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Xiii. Labor Law

medical mistreatment are now subject to the same standards when they draft their complaints.

The Fourth Circuit's decision in *Loe v. Armistead* has important implications for pretrial detainees seeking to vindicate their rights. In the Fourth Circuit, a pretrial detainee is guaranteed treatment which is at least commensurate with that which a prisoner is given.[64] A pretrial detainee may sustain a cause of action against federal as well as state officers for damages if he is not accorded treatment to which he is entitled.[65] Finally, in drafting his complaint for medical mistreatment, a pretrial detainee in the Fourth Circuit need only adhere to the standards required of a convicted prisoner.[66] Although pretrial detainees may not invoke the protection of the eighth amendment when they have been subjected to cruel and unusual punishment, their due process rights may serve as a shield against official misconduct.

CHRISTOPHER WOLF

XIII. LABOR LAW

A. Employee Loss of NLRB Reinstatement Remedy

Under Section 7 of the National Labor Relations Act (NLRA or the Act), both union and nonunion employees have the right to engage in concerted activities.[1] If an employee engaged in protected concerted activity is wrongfully discharged, the employee may be entitled to reinstatement and a back pay award from the National Labor Relations Board (NLRB or Board).[2] In *NLRB v. Waco Insulation, Inc.*,[3] the Fourth Circuit

recovery, which was termed a possible medical malpractice, but not a constitutional tort. *Id.*

The Fourth Circuit has adopted the *Estelle* standard in cases involving prisoner complaints. *See* Wester v. Jones, 554 F.2d 1285, 1286-87 (4th Cir. 1977); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977). For a discussion of constitutional standards of prisoner medical care, see *Prisoners' Rights, Fourth Circuit Review,* 35 WASH. & LEE L. REV. 584 (1978).

[64] 582 F.2d at 1294.

[65] *Id.* at 1295.

[66] *Id.* at 1295-96.

[1] Section 7 of the National Labor Relations Act (NLRA or the Act), 29 U.S.C. § 157 (1976) gives employees, whether union or non-union, the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protected concerted activity ". . . so long as he seeks to make common cause with others or to organize the employees or to protest general working conditions." Getman, *The Protection of Economoic Pressure by Section 7 of the National Labor Relations Act,* 115 U. PA. L. REV. 1195, 1225 n.129 (1967) [hereinafter cited as Getman]. *See also* LTV Electrosystems, Inc. v. NLRB, 408 F.2d 1122, 1127 (4th Cir. 1969); Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1365 (4th Cir. 1969); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967); NLRB v. Kit Mfg. Co. 335 F.2d 166, 167 (9th Cir. 1964); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964); NLRB v. Smith Victory Corp., 190 F.2d 56, 57 (2d Cir. 1951).

[2] The National Labor Relations Board (NLRB) has the authority to order reinstatement with back pay under NLRA § 10(c). 29 U.S.C. § 160(c) (1976). The NLRB has wide discretion in ordering a remedy, and can order reinstatement, back pay, or both depending on the

examined[4] whether an illegally discharged employee's rejection of an employer's voluntary offer of reinstatement forecloses the NLRB from ordering reinstatement of the employee.[5] The Fourth Circuit held that when an illegally discharged employee accepts an unconditional offer of reinstatement and then voluntarily quits, the employee forfeits his claim for reinstatement against the discharging employer.[6]

In *Waco,* employee Kuykendall was hired as a rigger on a boiler repair job. Two months later, employee Rexrode was hired as a welder.[7] Two weeks after being hired, Rexrode, Kuykendall and a group of welders[8] confronted their foreman with a request for a pay raise.[9] Despite the foreman's willingness to process the employees' request through appropriate channels, the employees demanded immediate action.[10] The foreman then arranged for the group to meet with the senior supervisor in the company lunchroom.[11] During the lunchroom discussion, Rexrode, as spokesman for the group, reiterated their request for a raise.[12] Although the supervisor indicated that a raise might be possible,[13] the employees' repeated insist-

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circumstances of the case. *See* NLRB v. Fibreboard Paper Prods. Corp., 379 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539-40 (1943); International Ass'n of Machinists Union v. NLRB, 311 U.S. 72, 82 (1940); Elam v. NLRB, 395 F.2d 611, 613-14 (D.C. Cir. 1968).

[3] 567 F.2d 596 (4th Cir. 1977).

[4] Section 10(e) of the Act gives circuit courts jurisdiction over the legal issues involved in the appeal of an NLRB order or a request for enforcement of an order by the NLRB. 29 U.S.C. § 160(e) (1976). Section 10(e) also allows circuit courts to enter a decree enforcing, modifying or setting aside in whole or in part an order of the NLRB.

[5] An employee may want to refuse an employer's voluntary offer of reinstatement and opt for an NLRB reinstatement order due to the conditional nature of the employer's offer. The employer may condition the offer of reinstatement on a reduction in pay, seniority or job classification. The employee is thereby forced to decline the reinstatement or quit soon after acceptance. *See* NLRB v. Hilton Mobile Homes, 387 F.2d 7, 10-11 (8th Cir. 1967). An NLRB reinstatement order requires the offer to be unconditional and is subject to continuing review by an NLRB compliance officer to insure that the employer does not resume the unfair labor practice. Wallace Corp. v. NLRB, 159 F.2d 952, 954 (4th Cir. 1947).

[6] 567 F. 2d at 603.

[7] *Id.* at 598.

[8] *Id.* Kuykendall voluntarily joined the group of welders despite his differing job responsibilities. *Id.*

[9] *Id.* Waco's employees were purportedly covered by a collective bargaining agreement with the United Steelworkers of America. The agreement was in effect between June 1, 1974 and June 1, 1977, and contained a provision establishing a grievance procedure for employee complaints. Rexrode and Kuykendall testified that they were not told of the agreement when they were hired, were unaware of the grievance procedure, and did not use the procedure during their dispute with Waco. *Id.* at 601-02.

[10] *Id.* at 598.

