



## **FEMALES RECOVER FOR INADEQUATE PROTECTIVE CLOTHING AND INADEQUATE SHOWER AND RESTROOM FACILITIES**



**Judith A. DePrisco**.....  
“... the court noted that mere inconvenience without any decrease in title, salary, or benefits, or that results only in minor changes in working conditions, does not meet this standard.”

protective clothing increased their chances of suffering injuries and were cumbersome and restricted their movement and caused them to trip or prevented them from easily climbing ladders. Excess length in the fingers in the gloves made it difficult to grip objects such as a fire hose. They claimed that the male-sized protective clothing made their jobs more difficult and more hazardous than was necessary. They also claimed that at a number of the fire stations that they visited, the restrooms were located in the male locker rooms with the male shower room, doors were not secure, males had the keys, and where female restrooms existed, they were unsanitary and often used as storage rooms.

The case was tried on a disparate treatment theory, and the court noted that mere inconvenience without any decrease in title, salary, or benefits, or that results

In an unusual case, but one with ramifications to many industries, two female firefighters recovered under a disparate treatment discrimination claim for inadequate protective clothing and shower and restroom facilities at their facilities. The female firefighters alleged that they were required to wear ill-fitting male firefighting clothing, although female clothing and gear were available and management officials knew of sources from which female gear could be obtained. They alleged the inadequate

only in minor changes in working conditions, does not meet this standard. The court went on to uphold a lower court ruling, however, that inadequate protective clothing and inadequate restroom and shower facilities in some circumstances amounts to discrimination on the basis of sex with regard to the “terms, conditions, or privileges of employment,” that prohibits an employer from depriving “any individual of employment opportunities or otherwise adversely affecting his status as an employee” on the basis of sex. The court rejected the defense theory that the plaintiffs were not subjected to disparate treatment on the basis of their sex because both sexes used the same bathrooms and because tailoring of inadequately fitting clothing was available for both men and women. The jury found otherwise, and the appellate court found its conclusion was supported by the evidence. The court apparently was influenced by the fact that in a firefighting job, these conditions jeopardized the plaintiffs’ ability to perform the important functions of their job in a safe and efficient manner.

**Editor’s Note** - *There are many industries where inadequate restroom and shower facilities can be at issue, such as in construction and trucking; indeed, almost any business can in theory be subject to this type of claim. The current case involved rather egregious facts in a safety-sensitive occupation, but it does serve as a reminder to employers that the issue could come up. Judges and juries seem to be sympathetic with the plights of female employees in these situations. So-called “uni-sex” bathrooms are not illegal per se, and indeed are necessitated in a number of industries.*

## KNOW YOUR ATTORNEY

Mary Moffatt Helms



MARY MOFFATT HELMS is a Member of the law firm of Wimberly Lawson Seale Wright and Daves, PLLC, which

she joined in 1994. Prior to joining Wimberly Lawson, Mary was a partner in a law firm in Kingsport, Tennessee. Her law practice includes Labor and Employment Law, Commercial and Business Law and Litigation. She received her Bachelor of Science degree, magna cum laude, from East Tennessee State University and her law degree from Washington and Lee University. Mary has served as a member on the Hearing Committee for Tennessee Board of Professional Responsibility, Supreme Court of Tennessee. She is a member of the Labor and Employment Law and Health Law Forum of the American Bar Association and is also a member of the Tennessee Bar Association. Mary is a member of the Board of Directors of the Morristown Boys and Girls Club.

## ANOTHER BATHROOM ISSUE INVOLVES TRANSEXUAL



**MIKE JONES** .....  
“...the “bathroom issue” does not directly raise sex discrimination issues, but could certainly raise them indirectly.”

More and more employers are being confronted with the issue of a transsexual wanting to use the bathroom of the opposite gender. In general, ADA concerns are probably not raised, because gender identity disorder is explicitly excluded from coverage under the ADA, although certain states may have broader laws.

Further, there might be a situation under which a “regarded as” disability claim might be brought by a transgender employee or a disability claim brought by someone seeking surgery or other medical attention to address their disorder.

Likewise, the “bathroom issue” does not directly raise sex discrimination issues, but could certainly raise them indirectly. A common issue might be a male employee, dressing as a woman, who wishes to use the female restroom. Female employees object, potentially raising a “hostile environment” issue. The male cross-dresser, may claim he is being discriminated against, because of his sex. What does the employer do?

A practical solution, may be to only allow a request to use a different restroom, upon receipt of a letter from the employee’s doctor containing a diagnosis of gender identity disorder. Alternatively, the point at which a person begins to live full-time in another gender, might seem to be a reasonable time to honor the request. But even then, there is the additional question of how much information the employer provides to the transgender employee’s co-workers.

Most employers handle the situation through very practical resolutions, such as finding a “unisex” bathroom or some other bathroom not being used, for the employee in question. In general, practical solutions will likely be upheld by the courts as legitimate, since the courts recognize the reasonable privacy interests of employees of the other gender.

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## IS THERE AN OBLIGATION TO REPORT EMPLOYEES' DANGEROUS OR CRIMINAL ACTIVITY TO OTHERS?



**Martin Conway** .....  
"A New Jersey court found the company liable for negligence, saying that the employer had a duty not only to investigate the employee's improper use of his work computer but also to take prompt and effective action to stop him from continuing to engage in that activity."

.....  
to take prompt and effective action to stop him from continuing to engage in that activity.

