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COMMENT

A RIGHT UNDER OSHA TO REFUSE UNSAFE WORK OR A HOBSON'S CHOICE OF SAFETY OR JOB?

I. INTRODUCTION

Prior to 1970, federal regulation of safety and health in the industrial workplace was limited to a few industries.¹ The only universal provisions available in federal law to prevent occupational injury were the self-help remedies within the National Labor Relations Act (NLRA)² and the Labor-Management Relations Act (LMRA).³ Section 7 of the NLRA⁴ provides employees with the right to act concertedly for mutual aid and protection; section 502 of the LMRA⁵ protects the refusal of employees to work in abnormally dangerous conditions from being considered a strike. Although allowing workers to avoid immediate dangers, these provisions did little to produce lasting safety improvements in the workplace. Consequently, the only remedy available to most workers was compensation after injury had occurred.⁶

A major change in national policy occurred with the enactment of the Occupational Safety and Health Act of 1970 (OSHA).⁷ With

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1. See, e.g., Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1976) as amended by Pub. L. No. 95-164, §§ 101-115, 303-07, 91 Stat. 1290 (1977); Act of August 9, 1969, 40 U.S.C. § 333 (1976), as amended by Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 4(b)(2), 84 Stat. 1592 (1970) [hereinafter cited as OSHA]; Atomic Energy Act of 1954, 42 U.S.C. § 2021 (1976), as amended by Pub. L. No. 86-373, § 1, 73 Stat. 688 (1959); Walsh-Healey Act, 41 U.S.C. §§ 35, 38 (1976), as amended by OSHA, Pub. L. No. 91-596, § 4(b)(2), 84 Stat. 1592 (1970).
 2. 29 U.S.C. §§ 151-166 (1976), as amended by Labor-Management Relations Act of 1947, ch. 120, §§ 1 et seq., 61 Stat. 136.
 3. Ch. 120, tit. I §§ 1-17, tit. II §§ 201-212, tit. III §§ 301-305, tit. IV §§ 401-402, tit. V §§ 501-503, 61 Stat. 136 (codified in scattered sections of 29 U.S.C. §§ 141-187 (1976)).
 4. 29 U.S.C. § 157 (1976).
 5. 29 U.S.C. § 143 (1976).
 6. Under common law tort theory, employers owed their employees a duty to provide a safe place to work. Any worker injured as a consequence of the employer's failure to exercise reasonable care could maintain a negligence action to recover damages. This remedy was extremely limited, however. An employer could only be liable for those conditions of which he knew or had reason to know. Recovery was further restricted by application of the principles of contributory negligence and the fellow servant rule. See generally W. PROSSER, LAW OF TORTS § 80 at 526-37 (4th ed. 1971); Blumrosen, Ackerman, Kligerman, Van Schaick & Sheely, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CALIF. L. REV. 702, 708-12 (1976) [hereinafter cited as BLUMROSEN]. In most jurisdictions, a worker's common law remedy has been displaced by workmen's compensation statutes. See, e.g., MD. ANN. CODE art. 101, §§ 1-102 (1979).
 7. 29 U.S.C. §§ 651-678 (1976).

the passage of this legislation, Congress declared accident prevention in all American workplaces a national priority.⁸ Although OSHA encompasses a comprehensive administrative scheme to effect directly a reduction of work-related injury, it does not expressly grant workers the right to refuse hazardous job assignments. The Secretary of Labor, however, has issued a regulation that permits employees to refuse unsafe work in certain, limited circumstances.⁹

Recent challenges to this regulation have raised the difficult question of whether Congress intended OSHA's administrative procedures to be the exclusive means by which workers can seek to obtain a safe workplace and thus avert injury to themselves.¹⁰ Courts answering this question have not come to a unanimous conclusion. In *Marshall v. Daniel Construction Co.*,¹¹ the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, held that the Secretary of Labor had exceeded his authority in promulgating the regulation, reasoning from the Act's legislative history that Congress did not intend employee self-help to be part of the statutory scheme to eliminate occupational injury. Similar results have been reached by two United States District Courts.¹² In contrast, the Sixth Circuit Court of Appeals in *Marshall v. Whirlpool Corp.*,¹³ found the self-help measure in the regulation consistent with congressional intent and the purposes of the Act. Accordingly, the court upheld the right of workers under OSHA to refuse unsafe job assignments.

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8. OSHA § 2(b), 29 U.S.C. § 651(b) (1976). OSHA does not, however, apply to federal, state, or local government employees. OSHA §§ 3(5), (6), 29 U.S.C. §§ 654(5), (6) (1976). Section 19 of the Act, 29 U.S.C. § 668 (1976), requires federal agencies to establish "effective and comprehensive occupational health and safety programs" for their employees. See 29 C.F.R. §§ 19.60.1-19.60.49 (1978).
 9. 29 C.F.R. § 1977.12 (1978). See text accompanying notes 47-60 *infra*.
 10. Workers may still resort to private civil actions to prevent occupational injury. BLUMROSEN, *supra* note 6, at 707, argues that OSHA does not create a federal private right of action for violation of safety standards, but rather that state law may be used to obtain injunctive relief against dangerous working conditions. *Id.* at 714-27. Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 57 MINN. L. REV. 647, 704 (1975) [hereinafter cited as ATLESON], maintains, in contrast, that private enforcement of OSHA safety standards via an injunction is not inconsistent with the Act. See generally Hollis & Howell, *Occupational Safety and Health Act: Potential Civil Remedies*, 10 FORUM 999 (1975); Comment, *Occupational Safety and Health Act of 1970: Its Role In Civil Litigation*, 28 Sw. L.J. 999 (1974).
 11. 563 F.2d 707, rehearing *en banc* denied, 566 F.2d 106 (5th Cir. 1977), cert. denied, 99 S. Ct. 216 (1978).
 12. *Usery v. Certified Welding Corp. and Wycon Chemical Co.*, No. C77-064 (D. Wyo. Sept. 19, 1977); *Aders v. Kennecott Copper Corp.*, No. 76-292-17 (D.N.M. Oct. 13, 1976). Three United States District Courts within the Sixth Circuit that invalidated the Secretary's regulation were reversed by that circuit's decision in *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979).
 13. 593 F.2d 715 (6th Cir. 1979). *Accord*, *Marshall v. Seaward Constr. Co.*, No. 78-95 (D.N.H. March 28, 1979); *Marshall v. Halliburton Services, Inc.*, No. 78-0185-E (N.D. W. Va. Feb. 27, 1979). *Whirlpool* affirmed *Usery v. Babcock & Wilcox Corp.*, 424 F. Supp. 753 (E.D. Mich. 1976).

This Comment examines the scope of the right to refuse unsafe work under OSHA and the validity of such a right in light of both the Act's legislative history and national labor law policy as defined by the Supreme Court and Congress. In addition, because remedies are also available under the NLRA to workers who walk off their jobs because of unsafe working conditions, this Comment addresses how the right provided by the OSHA regulation differs from and could effect those NLRA rights.

II. THE OCCUPATIONAL SAFETY AND HEALTH ACT

A. *The Administrative Scheme*

Employee participation is an integral feature of the enforcement scheme of OSHA. The Act imposes duties and confers rights upon employees to ensure that the goal of maintaining safe workplaces is achieved.¹⁴ The only duty applicable to employees is that of complying with safety and health standards, rules, regulations, and orders issued pursuant to the Act.¹⁵ In contrast, no less than twenty rights are expressly secured to employees by the Act. Included are rights to participate in every step of the formulation¹⁶ and application¹⁷ of safety standards, as well as rights designed to keep workers informed about conditions on their particular jobsite.¹⁸ The most important for the purposes of this Comment are three rights that enable workers to seek and obtain the elimination of hazardous working conditions.

14. OSHA §§ 2(b)(1), (2), (13), 29 U.S.C. §§ 651(b)(1), (2), (13) (1976).

15. OSHA § 5(b), 29 U.S.C. § 654(b) (1976).

16. Employees have the right to suggest to the Secretary of Labor that safety standards are needed in particular areas and to participate in hearings on proposed standards. OSHA § 6(b)(1), (2), 29 U.S.C. § 655(b)(1), (2) (1976). Employees also have the right to challenge the validity of standards that may adversely affect them. OSHA § 6(f), 29 U.S.C. § 655(f) (1976); *Industrial Union AFL-CIO v. Hodgson*, 499 F.2d 467 (D.C. Cir. 1974).

17. Employees have the right to be informed when their employer requests a variance from a safety standard and to contest the application for such variance. OSHA § 6(b)(6)(A), (B)(v), 29 U.S.C. § 655(b)(6)(A), (B)(v) (1976). If an employer is cited for a violation of a safety standard, the employees affected may contest the abatement period when it is unreasonable. OSHA § 10(c), 29 U.S.C. § 659(c) (1976). Employees may not, however, challenge the sufficiency of the abatement plan. *United Auto Workers v. OSHRC*, 557 F.2d 607 (7th Cir. 1977). When an employer contests a citation issued by OSHA, employees affected may elect party status and participate fully in the hearing. OSHA § 10(c), 29 U.S.C. § 659(c) (1976). Employees may also obtain judicial review of Occupational Safety and Health Commission orders that adversely affect them. OSHA § 11(a), 29 U.S.C. § 660(a) (1976). Finally, the Act contains a separate provision pertaining to employee participation in the enforcement of standards relating to toxic substances. OSHA § 8(c)(3), 29 U.S.C. § 657(c)(3) (1976).

18. Standards relating to toxic substances shall "prescribe the use of labels or other appropriate forms of warning as are necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and proper conditions and precautions of safe

First, employees or their representatives may request an inspection of their employer's place of business by the Occupational Safety and Health Administration when they believe a "violation of a safety and health standard exists that threatens physical harm" or when they believe that an imminent danger¹⁹ exists.²⁰ If the Secretary determines there are reasonable grounds to believe that such a violation or danger is present, he must make an inspection "as soon as practicable."²¹

Second, a representative of the employees has the right to accompany an OSHA compliance officer when an inspection is made to ensure that workers have an opportunity to assist in the inspection.²² Workers also have the right to provide information to the OSHA inspector concerning conditions in the workplace.²³

Should violations of the Act be discovered, one of two actions can be taken by the inspector, depending on the degree of danger involved. For violations of safety standards not threatening immediate and serious physical harm, compliance officers must issue a citation with "reasonable promptness."²⁴ A citation becomes

use or exposure." OSHA § 6(b)(7), 29 U.S.C. § 655(b)(7) (1976). The Secretary has recently interpreted 29 U.S.C. § 8(c)(1), (2) (1976) and issued a rule to allow employees to have access to employers' logs of occupational illnesses and injuries. This right is available to all employees and former employees and applies to any establishment in which the employee is or has been employed. 43 Fed. Reg. 31,329 (1978) (to be codified in 29 C.F.R. § 1904.7). In addition, where an employer is cited for a violation of a safety standard, copies of the citation must be posted at or near each place a violation referred to in the citation occurred. OSHA § 9(b), 29 U.S.C. § 658(b) (1976). Verbally explaining the contents of the notice has been held to be noncompliance with this provision, even where citations are in English and most employees are Spanish-speaking. *Belau Transfer & Terminal Co.*, [1977-78] OSHD (CCH) ¶ 22,681 (O.S.H.R.C. Feb. 2, 1978).

