

IN THE SUPREME COURT OF OHIO

07 - 0640

EURAND AMERICA, INC. :
Appellant, : On Appeal from the Montgomery
v. : County Court of Appeals,
RANDALL J. DOHME : Second Appellate District
Appellee. : Court of Appeals
Case No. 21520

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
EURAND AMERICA, INC.

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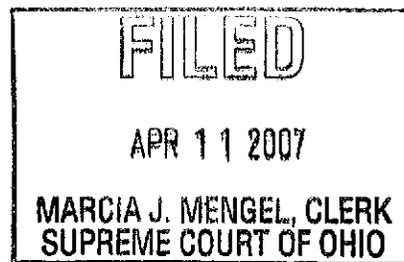


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST

This case involves the expansion of the tort of wrongful discharge in violation of public policy into a context that heretofore was unrecognized under Ohio law. More importantly, this case is the latest example of the Ohio appellate courts' struggle to develop a consistent expression of this legal doctrine on which Ohio's employers can rely.

The purpose of case precedent is to create a stability and predictability in the law that allows both the business and individual citizens of Ohio to function in an orderly manner. Unfortunately, few areas of Ohio law are currently as unstable and unpredictable as the doctrine of wrongful discharge. As a result, Ohio employers must navigate a maze of often-conflicting appellate rulings while trying to operate businesses that provide jobs for Ohio's citizens and compete in a global economy. This case is will provide the Court with the opportunity to provide much-needed guidance in this area to the employers of Ohio.

The conflict among Ohio's appellate courts involving wrongful discharge cases is around every corner. Courts are split on whether the claim can be premised on Ohio Revised Code § 4123.90. Courts are split on whether a public policy claim exists for failure to promote. Courts are split on whether employees covered by a labor agreement can maintain the claim. Unfortunately, the appellate court decision in this case has added to the conflict by disagreeing with prior cases on points of law and factually distinguishing cases that are legally indistinguishable.

Perhaps no greater evidence of the ill-defined state of this tort exists than the confusion reflected in the appellate court's decision in this case. To that end, the appellate court explained, "[w]e disagree with the *Jermer* court's implication that an employee must make some formal announcement that his statements are being made for the purpose of protecting the public policy favoring workplace safety." In another portion of its opinion the court stated, "[t]he *Herlik* opinion misconstrues Ohio law on this issue." How can Ohio's employers be expected to determine the state of Ohio's wrongful discharge law when the Sixth Circuit Court of Appeals, provided with briefs from the litigants and research from law clerks, apparently cannot do so. Few areas of Ohio law needs more clarification than the tort at issue in this case.

This Court has cautioned appellate courts to be mindful of its early admonition that the public policy exception to the at-will doctrine must be reserved for situations of serious import. However, this guidance has not been followed. Rather the "exception" to the at-will doctrine has subsumed the at-will rule. For Ohio employers to remain viable sources of support for Ohio's workers and their families, predictable and manageable employment laws must be in place. This case provides the Court with the vehicle to provide a definitive statement on the boundaries of the wrongful discharge tort.

The appellate courts' expansion of the law of wrongful discharge in violation of public policy is of great interest to the employers of the State of Ohio. As such, this court should hear this appeal.

STATEMENT OF THE CASE AND FACTS

This case arises from the termination of Appellee Randall Dohme ("Dohme") from his employment with Appellant Eurand, Inc. (formerly Eurand America, Inc.).

Dohme's short but tumultuous employment with Eurand was terminated following his admitted disregard of a management directive that the employees at Eurand's facility direct contact with an insurance company employee, who was on site for a two-day review of the premises for the submission of a policy proposal, through specifically-identified individuals.

Dohme filed suit against Eurand asserting, among other things, that his termination constituted a wrongful discharge in violation of the public policy of the State of Ohio. Although Dohme admits that he did not actually voice a safety concern, he based his public policy claim on the general policy favoring workplace safety. The Montgomery County Court of Common Pleas granted summary judgment in Eurand's favor on the wrongful discharge claim reasoning that "Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection."

