THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970: THE RIGHT TO REFUSE TO WORK UNDER HAZARDOUS CONDITIONS

I. INTRODUCTION

Increasing public concern with environmental pollution[1] and industrial safety and health[2] during the 1960's led to heightened congressional awareness of inadequate federal regulation of the employment environment.[3] Congress initially responded by passing several specialized safety and health statutes applicable to particular employees or industries.[4] A disastrous coal mine explosion in 1968[5] and increased

1. Environmental concern with regulatory programs at the federal level first manifested itself in the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1976).

2. By 1970, 14,500 persons were killed annually from industrial accidents, and a reported 2.2 million workers per year suffered disabling injuries in the workplace. Moreover, the rate of industrial accidents, measured in terms of the number of disabling injuries per million worker hours, increased 20% between 1958 and 1970. In addition, the Public Health Service estimates that 390,000 new occurrences of occupational disease are detected each year. S. REP. No. 1282, 91st Cong., 2d Sess. 2-3, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5178-79. A study commissioned by the federal government concludes that 25 million deaths and serious injuries go unreported every year for lack of adequate reporting techniques. Cohen, *OSHA and the Workplace Environment: An Unfulfilled Promise*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-SEVENTH ANNUAL CONFERENCE ON LABOR 214 (D. Raff ed. 1975).

The economic cost of industrial accidents is also substantial. The annual loss to the economy is more than $8 billion, $1.5 billion of which represents lost wages. The loss of work caused by industrial accidents is ten times greater than the loss caused by strikes. 116 CONG. REC. 38713 (1970); *see* S. REP. No. 1282, 91st Cong., 2d Sess. 2, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5178.

3. In 1713 Bernardino Ramazzini, the "father of occupational safety and health," described the adverse effects of an unhealthy workplace in *Diseases of Workers*. Not until the twentieth century, however, were effective steps taken to improve the industrial environment in the United States. For an historical overview of the law of occupational safety and health, see J. PAGE & M. O'BRIAN, BITTER WAGES, chs. 3-5 (1973). *See generally* M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW (1978).

4. The McNamara-O'Hara Public Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1976), required suppliers of governmental services to comply with safety and health guidelines. The National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. §§ 951-968 (1976), conditioned the receipt of federal funds on the maintenance of safe working conditions. The Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. §§ 721-740 (1976) (repealed 1977), established safety and health standards for segments of the mining industry. Except for the Metal and Nonmetallic Mine Safety Act, which has been incorporated into the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-962 (1976) (amended 1977), the safety and health standards of these statutes have been superseded by the standards established under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1976) (amended 1978). The enforcement and penalty provisions of these acts, however, remain operative. *See* Martin, *OSHA: A New*

pressure from organized labor[6] later set the impetus for the first comprehensive job safety and health reform legislation, the Occupational Safety and Health Act of 1970 (Act).[7]

The Act seeks "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[8] Employers must comply with specific safety and health standards promulgated under the Act, and when no specific standard is applicable, the employer has a general duty to furnish his employees with a place of employment free from recognized hazards that may cause death or serious physical harm.[9]

The Act also provides employees with numerous rights intended to advance their health and safety,[10] including rights to request an OSHA inspection of the workplace,[11] to "walkaround" with an OSHA inspector during an inspection,[12] and to exercise their rights without recrimi-

Era in Safety Concern, in LABOR LAW DEVELOPMENTS 1973: PROCEEDINGS OF NINETEENTH ANNUAL INSTITUTE ON LABOR LAW 139 (V. Randall ed. 1973).

5. The explosion, in Farmington, West Virginia, killed 78 miners. *See* N. ASHFORD, CRISIS IN THE WORKPLACE: OCCUPATIONAL DISEASE AND INJURY 46 (1976); M. ROTHSTEIN, *supra* note 3, at 4.

6. Organized labor has become increasingly concerned with the health and safety of workers. Historically, union leaders concentrated more heavily on obtaining economic concessions from management than on improving health and safety conditions. *See* N. ASHFORD, *supra* note 5, at 30-31, 492-93. By 1966, however, when health and safety were mandatory subjects of collective bargaining under the National Labor Relations Act, the condition of the work environment became an important pawn in the labor-management power struggle. *Id. Compare* NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967), *with* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958). Consequently, employee interest groups lobbied for a strong federal law when Congress considered the Act. 116 CONG. REC. 38713 (1970).

7. 29 U.S.C. §§ 651-678 (1976) (amended 1978). Many courts and commentators use the acronym "OSHA" to refer to both the Act and the Occupational Safety and Health Administration, the agency within the Department of Labor responsible for administering the Act. For the purpose of clarity in this Note, "Act" will refer to Occupational Safety and Health Act, and "OSHA" will denote the Occupational Safety and Health Administration.

8. Occupational Safety and Health Act of 1970, § 2(b), 29 U.S.C. § 651(b) (1976).

9. *Id.* § 5(a), 29 U.S.C. § 654(a) (1976); *see* Marshall v. Daniel Constr. Co., 563 F.2d 707, 709 (5th Cir. 1977), *cert. denied*, 99 S. Ct. 216 (1978); Ace Sheeting & Repair Co. v. OSHRC, 555 F.2d 439, 440 (5th Cir. 1977); N. ASHFORD, *supra* note 5, at 143-44.

10. For a general discussion of employees' rights under the Act, see N. ASHFORD, *supra* note 5, at 150-52, 163-65; Cohen, *Employee Rights and Responsibilities Under OSHA*, in OCCUPATIONAL SAFETY AND HEALTH LAW 135 (1978).

11. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C. § 657(f)(1) (1976).

12. *Id.* § 8(e), 29 U.S.C. § 657(e) (1976), reads in part: "[A] representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the purpose of aiding such inspection."

nation by their employers.[13]

Perhaps the most fundamental of employee rights is one whose existence has yet to be definitively settled[14]—an employee's right to refuse to work under hazardous conditions yet retain the Act's protection from discharge or discrimination. This Note argues that the judiciary should recognize an implied right to refuse hazardous work in light of the Act's legislative history, the implications of preexisting labor law, and the practical and policy considerations supporting this conclusion.

II. AN IMPLIED RIGHT TO REFUSE TO WORK UNDER HAZARDOUS CONDITIONS

Pursuant to his authority to promulgate regulations under the Act,[15]

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13. *Id.* § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976) provides:

> 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 proceeding under or related to this chapter* 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 chapter.*

Id. (emphasis added). Section 11(c)(2) describes the implementation procedure for the antidiscrimination provision of § 8(c)(1):

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

Id. § 11(c)(2), 29 U.S.C. § 660(c)(2) (1976).

14. The scope of employee rights under the Act is not well defined for two reasons common to controversial and complex federal legislation. First, the Act contains several vague and redundant provisions. *See* N. ASHFORD, *supra* note 5, at 159-63; M. ROTHSTEIN, *supra* note 3, at 8. Second, the statute is a product of numerous compromises; the House and Senate bills sent to the Conference Committee alone contained 105 points of disagreement. 116 CONG. REC. 42203 (1970).

15. The Occupational Safety and Health Act of 1970, § 8(e), 29 U.S.C. § 657(g) (1976), states in part that: "[t]he Secretary . . . shall . . . prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under this chapter . . . ." The Secretary's interpretation of this Act, and the regulations promulgated pursuant thereto, must be deferred to if that interpretation is a reasonable one, even though some other interpretation would be more reasonable. *See* Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor, 524 F.2d 1337, 1338 (7th Cir. 1975); *cf.* Marshall v. Daniel Constr. Co., 563 F.2d 707, 710 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) (Secretary's interpretation of Act's requirements entitled to "great weight") (citing Brennan v. Southern Contractors Serv., 492 F.2d 498, 501 (5th Cir. 1974)); Budd Co. v. OSHRC, 513 F.2d 201, 205 (3rd Cir. 1975) (court must accord "significant weight" to Secretary's interpreta-

the Secretary of Labor published regulation 1977.12(b), which interpreted section 11(c) of the Act to entail an implied right to refuse to work: (1) when an employee, in good faith, reasonably concludes that (a) there is a real danger of death or serious injury and (b) there is insufficient time to eliminate the danger through regular enforcement channels, and (2) when the employee is unable to obtain a correction of the hazardous condition from the employer.[16]

The Secretary's interpretation has met with mixed reception by the

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tion of statute and regulations promulgated under this chapter). *See also* Zuber v. Allen, 396 U.S. 168, 192 (1969) (courts must show great deference to interpretation given to statute by agency officers, especially when the challenged administrative procedure involves a contemporaneous construction of a statute by those responsible for setting the statutory machinery into motion); Marshall v. Daniel Constr. Co., 563 F.2d at 710 (agency's regulation will be upheld so long as it is "reasonably related to the purposes of the enabling legislation") (quoting Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973)).

