Whirlpool and its Aftermath: Navigating the Various Applications of the Supreme Court's Standard for Refusing to do Dangerous Work

Introduction

In 2013, 4,585 workers were killed on the job.[1] On average, that is over eighty-seven per week and more than twelve per day. Some of these accidents were completely unforeseeable (homicides, some traffic accidents, etc.) and, at least in many cases, did not result from blameworthy employee conduct, employer conduct, or longstanding but un-remedied safety hazards.[2] Others were caused by hazards of which employees, employers, or both were aware.[3] When hazards are known, employees often have sufficient time to notify their employers and, if necessary, the Secretary of Labor or other government agency.[4] The more difficult situations, though, are those in which employers instruct employees to perform tasks immediately that the employees believe pose an imminent threat to safety. Employees are then faced with a choiceð either do the work as instructed or refuse and risk discipline including termination. In some

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[1] *Revisions to the 2013 Census of Fatal Occupational Injuries (CFOI) Counts*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/iif/oshwc/cfoi/cfoi_revised13.pdf. (last visited Nov. 23, 2015).

[2] *Id.*

[3] Failure to use adequate fall protection and neglecting to meet scaffolding requirements were two of the three most frequently cited OSH Act violations in the 2014 fiscal year. *Commonly Used Statistics*, OCCUPATIONAL HEALTH & SAFETY ADMINISTRATION, https://www.osha.gov/oshstats/commonstats.html. (last visited Nov. 23, 2015).

[4] As stated in the Occupational Health and Safety Act:

> Any employees . . . who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing . . . and a copy shall be provided the employer or his agent . . . .

29 U.S.C. § 657(f)(1) (2012).

cases, the circumstances are so perilous that the choice is easy. Perhaps more commonly, uncertainty about the actual extent of the risk and the potential harm, combined with the employerôs adamant command and the short time in which to decide whether to perform the task, leave the best course of action unclear. Consider the following situation that arose in the unemployment insurance context.

A motel desk clerk received repeated calls making a bomb threat.[5] Law enforcement investigated the threat but determined it was a ñhoax.ò After the officers left, the motel received yet another threatening call. Firm in their conclusion that it was nothing to worry about, the police refused to return. Unsure of how to proceed, the motel security guard called both the motel manager and the branch manager of his security service. Both managers were annoyed that the guard called at such a late hour and disregarded his concerns. Upset and fearing for his safety, the guard quit and left the premises. The motel argued that the guard was ineligible for unemployment benefits because he voluntarily quit his job. The guard asserted he had no other recourse because of the possible danger of a bomb.

This case illustrates the tension between employersôneed to manage workers to accomplish necessary tasks and employeesôneed to protect themselves from imminent danger. On the one hand, a bomb threat obviously warrants the utmost precaution. One could reasonably contend that management did not appropriately address the guardôs concerns, and that the guard was understandably worried. On the other hand, law enforcement determined that these calls were not a threat, and the guard accepted some level of risk when he took a job as a security

[5] Appeal No. 3474-CUCX-76 (Texas Appeals Tribunal 1996), available in *Appeals and Policy Manual* 515.65(2), TEXAS WORKFORCE COMMISSION (Oct. 1, 1996), http://www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-voluntary-leaving-twc.pdf.

guard. Situations like this pose the greatest challenges to courts in their attempts to enforce a uniform standard for protected refusals to work.

In *Whirlpool Corp. v. Marshall*,[6] the Supreme Court addressed this tension. It upheld a Secretary of Labor-promulgated regulation (which the Secretary contended was authorized by the Occupational Health and Safety Act[7] (OSH Act)) that gave an employee the ñright . . . to choose not to perform his assigned task because of a *reasonable* apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available.ò[8] The ñreasonablenessò element is the focus of this Note. The *Whirlpool* standard for refusing to work has been interpreted in numerous different contexts. This Note discusses its application in OSHA agency adjudications, interpretations of similar state safety laws, National Labor Relations Board (NLRB) decisions construing section 143 of the National Labor Relations Act (NLRA), state unemployment benefits determinations, and arbitratorsô related interpretations of the ñjust causeò standard. Because *Whirlpool* failed to explain the meaning of ñreasonableness,ò these contexts have yielded distinct differences in application. In Section I, this Note describes *Whirlpool*. Section II surveys how courts, administrative law judges, and arbitrators have interpreted and applied the Courtôs broad ñreasonablenessò standard. Section III recommends a single, unified meaning of ñreasonablenessò to guide both employers and employees in all legal contexts.

[6] 445 U.S. 1 (1980).

[7] 29 U.S.C. § 651 *et. seq.* (2012).

[8] *Whirlpool*, 445 U.S. at 4 (emphasis added).

I. Background

In *Whirlpool*, the Court addressed whether 29 C.F.R. § 1977.12(b)(2) (the Regulation) was a permissible extension of the OSH Actôs enabling statute.[9] The statute prohibits an employer from discharging or discriminating against an employee for exercising ñany right afforded byò the OSH Act. The Regulation provides that:

> 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 employeeôs 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.[10]

Whirlpool arose in an appliance manufacturing plant in Ohio.[11] To protect employees from objects that sometimes fell from overhead conveyors carrying parts, the plant owner suspended from the ceiling a horizontal wire-mesh guard screen approximately twenty feet above the plant floor. To clean debris from it, employees routinely stood on the screen. However, as the screen degraded, employees began to fall through.[12] This concerned two employees, Deemer and Cornwell, enough to report the hazardous situation to the regional OSHA office. The next day, the two men were instructed to clean the screen. Fearing for their safety, they refused and were told to punch out, were not paid for the remainder of the shift, and were issued written reprimands. About a month later, the Secretary of Labor filed an action in the United States

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[9] *Id.*; *see* 29 U.S.C. § 660(c)(1) (2012).

[10] 29 C.F.R. § 1977.12(b)(2) (1979).

[11] *Whirlpool*, 445 U.S. at 5.

[12] *Id.* at 6.

District Court for the Northern District of Ohio, alleging that the employerôs actions against Deemer and Cornwell constituted discrimination in violation of the enabling statute.[13]

Although the District Court found that Deemer and Cornwellôs refusal to work was due to a good faith and reasonable fear of imminent death or serious injury, it ruled for the employer, holding the Department of Laborôs (DOL) Regulation invalid because it was inconsistent with the OSH Act.[14] The District Court held that, ñin considering the best methods for dealing with imminent danger situations, Congress considered and rejected employees walking off the job with pay.ò[15] The court relied on a committee report in which the OSH Actôs sponsor said that the members removed a statutory provision similar to the Regulation because it was ñgenerally misunderstood.ò[16] The Court of Appeals reversed.[17]

The Supreme Court noted that the OSH Act provides a ñdetailed statutory schemeò for employees to report the dangerous condition to OSHA, to seek prompt inspections, and to bring actions to compel OSHA to seek injunctions.[18] The Court concluded, however, that these remedies were not exclusive: ñ[L]egislative provisions authorizing prompt judicial action are designed to give employees full protection in most situations from the risk of injury or death

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[13] *Id.* at 7.

