

1983

## Employment-At-Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety

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### Recommended Citation

Daniel T. Schibley, *Employment-At-Will Doctrine: Providing a Public Policy Exception to Improve Worker Safety*, 16 U. MICH. J. L. REFORM 435 (1983).

Available at: <https://repository.law.umich.edu/mjlr/vol16/iss2/10>

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## THE EMPLOYMENT-AT-WILL DOCTRINE: PROVIDING A PUBLIC POLICY EXCEPTION TO IMPROVE WORKER SAFETY

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Most of the American work force is employed "at will," and is therefore subject to discharge at the discretion of employers.<sup>1</sup> Although many state courts have recognized exceptions to this common-law rule,<sup>2</sup> employees continue to be arbitrarily discharged.<sup>3</sup> Thus, the at-will doctrine still provides the employer with a powerful source of coercion over its employees.<sup>4</sup>

The employment-at-will rule yields particularly harsh results when employees are required to work under unsafe conditions. Such employees must choose between risking their health and losing their jobs should they refuse an assigned task. Congress has provided some legislative protection for employees working under unsafe conditions;<sup>5</sup> these efforts, however, have failed adequately to protect many workers and the incidence of injury and death in the workplace remains high.<sup>6</sup>

Occupational safety would be greatly enhanced if employees had a viable option of refusing to work under unsafe conditions without risking their jobs. This Note proposes a public policy exception to the employment-at-will doctrine that would give a cause of action to an employee discharged for refusing to work under unsafe conditions. Part

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1. See, e.g., *Bender Ship Repair, Inc. v. Stevens*, 379 So. 2d 594 (Ala. 1980); *Daniel v. Magma Copper Co.*, 127 Ariz. 320, 620 P.2d 699 (Ariz. Ct. App. 1980); *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981). One commentator has estimated that at least 60% of the American work force is employed at will. See Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979). For an excellent discussion of the employment-at-will doctrine and proposed alternatives see THE EMPLOYMENT-AT-WILL ISSUE, 111 LAB. REL. REP. (BNA) No. 23 (Nov. 22, 1982) [hereinafter cited as BNA REPORT]. See also COMM. ON LABOR & EMPLOYMENT LAW, *At-Will Employment and the Problem of Unjust Dismissal*, 36 REC. A.B. CITY N.Y. 170 (1981) [hereinafter cited as *At-Will Employment*].

2. These exceptions are based on several theories. See *infra* notes 10-14 and accompanying text.

3. See, e.g., *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979) (upholding discharge allegedly motivated by bad faith, malice, and retaliation).

4. See *Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1406 (1967).

5. See Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980); see also National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980) (protecting concerted activity aimed, *inter alia*, at eliminating workplace hazards).

6. In 1978, there were approximately 5.66 million injuries and illnesses and 4590 deaths in the private employment sector. 1 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 3106 (1980).

I examines the employment-at-will rule and its recognized exceptions. Part II analyzes the inadequacies of existing statutory remedies for a discharged employee who refused to work under unsafe conditions. Finally, Part III proposes an alternative remedy: providing a common-law exception to the employment-at-will rule that will give an employee the right to refuse work under unsafe conditions without risking his job. This Note concludes that such an exception is essential to protect the health and safety of American workers.

## I. THE EMPLOYMENT-AT-WILL DOCTRINE

At least sixty percent of the American work force is employed at will, and is consequently subject to discharge at the employer's discretion.<sup>7</sup> Discharge may be "for good cause, for no cause or even for cause morally wrong."<sup>8</sup> This employment-at-will rule has recently been criticized severely by commentators.<sup>9</sup> Courts have also questioned

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7. See Peck, *supra* note 1, at 8-10. Professor Peck estimates that between 60% and 65% of the nonagricultural work force is employed under contracts of employment that are terminable at will. This estimate is based on information derived from the U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977 (98th ed.). See also *At-Will Employment*, *supra* note 1, at 170 & n. 1 (discussing workers covered by at-will rule). This estimate is reached by excluding from the number of nonagricultural employees those workers who are covered by collective bargaining contracts and those employed by federal, state, and local governments. Federal civil service employees are protected against "adverse action" by federal law. 5 U.S.C. §§ 7501-7543 (1978 & Supp. IV 1980). More than half of state and local government employees have some type of civil-service protection. Peck, *supra* note 1, at 9. Approximately 90% of collective bargaining agreements require that there be "cause" or "just cause" for a discharge or that the discharge be for a specific offense. See 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTS. (BNA) 40:1 (1978).

8. Payne v. Western & Atlantic R.R., 81 Tenn. 507, 519-20 (1884). Employees have been discharged for many reasons, including serving on a grand jury, Bender Ship Repair v. Stevens, 379 So. 2d 594 (Ala. 1980); threatening to bring a malpractice action against an employer, Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ariz. Ct. App. 1980); and living with another employee outside of wedlock, Ward v. Frito-Lay, 95 Wis. 2d 372, 290 N.W.2d 536 (Wis. Ct. App. 1980). In all of these cases the court upheld the employer's right to discharge the employee.

These decisions are the result of a common-law doctrine first developed in the late nineteenth century when laissez-faire was the dominant economic theory. The employment-at-will doctrine was first enunciated in H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877). For a discussion of the historical development of the at-will rule see Murg & Scharman, *Employment At Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329, 332-40 (1982).

