No. 04-3615

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIELLE C. HERNANDEZ,

Plaintiff-Appellant,

v.

HCH MILLER PARK JOINT VENTURE,

Defendant-Appellee.

Appeal From The United States District Court
For the Eastern District of Wisconsin
The Honorable Charles N. Clevert, District Judge

BRIEF OF *AMICUS CURIAE* LEGAL MOMENTUM IN SUPPORT OF APPELLANT

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Rule 26.1 Corporate Disclosure Statement

In accordance with Federal Appellate Rule 26.1, counsel for *amicus* states that Legal Momentum has no parent corporation and has issued no stock.

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INTEREST OF *AMICUS CURIAE*

Legal Momentum is a leading national non-profit civil rights organization that for over thirty-five years has used the power of the law to define and defend women's rights. The Women Rebuild Project of Legal Momentum provides legal and policy support to women employed in "nontraditional fields," those in which women make up less than twenty-five percent of workers nationally. Legal Momentum frequently appears as counsel and as *amicus curiae* in federal and state courts nationwide on behalf of individuals who have experienced sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and as *amicus* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). By participating in this case as *amicus curiae*, we seek to ensure that the Court considers the relevance of excluded evidence about toilet facilities at a construction site with full awareness of the distasteful, yet key role such facilities often play in creating a discriminatory environment for female construction workers. Our motion for the leave of this Court to file as *amicus* accompanies this brief.

ARGUMENT

EVIDENCE ABOUT TOILET FACILITIES IS HIGHLY PROBATIVE OF SEX DISCRIMINATION ON NONTRADITIONAL WORK SITES

When the court below excluded plaintiff's proffered evidence that the toilet facilities on her job site were covered in anti-female graffiti, were filthy, could not be locked, and had peepholes, it excluded evidence that is highly probative of sex discrimination in working conditions and that describes one of the most common ways that women are encouraged to leave construction job sites because of their gender. This is reversible error that requires a new jury trial.

The number of women in construction in the United States has remained historically low in part because of systematic discrimination against women on the job, and one of the most common sites of this conflict is the women's restroom.[1] In a study performed by a Chicago advocacy group for women in construction, "no toilets or dirty toilets (80%)" was the third most common complaint of women on construction sites, following "pictures of naked or partially dressed women (88%)" and "unwelcome sexual remarks (83%)." Chicago Women in Trades, *Building Equal Opportunity: Six Affirmative Action Programs for Women Construction*

[1] In the 2000 United States Census, women were reported to be just 3.1% of construction workers and their supervisors nationwide, as compared with 14.3% of police officers, detectives and their supervisors. U.S. Census Bureau, Census 2000 EEO Data Tool, *available at* http://www.census.gov/eeo2000/index.html.

Workers 6 (1995). A body of Title VII case law establishes that the conditions of restrooms can be probative of sex discrimination, and the trial court erred in excluding such evidence.

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an individual "with respect to . . . [the] terms, conditions or privileges of employment because of such individual's . . . sex," and prohibits an employer from limiting or classifying employees in a way that "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affects his status as an employee, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). Although access to restrooms, and whether those restrooms are clean, hardly springs to mind as a textbook example of a "term, condition or privilege of employment," restrooms are a focal point of discrimination against women on construction sites because they "raise[] the issue of whether or not the industry [will] accommodate the needs of female workers that [are] different from men's." Susan Eisenberg, *We'll Call You If We Need You: Experiences of Women Working Construction* 123-24 (1998). The district court's evidentiary ruling was based in part on the erroneous assumption that evidence of restroom conditions is relevant only to a hostile environment claim. (A-30-31.) In fact, as set forth below, courts have analyzed this evidence under disparate treatment and disparate impact

theories as well. The gravamen of the dispute is whether restroom conditions can be probative of sex discrimination. The case law clearly establishes that they can.

