

**Refusing Work To Avoid Serious Injury or Death:
An Empirical Study of Legal Protections Before and During COVID-19**

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I present data on court and administrative rulings involving employees who were disciplined or quit after refusing to work due to concerns about death or injury. My sample of 109 pre-pandemic cases from 1944-2020, and its comparison to 12 COVID-19 cases in 2020 and 2021, shows an emerging picture of new forms of work refusal. The cases before COVID-19 were concentrated in mining, construction, and transportation. In contrast, the COVID-19 cases span new occupations in social services, education, law, healthcare, protective services, food preparation, and building cleaning. Before COVID-19, employees lost most work refusal cases because laws such as the National Labor Relations Act (NLRA), Occupational Safety Health Act (OSH Act), and others narrowly protect them from employer retaliation. In the past year, the Emergency Paid Sick Leave Act (EPSLA) afforded workers broader protections, however, it expired at the end of 2020.

I conclude that work refusal laws are out-of-date with today's workplace because they apply mostly to work refusal in mines, construction, and trucking— male-dominated workplaces, with 10% of 30% of female workers. These industrial settings do not reflect changes in the economy that have expanded jobs in service and office sectors, or the growth of gig work that falls outside the protections of work refusal statutes.

I offer policy suggestions. (1) The Americans with Disabilities Act could be amended to legislate an employee right to wear a mask at work as a presumptive reasonable accommodation unless this creates an undue hardship for an employer. (2) A narrow OSHA work refusal rule could be broadened to include invisible exposures that are associated with on-going COVID-19, carcinogens, and other life threatening conditions. (3) Title VII could be amended in response to severe forms of sexual and racial harassment, particularly workplace assaults, so that a victim's refusal to continue to work under these conditions is protected from employer indifference, inaction, or retaliation for reporting. (4) "Gig workers," a growing segment of the workforce that is exempt from employment and labor laws, could be included in work refusal protections.

The idea for this research originated from a live interview on KCBS radio (San Francisco) on March 30, 2020, during an extremely anxious time when COVID-19 lockdowns were implemented across the country. Stan Bunker (KCBS Anchor), Nic Palmer (News Operations Manager), and Frni Beyer (Morning Editor) recognized the importance of work-refusal during the pandemic, and provided a catalyst for my research. My Research Assistants— Elizabeth Ayala, Hailey Buffone, and Alondra Rios— provided invaluable assistance under the stress and difficult circumstances of COVID-19. The LER Alumni Professorship funded this research. In addition, my project was supported by administrative assistance from Lynne Hovel, Wyatt Martin, and Amanda Boyd. Janet LeRoy offered guidance and encouragement for conducting this research during an especially perilous time. To all of you, I owe my gratitude.

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“One of the great needs in industry today is the protection of life and limb and health.... [W]e do not want to place in this law any provision which would require men to work under abnormally dangerous conditions.”¹

“We are talking about people’s lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day’s work with their bodies intact.”²

“They never listen.”³

I. INTRODUCTION

Does an employee have a right to refuse abnormally dangerous work conditions? My research question is framed by a larger principle: Self-preservation has been recognized for

¹ 92 Cong. Rec. B Sen. 5687 (May 25, 1946) (Sen. Chapman Revercomb, W.V.).

² *Also see* S.Rep.No.91-1282, at 2 (1970), reprinted in Legislative History of the Occupational Safety and Health Act of 1970 [hereafter, LEG. HIST. OSHA], 92d Cong., 1st Sess. (June 1971).

³ May-Ying Lam, *Voices From the Aisles: The People Who Have Kept America’s Grocery Stores Open*, WASH. POST (Jan. 5, 2021) (quoting Jacob Streich, 20 year old cashier at Kroger, expressing his futile efforts to have unmasked customers comply with the store’s masking policy).

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millennia.⁴ Rome⁵ and England⁶ gave legal effect to this idea. American courts transplanted this fundamental right.⁷ In this study, I examine self-preservation in the context of COVID-19—specifically, when employees refuse work due to a concern of contracting this infection. The

⁴ Authoritative commentators have noted the foundational aspects of self-preservation. For the soul, *see* ARISTOTLE, *NICOMACHEAN ETHICS* (Book IX, ch. 4, trans. W. D. Ross), available <http://classics.mit.edu/Aristotle/nicomachean.9.ix.html>, stating: “Now each of these is true of the good man’s relation to himself.... For he desires the same things with all his soul; and therefore he wishes for himself what is good and what seems so, and does it ... for his own sake (for he does it for the sake of the intellectual element in him, which is thought to be the man himself); and he wishes himself to live and be preserved.”

For living organisms, *see* CHARLES DARWIN, *THE ORIGIN OF SPECIES* (1st ed. 1859), at 210: “Natural selection will never produce in a being anything injurious to itself, for natural selection acts solely by and for the good of each. No organ will be formed, ... for the purpose of causing pain or for doing an injury to its possessor.”

For the establishment of government as a means to promote self-preservation, *see* Thomas Hobbes, *Leviathan* (1991, at 117), stating: “The final Cause, End, or Designe of men in the introduction of that restraint upon themselves (in which we see them live in Commonwealths) is the foresight of their own preservation, and of a more contented life thereby.”

For preservation of the United States, *see* Abraham Lincoln, *House Divided Speech* (Illinois Republican State Convention, Springfield, Illinois June 16, 1858), stating: “A house divided against itself cannot stand. I believe this government cannot endure, permanently half slave and half free.”

For natural selections that are enabling COVID-19 to mutate along a track of permanence, *see* Bette Korber et al., *Spike Mutation Pipeline Reveals the Emergence of a More Transmissible Form of SARS-CoV-2*, *BIORXIV* (May 29, 2020), at 12, available in <https://www.biorxiv.org/content/10.1101/2020.04.29.069054v2.full.pdf+html>, stating that “recombination provides an opportunity for the virus to bring together, into a single recombinant virus, multiple mutations that independently confer distinct fitness advantages but that were carried separately in the two parental strains.”

⁵ *See* Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the Codex Justinianus*, 16 *J. ON FIREARMS & PUB. POL’Y* 163 (2004), at 165, quoting *Codex Justinianus* 3.27.1):

We grant to all persons the unrestricted power to defend themselves ... so that it is proper to subject anyone, whether a private person or a soldier, who trespasses upon fields at night in search of plunder, or lays by busy roads plotting to assault passers-by, to immediate punishment in accordance with the authority granted to all.

⁶ Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 *HARV. L. REV.* 567 (1903) provides a comprehensive review of the English law on killing in self-defense. In short, “the right to kill in self-defense was slowly established, and is a doctrine of modern rather than of medieval law.” *Id.* at 567.

⁷ *E.g.*, *Williams v. Register of West Tenn.*, 3 *Tenn.* 214 (*Tenn.* 1812), at 218 (“A desire of self-preservation is the first law of all being.”); *Glasgow’s Lessee v. Smith*, 1 *Tenn.* 144, 1 *Overt.* 144 (1805), at 166 (“nations as well as individuals are tenacious of the rights of self-preservation”); and *Griswold v. Waddington*, 16 *Johns.* 438 (*N.Y.* 1829), at 509 (“the unqualified inhibition of all intercourse and negotiations with an enemy, by the law of war, unless sanctioned by government, is dictated by the great law of self-preservation, which is immutable in its nature”). *Also see* *Runyan v. State*, 57 *Ind.* 80 (*Ind.* 1877), at 83 (“This right of self-defence is commonly stated in the American cases thus: If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable.”).

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COVID-19 pandemic has put many workers in a vice: One jaw is necessity to work to subsist or to serve the public as a frontline worker; the other jaw is risk of serious illness or death.⁸

⁸ The evidence is reflected in the toll of COVID-19. The virus has claimed the lives of 3,405 health care workers in the U.S. See *Lost on the Frontline*, THE GUARDIAN & KHN (visited on February 12, 2021), at <https://www.theguardian.com/us-news/ng-interactive/2020/aug/11/lost-on-the-frontline-covid-19-coronavirus-us-healthcare-workers-deaths-database>. Also see PBS, *Teacher Deaths from COVID-19 Raise Alarms as New School Year Begins* (Sept. 9, 2020), reporting that 31 teachers were among 75 people employed by the New York City Department of Education who died due to COVID-19 in the early phase of the disease; and Lam, *supra* note 3, reporting that as of November 2020, the United Food and Commercial Workers said that at least 109 grocery workers in the union had died from COVID-19.

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Specifically, employers in hospitals,⁹ meatpacking plants,¹⁰ grocery stores,¹¹ public transit,¹² rail freight,¹³ restaurants and bars,¹⁴ correctional facilities,¹⁵ fulfillment centers,¹⁶ and schools¹⁷ have put their workers in this vice.

My study investigates rulings from courts and agencies involving employees who refused to work when they believed their work assignment posed a risk of death or serious injury. My research poses these questions:

⁹ New York State Nurses Ass'n v. Montefiore Hospital, 457 F.Supp.3d 430 (S.D.N.Y. 2020) (union sought an injunction to order hospital to provide N-95 masks, other personal protective equipment, and rapid-response COVID-19 tests as necessary work precautions).

¹⁰ Rural Community Workers Alliance v. Smithfield Foods, Inc., 459 F.Supp.3d 1228 (W.D. Mo. 2020) (seeking injunctive relief for a meatpacking plant that became a major COVID-19 hot spot due to failure to maintain safe practices such as social distancing, handwashing, masking, and use of sick-leave policy). *Also see* Fernandez v. Tyson Foods, Inc., 2020 WL 7867551 (N.D. Iowa 2020), decedent employee's estate sued meat processing company arising out of the employer's alleged procedures and omissions related to COVID-19 pandemic safety in workplace.

¹¹ New York State Nurses Ass'n, *supra* note 9. Ironically, the fact that nurses had a union along with a collective bargaining agreement meant that their labor dispute could only go to arbitration. *Id.* at 434.

¹² Warner v. United Natural Foods, Inc., 2021 WL 120844 (M.D. Pa. 2021) (grocery worker alleged that he was wrongfully terminated in retaliation for his complaint to the Department of Health and for missing work as he waited for the result of his COVID-19 test after he isolated at home with symptoms of the virus).

¹³ Union Pac. R. Co. v. B'hd of Maintenance of Way Employes, (D. Neb. 2021), referencing a petition filed by several rail unions to seek an emergency work safety order from the Federal Railroad Administration. *Id.* at *2. The FRA did not issue an order but simply issued a Safety Advisory that encouraged railroads to abide by CDC guidelines. *Id.*

¹⁴ Massey v. McDonald's Corp., Case No. CH040427, Cook County Circuit Court, available at <https://www.law360.com/articles/1275084/attachments/3> (complaint seeks an injunction in response to inadequate steps by McDonald's to contain the virus, such as providing adequate protective equipment, hand sanitizer, and safety training for employees, or enforcing safety protocols).

¹⁵ Arnold v. Corecivic of Tennessee, LLC, 2021 WL 63109 (S.D. Cal. 2021) (detention officer alleged he was forced to quit due to his employer's failure to take measures to provide a workplace that adequately dealt with health risks from COVID-19).

¹⁶ Palmer v. Amazon.com, Inc., 2020 WL 6388599 (E.D.N.Y. 2020) (warehouse employees alleged that Amazon failed to adhere to state labor regulations for safe working conditions by not providing adequate safeguards against the transmission of COVID-19).

¹⁷ PBS, *supra* note 8.

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1. What occupations are most frequently involved in these cases? What specific risks of fatality or serious harm arise in these cases? What consequences do workers face for disobeying a work order in these circumstances?

2. What statutes apply in these situations? How do federal and state statutes apply to specific industries and work settings? How do these laws differ in recognizing a worker's right to refuse a work order on grounds of personal safety?

3. What common law causes of action apply in these situations—for example, the tort of wrongful discharge?

4. How often do workers prevail in these cases? How do rulings in favor of workers vary by statutes and by common law actions? Are workers more successful under federal or state laws?

My inquiry begins in Part II with an overview of federal and state statutes, and common law doctrines, that employees have used to offer legal justifications to refuse work directives.¹⁸

In Part III.A, I explain my research methodology.¹⁹ Part III.B presents my data in a series of tables, and distills fact findings from the empirical results.²⁰

Part IV provides interpretations of my findings.²¹ I examine cases—their facts, and court or agency rulings—that provide specific contexts to understand the data.²²

¹⁸ *Supra* notes 33-99.

¹⁹ *Infra* notes 100-112.

²⁰ *Infra* note 113; and Tables 1, 2A, 2B, 3A, 3B, 4A, 4B, 5A, & 5B.

²¹ *Infra* notes 114-169.

²² *Supra infra* notes 121-159; 163-169.

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Part V presents my conclusions.²³ Federal and state work refusal laws are out-of-date with today's workplace. They provide some legal protection against employer retaliation for work refusal in mines, on construction sites, and in trucking.²⁴ However, prior to COVID-19 these laws have provided meager benefits to employees who have refused to work when risks involved chemicals, radiation, cedar dust, and other microscopic or invisible hazards.²⁵

Special legislation for work refusal during COVID-19 is leading to somewhat better outcomes for frontline workers who are facing unmitigated exposure to the virus, but the initial win rate is essentially 50-50 between employees and their employers.²⁶ In any event, this legislation has expired, except for an obscure tax credit to employers who offer paid sick leave to employees who meet COVID-19 eligibility standards.²⁷

I conclude in Part V with policy suggestions. First, the Americans with Disabilities Act could be amended to legislate an employee right to wear a mask at work unless the employer proves, under the statute, that this is an undue hardship.²⁸ Second, a OSHA rule that provides a narrow right of work refusal could be broadened to include not only hazards that pose immediate, physical safety threats,²⁹ but also to invisible exposures that are associated with cancer and other life threatening conditions. Third, to remedy the gender bias in work refusal laws that protect miners, construction workers, and truck drivers, I suggest that sexual and racial

²³ *Infra* notes 170- 205.

²⁴ *Infra* notes 170-172.

²⁵ *Infra* notes 194-197.

²⁶ *Infra* Table 5B.

²⁷ *Infra* note 76.

²⁸ *Infra* note 187.

²⁹ *Infra* note 57.

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assaults— covered by Title VII of the 1964 Civil Rights Act— be treated as protected forms of work refusal when employees quit to avoid these assaults.³⁰ Fourth, I point out that while gig work is growing, government surveys fails to include them in an annual census of workplace injuries because these workers are not formally designated as employees.³¹ I suggest that legislation be considered to extend current work refusal protections to gig workers.³²

Part VI is an Appendix of the cases listed by federal and state court opinions.

II. A TYPOLOGY OF WORK REFUSAL SAFETY LAWS

Employment-at-will, a common law doctrine, provides employers freedom to end an employment relationship.³³ This doctrine eroded with the advent of discrimination laws that specified unlawful grounds for terminating a person’s employment.³⁴ A right of work refusal is also contextualized outside of safety laws. Unemployment laws generally disqualify claimants who leave work voluntarily,³⁵ or engage in misconduct.³⁶ My research shows, however, that

³⁰ *Infra* note 200.

³¹ *Infra* note 185-186.

³² *Infra* notes 202-204.

³³ See H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT §134 (1877) (“With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof.... [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.”). For a common law example, see *Payne v. Western & Atlantic R. Co.*, 81 Tenn. 507 (Tenn. 1884), at 519-20: “Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.... They have the right to discharge their employes (sic). The law cannot compel them to employ workmen, nor to keep them employed.”