9. Commentators have advocated a wide variety of solutions to the at-will problem. See, e.g., Blackburn, *Restricted Employer Discharge Rights: A Changing Concept of Employment At Will*, 17 AM. BUS. L.J. 467 (1980) (advocating use of contract principles to protect at-will employees); Blades, *supra* note 4, at 1421-27 (arguing for judicial recognition of a tort remedy for abusively discharged employees); Peck, *supra* note 1, at 46-49 (favoring either court-imposed due process requirements for employee discharges or, preferably, a broad legislative solution requiring state agencies to review discharges to find if employers had just cause); Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481 (1976) (advocating enactment of a statute making arbitration of discharge cases available to all employees); *Individual Rights in the Workplace: The At-Will Issue*, 16 U. MICH. J.L. REF. 200 (1983).

the doctrine's usefulness and have mitigated its harsher effects by resorting to a variety of judicial interpretations.

Most of these decisions recognize certain exceptions to the employment-at-will rule based on public policy considerations.<sup>10</sup> The first decision to make such an inroad on the general rule was *Petermann v. International Brotherhood of Teamsters*.<sup>11</sup> In *Petermann*, the California Court of Appeal held that a discharge based on an employee's refusal to commit perjury was "patently contrary to the public welfare."<sup>12</sup> The court based its decision on the state's public policy embodied in statutes making perjury and its solicitation criminal acts.<sup>13</sup>

Since *Petermann*, courts in a number of states have recognized public policy exceptions to the employment-at-will doctrine based on various statutory policies.<sup>14</sup> Before a court will recognize a public policy exception, though, there generally must be an explicit legislative statement of that policy.<sup>15</sup> It is usually not sufficient if the claimed exception is based on general statutory language<sup>16</sup> or codes of

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10. Twenty states have recognized public policy exceptions to the at-will rule. See BNA REPORT, *supra* note 1, at 8, 33-65. A few courts have also relied on contract and tort principles in the absence of a clear statutory expression of public policy. *Id.* For example, the Michigan Supreme Court held that a "just cause" provision in an employee handbook can create an implied contract term even if the employee had not read the provision. *Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980). The Supreme Judicial Court of Massachusetts has also implied a covenant of good faith and fair dealing in an employment contract. In *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977), the employer breached this covenant by terminating the plaintiff on the eve of his entitlement to substantial commissions. Another case involved an employee discharged for refusing to date her supervisor. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). Although *Monge* did not involve a violation of statutory public policy or an implied contract, the New Hampshire Supreme Court found that the employer's acts created a tort cause of action. *Id.* at 133, 316 A.2d at 551.

11. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

12. *Id.* at 186, 344 P.2d 27.

13. *Id.*

14. Courts have not allowed employers to discharge employees for applying for union membership, *Glenn v. Clearman's Golden Cock Inn*, 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961), filing worker's compensation claims, *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), refusing to falsify pollution control reports, *Trombetta v. Detroit, Toledo & Ironton R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978), requesting jury duty, *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975), and seeking employer compliance with federal and state consumer credit and protection laws, *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

15. See, e.g., *Percival v. General Motors Corp.*, 400 F. Supp. 1322 (E.D. Mo. 1975) (holding that there is no action for wrongful discharge unless a clear mandate of public policy has been violated); *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 52 Ill. Dec. 13, 421 N.E.2d 876 (1981) (stating that the employer retains the right to fire workers at will in the absence of clearly mandated public policy); *Geary v. United States Steel Corp.*, 456 Pa. 171, 184, 319 A.2d 174, 180 (1974) (noting that California courts have limited the creation of exceptions to cases where there has been an explicit declaration of public policy by the legislature). *But see* note 10 *supra* (listing cases where public policy exceptions have been recognized in the absence of a clear statutory expression).

16. See, e.g., *Lampe v. Presbyterian Medical Center*, 41 Colo. App. 465, 590 P.2d 513 (1978) (upholding discharge of nurse who complied with general statutory nursing standards).

ethics.<sup>17</sup> No court has yet recognized a public policy exception to protect workers from dismissal in situations involving a threat to safety.<sup>18</sup> Therefore, except where specific statutory provisions apply, the common-law rule permits employers to discharge at-will employees who refuse to work under unsafe conditions.<sup>19</sup>

## II. STATUTORY SOLUTIONS FOR UNSAFE CONDITIONS

Although courts have not adopted a public policy exception for refusal to work in unsafe conditions, there are statutes that may benefit employees in particular circumstances. These include the Occupational Safety and Health Act,<sup>20</sup> and the National Labor Relations Act.<sup>21</sup>

### A. *The Occupational Safety And Health Act*

In 1970, Congress approved the Occupational Safety and Health Act ("OSH Act")<sup>22</sup> to reduce the number and severity of work-related injuries and illnesses.<sup>23</sup> The OSH Act permits the Secretary of Labor to promulgate safety standards for employers engaged in interstate commerce. It also provides that all employers must provide a safe workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm . . . ."<sup>25</sup>

Section 11(c) of the OSH Act provides that no person can discharge or discriminate against any employee for exercising any right afforded

17. See, e.g., *Suchodolski v. Michigan Consolidated Gas Co.*, 412 Mich. 692, 696-97, 316 N.W.2d 710, 712 (1982) (refusing to recognize public policy exception based on Code of Ethics of Internal Auditors). *But see* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 72, 417 A.2d 505, 512 (1980) (stating that, in some circumstances, a professional code of ethics may express public policy).

