the basis of his answer, replied: "I would suspect that anybody voiding... 12 times a day would be making an appointment to see their doctor or see a urologist. That's excessive. That usually interferes with most peoples [sic] ability to carry out their normal activity."176 In later commentary, Nygaard observed:

In FitzGerald's study, there were women who considered themselves normal who voided 12 times a day. The problem is that doctors only see the women that present for care, not all the ones out there who may have the same symptom as the women that present for care but who are not bothered by it. For something subjective like urinary frequency, it becomes a medical diagnosis rather than a normal fact of life when the person is bothered and wants treatment. Restrictive work rules can take an asymptomatic person and turn them into someone who is seeking medical treatment—on the one hand, you could say that this makes it a medical diagnosis/condition for that person, but on the other, why should they have to pay $80/month and sustain side effects for a drug that helps them pee less at work?177

Stivers testified that since his deposition he had read the abstract of FitzGerald's paper and, without revealing any criticism, opined that "the paper is subject to criticism. The author criticizes the paper, the data herself."178 (To be sure, on cross-examination, he admitted that since he had not read the full paper, he was not in a position to comment on it.)179 Again, Nygaard later dismissed Stivers' assertion as unfounded: "Any good researcher tries to explain the data. In no way did FitzGerald criticize it. I think he is talking about the last sentence of the abstract: 'The differences (ie the fact that the frequency was more than [in] Larsson's study) may be due to the differing racial composition of the study sample or they may simply be due to higher fluid intake.' Abstracts have a small word limit, so one can't expand much. Clearly the other thing that may explain the difference is that this study with a larger population and less homogeneous population may be closer to the "truth."180

Stivers argued that at an average of 8 ounces per void, 12 voids would amount to 96 ounces or twice as much as a normal person puts out (1250-1500 cc's). Since there is, according to him, no reason to believe that more than a third of that

175Email from Ingrid Nygaard to Marc Linder (Oct. 9, 2002).
176"Transcript of Hearing" at 121 (Aug. 29).
177Email from Nygaard to Linder (Oct. 9, 2002).
178"Transcript of Hearing" at 122 (Aug. 29).
179"Transcript of Hearing" at 140 (quote) (Aug. 29).
180Email from Nygaard to Linder (Oct. 9, 2002).
amount (500 cc’s) should be occurring during the time of this work shift, and the kidneys make 60 cc’s an hour, a normal bladder should be able to store and expel it in an average of two-hour intervals.\textsuperscript{181} In contrast, Nygaard stated: “Many people void more often in the morning than later in the day. Younger people don’t make as much urine at night as in the daytime, so dividing a 24 hour total up into thirds doesn’t work.”\textsuperscript{182}

Asked directly by Griffith, Stivers allowed as how even three-hour intervals would still be a reasonable time between breaks.\textsuperscript{183} And prompted by the company’s lawyer, he sought support once again in OSHA’s toilet standard for farmworkers, about the contents of which he was manifestly ignorant and confused: “I believe there was a ruling by OSHA. I reviewed this ruling, that agriculture workers did not have to be provided with a bathroom. They just needed to be provided access. So, if they’re in a field, and there was no facility available, that...3 hours was the maximum time that they should be without.” To Griffith’s question as to whether a three-hour period would be “consistent with your knowledge about human physiology,” Stivers replied: “It should be adequate, especially considering the fact that most agriculture workers are under a hot sun. They’re going to lose more of their fluid by sweating than they are by urine production.”\textsuperscript{184} Nygaard, once again, later corrected this claim by pointing out that farmworkers are “supposed to be drinking way more to make up for the sweat plus some.”\textsuperscript{185}

As at his deposition, Stivers seemed almost to fault Jim Beam for being overly lenient: its policy of letting workers go every two hours “is more than generous, more than physiologically adequate, and the accommodation is anybody that needs an accommodation for some reason. It seems to cover all bases. It should be a policy. It should be something that would accommodate ninety-five, ninety-eight percent of the employees.”\textsuperscript{186} Nevertheless, on cross-examination he testified that in spite of being paid $250 per hour, he had not gone to Beam “with a preconceived notion.”\textsuperscript{187}

Instead of rehabilitating his expert witness, Griffith committed the tactical error of enabling the union to delegitimate Stivers as a urologist who advocates the view that holding it builds strong bladders and character:

Q. Would you agree that in general...employees should urinate as frequently as necessary?

\textsuperscript{181}“Transcript of Hearing” at 122, 125 (Aug. 29).
\textsuperscript{182}Email from Nygaard to Linder (Oct. 9, 2002).
\textsuperscript{183}“Transcript of Hearing” at 125 (Aug. 29).
\textsuperscript{184}“Transcript of Hearing” at 126 (Aug. 29). On the field sanitation standard, see above ch. 5; for the text of the field sanitation standard, see below App. III.
\textsuperscript{185}Email from Nygaard to Linder (Oct. 9, 2002).
\textsuperscript{186}“Transcript of Hearing” at 129 (Aug. 29).
\textsuperscript{187}“Transcript of Hearing” at 130, 132 (quote) (Aug. 29).
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A. Not as stated that way, no.
Q. What do you disagree with, about that statement?
A. Well, I think you're trying to put some [sic] into my mouth. And if you want me to agree that someone should go to the bathroom when they have the urge to go to the bathroom, yes, under most circumstances we recommend that.
Q. [Under] what circumstances would you not agree with that?
A. Well, there are a lot of situations where it's not possible for someone to go to the bathroom if they have the urge to. Having done lots of long surgeries, I personally have had to suppress the desire to go to the bathroom. And, I didn't go to the bathroom every time that I wanted to. But, I made sure that the surgical field was stable, and then I excused myself. ... You don't just drop everything and run out to go to the bathroom because you feel like you need to. Truck drivers do the same thing. They're coming down the highway and get the urge to urinate, they suppress it for a few minutes, and then it goes away. So, they don't stop at the next place.188

To confront this allegation with the real world of work, Nygaard observed: “My patients who are truck drivers (and I've had at least 10) say that they pee as soon as they get the urge—in the truck. There are gizmos sold to drivers for this purpose.”189 Moreover, as a bus drivers union has pointed out, “involuntary urine retention also represents a safety hazard to the riding and driving public since an operator who is forced to 'hold it' is distracted and more likely to make driving mistakes.”190

Conceding that there may not be anyone to replace a surgeon, the UFCW's lawyer then elicited from Stivers an admission that he in effect had little if any sympathy for the entire purpose of the OSHA Memorandum:

Q. How about in a case of someone working on a production line, where there are other employees who could relieve,...would you agree that if there was someone available to relieve them that it would be advisable for the employee who needed to go [to] the restroom to do so?
A. I don't have an opinion about that. ... My personal opinion is, that is not reasonable for everyone who has a transient urge to go to the bathroom, to immediately go to the bathroom. And that's not the way the world turns around. ... I don't think it's a medical

189Email from Nygaard to Linder (Oct. 9, 2002).
void where prohibited revisited

problem. I don't think it's medically appropriate. It may be socially appropriate, but to say medically appropriate, no. I don't think it falls into the realm of medically appropriate. 191

The most that Stivers could say in favor of OSHA's rule that workers need prompt access to toilets was: "I think it would be nice." And although he felt constrained to concede that he did not disagree with Triplett's statement that "it's the healthiest environment for a worker to have prompt access to toilet facilities," 192 he quickly reverted to form, apparently leaving even the UFCW's lawyer Peter Ford incredulous (and Jim Beam management doubtless rueing its decision to afford the "renowned urologist" an encore):

Q. Dr. Stivers, someone who has a gastro-intestinal problem, would you agree that they should, at least ideally, they should have prompt access to the restroom?

A. I would hope that anybody that has a GI problem would have access to the problem [sic].

Q. Would you agree that if they didn't have prompt access, someone in diarrhea could very well soil themselves if they had to wait any appreciable length of time?

A. It's a social problem, not a medical problem.

Q. Pardon?

A. That's a social problem, not a medical problem.

Q. Your [sic] not answering my question, by saying that.

A. I'm not answering your question the way you want me to answer the question. The answer to the question is, of course someone with a GI condition should under every hopeful circumstance have access to a bathroom when they need to go there. But if they have an accident, it's a social problem, not a medical problem. 193

Even if an administrative tribunal or court were ever to accept Stivers' startling opinion that a worker's urinating or defecating in her pants is a social rather than a medical problem, since Congress enacted OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions," 194 OSHA's administrators would still be operating within their powers in prohibiting employers from, and fining them for, causing employees to urinate, menstruate, or defecate in their pants on the grounds that it creates health and safety problems (such as chafing, rashes, contact of fecal matter with an open sore, and greater possibility of accidents and injuries attendant on workers' being inattentive

192 "Transcript of Hearing" at 155 (Aug. 29).
193 "Transcript of Hearing" at 159-60 (Aug. 29).
194 29 USC sect. 651(b).
and preoccupied with their wet, soggy, and smelly pants). One state-plan program has already gone beyond the physical-medical to the social-psychological: in 1998 OSHA in Washington State cited an employer for having failed to provide an employee with access to toilet facilities by virtue of having failed to inform his employees that they were authorized to use the toilet in the owner’s home next door to the place of employment, a repair shop, which lacked a toilet because construction had been held up by a lack of a permit. The hazard to which the employer had exposed the worker, who was expected to work eight hours a day “without being informed as to the availability of toilet facilities” for two weeks, was “physical harm or acute embarrassment.”

Jeff Conder, the Jim Beam plant manager, testified that from 1996 on tag rotation “was taking so much time of the sanitation person, and that Tech A, the person we were investing all that training in...would relieve the Tech B and the sanitation person would relieve almost everyone else, and these...2 folks were spending...2 to...2 ½ hours a day to relieve.” Tag rotation had been in place at least during the 18 years he had worked there, but “we” did not “really start taking notice of it” until the mid-90s “when the frustration levels really started getting high on the lines for the supervisors because of the number of times that employees were away from their lines.” Jim Beam, according to Conder, had “hoped and expected” that workers were using tag rotation only to use the restroom, but “that wasn’t the case.” To be sure, Jo Anne Kelley later commented that this claim “is definitely not true. The company started expecting that when he became plant manager and did not like what he saw.” Moreover, Kelley stated unequivocally that workers and the union had never claimed that the mini-breaks were used only for urinating: they were a rest-break benefit that the workers had used for whatever they wanted to do.

