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The Right to Refuse Hazardous Work after Whirlpool

Larry Drapkin†

In the recent Whirlpool case, the Supreme Court upheld an OSHA regulation which protects employees who refuse to perform imminently dangerous work. After analyzing the Whirlpool decision, with special emphasis on the unresolved back pay issue, the author discusses the parallel rights provided by sections 7 and 502 of the Labor Act and by illustrative collective bargaining agreements. He concludes that, although the OSHA regulation upheld by the Whirlpool Court represents a significant advance, most workers who refuse hazardous tasks remain without effective protection.

I. INTRODUCTION

An estimated 14,000 workers die each year and 2.2 million more suffer some form of disability due to work-related accidents and illnesses.1 Further, the Public Health Service has estimated that 390,000 new cases of occupational illness develop annually while “as many as 100,000 deaths occur each year as a result of occupational disease.”2 Recognizing this epidemic of workplace injuries, illnesses and deaths, Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act).3 The Act is designed to combat occupational accidents, illness and disease through a comprehensive regulatory framework, which depends, to a large extent, on employees to monitor workplace conditions and enforce statutory protections.4

The Supreme Court’s recent decision in Whirlpool v. Marshall5 was widely recognized as authorizing a controversial form of employee enforcement under the OSH Act: the right to refuse imminently hazardous work. Whirlpool, however, cannot be interpreted as a broad

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2. Id. at 10.
4. See notes 20-29 infra and accompanying text.
mandate for self-help measures. The decision upheld the validity of a regulation promulgated by the Occupational Safety and Health Administration (OSHA); the regulation affords workers a narrow right to refuse work when they suffer a reasonable apprehension of death or serious injury and alternative remedies prove ineffective. An employer may not discriminate against an employee who validly exercises this refusal right.7

Yet the OSHA regulation is not the only source of a right to refuse hazardous work; federal labor law extends protection to the refusing worker independently of the OSH Act. Under section 7 of the National Labor Relations Act (NLRA),8 employees may engage in concerted activity to protect themselves from workplace dangers without fear of employer reprisals. Further, section 502 of the Labor Management Relations Act (LMRA)9 provides that employee walkoffs in response to "abnormally dangerous" conditions do not constitute a strike, and an employee validly exercising section 502 rights does not violate a contractual no-strike agreement.10 Finally, under their collective bargaining agreements employees may be granted the right to refuse work when confronted with hazardous conditions.

These legal and contractual rights create a tangled web of protections for the employee. The individual protections differ in many respects, such as the requisite showing of workplace danger, the necessity of resorting to less disruptive alternatives and the range of remedies available to counter employer discrimination. Only by comparing the rights and recognizing the specific limitations of each can the worker understand the extent of her protection.

The law governing work refusal is evolving. The bulk of litigation over both labor law and OSH Act rights has arisen in the last decade.11 While industry has not faced widespread walkoffs in protest of safety and health conditions, the right to refuse is likely to assume greater importance, particularly for the individual worker. The prospect of severe reductions in OSHA's budget and jurisdiction12 may increase worker reliance on self-help measures. Employer resistance to OSHA

11. See notes 107-54 supra and accompanying text.
and OSHA’s attempts to improve worker safety can be expected to con-
tinue.\textsuperscript{13} The right to refuse hazardous work raises issues of symbolic as
gain as practical importance—questions concerning the employer’s
right to assign work, to determine production policies and, ultimately,
to control the workplace.

The premise underlying this article is that a worker must be af-
forded an effective right to refuse to do an assigned task, if doing that
task would damage the worker’s health or place her in jeopardy. As
such, the article does not address the question of what limitations
should, in theory, be placed on the right to refuse. Rather, it is con-
cerned with the practical problem faced by the person on the job: how
and when can she refuse to perform hazardous job assignments? The
answer to this turns on the extent to which the right to refuse has been
legally recognized. To this end the article will assess and compare the
effects and effectiveness of the various statutory rights to refuse hazard-
ous work. It will begin with an analysis of the \textit{Whirlpool} case, with
particular emphasis on an important question which the case touches
but does not answer: in what situations are refusing workers entitled to
back pay? The article will proceed to discuss the parallel rights under
section 7 of the NLRA, section 502 of the LMRA, and illustrative col-
lective bargaining agreements. As the article progresses, it will become
clear that neither \textit{Whirlpool}, federal labor law, nor private agreements
establish a comprehensive or broadly effective right to refuse hazardous
work.

\section*{II. THE OSH ACT AND THE \textit{WHIRLPOOL} DECISION}

\textbf{A. Legislative Action and Administrative Response}

In enacting the OSH Act, Congress declared its intent “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.”\textsuperscript{14}
To implement this goal, the OSH Act provides that “employers and
employees have separate but dependent responsibilities and rights with
respect to achieving safe and healthful working conditions.”\textsuperscript{15} Section
5(a), the “general duty clause,” establishes that the employer bears
prime responsibility for maintaining a workplace “free from recognized
hazards that are causing or are likely to cause death or serious physical

\bibliography{\textsuperscript{13}. The business community has been generally critical of OSHA. \textit{See}, e.g., Statement of
Richard L. Lesher, President, U.S. Chamber of Commerce, \textsc{Daily Lab. Rep. (BNA)}, April 1,
\textsuperscript{14}. 29 U.S.C. § 651(b) (1976).
\textsuperscript{15}. \textit{Id.} §§ 651(b)(2).}
harm to his employees." The philosophy embodied in the general duty clause represents a significant shift in the legal duties of the employer. The post-OSH Act employer must not only compensate victims of work-related injuries and illnesses, but must prevent injury and illness in the first place.

The OSH Act also creates a broad spectrum of employee rights. Employees have a right to information: the employer must keep them apprised of their "protections and obligations under this Act, including the provisions of applicable standards." Further, the employer has a duty to keep records of employee exposure to "potentially toxic materials or harmful physical agents," and workers have a corollary right to observe monitoring procedures and inspect the records that the employer compiles. Employees or their authorized representatives may request workplace inspections, which OSHA is obligated to perform if the complaint is deemed reasonable. In the event of an OSHA inspection, an employee representative may, without loss of pay, accompany the inspector during her tour of the workplace. The employee who exercises any of the rights accorded by the Act is pro-

16. Id. § 654(a).
17. At common law an employer faced potential legal liability for employees' work-related injuries. See D. BERMAN, DEATH ON THE JOB 19-20 (1978). Most states now have workers' compensation statutes governing employers' liability for injuries in the workplace. See 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 5.30, at 39 (1978). The OSH Act was the first legislation to impose on employers an affirmative duty to provide a safe workplace.
18. This article will not consider the issue of compensation for work-related injuries and illnesses, but brief mention of some of the problems involved is appropriate here. Numerous problems arise out of such concepts as the "exclusive remedy" provisions in workers' compensation statutes. Such provisions deny a cause of action in tort to employees injured through employer negligence. See 2A A. LARSON, WORKMEN'S COMPENSATION LAW §§ 65.00-.10, at 12-1 to 12-9 (1976 & Supp. 1980). Under the limited workers' compensation remedy, few employees are adequately compensated for serious or debilitating injuries. Compensation is a statutory fixed remedy, under which benefits are limited in both amount and duration. For a critical analysis of the workers' compensation system in general, see D. BERMAN, DEATH ON THE JOB 54-73 (1978). For an analysis of the limits of the workers' compensation system in compensating occupational illnesses, see Gosney, Whatever Happened to Brown Lung? Compensation for Difficult to Diagnose Occupational Diseases, 3 INDUS. REL. L.J. 102 (1979); Robblee, The Dark Side of Workers' Compensation: Burdens and Benefits in Occupational Disease Coverage, 2 INDUS. REL. L.J. 596 (1978).
20. 29 C.F.R. § 1977.1(c) (1979), promulgated pursuant to the OSH Act, provides: Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.
22. Id. § 657(c)(3).
23. Id. § 657(f)(1).
tected against employer retaliation.\textsuperscript{26}

