

by Boyd Byers

Potty Parity in the Workplace

The 110th Congress made history when it convened in January. The House of Representatives counted 71 women among its 435 members, a new record. And Nancy Pelosi became the first woman to wield the gavel as Speaker of the House.

Despite the strides made by female lawmakers, gender inequity persists in one area of the House of Representatives: toilet access. The House men's room is just a few steps from the House chamber, next to the Speaker's lounge. The women's restroom, however, requires a jaunt through a hall open to tourists and a winding corridor — which could turn a filibuster into a bladder buster.

When nature calls

Members of Congress are elected officials, not employees protected by employment discrimination laws. Unlike Congress, employers have a legal obligation to ensure that male and female employees have equal access to restrooms and other facilities.

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against employees in the terms, conditions, or privileges of their employment or to limit or segregate them in any way that would adversely affect their status as employees or deprive them of employment opportunities because of their sex. Courts have said that those prohibitions make it illegal to discriminate against women with respect to company restroom facilities. Federal regulations applicable to government contractors and general employment laws in several states specifically say that employers can't refuse to hire women or deny them particular jobs based on a lack of restrooms or associated facilities.

It would be blatantly illegal to require employees to use different restrooms based on their race. With sex, however, the universal norm — and legally acceptable practice — is to provide separate restrooms for men and women.

Courts have recognized that failing to provide female employees with equal toilet facilities can be sex discrimination. Lack of job-site restrooms might not only serve as an excuse not to hire women but also might discourage women from applying for and staying at jobs. These cases

often involve construction and mining jobs or other occupations in which employees are traditionally male and work at remote sites.

Twenty years ago, a federal appellate court found that female construction workers established a discrimination claim when they were adversely affected by unsanitary portable toilets at the work site and forced to choose between exposing themselves to a health hazard or being fired for violating company rules against entering a building that had cleaner restrooms. In another well-known case, the Equal Employment Opportunity Commission sued an employer when it fired 30 female employees after the Occupational Safety and Health Administration cited it for not having a sufficient number of toilet facilities for women.

Double, double, toilet trouble

Most of you have no trouble making toilets available to both male and female workers. But when are restrooms “equal” in the eyes of the law?

Equal employment practices can be unlawful if they have a disparate impact (or place a heavier burden) on a protected group. A leading employment law text says that “equal treatment might conceivably require that more toilets per capita be provided to women than men, if it can be shown that, because of physical differences, it takes women longer on the average to use toilet facilities.” In other words, providing restroom facilities that result in far longer waiting times for women than for men — thus creating a “heavier burden” — may be unlawful employment discrimination.

Is “separate but equal” really the best policy for restrooms? One might argue that because employees discuss business in the restroom, women are disadvantaged in networking with their male counterparts. An advocate for women’s rights to restroom access suggests that if unisex bathrooms could be built to accommodate modesty and safety concerns, they might better serve women once people overcame the initial unfamiliarity. (It seemed to work on “Ally McBeal.”) Nevertheless, most people are uncomfortable with the idea of sharing a restroom with someone of the opposite sex. The reality is that unisex restrooms are more likely to result in employee complaints and sex discrimination and harassment lawsuits than praise for being an equal opportunity employer.

He said it

Always go to the bathroom when you have a chance.

— King George V