³⁴ For a succinct explanation, see *Pugh v. See’s Candies, Inc.*, 171 Cal.Rptr. 917 (1981), at 920: “In recent years, there have been established by statute a variety of limitations upon the employer’s power of dismissal. Employers are precluded, for example, from terminating employees for a variety of reasons, including union membership or activities, race, sex, age or political affiliation.”

³⁵ Burke, *infra* note 161.

³⁶ *Infra* notes 90-91.

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some administrative agencies³⁷ and courts³⁸ treat work refusal due to personal safety concerns as valid claims for unemployment. Also, courts have developed a workplace tort called wrongful discharge,³⁹ and have fashioned a narrow doctrine— called the public policy exception to employment at will— that affords legal protection to employees who refuse to violate a law,⁴⁰ or who report a violation of a law.⁴¹ I show how these cases arise in certain work refusal situations.⁴² For the discussion in Part II.A, Chart A explicates the main features of federal and state work refusal statutes.

³⁷ Small, Webster, McClean & Cook, *infra* note 161.

³⁸ Mississippi Employment Sec. Com'n, *infra* note 93.

³⁹ *Infra* note 95.

⁴⁰ Borden, *infra* note 159.

⁴¹ Dicomes, *infra* note 95.

⁴² *Infra* notes 154-159.

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Chart A: Typology of Work Refusal Laws		
	Statute	Common Law
Federal	<p><u>1</u> <i>General Regulation</i></p> <ul style="list-style-type: none"> • Occupational Safety and Health Act, 1977.12(b)(2) (private- and public-sector) • Labor Management Relations Act, Section 502 (private sector) • The Families First Coronavirus Response Act (“FFCRA”), P.L. 116–127, including the Emergency Paid Sick Leave Act (EPSLA) <p style="text-align: center;"><i>Industry Regulation</i></p> <ul style="list-style-type: none"> • Mine Safety and Health Act (MSHA) • Surface Transportation Assistance Act of 1982 (STAA) • Federal Railroad Safety Act (FRSA) • 46 U.S. Code § 2114(a)(1)(B) - Protection of Seamen Against Discrimination • Surface Transportation Assistance Act of 1982 	<p><u>3</u> <i>Judicial Review of Labor Arbitration Rulings</i></p> <p>Steelworkers Trilogy (United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); and United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593 (1960))</p>
State	<p><u>2</u> <i>General Regulation</i></p> <ul style="list-style-type: none"> • Michigan Occupational Safety and Health Act, Act 154 of 1974 (MIOSH Act), Section 65. • California Labor Code Section 6311. • Washington WAC 296-360-150(2)-(3) <p><i>Unemployment Claims for Work Refusal</i></p> <ul style="list-style-type: none"> • State Unemployment Insurance (disqualification standards) 	<p><u>4</u> <i>Unjust Dismissal/Wrongful Discharge</i></p> <p>Tort (Public Policy Exception to Employment at Will)</p>

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A. Federal Work Refusal Laws

1. Statutes

National Labor Relations Act (NLRA), as Amended by the Labor-Management Relations Act (LMRA): In 1947, Congress amended the National Labor Relations Act by passing the Labor-Management Relations Act, also called the Taft-Hartley Act (Chart A, Cell 1).⁴³ While the statute enacted limits on strikes,⁴⁴ it carved out an exception in Section 502 for an employee's refusal to work under dangerous conditions. The law states:

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.⁴⁵

In vague terms, Section 502 regulates work refusal by employees who are subjected to abnormally dangerous conditions. Nonetheless, the scope of this privilege is unclear because “abnormally dangerous conditions” and “quitting . . . in good faith” are ambiguous. Federal courts have done little to clarify these terms. In *Gateway Coal Co. v. United Mine Workers of America*, the Supreme Court stated in dictum that a Section 502 work stoppage is protected only

⁴³ National Labor Relations Act, as amended by the Labor Management Relations Act, June 23, 1947, ch. 120, 61 Stat. 156, codified at 29 U.S.C. §143.

⁴⁴ 29 U.S.C. § 158(d)(4) (prohibiting strikes unless notice of intent to strike occurs, and time limits are met).

⁴⁵ 29 U.S.C. § 143.

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when a union presents “ascertainable, objective evidence ... that an abnormally dangerous condition for work exists.”⁴⁶ Cases arise infrequently under Section 502.⁴⁷

Occupational Safety and Health (OSH) Act: Congress passed the Occupational Safety and Health Act of 1970 “to assure as far as possible every working man and woman in the Nation safe and healthful working conditions.”⁴⁸ The Act encourages employers and employees to reduce workplace hazards and provides procedures for reporting occupational safety and health concerns to OSHA, the Occupational Safety and Health Administration.⁴⁹ The purpose of the OSH Act is prevent and abate hazards in the workplace.⁵⁰ Thus, the law provides a broad scope of worker safety rights.⁵¹

The OSH Act prohibits employers from retaliating or otherwise discriminating against employees for exercising safety rights, including reporting or testifying in connection to their complaint.⁵² More specifically, the law provides to employees a sequence of procedures when

⁴⁶ *E.g.*, *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368 (1974). The Court was confronted with the issue of whether there is federal jurisdiction to enjoin a safety strike and compel arbitration of a union’s complaint about abnormally dangerous working conditions. Although the Court ruled that the dispute was arbitrable under the labor agreement, it stated in dictum its view that a Section 502 work stoppage is protected only when a union presents “ascertainable, objective evidence ... that an abnormally dangerous condition for work exists.” *Id.* at 386.

⁴⁷ *E.g.*, *Airborne Freight Corp. v. International Broth. of Teamsters Local 705*, 216 F.Supp.2d 712 (N.D. Ill. 2002) (union-represented employees engaged in a safety strike that last several hours over a supervisor who displayed racist attitudes and battered a worker, and the employer’s denial of water to workers during a hot day); and *Odyssey Capital Group, L.P., III and Philip D. Demas*, 337 N.L.R.B. 1110 (2002) (three apartment maintenance workers who refused work due to concerns about airborne asbestos engaged in concerted activity).

⁴⁸ 29 U.S.C. § 651(b).

⁴⁹ *Id.* at § 651(b)(1), (10).

⁵⁰ *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 368 (8th Cir.1994).

⁵¹ See 29 C.F.R. § 1977.12 (discussing conduct explicitly and implicitly protected under the OSH Act); 29 C.F.R. § 1904.36 (prohibiting retaliation for reporting workplace injury).

⁵² See 29 U.S.C.A § 660(c) (prohibiting discrimination against an employee for exercising rights under OSH Act).

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they confront imminently dangerous work conditions: a right to request an OSHA inspection,⁵³ to assist in this inspection,⁵⁴ to participate in a judicial proceeding,⁵⁵ and to bring an action to compel the Secretary of Labor to enforce the OSH Act.⁵⁶ In 1979, the Secretary of Labor promulgated a work refusal rule that added to this sequence of employee reporting of potentially deadly working conditions.⁵⁷ In the event that employee reporting was futile, this rule stated narrow conditions for an employee to refuse an assigned task because of a reasonable apprehension of death or serious injury.⁵⁸ The Supreme Court upheld the rule as a valid exercise of authority under the OSH Act.⁵⁹

⁵³ 29 U.S.C. § 657(f)(1).

⁵⁴ 29 U.S.C. §§ 657(a)(2), (e), and (f)(2).

⁵⁵ 29 U.S.C. § 660(c)(1).

⁵⁶ 29 U.S.C. § 662(d).

⁵⁷ 38 FR 2681, Jan. 29, 1973, as amended at 38 FR 4577, Feb. 16, 1973, codified in 29 CFR 1977.12 (1979).

⁵⁸ The rule is stated in 29 CFR 1977.12(b)(2):

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

⁵⁹ *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 22 (1980) (among the rights that the Act so protects is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available); and *Donovan v. Commercial Sewing, Inc.*, 562 F.Supp. 548, 553 (D.Conn.1982) (employee experienced headaches and nausea when exposed to a type of glue used by the employer for a project, and after asking about the glue's contents, left work early and was then wrongfully discharged).

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The Federal Mine Safety and Health Act of 1977: A massive explosion killed 78 West Virginia coal miners in 1968.⁶⁰ This led to passage of the Federal Coal Mine Health and Safety Act (CMHSA, or Coal Act).⁶¹ The CMHSA contained a non-discrimination provision for miners who refused work once they notified their supervisor of a dangerous working condition.⁶² In 1977, Congress amended the CMHSA and titled it the Federal Mine Safety and Health Amendments Act of 1977 (FMSHA, or Mine Act).⁶³

This law's main purpose is to protect coal miners.⁶⁴ The Mine Safety and Health Administration ("MSHA"), an agency within the Department of Labor, enforces the law.⁶⁵ The Mine Act affords protection to miners who refuse to work because of hazardous conditions.⁶⁶ Its legislative history reflected an understanding that the right to refuse unsafe work was "essential,"

⁶⁰ Senate Comm. on Labor and Public Welfare, Sen. Rep. No. 411, 91st Cong., 1st Sess. 6 (1969), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 INCLUDING BLACK LUNG AMENDMENTS OF 1972, at 132 (1975).

⁶¹ The Federal Coal Mine Health and Safety Act of 1969 (Public Law 91-173). *Also see* Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).

⁶² Section 110(b) of the 1969 Federal Coal Mine Health and Safety Act) included a nondiscrimination provision for miners when "notif[y]ing] the Secretary or his authorized representative of any alleged violation or danger." At least two appellate court opinions viewed this language as protecting miners from discharge if they notified their supervisor of an unsafe condition and refused to work. *See Phillips v. Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D.C. Cir. 1974), and *Munsey v. Morton*, 507 F. 2d 1202 (D.C. Cir. 1974).

⁶³ The Federal Mine Safety and Health Act of 1977 (Public Law 95-164).

⁶⁴ S. Rep. 95-181, S. Rep. No. 181, 95th Cong., 1st Sess. 1977, 1977 U.S.C.C.A.N. 3401, at 3417, providing that:

Under this legislation, operators would have the duty to furnish miners places of employment which are free from recognized hazards that are causing or likely to cause death or harm to miners (citation omitted). The purpose is to require the elimination of recognized hazards that are not specifically covered by a standard.

⁶⁵ 29 U.S. Code § 557(a) (Mine Safety and Health Administration), Pub. L. 95-164, title III, § 302(a), Nov. 9, 1977, 91 Stat. 1319.

⁶⁶ *Id.*

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and therefore the law provided “the right to refuse work under conditions that a miner believes in good faith to threaten his health and safety.”⁶⁷

The Surface Transportation Assistance Act: The STAA was enacted in 1982 as part of a comprehensive infrastructure funding law.⁶⁸ The law contained legal protections against retaliation and discrimination for employees in trucking and related occupations when the employee has a good faith belief that working conditions present “reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.”⁶⁹

⁶⁷ 123 Cong.Rec. 20043, 95th Cong., 1st Sess. (June 21, 1977) (Sen. Williams), LEG. HIST., at 1089. More generally, see S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 623-624 [(1978).]

MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause. It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act. It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?

MR. WILLIAMS. The committee intends that miners not be faced with the Hobson’s choice of deciding between their safety and health or their jobs. The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful work place for all miners.

MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

LEG. HIST. at 1088-1089, searchable in <https://ufdc.ufl.edu/AA00024707/00001/1097?search=refuse+to+work>. See *Miller v. FMSHRC*, 687 F.2d 194, 195 (7th Cir.1982) (“so clear a statement in the principal committee report is powerful evidence of legislative purpose”).

⁶⁸ Public Law 97-424, 96 Stat. 2097, “H.R. 6211 — 97th Congress: Surface Transportation Assistance Act of 1982.” A succinct explanation of this complex legislation appears in Government Accounting Office, *The Surface Transportation Assistance Act Of 1982: Comparative Economic Effects on The Trucking Industry* (April 6, 1984) at I (Digest), available in <https://www.gao.gov/assets/150/141354.pdf>.

⁶⁹ 49 U.S.C. §31105 (a)(1)(B)(ii). In *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Supreme Court observed that Section 405 of the STAA protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance. *Id.* at 255.

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Federal Railroad Safety Act: Congress enacted the FRSA “to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.”⁷⁰ The law prohibits railroads from discriminating against employees for engaging in safety-related activities.⁷¹ The law applies to employees who have a good faith belief that work presents conditions of imminent death or serious injury.⁷²

Families First Coronavirus Response Act: The FFCRA was enacted shortly after the COVID-19 pandemic emerged in the U.S. It contained the Emergency Paid Sick Leave Act (EPSLA), a law that has been invoked in situations where an employee delayed work or refused work due to personal health concerns related to the virus. The EPSLA provides paid leave for a variety of personal and family reasons, including provisions that pertain specifically to the health of the employee:

- (1) An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to any of the following reasons:
 - (i) The Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
 - (ii) The Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 - (iii) The Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a health care provider;.... or
 - (vi) The Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.⁷³

⁷⁰ 49 U.S.C. § 20101.

⁷¹ 49 U.S.C. § 20109(a).

⁷² A railroad carrier “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for ... refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee’s duties” if certain prerequisite conditions exist. 49 U.S.C. § 20109(b)(1)(B). Work refusal is only protected when an employee has a good faith belief that “the hazardous condition presents an imminent danger of death or serious injury,” and “the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal,” and the employee has notified the railroad of the hazard. 49 U.S.C. § 20109(b)(2).

⁷³ 29 C.F.R. § 826.20(a)(1).

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Under the EPSLA, a qualifying full-time employee is entitled to a maximum of eighty (80) hours of paid sick leave.⁷⁴ The emergency law also prohibited an employer from discharging, disciplining, or discriminating for an individual who took paid sick leave.⁷⁵ Notably, however, the law expired on December 31, 2020.⁷⁶

2. Common Law

When union-represented employees refuse to work, employers may see this as an unauthorized work stoppage.⁷⁷ Traditionally, collective bargaining agreements (CBAs) have included union assurances that they will not strike in exchange for access to arbitration.⁷⁸ As a result of Supreme Court precedent, a federal common law has evolved in interpreting labor agreements.⁷⁹ This body of precedent includes the *Steelworkers Trilogy*,⁸⁰ a series of rulings that announced principles of judicial deference to the arbitration process as well as the awards

⁷⁴ 29 CFR § 826.21(a)(1).

⁷⁵ 29 CFR § 826.150(a) (Prohibited Acts and Enforcement under the EPSLA).

⁷⁶ U.S. Dep't of Labor, *Families First Coronavirus Response Act: Questions and Answers*, at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#:~:text=You%20are%20considered%20to%20have,%2Dday%20eligibility%20period> (“The requirement that employers provide paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA) expired on Dec. 31, 2020.”).

⁷⁷ E.g., Gateway Coal, *supra* note 46, at 372 (coal company viewed miners’ refusal to work until air flow returned to normal as an unauthorized strike under the collective bargaining agreement).

⁷⁸ See ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 717 (13th ed. 2001) (reporting that arbitration provisions reflecting this bargained exchange appear in about ninety-six percent of all labor agreements). Reflecting on section 301 of the LMRA, Justice Douglas remarked in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 455 (1957): “Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.”

⁷⁹ See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, at 567, stating: “In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve.”

⁸⁰ *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

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rendered by labor arbitrators.⁸¹ As Chart A shows in Cell 3, some work refusal cases arise under this body of federal common law.

B. State Work Refusal Laws

1. Statutes

In Chart A, state safety statutes are summarized in Cell 2, while the primary common law element in work refusal cases is shown in Cell 4. The following discussion provides elaboration.