The drafters of the OSH Act appreciated the need for expedited response to imminent dangers in the workplace. When an OSHA investigation reveals conditions posing an immediate threat of death or serious bodily harm, the Secretary of Labor (Secretary) may, under the Act, petition a federal district court to enjoin the hazard; if necessary, the court may order a complete cessation of operations.\textsuperscript{27} Here again, the Act anticipates an active employee role in the process. For example, an employee complaint may initiate the inspection leading to an injunction proceeding.\textsuperscript{28} Moreover, if the Secretary "arbitrarily or capriciously" refuses to seek injunctive relief from the imminent danger, a threatened employee may petition for mandamus in federal court to compel the Secretary to seek the proper abatement order.\textsuperscript{29}

There was, however, a conspicuous omission from the employee's arsenal of enforcement weapons under the OSH Act, as it was originally passed by Congress. The statute did not explicitly give workers the right to refuse dangerous work assignments without fear of employer retaliation. For the employee facing immediate, potentially deadly hazards, the omission was significant. Despite the availability of injunctive relief, the abatement of imminent dangers through OSHA channels was time-consuming. The statutory process—inspection, recommendation to the Secretary, and initiation of court proceedings—was of little use to the employee assigned that day to do hazardous work. It was this fact, coupled with the broad policy favoring self-enforcement under the Act, that led the Secretary to create a narrow right to refuse hazardous work.\textsuperscript{30}

In 1973 OSHA promulgated its work refusal regulation.\textsuperscript{31} While recognizing that most workplace hazards can be remedied without interruption of the production process, the regulation posits circumstances under which a worker who walks off the job will be protected:

\begin{itemize}
\item \textsuperscript{26} \textit{Id.} § 660(c)(1).
\item \textsuperscript{27} \textit{Id.} § 662(a).
\item \textsuperscript{28} \textit{Id.} § 657(f)(1).
\item \textsuperscript{29} \textit{Id.} § 662(d).
\item \textsuperscript{30} 29 C.F.R. § 1977.12(b) (1979). The regulation provides in part:

\begin{enumerate}
\item 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.
\item 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.
\end{enumerate}
\item \textsuperscript{31} \textit{Id.} § 1977.12.
\end{itemize}
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. 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.\(^3^2\)

An employer who discriminates against a worker for taking such action violates the Act and is subject to OSHA's remedial powers.\(^3^3\)

The regulation thus sets forth three elements necessary to establish that the refusal to work is protected: (1) a reasonable apprehension under the circumstances that the working conditions present a danger of death or serious injury; (2) insufficient time to utilize normal enforcement procedures under the OSH Act; and (3) a prior attempt to remedy the hazard through consultation with the employer. Despite the apparent narrowness of the right created, the regulation generated considerable resistance from the employer community, and litigation testing its validity soon ensued.\(^3^4\)

**B. The WHIRLPOOL Decision\(^3^5\)**

Whirlpool maintains a manufacturing plant in Marion, Ohio, where it produces household appliances. The plant has more than thirteen miles of overhead conveyors that transport appliance components to various production points. To prevent injuries caused by parts falling from the conveyors, the company installed a guard screen some twenty feet above the plant floor. Maintenance employees regularly walked on the guard screen to retrieve parts fallen from the conveyor. The older sections of the screen were weak, and on a number of occasions employees suffered falls when the grid collapsed underfoot. Employees brought the unsafe condition to the attention of their foremen, and the company embarked on a program of gradually replacing the old screen with a new, heavier mesh. However, tragedy struck before...

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\(^{32}\) Id. § 1977.12(b)(2).

\(^{33}\) To remedy OSH Act violations, the Secretary possesses broad powers to "order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660(c)(2) (1976).

\(^{34}\) At the time the Supreme Court granted certiorari in *Whirlpool*, two circuit courts had already ruled that the work refusal regulation was invalid. Marshall v. Certified Welding Corp., 7 O.S.H. Cases 1069 (10th Cir. 1978); Marshall v. Daniel Constr. Co., 563 F.2d 707 (5th Cir. 1977).

the safety measures had been fully implemented: a maintenance worker fell through the screen and plunged twenty feet to his death.

Following the fatal accident, two of the victim's co-workers reiterated their complaints about the hazardous conditions. When a foreman subsequently instructed the complaining employees to perform maintenance work on an old section of the screen, they refused. The pair were ordered to leave work and were not paid for the remaining six hours of the shift; additionally, written reprimands were placed in their permanent files.

Exercising its powers under section 11(c)(2) of the OSH Act, OSHA brought an action in federal district court. OSHA alleged that Whirlpool, by issuing reprimands and refusing to pay the employees for time lost during disciplinary suspension, had violated the anti-discrimination provision of section 11(c)(1):

> 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.

The district court denied relief, holding that the work refusal regulation exceeded OSHA's grant of authority and was therefore invalid. The Sixth Circuit reversed, and the Supreme Court granted certiorari.

A unanimous Supreme Court, speaking through Justice Stewart, upheld the validity of the regulation, holding that it "clearly conforms to the fundamental objective of the Act—to prevent occupational deaths and serious injuries." The Court emphasized that nothing in the Act itself prohibited the promulgation of a rule allowing an employee to refuse hazardous work. Since OSHA inspectors cannot be present at all times in all workplaces to ensure employees' rights under

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36. The complaining employees also requested the name, address and telephone number of the local OSHA representative. 445 U.S. at 6.

37. Prior to the incident, Whirlpool management had issued a safety instruction admonishing employees not to step on the steel grid. Id.

38. Id. at 7.


42. 416 F. Supp. at 33.


44. Whirlpool Corp. v. Marshall, 444 U.S. 823 (1979). The Sixth Circuit's decision had created a conflict among the circuits regarding the validity of the regulation. See note 34 supra.

45. 445 U.S. at 11-12 n.16. The Court cited Senator Yarborough's interpretation of the purpose of the bill: "We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact." 445 U.S. at 11-12 n.16, citing 116 CONG. REC. 37625 (1979).
the general duty clause, self-enforcement is essential. In light of the OSH Act's prophylactic nature, "[i]t would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous."46

Despite the apparent harmony between the OSH Act and the Secretary's work refusal regulation, there remained a significant issue for the Court to address: the employer's contention that the legislative history implied congressional disapproval of such an employee right. Whirlpool pressed this attack on two fronts. First, it argued47 that by deleting the Senate bill's "administrative shutdown provision,"48 the Conference Committee had manifested congressional hostility to the type of self-help fostered by the OSHA regulation. Second, the employer pointed out49 that Congress had rejected a proposed OSH Act provision50 that would have allowed employees to "strike without pay" when exposed to toxic substances; thus, it was argued, Congress had indicated disapproval of unilateral employee action.

The Court easily distinguished the plant shutdown provision from the OSHA regulation. The shutdown clause, as approved by the Senate, would have entitled federal inspectors (without a court order) to suspend for 72 hours any operation they believed to be imminently dangerous.51 In deleting that provision, the Court found that Congress had manifested opposition to granting federal officials the unilateral authority, "without any judicial safeguards, drastically to impair the operation of an employer's business."52 This concern for due process had resulted in section 13 of the OSH Act,53 which requires OSHA to petition for shutdown orders in federal district court. Congress, while limiting administrative power, had not addressed the question of a private employee's right to refuse hazardous work. The Court refused to find implied disapproval of such a right.54

46. 445 U.S. at 11.
47. 445 U.S. at 19-21.
48. S. 2193, 91st Cong., 2d Sess., §§ 11(b) (1970) (bill as passed by Senate) [hereinafter cited as Williams bill].
49. 445 U.S. at 14-17.
51. Williams bill, supra note 48, §§ 11(b) (1970). The version contained in the Daniels bill, supra note 50, § 12(a) (1970) (bill as reported to House), LEG. HIST., supra note 50, at 952-53, would have authorized the Secretary to issue a shutdown order of up to five days.
52. 445 U.S. at 21.
54. The Court noted:
The other prong of the employer's legislative history argument elicited a more detailed analysis from the Court. Representative Daniels sponsored one of several House bills that led to passage of the OSH Act. The Daniels bill contained the controversial "strike with pay" provision when it was reported to the House by the Committee on Education and Labor. The provision would have allowed employees to request a Department of Health, Education and Welfare (HEW) study of the toxicity of any workplace substance. If the HEW data disclosed that a substance had "potentially toxic or harmful effects in such concentration as used or found," the employer would have been given sixty days to correct the condition. If toxic concentrations were still present in the workplace after the sixty-day period, the employer would have had a duty to institute precautions for safe use of the suspect chemical and to provide employees with information about signs, symptoms and long-term effects of exposure. If the employer failed to meet the above requirements, employees would have had the right to refuse the hazardous work, with pay, until the employer complied in full.