16. 29 C.F.R. § 1977.12 (1978) provides:

> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). *Certain other rights exist by necessary implication.* For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
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> (b)(1) On the other hand, review 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 circumstance, 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.
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> (2) 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 alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination.* The condition causing the employee's apprehension of death or injury must be of such a nature that a *reasonable person*, under the circumstances then confronting the employee, *would conclude that there is a real danger of death or serious injury* and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Id. (emphasis added).

judiciary. The district courts disagree about the validity of regulation 1977.12(b),[17] and a split among the appellate courts recently arose from the only two circuit courts that have ruled on the regulation.[18]

A. *Judicial Denial of Right to Refuse Hazardous Work*

One of the two federal courts of appeals to consider regulation 1977.12(b) held it ultra vires. In *Marshall v. Daniel Construction Co.*[19] the Secretary of Labor accused the company of unlawfully discharging one of its employees in violation of the Act's antidiscrimination provision.[20] The employee, an ironworker required to connect steel beams 150 feet above the ground, came down from his work position with his crew when they feared that the wind velocity threatened their safety. When the employee refused to obey the foreman's order to return to work, he was fired.[21]

The district court dismissed the complaint, concluding that section 11(c)(1) does not imply an employee right to refuse to work when faced with a perilous situation.[22] The court reasoned that even though the Act should be broadly construed to effectuate its legislative purpose of eliminating unsafe employment conditions, section 8(f)(1) of the statute[23] "clearly provides a[n exclusive] method for dealing with the threat

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17. *See* notes 22, 45 *infra*.

18. *See* notes 19-57 *infra* and accompanying text.

19. 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978).

20. For the text and a discussion of the antidiscrimination provision, see note 13 *supra* and accompanying text.

21. 563 F.2d at 710. The construction industry has one of the highest injury rates among the major occupational trades. Brennan v. OSHRC, 513 F.2d 1032, 1038-39 (2d Cir. 1975).

22. Dunlop v. Daniel Constr. Co., 4 O.S.H.C. 1125 (N.D. Ga. 1975), *aff'd sub nom.* Marshall v. Daniel Constr. Co., 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978); *accord*, Usery v. Certified Welding Corp., 6 O.S.H.C. 1142 (D. Wyo. 1977), *aff'd sub nom. on other grounds*, Marshall v. Certified Welding Corp., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1069 (10th Cir. Dec. 28, 1978); Aders v. Kennecott Copper Corp., No. 76-292-M (D.N.M. Oct. 13, 1976); Brennan v. Empire-Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio June 25, 1976), *rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870); Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976), *rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870); Brennan v. Diamond Int'l Corp., 5 O.S.H.C. 1049 (S.D. Ohio 1976), *appeal dismissed*, No. 76-2139 (6th Cir. Apr. 1977).

23. Occupational Safety and Health Act of 1970, § 8(f)(1), 29 U.S.C. § 657(f)(1) (1978) states in pertinent part:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representa-

of imminent danger through . . . a request for immediate inspection."[24]

A divided Court of Appeals for the Fifth Circuit affirmed the district court's dismissal.[25] Relying upon the statutory scheme and the legislative history of the Act, it concluded that the Secretary of Labor exceeded his grant of authority under the enabling provision of the statute.[26]

The court first found persuasive the presence in the Act of two sections that explicitly address the problem of imminently dangerous conditions in the workplace:[27] section 8(f)(1), which allows employees to request inspections,[28] and section 13, which permits the Secretary to petition the district courts to restrain employment conditions that create an imminent danger to the safety of employees.[29] The court reasoned that these sections contain the only procedures that employees may follow when faced with imminent danger in order to retain the Act's protection against dismissal.[30]

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tive of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees . . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists.

24. 4 O.S.H.C. 1125, 1126 (N.D. Ga. 1975), *aff'd sub nom.* Marshall v. Daniel Constr. Co., 563 F.2d 707 (5th Cir. 1977), *cert. denied,* 439 U.S. 880 (1978); *see* Petitioner's Brief for Certiorari at 5.

25. 563 F.2d 707 (5th Cir. 1977), *cert. denied,* 99 S. Ct. 216 (1978).

26. 563 F.2d at 710. *See* note 15 *supra* and accompanying text.

27. 563 F.2d at 710-11.

28. *See* note 23 *supra* and accompanying text.

29. Occupational Safety and Health Act of 1970, § 13, 29 U.S.C. § 662 (1976) provides:

(a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists 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 this chapter . . .

(b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this chapter . . . . [N]o temporary restraining order issued without notice shall be effective for a period longer than five days.

. . . .

(d) If the Secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employees, might bring an action against the Secretary in the United States district court . . . for a writ of mandamus to compel the Secretary to seek such an order and for such further relief as may be appropriate.

30. 563 F.2d at 711.

The court then examined the legislative history of the Act to support its conclusion that the Act contains no implied right that allows workers to walk off the job because of unsafe conditions.[31] The court relied upon Congress' consideration and rejection of two provisions in the House bill: a controversial section that would have permitted employees to walk off the job with full pay under certain conditions[32] and a proposal that would have authorized administratively ordered shutdowns when imminent danger was present in the workplace.[33] The House subsequently acceded to the Senate's version of these provisions: a right to request an OSHA inspection rather than a right to strike with pay,[34] and the vestiture in the district courts of sole authority to enjoin an employer's business operations.[35]

In a strong dissent, Judge Wisdom found unpersuasive the majority's inference from the legislative history that Congress intended to deny employees the right to refuse hazardous work.[36] He questioned the relevance of the two deleted provisions to the regulation at issue, arguing that neither of the provisions paralleled the right embodied in regulation 1977.12(b).[37] He also offered two justifications for upholding the Secretary's interpretation of the antidiscrimination provision. First, the regulation comprehends "one of the 'other rights' mentioned in 11(c)(1), a right to safe conditions implicit in the entire law."[38] Second, the regulation represents an "essential part of the employee enforcement envisioned by Congress" and protected by § 11(c)(1).[39] The employee plays an important role in the Act's enforcement because of the limited manpower available for inspections.[40] The right to refuse un-

31. *Id.* at 712.

32. *Id.*; 116 CONG. REC. 38369, 38377-78, 38723.

33. 563 F.2d at 713-15; 116 CONG. REC. 37338, 38369, 38372, 38378-79, 38713, 42201, 42203 (1970).

34. 563 F.2d at 713; H.R. REP. No. 1765, 91st Cong., 2d Sess. 37 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5234; *see* note 23 *supra*.

35. *See* note 29 *supra* and accompanying text.

36. 563 F.2d at 719 (Wisdom, J., dissenting). *See* Petitioner's Brief for Certiorari at 9.

37. 563 F.2d at 719-20 (Wisdom, J., dissenting).

38. *Id.* at 718. Section 11(c)(1) of the Act does not contain the phrase "other rights," but speaks of "any right afforded by this chapter." Occupational Safety and Health Act of 1970, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976).

39. 563 F.2d at 718 (Wisdom, J., dissenting). *See* notes 11-12 *supra* and accompanying text.

40. 563 F.2d at 718 n.5 (Wisdom, J., dissenting); *see* S. REP. No. 1282, 91st Cong., 2d Sess. 11-12, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5187-89; 116 CONG. REC. 38386 (1970); *cf.* NLRB v. Scrivener, 405 U.S. 117 (1972) (employee participation in enforcement of National Labor Relations Act); Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772

safe work increases the incentive for employees to invoke the protection of the Act[41] and helps to ensure the employee's availability for assistance in OSHA investigations.[42] Judge Wisdom thus concluded that the Secretary's regulation fills a dangerous gap in the Act and is consistent with the broad remedial purpose of protecting the American worker.[43]

B. *Judicial Recognition of the Right to Refuse Hazardous Work*

In *Marshall v. Whirlpool Corp.*[44] the Sixth Circuit Court of Appeals unanimously held that regulation 1977.12(b) is consistent with the Act and its legislative history, and is a valid exercise of the Secretary of Labor's rulemaking authority.[45] The Sixth Circuit thus placed itself

(D.C. Cir. 1974) (employee participation in enforcement of Federal Coal Mine Safety and Health Act).

In *Usery v. Babcock & Wilcox Co.* 424 F. Supp. 753 (E.D. Mich. 1976), the court noted that Congress expected that employers would voluntarily correct hazardous conditions or temporarily cease operations in most cases. As a practical matter, however, the court maintained that some relief must be accorded to employees during the period before statutory enforcement proceedings can be implemented. *Id.* at 757, 758 & n.7; 116 CONG. REC. 37341, 37602-04, 38372 (1970); *see* notes 143-56 *infra* and accompanying text.

41. 563 F.2d at 718 (Wisdom, J., dissenting).

42. *Id.*

43. *Id.*

44. 593 F.2d 715 (6th Cir.) (consolidated appeal), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870), *rev'g* Brennan v. Empire-Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio June 25, 1976), *and* Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976).