As Conder related the history of the company’s opposition to mini-breaks, management in the mid-90s began working with stewards on the floor: “since we had the [union] executive board’s agreement that they’d help us...they’d keep things in check”; “I have to admit we did it minimally”; “we asked them to...make sure that if people are taking a break, that they really need to be taking a break, etc. That really back-fired on us. I think we really created a lot of hard feelings out of

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195 As an enforcement matter this position was confirmed in a telephone interview with Elizabeth Slatten, OSHA Austin Area Office Assistant Area Director (Nov. 8, 2002).
197 “Transcript of Hearing” at 166-67 (quote) (Aug. 29).
198 “Transcript of Hearing” at 170, 172 (quote) (Aug. 29).
199 Email from Jo Anne Kelley to Marc Linder (Oct. 9, 2002).
200 Email from Marc Linder to Jo Anne Kelley (Oct. 28, 2002) and from Jo Anne Kelley to Marc Linder (Oct. 29, 2002).
that. We set the supervisors up by failure because we let the seven...supervisors go out, and with their own discretion try to determine whether somebody was going to the bathroom or they weren’t, or they were smoking. So, it was incredibly difficult for a supervisor to do. And it created hard feelings among the employees because some supervisors were strict: some were not so strict.”201

Kelley later subjected Conder’s version to strong criticism:

It made for good testimony, but was basically pure bull. Mr. Conder began noticing it in the mid 1990’s because that is when he became plant manager. 1992 I believe. I am sure the frustration level became high with the supervisors when...Conder...put more and more demands on them for production and quality. It was an easy out to blame the union employees for taking too many breaks because this is exactly what...Conder...wanted to hear. There were supervisors who complained to Tech A’s for production being down or the bottling line not running good. The Tech A’s were not going to take the blame for it, so they used the excuse that they were spending all their time relieving. It was too easy for the supervisor to run to Mr. Conder and tell him that production was down because the Tech A’s could not do their job because they were relieving Tech B’s. It was a matter of everyone trying to cover their own ass and the Tech B’s were at the bottom of the heap and got the blame for taking breaks. Nothing was ever said about the Tech A’s['] breaks or the fact that they stood around in the shop smoking or hitting on women when they weren’t relieving. Maybe Mr Conder truly believes it happened the way he tells it, but it just shows how out of touch he is with reality.202

In talks with the union executive board in 2000, it became clear to Conder that “rotation was not the issue with the union.” The problem was twofold: how to make efficiencies and manage the business and how “to figure out what needs the employees actually had to go to the restroom. And we certainly weren’t the people to do that.” Beam made a survey of its industry and other industries and found “an incredibly broad range of break practices, from very liberal to very strict. ... And we were really trying to get some kind of strategy at this point...but again we knew very little about the medical side of it. ... So, that’s [when] we decided to talk to Dr. Stivers. But, we didn’t have all the experience that was need[ed] to make a determination on what was really abusive or not.”203

As far as the actual operation of the policy was concerned, Conder contended that “if someone claims to have” a temporary condition like diarrhea, “what happens is they identify to their supervisor that they’re sick that day. And they continue to go to restroom as needed. That documentation floats up to Human Resources, and has that documentation that those employees...had diarrhea or whatever. So that...there’s just no progression on discipline on that. It’s just so noted

201“Transcript of Hearing” at 174 (quote) (Aug. 29).
202Email from Jo Anne Kelley to Marc Linder (Oct. 28, 2002).
203“Transcript of Hearing” at 177-78, 185 (Aug. 29).
and excused for that particular day. So, there’s no progression if someone says ‘I’ve got diarrhea today,’ and so I go to the bathroom five times.”

Conder also praised the employees on whom Beam had conferred medical accommodations: “I think we owe that group a big compliment” because 75 percent of them were taking just 0 or 1 extra unscheduled break.

Inadvertently shedding light on the real-world impediments to the OSHA Memorandum’s ability to stop employers from interfering with employees’ need to void, Conder tried to dispel the notion presented by the union’s lawyer that the August 2001 collective bargaining agreement had put an end to the mini-breaks that workers had been taking for half a century.

Q. [T]he tag rotation system...was in effect for a long time...until company and union agreed to end it last August....
A. That practice...did not come to an end just because we said that it would. I mean, you said it ended in August, well it ended when we implemented the policy and controlled it.
Q. Well, in fact, it ended when the union and company entered into a letter of agreement dated August 16th, 2001...did it not.
A. How does a practice end with a signed piece of paper? No it didn’t: it did not end at that time.

The plant manager thus admitted that without the imposition of coercive disciplinary measures—which were in no way mentioned or permitted by the agreement—the company did not believe that workers could be weaned of the mini-breaks they had been taking for decades. As applied to the OSHA Memorandum, the analogous lesson would presumably be: OSHA should not have assumed that, without the accompanying imposition of coercive financial penalties, a piece of paper would stop employers from continuing their long-term policy of prohibiting workers from going to the bathroom outside of scheduled breaks.

In her cross-examination of the plant manager, Kentucky OSHA’s attorney was able, by focusing on the employer’s diarrhea doctrine, to uncover the deep self-contradiction inherent in Beam’s bathroom policy. To begin with, Triplett prompted Conder to state that five or six employees had fallen under that doctrine, by which “[t]hey get to counseling and they get to go, but it doesn’t count as any progression from that point.” In response to Triplett’s question as to whether it “[w]ould...surprise you to know that a lot of the employees weren’t even aware of that policy?” Conder replied: “You know what,...that’s not good.” She then raised with him the crucial issue underlying the entire structure and purpose of

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204"Transcript of Hearing" at 191-92 (Aug. 29).
205"Transcript of Hearing" at 195-96 (Aug. 29).
206"Transcript of Hearing" at 201 (Aug. 29).
207"Transcript of Hearing" at 211 (Aug. 29).
management restriction of worker autonomy at the workplace: "[I]f a person says they have diarrhea, how do you make sure that they’re actually using the facilities for diarrhea?" to which the plant manager surprisingly replied. "Trust them."208

With this notion of trust as a baseline operating principle, the OSHA lawyer then asked Conder the logically compelling follow-up question: "Well, wouldn’t it be the same if someone said they had to go to the toilet [to urinate]?" This time, however, instead of giving a straightforward and pithy answer, Conder descended into evasiveness: “Again, we consulted, we’ve consulted to tell us what is reasonable. That’s not my opinion, but what others have said. And, if they’re going more than that, then we question....”209 Triplett then made one last effort to achieve clarity on the matter:

Q. So...what you’re saying is, now...is that when someone says they really have to use the toilet, as long as it’s in the B-word, they can use it?
A. They [sic] think you are stretching that there. We said if someone had a condition that they’re identifying that they’re sick, and they’re not just lying to go because they’ve got [sic] go for whatever reasons on their mind, if they’re identifying to us that they’re sick, then we’re going to take their word for it, we’re going to document it, and we’re going to let them go, and it’s not going to count against them.
Q. But how do you know they’re really sick? Isn’t that the same as when you testified earlier, you couldn’t tell when they [sic] really using the toilet to void?
A. I guess I don’t.210

With Jim Beam’s final witness, the Clermont (and Boston) plant human resources director, John (Jack) Allen, Jr., Triplett returned to the issue of diarrhea, this time branching out in a different direction and ultimately provoking him into uttering the most poignant non sequitur of the entire proceedings. After Allen had stated that the company had accommodated all cases of diarrhea “[o]r any temporary illness that appears to be throwing the individual out of sync,” she asked:

Q. So does a female that has an onset of menses, has heavy flow, are they accommodated?
A: [W]e have not yet had such a case arise where that has been identified as the reason....
Q. Would that be accommodated?
A. If they were to identify that that was the particular problem, we would certainly consider it.
Q. So when a woman starts her period, she has to go to personnel to get approval?
A. No. ...
Q. So, what are you saying if a woman has a—
A. I’m saying that if an individual were to have a particularly difficult time where they

208 "Transcript of Hearing" at 212-13 (Aug. 29)
209 "Transcript of Hearing" at 213 (Aug. 29).
210 "Transcript of Hearing" at 215-16 (Aug. 29).
believe that they have additional needs, and they are temporary, that’s something that we
would entertain. But...it isn’t an automatic situation, it would be a case by case basis. ...
Q. If a woman has a menstrual accident because they didn’t realize they had started, but
they knew they had to go to the restroom fast. Now, I understand as a male, you don’t
understand just what that feels like. But you have to make that very rapid trip so as to
prevent embarrassment, and so you get your counseling and you’re saying if you explain
to the gentleman in personnel...during the counseling, they’ll be accommodated and that
won’t lead to the six...in a series of a corrective action. [S]he has to go to her male super­
visor, it’s a bit personal, don’t you think?
A. Yes, it is. There’s no question about it, but if I were at the last point in my disciplinary
action...I’m sure I can communicate that in a way that even a man would understand
without having to get terribly embarrassed. These are adults that are working here.211

After having imposed a regime that all its victims regarded as infantilizing, its
author found it convenient to remind his charges that they were, after all, adults.
Recalling her reaction to this testimony as she sat at the hearing, Kelley com­
mented: “I thought I would throw up with disgust at this man. ... This man actually
thought that diarrhea would qualify but a woman would have to have an accident
to qualify.”212

In fact, Allen’s assurances to the contrary notwithstanding, this particular cause
of workplace embarrassment is well known in industrial relations. One arbitrator,
dealing with a employer’s rule that required (mostly female) employees to register
with their foremen when leaving for and returning from relief so that management
could “exercise proper control of personal time” to avoid the “disastrous” con­
sequences of employees’ “taking too much time off...particularly in view of the
wage increases granted during the recent contract negotiations,”213 spoke of

the virtually inevitable affront to the sensibilities of these workers which administration
of the rule entails. Certainly it cannot be presumed that in seeking employment in the
manufacture of gaskets and similar products a woman worker has submitted herself to rules
which may require disclosure to her foreman of information normally reserved for discus­

sion with her physician. If she refuses the detailed “explanation” demanded of her, does
she then become subject to discipline for insubordination?214

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211“Transcript of Hearing” at 242, 245-46 (Aug. 29).
212Email from Kelley to Linder (Oct. 8, 2002).
(1956).
Aftermath and Lessons

A week after the hearings, as a result of the unprecedented adverse national and international multi-media publicity—including and especially a joke about the similarity between the color of Jim Beam bourbon and urine on the Saturday night Jay Leno television program215—and "[a]fter an outcry from employees and labor officials,"216 expertly promoted by the UFCW, whose website urged people to email Jim Beam, the company, deciding not to carry on this debate in the media, abandoned its appeal despite its alleged belief that the hearing officer would have decided in its favor.217 The company announced that:

effective immediately, it has voluntarily discontinued a former policy that limits breaks for bottling-line workers at its Clermont, Ky., distillery.

