ORIGINAL

In the

Supreme Court of the United States

WHIRLPOOL CORPORATION,

PETITIONER,

V.

RAY MARSHALL,
SECRETARY OF LABOR,

RESPONDENT.

No. 78-1870

Washington, D. C.
January 9, 1980

Pages 1 thru 53

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

WHIRLPOOL CORPORATION, Petitioner,	:	
v.	:	No. 78-1870
RAY MARSHALL, Secretary of Labor, Respondent.	:	

Washington, D. C.

Wednesday, January 9, 1980

The above-entitled matter came on for argument at 10:50 o'clock, a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, Jr., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, Jr., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT E. MANN, ESQ., Seyfarth, Shaw, Fairweather & Geraldson, 55 East Monroe Street, Suite 4200, Chicago, Illinois 60603; on behalf of the petitioner.

WADE H. McCREE, Jr., ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; on behalf of the respondent.

- - -

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1870, Whirlpool Corporation against the Secretary of Labor.

Mr. Mann, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT E. MANN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MANN: Mr. Chief Justice and may it please the Court:

My name is Robert Mann. I represent the petitioner, Whirlpool Corporation, in this proceeding.

This case raises a question of statutory interpretation, and specifically, whether under the Occupational Safety and Health Act of 1970, Congress intended to confer certain job security rights upon employees who might refuse to work because of perceived safety hazards.

The Secretary of Labor, in 1973, published a regulation purporting to interpret the act, and stating in the regulation that, as a general rule, the legislative history and the act itself indicated that Congress did not intend to create job security rights within the context of OSHA for employees who might refuse to work because of perceived safety hazards.

Within the interpretative regulation, however, but

without citing any legislative history or other source, the Secretary of Labor hypothesized situations which might give rise to such job security provisions if an employee refused work in imminent danger conditions, when resort to the normal enforcement procedures were not available.

QUESTION: Mr. Mann, the act does give the Secretary the authority to promulgate and enforce standards to eliminate hazards, does it not?

MR. MANN: Yes, sir.

QUESTION: Was there any rulemaking notice and comment in connection with this interpretative regulation?

MR. MANN: No, there was not, Your Honor. It was published as an interpretative regulation, and not as a rulemaking or legislative type regulation.

QUESTION: So it's a Swift against Wickham-type inquiry?

MR. MANN: I believe so; yes, Your Honor.

Whirlpool Corporation agrees with the Secretary that the legislative history of the act, and the act itself, clearly demonstrate that it was not Congress' intent to legislate job security provisions within the scope of the Occupational Safety and Health Act, except perhaps in connection with the protection of employees to invoke the procedures of the act.

However, it is our position, and we believe the

facts of this case demonstrate, that that type of exception would not exist in this case, since the work refusal occurred outside the scope or context of any attempt to invoke the statutory procedures.

The case arose in June and July of 1974. It arose at Whirlpool's Marion, Ohio, plant. And on the night--on the day shift of June 28th, 1974, an employee who was working at that plant, on a normal maintenance assignment on the overhead guard screen in the plant, fell between two panels of the screen and sustained fatal injuries.

Following that accident, Whirlpool notified OSHA of the fatality. And on July 1st, 1974, an OSHA inspector conducted an inspection in relation to the accident.

He informed management at the conclusion of his inspection that he felt the accident was a result of a mechanical failure, an unforeseeable accident.

On July 7th, 1974, two other maintenance employees who were---

QUESTION: Mr. Mann--

MR. MANN: Excuse me.

QUESTION: --in what respect was there a mechanical failure?

MR. MANN: As the administrative hearing developed later, Your Honor, it appeared two bolts, holding together portions of the screen, failed, and caused the screen to

separate at one point; and the employee stepped through the separation. That was brought out in the subsequent citation proceeding.

QUESTION: It doesn't sound very mechanical to me. But it's--maybe it's just the wrong term.

You certainly picked rather an unsympathetic set of facts for your case, didn't you?

MR. MANN: Well, that's true, Your Honor. I didn't pick the facts, but those are the facts. And we candidly admit that they are the facts.

On June--July 7th---

QUESTION: Whatever the facts, counsel, isn't the central question in this case whether this action must be taken by the Secretary through traditional rulemaking, or whether it can be done by regulations promulgated by the Secretary?

Is, or is not, that the central question?

MR. MANN: That is not--that question has not been the central question in the litigation, Your Honor.

The question, the central question, in the litigation has been whether or not the Secretary's interpretation of the act is in accordance with the legislative intent compiled by Senator Williams in his legislative booklet.

QUESTION: The Secretary's intent in doing what?

MR. MANN: In the interpretation of the act to provide protections for employees who refuse work assignments.

QUESTION: You would agree, wouldn't you, that the Secretary could perhaps go further, had he promulgated regulations as the statute authorizes him to do?

MR. MANN: Well, the Secretary's authorization to promulgate regulations under the statute exists with respect to the promulgation of standards, uniform standards, of course; and also, under Section 8(g), publication of regulations governing his own responsibilities under the act.

We do not read the act to provide him plenary regulatory authority to, in effect, issue legislative-type regulations under the act. And I don't believe the Secretary has contended that this particular regulation is a legislative-type regulation. He is attempting to interpret Section 11(c) of the act to find that under certain circumstances an employee would have a right to refuse a work assignment without regard to the employment consequences of that refusal.

On July 7th, two employees approached their supervision and asked to be relieved of guard screen duty. They were denied in their request, and on July 9th, one of the two employees contacted the OSHA area director for the region and spoke with him about the guard screen.

Prior to that contact, of course, the OSHA People

had conducted their inspection, and as it turned out later, had already decided to issue a citation with respect to the guard screen system.

The citation was not, of course, however, received by Whirlpool until the 12th or 13th of July.

On the evening shift of July 10th, a supervisor accompanied the two complaining employees to a section of overhead guard screen; climbed up to the guard screen, the supervisor did, and physically walked across the guard screen for from 10 to 15 minutes, approximately 800 feet in length, to physically demonstrate to these two employees that the screen they were to work on that evening was safe.

