

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.

CASE NO. 07-0640

Appellant,

vs.

RANDALL J. DOHME

Appellee.

On Appeal from the Montgomery
County Court of Appeals,
Second Appellate District

Court of Appeals
Case No. 21520

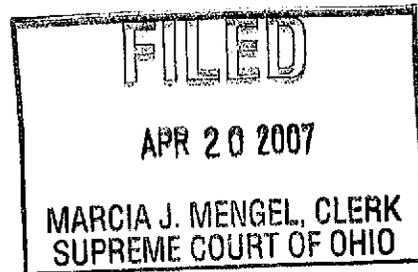
MEMORANDUM IN RESPONSE OF APPELEE DOHME

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EURAND'S DISCRETIONARY APPEAL DOES NOT RAISE A MATTER OF
PUBLIC OF GREAT GENERAL INTEREST

In this matter, the Second District Court of Appeals was asked by Appellee Randall Dohme to construe a specific and particular set of facts against an already clearly defined public policy exception to an employee's at-will employment. Though Eurand America Inc. may disagree with the appellate court's ultimate construction of these facts, the court cannot be fairly accused of confounding precedent or unnecessarily expanding its' breadth.

Rather, the Second District Court of Appeals expressly turned to "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.'" *See*, Opinion at 9, citing, *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308; *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St.3d 77, 89, 2002-Ohio-66. And, after identifying several other factually applicable statutory sections, the appellate court concluded, "There is a clear public policy favoring workplace safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy. *See*, Opinion at 9.

Mindful of these clear and unequivocal parameters, Eurand's jurisdictional motion is overreaching and far beyond the finite scope of issues before the Second District Court of Appeals. This Court should deny Eurand jurisdiction.

Proposition of Law No. 1: 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.

From the beginning of this litigation, and continuing throughout the briefing and memoranda filed with the lower courts, Eurand has consistently ignored the specific identity of Dohme's public policy claim, as if its' blissful ignorance might actually make the pink elephant in the room disappear. Eurand continues this posture within its' jurisdictional motion. *Cf.*, Motion at 4-6.

Dohme, however, did not offer a grab bag of policies for the lower courts' consideration, nor did he conjure up a "generic" claim. His *Greeley* claim, was, and has always been based upon the public policy favoring workplace safety, and specifically the danger associated with Eurand's administration of its' fire alarm system. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 234, 551 N.E.2d 981, 987; *cf.* Complaint at ¶¶ 7, 30-33, 37.

Corroborative of Dohme's sufficient specificity - both originally pleaded and consistently argued - and despite the "abundance" of supportive authority related to workplace safety, the Second District Court of Appeal's cited to narrowly confined statutes involving fire safety. *See*, Opinion at 9, citing, R.C. 3737.82; O.A.C. 1301:7-7-01 *et seq.* and 29 C.F.R. §§1910.164, 1910.165 ("Ohio's Fire Code includes rules relating to the installation, inspection and location of fire protection equipment * * * Further, there are federal laws relating to fire protection and employee alarm systems.")

As this Court has consistently held, "We have confidence that the courts of this state are capable of determining as a matter of law whether alleged grounds for a discharge, if true, violate a "Clear public policy" justifying an exception to the common-law employment-at-will doctrine, thereby stating a claim." *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51.

Further, while discussing the origin of the exception to Ohio's at-will employment doctrine, this Court in *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 68-69, 652 N.E.2d 653, observed:

In adopting the exception, it is often pointed out that the general employment-at-will rule is a harsh outgrowth of outdated and rustic notions. The rule developed during a time when the rights of an employee, along with other family members, were considered to be not his or her own but those of his or her paterfamilias. The surrender of basic liberties during working hours is now seen "to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out" (citations omitted).

Eurand's clear attempt to restrict either the continued maturity of the pertinent public policy exception, or the deference extended by this Court to the state courts' concerning their collective construal of the underlying affected policies is inapposite to the direction outlined by this Court. Eurand's first proposition of law must be denied.

Proposition of Law No. 2: To satisfy the jeopardy element of a wrongful discharge claim upon an alleged retaliation voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body.

Proposition of Law No. 3: 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.

Given the inherent similarity in Eurand's second and third propositions of law, Dohme has consolidated his response to each, as it is equally applicable.

In *Kulch*, 78 Ohio St.3d at 150-151, 677 N.E.2d at 321, this Court followed the suggestion of the court in *Painter*, 70 Ohio St.3d at 384, 639 N.E.2d at 57, fn. 8, and applied the analysis of Villanova Law Professor H. Perritt, who set forth the elements of a wrongful discharge claim in violation of public policy. 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. H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U.Cin.L.Rev. 397, 398-399. See, *Pytlinski*, 94 Ohio St.3d at 80, fn. 3.