18. Courts have recognized that an employer has a common law duty to provide a reasonably safe workplace. See *infra* note 51 and accompanying text. Courts have not held, however, that an employee may not be discharged for refusing to work under conditions where the employer has breached its duty.

19. "The common law left the worker free to resign, but unable to remain at work and insist on safe conditions." Blumrosen, Ackerman, Kligerman, VanSchaick & Sheehy, *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L. REV. 702, 711 (1976) (footnote omitted) [hereinafter cited as Blumrosen].

20. 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980).

21. 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980). Some employees may also claim protection under the Labor Management Relations Act, 29 U.S.C. § 143 (1976), but such protection is quite restricted. See *infra* note 48.

22. 29 U.S.C. §§ 651-678 (1976 & Supp. IV 1980).

23. See S. REP. NO. 1282, 91st Cong., 2d Sess. 1 (1970), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5177; H.R. REP. NO. 1291, 91st Cong., 2d Sess. 14 (1970).

24. 29 U.S.C. § 655(a) (1976 & Supp. IV 1980).

25. *Id.* § 654(a)(1) (1976). Congress's stated purpose in enacting the OSH Act was "to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . ." 29 U.S.C. § 651(b) (1976).

by the Act.<sup>26</sup> The Secretary of Labor has issued a complementary regulation stating that an employee may only refuse to perform work if he will be exposed to a "real danger of death or serious injury" and "there is insufficient time . . . to eliminate the danger through resort to regular statutory enforcement channels."<sup>27</sup> In addition, the Supreme Court has held that complaining employees must have a reasonable, good faith belief that the regulation's conditions are met.<sup>28</sup> An employer can defeat such a claim by showing that there were other, legitimate reasons for the dismissal; the employee must show that the dismissal would not have taken place "but for" his actions pursuant to the regulations.<sup>29</sup> The OSH Act therefore does not create an unfettered right to refuse work under potentially unsafe conditions.<sup>30</sup>

Even if an employee can refuse work under the OSH Act, however, section 11(c) does not furnish an effective enforcement mechanism to complement this right. An employee must file a complaint with the Secretary of Labor within thirty days of the alleged violation<sup>31</sup> or lose his cause of action.<sup>32</sup> Even if the employee files a timely complaint, though, the decision whether to prosecute is left to the Secretary's discretion.<sup>33</sup> Most courts addressing the issue have held that an employee has no right to bring suit under the OSH Act.<sup>34</sup> The Secretary, however,

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26. 29 U.S.C. § 660(c)(1) (1976).

27. 29 C.F.R. § 1977.12(b)(2) (1982). This regulation was upheld by the Supreme Court in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 22 (1980).

28. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 21 (1980). One commentator has noted that the Occupational Safety and Health Administration's Region II has installed a 24-hour hotline for emergency calls relating to safety conditions. By implication, this means that employees in this region are never without "resort to regular statutory enforcement channels." See Kirschner, *Workers in a Whirlpool: Employee's Statutory Rights to Refuse Hazardous Work*, 31 LAB. L.J. 283, 291 n.48 (1980).

29. 29 C.F.R. § 1977.6 (1982). In one case, the court denied the employees relief although it recognized that there was a good faith dispute as to whether the conditions were unsafe. The employees failed to show by a preponderance of the evidence that they were discharged for engaging in protected activity rather than for causing disruptions over the allegedly unsafe conditions. *Marshall v. Klug & Smith Co.*, 1979 O.S.H. Dec. (CCH) ¶ 23,469 (D.N.D. 1979). See also *Usery v. Granite-Groves*, 1977-1978 O.S.H. Dec. (CCH) ¶ 22,126 (D.D.C. 1977) (holding predominant motive for discharge was substandard job performance rather than employees filing complaints alleging safety violations).

30. 29 C.F.R. § 1977.12(b)(1) (1982).

31. 29 C.F.R. § 1977.15(d) (1982).

32. In one case, although the employee filed a complaint with the Wyoming Occupational Safety and Health Department within the 30-day period, the court dismissed the case because he failed to file directly with the Secretary as statutorily required. The Secretary actually received the complaint some 53 days after the incident. *Usery v. Certified Welding Corp.*, 1978 O.S.H. Dec. (CCH) ¶ 22,605 (D.Wyo. 1977), *aff'd sub nom. Marshall v. Certified Welding Corp.*, 1979 O.S.H. Dec. (CCH) ¶ 23,257 (10th Cir. 1978).

33. See 29 U.S.C. § 660(c)(2) (1976). An employee whose request for relief is denied by the Secretary can seek a writ of mandamus, but it will be granted only if the Secretary acted arbitrarily or capriciously. See 29 U.S.C. § 662(d) (1976).

