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Retaliatory Discrimination Actions Under Section 11(c) of OSHA: Too Many Rights, Not Enough Protection

Kevin J. Worthen

COMMENTS

Retaliatory Discrimination Actions Under Section 11(c) of OSHA: Too Many Rights, Not Enough Protection

I. INTRODUCTION

The declared purpose of the Occupational Safety and Health Act of 1970 (OSHA) is "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."[1] Congress believed that this laudable goal could be achieved "by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions."[2]

Among the rights OSHA grants to an employee is the right to be free from retaliatory discrimination brought about because he asserts his other OSHA rights.[3] Congress, fearful "that the possibility of retaliatory discharge might inhibit employees from reporting OSHA violations, . . . inserted provisions prohibiting discrimination against employees who report OSHA violations."[4] These provisions are contained in section 11(c) of OSHA:

> 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 Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Chapter.[5]

The broad statutory language of section 11(c) leaves three questions largely unanswered: (1) What employee activity is pro-

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1. 29 U.S.C. § 651(b) (1976).
2. *Id.* § 651(b)(2).
3. 29 U.S.C. § 660(c) (1976).
4. Taylor v. Brighton Corp., 616 F.2d 256, 260 (6th Cir. 1980).
5. 29 U.S.C. § 660(c) (1976). Although this Comment will focus mainly on employer discrimination, the statute prohibits discrimination by any "person." *Id.*

tected from retaliatory discrimination? (2) What employer activity constitutes impermissible discrimination? and (3) What procedural rights and burdens do an employee and employer have when an employee files a section 11(c) complaint? This Comment will examine the answers the Secretary of Labor and various courts have given to these questions and will consider whether these answers further section 11(c)'s goal of encouraging employees to exercise their OSHA rights.

II. Employee Activity Protected by Section 11(c)

Four kinds of employee activity are protected by section 11(c). An employee is protected from retaliatory discrimination (1) when he files any complaint under or related to OSHA, (2) when he institutes any OSHA-related proceeding, (3) when he testifies or is about to testify in any such proceeding, and (4) when he exercises on behalf of himself or others any right afforded by OSHA.[6]

The scope of each of these four kinds of activity has been the subject of litigation and interpretive administrative regulation. Both the courts and the Secretary of Labor have liberally interpreted the language of section 11(c), thereby expanding the scope of protected employee activity beyond that suggested by a literal reading of the section.

A. Filing a Complaint

An employee is clearly protected from retaliatory discrimination when he files a complaint with the Secretary of Labor. OSHA gives an employee the right to "request an inspection by giving notice to the Secretary" when he believes "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists."[7]

Although filing a complaint with persons other than the Secretary is not a procedure provided for by OSHA, this may also be protected activity under section 11(c). In *Marshall v. Springville Poultry Farm, Inc.*,[8] a federal district court rejected the argument that an employee's filing a complaint with his employer was not protected activity under section 11(c). The court emphasized the breadth of the phrase "under or related to this

6. *Id.*
7. 29 U.S.C. § 657(f)(1) (1976).
8. 445 F. Supp. 2 (M.D. Pa. 1977).

chapter" found in section 11(c) and noted, "Had the drafters of the statute intended to limit [section 11(c)] in the manner that defendant suggests, they would have omitted the phrase 'under or related to this chapter' and included the words 'provided for in the Act' or words of similar import."[9] The Secretary of Labor has likewise broadly interpreted the term "related to," stating, "The range of complaints 'related to' the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power."[10] Accordingly, the Secretary has promulgated regulations that interpret section 11(c) so that it protects not only good faith complaints to employers,[11] but also complaints about workplace conditions filed with other federal, state, or local agencies with authority to regulate or investigate occupational safety and health conditions.[12] An employee is therefore protected from retaliatory discrimination when he files a complaint with his employer or with appropriate state agencies even though such filings are not expressly provided for by OSHA.

B. Instituting a Proceeding

The proceedings an employee can institute or cause to be instituted without fear of retaliatory discrimination are mostly provided by OSHA itself. OSHA specifically gives the employee the right to initiate proceedings (1) challenging the reasonableness of an abatement period,[13] (2) reviewing Occupational Safety and Health Review Commission orders,[14] (3) compelling the Secretary to seek relief under section 13 (imminent danger injunctions),[15] (4) leading to the promulgation of occupational safety and health standards,[16] (5) seeking modification or revocation of a variance,[17] and (6) judicially challenging a standard.[18] The Sec-

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9. *Id.* at 3. *Cf.* Dunlop v. Hanover Shoe Farms, Inc., 441 F. Supp. 385 (M.D. Pa. 1976) (allegation that employee's discharge was caused by his filing complaint with employer an alternate ground for denying employer's motion to dismiss for failure to state a claim).

10. 29 C.F.R. § 1977.9(a) (1980).

11. *Id.* § 1977.9(c).

12. *Id.* § 1977.9(b).

13. 29 U.S.C. § 659(c) (1976).

14. 29 U.S.C. § 600(a) (1976).

15. 29 U.S.C. § 662(d) (1976).

16. 29 U.S.C. § 655(b) (1976).

17. *Id.* § 655(d).

retary has not, however, ruled out the possibility of extending section 11(c) protection to employee initiation of proceedings not specifically provided for by OSHA, stating that the Act's broad remedial purposes and sweeping scope of application should be considered when determining whether a proceeding is related to OSHA.[19] As yet, neither the Secretary nor the courts have explained what other kinds of proceedings can be instituted by an employee who wishes to be protected by section 11(c). The list of proceedings expressly authorized by OSHA is so complete that an employee will probably be adequately protected even if no other proceedings are added to that list.

C. Testifying in a Proceeding

Section 11(c) protects an employee against retaliatory discrimination when he "has testified or is about to testify in any such proceeding."[20] Two questions immediately arise: (1) What actions constitute "testifying"? and (2) What are "such proceedings"? No federal court has interpreted this part of section 11(c); thus, the only official effort to answer these questions is found in the regulations promulgated by the Secretary of Labor.

Again, the Secretary's interpretation takes a broad view of what type of employee activity is protected by section 11(c). Testimony, according to the Secretary, includes "any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions."[21] Statements given in the course of inspections or investigations, however, do not necessarily coincide with the typical judicial interpretation of the term testimony. " '[T]estimony' . . . implies the preliminary of taking an oath."[22] It is not likely that an employee's statements during an inspection would be made under oath. Accordingly, the Secretary's interpretation of "testimony" may be broader than that intended by Congress. As the Eighth Circuit noted in a different context:

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18. *Id.* § 655(f).

19. 29 C.F.R. § 1977.9(a) (1980).

20. 29 U.S.C. § 660(c)(1) (1976).

21. 29 C.F.R. § 1977.11 (1980).