45. *Accord*, Marshall v. Seaward Constr. Co., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1244 (D.N.H. Mar. 28, 1979); Marshall v. Halliburton Servs., Inc., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1161 (N.D. W. Va. Feb. 27, 1979); Usery v. Babcock & Wilcox Co., 424 F. Supp. 753 (E.D. Mich. 1976). *See generally* Brennan v. Alan Wood Steel Co., 3 O.S.H.C. 1654 (E.D. Pa. 1975), in which an employer fired an employee who refused to work on a crane that he alleged to be unsafe in a complaint he had filed with OSHA. The employee first sought relief through grievance proceedings instituted under a collective bargaining agreement. An arbitrator held that the employee had wrongfully refused to work on the crane, but ordered reinstatement without back wages. The Secretary of Labor then sought under § 11(c) of the Act to procure for the employee accumulated seniority and back pay in addition to his reinstatement. A federal district court rejected the employer's argument that the Secretary must defer to the arbitrator's decision and held that OSHA deferral to arbitration is within the Secretary's discretionary powers. *See also* 29 C.F.R. § 1977.18 (1978).

In its subsequent disposition of the case, Usery v. Alan Wood Steel Co., No. 74-1810, 4 O.S.H.C. 1598 (E.D. Pa. 1976), the court apparently recognized a right of employees to refuse to perform hazardous duties under § 11(c) of the Act when the work is unsafe in fact. This right must be contrasted with regulation 1977.12(b), in which a reasonable belief of danger may invoke the protection of the Act. *See* note 16 *supra* and accompanying text. *See also* notes 136-37 *infra* and accompanying text.

"squarely in conflict with . . . the Fifth Circuit"[46] in *Daniel Construction*.[47]

The *Whirlpool* court consolidated appeals from two district courts that had invalidated the Secretary's regulation.[48] In one of the cases[49] two maintenance employees refused to perform their duty of cleaning a guard screen suspended twenty feet above the plant floor. Another maintenance worker had fallen to his death while cleaning the screen two weeks before this refusal. After the accident occurred, OSHA inspected the plant, issued a citation for a serious violation of the general duty clause of the Act, and ordered immediate abatement and a $600 penalty.[50] The employer partially replaced the inadequate screen and

46. 593 F.2d at 736.

47. 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978).

48. Brennan v. Empire-Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio June 25, 1976), *rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870) and Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976),*rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870).

In *Usery* the lower court explicitly found that the regulation had been violated, but invalidated the regulation as "clearly inconsistent" with the Act. *See* notes 49-54 *infra* and accompanying text. In *Brennan* the district court dismissed the complaint for failure to state a claim upon which relief can be granted. The attorneys in that suit entered into a pretrial agreement that the disposition of a pending motion to dismiss in Brennan v. Diamond Int'l Corp., 5 O.S.H.C. 1049 (S.D. Ohio 1976), *appeal dismissed*, No. 76-2139 (6th Cir. Apr. 1977), would be dispositive of the instant case if decided favorably to the employer. The court in *Diamond Int'l Corp.* subsequently granted the employer's motion to dismiss.

49. Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976), *rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870).

50. *Id.*

The general duty clause is contained in § 5(a), 29 U.S.C. § 654(a) (1976). *See* note 9 *supra* and accompanying text.

Penalties may be assessed for nonserious, serious, and willful violations of the Act. An employer cited for a nonserious violation—*i.e.*, when an accident or illness resulting from a violation ordinarily would not cause death or serious physical harm, but would have a direct or immediate relationship to the safety or health of employees—may incur a civil penalty of up to $1,000. A serious violation occurs when a substantial probability exists that the cited condition would result in death or serious physical harm. Fines of $1,000 may be levied for serious violations, although this amount may be adjusted downward by no more than $500, based on considerations of the employer's good faith, business size, and history of violations. An employer commits a willful violation when he intentionally and knowingly violates the Act, or when he knows of a hazardous condition and makes no reasonable effort to eliminate it. Penalties of up to $10,000 may be assessed against employers for a willful violation. When a willful violation causes the death of an employee, however, the employer is also subject to six months imprisonment. The fine can be increased to $20,000 and/or imprisonment for one year upon a subsequent violation. Occupational Safety and Health Act of 1970, § 17, 29 U.S.C. § 666 (1976); OCCUPATIONAL SAFETY AND

contested the citation before the Occupational Safety and Health Review Commission (OSHRC)[51] at the time the two employees refused to perform the cleaning operation.

The district court initially concluded that under regulation 1977.12(b) the employees justifiably refused to clean the screen.[52] The court found that the job presented a danger of death or serious bodily harm, and that the refusal to perform the task resulted from a genuine fear of death or serious bodily harm. Embracing reasoning analogous to that of *Daniel Construction*,[53] the court, nevertheless, invalidated the regulation as "clearly inconsistent" with the Act because Congress "squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not."[54]

The Sixth Circuit Court of Appeals reversed.[55] After reviewing the legislative history, the court concluded that the remedial nature of the Act requires deference to the Secretary's rulemaking authority,[56] and that regulation 1977.12(b) is consistent with the congressional purpose to protect worker safety.[57]

III. THE LEGISLATIVE HISTORY

Because the Act does not explicitly confer on employees the right to

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HEALTH ADMINISTRATION, DEPARTMENT OF LABOR, FIELD OPERATIONS MANUAL (CCH) 57-61, 83-85 (1974).

From July 1972 through December 1974, 98.53% of the 591,160 violations cited by OSHA were classified as nonserious, resulting in an average fine of $14.99. During the same period, 1.22% of the cited violations were serious and .25% were willful, with mean fines of $618.66 and $866.44, respectively. Barnum & Gleason, *A Penalty System to Discourage OSHA Violations*, 99 MONTHLY LAB. REV. 30 (Apr. 1976).

51. OSHRC, established under § 12 of the Act, 29 U.S.C. § 661 (1976) (amended 1978), is an independent agency empowered to conduct adjudicatory hearings in accordance with the Administrative Procedure Act. Consisting of three members appointed by the President, OSHRC rules on actions initiated by OSHA or the Secretary of Labor that are contested by employers or employees. The Commission is the "final arbiter of penalties if the Secretary's proposals are contested and . . . in such a case, the Secretary's proposals merely become advisory." Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973); *accord*, California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975); *see* N. ASHFORD, *supra* note 5, at 144-45, 171-72; Martin, *supra* note 4, at 143-44.

52. 416 F. Supp. at 33.

53. *See* notes 27-35 *supra* and accompanying text.

54. 416 F. Supp. at 33.

55. 593 F.2d 715 (6th Cir. 1979).

56. *Id.* at 721-26.

57. *Id.* at 736.

refuse hazardous work, courts have looked readily to the legislative history for guidance. The only two courts of appeals that have ruled on the existence of this right, however, have split on the issue. Each focused on the legislative history of the Act, but derived opposite conclusions from Congress' consideration and rejection of two provisions: one provision would have permitted employees to "strike with pay"; the other would have authorized the issuance of administrative orders to temporarily restrain an employer's operations.

A. *"Strike With Pay" Rejected*

When the House Committee on Education and Labor first reported out an occupational safety and health bill sponsored by Representative Daniels, the bill contained a section permitting employees to leave the workplace because of dangerous conditions without loss of compensation.[58] The controversial section, which became known as the "strike with pay" provision, was located in a part of the bill that regulated employee exposure to toxic substances—an area concerned with the health of workers rather than with specific safety hazards.[59] Under this bill an employee could be exposed to potentially harmful toxicity levels only if the employer instituted specified protective measures within sixty days of an HEW determination of the toxicity of materials in the workplace.[60] If the employer did not take these precautions, however,

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58. H.R. 16785, 91st Cong., 2d Sess. § 19(a)(5) (1970), *reprinted in* H.R. REP. No. 1291, 91st Cong., 2d Sess. 12 (1970); 116 CONG. REC. 38369, 38377-78 (1970); *see* 416 F. Supp. at 33.

59. [H]ealth hazards include toxic and carcinogenic chemicals and dusts, often in combination with noise, heat, and other forms of stress. Other health hazards include physical biological agents. The interaction of health hazards and human organism can occur either through the senses, by absorption through the skin, by intake into the digestive tract via the mouth, or by inhalation into the lungs. The results of these interactions can be respiratory disease, heart disease, cancer, neurological disorder, systemic poisoning, or a shortening of life expectancy due to general physiological deterioration. The disease or sickness can be acute or chronic, can require a long latency period even if the original exposure is brief, and can be difficult or impossible to diagnose early or with certainty.

N. ASHFORD, *supra* note 5, at 9.

> Safety hazards are those aspects of work environments which can cause burns, electrical shock, cuts, bruises, sprains, broken bones, or the loss of limbs, eyesight, or hearing. In general, the harm is usually of an immediate and sometimes violent nature, is very often associated with industrial equipment or the physical environment, and often involves an employment task that requires care and training. [There has been an] alarming increase in such injuries over the past decade.

Id. at 8-9. Because of the more spectacular nature of occupational safety hazards, the occupational health area has been relatively neglected in terms of education, enforcement, and legislative remedies. *Id.* at 9-10, 24-25; Cohen, *supra* note 2, at 215-16.

