Standing for dignity in the workplace

Testimony in Support of SB 907- The Right to Refuse Dangerous Work
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Chair Taylor, Vice Chair Bonham, Members of the Committee,

My name is Kate Suisman. I am an attorney at the Northwest Workers' Justice Project (NWJP). Thank you for the opportunity to give testimony on these important bills. We represent workers in low-wage jobs when bad things happen to them at work: when they are not paid, or are discriminated against for being in a protected class or are retaliated against for speaking up. Finally, we engage in policy advocacy and try to bring the important perspectives of workers in low-wage jobs and immigrant workers to these policy discussions.

NWJP represents workers in some of the most dangerous professions in Oregon- forestry, construction, agriculture and others. Most of our clients are Spanish-speaking immigrants and all are in low-wage jobs. We believe SB 907 is absolutely necessary to make sure workers can protect themselves from dangerous work assignments, faulty machinery and other serious workplace risks. Our goal is to make sure workers can decide for themselves is a situation is just too dangerous. Sadly, we regularly see workers asked to do dangerous work with insufficient or no training and improper or no PPE. Workers must be able to choose to say no in these situations- especially workers that are the most likely to be injured or killed at work. We know that Black and Latinx workers have higher fatality rates than all others workers, per 2021 Bureau of Labor Statistic data: "Black or African American workers, as well as Hispanic or Latino workers had fatality rates (4.0 and 4.5 per 100,000 FTE workers, respectively) in 2021 that were higher than the all worker rate of 3.6." This data is borne out in Oregon fatalities as well. According to the last available Oregon Fatality Assessment and Control Evaluation report, OR-FACE 2020, published by OHSU each year, Latinx Oregonians accounted for 21% of fatalities, but only make up 11% of the workforce. This is why we need to clean up the already-existing "right to refuse" rule in Oregon.

The already-existing "right to refuse dangerous work" is in federal and state rule, and has been since 1973. However, the current Oregon OSHA administrative rule is extremely confusing:

(b) The employee refused in good faith to be subjected to imminent danger provided the employer refused to correct the hazard or it was not possible to notify the employer of the danger and the employee has notified Oregon OSHA or other appropriate agency, of the hazard, unless excused on the basis of insufficient time or opportunity as stated in OAR 839-003-0025, Bureau of Labor and Industries rules.

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I find this rule very difficult to understand, even though I regularly read complicated legal language: A worker must do "this **or** this **and** that **unless** that…" Further, the secondary rule referred to in the current rule does not shed any light on what constitutes "insufficient time or opportunity" to notify Oregon OSHA. A right on paper should be a right Oregonians can use. This one is not.

The proposed language in the -1 amendment to SB 907 is meant to simplify and clarify when a worker can refuse dangerous work. It reads:

(1) Any employee, acting in good faith, may refuse to:
(a) Perform a task assigned by an employer in any of the following circumstances:

(A)(i) The employee has a reasonable apprehension that the performance of the assigned task would result in serious injury or impairment to the health and safety of the employee or other employees;

(ii) Insofar as it is reasonably practicable, the employee or any other employee has communicated or otherwise attempted to notify the employer of the safety or health risk; and

(iii) The employer has failed to provide a response that is reasonably calculated to allay the employee's concerns regarding the safety or health risk associated with the assigned task;

The heart of the idea is that a worker must act *reasonably*. The scenarios in the one-pager on this bill are helpful in laying out what would and what would not be reasonable. *See* my submitted testimony, which also includes a document comparing the existing and proposed rules.

A worker does not have to know if they are in "imminent danger," which has a technical definition under Oregon OSHA law. It just has to be reasonable to think that doing the task would result in serious injury. A second change is that the worker *should* communicate the risk to the employer, but only if they are able to do so. The final change is that the worker does NOT have the right to refuse if the employer provides a response that is reasonably meant to allay the worker's concern. (If a worker is concerned about lack of training, for example, the employer could give the worker the required training, and the worker would not have the right to refuse.)

