**IN THE SUPREME COURT OF OHIO**

**RANDALL J. DOHME,**

Plaintiff-Appellee,

against,

**EURAND AMERICA, INC.**

Defendant-Appellant.

Case No. 2007-0640

On Appeal from the Court of Appeals for Montgomery County, Ohio, Second Appellate District, Case Number 021520

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# BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS ASSOCIATION URGING AFFIRMANCE

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## SUMMARY OF ARGUMENT

An employer's legal ability to discharge employees for raising health, safety and compliance concerns with outside non-governmental entities will jeopardize Ohio's clearly established public policies. This Court noticed how jeopardy arises from the content of the concern, irrespective of the status of the recipient, in *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 80, 2002-Ohio-66. If appellant prevails here, employers could stifle employee communications to the media, to management consultants, to insurance companies, and to any other private entity that serves important public purposes for the health and safety of all Ohioans.

Whistleblower law has its roots in the First Amendment. Since 1968, the United States Supreme Court has recognized that the First Amendment protects speech by covered employees on matters of public concern. *Pickering v. Board of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563, 571-72 (1968) (First Amendment protects teacher from retaliation for letter to the editor about school funding and the allocation of financial resources between the schools' educational and athletic programs). Although the First Amendment controls public employers and not private entities, the law developed under the First Amendment is a useful floor for statutory whistleblower protections,[1] and the growing body of common law protections.

Employees with concerns for health and safety need to raise their safety concerns with the entities that they believe are most likely to be effective. In this context, an insurance company is a most appropriate choice for raising concerns about workplace safety. It is a proper function of insurance

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[1] The U.S. Supreme Court recognized as much in *Garcetti v. Ceballos* (2006), 547 U.S. ___, when, in branch IV of the majority opinion, it stated that, "[t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing." The Court continued, explaining that, "[t]hese imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions."

companies to urge their insureds to eliminate hazards. Further, insurance companies have a legitimate interest in receiving full and accurate information about the liability risks of their customers. It is against the public interest for employers to restrict their employees from raising safety concerns with their insurance company.

Resorting to a chain of command to punish whistleblowers is untenable in the face of the public interest in raising and addressing concerns about dangers. The ability to impose a chain of command is the ability to impose silence. Legal protections for whistleblowers serves as a degree of accountability for those who can correct unlawful or hazardous conditions. When it comes to matters of public concern, employers cannot enforce a chain of command for how employees raise concerns on protected subjects.

## STATEMENT OF INTEREST

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism and ethics.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination OELA has an abiding interest in ensuring the integrity of our system of civil adjudication of disputes. The aim of OELA's amicus participation is to cast light not only on the legal issues presented in

a given case, but also on the practical effect and impact the decision in that case may have on access to the Courts for people who have been treated unlawfully in the workplace.

OELA has an interest in this case to assure that whistleblowers are protected when they raise concerns about health, safety, the environmental, fraud and illegality. The proper administration of justice depends on those who can speak truth to power. OELA also has an interest in the uniformity of caselaw protecting whistleblowers. In this regard, federal courts have developed a body of law protecting public employees under the First Amendment. The U.S. Department of Labor (DOL) adjudicates the administrative claims of nuclear and environmental whistleblowers. OELA urges adoption of whistleblower protections that draws on the experience of what works to protect the public interest.

## STATEMENT OF THE FACTS

The amicus adopts the statement of the facts contained in the merit brief of the appellee.

## ARGUMENT

Proposition of Law of Amicus Curiae OELA:

**The jeopardy element of a public policy tort claim is satisfied when an employer learns that an employee has raised protected concerns.**

### A. Introduction

In *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, paragraph two of the syllabus, this Court created an exception to the traditional common-law doctrine of employment-at-will where a discharge is in violation of a statute and thereby contravenes public policy. The *Greeley* holding was later expanded to recognize a cause of action in tort when the wrongful discharge violated the "Constitutions of Ohio and the United States, administrative rules and regulations, and the common law." *Painter v. Graley* (1994), 70 Ohio St.3d 377, 639 N.E.2d 51, paragraph three of the syllabus.