"Our former policy was intended only to manage excessive breaks, and we believe it provided appropriate flexibility," said Rich Reese, CEO. "However, we’ve listened to the concerns of our employees and have changed our policy. We will work with the local Union to find a mutually acceptable solution for managing breaks on the bottling-line."218

In a postmortem lamentation about the achievement of "unlimited bathroom breaks," not based on any knowledge of the case, an employer-side labor law firm empathized with Jim Beam: "Ever see a co-worker take a newspaper into the stall next to you, only to emerge an hour later having read it cover to cover? ... Imagine how much money this costs an employer. Perhaps this type of behavior is what Jim Beam Brands Company hoped to avoid by establishing a 'bathroom break' policy."219

The president of Local 111-D, surmising that "'reason has prevailed and they have come to their senses',"" expressed the hope that "'now we can get back to the business of making...bourbon.'"220 As of early October, the company had still


217Telephone interview with a Jim Beam Brands executive (Nov. 8, 2002).


220Goetz David, "Jim Beam Ends Limit on Bathroom Breaks," (Louisville) Courier-
refused to meet with the union. Indeed, despite its press release, it had also still not announced to the workers that it had rescinded its year-old policy, although it was apparently no longer enforcing it and the union instructed the workers to ignore it and to use the bathroom when necessary, but to inform the supervisor before they went. Reaching a new agreement was delayed over the issue of Beam’s removing from its files the disciplinary actions meted out for having violated the policy that it publicly rescinded.221

Although the denials of toilet access at the Excel Corporation hog slaughter plant in Ottumwa, Iowa were far more injurious to workers’ dignity than those inflicted by Jim Beam (as suggested by OSHA’s imposition of a $36,000 penalty on Excel), the whole world’s heart (or bladder) seemed to go out to the bourbon workers, whereas few outside of Ottumwa ever learned of the events there. Such are the vagaries of the media and how they shape popular consciousness.

By this point it should have become obvious that both more and less was at stake than voiding rights at Jim Beam and that the media’s involvement was neither fortuitous nor without consequences. Since there was never any pretense by workers or the union that employees were using tag rotation solely to void, the question arises as to why Jim Beam went to the effort and expense of monitoring bathroom breaks, generating spreadsheets, and hiring a urologist to try to prove that human beings simply do not urinate as much as the logs indicated. Formulated differently: Why was this dispute over how much time would be spent working/not working on the bottling line framed in terms of voiding when both sides knew that voiding took up only a part of the disputed time? Why did Jim Beam management not simply demand that the workers work more and spend less time off the bottling line not working? This question also occurred to Karen Triplett, the Kentucky Labor Cabinet counsel, but she, too, was unable to gain any insight into the employer’s motivation for implementing a strategy that attacked only part of the problem it perceived, but, perversely, in such a way that the company inadvertently touched off a national and international groundswell of public support for workers who had been deprived of their right to urinate—support that with certainty would not have been forthcoming if Jim Beam had, instead, focused on the 6-7 minute hourly rest breaks.222

Ironically, Jim Beam’s management and attorney could have benefited from pondering one of the fates of Void Where Prohibited—the disproportionate attention that has been paid to its treatment of toilet breaks, which takes up only two of its nine chapters. Although toilet breaks are merely a subset of rest breaks,

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221 Telephone interview with Jo Anne Kelley, Bardstown, KY (Oct. 4, 2002); Email from Peter Ford to Marc Linder (Sept. 30, 2002).
222 Telephone interview with Karen Triplett, General Counsel’s Office, Kentucky Labor Cabinet, Frankfort (Oct. 11, 2002).
few reviewers focused on this more general category, and its discussion of rest breaks has had incomparably less impact on public policy and opinion, which can be outraged by stories of adults forced to defecate or urinate in their pants, but would have remained indifferent to employers’ oppressive practices depriving workers of respite during the workday.\textsuperscript{223}

In the absence of privileged access to Jim Beam’s management, no empirically verifiable answer is available. Nevertheless, when asked, one company executive sought to undermine the legitimacy of the question by challenging the claim that the union had never made a pretense that the mini-breaks were used solely for voiding. He believed that he had refuted it by mentioning that Kelley had once told him that if the company eliminated the mini-breaks, employees would not be able to go to the bathroom when they need to. The author pointed out that these two positions were not irreconcilable since some workers had in fact used some proportion of their tag-rotation breaks to void, but the official insisted that the union had used (or, in a word suggested to him by the author, “hijacked”) the OSHA Memorandum for political purposes to preserve their non-bathroom breaks, although he hastened to exculpate OSHA from any complicity.\textsuperscript{224}

The UFCW’s attorney was himself puzzled and could only “speculate”:

Apparently Beam management had already decided to implement the policy before the parties entered into the side letter, so despite the fact that the side letter ended the tag rotation practice, Beam went full speed ahead with its policy. ... It really doesn’t make sense that Beam adopted its policy rather than take other measures to ensure that workers weren’t wasting time on unscheduled restroom breaks - e.g. they could have had restroom attendants, and they could have enforced more aggressively their longstanding work rules that prohibit loitering, etc...... I think this is a case of...hardheaded management with too much power...refusing to back down once challenged, until they were embarrassed into doing so by lots of media scrutiny.\textsuperscript{225}

The secretary-treasurer of UFCW Local 227, which has 20,000 members in Kentucky and provided strong support to Local 111-D during the dispute, offered

\textsuperscript{223}The chapter on regulation of rest breaks outside of the United States was, however, reprinted in a scholarly journal: Marc Linder and Ingrid Nygaard, “Rest in the Rest of the World,” \textit{Comparative Labor Law and Policy Journal} 20:105-24 (1998) (reprint of ch. 8). As a result of the editor’s negligence, readers were not informed that what formally appeared to be an article without any context was in reality a chapter from a published book. Letter from Matthew Finkin to Frances Benson and Marc Linder (Oct. 15, 1998) (promising to reprint the chapter “with a suitable headnote”); email from Matthew Finkin to Amy Winger, permissions manager, Cornell U. Press (Oct. 28, 1998) (“We’ll prepare a headnote giving attribution”).

\textsuperscript{224}Telephone interview with a Jim Beam Brands executive (Nov. 8, 2002).

\textsuperscript{225}Email from Peter Ford to Marc Linder (Oct. 1, 2002).
a complementary explanation. Gary Best conjectured that some consultant had just
sold Jim Beam management on the policy of a blanket ban on all unscheduled
bathroom breaks as a solution to the problem of worker abuse of tag rotation
instead of disciplining the violators. Since management had been used to dealing
with the weak distillery workers union that had been in place for decades before
the merger with the UFCW a few years earlier, the company, he speculated,
thought it could get away with it. But, fortunately for the workers, the UFCW
lucked into national media attention, which is always reinforced by the public’s
strong interest in any events that combine food or drink production with voiding
or toilets.226

Without knowing anything about the situation other than what a reporter told
him and what he had read in news accounts, a consultant with a doctorate in
psychology at a “absence management” consulting firm was easily able to intuit
that: “The bathroom break rule is an example of what we see too often—where
managers attempt to control all aspects of employee behavior. ... What went
wrong was trying to solve a problem by attempting to have control of employees’
bladders....” But when the consultant sought to explain what an employer in
Beam’s situation should have done, he instinctively recommended an approach
that failed to engage the workers’ purposes—“finding out why employees
weren’t more invested in getting the product out the door nor more committed to
getting the job done.”227 Because the whole point is to “engage...not punish
your employees,” Beam could not understand that its employees “feel discon­
nected. It’s a control battle between the workers and the management instead of
the focus on customers.”228 What the absence manager failed to understand was
that the workers at Jim Beam apparently wanted less, not more, connection with
customers, management, and production work. Instead, they wanted to regain
their decades-long vested right to six- or seven-minute mini-rest periods every
other hour. When supplied with these further details about Beam and especially
about its position that the OSHA Memorandum deprived it of its managerial
powers to discipline its employees, the consultant, who after 17 years of observ­
 ing management was no longer surprised by its irrational actions, acknowledged
that dealing with a practice of 50 years’ standing was not easy, but nevertheless
insisted that companies have to deal with their human capital as they do with their
other kinds of capital.229

226Telephone interview with Gary Best, Louisville, KY (Oct. 2, 2002).
227Carol Kleiman, “Restroom Off Limits? Workers Merit a Break,” Chicago Tribune,
228MaryBeth Matzek, “Employees Say Those Are the Breaks,” (Appleton, WI) Post-
229Telephone interview with Michael Scofield, Nucleus Solutions (Nov. 19, 2002).
In an undated letter sent in October 2002, Jim Beam finally informed the UFCW that it had "rescinded the Bottling Department Restroom Break Policy and withdrawn its Notice of Contest to the OSHA citation. This has paved the way to achieving a settlement of this matter. In addition to withdrawing the break policy, be advised that we will be expunging from the employees’ personnel files the disciplinary actions and related counseling which arose from the enforcement of this policy." Nevertheless, the Jim Beam story still lacks a happy ending. As of the autumn of 2002, Jo Anne Kelley reported, "the company still keeps a spreadsheet on employees who take bathroom breaks. The supervisor keeps track on a daily basis and turns a report in to [Human Resources] each day." Consequently, it remained her "belief that the company is still trying to build a case to defend their position and try again at some point." In November it confirmed that it was monitoring workers’ bathroom use and that workers were aware of that activity. An official stated that it "will manage excessive bathroom use on a case by case basis," although no fixed number of visits or interval between visits counted as “excessive”: the numbers are vague and neither workers nor management knows what they are.

In the pre-Memorandum years some labor arbitrators forthrightly condemned precisely this kind of “onerous and humiliating timekeeping procedure,” refusing to approve it, even where the employer alleged increased production, “at the cost to employees in loss of dignity and embarrassment.”

Despite the international media-mediated uproar over Jim Beam’s policy, other companies continue to impose similar restrictions on their employees. For example, according to the UFCW, a specialty meats food processor in Buffalo issued a break policy on August 14, 2002, which, in addition to a 15-minute coffee break at 9:30 a.m. and a 30-minute lunch break at noon, limited workers to one 5-minute break between 7:00 a.m. and 9:30 a.m., a second between 9:45 a.m. and noon, and a last one between 12:30 p.m. and 3:30 p.m. With the notice itself declared to be a “verbal warning to all employees!,” the employer announced: “If you have left your work station without permission, the following actions will be taken by management: 1st Offense - Written warning, 2nd Offense...

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Letter from J. C. Allen, Jr., Director, Human Resources, Jim Beam Brands Co., to George Orlando, Int’l Vice President, UFCW (undated [before October 18, 2002]).

Email from Jo Anne Kelley to Marc Linder (Oct. 5, 2002).