22. United States v. Mathern, 329 F. Supp. 536, 537 (E.D. Pa. 1971). *See also* Flowers v. Flowers, 284 Ala. 230, 236, 224 So. 2d 590, 595 (1969); State v. Ricci, 107 R.I. 582, 589-90, 268 A.2d 692, 697 (1970); *Ex parte* Jackson, 470 S.W.2d 679, 682 (Tex. Crim. App. 1971).

> The word "testimony" or "to testify" implies the usual preliminary qualification of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question.[23]

Although statements made by an employee during the course of an inspection would constitute activity protected by the "exercising any right" language of section 11(c),[24] a court should be careful to restrict the scope of protection granted by the "testifying" portion of section 11(c) to employee statements given under oath. Otherwise, an employee wishing to harm his employer might greatly exaggerate claims of safety violations in informal administrative proceedings because neither perjury laws nor employer-imposed sanctions would deter him from giving out such false information.

The Secretary's interpretation of "such proceeding" is likewise broader than a literal reading of section 11(c) might suggest. The use of the word "such" could, by literal interpretation, restrict the proceedings in which an employee could testify without being discriminated against to those "instituted or caused to be instituted" by that employee.[25] The Secretary, however, feels that protection should be given the employee "[i]f the employee is giving or is about to give testimony in *any* proceeding under or related to the Act."[26] "This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee . . . ."[27] In this instance, the Secretary's broad reading of section 11(c) is commendable. An employer would be no more justified in discriminating against an employee who testified in a proceeding instituted by someone else than he would be in discriminating against an employee who testified in a proceeding instituted by the employee himself. In either type of proceeding, fear of retaliatory discrimination might prevent the employee from reporting existing violations. Congressional concern for this type of employee reluctance

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23. Edelstein v. United States, 149 F. 636, 640 (8th Cir. 1906).

24. OSHA grants the employee the right to accompany and consult with the compliance officer during an inspection. 29 U.S.C. § 657(e) (1976).

25. *See* 29 U.S.C. § 660(c)(1) (1976).

26. 29 C.F.R. § 1977.11 (1980) (emphasis added).

27. *Id.*

prompted the passage of section 11(c).[28] The Secretary's refusal to adhere to a literal interpretation of "such proceeding" is therefore justifiable.

D. Exercising Rights Afforded by OSHA

The fourth kind of protected employee activity is "the exercise by such employee on behalf of himself or others of any right afforded by this Chapter."[29] The use of the term "afforded by," in contrast to the "under or related" language modifying "proceeding,"[30] suggests that the rights exercised by an employee must be directly provided for by OSHA before they constitute protected activity. However, this has not prevented the Secretary and the courts from expanding the scope of activities protected under this clause.

Clearly, an employee is protected when he is exercising the rights expressly granted him by OSHA. These rights include the right to (1) file a complaint with the Secretary of Labor,[31] (2) institute or cause to be instituted an inspection or other proceedings,[32] (3) testify in such proceedings,[33] (4) accompany the Secretary or his authorized representative during the physical inspection of any work place,[34] and (5) consult with this inspector when no authorized employee representative is present.[35]

In *Dunlop v. Hanover Shoe Farms, Inc.*,[36] the Federal District Court for the Middle District of Pennsylvania held that the rights afforded an employee by OSHA included the right to "safe and healthful working conditions"—a right the court felt was established by section 2(b) of the Act.[37] Section 2 expresses the congressional purpose behind OSHA, which was "to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions."[38] Whether this declara-

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28. H.R. REP. No. 1291, 91st Cong., 2d Sess. 27 (1970), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR & PUB. WELFARE, 92D CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 857 (Comm. Print 1971) [hereinafter cited as LEGISLATIVE HISTORY].

29. 29 U.S.C. § 660(c)(1) (1976).

30. *See* text accompanying notes 9-12 *supra*.

31. 29 U.S.C. § 657(f) (1976).

32. *See* text accompanying notes 13-19 *supra*.

33. *See* text accompanying notes 20-28 *supra*.

34. 29 U.S.C. § 657(e) (1976).

35. *Id.*

36. 441 F. Supp. 385 (M.D. Pa. 1976).

37. *Id.* at 388.

38. 29 U.S.C. § 651(b) (1976) (emphasis added).

tion of congressional purpose can be construed as an actual grant of the right to such conditions is questionable. Even more discomforting to the employer is the scope of employee activities which could be encompassed by such a right. In *Hanover Shoe Farms* the court held that "retention by the [employee] of counsel to represent him in rectifying *what he considered to be* unhealthy and unsafe working conditions . . . was the first step in his exercise of his right to 'safe and healthful working conditions.' "[39] If the employee's right to safe and healthful working conditions includes the right to retain counsel when he believes that working conditions are unsafe and unhealthful, it would also seem to include the right to encourage his coworkers to apply pressure on their employer to upgrade what they believe are unsafe or unhealthful working conditions, even if the conditons do not violate OSHA standards. Thus, an employer could be prevented from discharging an employee who he thought was unjustifiably fomenting discord among his other workers. If the employee caused the discord in an effort to improve what he felt were unsafe and unhealthy working conditions, he would be protected from retaliatory discrimination under the rationale of *Hanover Shoe Farms* even if the conditions complained of did not violate OSHA standards. Although such activity might be protected under the Labor Management Relations Act,[40] encouraging an employee to foment discord when he believes that unsafe conditions exist increases tension between the employer and his employees without effectively vindicating the policy behind OSHA. Congressional enactment of OSHA indicates a belief that it is more effective to use the power of a governmental agency to force compliance than it is to rely on the combined power of the employees. In addition, if truly objective standards are to be used, the agency, not the employee, should determine what conditions are unsafe. If an employee is not sure whether a condition violates OSHA standards, he should contact the agency and request that it take action. He should not be allowed to force his standards of safety on his employer.

The extent of this "right" to safe and healthful working conditions could be very broad indeed, and courts should carefully consider the extent to which the policies underlying OSHA

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39. 441 F. Supp. at 388 (emphasis added).

40. 29 U.S.C. §§ 141-187 (1976). Section 8(a) of the LMRA forbids employers from interfering with employees exercising their right to engage in concerted activities for the purpose of mutual aid or protection. 29 U.S.C. § 158(a)(1) (1976).

are vindicated by protecting an employee who uses avenues other than those contained in OSHA to pressure his employer into conforming with his perceptions of what constitutes safe and healthful working conditions.