Following that physical demonstration, he asked the two employees to clean some materials which had fallen on the guard screen, from the guard screen; and they refused. They were subsequently issued a disciplinary warning, lost four hours pay by being suspended, and thus generated this particular litigation.

Both employees returned to work the following day, and have continued to work on the--one of them has continued to work on the guard screen to date; the other apparently is in another position.

At no time throughout this proceeding has the Secretary of Labor or his delegate attempted in any way to initiate any type of imminent danger proceeding, as is

contemplated under Section 13 of the Act. Nor, so far as we know, have the complaining employees attempted to initiate such a proceeding on their own, as is their right under Section 13 of the act.

The Secretary of Labor's position under this particular set of facts is to have processed this case through the normal enforcement channels of citation, hearing, and ultimate decision by the Occupation Safety and Health Review Commission.

The complaint was filed. The Federal District Court for the Northern District of Ohio ruled in the case that the Secretary's interpretation of the regulation--of the act--was so inconsistent, so clearly inconsistent with the legislative history and the act itself that he felt he had no choice but to reject the Secretary's interpretation and dismiss the complaint.

The Circuit Court of Appeals for the Sixth Circuit reversed--

QUESTION: This was on the theory it was a strike-with-pay approach?

MR. MANN: I believe the district court's view was that it was tantamount to a strike-with-pay approach; it was a type of approach that had been rejected by Congress, both in connection with the strike-with-pay issue and in connection with the administrative-shutdown issue.

QUESTION: The district court found, did it not, that these employees had a genuine fear of death or physical injury?

MR. MANN: The court did find that, Your Honor; yes, he did.

QUESTION: And that the danger was real?

MR. MANN: He found that the danger was real.

QUESTION: And that they lacked any alternative?

MR. MANN: He did not find that they lacked any alternative, in the sense that they were precluded from using the normal enforcement procedures of the act, or the extraordinary enforcement procedures of the act under Section 13. He made no finding on that point.

And we think that that point is crucial in this--in the facts of this case.

QUESTION: Well, I take it your position is that even if they had utilized these alternative procedures, they were supposed to work on the job while these procedures were being employed?

MR. MANN: No, Your Honor, that is not our position. The Secretary, I think, in his brief has mischaracterized our position on that point.

It's our view that any employee under constitutional law, certainly under statutory law, has a right to withdraw from a dangerous situation on a work site.

The question in the case is not whether or not he has a right to withdraw. Whirlpool freely concedes that.

QUESTION: You mean, he can keep his job? He can keep his job--he can withdraw and keep his job, but he just won't be paid?

MR. MANN: Well, the question of his job security and pay, we feel that Congress intended to leave for regulation to other statutes; except in a case, perhaps, where the employee would leave his job for the purpose of invoking the procedures available under OSHA.

QUESTION: Well, then, OSHA covers that, I suppose?

MR. MANN: If--yes, I think Section 11--

QUESTION: Well, what is your position, then? Suppose he employs these other mechanisms. Say he files with OSHA, and says it's very dangerous. And he says, until they do something about it, I'm not going to work.

What is your right with respect to him? Could you suspend him and dock him some pay?

MR. MANN: Your Honor, the facts of this case don't present that situation. But I think hypothetically, in a case-by-case analysis, the Court could determine that the employee might be protected to the extent he is in the process of invoking or participating in the procedures.

QUESTION: Well, let's assume that it's perfectly clear that he's--he's called them on the phone, or written

them a letter, or something, and OSHA says, we'll be out day after tomorrow. And he says, well--he says to his employers, "Until these people come and inspect and do something about this, I'm not going to work."

And--what's your response? Could you fire him at that point?

MR. MANN: I think that under--he could be fired, if the reason for the firing was not based upon his having filed a complaint.

QUESTION: Well, I know.

MR. MANN: If the reason--

QUESTION: Let's assume the employer says, look, I'm not firing you for filing the complaint at all; I'm firing you for refusing to work while--during the period that--while you're waiting for OSHA to come. Could you fire him?

MR. MANN: All right, it's our view, yes, sir, that would be--that would be--

QUESTION: And--

MR. MANN: --not protected under OSHA. Now, there may be protections under other legislation, but not under OSHA.

QUESTION: Well, then I take it your position--why do you think the Solicitor General mischaracterizes your position, then, in their brief? Because I thought I asked

you whether he was free not to work while he's waiting for OSHA.

MR. MANN: It's our view that he is free not to work.

QUESTION: Well, he's free not to work; you mean there is no slavery?

MR. MANN: Right.

(Laughter.)

QUESTION: But--

MR. MANN: The question of whether or not he retains his job security during that period of time, we feel Congress did not intend to regulate under this act.

QUESTION: So you don't have to--you don't have to keep him as an employee, nor do you have to pay him while he's waiting for OSHA?

MR. MANN: That's our view; yes, sir.

QUESTION: Mr. Mann, you made reference to perhaps other protections, which I assume refers to the Labor-Management Relations Act.

MR. MANN: That's the one--

QUESTION: And I assume it would be true, would it not, under that case involving a place of work that was too cold, that if three or four of these people got together and said, "None of us will work, because we all want you to remedy the situation..." in some way, that would be protected under

the Labor Act.

MR. MANN: I believe it would under the facts you quote, yes, sir.

QUESTION: So the only issue really here, as I understand it, is whether one employee acting independently can refuse to work. If he gets a few co-workers to agree with him, and they agree they're going to sacrifice pay for the period they don't work, that's the whole fight here, isn't it?

MR. MANN: Well, I believe there have been some recent decisions under--by the National Labor Relations Board under the NLRA holding that a single employee's withdrawal may constitute protected activity under Section 7 of the National Labor Relations Act if it's a safety-related situation.

QUESTION: So if it's even--

QUESTION: And the result is what?

QUESTION: He doesn't get paid.

MR. MANN: He doesn't get paid, and he's on strike, but he--

QUESTION: And he cannot be disciplined; is that the idea?

MR. MANN: He cannot be disciplined, but he doesn't get paid.

QUESTION: So isn't the only question here is whether there--there are two ways to--I mean, whether he has an

additional protection for the same right that the Labor Act already protects?

MR. MANN: That's correct. But I think it--and the problem is, what is that additional protection?

Under the Secretary's view, that additional protection is, in effect, pay for not working.