60. These measures entailed employee education of hazards, including appropriate symp-

an employee still could be subjected to toxic concentrations if he were permitted to "absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period."[61]

The committee bill faced stiff resistance on the floor of the House, primarily from members of the Republican party. Representative Steiger of Wisconsin, an outspoken opponent of the committee bill, introduced a substitute bill on the House floor, which would not permit workers to absent themselves from a dangerous condition without loss of pay.[62] Seeking bipartisan support for the committee bill, Representative Daniels offered a series of floor amendments that would have brought the committee bill closer to the Steiger substitute.[63] One amendment would have strengthened the enforcement mechanism by allowing employees to request a special inspection of the premises when threatened by imminently dangerous safety violations.[64] Daniels' proposed amendment was never acted upon, however, and the House adopted the Steiger substitute, which contained neither a "strike with pay" provision nor a provision permitting employees to request an immediate inspection of the workplace.[65]

When the Senate considered its version of an occupational safety and health bill, the sponsor of the Committee on Labor and Public Welfare Bill,[66] Senator Williams, advised that the bill did not contain a so-called "strike with pay" provision.[67] In lieu of this provision, the com-

toms of illnesses and precautions, provision of warning labels, and provision of effective protective equipment. H.R. 16785, 91st Cong., 2d Sess. § 19(a)(5) (1970), *reprinted in* H.R. REP. No. 1291, 91st Cong., 2d Sess. 12 (1970).

61. *Id.*

62. The Steiger substitute bill, H.R. 19200, 91st Cong., 2d Sess. (1970), received strong support from employer-interest groups. 116 CONG. REC. 383713 (1970).

63. *Id.* at 38372, 38377-78. Refering to the "strike with pay" provision, Daniels stated that the "provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm." *Id.* at 38377-78.

64. *Id.*

65. *Id.* at 38369-70, 38714-15, 38723-24.

66. S. 2192, 91st Cong., 2d Sess. (1970), *discussed in* S. REP. No. 1282, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177.

67. [T]he committee bill does not contain a so-called strike-pay provision. Rather than raising a possibility for endless disputes over whether employees were entitled to walk off the job with full pay, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection.

116 CONG. REC. 37326 (1970).

mittee bill, which the Senate ultimately passed, conferred on employees the right to request an immediate inspection when they believed that an imminently dangerous condition existed at the workplace.[68]

In conference committee, the House receded from its position on this item; the Senate's provision granting employees the right to request inspections prevailed.[69] This series of events gives rise to several persuasive arguments in support of the view of the legislative history advanced in the *Daniel Construction* dissent and the *Whirlpool* opinion. Because the so-called "strike with pay" provision pertained only to the regulation of toxic substances,[70] Congress' rejection of the provision does not necessarily amount to a rejection of the Secretary's interpretive regulation, which is directed primarily to the prevention of injuries arising from immediate safety hazards rather than from health hazards caused by toxic concentrations. The Fifth Circuit in *Daniel Construction* recognized that the "strike with pay" proposal addressed health rather than safety conditions,[71] but insisted that rejection of this proposal demonstrated a congressional fear that workers might abuse this right by disrupting their employer's business.[72] Although this may be true of a right that permits employees to stop working without loss of compensation, the court's analysis lacks merit when applied to a regulation that does not provide compensation to employees who refuse to work. Workers who do not receive compensation for unperformed work have less bargaining power and greater incentive to continue work than do workers who face a loss of wages if they cease to work.[73]

The rights granted to workers under the "strike with pay" provision

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68. *Id.*

69. H.R. REP. No. 1765, 91st Cong., 2d Sess. 37 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5234. This provision rests now in § 8(f)(1) of the Act, 29 U.S.C. § 657(f)(1) (1976), and is substantially reprinted in note 23 *supra*.

70. The House Committee Report noted that § 19(a)(5) of H.R. 16785 is addressed to proliferation of carcinogenic and toxic substances in the work environment. H.R. REP. No. 1291, 91st Cong., 2d Sess. 29 (1970).

> Only after the Department of Health, Education and Welfare made a determination that a substance was toxic would employees have a right to information about these substances, a right to necessary protective equipment, if any. To assure these rights, the bill guarantees that employees may not be forced to work without these safeguards. There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay.

Id. at 30. *See* notes 58-61 *supra* and accompanying text.

71. *See* note 59 *supra* and accompanying text.

72. 563 F.2d at 714.

73. *See* notes 78-82 *infra* and accompanying text.

also differ markedly from those granted under the Secretary's interpretation of the antidiscrimination provision. The right to "strike with pay" did not require an immediate danger, and applied only when sixty days of employer inaction followed a government determination that toxic levels existed in the workplace.[74] Regulation 1977.12(b), in contrast, bestows on employees a much more limited right to refuse to work: the employee must hold a good faith and reasonable belief that performance of the assigned work would entail a real danger of death or serious injury; there must be insufficient time to correct the danger through regular statutory channels; and the employee must have sought and been unable to obtain a correction from the employer.[75]

Another crucial feature that distinguishes the Secretary's regulation from the "strike with pay" provision is the element of compensation. The requirement that employers pay employees who refuse to work is a concept alien to labor relations law.[76] Indeed, to accept compensation for work not performed is good cause for discharge.[77] Walking off the job without drawing wages, however, is a traditional means of protesting conditions of employment.[78] The regulation, therefore, contains a right that is distinct from, and much less objectionable than, the "strike with pay" proposal.

Moreover, the legislative record is silent on the right of employees to refuse hazardous work without pay—a right that is less open to abuse than a right to "strike with pay."[79] The *Daniel Construction* majority correctly pointed out Congress' concern with the potential abuses inherent in permitting employees to receive compensation while not performing their duties,[80] but failed to distinguish the situation in which

74. H.R. 16785, 91st Cong., 2d Sess. § 19(a)(5) (1970), *reprinted in* H.R. REP. No. 1291, 91st Cong., 2d Sess. 12 (1970); *see* Marshall v. Whirlpool Corp., 593 F.2d 715, 730 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870).

75. *See* note 16 *supra* and accompanying text.

76. *See* Usery v. Babcock & Wilcox Co., 424 F. Supp. 753, 757 (E.D. Mich. 1976).

77. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 319 (1976). A single, spontaneous walkout, however, is a presumptively protected activity under § 7 of the National Labor Relations (Wagner) Act, 29 U.S.C. § 157 (1976). This action often represents the "First Fragile Flower of Unionism"—*i.e.*, the genesis of a collective consciousness. *See, e.g.*, Polytech, Inc., 195 N.L.R.B. 695, 79 L.R.R.M. 1474 (1972). *Compare* Elk Lumber Co., 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950),*with* NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962),*and* Polytech, Inc., 195 N.L.R.B. 695, 79 L.R.R.M. 1474 (1972),*and* First Nat'l Bank, 171 N.L.R.B. 1145, 69 L.R.R.M. 1103 (1968), *enforced*, 413 F.2d 921 (8th Cir. 1969).

78. *See* R. GORMAN, *supra* note 77, at 318-19.

79. *See* text accompanying notes 71-73 *supra*.

80. 563 F.2d at 714, *cert. denied*, 439 U.S. 880 (1978); 116 CONG. REC. 38393 (1970).

the employee does not receive compensation. The *Whirlpool* court attached proper weight to this distinction when it noted that, "Congress was specifically concerned with the monetary incentive that workers would have by claiming that they believed a situation was hazardous and then sitting back and collecting their paychecks for doing nothing."[81] Because Congress rejected a "strike with pay" provision, but never considered the quite different right to refuse hazardous work without pay, the legislative history is not inconsistent with the Secretary's regulation, which contains a limited right of employees to refuse hazardous work without compensation.[82]

Finally, Congress' replacement of the "strike with pay" provision with a right to request an immediate inspection[83] does not preclude the regulation at issue. Nothing in the legislative history indicates that Congress intended the right to request an inspection to be the exclusive remedy of employees faced with hazardous work. The regulation treats the right to request an inspection and the right to refuse imminently dangerous work as complementary; the right to refuse imminently hazardous work may be invoked only when the right to request an inspection will not adequately further the legislative purpose of protecting the employee.[84]

B. *Administrative Shutdown Rejected*

In addition to its rejection of the "strike with pay" provision, Congress rejected a provision that would have permitted the issuance of administrative orders to shut down an employer's operations when his employees faced imminent danger. Opponents of the right to refuse unsafe work argue that this rejection demonstrates a legislative intent to prohibit employees from refusing to work under hazardous conditions.