19. Section 13(a) of the Act provides that an imminent danger is one "which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by the Act." 29 U.S.C. § 662(a) (1976).
20. OSHA § 8(f), 29 U.S.C. § 657(f)(1) (1976). Employees who initiate inspections may request that their names be withheld from requesting parties. *Id.* Moreover, employers may not obtain the name of the requesting employee through the Freedom of Information Act. *Cf. NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) (exemption 7(a) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A) (1976), applies to witness' statements obtained by the NLRB in investigating an unfair labor practice complaint); *T.V. Tower, Inc. v. Marshall*, 444 F. Supp. 1233 (D.D.C. 1978) (employer may not obtain name of employees interviewed by the Department of Labor after fatal accident on employer's premises). See generally Connelly & Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 46 *FORDHAM L. REV.* 203 (1977).
21. OSHA § 8(f)(1), 29 U.S.C. § 657(f)(1) (1976).
22. OSHA § 8(e), 29 U.S.C. § 657(e) (1976).
23. OSHA § 8(f)(2), 29 U.S.C. § 657(f)(2) (1976).
24. OSHA § 9(a), 29 U.S.C. § 658(a) (1976). Employees have standing to challenge the Secretary of Labor's withdrawal of a citation once they have elected party status in a contest over a violation of the statute. *IMC Chemical Group, Inc.*, 3 OSHD (CCH) ¶ 23,149 (Rev. Com. Nov. 19, 1978), *reversing* *Southern Bell Tel. & Tel. Co.*, 5 OSHC 1405, [1977-78] OSHD (CCH) ¶ 21,840 (Rev. Com. May 16, 1977).

final if not contested within fifteen working days of receipt and requires the employer to correct the offending condition.²⁵ When a danger exists that cannot be eliminated through enforcement channels before it could reasonably be expected to cause death or serious physical harm, section 13(a) of OSHA empowers the Secretary to seek an order from a United States District Court to restrain the practice or condition causing the danger.²⁶ An order issued under section 13(a) may "require . . . steps to be taken . . . to avoid, correct, or remove such imminent danger and prohibit the employment or presence of an individual in [affected] locations."²⁷

If the Secretary "arbitrarily" or "capriciously" fails to seek a restraining order against an immediate danger, employees are not left without a remedy. Section 13(d) provides the third right of employees to seek correction of dangerous conditions. It permits an employee, who may be injured by reason of the Secretary's failure, to petition a United States District Court for a writ of mandamus compelling the Secretary to obtain an injunction.²⁸

To guarantee that employees are not discouraged from exercising their rights under the Act, section 11(c) mandates that,

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of *any right* afforded by this Act.²⁹

An employee³⁰ who believes he has been discriminated against because of the exercise of protected rights must file a complaint with

25. OSHA § 10(a), (b), 29 U.S.C. § 659(a), (b) (1976). If an OSHA compliance officer determines that a violation should be abated immediately, the employer can be required to correct the offending condition before the fifteen-day period to contest the citation has expired. The Court of Appeals for the Tenth Circuit in *Brennan v. Occupational Safety and Health Comm'n*, 513 F.2d 553 (10th Cir. 1975), rejected an OSHRC ruling that the fifteen-day contest period was also a grace period for compliance and held that OSHA could reinspect within the fifteen-day period to determine if the employer has corrected the hazard.

26. OSHA § 13(a), 29 U.S.C. § 662(a) (1976).

27. *Id.*

28. OSHA § 13(d), 29 U.S.C. § 662(d) (1976). *But see* text accompanying note 56 *infra*.

29. OSHA § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976) (emphasis added).

30. Employees protected include applicants for employment and former employees. 29 C.F.R. § 1977.5(b) (1978). They would also include any person discriminated against for the exercise of protected rights when the remedial purposes of the legislation would be fulfilled. *Cf. Clarkson Constr. Co. v. OSHRC*, 531 F.2d 451 (10th Cir. 1976); *Magnus Firearms, Inc.*, 16 O.S.A.H.R.C. 1214 (1975) (cases holding that purposes of legislation should govern as to who is an employee for purposes of determining applicability of safety standards). It should also be noted that persons prohibited from discriminating are not limited to employers of the aggrieved worker. Included are employers of another, employment agencies, or unions. 29 C.F.R. § 1977.4 (1978).

the Department of Labor within thirty days of the alleged wrongful action.³¹ To restrain infringement of the employee's rights, the Secretary may institute an action on behalf of the employee in a United States District Court.³² Although the Secretary usually conducts an investigation into the merits of the complaint before proceeding to the district court, the need for, and extent of, an investigation have been held to be discretionary.³³

A prima facie violation of section 11(c) is established when the following are proven: (1) the employee was engaged in a protected activity; (2) the employer had reason to know that the employee had exercised his rights under the Act;³⁴ and (3) the employee would not have been disciplined "but for" his engagement in the protected activity.³⁵ Once a violation of the Act is found, the district court has authority to order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay.³⁶ Reinstatement or rehiring has been interpreted, however, to be available only when the employee has dealt with his employer in good faith during the period of his discharge.³⁷

The extent of protection afforded by section 11(c), and thus the efficacy of employees' statutory rights, depends upon what actions are deemed to be protected. When expressly mentioned rights are concerned, courts generally have broadly construed the Act to effect its remedial purposes. Thus, complaints "under or related to the Act"³⁸ have been held to include an employee informing his employer about potential safety violations,³⁹ as well as an employee retaining counsel to aid him in challenging an employer's unsafe work practice.⁴⁰ In addition, both the Fifth and Sixth Circuit Courts of Appeal have indicated in dicta that a temporary walkout to notify

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31. OSHA § 11(c)(2), 29 U.S.C. § 660(c)(2) (1976). The thirty-day period may be tolled when there are "strongly extenuating circumstances." 29 C.F.R. § 1977.15(c)(3) (1978). *Contra*, *Usery v. Northern Tank Line*, [1976-77] OSHD (CCH) ¶ 21,520 (D. Mont. Dec. 16, 1976) (holding that the thirty day period may not be extended).
 32. OSHA § 11(c)(2), 29 U.S.C. § 660(c)(2) (1976).
 33. *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976).
 34. If an employee initiates an inspection under § 8(f) of the Act and requests that his name be withheld, a discrimination action based on the exercise of that right will prove impossible to establish. *See Marshall v. Alpine Aromatics, Inc.*, 3 OSHD (CCH) ¶ 23,144 (D.N.J. June 1, 1978); *Powell v. Globe Indus., Inc.*, 431 F. Supp. 1096 (N.D. Ohio 1977).
 35. 29 C.F.R. § 1977.6(b) (1978). The "but for" standard means that discriminatory motives need not be the only motives contributing to the employer's action, merely the most substantial. This standard has been liberally applied. *See Dunlop v. Trumbull Asphalt Co.*, No. 75-1025-C (E.D. Mo. Nov. 2, 1976) (employee found to have been discharged for participation in filing OSHA complaint and not for two day absence that followed).
 36. OSHA § 11(c)(2), 29 U.S.C. § 660(c)(2) (1976).
 37. *Dunlop v. Trumbull Asphalt Co.*, No. 75-1025-C (E.D. Mo. Nov. 2, 1976).
 38. OSHA § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976).
 39. *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2 (M.D. Pa. 1977).
 40. *Dunlop v. Hanover Shoe Farms, Inc.*, 441 F. Supp. 385 (M.D. Pa. 1976).

the Occupational Safety and Health Administration of safety violations or to request an inspection would also be protected, because such action implements expressly conferred rights.⁴¹ These liberal interpretations of section 11(c) comport with the construction of similar antidiscrimination provisions of the Coal Mine Health and Safety Act,⁴² the NLRA,⁴³ and the Fair Labor Standards Practice Act.⁴⁴

Attempts to bring implied rights within the protective ambit of section 11(c) have not met with like success, however. Employees do not have the right to participate in post-inspection conferences between a compliance officer and an employer.⁴⁵ Furthermore, a right to refuse hazardous work has not been uniformly recognized.⁴⁶ Judicial reluctance to enlarge the rights afforded by OSHA seems to be motivated in part by a concern with overtaxing the ability and desire of employers to comply with the Act. This concern, however, poses particular problems for the administration of OSHA where implied rights are necessary to accomplish the goal of preventing occupational injury.

B. *The Implied Right To Refuse Unsafe Work*

Pursuant to his rule-making authority,⁴⁷ the Secretary of Labor has issued a regulation⁴⁸ that interprets section 11(c) of OSHA to include an implied, but limited, right to refuse work that threatens

41. *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 723 (6th Cir. 1979); *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 716, *rehearing en banc denied*, 566 F.2d 106 (5th Cir. 1977), *cert. denied*, 99 S. Ct. 216 (1978).

42. 30 U.S.C. § 820(b)(1) (1976), *construed in Phillips v. Interior Bd. of Mine Operations Appeals*, 163 U.S. App. D.C. 104, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975) (refusal of employee to work because of reasonable fear of explosion constituted initiation of internal grievance process and thus "notification" to agency of danger within meaning of Act).

This section was amended by Congress in 1977. Pub. L. No. 95-164, § 105(c)(1), 91 Stat. 1304 (presently codified in 30 U.S.C.A. § 815(c)(1) (Supp. 1978)). The Senate Report cited the *Phillips* decision and stated that it was Congress's intention "to insure the continued vitality of various judicial interpretations of the [discharge provision] of the Coal Act which are consistent with the broad interpretation of the bill's provisions." S. REP. NO. 91-181, 95th Cong., 1st Sess. 36, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3436.

43. 29 U.S.C. § 158(a)(4) (1976), *construed in NLRB v. Scrivener*, 405 U.S. 117 (1972) (NLRA prohibits discrimination against employee for giving sworn statement to NLRB field examiner, although NLRA only protects employees who "give testimony").

44. 29 U.S.C. § 215(a) (1976), *construed in Dunlop v. Carriage Carpet Co.*, 548 F.2d 139 (6th Cir. 1977) (statute protects former employees although statute on its face only protected employees).

45. *Ford Motor Co.*, [1974-75] OSHD (CCH) ¶ 18,598 (O.S.H.R.C. Sept. 10, 1974), *aff'd on other grounds sub nom. UAW v. Occupational Safety and Health Review Comm'n*, 557 F.2d 607 (7th Cir. 1977).

46. See text accompanying notes 100-24 *infra*.

47. OSHA § 8(g)(2), 29 U.S.C. § 657(g)(2) (1976).

48. 29 C.F.R. § 1977.12 (1978).

life or may cause serious bodily harm. The right is activated when the following four conditions are met:

- 1) a reasonable person under the circumstances would conclude that the hazard presents a real danger of death or serious injury;
- 2) there is insufficient time due to the urgency of the situation to eliminate the danger through resort to regular enforcement channels;
- 3) the employee refuses to work in good faith; and
- 4) the employee, if the situation allows, has requested and been unable to obtain correction of the condition by his employer before walking off the job.⁴⁹

This regulation was intended to supplement the administrative mechanisms available to employees to eliminate serious occupational dangers. For example, under section 8(f) of OSHA, which allows an employee to request an inspection of his workplace, the Secretary need only inspect a worksite "as soon as practicable" after an employee's request. The utility of a worker's right to request an inspection is, therefore, inherently limited by the resources available to the Department of Labor.⁵⁰ It provides little relief when immediate action is required but no Department of Labor personnel are available to respond quickly to an inspection request.⁵¹ Moreover, the effectiveness of section 8(f) may be further diluted by the

49. *Id.* The Secretary concedes that there is no general right to refuse unsafe work under OSHA. The regulation provides, in part, as follows:

[R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.