Another important thing to think about as you consider this bill is the increased risk of injury and death that workers face due to climate change. A worker like Sebastian Francisco Perez could have said "no" when he was asked to work alone laying heavy pipes on a 100+ degree day. He could still be with us today. We want to avoid anything close to the awful loss of life that took place in the Kentucky Candle Factory fire of 2021, where nine workers lost their lives at work when a tornado struck and their employer told them to stay at work. Or the six workers that died during that tornado in an Amazon warehouse when the company told them to stay at work. Those workers should have had the clear right to say "no, enough is enough- we are going to find safety."

If workers refuse to do a dangerous assignment, and are in fact retaliated against, they are likely already covered by the already-established rebuttable presumption of retaliation passed by this

body in SB 483 of 2021, and now law under ORS 654.062(7). (As a reminder, this means that an action is presumed to be retaliatory if it happens within sixty days of a worker speaking up or making a complaint about safety and health at the workplace. The employer can then "rebut" or disprove the retaliation by offering a non-retaliatory reason for the action. For example, if I complain about a safety issue today, and then a month later I am fired, my employer can show that I was in fact late to work every day for the past two weeks- a strong rebuttal to the presumption.) But SB 907 will make clear that a reasonable refusal to work is protected by the 2021 rebuttable presumption law.

Oregon should lead the way on making clear that we value human life more than profit. Workers know the risk of saying no to the boss; as someone who has spent years defending workers who suffer from retaliation for speaking up, I can say with certainty that workers do not make these decisions lightly. When you are in a low-wage job and live paycheck to paycheck, there is an incredible amount of pressure to keep working and to keep quiet. But workers stand up and raise their voices when it is truly necessary. We need to give workers clear guidance on when and how they can speak up when they fear serious injury or death. We owe it to all the workers who have been seriously injured or killed to make this change.

Thank you very much.

THE RIGHT TO REFUSE DANGEROUS WORK

PROBLEM:

Currently, federal and state rules allow workers to refuse unsafe work, but this right is very difficult to exercise, and often results in retaliation.

These protections are more critical than ever. Workplace hazards kill approximately 125,000 workers each year—4,764 from traumatic injuries, and another 120,000 from occupational diseases. This averages out to 340 workers deaths each day from hazardous working conditions. And Oregon has a higher fatality rate than neighboring states- our 2021 workplace fatality rate was 3.3 worker deaths per 100,000 workers, compared to California's 2.8 and Washington State's 2.1. This problem is exacerbated by rapidly accelerating climate change, resulting in devastating wildfires, ice storms, and extreme heat. As a result, Oregon workers are increasingly at risk of illness and death on the job due to climate hazards. In addition, workers are exposed to other dangerous conditions when they work with heavy machinery, toxins and other hazards. Lower-income, and Latinx and Black workers remain at greater risk of dying on the job than all workers. Each one of these deaths can be prevented.

SOLUTION:

The Oregon legislature must guarantee the "right to safe work" by making this existing right easier to exercise.

SB 907 WOULD:

- Allow workers to reasonably refuse to do work that can cause them death, serious impairment or injury– such as unsafe equipment.
- Give workers the right to leave or refuse to report to a worksite due to extreme natural disasters, active evacuations, and acts of criminal violence such as mass shootings.
- Allow employers the opportunity to remove or fix the hazardous conditions or reassign a worker, in which case the worker would not have a right to refuse.
- Allow sick time, PTO, or vacation time to be used to protect a worker's pay in situations where it is too dangerous to work.
- Protect workers from retaliation under Oregon's already-established rebuttable presumption if they exercise this right in good faith and act as a reasonable person would.

SCENARIO 1

There is a heat wave, and temperatures are above 100F- likely even higher on the pavement of an industrial complex in the city. Employees working outside of a warehouse moving furniture still feel lightheaded and dizzy even with shade and water. They tell their employer they can't keep working. The employer informs the workers they will be temporarily relocated to an air-conditioned warehouse to paint cabinets. The workers are NOT protected in this example, since the employer provided alternative work.

