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The Right of an Employee Under OSHA to Refuse to Work in the Face of Imminent Danger

Wilbur W. Fluegel*

I. INTRODUCTION

An employee who fears that an "imminent danger"¹ exists in his workplace has an express right under the Occupational Safety and Health Act of 1970 (OSHA),² to request an immediate inspection by OSHA personnel to confirm the danger.³ Although the Act prohibits employers from retaliating against employees who exercise this right,⁴ it fails to provide commen-

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1. Section 13(a) of the Occupational Safety and Health Act of 1970 (OSHA), empowers federal district courts, upon petition of the Secretary of Labor,

to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter.

29 U.S.C. § 662(a) (1976).

2. *Id.* §§ 651-678.

3. *Id.* § 657(f)(1) (1976). The employee's request must be made in writing and must set forth with "reasonable particularity" the alleged violation of OSHA that "threatens physical harm, or . . . imminent danger." *Id.* Once an inspector confirms that such a danger exists, he must "inform the affected employees and employers of the danger and that he is recommending . . . that relief be sought." *Id.* § 662(c). The regional administrator, acting for the Secretary of Labor, may then petition a federal district court for an injunction that will "prohibit the employment or presence of any individual . . . where such imminent danger exists" and that will "require such steps . . . as may be necessary to avoid, correct, or remove such imminent danger." *Id.* § 662(a). Should the government arbitrarily fail to secure such relief, the employee has standing to bring an action in the nature of mandamus to compel the Secretary to seek an injunction. *Id.* § 662(d).

4. Section 11(c)(1) of OSHA prohibits employers from discharging or discriminating against employees because they have exercised "any right afforded by this chapter." *Id.* § 660(c)(1). The Act states,

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.

surate protection to employees who refuse to work because they are faced with an imminent threat of death or serious injury, and because there is insufficient time to eliminate the threat by following normal statutory procedures. OSHA's failure to provide explicit protection for employees in circumstances where they have no time to await the arrival of an inspector creates a significant gap in its scheme of enforcement.

The fundamental issue under this section of OSHA is therefore whether employees faced with imminent danger have an implicit right to refuse to perform any work until an inspector arrives, without being subject to retaliatory discipline or discharge. In a carefully worded regulation,⁵ the Secretary of Labor⁶ has attempted to resolve this issue by interpreting OSHA's prohibition against retaliatory discharge as an implicit grant to employees of the right to refuse to work in the face of imminent danger.⁷

The validity of this regulation has been the subject of several recent court decisions⁸ that sharply divide on the question of whether the Secretary's construction of the statute is within the limits of his discretion.⁹ The Fifth Circuit, in *Marshall v.*

Id. Section 11(c)(2) allows "[a]ny employee who believes that he has been discharged or otherwise discriminated against [to] file a complaint with the Secretary [who] shall cause such investigation to be made as he deems appropriate." *Id.* § 660(c)(2). Remedies available to the employee upon a finding of employer retaliation include "rehiring or reinstatement of the employee to his former position with back pay" and other "appropriate relief." *Id.*

5. 29 C.F.R. § 1977.12 (1978).

6. OSHA provides that the Secretary of Labor has the authority and responsibility to establish standards regulating occupational safety. 29 U.S.C. § 655 (1976).

7. The regulation concedes that "there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions," 29 C.F.R. § 1977. 12(b)(1) (1978), but indicates that protection from retaliatory discipline should be afforded when "occasions . . . arise [in which] an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death from a hazardous condition at the workplace." *Id.* § 1977.12(b)(2).

8. See, e.g., *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.) (reversing lower court that had held regulation invalid), *appeal docketed*, No. 78-1870 (Sept. 21, 1979); *Marshall v. Daniel Constr. Co.*, 563 F.2d 707 (5th Cir. 1977) (affirming lower court that had held regulation invalid), *cert. denied*, 439 U.S. 880 (1978); *Usery v. Babcock & Wilcox Co.*, 424 F. Supp. 753 (E.D. Mich. 1976) (holding regulation valid). See also *Usery v. Certified Welding Corp.*, 6 OCCUPATIONAL SAFETY & HEALTH CASES (BNA) 1142, 1144, [1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 22,605, at 27,280 (D. Wyo. 1977) (holding regulation invalid).

9. The process of judicial review, as applied to the "law formulation" of an administrative agency, typically involves an initial inquiry as to whether the agency's interpretation is beyond the boundaries of its governing statute. See

Daniel Construction Co.,¹⁰ concluded that Congress, by rejecting certain OSHA provisions¹¹ that were similar to the Secretary's regulation, made clear its intent that employees should not be permitted to walk off the job, even when confronted by imminent danger.¹² The *Daniel* court therefore held that the regulation exceeded the Secretary's authority to promulgate regulations under the Act.¹³ More recently, the Sixth Circuit, in *Marshall v. Whirlpool Corp.*,¹⁴ reached the opposite result, finding the regulation to be consistent with both the purposes and the legislative history of the Act.¹⁵ The *Whirlpool* court

generally H. HART, JR. & A. SACKS, *THE LEGAL PROCESS* 1345-47 (1958). Should an interpretation be deemed consistent with the agency's statutory purpose, a reviewing court will treat the interpretation with great deference. See, e.g., *Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n*, 531 F.2d 451, 457 (10th Cir. 1976); *Brennan v. Occupational Safety & Health Comm'n*, 513 F.2d 553, 554 (10th Cir. 1975); H. HART, JR. & A. SACKS, *supra*, at 1346. *Accord*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Thus, "[o]nly such regulations as are clearly inconsistent with the [governing] statute can be voided," *Usery v. Babcock & Wilcox Co.*, 424 F. Supp. 753, 755 (E.D. Mich. 1976); however, "[a]ny regulation which . . . operates to create a rule out of harmony with the [governing] statute is a mere nullity." *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

10. 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978).

11. One of the provisions rejected by Congress was the "strike with pay" clause, which would have permitted workers to absent themselves from work without losing pay if certain toxic substances were found at the workplace. See text accompanying notes 91-121 *infra*. The second rejected provision would have permitted inspectors to shut down plants for up to 72 hours upon a finding of "imminent danger." See text accompanying notes 122-137 *infra*.

12. The *Daniel* court ruled that the regulation

expressly confers upon employees a right Congress deliberately chose not to grant to OSHA inspectors . . . Moreover, by permitting employees to refuse work upon making [a determination that there is insufficient time, due to the urgency of the situation, to eliminate an imminent danger through resort to regular means], the regulation provides them authority equivalent to that of an OSHA inspector when issuing an administrative stop work order—a right which Congress also deliberately withheld from OSHA inspectors. A worker's abuse of . . . the regulation could disrupt or cripple an employer's business. The legislative history is manifest that Congress feared such a result. We hold that the regulation exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act.

Marshall v. Daniel Constr. Co., 563 F.2d 707, 714-15 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) (footnote and citation omitted).

13. *Id.* at 715.

14. 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

15. The *Whirlpool* court stated,

Two district courts below ruled that this regulation is invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation. The district courts have sanctioned an employer's right to make workers choose between their jobs and their lives.

We cannot agree that the statute was ever intended to require placing an employee in such an untenable position. Since we find that

held that the regulation was "an appropriate employment of the regulatory power conferred upon the Secretary by the statute."¹⁶

This Article analyzes the question of whether the regulation is an appropriate exercise of regulatory power consistent with the statutory purposes of and the legislative intent underlying OSHA. The Article begins with an analysis of OSHA's statutory provisions and next discusses the degree of judicial deference ordinarily accorded administrative rulemaking under such broadly phrased statutes. It then considers whether the implicit right to walk off the job when confronted by imminent danger is unnecessary under OSHA, given the scope of other remedial labor statutes, and discusses the probable effect of recognizing an employee's right to walk off the job under hazardous conditions. The Article concludes that the regulation promulgated by the Secretary of Labor is a necessary and proper interpretation of the Act.

