

IN THE SUPREME COURT OF OHIO

07 - 0640

RANDALL J. DOHME,

Appellee,

v.

EURAND AMERICA, INC.

Appellant.

Case No. 2007-0646

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

MERIT BRIEF OF APPELLANT EURAND AMERICA, INC.

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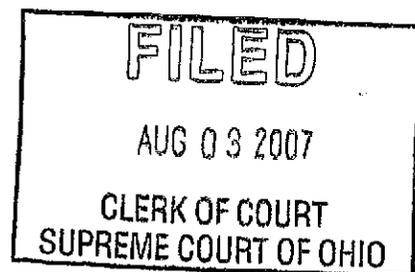


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
STATEMENT OF FACTS.....	1
ARGUMENT.....	5
 <u>Proposition of Law No. I:</u>	
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 concerns to a supervisor employee of the employer or to a governmental body	6
 <u>Proposition of Law No. II:</u>	
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	17
CONCLUSION.....	20
PROOF OF SERVICE.....	22
APPENDIX	<u>Appx. Page</u>
Notice of Appeal to the Ohio Supreme Court (April 11, 2007).....	1
Opinion of the Montgomery County Court of Appeals (March 2, 2007).....	4
Judgment Entry of the Montgomery County Court of Appeals (March 2, 2007).....	21
Decision, Order and Entry of the Montgomery County Court of Common Pleas (November 21, 2005).....	23

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGES</u>
<i>Aker v. New York and Co., Inc.</i> (N.D. Ohio 2005), 364 F. Supp. 2d 661	19
<i>Branan v. Mac Tools</i> (Franklin Cty. App. 2004), 2004-Ohio-5574	11
<i>Collins v. Rizkana</i> (1995), 73 Ohio St. 3d 65	5, 6
<i>Contreras v. Ferro Corp.</i> (1995), 73 Ohio St. 3d 244	11
<i>Coon v. Technical Construction Specialties, Inc.</i> (Summit Cty App. 2005), 2005-Ohio-4080	5
<i>Greeley v. Miami Valley Maintenance Contrs., Inc.</i> (1990), 49 Ohio St. 3d 228	5
<i>Herlik v. Continental Airlines, Inc.</i> (6 th Cir. 2005), 2005 U.S. App. LEXIS 21784	12
<i>Himmel v. Ford Motor Co.</i> (6 th Cir. 2003), 342 F.3d 593	6, 11, 18
<i>Jermer v. Siemens Energy & Automation, Inc.</i> (6 th Cir. 2005), 395 F.3d 655	18, 19
<i>Langley v. Daimler Chrysler Corp.</i> (N.D. Ohio 2005), 407 F. Supp. 2d 897	14
<i>Milhouse v. Care Staff, Inc.</i> (Mahoning Cty App. 2007), 2007-Ohio-2709	8, 19
<i>Mitchell v. Mid-Ohio Emergency Services, L.L.C.</i> (Franklin Cty App. 2004), 2004-Ohio-5264	12

<u>CASES:</u>	<u>PAGES</u>
<i>Painter v. Graley</i> (1994), 70 Ohio St. 3d 377	6
<i>Pfost v. Ohio State Attorney General</i> (Franklin Cty App. 1999), 1999 Ohio App. LEXIS 1792	17
<i>Pytlinski v. Brocar Products, Inc.</i> (2002), 94 Ohio St. 3d 77	9, 10, 11
<i>Sibley v. Alcan, Inc.</i> (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 22932	14
<i>Smith v. Calgon Carbon Corp.</i> (3d Cir. 1990), 917 F.2d 1338	15
<i>Tripp v. Beverly-Enterprises-Ohio, Inc.</i> (Summit Cty App. 2003), 2003-Ohio-6821	17
<i>Urda v. Buckingham, Doolittle, & Burroughs</i> (Summit Cty App. 2006), 2006-Ohio-6915	15, 20
<i>Westfield Ins. Co. v. Galatis</i> (2003), 100 Ohio St. 3d 216, 228, 2003-Ohio-5849	15
<i>Wiles v. Medina Auto Parts</i> (2002), 96 Ohio St. 3d 240	6
 <u>OTHER AUTHORITIES</u>	
<i>H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?</i> (1989), 58 U. Cin. L. Rev. 397	6, 7, 13

STATEMENT OF FACTS

A. Procedural Background

This case presents the Court with an opportunity to address the continuing erosion of the employment-at-will doctrine due to the application of the tort of wrongful discharge in violation of public policy to a seemingly endless array of fact patterns.

Appellee Randall Dohme (“Dohme”) was terminated from his employment with Appellant Eurand, Inc. (formerly Eurand America, Inc.) 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 an insurance policy proposal, through specifically-identified individuals. (Supp. at 70-73, 87; Dohme Depo. at 248–251, Exhibit DD) The Montgomery County Court of Common Pleas granted summary judgment in Eurand’s favor on the wrongful discharge claim reasoning that a policy favoring workplace safety was not implicated in Dohme’s termination because “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.” (Appx. at 29)

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. Specifically, the Second District

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 even suggest in his conversation that an unsafe work environment existed, found that the potential choice between higher insurance premiums and remedying an unarticulated, unknown workplace safety issue might indirectly advance the public’s interest in workplace safety.¹ (Appx. at 13-14) In other words, the Second District concluded that even though Dohme never actually mentioned safety and admittedly did not report a concern to either Eurand or a governmental body, a termination under these circumstances nevertheless jeopardized the general public policy of Ohio favoring workplace safety. (Appx. at 16-17)