The Secretary also believes that rights explicity provided for by OSHA are not the only rights protected by the "exercising any rights" language of section 11(c): "Certain other rights exist by necessary implication."[41]

The validity of a rule defining one of the rights impliedly afforded by OSHA was the issue decided in the only Supreme Court case dealing with section 11(c). In *Whirlpool Corp. v. Marshall*,[42] the Supreme Court considered a challenge to 29 C.F.R. § 1977.12(b)(2), a rule promulgated by the Secretary of Labor. The rule provides that an employee has the right to refuse hazardous work under certain circumstances and prohibits employers from discriminating against an employee exercising this right.[43] The case arose when two maintenance employees at Whirlpool's plant in Marion, Ohio refused to work on a mesh screen because a fellow employee had earlier fallen through the screen to his death. Because they refused to work on the screen, the employees were ordered to punch out without being paid for the remaining six hours of the shift. Subsequently, written reprimands were placed in the two employees' employment files. A month later the Secretary filed suit claiming Whirlpool's actions violated section 11(c). The Supreme Court granted certiorari to resolve a conflict in the courts of appeals regarding the validity of the regulation.[44]

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41. 29 C.F.R. § 1977.12(a) (1980).

42. 445 U.S. 1 (1980).

43. 29 C.F.R. § 1977.12(b)(2) (1980). The rule in full provides:

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

44. The Fifth and Tenth Circuits had invalidated the regulation. Marshall v. Certi-

The Court first noted that OSHA already contained a mechanism by which workers could protect themselves from working conditions that posed an immediate threat of death or serious injury.[45] Section 8(f) of OSHA provides that an employee who believes that such conditions exist is to notify an OSHA inspector, who, after inspection, can recommend that the Secretary seek an injunction in federal court to restrain the dangerous conditions.[46] The Court, however, noted that under some circumstances an employee would not be adequately protected by this procedure. For example, the employee may not have the time or the opportunity to inform the Occupational Safety and Health Administration (the Agency) before he is required to choose between disobeying his employer and risking death or serious injury.[47] The Secretary promulgated the contested regulation to fill this gap.[48] The Court upheld the regulation as a valid exercise of the Secretary's rule-making power because it (1) conformed to the fundamental objective of OSHA,[49] (2) rationally complemented OSHA's remedial scheme,[50] and (3) was not inconsistent with the legislative intent behind OSHA.[51]

The Court's decision in *Whirlpool* settled a dispute among the circuit courts over the meaning of OSHA's legislative history.[52] The Fifth Circuit had held that two aspects of OSHA's legislative history indicated congressional disapproval of the type of regulation the Secretary had promulgated. First, Congress had rejected a "strike with pay" provision that gave employees the right to "absent themselves from the job with pay" when an employer failed to comply with certain standards pertaining to toxic materials.[53] Second, Congress had also rejected "administrative shutdown" provisions granting Labor Depart-

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fied Welding Corp., 7 O.S.H. Cas. (BNA) 1069 (10th Cir. 1978); Marshall v. Daniel Constr. Co., 563 F.2d 707 (5th Cir. 1977). The Sixth Circuit in *Whirlpool* held that the regulation was valid. Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980).

45. 445 U.S. at 8.

46. *Id.* at 8-9.

47. *Id.* at 10-11.

48. *Id.* at 11.

49. *Id.*

50. *Id.* at 12-13.

51. *Id.* at 17, 21.

52. *Compare* Marshall v. Whirlpool Corp., 593 F.2d 715, 736 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980), *with* Marshall v. Daniel Constr. Co., 563 F.2d 707, 714-15 (5th Cir. 1977).

53. 563 F.2d at 712.

ment officials the power to temporarily shut down an employer's operation in imminent danger situations.[54] The Sixth Circuit, contrary to the Fifth Circuit, held that congressional rejection of these provisions was not inconsistent with granting an employee the right to refuse hazardous work under the circumstances provided for in the Secretary's regulation.[55]

Agreeing with the Sixth Circuit, the Supreme Court noted that when Congress "rejected the 'strike with pay' concept [it] very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for reasons of safety."[56] The Court found the contested regulation distinguishable because it did not "require employers to pay workers who refuse to perform their assigned tasks . . . . It simply provides that in such cases the employer may not 'discriminate' against the employees involved."[57]

The Court also distinguished the contested regulation from the "administrative shutdown" provisions rejected by Congress. The Court determined that Congress had rejected these provisions for two reasons. First, Congress was opposed to "the unilateral authority those provisions gave federal officials, without any judicial safeguards."[58] Second, Congress "feared that the provisions might jeopardize the Government's otherwise neutral role in labor-management relations."[59] The Court observed that "[n]either of these concerns [was] implicated by" the regulation.[60] The employees did not have the power to unilaterally shut down their employer's operations, and the regulation gave no authority to any government entity.[61] Having concluded that

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54. *Id.* at 713-14 & n.17.

55. 593 F.2d at 736. The regulation allows an employee to refuse to work when (1) he has no reasonable alternative, (2) he has a good faith belief that performing the task will subject him to a real danger of serious injury or death, (3) he has a similar good faith belief that there is insufficient time to eliminate the danger through statutory enforcement channels, and (4) where possible, he has sought, but has not obtained, correction of the situation from his employer. 29 C.F.R. § 1977.12(b)(2) (1980). The standard for determining the employee's good faith is an objective one (*i.e.*, a belief held by a reasonable person under the circumstances). *Id.*

56. 445 U.S. at 18-19.

57. *Id.* at 19. The distinction between withholding pay from an employee and discriminating against him will be discussed later. *See* text accompanying notes 77-78 *infra*.

58. 445 U.S. at 21.

59. *Id.* (footnote omitted).

60. *Id.*

61. *Id.*

the regulation was not inconsistent with OSHA's legislative intent, the Court affirmed the Sixth Circuit's decision upholding the regulation.

The *Whirlpool* decision effectively gives the Secretary broad authority to expand, by regulation, the scope of section 11(c)'s protection. In essence, the Court held that the Secretary could determine what rights are impliedly afforded by OSHA as long as these rights conform to the fundamental objective of OSHA, rationally complement OSHA's remedial scheme, and are consistent with the Act's legislative intent. The Secretary has given two examples of what types of employee rights are impliedly afforded by OSHA: the right to request information from the Occupational Safety and Health Administration, and the right to be interviewed by agents of the Secretary in the course of inspections or investigations.[62] Both of these rights fit easily within the *Whirlpool* guidelines. Both also are rights closely related to other rights expressly provided for by OSHA.[63] Like the right to refuse hazardous work, these rights should be protected if OSHA is to achieve its purpose. Thus far, the Secretary has exercised his broad power to declare implied rights only when the implied right has been closely connected to an express right. Because expanding the scope of section 11(c)'s coverage may actually lessen the extent to which its goals can be achieved,[64] the Secretary should exhibit similar restraint in the future.

Once it is decided that an employee's activity is protected by section 11(c), the employer's response to that activity must be evaluated to determine if it is prohibited by section 11(c).