[14] *Id.* at 7ï 8.

[15] Usery v. Whirlpool Corp., 416 F. Supp. 30, 34 (N.D. Ohio 1976).

[16] *Id.* at 33ï 34. The House committee chose to replace a process that would have paid employees who refused to work because of imminent harm with one allowing employees to get the Secretary of Labor involved more quickly. *Id.*

[17] *Whirlpool*, 445 U.S. at 8.

[18] *Id.* at 9ï 10. ñBy providing for prompt notice to the employer of an inspectorôs intention to seek an injunction against an imminently dangerous condition, the legislation obviously contemplates that the employer will normally respond by voluntarily and speedily eliminating the danger.ò *Id.* at 10.

resulting from an imminently dangerous condition at the worksite,ò but do not deny employees the right to self-help.[19] The Court observed that there are situations (including the case at hand) in which employees justifiably believe the statutory remedies do not protect them from serious harm. Although the Court made it clear that these situations would be rare, it noted that:

> such a situation may arise when (1) the employee is ordered by his employer to work under conditions that the employee *reasonably believes* pose an imminent risk of death or serious bodily injury, and (2) the employee has reason to believe that there is not sufficient time or opportunity either to seek effective redress from his employer or to apprise OSHA of the danger.[20]

The Court found nothing in the OSH Act explicitly allowing self-help in the face of imminent danger, nor anything in the statute prohibiting it.[21] In this ñlegislative silence,ò the Secretary of Labor properly exercised rulemaking power.[22] The majority held that the Regulation was consistent with the purpose of the OSH Act, which prescribes that ñ[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.ò[23] Since OSHA inspectors cannot monitor all workplaces at all times, the Regulation allows employees to avoid serious harm in regulatorsô absence.[24] The Court, therefore, affirmed the Court of Appeals decision that Deemer and Cornwellôs refusal to work was within the

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[19] *Id.* at 10.

[20] *Id.* at 10ï 11 (emphasis added).

[21] *Id.* at 11.

[22] *Id.*

[23] 29 U.S.C. § 654(a)(1) (2012).

[24] *Whirlpool*, 445 U.S. at 13.

Regulationôs scope, and thus protected by the discrimination prohibition of 29 U.S.C. § 660(c)(1).[25]

While *Whirlpool* was a groundbreaking decision that gave workers some ability to protect themselves from imminent dangers, the Court did not specifically define ñreasonableò in this context. Referring back to the example of the security guard leaving his job due to supposedly harmless bomb threats, does his role as a security guard affect the standard of reasonableness? What if the employee were elderly, or had traumatic past experiences with terroristic threats? Should the answers to these questions depend on the legal context in which the questions are posed? This Note addresses these questions.

II. Examples

While the following examples in no way provide an exhaustive summary of the different interpretations of the *Whirlpool* ñreasonablenessò standard, they do illustrate the application patterns that have developed in each forum. Interpreting different statutes and federal, state, and administrative precedent, these cases demonstrate that similar fact patterns receive different treatment depending on whether they are litigated in OSH Act cases, state safety law proceedings, NLRB cases interpreting section 143 of the National Labor Relations Act, unemployment insurance adjudications, or labor arbitration.

A. OSH Act Decisions

After *Whirlpool*, courts applied the Supreme Courtôs standard fairly meticulously in actions similarly brought under the Regulation and the OSH Act. In *Marshall v. N.L. Industries*,[26] the Seventh Circuit held that an employer improperly terminated an employee who refused to

[25] *Id.* at 22.

[26] 618 F.2d 1220 (7th Cir. 1980).

load scrap lead into a melting kettle with a payloader that had neither a windshield nor an enclosed cab.[27] Only a week earlier, similar conditions had caused large amounts of lead to spray towards the employee, but he avoided injury because of an enclosed cab.[28] The court considered the employeeôs actions reasonable in light of his good faith and the level of danger he faced.[29] The court did not discuss whether the harm was imminent.[30]

Whirlpool requires that, for the lawôs protection, the employer direct an employee to ñwork under conditions that the employee *reasonably believes* pose an *imminent risk* of death or serious bodily injury.ò[31] In other words, it is not reasonable to believe that an employeeôs only option is to refuse to work, unless there is an imminent risk. Imminency may have been assumed in *N.L. Industries* because the employee had already begun to dump the molten lead when he realized that the lead in the kettle had separated from the edge of the pot, creating the risk of spraying lead.[32] Continuing to dump the lead may have led to an explosion, spraying hot lead at the unprotected employee.[33]

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[27] *Id.* at 1224.

[28] *Id.* at 1222.

[29] *Id.* at 1224 (ñTherefore, for defendant to be liable, the Secretary need prove only that Heard had a reasonable and good faith belief that the conditions leading to his refusal to dump the lead were dangerous and that defendant discharged him for that refusal.ò).

[30] Neither the word ñimminentò nor any variation of it appears in the opinion.

[31] Whirlpool Corp. v. Marshall, 445 U.S. 1, 10ï 11 (1980) (emphasis added).

[32] *N.L.* Industries, 618 F.2d at 1221ï 22.

[33] *Id.* at 1222.

In *Donovan v. Hahner, Foreman & Harness, Inc.*,[34] the Tenth Circuit applied *Whirlpool*, emphasizing the imminency element of reasonableness. There a cement finisher often worked on scaffolding equipment that included two gondolas, one operated by the plaintiff and one by another employee.[35] In early January, the gondolas malfunctioned. Although its switch was in the ñupò position, the plaintiffôs gondola began descending, bending the platform connecting it with the other employeeôs into a forty-five degree angle. The plaintiff immediately reported the incident to his employer. Just days later, the gondolas again malfunctioned three to four stories above the ground. The employer got the equipment working again and directed the workers back to the gondolas. Both the plaintiff and the other employee refused to do so until the equipment was ñproperly examined.ò When given the ultimatumð to return to the defective gondola or be firedð the plaintiff refused and was terminated.

Unlike *N.L. Industries*, where imminency was similarly obvious, *Donovan* explicitly dissected the imminency of the potential harm.[36] The employer had argued that the plaintiff did not have a ñreasonable belief that using the gondola would present an imminent risk of serious injury.ò[37] The Tenth Circuit concluded that the plaintiffôs belief was reasonable because the equipment had seriously malfunctioned, the employerôs past attitude was between cavalier and reprehensible, and the supervisor was known for expecting ñworkers to do their assigned tasks

[34] 736 F.2d 1421 (10th Cir. 1984).

[35] *Id.* at 1422.

[36] *Id.* at 1428 (ñWe now address ourselves to the courtôs ruling that Kidd reasonably believed that the gondola was defective and that using it presented an imminent risk of serious injury or death.ò).