There are several possible types of Title VII violations involving restrooms for women. One problem is that traditionally male construction sites have usually provided only rudimentary toilets or even none at all. Thus, when women come onto a site, many construction companies resent the effort and expense required to provide and maintain restrooms for them. However, Title VII requires equal terms and conditions of employment for both sexes. For this reason, an employer's failure to provide adequate sanitary facilities to women constitutes unlawful discrimination based on gender under Title VII.

Thus, in *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000), this Court held that the complete absence of any toilet facilities at all for a road crew could support a disparate impact finding; "insofar as absence of restroom facilities deters women . . . but not men from seeking or holding a particular type of job, and insofar as those facilities can be made available to the employees without undue burden to the employer, the absence may violate Title VII." *Id.* at 436 (citations omitted). Similarly, in *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 874-75 (11th Cir. 1986), a trucking company was held liable for a pattern and practice of disparate treatment where it refused to provide separate sleeping, shower and restroom facilities for women employees, and informed

female job applicants of that fact in order to discourage them from pursuing employment. *See also Catlett v. Mo. Highway & Transp. Comm'n*, 828 F.2d 1260, 1265-66 (8th Cir. 1987) (finding disparate treatment where male interviewers emphasized lack of restrooms to female highway maintenance applicants); *Lynch v. Freeman*, 817 F.2d 380, 388 (6th Cir. 1987) (finding disparate impact in employer's "failure to furnish adequate and sanitary facilities to female workers[,] who have been shown to suffer identifiable health risks from using portable toilets in the deplorable conditions of those furnished by the TVA at the Cumberland City construction site" because women are more likely than men to experience urinary tract infections due to holding urine or contact with bacteria at unsanitary portable toilet facilities).

Employers have also been held liable under the disparate impact theory where they do hire female workers but refuse to put adequate toilet facilities for women in place. The New York City Commission on Human Rights, a government body charged with investigating and eliminating discriminatory employment practices, has long recognized that the goal of such conduct is not merely to deny the presence of women; it is intended to send a message to women that they are not welcome on a site and are "more trouble on a job than they are worth." New York City Commission on Human Rights, *Building Barriers: Discrimination in New York City's Construction Trades* 29-30 (1993). In

Ammons-Lewis v. Metropolitan Water Reclamation District, No. 93-C880, 1997 U.S. Dist. LEXIS 1950, at *17 (N.D. Ill. Feb. 21, 1997), an employer was found liable under the disparate treatment theory where it gave men adequate restrooms but provided the first female "fireman-oiler" a "slop-closet for a restroom" and changing facilities with "peeling paint, a severely puckered floor, a rusted locker with no bottom and no key, no window shade and falling plaster" for a year. Refusal to allow a woman a temporary transfer from one job site to another because the latter lacks female facilities is also unlawful disparate treatment. *Hulbert v. Memphis Fire Dep't*, No. 99-5358, 2000 U.S. App. LEXIS 15804, at *12 (6th Cir. June 25, 2000).

A company also faces Title VII liability when its workers vandalize or deface the women's restroom and the employer fails to repair the damage or discipline those responsible. To the extent that this results in women's restrooms that are sub-par compared to men's, this may result in a disparate treatment claim as described above, or the details of restroom access and conditions may help to establish sex-based harassment and retaliation claims. In *Silverman v. Johnson*, No. 01-C3594, 2004 U.S. Dist. LEXIS 19767, at *32, *37 (N.D. Ill. Sept. 7, 2004), the defacing of a female symbol on a unisex bathroom door in a firehouse helped to support both hostile environment and retaliation claims. *See also Kline v. City of Kansas City, Mo.*, 175 F.3d 660, 668 (8th Cir. 1999) (unequal restroom facilities

and lack of restroom privacy for women firefighters are probative of harassment); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988) (holding probative of harassment the facts that female members of a road construction crew were not allowed to drive a truck to town for bathroom breaks, and male members of the crew then used surveying equipment to observe the women urinating in a nearby ditch); *EEOC v. Union Camp Corp.*, 7 F. Supp. 2d 1362, 1365 (S.D. Ga. 1997) (hostile environment found where co-workers locked female firefighter out of unisex bathroom). Notably, however, the fact that such evidence could support a hostile environment claim does not detract from its relevance to a less specialized claim of disparate treatment in the terms, conditions and privileges of one's employment. "Because prejudice and ignorance have a way of defying formulaic constructs, the lines with which we attempt to divide the various categories of discrimination cannot be rigid." *DeClue v. Cent. Ill. Light Co.*, 223 F.3d 434, 440 (7th Cir. 2000) (Rovner, J., dissenting in part).