Dohme appealed the adverse judgment on his claim to the Montgomery County Court of Appeals. The Montgomery County Court of Appeals reversed the ruling of the trial court and, maneuvering around existing precedent, expanded the wrongful discharge tort beyond its previously existing bounds. More specifically, the court of appeals declared that "the employee's intent is largely irrelevant in an analysis of the clarity element of a wrongful discharge claim" and, ignoring the fact that Dohme did not actually mention workplace safety or even claim in his conversation that an unsafe environment existed, found that the potential choice between higher insurance premiums

and remedying unspecified workplace safety issues might advance the public's interest in workplace safety. The appellate court then ruled that even though Dohme never mentioned safety and did not report any safety concern to either Eurand or a governmental body, a termination under these circumstances jeopardized the public policy of Ohio.

The court of appeals erred in recognizing the wrongful discharge claim in the context of Dohme's termination. In fact, it appears that the motivation for the appellate court's extension of the law was an "implication" that was not argued by Dohme, does not exist in Ohio law, and is contradicted by the evidence in the record.¹

Eurand asks the Court to remedy these errors of law.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.

Whether the issue involves personnel, the physical environment of the workplace, or a company's product it is likely possible for an employee to manufacture an after-the-fact argument that workplace safety is somehow implicated. As such, nearly any termination will, under the ruling of the appellate court in this case, support a wrongful discharge cause of action. Ohio law requires more.

¹ According to the appellate court, "[w]hen an employer directs employees to not speak to an insurance representative inspecting a premises, an implication arises that the employer wishes to cover up defects, including those that create a danger to employees"

As the Franklin County Court of Appeals has noted, it is not enough for a plaintiff to refer generally to a statute or declare that his conduct was warranted by “safety.” Rather, the plaintiff must demonstrate the existence of a specific public policy in existing Ohio law that forms a policy that specifically relates to the facts at hand. *Lesko v. Riverside Methodist Hosp.* (Franklin Cty. App. 2005), 2005-Ohio-3142. In *Poland Township Bd. of Trustees v. Swesey* (Mahoning Cty. App. 2003), 2003-Ohio-6726, the court explained a plaintiff’s burden as follows:

It was [plaintiff’s] burden to indicate the specific public policy at issue and to establish how that clear public policy was violated by his termination. *Sorensen v. WiseMgt. Services, Inc.*, 8th Dist. No. 81627, 2003-Ohio-767 (stating that a person seeking to apply the public policy exception to the at-will employment doctrine must state with specificity the law or policy that was violated by his termination); *Gargas v. City of Streetsboro*, 11th Dist. No. 2000-P-0095, 2001-Ohio-4334 (stating that the burden to produce specific facts demonstrating that a clear public policy exists and that discharge under the circumstances violates that public policy is the burden of the person claiming he was wrongfully discharged); *Carver v. Universal Well Serv., Inc.* (Aug 20, 1997), 9th Dist. No. 96CA0082 (stating “when pleading this cause of action, a plaintiff must indicate the specific public policy at issue and explain how it was violated.”)

The appellate court’s decision in this case completely abandons this requirement and, in effect, adopts a rule that suggests that even though an employee does not intend to advance a public policy and does not even make a statement that mentions a public policy, the employee satisfies his burden if subsequent to his termination it can be calculated that there is a potential for a tangential byproduct that could involve the public policy.

More specifically, Dohme relies on the Court’s decision in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77 for the general proposition that Ohio’s public policy favors workplace safety. To be sure, every state prefers safe workplaces over unsafe ones. However the *Pytlinski* case recognized the workplace safety public policy in

the limited context of an employee's expression of specific safety concerns to his supervisors. That is a stark contrast to this case where the employee did not mention safety and was speaking to a private third party. To satisfy the clarity element of a wrongful discharge claim the employee must identify a specific public policy applicable to the actual circumstances of his termination.

In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264, the Franklin County Court of Appeals addressed whether a public policy exists under Ohio law in a situation where a physician wrote letters concerning emergency room overcrowding. In rejecting a blanket "patient safety" exception, the court explained:

any physician or health care worker who complained to anyone about patient care issues at anytime during their employment who is later discharged, could file an action for wrongful termination in violation of public policy. Ohio law does not support such a *sweeping* interpretation of the public policy exception to employment at-will. If we were to hold otherwise, Ohio's long-standing and predominate rate that employees are terminable at-will would disappear.