[37] *Id.* at 1428.

despite safety concerns.ò[38] These factors made it reasonable for the plaintiff to doubt that the equipment was properly repaired, so that return to the gondola posed an immediate danger.[39]

Judicial inconsistency in analyzing imminency in OSH Act cases has caused problematic results in other cases where imminency was not as obvious as in *N.L. Industries* and *Donovan*. One such example is *Dole v. H.M.S. Direct Mail Service, Inc*.[40]

In *Dole*, the Secretary of Labor sued, alleging that an employee was terminated in direct violation of the Regulation.[41] The employer was in the printing and distribution business.[42] One of the employeeôs usual duties was operating a cutting and collating machine called the ñMartini.ò[43] The cutting mechanism contained sharp knives. Occasionally, the Martini would ñjam,ò requiring employees to clear it manually by using their hands or pliers after the braking mechanism brought the machine to a halt. When functioning properly, the brake locked the Martini, ensuring that the blades would not cut employees trying to clear jams. On May 9, 1985, the employee assigned to the Martini found the brake not working properly and believed clearing a Martini jam would be unsafe. He informed his supervisor that he would not clear it. The supervisor refused to change the employeeôs work assignment, so the employee put a warning note on the machine and left. The employer suspended him for three days. On May 15th, after serving the suspension, the employee was again told to run the Martini. He believed the brake

[38] *Id.* 1428ï 29.

[39] *Id.*

[40] 752 F. Supp. 573 (W.D.N.Y. 1990), *rev'd*, 936 F.2d 108 (2nd Cir. 1991) (because of improper damages calculations).

[41] *Id.* at 574.

[42] *Id.* at 575.

[43] *Id.*

was again malfunctioning. He refused to operate it, his request for an alternate work assignment was denied, and he was terminated.

In assessing reasonableness, the district court observed that other employees had been injured trying to clear paper jams, that, in an attempt to fix a different problem, the employer rendered the braking mechanism inoperable, and that the Martini had only been ñcoasting to a stopò when it jammed.[44] For these reasons, the court found the employeeôs apprehension reasonable.[45] The district court did not mention the word ñimminent,ò[46] and addressed the issue only indirectly, saying that the employee ñhad insufficient time to eliminate the danger through regular enforcement channels.ò[47] It noted that, after the May 9th incident, the employee had notified OSHA, but that a resulting inspection had not cited problems with the Martini. According to the court, when the employee was next working with the Martini, ñresort to OSHA by [the employee] did not, and surely could not, relieve [him] from the confrontation of having to operate the Martini or face discharge.ò[48] The court concluded that the employee was reasonable to believe he had no alternative but to refuse to work, comparing him to the *Donovan* plaintiff.[49] This is where the inconsistency begins.

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[44] *Id.* at 577ï 78.

[45] *Id.* at 588.

[46] *Id.* (except in quoting the *Donovan* holding).

[47] *Id.*

[48] *Id.*

[49] *Id.* at 579.

> In [*Donovan*], the employee experienced previous malfunctioning with the machinery and, since he believed further operation to be a safety threat, the employee informed the supervisor that he would not operate the machinery until inspected. Despite the safety concerns which the employee raised, the supervisor

Dole missed an important distinguishing factor. The *Donovan* plaintiff had to choose between refusing to work and operating a gondola (several stories off the ground) that he reasonably believed would malfunction, leaving him and a peer in an extremely precarious situation. Once the plaintiff was raised in the gondola, a malfunction would leave him with no safe option. Similarly, the *N.L. Industries* employee faced the potential for serious injury if he made any move at all toward the molten lead. In contrast, the *Dole* employee did not face *imminent* danger. Operating the Martini was not dangerous. Clearing a paper jam was.[50] Unless the Martini jammed, the employee was not threatened. The employee may have had time to complain to OSHA again before the machine jammed. In short, the lack of emphasis on ñimminencyò allowed *Dole* to apply *Whirlpool* where there was only a potential future risk of harm, rather than a *currently* imminent harm. The imminency element of reasonableness was interpreted more broadly than in *Donovan*. The *N.L. Industries* omission had no material effects, but it did in *Dole*. Such varying emphasis on the necessary extent of imminency causes inconsistent OSH Act outcomes.

B. State Safety Law Decisions

Many states have safety laws and regulations that, similar to the OSH Act and Regulation, protect employees who refuse to do dangerous work.[51] Although worded similarly, there is notable variation in state courtsô applications of the reasonableness standard. Most statutes

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> ordered the employee to resume work. The employee refused further work and was discharged.

Id.

[50] *Id.* at 577 (ñ[O]ther Direct Mail employees had been injured by the Martiniôs cutting blades while attempting to clear a paper jam.ò).

[51] *See, e.g.*, Wash. Admin. Code § 296-360-150 (2015); Alaska Admin. Code tit. 8, § 61.480(d); Utah Admin. Code r. 614-1(H)(2)(a).

require that employeesô refusals to work must be reasonable.[52] However, some measure reasonableness more objectively than others. *Ballinger v. Department of Social and Health Services*[53] is an example of a highly objective standard.

In *Ballinger*, the state appointed a new prison administration after a long period of extreme overcrowding and repeated violent incidents, including stabbings and explosions.[54] Eight inmates and one correctional officer had been killed. Soon after the arrival of the new administration, which sought to eliminate nefarious inmate clubs, curb inmate freedom, and modernize infrastructure, prisoners killed an officer. The prison responded by imposing a ñlockdownò of several-monthôs duration in which correctional officers ñshook downò inmatesô cells to recover weapons and other dangerous items.[55] These measures ñfueled inmate violence.ò[56] A couple weeks later, the inmates rioted, looting cells and causing substantial damage. The prison needed assistance from the National Guard and 120 state patrol officers.

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[52] *See, e.g.*, Wash. Admin. Code § 296-360-150 (3) (2015) (ñThe hazard causing the employeeôs apprehension of death or injury must be such that a *reasonable* person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury.ò) (emphasis added); Alaska Admin. Code Tit. 8, § 61.480(d) (2015) (The condition . . . must be of such a nature that a *reasonable* person would conclude that there is a real danger of serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through the employer or regular governmental enforcement channels.ò) (emphasis added); Utah Admin. Code R. 614-1(H)(2)(a) (2015) (ñThe condition causing the employeeôs 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.ò) (emphasis added).

[53] 705 P.2d 249 (Wash. 1985).

[54] *Id.* at 252 (1,400 prisoners were housed in a facility desiged for 900).

[55] *Id.*

[56] *Id.*

Although management began work on several procedures to correct known issues,[57] the correctional officersô union gave the administration thirty-four proposals to protect staff. Soon after, the American Correctional Association, in a report that called prison conditions ñintolerable,ò listed many of the same recommendations.[58] Feeling that their complaints were not adequately addressed, the correctional officers reported to work but refused to take their posts, citing:

> numerous inexperienced officers resulting from high turnover, double shifts, ineffective allocation of manpower, the low officer/inmate ratio when prisoners were being escorted from their cells to other areas of the prison, insufficient lighting, strength of cages, danger of being hit by flying objects thrown from prison cells, and lack of communication with management.[59]

The officers were fired immediately.