34. The Fifth and Sixth Circuits have held that there is no private cause of action for a discharge under section 11(c). See *Taylor v. Brighton Corp.*, 616 F.2d 256 (6th Cir. 1980) (holding

has neither the resources nor the personnel to handle all the complaints filed pursuant to section 11(c).<sup>35</sup> Furthermore, the Secretary of Labor will not always adequately represent employee interests, as he must weigh the impact of his decisions on employers before pursuing a case.<sup>36</sup> Given these qualifications and shortcomings, section 11(c) of the OSH Act does not adequately protect employees faced with the dilemma of whether to work under unsafe conditions.<sup>37</sup>

### B. *The National Labor Relations Act*

The National Labor Relations Act ("NLRA")<sup>38</sup> ensures workers the right to engage in concerted activity for the benefit of their "mutual aid or protection."<sup>39</sup> Employees, whether or not they are organized, may strike for health or safety reasons under the NLRA.<sup>40</sup> The reasonableness of workers' decisions to engage in concerted activity is irrelevant when they are discharged for activity otherwise protected by the Act.<sup>41</sup>

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suit can be brought only by the Secretary of Labor); *Skidmore v. Travelers Ins. Co.*, 356 F. Supp. 670, 671 (E.D.La. 1973), *aff'd*, 483 F.2d 67 (5th Cir. 1973) (finding no legislative intention to create private cause of action). *See also* *Marshall v. Occupational Safety and Health Review*, 635 F.2d 544, 550 (6th Cir. 1980) (holding that Secretary of Labor is the exclusive prosecutor of OSH Act violation). While declining to rule on the question whether or not a private cause of action exists, the Second Circuit has held that if there is such a right it is contingent on exhaustion of all other administrative remedies. *McCarthy v. Bark Peking*, 676 F.2d 42 (2d Cir. 1982).

35. In *Taylor v. Brighton Corp.*, 616 F.2d 256, 263 (6th Cir. 1980), the Secretary of Labor filed an amicus brief urging the Court of Appeals, unsuccessfully, to recognize a private cause of action under section 11(c). *See* Comment, *Retaliatory Discrimination Actions Under Section 11(c) of OSHA: Too Many Rights, Not Enough Protection*, 1981 B.Y.U. L. REV. 909, 928 ("[A]s the scope of protected employee and prohibited employer activity continues to expand, the Secretary's workload may become so unreasonable that section 11(c) will not be adequately enforced.").

36. *See generally* Blumrosen, *supra* note 19, at 705-06 (arguing that the Secretary is not exclusively concerned with the safety of the individual worker but must also consider the impact of his actions on labor-management relations in general).

37. In comparing the standard under the Occupational Safety and Health Administration's ("OSHA") regulation to that under the criminal necessity defense, one commentator has said the regulation is actually "overprotecting the interests of employers and underprotecting the interests of workers." Frank, *A Question of Equity: Worker's Right to Refuse Under OSHA Compared to the Criminal Necessity Defense*, 31 LAB. L.J. 617, 623 (1980). *See also* Kirschner, *supra* note 28, at 294 (characterizing the regulation as a narrow provision unlikely to have a substantial effect in the workplace). *See generally* Blumrosen, *supra* note 19, at 715-17 (criticizing the implementation of OSH Act policy by OSHA on several grounds, including understaffing, underfunding, rare issuance of citations for serious violations, and ease with which industry may obtain modifications).

38. 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980).

39. 29 U.S.C. § 157 (1976 & Supp. IV 1980).

40. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (holding seven unorganized employees could not be discharged for leaving work without permission where shop was intolerably cold).

41. *See id.* at 16 (citing *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 344 (1938))

The "concerted activity" requirement, however, presents problems for the lone employee who refuses to work under what he perceives as unsafe conditions. The Court of Appeals for the Second Circuit has held that efforts by an individual employee to enforce provisions of a collective bargaining agreement constitute concerted activity.<sup>42</sup> Other circuits, however, have explicitly rejected this reasoning and denied an individual's cause of action predicated on "concerted activity."<sup>43</sup> Even the Second Circuit has rejected the extension of protection to individual action taken outside of the context of a collective bargaining agreement.<sup>44</sup> Thus, it is unlikely that a single at-will employee who refuses to work under unsafe conditions could successfully claim that he was engaged in concerted activity.

The NLRA has other statutory<sup>45</sup> and administrative<sup>46</sup> limitations that reduce its effectiveness. The Secretary of Labor has estimated that the NLRA covers forty-four million employees as compared with the OSH Act's sixty-four million.<sup>47</sup> Given this restricted coverage and the limited definitions of "concerted activity" in many circuits, the at-will employee

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(holding reasonableness of a worker's engaging in concerted activity is irrelevant in determining if a labor dispute existed or not); *see also* *Modern Carpet Indus.*, 1978 NLRB Dec. (CCH) ¶ 19,379, *enforced sub nom.* *NLRB v. Modern Carpet Indus., Inc.*, 611 F.2d 811 (10th Cir. 1979) (reasonableness of employees' fear of unsafe conditions is not an element to be considered when employees are discharged for protected activity).

42. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967). This is so even in the absence of interest on the part of fellow employees in the effort. *Id.* at 500.