[11] *Id.* The foreman initially agreed that the group deserved more money, and offered to recommend them for raises. Rexrode, as spokesman, pressed for an immediate answer, and a lunchroom meeting with the senior supervisor was arranged in an effort to satisfy Rexrode's demands. *Id.*

[12] *Id.* at 599. Kuykendall did not participate in the lunchroom meeting. After the welding group confronted the foreman, Kuykendall returned to his rigging crew with a promise from the foreman to call him for the meeting. The foreman failed to send for Kuykendall. *Id.*

[13] *Id.* at 598. The supervisor wanted to arrange a welder's test to determine who deserved

ence on immediate action inflamed the discussion. The supervisor then ordered the group to return to work "or else" and the employees complied.[14] At the end of his work shift, Rexrode was called into the supervisor's office and fired.[15] The supervisor alleged that Rexrode was seen talking to his fellow workers and was performing his job inadequately.[16] The next day Kuykendall was fired for poor work performance and for his complaints about low wages.[17] Both employees filed unfair labor practice charges against Waco, alleging that they had been discharged for engaging in protected concerted activity.[18] While the charges were pending, Waco voluntarily offered to reinstate the men to their old jobs. Rexrode and Kuykendall accepted the offers of reinstatement, but quit almost immediately thereafter.[19]

The administrative law judge (ALJ)[20] found that Rexrode was engaged in protected concerted activity. Therefore, Rexrode's dismissal by Waco was deemed an unfair labor practice under section 8(a)(1) of the NLRA.[21]

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raises. The employees rejected this offer, however, and again pressed for an immediate answer. *Id.*

[14] *Id.* at 599.

[15] *Id.* Unless limited either by contractual agreement or by the NLRA, an employer has the right to discharge any employee at will. Mushroom Transp. Co. v. NLRB. 330 F.2d 683, 685 (3d Cir. 1964). *See also* Lazano Enterprises v. NLRB, 357 F.2d 500, 503 (9th Cir. 1966).

[16] 567 F.2d at 599, 600 n.5.

[17] *Id.* at 599. Kuykendall's questions about his raise precipitated his discharge. The foreman told Kuykendall that the supervisor was still upset about the incidents of the previous day, and advised Kuykendall to "keep cool for a couple of weeks." The supervisor later called Kuykendall to the office and fired him. *Id.* at 599, 601 n.7.

[18] *Id.* at 599.

[19] *Id.*

[20] The NLRB can either assign the initial hearing of an unfair labor practice charge to the entire Board or to an administrative law judge (ALJ). *See* NLRA § 10(b), 29 U.S.C. § 160(b) (1976). The ALJ hears testimony, makes findings of fact, and submits recommended orders to the NLRB. NLRA § 10(c), 29 U.S.C. § 160(c) (1976). However, after receiving the ALJ's report and recommendations, the NLRB is free to affirm the ALJ's report or take further testimony and make its own findings. *Id. See also* Cheney Cal. Lumber Co. v. NLRB, 319 F.2d 375, 377 (9th Cir. 1963); NLRB v. Stocker Mfg. Co., 185 F.2d 451, 452-53 (3d Cir. 1950).

[21] Waco Insulation, Inc., 224 N.L.R.B. 1486, 1490 (1976). A violation of section 7 of the NLRA occurs if an employer interferes with employees' section 7 organizational and bargaining rights. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976). Cases involving employer discouragement of employees' section 7 rights to participate in union activity are analyzed under section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976). *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); *see generally* Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965). Because the right to belong to a union is protected under section 7 of the Act, any employer action taken in discouragement of the employee's right to belong to a union is a violation of section 8(a)(1). NLRB v. Burnup & Sims. Inc., 379 U.S. 21, 23 (1964). Therefore, both sections 8(a)(1) and 8(a)(3) are violated when union membership is a factor in an employee's discharge. However, courts draw a distinction between the two sections and hold that cases involving discrimination due to union activity must be examined under section 8(a)(3) standards. *See* NLRB v. Great Dane Trailers, Inc., 388 U.S. at 33; Cox, *The Right to Engage in Concerted Activities*, 26 IND. L. J. 319, 320 (1951); *Fourth Circuit Review*, 35 WASH. & LEE L. REV. 433, 612 n.32 (1977).

Although Waco alleged that just cause existed for the discharge[22] because Rexrode was unreasonable in requesting a raise so soon after being hired,[23] the ALJ held that Rexrode's participation in the group confrontations was protected despite the unreasonableness of the pay raise request.[24] Waco also produced evidence that the two employees failed to utilize a grievance procedure contained in Waco's collective bargaining agreement.[25] Despite the applicability of the collective bargaining agreement, the ALJ found that the supervisor improperly failed to instruct the employees to utilize the grievance procedure and that the employees were unaware of the existence of the procedure.[26] The ALJ's holding conformed to the rule that failure to use an existing grievance procedure renders employee actions unprotected[27] only if employees are unaware and uninformed of the existence of grievance procedures.[28]

With respect to Kuykendall, the ALJ concluded that Kuykendall's earlier, repeated requests for pay raises[29] and his purportedly inadequate record of work performance[30] gave Waco just cause for discharge.[31] Kuykendall, therefore, did not engage in protected activity and was not entitled to reinstatement or back pay.[32] The ALJ then ordered Waco to grant back

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[22] The NLRB may not issue a reinstatement order for a discharged employee if the employee was discharged for cause. NLRA § 10(c), 29 U.S.C. § 160(c) (1976). The Board defines cause as misconduct which is so severe as to render the employee unfit for further service. Bettcher Mfg. Corp., 76 N.L.R.B. 526, 527 (1948). Misconduct is defined by the courts as activity which is unlawful, violent, in breach of contract or indefensible. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 15-17 (1962); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 259 (1939); Allen v. NLRB, 561 F.2d 976, 979 (D.C. Cir. 1977); Johns-Manville Prods. Corp. v. NLRB, 557 F.2d 1136, 1133 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3069 (1978).

[23] Waco Insulation, Inc., 223 N.L.R.B. 1486, 1490 (1976).

[24] *Id.*

[25] 223 N.L.R.B. at 1490.

[26] *Id.*

[27] If an available grievance procedure is not used by employees, activity which otherwise would be protected under § 7 of the Act can constitute just cause for dismissal by the employer. *See* United Merchants and Mfrs., Inc. v. NLRB, 554 F.2d 1276 (4th Cir. 1977); NLRB v. Sunset Minerals, Inc., 211 F.2d 224, 226 (9th Cir. 1954); NLRB v. American Mfg. Co., 203 F.2d 212, 216-17 (5th Cir. 1950); Farmers Union Co-Op Marketing Ass'n, 145 N.L.R.B. 1, 2-3 (1963).