State Work Safety Statutes: Some states have work safety laws that are patterned after federal laws. These laws cover mine safety,⁸² public sector employee safety,⁸³ specific workplace hazards,⁸⁴ as well as more general supplements to federal OSHA regulations.⁸⁵ State laws protect certain forms of work refusal due to safety concerns.⁸⁶

⁸¹ See *Enter. Wheel*, 363 U.S. at 596, concluding: “The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.”

⁸² *E.g.*, Illinois (The Coal Mining Act, 225 ILCS 705); Kentucky (805 KAR, Mine Safety Regulations and Statutes); Pennsylvania (52 Pa. Cons. Stat. § 690.103(a) (2010)); Virginia (Coal Mine Safety Act § 45.1-161.7); and West Virginia (W.V., ch. 22, Miners’ Health, Safety, and Training).

⁸³ *E.g.*, New York (Labor Law § 27-a, the Public Employee Safety and Health Act (PESHA))

⁸⁴ *E.g.*, Massachusetts statute regulating the operation and maintenance of elevators in *Puffer’s Hardware, Inc. v. Donovan*, 742 F.2d 12 (1st Cir. 1984). *Also see* *City of New York asbestos handling regulations* (*Environmental Encapsulating Corp. v. New York*, 666 F Supp 535 (S.D.N.Y. 1987)); and Florida ordinance wind load standards (*Associated Builders & Contractors Florida East Coast Chapter v. Miami-Dade County, Florida*, 594 F.3d 1321 (11th Cir. 2010)).

⁸⁵ *E.g.*, Connecticut, C.G.S.A. § 31-368 (Division of Occupational Safety and Health); Michigan, M.C.L. § 408.1001 et seq. (Michigan Occupational Health and Safety Act); and Oregon, ORS 654.001 to 654.295, 654.412 to 654.423, 654.750 to 654.780 and 654.991 (Oregon Safe Employment Act).

⁸⁶ *E.g.*, *Mangini v. Penske Logistics LLC*, Civil No. 11-0270 (NLH/KMW), 09-28-2012, <https://casetext.com/case/mangini-v-penske-logistics> (work refusal under New Jersey Conscientious Employee Protection Act); and *Lee v. Ardagh Glass, Inc.*, 2015 WL 251858 (E.D. Cal. Jan. 20, 2015); *Hartnett v. New York City Tr. Auth.*, 657 N.E.2d 773 (1995); and *Davis v. Kitt Energy Corp.*, 365 S.E.2d 82 (W.V. 1987).

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Unemployment Statutes: State unemployment insurance programs are funded through coordination with federal policies.⁸⁷ Their purpose is “reducing the hardship of unemployment.”⁸⁸ Claims are generally allowed for “persons who become unemployed through no fault of their own.”⁸⁹ However, when unemployment results from a person’s misconduct, a state has grounds to deny a claim for benefit. Some states limit these grounds for disqualification to “wrongful intent or evil design,”⁹⁰ while others broaden misconduct standards to include employee dishonesty.⁹¹

These standards for voluntary quits and misconduct create ambiguity for certain work-refusal cases. Employers object to payment of claims on grounds that an employee quit work and was therefore ineligible.⁹² In other cases, employers object to payment of claims on grounds that

⁸⁷ Jenkins v. Bowling, 691 F.2d 1225, 1228 (7th Cir.1982) offers a succinct summary of the federal-state relationship in unemployment insurance:

Though administered at the state level in accordance with criteria for eligibility largely determined by each state, unemployment insurance is partly financed by the federal government, which naturally has attached some strings to its largesse. The two strings that are relevant to this case are sections 303(a)(1) and (3) of the Social Security Act, 42 U.S.C. § 503(a)(1), (3).

⁸⁸ Gibson v. Unemployment Ins. Appeals Bd., 509 P.2d 945 (Cal. 1973).

⁸⁹ Jones v. Dep’t of Emp. Sec., 657 N.E.2d 1141 (1995), at 1144 (Section 601(A) provides that an “individual shall be ineligible for benefits [because] he has left work voluntarily without good cause attributable to the employing unit,” quoting 820 ILCS 405/601(A) (West 1994).

⁹⁰ E.g., Jackson v. Bd. of Rev., 105 Ill. 2d 501 (1985), at 511-512:

Misconduct has been defined as conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer had the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer.

⁹¹ Misconduct can include dishonesty as grounds for dismissal [“[D]ishonesty is and should be grounds for dismissal and denial of benefits . . .”]

⁹² Long v. Traughber, 1991 WL 25917 (Tenn. App. 1991) (employee quit over concern of radiation exposure at a nuclear energy lab). The state’s Department of Employment Security Board of Review denied a terminated employee’s claim for unemployment benefits, agreeing with the employer that the claimant voluntarily quit his employment. The appeals court reversed, stating:

We cannot agree that the appellant’s refusal to work amounted to a wrongdoing which violated a duty owed to his employer, nor can we agree that the appellant’s refusal to work at the Oak Ridge

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the employee engaged in misconduct related to loss of their jobs.⁹³ A new rule by President Biden's administration, which sets standards for funding unemployment insurance programs, disallows employer objections to claims when an employee is fired for actions related to avoiding COVID-19.⁹⁴

2. Common Law

In general, states recognize employment-at-will which grants an employer the right to discharge an employee for any reason or no reason.⁹⁵

site constituted a voluntary termination of employment. An employee's obligation and duty is to work at a time and a place where he is called upon to work by his employer, however, there is a corollary duty on the part of the employer to provide working conditions which are not dangerous or detrimental to health.

Id. at *3.

⁹³ Mississippi Employment Sec. Com'n v. Phillips, 562 So.2d 115 (Miss. 1990), where Halliburton's Services discharged an employee who refused to work on a potential blow-out on an Exxon oil drilling rig in the Gulf of Mexico. The claimant held an objectively reasonable belief that this assignment endangered his life and safety. The Mississippi supreme court ruled that the claimant's "actions did not constitute misconduct" and ruled that he was entitled to unemployment benefits. *Id.* at 116.

⁹⁴ The U.S. Department of Labor is issuing guidance to state unemployment insurance agencies that expands the number of instances in which workers may be eligible for Pandemic Unemployment Assistance. See Dep't of Labor, UNEMPLOYMENT INSURANCE PROGRAM LETTER No. 16-20, Change 5 (Feb. 25, 2021), at 5, available in https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_5.pdf, stating:

[T]he Department hereby establishes additional COVID-19 related reasons under which an individual may self-certify to establish eligibility for PUA. These additional COVID-19 related reasons are described below.

i. Individuals who refuse to return to work that is unsafe or accept an offer of new work that is unsafe.

The DOL stated that a person could self-certify under this COVID-19 related reason:

The individual has been denied continued unemployment benefits because the individual refused to return to work or accept an offer of work at a worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes, but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidelines.

⁹⁵ *E.g.*, Gardner v. Loomis Armored Inc., 913 P.2d 377 (1996), at 379 ("Under the common law, at-will employees could quit or be fired for any reason."). In recent years, courts have created certain exceptions to the terminable-at-will doctrine. One of these exceptions says employees may not be discharged for reasons that contravene public policy. Almost every state has recognized this public policy exception. These public policy tort actions have generally been allowed in four different situations: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation

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However, most states provide a common law exception for the tort of wrongful dismissal.⁹⁶ This includes torts for wrongful discharge when an employee's termination violates a public policy.⁹⁷ This tort stems from an employer's common law duty to provide a safe workplace.⁹⁸ A separate tort exists for excising a statutory right to report a safety problem that imperils an employee's safety.⁹⁹

III. RESEARCH METHODS AND FINDINGS

Part III.A explains the methodology for this study. Part III.B. presents findings in four stages: (1) the sample and its primary characteristics, followed by fact findings; (2) total rulings won by employees and by employers in their first and second rounds of adjudication; (3) a subset of rulings, sorted by type of risk of serious injury or death, followed by fact findings, and (4) a subset of rulings, sorted by type of occupation, followed by fact findings rulings won by employees and by employers in their first and second rounds of adjudication. Throughout these empirical snapshots, I compare the 109 work refusal rulings prior to COVID-19, and the 12 cases involving work refusal stemming from employee concerns about COVID-19.

A. Research Methods and Sample

claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. *E.g.*, *Dicomes v. State*, 782 P.2d 1002 (1989), at 1007.

⁹⁶ 1 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* §§ 1.13-1.63 (3d ed. 1992 & Supp. 1995) (giving an exhaustive state-by-state survey of wrongful discharge actions).

⁹⁷ To state a claim for wrongful discharge in violation of public policy, a plaintiff must plausibly allege that: (1) a clear public policy existed, manifested in a state or federal constitution, statute or administrative regulation (clarity element); (2) dismissing employees under such circumstances would jeopardize the public policy (jeopardy element); (3) conduct related to the public policy motivated the dismissal (causation element); and (4) the employer lacked an overriding business justification (justification element). *Unger v. City of Mentor*, 387 Fed.Appx. 589, 593-94 (6th Cir. 2010).

⁹⁸ *See Bailey v. Central Vermont Ry.*, 319 U.S. 350 (1943), at 352, noting that at common law “the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain.”

⁹⁹ 460 U.S. 719 (1983).

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I created a database of federal and state rulings from courts and administrative agencies on work refusal disputes. I started my investigation in Westlaw's internet database by using various search combinations with "work," and "refus!" I also used leading cases on work refusal, *Gateway Coal*,¹⁰⁰ and *Whirlpool*.¹⁰¹ In 2021, I applied this method to search for COVID-19 work refusal cases.¹⁰² Once I found an appropriate case, I explored precedents cited by these decisions and keycited cases for additions to my list. Some cases contained more nuanced forms of employee resistance such as delay,¹⁰³ objection or complaint,¹⁰⁴ or a strike.¹⁰⁵ These cases were added if work was delayed and contention arose from the worker's complaint.

I developed a data coding form for each case. This form had a heading for the case citation, followed by variables such as private-sector or public-sector work, union represented or not, and individual or multiple plaintiffs. I assigned a unique number for these variables (e.g., 1 if the employee was in a union; 2 if the employee was not shown to be in a union; and 3 if the

¹⁰⁰ *Gateway Coal Co.*, *supra* note 46.

¹⁰¹ *Whirlpool Corp.*, *supra* note 59.

¹⁰² *See infra* notes 144-145.

¹⁰³ *E.g.*, *Sec'y of Labor, MSHA ex rel. Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (F.M.S.H.R.C.), 1981 WL 141638 (F.M.S.H.R.C.); *Leeco, Inc. v. Hays*, 965 F.2d 1081 (D.C. Cir. 1992); and *Mitchell v. TAC Technical Services, Inc.*, 734 N.E.2d 1198 (Mass. 2000).

¹⁰⁴

Collins v. Federal Mine Safety and Health Review Com'n, 42 F.3d 1388 (6th Cir. 1994); *Wellmore Coal Corp. v. Federal Mine Safety & Health Review Com'n*, 133 F.3d 920 (4th Cir. 1997); *Sisk v. Federal Mine Safety and Health Review Com'n*, 878 F.2d 1436 (6th Cir. 1989); *Acosta v. Jardon & Howard Technologies, Inc.* 2018 WL 5779506 (E.D.N.C. 2018); *Perez v. Eastern Awning Systems, Inc.*, 2018 WL 4926447 (D. Conn. 2018); *Perez v. Clearwater Paper Corp.*, 184 F.Supp.3d 831 (D. Id. 2016); *Perez v. Lear Corp. Eeds & Interiors LLC*, 2015 WL 2131282 (S.D. Ala. 2015); *Perez v. U.S. Postal Service*, 76 F.Supp.3d 1168 (W.D. 2015); *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372 (1985); and *Hentzel v. Singer Co.*, 188 Cal.Rptr. 159 (1982).

¹⁰⁵ *Boston & Maine Corp. v. Lenfest*, 799 F.2d 795 (1st Cir. 1986); and *Missouri-Kansas-Texas R.R. v. Brotherhood of R.R. Trainmen*, 342 F.2d 298, (5th Cir. 1965); *Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers, Int'l Union.*, 1969 BL 258 (N.D. Ind. 1969); *Philadelphia Marine Trade Ass'n v. Unemployment Compensation Bd. of Review*, 195 A.2d 138 (Pa. Sup. Ct. 1963); *Pan Am. World Airways, Inc. v. Air Line Pilots Ass'n, Intern.*, 206 N.Y.S.2d 98 (N.Y. 1960); and *Eastern Gas & Fuel Associates v. Unemployment Compensation Bd. of Review*, 63 A.2d 371 (Pa. 1949).

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employee was a contract worker in a workplace with union representation).

My data sheet continued with two sections for occupation and work related risk. To gather data on job types and occupational risks associated with work refusal disputes, I relied on two classifications used by the U.S. Department of Labor Bureau of Labor Statistics (BLS). First, I used the BLS classification for occupations in the agency's reporting of workplace fatalities.¹⁰⁶ BLS sorts occupations by (1) management; (2) business and financial operations; (3) computer and mathematical; (4) architectural and engineering; (5) life, physical, and social science; (6) community and social services; (7) education, training, and library; (8) legal; (9) arts and design; (10) entertainment, sports, and media; (11) healthcare practitioners, and technical; (12) healthcare support; (13) protective services; food preparation and serving; (14) building and grounds cleaning and maintenance; (15) personal care and service; (16) sales and related; (17) office and administrative support; (18) farming, fishing, and forestry; (19) construction and extraction; (20) installation, maintenance, and repair; (21) production; and (22) transportation and material moving.¹⁰⁷ I coded cases to match the job of the employee who engaged in work refusal to an occupational group in the BLS survey.

BLS also classifies risks associated with occupational injuries.¹⁰⁸ The main headings for this survey of risks included (1) violence; (2) transportation; (3) fire and explosion; (4) fall, slip, or trip; (5) exposure to harmful substances; (6) contact with objects or equipment; (7)

¹⁰⁶ U.S. Bureau of Labor Statistics, tbl A-5 (fatal occupational injuries by occupation and event or exposure, all United States, 2019), available in <https://www.bls.gov/iif/oshwc/foi/cftb0332.htm>.

¹⁰⁷ *Id.*

¹⁰⁸ U.S. Bureau of Labor Statistics, *Economic News Release*, Table 2. Fatal occupational injuries for selected events or exposures, 2015-19, at <https://www.bls.gov/news.release/foi.t02.htm> (identifying violence, transportation, fire and explosion, fall, slip or trip, explosion, exposure to harmful substances, and contact with objects or equipment as broad risk elements).

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overexertion or bodily reaction; (8) containers, furniture, and fixtures; (9) machinery; (10) parts and materials; (11) persons, plants, animals, and minerals; (12) structures and surfaces; (13) tools, instruments, and equipment; and (14) other.¹⁰⁹ While most cases had only one risk, some cases had two or more risk facts.¹¹⁰ I assigned a dominant risk for each case.¹¹¹

I coded results for first round rulings through fourth round rulings.¹¹² I treated an agency ruling the same as a court's ruling. A variable had scores for (1) employee wins all, (2) employee wins part, and (3) employer wins all. Separately, I coded rulings by the winners of procedural motions, and winners of merits rulings.

My coding extended to types of laws raised by employees in work refusal cases, including (1) LMRA, (2) OSH Act, (3) other federal safety laws, (4) state OSH acts, (5) other state safety laws, (6) collective bargaining agreements, (7) unemployment insurance, (8) tort (wrongful discharge); and (9) COVID-19 safety provisions in FFCRA (EPSLA).¹¹³

B. *Research Findings*

¹⁰⁹ *Id.*

¹¹⁰ *See* *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862 (9th Cir.1987) (employees were discharged after refusing to fill generators with gasoline under unsafe conditions).