In its effect, the Daniels bill bore little resemblance to the work refusal regulation. The "strike with pay" provision would have imposed strict liability on the employer for wrongfully exposing employees to toxic substances, even when the threat to human life was

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The regulation accords no authority to government officials. It simply permits private employees of a private employer to avoid workplace conditions that they believe pose grave dangers to their own safety. The employees have no power under the regulation to order their employer to correct the hazardous condition or to clear the dangerous workplace of others. Moreover, any employee who acts in reliance on the regulation runs the risk of discharge or reprimand in the event a court subsequently finds that he acted unreasonably or in bad faith. The regulation, therefore, does not remotely resemble the legislation that Congress rejected.

445 U.S. at 21.


56. Daniels bill, supra note 50, § 19(a)(5), LEG. HIST., supra note 48, at 969-70. As the Court noted, § 19(a)(5) provided:

The Secretary of Health, Education, and Welfare shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potentially toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education, and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees, by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period.

445 U.S. at 14 n.20.
The Whirlpool Court emphasized that the provision was simply not intended to provide protection from imminent, deadly hazards:

Congress rejected a provision that did not concern itself at all with conditions posing real and immediate threats of death or severe injury. The remedy which the rejected provision furnished employees could have been invoked only after 60 days had passed following HEW's inspection and notification that improperly high levels of toxic substances were present in the workplace. Had that inspection revealed employment conditions posing a threat of imminent and grave harm, the Secretary of Labor would presumably have requested, long before expiration of the 60 day period, a court injunction pursuant to other provisions of the Daniels bill. 58

The Court concluded: "[I]n rejecting the Daniels bill's 'strike with pay' provision, Congress was not rejecting a legislative provision dealing with the highly perilous and fast moving situations covered by the regulation now before us." 59

To further buttress the distinction between the Daniels bill and the OSHA regulation, the Court pointed out that two federal labor law provisions—section 7 of the NLRA 60 and section 502 of the LMRA 61—created an employee right to refuse hazardous work that predated the OSHA regulation. 62 Since the OSH Act contains no language altering the rights accorded by other laws governing the workplace, the Court surmised that "the Secretary's regulation does not conflict with the general pattern of federal labor legislation in the area of occupational safety and health." 63

The primary factor in Congress's disapproval of the Daniels bill, Justice Stewart concluded, was the compensation requirement. When the lawmakers refused to enact the "strike with pay" provision, they "meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety." 64

The OSHA regulation, in contrast, contains no explicit compensation requirement. While acknowledging that the OSH Act antidiscrimination provisions protect those unlawfully disciplined for refusing hazardous work, the Court suggested that an employer who withholds pay

57. 593 F.2d at 730.
58. 445 U.S. at 17.
59. Id.
62. 445 U.S. at 17-18 n.29. See the dissenting opinion of Judge Wisdom in Marshall v. Daniel Constr. Co., 563 F.2d 707, 721 (5th Cir. 1977), noting that the right to refuse under the NLRA is at times broader than under the OSHA regulation.
63. 445 U.S. at 17-18 n.29.
64. Id. at 18-19 (emphasis added).
from a refusing employee may not be discriminating at all: "An em-
ployer 'discriminates' against an employee only when he treats that em-
ployee less favorably than he treats others similarly situated."65 The
ambiguous implications of this statement necessitate an inquiry into the
availability of a back pay remedy under Whirlpool.

C. Whirlpool and the Right to Back Pay

While upholding the validity of the OSHA regulation, Whirlpool
did not address the important question of back pay under section
11(c)(1). The Court specifically refused to decide whether Whirlpool's
withholding of employee benefits for the hours the complainants re-
fused to work constituted unlawful discrimination:

Deemer and Cornwell were clearly subjected to "discrimination" when
the petitioner placed reprimands in their respective employment files.
Whether the two employees were also discriminated against when they
were denied pay for the approximately six hours they did not work on
July 10, 1974 is a question not now before us.66

On remand, the district court held that the Whirlpool employees were
entitled to back pay for lost wages during the six hours.67

There are several situations in which an employee may be entitled
to back pay. It may be afforded as a make-whole remedy to employees
who have been illegally suspended or discharged.68 Similarly, back
pay may be available to a worker who is constructively discharged.69
Finally, back pay also may be an appropriate remedy when the em-
ployer's withholding of pay is in itself the alleged discriminatory act.70
This form of back pay will be allowed only if the employer is obligated
to pay an employee for time spent idle, after the employee has refused
to perform hazardous work.

I. The Right to Back Pay: Firing or Discipline for Lawful Refusal

Traditionally, employees who have been illegally suspended or
discharged may be entitled to back pay. Such a remedy is common in
federal labor legislation, including the NLRA,71 the Federal Mine
Safety and Health Act of 1977, Title VII of the Civil Rights Act of 1964, and the Fair Labor Standards Act of 1938. Section 11(c)(2) of the OSH Act expressly provides a back pay remedy for victims of prohibited discrimination: "[T]he 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." Each of these statutory back pay provisions seeks to make whole the employee who has been discharged or suspended for exercising a protected right.

In the OSH Act, Congress did not specifically create a new right to refuse hazardous work; rather, it vested the Secretary with sufficient discretion to fashion the necessary regulation. It follows that Congress never specifically addressed the issue of back pay for employees who are fired or disciplined for exercising the subsequently-created right to refuse. Under the circumstances, any assessment of what Congress would have done, had it faced the issue squarely, is speculative. The more reasonable view, however, is that Congress would allow a back pay remedy under section 11(c)(1) for employees suspended or discharged for refusing hazardous work.

In Whirlpool, the Court noted that "what primarily troubled Congress about the Daniels bill's 'strike with pay' provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section." As discussed above, however, the Court also acknowledged that the Daniels bill's provision was not limited to imminent hazard situations. The fact that Congress was troubled by a broad "strike with pay" proposal does not indicate that it would balk at providing a back pay remedy for employer discrimination in the far more limited context of the Secretary's regulation.

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72. 30 U.S.C. § 815(c)(2) (1976 & Supp. II 1978) (amending the Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 815(c)(1), provides that the Commission can take affirmative action to remedy employer discrimination, "including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest."

73. 42 U.S.C. § 2000e-3(a) (1976) provides that it is an unlawful employment practice for an employer to discriminate against employees who exercise their rights under Title VII. 42 U.S.C. § 2000e-5(g) (1976) provides that the courts may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay."

74. Although 29 U.S.C. § 215(a) (1976) makes it unlawful for any person to discharge or discriminate against any employee exercising her rights under the FLSA, there is no specific provision authorizing back pay as a remedy. However, it has been held to be within the discretion of the trial court to impose back pay. Mitchell v. DeMario Jewelry, 361 U.S. 288, 293-96 (1960); Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962).


77. 445 U.S. at 17.
In fact, the history of statutory regulation in this area demonstrates that Congress recognizes back pay as an appropriate remedy for employer discrimination when employees exercise the right to refuse. As the *Whirlpool* Court noted, the NLRA gives employees a right—that predates the OSH Act—to refuse hazardous work. Under some circumstances, an employer may be free to hire permanent replacements for the refusing employees without violating section 8(a)(1) of the NLRA. However, the employer is guilty of an unfair labor practice if it fires or suspends an employee for engaging in "concerted" activity. Under section 10(c) of the NLRA, the National Labor Relations Board can then award back pay and take other appropriate remedial action. It would be inconsistent for Congress to prohibit back pay under the OSH Act while allowing it for the very same actions, under the NLRA.