Both the House and Senate committee bills initially provided for administratively ordered shutdowns of an employer's business operation in the event of an imminent danger to employees. In the House, the Daniels bill permitted an OSHA inspector to issue a shutdown order

81. 593 F.2d at 731. *See id.* at 730 n.35.
82. *See* text accompanying notes 74-75 *supra*.
83. *See* notes 66-69 *supra* and accompanying text.
84. *See* note 8 *supra* and accompanying text.

effective for up to five days.[85] The Steiger bill, however, required the inspector to petition the Secretary of Labor to seek a court injunction to restrain conditions or practices that cause imminent danger to employees.[86] As with the "strike with pay" provision, Representative Daniels offered to amend his bill to conform with the Steiger bill's treatment of imminent-danger closings,[87] but the Steiger bill prevailed in the House.[88]

In the Senate, the Williams bill permitted an OSHA inspector to issue a three-day shutdown order when the imminence of the danger would not allow sufficient time to obtain a court injunction.[89] To protect against the possibility of abuse, the bill required the inspector to obtain the concurrence of a regional director in the Department of Labor.[90] An amendment offered by Senators Schweiker, Dominick, and

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85. H.R. REP. No. 1291, 91st Cong., 2d Sess. 8 (1970); 116 CONG. REC. 38372, 38379, 38394 (1970).

86. 116 CONG. REC. 38372, 38394 (1970).

87. *Id.* at 38376, 38378. Representative Daniels explained that he introduced this amendment because:

> [Business groups] believe that the power to shut down a plant should not be vested in an inspector. While there is no documentation for this fear, we recognize that it is very prevalent. The Courts have shown their capacity to respond quickly in emergency situations, and we believe that the availability of temporary restraining orders will be sufficient to deal with emergency situations. Under the Federal rules of civil procedure, these orders can be used ex parte. If the Secretary uses the authority that he is given efficiently and expeditiously, he should be able to get a Court order within a matter of minutes rather than hours.

Id. at 38378.

88. 116 CONG. REC. 38723-24 (1970); *see* note 65 *supra* and accompanying text.

89. S. 2193, 91st Cong., 2d Sess. § 11(b) (1970), *discussed in* S. REP. No. 1282, 91st Cong., 2d Sess. 13, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5189-90. The Senate bill stated:

> If the Secretary determines that the imminence of a danger is such that immediate action is necessary, and the Secretary determines that there is not sufficient time . . . to seek and obtain a temporary restraining order . . . the Secretary shall issue an order requiring such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibiting the employment or presence of any individual in locations or under conditions where such imminent danger exists. . . . If the Secretary delegates his authority to issue such an order to close a business or plant, in whole or in substantial part, he shall provide that such an order may not be issued until the employer has been notified in writing . . . and the concurrence of an official of the Labor Department appointed by the President with the advice and consent of the Senate is first obtained.

S. 2193, 91st Cong., 2d Sess. § 11(b) (1970), *quoted in* Marshall v. Daniel Constr. Co., 563 F.2d at 720 (Wisdom, J., dissenting).

90. S. 2193, 91st Cong., 2d Sess. § 11(b)(1970), *quoted in* Marshall v. Daniel Constr. Co., 563 F.2d at 720 (Wisdom, J., dissenting). The Senate report explained the rationale for requiring a concurring judgment: "The committee adopted this qualification in order to meet the concern expressed by some that it should not be within the sole judgment of a single inspector to determine

Saxbe, which would have vested sole authority in the courts to enjoin business operations, was narrowly defeated in the Senate.[91] In conference committee, however, the Senate acceded to the House provision that permitted restraining orders to issue only from the judiciary.[92]

Opponents of regulation 1977.12(b) maintain that Congress could not have intended to permit employees to effectively shut down their employers' plants through refusals to work when Congress refused to grant this authority to OSHA inspectors. Congressional opponents of the administrative shutdown order, however, expressed four main concerns, none of which precludes the right contained in the interpretive regulation. First, many opponents believed that due process of law would be denied to employers if an administrative official could order a plant to close without judicial process.[93] Regulation 1977.12(b), however, does not raise a due process objection because it relies on the private action of the employee rather than on governmental action.[94]

Congressional opponents also expressed concern over the harshness of economic loss to an employer whose plant is closed down by an OSHA inspector.[95] This concern is misdirected toward a regulation

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whether a hazard is so imminent as to warrant interference with a production operation." S. REP. NO. 1282, 91st Cong., 2d Sess. 13, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5189-90.

91. 116 CONG. REC. 37601-05 (1970).

92. H.R. REP. NO. 1765, 91st Cong., 2d Sess. 40, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5236. This provision is now located in § 13 of the Act, which is reproduced in pertinent part in note 29 *supra*.

93. *See* H.R. 1291, 91st Cong., 2d Sess. 56 (1970); 116 CONG. REC. 37338, 37602, 37604, 38372, 38379, 38393, 38713, 42202 (1970). *See generally* Note, *Due Process and Employee Safety: Conflict in OSHA Enforcement Procedure*, 84 YALE L.J. 1380 (1975). For example, Congressman Robison remarked:

> [T]he Daniels bill would allow an inspector to shut down a plant in certain situations, without giving the employer the opportunity to be heard on the matter. Such a procedure amounts to a denial of due process as guaranteed by the Constitution. Surely, a more reasonable approach would be to make available injunctive relief in Federal court . . . .

116 CONG. REC. 38713 (1970).

94. Marshall v. Daniel Constr. Co., 563 F.2d 707, 720-21 (5th Cir. 1977) (Wisdom, J., dissenting), *cert. denied*, 439 U.S. 880 (1978). The majority opinion in *Daniel Construction* addressed this response by focusing on the degree of protection that Congress intended to afford the employers, rather than on due process considerations. By refusing to allow OSHA inspectors to close a plant's operation, the court argued Congress surely did not intend to give this power to a single employee. 563 F.2d at 715 n.20. *But see* notes 95-96 *infra* and accompanying text.

95. 116 CONG. REC. 37338, 37346, 37602-03, 37621, 37624, 37629, 38378-79, 38713 (1970). Senator Schweiker, for example, commented during the Senate debate:

> [T]he closing down of an industrial plant is indeed a drastic remedy. . . . In the average case where the Department of Labor finds a real imminent danger in a plant, I

that addresses the individual action of an employee or a small group of employees: only those workers endangered by a plant operation may refuse to work, and they may only refuse to do the specific hazardous task.[96] Although the suspension of a specific operation might necessitate the closure of an entire plant or project, it most likely would be a rare occurrence and of short duration.

A related concern is that workers might abuse their right to seek an administrative injunction to intimidate their employers and increase their bargaining leverage.[97] The right recognized in regulation 1977.12(b), however, is subject to numerous conditions that substantially diminish any opportunity for abuse.[98] More importantly, because Congress deleted the "strike with pay" provision, an employee who refuses to work is not entitled to wages; thus, he would not invoke the regulation unless he actually feared for his safety.

Finally, some legislators expressed uneasiness over the potential abuse of government power by an OSHA inspector wrongfully influenced by employees.[99] To alleviate this concern, Congress granted the courts sole authority to enjoin imminent dangers.[100] The regulation at issue does not raise this objection because a private action gives rise to the protection afforded by the right to refuse hazardous work.[101] Moreover, this right is less objectionable than an administrative shutdown provision because the right is narrowly drawn and is by no means revolutionary to the labor law field; employees already have a limited right to refuse unsafe work under other federal legislation.[102]

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would expect the employer to agree with the Department, and close the plant or the portion of the plant voluntarily himself. But if there is a difference of opinion between the Department and the employer, I feel the Department should have to sustain a burden of proof in persuading a Federal district judge that the closure of the plant is necessary. I believe that both the Department's side and the employer's side should be heard before such a drastic step is taken against the will of the employer and throwing employees out of work.

116 CONG. REC. 37602 (1970). *See* note 87 *supra*.

96. Usery v. Babcock & Wilcox Co., 424 F. Supp. 753, 757 n.6 (E.D. Mich. 1976). "There is a vast amount of difference between shutting down an entire plant and allowing a few employees to refuse a particular work assignment." *Id.* at 757; *see* note 16 *supra*.

97. *See* Marshall v. Whirlpool Corp., 593 F.2d at 734 & n.47; Marshall v. Daniel Constr. Co., 563 F.2d at 714; H.R. REP. No. 1291, 91st Cong., 2d Sess. 56 (1970); 116 CONG. REC. 38393 (1970).

98. *See* note 16 *supra* and accompanying text.

99. H.R. REP. No. 1291, 91st Cong., 2d Sess. 56 (1970); 116 CONG. REC. 38393-94 (1970). *See also* notes 87, 89, 90 *supra* and accompanying text.

100. *See* note 29 *supra* and accompanying text.

101. *See* text accompanying note 94 *supra*.

102. *See* notes 112-116, 129-142 *infra* and accompanying text.

A close reading of the legislative history of the Act compels the conclusion that the history is not inconsistent with regulation 1977.12(b). Deletion of the "strike with pay" and administrative shutdown provisions does not preclude an employee, with no other reasonable choice, from refusing to perform hazardous work. "The Congress that passed this Act did not intend to put the worker to the choice—his job or his life."[103]

IV. THE IMPLICATIONS OF PREEXISTING LABOR LAW

A. *Judicial Construction of Analogous Antidiscrimination Provisions*

Several federal courts have interpreted the scope of antidiscrimination provisions similar to section 11(c)(1) of the Act. These decisions demonstrate a progressive approach to worker safety in marked contrast to the analysis of the Fifth Circuit in *Daniel Construction*.