Id. at 22 (italic in original). In *Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 WL 2445947 the Sixth Circuit specifically rejected the generic assertion of "safety" as an underlying public policy where a pilot questioned another pilot about potentially unsafe flight techniques. These cases are in direct conflict with the appellate decision in this case.

Nowhere in Ohio law exists a public policy that addresses an employee's right to disregard a manager's directive and contact a private party to advance his own private interests. As the trial court properly found, that is all that occurred in this case. Thus, the appellate court's reversal of the trial court on this point was in error.

Proposition of Law No. II: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation for voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body.

Common sense teaches that if a person truly wants to remedy a situation by complaining, the complaint must be made to someone who possesses the ability to directly effectuate the necessary change. Complaints to those who do not possess such ability are ineffective as a practical matter and should be equally inconsequential in the eyes of the law.

In this case, Dohme approached a private insurance company representative to suggest he was being set up for a claim of poor performance. While Dohme was not seeking to advance the safety of Eurand's workplace with his comments, even if he was, his termination would not have jeopardized a public policy favoring workplace safety because the insurance employee he approached had no direct ability to advance safety at Eurand.

Prior to the decision in this case, no Ohio court had found complaints made outside of management of the employer or to a governmental agency to be of a sufficient character to enjoy a legally protected status in the wrongful discharge context. In *Branan v. Mac Tools* (Franklin Cty. App. 2004), 2004-Ohio-5574, the Franklin County Court of Appeals addressed whether a public policy was implicated when an employee was terminated due to calls made to a co-worker. The *Branan* court rejected private party contact as a basis of a public policy by noting that the employee "arguably had the right to report the incident to administrative or law enforcement authorities" but found that

nothing in the law upon which the policy was allegedly based implicated calls to co-workers. In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264, the Franklin County Court of Appeals addressed whether a public policy exists under Ohio law in a situation where a physician wrote letters to other physicians expressing concerns over emergency room overcrowding and patient care issues. Despite the obvious safety overtones of the letters, the Franklin County Court of Appeals rejected the third-party contact as supporting the claim and “decline[d] to extend the *narrow* public policy exception to the employment at-will doctrine this far.” Finally, in *Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 WL 2445947 the Sixth Circuit noted that a public policy could not be jeopardized where the concerns were not expressed to the government or even upper management. Herlik, 2005 WL 2445947 at 4-5.

The appellate court in this case determined that these decisions either misunderstood Ohio law or were factually distinguishable. There is no legal distinction between “safety” claims asserted under a generic “workplace safety” policy and those asserted under the guise of “whistleblowing.” As such, these cases are directly at odds with the appellate court’s decision in this case.

The appellate court avoided the logical requirement that the “safety” concerns be raised to someone with the authority to address them by reasoning that through indirect market forces workplace safety might eventually be advanced. However, recognizing a chain-of-events theory of benefit is surely opening a Pandora’s box of claims ill-fitted for a “limited” exception to the at-will doctrine.

For example, an employee who criticizes to a neighbor his employer's management because it mandates overtime might indirectly advance safety because such criticism may result in fewer applicants, generating a shortage of workers, and ultimately triggering a change in policy. Under the decision in this case this scenario is a protected expression of a safety concern yet the *Branan* court would flatly reject that claim. Similarly, an employee who is unhappy with a company dress policy might write a letter to his local paper suggesting that the workers are disgruntled. If the paper's coverage discourages customers from patronizing the company, this too may cause the company to change its policy. The *Mitchell* court would reject such indirect consequences but the appellate decision in this case concludes that the claims would be viable.

Only the appellate court in this case has recognized indirect forces as satisfying the jeopardy element of the wrongful discharge claim. However, to satisfy the jeopardy element, an employee who contends that his discharge was prompted by complaints must be required to show that his complaints were to someone within the company or to a governmental agency before the termination will jeopardize a public policy.