29 C.F.R. § 1977.12(b)(1), (2) (1978).

50. As of September 1974, there were 754 federal safety inspectors available to inspect 4.1 million work places covered by OSHA. 4 BNA OCC. SAFETY AND HEALTH REP. 383 (September 1974).

51. OSHA FIELD OPERATIONS MANUAL, Ch. VI(B) (1975), reprinted in [1978] 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 4340.4 indicates, however, that employee inspection requests must be given the highest priority when imminent dangers are involved.

Supreme Court's decision in *Marshall v. Barlow's Inc.*,⁵² in which the Court held that warrantless entries to make routine OSHA inspections violate the fourth amendment to the federal constitution. The Court in *Barlow* did not decide whether an inspection made pursuant to an employee's request might constitute an exigency justifying a warrantless entry. Even though there is strong precedent for such an argument,⁵³ *Barlow* may generate resistance to any warrantless entry, making swift action under the Act difficult.⁵⁴

Furthermore, under section 13 of OSHA, the Secretary is not empowered to order an immediate removal or correction of the danger; instead, the Secretary must obtain a court order. When an employer refuses voluntarily to correct a condition, precious time is consumed seeking court-ordered action under section 13(a). The right of employees to compel action by the Secretary⁵⁵ is an empty cure when immediate action is the tonic. The writ of mandamus was abolished by rule 81(b) of the Federal Rules of Civil Procedure,⁵⁶ and section 1361 of Title 28 of the United States Code states that federal district courts have original jurisdiction over "any action in the nature of mandamus."⁵⁷ It has been suggested that by implication such actions should now proceed as a regular civil complaint subject to normal docket delays.⁵⁸ Although it may be possible for employees to obtain a temporary restraining order⁵⁹ to compel the Secretary to

52. 436 U.S. 307 (1978).

53. In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Supreme Court held for the first time that the fourth amendment was applicable to searches made by administrative agencies. The Court was careful to note that the fourth amendment warrant requirement does not apply in emergency situations. *Id.* at 539. Whether the Supreme Court would consider the probable presence of an imminent danger an exigency justifying a warrantless entry by OSHA is uncertain. The majority opinion in *Barlow* cited OSHA § 8(f)(1), 29 U.S.C. § 657(f)(1) (1976) as an example of the statute's attempt to authorize warrantless inspections. 436 U.S. at 320 n.16.

54. The Supreme Court in *Barlow* was unconvinced that requiring warrants to inspect workplaces would present any serious impediment to the implementation of OSHA. 436 U.S. at 316-17. The Court recognized, however, that its holding in *Barlow* "might itself have an impact on whether owners choose to resist requested searches" and stated "we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be." *Id.* at n.11. The Department of Labor has reported that since May 23, 1978 (the date of the *Barlow* decision), fewer than 500 businesses out of 11,000 inspected have demanded search warrants. 47 U.S.L.W. 2228 (Oct. 10, 1978). See generally Comment, *Maryland's Warrantless Inspection Laws: A Warrantless Expectation of Constitutionality*, 8 U. BALT. L. REV. 88, 91-106 (1978).

55. OSHA § 13(d), 29 U.S.C. § 662(d) (1976).

56. FED. R. CIV. P. 81(b).

57. 28 U.S.C. § 1361 (1976).

58. Oldham, *OSHA May Not Work In Imminent Danger Cases*, 60 ABA L.J. 690, 691 (1974) [hereinafter cited as OLDHAM].

59. See FED. R. CIV. P. 65(b); OLDHAM, *supra* note 58, at 691-92. See generally Levosdorf, *The Standards for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

act, it is unrealistic to assume that the unorganized workforce of the United States would be able or willing to spend their personal savings to accomplish that result. The lack of cases where workers have sought redress against the Secretary's failure to act may be indicative of this reality. The regulation allowing workers to refuse unsafe work thus reaches work situations not expressly protected by the Act and applies only when an employee is faced with a Hobson's choice:⁶⁰ refuse work and be fired, or continue to work and be subject to the possibility of death or serious bodily harm.

To date, there has been little litigation concerning the circumstances that would entitle a worker to refuse a hazardous job.⁶¹ Several courts, however, have considered the validity of the regulation.⁶² Their conclusions rest largely on interpretations of OSHA's legislative history. An understanding of these cases can best be gained by first reviewing the events leading to the passage of OSHA.

C. Legislative History

When H.R. 16785 finally⁶³ emerged from the House Committee on Education and Labor it contained several provisions that were objectionable to a minority of the committee's members and to which they refused to assent.⁶⁴ These sections ultimately led to the defeat in the House of what became known as the Daniels Bill and concomitantly to the passage of the Steiger Bill,⁶⁵ supported by the

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60. *Usery v. Babcock & Wilcox Corp.*, 424 F. Supp. 753, 757 (E.D. Mich. 1976), *aff'd sub nom. Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979). The term "Hobson's choice" refers to Tobias Hobson, an English liveryman, who is said to have compelled his customers to take the horse that happened to be next to the stable door or go without a horse. Hence, the term connotes an apparent freedom of choice with no real alternative. *THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY*, Vol. 1, 406 (1971).
 61. *See Marshall v. Whirlpool Corp.*, 593 F.2d 715, 719 n.5 (6th Cir. 1979) (reasonable belief in danger threatening immediate death or serious harm established when worker had fallen through screen one week earlier; employer had been issued a citation for a serious violation of the general duty clause, and the condition had not been fully repaired); *Marshall v. Halliburton Services, Inc.*, No. 78-0185-E (N.D. W. Va. Feb. 27, 1979) (worker refused to drive truck on snow-covered West Virginia roads — order denying defendant's motion for summary judgment); *Alan Wood Steel Co. v. Brennan*, 4 O.S.H.R.C. 1241 (1975) (refusal to operate allegedly unsafe crane not protected when no objective evidence of danger presented and employer had not been cited for OSHA violation).
 62. See text accompanying notes 100-28 *infra*.
 63. From 1969 to 1970, four occupational safety and health bills were introduced in the House. H.R. 843, 3809, 4294 & 13373, 91st Cong., 1st Sess. (1969). Moreover, the Daniels Bill went through seven drafts in committee. *See generally Symposium: Developing Law of OSHA*, 9 GONZ. L. REV. 317 (1974); Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788, 799-802 (1972).
 64. H.R. REP. NO. 1291, 91st Cong., 2d Sess. 47 (1970) (statement of minority views), *reprinted in* 116 CONG. REC. 31888-889 (1970).
 65. H.R. 19200, 91st Cong., 2d Sess., 116 CONG. REC. 31873-881 (1970).

Nixon administration.⁶⁶ Two of these fateful provisions are relevant to a determination of whether a right to refuse unsafe work under the conditions specified by the Secretary may be implied from the Act.

Section 19(a)(5) of the Daniels Bill allowed employers or employees to request a determination by the Department of Health Education and Welfare of the toxicity of any material on a jobsite. Within sixty days of an affirmative determination, employers could not require employees to be exposed to toxic levels of the substance unless the material was labeled, informing workers of the hazards associated with it, symptoms of overexposure, and precautions to be taken when handling it. Additionally, employers were required to provide personal protective equipment to guard against toxic effects of the material. If these conditions were not met after sixty days, an employee was permitted to "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation of such period."⁶⁷ This provision was a by-product of one of the primary catalysts to the introduction of a federal occupational safety and health bill — increasing employee exposure to highly toxic, industrial materials.⁶⁸ It was designed to prevent an employee from exposing himself to toxic risks of which he was not aware and to protect adequately the worker when he knowingly encountered those risks.⁶⁹

The Secretary's regulation differs from section 19(a)(5) of the Daniels Bill in several respects. The Daniels provision was not concerned with immediate threats to life but, rather, with long-term exposure to health hazards, the effects of which would not be manifest for years.⁷⁰ In addition, the Daniels provision applied only to one type of hazard, toxicity, whereas the Secretary's regulation addresses all immediate dangers incapable of being corrected through normal enforcement channels. Moreover, the walkout right in the Daniels Bill contained none of the limitations of the Secretary's regulation. No particular degree of danger was delineated to justify a refusal to work. Indeed, no danger at all was required, only an employer's noncompliance with the Act. Rather than a means to protect the worker from imminent harm, section

66. Letter from Secretary of Labor Hodgson to Representative Steiger (Nov. 23, 1970), *reprinted in* 116 CONG. REC. 38374 (1970).

67. H.R. 16785, 91st Cong., 2d Sess., § 19(a)(5) (1970).

68. S. REP. NO. 91-1282, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5178-80 [hereinafter cited as *Senate Report No. 91-1282*].

69. 116 CONG. REC. 37326, 91st Cong., 2d Sess. (1970) (remarks of Sen. Williams with reference to analogous provision in the Senate Bill) [hereinafter cited as *Hearings*].

70. This difference is highlighted by the requirement of the regulation that a danger be so immediate that there be insufficient time to seek relief through administrative channels, while under the Daniels Bill an employee was entitled to walkout only if sixty days had elapsed and the employer had not complied with the Act.

19(a)(5) of the Daniels Bill was primarily a tool to compel employer compliance with OSHA.⁷¹

The objections to this section of the Daniels Bill focused on the power conferred upon employees to refuse work and disrupt business operations. Opponents branded the section as the "right to strike with pay,"⁷² a term that proved to be the bill's epitaph. Congressman Michel, for example, expressed concern that the provision could be used by labor unions to avoid no-strike clauses in collective bargaining agreements or be abused by individual union members.⁷³ The validity of these objections is substantially undermined by the fact that section 502 of the LMRA, which permits workers to refuse abnormally dangerous work notwithstanding the existence of a no-strike obligation, has been successfully used for over twenty years.⁷⁴ Nevertheless, the legislative debates are replete with concerns that the provision would disrupt labor-management relations.⁷⁵

Consequently, when the bill came before the House for debate and passage, Congressman Daniels, sponsor of the bill, offered several amendments in order to save it from defeat.⁷⁶ One such amendment eliminated the right of a worker to absent himself from the job⁷⁷ and substituted in its place a right to request a special OSHA inspection.⁷⁸ The substitution was identical to a provision in the Senate Bill⁷⁹ and to section 8(f) of the legislation⁸⁰ eventually enacted into law. Both Congressman Daniels and Senator Williams, sponsor of the Senate Bill, indicated that the right to request an inspection was included in lieu of the right to refuse work when the employer did not comply with the labeling requirements for toxic substances.⁸¹

Notwithstanding this compromise effort, the Daniels Bill was rejected by the House.⁸² Unlike the Daniels Bill, the Steiger Bill passed by the House did not include the right to refuse work or the

71. See *Hearings, supra* note 69, at 31887 (remarks of Rep. Steiger); *id.* at 37326 (remarks of Sen. Williams).

72. *Id.* at 38393.