II. OSHA STATUTORY PROVISIONS

The express intent of Congress in enacting the Occupational Safety and Health Act of 1970¹⁷ was "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."¹⁸ Congress sought to accomplish these broad objectives "by encouraging employers and employees . . . to reduce the number of occupational safety and health hazards,"¹⁹ and "by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions."²⁰

Employers, therefore, were charged with the responsibility of furnishing their employees with "a place of employment [that is] free from recognized hazards that are causing or are

the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, . . . we reverse

Id. at 717. The *Whirlpool* court made its ruling "aware that [it] places us squarely in conflict with . . . the Fifth Circuit." *Id.* at 736.

16. *Id.* at 717.

17. Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651-678 (1976)). Most of the legislative history of the Act is compiled 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 (Comm. Print 1971) [hereinafter cited as LEGISLATIVE HISTORY].

18. 29 U.S.C. § 651(b) (1976).

19. *Id.* § 651(b)(1).

20. *Id.* § 651(b)(2).

likely to cause death or serious physical harm,"²¹ and of "comply[ing] with occupational safety and health standards promulgated under [OSHA]."²² Employees were granted the express right²³ to file a written request for an immediate inspection whenever they fear that an imminent danger is present in their workplace.²⁴ Upon receiving such a request, the agency must determine whether the request is reasonable, notifying the complainant in writing if an inspection is deemed unnecessary, but undertaking immediate inspection if it is deemed appropriate.²⁵ If an inspection is considered necessary, an OSHA Compliance Safety and Health Officer (CSHO) must enter the workplace as soon as is practicable,²⁶ investigate the hazard, and recommend a course of action.²⁷ Should the inspector find that a standard has been violated, he must issue a citation to the employer.²⁸ If the inspector believes that conditions in the workplace are so violative of OSHA standards "that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of

21. *Id.* § 654(a)(1).

22. *Id.* § 654(a)(2).

23. OSHA expressly grants several other rights to employees, such as the right to participate in establishing standards for health and safety, *id.* § 656, and the right to be advised by their employers both of hazards proscribed under the Act that exist at the workplace, *id.* § 657(c)(1), and of potential exposure to toxic or dangerous materials. *Id.* § 657(c)(3). Each employee must also be notified of any citations issued against the employer, *id.* § 658(b), and of any application made by the employer for a variance from OSHA standards. *Id.* § 655(d) (permanent variances); *id.* § 655(b)(6)(B)(v) (temporary variance applications). In addition, the Act gives the employee the right to intervene in the employer's contest, if any, of an OSHA decision, *id.* § 659(c), and to dispute the time set for abatement of a violation. *Id.* An employee may appeal the decision of the Review Commission to a circuit court, *id.* § 660(a), and may even challenge the validity of an OSHA standard. *Id.* § 655(f). Finally, OSHA grants employees the right to insist that an employee representative accompany an OSHA inspector on any inspection. *Id.* 657(e).

24. *Id.* § 657(f)(1).

25. *Id.*

26. The *OSHA Field Operations Manual* states,

Any allegation of imminent danger received by an OSHA office, whether written or oral, shall be handled on a highest priority basis. Other commitments . . . and other considerations cannot interfere with the expedited and thorough handling of these cases.

. . . The evaluation of the imminent danger should be accomplished immediately. Except in extraordinary circumstances, any inspection should be conducted within 24 hours of receipt of the allegation.

EMPLOYMENT SAFETY AND HEALTH GUIDE, OSHA FIELD OPERATIONS MANUAL AND INDUSTRIAL HYGIENE FIELD OPERATIONS MANUAL (CCH) 58 (1979) [hereinafter cited as OSHA MANUAL].

27. *Id.* at 57-61.

28. *Id.* at 61; see 29 U.S.C. § 658 (1976).

such danger can be eliminated through [other] enforcement procedures,"²⁹ he must seek immediate injunctive relief in federal district court.³⁰ To ensure that employees will not be deterred from exercising their rights for fear of employer reprisals, the Act forbids employers to "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" the Act, or "exercise[d] . . . any right afforded" by the Act.³¹

The rights of threatened employees during the pendency of the preinjunctive procedures are not expressly considered in the Act.³² Thus, a literal reading of OSHA's imminent danger provisions would limit employees confronted with a serious hazard to a "Hobson's choice" between two equally dissatisfying alternatives: they may either refuse to perform the assigned task and risk retaliatory discipline, or they may subject themselves to imminent threats of serious injury.³³ Since the

29. 29 U.S.C. § 662(a) (1976).

30. *Id.* §§ 662(a), (b). The *OSHA Field Operations Manual* indicates that, absent situations in which "voluntary elimination" of a danger is assured, OSHA MANUAL, *supra* note 26, at 60, the employer should be asked to remove his employees from the area, *id.*, and the Compliance Safety and Health Officer (CSHO) "shall call the Area Director and discuss contacting the Regional Solicitor . . . to obtain a Temporary Restraining Order . . ." *Id.* The *Manual* also states that "[t]he . . . Regional Solicitor shall make immediate arrangements for the initiation of court action," *id.* at 61, and that the "CSHO shall give absolute first priority in scheduling his activities to prepare for litigation in imminent danger matters." *Id.*

Should the "Secretary arbitrarily or capriciously fail . . . to seek relief under this [injunctive provision], any employee who may be injured by reason of such failure, or the representative of such employees" may bring a federal court action in mandamus to "compel the Secretary to seek such an order." 29 U.S.C. § 662(d) (1976). *But see* Oldham, *OSHA May Not Work in "Imminent Danger" Cases*, 60 A.B.A.J. 690, 691-92 (1974) (criticizing utility of mandamus as a remedy, given its abolition by Fed. R. Civ. P. 81(b), and the effect of docket delays on a hearing).

31. 29 U.S.C. § 660(c)(1) (1976).

32. As Circuit Judge Damon J. Keith noted in *Marshall v. Whirlpool Corp.*, The knowledgeable employee who withdraws from the imminent job hazard and immediately take [*sic*] steps to locate an inspector is protected from retaliation. Yet, . . . the employee who withdraws from the danger but reasonably waits, or must wait, to summon an inspector or for one to arrive [before going back to work], can be fired without recourse—no matter what hazard he faced.

593 F.2d 715, 723 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

33. *See, e.g., id.* at 736 ("A worker should not have to choose between his job and his life . . ."); *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 722 (5th Cir. 1977) (Wisdom, J., dissenting) (the issue is whether the employee "had to lose his job to avoid return to a dangerous work-place"), *cert. denied*, 439 U.S. 880 (1978); *Usery v. Babcock & Wilcox Co.*, 424 F. Supp. 753, 758 (E.D. Mich. 1976) ("In the [interval before an OSHA inspector can arrive,] the complaining employee is confronted with the Hobson's choice of accepting the work assign-

express provisions of the Act merely allow employees to complain to the Secretary and wait for an inspector to arrive,³⁴ the Act apparently permits employers to insist that employees confronted with an imminent threat return to work, on penalty of discipline or discharge, at least until the CSHO inspector arrives.³⁵

The Secretary of Labor has concluded that a limited right to refuse dangerous work in this situation exists by necessary implication.³⁶ Relying on the employer's general duty under the Act to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees,"³⁷ and on the Act's protection of employees from retaliation for their exercise of "any right afforded" them by OSHA,³⁸ the Secretary determined,

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 situ-

ment and risking death or serious bodily injury . . . or refusing to . . . work and being permanently discharged.") (footnotes omitted); Brief for the Secretary of Labor at 22, *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979) ("the worker dilemma posed by these hypothetical facts—getting killed or maimed versus being fired—is made powerfully concrete by the record"); Reply Brief for the Secretary of Labor at 13, *Usery v. Daniel Constr. Co.*, *reported sub nom. Marshall v. Daniel Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) ("the critical juncture where an employee must immediately choose between his life or his job is precisely the point at which such preservation must start"); Brief *Amicus Curiae* for the Industrial Union Department, AFL-CIO at 8, *Usery v. Daniel Constr. Co.*, *reported sub nom. Marshall v. Daniel Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) (the employee is "confronted [by] a Hobson's choice: loss of employment or risk of death from imminent danger").

34. 29 U.S.C. § 657(f)(1) (1976).