B. Factual Background

Eurand is engaged in the manufacture and sale of drug delivery systems used in the pharmaceuticals industry. (Supp. 88; Cruz Aff. ¶ 2) Dohme is an electrician by trade who began work with Eurand on January 12, 2001 to supervise its maintenance staff. (Supp. 3; Dohme Depo. at 20)

During his brief employment with Eurand, Dohme had conflicts with his co-workers and direct reports, failed to perform his duties to management’s expectations, was the subject of various employee complaints to management and human resources, and was the subject of a complaint from an independent contractor who was working at

¹ When explaining the basis for its conclusion, the Second District stated, “[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.” However, this “implication” is wholly unsupported by the record. Even Dohme characterized the process of having limited points of contact whenever third parties entered the facility as routine at Eurand. (Supp. at 71-72; Dohme Depo. at 249-250)

the facility who relayed that Dohme had engaged in offensive behavior. (Supp. 4-33, 38-52, 80; Dohme Depo. at 43-66, 69, 73-77, 90, 143-151, 153-157, Exhibit A) This conduct resulted in a dysfunctional workplace, shifted reporting relationships, and discipline for Dohme. (Supp. 34-37, 80, 83; Dohme Depo. at 78-81, Exhibits A, Y) As a further result, Dohme's relationship with his supervisors became adversarial and on July 9, 2002, Dohme was relieved of his supervisory responsibilities. (Supp. 53-66, 68, 82; Dohme Depo. at 158-171, 204, Exhibit W)

Dohme's conduct did not improve following his demotion. On March 21, 2003, Eurand sent an e-mail to all of its Vandalia employees explaining that on March 24 and 25 an employee of an insurance company would be visiting the premises, and Eurand instructed employees to direct contact with him through certain identified employees. (Supp. at 70, 87; Dohme Depo. at 248, Exhibit DD) Dohme understood that the individual was an employee of a private insurance company who was coming to review the building in connection with submitting a bid for providing insurance coverage. (Supp. at 70-72; Dohme Depo. at 248-250) Dohme also understood that Eurand did not want him speaking with the insurance company employee and acknowledged that this was normal practice at Eurand. (Supp. 70-72; Dohme Depo. at 248-250)

On the second day of the insurance agent's visit, Dohme was called by Eurand's receptionist who was looking for another individual, who was identified as a contact point for the agent, to come meet the insurance agent. Dohme testified, "I said I will try to find him but I'll come down and greet him." (Supp. 73-74; Dohme Depo. at 251-252) When Dohme sought out the insurance company employee he did not merely "greet" the individual. Instead he immediately took out papers and, as Dohme describes

it, “I just said you might want to find out what happened with that inspection, and that was the end of the conversation.” (Supp. 73; Dohme Depo. at 251) Contrary to the inference suggested by the Second District, Dohme did not contend to the agent that the inspection was not completed. Rather, Dohme stated that he believed that the record of the inspection was removed to make it look as if he did not perform it. To that end, Dohme specifically testified:

- Q. What were you intending to suggest to her then?
- A. I didn’t know who it was that took it out of the computer. I assumed it was her so I just said he already knows the answer, tell him the truth....
- Q. Did you believe that Dell had done something inappropriate by taking that out?
- A. I had believed that Dell did it because they all had passwords, but Dell was the only one that was actively working in MP2. I think she’s probably the one that did it.
- Q. But when you say it, do you mean - -
- A. Took the fire alarm inspection out. I think she was either told or she did something to take that fire inspection out of there.

(Supp. at 75-76; Dohme Depo. at 253-254)

In short, Dohme feared only that he was being “set up” for a performance deficiency and told the insurance employee only that – “I told Mr. Lynch, somebody made this disappear and I’m afraid they’re trying to make it look like I wasn’t doing my job.” (Supp. 77; Dohme Depo. at 255)

Eurand terminated Dohme’s employment for his confrontation of the insurance agent in contradiction of its directive. (Supp. 69, 78, 79; Dohme Depo. at 247, 256, 259)

ARGUMENT

This Court has long recognized that “[t]he traditional rule in Ohio and elsewhere is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee’s rights, and a discharge without cause does not give rise to an action for damages.” *See Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 67 (citations omitted). To date, Ohio has recognized only limited exceptions to the at-will doctrine. However, the decision of the Second District in this case is a large stride toward the exception subsuming the rule.

The only exception to the at-will doctrine at issue in this case involves the tort of wrongful discharge in violation of a public policy, which was adopted in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St. 3d 228. The decisions following *Greeley* have attempted to refine the wrongful discharge tort. However, as one appellate court has noted, the development of the claim has not been a direct path. *See Coon v. Technical Construction Specialties, Inc.* (Summit Cty App. 2005), 2005-Ohio-4080 at ¶22 (“It is clear from the legal history of public policy wrongful termination causes of action that treatment of such claims has changed over time.”).

While their meaning has been the subject of litigation with often conflicting conclusions, the elements of the wrongful discharge claim remain unchanged. To establish a claim for wrongful discharge in violation of public policy, a plaintiff must establish the following elements: (1) that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy (the

jeopardy element); (3) that plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) that the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 384; *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70 citing *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. 397, 398-399.