¹¹¹ The two risks in *Paige* were containers, and fire and explosion. *Id.* I coded this case only for a risk of fire and explosion.

¹¹² For the small number of cases with more than four rounds of rulings, I counted the most recent ruling as the fourth, and worked back three more rulings. Thus, in a tiny fraction of cases, a first ruling was actually a ruling based on an appeal of an even earlier ruling. This tended to occur in unemployment cases.

¹¹³ Some COVID-19 cases involved employees who were terminated for not following employer safety guidelines—essentially, a form of work refusal but not for safety reasons. These were not included in my database. *E.g.*, *Wells v. Enterprise Leasing Co. of Norfolk/Richmond, LLC.*, 2020 WL 6779470 (E.D. Va. 2020) (employee fired for refusing to get tested for COVID-19 and to disclose medical information related to his family member who had tested positive for COVID-19).

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1. Risk, Occupation, and Year of First Ruling

Table 1
Work Refusal Cases (COVID-19 Cases in Parentheses)

<i>Occupational Groups</i>		<i>Source of Risk</i>	
Management	2	Violence or Injuries by Persons or Animals	0
Business & Financial	0	Transportation Incidents	19
Computer & Math	1	Fire or Explosion	11
Architecture & Engineering	1	Fall, Slip, or Trip	11
Life, Physical, & Social Science	0	Contact with Objects and Equipment	10
Community & Social Service	1 (1)	Overexertion and Bodily Reaction	26 (16)
Legal	1 (1)	Chemicals and Chemical Products	18
Education, Training, & Library	2 (1)	Containers, Furniture, and Fixtures	3
Arts, Design, Ent., Sports, Media	2	Machinery	2
Healthcare Practice & Technical	4	Parts and Materials	0
Healthcare Support	4 (2)	Persons, Plants, Animals, Minerals	2
Protective Service	2 (2)	Structures and Surfaces	2
Food Preparation & Serving	6 (2)	Tools, Instruments, and Equipment	6
Building & Grounds Clean/Main.	2 (1)	Other	9
Personal Care & Service	0	<i>Claim of Legal Right</i>	
Sales & Related	1	Labor-Management Relations Act (LMRA)	9
Office & Administrative Support	0	Occupational Safety and Health Act (OSH)	14
Farming, Fishing, & Forestry	3	Other Federal Safety Law	35 (1)
Construction and Extraction	30	State Safety Law	5
Install, Maintain, & Repair	12	Collective Bargaining Agreement (CBA)	4 (1)
Production	18	Unemployment Claim	24
Transportation/Material Moving	29 (2)	Tort (Public Policy Wrongful Discharge)	20 (2)
		FFCRA, EPSLA (COVID-19)	6 (6)
		ADA	2 (2)
		PDA	1
		<i>Employer Action</i>	
		Discharge	84 (6)
		Discipline (Less Than Discharge)	11
		Constructive Discharge	8
		Allow Quit	13 (3)
		Injunction	3 (1)
		Other	2
		No Accomm; Reopen; Operate	(3)
<i>Year of First Ruling</i>			
First Quartile (37 Years)	1944-1980		
Second Quartile (9 Years)	1981-1989		
Third Quartile (22 Years)	1990-2011		
Fourth Quartile (10 Years)	2012-2021		
<i>Work Refusal Actio</i>			
Refuse Work Order (1 Employee)	58 (1)		
Refuse Work Order (2 or More Emj	20		
Strike	6		
Delay or Stop Work (1 Employee)	10 (6)		
Delay or Stop Work (2 or More Emj	5		
Complain/Report/Object	12 (3)		
Quit	10 (2)		

Table 1 summarizes the sample of 121 cases. This includes 109 cases that began before COVID-19, and 12 cases that were filed after the onset of the pandemic in the U.S. The left-hand column of statistics combines the pre-COVID-19 and COVID-19 cases. The statistics in

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parentheses in the right-hand column break out the COVID-19 cases. This format allows an easy comparison of similarities and differences.

First round rulings from 1944-2021 were observed in federal and state courts, as well as federal and state administrative law agencies. Cases arose under a variety of statutes and torts, including the LMRA (9 cases), the OSH Act (14 cases), more industry specific federal safety laws (35 cases), state safety laws (5 cases), a collective bargaining agreement (3 cases), unemployment laws (24 cases), the public policy tort of wrongful discharge (18 cases), and the COVID-19 EPSLA for paid sick leave (6 cases).

Employees engaged in work refusal actions alone (58 cases) or with two or more employees (20 cases); or engaged in a strike (6 cases); or delayed work alone, (10 cases); or delayed work with two or more employees (5 cases); or complained, objected, or reported a safety concern (12 cases); or quit (5 cases). Employer reactions to work refusal included discharge (84 cases); discipline less than discharge (11 cases); constructive discharge (8 cases); allowing the employee to quit (13 cases); and seeking an injunction for an actual or imminent work stoppage (3 cases).

Based on this overview of Table 1, I report key findings in the table's categories. I begin by reporting findings for occupations in work refusal cases.

Finding 1.A (Overall): Work refusal cases were concentrated in industrial sector occupations that involved mechanization of work: (1) construction and extraction (30 cases); (2)

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transportation and moving material (29 cases); (3) production (18 cases); and (4) installation, repair, and maintenance (12 cases).¹¹⁴

Finding 1.B (COVID-19): Although the sample had only 12 cases, work refusal cases arose in seven different occupational groups. The pattern of cases shifted from industrial occupations to white-collar professional (community and social services; legal; and education, training, and library) and service jobs (healthcare support; protective services; food preparation and serving; and building cleaning).

Finding 2.A (Overall): Work refusal cases were concentrated in 1981-1989, and became less frequent until 2021.

Finding 2.B (COVID-19): The number of work refusal cases exploded in 2021 with 10 cases. In 1980, there were six work refusal cases, the next highest number by year.

Finding 3.A (Overall): The source of risk in work refusal cases was significantly concentrated in chemical exposure, and transportation work situations. A smaller number of cases involved fire or explosion, slips and falls, contact with equipment or objects, and overexertion or bodily reactions.

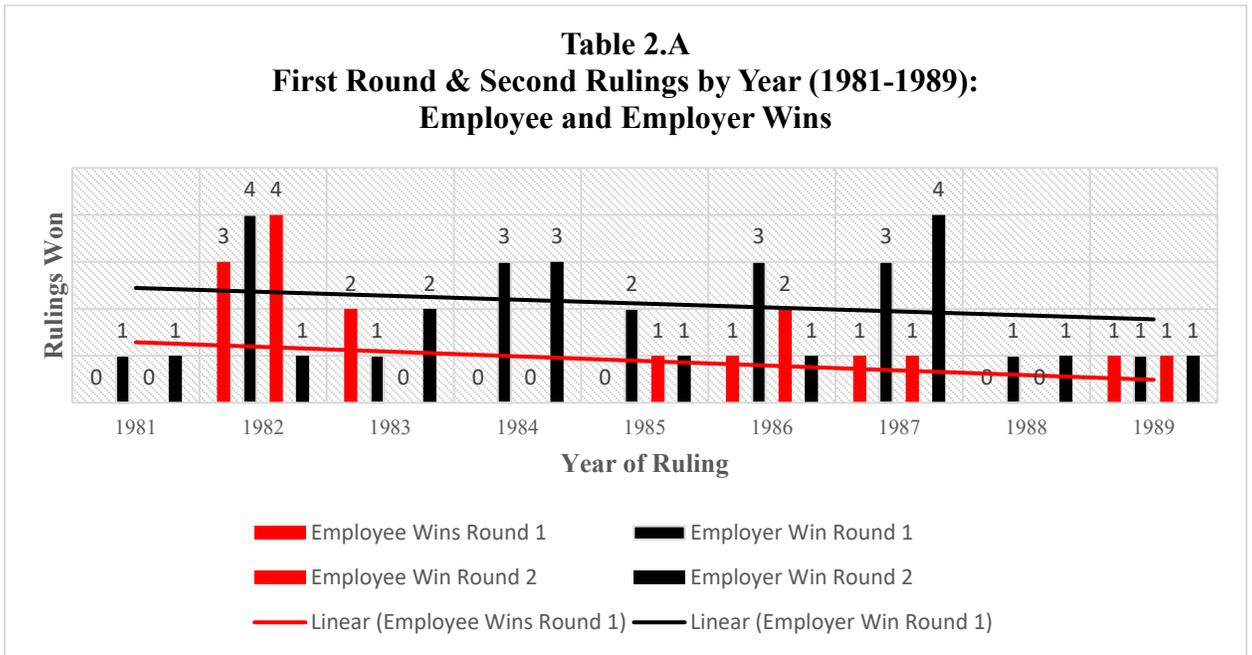
Finding 3.B (COVID-19): Since the onset of COVID-19 the risk of bodily reaction as a cause for a work refusal case has surged. While this development appears to be unique since the first case in 1944, bodily reaction cases for COVID-19 seem similar to chemicals and chemical products as a risk factor: both risk categories involve exposures to occupational diseases.

¹¹⁴ Occupations omitted in the table include those with three cases (healthcare and support; food preparation and serving; and farming, fishing, and forestry); two cases (management and protective services occupations); and one case (computer and mathematics; architecture and engineering; legal; education, training and library; arts, design, entertainment, sports, and media; healthcare practice and technical; and sales and related).

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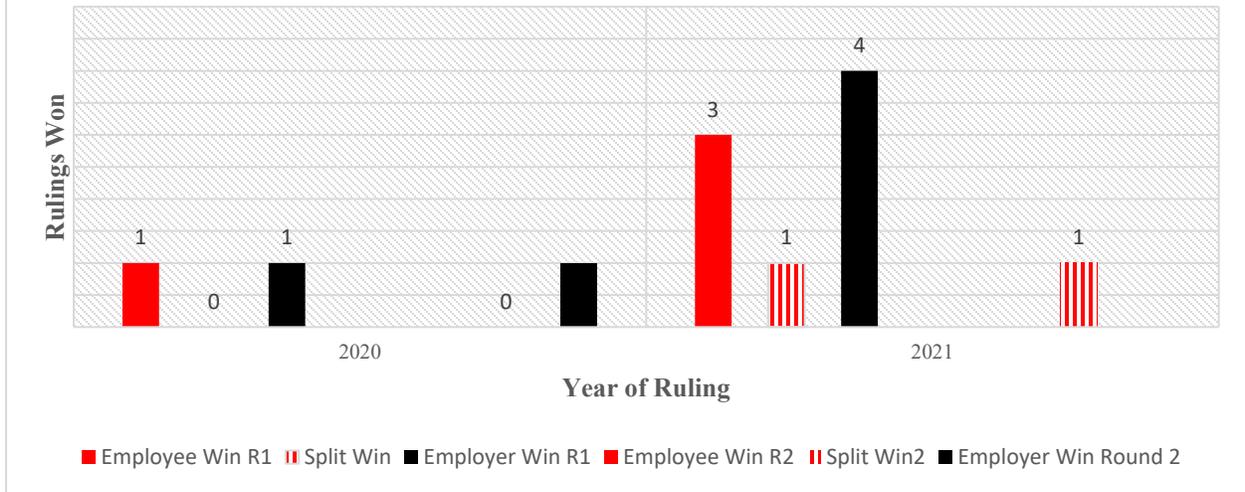
2. Winner of First Round and Second Round Rulings:1981-1989 and 2020-2021

Table 2.A and Table 2.B (*infra*) present court rulings in 1981-1989, and 11 cases in 2020-2021. The former group reflects the years comprising the most concentrated quartile of cases; the latter reflect the current period with its spike related to COVID-19 cases. Both times have higher concentrations of cases. The red bars in each cluster represents employee wins, while black bars show employer wins. Each year has a cluster of up to four bars (e.g., 1982). The first two bars show *first round* rulings per year, followed by two bars for *second round* rulings that year.



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Table 2.B
First Round & Second Rulings by Year (2020-2021):
Employee and Employer Wins



Finding 4 (1981-1989): Employees had only one year when they won more rulings than they lost. This occurred in second round rulings in 1982, when they won 4 rulings and employers won 1 ruling.

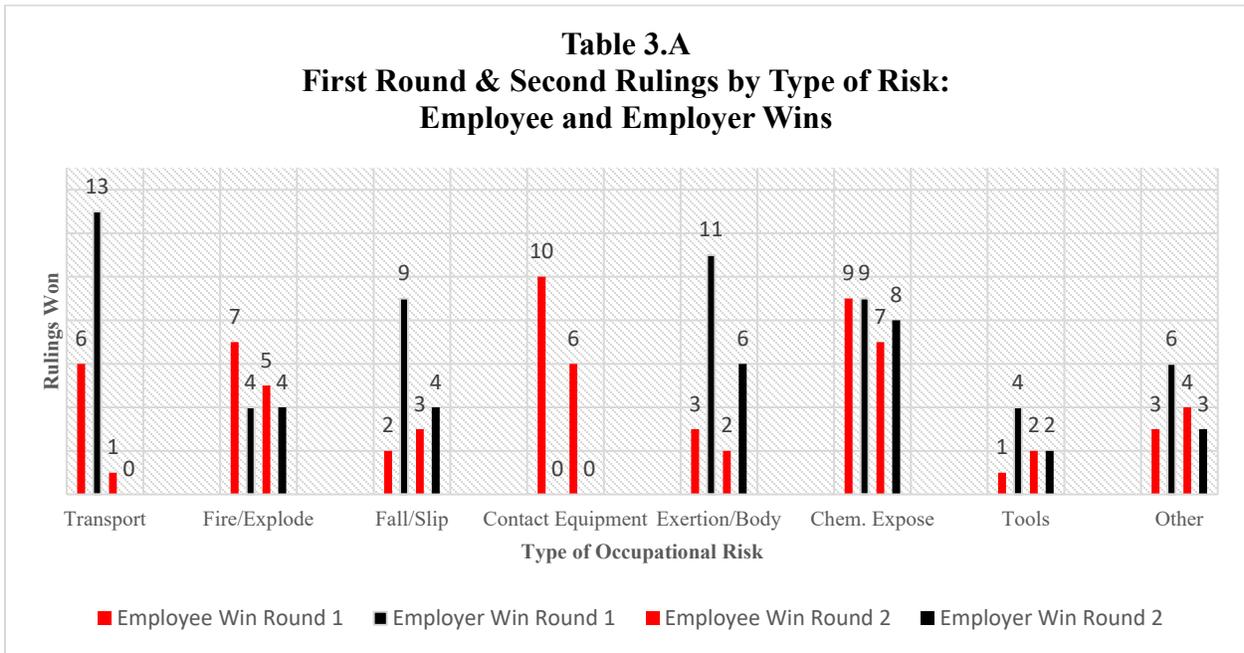
Finding 5 (1981-1989): Employer wins increased from 1983-1987, and then declined. Employees won only 5 first round rulings in this lengthy period, compared to 12 first round wins for employers. In second round rulings, employees won 4 rulings compared to 11 wins for employers. The two trendlines in Table 2 highlight the favorable pattern for employer wins relative to employee wins.

Finding 6 (2021-2021): Court rulings split evenly for employees and employers in this period. This trend, albeit with limited data, indicates more wins for employees compared to the 1980s. However, given COVID-19’s severity, the split in outcomes for employees and employers suggests that the paid sick leave law offered only modest protections for employees.