Another statute even more clearly demonstrates Congress's approach to the back pay question. As the *Whirlpool* Court noted, the OSHA regulation "conforms to the interpretation that Congress clearly wished the courts to give to the parallel antidiscrimination provision of the Federal Mine Safety and Health Amendments Act of 1977." In enacting that legislation, Congress specifically considered whether miners should have a right to refuse hazardous work. Senator Williams, a sponsor of the legislation, stated: "The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners." Legislative history clearly supports the proposition that a miner's refusal to perform hazardous work is protected by the statutory antidiscrimination clause, which contains an explicit back pay remedy. It follows that a miner discharged for refusing hazardous work is entitled to a back pay award to remedy employer discrimination.

In a post-*Whirlpool* case, *Marshall v. N.L. Industries, Inc.*, the Seventh Circuit reached the back pay issue under the OSH Act. There, an employee was discharged when he refused to load lead scrap into a melting kettle. The court concluded that if the Secretary shows that the refusal meets the requirements of the OSHA regulation, back pay is an appropriate remedy. The court noted that the *Whirlpool* decision spec-

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78. 29 U.S.C. § 158(a)(1) (1976); see note 138 infra; see also notes 107-31 and accompanying text.
79. 29 U.S.C. § 158(a)(4) (1976); see notes 107-31 infra and accompanying text.
84. 618 F.2d 1220 (7th Cir. 1980).
cifically refused to address the back pay issue, but concluded that so long as a claim for back pay arises from discriminatory activity such as an unlawful termination, the remedy is appropriate. 85

2. Right to Back Pay: Constructive Discharges

OSHA also recognizes some discrimination claims involving allegations of constructive discharge. 86 Such discharge occurs when an employer changes work hours and responsibilities or when an employee is subjected to harassment in response to the exercise of a protected right. If the employee then quits or resigns due to the more disagreeable or onerous work environment, a finding of constructive discharge is appropriate. 87 OSHA's willingness to recognize a back pay remedy for constructive discharge arising out of a work refusal has not been tested in the courts. 88

3. Right to Back Pay: Uncompensated Refusal Time

It appears clear that back pay is an appropriate remedy when an employee has been unlawfully discharged or suspended for engaging in protected activity. A more difficult problem arises when the employer does not terminate or harass the complainant. The issue is whether an employer's decision not to pay an employee who has rightfully refused hazardous work constitutes discrimination in the absence of any other disciplinary measures. Under a literal reading, section 11(c)(1) appears to allow a finding of discrimination; such an interpretation, though, would inevitably encounter challenges based on the legislative history of the OSH Act. 89

The proposition that an employee may absent himself from hazardous work without loss of pay resembles the type of compensation requirement Congress found objectionable in the Daniels bill's "strike with pay" provision. The court in Marshall v. N.L. Industries, Inc. recognized, in dicta, that:

The Supreme Court's extensive discussion of the "strike-with-pay" amendments in the legislative history is best understood as referring to

85. Id. at 1224.
86. In Brennan v. Diamond Int'l Corp., 5 O.S.H. Cases 1050 (S.D. Ohio 1976), the Secretary brought a constructive discharge action based on discrimination arising from a work refusal incident. The district court did not reach the constructive discharge issue, as it held that the Secretary's work refusal regulation was invalid. Nevertheless, OSHA has shown a willingness to embrace this theory and follow applicable NLRB doctrines. Further, the Department of Labor has remedied constructive discharges in settlement agreements. See, e.g., U.S. Department of Labor, Government Memorandum re: In the Matter of Will Dennis Chevrolet v. Schuler, Case no. 5-D-8120-79-36 (May 1, 1979) (obtained under the Freedom of Information Act, April 14, 1980).
88. See note 86 supra.
89. See notes 55-64 supra and accompanying text.
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a situation in which the employees voluntarily absent themselves from all work as a result of a belief that a particular assignment is dangerous. In such a case, back pay becomes more of a substantive issue, and Congress' hostility to a “strike-with-pay” provision is more germane.\(^9\)

It could be argued that the fatal flaw of the Daniels bill was not that it provided for back pay, but that it “did not concern itself at all with conditions posing real and immediate threats of death or severe injury.”\(^1\) If the Secretary were to advance this argument to support the conclusion that those refusing hazardous work are entitled to normal pay, we would likely witness a new and more intense judicial analysis of the Daniels bill.

To date, OSHA has not interpreted its regulation to require the payment of compensation for the time the employee refuses to work. Given the Secretary's discretionary power to process and bring discrimination actions, OSHA's interpretation closes the discussion for the time being.\(^2\) Unless OSHA reinterprets the regulation, courts will not be confronted with claims for back pay when no work is performed and no further discrimination is alleged.

OSHA does, however, insist that employers provide nonhazardous work alternatives, when available, for those employees validly exercising their rights under the regulation.\(^3\) If an employer has safe alternative assignments but refuses to allow a temporary transfer, a finding of discrimination may be warranted. Refusal to transfer may supply an inference of unlawful employer motivation: intent to punish the employee for asserting a right guaranteed by the Act. A finding of discrimination under these circumstances is easily distinguishable from the “strict” liability of the “strike with pay” provision rejected by Congress. Under the “alternate work” approach, an employer is subject to a back pay remedy only if he has the opportunity to utilize an employee elsewhere but fails to do so.

\(^9\) 618 F.2d at 1224 n.9.
\(^1\) 445 U.S. at 17; see note 56 supra and accompanying text.
\(^2\) See 29 U.S.C. § 660(c)(2) (1976), which provides:

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.

See also Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980) (history of the OSH Act shows congressional intent to give the Secretary the sole power to bring discrimination cases in the federal courts).

\(^3\) Whirlpool Corp. v. Marshall, Brief for Respondent at 23-25, reprinted in 13 LAW PRINTS, LABOR LAW SERIES, No. 5 at 107-09; phone conversation with August Denhard, Operations Review Officer—East, OSHA, Baltimore, Md. (April 7, 1980).
III

THE RIGHT TO REFUSE HAZARDOUS WORK

AFTER WHIRLPOOL

A. The OSH Act

In the wake of Whirlpool it is necessary to assess the practical value of an employee's right to refuse hazardous work under the OSH Act, and to compare it to the parallel rights afforded by federal labor law. To begin with, OSH Act coverage is broader, extending to approximately sixty million workers;94 about forty million workers enjoy rights under the NLRA,95 which excludes agricultural laborers and those covered by the Railway Labor Act.96 Neither the OSH Act nor the NLRA covers federal, state or local public employees.97

More important, the OSHA regulation's substantive requirements distinguish it from federal labor law. As discussed above, the OSHA regulation calls for a three-part showing: (1) the employee's apprehension of death or injury must be "reasonable" under the circumstances; (2) there must be insufficient time to resort to statutory enforcement mechanisms; and (3) the employee, when possible, must seek employer correction.98 Employee protection thus turns on an objective standard of imminent danger. Though the employee need not prove that the condition prompting her refusal actually posed an imminent threat, she must show that a reasonable person would have concluded that it did.

For the protection to be effective, the "reasonableness" test must be correctly applied.99 The judge or jury evaluating the employee's conduct must focus exclusively on what she knew at the time of refusal. The employee may have been motivated by subjective fears that were, under the circumstances, reasonable. The inquiry should not be influenced by hindsight determinations that no actual danger was present in the workplace. Nor should employer compliance with safety and health standards be sufficient to prove that an employee's actions were unreasonable, unless she knew at the time that the standards applied to her workplace were being met.

Application of the objective standard will be most difficult in the context of health hazards, particularly where employees are exposed to toxic or carcinogenic substances. An employee is normally not in a position to evaluate thoroughly the danger presented by a workplace

95. Id.
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In many cases even the scientific community lacks adequate human health data. The absence of comprehensive information about a substance, however, should not prevent the employee from protecting herself. Because of the potentially lethal effects of even short-term exposure to toxins, an employee may reasonably fear that a substance used in the workplace presents an imminent hazard, even if she lacks conclusive scientific evidence. The finder of fact must acknowledge the employee’s limited access to information and apply the objective standard accordingly.