The Federal Coal Mine Health and Safety Act of 1969[104] is the federal legislation most analogous to the Act. In *Phillips v. Interior Board of Mine Operations Appeals*[105] the District of Columbia Circuit determined that the Coal Mine Act grants miners the right to refuse to work under conditions that they believe in good faith to be hazardous.[106] The court found that a miner comes within the protection of section 110(b)(1),[107] the Coal Mine Act's antidiscrimination section, when he notifies his foreman of a suspected safety violation in the mine.[108] This notification, the court reasoned, constitutes the initial stage in two enforcement procedures expressly protected by section 110(b)(1): notifi-

103. Marshall v. Daniel Constr. Co., 563 F.2d at 722 (Wisdom, J., dissenting).

104. 30 U.S.C. §§ 801-962 (1976) (amended 1977).

105. 500 F.2d 772 (D.C. Cir. 1974) (2-1 decision), *cert. denied*, 420 U.S. 938 (1975).

106. 500 F.2d at 780; *accord*, Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974); *see* Galloway, *Rights and Entitlements of Miners and their Representatives Under the 1977 Amendments*, in FEDERAL REGULATION OF MINE, SAFETY, HEALTH AND RECLAMATION 181 (1978).

107. No person shall *discharge or in any other way discriminate* against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted *any proceeding under this chapter*, or (C) has testified or is about to testify *in any proceeding resulting from the administration or enforcement of the provisions of the chapter*.

Federal Coal Mine Health and Safety Act of 1969, § 110(b)(1), 30 U.S.C. § 820(b)(1) (1976) (amended 1977) (emphasis added).

108. 500 F.2d at 778-79. This case overturned an Interior Department rule that miners were protected from discharge only from the time they instituted a formal complaint with the Secretary of the Interior or an inspector. *See* Galloway, *supra* note 106, at 205-06.

cation of unsafe conditions to the Secretary of the Interior, and the institution of proceedings under the Coal Mine Act.[109] The court also noted from the legislative history the wide scope of protection intended by section 110(b)(1) and the broad remedial purpose of the Coal Mine Act.[110]

The language of the Occupational Safety and Health Act's antidiscrimination provision appears to give broader protection to workers than did the Coal Mine Act's provision at the time *Phillips* was decided.[111]

Congress' amendment of the Coal Mine Act in 1977[112] further supports the Secretary's interpretation of the Act. The amendment broadened the language of the antidiscrimination section to parallel that in the Occupational Safety and Health Act.[113] According to the Senate Committee Report on the 1977 Amendments, the broader language intends to ensure that the antidiscrimination provision will be construed expansively to continue to give miners the right to refuse hazardous work.[114] Although the relevant legislative intent regarding a congres-

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109. 500 F.2d at 779; *see* note 107 *supra*.

110. 500 F.2d at 781-83. Senator Kennedy, in introducing the antidiscrimination provision, remarked that it should "deter . . . retaliation, and, therefore, encourage miners to bring dangers and suspected violations to public attention." 115 CONG. REC. 27948 (1960), *quoted in* 500 F.2d at 782.

111. *Compare* Occupational Safety and Health Act, § 11(c)(1), 29 U.S.C. § 660(c)(1) (1976) ("any proceeding under *or related to* this chapter") (emphasis added),*with* Federal Coal Mine and Safety Act of 1969, § 110(b)(1), 30 U.S.C. § 820(b)(1) (1976) (amended 1977) ("any proceeding under this chapter"). *Compare also* Occupational Safety and Health Act, § 11(c)(1) ("*any right* afforded by this chapter") (emphasis added),*with* Federal Coal Mine and Safety Act of 1969, § 110(b)(1) ("any proceeding resulting from the administration or enforcement of the provisions of the chapter").

112. Federal Mine Safety and Health Amendments Act of 1977, § 201, 30 U.S.C.A. § 815 (Supp. 1979) (amending 30 U.S.C. § 820 (1976)).

113. The revised language now protects miners who file a complaint "under *or related to* this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger of safety or health violation in a coal or other mine." *Id.* (emphasis added). The amendment also extended protection to "*any right* afforded by this chapter." *Id.* (emphasis added). *See* note 111 *supra*.

114. S. REP. No. 181, 95th Cong., 1st Sess. 35-36 (1977). The Report of the Senate Committee on Human Resources provided in pertinent part:

> The wording of section [201] is broader than the counterpart language in section 110 of the Coal Act and the Committee intends section [201] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law. The committee intends to insure the continuing

sional act is that of the Congress which passed the act and not that of a more recent Congress,[115] Congress' use of this all-embracing phraseology in the Occupational Safety and Health Act represents language that legislatures generally use to express an intent to extend broad protection to a particular class of persons.[116]

Decisions under two other pieces of federal legislation also rely upon reasoning supportive of the Secretary's interpretation of the Act. In *NLRB v. Scrivener*[117] the Supreme Court held that the antidiscrimination provision of the National Labor Relations Act[118] prohibits the dismissal of an employee who gave written sworn statements to a Board field examiner investigating an unfair labor practice charge, even though the employee had not filed formal charges or given formal testimony as expressly required by the statute.[119] Mr. Justice Blackmun, writing for a unanimous Court, determined that the words "to discharge or otherwise discriminate" and the necessity of keeping open the Board's "channels of information" required a liberal interpretation of the antidiscrimination provision.[120]

Title VII of the Civil Rights Act of 1964 offers another example of an expansive construction accorded to a provision designed to protect

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vitality of the various judicial interpretations of section 110 of the Coal Act which are consistent with the broad protections of the bill's provisions; See, *e.g., Phillips v. IBMA*, 500 F.2d 772; *Munsey v. Morton*, 507 F.2d 1202.

Id. at 36.

115. *But see* NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267, 275 (1974); F.H.A. v. Darlington, Inc., 358 U.S. 84, 90 (1958).

116. *See* S. REP. No. 181, 95th Cong., 1st Sess. 36 (1977). In addition, the Sixth Circuit in *Whirlpool* attached significance to the absence of controversy over the broader language when Congress directly considered the right to refuse to work under hazardous conditions in its debate on the Coal Mine Act Amendments. 593 F.2d at 735-36.

117. 405 U.S. 117 (1972).

118. "It shall be unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act] . . . ." National Labor Relations (Wagner) Act, § 8(a)(4), 29 U.S.C. § 158(a)(4) (1976).

119. 405 U.S. 117 (1972); *cf.* Sinclair Glass Co. v. NLRB, 465 F.2d 209 (7th Cir. 1972) (affidavit filed by employee in connection with unfair labor practice charge equivalent to giving testimony and thus a protected activity); M & S Steel Co. v. NLRB, 353 F.2d 80 (5th Cir. 1965) (employer violated antidiscrimination provision by discharging employee for giving statement to field examiner) (enforcing 148 N.L.R.B. 789, 57 L.R.R.M. 1092 (1964)); NLRB v. Dal-Tex Optical Co., 310 F.2d 58 (5th Cir. 1962) (employee who appeared at a Board hearing but did not testify protected from discharge). *But cf.* Hoover Design Corp. v. NLRB, 402 F.2d 987 (6th Cir. 1968) (employee who threatened to file unfair labor practice charges but had not done so not protected by antidiscrimination provision).

120. 405 U.S. at 122. *See* text accompanying note 13 *supra* for the corresponding antidiscrimination language in the Occupational Safety and Health Act.

from discrimination or discharge employees who exercise their rights.[121] A federal district court held that Title VII's antidiscrimination provision protected an employee who gathered information for a complaint through inquiries of the employer's customers.[122] Additionally, the First Circuit held that the language of this provision encompasses employees who initiate sex discrimination proceedings before agencies other than the Equal Employment Opportunity Commission or through the use of internal grievance machinery.[123]

These decisions recognize that employees play a critical role in the enforcement of federal labor legislation because workers are often in the best position to detect and report violations of the law. Thus, protecting workers from employer retaliation ensures their participation in the overall enforcement mechanism.[124]

Similarly, Congress acknowledged that enforcement of the Occupational Safety and Health Act required the active participation of employees.[125] The dissenting opinion in *Daniel Construction* properly attached great importance to the necessity of employee enforcement in its view of regulation 1977.12(b).[126] Unfortunately, the *Daniel Con-*

121. Civil Rights Act of 1964, tit. VII, § 704(a), 42 U.S.C. § 2000e-3(a) (1976), states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

122. EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975).

123. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 545 F.2d 222 (1st Cir. 1976). *See* Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977); Smith v. Columbus Metropolitan Hous. Auth., 443 F. Supp. 61 (S.D. Ohio 1977); Jeffries v. Harris County Community Action Ass'n, 425 F. Supp. 1208 (S.D. Tex. 1977).

