

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.

CASE NO. 07-0640

Appellant,

vs.

RANDALL J. DOHME

Appellee.

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

Court of Appeals
Case No. 21520

**MERIT BRIEF OF APPELEE DOHME PER
COURT'S OCTOBER 1, 2008 ENTRY**

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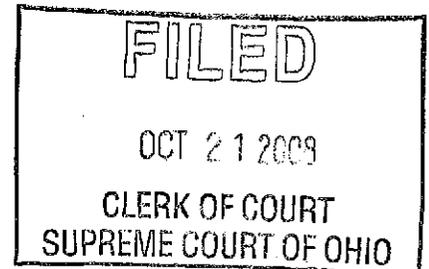


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SUMMARY OF THE ARGUMENT

By now, this Court is well aware of the factual underpinnings of this appeal, as capably addressed in the well-developed record that preceded this supplement. And, as it concerns Eurand's very narrow first proposition of law, this Court knows too it's long-standing precedent on the clarity element of a wrongful discharge public policy claim. Eurand has offered no persuasive rationale why this Court should deviate from its clear mandates. Instead, Eurand sounds the bell upon flawed appellate court reasoning that muddies the staged, analytical framework that accompanies any public policy claim. The Second District Court of Appeals got it right, and followed exactly the parameters long favored by this Court.

When determining whether a clear public policy exists, a court must consider both state and federal law, including the Ohio and federal Constitutions, statutes, administrative regulations, and common law. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 34, 151, quoting H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U.Cin.L.Rev. 397, 398-399. This consideration is legally based, and is a separate and distinct component of any public policy claim. It is the first consideration given to any public policy claim and precedes any factual analysis, to include the superfluous analysis and argument Eurand seeks to cram into the clarity evaluation.

At issue in Eurand's first proposition of law is whether this Court will condone Eurand's request to blur the clear distinction that presently exists between *Kulch's* clarity element and the subsequent, fact-based causation and overriding

business justification elements of a wrongful discharge public policy claim.

Employers that argue, and appellate districts that perpetuate, this blurred distinction unnecessarily confuse the intended analysis outlined by this Court, and themselves are the very cause of problems observed by Eurand.

Dohme's complaint and subsequent briefing unmistakably parallel *Pytlinski's* expectation, and gave Eurand unambiguous notice of his belief that his advocacy of Eurand's workplace safety concerns were proximately related to his discharge:

"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 v. Brocar Prod., Inc.* (2002) 94 Ohio St.3d 77, 2002-Ohio-66, at paragraph one of the syllabus. Dohme's clarity requirement could not be clearer. *Cf.*, Complaint, ¶ 37, *infra*.

Because Eurand's first proposition materially depends on the same blurred analysis recently observed in several of Ohio's appellate districts addressing this tort, this Court should issue a clear pronouncement that redirects those misguided courts, and its' dependent employers, to the clear guideposts of public policy claims first articulated by *Painter* and later rooted by *Kulch* and their progeny. *Kulch, supra*, 78 Ohio St.3d 134; *Painter v. Graley* (1994), 70 Ohio St.3d 377, 384, 634 N.E.2d 51, 57.

STATEMENT OF FACTS

The record makes clear that Eurand seeks too narrow an interpretation of this Court's precedent; requests too much of Dohme's pleading requirements; confounds the Second District's opinion; and impermissibly blurs the factually based causation element with the legally based clarity element of any public policy wrongful discharge

claim. Under this Court's clear and unmistakable precedent, if a discharged plaintiff pleads a "clear public policy," which relates to his work environment and discharge, the clarity element is satisfied. Mindful of the *Kulch* framework, factual analysis at the clarity stage is largely irrelevant, but is minimally recalled to shape Dohme's public policy claim, and illustrate the adequacy of his workplace safety allegations.

Until at least July 2002 during his employment with Eurand, Dohme was responsible for overseeing the type of on-site insurance inspections and assessments conducted by Peter Lynch. (Dohme Depo. at 247) At the time of Lynch's visit in March 2003, due to matters immaterial to this proposition of law, Dohme's latest job description could be interpreted to require his involvement with the inspection. (*Id.* at 162, Exhibit N, Major Responsibilities, ¶¶ 1, 4, 9, 11, and 14.)

As a member of Eurand's engineering department, and carrying the moniker of Facilities/CMMS (Computerized Maintenance Management System) Administrator, Dohme's interaction with Lynch would be customary, if not expected. But for the factually charged e-mail, Eurand would expect Dohme to meet with Lynch as part of his job duties. (Dohme Depo. at 162, Exhibit N, Major Responsibilities, ¶¶ 1, 4, 9, 11, and 14.) But the e-mail has nothing to do with whether Dohme successfully pleaded a public policy claim.

As part of Dohme's job duties, he could have (and likely was required to) properly advised Lynch of his work place safety concerns detailed in the MP2 printouts, which plainly documented overdue fire alarm inspections at the facility. Under *Pytlinski*, Ohio law prohibits any company from terminating an employee for raising workplace safety concerns.