43. *See, e.g.*, *Scooba Mfg. v. NLRB*, 51 U.S.L.W. 2399 (5th Cir. Dec. 20, 1982) (finding no concerted activity where there was no evidence that discharged employee acted on behalf of her co-workers); *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 308 (4th Cir. 1980) (quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969)) (action must be "intended to enlist the support and assistance of other employees. . . ."); *ARO, Inc. v. NLRB*, 596 F.2d 713, 718 (6th Cir. 1979) (holding that individual action "must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement."); *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (individual action "must appear at the very least [to be] engaged in with the object of initiating or inducing or preparing for group action or [have] some relation to group action."). Other restrictions include the Sixth Circuit's requirement that the employer know that the employee's behavior was "concerted" before the employer can be found to have illegally discharged an employee who complained of hazardous conditions. *Jim Casuley Pontiac v. NLRB*, 620 F.2d 122, 125-26 (6th Cir. 1980).

44. *Ontario Knife Co. v. NLRB*, 637 F.2d 840 (2d Cir. 1980) (rejecting the argument of the NLRB in *Steere Dairy, Inc.*, 237 N.L.R.B. No. 219 (1978)). *But see* *Randolph Division, Ethan Allen, Inc. v. NLRB*, 513 F.2d 706 (1st Cir. 1975) (holding that unorganized employee's statements to management were "concerted activity"); *Allouia Cushion Co.*, 1975-1976 NLRB Dec. (CCH) ¶ 16,451 (discussing implied consent of unorganized employees to individual worker's complaints concerning violations of occupational safety statute).

45. The NLRA does not apply to agricultural workers, independent contractors, or supervisors. *See* 29 U.S.C. § 152(3) (1976 & Supp. IV 1980).

46. The NLRB will not assert jurisdiction over businesses not meeting a minimum volume of business test (including about 22% of retail and service businesses). *See* *LESLIE, CASES AND MATERIALS ON LABOR LAW* 53 (1979).

47. *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 726 n.23 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980).



who refuses to work under unsafe conditions is unlikely to find much protection under the NLRA. Most employees will be unwilling to risk their jobs by relying on this remedy, even when faced with a risk to their health.<sup>48</sup>

### III. PROPOSAL: A PUBLIC POLICY EXCEPTION TO PROTECT EMPLOYEES WHO REFUSE TO WORK UNDER UNSAFE CONDITIONS

#### A. Nature of the Exception

Given the inadequacy of the existing statutory remedies, courts should recognize a public policy exception to the employment-at-will rule to protect an employee discharged for refusing to work under unsafe conditions.<sup>49</sup> Many courts already recognize exceptions to the at-will rule when the public policy is clear and specific.<sup>50</sup> In the area of worker safety, there is a clear public policy: courts have held that employers have an affirmative duty to provide a safe workplace<sup>51</sup> and the OSH

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48. Another source of statutory relief available to organized employees is the Labor Management Relations Act ("LMRA"). 29 U.S.C. § 143 (1976). This Act seeks to prescribe certain "legitimate rights" of employees and employers in their business relationships. The LMRA exempts work stoppages related to "abnormally dangerous conditions" from no-strike clauses in collective bargaining agreements. *Id.* Pursuant to court decisions interpreting the LMRA, an honest belief by the employee that the conditions with which he is faced are "abnormally dangerous" is not enough. The Supreme Court has held that "objective evidence" must be presented on this question. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974). *See also*, *Redwing Carriers, Inc.*, 1961 NLRB Dec. (CCH) ¶ 9748, *aff'd sub nom. Teamsters, Chauffeurs & Helpers Local Union No. 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963) (holding that an objective test is to be employed). The limited protection offered by the LMRA has prompted scholarly criticism. *See, e.g.*, Ferris, *Resolving Safety Disputes: Work or Walk*, 26 LAB. L.J. 695, 704 (1975) ("reliance upon [the LMRA's] protection by employees is a very complicated and risky matter"). Because the LMRA applies only where there is a collective bargaining agreement, it is of no help to at-will employees.

49. *But see* Scarzafava & Herrera, *Workplace Safety — The Prophylactic and Compensatory Rights of the Employee*, 13 ST. MARY'S L.J. 911 (1982). The authors argue that sufficient protection is afforded employees under the existing statutory remedies. However, they fail to address the Secretary's admitted inability to handle all of the complaints received pursuant to the OSH Act. The authors do not consider the issue of the desirability of giving the employee a private cause of action.

50. *See supra* text accompanying notes 14-19; *see also At-Will Employment, supra* note 1, at 181 ("decisional developments suggest an emerging trend in favor of extension of protection to the unorganized employee in the private sector").

51. *See, e.g.*, *Hough v. Railway Co.*, 100 U.S. 213, 217 (1879) (holding that an employer is obliged not to expose its employees to perils or hazards which may be guarded against by the employer's exercise of proper diligence); *Smith v. Western Electric Co.*, 51 U.S.L.W. 2200 (Mo. Ct. App. Sept. 14, 1982) (stating that employer must use all reasonable care to provide a reasonably safe workplace and protect employees from avoidable perils); *Shimp v. New Jersey Bell Telephone Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976) (holding that employer has "affirmative duty" to provide a safe working environment). Prosser states that at common law an employer had a duty to provide its employees a safe place to work. The enforcement of this right was severely hampered by the employer's common-law defense of contributory negligence, assump-

Act contains explicit statutory language embodying this duty.<sup>52</sup> This policy implies that workers should not have to choose between facing health and safety hazards and keeping their jobs. The best way to provide employee protection is to adopt a judicial exception to the at-will doctrine.