III. Employer Activity Prohibited by Section 11(c)

Section 11(c) prohibits an employer from "discharg[ing] or in any manner discriminat[ing]" against any employee who has engaged in a protected activity.[65] The majority of section 11(c) suits have been based on allegations that the employee was wrongfully discharged.[66] This is the clearest type of prohibited

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62. 29 C.F.R. § 1977.12(a) (1980).

63. These rights are related to the right (and in some instances the duty) of the OSHA inspector to "consult with a reasonable number of employees." 29 U.S.C. § 657(e) (1976).

64. *See* text accompanying note 137 *infra*.

65. 29 U.S.C. § 660(c)(1) (1976).

66. *See, e.g.*, Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980); Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980); Marshall v. Commonwealth Aquarium, 469

employer activity. The scope of the term "in any manner discriminate" is not as clear.

In *Whirlpool* the Supreme Court stated that "[a]n employer 'discriminates' against an employee only when he treats that employee less favorably than he treats others similarly situated."[67] This very general definition could prohibit a broad range of employer activity.[68] For example, the Court noted in *Whirlpool* that an employer clearly discriminates when he places reprimands in an employee's employment file after that employee exercises his OSHA rights.[69] Similarly, after an employee engages in a protected activity, an employer could not, without violating section 11(c), promote similarly situated employees, compensate them differently (in terms of pay or fringe benefits,[70] including vacation time), allow them to work more overtime, or give them less burdensome work than the protected employee. In fact, such a broad definition of discrimination could arguably justify a court in granting relief to an employee whose employer continually made derogatory and opprobrious remarks about him.[71] However, the employee must always show that the discrimina-

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F. Supp. 690 (D. Mass.), *aff'd*, 611 F.2d 1 (1st Cir. 1979); Marshall v. S.K. Williams Co., 462 F. Supp. 722 (E.D. Wis. 1978); Marshall v. Springville Poultry Farm, Inc., 445 F. Supp. 2 (M.D. Pa. 1977); Dunlop v. Hanover Shoe Farms, Inc. 441 F. Supp. 385 (M.D. Pa. 1976).

67. 445 U.S. at 19 (footnote omitted).

68. Interpreting the phrase "otherwise to discriminate" in the context of Title VII of the Civil Rights Act of 1964, one court noted:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such . . . activities. . . . Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon.

Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

69. 445 U.S. at 19 n.31.

70. "[T]he modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection [from discrimination], nor blind ourselves to their potential misuse." Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (discussing employment discrimination under Title VII of the Civil Rights Act of 1964).

71. Such comments, if excessive and opprobrious enough, can constitute discrimination under Title VII of the Civil Rights Act of 1964. *See* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977), *citing* Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

tion is the result of his engaging in a protected activity.[72]

Whether withholding pay from an employee who asserts his OSHA rights constitutes discrimination is not clear. Obviously, if the employee has worked to earn his pay, an employer discriminates against him by withholding that pay. The harder question arises when the employee demands pay for time he spends exercising his OSHA rights *instead* of working for his employer. This problem arises, for example, when the employee requests that he be paid for the time he spends accompanying an OSHA inspector, or when he voluntarily absents himself from work which he in good faith believes is hazardous. In both instances the employee would be exercising his OSHA rights,[73] but in neither instance is the employee doing work for his employer. Although withholding pay is a traditional form of employment discrimination,[74] and even though it would have a chilling effect on an employee's exercise of his OSHA rights, in neither of the above situations should withholding pay be considered discriminatory.

The main barrier to recognizing withholding pay as a form of discrimination when an employee exercises his right to refuse hazardous work is the express congressional rejection of a "strike with pay" provision. An interpretation of section 11(c) which forces an employer to pay an employee who voluntarily absents himself from work because he believes a particular assignment is dangerous would be the equivalent of the "strike with pay" provision Congress rejected. Confusion over the effect of the congressional rejection of the "strike with pay" provision exists in part because of the Supreme Court's language in *Whirlpool*. Despite recognizing that 29 C.F.R. § 1977.12 "does not require employers to pay workers who refuse to perform their assigned tasks in the face of imminent danger,"[75] the Supreme Court remanded the case, instructing the district court to consider

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72. *See* text accompanying notes 127-36 *infra*.

73. A representative of the employees "shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace." 29 U.S.C. § 657(e) (1976).

An employee may refuse hazardous work under certain circumstances. *See* note 55 *supra*.

74. *See* Note, *Your Job or Your Life!—The Sixth Circuit's Endorsement of the OSHA Imminent Danger Regulation in* Marshall v. Whirlpool Corp. *Receives Supreme Court Approval*, 11 U. TOL. L. REV. 595, 620 (1980).

75. 445 U.S. at 19.

whether requiring back pay would be an appropriate remedy.[76] Thus, it appears that the Court in one breath found that the employer could not be forced to pay employees who refused hazardous work and in the next breath gave the district court the discretion to require that he do just that.

Two distinctions explain this apparent contradiction. First, there is a difference between finding that withholding pay constitutes discrimination and stating that back pay is an appropriate remedy. If the employer merely declined to pay an employee for time during which the employee refused to work, there would be no discrimination, and no remedy would be necessary. In *Whirlpool*, the Court held that the employer clearly discriminated by placing reprimands in the employee's employment file; the Court did not decide whether withholding pay was also discriminatory.[77] On remand the district court was merely to determine if back pay was an appropriate remedy for the discriminatory treatment, not whether withholding pay was itself discriminatory.

Second, although using back pay as a remedy arguably achieves the same result as finding that withholding pay constitutes discrimination, the two are not the same. There is a difference between a situation in which an employee *voluntarily* absents himself from work which he believes to be dangerous and one in which his employer orders him to punch out because he refuses to perform the hazardous work. In the latter situation (the situation in *Whirlpool*) the employer has discriminated against the employee by refusing to assign him any available, less hazardous work.[78] In such circumstances the employer's refusal to provide work for the employee would constitute discrimination, and back pay would be an appropriate remedy. However, when the employee voluntarily absents himself from work because he believes his assigned task is too dangerous, his employer would not be discriminating against him by withholding his pay. Because an employer is not expected to pay any employee who voluntarily absents himself from work, he would be treating all similarly situated employees equally. If the employer has not discriminated against the employee, he has not violated section 11(c), and no remedy is necessary.

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76. *Id.* n.31. *See also* Marshall v. N.L. Indus., Inc., 618 F.2d 1220, 1224 n.9 (7th Cir. 1980).

77. 445 U.S. at 19 n.31.

78. *See* Note, *supra* note 74, at 622-24.

Therefore, a court may order an employer to pay back pay to an employee who has otherwise been discriminated against, but a court should not hold an employer liable under section 11(c) if his only action was withholding pay from an employee who asserted his right to refuse hazardous work. Holding an employer liable under such circumstances would be contrary to Congress' rejection of the "strike with pay" provision.

