

IN THE SUPREME COURT OF OHIO

RANDALL J. DOHME,

Plaintiff-Appellee,

v.

EURAND AMERICA, INC.

Defendant-Appellant.

Case No. 2007-0640

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

REPLY BRIEF OF AMICUS CURIAE OHIO EMPLOYMENT LAWYERS
ASSOCIATION IN SUPPORT OF APPELLEE RANDALL J. DOHME
CONCERNING PROPOSITION OF LAW NO. I

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REPLY BRIEF

Appellant Eurand's Merit Brief Addressing Proposition of Law No. I demonstrates that, while Eurand's Proposition addresses the issue of "clarity," the substance of its argument is actually directed to the issues of jeopardy—which had already been briefed and argued prior to the Court's October 1, 2008 entry ordering briefing on this Proposition—and the purely factual issues of causation and overriding business justification, which are not at issue in this appeal.

Eurand devotes several pages of its brief to wholly irrelevant factual issues, placing increased emphasis on Appellee Dohme's subjective intent in raising workplace safety concerns, a question of fact that is not even a proper consideration for the jury, much less this Court. Eurand attempts to use its misleading factual assertions to support its legal argument in favor of inserting an artificial and unnecessary "specificity" requirement into the clear, four-element analysis of wrongful discharge claims set forth by this Court's unambiguous precedents. The only purpose of this additional procedural hurdle is to eliminate plainly meritorious claims; Eurand cannot point out a single case, or even a single convincing hypothetical, where permitting the public policy in favor of "workplace safety" to satisfy the clarity element would lead to an undesirable result. This Court should reject Eurand's Proposition of Law No. I.

1. Eurand's Additional Factual Assertions are Irrelevant and Misleading

Eurand's new Statement of Facts, though similar to the statement in its original merit brief, introduces two entirely new assertions that place added emphasis on wholly irrelevant factual issues. These assertions require a response, not only because they are misleading and inconsistent with the record, but also because they demonstrate that Eurand's Proposition is directed at every element of the wrongful discharge cause of action *except* the clarity element, the only proper subject of this phase of the briefing.

Eurand's first new assertion relates to its general procedures for communicating with outside inspectors, such as the insurance inspector to whom Dohme raised his safety concerns. According to Eurand, forbidding employees from communicating with such inspectors except through a single point of contact was its established policy for all outside inspections, including the inspection at issue and similar visits by the FDA and the fire department. Appellant's Merit Brief Addressing Proposition No. I, at p. 4. Eurand claims Dohme knew this policy applied to the inspector he spoke with, and that the policy's general applicability proves that Eurand lacked any improper motive for instituting it. *Id.* This is a distortion of the record.

This appeal arises from a summary judgment ruling, in which all evidence is to be "construed most strongly in the [nonmovant's] favor," Civ. R. 56(C), and Dohme has consistently disputed whether he was actually forbidden to speak to the insurance inspector, and whether such a prohibition was actually communicated to him. Dohme testified that he may not have received the e-mail directing employees not to speak to the insurance inspector, and that in any case, he was specifically authorized to speak to the inspector at the time he did. See Merit Brief of Appellee (concerning Propositions No. II & III), at pp. 6-7.

The more difficult, related question of how Eurand's purported "single point of contact" policy should be interpreted—either as an attempt to cover up defects, as Dohme claims, or as an appropriate response to "the frequency of review and the need for those involved to have complete and accurate information," as Eurand asserts—is similarly a question for the jury to decide based on all of the circumstances, not a question of law for this or any other Court. The appellate court agreed with Dohme that such a policy may imply "that the employer wishes to cover up defects." *Dohme v. Eurand Am., Inc.* (2d Dist.), 170 Ohio App.3d 593, 2007-Ohio-865, at ¶ 32. Whether or not this conclusion was fair in light of Eurand's claim that it prohibited

employees from speaking to *any* outside inspectors (and it is difficult to understand why a policy prohibiting complaints to FDA inspectors should make a policy prohibiting complaints to insurance inspectors appear *more* reasonable), it was entirely appropriate in the context of a summary judgment determination, where all reasonable inferences were required to be drawn in favor of Dohme. Civ. R. 56(C).