Although Eurand challenged Dohme's ability to satisfy the clarity element of his claim and continues to maintain that no public policy exists that is applicable to the facts of this case, the Propositions of Law that this Court has agreed to hear both involve the boundaries of the jeopardy element of this tort.

Proposition of Law No. I:

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 concerns to a supervisor employee of the employer or to a governmental body.

In 2003, the Sixth Circuit noted, "Ohio has yet to adopt a clear analytical framework for analyzing jeopardy, and discussions of this element by Ohio courts are often brief." *Himmel v. Ford Motor Co.* (6th Cir. 2003), 342 F.3d 593, 599. Since that time, Ohio courts have devoted significant attention to the issue of whether a public policy can be jeopardized where adequate statutory relief is available. *See, e.g., Wiles v. Medina Auto Parts* (2002), 96 Ohio St. 3d 240. However, extensive attention to the other parameters of the jeopardy element is not reflected in Ohio jurisprudence.

The Sixth Circuit surmised that Ohio's reliance on Henry H. Perritt, Jr.'s scholarly work in the adoption of the wrongful discharge tort suggested that Mr. Perritt's thoughts on the jeopardy element would also be adopted. *Id.* at 599. According to Mr. Perritt, the steps of the jeopardy analysis include: (1) determine "what kind of conduct is necessary to further the public policy" at issue; (2) decide whether the employee's actual conduct fell within the scope of conduct protected by this policy; and (3) consider whether employees would be discouraged from engaging in similar future conduct by threat of dismissal. *Id.* at 599 citing *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. at 408. Whether this Court endorses the use of Mr. Perritt's analysis of the jeopardy element or adopts another approach, under any standard the decision of the Second District in this case must be reversed.

A. The Second District's Decision is Unsupported by Existing Law.

The cornerstone of the jeopardy element is the determination of whether dismissing employees under circumstances like those involved in plaintiff's dismissal would directly undermine the public policy at issue in the case. Thus, an analysis of both the specific public policy at issue and the specific circumstances of the employee's termination are required when performing the analysis. In the present case, the trial court performed just such an analysis when it looked at the specifics of Dohme's conduct and his late-identified public policy and noted:

In the instant case, Plaintiff was discharged for disobeying a specific order from his employer to not speak with a representative from a private insurance company. 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. Plaintiff feared he was being set up for failure, as evidenced by the plain language of his statements, and the lack of any insinuation for work place safety concerns.

(Appx. at 29)

This analysis is entirely consistent with every case decision previously issued by the appellate courts of Ohio – Dohme's expression of concern about the perception of his performance to a non-governmental entity far exceeded the boundaries of the limited exception to the at-will doctrine under which he asserted his claim. Only the opinion by the Second District departs from this position and by doing so, the Second District significantly undermines the continued viability of the at-will doctrine.

The Second District first strayed from the purpose of the wrongful discharge exception when it expanded the people to whom an employee may make protected complaints. To that end, the Second District ruled that “[a]n employee who reports safety concerns to the employer's insurance inspector, regardless of the employee's intent in doing so², is protected from being fired solely for the sharing of the

² The Seventh District Court of Appeals disagreed with this proposition in its decision in *Milhouse v. Care Staff, Inc.* (Mahoning Cty App. 2007), 2007-Ohio-2709 at ¶27, a decision issued subsequent to the one in this case. There, the court found that the employee's self-serving justification for her insubordination defeated the jeopardy element of her claim.

safety information.” (Appx. at 13) Not only is this proposition unreflective of the actual facts of the case³ but it extends the public policy umbrella significantly beyond its prior coverage.

The Second District made this extension of the law without undertaking the analysis suggested by the Sixth Circuit or offering any alternative analytical framework. Instead, the decision was premised on what the Second District believed was an application of the law announced in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, 80.

As support for its newly-adopted rule of law, the Second District cited this Court’s decision in *Pytlinski* for the proposition that the recipient of the employee’s protected expressions is irrelevant in the wrongful discharge context. However, *Pytlinski* makes no such pronouncement.

The sole issue before the Court in *Pytlinski* was to determine the statute of limitations to be applied to a wrongful discharge claim that mimics a statutory whistleblower claim but which is instead based only upon a general common law policy favoring workplace safety. *Pytlinski*, 94 Ohio St. 3d at 78. Thus, the footnoted observation cited by the Second District as supporting its decision in this case was merely dicta.

In fact, Justice Cook’s concurring opinion in *Pytlinski* reflects that this entire proposition of law has never been endorsed by the Court. *Pytlinski*, 94 Ohio St. 3d

³ The record conclusively establishes that Dohme did not report a “safety concern.” Rather, Dohme reported a concern that someone was “trying to make it look like I wasn’t done my job” by removing an inspection from a report. (Supp. at 77; Dohme Depo. at 255; Appx. at 29)

at 82. (“*Kulch* was a plurality opinion, and that portion of *Kulch* that the majority cites as supporting the proposition that the elements of a *Kulch* common-law cause of action based on wrongful discharge in violation of public policy ‘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’ garnered only three votes. Because a majority of this court did not join the non-syllabus language on which today’s majority relies to make this blanket assertion, *this language is not the law.*” (emphasis in original)) In sum, this Court has never before held - - and should not do so in this case - - that the recipient of alleged “whistleblowing” or safety complaints is irrelevant to the application of wrongful discharge exception.