The issue whether withholding pay from an employee exercising his right to accompany an inspector is discriminatory has been considered by one court, but it has not been completely resolved. In 1971 an employee of Mobil Oil filed a complaint with the Secretary of Labor contending that Mobil had violated section 11(c) by not compensating him for walkaround time. This claim was rejected by the Assistant Secretary of Labor. Later in *Leone v. Mobil Oil Corp.*,[79] the Court of Appeals for the District of Columbia refused to accept the employee's argument that the policies of OSHA require that the time spent with the inspector "be considered 'hours worked,' and thus compensable, under FLSA [Fair Labor Standards Act]."[80] The court held that the employer was not required to pay because the employee's activity was not controlled by nor performed for the primary benefit of the employer.[81]

The same issue arose in 1977 when a new Assistant Secretary of Labor issued an interpretive rule declaring that "an employer's failure to pay employees for time during which they are engaged in walkaround inspections is discriminatory under section 11(c)."[82] In *Chamber of Commerce v. OSHA*[83] the D.C. Circuit invalidated the rule because the Assistant Secretary had not followed the notice and comment requirements of the Administrative Procedures Act (APA).[84] The court rejected the Agency's argument that the rule was interpretive and therefore exempt from the APA's notice and comment requirements, noting "[a]fter this court's ruling in *Leone* that the Act [OSHA], its legislative history, and its policies do not mandate walkaround pay, an Administration issuance of a differing view solely as a

79. 523 F.2d 1153 (D.C. Cir. 1975).

80. *Id.* at 1159.

81. *Id.* at 1163-64.

82. 42 Fed. Reg. 47,344, 47,344-45 (1979).

83. 636 F.2d 464 (D.C. Cir. 1980).

84. *Id.* at 470-71. The notice and comment requirements of the APA are found in 5 U.S.C. § 553 (1976).

matter of its own interpretation would be inconceivable."[85] The court "intimate[d] no view on whether the Assistant Secretary could reissue the same rule after satisfying the requirements of [the APA]," leaving "that question for another day."[86] The Assistant Secretary accordingly announced her intention to promulgate a new rule containing requirements for walkaround compensation.[87] The new regulation, like the invalid *Chamber of Commerce* regulation, provided that failure to compensate an employee for walkaround time was a violation of section 11(c).[88] The Agency provided time for comments and based its statutory authority to promulgate the rule on section 8(g)(2),[89] which gives the Secretary authority to issue "rules and regulations dealing with the inspection of an employer's establishment."[90] However, the Assistant Secretary again placed the regulation in jeopardy by failing to follow standard promulgation procedure. The comment period for the proposed regulation was shortened from sixty to forty-five days.[91] Several groups immediately objected to this as a "transparent effort to enact a new walkaround pay regulation before the new administration takes office."[92] The Reagan administration apparently agreed that the shortened comment period was inappropriate. In February 1981 the Department of Labor (DOL) postponed the effective date of the proposed regulation until March 30, 1981, to allow for a complete review of the rule.[93] Later, after reviewing the regulation, the Secretary revoked it completely because he thought the rule unnecessary.[94]

As a practical matter, the Reagan administration may be right; the regulation does appear to be unnecessary. In 1975 ninety-three percent of the employees covered by OSHA were paid by their employers for walkaround time. Another four percent were paid by the union. The remaining three percent in-

85. 636 F.2d at 469.
86. *Id.* at 471.
87. 45 Fed. Reg. 75,232 (1980).
88. *Id.* at 75,236.
89. *Id.* at 75,235.
90. 29 U.S.C. § 657(g) (1976).
91. 45 Fed. Reg. 75,232, 75,237 (1980).
92. 10 O.S.H. REP. (BNA) 717 (Dec. 4, 1980) (quoting William G. Van Meter, Senior Vice President of the Chamber of Commerce of the U.S.). *See also* 10 O.S.H. REP. (BNA) 761 (Dec. 18, 1980) for similar criticism by the American Petroleum Institute.
93. 10 O.S.H. REP. (BNA) 1225 (Feb. 5, 1981) (quoting Acting Labor Secretary Alfred M. Zuck).
94. 46 Fed. Reg. 28,842 (1981).

cluded some who were paid one-half by the employer and one-half by the union.[95] The situation has not changed much since then. In March 1981 the Agency asserted that "the record fails to show that more than a few employees (mostly limited to one industry) have suffered any economic loss by exercising their statutory right. The record is unclear, even in the cases where the employer refused to pay, that the employee actually lost pay. In most cases the union appears to have paid the representative when the employer did not."[96] Thus, the overwhelming majority of employees are compensated for time spent accompanying an inspector during an inspection.

As a logical matter, the Reagan administration also appears to be right; the rule is not required by section 11(c). Withholding pay from an employee for time spent accompanying an inspector is not discriminatory as that term has been defined by the Supreme Court. In *Whirlpool* the Court stated that an employer discriminates only if "he treats [an] employee less favorably than he treats others similarly situated."[97] An employee who voluntarily[98] accompanies an inspector during an inspection is not working for his employer's benefit.[99] Employers do not pay other employees for time not spent working. In that respect employees accompanying inspectors are treated the same as other similarly situated employees; thus, no discrimination is involved. The Carter administration apparently realized that walkaround pay is not required by section 11(c), noting in its last effort to promulgate a regulation requiring walkaround compensation that the regulation was "not based on section 11(c)."[100]

Even though it is not required as a practical or logical matter, a rule requiring compensation for walkaround time may be desirable as a matter of policy. Proponents of the rule could argue that OSHA's effectiveness is lessened if any employee is deterred from exercising his rights. Certainly there are times when an employee will forgo the opportunity of accompanying an inspector if it means giving up a day's wages.[101] In such instances

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95. Leone v. Mobil Oil Corp., 523 F.2d 1153, 1161 (D.C. Cir. 1975).

96. 46 Fed. Reg. 18,999 (1981).

97. Whirlpool Corp. v. Marshall, 445 U.S. 1, 19 (1980).

98. An employee is not required to accompany the inspector. The employer's only responsibility is to give the employee the *opportunity* to accompany the inspector. *See* 29 U.S.C. § 657(e) (1976).

99. *See* Leone v. Mobil Oil Corp., 523 F.2d 1153, 1163-64 (D.C. Cir. 1975).

100. 46 Fed. Reg. 3857 (1981).

101. For examples of instances in which the employer's failure to pay resulted in the

the inspection may not be as effective as it would be if the employee accompanied the inspector, for often the employee is in the best position to know what hazards exist. However, even under the present system an employee can inform the agency—either before, during, or after the inspection—of any condition he feels is unsafe.[102] If an employee is unwilling to take the time to air his complaints unless he is paid for doing so, either the seriousness of his complaint or his interest in his own safety must be questioned. In any event, if the agency does determine that a walkaround pay rule is desirable as a matter of policy, the rule should be promulgated under section 8(g)(2) and not under section 11(c), which clearly does not require such a rule.