Some courts are unwilling to apply such an exception because they believe Congress intended the OSH Act to be the exclusive remedy for workplace hazards.<sup>53</sup> Such a belief is mistaken.<sup>54</sup> Furthermore, the Secretary of Labor recognizes that the best way to achieve worker safety is to allow private causes of action against employers.<sup>55</sup> Given the clear statutory policy in favor of worker safety, courts should be willing to fashion a private cause of action for an employee threatened by an employment hazard.

Courts are already familiar with the process of embellishing safety statutes for the benefit of employees. The Federal Employer's Liability Act<sup>56</sup> and the Jones Act<sup>57</sup> provide for recovery by injured railroad

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tion of risk, and the fellow servant rule. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 526-27 (4th ed. 1971).

52. See *supra* text accompanying note 25.

53. Despite the obvious shortcomings with the protection afforded employees under section 11(c) of the OSH Act, the Oregon Supreme Court has come to the surprising conclusion that no additional protection for a wrongfully discharged employee is necessary. *Walsh v. Consolidated Freightways, Inc.*, 278 Or. 347, 563 P.2d 1205 (1977). In *Walsh*, the plaintiff was discharged for complaining about safety conditions. Although he had filed a complaint pursuant to section 11(c), in addition to this common-law action for wrongful discharge, the record does not show the eventual disposition of that complaint. The Sixth Circuit, in criticizing the Oregon Court's reasoning, stated that "[t]he Oregon Supreme Court has held that although it would be willing to extend common-law protection to employees who complain about safety, there was no need to do so because of OSHA! We cannot abdicate our responsibilities under OSHA in the hope that state courts will extend needed protection to workers." *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 726 n.23 (1979), *aff'd*, 445 U.S. 1 (1980).

The Oregon Supreme Court subsequently has shown signs of rethinking its position. *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978). *Brown* granted a common-law cause of action to an employee discharged for filing a workmen's compensation claim despite the existence of an alternative, statutory remedy. The Court tried to distinguish *Walsh* because the statutory remedies in *Brown* were clearly inadequate. *Id.* at 613, 588 P.2d at 1095. The continued vitality of *Walsh* is doubtful, however, given the court's equivocal language: "We do not believe that our decision in this case is *necessarily* inconsistent with our decision in [*Walsh*]. *Id.* (emphasis supplied).

54. The OSH Act cannot be construed "to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4) (1976 & Supp. IV 1980). "The statute reflects a desire to improve worker health and safety conditions without supplying the definitive program for achievement of that objective. Under these circumstances, the Act should not be construed to foreclose development of the state common law system." Blumrosen, *supra* note 19, at 725.

55. According to the Secretary, "individual suits offer the only realistic hope of protecting employees from retaliatory discrimination." *Taylor v. Brighton Corp.*, 616 F.2d 256, 263 (6th Cir. 1980).

56. 45 U.S.C. §§ 51-60 (1976).

57. 46 U.S.C. § 688 (1976).

workers and merchant seamen. The Supreme Court has stated that in enacting these statutes, Congress "created only a framework within which the courts were left to evolve, much in the manner of the common law, a system of principles providing compensation for injuries to employees consistent with the changing realities of employment. . . ." <sup>58</sup> In the same way, the courts should allow recovery for employees discharged for taking actions to avoid being injured in the first place.

Courts are also the most appropriate and most likely place for such protection to arise.<sup>59</sup> One significant reason for a judicially created rule is that there are numerous obstacles to any legislative effort. Legislatures rarely enact major reforms in the absence of strong pressure to do so.<sup>60</sup> Given the diversity of unorganized employees as a whole, they are unlikely to coalesce into an effective lobbying effort.<sup>61</sup> On the other hand, any legislative initiative is likely to face the combined opposition of management and organized labor. The former would seek to avoid restraints on their discretion; the latter would seek to prevent unorganized employees from receiving protection absent a union.<sup>62</sup> The inevitable institutional constraints of legislatures, such as the numerous committees which must review and propose legislation, also militate against legislative action.<sup>63</sup>

Creating a judicial exception to the at-will rule, however, avoids these problems by placing the burden of convincing the legislature to act on organized lobbies and pressure groups rather than on unorganized

58. *Kernan v. American Dredging Co.*, 355 U.S. 426, 437 (1958).

59. *But see* Platt, *Rethinking the Right of Employers to Terminate At-Will Employees*, 15 JOHN MARSHALL L. REV. 633 (1982) (arguing that statutory standards, similar to those under the Civil Service Act, should be adopted to deal with wrongfully discharged at-will employees). The author criticizes the common-law approach because it relies on the gradual development of case law with the danger of inconsistent decisions or of outright rejection of the proposed remedy by some courts. *Id.* at 646-47. This reasoning fails to recognize that the courts will still engage in the inevitable case-by-case judicial interpretation of the meaning and appropriate application of any such statute. Furthermore, state legislatures are as likely to be reluctant to adopt the proposed remedy as are some courts. Indeed, legislatures may well be less likely to accept the remedy. *See infra* notes 60-65 and accompanying text; *see also* Blades, *supra* note 4, at 1433-34 (stating that employee protection will have to originate in the courts); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963) (maintaining that the realities of the legislative process hinder the tort law reform); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1837-39 (1980) (arguing that prospects for legislative action are doubtful).