73. *Id.*

74. *But see, e.g.,* Tidemarth Ventures, Inc., 54 L.R.R.M. 1197 (1963) (abuse of section 502 evidenced where employee's claim of unsafe working conditions found to be a pretext to refuse work in retaliation for employer's decision to dock him for unauthorized absence).

75. *E.g., Hearings, supra* note 69, at 38393 (remarks of Rep. Michels); *id.* at 38709 (remarks of Rep. Hull); *id.* at 36512 (remarks of Sen. Saxbe); *id.* at 37346 (remarks of Sen. Tower).

76. *Hearings, supra* note 69, at 38378.

77. *Id.* amend. no. 2.

78. *Id.* amend. no. 3.

79. S. 2193, 91st Cong., 2d Sess., § 8(f), 116 CONG. REC. 37319 (1970).

80. 29 U.S.C. § 657(f)(1) (1976).

81. *Hearings, supra* note 69, at 38377-378 (remarks of Rep. Daniels); *id.* at 37326 (remarks of Sen. Williams).

82. *Id.* at 38723 (roll call vote: 220-173). The Daniels Bill was rejected before the amendments offered by Congressman Daniels had a chance to be voted upon.

right to request an inspection.⁸³ The Senate bill, however, was ultimately adopted in conference between the House and the Senate, with the House accepting the right of employees to initiate OSHA inspections.⁸⁴

The second provision of the original OSHA legislation that is relevant to whether a right to refuse unsafe work may be implied from the Act, pertains to the procedure to counteract imminent dangers.⁸⁵ The Daniels Bill directed the Secretary of Labor to obtain a court-ordered injunction against a work condition causing an imminent danger unless he determined that, due to the urgency of the situation, there was insufficient time to obtain such an order. In the latter event, the bill allowed the Secretary to take summary action to remedy the danger, including, if necessary, shutting down an entire plant.⁸⁶ The summary order could be effective for no more than five days. Similarly, the Williams Bill in the Senate permitted summary action by the Secretary when there was insufficient time to obtain a court-ordered injunction, but limited its effectiveness to seventy-two hours.⁸⁷ In addition, before an enforcement officer could act under the Williams procedure, the concurrence of the regional director of the Labor Department had to be obtained.⁸⁸

The summary shutdown provisions of both the Daniels and Williams Bills were the most hotly contested features of the legislation. Proponents of the summary power argued that the Act should contain some procedure to enable the Secretary to take immediate action in situations when disaster was the probable alternative.⁸⁹ Advocates also pointed out that similar provisions were found in most state occupational safety laws,⁹⁰ as well as in the Coal Mine Health and Safety Act,⁹¹ which had been passed only the year before.⁹² Opponents in both the House and the Senate focused, however, upon the power of the Secretary to close an entire operation, fearing that such a summary procedure would place too

83. H.R. 19200, 91st Cong., 2d Sess., 116 CONG. REC. 38723 (1970).

84. CONF. REP. No. 91-1765, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5234.

85. See text accompanying notes 26-27 *supra*.

86. H.R. 16785, 91st Cong., 2d Sess., § 12(a) (1970).

87. S. 1293, 91st Cong., 2d Sess., § 11(b), 116 CONG. REC. 37320 (1970).

88. *Id.*

89. *Id.* at 37340 (remarks of Sen. Williams).

90. *Senate Report No. 91-1282, supra* note 68, at 5190. See, e.g., ARK. STAT. ANN. § 81-406 (1976); COLO. REV. STAT. § 8-11-107 (Supp. 1976); KY. REV. STAT. ANN. § 338.131(1) (Baldwin 1978); MICH. STAT. ANN. § 17.50(31)(1) (1975); MINN. STAT. ANN. § 182.662 (West Supp. 1978); MONT. REV. CODES ANN. Tit. 41, § 1720 (Supp. 1977); NEB. REV. STAT. § 48-414 (1974); ORE. REV. STAT. § 654.082(1), (2) (1977); PA. STAT. ANN. Tit. 43, § 25-7 (Purdon 1964).

91. 30 U.S.C. §§ 814(a)-814(c), (i), 817 (1976), *as amended by* PUB. L. NO. 95-164, §§ 104, 107, 91 Stat. 1300-1303, 1307-1309 (1977).

92. *Senate Report No. 91-1282, supra* note 68, at 5190. Congress may have been willing to vest mine inspectors with the power to close an unsafe mine because of the extraordinarily disastrous consequences of mining mishaps.

much power in the hands of an inspector⁹³ and violate due process.⁹⁴ Economic considerations were also paramount; lost production time as the result of disruption or shutdown of plants was seen as increasing the cost of doing business, contributing to inflation, and generally causing American business to be less competitive.⁹⁵ The more moderate procedure to counteract imminent dangers, supported by the Nixon administration in both the House and the Senate, was ultimately enacted into law. The Secretary is empowered to seek court-ordered action only to avert immediate danger; no power of summary action was conferred by Congress.⁹⁶

Both proponents and opponents of the summary shutdown and strike-with-pay provisions had in mind the identical goal of eliminating occupational injury. The differences between these legislative factions reflected, therefore, only disagreement over the procedures that should be employed to realize that goal. Congressional concern with the appropriate procedures to implement the Act played no small part in the findings of the Fifth Circuit Court of Appeals⁹⁷ and two United States District Courts⁹⁸ that sections 8(f) and 13 are the sole remedies available to employees under OSHA to

93. *Hearings, supra* note 69, at 35607 (remarks of Sen. Saxbe); *id.* at 38380 (remarks of Rep. Eshleman).

94. *Id.* at 38379 (remarks of Rep. Randall); *id.* at 38381 (remarks of Rep. Erlenborn); *id.* at 38393 (remarks of Rep. Michel); *id.* at 38703 (remarks of Rep. Steiger). Although the Supreme Court held in *Fuentes v. Shevin*, 407 U.S. 67 (1972), that even a temporary deprivation of a property right without prior notice or opportunity to be heard violates due process, Congress was mistaken in assuming that due process safeguards would be required in an imminent danger situation. In *Fuentes*, the Court reaffirmed the principle that immediate seizure of a property interest without prior opportunity for a hearing is constitutionally permissible when "the seizure [is] directly necessary to secure an important governmental or general public interest . . . [t]here [is] a special need for very prompt action . . ." and "the person initiating the seizure [is] a government official responsible for determining under the standards of a narrowly drawn statute, that it [is] necessary and justified in the particular instance." 407 U.S. at 91. Thus, the Supreme Court has subsequently held that immediate summary seizure is permissible to assert *in rem* jurisdiction over property in order to conduct forfeiture proceedings and thereby prevent continued illicit use of the property. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Nor is due process denied when postponement of notice and hearing is necessary to protect the public from misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), or contaminated food. *North American Storage Co. v. Chicago*, 211 U.S. 306 (1908). Certainly, the need to protect workers from immediate injury would also be an important government interest justifying summary action. For a discussion of the due process problems in OSHA, see Note, *Due Process and Employee Safety: Conflict In OSHA Enforcement Procedures*, 84 YALE L.J. 1380 (1975).

95. *Hearings, supra* note 69, at 36512 (remarks of Sen. Saxbe).

96. OSHA § 13(a), 29 U.S.C. § 662(a) (1976).

97. *Marshall v. Daniels Constr. Co.*, 563 F.2d 707, *rehearing en banc denied*, 566 F.2d 106 (5th Cir. 1977), *cert. denied*, 99 S. Ct. 216 (1978).

98. *Usery v. Certified Welding Corp. and Wycon Chemical Co.*, No. C77-064 (D. Wyo. Sept. 19, 1977); *Aders v. Kennecott Copper Corp.*, No. 76-292-M (D.N.M. Oct. 13, 1976).

eliminate imminent dangers on the job and to prevent injury to themselves.⁹⁹

D. Case Interpretation of the Right To Refuse Hazardous Work

In *Marshall v. Daniel Construction Co.*,¹⁰⁰ a crew of ironworkers refused to work on steel beams 150 feet high because high winds made their work treacherous. When one worker persisted in his refusal to return to his job, he was fired. The Court of Appeals for the Fifth Circuit upheld the employer's right to discipline the employee for his action, and held that no right to refuse dangerous work may be implied from OSHA. The court in *Daniel* based its holding squarely on the legislative history of the Act. It conceded, however, that the right to strike provision of the rejected Daniels Bill did not address immediate safety hazards, the subject of the disputed regulation.¹⁰¹ Moreover, the majority also asserted that Congress had not considered the employee's dilemma of being forced to choose between his job or his safety under the procedures available in the Act.¹⁰² Nonetheless, the deletion of the strike-with-pay clause and the concern for employee abuse of that provision were interpreted as a rejection of the self-help remedy.¹⁰³ Furthermore, the court found that Congress had included the right to request an inspection in lieu of any right to walk off the job, and therefore a right to refuse dangerous work could not be implied from the language or purpose of OSHA.¹⁰⁴ Courts have interpreted similar antidiscrimination provisions in other remedial labor legislation to include implied rights when the purposes of the legislation were promoted.¹⁰⁵ These cases were not found persuasive.¹⁰⁶ The potential for abuse and adverse economic consequences for employers constitute "substantial countervailing considerations"¹⁰⁷ to the court of appeals, militating against a liberal construction of the Act.

99. When Congress has empowered an agency to promulgate rules and regulations to execute its duties under a regulatory statute such as OSHA, regulations duly promulgated are entitled to great deference by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Accordingly, the standard of review employed to ascertain the validity of interpretative regulations is a limited one: the regulation should be upheld unless it is clearly inconsistent with the intent of Congress or it is an unreasonable construction of the legislation. *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Manhattan G.E. Co. v. Commissioner*, 297 U.S. 129, 134-35 (1936).

100. 563 F.2d 707, *rehearing en banc denied*, 566 F.2d 106 (5th Cir. 1977), *cert. denied*, 99 S. Ct. 216 (1978).

101. *Id.* at 714.

102. *Id.* at 716 n.21.

103. *Id.* at 714 ("[T]he wholesale rejection of the provision demonstrates that an overriding concern of Congress was its fear that workers might abuse the rights granted and disrupt or terminate their employer's business operations as a form of intimidation or harassment.")

104. *Id.* at 713-14.

105. See notes 42-43 *supra*.

106. 563 F.2d at 713-14.

107. *Id.* at 716 (quoting *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972)).