[28] 223 N.L.R.B. at 1490; *see* Ernst Const. Div. of Ernst Steel Corp., 212 N.L.R.B. 78, 80 (1974); Singer Co., 198 N..R.B. 870, 873 (1972). *Cf.* NLRB v. Serv-Air, Inc., 401 F.2d 363, 365 (10th Cir. 1968) (No formal grievance procedure established; use of informal procedure to discuss grievance protected); NLRB v. Kennametal 182 F.2d 817, 818 (3d Cir. 1950) (in the absence of established grievance procedure, spontaneous work stoppage to present grievance protected).

[29] On at least three occasions before the group activity, *see* text accompanying notes 8-17 *supra*, Kuykendall had made individual requests for a raise. 223 N.L.R.B. at 1490.

[30] *Id.* Although Kuykendall was accused of rigging a large fan improperly, the Board discounted this basis for the discharge and noted that the blame could have been laid upon anyone in Kuykendall's crew. *Id.* at 1486.

[31] *See* text accompanying note 22 *supra*.

[32] 223 N.L.R.B. at 1490. The ALJ also cited Kuykendall's absence from the lunchroom meeting, *see* note 12 *supra*, and his status as a rigger in a group of welders, *see* text accompanying notes 7-8 *supra*, as factors removing him from the protection of NLRA § 7. 223 N.L.R.B.

pay to Rexrode but did not order reinstatement.[33] The ALJ found that both Rexrode and Kuykendall were voluntarily offered reinstatement by Waco and were assured that they would be treated fairly on their return.[34] Since both men quit work shortly after being voluntarily reinstated, the ALJ determined that Rexrode forfeited his right to reinstatement.[35]

On review of the ALJ decision, the NLRB agreed with the ALJ that Rexrode was engaged in protected activity.[36] The NLRB also found that Kuykendall's actions were protected because he voluntarily joined with the group led by Rexrode and had he been notified, he would have been present at the lunchroom meeting with the supervisor.[37] The NLRB ordered back pay for Kuykendall and required reinstatement of both employees[38] on the ground that Waco's offer of reinstatement was not unconditional.[39]

On petition for enforcement of the NLRB order, the Fourth Circuit noted that substantial evidence[40] supported the NLRB findings. The Fourth Circuit upheld the Board's finding that Rexrode and Kuykendall were engaged in protected concerted activity and therefore were illegally discharged under section 8(a)(1).[41] The court disagreed, however, with the Board's order of reinstatement for both employees. The Fourth Circuit held that when an illegally discharged employee accepts an unconditional

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at 1491. Kuykendall's status as a rigger seemed to indicate to the ALJ that had the welders secured a raise, Kuykendall probably would not have been so favored. *Id.*

[33] *Id.* at 1491.

[34] *Id.* at 1490. The ALJ noted that the president of Waco not only sent telegrams assuring that Rexrode and Kuykendall would be treated fairly upon their return to work, but also held a personal meeting with the two dischargees where he repeated his assurances. *Id.*

[35] *Id.*; see text accompanying notes 43-49 *infra*.

[36] *Id.* at 1486.

[37] *Id.* The NLRB also stated that the supervisor did not mention poor work performance as a reason for Kuykendall's discharge. The supervisor noted only Kuykendall's most recent request for a raise and his discussions with other employees concerning Rexrode as grounds for dismissal. The supervisor characterized Kuykendall's discussions as "trying to start trouble again." *Id.* 1486.

[38] *Id.* 1487-88.

[39] *Id.* Before the ALJ, the president of Waco testified that the employer had sent telegrams to Rexrode and Keykendall offering them reinstatement. The NLRB noted that the president was not sure of the date or the contents of the telegrams. The Board also believed that the issue of whether the offers were conditional should be left to the compliance stage of the proceeding, in order to gather more evidence concerning Waco's reinstatement offers. *Id.*; *see* text accompanying notes 43-57 *infra*.

[40] The substantial evidence test is employed by the courts on review of NLRB findings. NLRA § 10(f), 29 U.S.C. § 160(f) (1976); *see* Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-91 (1951). If substantial evidence supports a finding of fact by the NLRB, the finding is conclusive "even though the court would justifiably have made a different choice." *Id.* at 488; *see* Owens-Corning Fiberglas Corp. v. NLRB, 407 F.2d 1357, 1360 (4th Cir. 1969). If, however, substantial evidence does not support a finding of fact upon which an NLRB remedial order is based, the reviewing court may then enter a decree modifying or setting aside in whole or in part the NLRB order. NLRA § 10(e), 29 U.S.C. § 160(e) (1976). *See also* Universal Camera Corp. v. NLRB, 340 U.S. at 488; NLRB v. United Brass Works, Inc., 287 F.2d 689, 691-92 (4th Cir. 1961).

[41] 567 F.2d at 600, 601.

offer of reemployment and then voluntarily quits, the employee loses his claim for reinstatement against the discharging employer.[42]

The NLRB had argued that the conditional nature of the reinstatement offers should be left to the compliance stage[43] rather than the enforcement stage of the proceedings,[44] on the grounds that insufficient evidence existed in the record to find that Waco made unconditional offers of reinstatement.[45] The court disagreed, however, with the NLRB and found substantial evidence to affirm the ALJ's recommendation not to order reinstatement.[46] The court noted that prior to the ALJ hearing,[47] telegrams and the assurances of fair treatment by Waco's president were sufficient to establish the unconditional nature of the reinstatement offers.[48] On the basis of these indicia of unconditionality, the Fourth Circuit held that the employees' acceptance of the offers and their subsequent voluntary resignation operated as a forfeiture of the right to reinstatement through an NLRB order, and denied enforcement of the NLRB reinstatement order.[49]

The Fourth Circuit's modification of the NLRB reinstatement order reached an equitable result. However, the NLRB's argument that the conditional nature of the reinstatement offers be left to the compliance stage of the proceedings[50] is not without merit. Normally, an employer may claim compliance with the NLRB order subsequent to its issuance but before the NLRB petitions a circuit court for enforcement.[51] The employer

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[42] *Id.* at 603.