The officers sued, claiming their termination violated a state regulation[60] that allows employees to, in good faith, refuse to do work that they reasonably believe exposes them to imminent danger.[61] In its analysis, the Washington Supreme Court cited *Whirlpool* as its guiding standard.[62] The court ruled against the officers on the ground that their refusal was unreasonable in light of conditions at the time of their walkout.[63] The court conceded that officer safety had

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[57] Including installation of metal detectors, construction of metal cages for correctional officers, and increased inmate control. *Id.*

[58] *Id.*

[59] *Id.*

[60] Wash. Admin. Code § 296-360-150(3).

[61] *Id.* at 254.

[62] *Id.*

[63] *Id.* at 255.

previously been precarious, but it cited measures that had improved safety.[64] The court held that, ñ[w]hile the extensive record is replete with evidence the prison may have been operated more safely and additional resources should have been allocated, . . . [t]here simply was no overwhelming evidence demonstrating there was an imminent risk of serious bodily injury.ò[65] It thought that the officers had other alternatives, including utilizing the stateôs ñelaborateò procedure for reporting an emergency and obtaining an injunction from the Department of Labor and Industries.[66] This was a fairly strict interpretation of reasonableness, especially considering the long history of violence and the plaintiffsô previous complaints. The court did not stop here though.

On appeal, one of the plaintiff officers, Granger, maintained that, despite the lower courtôs decision as to the other officers, his refusal to work was justified by a medical disability that prevented him from having contact with inmates.[67] At the time of the walkout, Granger had been working two days each week in the admissions department where there was a potential for inmate contact.[68] The court nevertheless found no reason that Granger was any less safe than his co-plaintiffs.[69] This is especially significant. The courtôs treatment of the plaintiffs in general evidences a fairly high requirement of reasonablenessð denying the officersô claim even after

[64] *Id.* (including newly instituted two-to-one officer-to-inmate escort ratios, an entire facility shake down, the initiating of structural modifications that would eliminate ñblind spots,ò new security cages, new video cameras, and extra help from the National Guard and state patrol officers).

[65] *Id.*

[66] *Id.* at 256.

[67] *Id.* at 255. The opinion does not elaborate any further on the condition.

[68] *Id.* at 256.

[69] *Id.*

conceding the prison could have been operated more safely and that more resources could have been allocated. With regard to Granger, the court went even further, holding that two days per week of increased exposure to conditions that made a man with a medical disability particularly vulnerable did not put the officer at risk. The court seemed not to take into account the disabled officerôs subjective condition or fears. This failure is most evident when compared to *Maglich v. Miller-Dwan Medical Center*,[70] a Minnesota administrative decision representative of some statesô more subjective applications of reasonableness.

In *Maglich*, a pregnant lab technician was responsible for cleaning dialysis equipment for a medical center.[71] The cleaning process required exposure to Renalin, a sterilizing chemical.[72] The manufacturerôs fact sheet and label warned users that Renalin could cause eye damage and skin irritation. The company recommended that users wear goggles, gloves, aprons, and protective boots.[73] The medical center maintained stringent policies for air testing to ensure that air levels of Renalin did not exceed OSHA standards, even installing additional equipment to control Renalin air concentration upon an expertôs recommendation.[74] Although the plaintiff technician and other employees reported incidents of skin irritation and sore throats, no serious issues were reported.[75] During training, a manufacturerôs representative told the technician that there was no indication exposure to Renalin had harmful effects on pregnant women or their

[70] Minn. O.A.H. No. 1-1901-11970-2 (July 26, 1999).

[71] *Id.* at ¶¶ 3ï 10.

[72] *Id.* at ¶ 11.

[73] *Id.* at ¶¶ 11ï 12.

[74] *Id.* at ¶¶ 19ï 20 (even though the concentration still did not rise above OSHA recommended levels).

[75] *Id.* at ¶¶ 18ï 22.

unborn children.[76] However, the technician became worried when a co-worker showed her a letter from the manufacturer recommending that, because of the absence of studies on the issue, pregnant women should not be exposed to Renalin.[77] The technician was frightened because she was six months pregnant and had already been exposed to Renalin during the pregnancy.[78] After hearing of three other employees who claimed to have experienced ñpre-term labor hypertension, severe headaches, and prolonged nauseaò after exposure to the chemical during their pregnancies, the technician sent the employer a letter requesting a temporary change in work responsibilities.[79] Management refused, citing several medical professionalsôopinions that Renalin presented no danger to pregnant women or their children.[80] A survey revealed that seven other hospitals in the state did not provide special precautions for pregnant employees, while one reassigned employees, upon request, to duties without Renalin exposure.[81] When the pregnant technician refused to do any more work that exposed her to Renalin, the employer put the technician on unpaid leave.[82]

The technician claimed the medical center violated state statutes[83] nearly identical to the OSH Act and Regulation.[84] In the administrative process, the medical center contended that there

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[76] *Id.* at ¶ 15.

[77] *Id.* at ¶ 25.

[78] *Id.* at ¶ 27.

[79] *Id.* at ¶¶ 30ï 31.

[80] *Id.* at ¶ 34.

[81] *Id.*

[82] *Id.* at ¶¶ 38ï 39.

[83] Minn. Stat. §§ 182.654, subd. 9 and 182.654, subd. 11.

was no proof the technician was ever exposed to a dangerous substance.[85] The manufacturer advised that pregnant women not be exposed to it because the issue had not been studied to its satisfaction, and her personal physician concurred, although no study had ever proved that Renalin had harmful effects.[86] Further, the technician was never exposed to it beyond OSHA-approved levels.[87]

The administrative law judge nevertheless ruled for the pregnant technician, saying:

> [T]he employerôs assertion that Renalin has not been shown to be hazardous is disposed of by the language of the statute itself as well as case law interpreting similar provisions. The statute does not only allow an employee the right to refuse work which presents an imminent danger of death or serious physical harm. Rather, it specifically states that an employees [sic] may refuse to work under conditions which the employee ñreasonably believesò present an imminent danger of death or serious physical harm. The complainant is therefore not required to prove that [the technician] was in fact in imminent danger of serious physical harm. While the nature of Renalin and its components are certainly relevant to this proceeding, whether they are *in fact* hazardous is not determinative.[88]

In *Ballinger*, the prison case, the court seemed to analyze the correctional officersô reasonableness from a birds-eye view with twenty-twenty hindsight. *Ballinger* did not consider the issues at the time of the walkout from the perspective of officers who had been surrounded by death and violence. Instead, *Ballinger* examined danger highly objectively, mentioning newly-installed cameras, fewer blind spots, and the shake down.[89] The court did not address whether the officers even knew of some of these changes. Unlike *Maglich*, *Ballinger* failed to

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[84] *Maglich*, OAH No. 1-1901-11970-2 at Conclusions ¶ 4ï 5.