QUESTION: Well, he disclaims that. He says, no. He says--that's how he distinguishes all this strike-with-pay legislative history. He says, well, that's talking about paying him, and we are not contending--in other words, if our opinion--say you lose here, and we wrote an opinion that says that man is not entitled to be paid, would you be perfectly happy?

MR. MANN: Well, I, certainly I would hope---

QUESTION: Well, you didn't try to fire him, did you?

MR. MANN: No, we gave him a warning.

QUESTION: You just put a citation in his file, and you didn't give him another thing to do during that--

MR. MANN: That's right.

QUESTION: If all we said was, take the citation out of his file, and you don't have to pay him, then there isn't much of a fight here as I see it.

MR. MANN: Well, I think there may be a fight, Your Honor, in this sense: Our concern is that the OSHA Act

attempts, we believe, to encourage employees to utilize the procedures under that act, and not resort to self-help; that the resort to self-help is defeating the objects of that act which are to try and eliminate safety hazards through cooperative efforts and through orderly procedures under the supervision of the Secretary.

Now, we feel that this regulation, to the extent that it is presently utilized by the Secretary, and interpreted, has the effect of encouraging employees to utilize self-help--

QUESTION: Yeah, but they give up there--they don't get paid when they do it. I mean, that's a sort of a deterrent.

MR. MANN: Well--

QUESTION: And that you--you've told us that at least under some Federal decisions that individual employee has a--the freedom to do under the National Labor Relations Act.

MR. MANN: He has the freedom to withdraw from work.

QUESTION: Because of dangerous or intolerable conditions of some other kind.

MR. MANN: That's correct.

QUESTION: But he doesn't get paid?

MR. MANN: He doesn't get paid.

QUESTION: No. But my brother Stevens, the hypothesis of his question was that he wouldn't get paid in

this case, even if we disagreed with you.

MR. MANN: The Secretary takes the view in his brief, and I would point this out, that the employee's right is to be given alternate work.

QUESTION: If available.

MR. MANN: If available. But the dynamics of a workplace, Your Honor, is that there will always be alternate work available, in any type of a reasonably sized industry. That's going to always happen.

QUESTION: Well, wouldn't you have the same duty under the Labor Act?

MR. MANN: Not if an employee goes on strike.

QUESTION: No.

QUESTION: Well, he just says, "I won't work because it's too cold or dangerous," or something?

MR. MANN: He's out of the plant; he's on strike.

QUESTION: Right.

MR. MANN: There's no requirement under the Labor Act to provide him some alternate--

QUESTION: How do you read Judge Damon Keith's opinion for the Court of Appeals as requiring the employer to do what? Pay him? First of all, pay him?

MR. MANN: I believe that Judge Keith's decision implies an obligation to pay the employee.

QUESTION: That's the way I read it too. But it

wasn't all that clear.

MR. MANN: During that period of time--

QUESTION: And certainly not to discipline them.

MR. MANN: That's right.

QUESTION: And to pay them?

MR. MANN: And to pay them, or find alternate work for them.

QUESTION: Well, he doesn't spell it out, does he?

MR. MANN: He doesn't spell that out, but he upholds the regulation which has that--has that connotation to it, yes sir.

QUESTION: Does it? Does the regulation have it?

MR. MANN: The Secretary in his brief repeatedly refers to the obligation to find alternate work if available.

QUESTION: Well, that's not--

MR. MANN: I think he draws that--

QUESTION: You mean alternate work at the same pay?

MR. MANN: Alternate work at some pay; perhaps not the same pay.

QUESTION: Well, that's--

MR. MANN: He doesn't elaborate that.

QUESTION: I read these briefs pretty carefully, and I came away with a good many unanswered questions in my mind.

QUESTION: I did too.

QUESTION: And that's the reason I'm asking you

some of those questions.

Do you understand that the Court of Appeals opinion said that under this regulation, which of course the Court of Appeals held was a valid regulation under the statute, that the employer has an obligation, A, not to discipline--that's certainly clear; B, do you think to pay?

MR. MANN: Well--

QUESTION: Because that's not clear, is it?

MR. MANN: --if he's not--I believe what the Court of Appeals said is that the employer cannot discriminate against the employee.

QUESTION: What's that mean?

MR. MANN: Under the Secretary's--

QUESTION: I mean, under the Labor Act, that simply means you can't fire him, because that's a protected union activity.

MR. MANN: But under Section 1977.12 of the Secretary's regulations, he defines discrimination in the broadest possible sense: the deprivation of any perquisite of employment, or words to that effect.

QUESTION: Does that mean pay for not work?

MR. MANN: And we believe it means pay for not work. And that's exactly--

QUESTION: Well, it's not clear, is it?

MR. MANN: It's not clear. But that's the position

that the Secretary has been taking--

QUESTION: Couldn't it be argued that a day's pay is discipline?

MR. MANN: They're here to pay his discipline, that's--

QUESTION: Couldn't it be argued?

MR. MANN: That could be argued.

QUESTION: Sure.

MR. MANN: And that undoubtedly would be argued.

QUESTION: What do you think on the first point--or perhaps it was the second that was just propounded? What do you think the Sixth Circuit opinion means with respect to the pay?

MR. MANN: I would read the Sixth Circuit's opinion to mean that--or could be construed to mean that an employee may not be discriminated against, either with respect to pay or any other term or condition of employment, if he refuses to work under the conditions posed by this regulation.

I believe that's how the lower Federal courts would probably construe that regulation, in the dynamics of a particular case.

QUESTION: Well, does that mean pay or not?

MR. MANN: It means pay; and it means pay for this reason, Your HOnor--

QUESTION: While not working?

MR. MANN: While not working. Consider the employer's options under these circumstances. If the employee refuses to perform a job, and the employer agrees that the job should not be performed and reassigns him, to that extent, the employer is paying him but not getting the work done that the employee was hired for. So that's, in a sense, a pay situation.

If the employer says, "No, I disagree with you. I believe that job is safe." Or, "I believe that I have taken sufficient steps to correct the problem, and therefore, I will either discipline you or require you to work that job." Once an employer disciplines the employee, you automatically have a pay situation.