Even if the objective standard is properly applied, it is unlikely that the OSHA regulation will provide an effective right to refuse hazardous work. Legal theorizing about what constitutes reasonable behavior is remote from the realities of the workplace. It is simply unrealistic to expect that substantial numbers of workers will risk their jobs on the possibility that their conduct will, perhaps years later, be deemed reasonable by a federal court. The broad policy objective of the OSH Act—to encourage employee enforcement of safety and health standards—would be better served by a subjective “good faith” test as the standard of employee protection. Such a standard would remove the element of risk; an employee could be confident that she was not sacrificing her job for her safety.

However inadequate it may be in practice, the OSHA regulation, when properly invoked, affords workers one important protection—the right to keep their jobs. An employee cannot be discharged or disciplined solely for engaging in activity protected under the OSH Act.


101. In 1977 exposure standards had been set for approximately 500 of the 20,000 chemicals listed on the government’s Toxic Substance List. Washington Post, Feb. 13, 1977, at A7, col. 1. In 1973 when the National Institute of Occupational Safety and Health (NIOSH) listed 12,000 toxic substances used in industry, the Assistant Surgeon General estimated that “3000 new chemicals are synthesized each year, with approximately 500 finding use in industry. N. Ashford, Crisis in the Workplace 88 (1976).

102. E.g., cancer experts lack a consensus as to whether dose-response curves can be used to establish any safe exposure levels to carcinogens. See New York Academy of Sciences, Cancer and the Workplace 9-10 (1977).

Dr. Irving J. Selikoff of New York City’s Mount Sinai School of Medicine cites a study of 250 asbestos workers exposed at least 25 years ago to heavy concentrations of asbestos for three months or less. Even though their exposures were brief, these workers still died of lung cancer at three and a half times the expected rate. It is conceivable that a worker could be heavily exposed to asbestos for just one day and develop cancer years later as a result of that exposure.

See also L. Agran, The Cancer Connection 31-32 (1977).

103. If, for example, a job assignment entailed exposure to asbestos dust, it is unclear whether an employee would be protected in refusing work on the basis of knowledge that one day’s exposure might lead to lung cancer thirty years later. The employee would have neither the means to measure the exposure nor data to evaluate the actual risk of one day’s exposure.
The regulation governing discrimination states: "If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity, section 11(c) has been violated." Unlike under section 7 of the NLRA, employees exercising the OSH Act right of refusal cannot be permanently replaced or forced to await a new job opening. Workers have a right to return to their jobs when they decide that the imminent hazard has abated.

B. Section 7 of the NLRA

The core of the NLRA is section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." To ensure unfettered participation in concerted activities, Congress enacted section 8(a)(1), which provides that employers shall not "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Consequently, an employer cannot discriminate against employees who properly exercise their right to engage in concerted activities for mutual aid or protection. If refusing hazardous work thus constitutes appropriate concerted activity under section 7, an employer may not terminate, discipline or reprimand an employee who chooses to take such action.

The Supreme Court has had no difficulty in finding refusals of hazardous work to be protected under section 7. In *NLRB v. Washington Aluminum Co.*, a unanimous Court upheld the right of employees to walk off their jobs in protest of bitterly cold working conditions. In dismissing the employer's objection that the protesting employees had violated company rules, the Court stated that concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and the Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

The Court held that employees exercising section 7 rights need not

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104. 29 C.F.R. § 1977.6(b) (1979); see also *Id.* § 1977.6(a).
105. *See Comment, A Right Under OSHA to Refuse Unsafe Work or a Hobson's Choice of Safety or Job?, 8 Balt. L. Rev. 519, 543 n.168 (1979).*
108. *Id.* § 158(a)(1).
110. *Id.* at 17.
show that an objective hazard existed, "nor that their refusal to work was reasonable: "'[I]t has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."

The Washington Aluminum rule has been followed and clarified by the NLRB and federal courts. In Union Boiler Co., the Board set forth its position that an employee's refusal to work would be protected under section 7 if she believed conditions were unsafe, regardless of any objective evaluation of the hazard. The Fourth Circuit enforced the Board's order. In NLRB v. Modern Carpet Industries, Inc., the Tenth Circuit reaffirmed Washington Aluminum and posed a subjective standard, holding that concerted activity in response to perceived hazards must be motivated by a "genuine fear."

Washington Aluminum also refused to impose on employees the requirement of presenting specific demands. The Court stated: "We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable." The NLRB refined this rule in Union Boiler Co. to provide that the failure to raise safety and health complaints to management does not render employee actions unprotected so long as they were motivated by safety and health concerns in the first instance.

In order to enjoy protection under the NLRA, employee action must be "concerted." Concerted activity must further a group interest. Group action aimed at correcting safety and health hazards would clearly receive protection. Moreover, the NLRB has significantly expanded its test for concerted activity to include individual actions that tend to advance group interests.

The Board has recognized that individual actions in response to

111. Id. at 16.
113. Union Boiler Co. v. NLRB, 530 F.2d 970 (4th Cir. 1975).
114. 611 F.2d 811 (10th Cir. 1979).
115. Id. at 815. The court stated further: "Employees who refuse to work and who absent themselves from their employer's premises in protest over wages, hours, or other working conditions are engaged in concerted activities for mutual aid or protection within the meaning of § 7."
116. Id. at 813.
117. 370 U.S. at 14.
118. 213 N.L.R.B. at 818.
workplace conditions often go beyond self-interest. Thus, concerted activity may be found when an employee makes inquiries at her employer's bank to determine whether the employer has sufficient funds on deposit to meet an upcoming payroll; such information, by its nature, is of vital concern to all employees. Concentrated activity has been found where an individual attempted to vindicate the rights of female employees under Title VII of the Civil Rights Act of 1964, where an employee filed a claim for workers' compensation and where an employee applied for unemployment insurance benefits.

This line of analysis is particularly germane to health and safety issues. Workplace hazards often have the potential to spread to other parts of the jobsite (e.g., toxic chemicals). The Board will thus imply concerted activity when an individual employee exercises rights under the OSH Act or its state counterparts. In Alleluia Cushion Co., the Board held that an individual employee's safety complaint was protected activity:

> [S]ince minimum safe and healthful employment conditions for the protection and well-being of employees have been legislatively declared to be in the overall public interest, the consent and concert of action emanates from the mere assertion of such statutory rights. Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

The Board has extended the Alleluia Cushion doctrine to employee work refusals over unsafe conditions. In United States Stove Co., an employee refused to operate an electrical press supplied by a power line that ran through a water puddle adjacent to the work area. The Board held that when other employees are subject to being assigned to do the

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121. Dawson Cabinet Co., 228 N.L.R.B. 290, enforcement denied, 566 F.2d 1079 (8th Cir. 1977) (individual employee's refusal to perform a certain job unless she was paid same wages as male workers doing the same job).
124. Alleluia Cushion Co., 221 N.L.R.B. 999, 1000, 91 L.R.R.M. 1131 (1975). The Board did find that the employee's complaints in Alleluia Cushion encompassed the well-being of fellow employees and not just of the complaining individual. Id. at 1001, 91 L.R.R.M. at 1133. See also NLRB v. Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1962) (attempts by solitary employee to enforce collective bargaining agreement deemed concerted activity notwithstanding absence of co-worker support).
same work and don’t disavow an individual’s refusal to perform what that individual perceives to be dangerous work, the refusal constitutes concerted activity.\textsuperscript{126} Similarly, in \textit{Pink Moody, Inc.}\textsuperscript{127} an employee refused to drive a truck with malfunctioning brakes. The Board’s conclusion that the driver had engaged in concerted activity rested on evidence that the employer had received prior complaints from other drivers, one of whom had previously refused to drive the same truck.\textsuperscript{128} The outer limits of this expansive approach to concerted activity are not well defined. The Board has yet to pass on the issue of whether an individual’s refusal to perform hazardous work is protected when she alone is exposed to the alleged danger.