[85] *Id.* at Memorandum.

[86] *Id.*

[87] *Id.*

[88] *Id.* (emphasis added).

[89] Ballinger v. Depôt of Soc. and Health Servs., 705 P.2d 249, 255 (Wash. 1985).

credit the disabled employeeôs reliance on doctorsô opinions. *Maglich* relied heavily on the fact that the technicianôs doctor advised her to avoid Renalin during pregnancy, but *Ballinger* was unimpressed by the medical opinion that the disabled officer should not have contact with inmates.[90] Instead of assessing the reasonableness of a disabled officerôs view, the court found the officer was, objectively, in no greater danger than non-disabled officers.[91] *Ballinger* and *Maglich* illustrate that states interpreting statutes similar to the OSH Act and Regulation differ on the extent assessment of reasonableness is to be subjectively analyzed from the perspective of a person in the plaintiffôs situation, including such characteristics as pregnancy and disability, or objectively from the perspective of a generalized hypothetical person.

C. NLRB Decisions

In general, a labor strike that violates a collective bargaining agreement is not protected by the National Labor Relations Act (NLRA).[92] The NLRA does, however, protect employees who quit working in good faith because of ñabnormally dangerous work conditions.ò[93] Unlike the OSH Act and Regulation, which require only a ñreasonable belief,ò and some state courtsô more subjective applications of the *Whirlpool* reasonableness standard, *Gateway Coal Co. v. United Mine Workers of America*,[94] the controlling Supreme Court case, held that the NLRA requires ñascertainable, *objective evidence* supporting [a] conclusion that an abnormally dangerous

[90] *Id.* at 255.

[91] *Id.* at 256.

[92] NLRB v. Sands Mfg. Co., 306 U.S. 332, 345ï 46 (1939).

[93] 29 U.S.C. § 143 (2012).

[94] 414 U.S. 368 (1974).

condition for work exists.ò[95] In *Gateway*, mine workers struck because three foremen falsified information about the adequacy of the mineôs ventilation system, and, although suspended for a short time, the foremen were reinstated during the pendency of the criminal proceedings.[96] The Supreme Court ruled that, under the collective bargaining agreement, the dispute was subject to arbitration, and the agreementôs no-strike provision precluded the miners from refusing to work under section 143.[97] The Court held that section 143 did not apply because the return of foremen who falsified airflow data two months earlier was not ascertainable, objective evidence of abnormally dangerous conditions.[98] How this requirement interacts with the OSH Act, Regulation, and their interpretation in *Whirlpool* is an issue. As a labor law treatise states:

> [*Whirlpool*] raises intriguing questions concerning potentially conflicting standards under OSHA and Section [143] of the NLRA, which . . . only protects the employee if an abnormally dangerous condition is actually proven to exist. Although the Court in *Whirlpool* noted summarily that the OSHA regulation comported with the general pattern of federal labor legislation concerning safety and health, and cited Section [143] and *Gateway Coal*, it did not attempt to reconcile the potentially disparate standards.[99]

Even today, courts have not reconciled *Whirlpool*ôs subjectivity with the NLRAôs objectivity, instead using objectivity in assessing protected refusals to work under the NLRA. *TNS, Inc. v. NLRB*[100] is illustrative.

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[95] *Id.* at 386 (emphasis added).

[96] *Id.* at 372.

[97] *Id.* at 385ï 86.

[98] *Id.* at 386.

[99] Lee Modjeska et al., *Abnormally Dangerous Working Conditions*, FED. LAB. LAW: NLRB PRAC. § 5.4 (2015).

[100] 296 F.3d 384 (6th Cir. 2002).

The employer, TNS, manufactured armor-piercing projectiles that contained depleted uranium, a material with carcinogenic properties when inhaled or ingested over a long period of time and which also was linked to kidney failure.[101] TNSôs employees were represented by a union. Following a joint management-labor committee inspection which revealed uranium levels in excess of suggested limits and issues with the procedures and devices used to limit uranium exposure, the union informed TNS that the employees would not work until conditions were remedied.[102] When wage and safety negotiations failed to reach a new collective bargaining agreement prior to the current agreementôs expiration, the union members struck, and asserted that their work stoppage was protected by section 143.[103] When TNS threatened to hire replacements, the union made an unconditional offer to return to work, but TNS refused to reinstate the employees. The union filed a charge with the National Labor Relations Board (NLRB), claiming that TNS violated section 143 by not reinstating workers who had exercised the statutory right to refuse to do ñabnormally dangerous work.ò[104] TNS responded that the employees *believed* that conditions were dangerous, but they were not *actually* dangerous. The NLRB found for the union, holding that there was objective evidence to support the employeesô contention of unsafe uranium levels. It stated:

> With respect to the issue of whether the employees were facing an óimmediate, presently existing danger,ô we emphasize that the danger must have been presently existing and direct, but we do not interpret the term óimmediateô as meaning that the employees had to depart the workplace in one moment or face grave injury in the next. In the case of cumulative exposure to radioactive and toxic substances, there will probably not be a single moment when ñimmediateò departure from the

[101] *Id.* at 387.

[102] *Id.*

[103] *Id.* at 388.

[104] *Id.*

> workplace is obviously necessary. Where the danger is cumulative, the issue will not be whether employees should suddenly leave, but rather whether a presently existing, *reasonable possibility* of serious incipient or future illness or injury existed.[105]

The NLRB maintained that section 143 only required a ñreasonable possibilityò of serious injury to justify refusing to work. TNS sought review in the Sixth Circuit.

TNS offered two arguments that the NLRB erred in finding objective evidence of abnormally dangerous conditions. First it said that the National Regulatory Commission (NRC) was actively monitoring the plant and found no reason to require remedial actions or plant closure.[106] Second, it asserted the NLRBôs findings of fact regarding uranium levels lacked sufficient evidentiary support. The court accepted the second argument, noting that the NLRB merely found ñobjective evidence to support the employeesô belief that their working conditions were abnormally dangerous,ò not actual abnormally dangerous conditions.[107] The court did not believe a lack of NRC action precluded a finding of abnormal danger, but took issue with the Boardôs reliance on the fact that TNSôs uranium levels were several times higher than in other plants.[108] Although the employerôs levels were still within the range of the NRCôs acceptable levels, the Board held that they provided reasonable grounds for employeesô belief of danger. The Sixth Circuit instead strictly applied the NLRAôs objective standard. It noted both that TNS maintained NRC-compliant uranium levels, and that the NRCôs standards were very conservative, leaving ñconsiderable margin for safety.ò[109] Although not determinative, the court

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[105] TNS, Inc., 329 N.L.R.B. 61, 11 (1999) (emphasis added).