If the employee, on the other hand, were to actually just say, "I'm going on strike. I'm exercising my rights under Section 7," then obviously, there's no pay situation there.

QUESTION: Well, don't most collective bargaining contracts call for some provision for sick leave?

MR. MANN: Most collective bargaining agreements call for some provision of sick leave--or make some reference of that type, right.

QUESTION: Well, what if a man simply failed to show up because he was hung over for the period of time that this man was--refused to work?

MR. MANN: Well, it would--I--you mean as a subterfuge for not working?

QUESTION: No; he was sick.

MR. MANN: Oh. Well, under those circumstances, depending on what his contract provided, he may or may not be paid. Some do, and some don't.

QUESTION: But that wouldn't be a form of discipline, would it?

MR. MANN: Denying him pay for not working, no, sir.

QUESTION: In this case, your client, after these two employees refused to go on the screen, did what? Said, you go home--

MR. MANN: Well, our--yes. The supervisor asked them a couple of times to work, and they refused.

QUESTION: All right.

MR. MANN: There was a dialogue, and then--

QUESTION: But then there was a final refusal?

MR. MANN: There was a final refusal. The matter was re-discussed in the personnel office. And the personnel director directed the persons to go home--

QUESTION: But there was then a final refusal?

MR. MANN: And a final refusal. They went home for the balance of the shift.

QUESTION: They went home at the directionof the employer?

MR. MANN: That's correct; and returned the following morning.

QUESTION: For the balance of the shift, and they didn't get paid for those hours.

MR. MANN: That's right.

QUESTION: And in addition to that, they were disciplined.

MR. MANN: That's right.

QUESTION: And in what way?

MR. MANN: They were issued a written warning; it was put in their file.

QUESTION: And that was it?

MR. MANN: That was it.

QUESTION: They weren't docked any pay for work they had done, or anything like that.

MR. MANN: Oh, no.

QUESTION: Mr. Mann, may I suggest this approach, that the statute and regulations say there are certain kinds of things that the employee has a statutory right to do, such as file complaints. And then there is a provision that if he does any of those things, there are certain things may not--he may not be disciplined for them.

Now, it would seem to me the question of whether it's discipline would be the same question whether he refused to work because he thought it was dangerous, or because he went and made a complaint.

Now, my question then is: Supposing he didn't show up one morning, but instead went over to the OSHA Office to file a complaint; he had to sit in the waiting room all morning before they'd listen to him; he killed the whole day. He showed up the next day.

Would you have a statutory obligation to pay him?

MR. MANN: No.

QUESTION: Well, then, what's the difference?

QUESTION: That's what I want to know.

QUESTION: Supposing he just doesn't work that day because he thinks it's too dangerous.

QUESTION: You'd have a statutory obligation not to discipline.

MR. MANN: We have a statutory obligation not to discipline him.

QUESTION: And I'm saying, if you failed to pay him, that's not discipline?

MR. MANN: No, but the reason---

QUESTION: Why is it discipline in this case?

MR. MANN: The reason that it's not discipline is that he is not presenting himself for work, and he is merely exercising a right that he has under the statute.

QUESTION: Well, but if we say that's all he did here, then the consequence is the same. He--these two people are not presenting themselves for work when they say

it's too dangerous for us to work.

MR. MANN: Well, they are being--well, the reason that they're going to be paid for not working is because they're being disciplined, or they're being assigned to some other job.

QUESTION: Now, the reason they're going to be paid for not working, you say?

MR. MANN: It's the disciplinary action that triggers the pay.

QUESTION: No, no, now I--in answer to Justice Stevens, you said that instead of coming to work and reporting in at the beginning of his shift, this employee had gone to the OSHA office in Marion, Ohio, to file a complaint, that under the statute, clearly you couldn't discipline him for that.

MR. MANN: That's correct.

QUESTION: But you further said that there's no requirement under the statute that you pay him for work not done.

MR. MANN: That's correct.

QUESTION: Well, now, what's the difference in this case?

MR. MANN: Because the employee is being discplined. In the case of the work refusal, he's being disciplined.

QUESTION: No, but if the Solicitor General is

right, all you had to do differently was just not put that piece of paper in his file.

QUESTION: That's right, that's right.

QUESTION: Just don't pay him. And why wouldn't the case then be the same, and then there isn't this terrible consequence?

QUESTION: That's right.

MR. MANN: Well, the Solicitor has taken the position in this case that we had an--an additional obligation not only not to put the paper in his file, but find him an alternate work assignment.

QUESTION: That wouldn't even be true if he were at the OSHA office, would it?

MR. MANN: No, that wouldn't be true.

QUESTION: Where it was clearly under the statute. Your only statutory duty is not to discipline him; isn't it?

MR. MANN: That's right.

QUESTION: Then why would he have greater rights when the statutory is considerably more ambiguous? And if it weren't so ambiguous, this case wouldn't be here.

MR. MANN: Well, the obligation of the employer is not to discriminate against him, including imposition of discipline.

QUESTION: Well, I have a little trouble.

What would you do if the man says, "Look, I just

won't work." And you say, "Well, you don't work, I won't pay."

Is that discipline?

MR. MANN: That could be construed as discipline; that could be construed as discriminatory action.

QUESTION: That's what I mean.

MR. MANN: If he had a right to refuse that job under--

QUESTION: Well, I'm not talking--I'm talking about this case. What could you do other than what you did?

MR. MANN: I don't know what could have been done other than what we've done in this case, the issuance of discipline.

There was a dispute over the existence of a hazard, and--

QUESTION: Number one, you couldn't pay him for not working.

MR. MANN: That's right.

QUESTION: But you do pay him when he's on sick leave.

MR. MANN: That may be the policy. I'm not familiar with the sick leave policy, Your Honor.

QUESTION: Well, have they got a union contract?

MR. MANN: No.

QUESTION: Mr. Mann, may I suggest that, assuming there's a statutory right here, there are three possible

answers on the remedy.

One is, you had to pay him even if he didn't work. And you say that's what's implicitly required, and the other side says no.

Secondly, that you could stick a piece of paper in his file, and that's discipline.

And thirdly, that you had to give him another job.