35. See, e.g., *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 723 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979). The *OSHA Field Operations Manual* states that, until an injunction is secured, the "CSHO has no authority either to order the closing down of the operation or to direct employees to leave the area of the imminent danger or the workplace," *OSHA MANUAL*, *supra* note 26, at 60. The employer must instead be "requested to notify his employees of the danger and remove them from the area of imminent danger." *Id.* (emphasis added). The determination by an inspector that an imminent danger exists may be so closely related to the enforcement process that employers would not, as a practical matter, order employees to work until an injunction issued. It is not clear, however, that 29 U.S.C. § 660(c)(2) would protect an employee from discipline for refusing to work during this interim period. No case has yet confronted this issue.

36. 29 C.F.R. § 1977.12(a)-12(b)(2) (1978).

37. 29 U.S.C. § 654(a)(1) (1976).

38. *Id.* § 660(c)(1).

ation, 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.³⁹

The right of employees to walk off the job when reasonably apprehensive of imminent serious injury will depend on whether the courts view the Secretary's construction of the Act as a valid exercise of his regulatory powers. The validity of his construction should, in turn, be viewed with OSHA's primary purpose in mind: "encouraging employers and employees . . . to reduce the number of occupational safety and health hazards."⁴⁰ Given the concededly inadequate number of OSHA enforcement personnel,⁴¹ this express responsibility to provide a safe and healthful workplace would appear to be seriously undermined if employees do not have the implicit right to enforce their employer's responsibility when it is most egregiously violated.

III. VALIDITY OF THE SECRETARY'S INTERPRETATION

A. JUDICIAL DEFERENCE TO ADMINISTRATIVE REGULATIONS

OSHA delegates broad power to adopt regulations ensuring "safe and healthful working conditions,"⁴² and authorizes the Secretary of Health, Education, and Welfare to "prescribe such rules and regulations as he may deem necessary" to carry out his joint responsibilities with the Secretary of Labor, "including rules and regulations dealing with the inspection of an employer's establishment."⁴³ When Congress empowers an agency to promulgate regulations necessary to carry out its responsibilities under an act, such regulations are generally entitled to great judicial deference, and are presumed valid.⁴⁴ In

39. 29 C.F.R. § 1277.12(b)(2) (1978).

40. 29 U.S.C. § 651(b)(1) (1976). *See also* text accompanying notes 17-20 *supra*.

41. *See* note 56 *infra* and accompanying text.

42. 29 U.S.C. §§ 651(b), 657(g)(2) (1976).

43. *Id.* § 657(g)(2). "There are overlapping functions with the Department of Health, Education, and Welfare (HEW) which involve recordkeeping and research." *Symposium—The Occupational Safety and Health Act of 1970: An Overview*, 9 GONZ. L. REV. 477, 485 (1974) (footnote omitted).

44. The scope of judicial review accorded regulations promulgated under an intentionally broad congressional delegation of power is limited:

Where a statute specifically delegates to an administrative agency the power to make rules, courts recognize a presumption that such rules, when duly noticed, are valid. . . . This presumption is rebuttable . . . upon a showing that the challenged regulation is an unreasonable exercise of the delegated power—*i.e.*, inconsistent with the statute. . . . The burden placed on [one challenging a regulation] is thus a heavy one, for he must show that the [regulation] cannot be considered a rea-

order to sustain a challenged regulation, therefore, a court need not find that the agency's interpretation is the most reasonable one, but only that it is consistent with the purposes of its enabling statute.⁴⁵

The stated objectives of OSHA reflect its "broad remedial purpose":⁴⁶ the preservation of human resources.⁴⁷ It is a tradition that courts liberally construe statutes whose primary purpose is to protect human life:

Since the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a "narrow or limited construction is to be eschewed." . . . Rather, [a] court must interpret the Act liberally in light of its primary purpose.⁴⁸

Those who challenge regulations promulgated under acts such as OSHA must therefore overcome not only the deference

sonable expression of the Congressional will, even though Congress has given the [agency] broad authority to make that determination.

United States v. Boyd, 491 F.2d 1163, 1167 (9th Cir. 1973) (citations omitted). See, e.g., Grubbs v. Butz, 514 F.2d 1323, 1330 (D.C. Cir. 1975) ("agency regulations are of course normally presumed valid unless shown to be inconsistent with the statute they implement"); Hoffenberg v. Kaminstein, 396 F.2d 684, 685 (D.C. Cir.) (per curiam) ("A regulation, of course, is presumptively valid and ordinarily should be upheld unless it is inconsistent with the statute. . . . Even if there were some doubt, we would be required to resolve that doubt in favor of the [agency's] interpretation.") (citations omitted), *cert. denied*, 393 U.S. 913 (1968). See generally United States v. Larionoff, 431 U.S. 864, 872 (1977); Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936).

45. The Supreme Court has indicated, "To sustain the [agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 153 (1946). "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965). This degree of respect is "[p]articularly . . . due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." Power Reactor Dev. Co. v. International Union of Electrical, Radio & Machine Workers, 367 U.S. 396, 408 (1961) (quoting Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933)).

46. Marshall v. Cities Serv. Oil Co., 577 F.2d 126, 130 (10th Cir. 1978); Clarkson Constr. Co. v. Occupational Safety & Health Review Comm'n, 531 F.2d 451, 458 (10th Cir. 1976).

47. 29 U.S.C. § 651(b) (1976).

48. Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals, 504 F.2d 741, 744 (7th Cir. 1974) (quoting St. Marys Sewer Pipe Co. v. Director of United States Bureau of Mines, 262 F.2d 378, 381 (3d Cir. 1959)) (construing imminent danger provision of Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 814(a) (1976)). See Lilly v. Grand Trunk W.R.R., 317 U.S. 481, 486 (1943); Rushton Mining Co. v. Morton, 520 F.2d 716, 720 (3d Cir. 1975).

courts generally accord agency interpretations but also the tendency to construe liberally statutes such as OSHA.

B. DEFERENCE ACCORDED AGENCY FINDINGS OF IMPLICIT STATUTORY RIGHTS

Because OSHA affords employees no express right to refuse work when confronted by imminent danger,⁴⁹ the right must be inferred from the purposes or provisions of the Act. Through its general duty clause,⁵⁰ OSHA extends to employers the responsibility to furnish a workplace free of foreseeable and preventable hazards⁵¹ which cause or are likely to cause death or serious physical injuries.⁵² The intent of Congress to protect employees is prevalent throughout the Act and is included in its announced "purpose" of ensuring "safe and healthful working conditions."⁵³

The Act's goal is to enforce, in two ways, an employer's duty to protect his employee's safety. Not only does the Act provide remedies when injuries occur, but it also regulates potentially hazardous conditions⁵⁴ before accidents occur. Although the Act specifically provides for the training of safety specialists to enforce compliance with its regulatory standards,⁵⁵ the task of enforcement easily surpasses the resources of this workforce.⁵⁶ At the time it enacted OSHA, Congress

49. See text accompanying note 4 *supra*.

50. 29 U.S.C. § 654(a)(1) (1976).

51. See *California Stevedore & Ballast Co. v. Occupational Safety & Health Review Comm'n*, 517 F.2d 986, 988 (9th Cir. 1975) ("Congress clearly intended to require employers to eliminate all foreseeable and preventable hazards."); *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1266 (D.C. Cir. 1973); H.R. REP. NO. 1291, 91st Cong., 2d Sess. 21 (1970) [hereinafter cited as H.R. REP. NO. 1291], reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 851 ("An employer's duty under [the general duty clause] is not an absolute one. It is the Committee's intent that an employer exercise care to furnish a safe and healthful place to work . . . This is not a vague duty, but is protection of the worker from preventable dangers.").

52. 29 U.S.C. § 654(a)(1) (1976); see *Cape & Vineyard Div. v. Occupational Safety & Health Review Comm'n*, 512 F.2d 1148, 1150 (1st Cir. 1975); *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 521-22, 368 A.2d 408, 410-11 (Super. Ct. Ch. Div. 1976) (applying concurrent state power permitted by 29 U.S.C. § 653(b)(4)).

53. 29 U.S.C. § 651(b) (1976).