Accordingly, this Court in *Pytlinski* specifically "disagree[d] with any contention * * * that [the employee's] claim fail[ed] because his complaints were not filed with OSHA * * * [I]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety." *Pytlinski*, 94

Ohio St.3d at 80. And like Pytlinski, Dohme's complaint "clearly sets forth the allegation that [Eurand] retaliated against him for lodging complaints regarding workplace safety." *Id.*

Dohme's Complaint is equally clear and discernible. *See, e.g.*, Complaint at ¶ 7 ("As Engineering Supervisor, Plaintiff would routinely notice Defendant as to ongoing organizational concerns, employee performance, overtime issues, plant safety and a flawed chain of communication or command in an effort to better maximize Defendant's business operation and encourage workplace safety"); ¶ 30 ("In the course of his employment and following a fire at the facility on February 10, 2002, Plaintiff became aware of environmental safety concerns related to diaphragm pumps and their attendant venting that he reasonably believed posed an imminent risk of physical harm to employees and the physical integrity of the facility itself"); ¶ 31 ("Plaintiff informed Cruz and Larned [his supervisors] of his concerns, and following a discussion regarding the same, was instructed to keep the matter confidential"); ¶ 32 ("During the next several months, Plaintiff continued to express concerns to Cruz and periodically requested additional meetings to further discuss Plaintiff's workplace safety concerns"); ¶ 33 ("On or about June 17, 2002, a meeting was scheduled and was to include Plaintiff, Cruz and Dan Salain, vice president of plant operations, in order to further explore the safety concerns. Despite the same, Cruz failed to attend the meeting, purportedly upon the earlier expressed sentiments on or about May 30, 2002 that Plaintiff was a "troublemaker" and that Plaintiff's continued disagreement as to workplace safety concerns would lead to termination"); and ¶ 37 ("On or about March 27, 2003, Plaintiff was

wrongfully terminated in contravention of public policy for his perceived role in an on-site insurance adjuster's discovery of certain violations relative to Defendant's fire alarm system, which, upon information and belief, jeopardized workplace safety and placed employees in an unreasonable and dangerous setting. Despite reasonable concerns to the aforementioned system, the site and the employees themselves, Defendant actively attempted to prevent employee communication with said adjuster pursuant to an interoffice email sent by management personnel to all employees, including Plaintiff, days prior to the adjuster's arrival, which expressly prohibited communication with said adjuster").

These allegations were neither "generic" nor the type of hyperbole argued by Eurand in its' jurisdictional motion. Though the expansive legal theories contrived by Eurand certainly appear logical, they are not derivative of the underlying facts of this case, nor descriptive of the arguments placed before the Second District Court of Appeals.

Ironically, Eurand claims that it was deprived the benefit of claim specificity, when it is often the employer that fosters a convenient misperception of the claim. Too often, like present, the true identity of the employee's claim is lost in the employer's pigeon holed discovery technique: ask and seek only that information that is employer friendly and that may embolden the inevitable summary judgment motion. Often, the first opportunity the employee receives to communicate his complete position, is on the date of the trial. Eurand cannot have it both ways.

Finally, despite its feigned benevolence on behalf of all Ohio's employers, Eurand is only asked in this matter to defend against a well-rooted exception to at-will employment already found to exist: workplace safety. Regardless of Eurand's convenient perspective of the state of wrongful discharge law in Ohio, it matters little on the limited issues involved in this case.

Further still, the Second District Court of Appeals did not award judgment to Dohme; that much still remains for a jury's deliberation. What the appellate court did, however, was look beyond Eurand's subjective interpretation of Dohme's public policy claim, and determine that Dohme's articulated claim not only touched a cognizable public policy, but is one that should be determined by a jury capable of assessing the parties' true intentions.

As contemplated by this Court, that is how public policy is to be developed:

We note as well that a finding of a "sufficiently clear public policy" is only the first step in establishing a right to recover for the tort of wrongful discharge in violation of public policy. In cases where this required element of the tort is met, a plaintiff's right of recovery will depend upon proof of other required elements. Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio will result through litigation and resolution of future cases, as it is through this means that the common law develops. *Painter v. Graley* (1994), 70 Ohio St.3d 377, 384, 639 N.E.2d 51.

The Second District Court of Appeals did no more than what has long been contemplated, intended and favored by this Court.

CONCLUSION

For these reasons, Dohme respectfully requests that this Court deny Eurand's memorandum in support of jurisdiction and decline jurisdiction to decide the case on the merits.

This is not a case of public or great general interest, and it does not upset the existing state of the law in this area. Instead, this case is a fact-sensitive matter arising from a firmly rooted exception to the employment at-will doctrine.

Respectfully submitted,

DUWEL & ASSOCIATES

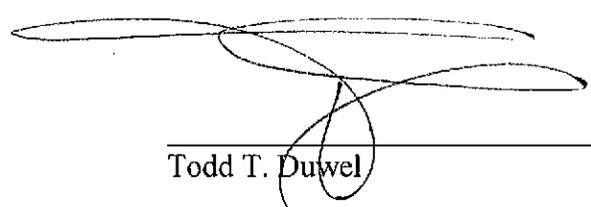


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Memorandum in Response has been served via regular U.S. mail upon counsel for Appellant, Todd D. Penney, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Defendant's counsel, via regular U.S. mail, this 18th day of April 2007.



Todd T. Duwel

COUNSEL FOR APPELLEE DOHME