[106] *TNS, Inc.*, 296 F.3d at 396.

[107] *Id.* at 399.

[108] *Id.* at 402.

[109] *Id.*

said that the NRCôs lack of action must ñcount for something,ò and, similarly, so must successful maintenance of NRC-dictated uranium levels.[110] The NLRB was not free to substitute a ñreasonable beliefò standard for the ñobjective evidenceò measure delineated in *Gateway*.[111] Although *TNS* cited *Whirlpool* as precedent that it need not absolutely defer to the NRC, it applied the more strict NLRA standard. Such a stringent, objective standard is typical of recent NLRB cases. This demonstrates the tension between the NLRA and *Gateway*ôs objective test, and the OSH Act and *Whirlpool*ôs more subjective considerations. Although conflicting, the two lines of judicial precedent still bind courts.

D. Unemployment Benefits Decisions

Refusals to work because of unsafe conditions often arise in disputes over unemployment benefits. State statutes commonly provide that employees who voluntarily quit are not eligible for benefits, although they recognize exceptions.[112] Standards for determining if an employeeôs refusal was justified vary greatly. Below are three examples.

In *Thimm v. Pieper Electric, Inc.*,[113] the Wisconsin Labor and Industry Review Commission held that an electrical contracting business employee was ineligible for

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[110] *Id.* at 402ï 3.

[111] *Id.*

[112] *See, e.g.*, Ind. Code § 22-4-15-1 (2015) (ñan individual who voluntarily left the employment without *good cause* in connection with the work or was discharged from the employment for just cause is ineligibleò (emphasis added)); Minn. Stat. § 268.095, subd. 1(1) (2014) (ñAn applicant who quit employment is ineligible for all unemployment benefits . . . except when: . . . the applicant quit the employment because of a *good reason caused* by the employer . . . .ò (emphasis added)); Wis. Stat. § 108.04(7)(b) (2015) (The general rule that employees will not receive employment benefits if they voluntarily quit will not apply if ñthe department determines that the employee terminated his or her work with *good cause* attributable to the employing unit.ò (emphasis added)).

[113] U. I. Dec. Hearing No. 89-607722 (Wis. L.I.R.C. 1990).

unemployment benefits. The employee was assigned to work second shift at several Milwaukee Public Schools. She worked at over sixty locations, but objected to working in areas that she called ñhigh crime.ò Prior to her current assignment in a different location, she had to walk a block to her car alone at eleven at night in one ñhigh crimeò area, had her radio stolen, and had to work in an area where her co-workerôs car had been stolen. The employee quit when assigned to work second shift in an area that she deemed ñhigh crime.ò[114] Pursuant to Wisconsin statute,[115] the Commission had to determine if she ñterminated her employment with good cause attributable to the employer.ò The Commission stated that the employeeôs reason for quitting must be ñreal and substantialò and the decision to quit must have been ñreasonable under the given circumstances.ò[116] It held that the employeeôs decision was unreasonable because, although the fear may have been ñreal to her,ò she failed to substantiate her claim that the area was ñhigh crime.ò Without proof of the danger, special accommodations not afforded other employees could not be categorized as necessary. Thus, the employee was denied unemployment benefits.

In *Thimm* there is an objective standard, under which quitting is only reasonable if there is (1) ñgood cause,ò (2) the reason is ñreal and substantial,ò and (3) the decision is ñreasonable under the given circumstances.ò[117] Although the third requirement seems to inject some level of subjectivity, the Commission here refused to classify quitting because of past experiences of theft and night walks in neighborhoods perceived as dangerous as reasonable. It required the employee to prove the danger by empirical evidence, explicitly saying that being ñreal to herò was not

[114] *Id.* (after asking for first shift instead).

[115] Wis. Stat. § 108.04(7)(b) (2015) (ñif the department determines that the employee terminated his or her work with *good cause* attributable to the employing unitò (emphasis added)).

[116] Thimm v. Pieper Electric, Inc ., U. I. Dec. Hearing No. 89-607722 (L.I.R.C. 1990).

[117] *Id.*

enough. The requirements of good cause and real and substantial reasons create an objective standard quite distinct from *Whirlpool*ôs subjective standard applied in federal workplace safety law contexts.

The unemployment case summarized in the introduction to this Note, in which a security guard left when faced with repeated bomb threats that the police called a ñhoax,ò applied an objective standard similar to that used by the Wisconsin Commission. [118] In the guardôs case, the Texas Appeals Tribunal held that the guard did not have good cause to quit. The decision observed that some degree of danger was implicit in the job of a security guard, and the guard accepted it when he took the position. Since the risk was ñnot extraordinaryò and had been ñchecked out,ò the guard was not justified in leaving his post and, therefore, was not entitled to unemployment benefits. In its application of a good cause standard, this decision adds a new explicit consideration of the level of danger inherent in a job as a limitation upon a workerôs protection for refusal to work. It also defers to the policeôs assessment of the danger, maintaining that it made the guardôs belief unreasonable. Such deference focuses more on objective facts and less on the guardôs subjective belief and its reasonableness under the circumstances, which would be applied according to *Whirlpool* in federal safety cases.

In contrast, some unemployment decisions apply the *Whirlpool* standard fairly closely. For example, in *Stepp v. Review Board of the Indiana Employment Section Division*,[119] the Indiana Court of Appeals cited the Regulation and quoted the two-part *Whirlpool* test verbatim in maintaining that a lab technicianôs refusal to handle fluids from individuals who may have had

[118] Appeal No. 3474-CUCX-76 (Texas Appeals Tribunal 1996), available in *Appeals and Policy Manual* 515.65(2), Texas Workforce Commission (Oct. 1, 1996), http://www.twc.state.tx.us/files/jobseekers/appeals-policy-precedent-manual-voluntary-leaving-twc.pdf.

[119] 521 N.E.2d 350 (Ind. App. 1988).

AIDS failed both parts of the test.[120] Although the technician claimed she had heard of workers contracting AIDS from the fluids, it was only hearsay. She could not prove that her employerôs safety precautions were inadequate,[121] and she had several days to report her worries to OSHA before her discharge.[122] The court found that her belief of danger was not reasonable and that the perceived danger was not imminent. Thus, she was not entitled to unemployment compensation because her refusal to work was ñjust causeò for discharge.[123] This decision exemplifies a rigorous application of *Whirlpool* in the unemployment context.

The different standards of *Thimm*, the security guard example, and *Stepp* illustrate the great variance in unemployment applications of the ñreasonablenessò standardð some closely following *Whirlpool* and others adding either additional subjective or objective elements.

E. Arbitrator Decisions

The reasonableness standard also appears in labor arbitration, most commonly in determining if an employer had ñjust causeò to discipline or terminate a worker under a collective bargaining agreement.[124] ñAn employee is not obliged to follow an order that threatens the employeeôs health or safety,ò nor can exercising this right to refuse constitute just cause for

[120] *Id.* at 353.