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3. Winner of First-Round and Second Round Rulings by Risk

Table 3.A (pre-COVID-19) and Table 3.B (during COVID-19) present court rulings, arranged in clusters, related to seven specific occupational risks, and a category for others. The first bar in each cluster represents employee wins for first round rulings (red bar). The second bar shows wins for employers (black bar). In Table 3.A, the third and fourth bars, respectively, show employee and employer wins in the second round. Table 3.B (below Table 3.A) reports only first round rulings due to negligible second ruling rulings for COVID-19 cases.



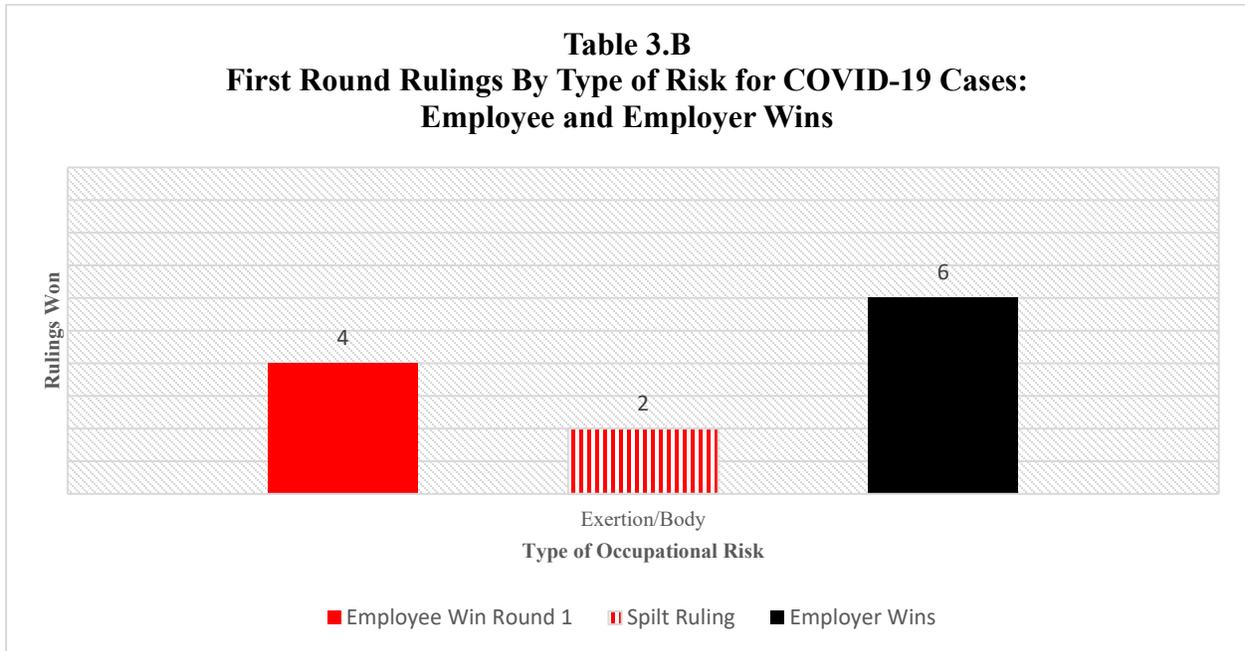
Finding 6 (Pre-COVID-19 Cases): Employers won most rulings when work refusal was connected to an occupational risk from transportation (13 wins to 6 wins for employers in first round rulings); overexertion or bodily reaction (11 wins to 3 wins for employers in first round rulings); and fall, slip, and trip risks (9 wins to 2 wins for employers in first round rulings).

Finding 7 (Pre-COVID-19 Cases): Only one occupational risk led to an even split of

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first court rulings for employee wins and employers win: chemical exposure (9 cases, apiece).

Finding 8 (Pre-COVID-19 Cases): Employees won all first round and second round rulings in connection with a risk from contact with equipment or an object (10 wins in Round 1, and 6 wins in Round 2).



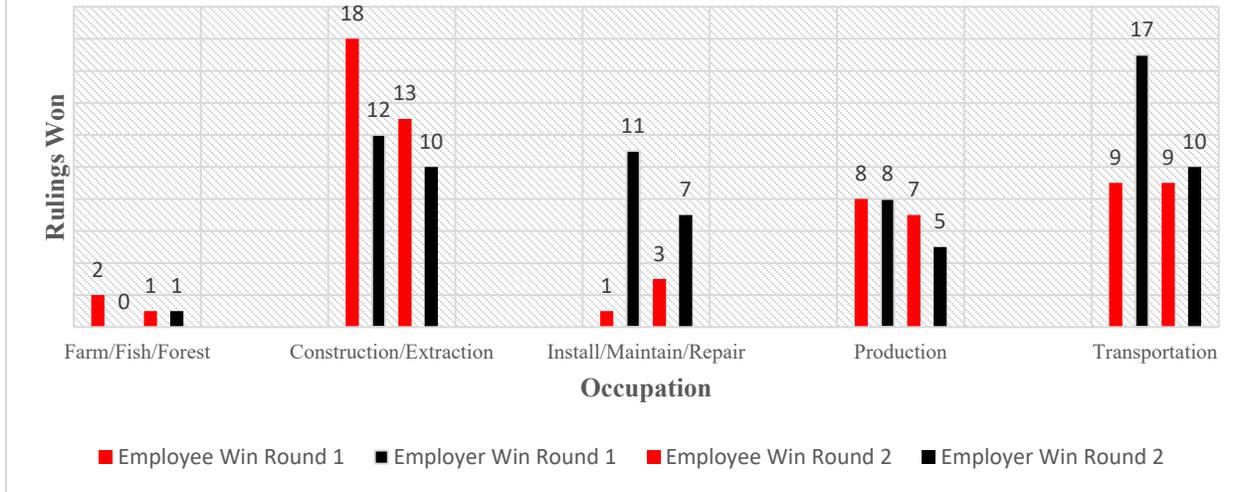
Finding 9 (COVID-19 Cases): In all twelve cases, the occupational risk was bodily reaction. Employees won all or part of the rulings in six first round rulings, while employers won rulings in the other six cases. While the sample is small, it indicates a higher win rate for employees in bodily reaction cases involving work refusal compared to pre-COVID-19 cases.

4. Winner of First Round and Second Round Rulings by Occupation

Tables 4.A and 4.B present court rulings, arranged in clusters, related to specific occupational groups for pre-COVID-19 and COVID-19 cases.

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Table 4.A
First Round & Second Rulings by Type of Occupation:
Employee and Employer Wins

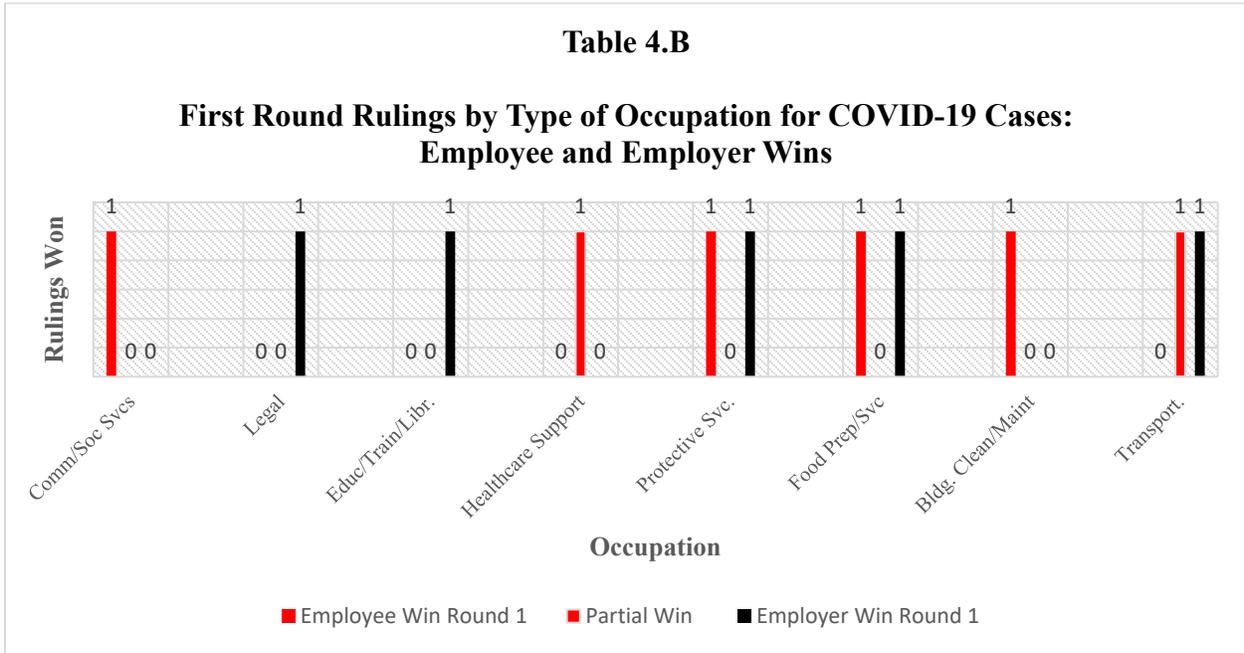


Finding 9 (Pre-COVID-19 Cases): Employers won most rulings when work refusal occurred in a transportation job (13 wins to 6 wins for employees in first round rulings), and installation or maintenance (11 wins to 11 wins to 3 wins for employees in first round rulings).

Finding 10 (Pre-COVID-19 Cases): Only one occupational group, production, had an even split of first court rulings for employee wins and employers win (9 cases, apiece).

Finding 11 (Pre-COVID-19 Cases): Employees in construction or extraction won most rulings relating to work refusal (11 wins to 1 employer win in first round rulings, and 7 wins to 3 employer wins in second round rulings).

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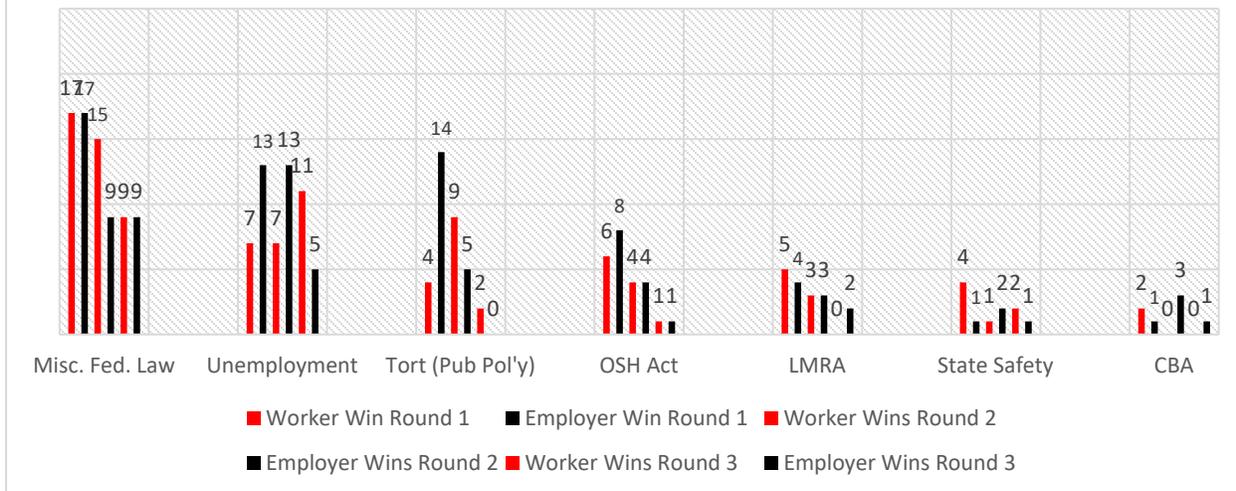


Finding 12 (COVID-19 Cases): COVID-19 work refusal cases show a marked change in affected occupations. None of the occupations in the pre-COVID-19 sample, except for transportation, are reflected in Table 4.B. A broad range of new occupations are in evidence: community and social services; legal; education and related jobs; healthcare support; protective services; food preparation and service; and building cleaning and maintenance. Notably, this marks a shift of work refusal cases to white collar and service sector jobs, away from the industrial jobs in the pre-COVID-19 period.

5. Winner of First Round and Second Round Rulings by Law

Tables 5.A and 5.B follow the same presentation with court rulings arranged by the type of law, except that third round rulings are reported. This is to account for unemployment and industry safety laws that begin with an entry-level administrative ruling, and have appeals to a state board or commission and eventually a court. Thus, there are six bars for each area of law.

**Table 5.A (Pre-COVID-19)
First, Second, and Third Round Rulings Type of Law:
Employee and Employer Wins**



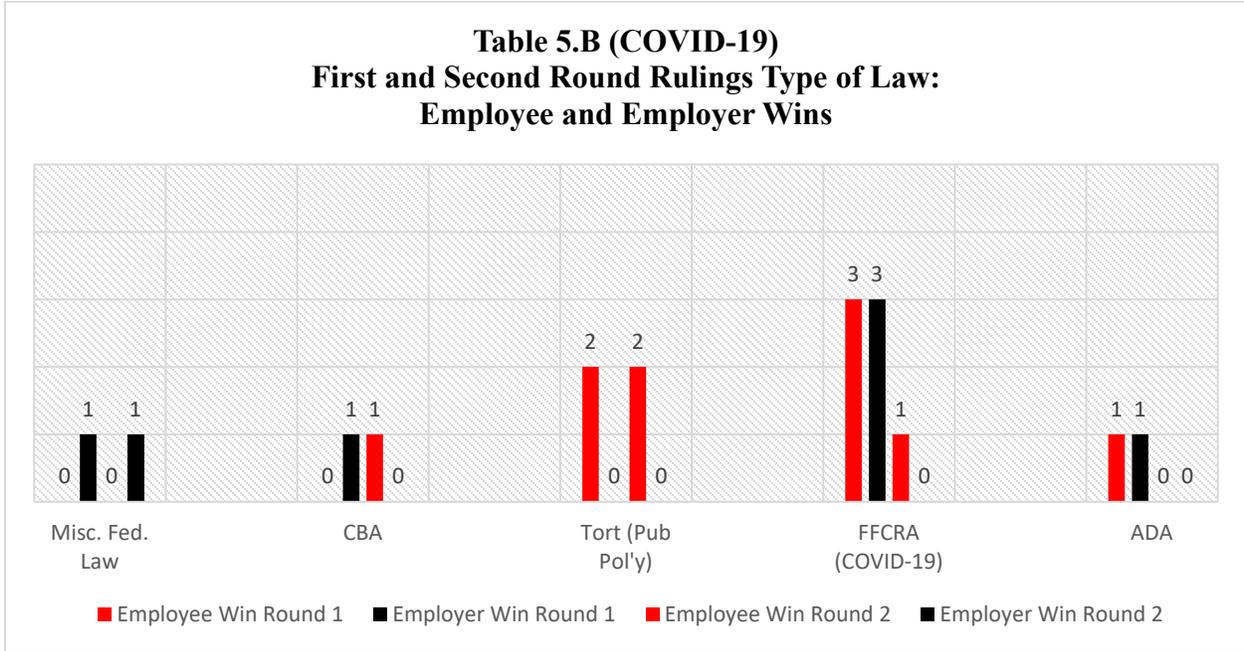
Finding 12 (Pre-COVID-19 Cases): Employees had the most success in winning rulings involving industry specific safety laws for mines, transportation, and railroads (shown as Misc. Fed. Law). In first round rulings, employees and employers won 17 cases apiece; however, in second round rulings, employees won 15 rulings, compared to 9 wins for employers. In third round rulings, employees and employers won 9 rulings apiece.