It is also unclear to what extent the courts will embrace the Board’s broad interpretation of concerted activity. The Ninth Circuit, for example, has taken a narrow view and has rejected the \textit{Alleluia Cushion} doctrine. In \textit{NLRB v. Bighorn Beverage Co.},\textsuperscript{129} the court held that a finding of concerted activity could not be sustained where an employee individually filed a safety complaint. While recognizing that some circuits have found concerted activity where an individual seeks to enforce a collective bargaining agreement,\textsuperscript{130} the court held that a statutory complaint required a different analysis. Enforcement of a contract provision, it reasoned, was an assertion of a collectively negotiated right. The court found that because safety statutes were imposed on the workplace and not achieved through collective action, their enforcement by an individual could not constitute concerted activity.\textsuperscript{131} It is not clear whether other courts will follow the lead of \textit{Bighorn Beverage}. In the absence of a Supreme Court ruling on the issue, however, it appears that the Board will continue to apply its \textit{Alleluia Cushion} reasoning.

In summary, there are significant differences between section 7 and OSH Act work refusal rights. Most important is the distinction between the subjective (good faith) determination of a hazardous condition under section 7 and the reasonable person standard imposed by the OSH Act. Further, the groups afforded refusal rights may be different. Section 7 protects those not exposed to dangerous conditions who

\begin{itemize}
\item \textsuperscript{126} \textit{Id.}, slip op. at 19, 102 L.R.R.M. at 1574. The employee who refused was the union president; he had previously filed numerous grievances. A co-worker who was asked to operate the press also refused.
\item \textsuperscript{127} 237 N.L.R.B. No. 7, 98 L.R.R.M. 1463 (July 20, 1978).
\item \textsuperscript{128} \textit{Id.}, slip op. at 4, 98 L.R.R.M. at 1463.
\item \textsuperscript{129} 614 F.2d 1238 (9th Cir. 1980).
\item \textsuperscript{130} The court cited Interboro Contractors, Inc., 388 F.2d 495 (2d Cir. 1967); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217 (8th Cir. 1970) (opinion of then Circuit Judge Blackmun).
\item \textsuperscript{131} 614 F.2d at 1242; see also Dawson Cabinet Co., 566 F.2d at 1083.
\end{itemize}
join with co-workers in concerted activity against workplace hazards; the OSHA regulation protects only those directly threatened. By the same token, the personal right found in the OSH Act may at times afford protection where section 7 does not. As we have seen, the NLRB must imply concerted activity to protect a work refusal; it remains to be seen how liberal a rule the Board and the courts will ultimately adopt in bringing individual refusals within section 7 protection.

Several other distinctions are of practical importance. The OSHA regulation requires an employee to exhaust alternative remedies—through both administrative channels and direct consultation with the employer—before resorting to work refusal. Prior exhaustion is not a condition of section 7 protection. An aggrieved employee may file an NLRB complaint within 6 months of the alleged unfair labor practice; an OSHA complaint must be filed within thirty days.

The breadth of the section 7 right to refuse hazardous work is, however, mitigated by the employer's apparent prerogative to hire temporary or permanent replacements for workers who walk off the job.

132. NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942); Morrison-Knudsen Co. v. NLRB, 358 F.2d 411, 413 (9th Cir. 1966).
134. See notes 124-31 supra and accompanying text.
135. See notes 116-17 supra and accompanying text.
138. See Comment, A Right to Refuse Unsafe Work or a Hobson's Choice of Safety or Job?, 8 BALT. L. REV. 519, 542 (1979). If a worker refusing hazardous work becomes a participant in a labor dispute and Witholds services from the employer, the question is then whether the employee who refuses work due to safety and health concerns is subject to the same rules that govern economic strikes. In a strike to secure economic gains, the employer may not fire striking employees but may hire temporary or permanent replacements to maintain production. Labor Board v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938). Once the strikers are willing to resume work, they have the right to return to jobs performed during the dispute by temporary replacements. If permanent replacements were hired, displaced strikers lose the right to return to the job immediately but are entitled to first preference hiring when comparable jobs subsequently become available. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

Neither the courts nor the Board have expressly determined whether workers exercising the section 7 right to refuse hazardous work can be temporarily or permanently replaced. It appears that the Board would allow replacement. In Keystone-Seneca Wire Cloth Co., 244 N.L.R.B. No. 62, 102 L.R.R.M. 1161 (Aug. 20, 1979), it stated in dicta that when an employee refuses hazardous work under section 7, "the employer is not without recourse in the face of such protected activity; while he cannot discharge employees so engaged, he is not precluded from treating them as economic strikers, subject to replacement." Id., slip. op. at 7.

It may be argued, however, that because employees who refuse to perform hazardous work are not seeking economic gain, they should be treated in the same manner as unfair labor practice strikers or employees who refuse, out of principle, to cross picket lines of unions other than their own. Unfair labor practice strikers have a right to return to their jobs regardless of whether replacements were hired during the dispute. In the picket line cases, an employer may replace workers only when it has shown that "the refusal constituted a substantial interference with its business, that any such interference could not be overcome merely by assigning another employee.
In contrast, the employee claiming OSH Act protection enjoys a right to return to work immediately after a determination that the hazard has abated. Finally, as discussed below, employees' rights under section 7 may be limited or wholly nullified by a collectively-bargained no-strike pledge.

C. Section 502 of The LMRA

In an organized workplace, the existence of a no-strike provision may render ineffective the section 7 right to engage in concerted activity against work hazards. If an employee is covered by a no-strike clause, express or implied, which does not exempt safety and health matters, she may not engage in any concerted work refusal that may be classified as a strike. Such an employee, however, is not necessarily deprived of a right to refuse hazardous work under federal labor law.

Section 502 of the LMRA exempts certain work refusals from characterization as strike activity. It provides: "[T]he quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this chapter." Thus when "abnormally dangerous" conditions exist, employees may engage in work refusals without fear of contract violations; the effect of section 502 is to strip away the no-strike clause and allow the pursuit of section 7 rights.

In addition, section 502 appears to protect activity that is not "concerted." The section's unambiguous language specifically provides that a single employee may refuse abnormally dangerous work. To subject the refusing employee to the section 7 concerted action requirement would undermine the individual right clearly intended by section 502.

139. See note 106 supra and accompanying text.
140. See notes 141-42 infra and accompanying text.
142. 29 U.S.C. § 142(2) (1976) provides that "[t]he term 'strike' includes any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees."
144. See Atleson, Threats to Health and Safety: Employee Self-Help Under the N.L.R.A., 59 MINN. L. REV. 647, 659 (1975): [S]ection 502 has operational value only when a no-strike clause is otherwise applicable. In such a case, section 502 operates as a rule of construction for private agreements, much like the federal policy discussed in Mastro Plastics Corp. v. NLRB. In Mastro the Supreme Court decided that, because of the need to effectively enforce the Act, the normal no-strike clause would not preclude strikes in response to serious employer unfair labor practices. Similarly, a common no-strike clause does not encompass strikes over abnormally dangerous conditions, because of the obvious human interest reflected in section 502.
One appellate court has observed: "When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section [502] protects him from employer retaliation."\(^{145}\)

For a worker to claim the protection of section 502, though, she must prove that the working conditions leading to her refusal were "abnormally dangerous." Early cases interpreted this language to imply a subjective test.\(^ {146}\) However, the Board, and subsequently the courts, reinterpreted the section to require an objective showing of hazard. The Supreme Court has held that a union claiming a section 502 right to refuse must produce "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."\(^ {147}\)

In interpreting the section 502 requirement of "abnormal" danger, the Board has determined that the complained-of conditions must have changed "the character of the danger."\(^ {148}\) The section 502 protection does not apply to inherently dangerous occupations, such as mining or construction, unless normal working conditions have been significantly altered.\(^ {149}\) "Abnormally dangerous" is a relative term that must be applied to each industry and workplace in order to determine when "the risk of danger has increased over that considered to be normal for the specific job assignment."\(^ {150}\)

While inherently dangerous work may not, in itself, justify a refusal, changes in the workers' perceptions of the hazard will trigger a section 502 refusal right, even though the actual physical danger has

\(^{145}\) Clark Eng'ring & Constr. Co. v. United Bhd. of Carpenters, 510 F.2d 1075, 1079 (6th Cir. 1975) (emphasis added).