54. Violations of the general duty clause are not preconditioned on the occurrence of an accident. See, e.g., *Brennan v. Butler Lime & Cement Co.*, 520 F.2d 1011, 1017 (7th Cir. 1975); *REA Express, Inc. v. Brennan*, 495 F.2d 822, 825 (2d Cir. 1974); *Brennan v. Occupational Safety & Health Review Comm'n*, 494 F.2d 460, 463 (8th Cir. 1974); *National Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).

55. 29 U.S.C. § 670 (1976).

56. The limited number of enforcement personnel are clearly incapable of

was aware that there would be a shortage of qualified enforcement personnel and therefore emphasized employee assistance in enforcement.⁵⁷

1. *Retaliatory Discharge Provision*

In order to protect the safety-minded employee from discharge or discipline for reporting a dangerous situation to authorities, the Act prohibits retaliatory discharge of, or discrimination against, any employee for exercising "any right afforded" him by the Act.⁵⁸ Thus, formal complaints initiated by employees who seek to enforce a right articulated by the Act, such as the right to be free from foreseeable and preventable hazards, may not be the basis for discipline.

There is no language in the Act, however, that expressly permits an employee to refuse work because of dangerous work conditions. Its provisions merely allow employees the right to summon a CSHO inspector.⁵⁹ Under a strict construction of the statute,⁶⁰ therefore, it is permissible for an employer to discipline an employee who refuses to work until an inspector arrives. This is the construction accorded the Act by some

administering regular inspections of the more than four million places of employment covered by the Act. *See, e.g.,* Cohen, *The Occupational Safety & Health Act: A Labor Lawyer's Overview*, 33 OHIO ST. L.J. 788, 800 (1972); *Symposium, supra* note 43, at 485-86.

57. *See* H.R. REP. NO. 1291, *supra* note 51, at 31, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 861 ("The Committee recognizes that a substantial increase in [enforcement] manpower . . . is needed In order to promote a greater awareness of safety in the workplace, the bill also provides for employee training to be conducted by the Secretary"); S. REP. NO. 1282, 91st Cong., 2d Sess. 21-22 (1970) [hereinafter cited as S. REP. NO. 1282], *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 161-62, *and reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5198-99 ("Both Federal and state safety and health inspectors are in critically short supply. . . . Section 18 [therefore] authorizes . . . programs for the education of safety and health personnel. In order to promote a greater awareness of safety . . . , the bill also provides for the training of employers and employees").

58. 29 U.S.C. § 660(c)(1) (1976), *quoted in* note 4 *supra*. The statute not only protects against retaliation by an employer, but against discrimination by any "person." Discrimination against the employees of another is therefore prohibited. *See* 29 C.F.R. § 1977.4 (1978).

59. *See* notes 1-3 *supra* and accompanying text.

60. *See* *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 708 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) (refusing to apply retaliatory discharge provision to prohibit discharge of employee who refused to work "under conditions which reasonably caused him to conclude that there was a real and immediate danger of death or serious injury if he performed his assigned work"). *See generally* *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 723 (6th Cir.) ("absurd results" can occur if the Act is read not to extend the right to avoid work under dangerous conditions), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

courts.⁶¹ The Secretary has construed the Act liberally, however, and has concluded that a limited right to refuse to perform extremely hazardous work is implicit in the general right to a safe workplace. The Secretary has therefore promulgated a regulation that extends the protection of OSHA's retaliatory discharge provision to employees who have been disciplined for refusing to work in imminently dangerous assignments.⁶²

2. *Judicial Treatment of Rights Implicit in Safety Statutes*

Safety regulations promulgated under broad congressional delegations of authority are liberally construed by reviewing courts.⁶³ In particular, judicial construction of retaliatory discharge provisions in remedial statutes similar to OSHA has been liberal. For example, the National Labor Relations Act (NLRA) provides that it is an unfair labor practice when an employer discharges "or otherwise discriminate[s] against an employee because he has filed charges or given testimony" under provisions of the NLRA.⁶⁴ The Supreme Court, in *NLRB v. Scrivener*,⁶⁵ held that although the NLRA's express provisions protect only those employees who have filed charges or have given testimony, the Act should be liberally construed to implicitly protect employees who have given written statements to NLRB field officers.⁶⁶ The Court focused on the words "otherwise discriminate," as evidence of "an intent on the part of Congress to afford broad rather than narrow protection to the employee."⁶⁷

A second example, the Fair Labor Standards Act, provides that it is unlawful "to discharge or in any other manner discriminate against any employee because [he] has filed any complaint or instituted . . . any proceeding . . . or has testified . . . or has served . . . on an industry committee."⁶⁸ The statute's

61. See, e.g., *Marshall v. Daniel Constr. Co.*, 563 F.2d 707 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978); *Usery v. Whirlpool Corp.*, 416 F. Supp. 30 (N.D. Ohio 1976), rev'd sub nom. *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.), appeal docketed, No. 78-1870 (Sept. 21, 1979).

62. 29 C.F.R. § 1977.12 (1978).

63. See text accompanying note 48 *supra*.

64. 29 U.S.C. § 158(a)(4) (1976).

65. 405 U.S. 117 (1972).

66. *Id.* at 124-25 ("The approach to [the anti-discharge provision] generally has been a liberal one in order fully to effectuate the section's remedial purpose We therefore conclude that an employer's discharge of an employee because the employee gave a written sworn statement . . . constitutes a violation of [the] Act.").

67. *Id.* at 122.

68. 29 U.S.C. § 215(a)(3) (1976) (emphasis added).

express protection is restricted to employees. The Sixth Circuit, however, held in *Dunlop v. Carriage Carpet Co.*⁶⁹ that the Act, by implication, protects former employees from retaliation. The court reasoned that “[t]o hold otherwise would do violence to the Congressional intent and purposes of the Act and would prejudice the effective enforcement of the Act.”⁷⁰

A similar provision in Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer to discriminate against his employees or applicants for employment . . . because he has opposed any . . . unlawful employment practice . . . or . . . made a charge, testified [or] assisted . . . in an investigation, proceeding, or hearing”⁷¹ In *Smith v. Columbus Metropolitan Housing Authority*,⁷² this retaliatory conduct provision was liberally construed to protect an employee, uninvolved in a race discrimination charge, who was disciplined for refusing to cooperate with an employer defending itself against the charge.⁷³

A final example is the Coal Mine Safety and Health Act which, prior to its 1977 amendments, provided that “[n]o person shall discharge or in any other way discriminate against . . . any miner . . . by reason of the fact that [he] has notified the Secretary . . . of any alleged . . . danger, . . . has filed . . . any proceeding . . . or . . . has testified . . . about . . . enforcement.”⁷⁴ The Court of Appeals for the District of Columbia held, in *Phillips v. Interior Board of Mine Operations Appeals*,⁷⁵ that the protection of the Act began “when the miner notif[i]e[d] his foreman . . . of possible safety violations.”⁷⁶ Thus, it protected an employee who was discharged “because

69. 548 F.2d 139 (6th Cir. 1977).

70. *Id.* at 147.

71. 42 U.S.C. § 2000e-3(a) (1976).

72. 443 F. Supp. 61 (S.D. Ohio 1977).

73. *Id.* at 63-64. See also *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164-66 (10th Cir. 1977) (former employer's act of informing prospective employer that employee had filed a sex discrimination charge, held to be violation of Act despite employee's voluntary resignation); *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 72-74 (S.D.N.Y. 1975) (filing of sex discrimination charge held inappropriate basis for termination of employment; good faith business justification was pretext), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

74. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 110(b) (1), 83 Stat. 758 (current version at 30 U.S.C. § 815(c) (1) (Supp. I 1977)) (emphasis added). This provision in the 1969 Act was amended in 1977 by the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, tit. II, § 201, 91 Stat. 1303.

75. 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975).