The gist of a "*Greeley* claim" is that an employer may not discipline or discharge an at-will employee under circumstances where the discharge violates the clear public policy of the State of Ohio. *E.g., Collins v. Rizkana,* 73 Ohio St. 3d 65, 68-69, 1995-Ohio-135. To prove wrongful discipline or discharge in violation of public policy, an employee must demonstrate four elements: (1.) clarity; (2.) jeopardy; (3.) causation; and (4.) lack of an overriding business justification. *See id.* at 69-70. The first two elements are issues of law for the court to resolve. *Id.* at 70.

This Court accepted this case for review solely to address the jeopardy element of a public policy claim. In *Himmel v. Ford Motor Co.* (6th Cir. 2003), 342 F.3d 593, 599, the court noticed that this Court relied on the analysis of Villanova Law Professor H. Perritt, in The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie? (1989), 58 U.Cin.L.Rev. 397, 398-399 (cited with approval in *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 80, 2002-Ohio-66, and

*Painter*, 70 Ohio St.3d at 384, 639 N.E.2d at 57, fn. 8). This analysis uses a three-part test: (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 the threat of dismissal.

For example, suppose an employee explores her workplace safety concerns first with co-workers before lodging a formal complaint with the employer or OSHA. Suppose further that the employer learns about the co-worker discussion and discharges the employee before she makes the formal complaint. Workplace safety will be in jeopardy if the employer retaliates quickly against this emerging whistleblowing report. To effectively protect the public policy at stake, employees must be protected while collecting information about a possible violation "before they have put all the pieces of the puzzle together." *U.S. ex rel. Yesudian v. Howard University* (D.C. Cir. 1998), 153 F.3d 731, 739-40 (False Claims Act case). If appellant prevails here, we can expect that employers will next seek a reversal of *Fox v. Bowling Green* (1996), 76 Ohio St.3d 534, 668 N.E.2d 898, and require that employees will be protected only if they can prove the underlying violation of the law (not merely that they raised a good faith concern about a violation). The rationale behind allowing a good faith belief rather than proof of an actual violation (to encourage complaints) supports protecting the employee's conduct in raising the concern with any entity that the employee believes, in good faith, will further the public policy. It is the employee's signal that he or she will act for the public trust, rather than for the interests of individual managers, that public policy must protect. The content of a whistleblower's communication sends that signal, irrespective of the status of the recipient, and irrespective of whether the concern was or was not valid.

As another example, suppose the employer discharged the employee in the incorrect belief that she was raising concerns with co-workers. Under a public policy scheme that protects employees only after they actually make a report to the employer or government, this employer would not only be able to discharge this employee with impunity, but would actually have a positive incentive to do so before any report is made. Retaliation founded on a mistaken belief about the victim's protected activity has the same deterrent effect against speaking out as retaliation against the real whistleblower. Accordingly, the law must protect both the real whistleblower and the one mistakenly identified. *Brock v. Richardson* (3d Cir. 1987), 812 F.2d 121, 123-25.

The court of appeals below is correct, at p. 9, when it states, "[w]hat is relevant is whether Dohme did in fact report information to the inspector that encompassed a public policy favoring workplace safety." At p. 10, the court below addresses the jeopardy element directly, stating, "[i]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety."

In this case, as long as Dohme in good faith believed that the insurance inspector could impact the plant's safety in a positive way, his action should be protected. The conduct necessary to further the public policy in favor of promoting workplace safety is to make someone aware of a safety concern in the workplace. Dohme would be protected if he raised his concern with the government, with an insurance inspector, with a newspaper, or with anyone else whose actions could reasonably lead to correction of a danger. Dohme's conduct thus fell within the scope of protection protected: he made an insurance auditor aware of a fire report that was missing (indicating the fire inspection had not been done). In light of the fact that he had previously been injured in a workplace fire, this conduct reasonably raises the issue of fire safety, even if Dohme's purposes in communicating with the inspector included a

concern about protecting his employment. Lastly, allowing employers to fire employees for talking to insurance representatives who are auditing a workplace for insurance purposes – part of which includes safety compliance – would discourage others from raising similar concerns. After all, why did Eurand state that no one but a designated few could talk to this representative? What did they not want that representative to hear?