Proposition of Law No. III: To satisfy the jeopardy element of a wrongful discharge claim based upon an alleged retaliation an employee must advise the employer or act in a manner that reasonably apprises the employer that the employee's conduct implicates a public policy.

Before the decision in this case, Ohio law required that before an employer could be held liable under a wrongful discharge claim it must have been placed on notice that a public policy was implicated. The appellate court's decision removes this requirement and allows an employer to be blindsided by after-the-fact justifications.

In *Jermer v. Siemens Energy & Automation* (6th Cir. 2005), 395 F.3d 655, the Sixth Circuit addressed what proof was required for a plaintiff to establish the jeopardy element of the Ohio wrongful discharge claim. In *Jermer*, the employee based his public policy on complaints concerning poor air quality in the employer's facility. Citing *Himmel v. Ford Motor Co.* (6th Cir. 2003), 342 F.3d 593, the Sixth Circuit rejected the claim and explained that:

The question before us is the meaning of the second element, the so-called "jeopardy element." Our interpretation of this gateway element is as follows: although complaining employees do not have to be certain that the employer's conduct is illegal or cite a particular law that the employer has broken, the employee must at least give the employer clear notice that the employee's complaint is connected to a governmental policy. It must be sufficiently clear from the employee's statement that he is invoking governmental policy that a reasonable employer would understand that the employee relies on the policy as the basis for his complaint. Because the employee here never connected his statements . . . to governmental policy or mentioned or in any way invoked governmental policy as the basis of his complaint, we agree with the district court that his case must be dismissed for the failure to show that his dismissal would "jeopardize" Ohio's public policy.

Jermer, 395 F.3d at 656.

Relying on *Jermer*, the United States District Court for the Northern District of Ohio similarly rejected a public policy claim based upon an employee's safety complaints. *Aker v. New York and Co., Inc.* (N.D. Ohio 2005), 364 F. Supp. 2d 661. In rejecting the claim, the *Aker* court noted:

Nothing in plaintiff's complaint indicates that plaintiff told defendant that, if she was terminated, defendant would be violating the Ohio public policy favoring workplace safety. Because plaintiff did not put the defendant on notice that her termination would be contrary to Ohio public policy, she has not pleaded facts sufficient to establish the jeopardy element.

Id. at 666. Dohme's claim must fail for the same reason.

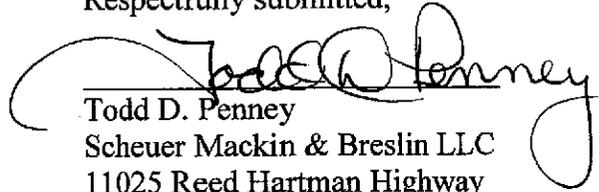
It is beyond debate that Dohme did not intend to advance workplace safety with his conduct and did not even mention safety in his comments to the third-party. Nevertheless, the appellate court's decision imposed a requirement on Eurand to go past what was actually said and done, and calculate what byproduct could eventually develop from what was said and done. No such requirement exists under Ohio law and this onerous burden should not be imposed.

The logic and merit of the positions taken in the *Jermer* and *Aker* decisions are inescapable. Employers cannot be expected to evaluate unstated hidden agendas or unintended byproducts. If an employee believes that the workplace is unsafe, for example, it is not unreasonable to require him to indicate so before he can maintain a retaliation-based claim. The appellate court's contrary ruling must be reversed.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Eurand requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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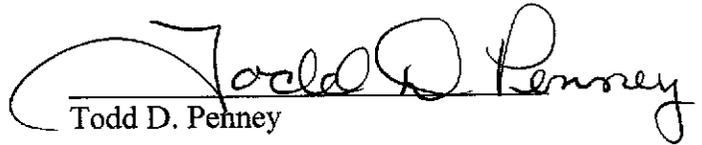
Counsel for Appellant Eurand, Inc.

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the following counsel for Appellee:

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MONTGOMERY COUNTY, OHIO

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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RANDALL J. DOHME
Plaintiff-Appellant

C.A. CASE NO. 21520

vs.