[121] The employer provided gloves, aprons, training seminars, etc. *Id.*

[122] *Id.*

[123] *Id.* at 354. First, the court found the technicianôs religious beliefs, not an objectively reasonable apprehension of danger, were the reason she refused to work. *Id.* Second, the court held that the perceived danger was not imminent. The technician was warned she would have to perform tests on the specimens, was suspended for not performing them, and finally was discharged. *Id.* She had time to contact OSHA. *Id.*

[124] *See e.g.*, Stockham Valve & Fittings, Inc., 102 L.A. 73 (Poole, 1993).

discipline.[125] While the just cause standard gives arbitrators substantial discretion, ñthe majority apply an objective standard to determine if the employeeôs safety or health-related fear was reasonable under the circumstances.ò[126] As one arbitrator stated: ñThe fear of bodily harm . . . must be real, not something which could possibly happen. The fear of danger must be sufficient that a normal ordinary person would reasonably and conscientiously believe that peril was imminent.ò[127] If employeesô conduct fulfills this test, discipline is reversed and damages are granted to make them whole.[128]

In *Stockham Valve Fittings, Inc.*,[129] a veteran employee was asked to work as a fitting tester.[130] The job entailed repetitive use of a right-foot pedal and right-hand-operated lever. The employee refused, claiming it hurt her right side and might cause physical injury. The supervisor checked her personnel file for records of any medical issues, and, finding none, discharged the employee for insubordination. The employee filed a grievance, and the matter was submitted to arbitration to determine if the employee was fired for just cause.

Using the *Fulton Seafood* test, the arbitrator held that the employeeôs refusal was not insubordination because it was not a ñrefusal to do work she was capable of doing, it [was] a

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[125] DISCIPLINE AND DISCHARGE IN ARBITRATION 160 (Norman Brand ed., 1998).

[126] *Id. See, e.g.*, Stockham Valve & Fittings, Inc., 102 L.A. 73 (Poole, 1993) (physical work put an employee with shoulder tendinitis at risk of further physical injury); Fulton Seafood Indus., Inc., 74 L.A. 620 (Volz, 1980) (truck driver refused to deliver during snowstorm); Sheller-Globe Corp., 60 L.A. 414 (Seidman, 1973) (employee refused to ascend a twenty-foot high wire mesh, which he had nearly fallen from just prior).

[127] Fulton Seafood Indus., Inc., 74 L.A. 620, 623 (Volz, 1980), quoting Union Carbide Corp. 70-2 A.R.B. ¶ 8536 (Stouffer, 1970).

[128] Discipline and Discharge in Arbitration 160 (Norman Brand ed., 1998).

[129] 102 L.A. 73 (Poole, 1993).

[130] She worked for the employer for fifteen years. *Id.*

statement that she lacked the capacity to carry out her supervisorôs order.ò[131] Although he did not find any records of physical disability, the supervisorôs act of checking the employeeôs file demonstrated he thought the employeeôs response was based on a reasonable belief. In addressing the lack of documented physical impairments, the arbitrator concluded that there were no medical records, but there was evidence affirming a reasonable belief. Six months prior, the employee asked that she be laid off instead of having to perform a physically-demanding belt inspection. This request and subsequent layoff were recorded in her file. A medical report obtained at the employerôs request after the termination confirmed that the employee ñhad tendonitis in her right shoulder and elbow which required treatment and prohibited her from performing jobs involving heavy work.ò[132] This further validated the reasonableness of her belief. The employee was, therefore, reinstated with back pay and benefits retroactive to the date of her discharge. The arbitratorôs analysis of the supervisorôs impression of the employee refusalôs reasonableness, prior health-related issues, and a doctorôs opinion is evidence of objectivity. The arbitrator focused less on the employeeôs subjective sincerity in the moment than more concrete records and the impressions of others. Other arbitration decisions have similar emphasis.[133]

III. The Situation Warrants a Uniform Standard.

Confronted with OSH Act decisionsô inconsistent application of imminency, varying levels of objectivity in state-court interpretations of state safety laws and unemployment decisions, labor arbitratorsô objective leanings, and the NLRAôs strictly objective means of

[131] *Id.*

[132] *Id.*

[133] *See, e.g.*, Fulton Seafood Indus., Inc., 74 L.A. 620 (Volz, 1980); Sheller-Globe Corp., 60 L.A. 414 (Seidman, 1973).

assessing reasonableness, it is natural to call for uniformity. After all, ñ[t]here is a tradition . . . that holds that the principle ótreat like cases alikeô is central to the notion of justice.ò[134] ñ[H]orizonal equity is an independent and important reason to treat similar cases similarly; to do otherwise is to treat some who are similarly situated worse than those to whom they otherwise compare for no justifiable reason. That offends basic norms of equality . . . .ò[135] Employees who make the same decision to refuse to work in the face of the same danger should be treated similarly whether the NLRB is deciding if they violated a no-strike provision or a state commission is deciding if they are entitled to unemployment benefits. There is some nuance though.

A. Different Statutes with Different Purposes

One could make a reasonable argument that there are reasons for treating similarly situated employees who refuse to do dangerous work differently. Different forums are bound by statutes and precedent with varying purposes and goals. For example, the OSH Act was passed with the purpose of ñassur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.ò[136] The OSH Act contemplated states enacting equivalents with the purpose of:

> encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions

[134] David A. Strauss, *Must Like Cases Be Treated Alike?* 1 (Univ. of Chicago Law Sch. Pub. Law Theory, Paper No. 24, 2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312180.

[135] ROBIN L. WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 52 (2013).

[136] 29 U.S.C. § 651(b) (2012).

> of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith.[137]

Recognizing that they needed government protection, the laws were passed to ensure worker safety. It makes sense that the state and federal OSH Act tests are tailored to take subjective worker beliefs into account.[138] The worker-focused purpose also explains why courts in state safety law decisions sometimes err on the side of workers whose belief may not meet the *Whirlpool* measure of reasonableness because of a lack of imminency.[139]

Unemployment laws are also instituted for worker protectionð specifically economic protection. They provide for workers who find themselves unemployed through no fault of their own, while still allowing employers to terminate genuinely insubordinate employees without the extra unemployment benefits expense.[140] This balancing act could explain the wide range of levels of subjectivity and objectivity in unemployment decisionsô interpretations of reasonableness, as adjudicators attempt to be fair to employers and employees.

In contrast, the NLRA is aimed at preventing economic disruption. The Actôs stated purpose is to ñeliminate the causes of certain substantial obstructions to the free flow of

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[137] *Id.* at § 651(b)(11).

[138] Whirlpool Corp. v. Marshall, 445 U.S. 1, 10ï 11 (1980) (ñconditions that the employee *reasonably believes* pose an imminent risk of death or serious bodily injuryò (emphasis added)).

[139] *See* Dole v. H.M.S. Direct Mail Serv., Inc., 752 F. Supp. 573 (W.D.N.Y. 1990).