76. *Id.* at 778.

of his failure to comply with an order to return to work, despite his belief that the working conditions were dangerous."⁷⁷ When Congress amended the Coal Mine Health and Safety Act in 1977,⁷⁸ it cited *Phillips* and noted that the amendment was intended "to insure the continuing vitality of the various judicial interpretations of [the retaliatory discharge provision] of the Coal Act which are consistent with the broad protection of the bill's provisions."⁷⁹

The construction accorded the retaliatory discharge provisions in all of these statutes has been liberal. Courts have found many employee rights implicit in the broad statutory language. None of these statutes, however, contain language broader than the retaliatory discharge provision of OSHA.⁸⁰ The Supreme Court has determined that the NLRA's protection against employer action that "otherwise discriminate[s]" against employees is dispositive of the fact that the NLRA's retaliatory discharge provision should be liberally construed.⁸¹ The same analysis should apply to OSHA since its language is even broader, protecting employees against actions that "in any manner discriminate."⁸² In addition, the NLRA, the Coal Mine Safety and Health Act,⁸³ the Civil Rights Act of 1964, and the Fair Labor Standards Act only protect employees against the infringement of specifically enumerated rights⁸⁴ while OSHA protects the exercise by an employee "of *any* right afforded" by

77. *Id.* at 774.

78. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified at 30 U.S.C. §§ 801-961 (Supp. I 1977)).

79. S. REP. NO. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3436.

80. When *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), was decided, the Coal Mine Safety and Health Act's retaliatory discharge provision contained the language set out at text accompanying note 74 *supra*. The provision was amended in 1977, see notes 78-79 *supra* and accompanying text, and now contains language of a similar broad nature: "No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . ." 30 U.S.C. § 815(c)(1) (Supp. I 1977).

81. See text accompanying notes 64-67 *supra*.

82. 29 U.S.C. § 660(c)(1) (1976). This language is similar to the Fair Labor Standards Act, which makes it unlawful to discharge or "in any other manner discriminate," *id.* § 215(a)(3), and the language originally used in the Coal Mine Safety and Health Act, which made it a violation to "in any other way discriminate." See text accompanying note 74 *supra*. The Coal Mine Safety and Health Act now uses the language "in any manner discriminate." See note 80 *supra*.

83. The 1970 Act has been amended. See note 80 *supra*. The 1977 provision now extends the protection to "any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1) (Supp. I 1977).

84. See text accompanying notes 64, 68, 71, 74 *supra*.

the Act.⁸⁵ Presumably, this language in OSHA refers to implicit as well as explicit rights. The courts that have refused to recognize the implicit right under OSHA to walk off the job when faced with imminent danger have therefore departed from the traditional policy of liberally construing labor legislation that is remedial in character⁸⁶ and legislation that broadly delegates power to an agency to create regulatory guidelines.⁸⁷ Courts that have found the Secretary's regulation invalid have based their decisions on the belief that the regulation is inconsistent with congressional intent.⁸⁸ Resolving the issue of the regulation's validity therefore requires an assessment of congressional objectives.

IV. CONGRESSIONAL INTENT

In enacting OSHA, Congress did not consider the issue of an employee's right to refuse to work in the face of imminent danger. The judiciary's rationale for concluding that Congress did not intend such a right rests on congressional discussion of and objections to two particular provisions.

A. STRIKE WITH PAY PROVISION

The first justification advanced by courts in support of the contention that Congress did not intend to provide employees the right to refuse an imminently dangerous work assignment⁸⁹ is the House's rejection of a bill, H.R. 16785, introduced by Representative Daniels.⁹⁰ One provision of the bill would have permitted employees to absent themselves from their jobs, with

85. 29 U.S.C. § 660(c)(1) (1976) (emphasis added).

86. See text accompanying note 48 *supra*.

87. See notes 42-45 *supra* and accompanying text.

88. *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 715 (5th Cir. 1977) ("We hold that the regulation exceeds the Secretary's scope of authority to promulgate regulations as granted under the Act."), *cert. denied*, 439 U.S. 880 (1978); *Usery v. Whirlpool Corp.*, 416 F. Supp. 30, 33 (N.D. Ohio 1976, *rev'd sub nom. Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.)) ("This Court is of the opinion that the regulation in question is clearly inconsistent with the statute and therefore invalid."), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

89. See, e.g., *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 712-13 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978); *Usery v. Whirlpool Corp.*, 416 F. Supp. 30, 33-34 (N.D. Ohio 1976), *rev'd sub nom. Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

90. H.R. 16785, 91st Cong., 2d Sess. (1970) [hereinafter cited as H.R. 16785], reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 755-56. The House rejected the bill by substituting an alternative bill, H.R. 19200, for H.R. 16785. See note 100 *infra* and accompanying text.

pay, when exposed to certain toxic substances.⁹¹ This portion of the bill became known as the "strike with pay" provision.⁹²

1. *Legislative Action*

Opponents of the bill attacked the provision as enabling employees to call a strike and continue to receive pay whenever the Secretary determined that the workplace contained a "known or potentially toxic substance."⁹³ According to the House Committee on Education and Labor, the provision was necessary because of the "real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay."⁹⁴

Although opposition to Representative Daniels' bill centered largely on provisions other than the "strike with pay" clause,⁹⁵ the bill's opponents rallied around H.R. 19200, in-

91. H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 755-56. The provision required that the Secretary of HEW shall publish within six months of enactment of this act and thereafter . . . at least annually a list of all known or potentially toxic substances . . . ; 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 Within sixty days of such determination . . . , an employer shall not require any employee to be exposed to such substance designated above in toxic or greater concentrations unless [*inter alia*] 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.

Id. (emphasis added).

92. The employee's right to leave the workplace without loss of normal pay resulted in § 19(a)(5) being called the "strike with pay" provision. *See generally* 116 CONG. REC. 38,379 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1011 (remarks of Rep. Randall); 116 CONG. REC. 38,369 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 986 (remarks of Rep. Perkins).

93. H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 755-56.

94. H.R. REP. NO. 1291, *supra* note 51, at 30, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 860.

95. Most of the controversy over OSHA did not center on the "strike with pay" provision but on other aspects of labor-supported bills, such as the procedures for establishing protective standards, *see* H.R. REP. NO. 1291, *supra* note 51, at 49-50, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 879-80, whether an independent adjudicatory body should be created to review alleged violations, *see* S. REP. NO. 1282, *supra* note 57, at 55-56, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 194-95, and *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5220-21, and whether employers should be subjected to a general duty clause. *See* H.R. REP. NO. 1291, *supra* note 51, at 50-51, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 880-81. A fourth major controversy concerned

roduced five months later by Representative Steiger,⁹⁶ which did not contain a "strike with pay" provision.⁹⁷ Confronted with this opposition, Representative Daniels sought to make his bill more attractive by deleting, among other things, the bill's "strike with pay" provision.⁹⁸ Daniels explained,

The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly.⁹⁹

This proposed modification was never adopted into H.R. 16785, and the House instead passed Representative Steiger's alternative bill.¹⁰⁰ The alternative bill said nothing about the right of employees to walk off the job, but did allow the Secretary to obtain temporary restraining orders in federal court to enjoin im-

the Secretary's right to order administrative shutdowns. See text accompanying notes 122-127 *infra*.

96. The alternative bill, H.R. 19200, 91st Cong., 2d Sess. (1970) [hereinafter cited as H.R. 19200], *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 763-830 (Rep. Steiger's bill), was introduced on September 15, 1970, see 116 CONG. REC. 31,914 (1970), five months after H.R. 16785, which was introduced on April 7, 1970. See 116 CONG. REC. 10,656 (1970).

H.R. 16785 was the first OSHA bill introduced in the second session of the Ninety-first Congress. Four other bills had been introduced in the House in 1969: H.R. 13373, 91st Cong., 1st Sess. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 679-720 (Administration bill); H.R. 4294, 91st Cong., 1st Sess. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 659-78 (Rep. Perkins' bill); H.R. 3809, 91st Cong., 1st Sess. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 629-58 (Rep. O'Hara's bill); H.R. 843, 91st Cong., 1st Sess. (1969), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 599-628 (Rep. Hathaway's bill).

97. See H.R. 19200, *supra* note 96, § 23(a)(4), (a)(5), (b) (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 817-18.

98. The proposed change was to remove the "strike with pay" provision and substitute one granting employees the right to request immediate inspections. See 116 CONG. REC. 38,377-78 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1008-09 (remarks of Rep. Daniels including text of Amendment No. 3 to H.R. 16785). Such a provision eventually was incorporated into law, 29 U.S.C. § 657(f)(1) (1976), but since the proposed change was never considered by the House, see note 100 *infra*, any similarity between the proposed amendments and the provisions of OSHA should be accorded little weight in assessing congressional intent.