Telephone interview with Jim Beam Brands executive (Nov. 8, 2002).

Unions and workers have at times engaged in creative guerrilla warfare against such managerial incursions into their ability to respond to calls of nature. In an innovative application of a work-to-rule tactic, UNITE reacted to a similar rule prohibiting bathroom visits outside of scheduled breaks at a textile plant in North Carolina by arranging for all the workers to hold their urine until break-time; because the long line far exceeded the capacity of the bathroom, by the time the 15-minute break had ended, many workers were still waiting in line and continued to stand there until their turn came. Management quickly rescinded the rule.\textsuperscript{235}

One ironic product of the publicity surrounding the Jim Beam case is the potential for the proliferation of opportunistic employer responses. For example, the Manager of the Employment Standards program of the Washington State Department of Labor and Industries reported that at the time of pervasive media interest in Jim Beam he happened to be meeting with employers—many of whom give their workers only scheduled breaks—who asked him whether, if they had to start letting employees go to the bathroom, they could deduct that time from the 10-minute rest break that Washington State law requires employers to give employees every four hours.\textsuperscript{236} The agency had still not yet issued an opinion letter on the question by the beginning of 2003, but it was, despite predictable employer opposition, preparing a ruling that the practice was unlawful.\textsuperscript{237}

\textbf{Coda:}

\textbf{How the OSHA Memorandum Has Constituted Progress Compared with Arbitration and Litigation}

The restrictive toilet-access policy imposed by Jim Beam was by no means unprecedented. Other unionized employers, also alleging that """"too many employees [were] absent from their work positions too long and too often for personal reasons, toilet, smoking, gossiping, just plain resting, etc.,"""" had, years


\textsuperscript{235}Telephone interview with Willie Jones, State Director for UNITE, Montgomery, AL (Nov. 25 and Dec. 16, 2002), according to whom the events took place at Cone Mills in North Carolina around 1984-85.


Void Where Prohibited Revisited

Before the Memorandum was issued, implemented rules prohibiting workers from leaving their work stations, except during scheduled breaks, without supervisors' permission. In 1967, Jones Dairy Farm, a sausage, bacon, and ham processing firm in Wisconsin, after years of trying to prevent workers from "remaining unnecessarily long from their work positions for personal reasons,"238 and one year after Local P-1236 of the Amalgamated Meat Cutters and Butcher Workmen of North America (a predecessor of the UFCW) had begun representing the employees there,239 informed them that "[s]upervisors were to grant such permission only for emergencies" and that "requirements for bodily relief on a regularly scheduled basis would not be considered an emergency. The requirement for permission was strictly enforced." After this policy and an "honor system" vesting discretion in the workers had both failed to satisfy the employer, the parties agreed on a new policy during the 1970 bargaining negotiations, stating that the then current emergency relief policy was unreasonable and that emergency relief periods had been "abused." Under the new rule, beyond a 15-minute rest period during the first three hours of work, "[a]dditional relief periods will only be granted on an emergency basis. The past practice of continual rotation of additional relief periods will be discontinued. Absences away from an employee's work station on a regular basis and/or pattern is [sic] not an emergency. ... In all cases, an employee must receive authorization before leaving his work station...." The only specificity that the parties injected into the policy was the guideline that the emergency relief periods "shall not be used for the purpose of loitering in the rest rooms" or "granted for the purpose of smoking." Without further definition, employees with "special problems" were to be given "consideration."240

Despite having agreed to the policy, by 1972 the union realized that it disagreed with what it regarded as the company's "much too restrictive and...unreasonable" "interpretation of an emergency as being a rare and non-recurring incident...." There do not appear to have been mass disciplinary actions, but that year Jones Dairy Farm sent one employee a reprimand letter "because of your excessive amount of 'emergencys [sic]' regarding going to the rest room during working hours." Informing the worker that if there was a "temporary physical reason" for his rest room visits during unscheduled breaks, he should get a doctor's statement verifying his condition, the employer warned him that further violation would subject him to suspension. Because he "again went to the rest room during working hours" three and a half months later, the company suspended him

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238Jones Dairy Farm, 72-2 Labor Arbitration Awards (CCH) ¶8639 at 5254 (1973).
239Jones Dairy Farm, 245 NLRB 1109, 1113 (1979). UFCW Local 538 currently represents the workers at Jones.
240Jones Dairy Farm, 72-2 Labor Arbitration Awards at 5254-55.
for three days, provoking a grievance.241

During the 27 months since the policy had gone into effect, the grievant had
gone to the bathroom on emergency relief nine times, each time having requested
and been given permission by his foreman. The employer took the position that
the fact that each of the employee’s emergencies had taken place within an hour
and a half of starting work, in combination with “the odor of liquor on the griev­
ant’s breath indicated...a pattern that was caused by the grievants [sic] conduct
prior to reporting for work. ... Specifically, we are referring politely to [D’s] li­
quid intake.” The company argued that “[s]elf-imposed problems due to an un­
willingness to conduct one’ self [sic] during off-work hours in such a way as to
prepare for work in accordance with policies, work rules, and schedule, does not
constitute an emergency or special consideration within the intent of the agree­
ment.” In sharp contrast, the union insisted that “what an employee does away
from work is ‘none of the Company’s business.’” Moreover, it argued that the
company’s interpretation was “unworkable” and “could result in employees being
disciplined and discharged for something that is beyond the reasonable control
of the employee” (though it unclear whether the union alleged that circumstance
in this case).242

The arbitrator did not grapple with any of the principled issues raised by these
severe restrictions imposed on workers’ freedom to void. Declaring himself
without authority to engage in any further definition of emergency relief periods,
he confined himself to applying the policy to the facts of the case. Without ex­
planation, but presuming that the employer had not even tried to determine
whether any of the worker’s bathroom visits were attributable to legitimate emer­
gencies, he merely found that nine relief periods over 27 months failed to form
a sufficient basis for concluding that “a pattern exists independent of and beyond
the control of the employee.”243

Without any doubt, this policy, which in its vagueness could be and was in­
terpreted by the employer far more strictly than the Jim Beam one-a-day un­
scheduled void regime, would, on its face, have been a violation of OSHA’s toilet
standard as subject to the 1998 Memorandum. This narrowly legalistic griev­
ance-arbitration procedure on behalf of a single worker—whose case presumably
offered neither typical nor especially compelling facts—is much inferior as a
means of combating employer overreaching, which the union was in part re­
sponsible for facilitating by having agreed to the “emergency” system in the first
place, to an OSHA complaint.

This claim will now be tested, against the background of Jo Anne Kelley’s

241Jones Dairy Farm, 72-2 Labor Arbitration Awards at 5255.
242Jones Dairy Farm, 72-2 Labor Arbitration Awards at 5256-57.
243Jones Dairy Farm, 72-2 Labor Arbitration Awards at 5257.
statement that she had more faith in OSHA than in arbitrators, with reference to a more recent arbitration of a dispute—also involving a union that became part of the UFCW—which bears an uncanny resemblance to the Jim Beam case.

Cagle's Poultry and Egg Company, which is headquartered in Atlanta, owned five chicken processing plants in the late 1970s, one of which was located in Macon, Georgia, where Local 315 of the Retail, Wholesale and Department Store Union (RWDSU) represented about 200 workers pursuant to a collective bargaining agreement, which ran from October 1977 to October 1980. The RWDSU also represented workers at two of the other plants in Georgia, at one of which the National Labor Relations Board found that Cagle's in the latter part of the 1970s had committed numerous unfair labor practices after the workers there had selected the union as their exclusive bargaining representative. Almost all the 150 production-line workers at the Macon plant were black women. Although one of the Cagle's lawyers later called them a particularly "militant" group of workers, applying the same epithet to the civil rights movement of the period in Macon, the workers' own lawyer dismissed those characterizations, but did stress that the black women were very poor and had been deeply dissatisfied with the discriminatory treatment to which they were subjected at the plant.

Some sense of the rancor that must have prompted and, in turn, been intensified by the dispute was conveyed by the remarks of Cagle's chief attorney almost a quarter-century later. A retired founding and name partner in a prominent Atlanta law firm and former visiting professor at Emory Law School, he retained a vivid memory of the case, referring to some of the workers as "troublemakers" who had claimed that the company had not furnished them relief and had been watching them in the bathroom. He also allowed as how a couple of the women "were really bitches," and felt compelled to mention the "bad attitude with the brothers," who believed that "everything the white man did was to put us down." Finally, he observed that the union, being headquartered in New York City, was "communist," but, at the same time, "weak."

The toilet access dispute was purportedly triggered by the company's dis-

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244Cagle's Poultry and Egg Co., 73 Labor Arbitration Reports (BNA) 34, 35 (1979).
245Cagle's Inc. and Southeast Council, Retail, Wholesale & Department Store Union, 234 NLRB 1148 (1978).
246Cagle's Poultry and Egg Co., 73 Labor Arbitration Reports at 37, 38.
247Telephone interview with Victor Cavanaugh, attorney, Elarbee, Thompson, Sapp & Wilson, Atlanta (Jan. 23, 2003).
248Telephone interview with Linda Mabry, Atlanta (Jan. 28, 2003). Reverend Henry Ficklin, who had been the head of the Southern Christian Leadership Conference in 1979, also denied that the civil rights movement in Macon had been militant. Telephone interview with Ficklin, Macon (Feb. 4, 2003).
249Telephone interview with Warner Currie, Atlanta (Jan. 28, 2003).
covery in 1978 that the Macon plant was operating less efficiently than some of the other Cagle’s plants. The company alleged that one reason for this inefficiency was that “frequently, the production line was slowed down and an excessive number of relief employees had to be provided because employees were visiting the rest room too frequently and staying too long. On occasions thirteen...or fifteen...employees were found in the rest room at the same time while the line was running. There were twelve...relief employees manning the line. The Company estimated that it should not be necessary to provide more than four...or possibly even two...relief workers.”

A quarter-century later, Cagle’s CEO, who had no difficulty recalling the dispute, characterized the union back then as “reasonably strong,” observing that the workers had just walked off the line “at-will” to go to the toilet. Moreover, he asserted that they had gone to the bathroom not to void, but to smoke, which was permitted at the time in the restrooms. The lead plaintiff in the lawsuit that arose out of the dispute, Margie Bagley, and one of the other named plaintiffs, Alma Oliver, both stated in refutation that many if not most of the women, including themselves, did not even smoke.