Allowing employees to refuse work, the *Daniel* majority reasoned, would confer powers upon workers that were expressly withheld from OSHA inspectors: to determine the existence of a danger that could not be corrected through regular statutory procedures and to shut down an operation without prior opportunity for a hearing.¹⁰⁸ The court did not equate the action of a government official with that of a private person. Rather, it interpreted the protections afforded by a judicially ordered work stoppage as grounded on more than due process considerations.¹⁰⁹ Use of the injunction procedure, the court implied, was a protection against abusive employee conduct as well as arbitrary governmental action.¹¹⁰

A clarion dissent was written in *Daniel* by Judge Wisdom. The Sixth Circuit Court of Appeals found itself "in full agreement with" this dissent in its decision in *Marshall v. Whirlpool Corp.*,¹¹¹ both opinions upheld the right of workers under OSHA to refuse work in the face of immediate danger. Neither Judge Wisdom nor the *Whirlpool* court found the sections of legislative history relied upon by the majority in *Daniel* to be dispositive of the regulation's validity. First, substantial differences were noted between the Secretary's regulation and the strike-with-pay clause of the Daniels Bill.¹¹² Moreover, the court in *Whirlpool* emphasized that the focus of the objections in Congress to the strike-with-pay provision was not the right to refuse work but the right to be *paid* when exercising that right.¹¹³ The right to walk off the job, the court reasoned, could not have sparked the controversy in Congress because workers are already specifically permitted to strike over safety issues under federal labor law in two instances.¹¹⁴ Because the regulation promulgated by the Secretary of Labor does not authorize pay without work, nor privilege an employee to refuse alternative safe work, the court concluded that it is not subject to the objections levied against the Daniels Bill.¹¹⁵

Nor was the abandonment of the summary imminent danger provision deemed to be controlling by either Judge Wisdom or the

108. *Id.* at 714-15.

109. *Id.* at 715 n.20.

110. The court did suggest, however, that a temporary walkout taken to request an OSHA inspection would be protected by §11(c) because it was necessary to implement an expressly conferred right. *Id.* at 716.

111. 593 F.2d 715, 736 (6th Cir. 1979). *Accord*, *Marshall v. Halliburton Services, Inc.*, No. 78-0185-E (N.D. W. Va. Feb. 27, 1979) (order denying defendant's motion for summary judgment).

112. 593 at 730; 563 F.2d at 719 (Wisdom, J., dissenting).

113. 593 F.2d at 730 (6th Cir. 1979). The validity of the court's conclusion is questionable. At least one key legislator intimated that it was the right to walk off the job that was objectionable and not the fact that an employee would be paid for doing so. *See Hearings, supra* note 69, at 38708 (remarks of Rep. Steiger).

114. 593 F.2d at 731. The court cited § 7 of the NLRA and § 502 of the LMRA.

115. *See id.* at 734-35.

Sixth Circuit. The opinions noted that the legislation, unlike the regulation, permitted an official to close down an entire plant, allowed changes to be ordered on the spot, and, most importantly, vested these powers with an agent of the government.¹¹⁶ Judge Wisdom found the objections to summary action by an OSHA inspector to be premised upon due process considerations. These objections, Judge Wisdom argued, have no applicability where a private employee is the actor because state action is not involved.¹¹⁷ In addition, both the Sixth Circuit in *Whirlpool* and Judge Wisdom asserted that it was the potential for abuse of authority by an arbitrary inspector that Congress feared. The regulation, the opinions concluded, presents no similar opportunities for abuse because the right it provides may be exercised only by endangered employees in narrowly defined circumstances.¹¹⁸

Concluding that Congress neither discussed nor contemplated the dilemma addressed by the regulation, the *Whirlpool* court upheld the regulation by relying upon settled rules of statutory construction, as well as several policy and practical considerations. First, the right to refuse work embodies one of the "other rights" mentioned in section 11(c) of OSHA: the right to work in a hazard-free environment implicit in the entire law.¹¹⁹ Second, the practical need for the regulation is great. It removes a worker from the threat of serious harm when the administrative procedures of OSHA are too slow to effectuate Congress's goal of preventing injury; failure to provide a remedy to an employee would be contrary to the remedial purpose of the Act.¹²⁰ Furthermore, because the regulation only provides an interim remedy and requires no correction of the dangerous condition, it promotes employee utilization of the Act's reporting procedures under section 8(f), thereby reinforcing vital employee participation and assistance in implementing the Act.¹²¹

The *Whirlpool* court also insisted that a narrow construction of the Act would result in anomalous applications of its protections. An employee who refuses unsafe work and immediately requests and obtains an inspection by OSHA would be protected under section

116. *Id.* at 733-34; 563 F.2d at 720 (Wisdom, J., dissenting).

117. 563 F.2d at 720. The safeguards of the Bill of Rights and the fourteenth amendment only apply to action taken by the state or its agents. *Civil Rights Cases*, 109 U.S. 3 (1883). State action may be found in nominally private conduct if there is significant state involvement, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), or where the private party performs a function ordinarily reserved to the government. Compare *Marsh v. Alabama*, 326 U.S. 501 (1946) and *Nixon v. Condon*, 286 U.S. 73 (1932) with *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

118. 593 F.2d at 734; 563 F.2d at 721-22 (Wisdom, J., dissenting).

119. 593 F.2d at 725. The right of employees to work in an environment "free from recognized hazards likely to cause serious harm" is specifically guaranteed by 29 U.S.C. § 654(a) (1976).

120. See 593 F.2d at 721-22.

121. *Id.* at 722.

11(c) as his refusal to work would be but a step in the exercise of an expressly conferred right. On the other hand, an employee who refuses an unsafe job but is unable to obtain an immediate inspection by OSHA would not be protected because the refusal to work is not incident to the inspection request. Refusing to uphold the regulation would therefore "lay a trap for the unwary employee and . . . strip the employee of vital protection under a statute meant to safeguard him."¹²²

Finally, the *Whirlpool* court found support for its interpretation of the statute in congressional action taken since the passage of OSHA with regard to the Coal Mine Health and Safety Act. In 1977, Congress amended the antidiscrimination provision of the Coal Mine Act. The amended version does not expressly grant the right of employees to refuse dangerous work. Congressional debates, however, explicitly refer to, and approve of, protecting from retaliation miners who refuse to work in good faith when they reasonably believe a danger to be imminent.¹²³ Although the Coal Mine Act is much more limited in application than OSHA, the *Whirlpool* court interpreted these debates as an affirmation of the right to refuse dangerous work in the circumstances such as those permitted by the OSHA regulation.¹²⁴

One commentator has astutely noted that implementation of the substantive and procedural philosophy of OSHA requires balancing the "need of workers to have a safe and healthy work environment against the requirement of industry to function without undue interference."¹²⁵ The outcomes of the decisions discussed above reflect the weights assigned to each side of this scale. In *Daniel*, the significance attached to congressional reservations with the potentially disruptive effects of the right to refuse unsafe work displaced the undeniable need to provide some remedy to workers who are confronted with the choice of their jobs or their safety. Although consonant with the substance of some Congressmen's concerns, the position adopted by this court is somewhat unusual. As Judge Wisdom and the *Whirlpool* court noted, walkouts because of unsafe conditions have long been part of labor-management relations.¹²⁶ Congressmen expressing fears of employee abuse seemed unaware of this fact, for only once were the rights to refuse unsafe work in the NLRA mentioned during legislative debates.¹²⁷ Because the regu-

122. *Id.* at 723.

123. *Id.* at 735-36; 123 CONG. REC. S10287-88 (daily ed. June 21, 1977) (remarks of Sen. Williams and Sen. Javits); 123 CONG. REC. H11662 (daily ed. Oct. 27, 1977) (remarks of Rep. Perkins). S. REP. No. 91-181, 95th Cong., 1st Sess. 36, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3436.

124. 593 F.2d at 736.

125. McClintock, *Symposium: Developing Law of OSHA*, 9 GONZ. L. REV. 317, 323 (1974).

126. 593 F.2d at 731; 563 F.2d at 721 (Wisdom, J., dissenting).

127. 116 CONG. REC. 42208 (1970) (remarks of Rep. Scherle).

lation comports with the purpose of OSHA, and the language of the Act is broad enough to encompass a limited self-help remedy, any disruption that could occur seems a small price to pay for protection against injury in the workplace. Moreover, as Justice Douglas said with reference to section 502 of the LMRA, giving workers the right to remove themselves from the possibility of serious harm "recognize[s] in law what is in any event an unavoidable principle of human behavior: self-preservation."¹²⁸

The right provided by the OSHA regulation is not the only remedy available to workers who refuse to work because of a perceived danger. As the *Whirlpool* decision noted, employees may have protection under section 7 of the NLRA if their action constitutes a protected concerted activity.¹²⁹ In addition, a walkout over abnormally dangerous conditions is not deemed to be a strike under section 502 of the LMRA.¹³⁰ The existence of alternative statutory remedies to employees was not seen as a reason for invalidating the Department of Labor's regulation. In *Whirlpool*, the court concluded that the NLRA and LMRA rights inadequately protect workers for the purposes of OSHA, and that the remedies afforded by the OSHA regulation are in any event coextensive with the alternative statutory rights, thereby creating no conflict between the acts.¹³¹

There are, however, significant differences between the rights and remedies granted by the NLRA, the LMRA and the OSHA regulation. Providing an additional and different remedy to employees who refuse to work would seem to be contrary to the concern often expressed during the legislative debates that OSHA would duplicate many of the existing federal laws and create confusion concerning what is required in order to be in compliance with the pertinent laws.¹³²

Alternative remedies available to employees who refuse to work because of unsafe conditions are also significant given the "Memorandum of Understanding"¹³³ between the National Labor Relations

128. *Gateway Coal Co. v. UMW*, 414 U.S. 368, 391-92 (1974) (Douglas, J., dissenting).

129. 29 U.S.C. § 157 (1976). See text accompanying notes 143-70 *infra*.

130. 29 U.S.C. § 143 (1976). See text accompanying notes 171-200 *infra*.

131. *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 726 n.23 (6th Cir. 1979).

132. *E.g., Hearings, supra* note 69, at 42208 (remarks of Sen. Scherle). Section 4(b)(3) of OSHA, 29 U.S.C. § 653(b)(3) (1976), deals with the problem of overlapping legislation. It provides that "[t]he Secretary shall, within three years after the effective date of this Act, report to Congress his recommendations for legislation to avoid unnecessary duplication and to achieve coordination between this Act and other federal laws."

133. 40 Fed. Reg. 26083 (1975) [hereinafter cited as *Memorandum*]. The memorandum, after citing §§ 7 and 8(a)(1) of NLRA, states, in part:

Although there may be some safety and health activities which may be protected solely under the OSH Act, it appears that many employee safety activities may be protected under both Acts. However, since an employee's right to engage in safety and health activity is specifically

Board (NLRB) and the Occupational Safety and Health Administration. Recognizing that many safety activities expressly protected by section 11(c) of OSHA are "only generally included in the broader right to engage in concerted activities under the NLRA,"¹³⁴ the agencies have entered into an agreement to eliminate duplicate litigation and to "insure that employee rights in the area of safety and health will be protected."¹³⁵ Procedurally, the agreement provides that "where a charge involving issues covered by section 11(c) of the OSH Act has been filed with the General Counsel and a complaint has also been filed with OSHA as to the same factual matters, the General Counsel will, absent withdrawal of the matter, defer or dismiss the charge."¹³⁶ If the employee has filed only with the NLRB, he will be informed of the right to litigate under section 11(c) of OSHA.¹³⁷ Only where an employee fails to file under OSHA will the complaint be processed by the NLRB.¹³⁸ Finally, when a complaint filed with the NLRA covers both issues protected by section 11(c) and matters within the exclusive jurisdiction of the NLRB, the General Counsel will consult with the Solicitor of Labor to determine the course of action that will be taken.¹³⁹

The scope of the memorandum is unclear, but it purports to limit employee access to statutory rights under section 7 of the NLRA when, under the given facts, section 11(c) of OSHA may provide a remedy and the employee has either filed a complaint or previously litigated his claim under OSHA. Although the authority for abdicating enforcement of NLRA rights seems questionable,¹⁴⁰ the practical effect of the agreement could significantly curtail rights

protected by the OSH Act and is only generally included in the broader right to engage in concerted activities under the NLRA, it is appropriate that enforcement actions to protect such safety and health activities should primarily be taken under the OSH Act rather than the NLRA.