Further, even if the logic of *Pytlinski* is applied to the present case, it does not support the Second District’s conclusion. The facts in *Pytlinski* involved a termination following an internal complaint to the management of the employer. *Pytlinski*, 94 Ohio St. 3d at 78. As such, the employee in *Pytlinski* at least addressed his complaints to the management of his employer who had the ability to respond to the concerns. In contrast, Dohme addressed his comments to a third-party vendor who was entirely without authority to address the issue in any manner. With this significant factual distinction, the logic of *Pytlinski* also does not support the result reached by the Second District.

In sum, the only support offered by the Second District for its conclusion does not, in fact, support its conclusion.

B. The Rationale of Other Cases Undercuts the Second District's Conclusion.

At the core of a public policy claim that is based upon statutory whistleblowing is a requirement that the report be made to an appropriate governmental agency. *See, e.g., Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244. While this line of cases plainly does not support the Second District's decision in this case, the same basis for the public policy is admittedly not involved. Thus, the statutory whistleblower cases are of little value to the analysis of this case unless the Court reverses the *Pytlinski* decision and rejects the general "workplace safety" public policy. However, it is not necessary to take this step to resolve the present case.

Outside of the context of public policy claims based upon statutory whistleblowing, a limited line of wrongful discharge cases has also developed that protect general "workplace safety" complaints, and complaints of illegal employer conduct, when such complaints are made to managers within a business organization. *See, e.g., Pytlinski*, 94 Ohio St. 3d 77; *Himmel*, 342 F.3d 593. Although the basis for these cases is more legally analogous to the present case than the statutory whistleblower cases, the cases are nevertheless easily distinguished because, prior to the Second District's decision in this case, no Ohio court had found complaints made to someone outside of internal management of the employer and outside of a governmental agency to be of a sufficient character to enjoy a legally protected status in the wrongful discharge context. In fact, every claim presenting such a fact pattern was rejected.

In *Branan v. Mac Tools* (Franklin Cty. App. 2004), 2004-Ohio-5574 at ¶40, 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 protection for calls made to co-workers.

In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264 at ¶19, 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 U.S. App. LEXIS 21784 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 U.S. App. LEXIS 21784 at *14.

In short, no Ohio court has adopted the rule of law advocated by the Second District despite repeated opportunities to do so.

C. Critical Analysis Requires the Reversal of the Second District.

The lack of other case decisions confirming the result reached by the Second District suggests that problems exist in the analysis. These problems can be readily identified whether the analysis used by the Sixth Circuit is employed or some other model is developed.

Mr. Perritt suggests that the steps of the jeopardy analysis include: (1) determine “what kind of conduct is necessary to further the public policy” at issue; (2) decide whether the employee’s actual conduct fell within the scope of conduct protected by this policy; and (3) consider whether employees would be discouraged from engaging in similar future conduct by threat of dismissal. *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. at 408. According to the Second District, the public policy at issue in this case is the general advancement of workplace safety. When the facts of the present case are reviewed under the three-step analysis, it is clear that Dohme cannot satisfy the jeopardy element of his claim.

First, Dohme complained to a private insurance vendor only that he was being set up by his employer to make it appear that he had not performed his job. Such a complaint is plainly not necessary to advance workplace safety. Instead, only complaints made to government entities charged with insuring a safe workplace or made to management employees capable of addressing the concerns are required to advance workplace safety. Second, Dohme’s actual conduct, as is overwhelmingly established by the record, did not fall within the “necessary” behavior because he did not actually voice a safety concern and did not address a safety concern to a governmental body or a management employee. Rather, Dohme’s conduct was only necessary if he acted to advance his own self interest. A public policy simply was not jeopardized in this case under Mr. Perritt’s analytical framework.

Although the Second District did not refer to any particular analytical framework, it did recognize the logical requirement that it explain how complaining to a

third party somehow advanced workplace safety. To fill that void, the Second District reasoned that a complaint to a private vendor hoping to sell a service to the employer may result in indirect market forces eventually making the workplace safer by encouraging the employer to act through the prospect of higher insurance premiums. (Appx. at 13-14) However, not only does this proposition require multiple cause-and-effect reactions that in many instances simply will not occur, but it is surely opening a Pandora's box of potential claims ill-fitted for a "limited exception" to the at-will doctrine. This Court should definitively rule that indirect market forces are not the type of workplace impact that will satisfy the jeopardy element of the wrongful discharge tort.

Dohme's claim also fails when other methods of analyzing the jeopardy element are employed. In what appears to be a shorthand version of Mr. Perritt's analysis, the United States District Court for the Northern District of Ohio concluded that a finding that the jeopardy element is satisfied "demands that the 'policy itself is at risk if dismissals like the one in question are allowed to continue.'" *Sibley v. Alcan, Inc.* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 22932 at *39 quoting *Langley v. DaimlerChrysler Corp.* (N.D. Ohio 2005), 407 F. Supp. 2d 897, 909. In other words, the *Sibley* court's analysis requires that to find that Dohme satisfied the jeopardy element of his claim a court must conclude that if employees are not permitted to violate management directives and contact private insurance companies about the evaluation of their job performance then Ohio's workplaces will become increasingly unsafe. Such a conclusion is absurd and highlights the shortcomings of the "indirect market forces" analysis.