Now it's conceivable that you didn't have to do any of those three things. All you had to do was just say, "Well, we won't pay you. We'll treat you just like you're on strike." And that would recognize the statutory right, and avoid all the--it may well be that they granted a remedy they had no right to grant.

MR. MANN: That would be an approach that could be taken.

QUESTION: And maybe that under--that even though you're wrong, and that you are under the statute, the Secretary's regulation is a correct or allowable interpretation of the act, it may be that even so your only duty was not to put that piece of paper in his file. And that's not at all clear in this case, either from your brief or from the Solicitor General's.

MR. MANN: Well, I might---

QUESTION: Or from the Court of Appeals opinion.

MR. MANN: And I might suggest that the ambiguities

in the regulation itself tend to lend some problem there, too.

QUESTION: That's right.

QUESTION: Well, the--whether you could fire him or not is the same question as to whether you can put the piece of paper in his file.

MR. MANN: Yes.

QUESTION: And you think you should be able not only to put the piece of paper in his file, but to fire him?

MR. MANN: Well, I think any form of discipline that's--

QUESTION: Yes, any form.

So it's just not a piece of paper.

MR. MANN: That's right.

QUESTION: Well, it's discipline.

MR. MANN: That's right.

QUESTION: It's discipline; any kind of discipline. Like getting rid of him.

MR. MANN: That's correct.

QUESTION; But then there might be a grievance.

MR. MANN: There might be a grievance, or he might make a claim under the National Labor Relations Act, or some other contract.

QUESTION: It would seem to me that you've conceded that the National Labor Relations Act would prevent you from firing him.

MR. MANN: If he engaged in concerted activity and went on strike.

QUESTION: But you earlier told me just one man alone could do this under the---

MR. MANN: That's correct.

QUESTION: Well, there are some cases, you say?

MR. MANN: There have been some recent decisions in that area.

QUESTION: Has the Board taken a position on that, or is that just a--is that just a 301 action?

MR. MANN: No, the Labor Board, I believe, in a case called Alleluia Cushion has taken a position that there's a right to engage in--

QUESTION: On the other hand, you could just--the man might have to work, and he gets killed; it wouldn't hurt you at all.

MR. MANN: Well, we would expect that if the employee was concerned that there was an imminent--

QUESTION: Yes, if he had to work. And that broke again, and he died. That wouldn't cost you anything.

MR. MANN: Well, we would hope that wouldn't occur, Your Honor.

QUESTION: You just have workmen's comp; you've already paid that.

MR. MANN: We feel that the salutary effects of this

act are going to be lost if we're litigating in Federal court these kinds of decisions over discriminatory or disciplinary actions, which really never lead to the ultimate question of the existence or non-existence of hazards, or what is needed to abate them.

The only question that's resolved by this type of litigation is whether or not discipline was proper.

QUESTION: Well, the issue was what was in the minds--

MR. MANN: What was in the minds.

QUESTION: --of the employees, isn't it?

MR. MANN: Contrast that with the Section 13 procedures.

QUESTION: Were they in good faith, and was it reasonable, and so on.

MR. MANN: Right. In the Section 13 procedures prescribed by Congress, the issue before the Court is whether there's a hazard or not; that's the issue to be resolved.

I see my time is up. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. McCREE: Mr. Chief Justice, may it please the Court:

This case presents the question, whether Section 11(c)(1) of OSHA, as interpreted by the Secretary of Labor in

29 CFR 1977.12(b)(2) prohibits an employer from retaliating against an employee who refuses to perform particular assigned tasks when the following conditions exist.

QUESTION: Well, now before you go off--I had thought that that wasn't the issue at all; that the issue was, whether or not the Secretary had any power at all to issue 1977.12(b)(2).

MR. McCREE: Well, that may--

QUESTION: Or whether or not that was contrary to the statute.

MR. McCREE: If the Court please, that may be another way of expressing the same thought.

QUESTION: Well, it may be; may be.

MR. McCREE: Clearly, this is an interpretative regulation; it's not a legislative regulation.

QUESTION: And the question is--

MR. McCREE: And the question is, does the statute--

QUESTION: --is it an authorized interpretative regulation.

MR. McCREE: Precisely. Does the statute afford a worker the right that the Secretary delineated in this carefully drawn interpretative regulation.

And this regulation provides that he may not be discriminated against if he refuses to perform a particular assigned task when the following conditions occur: first, in good faith; second, he concludes that there is a real danger

of death or serious injury confronting him; three, under circumstances that a reasonable person would so conclude; four, and the urgency of the situation afforded insufficient time to eliminate the danger through resort to the regular statutory enforcement channels; five, he also sought if possible from his employer, but without success, a correction of the dangerous condition; and six, he had no reasonable alternative.

We suggest that under that very narrow concurrence of circumstances that the act, by necessary implication, affords this right to the employee, which under Section 11(c)(1), which is the anti-discrimination provision of the statute, protects him from discrimination on the part of his employer.

QUESTION: Now, what do you think that means, protects him from discrimination? It certainly means, if you're correct, that he's protected from any disciplinary action, being fired or anything less than that.

MR. McCREE: I think that's clear.

QUESTION: But does it mean that he's entitled to be paid for time that he doesn't work, when he goes off, unlike a striker?

MR. McCREE: No, I do not believe it entitles him to pay unless, in an almost equivalent situation, another employee would be entitled to pay.

I interpret discrimination to mean to treat him

differently from the way someone else--

QUESTION: Because of what he does.

MR. McCREE: --in an almost similar situation would be following.

QUESTION: Well, what's a similar situation?

QUESTION: Well, why would another employee ever do that?

MR. McCREE: Well, for example, suppose he agreed--suppose an employee recognized an situation as presenting an imminent risk of death or serious bodily harm, and objectively it existed--

QUESTION: And all these conditions existed.

MR. McCREE: --and he believed it in good faith, and so forth. Except, the only difference being, the foreman agreed with him. The foreman said, "You're right. You don't have to work until we correct that."

Now, if that employee received pay while the matter was being corrected, then I would think this employee would be entitled to pay.

QUESTION: But only under that sort of--

MR. McCREE: Under that kind of situation.

QUESTION: Only--you can't be treated other than other similarly situated employees are treated.