Finally, the absence of minimally sanitary toilet facilities, as well as other facilities where women can change clothes at the beginning and end of the day (shanties), can lead to other discriminatory practices. As the New York City civil rights agency found, women who complain about the absence of restrooms may not be taken seriously, or may be labeled as troublemakers. *Building Barriers, supra*, at 159. They may also become targets of unlawful retaliation. Women who

deal with the problem by quietly leaving the site for a nearby public restroom risk disciplinary action that can become a pretext for layoffs from a particular job or even dismissal from an apprenticeship program. *Id.* at 166.

The Equal Employment Opportunity Commission is statutorily charged with administering Title VII, 42 U.S.C. §§ 2000e-5–2000e-6, and has formally opined that failure to provide adequate equipment or facilities based on sex can constitute unlawful disparate treatment under Title VII. 2 EEOC Compliance Manual § 618.2(c).[2] The standards set by the Office of Federal Contract Compliance Programs (OFCCP) are especially relevant, because the OFCCP enforces equal opportunity requirements for federal construction contractors. The OFCCP requires employers to "assure appropriate physical facilities to both sexes," 41 C.F.R. § 60-20.3(e), and mandates that "separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes." 41 C.F.R. § 60-1.8.

In sum, the excluded evidence in this case could have been used to show a range of Title VII violations. Insofar as the graffiti, filth, absence of locks, and peepholes in the women's toilets were worse than in the men's, case law supports a disparate treatment holding on that ground alone. *E.g., Ammons-Lewis,* 1997 U.S.

[2] The EEOC Compliance Manual constitutes a "body of experience and informed judgment" to which this Court may resort for guidance. *Clackamas Gastroenterology Assocs. v. Wells,* 538 U.S. 440, 449 n.9 (2003) (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)).

Dist. LEXIS 1950, at *17 (disparate treatment where men had adequate restrooms but female had "slop-closet for a restroom" and changing facilities with "peeling paint, a severely puckered floor, a rusted locker with no bottom and no key, no window shade and falling plaster"). As appellant reported some of the problems with the toilets to management, and management refused to remedy those problems, a jury could have found that management wanted to pressure women to quit, also a disparate treatment violation. *See, e.g., Kilgo*, 789 F.2d at 874-75 (disparate treatment where company informed female job applicants of absence of female toilets to discourage them from applying). The contested evidentiary ruling therefore deprived appellant of any opportunity to prove significant disparate treatment in this aspect of the "terms, conditions or privileges" of her employment. 42 U.S.C. § 2000e-2(a)(1). This is serious, reversible error requiring remand for a new jury trial.

CONCLUSION

For the foregoing reasons, as well as those stated in the brief for Appellant, this case should be remanded for a new jury trial.

Respectfully submitted,

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March 9, 2005

United States Court Of Appeals
For The Seventh Circuit

Danielle C. Hernandez, Plaintiff-Appellant,	:	No. 04-3615
v.	:	Motion for Leave to File as *Amicus Curiae*
HCH Miller Park Joint Venture, Defendant-Appellee.	:	

PLEASE TAKE NOTICE that Legal Momentum moves for an Order granting leave, pursuant to Rule 29(b) of Federal Rules of Appellate Procedure, to file the accompanying brief as *amicus curiae* in support of Appellant in order to place before the Court relevant matter that has not already been brought to its attention. The interest of the proposed *amicus* in this matter is set forth in the Statement of Interest in the accompanying brief.

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March 9, 2005