99. 116 CONG. REC. 38,377-78 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1009 (remarks of Rep. Daniels).

100. The amendment was not considered by the House, because the alternative bill, H.R. 19200, was introduced the following day by way of a substitute for H.R. 16785. See 116 CONG. REC. 38,715 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1092 (question called on amendment to substitute Representative Steiger's bill, H.R. 19200, for Representative Daniels' bill); 116 CONG. REC. 38,723-24 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1112-14 (amendment passed). The amended bill passed the same day. 116 CONG. REC. 38,724 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1115-18. See generally *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 728 n.28 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

minently dangerous work.¹⁰¹

The Senate bill, S. 2193,¹⁰² did not contain a "strike with pay" provision,¹⁰³ but did provide that an employee could request an immediate inspection by notifying the Secretary in writing of an imminently dangerous situation.¹⁰⁴ Although itself controversial,¹⁰⁵ the bill was passed by the Senate one week before the House acted on H.R. 16785.¹⁰⁶ The Conference Committee adopted most of the provisions of the Senate bill, including the provision granting employees the right to contact an inspector immediately when faced with an imminent danger.¹⁰⁷ The preceding events have been characterized as representing a specific determination by Congress that, under OSHA, employees are to have no implicit right to walk out when confronted by immediate hazard because the right to summon an inspector was intentionally substituted in place of the right to walk out.¹⁰⁸

101. H.R. 19200, *supra* note 96, § 12, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 796-98, 1101-02.

102. S. 2193, 91st Cong., 2d Sess. (1970) [hereinafter cited as S. 2193], *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 204-95 (as amended from 1969 session upon introduction on Oct. 6, 1970).

103. *See* 116 CONG. REC. 37,326 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 416 (remarks of Sen. Williams) ("the committee bill does not contain a so-called strike-pay provision").

104. S. 2193, *supra* note 102, § 8(f)(1), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 252-53.

105. Opposition to S. 2193 centered on the vesting of standard-making and adjudicatory powers in the Secretary, and in the bill's authorization of administrative shutdowns. *See* S. REP. NO. 1282, *supra* note 57, at 54-64, *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 193-203, and *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5177, 5218-27. *Cf.* note 95 *supra* (controversy involved in H.R. 16785).

106. The Senate passed an amended version of S. 2193 on November 17, 1970, *see* 116 CONG. REC. 37,632 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 528, about one week before H.R. 19200 was accepted and passed as a substitute for H.R. 16785 on November 24, 1970. *See* 116 CONG. REC. 38,724 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1112-18.

107. *See* CONF. REP. NO. 1765, 91st Cong., 2d Sess. 11-12, 37-38 (1970) [hereinafter cited as CONF. REP. NO. 1765], *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1164-65, 1190-91, and *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5228, 5234. The provision is codified at 29 U.S.C. § 657(f) (1976).

108. *See, e.g.,* Marshall v. Daniel Constr. Co., 563 F.2d 707, 714 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978); Usery v. Whirlpool Corp., 416 F. Supp. 30, 34 (N.D. Ohio 1976), *rev'd sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979); Brief for Appellee Cross-Appellant [Whirlpool Corp.] at 26, Usery v. Whirlpool Corp., *reported sub nom.* Marshall v. Whirlpool Corp., 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979) ("The foregoing review of the Act's legislative history makes it clear that both houses of Congress expressly rejected the idea of employees having the right to walk off the job with pay and embraced instead the request-for-inspection provision.").

2. Legislative Intent

The determination of whether Congress, by rejecting the "strike with pay" provision, intended to eliminate the right to walk off the job when faced with imminent danger, requires a comparison of the scope and effect of the two rights. The "strike with pay" provision related to concentrations of toxic substances in the workplace and was not premised on the existence of an imminent hazard.¹⁰⁹ The Secretary's regulation, however, deals only with imminent hazards that present "a real danger of death or serious injury."¹¹⁰ Besides not requiring an imminent danger to health or safety, the "strike with pay" provision was inoperative unless an employer had not taken action to protect his employees "[w]ithin sixty days of [a] determination by the Secretary . . . of potential toxicity of any substance" in the workplace.¹¹¹ Moreover, it provided that the "employee may absent himself from such risk of harm for the period necessary to avoid such danger" without any reference to the degree of the threat which was posed by the presence of toxins.¹¹² The Secretary's regulation, on the other hand, narrowly restricts the right to walk off the job to situations where the

condition causing the employee's apprehension of death or injury [is] 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.¹¹³

The major objection to the "strike with pay" provision was its directive that an employer must allow the "exposed employee [to] absent himself . . . without loss of regular compensation" during the period that the employee refused to work.¹¹⁴ The

109. See H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 755 ("The Secretary . . . shall publish . . . a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur . . .").

110. 29 C.F.R. 1977.12(b)(2) (1978). Under the Act as it was adopted, any breach of a safety or health standard developed by the Secretary creates a right to "request an inspection." 29 U.S.C. § 657(f)(1) (1976).

111. H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 755.

112. H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 756.

113. 29 C.F.R. § 1977.12(b)(2) (1978) (emphasis added).

114. H.R. 16785, *supra* note 90, § 19(a)(5), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 756.

Secretary's regulation, however, does not guarantee salary, but simply protects the employee from subsequent discharge or other retaliatory measures if he, "with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition."¹¹⁵

The disparity in the scope of the two approaches is evident. Of all the distinctions, however, the most significant to Congress was the "with pay" aspect of the "strike with pay" provision in the rejected House bill. When the provision was discussed, it was inevitably in the context of "strike *with pay*."¹¹⁶ Thus, rather than focusing on the possibility that employees might prefer not receiving pay to performing hazardous work assignments, Congress was concerned primarily with the possibility that the provision would enable employees to demand full pay while indiscriminately abandoning a job location. As one Representative noted:

If H.R. 16785 passes as is, it will add more fuel to the fire in an already turbulent labor arena. Unions could and would use H.R. 16785 to disregard the no-strike provisions in collective agreements. Further, even if union officers were against a local strike, "red hot" rank-and-file members could and would disregard their contractual no-strike pledge.¹¹⁷

It is obvious that Congress considered the "strike" aspect of the "strike with pay" provision as only incidental to the "with pay" guarantee. Employees, after all, already had the

115. 29 C.F.R. § 1977.12(b)(2) (1978).

116. On at least nine occasions when the provision was specifically addressed during legislative activity, it was characterized as strike *with pay*. See 116 CONG. REC. 38,714 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1089 (remarks of Rep. Horton); 116 CONG. REC. 38,707 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1071 (remarks of Rep. Daniels) ("we have deleted a provision which was—though inaccurately—called a 'strike with pay' provision"); 116 CONG. REC. 38,391 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1046 (remarks of Rep. Feighan); 116 CONG. REC. 38,379 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1011 (remarks of Rep. Randall); 116 CONG. REC. 38,377-78 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1009 (remarks of Rep. Daniels) ("This amendment is a substitute for the provision . . . permitting employees to absent themselves . . . without loss of pay. . . . The provision on employees *not losing pay* was so generally misunderstood that we have decided to drop it.") (emphasis added); 116 CONG. REC. 38,376 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1005 (remarks of Rep. Daniels) ("the provision . . . has been frequently misinterpreted as a 'strike with pay' provision"); 116 CONG. REC. 38,369 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 986 (remarks of Rep. Perkins) ("the so-called 'strike with pay' provision, has been deleted"); 116 CONG. REC. 37,326 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 416 (remarks of Sen. Williams) ("the committee bill does not contain a so-called strike-pay provision").