### B. This Court correctly determined in *Pytlinski* that the content analysis is sufficient to determine jeopardy to our public policy.

In *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 80, 2002-Ohio-66, this Court's syllabus made two points. The syllabus stated:

> 1. 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.
> 2. A common-law cause of action against an employer who discharges an employee in violation of public policy favoring workplace safety is subject to the four-year limitations period set forth in R.C. 2305.09(D).

Appellant's brief ignores the first paragraph in this syllabus when it claims, at p. 9, that, "[t]he sole issue before the Court in *Pytlinksi* 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."

In reaching the first holding, this Court addressed an argument raised by the employer. Brocar Products claimed that Pytlinksi should have no protection because he never made an official complaint with OSHA. This Court rejected this claim as follows:

> We disagree with any contention on appellees' behalf that Pytlinski's claim fails because his complaints were not filed with OSHA. As discussed in *Kulch*, it is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety.[3] Pytlinski's complaint clearly sets forth the allegation that appellees retaliated against him for lodging complaints regarding workplace safety.

> fn3 In *Kulch*, 78 Ohio St.3d at 150-151, 677 N.E.2d at 321, we 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.

The court of appeals below, at p. 10, rightly relied on this reasoning. See also *Miller v. MedCentral Health System, Inc.* (5th Dist.), 2006-Ohio-63, ¶41 (protecting employee raising concerns about safekeeping of food, and quoting this section of *Pytlinski*). Appellant's merit brief, pp. 9-10, dismisses this holding from *Pytlinski* with an argument based on the number of justices who concurred in the plurality opinion in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 677 N.E.2d 308. The judgment in *Pytlinski* had the support of six justices, and the majority opinion had the support of four. The section quoted here is the culmination of the Court's explanation for the first paragraph of the syllabus. It is hard to accept appellant's argument that Ohio law should flow from the *Pytlinksi* dissent instead of this majority opinion.

### C. Whistleblower law has traditionally protected employees who communicate their concerns to outside parties.

Whistleblower law now encompasses a variety of state and federal statutes and jurisprudence. Judges and practitioners will benefit from uniformity in how this law is applied. Courts can look to the experience developed in other branches of whistleblower law to see which principles will best protect the public interest. Mr. Dohme's work on behalf of fire protection is important for workplace safety, for the preservation of the employer's property, for the insurance company, and for the community. These are the interests for which his activity is protected by law.

Whistleblower law has roots in the First Amendment. As a nation, we reject retaliation against those who blow the whistle on fraud, illegality, pollution and other misconduct in part because we uphold the right of everyone to free speech. In *Pickering v. Board of Educ. of Township High Sch. Dist.* 205, 391 U.S. 563, 571-72 (1968), the Supreme Court also recognized that speech on matters of public concern[2] is protected not only because the First Amendment is concerned with a speaker's interest in speaking, but also with the public's interest in receiving information. In *Pickering*, the Supreme Court protected a teacher who wrote a letter not to the superintendent, not even to the school board, but to a local newspaper. The letter raised a concern about school funding and the allocation of financial resources between the schools' educational and athletic programs. The Supreme Court "unequivocally" rejected the claim that "comments on matters of public concern that are substantially correct *** may furnish grounds for dismissal if they are sufficiently critical in tone." 391 U.S. at 570. That he chose to send his letter outside the chain of command, and indeed to the public through the media, certainly inflamed the reaction of the managers who fired him. Those managers learned that they cannot use their authority to retaliate against those who raise issues of concern. *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("Surely, anyone who takes an oath of office knows—or should know—that much.").