In order to determine whether Plant Rule No. 39, “Abuse of emergency rest room privilege,” was being violated, Cagle’s decided to do a three-week time study, beginning on January 8, 1979. Remarkably, the company assigned the monitoring of the bathroom near the production line to the chief union steward and assistant steward, whose job it was to record the time each employee entered and left. (They did not want to perform this task, but “were not allowed to refuse”; nevertheless, they also did not file a grievance.) The results, according to the company, revealed that in the aggregate workers spent 188.38 hours per week in the bathroom on unscheduled breaks (including 2.25 minutes for the trip to and from the bathroom), which, at an average labor cost of $3.78 per hour, amounted to a “cost” of $712.08 per week; adding on the weekly wages ($1,209.60) of eight excess relief workers, the company calculated “the total cost for the unscheduled rest room use” at $1,921.68 per week or $99,927.36 annually. Cagle’s also reported that practically all 148 of the employees in seven departments made emergency bathroom visits, averaging more than two per day, each one lasting on

250 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 39.
251 Telephone interview with Doug Cagle, Atlanta (Jan. 28, 2003). When told of this explanation, the company’s attorney at the time of the dispute responded that it made sense. Telephone interview with Victor Cavanaugh, Atlanta (Jan. 30, 2003).
252 Telephone interviews with Margie Bagley and Alma Oliver, Macon (Jan. 29, 2003). Reverend Henry Ficklin, a civil rights activist who aided the workers in 1979 confirmed that most of the women were churchgoers and did not smoke. Telephone interview with Ficklin.
253 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 39.
The company and union met in February to discuss the issue, but management did not respond to a request for the names of the workers “who might be abusing the privilege” so that the union could “try to correct the problem,” and on March 5 the company issued a memorandum laying out the guidelines that supervisors would be following in order to comply with Rule No. 39. The spirit underlying the new regime was manifestly driven by the world view that “the price of tyranny is eternal vigilance.”

Any employee will be allowed to visit the bathroom eight...times in any four...week period with a five...trip limit in any two...week period of the four...weeks. Maximum time from job is five...minutes.

1st offense will be a verbal warning.
2nd offense will be a written warning.
3rd offense will be three...days off without pay.
4th offense will be discharge.

Anyone taking medication which requires [the] employee to visit the bathroom more than the above stated limits will be required to furnish the Company with a doctor’s statement of said medication. The Company will then give the employee three...weeks of excessive bathroom privileges in order to correct their problem. If after three...weeks the problem is not corrected, the said employee will be given a Leave of Absence to get the problem corrected.

Any employee who has been on continuous medication prior to 1-1-79 which requires additional bathroom privileges will be handled on an individual basis by their supervisor.

Each employee will be issued a Bathroom or “B” Card to be placed in the racks next to the Time Clock outside of the Bathrooms. It will be the responsibility of each employee to punch their card before they enter the Bathroom and again as they exit. Any employee failing to do so will be severely reprimanded. First offenders will be given a disciplinary layoff. Second offenders will be terminated from their employment with Cagle’s. Any deviation from this will be done so in good faith by the employee’s immediate supervisor.

The Cagle’s regime was far more restrictive than Jim Beam’s, limiting unscheduled breaks to an average of two per week, expressly capping the length of the visit, requiring only four steps to discharge, putting the burden on workers to

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254 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 42, 43.
255 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 39.
257 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 36.
overcome their medical problems, and adding a bathroom time clock as a means of intimidation. But it was similar to the rule in effect at that time at the Sanderson Farms poultry plant in Laurel, Mississippi, which granted workers only three weekly toilet breaks. The huge change brought about by the new system was highlighted by the fact that, according to Annie Kitchens, the shop steward who had worked at the Macon plant since the day it had opened 21 years earlier, until 1979 no one had ever been “discharged for abusing the bathroom privilege.”

However, in order to appreciate fully the rule’s oppressiveness, it is necessary to consider that the company had been systematically depriving the workers of one of their two contractually guaranteed breaks. In addition to an unpaid one-hour lunch period, according to Article X, Paragraph 31: “One paid ten (10) minute rest period shall be provided for all employees during the first four...hours of normal shift work and one paid ten...minute rest period during the second four...hours of normal shift work and a fifteen...minute paid rest period after ten...hours total of normal shift work.” Nevertheless, as an arbitrator found later in 1979: “The Company has interpreted Article X, Paragraph 31 to mean that the second rest period would only be provided if and when employees worked more than four...hours in the afternoon. Thus, no rest period was provided if employees worked four...hours in the afternoon. Thus, no rest period was provided if employees worked four... hours or less in the afternoon. The Union has never objected to this practice.” Consequently, on days when a shift lasted no more than eight hours, workers had only the one scheduled rest break and lunch during which they could void.

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259 Brief on Behalf of the Union at 3, 4, In the Matter of Arbitration Re: Cagle’s Poultry and Egg Company, Inc., and Retail, Wholesale and Department Store Union, Local 315 (FMCS No. 79K-12882). Isach James, the then Atlanta-based representative (and later president) of Local 315, who confirmed Kitchens’ statement, added that the shop stewards had told him at the time that some employees had “abused” breaks; the example he gave, however, was of women who wanted to leave the line to void soon after returning from lunch. Telephone interview with Isach James, Atlanta (Feb. 5, 2003).

260 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 35-36.

261 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 41. According to Cagle’s then attorney, the reason for this practice was that the length of the workday was not known in advance—the shift ended when the last chicken had been processed. Thus not only did the company not know whether the second half of the shift would last four hours, it would have been unusual for it to have lasted exactly four hours rather than less time (in which case no rest period was granted) or more time (in which case instead the overtime rest period kicked in). Telephone interview with Cavanaugh.
Unsurprisingly, the same day that Cagle’s issued the memorandum the union filed a grievance requesting discontinuance of the bathroom clock and of Rule No. 39 itself. Efforts to resolve the grievance during the next few days were unsuccessful and the guidelines were put into effect on Monday March 12.³² Six days later the banner headline on the front page of The Macon Telegraph read: “Cagle’s Employees Fired Over Restroom Rules.” On March 14, some of the workers, who considered the new rule “‘harsh’ and even ‘ridiculous,’” had asked to speak to company officials about the right to use the bathroom and the three-day suspension of Margie Bagley without pay (for failing to use the bathroom clock), “and ended up being fired.” Already during the first three days under the rule six workers had received warnings and four had been fired and rehired because they had refused to clock in when going to the bathroom. Defiantly, one of the workers declared that the new rules “‘can’t control your body.’” The newspaper reported a “mass-firing” of 175 workers, and although it could not confirm that production had been interrupted, reportedly all the chickens at the plant had been moved to a different slaughter plant.³²³

As an arbitrator later depicted the week’s events: “[T]he production line was disrupted several times as the employees displayed resentment to the guidelines and the time clock which had been installed at the restroom.”³²⁴ In the midst of these wildcat strikes “in protest” against what U.S. News & World Report called the company’s “‘edict,’” Cagle’s sought to settle the grievance by agreeing to “liberalize its policy.”³²⁵ On Thursday March 15, the approximately 175 workers standing outside the plant’s locked gates “still considered themselves fired for not wanting to abide by the company’s new rule.”³²⁶ In the course of the day, Isach James, Local 315’s representative from Atlanta, met with the company and then told the workers outside that Cagle’s officials had increased the number of permissible bathroom visits to 16, but that otherwise they were not “going to change,” and that the workers should “‘go back to work Monday and let the union handle it.’” The message was met with “outspoken disapproval” by most of the workers, who complained of race discrimination because, unlike the virtually all-black and -female line workers, the all-white office workers were not subject to the rule.³²⁶ The same day, Cagle’s posted a revised memorandum, incorporating

³²²Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 39.
³²³Yvonne Shinhoster, “Cagle’s Employees Fired over Restroom Rules,” Macon Telegraph, Mar. 15, 1979, at 1A, col. 1-4 (Home ed.). Alma Oliver stated 24 years later that the workers themselves had not been fired. Telephone interview with Oliver.
³²⁴Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 39.
the 16-visit maximum, raising the two-week limit to 10, and introducing two- and three-trip maximums for two- and three-day weeks. In addition, it omitted the last paragraph of the original memorandum altogether. If the offer was unacceptable to the union, the company requested immediate arbitration.267

The dispute sharpened on the weekend when the shop steward, Annie Kitchens, and the two assistant stewards, Dorothy Stanford and Alma Oliver, received letters informing them that they had been “discharged immediately” for violating the contract provision prohibiting employees from taking part in a walkout or slowdown as well as for having failed to carry out their duties as shop stewards. That same day about 30 workers met with the local chapter of the Southern Christian Leadership Conference (SCLC), the black civil rights organization, whose president, Reverend Henry Ficklin, declared that it supported the workers “100 percent.” Ficklin also had the presence of mind to announce that SCLC would contact the U.S. Department of Labor and OSHA to determine whether Cagle’s had violated any federal regulations.268 (Ficklin’s recalled that he did contact OSHA, but that its response was “nebulous” and that the agency never did anything.)269 Ficklin stated that the organization’s primary concern was “the complete disregard for human rights. The worst thing that comes to mind...is after you have used all of your allotted times for restroom visits, what do you do—lose your job, or wet your clothes?”270 By this point reporting was intensive, with television cameras present, and public sentiment heavily in favor of the women, whose dignity was seen as under attack by an absurd policy.271 Press coverage had also become national with the Washington Post and Chicago Tribune both printing wire service reports.272

At a meeting on Sunday night at Ficklin’s Mt. Vernon Baptist church, Robert Steele, an American Civil Liberties Union lawyer who had filed a discrimination

268Sidney Hill, “Cagle Fires 3 Union Stewards,” Macon Telegraph, Mar. 18, 1979, at 1A, col. 3-5, at 6A, col. 3-6 (Home ed.). See also Yvonne Shinhoster, “Arbitrator May Handle Cagle Case,” Macon Telegraph, Mar. 26, 1979, at 1B, col. 4. A quarter-century later, Alma Oliver noted that she, Kitchens, and Stanford had in fact told the workers that it would be best to let the union try to work things out; they were reinstated with back pay after six months. Telephone interview with Oliver.
269Telephone interview with Ficklin. Ficklin is still the head of the local SCLC and has been a member of the Macon city council ever since 1979.
270Hill, “Cagle Fires 3 Union Stewards” at 6A, col. 3-4.
271Telephone interview with Yvonne Shinhoster Lamb, Washington, D.C., Feb. 6, 2003). Shinhoster was the Macon Telegraph reporter who covered the dispute.
complaint on behalf of the workers with the Equal Employment Opportunity Commission, advised the 130 assembled workers to return to work so that he and the union could continue the fight against the bathroom restrictions. Insisting that even the revised rule was "inconceivable" and that they "would be opposed to any restrictions," Steele assured them that three labor attorneys had told him that Cagle's "could not impose [a] rule regulating restroom use." However, both he and Kitchens argued that the no-strike clause in the contract meant that a successful outcome required them to resume work. Though they were "unhappy" about the firing of the three shop stewards, on whose behalf charges of unfair firing had been filed with the National Labor Relations Board, most of the workers did return to work on Monday. As before, Cagle's refused to comment on the events. That day's editorial page cartoon in The Macon Telegraph suggesting that the company had laid an egg may explain Cagle's studied silence. That the company nevertheless intended to continue wielding a big stick was confirmed on March 21 when it fired Bagley for having forgotten again to clock in and out of the bathroom.