\(^{146}\) See, e.g., NLRB v. Knight Morley Corp., 251 F.2d 753 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958). The test the court used in Knight Morley was ambiguous; the court stated that it was applying a "good faith" test, but it admitted evidence to determine whether the employees' belief that conditions were dangerous was "reasonable."


\(^{149}\) 197 N.L.R.B. at 344, 345, 80 L.R.R.M. at 1782.

\(^{150}\) 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, 806. In Anaconda Aluminum Co., 197 N.L.R.B. at 344, 80 L.R.R.M. at 1782, the Board commented: "[W]ork which is recognized and accepted by employees as inherently dangerous does not become 'abnormally dangerous' merely because employee patience with prevailing conditions wears thin or their forbearance [sic] ceases."

The treatment of inherently hazardous work illustrates the difference between the objective standards under section 502 and the OSH Act. The OSHA regulation's "reasonable apprehension" test appears to require no accommodation for the inherent dangerousness of a particular job. The fact that the worker decides he will no longer risk what he believes to be an imminent danger may be sufficient under the OSH Act, even if the decision comes after a long period of forbearance. The Board's more stringent interpretation of section 502 requires a showing that the dangerous conditions actually changed.
not changed. For example, if a worker handles toxic substances in an apparently safe manner but later discovers evidence that the process involves imminently dangerous health consequences, she may be able to meet the "increased danger" requirement under section 502. Although the work practices remain the same, the new information changes the perception of danger. Thus, when an employee fell through the wire mesh at the Whirlpool plant, other workers could arguably have relied on changed factual circumstances (increased likelihood of death or serious injury) in asserting the right to refuse under section 502.

Section 502 imposes a heavy burden on the employee claiming a right to refuse: objective evidence that an abnormal danger actually existed. If the worker does not meet the burden, the refusal may be deemed a strike. Recent cases, however, suggest that the Board may be willing to exempt some temporary safety and health work stoppages from characterization as strike activity even if they do not meet the strict requirements of the section 502 test.

In Anheuser-Busch, Inc.,151 two employees refused to work with potentially explosive grain dust while a welding operation was in progress in the workplace. The employees had determined that the welders had approximately fifteen minutes of work remaining and they were willing to resume work as soon as the welding was completed. The employer suspended one of the employees. In holding that the employee's refusal was protected, the Board did not consider whether the workplace conditions met the section 502 test. Instead, it enumerated three factors that militated against characterization of the refusal as a strike. First, there was no evidence that the refusing employees intended to pressure the employer "to grant any concessions or to protest any of its policies."152 Second, the work stoppage was intended to be very brief. Third, there was no indication that the brief stoppage interfered with production.153

The Board found the same factors present in a subsequent case, Brown & Root, Inc.,154 in which it ruled that employees did not strike when they refused to perform outdoor work with an electrically powered pipe fabricating machine during a brief rainstorm. This line of cases suggests that the Board is willing to allow brief work stoppages.

152. Id., 99 L.R.R.M. at 1549.
153. Id. at 207-08, 99 L.R.R.M. at 1549; see also Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200, 1203 (9th Cir. 1974).
154. 246 N.L.R.B. No. 9, 102 L.R.R.M. 1511 (Oct. 11, 1979). In both Brown & Root and Anheuser-Busch the Board emphasized that the stoppages were motivated by self-protection, were of brief duration, did not interfere with production, and were not intended to influence employer policies.
motivated by safety and health concerns, when the production process is not significantly interrupted. Such a right to refuse is independent of section 502 protection and does not require proof of objectively dangerous conditions.

D. Collective Bargaining Agreements

The existence of a contractual grievance and arbitration mechanism creates both rights and duties for the employee facing hazardous work conditions. Since the Steelworkers Trilogy, federal law has recognized a general presumption that labor disputes are arbitrable. Unless specifically exempted from arbitration by the collective bargaining agreement, safety and health matters fall within this presumption. The availability of the arbitral forum thus affects work refusal rights in two ways: first, an employer may be able to enjoin the work refusal and compel arbitration; second, an employee may resort to arbitration to challenge discipline imposed due to her work refusal.

In Gateway Coal Co. v. UMWA, the Supreme Court upheld a district court's injunction of a work stoppage motivated by safety and health concerns where the employees were covered by a broad arbitration agreement. The decision stands for the proposition that an employer may obtain injunctive relief to enforce an implied no-strike obligation where the work refusal is in response to hazards that have been abated or that lack an objective basis. The Court emphasized, however, that a refusal due to conditions meeting the section 502 "abnormally dangerous" test would not be enjoined.

It must also be noted that the Court in Gateway Coal addressed

155. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). As the Court announced in Warrior & Gulf: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-83.


158. The work stoppage in Gateway Coal was motivated by the presence on the job of supervisors who were suspected of falsifying safety information. In addition to enjoining the work stoppage, the district court ordered the supervisors suspended. Id. at 372-73.

In seeking to enjoin work stoppages generally, an employer must show that: (1) the no-strike clause is applicable; (2) there will be continued breaches; (3) the breaches have caused or will cause irreparable harm to the employer; and (4) the damage to the employer will be greater in the absence of an injunction than the damage suffered by the union when the stoppage is enjoined. Boys Market, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, 254 (1970); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting).

159. The Court stated:

The Court of Appeals held that "a refusal to work because of good faith apprehension of physical danger is protected activity and not enjoicable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract." 466 F.2d at 1160. We agree with the main thrust of this statement—that a work stoppage called
right to refuse hazardous work

itself only to the legal arguments surrounding the exercise of the section 502 right of refusal. The OSH Act arguably supersedes any contractual no-strike obligation. If so, injunctive relief will not be available when workers assert a right to refuse under the OSHA regulation. 160

If, rather than seeking an injunction, an employer disciplines or otherwise retaliates against an employee for refusing unhealthful or unsafe work, the employee has recourse to the grievance and arbitration machinery. If the parties fail to resolve the dispute in the early stages of the process, it is the arbitrator who will ultimately decide the propriety of the discipline. The role of the arbitrator is to interpret and apply the collective bargaining agreement. It is a general tenet of arbitration, absent specific contract language to the contrary, that a worker must “obey now and grieve later.” However, arbitrators have fashioned an exception to this rule when the employee walks off the job because of a workplace hazard. 161

The standard applied by the arbitrator in determining whether a hazard exists will significantly influence the arbitral result. In the absence of specific contract language regarding work refusals, arbitrators probably will shun the subjective standard. A recent survey of arbitrations involving refusals to perform hazardous work concluded that most arbitrators will consider whether or not the evidence supported a finding that existing conditions were in fact hazardous to safety or health. 162 The standard most likely to be used parallels the section 502 objective test. 163 Yet an arbitrator is likely to be more sensitive than 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.

414 U.S. at 385.


162. Summa, supra note 161, at 372.

163. Summa, supra note 161, at 372; but see Elkouri & Elkouri, supra note 161, at 673-74, which states that most arbitrators take a “reasonable person under the circumstances” approach, which resembles the OSHA standard.

