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OSHA Regulation: Workers Right to Refuse to Work in Situation of Imminent Danger Held Invalid

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NOTES

OSHA REGULATION: WORKERS RIGHT TO REFUSE TO WORK IN SITUATION OF IMMINENT DANGER HELD INVALID.—*Marshall v. Daniel Construction Co., 563 F.2d 707 (5th Cir. 1977), cert. denied,* 99 S. Ct. 216 (1978).

INTRODUCTION

On December 29, 1970, President Nixon signed the Occupational Safety and Health Act (OSHA) of 1970 into law.[1] Although there was extensive congressional debate, accord was reached on the necessity for legislation in the wake of the death and disability toll on the nation's work force resulting from the introduction of increasingly sophisticated technology and chemicals into the workplace.[2]

Congress declared the policy of OSHA in section 1(b): "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ."[3] Pursuant to authority granted in section 7(g) of OSHA,[4] the Secretary of Labor promulgated 29 C.F.R. section 1977.12(b)(2).[5] This regulation permits an employee the right to refuse to work

> under . . . circumstances then confronting the employee at the workplace which would cause him to conclude that there is a real danger of death or serious injury and there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.[6]

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1. 29 U.S.C. §§ 651-678 (1976).

2. *See generally* Gross, *The Occupational Safety and Health Act: Much Ado About Something,* 2 LOY. CHI. L.J. 247, 247-51 (1972); Marinelli, *Occupational Safety and Health Act: The Right of a Worker to a Safe Work Place Environment,* 78 W. VA. L. REV. 57, 57-61 (1975-76); Cohen, *The Occupational Safety and Health Act: A Labor Lawyer's Overview,* 33 OHIO ST. L. REV. 788, 788-91 (1972).

3. 29 U.S.C. § 651(b) (1976).

4. "The Secretary [of Labor] and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter, including rules and regulations dealing with the inspection of an employer's establishment." 29 U.S.C. § 657(g)(2) (1976).

5. 29 C.F.R. § 1977.12(b)(2) (1978).

6. 29 C.F.R. § 1977.12 (1978) provides:

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administra-

At least six district courts and one circuit court have reviewed this regulation and with one exception all have found the regulation to exceed the Secretary's grant of authority under the Act.[7] The Fifth Circuit, in *Marshall v. Daniel Construction Co.*,[8] held that it conflicts with the intent of Congress as reflected in OSHA's legislative history. This note analyzes that case and considers the statute, the regulation, case law and the legislative history of OSHA to determine whether the regulations expands OSHA's jurisdiction in an area where Congress intended to contract it.

FACTS

Jimmy Simpson, an iron worker employed by Daniel Construction Company, was perched atop a steel skeleton 150 feet above the

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tion; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstance, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

7. Usery v. Babcock & Wilcox Co., 424 F. Supp. 753 (E.D. Mich. 1976) (upheld the regulation). *Contra*, Marshall v. Daniel Construction Co., 563 F.2d 707 (5th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3226 (1978); Usery v. Whirlpool Corp., 416 F. Supp. 30 (N.D. Ohio 1976); Dunlop v. Daniel Construction Co., Inc., C-75-26-N, 4 O.S.H.C. 1125 (N.D. Ga. 1975); Brennan v. Diamond International Corp., C-1-75-43, 5 O.S.H.C. 1049 (S.D. Ohio 1976); Brennan v. Empire Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio 1976); Aders v. Kennecott Copper Corp., No. 76-292-M (D.N. Mex. 1976).

8. 563 F.2d 707 (5th Cir. 1977).

ground, fitting heavy steel beams into place with the aid of a crane. The wind became so strong that Simpson feared he would be unable to continue without jeopardizing his life. Simpson along with the rest of the crew came to the ground, but the foreman ordered the crew back up. Simpson refused and was fired.[9]

Pursuant to section 10(c)(2)[10] of OSHA the Secretary of Labor filed a complaint charging that Daniel Construction Co. violated Simpson's right to refuse work under 29 C.F.R. section 1977.12(b)(2) and requested that Simpson be rehired with back pay. District court Judge Henderson held that OSHA provided an insufficient legal basis for the Secretary's regulation protecting an employee's refusal to work in the face of hazardous conditions, and pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissed the complaint for failure to state a claim upon which relief could be granted, and the Secretary appealed.[11] The court of appeals affirmed, over a vigorous dissent written by Judge Wisdom.[12]

DECISION OF THE COURT

The issue raised by the construction company was whether 29 C.F.R. section 1977.12(b)(2), which entitles a worker to refuse a work assignment presenting an immediate danger to the employee's safety provided no reasonable alternative exists, is consistent with OSHA.