60. *See generally* D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1962).

61. "[E]mployees having diverse job specialties and working at varying echelons of employment simply are not equipped to form a cohesive group with enough power to influence legislators." Blades, *supra* note 4, at 1434 (footnote omitted).

62. *See id.*; Note, *supra* note 59, at 1838 (1980).

63. One commentator has indicated that legislators "seldom give high priority to bills proposing to modernize outmoded decisional rules of law." Keeton, *Judicial Law Reform — A Perspective on the Performance of Appellate Courts*, 44 TEXAS L. REV. 1254, 1262 (1966).

at-will employees.<sup>64</sup> This "catalytic function" of the judiciary facilitates, rather than hinders, representational government.<sup>65</sup>

### B. A Proposed Judicial Test

In applying a public policy exception to the diverse set of employment conditions which will be encountered, courts will inevitably engage in a large amount of case-by-case development — the test will necessarily be affected by particular fact situations. Certain general guidelines can, however, be established.

1. *The standard of liability*— Following the OSH Act standard establishing an employer's duty, employees should not be forced to work under conditions "that are causing or are likely to cause death or serious physical harm, . . . ."<sup>66</sup> In decisions under the OSH Act, courts have allowed the factfinder to define "serious physical harm." One factor which courts often consider in making such a determination is whether the threatened injury would have required medical attention.<sup>67</sup> A more restrictive definition of serious physical harm is undesirable. The factfinder should evaluate *all* of the circumstances surrounding an employee's injury in arriving at a determination without any single factor being determinative.<sup>68</sup> In applying this standard, a good-faith, reasonable belief by the employee that the conditions are dangerous should be required to prevent numerous trivial complaints.<sup>69</sup>

2. *Causation*— The test for causation that is fairest to the employee is the test articulated by the Supreme Court in *Mount Healthy City School District v. Doyle*<sup>70</sup>. It has subsequently been used by the Na-

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64. See Peck, *supra* note 59, at 286.

65. "Such a catalytic function of the judiciary, producing legislative consideration of society's needs on matters that no interested group would otherwise question, might well be categorized as an implementation of representative government." *Id. Cf. Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). In *Wong*, the Supreme Court held that deportation proceedings of the Immigration Service were subject to the Administrative Procedure Act. According to the Court: "The agencies, unlike the aliens, have ready and persuasive access to the legislative ear and if error is made by including them, relief from Congress is a simple matter." *Id.* at 47.

66. 29 U.S.C. § 654(a)(1) (1976). A cause of action under this proposed test should not be governed by the OSH Act's 30 day requirement, *see supra* notes 31-32 and accompanying text; rather, the action should be subject to the applicable statute of limitations for tort actions.

67. See *Dorman Products, Inc.*, 1979 O.S.H. Dec. (CCH) ¶ 23,508.

68. *Cf. United States v. Johnson*, 637 F.2d 1224, 1245-46 (9th Cir. 1980) (existence and definition of serious bodily injury under the Major Crimes Act were questions for the jury).

69. Although the NLRA requires only a good-faith, not a reasonable, belief by the employee, this standard is essential to the particular character of that Act — to protect concerted activity — and is best left to actions under that Act. *See generally NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938) (finding that reasonableness of employee's position is irrelevant to essential question of whether a genuine labor dispute exists).

70. 429 U.S. 274 (1977).

tional Labor Relations Board in discriminatory discharge cases.<sup>71</sup> Under the *Mt. Healthy* test, the employee must make a prima facie showing that his engaging in protected conduct was a motivating factor in his employer's discharge decision. In this instance, the protected conduct would be a refusal to work under conditions threatening death or serious physical injury. The burden then shifts to the employer to show that the discharge would have occurred even in the absence of the employee's protected action.<sup>72</sup>

This test protects the legitimate interests of both parties while reasonably allocating the burden of proof.<sup>73</sup> The employee is freed from the onerous task of establishing what was in the employer's mind beyond the showing necessary to establish a prima facie case. The employer, who is in a much better position to furnish proof on the matter, is then provided a framework within which to establish its justifiable motives.<sup>74</sup>

3. *Defenses*— Once the employee has established a prima facie case, the employer can establish certain defenses. One such defense is that the discharge was for legitimate business reasons quite apart from the employee's refusal to work. Such legitimate reasons would include situations where the employee was, for example, continually unproductive or tardy. These situations could not, however, result from the existence of the unsafe working conditions and still constitute legitimate motives for the discharge.

Another defense available to the employer would be that the worker had assumed the risk of the unsafe conditions. The factfinder should be instructed that employees assume the ordinary risks of their business.<sup>75</sup> Ordinary risks of the business are those risks that are incidental to the business.<sup>76</sup> Thus, a construction worker should not be able to refuse to work at heights, while a schoolteacher may.<sup>77</sup>

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71. See, e.g., *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. No. 438, 1980 NLRB Dec. (CCH) ¶ 17,356. This test has been applied outside the labor context in a case involving an equal protection claim. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

72. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287-88 (1977).