T.C. CASE NO. 2003CV4021

EURAND AMERICA, INC.
Defendant-Appellee

FINAL ENTRY

R

Pursuant to the opinion of this court rendered on the
2nd day of March, 2007, the judgment of the trial
court is Reversed and the matter is Remanded for further
proceedings consistent with the opinion. Costs are to be paid
as provided in App.R. 24.

James A. Brogan

JAMES A. BROGAN, JUDGE

Thomas J. Grady

THOMAS J. GRADY, JUDGE

Mary E. Donovan

MARY E. DONOVAN, JUDGE

THE COURT OF APPEALS OF OHIO

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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

RANDALL J. DOHME	:	
Plaintiff-Appellant	:	C.A. CASE NO. 21520
vs.	:	T.C. CASE NO. 2003CV4021
EURAND AMERICA, INC.	:	
Defendant-Appellee	:	

OPINION

Rendered on the 2nd day of March, 2007.

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Attorney for Defendant

GRADY, J.

Plaintiff, Randall Dohme, appeals from a summary judgment for Defendant, Eurand America, Inc. ("Eurand"), on Dohme's wrongful discharge claim.

Eurand hired Dohme on January 12, 2001 as an Engineering Supervisor. In August 2001, there was a fire on Eurand's

property. Dohme pulled a fire alarm but the alarm did not activate. Dohme had to run to another fire alarm station to pull the alarm. Dohme was taken to the hospital and treated for smoke inhalation. Subsequently, Dohme reported what he believed to be fire safety problems to a fire captain with the Vandalia Fire Department.

During his first eighteen months with Eurand, issues arose regarding Dohme's interaction with his co-workers and with an independent contractor. On July 9, 2002, Dohme was reassigned to assume the duties of Facilities/Computerized Maintenance Management System Administrator, which included responsibilities relating to Eurand's fire system. On November 4, 2002, Dohme was granted leave by Eurand under the Family Medical Leave Act. He returned to work on a full-time basis on January 20, 2003.

On March 21, 2003, Eurand sent an e-mail message to its employees advising them that an insurance inspector would be visiting Eurand on March 24-25, 2003 to perform a site survey and risk assessment. Dohme believed that the insurance inspector was there to rate how safe the facility was. (Dohme Depo., p. 249.) Eurand instructed its employees not to speak to the inspector, but identified certain employees in the e-mail who had permission to speak to the inspector. Dohme was

not identified in the e-mail as an individual with permission to speak to the inspector.

According to Dohme, on March 25, 2003, he was asked by an employee of Eurand to greet the inspector, because another Eurand employee was unavailable to do so. Dohme approached the inspector in Eurand's lobby and presented the inspector with a computer printout that showed overdue fire alarm inspections. A scheduled March 20, 2003 overdue fire alarm inspection was not reflected on the printout. Dohme told the inspector that he may want to check out what happened with that inspection. Dohme testified that he was concerned that he would be blamed for the omission. (Dohme Depo., pp. 250-56.) On March 27, 2003, Eurand fired Dohme.

On June 9, 2003, Dohme commenced a civil action against Eurand, alleging violations of the Fair Labor Standards Act, as adopted and codified in R.C. 4111.01, the Family and Medical Leave Act, and Ohio public policy relating to workplace safety. Pursuant to 28 U.S.C. §§ 1331, 1441, and 1446(b), Eurand removed the action to federal court. On November 29, 2004, the federal court sustained Eurand's motion for summary judgment on the Family and Medical Leave Act claim, and supplemental state claims were transferred to the common pleas court.

Eurand moved for summary judgment on Dohme's two remaining state claims. On November 21, 2005, the trial court granted summary judgment on the wrongful discharge claim and denied summary judgment on the R.C. 4111.01 claim. Dohme elected to voluntarily dismiss his R.C. 4111.01 claim in order to perfect his right to appeal the summary judgment on his wrongful discharge claim. On March 7, 2006, the trial court determined that there was no just reason for delay of any appeal of its summary judgment. Dohme filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING EURAND JUDGMENT ON THE ISSUE OF DOHME'S WRONGFUL DISCHARGE CLAIM."