The same result occurs under the third type of analysis that appears in existing case law. At least one Ohio court appears to have applied a balancing test to the

jeopardy element rather than the Perritt analysis. According to the Summit County Court of Appeals, in addressing whether conduct jeopardizes a public policy a court “must weigh ‘the public’s interest in harmony and productivity in the workplace’ with the public’s interest in encouraging the conduct performed by plaintiff.” *Urda v. Buckingham, Doolittle, & Burroughs* (Summit Cty App. 2006), 2006-Ohio-6915 at ¶20, citing *Smith v. Calgon Carbon Corp.* (3d Cir. 1990), 917 F.2d 1338, 1344-45. Such a balancing also suggests that the Second District’s conclusion is flawed.

It is an elementary business premise that when an employee is permitted to disregard management directives, the disruption in the workforce is enormous. Management directives become advice, productivity becomes a happenstance, and jobs are placed at risk when competing products become more efficiently produced. In contrast, when an employee takes a complaint to a third-party that has no authority to redress the problem there is no immediate public benefit. In these circumstances, the balance suggested by the *Urda* court dictates that the jeopardy element must fail because the complaint has no opportunity to result in an immediate remedy to the unsafe situation.

In the end, regardless of the analysis employed, Dohme’s termination did not jeopardize a public policy favoring workplace safety because his complaint was not addressed to the government or internal management.

D. The Second District’s Holding is an Unworkable Rule of Law.

Finally, the role of the Second District’s decision as precedent also warrants its reversal because the ill-defined limits of its reasoning make it, as a practical matter, wholly unworkable for Ohio’s employers. Precedent cannot be allowed to stand when it presents an unworkable rule of law. See, e.g., *Westfield Ins. Co. v. Galatis*

(2003), 100 Ohio St. 3d 216, 228, 2003-Ohio-5849 at ¶50 (“*Scott-Ponzer* and its progeny defy practical workability.”) If left to stand, the Second District’s decision will prompt further litigation due to its lack of definition. Does the Second District’s rule apply to all third-parties or only to insurance estimators? Do the market forces stemming from a vendor differ from those stemming from the indirect forces associated with the press, a politician, or an influential member of the community such that an attempt to analogize the holding is invalid? The fact is the Second District offered a potentially limitless rule of law without any discussion of how such rule would apply or where its limits lie. This is a particularly untenable position for a “limited exception.”

It takes little creativity to envision the cases where employees who have complained to relatives, friends, co-workers, neighbors, and the like about unfavorable circumstances at work, and who are subsequently terminated, contend that their actions would have ultimately produced a safer workplace. Under the Second District’s logic, each of these complaining employees is no longer employed at-will because all of the scenarios have the potential to indirectly impact the safety of the workplace. This unprecedented doctrine has no place in Ohio law.

Only the appellate court in this case has recognized non-governmental third-party contact and indirect market forces as sufficient to satisfy the jeopardy element of the wrongful discharge claim. This rule of law must be rejected. To satisfy the jeopardy element, an employee who contends that his discharge was prompted by his complaints must be required to show that his complaints were directed to someone within the company with authority to address the issue or to a governmental agency.

Proposition of Law No. II:

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.

The record in this case, as found by the trial court and acknowledged by the Second District, is clear. "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." (Appx. at 29) Nevertheless, the Second District's decision suggests that Eurand was required to go beyond what was actually said and done, ignore the motivation of the employee engaging in the conduct, and ascertain what unspoken and indirect implications might lie beyond the words and conduct before a response to the conduct can be made. This Court must not impose such extraordinary requirements on Ohio's employers.

Although the doctrine was adopted in another context, it is recognized that an Ohio employer is not required to read its employees' minds when addressing an employee's behavior. *See, e.g., Tripp v. Beverly Enterprises-Ohio, Inc.* (Summit Cty App. 2003), 2003-Ohio-6821 at P32 ("her supervisor, should not be required to read her mind to know that this request for aid during a time of increased business actually related specifically to the depression that Appellant had informed him of over six months previously."); *Pfost v. Ohio State Attorney General* (Franklin Cty App. 1999), 1999 Ohio App. LEXIS 1792 at *8 ("Here, appellant did not communicate to the AG a need for a

specific accommodation. Accordingly, appellant ‘cannot expect the employer to read her mind and know that she secretly wanted a particular accommodation and [blame] the employer for not providing it.’” (citation omitted)). Rather, an Ohio employer must be permitted to take its employee’s conduct for what it is, and the employee’s proffered explanation at face value, and respond accordingly.

The Second District ignored this reasonable proposition and again departed from the established law of Ohio. The requirement imposed by the Second District is unsupported under the decisions of this Court and, in practice, places Ohio’s employers in a wholly unworkable position of reacting to the unstated and unintended. Such a doctrine is inconsistent with the limited nature of the public policy exception to the at-will doctrine and must be rejected. Rather, the rationale adopted by the Sixth Circuit when addressing this issue should be endorsed by this Court.

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.⁴ 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

⁴ Although *Jermer* was issued after the Sixth Circuit issued *Himmel*, the Sixth Circuit did not explain where the “notice” requirement fits into the analysis suggested by Mr. Perritt. Given that an employee in a *Jermer* case has not put the employer on notice that a public policy is even, it does not appear that any of the jeopardy elements are satisfied.

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.

This rule has been effectively applied in other cases. Relying on *Jermer*, the United States District Court for the Northern District of Ohio 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.