134. *Id.* Compare *Walls Mfg. Co.*, 137 N.L.R.B. 1317 (1962), *aff'd*, 321 F.2d 753 (D.C. Cir.), *cert. denied*, 375 U.S. 923 (1963) with 29 C.F.R. § 1977.9(b) (1978).

135. *Memorandum, supra* note 133, at 26083.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. 29 U.S.C. § 153(d) (1976) vests the General Counsel with "final authority" to issue unfair labor practice complaints and thus the power to determine which cases will be litigated before the NLRB. The courts have uniformly held that the statute divests federal courts of jurisdiction to review the General Counsel's decisions. *E.g.*, *Vaca v. Sipes*, 386 U.S. 161, 182 (1967); *Mayer v. Ordman*, 391 F.2d 889, 892 (6th Cir.) (per curiam), *cert. denied*, 393 U.S. 925 (1968). It has been argued, however, that such absolute discretion is incompatible with the intent of Congress to make the NLRB the policy making body under the NLRA and contrary to the principles of judicial review of administrative action. *Rosenblum, A New Look at the General Counsel's Unreviewable Discretion Not To Issue A Complaint Under The NLRA*, 86 YALE L.J. 1349, 1371-85 (1977); *McClintock, The Unreviewable Power of the General Counsel - Partial Enforcement of the Labor Act*, 12 GONZ. L. REV. 79, 103-15 (1976). See generally *Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

under the NLRA and LMRA. As will be explained later in this Comment, this is particularly true regarding safety related walkouts if the OSHA regulation allowing employees to refuse unsafe work is valid. The practitioner, therefore, should be aware of the differences in protection afforded walkouts under each act and know that prior adjudication under OSHA may bar resort to the NLRA¹⁴¹ and vice versa.¹⁴²

The remaining sections of this Comment will discuss the NLRA and LMRA rights that protect safety related walkouts and some of the conflicts and problems created by the OSHA regulation in light of the NLRB's deferral policy.

III. THE NLRA AND LMRA PROTECTIONS

A. Safety Walkouts As A Concerted Activity Under Section 7

Under section 8(a)(1) of the NLRA,¹⁴³ it is an unfair labor practice for employers to curtail the exercise of employee rights guaranteed by section 7 of the Act. The latter section provides that "[e]mployees shall have the right to . . . engage in other concerted activities for . . . mutual aid and protection."¹⁴⁴

Concerted activities protected by section 7 include refusal to work because of unsafe conditions of employment. In *NLRB v.*

141. *Memorandum, supra* note 133, at 26083. Unfair labor practice complaints involving safety walkouts have been litigated since the date of the agreement. See *Sargent Electrical Co.*, 237 N.L.R.B. No. 182 (1978); *Newport News Ship Building & Dry Dock Co.*, 236 N.L.R.B. No. 197 (1978); *Modern Carpet Industries, Inc.*, 236 N.L.R.B. No. 132 (1978). It is certain, then, that the deferral is not mandatory, at least where no prior filing under OSHA has occurred.

142. The Secretary of Labor has also adopted a deferral policy under OSHA. 29 C.F.R. § 1977.18(b) (1978) provides that the Secretary may postpone determination of a complaint pending in arbitration or under the NLRB where (1) the rights asserted in the other proceeding are substantially the same as OSHA's; (2) the factual issues are substantially the same; and (3) the forum hearing the matter has power to determine the ultimate issue of discrimination. The Secretary may defer to the outcome of the other proceeding when the above conditions are met, and the proceeding dealt adequately with all factual issues, was fair, regular, and free of procedural error, and the outcome was not repugnant to the purpose or policy of OSHA. *Id.* at § 1977.18(c). Whether the Secretary must defer to arbitration rulings based on the same facts is a matter of controversy. Compare *Brennan v. Alan Wood Steel Co.*, 3 OSHRC 1654 (E.D. Pa. Oct. 14, 1975) with *Marshall v. General Motors Corp.*, No. C75-134Y (N.D. Ohio July 19, 1977) and *Brennan v. Pascoe Steel Corp.*, No. 74-73-COL (D. Md. Jan. 23, 1974). In addition, the validity of agency deferral to private employment agreements has been called into question by two Supreme Court rulings that the pendency or outcome of grievance procedures has no effect on an individual's rights under Title VII. See *International Union of Electrical, Radio & Machine Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229 (1976); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *But see N.L. Ind. v. Brennan*, 3 OSHD (CCH) ¶ 23,105 (S.D. Ind. June 30, 1978) (employee's acceptance of prior arbitration settlement bars action under § 11(c) for discharge after refusing to accept dangerous work, absent showing that acceptance was not voluntary — applying *Gardner-Denver*).

143. 29 U.S.C. § 158(a)(1) (1976).

144. 29 U.S.C. § 157 (1976). For a general treatment of § 7, see Cox, *The Right To Engage In Concerted Activities*, 26 IND. L.J. 319 (1951).

Washington Aluminum Co.,¹⁴⁵ the Supreme Court held that a walkout by seven employees occasioned by subfreezing temperatures in their plant was a concerted activity, notwithstanding the employer's work rule prohibiting such action. The policy of the NLRA, the Court reasoned, was to protect the right of workers to act together to better their working conditions. The walkout, it concluded, was the most effective means available to wholly unorganized employees to present their grievances and thus improve their working conditions.¹⁴⁶

Several conditions must be met before section 7 can be invoked. There first must be a labor dispute, defined by section 2(9) of the NLRA in part as "any controversy concerning . . . conditions of employment."¹⁴⁷ In addition, a specific remedy must be sought, and the action must further some group interest, be taken in good faith,¹⁴⁸ and not be unlawful or otherwise improper.¹⁴⁹ Because of the latter requirement, union workers who refuse to work in violation of a contractual obligation not to strike may not claim the benefits of sections 7 and 8(a)(1).¹⁵⁰ Moreover, section 7 offers no protection when the worker's action is in derogation of the union's right of exclusive representation.¹⁵¹ Section 7 is thus available both to unorganized workers¹⁵² and union workers so long as the latter are not acting in violation of their collective bargaining agreements.¹⁵³

145. 370 U.S. 9 (1961).

146. *Id.* at 14.

147. NLRB v. International Longshoremen's Ass'n, 332 F.2d 992 (4th Cir. 1964).

148. NLRB v. Red Top, Inc., 455 F.2d 721, 726 (8th Cir. 1972).

149. Shelley & Anderson Furn. Mfg. Co. v. NLRB, 497 F.2d 1200, 1202 (9th Cir. 1974).

150. NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939); United Electrical Radio & Machine Workers, 223 F.2d 338 (D.C. Cir.), *cert. denied*, 350 U.S. 981 (1955); NLRB v. Sunset Minerals, Inc., 211 F.2d 224 (9th Cir. 1954). An exception to this rule is that employees may strike in violation of their contracts in order to protest a serious unfair labor practice under the NLRA. *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). By analogy to *Maestro*, it has been argued that employee strikes to protest serious OSHA violations should be given protection under § 7, even if in violation of no-strike agreements. Doppelt, *OSHA: Impact On NLRA And Arbitration*, 20 WAYNE L. REV. 1015, 1024-25 (1974) [hereinafter cited as DOPPELT].

151. *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963) (walkout by truck drivers in attempt to have heaters installed in trucks protected by § 7 because the union supported the strike and thus walkout was not a "wildcat strike"). *But see South Central Timber Dev., Inc.*, 230 N.L.R.B. 468, 95 L.R.R.M. 1442 (1978) (union longshoremen's refusal to load logs from snow laden rafts when employer used inexperienced winchmen protected because workers were not acting under union auspices).

152. *See, e.g., NLRB v. KDI Precision Products, Inc.*, 436 F.2d 385 (6th Cir. 1971) (circulating petition protesting excessive heat in workplace); *Elam v. NLRB*, 395 F.2d 611 (D.C. Cir. 1968), *enforcing* 165 N.L.R.B. 22 (1967) (walkout in protest of unsafe mail machine); *NLRB v. Southern Silk Mills, Inc.*, 209 F.2d 155 (6th Cir. 1953), *cert. denied*, 347 U.S. 976 (1954) (walkout over excessive heat).

153. *See, e.g., NLRB v. Belfry Coal Corp.*, 331 F.2d 738 (6th Cir. 1964), *enforcing* 139 N.L.R.B. 1058 (1962) (refusal to work in mine beyond posted danger signs); *T & T Industries, Inc.*, 235 N.L.R.B. No. 73 (1977) (refusal of worker to drive truck with suspect brakes and headlights); *G. W. Murphy Industries, Inc.*, 183 N.L.R.B. 996, 74 L.R.R.M. 1474 (1970) (walkout due to excessive smoke and heat).

Although safety walkouts may be protected by section 7, the NLRA does not provide a right to refuse unsafe work *per se*. The right protected is one to engage in concerted activities. Consequently, the extent of protection afforded by section 7 of the NLRA to employees who walk off their jobs for safety reasons differs significantly from that afforded by section 11(c) of OSHA, according to the focus and purposes of each act.

First, the reasonableness of the employees' action under section 7 is irrelevant to the determination of whether a controversy exists over conditions of employment.¹⁵⁴ So long as employees have a good faith belief in the existence of unsafe working conditions, their actions constitute a labor dispute within NLRA section 2(9).¹⁵⁵ Under this subjective standard of review, neither the Board nor the reviewing courts need scrutinize the actual conditions that provoked the workers' action. The conditions can present no danger or constitute only a minimal safety problem.¹⁵⁶ In contrast, under the disputed OSHA regulation only a reasonable belief that there is a real danger of death or serious harm will justify a walkout. A recent finding by an OSHA compliance officer that a condition complied with OSHA's safety standards would most certainly be the best evidence to rebut employees' claims under section 11(c).

The second significant difference pertains to the persons protected by each act. OSHA extends protection only to an individual who is actually threatened with harm.¹⁵⁷ Depending on the hazard, the right to refuse work could apply to one person or to an entire factory, but a nexus between the condition and the individual refusing work must be established. The NLRA, however, requires that the employees' actions be "concerted" and undertaken for "mutual aid and protection." This language has been interpreted to encompass " 'intended, contemplated, or even referred to' group action."¹⁵⁸ No nexus between the condition promoting the walkout and the actor need be established so long as the refusal to work is over a shared grievance or in support of other workers' grievances. For example, in *Morrison-Knudsen v. NLRB*,¹⁵⁹ the Court of Appeals

154. *Washington Aluminum Co. v. NLRB*, 370 U.S. 9, 18 (1961); *Union Boiler Co. v. NLRB*, 530 F.2d 970 (4th Cir. 1975) (per curiam), *enforcing* 213 N.L.R.B. 818 (1975); *Essex International Co.*, 213 N.L.R.B. 260, 87 L.R.R.M. 1671 (1974).