While *Pickering* involved the expansion of First Amendment protections to public employees, it is notable that this expansion occurred as a result of communication to an outside entity, not to the employer or its representatives or anyone in government. Indeed, whistleblower law, as developed under the First Amendment, and as applied in other protections, allows no difference among the

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[2] Speech on matters directly affecting the health and safety is obviously a matter of public concern. *Chappel v. Montgomery Co. Fire Protection Dist. No. 1*, 131 F.3d 564 (6th Cir. 1997)(fire and paramedic services); citing *Gustafson v. Jones*, 117 F.3d 1015, 1021 (7th Cir. 1997); *Caldwell v. City of Elwood*, 959 f.2d 670, 672 (7th Cir. 1992).

communications to the employer, to government, or to other outside entities. In *Donovan v. R.D. Anderson Constr. Co.* (D.Kan. 1982), 552 F.Supp. 249, 253, for example, the court protected, under OSHA Section 11(c), the employee who raised safety concerns with the media because it was "clear" that an "employee's communications with the media" could result in the initiation of safety proceedings. See also, *Legutko v. Local 816, International Brotherhood of Teamsters* (E.D.N.Y. 1985), 606 F.Supp. 352, 358-59, *aff'd* (2d Cir. 1988); *Consolidated Edison Co. of N.Y. v. Donovan* (2d Cir. 1982), 673 F.2d 61 (complaint to union safety committee protected).

Thus, appellant's brief (p. 8) misconstrues the law on public policy favoring workplace safety when it claims that the court of appeals below "expanded the people to whom an employee may make protected complaints." The scope of people to whom employees could make protected complaints was never as limited as appellant claims. The content of the complaint has always been sufficient to make it protected. If the content is such that the employer's retaliation would jeopardize a clearly established public policy, then the nature of the recipient is immaterial.[3] This has been the law since *Pickering*, when the Supreme Court first recognized a whistleblower protection in the First Amendment. In *Pytlinski*, this

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[3] One can imagine situations in which protection is conferred because of the status of the recipient, irrespective of the content. For example, if an employee of a hazardous waste facility communicated with representatives of the OEPA, that employee is protected from adverse actions imposed because of that communication, regardless of its content. Otherwise, an employer could effectively deter its employees from talking to OEPA staff, and the public policy of encouraging such communications would be directly jeopardized. These were the facts of *Trueblood v. VonRoll America, Inc.*, (U.S. Department of Labor, March 26, 2003), OALJ Case No. 2002-WPC-3, available at:
http://www.oalj.dol.gov/Decisions/ALJ/WPC/2002/trueblood_donna_l_v_von_roll_america_inc_2002wpc00003_(mar_26_2003)_140311_cadec_sd.PDF
There, the Department of Labor's Administrative Law Judge rejected this employer policy: "Although VRA averred it encourages its employees to communicate with the EPA, its policy was firm that employees should first run compliance issues through management before communicating them to outside agencies." The ALJ, at page 43, adopted this contention by the employee: "[T]his is a case where the employer identified the whistleblower (CX 1), but could not identify the subject matter of Trueblood's reports to the US and Ohio EPAs. As such, it is appropriate that Trueblood is protected by all seven of the federal environmental laws enforced through 29 C.F.R. Part 24."

Court recognized that workplace safety was important enough to be protected by an exception to the at-will doctrine — an exception that stands on its own.

In *Burlington Northern & Santa Fe Railway Co. v. White* (2006), 548 U.S. ___, 126 S. Ct. 2405, the Supreme Court addressed how courts would determine if a particular adverse action violated federal anti-retaliation statutes. At page 8 of its slip opinion, the Court explained how interpretation of the anti-retaliation provision of Title VII is guided its unique purpose:

> The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 800–801 (1973). The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct.
>
> ***
>
> But one cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace.

The Court continues on p. 9:

> [A] limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U. S. 337, 346 (1997).