Because of the difficult burden of proof which the worker must shoulder, both under section 502 and under bargaining agreements in general, unions should take an active role in educating their members on their right to refuse hazardous work. A faction within the Teamsters Union, PROD (which recently merged with another Teamsters group, Teamsters for a Democratic Union), has consistently made such efforts. In its newspaper PROD, the section 502 standard and its implications were explained to its truck driver membership. PROD set forth strategies to prepare employees for effective assertion of section 502 rights:

[T]he N.L.R.B. will insist that you be able to produce “evidence,” not just your own statement attesting to your own personal belief that your job was unsafe. If you cannot, you’re dead. So, be sure to get witnesses to verify the problem and if it is something visible, you should take a photograph. All drivers NOTE: buy and keep a cheap instant camera with film and flash bulbs in your bag at all times. Ditto for a cheap cas-
the courts to such factors as workplace conditions, practices and policies. This sensitivity, coupled with a concern for worker morale and productivity, may lead to compromise awards. Many unions have negotiated clauses that afford unit members the right to refuse or protest specific dangers. These provisions provide differing degrees of protection. The United Steelworkers Union has been the most persistent proponent of such provisions, though the protections it has negotiated vary significantly from unit to unit. In some agreements the employee protesting an unsafe condition has the choice of filing a grievance with preferred handling or seeking to resolve the issue with the foreman—if necessary, with the help of a union and a company representative. If the employee chooses the latter course, and the negotiations fail, the employee may present a grievance in the second stage of the grievance procedure. This clause bestows no specific right to refuse. Other Steelworker contracts allow for a greater degree of self-help. One such agreement provides:

[A]n employee or group of employees who believe that they are being required to work under conditions which are unsafe or unhealthy beyond the normal hazard inherent in the operation in question shall have the right to:

1) file a grievance with preferred handling, or
2) be relieved “from the job or jobs, without loss to their right to return to such job or jobs, and, at Management’s discretion, assignment to such other employment as may be available in the plant . . . should either management or the Board conclude that an unsafe condition existed and should the employee not have been assigned to other available equal or higher-rated work, he shall be paid for the earnings he otherwise would have received.

Such a provision provides extensive protection to unit members. For back pay purposes, the standard used to evaluate hazardous conditions appears to be objective (i.e., unsafe or unhealthy conditions beyond the normal inherent hazard). A worker, nonetheless, can refuse work on
the basis of a subjective fear of danger without loss of future job rights. This clause thus combines the protections and standards of the NLRA and OSH Act work refusal provisions, and the unit member enjoys greater protection than is available under any individual statute.

While contract provisions such as these benefit workers and their unions, they may give rise to unforeseen liabilities. For example, if a union negotiates a clause allowing it to remove workers from hazardous work, unit members may later bring civil actions alleging that the union negligently failed to enforce that provision. In Helton v. Hake, the Missouri Court of Appeals held that employees or their survivors may sue a union for negligently failing to exercise contractual rights. The court dismissed claims of federal preemption and concluded that when a union has the power unilaterally to enforce a contractual provision, it assumes a common law duty to its members and must consequently exercise due care in ensuring enforcement.

Some courts have followed Helton, while others have held that the federal labor law duty of fair representation preempts state negligence actions arising out of the enforcement of bargaining agreement provisions. Several federal courts have held that to impose such liability on unions would frustrate national labor policy and cause unions to withdraw from negotiations over provisions establishing greater health and safety protection. The threats of costly litigation expenses and potential liability may also discourage otherwise aggressive unions from seeking greater influence over workplace safety and health.

We have seen that arbitration may provide an alternate, non-statutory remedy for the employee disciplined after refusing hazardous work. Its availability, however, raises tactical questions that the worker and union must carefully consider. If an employee submits his grievance to arbitration, subsequent recourse to the NLRB may be foreclosed; the Board will defer to a prior arbitration award unless there is evidence of unfair proceedings. When the employee files an unfair labor practice charge with the Board prior to arbitration, a different deferral rule applies. If the charge alleges infringement on an individ-

168. Id. at 321.
172. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). In Spielberg, the Board announced that it would defer to a prior arbitration when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. Id. at 1082.

The Spielberg doctrine was employed in United Parcel Services, Inc., 232 N.L.R.B. 1114 (1977), enforced, 603 F.2d 1015 (D.C. Cir. 1979) where the Board deferred to an arbitration decision involving a truck driver's refusal to drive an allegedly unsafe truck.
ual employee right and involves a matter that could be (but has not been) submitted to arbitration, the Board will proceed to adjudicate the unfair labor practice.\textsuperscript{173} To preserve a maximum degree of flexibility, the employee may want to concurrently file a charge with the Board and exhaust all pre-arbitration stages of the grievance procedure before finally choosing between the arbitral and administrative forums.

Deferral policy under the OSH Act is less well defined. OSHA asserts the right to postpone its proceedings until other forums have adjudicated an employee’s complaints.\textsuperscript{174} The decision to defer to other forums is made on a case-by-case basis. The regulation governing deferral states:

Before deferring to the results of other proceedings, it must be clear that those proceedings dealt adequately with all factual issues, that the proceedings were fair, regular, and free of procedural infirmities, and that the outcome of the proceedings was not repugnant to the purpose and policy of the Act.\textsuperscript{175}

Clearly, however, OSHA is not required to defer and may provide a wholly independent remedy.\textsuperscript{176} Indeed, one federal court has challenged OSHA’s right to defer to the results in other proceedings, holding that “[w]hile he [the Secretary] has the leeway as to when he will file the action, nothing in the Act authorizes him to permit another agency to bring the action, or make a determination of liability under the Act.”\textsuperscript{177}

The employee’s choice of remedy involves a variety of considerations. The most important factor is the substantive law applied in each of the respective forums. In addition, there is a significant economic factor: the NLRB and OSHA provide legal representation if they determine that a statutory violation has occurred, while in an arbitration proceeding the union or the employee may incur the potentially substantial costs of counsel and arbitrator’s fees.

\textsuperscript{174} 29 C.F.R. § 1977.18(b)-(c) (1979).
\textsuperscript{175} Id. § 1977.18(c).
\textsuperscript{176} Relying on the principle of independent remedies set forth in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the court in Marshall v. N.L. Industries, Inc., 618 F.2d 1220 (6th Cir. 1980) observed: “[T]he OSHA legislation was intended to create a separate and general right of broad social importance existing beyond the parameters of an individual labor agreement and susceptible of full vindication only in a judicial forum.” 618 F.2d at 1222.
IV.

Conclusion

As workplace dangers increase and as efforts mount to repeal or limit the OSH Act, it is crucial that workers become more sensitive to workplace hazards. Yet increased vigilance will mean little unless workers have the right to refuse work they believe to be dangerous. Despite the Whirlpool decision, however, most workers still do not enjoy an effective right to refuse imminently hazardous work. Instead, they are faced with a fragmented and inadequate set of partial protections.

The OSHA regulation upheld by the Court in Whirlpool is a significant advance. The objective standard by which the refusing employee is judged, however, limits the usefulness of the regulation. Workers forced to make a snap decision may be reluctant to risk their jobs on the possibility that their refusal will be found legally reasonable months or years later. Moreover, a trier of fact may look askance at employees who refused to do work that they reasonably but erroneously believed to be imminently hazardous.

Similarly, there are gaps in the other protections afforded refusing workers. Section 7 of the NLRA, which correctly employs a "good faith" standard, may not protect the employee from being "permanently replaced." Moreover, section 7 protections are frequently sacrificed in collective bargaining. In contrast, the right to refuse granted by section 502 of the LMRA may not be bargained away. The standard employed by section 502 is prohibitively high, however; to be protected, the employee must be able to show that the workplace hazard was in fact "abnormally dangerous." A worker is thus forced to do what scientists often cannot do: determine the exact extent to which a given chemical is dangerous to her health.

Finally, some workers are protected by clauses in collective bargaining agreements that permit them to refuse dangerous work. This protection is of no use, though, to the majority of American workers—those not represented by a union, those belonging to weak unions, and those belonging to strong unions that have traded safety and health protection for other bargaining objectives. Furthermore, even when a contract contains a favorable provision, the worker has to wager that it will be correctly applied by an arbitrator; if the worker loses the grievance, she may be practically foreclosed from pursuing her statutory remedies.

When workers are given an effective legal right to refuse hazard-
ous work, the nation will begin to fulfill the OSH Act's objective: "To assure so far as possible every working man and woman in the nation safe and healthful working conditions. . . ." 180 Until workers can exercise that right, they will be forced to risk their lives and health doing unnecessarily dangerous work, or to risk their jobs when they refuse.