155. *Washington Aluminum Co. v. NLRB*, 370 U.S. 9, 18 (1961).

156. *See, e.g.*, *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811 (6th Cir. 1975) (walkout arising from failure of company to maintain plant discipline).

157. *Compare* 29 U.S.C. § 660(c)(1) (1976) *with* 29 C.F.R. § 1977.12(b) (1978). The statutory language would permit one to refuse work on behalf of others who are exposed to danger while the regulation limits the right to those actually threatened with danger.

158. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).

159. 358 F.2d 411 (9th Cir. 1966).

for the Ninth Circuit held that a father's refusal to work because of the danger to which his son was exposed constituted a concerted activity. The court reasoned that when employees "'make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection' although the aggrieved workman is the only one of them who has any immediate stake in the outcome.'"¹⁶⁰

In addition, there is some doubt at the present time concerning whether a solitary employee would be protected under the NLRA for refusing to perform unsafe work. The NLRB seems to have adopted the position that any safety related action will be deemed to be concerted, notwithstanding lack of support from fellow workers. The Board has ruled, for example, that when an employee makes a safety complaint under OSHA or to a state health department, his action is concerted because the benefit sought ultimately accrues to all workers and thus concurrence of co-workers is implied.¹⁶¹ The Third,¹⁶² Fifth,¹⁶³ and Ninth¹⁶⁴ Circuits, however, have refused to accept the Board's implied concerted action theory. Under these courts' decisions, a solitary employee who refuses hazardous work that threatens only his well-being would not be protected by section 7.¹⁶⁵

The procedural aspects of the two acts also differ. Under section 7, employees need not specifically notify an employer prior to walking off the job of the nature of the grievance,¹⁶⁶ whereas under OSHA a request must be made, conditions permitting, to the employer to correct the safety hazard before a walkout can occur.¹⁶⁷

Finally, contrary to the assertion by the Sixth Circuit in *Whirlpool*, the remedies afforded by each act are not coextensive.

160. *Id.* at 414 (quoting *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942)).

161. See *Jim Causley Pontiac*, 232 N.L.R.B. No. 37 (1977); *B & P Motor Express, Inc.*, 221 N.L.R.B. No. 96 (1977); *Allelvia Cushion Co.*, 221 N.L.R.B. 999, 191 L.R.R.M. 1131 (1975) (cases holding that an employee who files a complaint with OSHA or state health department protected by § 7 although acting alone, because benefit sought accrues to all workers). See also *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1962) (attempts by solitary employee to enforce collective bargaining contract deemed concerted, notwithstanding absence of co-worker support).

162. *NLRB v. Northern Metal Co.*, 440 F.2d 881 (3d Cir. 1971).

163. *NLRB v. Buddies Suprmkt., Inc.*, 481 F.2d 714 (5th Cir. 1973).

164. *NLRB v. C & I Air Conditioning Co.*, 486 F.2d 977 (9th Cir. 1973).

165. *Id.* (worker who voiced complaints about unsafe temporary stairs and refused to go up stairs in the future not acting in concert for mutual aid and protection when acting on his own behalf).

166. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). The employee, however, must give notice to the employer at some time during the labor dispute. *A.H.I. Mach. Tool & Die v. NLRB*, 432 F.2d 190, 198 (6th Cir. 1970); *NLRB v. Marydale Prods. Co.*, 311 F.2d 890, 892 (5th Cir. 1963).

167. 29 C.F.R. § 1977.12(2)(b) (1978).

Although an employer may not discharge or otherwise discriminate against an employee for the exercise of protected section 7 activities, he may permanently replace the striking worker.¹⁶⁸ Once a permanent replacement is found, an employee has no right to be reinstated.¹⁶⁹ Under OSHA, the employer is prohibited from discriminating because of the exercise of protected rights. Because the purpose of shielding the worker from employer retaliation is to provide an alternative to employees facing a risk of serious injury, discrimination within the meaning of OSHA would include abolition of one's job or permanent replacement. Indeed, reinstatement is expressly authorized as a remedy against unlawful employer discrimination.¹⁷⁰

B. Section 502 Of The LMRA

The right to refuse hazardous work is expressly protected by section 502 of the Labor-Management Relations Act.¹⁷¹ It provides that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike." This section has particular importance for organized workers who have express or implied no-strike obligations in their collective bargaining contracts. A work stoppage under section 502 cannot be enjoined under section 301(a) of the LMRA.¹⁷² Moreover, section 502 protects from

168. A strike over conditions of employment is an economic strike, during which time the employer may seek to continue operating by hiring permanent replacements. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). One striking over the employer's unfair labor practices, however, may not be permanently replaced and does have a right to be reinstated upon an unconditional request for reinstatement. *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). See generally Comment, *The Reinstatement Rights of Economic Strikers: Laidlaw Five Years After*, 3 U. BALT. L. REV. 89 (1973).

169. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

170. 29 U.S.C. § 660(c)(2) (1976).

171. 29 U.S.C. § 143 (1976).

172. 29 U.S.C. § 185(a) (1976), provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." This section conflicted with § 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1976), which limited the power of federal courts to issue injunctions in labor disputes. In *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Supreme Court reconciled these two provisions and held that federal courts can enjoin a strike in violation of an express no-strike clause provided certain equitable considerations are met. An injunction can also issue against a striking union that has agreed only to compulsory arbitration, because an agreement not to strike may be implied from an agreement to arbitrate. *Gateway Coal Co. v. UMW*, 414 U.S. 368 (1974); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). See generally Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and The Occupational Safety and Health Act*, 52 NOTRE DAME LAWYER, 802, 809-14 (1977) [hereinafter cited as ASHFORD & KATZ]; ATLESON, *supra* note 10, at 665-75; Tobin, *OSHA, Section 301 and the NLRB: Conflicts of Jurisdiction and Rights*, 23 AM. U.L. REV. 837, 841-45 (1974).

retaliation employee action that would otherwise run afoul of the contractual no-strike clause¹⁷³ and would be unprotected by section 8(a)(1) of the NLRA.¹⁷⁴

1. Abnormally Dangerous Conditions

Prior to the Supreme Court's decision in *Gateway Coal Co. v. UMW*,¹⁷⁵ two tests had emerged to determine the existence of abnormal dangerous conditions. The first test embraced by the courts was a subjective one — a good faith belief that conditions at the workplace were abnormally dangerous brought an employee's action under the protective umbrella of section 502.¹⁷⁶ Furthermore, the testimony of employees was held admissible to prove the existence of physical conditions provoking the walkout.¹⁷⁷ The subject good faith test was later rejected by the NLRB in *Redwing Carriers*¹⁷⁸ in which the Board adopted an objective evidence test:

It is necessary first to clarify the meaning of the term "abnormally dangerous conditions" as used in Section 502. We are of the opinion that the term contemplates, and is intended to insure, an objective as opposed to a subjective test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."¹⁷⁹

The objective evidence test enunciated in *Redwing* received approval by the Supreme Court in *Gateway Coal Co. v. UMW*,¹⁸⁰ which involved a local union of the U.M.W. that walked off the job because management rehired two supervisors who had falsified tunnel air flow recordings. The union refused to arbitrate the dispute under its compulsory arbitration agreement, and the employer subsequently sought to obtain an injunction against the work stoppage and to compel arbitration. The Supreme Court reversed the decision of the Third Circuit Court of Appeals,¹⁸¹ which had held

173. See, e.g., *Interlake, Inc. v. NLRB*, 529 F.2d 1277 (8th Cir. 1976); *Combustion Eng'r, Inc., Power Sys. Div.*, 224 N.L.R.B. 542, 93 L.R.R.M. 1049 (1976). *ASHFORD & KATZ*, *supra* note 172, at 807; *ATLESON* *supra* note 10, at 659.

174. See text accompanying note 150 *supra*.

175. 414 U.S. 368 (1974).

176. *Gateway Coal Co. v. UMW*, 466 F.2d 1157, 1160 (3d Cir. 1972), *rev'd*, 414 U.S. 368 (1974); *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 757 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

177. *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 758 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

178. 130 N.L.R.B. 1208 (1961), *enforced as modified sub nom.* *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

179. *Id.* at 1209.

180. 414 U.S. 368, 385-87 (1974).

181. 466 F.2d 1157 (3d Cir. 1972).

that safety disputes were not arbitrable, and ordered the union to submit its grievance to binding arbitration. The Court in *Gateway* held that safety issues were presumed to be included in a union's duty to arbitrate, absent express exclusion from collective bargaining contracts. In so holding, the Court extended the policy favoring arbitration and peaceful settlement of labor disputes established in the *Steelworkers* trilogy¹⁸² to encompass safety issues.

Concomitantly, the *Gateway* Court reaffirmed the right of workers to refuse to work under abnormally dangerous conditions. The Court stated "that a work stoppage called solely to protect employees from immediate danger is authorized by § 502 and cannot be the basis for either a damages award or a *Boys Market* injunction."¹⁸³ The *Gateway* Court, however, rejected the Third Circuit's view that a good faith belief in the existence of abnormal conditions invokes the protection of section 502, reasoning that "[a]bsent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment, however honest it may be."¹⁸⁴ An employee seeking to justify a contractually prohibited work stoppage under section 502 must present "ascertainable, objective evidence supporting [his] conclusion that an abnormally dangerous condition for employment exists."¹⁸⁵ Accordingly, the Court held in *Gateway* that objective evidence was lacking to justify a continued refusal to work and issued an injunction against the walkout.

The objective evidence test has created an additional barrier to employees seeking to vindicate the right to avoid hazardous work. Not only must an employee prove that a danger in fact existed and that he acted in good faith, but he must also establish that the danger was greater than that considered normal for the type of work concerned. In *Anaconda Aluminum*,¹⁸⁶ the NLRB defined the evidentiary burden upon employees claiming section 502 protection as follows:

Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous

182. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). In the *Steelworkers* trilogy, the Supreme Court established the principle that the subject of a labor dispute is presumed to be arbitrable unless expressly excluded from an arbitration clause.

183. 414 U.S. at 385.

184. *Id.* at 386.

185. *Id.* at 386-87.

186. 197 N.L.R.B. 336, 80 L.R.R.M. 1780 (1972).

does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases.¹⁸⁷

Requiring that the danger be abnormal before a worker is permitted to refuse work is particularly harsh when applied to hazardous occupations. A condition may be imminently threatening to life or limb, but if part of the custom in the trade¹⁸⁸ or if tolerated in the past by employees,¹⁸⁹ it does not justify a refusal to work nor does it prevent employer retaliation. The abnormally dangerous requirement also demonstrates the limited utility of section 502 in preventing work-related injury. It effectively gives license to employers to continue unsafe operating procedures.