[140] *See e.g.*, Minn. Stat. § 268.03, subd. 1 (2015) (ñEconomic insecurity because of involuntary unemployment . . . is a subject of general concern . . . . The public good is promoted by providing workers who are unemployed through no fault of their own a temporary partial wage replacement to assist the unemployed worker to become reemployed.ò); Cal. Un. Ins. § 100 (2015) (ñThe Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.ò).

commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining.ò[141] *Gateway*ôs stringent objective and ascertainable requirement furthers this goal. Recognizing a strikeôs grave economic consequences, it requires a showing of actual danger to justify one.[142] Similarly, collective bargaining agreements promote stability. Thus, labor arbitrators impose an objective standard of reasonableness when determining if an employeeôs refusal in the face of imminent harm is not just cause for discipline, even when refusal would otherwise violate a collective bargaining agreement.[143] Allowing too much of a subjective focus on employee sincerity, instead of objective reasonableness would dilute collective bargaining agreements.

B. While Each Standard Makes Sense From a Policy Perspective, the Variance is Unworkable for Employers and Employees.

When the law applied in each forum is compared with the policy motivating its creation, one can understand how legislators and judges have rationalized using different standards for reasonable refusal to work. The lack of ñhorizontal equityò is not unjustified.[144] However, justification does not always translate to pragmatism. By definition, danger warranting refusal arises quickly and without warning.[145] Knowing a single, uniform standard for when employees

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[141] 29 U.S.C. § 151 (2012).

[142] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 386, n.16 (1974) (ña wholly subjective test would open ónew and hazardous avenues in labor relations for unrest and strikesò).

[143] Fulton Seafood Indus., Inc., 74 L.A. 620, 623 (Volz, 1980), quoting Union Carbide Corp. 70-2 A.R.B. ¶ 8536 (Stouffer, 1970).

[144] Robin L. West, Teaching Law: Justice, Politics, and the Demands of Professionalism 52 (2013).

[145] 29 C.F.R. § 1977.12(b)(2) (1979) (ñthere is insufficient time, due to the urgency of the situationò).

could quit work in the face of potential harm would be difficult enough, but knowing the requirements for each potential forum would be impossible, especially in the heat of the moment. In the current state of the law, a seminar for employees on when they can refuse to work would give directions somewhat like this:

> If you are confronted with a dangerous situation while on the job, and you do not believe that reporting it to the appropriate supervisor or government agency will remedy the issue in time, prior to acting, you must determine in what kind of forum your refusal may be challenged. If you think that you might be discriminated against for your refusal, and you intend to sue for back pay or reinstatement under the OSH Act, then you must make sure that you reasonably believe that the work conditions pose an imminent threat of death or serious bodily harm and that you do not have sufficient time to complain to OSHA or your employer.[146] If you expect it will be advantageous to seek redress under your stateôs OSH Act equivalents, then the danger may not have to be as imminent as federal law would require.[147] If you expect to be terminated and hope to obtain unemployment benefits, prior to refusing to work or voluntarily quitting, you must make absolutely certain that you are doing so for ñ*good cause* attributable to the employing unit.ò[148] If you are a member of a union, there are additional considerations. If you think that your refusal might be examined under section 143 of the NLRA, you must make sure that the danger you perceive exists without a

[146] Whirlpool Corp. v. Marshall, 445 U.S. 1, 10ï 11 (1980).

[147] Dole v. H.M.S. Direct Mail Serv., Inc., 752 F. Supp. 573 (W.D.N.Y. 1990).

[148] Wis. Stat. § 108.04(7)(b) (2015).

> doubt. You must be absolutely certain that the danger is objectively ascertainable.[149] However, if you think that your situation will be adjudicated by an arbitrator who will be interpreting just cause in a collective bargaining agreement instead of the NLRA, then you only need to make sure that an ordinary person would agree the danger is both real and imminent.[150] If you do not correctly navigate this analysis, the consequences will be significant.

Even the most experienced labor and employment attorneys would have a difficult time navigating this labyrinth of considerations before they are sprayed with molten lead[151] or forced to aggravate a shoulder condition by repetitively operating a lever.[152]

Likewise, an employer has to do the same complex analysis when deciding whether to discipline or terminate an employee who refused to carry out a task in the face of perceived danger. Although employers are more likely to have lawyers to consult, an attorneyôs opinion takes time, expense, and is in no way foolproof, especially considering the nuances associated with so many potential forums. For the sake of efficiency, employers need a single rule that they can confidently administer without fear of later reprisal.

C. All Forums Should Use the Whirlpool *Standard.*

The *Whirlpool* standard[153] is an administrable, all-encompassing test that equally balances employee safety with management interests. Unlike section 143 of the NLRA,

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[149] Gateway Coal Co. v. United Mine Workers of America, 414 U.S. 368, 386 (1974).

[150] Fulton Seafood Indus., Inc., 74 L.A. 620, 623 (Volz, 1980), quoting Union Carbide Corp. 70-2 A.R.B. ¶ 8536 (Stouffer, 1970).

[151] Marshall v. N.L. Industries, 618 F.2d 1220 (7th Cir. 1980).

[152] Stockham Valve Fittings, Inc., 102 L.A. 73 (Poole, 1993).

[153] Whirlpool Corp. v. Marshall, 445 U.S. 1, 10ï 11 (1980).

Whirlpool recognizes that it is unrealistic to expect employees to infallibly assess the magnitude of perceived harm while under extreme duress. The ñreasonably believesò element introduces a necessary level of subjectivity. However, it does not go quite far enough. The test should acknowledge human limitations and the impacts of certain circumstances by adding ñin the workerôs circumstancesò to the reasonable belief requirement. This would recognize that employees who are pregnant, physically handicapped, elderly, or who have lingering mental residue of a traumatic life experience cannot be expected to do the same work as a hypothetical worker imagined by the adjudicator considering the case after-the-fact and with all relevant evidence available in the record.

This measured subjectivity is balanced by the imminency element. It recognizes that most dangerous situations can be remedied through company complaint policies or OSHA notifications, limiting self-help to a narrow subset of situations.[154] It, therefore, gives employees the right to protect themselves without rendering employer complaint procedures irrelevant.

Conclusion

Although *Whirlpool* attempted to address the issue of when an employee may refuse to do dangerous work without fear of repercussions, its test left significant room for interpretation. Adjudicators in different forums have developed many variations of *Whirlpool*ôs ñreasonablenessò standard. An employeeôs actions could be called ñreasonableò in one legal context but ñunreasonableò in another. This unpredictability is unacceptable, especially considering the imminency, stress, and substantial repercussions that characterize these situations. All forums should apply the *Whirlpool* standard to give employees a realistic means to assess when they can refuse dangerous tasks, and to give employers a manageable test to confidently determine when discipline is legal and warranted.

[154] *Id.* at 10.