[43] Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1976) provides that after the NLRB issues a cease and desist order, with or without such affirmative relief as reinstatement or back pay, the Board may require the employer guilty of the unfair labor practice to file reports showing the extent to which the employer has complied with the order. This procedure insures that the employer follows the Board's order, and provides evidence to enable the Board to fashion suitable affirmative action remedies. Wallace Corp. v. NLRB, 159 F.2d 952, 954 (4th Cir. 1947). *See also* Home Beneficial Life Ins. Co. v. NLRB, 172 F.2d 62, 63 (4th Cir. 1949).

[44] 567 F.2d at 603. If the employer refuses to comply with the NLRB order, the NLRB may petition the circuit court to enforce the order through judicial decree. NLRA § 10(c), 29 U.S.C. § 160(c) (1976). *See also* note 4 *supra.*

[45] 567 F.2d at 602-603. *See also* text accompanying notes 50-57 *infra.*

[46] 567 F.2d at 602-03.

[47] Waco had already made offers of reinstatement to Rexrode and Kuykendall before the unfair labor practice charge came before the ALJ. *See* text accompanying note 34 *supra*

[48] 467 F.2d at 602 n.12.

[49] *Id.* at 603. Although the court did not order reinstatement, the court did uphold the portion of the Board's order requiring Waco to furnish back pay to the discharged employees for the period between the discharge and the offers of reinstatement. *Id.*

[50] *See* text accompanying note 43 *supra.*

[51] NLRB v. Mexia Textile Mills, 339 U.S. 563, 565 (1950); Wallace Corp. v. NLRB, 159 F.2d 952, 954 (4th Cir. 1947). In *Mexia,* the employer asserted compliance with the ALJ's recommended order to bargain in good faith with the union before the NLRB ordered the employer to commence good faith bargaining. NLRB v. Mexia Textile Mills, 339 U.S. at 565. After the NLRB order was issued, the employer claimed previous independent compliance, which rendered the order moot. *Id.* at 569. The Court held, however, that the NLRB was entitled to have the order enforced by a circuit court. *Id.* at 567. The Court reasoned that it had no way of knowing whether the employer had complied with the order. The Court would not permit allegations of compliance to release the employer from the obligation of correcting the effect of an unfair labor practice. *Id.* The issue of compliance should, therefore, be left to

is thereby using compliance to prevent the NLRB from obtaining a court decree which carries the possibility of court imposed sanctions.[52] However, the fact that the employer alleges prior compliance with the order does not prevent the NLRB from correcting the effect of the unfair labor practice.[53] The Board is entitled to correct an unfair labor practice through court enforcement of a reinstatement or back pay order even though the employer claims such affirmative action has already been taken.[54] Furthermore, the NLRB can insure that the employer follows its order by requiring compliance reports.[55] The compliance report provides evidence of the extent of an employer's good faith effort to correct the unfair labor practice.[56] If the employer acts in bad faith, the NLRB can have the employer cited for contempt by the court which enforced the order.[57]

NLRB discretion to order affirmative relief when the employer claims prior compliance with the remedy is not unlimited.[58] Where the NLRB seeks court enforcement of a remedy, the record must contain substantial evidence supporting the remedy.[59] In *Waco*, the Fourth Circuit concluded that no substantial evidence existed to justify the reinstatement order.[60] On the contrary, the court found substantial evidence indicating that Waco in fact had made unconditional offers of reinstatement.[61] Unlike the situation in which the employer claims compliance after the issuance of an order, Waco alleged compliance before any order was issued.[62] Therefore, the ALJ correctly admitted evidence on the conditional nature of the reinstatement offers at the ALJ hearing and did not wait until the compliance stage of the proceedings.[63] Substantial evidence thus existed in the

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the compliance stage of the proceeding when the NLRB can gather evidence of the employer's allegations. *See* Solo Cup Co. v. NLRB, 332 F.2d 447, 449 (4th Cir. 1964); Wallace Corp. v. NLRB, 159 F.2d 952, 954 (4th Cir. 1947).

[52] *See* NLRB v. Mexia Textile Mills, 339 U.S. 563, 569 (1950).

[53] *Id.* at 567.

[54] *Id. See also* NLRB v. Great A & P Tea Co., 407 F.2d 387 (5th Cir. 1969); NLRB v. Weber, 382 F.2d 387 (3d Cir. 1967); NLRB v. Rippee, 339 F.2d 315 (9th Cir. 1964).

[55] *See* text accompanying note 43 *supra.*

[56] *Id.*

[57] *See* NLRB v. Little Rock Downtowner Inc., 414 F.2d 1084 (8th Cir. 1969).

[58] Affirmative relief such as reinstatement, with or without back pay, is not always warranted where the policies of the NLRA would not be served. *See* text accompanying note 2 *supra. See also* Iowa Beef Packers, Inc. v. NLRB, 331 F.2d 176, 185 (8th Cir. 1964) (false testimony given by employee regarding circumstances of discharge cannot be used to support NLRB order to reinstate employee to his former job). Also, the NLRB's discretion in ordering a remedy is circumscribed by the requirement that the remedy be appropriate and adapted to the situation calling for redress. NLRB v. Kiekhaefer Corp., 292 F.2d 130, 137 (7th Cir. 1961). *See also* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964); Bagel Bakers Council of Greater N.Y. v. NLRB, 555 F.2d 304, 305 (2d Cir. 1977).

[59] *See* text accompanying note 40 *supra.*

[60] 567 F.2d at 603.