Recent decisions and the advent of OSHA indicate that the definition of abnormally dangerous conditions may be undergoing revision. In *Banyard v. NLRB*,¹⁹⁰ the Court of Appeals for the District of Columbia reversed an NLRB decision¹⁹¹ that an arbitrator's ruling was determinative concerning a subsequently filed unfair labor practice complaint under sections 7 and 502. The arbitrator had ruled that a truck driver could be ordered under the terms of his union contract to continue an unsafe and illegal work practice. The court of appeals held that the NLRB could not defer resolution of an unfair labor practice complaint to an arbitrator's ruling requiring employees to violate state statutory safety requirements, because such a ruling was repugnant to the purpose of the NLRA.¹⁹² Although not directly addressing the scope of the right to

187. *Id.* at 344 (emphasis added). *Accord*, *Curtis Mathes Mfg. Co.*, 145 N.L.R.B. 473, 481, 54 L.R.R.M. 1414, 1415 (1963) (routine breakdown of blower system in a lumber yard causing "discomfort" in breathing, coughing, sneezing, and spitting of dust not an abnormal danger). Evidence of new factors that changed the character of a danger was found in *Plain Dealer Publishing Co. v. Cleveland Typographical Union No. 53*, 520 F.2d 1220 (6th Cir. 1975) (threat of violence entailed in crossing another union's lawful picket line); *Philadelphia Marine Trade Ass'n v. NLRB*, 330 F.2d 492 (3d Cir. 1964), *enforcing* 138 N.L.R.B. 737 (1962), *cert. denied sub nom. Longshoremen Local v. NLRB*, 379 U.S. 841 (1964) (use of pallets rather than slings in unloading cargo); *Combustion Eng'r, Inc.*, 224 N.L.R.B. 542, 93 L.R.R.M. 1049 (1976) (threat of violence from two intruders on worksite).

188. *See, e.g.*, *NLRB v. Fruin-Colnon Constr. Co.*, 330 F.2d 885, 890-91 (8th Cir. 1964) (mining workers widening shaft not justified in refusing work where work platform, although dangerously slippery, had been built at a slant); *Anaconda Aluminum*, 197 N.L.R.B. 336, 344, 80 L.R.R.M. 1780, 1782 (1972) (employees following normal work procedures exposed to pot full of hot pitch (tar) not justified in refusing to work).

189. *See, e.g.*, *G.F. & I. Steel Corp. v. U.M.W.*, No. C-5083 (D. Colo. Nov. 12, 1973) (lack of medical services available at mine not basis for walkout when union had several months earlier complained about medical services without finding any need to stop work).

190. 505 F.2d 342 (D.C. Cir. 1974).

191. *McLean Trucking Co.*, 202 N.L.R.B. No. 102, 82 L.R.R.M. 1652 (1973).

192. 505 F.2d at 347.

refuse hazardous work under section 502 of the LMRA, the decision suggests that abnormally dangerous conditions should be defined by statutory safety standards such as those in OSHA. Indeed, several commentators have argued that OSHA standards should be employed as definitions of conditions that are abnormally hazardous or used as conclusive presumptions of such dangers.¹⁹³ The Supreme Court in *Gateway*, however, strongly implied that any statutory right in derogation of a contractual obligation not to strike should be narrowly interpreted. The OSHA standards used to define abnormally dangerous conditions would consequently be limited to imminent dangers or serious safety violations.¹⁹⁴

2. Section 502 and Section 11(c)

A worker who has been discriminated against because of a work stoppage justified by section 502 of the LMRA may file an unfair labor practice complaint with the NLRB. When the NLRB defers such complaints to OSHA, workers will find the extent of protection from employer retaliation changed in several respects. Whether section 502 provides a right of group action or extends only to employees threatened by a danger has never been decided.¹⁹⁵ Under section 11(c) of OSHA, the right is an individual one.¹⁹⁶ In addition, the reasonable belief standard of section 11(c) is considerably more flexible than the objective evidence test of section 502; an employee cannot be penalized for an incorrect assessment of a condition provided it is reasonable under the circumstances, whereas section 502 protects only those whose perceptions of a danger are consistent with an objective determination of the degree of actual danger involved. Furthermore, the degree of danger enabling workers to refuse work under each statute also varies. Only a serious threat to life or limb will sustain an action under OSHA, while the nature of the occupation determines the extent of danger that would allow workers to refuse work under section 502. Section 11(c) could thus be used to expand the situations in which employees in particularly hazardous occupations can refuse to work while narrowing the scope of the right to refuse work in occupations where threats to life and limb are uncommon.

193. ASHFORD & KATZ, *supra* note 172, at 826-34. ATLESON, *supra* note 10, at 706. It has also been suggested that the objective evidence test of § 502 be replaced by a standard of reasonableness similar to that of the regulation interpreting section 11(c) of OSHA. *Id.* at 711-13.

194. OSHA § 17(j), 29 U.S.C. § 666(j) (1976) defines a serious violation as one where "there is a substantial probability that death or serious physical harm could result." See OSHA FIELD OPERATIONS MANUAL, Ch. VIII(B), *supra* note 51, at ¶ 4360.2.

195. *But see* Clark Eng'r & Constr. Co. v. United Bhd. of Carpenters and Joiners, 510 F.2d 1075, 1079 (6th Cir. 1975); *United States v. Union Carbide Corp.*, 265 F. Supp. 756, 760 (D.D.C. 1966) (cases state that § 502 is available only to workers exposed to danger).

196. *But see* note 157 *supra*.

A unique aspect of section 502 is that it also prevents a walkout from being considered a strike. When a walkout is provoked by an abnormal danger, therefore, an employer cannot obtain an injunction against the action pursuant to section 301(a) of the NLRA.¹⁹⁷ Unlike section 502, the regulation issued under section 11(c) of OSHA, does not specifically state that employee action qualifying under its aegis is not a strike. It merely provides a right of action to the employee if the employer discriminates because of the exercise of protected rights. Because a walkout by union employees under a no-strike obligation could conceivably meet the requirement of section 11(c), but not those of section 502, a problem arises as to whether action taken under section 11(c) may be enjoined under section 301(a) of the NLRA. It could be argued that an injunction would constitute employer interference with protected rights under OSHA and therefore could not be obtained. Moreover, it is doubtful whether equity could grant an injunction consistent with the "clean hands" rule to an employer whose own action in violating a statutory duty under OSHA promoted the employee walkout.¹⁹⁸ In addition, if section 11(c) does not prohibit an injunction, an anomalous situation could occur: the employer could secure an injunction against a walkout, yet be liable under section 11(c) for any subsequent disciplinary action imposed because of the employee's refusal to work. The employer's duty not to discriminate would not be coterminous with the employee's no-strike duty.

Implying a parallel right to refuse unsafe work under OSHA creates ambiguities in the extent of a union's no-strike obligations. The problems can be avoided, however, through contract negotiation. A no-strike obligation can be expressly negated or safety issues exempted from the duty not to strike.¹⁹⁹ In this event, union workers would not violate their contracts when they walk off the job for safety reasons, and sections 502 and 301(a) would accordingly be inapplicable. Also, provisions defining the conditions under which workers would be entitled to refuse to work could be incorporated into collective bargaining agreements.²⁰⁰

197. See text accompanying note 172 *supra*.

198. DOPPELT, *supra* note 150, at 1024.

199. Gateway Coal Co. v. UMW, 414 U.S. 368, 382 (1974). This may be an unrealistic alternative because 90% of all collective bargaining agreements have unconditional or conditional no-strike pledges. BUREAU OF NATIONAL AFFAIRS, *Basic Patterns In Union Contracts*, §95:4 (7th ed. 1971).

200. See Jones & Laughlin Steel Corp. v. UMW, 519 F.2d 1155 (3d Cir. 1975); Hanna Mine Co. v. United Steelworkers of America, 464 F.2d 565 (8th Cir. 1972). Hazardous work clauses are found in approximately 10% of union contracts. Seven out of ten clauses enable a worker to refuse hazardous work on the spot. The remaining 30% require the worker to follow a prescribed procedure such as notifying management before refusing work. BUREAU OF NATIONAL AFFAIRS, *supra* note 199, at §95:4. Safety committees are a prominent feature of safety-related contract provisions. Nineteen percent of non-manufacturing industry contracts provide for such committees, while 38% of manufacturing industry contracts do so. *Id.*

IV. CONCLUSION

Assessing the validity of the OSHA regulation creating the right of workers to refuse hazardous jobs involves an examination of congressional intent, the language and purpose of OSHA, comparable provisions in other labor statutes, and national labor law policy. Arguments exist supporting both the Department of Labor's and industry's interpretations of OSHA.

On the side of industry, it can be argued that workers already have the prerogative to refuse unsafe work under the NLRA and LMRA. Creating a parallel right under OSHA produces duplication of rights and unnecessary conflict in the jurisdiction of the two acts. Consequently, employers will not know when they are within their rights to discipline or fire workers who walk out because of unsafe employment conditions.

The agreement between the Occupational Safety and Health Administration and the NLRB attempts to minimize the duplication. It does not, however, eliminate the problems with respect to the rights to refuse hazardous work and engage in concerted action. The scope of the protection given to employees who walk off the job because of unsafe conditions varies under each act. Because the NLRB will not defer to the Occupational Safety and Health Administration when an employee does not file under OSHA, workers can still choose to file a discrimination complaint under the statute affording the greatest protection to their conduct. It may also be possible for a person to relitigate a discrimination complaint under one act after obtaining an unsatisfactory result under the other.²⁰¹ Moreover, the NLRB's deferral policy itself may alter the scope of rights under the NLRA in a manner not intended by Congress. Finally, because OSHA is applicable to union workers, the regulation allowing employees to refuse work will have undetermined consequences for the scope of contractual agreements not to strike.

Notwithstanding these problems, several considerations recommend validation of the right created by the Department of Labor regulation. The scope of the right in the regulation is coextensive with the need for self-help under OSHA. Unlike the self-help remedies of the NLRA, the regulation does not conflict with the administrative mechanisms available to eliminate occupational injury. In addition, the regulation is specifically designed to protect workers from injury while the NLRA and LMRA rights regulate

201. See *Brennan v. Alan Wood Steel Co.*, No. 74-1810 (E.D. Pa. Oct. 14, 1975). OSHA will only defer to the outcome of other proceedings if the rights and facts involved are "substantially" the same. 29 C.F.R. § 1977.18(b) (1978). Since §§ 7 and 502 differ from § 11(c) in material respects, it could be asserted that the NLRA rights are not substantially the same and thus OSHA need not defer to the results of unfair labor practice complaint litigation.

relations between labor and management. Most importantly, the policy favoring peaceful settlement of labor controversies is not contravened by the regulation. An employee is permitted to resort to self-help only when statutory means are unavailable to prevent serious injury or death and only if there is an objective basis to conclude that an imminent danger is present.

With the current split between the Fifth and Sixth Circuits over the Secretary's regulation, as well as the importance of the issue presented, it is simply a matter of time before the Supreme Court decides to resolve the conflict between the circuits. Congress could, of course, easily resolve the issue by amending OSHA to permit or disallow the result reached by *Whirlpool*. Express congressional affirmance or denial of the right to walk off a hazardous jobsite is needed to end the controversy over section 11(c) of OSHA.

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