Finding 13 (Pre-COVID-19 Cases): Unemployment had a large swing in rulings from the first to third rounds. Employers were mostly successful when they challenged unemployment claims from former employees who refused injurious work. Employers won 13 cases in the first round, and also the second round, while employees won only 7 cases in the first round and second rounds. However, these results changed in third round rulings, where employees won 11 rulings, compared to 5 wins for employers.

Finding 14 (Pre-COVID-19 Cases): The biggest swing in rulings occurred for claims

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arising out of the public policy tort of wrongful discharge. Employers won most of these rulings in the first round by a wide margin, 14 cases to 4 cases for employees. This advantage was reversed in second round rulings, where employees won 9 rulings to 5 rulings for employers. There were only two third round rulings. Employees won in both cases.



Finding 15 (COVID-19 Cases): The FFCRA (EPSLA) was the most common work refusal law for COVID-19. Employees won just over half of first and second round rulings for EPSLA cases. The public policy tort provided continuity of results in favor of employees, as these workers registered two wins in first and second round cases while employers had no wins.

IV. INTERPRETING THE FINDINGS

The paucity of cases in this study is likely due to restrictive legal protections for employees who encounter perilous work conditions, rather than widely available safe working conditions. The LMRA only affords employees a vague protection, when their work conditions

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are “abnormally dangerous.”¹¹⁵ Because mines are inherently dangerous, it takes an unusual threat to life to successfully invoke this law.¹¹⁶ Similarly, the OSH Act rule that provides employees a right to refuse work is mostly unusable, protecting them from retaliation only after they have exhausted other ways to communicate and address their safety concerns.¹¹⁷ Laws for unemployment insurance have no specific language for work refusal; however, their disqualification standards include willful disregard of an employer’s interests, a potential impediment to successful claims because refusing a work assignment is a willful act.¹¹⁸ Employment at-will offers workers a faster solution, permitting them to avoid an imminent danger, by seeking a new job.¹¹⁹ This practical alternative probably limits work refusal litigation.

The results also show a pre-COVID-19 spike in work refusal cases from 1981 through 1989. This period occurred shortly after Supreme Court said in dictum in 1974 that work refusal could be legally protected when there is “ascertainable, objective evidence... that an abnormally dangerous condition for work exists,”¹²⁰ and an OSHA rule in 1980.¹²¹ But the landmark rulings in *Gateway Coal* and *Whirlpool* did not unleash a growth in employee wins in work refusal cases, and the trends from the 1980s appear to have deterred employees from bringing more cases.

Other findings demonstrate a few pockets of specific strengths for work refusal laws.

¹¹⁵ National Labor Relations Act, *supra* note 43.

¹¹⁶ 29 CFR 1977.12(b)(2), *supra* note 58.

¹¹⁷ *Id.* (employee, where possible, must have sought to try to eliminate the condition before refusal of work is legally protected).

¹¹⁸ Jackson, *supra* note 90; and Boynton, *supra* note 90.

¹¹⁹ Gardner, *supra* note 95 (an employee may quit for no stated reason).

¹²⁰ *Gateway Coal*, *supra* note 46.

¹²¹ *Whirlpool*, *supra* note 59.

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Table 3.A shows that employees won rulings when risks from contact or objects presented objective dangers. Cases included a worker who refused to grease a moving mining belt,¹²² refused to put his hands near exposed blades,¹²³ refused to use a polishing machine without guards,¹²⁴ refused to change grates “on the fly,”¹²⁵ refused to operate an unsafe saw guide,¹²⁶ refused to stay in a mine after a five-ton rock fell from a ceiling,¹²⁷ refused to travel in a mine section with accumulating water,¹²⁸ and refused to work near an open electrified cable.¹²⁹

Table 3.A also shows that courts ruled for employees who refused to work when there was an objective risk of fire or explosion. Cases included an oil rig worker who refused to cap a leaking well,¹³⁰ a miner who refused to ignite a drier in a taconite mine,¹³¹ a worker in a coal liquification plant who refused to refuel gas in tanks that had not yet cooled and were located beneath sparks from welders,¹³² a worker who refused to load scrap metal in a kettle where his vehicle had no safety shield from splashing molten lead,¹³³ a miner who refused to continue to work as his crew advanced toward a mapped abandoned mine, where penetration of a wall could

¹²² *Leeco, Inc. v. Hays*, 965 F.2d 1081 (D.C. Cir. 1992).

¹²³ *Martin v. H.M.S. Direct Mail Service, Inc.*, 936 F.2d 108 (2d Cir. 1991).

¹²⁴ *Walt Industries, Inc. v. Department of Labor* (Mich. Ct. App. 1997), 1997 WL 33352761 (1997).

¹²⁵ *Hanna Mining Co. v. Steelworkers*, 464 F.2d 565, 80 LRRM 3268 (8th Cir. 1972).

¹²⁶ *Webster v. Potlatch Forests, Inc.*, 68 Idaho 1, 187 P.2d 527 (1947).

¹²⁷ *Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974).

¹²⁸ *Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Com'n*, 716 F.2d 1105 (6TH Cir. 1983).

¹²⁹ *Odell Maggard v. Chaney Creek Coal, Corp.*, 1986 WL 221513 (1986).

¹³⁰ *Mississippi Employment Sec. Com'n v. Phillips*, 562 So.2d 115 (Miss. 1990).

¹³¹ *Ottawa Silica Co. v. Secretary of Labor, Mine Safety and Health Admin. (MSHA)*, 780 F.2d 1022 (6th Cir. 1985).

¹³² *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987).

¹³³ *Marshall v. N. L. Industries, Inc.*, 618 F.2d 1220 (7th Cir. 1980).

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lead to explosion, fire, or air with no oxygen,¹³⁴ and workers who refused to be hoisted 180 feet above the ground to a narrow platform without guards or padeyes to hook their safety harnesses.¹³⁵

However, Table 3.A shows a different pattern, too: Employers won most of the rulings involving invisible or latent risks to workers. These cases included work refusal due to an employee's concern about overexertion or a bodily reaction—for example, a nurse who feared needle pricks from HIV-positive patients,¹³⁶ and another nurse who feared an adverse reaction to a flu shot.¹³⁷ Employers won cases where a truck driver,¹³⁸ a railroad worker,¹³⁹ and fish processing workers out at sea¹⁴⁰ refused to work on safety grounds related to their fatigue. Similarly, an employee was denied unemployment benefits when he refused work due to his experience with long term rashes from exposure to conditions in a mine.¹⁴¹ An employee who refused to continue working in 110 degree heat while suffering from dehydration lost his unemployment case,¹⁴² while a welder who complained about air quality and breathing conditions in a confined space lost his wrongful discharge case.¹⁴³

¹³⁴ *Simpson v. Federal Mine Safety and Health Review Com'n*, 842 F.2d 453 (D.C. Cir. 1988)

¹³⁵ *Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985).

¹³⁶ *Stepp v. Review Bd. of the Indiana Employment Sec. Div.*, 521 N.E.2d 350 (Ind. 1988)

¹³⁷ *Rhodenbaugh v. Kan. Emp't Sec. Bd. of Review*, 372 P.3d 1252 (Ct. App. 2016).

¹³⁸ *Peery v. Rutledge*, 177 W. Va. 548, 355 S.E.2d 41 (1987)

¹³⁹ *Laveing v. Norfolk S. Ry.*, 2020 BL 321408 (W.D. Pa. Aug. 21, 2020)

¹⁴⁰ *Cornelio v. Premier Pacific Seafoods, Inc.*, 127 Wash. App. 1037 (App. Div. 1 2005). The crewmembers are expected to work 16 hour days, seven days a week, and many of them had previously worked as processors for Premier Pacific. They understood the harsh conditions they faced when they agreed to do the work. Their wrongful discharge claim requires that they prove that the extra half hour in their daily work schedule created unreasonably dangerous working conditions such that public policy required that they be allowed to refuse to work without being discharged.

¹⁴¹ *Wolfgram v. Employment Sec. Agency*, 291 P.2d 279 (Wyo. 1955).

¹⁴² *Hernandez v. Pitt Ohio Express, LLC*, 2012 WL 3496860 (N.D. Ohio Aug. 14, 2012).

¹⁴³ *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932 (Mo. App. W.D. 1998). *Compare McCrocklin v. Emp't*

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Unsurprisingly, Table 3.B shows that all of the COVID-19 cases involved a risk of bodily reaction to the virus. The more salient point is that the cases demonstrate the recklessness of some workplaces during the pandemic. Employees lost their jobs for refusing to break COVID-19 protocols ordered by health care professionals;¹⁴⁴ other employees, some with serious COVID-19 risk factors, faced adverse treatment after they avoided in-person work because their employer failed to take basic precautions to mitigate infection;¹⁴⁵ and an employee was terminated for missing work while she ill and sought medical help to determine if she had COVID-19.¹⁴⁶

Dev. Dep't, 156 Cal.App.3d 1067 (App. 2d Dist. 1984) (court awarded unemployment benefits to worker who quit due to exposure to second-hand smoke, where the employee suffered tangible physical side effects and worried about his health and safety).

¹⁴⁴ In *Payne v. Woods Services, Inc.*, 2021 WL 603725 (E.D. Pa. 2021), a residential counselor was fired for refusing to return to work when he was instructed to remain in quarantine after testing positive for COVID-19. In *Beltran v. 2 Deer Park Drive Operations LLC*, 2021 WL 794745 (D.N.J. 2021), a building maintenance technician was terminated after he complied with a quarantine memo relating to his mother's positive COVID-19 test and failed to report to work during this period. In *Colombe v. SGN, Inc.*, 2021 WL 1198304 (E.D. Ky. 2021), an employee whose husband was instructed to quarantine, along with all other family members, was fired for not returning to work during this period and for not satisfying her employer's concern that the quarantine order did not have her name on it.

¹⁴⁵ In *Smith v. Corecivic of Tennessee LLC*, 2021 WL 927357 (S.D. Cal. 2021), a correctional officer who was at a higher risk for COVID-19 complications due to asthma and pneumonia in March 2020 alleged that she was forced to quit her employer failed to provide a safe work environment to mitigate COVID-19 at its facilities by having large group meetings and failing to provide masks. In *Peeples v. Clinical Support Options, Inc.*, 487 F.Supp.3d 56 (D. Mass. 2020), an office manager who suffered from moderate asthma, and who was ordered to return to work in a setting where personal protective equipment ("PPE"), masks, hand sanitizer, and wipes were not always available, sued to enjoin her employer from imminently firing her because she requested the reasonable accommodation of continued telecommuting. In *Brooks v. Corecivic of Tennessee LLC*, 2020 WL 5294614 (S.D. Cal. 2020), a detention officer, with risk factors for her race and obesity, felt compelled to resign after a supervisor ordered her to work without a mask, even after 234 detainees and 30 staff members tested positive for the virus. In *Toro v. Acme Barricades, L.C.*, 2021 WL 616318 (C.D. Fla. 2021), an employee with COVID-19 risk factors who was instructed by his doctor to work from home was terminated for not reporting to work in his office. In *Chew v. Legislature of Idaho*, 2021 WL 112146 (D. Id. 2021), two lawmakers with serious medical conditions— one with type II diabetes and hypertension, and another with paraplegia that led to diminished lung capacity— sought telecommuting or self-contained work spaces as accommodations under the Americans with Disabilities Act but were denied. In *Thornberry v. Powell County Detention Center*, 2020 WL 5647483 (C.D. Ky. 2020), a substance abuse counselor at a detention center during the early days of the COVID-19 pandemic, refused to come to work unless her employer provided new precautions to mitigate the spread of the virus.

¹⁴⁶ In *Valdivia v. Paducah Center for Health and Rehabilitation, LLC*, 2020 WL 7364986 (W.D.Ky. 2020), a nurse was fired after she was sent home with a fever, determined that she had a stomach virus, sought

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Turning to the relationships between types of jobs and win rates in work refusal cases, the finding in Table 4 that mining and extraction employees won a majority of cases shows how work refusal laws that are tailored to an industry's extreme conditions can benefit workers. Discharged employees won rulings after they refused an assignment that created risk from a hauling ten ton trailing motor,¹⁴⁷ refused to start an unsafe longwall mining machine,¹⁴⁸ refused to work on a mine section with a cracked roof that later fell,¹⁴⁹ refused to load a coal truck above 24 tons,¹⁵⁰ refused to work in an area of trapped fumes,¹⁵¹ refused to light a gas drier with a hand held flame,¹⁵² and refused to grease machinery that was running.¹⁵³

Table 5, depicting the law in employee and employer wins, reinforces my study's primary finding that work refusal safety laws have only limited value for employees. Employee success in appellate rulings for the public policy tort of wrongful discharge and unemployment

confirmation that she was not infected with COVID-19, and tried unsuccessfully to have her absence excused with a doctor's note.

¹⁴⁷ Consolidation Coal Co. v. Federal Mine Safety and Health Review Com'n, 795 F.2d 364 (4th Cir. 1986) (mine worker was fired for refusing work assignment that he believed endangered the safety of a co-worker by exposing that person to a risk from a ten-ton trailing motor);

¹⁴⁸ Miller v. Federal Mine Safety and Health Review Com'n, 687 F.2d 194 (7th Cir.1982) (mine worker was fired for refusing order to start up a long-wall machine because he believed the machine was not legally safe to operate).

¹⁴⁹ Gilbert v. Federal Mine Safety & Health Review Com'n, 866 F.2d 1433 (D.C. Cir. 1989) (miner who refused to work in a section with an exposed roof crack quit after supervisor told him this was the only job available to him, and roof subsequently fell and was cited by an MSHA inspector).

¹⁵⁰ Wellmore Coal Corp. v. Federal Mine Safety & Health Review Com'n, 133 F.3d 920 (4th Cir. 1997) (coal truck driver was fired for refusing to load his truck above the company's minimum load requirement of 24 tons, claiming that this weight was an unacceptable safety hazard)

¹⁵¹ Liggett Industries, Inc. v. Federal Mine Safety and Health Review Com'n, 923 F.2d 150 (10th Cir. 1991) (welders walked off the job after a miner named Begay voiced concerns about his health being endangered by trapped fumes were not addressed by his employer).

¹⁵² Ottawa Silica Co. v. Secretary of Labor, Mine Safety and Health Admin. (MSHA), 780 F.2d 1022 (6th Cir. 1985) (miner, ostensibly fired for using profanity, was fired after he refused to light a gas drier with a hand held flame, a practice the miner considered to be unsafe).

¹⁵³ Leeco, Inc. v. Hays, 965 F.2d 1081 (D.C. Cir. 1992) (employee routinely was required to risk his life and limb by greasing machinery while it was in operation, even after he addressed his safety concerns to management).

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offer an intriguing perspective on the low value of worker safety laws. This tort, and this post-employment benefit law, act as safety nets for safety conscious workers. But these laws were not specifically designed for safety or work refusal situations. They serve as gap-fillers when other safety laws fail employees by penalizing them for refusing unusually hazardous assignments.