Although the union had asked for arbitration on March 16, it told workers to return to work on Monday, March 19, but the company's offer did not satisfy them. As early as March 19, the Chicago Tribune reported the ACLU lawyer Steele as saying that the "whole thing is degrading" and held racial connotations because most of the affected employees are black." He added that "[t]hese women have no skills and...really need the job." Then on March 28 three women workers (with Bagley as lead plaintiff)
filed suit under section 301 of the National Labor Relations Act in U.S. District Court for the Middle District of Georgia, Macon Division, against Cagle's for breach of the collective bargaining agreement and against their own union for breach of its duty of fair representation.281The workers alleged that the guidelines, which were "directed only toward plaintiffs and other production and maintenance employees, who are predominantly Black and females," were "racially discriminatory and obviously unreasonable," and constituted an attempt to "limit a natural biological function.... If said natural biological function is not deferred within the limits of plant rule #40 [sic; should be 39] guidelines, plaintiffs are left in the unenviable position of suffering a loss of pay and/or employment with defendant company."282 Alleging that the modification of the guidelines to which the union had agreed was "still discriminatory and unreasonable,"283 the plaintiffs stated that the union had "conspired" with Cagle's "to allow the guidelines" to "remain intact." Moreover, the grievance negotiations "were spurious, and deliberately designed to give the false impression that a sincere effort was being made by defendant union to resolve the grievance."284 In conclusion, the plaintiffs, who, as their attorney explained to The Macon Telegraph, "wanted the rule abolished, not amended,"285 requested that the court enjoin Cagle's from "adhering to the guidelines...."286 Cagle's senior attorney in effect lent credence to the plaintiffs' account of the union's role by noting years later both that the nub of the complaint had been that the company either dominated or was in cahoots with the union and that the union representative was someone "you could run over...you could get a better deal from him than you should have."287

CIO, Amendment to Complaint, ¶4, C.A. No. 79-71-MAC (M.D. Ga., Apr. 13, 1979), and on the docket sheet, which the Deputy Clerk of the District Court made available.


284Bagley v. Cagle's Poultry and Egg Co., Complaint, ¶10. Local 315's representative from Atlanta, Isach James, who was later its president for many years, when asked why the workers had sued the union, asserted that the ACLU lawyer had done it because he wanted money, intimating that the workers had not even realized that they had also sued their own union. In a similar vein, James also related that at the April 19 hearing before Judge Owens, Steele and the union's lawyer, Morgan Stanford, got into a shoving match in the courthouse. Telephone interview with James. In turn, Ficklin of the SCLC regarded the union as akin to a company union. Telephone interview with Ficklin.


287Telephone interview with Currie. On November 21, 1979, the union was dismissed.
Two weeks later the plaintiffs filed an amended complaint alleging that the bathroom-access rule, which violated their "right to privacy," was racially and sexually discriminatory because it applied to the production-line workers, 97 percent of whom were black and female, but not to office, supervisory, or maintenance personnel, all of whom were white. \textsuperscript{288} The amended complaint also charged that Cagle's was engaged in a pattern and practice of race and sex discrimination in employment and promotions by denying the black women on the production line "the opportunity to advance into the office, maintenance or supervisory positions." \textsuperscript{289} The point of the amendments, according to one of the workers' lawyers, was to attack a whole series of sex-discriminatory practices at the plant—which the union had not effectively opposed—that prevented women from securing the same production jobs that black men held and office jobs that white women held. \textsuperscript{290}

On April 19, the court held a preliminary hearing, well attended by the press, \textsuperscript{291} on the issues raised by the alleged breach of the collective bargaining agreement, at which Judge Wilbur D. Owens, Jr. (a Nixon appointee) suspended Plant Rule No. 39 until the arbitration proceeding could be completed, but in the interim "required that every employee clock in and out of the bathroom." \textsuperscript{292} According to the account the next day in \textit{The Macon Telegraph}:

"Speaking to the Cagle employees sitting in the courtroom, Owens said that in the event any employee fails to clock in and out, the company still has the authority to deal with them. The judge added Cagle management also has all "the authority it has always had to deal with what it perceives to be an abuse of the bathroom privilege."\textsuperscript{293}

It was perhaps this kind of tough talk that prompted one of the Cagle's attorneys to recall the judicial proceeding as having been favorable to the company.
particular he remembered that Owens had declared at the hearing that he was taking judicial notice of the fact that he drove some six hours to South Florida without stopping to use the bathroom and that he therefore had no sympathy for workers who wanted to go every hour or so. 294 (When asked about his comment, Judge Owens, on senior status, admitted that he was plain-spoken, but had no recollection of the case, and could only express nostalgia for the days when he could hold it that long. Since he remembered nothing about the dispute, it was, unfortunately, not possible to discover whether, with his now shortened urinary time-horizon, he would have viewed the workers’ complaint differently.) 295

However, the judge’s sympathies did not rest solely with the company, as witnessed by this question that he posed to the plant’s general manager: “[W]hy don’t you deal with the individual case here instead of just passing some blanket rule that’s inflexible?” 296 The plaintiffs’ attorney also had reason for viewing the judge’s order as a “partial victory,” since Owens also ruled in open court that employees who have a “genuine need” to go to the restroom at times other than their break or lunchtime should feel free to do so, if there is a relief person available to take their place on the production line.

“In the court’s best judgement [sic] this is a fair arrangement pending arbitration. That is, the company is in position to run the plant, and you all are in position to work and to go to the bathroom when you really need to do so.” 297

Despite his acceptance of Cagle’s unilaterally and self-regardingly structured relief system, Judge Owens appeared to harbor some skepticism about the basis of the company’s determination of “the number of times a worker should be allowed to go to the restroom outside of company-paid breaks [sic] and lunch-time.” When the plant general manager replied that he had both conducted a time and motion study of the bathroom trips and asked other poultry plants how they maintained efficiency, Owens was clearly dissatisfied: “What is your scientific or medical basis for saying you can expect a human being, a normal human being, to refrain from going to the bathroom two hours after lunch? What knowledge

294Telephone interview with Cavanaugh. Mabry, one of the plaintiffs’ lawyers, confirmed the substance of the judge’s remarks, which she and her clients had regarded as odd. Telephone interview with Mabry.


296Brief on Behalf of the Union at 5, In the Matter of Arbitration Re: Cagle’s Poultry and Egg Company, Inc. (quoting court transcript at 39-40). Unfortunately no such transcript was found in the case file housed at the federal archive in Atlanta. Telephone interview with Denise Partee, Deputy Clerk, U.S. District Court for the Middle District of Georgia, Macon Division (Feb. 6, 2003).

297Shinhoster, “Cagle Toilet Rule Suspended.”
do you have of human habits?""\textsuperscript{298}

Cagle's, whose Answer to the plaintiffs' Complaint denied virtually all the allegations and offered as one of its defenses that it had promulgated the bathroom rule "out of 'business necessity' to insure an adequate number of employees on the production line for safe and efficient operation of the plant,"\textsuperscript{299} had made the most of the brief period of 24 working days before the court suspension took effect to enforce the rule, disciplining 22 employees one or more times, including six who were suspended for three violations (none of which involved exceeding the five-minute visit rule).\textsuperscript{300} The spirit in which the company conducted this campaign was captured by the lecture that the plant manager gave a worker after she had received a verbal warning for exceeding the permissible number of trips. After informing her that "she had to train herself to go to the bathroom before she came to work in the morning and during the ten-minute break," he added that he knew that she "could train herself, because he had a dog who stayed in his house seven or eight hours a day, and when he got home, he would let the dog out of the house to relieve himself."\textsuperscript{301} In order to assist the women with their urinary obedience training, Cagle's radically reduced the number of relief workers from twelve to four, thus increasing substantially the amount of time that a worker who signaled the need for relief had to wait before being allowed to leave the line.\textsuperscript{302}

In the Answer that Local 315 filed with the court, the union denied the plaintiffs' allegations concerning its role, but rehearsed the same facts about the bathroom rule in its Cross-Claim against Cagle's seeking "a permanent injunction restraining Cagle's from discriminatorily maintaining and enforcing rules which restrict employees' use of bathroom facilities."\textsuperscript{303}

At the arbitration, the RWDSU raised a number of objections, in opposition to the company's new rule, alleging contract violations. First, it was unreasonable for the company to "change its longstanding bathroom rule which required that the individual employee who abused the rule should be dealt with." The new rule was at odds with "our democratic, industrial society" in which "guilt should
be individual and not by association, so that the individual employee who abuses the legitimate rights of an employer should be penalized instead of penalizing the whole group of employees.” Next, Local 315 accused the company of having “seized on the pretext of abuse of the bathroom rule in order to get more production at the Macon plant.” The union adroitly noted that it was “manifestly unfair” for Cagle’s to limit bathroom breaks—which was “undignified” in its own right and “not in keeping with...biological variances”—while it was in breach of the contract by denying workers their afternoon rest break. Finally, the RWDSU raised the specter of racism by pointing out that “[w]ith the office staff being 100% white and subject to the old bathroom rule of individual abuse, and with the production employees being over 90% black, it could easily be argued that the change in the bathroom rule was racially motivated.”

For its part, Cagle’s insisted at arbitration that uniform application of the rule to everyone in the bargaining unit was more just and fair-minded than case-by-case procedures. Otherwise, it focused on the need to “curtail the abuse of the bathroom privileges afforded by the Company” in light of the drop in production and the lack of any definition of abuse in the old rule. Ratcheting up the rhetoric, Cagle’s insisted that the “lack of production in the Macon facility” had made it necessary to “establish[ ] order” there. Finally the company declared that “[i]n addition to providing an adequate number of times an employee can take emergency leave from the production line, there are five other times during the working day [during] which employees may visit the rest room.” This total derived from including not only, as Jim Beam would do more than two decades later, use of the toilet before and after work, but also the afternoon rest break that Cagle’s denied the workers.