The court noted that administrative regulations are entitled to a presumption of validity and allocated the burden of persuasion to Daniel Construction Company.[13] In reaching its decision, the court scrutinized the express rights of workers embodied in OSHA itself, and found that workers have no right to absent themselves from work assignments merely because they believe the assignment imperils their safety.[14]

The court then looked to see if authority for the regulation could be logically implied from the statute. It found that although the regulation is not plainly inconsistent with the statute, Congress had considered and rejected a proposed amendment to the Act, the substance of which is not embodied in this regulation. This proposed amendment would have entitled workers to walk off the job with full pay when

9. *Id.* at 717 (Wisdom, J., dissenting).
10. 29 U.S.C. § 660(c)(2) (1976).
11. Marshall v. Daniel Construction Co., 563 F.2d at 709.
12. A writ of certiorari was filed with the Supreme Court on May 26, 1977 which was denied on October 2, 1978. Mr. Justice Brennan and Mr. Justice Blackmun would have granted certiorari. Marshall v. Daniel Construction Co., 99 S.Ct. 216 (1978).
13. Marshall v. Daniel Construction Co., 563 F.2d at 709-11.
14. *Id.* at 710-11.

they were exposed to potentially toxic substances.[15] The court found the regulation to be substantially the same as the rejected amendment and held that the Secretary of Labor had gone beyond his authority in promulgating this regulation.[16] Therefore, the regulation was held invalid.[17]

The dissent argued that a careful reading of the regulation and the legislative history reveals that Congress did indeed reject a proposal to OSHA similar to the regulation, but that because of the differences it does not necessarily follow that it would have rejected the substance of this regulation. The dissent distinguished the two, and found the subject regulation consistent with the authority delegated by OSHA. The dissent would hold that the regulation is valid, and require Simpson to be reinstated.[18]

ANALYSIS

A. Enabling Legislation

Because Congress realized that no statute could cover every conceivable situation that might arise, it enacted section 7(g)[19] which entitles the Secretary to promulgate regulations to fill gaps where the statute is silent. An administrative regulation, once promulgated, is entitled to a presumption of validity, and the burden of persuasion is on those who would challenge its validity.[20] A finding that the regulation is not clearly inconsistent with the enabling legislation, in the absence of substantial countervailing considerations, will be sufficient to sustain the regulation.[21] Without exception, all of the courts that have passed upon the regulation have agreed with this standard of judicial review.[22]

The case turns on whether Congress intended the short term remedies provided in OSHA to be exclusive. The two statutory procedures which deal directly with imminent danger situations do not indicate that they were meant to be exclusive.[23] Section 7(f)[24] which provides for inspection by the Secretary of Labor or his delegate in immi-

15. H.R. 16785, 91st. Cong., 2d Sess., § 19(a)(5) (1970).
16. Marshall v. Daniel Construction Co., 563 F.2d at 710, 714-15.
17. *Id.* at 710.
18. *Id.* at 718-22 (Wisdom, J., dissenting).
19. 29 U.S.C. § 657(g)(2) (1976).
20. In *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965), the reasonableness of the Secretary of Interior's authority to issue oil and gas leases was questioned.
21. Marshall v. Daniel Construction Co., 563 F.2d at 710, 716.
22. *See* note 7 *supra.*
23. Marshall v. Daniel Construction Co., 563 F.2d at 719 (Wisdom, J., dissenting).
24. 29 U.S.C. § 657(f) (1976).

nent danger situations upon an employee's request, and section 12[25] which provides for injunctive relief upon a finding of an imminent danger, are ineffective to deal with a situation where time is of the essence. In *Daniel Construction Co.* the remedy provided by the statute would have required Simpson to file his complaint with the Secretary, and then return to the job and wait for an OSHA inspector to investigate. At best this procedure could take a matter of hours, at worst several days.[26] In the meantime to avoid losing his job Simpson would have had to return to his precarious position atop the steel skeleton.[27] To fill this critical time gap the Secretary promulgated 29 C.F.R. section 1977.12(b)(2) which offers workers interim protection while statutory procedures are pending.

The Secretary of Labor has conceded in the regulation itself, that OSHA does not expressly afford employees the right to walk off the job because of potentially unsafe conditions at the workplace.[28] Here, the regulation activates only when time is so critical that no reasonable alternative exists to safeguard the employee's safety.[29] Once this imminent danger is abated, the employee must follow the express statutory procedure.[30]

B. Legislative History of OSHA

The majority of courts which have addressed the regulation have dismissed the plaintiff's claims in rather summary fashion by holding that the statute does not provide this remedy and that the Secretary cannot expand his authority to grant this remedy where the statute is silent. These courts reasoned that federal courts are of limited jurisdiction, specifically governed by Congress and that absent a clear grant from Congress, the federal courts cannot claim jurisdiction over the subject matter. Since there was not express grant of a remedy in the Act which would confer subject matter jurisdiction on the federal court, these courts held that an interpretative regulation issued under the Act may not do so.[31]

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25. 29 U.S.C. § 662 (1976).