Finally, the Seventh District reached a conclusion contrary to that reached by the Second District in this case in *Milhouse v. Care Staff, Inc.* (Mahoning Cty App. 2007), 2007-Ohio-2709. There the employee suggested that her refusal to follow her employer's directive protected the employer's patients' interests in the privacy of their records. However, the court rejected this rationale, and noted that "Appellant never told her employer that this was her goal." *Id.* at ¶28. Without the articulation of the public policy the employee purportedly intended to advance, the Seventh District reasoned that the jeopardy and causation elements of the claim are lacking.

Requiring an employee to “say what he means” is not only logical but it has its roots in the delicate balancing of the competing interests that is the essence of the jeopardy element. *Urda*, 2006-Ohio-6915. The individuals making employment decisions for employers are real people with the same limited abilities to “read minds” and extrapolate unstated intentions and consequences as everyone else. Requiring them to run through a protracted series of “what ifs” rather than reacting to what was actually said and done is unprecedented in Ohio law and potently disrupts the balance of responsibilities in the workplace. This Court must reject this proposition.

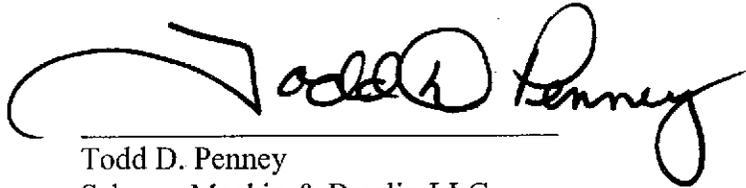
It is beyond debate that Dohme did not intend to advance workplace safety with his conduct and did not even mention safety in his comments to the insurance agent. (Appx. 29, Supp. at 73-77; Dohme Depo. at 251-255) Nevertheless, the Second District’s decision imposed a requirement on Eurand to go past what Dohme actually said, and beyond what he actually did, and calculate what byproduct could eventually develop from them. No such requirement exists under Ohio law and this Court must not impose this onerous burden. To satisfy the jeopardy element of his claim, an employee must place the employer on notice through his actual words or conduct that he is acting to advance a public interest. Dohme plainly did not do so in this case. Thus the decision of the Second District must be reversed on this ground as well.

CONCLUSION

The decision below is fundamentally wrong and is a dangerous encroachment on the at-will doctrine. If permitted to stand, discipline of insubordinate employees stemming from unstated complaints made to disinterested third parties

become viable causes of action and the ability of Ohio's employers to compete in an increasingly-difficult global economy is further handcuffed. Thus, the decision below must be reversed.

Respectfully submitted,

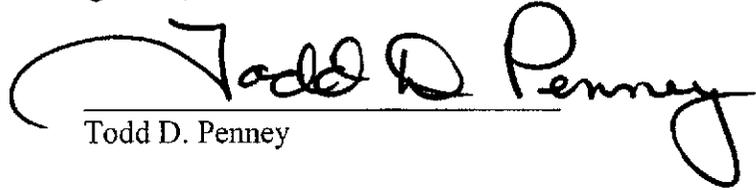
A handwritten signature in black ink that reads "Todd D. Penney". The signature is written in a cursive style with a large, sweeping initial "T" and a circular flourish around the "D".

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Appellant was sent by ordinary U.S. Mail to Counsel of Record for Appellee, David H. Duwel, 130 W. Second Street, Suite 2101, Dayton, OH 45402 on August 3rd, 2007.

A handwritten signature in black ink that reads "Todd D. Penney". The signature is written in a cursive style with a large, sweeping initial "T". A horizontal line is drawn across the signature, starting from the left and ending under the "y".

Todd D. Penney

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EURAND AMERICA, INC.

APPENDIX

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.

07 - 0640

Appellant,

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

v.

RANDALL J. DOHME

Court of Appeals
Case No. 21520

Appellee.

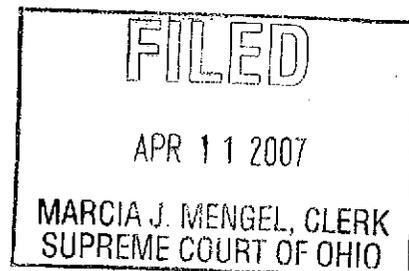
NOTICE OF APPEAL OF APPELLANT EURAND AMERICA, INC.

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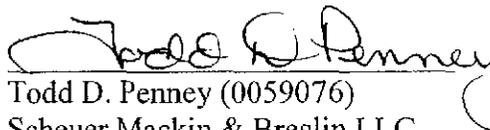


Notice of Appeal of Appellant Eurand America, Inc.

Appellant Eurand America, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals case No. 21520 on March 2, 2007.

The case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

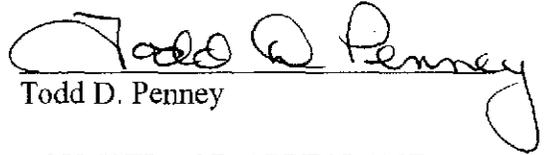


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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee David M. Duwel and Todd T. Duwel, 130 W. Second Street, Suite 2101, Dayton, Ohio 45402 on April 11th, 2007.


Todd D. Penney

COUNSEL FOR APPELLANT
EURAND AMERICA, INC.

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 :

.....
O P I N I O N

Rendered on the 2nd day of March, 2007.
.....

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Attorney for Defendant
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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 effect 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.