These six opportunities to void were within the range specified by Dr. Theopholius Worrell, a general practitioner—several of whose patients worked at the plant—who had offered expert testimony that “[a] normal person uses the bathroom for elimination purposes four...to six...times a day, primarily in daylight hours” and that “[u]nder normal circumstances, it would be reasonable for a person to be allowed to go to the restroom five...times between 6:30 a.m. and 4:00 p.m.” The doctor focused on a number of factors that would heighten the need for women and blacks, who formed the vast majority of the line workers, to urinate. The medication prescribed for hypertension, high blood pressure, and diabetes, which are “frequently found in blacks, may cause a need to use the bathroom more frequently.” In addition to pointing out that women tend to go to the

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304Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 37.
305Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 37-38.
306Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 46.
bathroom more often than men during or after their menstrual cycle, Worrell testified that “[r]estrictions on the time used for urination by females...may require them to hasten the process which could cause urinary tract infection.” With special reference to conditions prevailing at the poultry plant, the expert also observed that “[w]orking around water may have [the] psychological effect of requiring use of the bathroom more frequently” and that “[s]trress or fear of punishment or loss of job could psychologically cause biological variances which would require changes in bathroom habits.”

The normal range of daily voids suggested by Worrell was almost identical to that presented by Stivers and much lower than that indicated by Nygaard 23 years later. Ironically, although Worrell testified on the workers’ behalf, his testimony served to support the arbitrator’s decision to uphold the company’s final offer of one unscheduled void per day, which, together with the morning rest break, lunch break, voids on the workers’ own time before and after work, and the restoration of the mid-afternoon rest break, brought the total to the top of the “normal” range of six daily voids.

In his decision, the arbitrator, George Roberts, who had spent 35 years as a personnel director and in industrial relations with the U.S. Postal Service, Willys Motors, and Babcock and Wilcox, first turned to the issue of the company’s failure to provide the contractually guaranteed afternoon rest period, to which practice the union had “never objected.” After taking notice that work on the continuous production line was “confining and monotonous” and that “[t]he protective clothing and working conditions are not conducive to long periods of peak personal efficiency,” Roberts concluded that since it was “obvious” that the contractual rest periods were “for the purpose of reducing fatigue and satisfying the personal needs of the employees,” Cagle’s failure to provide the second one “defeats the fundamental purpose of the rest periods.” Excoriating the company’s interpretation for “completely disregard[ing] the human needs of the employees,” the arbitrator declared that it was “ridiculous to think that the negotiators of this Agreement intended to provide a rest period only if employees worked more than four...continuous hours....” In addition to ordering Cagle’s to cease violating the provision, Roberts rebuked the union for its complacency about the company’s contract breach until the issue of bathroom breaks had arisen.

The arbitrator’s discussion of toilet access was circumscribed by his acceptance at face value of the language of Rule No. 39—“Abuse of emergency rest room privilege.” Since an “emergency” is an unforeseen combination of circum-

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308 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 40.
310 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 41.
stances calling for immediate action, the term itself suggests that, as the antithesis of a normal situation, it was designed to encompass, for example, sudden and unexpected diarrhea, but certainly not the worker’s normal quota of workday urinary voids, which apparently in the company’s and his view could be satisfactorily taken care of during the mid-morning rest break and lunch. Given this understanding, Roberts upheld both Cagle’s right to perform an analysis of “emergency use” of the bathroom, regardless of how well or ill founded the causal connection was to perceived inefficiency at the plant, and its decision, since “the abuse was…out of hand,” to “set uniform standards for all employees before taking individual disciplinary action.” Indeed, the arbitrator was so deferential to managerial prerogatives that, despite the absence of any evidence that the bathroom use study was credible, he declared that the company’s “conclusion that the emergency use of the restroom was being abused was a judgement [sic] decision of the Company and must be accepted as factual.” Apart from the definitional implication that emergencies do not occur (twice) daily, neither Cagle’s nor the arbitrator offered any evidence at all that there was anything ‘abusive’ about voiding twice outside of two scheduled breaks. Ironically, Roberts lamented that the employer had not made greater use of the results of the study to explain the limitations in the guidelines to the employees. He faulted Cagle’s for articulating only one conclusion from the study—“that the cost of the emergency use of the restroom was excessive”—and then drawing the ultimate conclusion of abuse from it. Roberts raised the possibility that if the company had informed the workers that virtually all the line workers made two emergency trips a day, each averaging 7.34 minutes (including travel time), “it would have possibly dispelled the impression that the decision to issue the guidelines was made arbitrarily and capriciously and that it was ‘pretext—in order to get more production.’”

It is extraordinarily revealing of the arbitrator’s own bias that he could even have imagined that workers whose employer was disciplining them for voiding more than twice a day would somehow undergo a conversion and share Cagle’s outrage over their “abusive” efforts to void four times a day if only they knew how often and for how long they were going to the bathroom.

Roberts then dealt with the union’s two charges of unreasonableness directed at the guidelines to Rule No. 39 concerning the time clock and the limit on the number of bathroom visits. He summarily upheld the use of the clock on the grounds that the permissible purpose of the guidelines was to prevent abuse and that there was “no better way to determine who, when, and how long an employee uses the restroom.” He was equally dismissive of the union’s claim that the five-minute limit on bathroom visits was also unreasonable, especially since the

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31 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 42-43.
32 Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 44.
company had failed to consult with medical authorities and testimony had indicated that "biological variances of individuals" made it "virtually impossible to set a maximum time limit...." Roberts' sole basis for rejecting this claim hinged on his literalist acceptance of the company's designation of the breaks as "emergency restroom privileges"; he asserted that if 10 minutes was reasonable for a scheduled rest break, which could also be used for going to the bathroom, a lesser amount of time was "[c]ertainly" reasonable for emergency use. Moreover, even conceding that there were circumstances—for which he did not even purport to have evidence to call "rare cases"—under which five minutes might not be sufficient, he argued that employees could always grieve any disciplinary action.313

Finally, Roberts reached the rule that the union "strongly resented"—the limitation on the number of permissible emergency bathroom visits. The arbitrator was compelled to concede that "[t]here is much truth to the adage 'when you got to go, you got to go.'" In addition, because needs are so variable and unpredictable, "it is most difficult to determine a realistic and fair figure," as witnessed by the company's own increase in the four-week total from an initial eight visits to the 20 it offered at the hearing. Once again, however, he stressed that Rule No. 39 applied only to emergencies—that is, "when an employee unexpectedly has need to use the restroom facilities immediately." He then appeared to exclude from this category toilet needs triggered by medication or the menstrual cycle because they shared elements of predictability. Roberts tried to downplay the significance of such exclusions by pointing to the "special arrangements" in the guidelines for "some of these conditions," but they were in fact so limited and driven by a spirit of blaming-the-victim that their usefulness would have been marginal at best.

Roberts again confused two distinct issues when he proceeded to mention studies cited by the union indicating that 20 or 24 minutes was adequate personal allowance time for an eight-hour day. The two 10-minute rest breaks approximated this standard, in his view, especially as adjusted by the "extenuating circumstances" of the once-a-day emergency void.315 However, Roberts overlooked the crucial fact that the total amount of non-working time available is irrelevant if it is so concentrated that the number of breaks is insufficient to enable workers to void when they need to. Ultimately, then, the question boiled down to the specific number of permissible breaks, to which Roberts finally turned.

Before reaching it, however, Roberts stopped long enough to dismiss the union's argument that "any limitation is unreasonable." This first mention of the union's position disclosed that Local 315 had presented five witnesses who had

313Cagle's Poultry and Egg Co., 73 Labor Arbitration Reports at 45.
314Cagle's Poultry and Egg Co., 73 Labor Arbitration Reports at 45.
315Cagle's Poultry and Egg Co., 73 Labor Arbitration Reports at 45.
testified about “the trauma and physical difficulties which they encountered when
emergency use of the restroom was restricted.” In addition, expert testimony had
“explained the physical and psychological effect on women of such conditions.”

The arbitrator’s only response was that the original rule, without restrictions, “did
not work.” Why voiding a total of four times during a workday was unworkable,
he did not even try to explain. Instead, he insisted—doubtless without the slight­
est tinge of sarcasm—that both the employees and the supervisors “needed and
deserved help in making it work. The guidelines provided this help.” Again,
Roberts did not bother to explain how a rule that prevented workers from going
to the bathroom when they needed to go helped make a rule on emergency bath­
room use work. Instead, he assured the workers that it had been “definitely un­
reasonable” not to furnish a standard so as to insure “uniform and equitable en­
forcement,” leaving it to each supervisor (and employee) to exercise his or her
own judgment. As to why twice a week or once a day was an acceptable number,
but twice a day was not, he could offer as an oblique answer only “the impor­
tance and justification for disciplining oneself in such matters,” citing as author­
ity the opinion of the arbitrator in the Jones Dairy Farm case that “it most certainly
is not unreasonable to learn to regulate and train one’s self [sic] to work periods
of 1½, 2 or 2½ hours. This is expected of us from childhood into school....”316

Again, without having articulated or cited any independent substantive definition
of “abuse,” Roberts found additional support for the limitation in its being “mere­
ly a way to ‘regulate or police’ the observance of a rule.”317 Since any other num­
ber would have served the same purpose, the arbitrator was no longer able to de­
lay discussion of the reasonableness of the number itself.

The arbitrator’s simple answer for upholding the company’s once-a-day
day emergency rule was that, added on to the two breaks, lunch, and bathroom visits
before and after work, it fully satisfied the guidelines set by the expert witness. 
As to why the use of the bathroom on the employee’s own time before and after
shift should count—a position rejected by Kentucky OSHA in the Jim Beam
case—Roberts merely repeated that “[n]ormally it is expected that employees will
discipline themselves to use these periods for that purpose in order to avoid the
possibility of emergency situations.” Ignoring the union’s evidence that he had
already cited, he held that, absent any suggestion by the union as to a number and
any proof of an “unusual or extraordinary hardship,” the company’s number was
substantively reasonable.318

Roberts reserved his criticism of Cagle’s for its administration of the guide­
lines, which he deemed unreasonable because it lacked flexibility, the company failed to involve a female supervisor or female nurse, “who should have much authority in decision making in this very sensitive area,” and in two instances the company let violations from one period carry over to the next instead of wiping the slate clean. He then denied the grievance and Solomonically directed Cagle’s to instruct all supervisors to “insure compassion and understanding along with firmness.”

The ruling left workers, who recognized that Roberts had gone “right along with the company,” profoundly dissatisfied. In particular, they believed that it was wrong that “[e]verybody should...be made to suffer for what a few people are doing,” especially since Cagle’s had been treating them “harshly” after Judge Owens’ suspension of the rule.