[61] *Id.* at 602-03; *see* text accompanying notes 43-49 *supra.*

[62] 567 F.2d at 602-03; *see* text accompanying notes 50-57 *supra.*

[63] 567 F.2d at 602. Because Waco's offers occurred before the ALJ hearing, the ALJ was able to take evidence of the conditional nature of the offers and base a recommended order on the evidence gathered. *See* text accompanying notes 33-35 & 51-57 *supra.*

record to show that Waco voluntarily had consented to the NLRB order prior to its issuance. Since the evidence was already in the record, no reason existed to require further compliance or to gather new evidence of Waco's good faith offers of reinstatement.[64] Therefore, the Fourth Circuit was correct in concluding that the discharge of Rexrode and Kuykendall violated section 8(a)(1), and that an illegally discharged employee loses his claim for reinstatement when he voluntarily quits after accepting an unconditional offer of reemployment.[65]

THOMAS H. JUSTICE, III

B. Willful and Repeated Safety Violations Under OSHA

In *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*[1] the Fourth Circuit departed from other circuits in its interpretation of penalty provisions in the Occupational Safety and Health Act[2] (OSHA) and in its view of what constitutes an appealable order of the Occupational Safety and Health Review Commission[3] (Review Commission). The Fourth Circuit set a procedural precedent by assuming jurisdiction from a deadlocked Review Commission,[4] holding that the congressional requirement of a two-vote majority for official action[5] did not bar further appeal of a Commission decision.[6] The Fourth Circuit also construed an OSHA provision covering willful and repeated violations[7] as

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[64] *See* text accompanying notes 46-57 *supra.*

[65] *See also* Bon Hennings Logging Co. v. NLRB, 308 F.2d 548, 555 (9th Cir. 1962); NLRB v. L. Ronney & Sons Furniture Mfg. Co., 206 F.2d 730, 737-38 (9th Cir. 1953), *cert. denied,* 346 U.S. 937 (1954); NLRB v. Caroline Mills, Inc., 167 F.2d 212, 214 (5th Cir. 1948); NLRB v. Wilson Line, 122 F.2d 809, 812-13 (3d Cir. 1941).

[1] 582 F.2d 834 (4th Cir. 1978).

[2] 29 U.S.C. §§ 651-678 (1976).

[3] 582 F.2d at 837. *See* note 16 *infra.* The three-member Occupational Safety and Health Review Commission (Review Commission) is charged with interpreting and applying the provisions of the Occupational Safety and Health Act (OSHA), 29 U.S.C. § 661 (1976). Moran, *A Court in the Executive Branch of Government: The Strange Case of the Occupational Safety and Health Review Commission,* 20 WAYNE L. REV. 999, 1000 (1974) [hereinafter cited as Moran]. After an inspection by a representative of the Secretary of Labor an employer may appeal a citation to the Review Commission. 29 U.S.C. § 659 (c) (1976). The Review Commission appoints an administrative law judge to give a preliminary review to the citation, 29 U.S.C. § 661(i) (1976) (hearing examiner to be appointed to review citations); 5 C.F.R. § 930.203(a) (1978) (title of hearing examiner changed to administrative law judge). K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 10 (1976). The administrative law judge's determination is final unless a Commissioner chooses to bring the appeal before the full Commission. 29 U.S.C. § 661(i) (1976). After a Review Commission order, the employer may appeal his citation to a United States Court of Appeals. 29 U.S.C. § 660(a) (1976). *See also* note 21 *infra.*

[4] *See* text accompanying notes 11-20 *infra.*

[5] 29 U.S.C. § 661(e) (1976).

[6] 582 F.2d at 837 n.5.

[7] 29 U.S.C. § 666(a) (1976).

establishing two distinct violations.[8]

Hyman Construction Company contested a fine levied after an OSHA inspector found six minor safety violations at a Hyman construction site in Washington, D.C.[9] All but one of the six infractions had occurred within the previous year at other Hyman projects in Washington, and the inspector charged Hyman with repeated violations of OSHA.[10] An administrative law judge upheld the fine, and on appeal the three member Review Commission divided three ways over the proper definition of a repeated violation.[11]

The Commission's inability to reach a two vote majority presented the question of whether the Fourth Circuit had jurisdiction to review Hyman's fine.[12] OSHA permits appeal of final Commission orders,[13] but specifies that the Commission can take official action only on the affirmative vote of at least two members.[14] Since the Commission could not agree on a disposition of Hyman's appeal, their decision did not meet the statutory standard for official action.[15] The Fifth and Ninth Circuits have held that similar split decisions are not official action and thus not appealable as final orders of the Commission, basing their rulings on "the plain direction of the statute."[16] In *Hyman,* however, the Fourth Circuit decided that Congress could not have intended the majority vote provision in OSHA to bar appeal from a deadlocked Commission.[17] The Fourth Circuit noted

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[8] 582 F.2d at 839 & 841.

[9] *Id.* at 836. The six violations were placing materials within six feet of a floor opening, 29 C.F.R. § 1926.250(b)(1) (1978), failure to ground electrical equipment, 29 C.F.R. § 1926.401 (a)(1) (1978), having an unshielded light bulb, 29 C.F.R. § 1926.401 (j)(1) (1978), using a fixed ladder not complying with the American National Standards Institute's Safety Code for Fixed Ladders, 29 C.F.R. § 1926.450(a)(5) (1978), omission of a guard railing on a platform, 29 C.F.R. § 1926.500(d)(1) (1978), and using a hammerhead tow crane contrary to the manufacturer's recommendations, 29 C.F.R. § 1926.550(c)(5) (1978). *George Hyman Construction Co.,* [1977-1978] OCCUPATIONAL SAFETY AND HEALTH DECISIONS (CCH) ¶ 21,774 at 26,172 n.2 [hereinafter cited as *Commission Decision*].

[10] 582 F.2d at 839.

[11] *See* text accompanying notes 28-34 *infra.*

[12] 582 F.2d at 836.

[13] 29 U.S.C. § 660(a) (1976).

[14] 29 U.S.C. § 661(e) (1976).

[15] 582 F.2d at 836.

[16] Cox Bros. Inc. v. Secretary of Labor, 574 F.2d 465, 467 (9th Cir. 1978). In *Cox Bros.* the Ninth Circuit denied jurisdiction to hear a case in which the only two voting Commissioners split their votes. *Id.* at 466-67. The Fifth Circuit in Shaw Construction, Inc. v. OSHRC, 534 F.2d 1183 (1976), considered two citations, the first upheld by the Commission in a 2-0 vote, and the second causing the Commission once again to split evenly. *Id.* at 1185. The Fifth Circuit affirmed the Commission's decision on the first citation, but refused to review the second for lack of a two-vote majority as specified in 29 U.S.C. § 660(f) (1976). *Id.* at 1185-86. The Fifth and Ninth Circuits have been the only circuits to address the question of whether two affirmative votes are necessary for an appealable Commission order, and both concluded that without two votes a Commission order could not be reviewed. 574 F.2d 465, 467 (9th Cir. 1978).