Courts have adopted the public policy tort (often called wrongful discharge or unjust dismissal) to temper the harsh consequences of employment-at-will.¹⁵⁴ Discharged employees benefitted from appellate rulings after they were fired for refusing to work in a war-torn region,¹⁵⁵ sought a smoke-free environment,¹⁵⁶ requested a transfer after his employer installed a machine with live radioactive cobalt,¹⁵⁷ refused to work near cyanide with an open surgical wound,¹⁵⁸ and declined work on Saturday and Sunday— due to angina stemming from heart surgery— because he worked 35 hours the previous two days and 61 hours for the week.¹⁵⁹ The public policy tort also benefitted a ship captain who was to set sail with his crew twice in a short time with a barge load of a toxic chemical but refused to leave port due to two separate hurricane advisories for his routes in the Gulf of Mexico.¹⁶⁰

¹⁵⁴ Gardner, *supra* note 95, at 379 (armored truck security driver was fired for violating company policy by leaving the cab to save a woman from a knife-wielding assailant)

¹⁵⁵ Parsons v. United Tech. Corp., Sikorsky Aircraft Div., 700 A.2d 655 (1997) (employee was fired immediately after he informed his employer he would not travel to Bahrain because of concerns for his health, safety and welfare, supported by a State Department travel advisory).

¹⁵⁶ Hentzel v. Singer Co., 188 Cal.Rptr. 159, 161 (1982) (employee was terminated for his “attempt to obtain a reasonably smoke-free environment”).

¹⁵⁷ Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985).

¹⁵⁸ Western States Mineral Corp. v. Jones, Docket No. 19697, sub nom. D’Angelo v. Gardner, 819 P.2d 206 (1991) (“it is violative of public policy for an employer to dismiss an employee for refusing to work under conditions unreasonably dangerous to the employee”).

¹⁵⁹ Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355, 358 (7th Cir.1992).

¹⁶⁰ Borden v. Amoco Coastwise Trading Co., 985 F.Supp. 692 (S.D. Tex. 1997), at 698 (there is a “strong public policy in protecting the safety of not only seamen, but the public as well,” ... coupled with the public policy implications surrounding (46 U.S.C.) § 10908” to “overcome the at-will presumption. Thus, the public policy exception is clearly applicable in this case.”).

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Unemployment insurance claimants won appellate rulings because they had legal justifications to quit jobs that presented some degree of peril. These outcomes overcame legal barriers for claimants who quit work. These unemployment claims are generally denied because the law requires evidence that the employer caused the employment relationship to end.¹⁶¹ Even when work conditions create some degree of pressure to consider quitting, unemployment claims are sometimes denied.¹⁶² However, when employees in this study were terminated in response to avoiding a threat to their safety, their claims were ruled to be compensable.¹⁶³

*Moore v. Unemployment Ins. Appeals Bd.*¹⁶⁴ illustrates this framework. A union electrician was referred to a job at a nuclear power plant but refused the assignment due to safety concerns.¹⁶⁵ Based on news reports and co-worker accounts, he was made aware of alleged safety violations relating to radiation exposure.¹⁶⁶ He asked his supervisor for the precise location of his assigned job, and told his supervisor he feared working near “red waste.”¹⁶⁷ When he was

¹⁶¹ *E.g.*, Jones, *supra* note 98, at 1144 (“The Act is intended to benefit only those persons who become unemployed through no fault of their own.”). Thus, “[a]n individual shall be ineligible for benefits [because] he has left work voluntarily without good cause attributable to the employing unit.”

¹⁶² *E.g.*, Davis v. Labor and Industrial Relations Comm’n, 554 S.W.2d 541, 543 (Mo. App. E.D.1977), concluding that a “pressure of the circumstances” in a quit case could be found as a discharge for purposes of unemployment compensation, though in this a nurse who stopped working 40 days before giving birth, and remained out of work for an additional month before applying for unemployment benefits had not been discharged. *Compare* Burke v. Board of Review, 477 N.E.2d 1351, 1356 (Ill. 1985), stating that “good cause” for voluntarily quitting includes “circumstances producing real and substantial pressure to terminate employment and which under the circumstances would compel “a reasonable person to act in the same manner.”

¹⁶³ A misconduct standard in unemployment compensation laws does not apply when a claimant refuses to perform a job assignment because he or she believes in good faith that performing the assignment would jeopardize his or her health. *See* Smallwood v. Florida Department of Commerce, 350 So.2d 121 (Fla. Dist. Ct. App. 1977) (refusal to drive a truck); Webster v. Potlatch Forests, Inc., 68 Idaho 1, 187 P.2d 527 (1947); Ferguson v. Department of Employment Services, 311 Minn. 34, 247 N.W.2d 895 (1976); McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 383 A.2d 533 (1978) (refusal to drive a truck); Kuhn v. Department of Employment Security, 134 Vt. 292, 357 A.2d 534 (1976). *Also see* City of Dallas v. Texas Employment Commission, 626 S.W.2d 549, 551 (Tex. Ct. App. 1981)

¹⁶⁴ 169 Cal.App.3d 235 (Cal. App. 1985), at 239.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

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terminated for refusing work,¹⁶⁸ he replied: “Well, I want to make something very clear here. I’m not refusing to do the work. I can’t go in the radioactive waste area because I’m afraid of the radiation.”¹⁶⁹ After this electrician filed for unemployment, a court ruled that he presented evidence of a “reasonable, good-faith and honest apprehension of harm to one’s health and safety within the San Onofre work environment, setting forth a condition of employment falling within the ambit of good cause.”¹⁷⁰

V. CONCLUSIONS

Work refusal safety laws serve employees poorly. That is the primary import of my empirical study. Certainly, these laws achieve policy objectives when there is a good match between an industry-specific law and a physical hazard that a court or agency can readily comprehend— a falling roof in a mine,¹⁷¹ molten lead that splashes into a work-space,¹⁷² an underwater leak from an oil rig.¹⁷³ But even my data sources demonstrate structural problems with our work safety laws. The Bureau of Labor Statistics data collection for occupational fatalities count physical events, such as crashes, collisions, shootings, fires, falls, electrical shocks, contact with objects, and the like.¹⁷⁴ At the end of this lengthy survey with many dozens of physical causes, there are two entries for overexertion and bodily reaction—and the data reporting indicates very few occurrences.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 244.

¹⁷¹ Gilbert, *supra* note 148.

¹⁷² Marshall v. N. L. Industries, Inc., *supra* note 132.

¹⁷³ Mississippi Employment Sec. Com’n, *supra* note 92.

¹⁷⁴ See *Census of Fatal Occupational Injuries (CFOI): Definitions*, available in <https://www.bls.gov/iif/oshcfdef.htm>.

¹⁷⁵ See *Injuries, Illnesses, and Fatalities* (tbl 9, fatal occupational injuries by event or exposure for all fatal injuries and major private industry sector, all United States, 2019), at

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As my research shows, conflating overexertion and a bodily reaction to a disease obfuscates two entirely different physiological responses to workplace exposure to potentially lethal conditions. It is not even clear that BLS will be able to capture the work exposures to COVID-19 that are highlighted in this Article— specifically, the cases reported by front-line workers in healthcare,¹⁷⁶ and meatpacking plants.¹⁷⁷ In sum, the federal government’s probable undercounting of fatal bodily reactions to exposure events such as disease, radiation, and chemicals correlates to safety laws that are stuck in outdated notions of job hazards.

My study also shows that COVID-19 has shifted work refusal from blue collar jobs to white collar and service sector jobs.¹⁷⁸ At some point, however, the pandemic will recede and the pattern of work refusal may revert to trends from the 1944 to 2020.¹⁷⁹ My study reveals the pronounced use of work refusal laws in construction and extraction, production, and transportation. As the COVID-19 cases show, however, a virus can present risks that the traditional occupational fatality survey will likely miss.¹⁸⁰

Workplace sexual assaults¹⁸¹ are a case in point. My extensive research failed to uncover

<https://www.bls.gov/iif/oshwc/foi/cftb0334.htm> (reporting 7 fatalities in 2019 due to overexertion).

¹⁷⁶ Colombe, *supra* note 144.

¹⁷⁷ Rural Community Workers Alliance, *supra* note 10.

¹⁷⁸ *Supra* Finding 1.B.

¹⁷⁹ U.S. Bureau of Labor Statistics, *supra* note 105.

¹⁸⁰ *See* Brooks, *supra* note 144.

¹⁸¹ Extreme forms of sexual harassment appear to present women with scenarios that are analogous to the DOL rule that requires apprehension of injury, however, my research found no evidence that the rule has been invoked in these situations. *E.g.*, EEOC, *EEOC Sues Virginia IHOP Owner for Sexual Harassment and Constructive Discharge* (March, 16, 2021), at <https://www.eeoc.gov/newsroom/eeoc-sues-virginia-ihop-owner-sexual-harassment-and-constructive-discharge>, where a restaurant settled a lawsuit after a manager was accused of subjecting female employees to unwanted advances and touching, “including asking teen workers to show their breasts to him and exposing himself to a teen worker.” *Also see* *Small v. N.Y. State Dep’t of Corrections and Comm. Supervision*, 2019 WL 1593923 (W.D.N.Y. 2019), at *5 (male corrections officer relentlessly pursued female corrections teacher, “mercilessly preying on her religious beliefs in an effort to coerce and convince Small that God intended her to be his new wife”); *Tri-County Youth Programs, Inc. v. Acting Dep. Dir. of Div. of Emp. & Training*, 765 N.E.2d 810 (Mass. 2002), at 813 (employer denied female manager’s request for transfer after youth

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a single case where an employee refused to return to work, or quit, because she experienced or feared sexual assault on the job. This cannot reflect the reality of today's workplace for some women. The juxtaposition of work refusal cases in mining,¹⁸² factory,¹⁸³ and truck driving¹⁸⁴ cases— male-dominated jobs that present obvious physical hazards¹⁸⁵— with the total absence of work refusal cases involving sexual assaults demonstrates how laws and surveys miss some types of work refusal.

These holes in collecting data on workplace injuries are compounded by the outmoded way that the Bureau of Labor Statistics defines a job. BLS has a classification for passenger vehicle drivers that includes taxi drivers and chauffeurs as it collects hourly wage information for them.¹⁸⁶ Ride-share drivers do not make an hourly wage, however. This signifies that the agency

offender in a detention center who sexually assaulted her); in re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit, 759 P.2d 17 (Colo. 1998) (en banc) (janitor raped employee as she was walking to company cafeteria); *Maksimovic v. Tsogalis*, 687 N.E.2d 21 (Ill. 1997), at 22 (restaurant owner threatened waitress that he would to “give her a stiff one up the ass,” ordered her to perform oral sex on him, . . . placed his hand under her skirt and grabbed her leg, grabbed her buttocks and touched her while attempting to kiss her”); and *Ford v. Revlon, Inc.*, 34 P.2d 580 (Ariz. 1987), at 582 (male supervisor, after telling a female employee, “I am going to fuck you if it takes me ten years,” grabbed her in a chokehold while running his open hand over her breasts, stomach, and between her legs).

¹⁸² *E.g.*, *Odell Maggard v. Chaney Creek Coal, Corp.*, 1986 WL 221513 (1986); *Richard E. Bjes v. Consolidated Coal Co.*, 4 F.M.S.H.R.C 2043 (1982); *Sec. of Labor ex rel. Danny H. Bryant v. Clinchfield Coal Co.*, 4 F.M.S.H.R.C. 1379 (1982); and *Sec’y of Labor, MSHA ex rel. Thomas Robinette v. United Castle Coal Co.*, 3 F.M.S.H.R.C. 803 (F.M.S.H.R.C. 1981).

¹⁸³ *E.g.*, *Commissioner of Labor v. Talbert Mfg. Co.*, 593 N.E.2d 1229 (Ind. 1992); *Perez v. Eastern Awning Systems, Inc.*, 2018 WL 4926447 (D. Conn. 2018); and *Lee v. Ardagh Glass, Inc.*, 2015 WL 251858, (E.D. Cal. 2015).

¹⁸⁴ *E.g.*, *Smallwood v. Florida Department of Commerce*, 350 So.2d 121 (Fla. Dist. Ct. App. 1977); *McLean v. Unemployment Compensation Board of Review*, 476 Pa. 617, 383 A.2d 533 (1978); and *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133 (6th Cir. 1994).

¹⁸⁵ Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (tbl. 18, Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity) (2020), showing that the percentages of women in mining (10.1%), manufacturing (29.5%), and truck transportation (12.4%) were low.

¹⁸⁶ *See* Bureau of Labor Statistics, *Occupational Employment and Wage Statistics* (May 2020), 53-3058 Passenger Vehicle Drivers, Except Bus Drivers, Transit and Intercity, at <https://www.bls.gov/oes/current/oes533058.htm>. The table explains that the definition of these jobs comes from the 2018 SOC (Standard Occupational Classification). *Id.*

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only collects data for passenger drivers who are in a formal employment relationship, not gig drivers for Uber, Lyft and other ride sharing platforms. To the extent that federal labor statistics are premised on a formal employment relationship, they omit the growing class of workers who are paid piece-rates. To put this problem more concretely, the 2021 BLS occupational fatality report might fail to include the Instacart shopper who was shot and killed at a Boulder, Colorado grocery store but count the King Soopers employees who lost their lives.¹⁸⁷

Several policy suggestions emerge from this research. A seemingly minor idea, perhaps fraught with political controversy, is to amend the Americans with Disabilities Act¹⁸⁸ to enact a right of employees to wear a mask at work, unless an employer can prove that it is an undue hardship.¹⁸⁹ This would appear to address employee concerns about poor employer mitigation for COVID-19, but would also have longer impact for workers who are exposed to second-hand smoke, the flu, and other aerosol hazards. As such, this law would function as a proxy for work refusal safety laws. It would also address the increasing trend of work refusal cases in white collar and service sector jobs.¹⁹⁰

My research also underscores the possible utility of a federal paid sick leave law, perhaps patterned after California's law.¹⁹¹ If COVID-19 mutations persist and evade vaccines, Congress might consider reviving the Emergency Paid Sick Leave Pay Act.¹⁹² Given the large number of

¹⁸⁷ Kate Taylor, *Boulder Shooting Victims Include 3 Employees at the King Soopers Grocery Store and an Instacart Shopper*, BUS. INSIDER (March 24, 2021).

¹⁸⁸ Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2018).

¹⁸⁹ *Id.* at 42 U.S. Code § 12111(10)(a)-(b).

¹⁹⁰ *Supra* Finding 1.B.

¹⁹¹ California Labor Code §§ 245-249 (2020). The law provides that an “employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period.” *Id.* at § 246(3). The law also requires supplemental paid sick leave for COVID-19 related matters. *Id.* at § 248.1(B)(4)(b).

¹⁹² *See supra* note 72.

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immunocompromised individuals,¹⁹³ a paid sick leave law would obviate some of the need for these vulnerable people to refuse work in order to avoid consequential exposures to seasonal flu, measles, and other upsurges in infectious diseases.

A third suggestion is to amend the OSH Act work refusal rule to address some of the occupational disease exposures that this study are reports. The current rule protected the two employees in *Whirlpool* who refused to work on a suspended screen after an employee fell through the screen and died a short time before.¹⁹⁴ But the rule in its present form would not appear to address the concern of the electrician in the nuclear power plant who refused to work near “red waste,”¹⁹⁵ nor the x-ray technician who worked near live cobalt,¹⁹⁶ nor the sawmill employee who refused to work in red cedar dust,¹⁹⁷ nor a worker who had an open wound exposed to cyanide.¹⁹⁸ The contours of an amended law cannot be discerned casually. However, the DOL rule’s requirement that an employee can refuse work only when there is “a real danger of death or serious injury and . . . insufficient time, due to the urgency of the situation” to avoid harm could be modified to redefine the time element. This could be broadened to include exposures to the foregoing examples. Waiting for a cancer diagnosis to begin the legally sanctioned process of refusing dangerous work is pointless.