73. See generally *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. No. 438, 1980 NLRB Dec. (CCH) ¶ 17,356.

74. "[T]he shifting burden analysis set forth in *Mt. Healthy* and *Arlington Heights* represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation." *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. No. 438, 1980 NLRB Dec. (CCH) ¶ 17,356. See also *Garcia v. Industrial Accident Comm'n*, 41 Cal. 2d 689, 263 P.2d 8 (1953) (stating that burden may be shifted to one who has information needed to establish a fact asserted by party-opponent).

75. See *Hough v. Railway Co.*, 100 U.S. 213, 217 (1879); *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 566, 183 S.W.2d 140, 144 (1944).

76. *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 566 183 S.W.2d 140, 144 (Mo. 1944).

77. The particular condition involved, although of a kind generally encountered in the business, may be such an extreme example of that condition that it is an "out-of-the-ordinary" risk. For

4. *Mitigation*— If, upon the employee's refusal to work under unsafe conditions, the employer offers comparable alternative employment that is safe, the employee should be expected to undertake such alternative employment.<sup>78</sup> In keeping with the general rule of mitigation of damages in an employment context, the employee would not have to accept alternative employment of a substantially different character.<sup>79</sup> If the employer can offer no alternative employment, however, the employee should not be penalized.

5. *Remedies*— Courts should grant relief based on the general rules covering damages in tort actions. Thus, the employee should be compensated for all injuries proximately resulting from his wrongful discharge.<sup>80</sup> This award will often consist of back pay.<sup>81</sup> Reinstatement will also generally be appropriate.<sup>82</sup>

6. *Injunctive relief*— As long as the employee has a right to keep his job while refusing to work under unsafe conditions there is no reason to give him any additional right to sue for an injunction against the continuance of the condition. The employee can still seek an abatement of the condition under the existing administrative procedures without suffering any danger to his person in the meantime.<sup>83</sup>

7. *Application of the Test*— Under this proposed test, an at-will employee who is discharged for refusing to work under "unsafe conditions" would be able to bring an action for unjust dismissal within the jurisdiction's statute of limitations for tort actions. The plaintiff-employee would bear the burden of establishing a prima facie case that

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example, a construction worker could refuse to work at heights that were out of the ordinary even for the construction trade.

78. See generally Comment, *supra* note 35, at 914-26 (distinguishing between employee who resigns voluntarily and one who is dismissed by the employer without an offer of alternative employment).

79. See, e.g., Michigan Employment Relations Comm'n v. Kleen-O-Rama, 60 Mich. App. 61, 64, 230 N.W.2d 308, 310 (1975) (holding that employee is under a duty to mitigate damages by accepting employment of a "like nature", considering the type of work, hours of labor, wages, tenure, etc.).

80. See AM. JUR. 2d *Damages* § 11 (1965).

81. Whether or not back pay is an appropriate remedy under section 11(c) of the OSH Act is a question left unresolved by the Supreme Court. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 19 n.31 (1980); see also *Marshall v. N.L. Indus., Inc.*, 618 F.2d 1220, 1224 (7th Cir. 1980) (holding that back pay is an appropriate remedy for a discriminatory discharge); *Marshall v. Firestone Tire & Rubber Co.*, 8 O.S.H. Cas. (BNA) 1637, 1639 (C.D. Ill. 1980) (back pay appropriate). But see Note, *Imminent Danger in the Workplace: Does the Employee Have a Choice?* — *Whirlpool Corp. v. Marshall*, 100 S.Ct. 883 (1980), 14 CREIGHTON L. REV. 641, 654-55 (1981) (arguing that back pay is probably not allowable under section 11(c) even though this section allows nonequitable relief).

82. See, e.g., *NLRB v. International Van Lines*, 409 U.S. 48 (1972); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Of course, whether to accept reinstatement is up to the employee. For a different view of appropriate remedies in discharge cases, see Malin, *Protecting the Whistleblower from Retaliatory Discharge*, 16 U. MICH. L.J. REF. 277, 314 (1983).

83. See 29 U.S.C. § 657(f) (1976 & Supp. IV 1980) (right of employee to request inspection by Secretary).

his refusal to undertake the unsafe assignment was a motivating factor in the discharge. The employer would then bear the burden of producing evidence showing that it would have ordered the discharge even in the absence of the employee's refusal.

The employee would also bear the burden of proving that he had an objective, reasonable belief that the conditions were causing or were likely to cause death or serious physical harm. The employer may establish as an affirmative defense that the conditions involved only the ordinary risks incidental to the business. Such conditions would normally qualify as "safe" within the meaning of the test.

If the factfinder decides that the employee has met his burden of proof and that the employer has failed to establish any affirmative defenses, then it should find for the employee. Damages would normally consist of back pay although the employee might lose these if he had failed to mitigate damages by refusing proffered alternative employment substantially similar to the plaintiff's usual employment. Reinstatement would be appropriate if the employee wished to return to work that did not involve unsafe conditions.

#### CONCLUSION

At present, at-will employees can be dismissed by their employers for refusing to work under conditions that could cause death or serious physical injury. Existing statutory remedies on which at-will employees might rely are inadequate. The most viable alternative is a court-drawn public policy exception to the employment-at-will doctrine that would protect employees faced with discharge for having refused to work under unsafe conditions. Such an exception would save many employees from the intolerable dilemma of having to choose between their safety and their livelihood.

—*Daniel T. Schibley*