26. Usery v. Babcock & Wilcox Co., 424 F. Supp. 753, 758 (E.D. Mich. 1976).

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

28. 29 C.F.R. § 1977.12(b)(1) (1978).

29. 29 C.F.R. § 1977.12(b)(1) (1978). This remedy can be used only when there is "insufficient time . . . to eliminate the danger through resort to regular statutory enforcement channels."

30. Usery v. Babcock & Wilcox Co., 424 F. Supp. 753, 756 n.4 (E.D. Mich. 1976).

31. Dunlop v. Daniel Construction Co., No. C-75-26-N, 4 O.S.H.C. 1125 (N.D. Ga. 1975); Brennan v. Diamond International Corp., No. C-1-75-43, 5 O.S.H.C. 1049

The court in *Daniel Construction Co.* confronted the merits of the regulation and rejected it on the ground that it conflicts with the legislative history of OSHA in two respects.[32] The court found the first conflict in the deletion of a provision in the proposed Daniels Bill,[33] which entitled workers to absent themselves from the workplace with full pay when the employee was exposed to "potentially toxic or harmful" substances.[34] Ultimately the Daniels Bill was rejected and the House adopted the Steiger bill, which did not contain this "strike with pay" provision.[35] In lieu of the "strike with pay" provision the House provided a remedy whereby workers could request the Secretary to inspect the workplace immediately and issue a citation for any violation of OSHA.[36] *Daniel Construction Co.* reasoned that this regulation allows an employee to do exactly what Congress considered and forbad: to walk off the job with full pay when the employee determines that the work practice presents a real danger of death or serious injury.[37]

The dissent in *Daniel Construction Co.* and a district court in *Usery v. Babcock & Wilcox Co.* disagreed. They were able to distinguish 29 C.F.R. section 1977.12(b)(2) from the provision rejected by Congress in the Daniels Bill.[38] The rejected provision in the Daniels Bill shielded workers from exposure to potentially toxic substances which may have impaired their health.[39] 29 C.F.R. section 1977.12(b)(2) applies only when the danger to the employee's safety is so immediate that resort to regular enforcement channels would be too late to prevent a tragedy.[40]

In the former situation there is ample time to safeguard both the employee's and employer's interests through an administrative determination that the substance to which the employee is exposed is harm-

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(S.D. Ohio 1976); Brennan v. Empire Detroit Steel Div., Detroit Steel Corp., No. C-1-74-345 (S.D. Ohio 1976); Aders v. Kennecott Copper Corp., No. 76-292-M (D.N. Mex. 1976).

32. 563 F.2d 707 (5th Cir. 1977).

33. The Daniels Bill applied to "known or potentially toxic substances" and shielded workers from exposure to them by providing that an "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." H.R. 16785, 91st Cong., 2d Sess. § 19(a)(5) (1970).

34. 116 CONG. REC. 38,377-78 (1970).

35. 116 CONG. REC. 38, 715, 38723-24 (1970).

36. H.R. NO. 1765, 91st Cong., 2d Sess. 37, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5234-35. Codified in 29 U.S.C § 657 (1976).

37. 563 F.2d at 712-14.

38. 563 F.2d 707; 424 F. Supp. 753 (E.D. Mich. 1976).

39. *See* note 33 *supra.*

40. 563 F.2d at 719-20 (Wisdom, J., dissenting).

ful to his health. In the latter situation, unless immediate action is taken the employee will be without a remedy.

Congress expressed concern that a legislative provision similar to the Daniels amendment might be subject to abuse.[41] To dispell these fears the regulation contains four specific safeguards. First, the employee must attempt to obtain a remedy from his employer. Second, he can only leave his work assignment if there is no reasonable alternative. Third, the employee is bound by an obligation of good faith. Fourth, the employee must cooperate with his employer to remove the danger before leaving the job site.[42] These requirements may allay the congressional fears of abuse that were expressed during debates on the Daniels Bill.

Perhaps the crucial distinction is that the regulation does not expressly provide for pay,[43] while the Daniels Bill did. Opponents of the Daniels Bill claimed that the "strike with pay" provision would upset the government's neutral position in labor-management relations and place an added burden on the employer.[44] This argument is weak when applied to the subject regulation because workers would be reluctant to refuse work when they are not entitled to pay and face a possible loss of a job if a subsequent determination finds the employee did not act in good faith. Further, there is nothing in the regulation which would prevent an employer from requiring his employee to perform alternative work until the dangerous condition is eliminated or while statutory procedures are pending.[45]

In sum, 29 C.F.R. section 1977.12(b)(2) is not the same as the "strike with pay" provision in the Daniels Bill. Hence, this legislative rejection of the Daniels Bill does not mean Congress decided the remedy provided by this regulation was inappropriate.