MR. McCREE: And I said, almost similarly situated, because there is this one minor--

QUESTION: Yes.

QUESTION: But your similarity is limited to OSHA-type situations, when you're talking about discriminating.

MR. McCREE: Yes. If he--if it were an economic strike, or something of that sort, certainly he would not be entitled to pay. But he would have to be treated as another employee would.

QUESTION: May I probe a little bit about what kind of similarity we're talking about?

Are you saying that if, in a given plant, an employee comes in, and it's manifestly terribly dangerous for him to work, and he says, "I don't want to work until this is corrected," and the company says, "Okay, you don't have to work, and you'll be paid," is it then similar if the next day there's another situation in which there is--not nearly as clear that it's dangerous; it's an entirely different part of the plant and all the rest; and the supervisor says, "I don't agree with you; I think you should work." He refuses. And the company does not pay him. And he comes in and says, "Well, you paid the other man." They say, "Well, that was much more dangerous, and we agreed with you there, but we don't agree with you here."

Does he have to pay--in other words, does the company set a precedent that it must always pay everytime it agrees to pay one?

MR. McCREE: No, I would think the company reserves its right to make a distinction between situations.

QUESTION: All right.

MR. McCREE: And the test would be this: If a company refused to pay on your second day situation--

QUESTION: Yes.

MR. McCREE: ---then the employee under the statute would have to ask the Secretary--

QUESTION: Right.

MR. McCREE: --to bring an action for him to relieve him of the consequences of the discrimination, if it was discrimination.

QUESTION: And it would be discrimination if they paid the man on the night shift but not the man on the day shift--

MR. McCREE: That's right.

QUESTION: --or something like that.

MR. McCREE: We would hope the Secretary would make--would discriminate, too, and would look carefully and decide whether to bring this. And if the Secretary ultimately decided to bring it, the burden would be on the Secretary to prove that the employee's refusal to work was within the narrow circumstances delineated in the interpretative regulation that the Secretary established.

We suggest in our brief that the entire structure of

the statute requires us to infer such a right, because the statute to begin with, looked at as a whole, is prophylactic and not compensatory.

It begins with the purpose stated of affording every man and woman in the workforce a safe place to work, and it isn't couched in terms of recompensing him after an accident has happened.

And we suggest that a statute that has that general design must necessarily permit him to refuse to work where his life is imperilled, or where he's subjected to serious imminent bodily harm.

QUESTION: Well, actually, that's not--I'm not criticizing you for making that argument. But the issue here is considerably narrower, isn't it? And that is, whether or not this interpretative regulation is within the terms of a specific part of this statute?

MR. McCREE: Well, it's not explicit. It's implicit. We must argue that it's implicit in the language the Congress employed.

But when the language is read as a whole--

QUESTION: That is, 10(c)(1).

MR. McCREE: --it's a necessary part of the statute.

QUESTION: 29 USC 660 (c)(1)?

MR. McCREE: That's correct.

QUESTION: That's what's specifically involved,

isn't it?

MR. McCREE: That's correct, sir.

I quarrel with my brother, Mr. Mann, in this respect: We submit that there is no question about the two employees here coming within the narrow strictures of this described right.

I think, and there's no question about it as I read the district court's opinion, the district court found that he would be entitled to be free from discrimination but for the fact, as the district court determined, the statute didn't afford him that right.

And the Court of Appeals found that there was ample support for that finding, and expressly adopted the--or confirmed the findings of fact and conclusions of law.

And so this Court has at this point the pure legal question of statutory interpretation: Does OSHA afford a narrowly--this narrowly described right?

And we suggest it is--in our brief--as we look at the several provisions of the statute, that it must necessarily must have intended this to be.

QUESTION: Of course, as you say, Mr. Solicitor General, your brother says that the Secretary has gone even beyond his own regulation in this particular case. That's in his reply brief, and I think it's also in his brief.

MR. McCREE: Yes. I don't understand his assertion--

QUESTION: But you're just telling us that you disagree with that?

MR. McCREE: --that he's gone beyond it. I don't know in what respect he contends he's gone beyond it.

QUESTION: Well, I thought I understood what he was saying.

MR. McCREE: And--well, I read his brief as saying the same thing, but I don't know in what respect he does. Because the court found all of these elements there. And certainly there isn't any question about the ample evidentiary support for it.

I was very much interested in the physical attributes of this plant. There are some not very revealing photographs unfortunately; they're part of the record. I think if the Court would like to see those in the record, it could see visually this artificial floor made of mesh, and it could see, indeed, that the June 28th fatal plunge isn't very difficult to imagine, nor is it difficult to credit the employees with good faith and a reasonable apprehension of danger, to walk across that mesh.

QUESTION: Mr. Solicitor General, one thing--back up a minute--in a case just like this where the man says, "Look, one or two or three people have falled through there, and I'm not going up there." And the supervisor says, "Well, you've got to go." He says, "I won't go."

He says, "Well, go home."

Now, suppose he just stays home. Suppose nobody does anything from then on. What happens?

MR. McCREE: Well, I would think--I would think we'd have to work out some rule of reason. He certainly cannot remain home and expect to be paid.

QUESTION: That's my point.

MR. McCREE: Again, I say, we'd have to see what would happen if the foreman had agreed with him. If the foreman had agreed with him and said, "All right, you go home and show up tomorrow morning," then this man, too, would have the duty--who unilaterally decided the risk was something he shouldn't endure. He'd have to show up the next day. And if they could find him alternative work, he would have to perform that, unless it would violate the--

QUESTION: But there are some plants where you couldn't find alternative work. For example, the asbestos plants.

MR. McCREE: Well, if he--if the plant--another analogy suggests itself. Suppose the machinery broke down at the plant.

QUESTION: Right.

MR. McCREE: Nobody could work. Well, they don't pay under those circumstances either. And so this is not a strike-with-pay situation at all. The very narrowly drawn

right that the Secretary recognized in this regulation was just to prevent a tragedy from occurring, and to allow the regular procedures of OSHA to run their normal course.

We would expect him--

QUESTION: Mr. Solicitor General, on that suggestion, supposing--I'd like to ask you the same question I asked Mr. Mann--if he had been concerned, and in the morning got up and went to the OSHA office. It took him all day to file his complaint so he didn't show up at all for a given day. And it's clearly protected by the statute because he's making a complaint.