The *Burlington* Court drew on the similar remedial purpose of the NLRA, citing (at p. 12) *Bill Johnson's Restaurants, Inc. v. NLRB* (1983), 461 U. S. 731, 740 (construing anti-retaliation provision to "prohibi[t] a wide variety of employer conduct that is intended to restrain, or that has the likely effect of restraining, employees in the exercise of protected activities," including the retaliatory filing of a lawsuit against an employee), and *NLRB v. Scrivener* (1972), 405 U. S. 117, 121–122 (purpose of the anti-retaliation provision is to ensure that employees are "completely free from coercion against reporting" unlawful practices). Restricting protected activity to communications with the employer or the

government would be contrary to this clearly established public policy. An employer who receives information about an employee's report to any outside agency may fear that the employee is about to cause trouble with the government or cause other employees to create such trouble. Employer action to silence the employee for those reasons would deter all employees from raising concerns that need to see more light. What other purpose did Eurand have for discharging Mr. Dohme if it was not to deter other employees from similar activity? Employees should be protected from such discrimination.

Appellant's argument is incongruous with the core public policy that drove the creation of the public policy exception to the at-will doctrine in *Kulch* and *Pytlinski.* Once our State recognizes workplace safety as a clear public policy, that policy should also drive the jeopardy analysis. Adding hurdles to the jeopardy analysis would work against the public policy recognized in the clarity analysis. The very purpose of the recognized cause of action would be for naught if employees spoke out on matters within our clear public policy, but then failed the jeopardy analysis based on a restriction that does not further the public interest at issue.

### D. Policy interests urge against any rule restricting communications on issues of health, safety and illegality.

When an employee feels called to raise a safety concern, it is in the public interest to protect that employee in raising the concern. We would naturally hope that the employee would feel free to raise the safety concern to the appropriate managerial representatives of the employer. If management has properly led the staff on the primacy of safety, employees would feel encouraged to raise their concerns through established procedures. However, not all management leaders are so enlightened. Employees might want to raise their concern, but be afraid of the consequences of raising their concern to their immediate supervisor, or to others who would communicate with those who control the employee's

future career. In this context, employees might choose a variety of avenues to raise their safety concern. They might report their concern to the government. Appellant concedes that such avenues must be protected. However, not all employees know which government offices are most appropriate for the concern they are raising. Some employees may have past experiences that suggest the reports might not be kept confidential, or might not be effective. For a variety of reasons, employees can properly choose to report their concerns to anyone else who might help.

Insurance companies, in particular, have a legitimate interest in learning about the liability risks of their insureds. They need accurate information about the risks to determine premium rates that are fair to customers who apply themselves better toward safety. Insurance companies have a proper function in encouraging their customers to identify and address known safety hazards. Thus, appellant's merit brief, p. 10, is wrong when it claims that, "Dohme addressed his comments to a third-party vendor who was entirely without authority to address the issue in any manner." The insurance company had a most legitimate role to raise Dohme's safety concerns with the appellant, and to re-assess its premium based on the new information about the liability risks. The court of appeals opinion, pp. 11-12, specifically considered the role insurance inspectors can serve:

> 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.

Insurance companies will be frustrated in these proper functions if the employees of their insureds are intimidated by managers to stay silent when they should speak up. Even a discharge for remarking

how an inspection was removed from a report (see appellant's merit brief, p. 9, fn 3) jeopardizes the public interest by deterring other employees from speaking out on matters that relate to safety.

Employees might have any number of reasons to raise their concerns with an outside non-governmental entity. A fear of retaliation, whether or not it is objectively reasonable, could deter employees for raising their concerns through the chain of command, or with other representatives of management. Similarly, a concern that government inspectors may be aligned with the industry they regulate might deter some employees from going to the government. The public interest is served if every employee with information about a danger has at least one place they feel safe to go. As long as the employee raises the concern with someone who can fix it, the public interest is served.