The general rule is that, absent an employment contract, the employer/employee relationship is considered at-will. *Painter v. Graley*, 70 Ohio St.3d 377, 382, 1994-Ohio-334. Thus, the employer may terminate the employee's employment for any lawful reason and the employee may leave the relationship for any reason. *Id.* There are exceptions to the general rule. In *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 235, 551 N.E.2d 981, the Supreme Court held that an exception to the traditional common law

doctrine of employment-at-will exists where an employee is terminated wrongfully in violation of public policy. Public policy is generally discerned from the United States and Ohio Constitutions, statutes, administrative rules and regulations, and common law. *Painter*, 70 Ohio St.3d at 384.

To state a claim of wrongful discharge in violation of public policy, a plaintiff must demonstrate the following four elements: (1) a clear public policy exists and is manifested in a state or federal constitution, statute, administrative regulation, or common law (the "clarity" element); (2) the dismissal of employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the "jeopardy" element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the "causation" element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the "overriding justification" element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1999-Ohio-135 (citation omitted). The clarity and jeopardy elements involve relatively pure law and policy questions and are questions of law to be determined by the court. *Id.* at 70. The jury decides factual questions relating to causation and overriding justification. *Id.*

The trial court granted summary judgment based solely on Dohme's failure to establish the clarity element. The trial court held that:

"Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff for such action. Although Plaintiff claims that he was discharged for voicing a concern for work place safety, the insurance Representative's purpose for being on the premises was to provide Defendant an insurance quote. Moreover, Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing inspection report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection. Based on the facts presented to the court, it appears that due to the deteriorating relations between the parties at the time of the incident, the content of the report would not have changed Plaintiff's basis in making the statements.

"Because Plaintiff can articulate no public policy of which Defendant is in violation, the court need not and can not analyze the other elements established by the Supreme

Court in Painter. As such, because the court was presented no public policy which prohibits an employer from discharging an employee for disobeying an order, not in violation of any statute or any other regulation, the court finds that no genuine issue of material fact exists as to the basis of Plaintiff's discharge."

The trial court placed great emphasis on Dohme's intentions when he confronted the underwriter. Dohme testified as follows regarding his encounter with the insurance inspector:

"Q: When you approached [the inspector] in the lobby that day, did you identify your role with Eurand?

"A: Yes, I did.

"Q: What did you tell him?

"A: I said something to the fact that here's my card and I had scratched out engineering supervisor and I told him that I used to be engineering supervisor and I'm in charge of the fire safety stuff and also in charge of the computer -- the CMMS system. . . . And he said what's that. I said well, I got the feeling that they're trying to make it look like I'm not doing my job and I got the forms out and I showed him on January 20 the fire alarm was overdue and February 20 the same report and on March

20 it was missing. It didn't say it had been done, not done, it was nowhere in the system. I just said you might want to find out what happened with that inspection, and that was the end of our conversation.

* * *

"Q: And at that point in time, I believe your testimony was earlier you were no longer in charge of the fire alarm?

"A: I wasn't even doing anything with it, but my job description said I still should have been. That's what worried me. When I got my appraisal, it's back here, I got dinged for stuff I wasn't doing the first six months of the year and some things that I shouldn't have been doing the second six months of the year.

I was under the impression that even though this is on my job description, he's still going to hold me accountable for it. That's what I told [the inspector], somebody made this disappear and I'm afraid they're trying to make it look like I wasn't doing my job."

(Dohme Depo., pp. 250-55.)

The trial court stressed the fact that Dohme was not motivated by a desire to report workplace safety issues to the inspector but, instead, to protect himself from complaint or criticism. But the employee's intent is largely irrelevant in

an analysis of the clarity element of a wrongful discharge claim. What is relevant is whether Dohme did in fact report information to the inspector that encompassed a public policy favoring workplace safety. If Dohme did so, then the trial court erred in granting summary judgment.