Would the employer have a statutory duty to pay him for that day?

MR. McCREE: I think he might, because this is--and he might. This is an express right that's given.

QUESTION: What's the discrimination? He didn't show up for work. So you don't pay people who don't work.

MR. McCREE: Well, but the statute here--

QUESTION: There's no discipline. No paper in the file, no discharge, no--nothing hanging over that--he came back the next day, and they say, "Gee, I'm glad you called it to the inspector's attention, because we'd like to know whether they think it's too dangerous." They're just as nice as they can be to him.

How could you say there's discrimination because

they don't pay him for a day he doesn't work?

MR. McCREE: Well, because this is an express right that's given him under the act.

QUESTION: It's a right to be paid--to be paid for making a complaint?

MR. McCREE: Well, in other words, it's a right to file complaints and to initiate the statutory machinery for investigation and remedying--

QUESTION: But it seems to me that if you take that position, that he's entitled to be paid that day, and you also say he has a right just not to work for a day because it's too dangerous, equally he ought to be paid for that day.

Therefore, it seems to me, you are arguing for a right to strike without--with pay.

MR. McCREE: Well, I really don't think so. And I think the two situations are distinguishable in this fashion: The statute encourages the filing of a report, and bringing into operating--

QUESTION: There's a statutory right to do that, but you're arguing there's a statutory right to sit down, too.

MR. McCREE: All right. But he may have to spend all day to get the attention of the OSHA inspector.

QUESTION: Right.

MR. McCREE: He doesn't have to remain all day to get down off that mesh.

QUESTION: If there's no alternate work?

MR. McCREE: And once he's down from that mesh, and he's no longer in a place of peril, then he's subject to the orders of the foreman at the workplace. The foreman can put him on another job. These are maintenance people in this case, and it was estimated that they spent about 15 hours a week--I take it that's out of a 40-hour week--working on this overhead mesh, retrieving stock that fell from the conveyor belt, and getting rid of dripping oil. And the other portion of the 40-hour week, the other 35 hours were spent--or 25 hours, I guess--were spent in other maintenance tasks.

So as soon as he got down from the place of peril, then it would seem that the authority of the foreman would be reestablished. Whereas, the worker who had gone out to the OSHA office, and had to sit in the waiting room, he couldn't do anything until he reached the OSHA inspector. After that, he would have a duty to come back.

In Marshall v. Barlow's, Inc., in the--I think the dissenting opinion authored by Your Honor, the statement of the--the quotation appears, "The number of inspections which it would be desirable to have made will undoubtedly, for an unforseeable period, exceed the capacity of the inspection force."

That was footnote 6 in the dissenting opinion, and I think that that suggests that there might--require some

additional time to be spent in the waiting room. And that's the way I would try to distinguish those cases.

QUESTION: Well, I just don't see how that--that really answers my problem about why, if there's the same statutory right in both of the hypothetical cases, in one case you say he gets pay and the other one, you say he doesn't.

MR. McCREE: Well, because--because the exercise of the right will take longer in one case than it will in the other. And it seems to me that he's protected while he exercises the right.

QUESTION: But what he's protected against is discipline or discrimination. It just doesn't seem to me that it fits the definition of discrimination or discipline to say, "I'm not going to pay you for days you don't work."

MR. McCREE: I know I'm repeating myself--

QUESTION: Yes, I guess I am, too.

MR. McCREE: --but my best answer is, that he's protected while he does what the statute gives him permission to do. He's not protected against discrimination after that time. As soon as he's--

QUESTION: Well, I agree, he's protected in both cases.

MR. McCREE: --made the report, he has to come back.

QUESTION: The question is whether the--when the

employer doesn't pay, why is it discrimination in one case and not the other?

MR. McCREE: Well--

QUESTION: He's protected in both?

MR. McCREE: --I suppose a further answer is, in order to vindicate the right to be free from discrimination, he's going to have to ask the Secretary to bring an action for him. And maybe this is one of those instances where, on a case-by-case basis, some of these lacunae in the statutory scheme are just going to have to be worked out.

QUESTION: Well, General McCree, would you go so far as to say that not only in his trip to the OSHA office, but perhaps in the two or three days he spends testifying in the district court in Toledo, he's also entitled to be paid?

MR. McCREE: Well, I'm not prepared to say he may not be. But I'm suggesting that if he tries to extend it beyond what the statute--the authorization of the statute gives him, then he is not entitled to pay; of that I'm certain.

QUESTION: Well, if the employer's policy with respect to employees is to pay them only if they work, then somebody who goes to the OSHA office or goes to Toledo to testify is not entitled to pay, is he?

MR. McCREE: That may not--

QUESTION: Because it's not discrimination against

him for exercising his rights under the act, his conceded rights under the act.

MR. McCREE: That may very well be the resolution that a court would make. But I suggest that's not before us.

QUESTION: Well, isn't that the logical resolution for any court to make?

MR. McCREE: I say--

QUESTION: A single, even-handed policy of the employer is simply not to pay people if they don't work.

MR. McCREE: I would say, it is a logical--a logical distinction. If I may shift--

QUESTION: I mean, subject to vacation and sick pay and all the rest of it.

MR. McCREE: --into another area, we speak about citizens performing their civic duty. Some states have statutes--

QUESTION: Yes, but it's a statute.

MR. McCREE: --that require payment--

QUESTION: For jury duty.

MR. McCREE: --for jury duty.

QUESTION: I know, but it's a matter of statute. In the absence of any statute.

MR. McCREE: Well, this statute may, by implication, do that. And I'm not prepared--that's not before us in any

event today; I don't think it is.

QUESTION: Well, it really is, in many ways.

MR. McCREE: In a sense.

QUESTION: Because it seems to me that you and your brother argue about something that now you say is not before us.

I had understood that your position, and indeed, that Judge--

MR. McCREE: Keith; Judge Keith.

QUESTION: --yes, Damon Keith's opinion for the Sixth Circuit implied that this person was entitled to be paid.

QUESTION: That's the way I understood the--I though that was one of the issues between you.

MR. McCREE: Well, I'm not certain--and I would like to look at his opinion more carefully.