[17] 582 F.2d at 837 n.5. The Fourth Circuit noted that the legislative history of OSHA indicated Congress's concern that citations be speedily reviewed. *Id. see* SENATE SUBCOMM. ON LABOR, COMM. ON LABOR & PUBLIC WELFARE, 92nd Cong. 1st Sess., LEGISLATIVE HISTORY OF

that refusing review would leave Hyman bound under unsettled law in a "jurisdictional limbo," responsible for but unable to contest the fine.[18] Rejecting this result, the Fourth Circuit drew an analogy between the Commission's three way division and a split decision by a court of appeals in which the lower court's ruling stands and is subject to further review.[19] Since the divided Commission left standing the opinion of the administrative law judge, the Fourth Circuit held the judge's order had become final and reviewable in federal circuit court.[20]

The Fifth and Ninth Circuits created a jurisdictional anomaly by construing OSHA to permit appeal only of definitive Commission action, and to preclude the appeal of disputed fines.[21] While tacitly circumscribing the official action provision in OSHA by holding that a two-vote majority is no longer a prerequisite for appeal,[22] the Fourth Circuit furthered the congressional goal of providing speedy review for citations.[23] The Fourth Circuit's concern for expedience accords with the prevailing judicial attitude toward review of agency action.[24] Courts recognize the impracticality of hampering agencies with appellate review of technical rule-making and administration.[25] The courts remain receptive, however, to appeals raising

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THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970 392, 463, 470, 991 (Comm. Print 1971).

[18] 582 F.2d at 837.

[19] *Id. at n.5; see* Neil v. Biggers, 409 U.S. 188, 192 (1972) (if judges divide evenly on appeal, prior decision stands although without precedential value); Durant v. Essex, 74 U.S. (7 Wall.) 107, 112 (1868) (if appellate court is divided, judgment below is affirmed since plaintiff fails to meet his obligation of moving court to nullify prior ruling).

[20] 582 F.2d at 837; *see* 29 U.S.C. § 660 (1976). *See also* note 21 *infra.*

[21] If two Commissioners vote to sustain or overturn a fine their decision is appealable. 29 U.S.C. § 660(a) (1976). If the Commission refuses to review the fine the administrative law judge's order becomes final and is subject to appeal. 29 U.S.C. § 661(i) (1976). Only in the case of a Commission deadlock does the question arise of whether their decision is official action and hence appealable, 582 F.2d at 837 n.4.

[22] While after *Hyman* the two-vote majority requirement no longer determines which Commission orders are reviewable, *see* text accompanying notes 12-20 *supra,* the two-vote majority provision in OSHA plausibly might be interpreted as still governing the Commission's promulgation of in-house procedural rules and whether a Commission decision may be "entered of record." 29 U.S.C. § 661(f) (1976). The Fourth Circuit did not indicate what function the official action provision in 29 U.S.C. § 661(e) (1976) now serves. 582 F.2d at 836-37 n.5.

[23] *See* note 17 *supra.*

[24] Although Congress may prescribe the terms for judicial review of administrative orders, Tacoma v. Taxpayers, 357 U.S. 320, 336 (1958), the Supreme Court has indicated that the presumption in favor of appellate review is so strong that a statutory curtailment of appeals must be purposeful and explicit. Barlow v. Collins, 397 U.S. 159, 166 (1970) (judicial review is the rule; nonreviewability is the exception); Chicago v. United States, 396 U.S. 162, 164 (1969) (the presumption in favor of review obtains unless there is "persuasive reason to believe" Congress meant to preclude appeal). *See generally* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 COLUM. L. REV. 1, 56 (1975) [hereinafter cited as Currie & Goodman]; Leedes, *Understanding Judicial Review of Federal Agency Action: Kafkaesque and Langdellian,* 12 U. RICH. L. REV. 269, 271 (1977) [hereinafter cited as Leedes]. Courts tend to approach the question of reviewing agency action in an ad hoc, practical fashion. *Cf.* Currie & Goodman, *supra* at 56.

[25] Appellate courts are not an appropriate forum for assessing the merits of technical regulations. Texas v. E.P.A., 499 F.2d 289, 321-22, (5th Cir. 1974) (Clark, J. concurring);

issues of legal interpretations.[26] Since the Review Commission is charged only with interpreting regulations promulgated and enforced by the Secretary of Labor,[27] there is little danger that speedy review of Commission decisions would disrupt agency functions. The Fourth Circuit drew an appropriate analogy between the Review Commission and an appellate court and properly asserted jurisdiction to resolve the issue that had divided the Commission.

The jurisdictional question arose because the Review Commission divided evenly over the definition of a repeated violation in section 666(a) of OSHA.[28] Section 666(a) provides substantial penalties for willful and repeated violations.[29] In *Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission*[30] the Third Circuit held that the terms willful and repeated in section 666(a) are virtually synonymous.[31] The Third Circuit ruled that section 666(a) is meant to apply to flagrant misconduct raising a presumption of bad faith.[32] Following the Third Circuit's analysis, Hyman argued that since two of its violations occurred only once before and all were minor, Hyman was not guilty of flagrant misconduct deserving citation as a repeated violation.[33] One Commissioner agreed with

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Nardiak v. C.A.B., 305 F.2d 588, 593 (5th Cir. 1962); *accord,* Currie & Goodman, *supra* note 24, at 41-50.

[26] A question of law arising out of agency adjudication is suitably addressed in a court of appeals. Hardin v. Kentucky Utilities Co., 390 U.S. 1, 14 (1968) (Harlan, J., dissenting); *accord,* Deutsche Lufthansa Aktiengesellschaft v. C.A.B., 479 F.2d 912, 916 (D.C. Cir 1973); Beryllium Corp. v. United States, 449 F.2d 362, 366 (Ct. Cl. 1971). *See also* Leedes, *supra* note 24, at 497.

[27] Moran, *supra* note 3, at 1008. Congress intended to separate the promulgation of safety regulations and adjudication under those regulations. *See* 29 U.S.C. § 651(b)(3) (1976). Moran, *supra* note 3, at 1004-05. Hence the Review Commission performs none of the normal regulatory functions of an administrative agency, instead viewing itself as a court of appeals for OSHA penalties. Wetmore & Parman Inc., [1971-1973] OCCUPATIONAL SAFETY AND HEALTH DECISIONS (CCH) ¶ 15,400 at 20,612; *accord,* Moran, *supra* note 3, at 1008. *But see* Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 455 (1977) (Review Commission held to be an administrative agency and not a court, consequently seventh amendment right to a jury trial is inapplicable).