In addition, a work refusal rule could be fashioned to address sexual¹⁹⁹ and racial²⁰⁰

¹⁹³ See Rafael Harpaz, *The Prevalence of Immunocompromised Adults: United States, 2013*, 3 OPEN FORUM INFECTIOUS DISEASES S1 (2016) (2.8% of respondents in a large national survey answered that they were informed by a medical professional that they were IC).

¹⁹⁴ *Whirlpool*, *supra* note 47.

¹⁹⁵ Moore, *supra* note 163.

¹⁹⁶ Wheeler, *supra* note 156.

¹⁹⁷ *Perez v. Clearwater Paper Corp.*, 184 F.Supp.3d 831 (D. Id. 2016).

¹⁹⁸ *Western States Mineral Corp.*, *supra* note 157.

¹⁹⁹ *Supra* note 180.

²⁰⁰ *E.g.*, *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140 (2d Cir. 2014), at 146 (Black employee “endured

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harassment in the workplace that presents a risk of serious injury. Title VII of the Civil Rights Act of 1964²⁰¹ could be modified to broaden discrimination to include work refusal in these cases. This revision would seem to address situations where employees are constructively discharged in the course of facing intolerable conditions of harassment that have objective conditions of risk to personal safety.²⁰²

Finally, the DOL work refusal work could be broadened to expand the OSH Act's conventional definition of an employee.²⁰³ In the paragraph that regulates work refusal, the rule refers to "employee" five times.²⁰⁴ To cover gig workers, the rule could be expanded to include the proposed definition of an employee in the Protecting the Right to Organize Act of 2021, a union election bill before the 117th Congress.²⁰⁵

For now, the state of work refusal safety laws was summed up by a 20 year-old grocery clerk at Kroger during the COVID-19 pandemic. In response to customers who refused to

an extraordinary and steadily intensifying drumbeat of racial insults, intimidation, and degradation" for more than three years, including "insults, slurs, evocations of the Ku Klux Klan, statements comparing black men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile").

²⁰¹ 42 U.S.C. § 2000e et seq (1964).

²⁰² Occupational Safety and Health Act of 1970, *supra* note 50, at Section 3(6) ("The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce.").

²⁰³ 29 CFR 1977.12(b)(2), *supra* note 58.

²⁰⁴ *Id.*

²⁰⁵ Protecting the Right to Organize Act of 2021 ("This bill expands various labor protections related to employees' rights, including ... (1) revises the definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the fair labor standards....") Specifically, the bill would amend the definition of the NLRA's Section 2(3) of an employee such that:

An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—

(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;

(B) the service is performed outside the usual course of the business of the employer; and

(C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

H. R. 842, 117th Cong., 1st Sess, March 11, 2021, available in <https://www.congress.gov/bill/117th-congress/house-bill/842/text#toc-H3A91F8B36FE4415495CD8B9AE4E2AC4A>.

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comply with the store's masking policy, he stated, "They never listen."²⁰⁶ His exasperation also applies to lawmakers, labor data collection agencies, and judges who miss the many warning signals in work refusal cases that America's workplaces are so dangerous at times that workers are pushed to the brink of resisting work directives.

²⁰⁶ Lam, *supra* note 3.

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VI. APPENDIX: ROSTER OF CASES

Federal Courts

Supreme Court

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)
Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 94 S. Ct. 629, 38 L. Ed. 2d 583 (1974)

First Circuit

Boston & Maine Corp. v. Lenfest, 799 F.2d 795 (1st Cir. 1986)
In Peebles v. Clinical Support Options, Inc., 487 F.Supp.3d 56 (D. Mass. 2020)

Second Circuit

Tompkins v. Metro-North Commuter R.R., 983 F.3d 74 (2d Cir. 2020)
Brink's, Inc. v. Herman, 148 F.3d 175 (2d Cir. 1998)
Yellow Freight Systems, Inc. v. Reich, 38 F.3d 761 (2d Cir 1994)
Martin v. H.M.S. Direct Mail Service, Inc., 936 F.2d 108 (2d Cir. 1991)

March v. Metro-North R.R., 369 F. Supp. 3d 525 (S.D.N.Y. 2019)
Lopez v. Burriss Logistics, Co., 952 F.Supp.2d 396 (D. Conn. 2013)

Third Circuit

Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir.1981)
Beltran v. 2 Deer Park Drive Operations LLC, 2021 WL 794745 (D.N.J. 2021)
Payne v. Woods Services, Inc., 2021 WL 603725 (E.D. Pa. 2021)
Laveing v. Norfolk S. Ry., 2020 BL 321408 (W.D. Pa. Aug. 21, 2020)
Mangini v. Penske Logistics LLC, 2012 BL 262744 (D.N.J. Sept. 28, 2012)

Fourth Circuit

Wellmore Coal Corp. v. Federal Mine Safety & Health Review Com'n, 133 F.3d 920 (4th Cir. 1997)
Consolidation Coal Co. v. Federal Mine Safety and Health Review Com'n, 795 F.2d 364 (4th Cir. 1986)

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Acosta v. Jardon & Howard Technologies, Inc. 2018 WL 5779506 (E.D.N.C. 2018)

Fifth Circuit

Feemster v. BJ-Titan Servs. Co., 873 F.2d 91, 4 IER Cases 643 (5th Cir. 1989)

Marshall v. Daniel Const. Co., Inc., 563 F.2d 707 (5th Cir. 1977)

Missouri-Kansas-Texas R.R. v. Brotherhood of R.R. Trainmen, 342 F.2d 298 (5th Cir. 1965)

Borden v. Amoco Coastwise Trading Co., 985 F.Supp. 692 (S.D. Tex. 1997)

Brock v. Stamper Drilling Corp., 1987 WL 258183 (S.D. Tex. 1987)

Sixth Circuit

TNS, Inc. v. N.L.R.B., 296 F.3d 384 (6th Cir. 2002)

Collins v. Federal Mine Safety and Health Review Com'n, 42 F.3d 1388 (6th Cir. 1994)

Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133 (6th Cir. 1994)

Sisk v. Federal Mine Safety and Health Review Com'n, 878 F.2d 1436 (6th Cir. 1989)

Ottawa Silica Co. v. Secretary of Labor, Mine Safety and Health Admin. (MSHA), 780 F.2d 1022 (6th Cir. 1985)

Southern Ohio Coal Co. v. Federal Mine Safety and Health Review Com'n, 716 F.2d 1105 (6th Cir. 1983)

Colombe v. SGN, Inc., 2021 WL 1198304 (E.D. Ky. 2021)

Valdivia v. Paducah Center for Health and Rehabilitation, LLC, 2020 WL 7364986 (W.D.Ky. 2020)

Thornberry v. Powell County Detention Center, 2020 WL 5647483 (C.D. Ky. 2020)

Secretary of Labor v. Niles Family Dentistry Associates, Inc. 2012 WL 3913032 (N.D. Ohio 2012)

Seventh Circuit

Samson v. United States Department of Labor, 732 Fed.Appx. 444 (7th Cir. 2018)

Wilcox v. Niagara of Wisconsin Paper Corp., 965 F.2d 355 (7th Cir. 1992)

Miller v. Federal Mine Safety and Health Review Commission, 687 F.2d 194 (7th Cir.1982)

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

Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers, Int'l Union., 1969 BL 258 (N.D. Ind. 1969)

Eighth Circuit

N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171 (8th Cir. 1982)

Hanna Mining Co. v. Steelworkers, 464 F.2d 565 (8th Cir. 1972)

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Ninth Circuit

Davies v. Premier Chemicals, Inc., 50 Fed. Appx. 811 (9th Cir. 2002)

Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987)

Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984)

Smith v. Corecivic of Tennessee LLC, 2021 WL 927357 (S.D. Cal. 2021)

Chew v. Legislature of Idaho, 2021 WL 112146 (D. Id. 2021)

In Brooks v. Corecivic of Tennessee LLC, 2020 WL 5294614 (S.D. Cal. 2020)

Ford v. BNSF Ry., 2017 IER Cases 439964 (W.D. Wash. Dec. 08, 2017)

Perez v. Clearwater Paper Corp., 184 F.Supp.3d 831 (D. Id. 2016)

Perez v. U.S. Postal Service, 76 F.Supp.3d 1168 (W.D. Wash. 2015)

Lee v. Ardagh Glass, Inc., 2015 WL 251858, (E.D. Cal. 2015)

Frazier v. United Parcel Serv., Inc., 2005 WL 1335245 (E.D. Cal. 2005)

Seymore v. Lake Tahoe Cruises, Inc., 888 F.Supp. 1029 (C. D. Cal. 1995)

Tenth Circuit

Liggett Industries, Inc. v. Federal Mine Safety and Health Review Com'n, 923 F.2d 150 (10th Cir. 1991)

Union Pacific Railroad Company v. Brotherhood of Maintenance of Way Employees Division of International Brotherhood of Teamsters, 2021 WL 65508 (D. Neb. 2021)

Marshall v. Natl. Industrial Constructors, Inc., 8 OSHC 1117 (D. Neb. Jan. 25, 1980)

Eleventh Circuit

Koch Foods, Inc. v. Secretary, U.S. Dept. of Labor, 712 F.3d 476 (11th Cir. 2013)

National Cement Co. v. Federal Mine Safety and Health Review Com'n, 27 F.3d 526 (11th Cir. 1994)

Brock ex rel. Parker v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985)

Toro v. Acme Barricades, L.C., 2021 WL 616318 (C.D. Fla. 2021)

Perez v. Lear Corp. Eeds & Interiors LLC, 2015 WL 2131282 (S.D. Ala. 2015)

D.C. Circuit

Wood v. Department of Labor, 275 F.3d 107 (D.C. Cir. 2001)

Gilbert v. Federal Mine Safety & Health Review Com'n, 866 F.2d 1433 (D.C. Cir. 1989)

Simpson v. Federal Mine Safety and Health Review Com'n, 842 F.2d 453 (D.C. Cir. 1988)

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Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974)

Leeco, Inc. v. Hays, 965 F.2d 1081 (D.C. 1992)

Wood v. Herman, 104 F. Supp. 2d 43 (D.D.C. 2000)

Federal Administrative Agency

Odyssey Capital Group, L.P., III and Philip D. Demas, 337 N.L.R.B. 1110 (2002)

Odell Maggard v. Chaney Creek Coal, Corp., 1986 WL 221513 (1986)

L. E. Myers Co., 270 N.L.R.B. 1010 (1984)

Albert J. Dicaro v. U.S. Fuel Co., 5 FMSHRC 954 (F.M.S.H.R.C.), 1983 WL 165211 (1983)

Richard E. Bjes v. Consolidated Coal Co., 4 FMSHRC 2043 (1982)

Sec. of Labor ex rel. Danny H. Bryant v. Clinchfield Coal Co., 4 FMSHRC 1379 (F.M.S.H.R.C.)
1982 WL 176103 (1982)

Sec'y of Labor, MSHA ex rel. Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803
(F.M.S.H.R.C.), 1981 WL 141638 (F.M.S.H.R.C.)

Oakland Scavenger Co., 241 N.L.R.B. No. 1 (1979)

States

California

Dabbs v. Cardiopulmonary Mgmt. Servs., 188 Cal.App.3d 1437 (App. 4th Dist. 1987)

Moore v. Unemployment Ins. Appeals Bd., 169 Cal.App.3d 235 (Cal. App. 1985)

McCrocklin v. Emp't Dev. Dep't, 205 Cal.Rptr. 156 (App. 2d Dist. 1984)

Hentzel v. Singer Co. 138 Cal.App.3d 290 (Cal. App. 1982)

Alexander v. Unemployment Ins. Appeals Bd., 163 Cal.Rptr. 411 (App. 2d Dist. 1980)

Connecticut

Perez v. Eastern Awning Systems, Inc., 2018 WL 4926447 (D. Conn. 2018)

Parsons v. United Tech. Corp., 700 A.2d 655 (1997)

Florida

Smallwood v. Florida Dept. of Commerce, 350 So. 2d 121 (Fla. 4th Ct. App. 1977)

Idaho

Webster v. Potlatch Forests, Inc., 187 P.2d 527 (1947)

Illinois

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Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (1985)

Indiana

Commissioner of Labor v. Talbert Mfg. Co., 593 N.E.2d 1229 (Ind. 1992)
Stepp v. Review Bd. of the Indiana Employment Sec. Div., 521 N.E.2d 350 (Ind. 1988)

Kansas

Rhodenbaugh v. Kan. Emp't Sec. Bd. of Review, 372 P.3d 1252 (Kan. App. 2016)

Louisiana

Operators, Inc. v. Comeaux, 579 So.2d 1228 (La. 1991)

Massachusetts

Mitchell v. TAC Technical Services, Inc., 734 N.E.2d 1198 (Mass. 2000)

Michigan

Walt Industries, Inc. v. Department of Labor, 1997 WL 33352761 (Mich. 1997)

Minnesota

Ferguson v. Dep't of Emp't Servs., 247 N.W.2d 895 (Minn. 1976)
Fannon v. Federal Cartridge Corp., 18 N.W.2d 249 (Minn. 1945)

Mississippi

Mississippi Employment Sec. Com'n v. Phillips, 562 So.2d 115 (Miss. 1990)

Missouri

Jennings v. Labor and Indus. Relations Commission, 579 S.W.2d 845 (Mo. 1979)
Wilson v. Labor & Indus. Rel. Com'n, 573 S.W.2d 118 (Mo.App.1978)
Bussmann Mfg. Co. v. Industrial Commission of Mo., 327 S.W.2d 487 (Mo. 1959)

Nevada

D'Angelo v. Gardner, 819 P.2d 206 (1991)

New York

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Buffalo Teachers Federation, Inc. v. Board of Education of City School District of City of Buffalo, 2021 WL 609873 (N.Y. 2021)
Hartnett v. New York City Tr. Auth., 657 N.E.2d 773 (1995)
Pan Am. World Airways, Inc. v. Air Line Pilots Ass'n, Intern, 206 N.Y.S.2d 98 (N.Y. 1960)

Ohio

Hernandez v. Pitt Ohio Express, LLC, 2012 WL 3496860 (N.D. Ohio Aug. 14, 2012)

Pennsylvania

West Penn Power Co. v. Com., Unemployment Compensation Bd. of Review, 436 A.2d 1045 (Pa. 1981)
Philadelphia Marine Trade Ass'n v. Unemployment Compensation Bd. of Review, 195 A.2d 138 (Pa. 1963)
Eastern Gas & Fuel Associates v. Unemployment Compensation Bd. of Review, 63 A.2d 371 (Pa. 1949)
McLean v. Unemployment Compensation Bd. of Review, 383 A.2d 533 (1978)

Tennessee

Long v. Traugher, 1991 WL 25917 (Tenn. App. 1991)

Washington

Cornelio v. Premier Pacific Seafoods, Inc., 127 Wash. App. 1037 (App. Div. 1 2005)

West Virginia

Lilly v. Overnight Transp. Co., 425 S.E.2d 214 (1992)
Davis v. Kitt Energy Corp., 365 S.E.2d 82 (W.V. 1987)
Peery v. Rutledge, 177 W. Va. 548, 355 S.E.2d 41 (1987)

Washington

Awana v. Port of Seattle, 89 P.3d 291, 21 IER Cases 701 (App.Div. 1 2004)

Wyoming

Wolfgram v. Employment Sec. Agency, 291 P.2d 279 (Wyo. 1955)