Once the scope of protected employee and prohibited employer activity is determined, the next step toward understanding section 11(c) is to analyze the procedure which must be followed to file and defend against claims arising out of this section.

IV. Procedure and Burden of Proof in Section 11(c) Actions

A. Who Can Bring an Action

Subsection (2) of section 11(c) provides that "[a]ny 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."[103] The Secretary, after investigation, is authorized to bring suit in federal district court.[104]

The Sixth Circuit noted that "the language of § 11(c) as

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employee's failure to accompany the inspector, see 46 Fed. Reg. 3855-57 (1981).

102. *See* 29 U.S.C. § 657(e), (f) (1976).

103. 29 U.S.C. § 660(c)(2) (1976). The thirty-day period for filing may be extended when the employer conceals the reason for an employee's discharge, or when a good faith effort is made to resolve the matter through a grievance arbitration procedure. 29 C.F.R. § 1977.15(d)(3) (1980).

104. Section 11(c) provides, "If upon . . . investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action . . . ." 29 U.S.C. § 660(c)(2) (1976). Two federal district courts have rejected the argument that the Secretary's failure to make a formal determination that section 11(c) has been violated before he commences suit bars him from bringing such a suit. Marshall v. S.K. Williams Co., 462 F. Supp. 722, 724 (E.D. Wis. 1978); Dunlop V. Hanover Shoe Farms, Inc., 441 F. Supp. 385, 387 (M.D. Pa. 1976).

finally enacted is the result of a compromise between the Senate version, which contained an administrative enforcement procedure, and the House version, which provided only civil and criminal penalties."[105] The Senate version originally authorized the Secretary to investigate complaints filed with him and, after a public hearing, to issue a decision and order reviewable by the federal circuit courts of appeals.[106] However, the Senate amended the bill by creating the Occupational Safety and Health Review Commission and giving the Commission authority to hold hearings concerning retaliatory discrimination complaints when the Secretary notified the Commissioners that the complaint was valid.[107]

The House took a different approach by providing for civil and criminal penalties for persons discharging or discriminating against an employee instituting or testifying in a proceeding under or related to OSHA. The House version did not provide a means by which the injured employee could himself obtain relief.[108] The Senate and House conferees adopted the Senate's approach, but amended the Senate version to authorize the Secretary to bring section 11(c) actions in federal district court rather than before the Review Commission.[109]

This legislative history was instrumental in convincing the Sixth Circuit that a private right of action for section 11(c) should not be implied. In *Taylor v. Brighton Corp.*[110] the Sixth Circuit held that former employees who alleged they were discharged in retaliation for reporting OSHA violations could not bring a section 11(c) action on their own after the Secretary of Labor refused to bring it on their behalf. The court first noted that "Congress explicitly provided an alternative means of redressing § 11(c) violations."[111] Then, after examining the legislative history noted above, the court concluded: "Such a legislative narrowing of the individual employee's rights and role under §

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105. Taylor v. Brighton Corp., 616 F.2d 256, 259 (6th Cir. 1980).

106. *See* S. REP. No. 1282, 91st Cong., 2d Sess. 34-35, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5211.

107. *See* S. 2193, 91st Cong., 2d Sess. § 10(f) (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 28, at 557-58.

108. See H.R. 16785, 91st Cong., 2d Sess. § 17(g) (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 28, at 1104.

109. *See* H.R. REP. No. 1765, 91st Cong., 2d Sess. 39 (Conference Report), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5228, 5235-36.

110. 616 F.2d 256 (6th Cir. 1980).

111. *Id.* at 259.

11(c) indicates a Congressional intent to deny alternative remedies."[112] In summarizing its analysis the court stated, "A private cause of action is simply inconsistent with the enforcement plan provided by Congress."[113]

Although the Sixth Circuit's analysis and conclusion appear to be legally sound, the practical results of the decision are somewhat disconcerting. In *Taylor* the Secretary of Labor filed an amicus brief urging the court to allow private actions because "he ha[d] neither the resources nor the personnel to handle all § 11(c) complaints adequately [and because] he expect[ed] the number of such complaints to increase dramatically due to his current campaign to alert employees of their OSHA rights."[114] Other efforts to lighten the Secretary's workload have also been rejected. In *Newport News Shipbuilding & Dry Dock Co. v. Marshall*,[115] the court held that once the Secretary determines that an employer has violated section 11(c) the Secretary cannot postpone action and defer to the National Labor Relations Board, which in certain cases also has authority to remedy the situation. The Secretary's argument in favor of private actions is therefore compelling because even before *Taylor* and *Newport News* the number of section 11(c) complaints he received had tripled in three years.[116] Furthermore, as the scope of protected employee and prohibited employer activity continues to expand, the Secretary's workload may become so unreasonable that section 11(c) will not be adequately enforced. However, as the Sixth Circuit noted, "[t]he Secretary should address his arguments to Congress, not the courts."[117]

An injured employee could argue that when his employer violates section 11(c) the Secretary is required to bring an action under that section because some of the language of section 11(c) appears to be mandatory. Section 11(c) states, "If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he *shall* bring an action . . . ."[118] However, the Secretary is granted the discretion to investigate

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112. *Id.* at 262.

113. *Id.* at 263.

114. *Id.*

115. 8 O.S.H. Cas. (BNA) 1393 (E.D. Va. 1980).

116. In 1974 about 700 complaints were filed. By 1977 this number had increased to 2,226. M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 201 n.74 (1978 & Supp. 1981).

117. 616 F.2d at 264.

118. 29 U.S.C. § 660(c)(2) (1976) (emphasis added).

the claim only to the extent "he deems appropriate"[119] and to determine whether section 11(c) has been violated.[120] Accordingly, the Secretary could argue that he does not have to consider all possible evidence, and that he is compelled to bring suit only when he determines that section 11(c) has been violated, a determination over which he has a great deal of discretion. This argument is supported by *Dunlop v. Bachowski*,[121] in which the Supreme Court held in an analogous situation[122] that the review of the Secretary's decision not to file suit should "be confined to examination of the [Secretary's] 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious."[123]

Apparently, the Secretary has adopted the position that he can not be required to bring an action under section 11(c). The current administrative rules provide, "If . . . the Secretary determines that the provisions of section 11(c) have been violated civil action *may* be instituted . . . ."[124] The use of the word "may" instead of "shall" indicates that the Secretary believes that his duty to decide whether to bring a suit under section 11(c) is discretionary and not mandatory. The broad language of section 11(c) supports this conclusion, at least insofar as it limits review of the Secretary's decision not to file an action to those instances in which the decision is arbitrary and capricious.