QUESTION: Well, Mr. Solicitor General, do you think now, having listened to your colleague and having said what you're said, that you are in agreement on pay, at least with respect to non-waiting time in OSHA office? If he just says, "I'm going home today."

MR. McCREE: On that, I agree, he is not entitled to pay.

QUESTION: So that is--you're together on that.

MR. McCREE: I think so; I think we are.

I think he is entitled to be treated no differently from any other employee under those circumstances.

QUESTION: I understand.

MR. McCREE: But I have to say, I'm not certain that that would be so if he exercised one of the rights expressly given him under the statute. The Congress may have intended that.

It would seem quite consistent with a policy to encourage reports, to promote safety, to make it possible--

QUESTION: Is it your position, Mr. Solicitor General, to say--you are arguing that the unexpressed, implicit right is just as important as the expressed right.

QUESTION: Right.

QUESTION: And yet you are suggesting that the remedy for violating the express right is more stern than the remedy for violating the unexpressed right.

MR. McCREE: Well--

QUESTION: It doesn't seem to me the statute--that makes the statute very consistent.

MR. McCREE: I have failed to communicate a distinction that appears valid to me. And it apparently has some infirmities, because it doesn't appear valid to you.

But it seems to me that the right to refuse work--

QUESTION: Yes.

MR. McCREE: --is exercised in a short period of time. He just says,"I'm getting down from this mesh before I fall through to my death."

QUESTION: And as soon as he reaches the floor, then, he has removed himself from the danger of harm.

QUESTION: And then the question--

MR. McCREE: And he is subject then to the foreman's instruction: "Well, all right, get a broom, you're a maintenance person, and sweep the floor." "Get a mop, clean up the oil." Or something of that sort.

QUESTION: Or the foreman might say, "This was your job on the shift; go home."

MR. McCREE: Yes.

QUESTION: If you don't want to do this job--

QUESTION: Or he says, "All the other maintenance people are doing all the other jobs, so there's nothing more for you today to do today."

MR. McCREE: Well, that's--

QUESTION: And then doesn't he get in exactly the same position as the man who went to the OSHA office and had to kill the day because it took the whole day?

MR. McCREE: Well, I would analogize him more to the person whose machine broke down. And if his--if the machine broke down, and there wasn't anything else to do because everybody else was working on every available machine, and

they said, "You have to go home."

QUESTION: Yes, but in one case, the employee doesn't work because the employer doesn't have work that, in effect, was promised to him; he promises him a machine to work on.

QUESTION: Right.

QUESTION: In the other two cases--both the office case and the dangerous case--the employee isn't working because he's exercising what you describe as a statutory right.

And then you're saying, one statutory right has--even though it's the same one sentence in the statute--the remedy differs in the two cases.

MR. McCREE: Well, perhaps--

QUESTION: You may be right. I'll reflect on it, certainly, because I have the same regard for your views as you so kindly express with respect to mine.

MR. McCREE: Yes. I would like to suggest in any event that this isn't before us at this time for a decision. Because if this Court decides that there is a right, as described by the Secretary in the challenged interpretative regulation, that's what this lawsuit is about.

Now, what--

QUESTION: Mr. Solicitor General?

MR. McCREE: ---should the consequences be because his employer didn't recognize it, is another matter. And it

wasn't challenged in this case.

QUESTION: See, it all goes back to the question of how much weight we are to give to the Congressional--a very strong evidence of Congressional intent on the strike-with-pay provision.

MR. McCREE: Yes.

QUESTION: And as I understood Judge Keith--and I may have misread him, because I think parts of it are hard to understand--he, in effect, was saying, all of that is inapplicable, because there's no requirement of pay here.

Now, if you decide there is a pay provision, then the legislative history, which was persuasive to the Fifth Circuit, becomes much more significant.

And I think it all helps us focus on how much weight we give to the legislative history which Judge Keith discounted and the Fifth Circuit relied on.

And that's why I make such a point of it.

MR. McCREE: Well, I think I must conclude that it's always easier to state a proposition than to apply it. And the proposition, I think, we agree on: That he shouldn't be treated differently from another person under the same circumstance.

QUESTION: Well, if you're correct in your basic position.

MR. McCREE: That's right. And the difficulties

result from trying to do this.

I would like to suggest some--I'm not certain of my time here--that to imply, or to find that the statute implies this very narrow right is entirely consistent with all of its provisions, and that my brother's reference to legislative history as negativing such a right is misplaced.

The two bits of legislative history to which he makes reference are, the one pertaining to strike-with-pay, and the other pertaining to shutting down a plant. And in our brief we distinguish them, I believe successfully, by pointing out that the strike with pay provision applied not to imminent danger, but applied to a section of the statute which required the Secretary of Health, Education, and Welfare to develop a schedule of toxic substances, exposure to which created an impermissible hazard; and that after the Secretary promulgated this list--in fact, six months after that--an employee could then leave his workplace, and not return until certain protective measures were adopted, including protective clothing and certain kinds of notices and so forth.

This is the provision that was in the Daniels bill that was rejected utterly by the Congress. But we submit that this was not at all related to the question of immediate, imminent danger to life and limb; and therefore, the fact that that was rejected doesn't mean that the Congress meant to reject the ultra-hazardous situation that happened under these

narrow circumstances.

The other legislative history related to the right that would be given an inspector for a short period of time to shut down a plant or an operation, and this was similarly rejected when it appeared in the Senate bill. And we suggest the right that we believe the statute implies, as described in the regulations, doesn't shut down a plant or an operation, unless it's just a one-person plant; it just means that the employee who is confronted with imminent danger to life or limb may, to save his own life, or to spare him the cruel dilemma of choosing between his job and his health, might discontinue, and be free from discrimination.

QUESTION: Well, it could disrupt the whole plant, depending on the nature of his job.

MR. McCREE: It could. But it's not the same as the inspector--

QUESTION: I mean, if it were a matter of opening the door so the employees could come in, and he's afraid the ceiling would fall on him.

MR. McCREE: And we think, of course, the two cases are distinguished--I see my time is expired.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

(Whereupon, at 11:48 o'clock, a.m., the case in the above-entitled matter was submitted.)