[28] 582 F.2d at 836-37, 29 U.S.C. § 666(a) (1976); *see* note 34 *infra.*

[29] 29 U.S.C. § 666(a) (1976) ($10,000 fine). OSHA identifies four types of violations and fines. The penalty for serious violations is up to $1,000. 29 U.S.C. § 666(b) (1976). Less serious violations may also bring penalties of up to $1,000. *Id.* § 666(c). Failure to correct a violation after a citation allows imposition of a penalty of up to $1,000 for each day the violation continues. *Id.* § 666(d). *See* 582 F.2d 836 n.1. *See generally* B. FELLNER & D. SAVELSON, OCCUPATIONAL SAFETY AND HEALTH-LAW AND PRACTICE, 85-129 (1976) (review of penalties and their application). *See also* note 39 *infra.*

[30] 540 F.2d 157 (3d Cir. 1976).

[31] *Id.* at 162. The Third Circuit construed "repeatedly" in 29 U.S.C. § 666(a) as a means of inferring willful misconduct from constant noncompliance, and the court held that a single prior violation was not sufficient to raise the presumption of bad faith. *Id.*

[32] *Id.* at 161-62. The Third Circuit reasoned that the wide disparity in penalties between an ordinary violation and a willful or repeated violation, *see* note 29 *supra,* evinced a congressional intent to punish an employer who obdurately refuses to comply with safety regulations. 540 F.2d at 161.

[33] 582 F.2d at 839.

Hyman, a second voted to remand for further consideration of the facts, and the third voted to sustain the fine.[34]

The Fourth Circuit held that repeated and willful are not synonymous under section 666(a) and rejected a bad faith requirement for either violation.[35] Previously the Fourth Circuit had adopted the Secretary of Labor's view[36] that a willful violation need only be conscious or voluntary.[37] In *Hyman* the Fourth Circuit again endorsed the Secretary's interpretation of section 666(a) and held that repeated violations are distinguishable from willful violations.[38] While a willful violation entails intentional disregard for OSHA regulations, the Fourth Circuit held that a repeated violation may consist simply of two or more separate infractions.[39]

The Third Circuit in *Bethlehem Steel* had rejected the Secretary's "per se" test of repeated violations because such a mechanical approach could unfairly penalize employers for violations repeated by accident.[40] The Fourth Circuit countered this argument in *Hyman* by specifying that penalties for a repeated violation may not be imposed merely for violations repeated inadvertantly. Such penalties are appropriate only if an employer receives notice of the first violation and has a chance to prevent its recurrence elsewhere.[41] The Fourth Circuit would seem to allow sanctions for a repeated violation for negligence or an unreasonably ineffectual attempt to comply with OSHA regulations.

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[34] Commissioner Moran adopted the Third Circuit's construction that a repeated violation meant flouting the safety regulations and voted to reverse Hyman's fine for a repeated violation since there was no evidence of a grievous infraction. *Commission Decision, supra* note 9, at 26,171-72. Commissioner Cleary rejected the Third Circuit's view and voted to sustain the fine in accord with the Secretary of Labor's determination that a willful violation may entail "flouting," but a repeated violation is a separate and lesser offense that may follow a single prior transgression. *Id.* at 26,167-71. Chairman Barnako took a middle ground, noting that willful and repeated violations share characteristics but are nonetheless distinct. *Id.* at 26,163. Chairman Barnako decided that a repeated violation does entail some element of employer neglect although not rising to the level of willful neglect. He voted to remand the case to determine if the same safety director was responsible for abating hazards at all Hyman construction sites. *Id.* at 26,167; 582 F.2d at 838; *see* M. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW, 302 (1978) (discussion of the Review Commission's *Hyman* decision) [hereinafter cited as ROTHSTEIN].

[35] 582 F.2d at 839.

[36] *Id.* The Secretary of Labor's guidelines for OSHA inspectors are found in the FIELD OPERATIONS MANUAL, ch. VIII, § B(5)(a), (b) (1977) [hereinafter cited as FIELD MANUAL].

[37] 582 F.2d at 839. The Fourth Circuit decided in Intercounty Construction Co. v. OSHRC, 522 F.2d 777 (4th Cir. 1975), *cert. denied,* 423 U.S. 1072 (1976) that "willful" means with knowledge but not necessarily with malicious intent. *Id.* at 780.

[38] 582 F.2d at 839-40.

[39] *Id.* at 840. The distinction between a repeated violation under 29 U.S.C. § 666(a) (1976) and a failure to abate under 29 U.S.C. § 666(d) (1976) is that a repeated violation requires two separate incidents; failure to abate means simply omitting to correct the original infraction. Cummins Constr. Co. [1974-75] OCCUPATIONAL SAFETY AND HEALTH DECISIONS (CCH) ¶ 19,831 at 23,622 (1975); *see* ROTHSTEIN *supra* note 34 at 305.

[40] 540 F.2d at 160-61. Chairman Barnako in the Review Commission decision also recognized the danger that a per se approach to repeated violations may punish unfairly an employer for an ineffectual attempt to comply. *Commission Decision, supra* note 9, at 26,166.

[41] 582 F.2d at 841.

The Fourth Circuit's requirements of notice and an opportunity to prevent recurring violations makes the distinction between willful and repeated violations difficult to draw. To the extent that a repeated violation is preventable, the repetition of the infraction may be considered voluntary and intentional, indicating an employer's indifference to OSHA regulations.[42] The Fourth Circuit defined a willful violation as intentional disregard for OSHA's safety provisions.[43] Hence the distinction between a willful and a repeated violation is blurred, since both violations must be voluntary and neither requires bad faith. The difference ostensibly would be one of degree, depending on the severity of an employer's failure to respond to his first citation.[44] Consequently employers may be at some disadvantage in appealing citations for a willful violation to reduce the citation to a repeated violation, since the difference may rest on the facts of each case.[45] The Commission's factual assessments are rarely disturbed on review.[46] The Fourth Circuit avoided a rigid demarcation between repeated and willful violations to afford the Commission needed flexibility in imposing sanctions.[47]

The employers most affected by the *Hyman* decision will be general contractors such as Hyman Construction Company.[48] Unlike employers in

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[42] In the law of torts forseeable wrongdoing resulting from a failure to exercise proper care can be considered intentional wrongdoing. W. PROSSER, LAW OF TORTS, 30-31 (4th Ed. 1971); *see* Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1, 1 (1894) [hereinafter cited as Holmes]. Similarly, in criminal law a duty to act coupled with inaction in certain circumstances is termed an intentional crime. W. LAFAVE & A. SCOTT, CRIMINAL LAW, 182-90 (1972). Insofar as notice of an OSHA violation furnishes a duty to correct all similar infractions, failure to do so may be regarded as intentional disregard for OSHA's safety provisions.