117. 116 CONG. REC. 38,393 (1970), *reprinted in* LEGISLATIVE HISTORY, *supra* note 17, at 1050 (remarks of Rep. Michel).

right under section 7 of the NLRA to strike in protest over conditions affecting the collective safety of workers.¹¹⁸ Moreover, it has been held that when employees facing abnormally hazardous conditions have walked out en masse despite a no-strike compulsory arbitration clause, such concerted activity is not a "strike."¹¹⁹ The intent of Congress in enacting OSHA was to ensure safety in the workplace by expanding these employee rights, not by compromising them. As the court noted in *Usery v. Babcock & Wilcox Co.*,¹²⁰

because Congress considered and rejected a "strike with pay" provision [does not mean] that it thereby considered and rejected the right of an employee to refuse to work in an inherently dangerous environment. . . . Even more tenuous is the . . . suggestion that Congress, by its action described above, implicitly sanctioned the discharge of employees who refused to work in abnormally dangerous surroundings. Such an implication, would be completely contradictory to the purpose of OSHA.¹²¹

B. ADMINISTRATIVE SHUTDOWN PROVISION

1. Legislative Action

The second justification advanced by courts that have declared the Secretary's regulation invalid is the Senate's rejection of a provision in its bill that would have given inspectors the right to issue an order restraining the operation of a business for up to seventy-two hours upon a finding of imminent danger.¹²² This provision¹²³ was less harsh than the clause rejected in the House bill, which provided for shutdown orders of

118. See 29 U.S.C. § 157 (1976). See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) ("The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time [that] a demand [on the employer to remedy an objectionable condition] is made."); *NLRB v. Leslie Metal Arts Co.*, 509 F.2d 811, 814 (6th Cir. 1975) ("[T]he personal safety of employees is a . . . valid basis of a labor dispute. . . . Under such circumstances [employees] could legitimately protest by concerted activity . . .").

119. *NLRB v. Knight Morley Corp.*, 251 F.2d 753, 759 (6th Cir. 1957), cert. denied, 357 U.S. 927 (1958) ("The heat and humidity . . . joined in creating the abnormal danger. . . . Since Section 502 [of the Taft-Hartley Act] provides that walking out under a good faith belief of abnormally dangerous conditions does not constitute a strike, the no-strike provision was not applicable."). See 29 U.S.C. § 143 (1976).

120. 424 F. Supp. 753 (E.D. Mich. 1976).

121. *Id.* at 756-57.

122. See *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 713-14 (5th Cir. 1977), cert. denied, 439 U.S. 880 (1978).

123. S. 2193, *supra* note 102, § 12(b), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 562-63.

up to five days,¹²⁴ and more harsh than the provision ultimately passed by the House, which granted courts the exclusive authority to enjoin violations upon application by the Secretary.¹²⁵ The Conference Committee deleted the administrative shutdown authority contained in the Senate bill and adopted a version of the House proposal.¹²⁶ These events have been characterized as indicating that, because Congress expressly denied shutdown authority to trained OSHA inspectors, Congress did not intend to allow employees to shut down a business by walking off the job.¹²⁷

2. *Legislative Intent*

The question of whether Congress intended to eliminate the right to walk off the job in the face of imminent danger by rejecting the administrative shutdown provision again involves a consideration of the scope and effect of the two rights. Although the subsection of the bill containing the administrative shutdown provision evolved into the current imminent danger section of OSHA, the two subsections differ in several material respects. First, the shutdown provision would have resulted in a total cessation of activity in a dangerous plant for up to three days upon the Secretary's finding of imminent danger.¹²⁸ The Secretary's regulation, however, is limited to situations in

124. H.R. 16785, *supra* note 90, § 12(a), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 742.

125. H.R. 19200, *supra* note 96, § 12, reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 796-98.

126. See CONF. REP. NO. 1765, *supra* note 107, at 40, reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 1193, and reprinted in [1970] U.S. CODE CONG. & AD. NEWS 5228, 5236.

127. See *e.g.*, *Marshall v. Daniel Constr. Co.*, 563 F.2d 707, 714 (5th Cir. 1977), *cert. denied*, 439 U.S. 880 (1978) ("Apparently believing that workers might also attempt unduly to influence OSHA inspectors if these officials were given the authority to issue administrative orders restraining an employer's business operations, Congress gave the federal courts the sole authority to enjoin . . . an employer's business . . ."); *Usery v. Whirlpool Corp.*, 416 F. Supp. 30, 34 (N.D. Ohio 1976) ("It is obvious that Congress considered the shut-down of an operation such a serious matter that nothing short of the judicial process . . . was acceptable as a means of accomplishing it. Certainly allowing employees to simply walk off the job was not acceptable."), *rev'd*, *Marshall v. Whirlpool Corp.*, 593 F.2d 715 (6th Cir.), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

128. S. 2193, *supra* note 102, § 12(b), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 562-63 ("[T]he Secretary shall issue an order . . . prohibiting the employment or presence of any individual in locations or under conditions where such imminent danger exists Such order may remain in effect for not more than seventy-two hours . . ."). Apparently an inspector only needed greater authority than his own presence when he proposed to close a plant "in substantial part." See 116 CONG. REC. 37,624 (1970), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 508 (remarks of Sen. Javits).

which "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."¹²⁹ The right defined in the regulation is thus personal, not collective, and its exercise in most cases would not entail shutting down an entire plant. Second, the shutdown provision authorized an inspector at the scene to "issue an order requiring such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger."¹³⁰ The Secretary's regulation is far less onerous since it does not contemplate immediate, on-the-spot remedies. It instead simply authorizes an employee to leave, without fear of reprisal, until it is possible "to eliminate the danger through resort to regular statutory enforcement channels."¹³¹ Third, the shutdown provision made the inspector's finding of imminent danger determinative of the employees' right to walk off the job en masse, regardless of the number of employees actually threatened.¹³² Unauthorized walkouts could otherwise be conducted with impunity. The regulation, on the other hand, conditions an employee's ability to walk off the job on the reasonableness of his personal apprehension of death or injury.¹³³ Finally, the shutdown provision is premised on the judgment of a federal officer, while the Secretary's regulation is actuated by employee determinations of danger.¹³⁴

The difference in the scope of the two approaches is evident. The most significant aspect of the shutdown provision to Congress was the fact that it authorized government intervention in the labor-management arena with immediate and far-reaching impact. The result was a fear that the section would be found unconstitutional. Senator Dominick expressed a concern representative of that felt by Congress:

[I]f [an inspector] thinks there is an imminent danger somewhere, all he has to do—one man, as an inspector—is to call the regional office or somebody else in the Labor Department and shut down the whole

129. 29 C.F.R. § 1977.12(b)(2) (1978).

130. S. 2193, *supra* note 102, § 12(b), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 563.

131. 29 C.F.R. § 1977.12(b)(2) (1978).

132. See S. 2193, *supra* note 102, § 12(b), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 562-63.

133. 29 C.F.R. § 1977.12(b)(2) (1978) ("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 . . .").

134. Compare note 128 *supra* ("Secretary shall issue an order") with note 133 *supra* (employee determines whether "a real danger of death or serious injury" exists).

plant immediately, by an order, without any court findings, without any adjudication, without any due process.¹³⁵

Congress was also concerned with the possibility that striking employees would abuse the shutdown power by focusing pressure on OSHA inspectors:

More realistically, the all powerful inspector would become a pawn in labor disputes.

The great potential for misuse that would be created if this power were put into the hands of an inspector in the field was amply demonstrated during the public hearings Thus, this unrestricted power in one person would realistically find itself in the middle of labor-management disputes. It would be far simpler for a disgruntled employee to pass by established labor-management grievance procedures and complain to a federal safety inspector that unsafe conditions existed when the real basis of a dispute was properly a labor-management problem¹³⁶

It is clear, therefore, that the concern of Congress was not over the right of an individual employee to exercise his personal discretion about work conditions that immediately threatened his safety. Rather, the fear was that direct government involvement in plant shutdowns might present constitutional problems through an abuse of power "culminating in a breakdown of Governmental neutrality in labor-management relations."¹³⁷

C. CONCLUSION

In considering the rejected "strike with pay" and modified administrative shutdown provisions, Congress never directly addressed the issue of whether an employee had the right under OSHA to absent himself from the workplace at the risk of discipline for having unreasonably apprehended the existence of imminent danger. Moreover, Congress' concern over both provisions reflects fears over labor-management impacts

135. 116 CONG. REC. 37,388 (1970), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 425 (remarks of Sen. Dominick). See H.R. REP. NO. 1291, *supra* note 51, at 56, reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 886 (minority report) ("In essence, the exercise of this shut-down power amounts to summary punishment which is contrary to our established standards of law.")