Employees cannot be disciplined for merely refusing to inform management of the concerns they raised with an outside agency: The U.S. Department of Labor recognizes that enforcing a chain-of-command rule on safety concerns violates the federal whistleblower statutes:

> An employee who refuses to reveal his safety concerns to management and asserts his right to bypass the "chain of command" to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA). 42 U.S.C. § 5851 (1988). Covered employers who discipline or discharge an employee for such conduct have violated the ERA.
>
> *Saporito v. Florida Power & Light Co.*, 1989-ERA-7/17, SOL Remand Order, at 1 (June 3, 1994)

In this vein, employees are protected even if they go "around established channels," in bringing forward a safety complaint, go "over" their "supervisor's head" in raising a concern, or fail to follow the workforce "chain of command" or normal procedure. Accord *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984). Consequently, taking "adverse action" against an employee merely because the employee "circumvented the chain of command" violates the whistleblower protection statutes. *Dutkiewicz v.*

*Clean Harbors Environmental Services*, 1995-STA-34, D&O of ARB, at 7 (August 8, 1997),[4] *aff'd, Clean Harbors Environmental Services v. Herman*, 146 F.3d 12 (1st Cir. 1998). Ohio can learn from this developed body of whistleblower jurisprudence, and use the same broad scope of protected activity to encourage employees to raise concerns about workplace dangers. In this case, that the employer would restrict his communications to the insurance inspector conveys to Mr. Dohme that he would be alone in raising his fire safety concern. The attempt to silence him revealed that, to date, the employer had been successful in suppressing his concerns. He and every other employee needs to know that if they choose to speak in furtherance of our public interests, the law will be with them.

The appellant's propositions of law would create a new exhaustion requirement for public policy tort claims. No such requirement exists in the law today. "[W]here there is a judicial remedy that is intended to be separate from the administrative remedy, the requirement of exhaustion of administrative remedies does not apply." *Basic Distrib. Corp. v. Ohio Dep't of Taxation* (2002), 94 Ohio St. 3d 287, 290, 2002–Ohio–794 at ¶ 10, 762 N.E.2d 979. See also, *Smith v. Friendship Vill. of Dublin* (2001), 92 Ohio St.3d 503, 505, 751 N.E.2d 1010 (discrimination claim); *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134 (public policy tort claim for raising workplace safety issue allowed, even if employee does not use OSHA's administrative procedure for retaliation complaints); *Flenker v. Willamette Industries, Inc.* (Kan.), 967 P.2d 295, 298 (1998) (same, holding that OSHA § 11(c) is inadequate).

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[4] This decision is available at: http://www.oalj.dol.gov/Decisions/ARB/STA/1995/DUTKIEWICZ_THOMAS_v_CLEAN_HARBORS_ENVIRO_1995STA00034_(Aug_08_1997)_170719_FLRCV_OC.PDF

## CONCLUSION

The appellant's propositions of law are contrary to the established law protecting employee whistleblowers, and contrary to the public interest. The amici urge this Court uphold the established law, and affirm the judgment of the court of appeals.

Respectfully submitted by:

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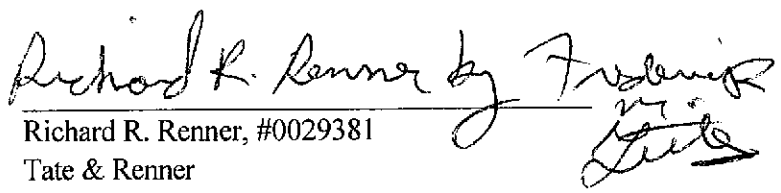

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## CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Brief of Amicus Curiae Ohio Employment Lawyers Association Urging Affirmance was served by regular U.S. mail, postage pre-paid, on the following persons at the following addresses on this 24th day of September, 2007:

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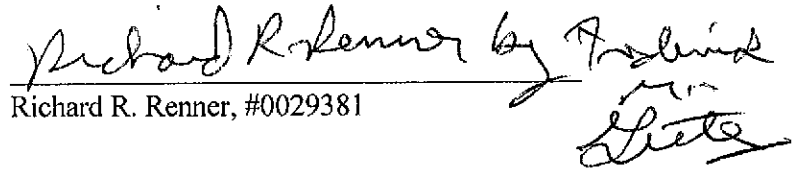

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