REAL LIFE SCENARIO 2

A worker is told to bring gravel to the bottom of a sloped street using a heavy-duty loader. The worker knows the brakes on the loader are faulty and tells the boss he is concerned for the safety of his coworkers at the bottom of the slope. The boss says not to worry and to go ahead with the work. The worker WOULD have the protection of the right to refuse dangerous work.

REAL LIFE SCENARIO 3

A worker is sent to lay irrigation pipe on his own in a distant field on an 100 degree day. He asks his supervisor to send another worker with him so they can monitor each other and lighten the load of the heavy pipes. The supervisor tells him to tough it out. The worker WOULD have the protection of the right to refuse dangerous work.

WHY WE NEED TO CLEAN UP THE CURRENT RULE

Currently, Oregon workers have the right to refuse dangerous work in a very confusing set of circumstances, (under OAR 437-001-0295**,** Oregon OSHA's rule on the OSHA Discrimination Complaint procedure.) The rule is complex and hard to understand, putting workers at risk of "doing it wrong" and losing the intended protection of the rule. Further, workers don't know they have this right already since it is buried in an administrative rule. We want to make these circumstances clearer and enshrine this right in statute.

What does the current rule say? Under the current administrative rule, an employee needs to understand technically what counts as an "imminent danger," **and** has to notify the employer, **or** have notified OSHA, **unless** excused under a different rule that does not explain what excuses the required notice. This is extremely complicated and not realistic in an emergency situation where time is of the essence. Workers should not be compelled to make a specialized assessment of the dangers they face in order to keep themselves safe, but instead should be able to use common sense to refuse to perform dangerous work.

Bottom line: Workers need to be safe on the job. If a worker reasonably believes a job assignment can seriously injure or kill them, they should be able to say no.

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WHY WE NEED TO CLEAN UP THE CURRENT "RIGHT TO REFUSE" RULE AND PASS SB 907 (2023)

Currently, Oregon workers have the right to refuse dangerous work in a very confusing set of circumstances, (under OAR 437-001-0295**,** OR OSHA's rule on the OSHA Discrimination Complaint procedure.) The rule is complex and hard to understand, putting workers at risk of "doing it wrong" and losing the rule's intended protection. Further, workers don't know they have this right since it is buried in an administrative rule. We want to make these circumstances clearer and enshrine this right in statute.

Legal Standard: Under SB 907, a worker could refuse dangerous work if they have a "reasonable apprehension that performing assigned duties would result in serious injury to, or serious impairment of the health of, the employee or other employees." The current rule uses "refused in good faith to be subjected to imminent danger." "Imminent danger" is an OSHA term that has a very specific definition under OSHA law, but most workers are not familiar with its specific requirements. SB 907 instead uses a common-sense standard based on what a reasonable worker would think would cause a serious injury.

What an employee needs to do to assert this right: SB 907 says a worker, "when practicable, shall have communicated or attempted to communicate the safety or health concern to the employer and have not received from the employer a response reasonably calculated to allay such concern." This means a worker should let their employer know about their concern, but this is not required if it's not practicable for the worker to do so- i.e. in an emergency. The proposal also gives the employer a chance to allay the concern. The current rule says the worker is protected only if "the employer **refused to correct** the hazard **or** it was **not possible to notify the employer** of the danger **and** the **employee has notified Oregon OSHA or other appropriate agency**, of the hazard, **unless excused on the basis of insufficient time or opportunity as stated in OAR 839-003-0025."** It is difficult to figure out just what is required under the current rule- "This **or** that **and** that **unless** this…" Also, the *secondary* rule referred to in the current rule does not explain what is meant by "insufficient time or opportunity" to notify the employer or OSHA.

Bottom line: Under the current rule, an employee needs to understand technically what counts as an "imminent danger," **and** has to notify the employer, **or** have notified OSHA, **unless** excused under a different rule that does not explain what excuses the required notice. This is extremely complicated and not realistic in an emergency situation where time is of the essence. Workers should not be compelled to make a specialized assessment of the dangers they face in order to keep themselves safe, but instead should be able to use common sense to refuse to perform dangerous work.