On August 3, noting that the arbitrator had ruled that Rule No. 39 was “reasonable as written,” Judge Owens, with the concurrence of plaintiffs’ counsel, dissolved his order preliminarily enjoining the plant rule. In November the union was dismissed from the suit, and in September 1980 the parties entered into a consent decree, which the court approved. In addition to wide-ranging measures for increasing the representation of blacks and women in various positions off the chicken line, the decree abolished Rule No. 39 and did away with the bathroom clock and the requirement of clocking in and out of the bathroom. Instead, the parties—including the union, which agreed that the new rule was “reasonable” and executed the order and decree—created a “new plant rule regarding abuse of the emergency restroom privilege.” First, in addition to retaining the mid-morning break, the agreement provided for a 10-minute mid-afternoon break on days when workers worked at least two hours after lunch. The core of the rule then read as follows:

Two...relief workers shall be provided by Cagles for the purpose of allowing employees to make use of the bathroom on an emergency basis ([a]t times other than before and after work, during lunch break and during rest periods...)]

No production line employee shall be permitted to leave his/her position on the production line unless and until his/her place on the line is occupied by a designated relief worker. Any employee who leaves the line without his/her position being properly staffed by a designated relief worker shall be subject to progressive discipline outlined as follows:

39Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 47, 48.
323Bagley v. Cagle’s, Consent Order and Decree, slip op. at 5.
(1) FIRST OFFENSE - Verbal warning
(2) SECOND OFFENSE - Written warning
(3) THIRD OFFENSE - Three...day suspension without pay
(4) FOURTH OFFENSE - Immediate discharge

After an employee has had a clear record for twelve...months, their record will be considered as cleared.

Employees will be permitted emergency bathroom visits...in the order of their request. Those employees who need special use of the bathroom, for medical or personal reasons, may obtain priority on the waiting list...by contacting the company nurse and stating the reason therefore. If the nurse grants priority, the relief workers and the employee’s supervisor will be notified. If priority is denied, such priority can only be granted by the presentation of a statement of a medical doctor setting forth the necessity for such a request. ...

Should there be any abuse of the above described bathroom rule, it is agreed that the rule may be reasonably amended by Cagle’s in accordance with the terms of the Collective Bargaining Agreement then in existence to enable the company to eliminate the bathroom abuse problem.324

To be sure, this new rule was more favorable to the workers than the rule approved by the arbitrator because it eliminated the express maximum of one unscheduled break per day and of five-minute stays and removed the clocks. Nevertheless, the rule was profoundly flawed and would be unlawful under the OSHA toilet standard today. First of all, it retained the employer’s focus on “privilege,” “abuse,” and “emergency,” all of which individually and especially taken together are antithetical and inimical to workers’ right to be free to void when they need to. Second, the reduction in the number of relief workers to two from 12 constituted a victory for Cagle’s, which, before the litigation, had initially demanded a reduction to four and mentioned two as its ultimate goal. Two relief workers for about 150 female workers or 75 workers per reliever created per se a waiting list of completely unworkable proportions, the existence of which was corroborated by Alma Oliver’s retrospective comment that sometimes workers had to wait an hour or more, sometimes they never got relief at all before a scheduled break, and sometimes women “messed themselves.”325 The minuscule ratio of relievers to relief-seekers made virtually superfluous an express limitation on the number of daily unscheduled bathroom breaks, while Cagle’s was authorized to deal with the length of the individual breaks by virtue of the unilateral power conferred on the company to amend the rule to eliminate “abuse.”

But the most important aspect of the decree from Cagle’s perspective, as its

324Bagley v. Cagle’s, Consent Order and Decree, slip op. at 3-5.
325Telephone interview with Oliver.
then attorney stressed more than 20 years later, was the imposition of the pro-
hibition on leaving the line without permission, thus destroying any at-will
custom that had ever existed and restoring to the employer absolute authority
over the granting of permission for and the timing and sequence of breaks. By
making departure from the line conditional on the availability of a relief worker
controlled by management, the new rule eliminated any vestiges of worker col-
lective self-determination under which those workers who did jobs also per-
formed by several other workers standing next to them could be spelled for short
periods by their co-workers without the need for a special relief worker.

When asked a quarter-century later why a dispute over going to the bathroom
had been so emotional, the company’s lawyer observed that standing and working
on a continuously moving production line in cold and wet conditions was not
pleasant and that employees were therefore looking for “a little excitement.”
That management’s first suspicion takes the form of a not so subtle analogy to
powerless school children who know no other way to relieve their boredom than
to pretend to have to relieve themselves raises the (rhetorical) question as to why
the employer did not instead choose to improve working conditions. The workers
themselves offered an entirely different perspective. As Alma Oliver, a shop
steward and one of the named plaintiffs, put it, the company’s basic position was
that the workers could go to the bathroom on their breaks, but “not on the man’s
time.”

Bathroom “abuse” was not the only kind that preoccupied Cagle’s at that
time: apparently “the man” wanted the women to hold their tongues as well as
their urine. Literally just days before The New York Times reported on the arbri-
tration decision, it ran a six-column article in its Sunday edition on a then recent
trend in labor-management relations for firms to seek enhanced authority to disci-
pline employees for “verbal abuse” of supervisors. Chief among them was
Cagle’s, which was “[o]ffended by the indelicate speech” of the women in the
chicken-dressing department, who “often used...men’s language”—especially to-
toward their supervisors.” Cagle’s therefore issued a rule in April 1978 “banning
‘all profanity including the use of abusive language to supervisors.’” Soon
thereafter it fired a woman who “shouted, ‘Dammit, I can’t!’” when her boss
ordered her to speed up her work.” Cagle’s reduced the penalty to a two-week
suspension during the grievance procedure, but the union, insisting that “‘[i]his
is a factory—not a girls’ finishing school,’” went to arbitration in order to have

327 Telephone interview with Oliver.
328 Telephone interview with Cavanaugh (Jan. 30, 2003).
329 Telephone interview with Alma Oliver. Oliver worked at the plant for 37 years,
stopping only in 2001 when it was closed.
the rule rescinded; the arbitrator, however, upheld the rule and the penalty.330

Given the outrageously restrictive character of Cagle’s toilet access rule, its obvious race and gender impact, and the workers’ perseverance, it is hardly surprising that, as the arbitrator himself noted, “[t]here was much publicity of the dispute in the news media of the entire area”331—especially relating to the number of times workers were permitted to void.332 Although this struggle generated the most intense interest in the Macon area, the reporting was “worldwide,”333 with interest coming from as far away as Australia.334 Even the national newspaper of record carried one brief report: bestowing on the Cagle’s workers the honor of its attention which it withheld from the Jim Beam dispute 23 years later, The New York Times ran a 134-word Associated Press article titled, “Arbitrator Backs Limit on Visits to Restrooms,” which presented a very concise account of the course of the events.335 Although one of the Cagle’s lawyers was later surprised to hear of the Times piece, mention of it reminded him that at the time the six o’clock national TV-news had also used the event as a closing human interest story. In addition, he, one of the workers’ lawyers, and Reverend Ficklin all recalled that the then new NBC television show “Real People” came to Macon to do an episode about the bathroom denial, which also involved the sports stadium mascot, the Famous San Diego Chicken.336 U.S. News & World Report added the dimension of sexism to the media’s inability to transcend the jocular approach to the subject of workplace voiding by titling its little filler “Henhouse Spat.”337 Yet in spite of this adverse publicity, Cagle’s was not impelled to change its policy.

Both the reasoning and the outcome of the Cagle’s case soundly vindicate President Kelley’s skepticism of arbitrators. Roberts, who was clearly not blind to the very arduous nature of the work that the employees performed and even summoned up a dose of outrage over the employer’s elimination of the afternoon

330Lawrence Stessin, “Blue-Collar Crime: Chewing Out the Boss,” N.Y. Times, July 1, 1979, at F3, col. 1-6 (Proquest). Neither the Macon plant nor the RWDSU was involved in this dispute.

331Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 35.

332Cagle’s Poultry and Egg Co., 73 Labor Arbitration Reports at 45.

333Telephone interview with Oliver.


336Telephone interviews with Cavanaugh (Jan. 23), Mabry (Jan. 30, 2003), and Ficklin. One of the union’s lawyers also recalled the extensive reporting. Telephone interview with James Fagan, Atlanta (Jan. 29, 2003). Cavanaugh, though a management-side labor lawyer in a firm specializing in labor law, was also surprised to hear about the OSHA Memorandum.

rest period as well as the union's (unexplained) acquiescence in it, nevertheless displayed no understanding of, let alone sympathy for, workers who, not on an exceptional or emergency basis, but on a normal, day-to-day basis, had to void more often than the employer deemed compatible with its production, productivity, and profitability goals. Moreover, the whole notion of "abuse," which underpinned the company's strategy and Roberts's decision, was inappropriate as applied to a factory in which the employer accused virtually the entire workforce of spending too much time in the bathroom. While the charge of "abuse" may make sense in a situation in which some workers who do not need to void stop work, disproportionately burdening their co-workers with performing two employees' jobs, it loses its meaning when all the workers use the bathroom more frequently than management desires; it is more plausible that this latter phenomenon means that supervisors are seeking to suppress necessary voiding and/or that the workers as a group are engaged in a protest over what they view as unacceptable working conditions.338 Perhaps as a result of his ingrained bias acquired over decades as a personnel manager himself, Roberts was able to perceive in the low-paid black women only malingerers whom a little discipline and self-discipline would not have hurt at all.

The lawsuit and the resolution of the toilet-access dispute reached by the parties (and approved by the court) was also less favorable to the workers than the outcome that rigorous (post-Memorandum) OSHA enforcement could have achieved. In any event, the relief system for which the workers were to able bargain should not have passed muster under today's toilet standard. Although OSHA had been in operation for almost a decade and the dispute had gained widespread publicity, the agency did not intervene. A quarter-century later, the attorneys on both sides stated that the RWDSU did not file an OSHA complaint.339 But Isach James, the Local 315 representative, insisted that the union had complained to OSHA and to the health department, but that neither had done anything—exactly the same experience that Ficklin of the SCLC reported.340 Thus, not even a unilaterally imposed rule so restrictive, one-sided, and harsh as to approach self-caricature prompted OSHA to (re-)consider whether its requirement that employers provide toilets included the obligation to make them available to their employees so they could use them when they needed to and not merely when it was profitable for the companies. And even if OSHA had investigated, it would doubtless have taken the same position in 1979 that it maintained all along until the UFCW-Void Where Prohibited campaign prompted it to cite Hudson Foods in 1997 and issue the Memorandum in 1998.

338See below ch. 17.
339Telephone interviews with Cavanaugh and Mabry.
340Telephone interviews with James and Ficklin.