The Supreme Court has recognized the abundance of Ohio statutory and constitutional provisions that support workplace safety and form the basis of Ohio's public policy, which is "clearly in keeping with the laudable objectives of the federal Occupational Safety and Health Act." *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308. See also *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 89, 2002-Ohio-66. Ohio's Fire Code includes rules relating to the installation, inspection, and location of fire protection equipment. R.C. 3737.82; O.A.C. 1301:7-7-01, et seq. Further, there are federal laws relating to fire protection and employee alarm systems. 29 C.F.R. § 1910.164, 1910.165. Employers also are subject to inspections from local fire authorities. There is a clear public policy favoring workplace fire safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy.

According to Dohme, the information he shared with the

insurance inspector concerned whether or not the fire alarm system was inspected at the appropriate times. Dohme had a prior experience at Eurand when he was injured after a fire alarm malfunctioned. He also had reported prior fire safety concerns to a member of the Vandalia Fire Department. An employee who reports fire safety concerns to the employer's insurance inspector, regardless of the employee's intent in doing so, is protected from being fired solely for the sharing of the safety information.

Eurand argues that Dohme's claim must fail because Dohme did not report the safety issue to a governmental employee. We do not agree. It is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety. "The elements of the tort do not include a requirement that there be a complaint to a specific entity, only that the discharge by the employer be related to the public policy." *Pytlinski*, 94 Ohio St.3d at 80, n.3 (citation omitted).

Furthermore, Eurand's argument ignores the fact that an insurer's requirements may function to avoid fire safety defects. When such requirements are imposed, or higher premiums are the alternative, an employer such as Eurand is motivated to cure safety defects. The market thus plays a

role different from that of government, which may issue citations, but perhaps more immediate and compelling. And, making the insurer aware of defects through its representative furthers the public interest in effective fire safety measures.

Eurand cites *Branan v. Mac Tools*, Franklin App. No. 03AP-1096, 2004-Ohio-5574, in support of the trial court's decision to grant summary judgment on the clarity element. In *Branan*, the fired employee filed a claim under the whistleblower statute (R.C. 4113.52) based on alleged false imprisonment that occurred during a meeting with supervisors involving the disclosure of the employer's confidential information. No workplace safety concerns were raised in *Branan*. Further, *Dohme* is not alleging a whistleblower claim. Therefore, *Branan* is inapposite.

Eurand also argues that summary judgment was appropriate because *Dohme* cannot establish the jeopardy element. The trial court did not specifically address this element, but the trial court's discussion of the employee's self-interest in bringing a concern to the insurance inspector, according to Eurand, arguably implicates the jeopardy element. Because the jeopardy element concerns a question of law, we will address Eurand's argument. According to Eurand, *Dohme* cannot

establish that the public policy favoring workplace safety is jeopardized by Dohme's discharge from employment. Eurand cites four cases in support of its argument. We find that all four of these cases are inapposite.

In *Jermer v. Siemens Energy & Automation, Inc.* (6th Cir. 2005), 395 F.3d 655, 658, the plaintiff contacted his employer's ethics hotline to report his concerns that his employer's air quality problems had not been addressed. Prior to this contact between the plaintiff and the employer's ethics hotline, the employer had decided to fire the plaintiff due to the plaintiff's prior conduct in the workplace. Unlike *Jermer*, Dohme was not fired for prior conduct, but rather was fired for his conversation with the insurance inspector contrary to Eurand's order to its employees. Of course, it is a question of fact for the jury whether Eurand fired Dohme because he raised safety concerns with the inspector or for reasons unrelated to the safety concerns Dohme raised.

The *Jermer* court also relied heavily on the fact that the plaintiff did not give his employer sufficient notice that he was raising a workplace safety issue. According to *Jermer*, "The Ohio Supreme Court views employee complaints and whistleblowing as critical to the enforcement of the State's public policy, and the Court therefore intended to make

employees de fact 'enforcers' of those policies. Toward this end, the Court granted them special protection from Ohio's generally applicable at-will employment status when the employees act in this public capacity. In exchange for granting employees this protection, employers must receive notice that they are no longer dealing solely with an at-will employee, but with someone who is vindicating a governmental policy. Employers receive clear notice of this fact when actual government regulators arrive to audit or inspect. They should receive some similar notice when an employee functions in a comparable role. Even though an employee need not cite any specific statute or law, his statements must indicate to a reasonable employer that he is invoking governmental policy in support of, or as the basis for, his complaints."