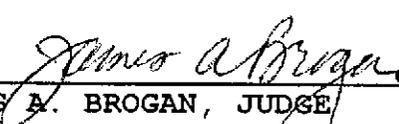
Copies mailed to:

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Hon. Mary Katherine Huffman

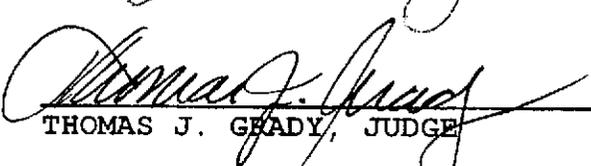
IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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

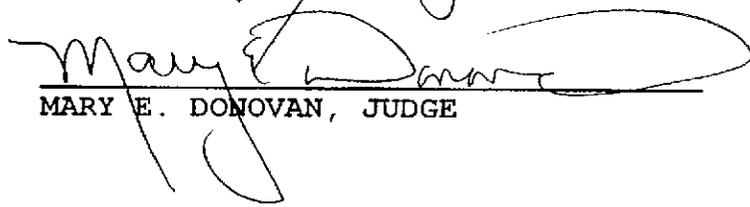
Pursuant to the opinion of this court rendered on the
2nd day of March, 2007, the judgment of the trial
court is Reversed and the matter is Remanded for further
proceedings consistent with the opinion. Costs are to be paid
as provided in App.R. 24.



JAMES A. BROGAN, JUDGE



THOMAS J. GADY, JUDGE



MARY E. DONOVAN, JUDGE

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Hon. Mary Katherine Huffman



FILED
2005 OCT 11 10:00
CLERK OF COURT
MONTGOMERY COUNTY OHIO

MAILED

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION**

RANDALL J. DOHME,

Plaintiff,

-vs-

EURAND AMERICA, INC.,

Defendant.

CASE NO.: 2003 CV 4021

**JUDGE MARY
KATHERINE HUFFMAN**

**DECISION, ORDER AND ENTRY
OVERRULING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT IN PART AND
SUSTAINING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT IN PART**

This matter is properly before the court on the Motion for Summary Judgment filed by the Defendant, Eurand America, Inc. on September 14, 2005. Plaintiff, Randall Dohme, filed a Memorandum in Opposition on September 26, 2005. Defendant subsequently filed a Reply Memorandum on October 5, 2005. This matter is now ripe for decision.

I. FACTS

Plaintiff, Randall Dohme, was an employee of Defendant, Eurand America, Inc. ("Eurand") from January 12, 2001 to March 27, 2003. During that time, Mr. Dohme held

two different positions. He was employed as Eurand's Engineering Supervisor from January 12, 2001 to July 9, 2002 and as Facilities/Computerized Maintenance Management System (CMMS) Administrator from July 9, 2002 to March 27, 2003. The parties stipulate that as Engineering Supervisor, Mr. Dohme was responsible for supervising the engineering technicians/staff and that at various times during such tenure, technicians voiced concerns and/or objections about Mr. Dohme to Karen Waymire, Eurand's human resources manager. Mr. Dohme had recurring issues with two technicians in particular, Mr. Ralph Lindon and Mr. Darrell Tolliver, who had each been employed by Eurand for approximately seventeen and sixteen years, respectively, at the time Mr. Dohme was their supervisor.

In or about July, 2002, Mr. Dohme was relieved of his duties as Engineering Supervisor and was reassigned to assume the duties of Facilities/CMMS Administrator. Plaintiff's Exhibit A to the Complaint contains the job description which articulates the position's major responsibilities, requisite knowledge and experience, physical requirements, scope of contacts, degree of control and degree of interpersonal skills required, however the parties do not stipulate as to the actual duties the job consisted of.

On November 4, 2002, Plaintiff was granted leave by Defendant under the Family Medical Leave Act ("FMLA"). On or about January 6, 2003, such leave was extended to January 20, 2003, at which date Plaintiff returned to work part-time, and three days later, he returned as Facilities/CMMS Administrator on a full-time basis.

On or about March 21, 2003, Defendant sent an e-mail message to its employees, advising them that an underwriter of a private insurance company ("Representative") would

be visiting the premises on March 24-25, 2003. In such e-mail, Defendant specifically instructed its employees not to speak to the Representative and specifically identified therein certain individuals with whom the Representative should speak. Plaintiff was not listed as one of the specific individuals with whom the Representative should speak. However, on March 25, Plaintiff approached the Representative in the lobby of the premises and presented the Representative with papers that related to whether a fire alarm inspection had been removed from the computer. Plaintiff did not mention any safety concerns and/or suspected problems to the Representative regarding the inspection results, rather he voiced a concern that Defendant was "trying to make it look like [he] wasn't doing [his] job." *Defendant's Motion for Summary Judgment, citing Dohme Depo. at 255.*

Upon discovering that Plaintiff had a deliberate encounter with the Representative after being specifically instructed not to do so, Defendant terminated Plaintiff's employment on March 27, 2003.

In his Complaint, Plaintiff claims that Defendant (1) violated Ohio's adoption of the FLSA under O.R.C. 4111.01, et seq. when it incorrectly classified his Facilities/CMMS Administrator position as an exempt employee, thus rendering him ineligible for overtime pay; (2) wrongfully discharged Plaintiff, in violation of public policy under *Greeley*, when it terminated Plaintiff's employment following his encounter with the insurance Representative; and (3) violated the FMLA upon his return from medical leave. The third claim was removed to Federal court by Defendant and the court dismissed Plaintiff's FMLA claim on November 29, 2004. As a result, the only issues before this court are Plaintiff's first two claims

regarding the FLSA violation and wrongful termination.