The New Jersey court set forth a four-part test to prove that the employer should have taken "reasonable care" to prevent the employee from engaging in an illegal activity. The test considers whether the employer: has the ability to monitor its employees' internet access; the right to monitor employees' computer use; actual or implied notice of an employee's criminal activity; and an affirmative duty to stop the employee's continuing criminal activity. Regarding the third issue, the court said that when co-workers reported that there was suspicious activity on the employee's computer, that constituted sufficient notice to warrant further investigation. Regarding the fourth element, the court found the employer had a duty to act affirmatively to prevent an employee's illegal activity and its potential harm to others, and found in this particular case the employer should have reported the employee's activities to the proper authorities for crimes committed on its property during work hours.

In the facts of the case, the employer knew the employee had visited pornographic websites and had counseled him on it. The court found fault with the fact that the network administrator testified

that he was able to use the network's daily log system to isolate and identify pornographic websites visited by the employee, but did not open any specific sites, and the employee's immediate supervisor had opened the employee's computer while he was at lunch and clicked on "websites listed," but here again none of the sites identified were actually explored and no further action was taken to determine the nature of the employee's pornographic related computer activities. Instead, the supervisor was simply instructed to tell the employee to stop whatever he was doing.

The court ruled that if the employer had properly investigated the employee's computer usage, it would have discovered the child pornography. And, once it understood the scope of the employee's misconduct, it would have had an obligation to report the employee to law enforcement authorities. Given the fact that possessing child pornography is a federal and state crime "we agree with plaintiff that defendant had a duty to report the employee's activities to the proper authorities and to take effective internal action to stop those activities, whether by termination or some less drastic remedy," the court said.

*Editor's Note - Although this case involves a state appellate court ruling that is not even the highest court of a single state, it does raise important implications for employers. Many times employers are confronted with evidence or information or gossip that an employee has threatened others, contemplated suicide, suggested illegal drug activity, or contemplated or done a whole host of matters that might be considered criminal law violations. Does an employer have an obligation to report such matters to legal authorities, to family members, or even to co-workers? What about the laws of defamation, privacy, intentional infliction, and the like, if the employer is wrong or acts inappropriately? All of these are sensitive and fair questions.*

*It is hard to draw firm conclusions as to what the employer should do in reacting to such situations. Indeed, some have even wondered whether the employer does the right thing monitoring its employees, because once you've got the information, there is clearly an obligation to conduct a thorough investigation. One of the employer's problems in the case at issue, is*

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# STATE LEGISLATURES ADDRESS PROHIBITION OF GUNS ON COMPANY PROPERTY



**T. Joseph Lynch** .....  
"Some thirteen state legislatures have considered legislation seeking to prevent employers from prohibiting weapons on company property."

Some thirteen state legislatures have considered legislation seeking to prevent employers from prohibiting weapons on company property. However, only two states signed into law such legislation, Oklahoma and Alaska. The Oklahoma

law provides: "No person, property owner, tenant, employer, or business entity shall be permitted to establish any policy or rule that has the effect of prohibiting

any person, except a convicted felon, from transporting and storing firearms in a locked vehicle on any property set aside for any vehicle." This amendment to Oklahoma's Self-Defense Act was to take effect on November 1, 2004, but business groups filed suit in federal district court to block it from taking effect, and the judge issued a temporary injunction barring the state from enforcing it.

The impetus behind the legislation appears to be an incident in late 2002, when a number of workers at an Oklahoma plant were fired after drug-sniffing police dogs found firearms in their vehicles on the company's parking lot. The legislation and various legislative

proposals have been followed with interest by business groups, as the bills are backed by the National Rifle Association, and employer groups are concerned about liability and workplace violence.

One non-partisan study suggests that allowing guns on company property more than quadruples the chances that a worker will be killed. According to another study, by High Risk Control Strategies, a corporate security firm, 60% of employers polled said that angry employees "had threatened to assault or kill" someone in management within the last year. In contrast, the National Rifle Association's lobbying arm, states that prohibiting employees from leaving their firearms in their cars deprives employees of the right to protect themselves, not just in the company's parking lot, but during their entire commute, since they would have to leave their weapons at home.

*Editor's Note - Almost all employers ban weapons inside the company's facilities, but employers continue to struggle with the issue whether to ban such weapons in vehicles in the company parking lot. Most employers are faced with issues of employees wanting to carry hunting weapons and the like in their vehicles. Most experts agree that weapons should be banned anywhere on company property, including the parking lot, but some employers are moved to grant the parking lot exception, because of local culture.*

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## IS THERE AN OBLIGATION TO REPORT EMPLOYEE'S DANGEROUS OR CRIMINAL ACTIVITY TO OTHERS continued from page 3

that it did not conduct a thorough investigation of an apparently serious matter that had been brought to its attention.

The case does not address what obligation the employer might have to inform family members or co-workers. The editor believes that in some situations, after conducting a thorough investigation and reaching certain preliminary conclusions, some type of reporting to relevant family members and/or relevant co-workers, may be required under a "reasonable care" standard. Indeed, under such a standard, the employer may be required to terminate the employee and/or isolate him from potential victims, and/or notify company security guards and the like. In terms of notifying

legal authorities, further care is necessary to avoid a malicious prosecution situation. A possible middle ground is to make a police report, making sure that a police report is actually recorded by getting a copy of the report and/or the police report number. This shows that the employer exercised reasonable care, then putting the burden on the police authorities to conduct any additional investigation they deem necessary. This is something short of the employer making a criminal complaint against an employee, although the latter may in some cases be necessary. All of these situations are so legally sensitive, that advice of counsel is necessary.