We disagree with the Jermer court's implication that an employee must make some formal announcement that his statements are being made for the purpose of protecting the public policy favoring workplace safety. Employers are presumed to be sophisticated enough to comply with the workplace safety laws. When an employer directs employees to not speak to an insurance representative inspecting a premises, an implication arises that the employer wishes to cover up defects, including those that create a danger to

employees. Supporting the employer's conduct endorses its efforts to conceal potential dangers. As the *Jermer* court recognized, the Supreme Court views employee complaints as critical to the enforcement of the State's public policy. We would be minimizing the importance of these complaints and the State's public policy were we to concentrate on the employee's intent in raising the safety concern rather than on whether the employee's complaints related to the public policy and whether the employer fired the employee for raising the concern.

In *Aker v. New York & Co., Inc.* (N.D. Ohio 2005), 364 F. Supp.2d 661, the employer had an internal policy regarding shoplifting that was created to minimize the chance of confrontation and physical injury (i.e., ensure workplace safety). The employee ignored the company's policy, which led to an altercation with suspected shoplifters. *Id.* at 664. Unlike *Dohme*, the employee did not allege that her termination resulted from a report about unsafe working conditions. Moreover, in *Aker*, the employee's actions actually undermined workplace safety. The same cannot and has not been alleged regarding *Dohme's* actions in speaking with the insurance inspector.

In *Mitchell v. Mid-Ohio Emergency Services, L.L.C.*, Franklin App. No. 03AP-981, 2004-Ohio-5264, a physician sent letters to a number of individuals regarding an incident at a hospital that raised issues regarding the quality of patient care. In these letters, the physician included confidential patient information, which violated his employer's policies and could have exposed his employer to liability for violating patient confidentiality. *Id.* at ¶7. The court was confronted with the employee's request to find a clear public policy that employers could not discharge employees who complain about patient care outside the quality assurance chain. *Id.* at ¶19. This is far from Dohme's situation, which involves the more precise public policy relating to fire safety. *Kulch*, 78 Ohio St.3d at 152; *Pytlinski*, 94 Ohio St.3d at 89.

Further, the *Mitchell* court held that the public policy identified in the statute at issue would be defeated if complaints were not kept confidential. 2004-Ohio-5264, at ¶23 n.5. Here, no argument can be made that the public policy favoring workplace safety would be defeated were employees allowed to express safety concerns to an employer's insurance inspector.

Finally, *Eurand* cites *Herlik v. Continental Airlines, Inc.* (6th Cir. Oct. 4, 2005), No. 04-3790. In *Herlik*, a pilot

was fired after he raised safety concerns with a co-pilot. The Sixth Circuit noted the Ohio Supreme Court's willingness to find a clear public policy from sources other than legislation, but then noted that the Supreme Court has not actually done so in practice. The Sixth Circuit then espoused a position that public policy prevents a firing only when there is a statute that prohibits firing employees for engaging in a particular protected activity. *Id.*

The *Herlik* opinion misconstrues Ohio law on this issue. The Supreme Court has made it very clear that a public policy preventing termination of an employee may flow from sources other than a statute that specifically prohibits firing employees for engaging in a particular protected activity. "Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted." *Pytlinski*, 94 Ohio St.3d at 80. The cause of action is not based upon the whistleblower statute, but is, instead, based in common law for violation of public policy. *Id.*

We do not suggest that Dohme will or should prevail on his claim of wrongful discharge. Rather, we conclude only that the trial court erred in finding that there was not a public policy that protects Dohme from being fired for sharing

information with an insurance inspector that relates to workplace safety. In order to prevail on his claim, Dohme must carry his burden to prove the remaining elements of a wrongful discharge claim.

The assignment of error is sustained. The judgment of the trial court will be reversed and the cause remanded for further proceedings consistent with this opinion.

BROGAN, J. and DONOVAN, J., concur.

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