136. H.R. REP. NO. 1291, *supra* note 51, at 56, reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 886 (minority report). The minority report cited as support for its conclusion an incident in a Texas jet fuel refinery in which union employees went out on strike at 2 a.m. on a Sunday morning with only a few minutes' notice to management. Management personnel operated the plant to maintain the firm's obligations under a government contract, but the union sent a complaint to the Secretary of Labor charging that the plant was unsafe because it was operated with less than a full crew. Despite two prior safety inspections that year, the Secretary was asked to use his authority under the Walsh-Healey Act to find the operation of the plant unsafe. *Id.*

137. 116 CONG. REC. 37,346 (1970), reprinted in LEGISLATIVE HISTORY, *supra* note 17, at 448 (remarks of Sen. Tower).

that are significantly different from those of the Secretary's regulation.¹³⁸ The two provisions should not, therefore, be considered to control the validity of the imminent danger regulation. This is particularly true given Congress' broad delegation of authority to the Secretary to promulgate regulations, and given the strong remedial purpose of the Act.

A few years after OSHA was enacted, Congress passed a statute with a similar imminent danger provision. The legislative history of that act—the Federal Mine Safety and Health Amendments Act of 1977¹³⁹—makes it clear that Congress intended miners to be able to leave a dangerous job at their own discretion, without fear of discipline:

[T]he Committee intends [the Act] to be construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.¹⁴⁰

The issue of walking off the job was raised on the Senate floor:

It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination . . .

It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety and health have the right to refuse work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?¹⁴¹

Senator Williams—the same legislator whose bill was largely adopted as OSHA seven years earlier—replied:

The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.

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.¹⁴²

138. Concern with the "strike with pay" provision was largely over the prospect of federally guaranteed full wages for walkouts that could be completely unrelated to the actual degree of danger faced by an employee. See notes 116-17 *supra* and accompanying text. Concern with the administrative shutdown provision was largely over the constitutional implications of government involvement in labor-management relations. See notes 135-137 *supra* and accompanying text.

139. Pub. L. No. 95-164, 91 Stat. 1290 (1977) (codified at 30 U.S.C. §§ 801-961 (Supp. I 1977)).

140. S. REP. NO. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in [1977] U.S. CODE CONG. & AD. NEWS 3436.

141. 123 CONG. REC. S10,287-88 (daily ed. June 21, 1977) (remarks of Sen. Church).

142. *Id.* at S10,288 (remarks of Sen. Williams). Senator Javits replied, "I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be

Senator Williams' reply amply demonstrates Congress' understanding of the nature of remedial safety statutes. When the safety standards set by Congress are vague and optimistic, and the number of government enforcement personnel is woefully inadequate to ensure compliance, there is only one inference possible: that Congress intended employees to play an active role in enforcement. It would be paradoxical to impute to Congress the intent to condone the retaliatory discharge of employees who refuse to face hazardous work conditions when Congress expressly announced its intent to enlist the aid of employees in making workplaces safer.¹⁴³

V. EFFECT OF RECOGNIZING THE IMPLICIT RIGHT

This Article has suggested that Congress, by eliminating the "strike with pay" and administrative shutdown provisions from OSHA, did not intend to limit employees' right to self-protection, but simply intended to provide for a limited right of self-help. There remains to be discussed, however, the issue of whether other remedial statutes provide sufficient protection, or whether such protection may be implied only under OSHA.

A. SCOPE OF OTHER REMEDIES

Remedies at common law are limited largely to suits for injuries after they have occurred,¹⁴⁴ and courts are hesitant to limit the right of employers to discharge employees who refuse to perform as directed.¹⁴⁵ Although employer retaliation may be compensable if demonstrably in "bad faith,"¹⁴⁶ the use of after-the-fact remedies is not an efficient method to accomplish OSHA's goal of ensuring safe and healthful workplaces.

The NLRA, as amended by section 502 of the Labor Man-

able to afford themselves their rights under the full protection of the act as responsible human beings." *Id.*

143. See generally *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 735-36 (6th Cir.), appeal docketed, No. 78-1870 (Sept. 21, 1979).

144. See generally *W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 80 (4th ed. 1971).

145. Compare *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976) (no wrongful discharge for firing employee who revealed product misrepresentation to government) and *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (no wrongful discharge for firing employee who revealed potentially dangerous defect in employer's product to potential purchasers) with *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (discharge of "at will" employee wrongful only when in bad faith; wrongful to fire employee who refused to engage in sexual relations with foreman).

146. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

agement Relations Act,¹⁴⁷ provides that a walkout "in good faith because of abnormally dangerous conditions for work at the place of employment" is not a strike but an acceptable tactical approach.¹⁴⁸ The Supreme Court, however, has construed the NLRA's walkout provision as requiring proof by a union of "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."¹⁴⁹ This standard requires more than a good faith belief. There must be exacting proof that an objective, reasonable person would conclude that an abnormally dangerous condition exists. Moreover, since the NLRA's walkout provision is addressed to group walkouts, the withdrawal of a single employee may not constitute a sufficiently "concerted" activity to warrant the protective machinery of the NLRA.¹⁵⁰ Under the NLRA, employees therefore have a remedy only by resort to the collective bargaining strength of their union; the ability of their union representative will be determinative of whether work stoppage is permissible. The right to walk out under section 7 of the NLRA is thus not coextensive with the Secretary's OSHA regulation.

B. SCOPE AND APPROPRIATENESS OF THE IMPLICIT RIGHT

The Secretary's regulation provides employees who face immediate danger the right to walk off the job.¹⁵¹ If employees do so, however, their employers may discipline them. Each employee then has the right to seek relief under the regulation:

At trial he must prove before a federal judge 1) his good faith in taking the action, 2) that he had no reasonable alternative, and 3) that his apprehension of death or serious injury was based on circumstances then facing him which would cause a reasonable person to reach the same conclusion, and 4) that the urgency of the situation provided "insufficient time . . . to eliminate the danger by resort to regular statutory en-

147. Labor Management Relations Act of 1947, ch. 120, tit. V, § 502, 61 Stat. 162 (codified at 29 U.S.C. § 143 (1976)).

148. *Id.*

149. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 387 (1974) (quoting *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157, 1162 (3d Cir. 1972) (Rosenn, J., dissenting)).

150. *See, e.g., NLRB v. C & I Air Conditioning, Inc.*, 486 F.2d 977, 978 (9th Cir. 1973) (employee who was discharged after complaining of safety hazard caused by stairway collapsing beneath him held not engaged in concerted activity protected by NLRA); *NLRB v. Northern Metal Co.*, 440 F.2d 881, 884-85 (3d Cir. 1971) (employee who was discharged after demanding holiday pay for himself under collective bargaining agreement held not engaged in concerted activity protected by NLRA).

151. 29 C.F.R. § 1977.12(b)(2) (1978).

forcement channels."¹⁵²

This proof requirement, while not as burdensome to the employee as that required to invoke NLRA section 7,¹⁵³ does require the employee to risk discipline should he fail to meet it. The regulation, therefore, is distinct from the "strike with pay" and the administrative shutdown provisions of OSHA, which would have permitted an employee to leave a job site with impunity upon a governmental determination of "toxicity" or "imminent danger." Though placing some risk on employees, the regulation clearly fits OSHA's purpose: ensuring employees a safe and healthful workplace. It bridges a gap in the Act, affording protection to employees in the interim between their confrontations with danger and the arrival of OSHA inspectors. Moreover, the regulation aids in the enforcement of statutory requirements by affording coverage of the Act's retaliatory discharge provision to all employees who complain of hazardous work conditions.

The "imminent danger" regulation, which permits employees to walk off the job if they reasonably believe themselves to be confronted with an immediate threat to life or health, is a proper reading of the enabling legislation, and should be accorded the deference normally given promulgations made under broad, remedial statutes. Congress enacted OSHA so that American employees would no longer have to make a Hobson's choice between their jobs and their lives.

152. *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 735 (6th Cir.) (quoting 29 C.F.R. § 1977.12(b)(2) (1978)), *appeal docketed*, No. 78-1870 (Sept. 21, 1979).

153. *See* text accompanying notes 147-150 *supra*.