Inasmuch as Dohme pleaded a clear public policy rooted in this Court's own analysis and the General Assembly's own words, which was accompanied by specific, factual allegations tied to his discharge, Dohme capably satisfied this Court's clarity hurdle. This Court has never required a magical incantation to plead a wrongful discharge public policy claim. And Eurand's rationale does nothing to warrant such now. Analyzing a wrongful discharge public policy claim from the bottom to the top, is incongruent, and robs the staged, analytical framework of its intended effect. Employers, employees and courts benefit if such analysis is properly adhered, and any unrest is quickly quieted. No change in the law is needed.

ARGUMENT

Proposition of Law No. 1: To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.

From the beginning of this litigation, Eurand has consistently ignored the specific identity of Dohme's public policy claim. Dohme did not loosely allege workplace safety, nor conjure up a "generic" claim. His *Greeley* claim was based on this Court's developed public policy favoring employee advocacy for workplace safety, and specifically, the danger associated with Eurand's administration of its' fire alarm system. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 234, 551 N.E.2d 981, 987; cf. Complaint at ¶¶ 7, 30-33, 37.

In fact, his public policy claim largely mirrored this Court's analysis in *Pytlinski* (where that plaintiff "claimed that he was discharged in violation of Ohio

public policy favoring workplace safety because the discharge was predicated upon his complaints regarding workplace safety,” *Pytlinski, supra*, 94 Ohio St.3d at 79.)

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

“Where the General Assembly has spoken, and in so speaking violated no constitutional provision, [courts] must not contravene the legislature’s expression of public policy.” *Painter, supra*, 70 Ohio St. 3d at 385. “Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.” *Id.* Eurand seeks to silence both this Court and the General Assembly’s clear pronouncements on this public policy.

As this Court has consistently held, “We have confidence that the courts of this state are capable of determining as a matter of law whether alleged grounds for a discharge, if true, violate a clear public policy justifying an exception to the common-law employment-at-will doctrine, thereby stating a claim.” *Painter, supra* 70 Ohio St.3d at 383-384.

In *Kulch*, this Court followed the suggestion of the *Painter* Court and applied the analysis of Professor Perritt, who set forth the elements of a wrongful discharge

claim in violation of public policy. *Kulch, supra*, 78 Ohio St.3d at 150-151; *Grale, supra*, 70 Ohio St.3d at 384. The elements of the tort do not include a requirement of specificity, or something beyond traditional notice pleading. Only that the discharge by the employer be related to the public policy. *Pytlinski, supra*, 94 Ohio St.3d at 80.

Pytlinski found: [I]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety.” *Pytlinski*, 94 Ohio St.3d at 80. Like *Pytlinski*, Dohme’s complaint plainly alleges Eurand retaliated against him for lodging complaints regarding workplace safety.” *Id.* Eurand’s proffered justification for Dohme’s discharge is simply not ripe at the time the clarity element is engaged.

The complaint “addresses the specific facts of the incident,” which, in part, formed his lawsuit, and “satisfy the clarity element of a wrongful discharge claim * * * [by] articulat[ing] a policy based in existing Ohio law.” *See, e.g.*, Complaint at:

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

workplace safety concerns would lead to termination”); and ¶ 37 (“On or about March 27, 2003, Plaintiff was wrongfully terminated in contravention of public policy for his perceived role in an on-site insurance adjuster’s discovery of certain violations relative to Defendant’s fire alarm system, which, upon information and belief, jeopardized workplace safety and placed employees in an unreasonable and dangerous setting. Despite reasonable concerns to the aforementioned system, the site and the employees themselves, Defendant actively attempted to prevent employee communication with said adjuster pursuant to an interoffice email sent by management personnel to all employees, including Plaintiff, days prior to the adjuster’s arrival, which expressly prohibited communication with said adjuster”).

These allegations are neither “generic” nor the type of hyperbole argued by Eurand. And Eurand’s proposed law does not comport to the underlying facts of this case, nor is descriptive of the rationale of the Second District Court of Appeals.

The Second District did not award judgment to Dohme; that much was left for a jury’s deliberation. It resolved the legal issues, and passed the factual issues. In so doing, it looked beyond Eurand’s subjective, factually dependent interpretation of Dohme’s public policy claim, and determined that Dohme’s discharge not only related a cognizable public policy, but also is one that should be determined by a jury capable of assessing the parties’ true intentions.

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

We note as well that a finding of a “sufficiently clear public policy” is only the first step in establishing a right to recover for the tort of wrongful discharge in violation of public policy. In cases where this required element of the tort is met, a plaintiff’s right of recovery will depend upon proof of other required elements. Full development of the elements of the tort of wrongful discharge in violation of public policy in Ohio will result through litigation and resolution of future cases, as it is through this means that the common law develops. *Painter, supra*, 70 Ohio St.3d at 384.

The Second District Court of Appeals did no more than what has long been contemplated, intended and favored by this Court. Eurand’s clear attempt to blur the

multi-staged analytical framework of any public policy claim, or the deference extended by this Court to the state courts' concerning their collective construal of the underlying affected policies is inapposite to the direction outlined by this Court. Eurand's first proposition of law must be denied.

CONCLUSION

For these reasons, Dohme respectfully requests that this Court reject Eurand's first proposition of law, and reaffirm the clear and compelling mandates of the wrongful discharge public policy claims in Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Dohme's (supplemental) Merit Brief was served via regular U.S. mail upon counsel for Appellant, Todd D. Penney, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Defendant's counsel, via regular U.S. mail, this 17th day of October 2008.



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