H. LAW & ANALYSIS

Summary judgment is appropriate pursuant to Rule 56(C) of the Ohio Rules of Civil Procedure when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to only one conclusion, that being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St 2d 64, 66 (1978). The burden of showing that no genuine issue exists as to any material fact falls upon the moving party. *Mitseff v. Wheller*, 38 Ohio St. 3d 112, 115, 526 N.E.2d 798 (1988). Additionally, a motion for summary judgment forces the nonmoving party to produce evidence on any issue (1) for which that party bears the burden of production at trial, and (2) for which the moving party has met its initial burden. *See Drescher, v. Burt*, 75 Ohio 3d 280, 662 N.E.2d 264 (1996).

The key to a summary judgment is that there must be no genuine issue as to any material fact. Whether a fact is "material" depends on the substantive law of the claim being litigated. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986); *Turner v. Turner*, 67 Ohio St. 3d 337 (1993). An issue of fact exists when the relevant factual allegations in the pleadings, affidavits, depositions or interrogatories are in conflict. *Link v. Leadworks Corp.*, 79 Ohio App. 3d 735, 741 (1992).

A. FLSA Claim

The court must first consider whether a genuine issue of material fact exists as to

whether Defendant violated Ohio's adoption of the FLSA under O.R.C. 4111.01, et seq. when it incorrectly classified his Facilities/CMMS Administrator position as an exempt employee, thus rendering him ineligible for overtime pay.

Section 4111.03(A) of the Ohio Revised Code provides, "[a]n employer shall pay an employee for overtime at a rate of one and one-half times the employee's rate for hours worked in excess of forty hours in one work week, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the 'Fair Labor Standards Act of 1938,' 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended." Employees who are employed in a "bona fide administrative capacity" are exempt from the overtime pay requirements under the Ohio Revised Code 4111.03 and the FLSA 29 U.S.C. 213(a)(1).

Where an employee is paid more than \$250.00 per week, a short test is applied to determine whether he/she is eligible for the overtime exemption. Under that test, the employer must prove that: (1) it paid Plaintiff on a salary basis; (2) Plaintiff's primary job duties consisted of the "performance of non-manual work directly related to the management policies or general business operations" of the employer; and (3) the Plaintiff's work "includes work requiring the exercise of discretion and independent judgment." 29 C.F.R. 541 (a)(1).

The parties in the instant case disagree as to the nature of Plaintiff's duties in his capacity as Facilities/CMMS Administrator. In viewing the evidence in a light most favorable to Plaintiff, the non-moving party, Defendant is not entitled to summary judgment as a matter of law because this court finds that a genuine issue of material fact exists as to

Plaintiff's FLSA claim and this particular issue remains to be litigated.

B. Wrongful Discharge Claim

The court must next consider whether a genuine issue of material fact exists as to whether Defendant wrongfully discharged Plaintiff, in violation of public policy under Greeley, when it terminated his employment following his deliberate encounter with the insurance Representative.

An exception to the common-law employment-at-will doctrine historically followed in Ohio was first articulated in Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981. The Ohio Supreme Court held that a discharged employee has a private right of action under tort law for wrongful discharge where the termination of his employment is in contravention of a "sufficiently clear public policy." Id. In Painter v. Greeley, the Court reaffirmed its holding in Greeley, and held that public policy is "'sufficiently clear' where the General Assembly had adopted a specific statute forbidding an employer from discharging or disciplining an employee on the basis of a particular circumstance or occurrence." (1994) 70 Ohio St. 3d 377, 382-383. The Painter Court further articulated, "We noted [in Greeley] that other exceptions might be recognized where the public policy could be deemed to be 'of equally serious import as the violation of a statute.' *** The existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law" Id. at 383-384.

The Ohio Supreme Court in Painter held that a Plaintiff must satisfy four elements to

successfully establish a claim for wrongful termination: (1) that clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing 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 justification element). *Id.* at 384.

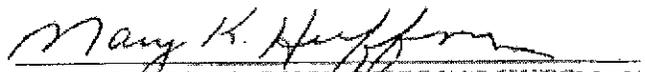
In the instant case, Plaintiff was discharged for disobeying a specific order from his employer to not speak with a representative from a private insurance company. Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff for such action. Although Plaintiff claims 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. Defendant feared he was being set up for failure, as evidenced by the plain language of his statements, and the lack of any insinuation for work place safety concerns.

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. In viewing the evidence in a light most favorable to Plaintiff, the non-moving party, this court finds that no genuine issue of material fact exists and Defendant is entitled to judgment as a matter of law.

III. CONCLUSION

Based on the foregoing, this court: (1) **overrules** Defendant's Motion for Summary Judgment as it relates to Plaintiff's claim on the alleged FLSA violation and finds that a genuine issue of material fact as to the nature of Plaintiff's duties remains to be litigated; and (2) **sustains** Defendant's Motion for Summary Judgment as it relates to Plaintiff's wrongful discharge claim because no genuine issue of material fact exists.

SO ORDERED:


HONORABLE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail on this date of filing.

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