The second event in the legislative history relied on by *Daniel Construction Co.* in arguing that Congress disapproved of the substance of the Secretary's regulation is the deletion of a provision dealing with

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41. 116 CONG. REC. 38,712 (1970).

42. 29 C.F.R. § 1977.12(b)(2) (1978).

43. The regulation itself does not provide for pay. *See* note 6 *supra.* However, if an employee was discharged because he attempted to exercise any right afforded by OSHA, the statute provides that the Secretary may bring an action in federal court to reinstate the employee with back pay. 29 U.S.C. § 660(c) (1970).

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

116 CONG. REC. 38,393 (1970) (remarks of Congressman Michel).

45. 563 F.2d at 718 (Wisdom, J., dissenting).

imminent dangers.[46] Senator Williams introduced a bill[47] that permitted the Secretary or his delegate to close down an employer's business, if the danger to the employee was such that immediate action was imperative. This order could remain in effect for seventy-two hours. To continue the shutdown the Secretary would have to obtain a court order. Rejection of this provision was attributed to congressional reluctance to vest such power in a lone federal inspector due to the grave economic consequences that could befall a business ordered to be closed. Further, vesting such power in one individual plants seeds of abuse.[48] In lieu of the seventy-two hour administrative shutdown, the federal district courts were given the power to issue injunctions.[49] Congress concluded that only a judicial proceeding with all its safeguards should grant such an extraordinary remedy.[50]

In light of the above, the court in *Daniel Construction Co.* decided that the regulation might have the same effect on an employer's business as the rejected Williams amendment if enough employees refused to work due to hazardous conditions.[51] Since the Act requires that a decision to shutdown a business be made only by a federal district court, rather than by a nonjudicial officer it follows that this regulation which allows a worker to decide when he may walk off the job is contrary to the will of Congress.[52]

In contrast, the dissent in *Daniel Construction Co.* argued that the regulation is directed at very limited individual action. It allows an employee to refuse a particular work assignment which presents an immediate danger to the employee's safety when no reasonable alternative exists; an employee has no right to close down an employer's business. The fatal defect in the Williams Bill is not present in the regulation. Although this regulation might impose a burden on the employer, it is different in kind from what Congress disapproved. The corresponding benefit of preserving the worker's life is far greater than the employer's burden.[53]

Finally, in *Daniel Construction Co.* the defendant argued that in lieu of administrative shutdowns authorized by the Williams Bill, Congress granted workers the right to request an immediate inspection of

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46. *Id.* at 713-15.
47. S. 2193, 91st Cong., 2d Sess., § 11(b) (1970).
48. 563 F.2d at 714.
49. 116 CONG. REC. 38,369 (1970); Codified in 29 U.S.C. § 662 (1976).
50. 563 F.2d at 714-15.
51. *Id.*
52. *Id.* at 715.
53. *Id.* at 720-22 (Wisdom, J., dissenting).

any dangerous condition at the workplace.[54] The problem with the right of immediate inspection is that it would offer no protection to workers in situations such as that in which Simpson found himself. Simpson would be required to remain atop the windswept steel skeleton until an OSHA inspector arrived. At best an inspector could arrive in a matter of hours. In the meantime the worker is confronted with a Hobson's choice of his life or his job.[55]

This regulation merely provides a remedy for this otherwise unprotected hazardous situation, and incorporates restrictions to minimize the unreasonable interference with an employer's business with which Congress has expressed concern.

CONCLUSION

29 C.F.R. section 1977.12(b)(2) is reasonably related to the enabling legislation in that it furthers the goal of OSHA to "insure so far as possible safe and healthful working conditions to every man and woman in the nation."[56] The *Daniel Construction Co.* dissent points out that although the Act does not expressly provide for a procedure as embodied in the regulation, it is a reasonable extension of the remedies provided in the Act, and is designed to fill a narrow but potentially deadly seam in the Act. Scrutiny of the legislative history reveals that although Congress disapproved of certain bills that contained provisions similar to this regulation, this regulation was carefully drafted to avoid the features to which Congress had objected. Nevertheless, the Fifth Circuit reads the legislative history and the other remedies provided by the Occupational Safety and Health Act to reflect a legislative decision against employee self-determination of imminently dangerous working conditions.

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54. *Id.* at 714.
55. *Id.* at 722 (Wisdom, J., dissenting).
56. 29 U.S.C. § 651(b) (1976).