Another obstacle to an employee's attempt to force the Secretary to bring suit on his behalf is section 11(c)'s legislative history. As the Sixth Circuit noted, "the Senate wanted the Secretary to screen out frivolous complaints so as not to overburden the hearing body."[125] Significantly, "the Senate made no provision for appeal from the Secretary's determination that a com-

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119. *Id.*

120. "*If* . . . the Secretary determines that the provisions of [section 11(c)] have been violated, he shall bring an action . . . ." *Id.* (emphasis added).

121. 421 U.S. 560 (1975).

122. *Bachowski* involved the Secretary of Labor's refusal to file suit under the Labor-Management Reporting and Disclosure Act (LMRDA) on behalf of an unsuccessful candidate for union office. 421 U.S. at 562-66. The LMRDA provides that "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred . . . he shall . . . bring a civil action." 29 U.S.C. § 482(b) (1976).

123. 421 U.S. at 572-73.

124. 29 C.F.R. § 1977.3 (1980) (emphasis added).

125. Taylor v. Brighton Corp., 616 F.2d at 261.

plaint was frivolous."[126] Congress apparently intended to grant the Secretary extremely broad discretion in determining whether an action should be brought under section 11(c) because they expected him to screen out frivolous claims. Thus, an employee is not likely to succeed in an effort to force the Secretary to bring a suit on his behalf.

B. Burden of Proof

Section 11(c) prohibits an employer from discriminating against an employee only when he discriminates *because* the employee engaged in a protected activity. The Secretary has emphasized that "the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case."[127] However, he has provided some guidelines for the courts to follow. According to the Secretary, a violation of section 11(c) is established when it is shown that the "protected activity was a substantial reason for the [employer's discriminatory] action, or if the discharge or other adverse action would not have taken place 'but for' engagement in protected activity."[128]

In *Marshall v. Commonwealth Aquarium*[129] one federal court agreed in part with the Secretary's interpretation. The court was careful, however, to indicate that causation could not be determined solely on a showing that the employee's engaging in a protected activity played a substantital part in the employer's decision. Citing *Mount Healthy City School District Board of Education v. Doyle*,[130] the *Commonwealth Aquarium* court noted that the Supreme Court had rejected such a rule of causation because "to apply such a rule would place the employee in a *better* position than if he had not engaged in the protected activity."[131] For example, an employer might have al-

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126. *Id.* at 262. The Secretary could argue that his discretion in this matter is so broad that a decision not to file an action is unreviewable. However, a similar argument with respect to the LMRDA was rejected by the Supreme Court in Dunlop v. Bachowski, 421 U.S. 560, 566-68 (1975). The enforcement scheme and legislative history of section 11(c) are so similar to that of the LMRDA (*see Bachowski*, 421 U.S. at 568-70) that *Bachowski* is likely to be controlling.

127. 29 C.F.R. § 1977.6(b) (1980).

128. *Id.* (citing Goldberg v. Bama Mfg. Corp., 302 F.2d 152 (5th Cir. 1962), and Mitchell v. Goodyear Tire & Rubber Co., 278 F.2d 562 (8th Cir. 1960)).

129. 469 F. Supp. 690 (D. Mass. 1979).

130. 429 U.S. 274 (1977).

131. 469 F. Supp. at 692.

ready been thinking of firing an employee before the employee engaged in the protected activity. The employee's activity may have merely intensified the employer's prior feelings. A jury could find that the employee's engaging in the protected activity constituted twenty percent of the reason he was fired. That percentage could be viewed as a substantial part of the employer's decision. Yet, the employee might have been fired even if he had not engaged in the protected activity. To prevent the employer from having to retain an employee he would have fired anyway, the court held that the employer should be given the opportunity to show that the employee was in no worse position than if he had not engaged in the protected activity.

> [O]nce the plaintiff establishes that his activity was protected and that the protected activity was a substantial factor in the employer's decision, the burden then shifts to the employer to establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.[132]

In *Commonwealth Aquarium* the employee met his burden of proof by showing that he had notified a National Institute of Occupational Safety and Health employee and a city health inspector about health hazards in the store, that his employer had not considered discharging him before that time, and that he was discharged shortly thereafter.[133] The employer failed to persuade the court that he discharged the employee because the employee refused to work on a scheduled work day. The court chose instead to believe the employee's testimony that he never refused to work when requested to do so.[134] Having found that the employee "established that improper motivation played a substantial part" in the employer's decision to discharge him, and that the employer "failed to prove by a preponderance of the evidence that he would have discharged [the employee] even in the absence of protected activity," the court awarded the employee $12,880 in back pay as damages.[135]

Commonwealth Aquarium's allocation of the burden of proof appears to be fair and consistent with the purpose of section 11(c), which is to eliminate the employee's reluctance to ex-

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132. *Id.* (footnote omitted).
133. *Id. passim.*
134. *Id.* at 693.
135. *Id.*

ercise his OSHA rights. An employee is protected because he is only required to show that the exercise of his OSHA rights was a substantial factor in his employer's decision to discriminate against him. At the same time, the employer is given the opportunity to show that the employee is in no worse position than if he had not engaged in the protected activity. Applying this burden of proof will lead to a case by case analysis of the facts—the result envisioned by the Secretary.[136]

V. Effectively Enforcing Section 11(c)

Section 11(c) was enacted to encourage the exercise of OSHA rights by those employees who might otherwise refrain from acting because they fear retaliatory employer discrimination. However, as the Secretary's brief in *Taylor v. Brighton Corp.* indicated, the present resources allocated to section 11(c) enforcement may be inadequate.[137] Therefore, the effectiveness of the protection granted the employee under section 11(c) is becoming suspect. The Secretary's inability to muster the resources needed to adequately handle all section 11(c) complaints is ironic. The increase in the number of complaints is at least partially attributable to the Secretary's campaign to apprise employees of their OSHA rights and to his efforts to expand the scope of protected employee and prohibited employer activity. Therefore, the Secretary's success in encouraging employees to assert their OSHA rights and in expanding the scope of section 11(c) has undermined his ability to enforce that provision. The end result may be that employees with discrimination claims are now less likely to see those claims enforced than they were before the Secretary began his efforts to expand the scope of protected employee activity.

The ultimate solution to this dilemma is most likely to be found in congressional legislation. Three basic solutions are available. Congress can (1) increase the resources available to the Secretary to enforce meritorious section 11(c) claims, (2) restrict the scope of complaints that can be brought under section 11(c), or (3) set up an alternative means of enforcement.