124. *See generally* note 114 *supra*.

125. S. REP. NO. 1282, 91st Cong., 2d Sess. 11-12, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5187-89; *see* 116 CONG. REC. 38366 (1970).

126. *See* notes 39-42 *supra* and accompanying text. On the same theory, another court held that the protection afforded by the antidiscrimination provision came into play when an employee retained counsel in connection with an OSHA complaint, even though no complaint had been filed with the Secretary of Labor, as required by the language of the Act. Dunlop v. Hanover Shoe Farms, Inc., 4 O.S.H.C. 1241 (M.D. Pa. 1976). In *Hanover* an employer discharged an employee who had complained to Legal Services about dangerous conditions of employment and had retained counsel to help remove the danger. The employer argued that the antidiscrimination provision of the Act did not apply because the employee had been discharged prior to a complaint to the Secretary of Labor. The court, however, held that the retention of counsel "was the first step in his exercise of his right to 'safe and healthful working conditions.'" *Id.* at 1242. *See* 29 C.F.R. § 1977.9(c) (1978); note 13 *supra*; *cf.* United States v. Wallace Bros. Mfg. Co., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1022 (M.D. Pa. Dec. 27, 1978) (oral complaints made by employees to employer regarding safety and health matters are protected activities for

struction majority overly restricted this function of the antidiscrimination provision. After conceding that the right to request an inspection advances a valid informational purpose, the court held that the right to refuse hazardous work "does not necessarily further the same informational purposes that the right to request inspections promotes."[127] This view, however, fails to appreciate that the right to request an inspection is only one aspect of employee self-help, and more importantly, that the right to refuse hazardous work is a component of employee enforcement fundamental to achievement of the Act's remedial purpose of attaining a safe workplace for employees. To grant workers the right to request an inspection but withhold the right to refuse hazardous work creates an anomaly of Congress' intent concerning the Act.[128]

B. *The Right to Refuse Unsafe Work Prior to the Act*

Before passage of the Act, employees had a limited right to refuse unsafe work under both statutory authority and arbitration law doctrine.[129] The importance of this preexisting right cannot be overstated

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which they cannot be discharged or discriminated against); Usery v. Granite-Groves, 5 O.S.H.C. 1935 (D.D.C. 1977) (employee's safety-related complaints to employer, OSHA, and outside agencies constitute protected activity under Act); Marshall v. Springville Poultry Farm, Inc., 445 F. Supp. 2 (M.D. Pa. 1977) (safety complaint to employer is "related to" Act within meaning of antidiscrimination provision and, therefore, protected activity). *But cf.* Usery v. Certified Welding Corp., 6 O.S.H.C. 1142 (D. Wyo. 1977) (safety complaint to state job safety enforcement agency was not complaint "under or related to" Act), *aff'd sub nom.* Marshall v. Certified Welding Corp., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1069 (10th Cir. Dec. 28, 1978) (holding unclear). *See also* Marshall v. Klug & Smith Co., OCCUPATIONAL SAFETY & HEALTH REP. (7 O.S.H.C.) 1162 (D.N.D. Mar. 19, 1979) (employees lawfully discharged when, after safety complaint to employer produced no improvement, they disrupted project by taking complaint to other employees).

127. 563 F.2d at 716.

128. *See* Union Elec. Co. v. EPA, 427 U.S. 246, 268-69 (1976) (regarding legislative history and statutory construction of statutes generally); United States v. Blasius, 397 F.2d 203 (2d Cir.) (same), *cert. dismissed*, 393 U.S. 1008 (1968).

129. *See generally* N. ASHFORD, *supra* note 5, at 185-201; 1 W. CONNOLLY & D. CROWELL, A PRACTICAL GUIDE TO THE OCCUPATIONAL SAFETY & HEALTH ACT: LAW, PRINCIPLES & PRACTICES (1977); M. ROTHSTEIN, *supra* note 3, at 466-68; Ashford & Katz, *Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act*, 52 NOTRE DAME LAW. 802 (1977); Brownjohn, *Effect of OSHA on Industrial Relations and Collective Bargaining* (pt. 2), in PROCEEDINGS OF THE ABA NATIONAL INSTITUTE ON OCCUPATIONAL SAFETY AND HEALTH LAW 132 (1976); Cohen, *supra* note 11; Irving, *Effect of OSHA on Industrial Relations and Collective Bargaining* (pt. 1), in PROCEEDINGS OF THE ABA NATIONAL INSTITUTE ON OCCUPATIONAL SAFETY AND HEALTH LAW 123 (1976); Tobin, *OSHA, Section 301 and the NLRB: Conflicts of Jurisdiction and Rights*, 23 AM. U.L. REV. 837 (1974).

in interpreting the regulation because it places regulation 1977.12(b) into the wider context of labor relations law.

Unorganized employees who refuse to perform their employment duties may be protected from discharge or other detrimental action under the National Labor Relations Act (NLRA).[130] Pursuant to section 8(a)(1) of the NLRA, an employer commits an unfair labor practice when he interferes with an employee's section 7 rights.[131] Section 7, in turn, grants employees the right to engage in concerted activities for their mutual aid or protection.[132] Although the NLRA is not primarily concerned with occupational safety and health, the refusal of two or more employees to perform work they believe to be hazardous is a concerted activity within the meaning of section 7.[133] Thus, workers may not be discharged for collectively striking to protest safety conditions. In addition, a single employee's efforts to obtain compliance with safety laws designed to benefit employees may be a protected activity under the doctrine of constructive concerted activity.[134]

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130. National Labor Relations (Wagner) Act, 29 U.S.C. §§ 151-169 (1976).

131. Section 8(a)(1) states that, "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . . ." *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976).

132. *Id.* § 7, 29 U.S.C. § 157 (1976).

133. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). Section 8(a)(1) is violated regardless of whether the employees previously attempted to obtain a correction of the condition from the employer, the condition is actually shown to be unsafe, or the refusal to work is later determined to be unreasonable. Cohen, *supra* note 11, at 156.

134. Alleluia Cushion Co., 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975). The status of constructive concerted activity in the federal courts, however, is in doubt. *Compare* NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967), *with* NLRB v. C. & I. Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973). To invoke this doctrine, an employee by his action must benefit other employees as well as himself, and these employees cannot disclaim his actions. Alleluia Cushion Co., 221 N.L.R.B. 999, 91 L.R.R.M. 1131 (1975). *See* Atleson, *Threats to Health and Safety: Employee Self-Help Under the NLRA*, 59 MINN. L. REV. 647 (1975).

This protection may also run to unionized employees who are not covered by an effective collective bargaining agreement, who have entered an agreement without a no-strike clause, or who are covered by a contract that excludes health and safety matters from the no-strike clause. When an effective contract contains a broad, compulsory grievance-arbitration provision, however the courts generally require employees to pursue their contractual remedies. Thus, a no-strike clause is implied from a contract that encompasses a broad grievance provision and binding arbitration. *See* Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Ashford & Katz, *supra* note 129; Atleson, *supra*; Cohen, *supra* note 11. When a contract includes an express or implied no-strike provision, a presumption of arbitrability exists for the resolution of safety disputes, although arbitration doctrine permits employees to refuse work that creates an immediate danger. *See* Gateway Coal Co. v. UMW, 414 U.S. 368 (1974); Boys Markets, Inc. v. Retail Clerks Union, Local 770, 389 U.S. 235 (1970); note 139 *infra* and accompanying text.

Employees who refuse to perform unsafe work also may be protected by section 502 of the Labor-Management Relations Act.[135] Section 502 establishes an exception to the rule that employees covered by an express or implied no-strike clause in a collective bargaining agreement may not strike over safety disputes. To justify a contractually prohibited safety walk-off under section 502, the union must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."[136] Employees need not prove that work conditions were unsafe in fact, but must demonstrate that their belief of unsafe conditions was amply supported by ascertainable, objective evidence.[137]

Collective bargaining agreements are usually enforced by a binding arbitration procedure. The common law of arbitration states that when grievance machinery is available to resolve labor disputes, an employee ordered to perform unreasonable work must do so, and thereafter file a grievance.[138] If the worker reasonably believes, however, that compliance with the order or rule would be illegal or hazardous, he may disobey it.[139] Arbitrators utilize a broad range of standards, but generally require employees to support by competent evidence their belief that

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A collective bargaining agreement may stipulate, however, that certain conditions will be grounds for a safety strike. *See, e.g.*, Jones & Laughlin Steel Corp. v. UMW, 519 F.2d 1115 (3d Cir. 1975).