[43] 582 F.2d at 840.

[44] *See* Bethlehem Steel Corp. v. OSHRC, 540 F.2d at 161 n.10. *See also* Holmes, *supra* note 42 at 1. "If the manifest probability of harm is very great . . . we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger we call it mischance." *Id.* Apparently the Fourth Circuit expects the Review Commission to develop its own standards for evaluating the seriousness of a recurring violation that will determine whether it is intentional (willful), negligent (repeated) or merely accidental. *See* 582 F.2d at 841 n.12.

[45] *See* text accompanying notes 42-44. The Fourth Circuit anticipated that "common sense and fairness" would guide the Commission in applying sanctions for repeated violations of OSHA. 582 F.2d at 841. *See also* notes 47, 56 *infra.*

[46] Dunlop v. Rockwell Int'l, 540 F.2d 1283, 1287 (6th Cir. 1976); 29 U.S.C. § 660(a) (1976) (Commission's findings of fact are conclusive if supported by any evidence in record); Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1264 (4th Cir. 1974) (if factual argument could go either way, circuit court should defer to Review Commission's discretion in enforcement). Although the Review Commission is bound to make an independent determination of the type of violation that occurred, Empire Art Products Co. [1974-1975] OCCUPATIONAL SAFETY & HEALTH DECISIONS (CCH) ¶ 18,820 (1974), in practice an inspector's on-the-spot impressions are given great weight. *Rothstein, supra* note 34, at 325, 352.

[47] 582 F.2d at 841. The Fourth Circuit chose to allow the Commission some leeway in view of the necessity of tempering legal theory with "enforcement experience." *Id.* at n.12; *see* text accompanying note 56 *infra. But cf.* Papercraft Corp. v. FTC 472 F.2d 927, 933 (7th Cir. 1973) (when administrative agency creates an "untried and blunt instrument," courts should carefully examine its justification).

[48] The impact of OSHA regulations on the construction industry was not the major concern of OSHA's draftsmen. Forkosch, *OSHA Problems in the Construction Industry,*

factories or workshops with predictable operations, a stable workforce and regular supervision, the general contractor may be responsible for dozens of construction sites employing different subcontractors at various stages of progress at each site.[49] While prevention of safety violations is relatively simple at fixed worksites, violation of the myriad and meticulously detailed OSHA regulations is difficult to avoid in the flux of construction sites.[50] Furthermore, a fixed-site employer may be cited for a repeated violation only if the infraction occurred previously at the same establishment.[51] In contrast the general contractor may be responsible for a repeated violation occurring at one worksite and recurring at another anywhere within the same state.[52] After *Hyman*, notice of an infraction at one construction site is theoretically notice of similar infractions under different subcontractors at all other sites in that state. Multiple-site employers must either bear the cost of continuing in-house inspection of all other worksites within the state after a citation at one site, or risk increased penalties for repeated violations.[53]

Since the construction industry is the most hazardous private industry, a heightened burden of compliance with OSHA regulations may be necessary.[54] The *Hyman* decision accords with prior Fourth Circuit policy of

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PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION NATIONAL INSTITUTE ON OCCUPATIONAL SAFETY AND HEALTH LAW (April 30, 1976, Washington, D.C.) 185 (1976).

[49] *Id.*

[50] *Id. See also* Note, *The Occupational Safety and Health Act of 1970 as Applied to the Construction Industry: The Multi-Employer Worksite Problem*, 35 WASH. & LEE L. REV. 173, 173-75 (1978). There are several thousand OSHA regulations, covering every type of activity relating to construction. Greenberg, *OSHA: More Headaches for the Building Industry*, 7 PUB. CONT. L.J. 106, 106 (1974) [hereinafter cited as *Building Industry*]. General contractors seem to share the opinion that OSHA safety regulations are so detailed and complex that the contractors cannot feasibly comply with all of them and usually take only common sense precautions without reference to specific standards. Interview with Frank Barger, General Superintendent, Bass Construction Co. (Lexington, Va., October 30, 1978) [hereinafter cited as Barger].

[51] FIELD MANUAL, *supra* note 36, ch. VIII § B(5)(e).

[52] *Id.* The state boundary provision survived constitutional challenge as a violation of due process in Desarrollos Metropolitanos v. OSHRC, 551 F.2d 874, 876 (1st Cir. 1977). Hyman also contested this provision, but the Fourth Circuit adopted the Desarrollos reasoning that holding a construction company liable for repeated violations at different sites within a state served administrative convenience and gave construction companies incentive to ensure full compliance at each new job site. 582 F.2d at 837-38. The Fourth Circuit noted also that the validity of the state boundary provision was not before it since all of the violations in *Hyman* occurred within five miles of each other in metropolitan Washington, D.C. *Id.* at 838.

[53] *Id.* at 836, 838. The difficulties resulting from proliferating safety requirements are discussed in *Building Industry*, *supra* note 50, at 108. The economic burdens of compliance are not as heavy in practice as they might be in theory, since OSHA inspectors usually treat widely separated construction sites under the same general contractor as individual establishments. Barger, *supra* note 50. Regulations that may be superfluous or counter-productive need not be enforced. *Building Industry*, *supra* note 50 at 110.

[54] The construction industry has the highest rate of job-related injuries of any major category of private employment. Note, *OSHA and Multiple-Employer Liability: A Discussion of Anning-Johnson Co. v. OHSRC*, 62 VA. L. REV. 788, 788 n.1 (1976), *citing* (1975) 3 EMPL. SAFETY & HEALTH GUIDE (CCH) ¶ 10,092 (reporting statistics from the Bureau of Labor Statistics).