The first solution is not likely to be adopted in these times of fiscal belt tightening. When funds for more popular programs are being reduced, it is doubtful that the increased expenditures

136. *See* text accompanying note 127 *supra*.
137. *See* 616 F.2d at 263.

needed to give the Secretary the manpower to handle all complaints would receive congressional approval. The second solution, restricting the scope of section 11(c), may be possible and desirable, at least to the extent of restricting the Secretary's power to define new rights impliedly afforded by OSHA. However, a complete revision of OSHA would be required before any meaningful reductions in the scope of section 11(c) could be made. Such a revision would be very time consuming, extremely controversial, and probably undesirable. The greatest hope, therefore, lies in providing an alternate means of enforcing section 11(c).

A number of alternative enforcement means could be utilized. Congress could relieve the Secretary's burden and increase the effectiveness of section 11(c) by creating a government-sponsored hearing board authorized to hear and resolve section 11(c) complaints. The board would be similar to the present Occupational Safety and Health Review Commission, but its jurisdiction would be limited to section 11(c) claims. However, creating such a board is not likely to be any more efficient or less expensive than increasing the resources available to the Secretary—an alternative which, as noted earlier, is not very promising at this time.

Another way of enforcing section 11(c) more efficiently would be to leave the development of an alternate means of enforcement to the collective bargaining system. The Secretary could be required to defer to a collective bargaining agreement when it provided for a method of resolving section 11(c) disputes. This would allow employees and employers to develop their own dispute resolution systems. This proposal, however, would result in inconsistent applications of section 11(c). Employees covered by one collective bargaining agreement would have different rights than those covered by another agreement or those not covered at all. In dealing with issues as important as employee safety, it is desirable to have a uniform standard of application so that employees in a weaker bargaining position are not required to forfeit important rights.

A third method of increasing the effectiveness of section 11(c) would be for Congress to provide a private right of action under section 11(c). However, allowing employees to file section 11(c) complaints in federal courts would place additional strains on the already overburdened federal court system. This concern may have been one of the reasons that Congress placed the Sec-

retary in a position to screen out frivolous complaints.[138] Such screening is desirable both to prevent the courts from being overburdened and to protect an employer from being unduly harassed by employees with unfounded claims.

One solution that would avoid all of the problems discussed above would be to adopt an enforcement procedure similar to that utilized under the Civil Rights Act of 1964 (Title VII).[139] Under Title VII, when an employee believes he has been discriminated against, he may file a claim with the Equal Employment Opportunity Commission (EEOC).[140] The EEOC notifies the employer and investigates the claim.[141] If the EEOC determines that there is no reasonable cause to believe the charge is true, it dismisses the charge, notifying both the employee and the employer.[142] The employee may then bring a civil action on his own.[143] On the other hand, if the EEOC determines that there is reasonable cause to believe the charge is true, it must attempt to remedy the situation by informal means.[144] If such efforts fail, the EEOC may either bring a civil action against the employer in federal district court[145] or notify the employee that he may file the action himself.[146]

Such a procedure, modified in some respects, could be used to more effectively enforce section 11(c) without diminishing the employee's protection or dramatically disrupting the federal courts' workload. When an employee believes that his employer has violated section 11(c), he could file his complaint with the Secretary. The Secretary would investigate the validity of the claim as he does under the present system. If the Secretary determined that there was no reasonable cause to believe that section 11(c) had been violated, he would dismiss the claim. If, however, the Secretary determined that there was reasonable cause to believe that section 11(c) had been violated, he could file the action himself, authorize the employee to bring the action, or attempt to use informal methods to resolve the dispute.

The Title VII procedure would be modified in two respects:

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138. *See* Taylor v. Brighton Corp., 616 F.2d at 261-62.
139. 42 U.S.C. § 2000e to § 2000e-17 (1976).
140. 42 U.S.C. § 2000e-5(b) (1976).
141. *Id.*
142. 42 U.S.C. § 2000e-5(f)(1) (1976).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

the employee could not bring an action on his own if the Secretary dismissed the complaint, and the Secretary would not be required to utilize informal methods of reconciliation (although he could follow such a course if he desired). These modifications are necessary to avoid further problems.

If an employee were authorized to bring an action whenever the Secretary dismissed the complaint, the problems involved in creating a private right of action would arise. The Secretary would no longer be able to screen out frivolous claims, and the courts and employers would bear the expense of dealing with such claims. Prohibiting an employee from bringing an action under such conditions preserves the desirable screening power of the Secretary.

The second modification—giving the Secretary discretionary rather than mandatory authority to resort to informal reconciliation methods—is also necessary. In some situations, informal reconciliation may be foreseeably unsuccessful. Requiring the Secretary to follow such procedures in futile situations would be a waste of the Secretary's scarce resources. Giving the Secretary the discretion to decide whether informal reconciliation methods should be used provides him with the flexibility to determine how his resources can best be utilized.

Such a modified Title VII procedure would give the Secretary the ability to enforce section 11(c) to the fullest measure possible with his current, limited resources. He could bring the action himself or try to resolve the dispute informally. Alternatively, if the Secretary thought the claim was valid but lacked the resources to enforce it, he could authorize the employee to bring an action on his own. The Secretary would also retain the ability to screen out frivolous claims, protecting both the courts and employer from wasting their time.

Congress should begin considering alternative methods of enforcing section 11(c), such as the modified Title VII approach, so that employees will be adequately protected from retaliatory discrimination. Meanwhile, the Secretary should continue to bring actions to vindicate the most meritorious claims. Selective enforcement will to some extent deter employers from retaliating against employees who assert their OSHA rights.

VI. Conclusion

To encourage employees to exercise their OSHA rights, Congress enacted section 11(c), which prohibits employers from

discriminating against employees who exercise these rights. The courts and the Secretary of Labor have broadly interpreted the scope of employee activity protected by section 11(c), and the possibility exists that the category of prohibited employer activity will likewise be expanded. However, this broad reading of section 11(c), coupled with the Secretary's campaign to alert employees of their OSHA rights, may actually preclude effective enforcement of section 11(c). As the number of complaints continues to increase, the Secretary will be less able to deal with them given his present limited resources.

Congress should consider how the present enforcement scheme can be modified to provide employees with an assurance that they will be protected from retailiatory employer discrimination. One possible solution is to adopt a procedure similar to that followed in Title VII cases. Such a modified procedure would give the Secretary greater flexibility to more effectively utilize his limited resources, while also protecting the courts and employers from frivolous claims.

Meanwhile, the Secretary and the courts should consider the Secretary's limited resources and the need to protect both the employee and the employer. To prevent the number of complaints from becoming burdensome, the Secretary and the courts should cautiously utilize their power to expand the scope of section 11(c). The Secretary should also continue to vigorously pursue those claims which are most meritorious. Selective enforcement will inhibit retaliatory employer discrimination, thus assuring that the nation's employees are not completely stifled in their efforts to improve their working conditions.

Kevin J. Worthen