135. Labor-Management Relations (Taft-Hartley) Act, § 502, 29 U.S.C. § 143 (1976).

136. Gateway Coal Co. v. UMW, 414 U.S. 368, 386-87 (1974) (quoting Gateway Coal Co. v. UMW, 466 F.2d 1157, 1162 (3d Cir. 1972) (Rosenn, J., dissenting)). In comparing regulation 1977.12(b) with § 502, it is interesting to note that the regulation is primarily concerned with the individual action of employees. *See* note 96 *supra* and accompanying text. Section 502 rights are also probably individual rights, available only to those workers actually threatened by abnormally dangerous conditions. The extent of these rights, however, has never been decided. Ashford & Katz, *supra* note 129, at 807; Ferris, *Resolving Safety Disputes: Work or Walk*, 26 LAB. L.J. 695 (1975). The regulation requires a reasonable belief in the imminent danger of severe bodily harm or death, which could not be corrected through ordinary statutory channels in a timely fashion. *See* text accompanying note 16. Section 502 requires objective, ascertainable support for a good-faith belief that conditions are abnormally dangerous, but lacks a requirement of imminence, threat of death or severe bodily harm, or inadequate statutory mechanisms for neutralizing the danger. *See* Marshall v. Daniel Constr. Co., 563 F.2d 707, 722 n.16 (5th Cir. 1977) (Wisdom, J., dissenting), *cert. denied*, 439 U.S. 880 (1978); Ashford & Katz, *supra* note 129. The relationship between § 7 and § 502 of the NLRA is complex and unclear in many areas. *See* Ashford & Katz, *supra* note 129, at 807-08.

137. Banyard v. NLRB, 505 F.2d 342, 348 (D.C. Cir. 1974).

138. N. ASHFORD, *supra* note 5, at 186.

139. Sperry Rand Corp., 51 Lab. Arb. 709, 711 (1968) (Rohman, Arb.); N. ASHFORD, *supra* note 5, at 186.

unsafe conditions actually existed in the workplace.[140]

In short, the right to refuse unsafe work existed in several forms before passage of the Occupational Safety and Health Act. When viewed from this broader perspective of labor law, therefore, regulation 1977.12(b), which embodies a variation of this right, seems consistent with the pattern of federal supervision. Moreover, the right set forth in regulation 1977.12(b) provides a valuable addition to the congressional framework for protecting the safety of American workers.[141] The Act's protection extends to twenty million more workers than covered under the NLRA.[142] The rejection of regulation 1977.12(b) by the *Daniel Construction* court thus signifies that, at least in the Fifth Circuit, workers who interrupt their work because of unsafe conditions will ironically receive greater protection under the NLRA than under the Occupational Safety and Health Act, which was specifically designed by Congress to overcome the inadequacies of preexisting law regarding worker safety.

V. Practical Reasons and Policy Considerations

Aside from the language and legislative history of the Act, important practical reasons and policy considerations support regulation 1977.12(b) as a valid exercise of the Secretary of Labor's power under the Act.

A primary reason for recognition of a worker's right to refuse hazardous work stems from the delay associated with the Secretary's obtaining injunctive relief for imminently dangerous conditions. To enjoin an imminent danger under the Act, four independent judgments must be made:

> (1) The Secretary must conclude that the worker's notice provides reasonable grounds to believe that an imminent danger exists. (2) An OSHA inspector must conclude upon inspecting the workplace that the danger cannot be prevented through normal enforcement procedures but requires immediate injunctive relief and recommend to the Secretary that

140. Marble Products Co., 40 Lab. Arb. 247 (1963) (Marshall, Arb.); Laclede Gas Co., 39 Lab. Arb. 833 (1962) (Bothwell, Arb.); Ferris, *supra* note 136, at 705-07.

141. *See* notes 133, 136 *supra*.

142. Marshall v. Whirlpool Corp., 593 F.2d 715, 726 n.23 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870). The NLRA does not apply to supervisors or agricultural workers. National Labor Relations Act, § 2(3), 29 U.S.C. § 152(3) (1976). The National Labor Relations Board does not exercise jurisdiction over small employers. 593 F.2d at 726 n.23.

he seek relief. (3) The Secretary must conclude that the inspector is correct and proceed to federal court. (4) A federal district court must find that an imminent danger exists at the worksite such that requires immediate injunctive relief.[143]

This protracted procedure underscores an inherent imbalance in the Act in the absence of regulation 1977.12(b): an employee must risk death or serious bodily injury awaiting an injunction, but an employer risks only a temporary interruption of production.[144] If courts continue to invalidate the regulation, the Act will contain too many postponing devices to make the injunction a practical alternative for imminently endangered employees.[145]

The Supreme Court's recent decision in *Marshall v. Barlow's, Inc.*[146] further intensifies this harshness on employees. In this case the Court held that section 8(a) of the Act,[147] which authorizes warrantless OSHA inspections of employer business premises, violates the warrant clause of the fourth amendment.[148] Accordingly, employers may refuse entry until the inspector obtains compulsory process, thus, the decision creates yet another delay in the enjoinment of an imminent danger.[149]

Another reason to sustain the Secretary's interpretive regulation is the inadequacy of the mandamus procedure embodied in the Act. Section 13(a) authorizes the Secretary of Labor to petition the federal dis-

143. Marshall v. Daniel Constr. Co., 563 F.2d 707, 711 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978); *see* notes 39-43 *supra* and accompanying text.

144. Wood, *Enforcing Job Safety: A Union View of OSHA*, 98 MONTHLY LAB. REV. 39 (Mar. 1975).

145. *See* Atleson, *supra* note 134, at 709.

146. 436 U.S. 307 (1978).

147. Section 8(a) of the Act, 29 U.S.C. § 657(a), provides:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed . . . and (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment . . . and to question privately any such employer, owner, operator, agent or employee.

148. 436 U.S. at 325. *See generally* McManis & McManis, *Structuring Administrative Inspections: Is There Any Warrant for a Search Warrant?*, 26 AM. U.L. REV. 942 (1977).

149. *Barlow's* will likely affect only the frequency with which employers deny entry to inspectors because even prior to *Barlow's* an OSHA inspector who was denied entry could gain entry only by compulsory process. 29 C.F.R. § 1903.4 (1978). *Barlow's*, however, shifts the focus of the Act from embracing a statutory right of immediate entry—with occasional, and consequently tolerable, denial of entry—to a judgment that no statutory right to immediate entry exists absent an administrative search warrant. 436 U.S. at 329-32 (Stevens, J., dissenting).

trict courts to restrain conditions that create an imminent danger.[150] If the Secretary arbitrarily or capriciously fails to seek relief, any affected employee may seek a writ of mandamus to compel the Secretary to carry out his duty.[151] The Federal Rules of Civil Procedure state, however, that the writ of mandamus has been abolished,[152] and that relief formerly available through mandamus "may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."[153] Thus, a complaint filed by an employee to compel the Secretary to exercise his authority may be handled as a civil complaint and placed on the normal civil docket, subject to the usual delay.[154] Even if the Act contemplated federal injunctive action against the Secretary when mandamus was appropriate,[155] this multistep litigation would afford little relief to an employee facing death or serious physical harm.[156] In either case, the waiting period is unacceptable on policy grounds.

Regulation 1977.12(b) was promulgated to alleviate the delay encumbering the imminent-danger remedy. The search warrant requirement and the writ of mandamus procedure accentuate the practical necessity of upholding the regulation. Without the right to refuse hazardous work, the congressional purpose of assuring safe working conditions for employees is not attainable.

VI. CONCLUSION

A majority of the courts that have considered regulation 1977.12(b) has overly restricted the Act's antidiscrimination provision. This interpretation is neither compelled by the legislative history nor desirable as a practical matter. On the contrary, the legislative history supports the right to refuse hazardous work, especially when viewed in the context of preexisting labor law relating to the issue; moreover, in light of the inadequacy of previously recognized federal protections, the practical and policy considerations underlying the Act's purpose warrant judicial approval of the Secretary of Labor's interpretive regulation.

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150. *See* note 29 *supra.*

151. *Id.*

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

153. *Id.*

154. Oldham, *O.S.H.A. May Not Work in "Imminent Danger" Cases*, 60 A.B.A.J. 690 (1974).

155. *See* Marshall v. Whirlpool Corp., 593 F.2d 715, 720 n.7 (6th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3826 (U.S. June 26, 1979) (No. 78-1870); Oldham, *supra* note 154, at 692.

156. Atleson, *supra* note 139, at 709.

The Supreme Court's denial of certioriari in *Daniel Construction* indicates that in at least one circuit, the Act does not embrace a right to refuse unsafe work. The *Whirlpool* decision, which creates a split among the circuits, presents another opportunity for the Court to recognize this potentially life-preserving right. Supreme Court approval of *Whirlpool* would be an important step in effectuating the congressional purpose of assuring "safe and healthful working conditions and . . . preserv[ing] our human resources."[157] In the event that the Court approves the *Daniel Construction* result, Congress should clarify its intent and expressly recognize the right to refuse hazardous work.

Steven B. Feirman

As this Note went to press, the Supreme Court granted certiorari in Marshall v. Whirlpool Corp., 593 F.2d 715, cert. granted, 48 U.S.L.W. 3188 (U.S. Oct. 2, 1979) (No. 78-1870).

157. Occupational Safety and Health Act of 1970, § 2(b), 29 U.S.C. § 651(b) (1976).