Eurand's second new factual claim also relates to Dohme's conversation with the insurance inspector. Eurand claims that, "[a]s found by the trial court and acknowledged by the Second District, 'Plaintiff's statements did not indicate a concern for work place safety. . . .'" Appellant's Merit Brief at p. 5. This claim is simply false. Whether through sloppy use of quotation marks or a deliberate distortion of the appellate court's opinion, Eurand elides the fact that the appellate court used those words only in quoting verbatim from the trial court's opinion, then concluded that "the employee's intent is largely irrelevant in an analysis of the clarity element of a wrongful-discharge claim." 2007-Ohio-865, at ¶ 12 (quoting trial court), ¶ 23 (rejecting reasoning).

The underlying assertion regarding Dohme's intent, as to which the appellate court reached no conclusion, is another contested factual issue. A jury is capable of determining what concerns Dohme intended to raise in light of all of the relevant circumstances. These circumstances include Eurand's checkered safety record—a deeply important issue to Dohme, as he had previously fallen victim to deficient fire safety equipment, see *Dohme*, 2007-Ohio-865, at ¶ 2 (describing incident where Dohme suffered smoke inhalation after fire alarm failed to activate)—as well as Dohme's contemporaneous documentation of his safety concerns. See Deposition Exhibit I (stating fire safety concerns).

More important, though, the Second District's description of Dohme's intent as "largely irrelevant" was absolutely correct: what matters is the employer's intent, not the employee's. If Eurand intended to terminate Dohme because he alerted the insurance inspector to a potential safety hazard, it violated Ohio's clear public policy in favor of workplace safety, regardless of whether Dohme's intent was only to protect his job, as Eurand claims. Any other rule would embrace the mythical distinction between altruistic, saintly whistleblowers, and greedy, self-serving employees who raise safety concerns only when it serves their own ends. While these may be effective caricatures for attorneys to present to the jury, they should have no place in this Court's legal analysis. Even "self-serving" whistleblowers are protected under the law, not only because their actions serve the public interest, but also to ensure that unchecked retaliatory terminations do not discourage other potential whistleblowers from coming forward.

Disregarding the employee's subjective intent is consistent with the established framework for wrongful discharge actions. The character and motives of the employee have no bearing on whether the employee's statements relate to a clear Ohio public policy (clarity), whether the employee's termination endangers that policy (jeopardy), or whether there is a causal link between the statements and the termination (causation), and an employee's supposed "selfishness" is hardly an overriding business justification. A wrongful termination does not become less wrongful because a court deems the fired employee's motives insufficiently pure.

2. Eurand's Reliance on Irrelevant Factual Considerations is Consistent with Its Attempt to Conflate the Distinct Elements of Wrongful Discharge

It may seem odd that Eurand has placed increased emphasis on these disputed facts in a brief that is purportedly directed to the purely legal question of clarity. These new assertions, however, are further indication of Eurand's effort to import considerations relevant only to causation, jeopardy, or business justification into this Court's analysis of clarity.

Eurand apparently believes that for a public policy to be “clear,” it must encompass all of the factual circumstances of a particular case, as found by the employer. In satisfying that requirement, it might indeed matter whether Dohme intended to emphasize workplace safety, or whether Eurand’s “single point of contact” policy was intended to silence safety concerns. But Eurand’s notion of clarity has little to do with the definition previously established by this Court. As stated in virtually every opinion of this Court addressing wrongful discharge since the formal adoption of Professor Perritt’s four-element analysis in *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653, clarity is a “relatively pure law and policy question,” not a question of fact. *Id.* at 70 (quotations omitted). It depends on the state of the law, not the means by which an employee raises concerns about conditions in the workplace.

The content and context of the employee’s statements are properly considered by the jury as factual issues: under the rubric of “causation,” to determine whether the employee’s words *caused* the employer to terminate him or her, and in the consideration of “overriding business justification,” to determine whether the manner or timing of the employee’s statements was so inappropriate that it justified the employee’s termination. Those issues are not before this Court.

Since it cannot openly ask this Court to resolve disputed facts, Eurand attempts to insert these facts into the clarity analysis by rephrasing them as legal issues. Eurand states, “Dohme was terminated for disobeying a company directive with his only motivation being his fear he was being ‘set up’ to facilitate his termination. When he acted to prevent the perceived set up, Dohme contacted only a private insurance company representative.” Appellant’s Merit Brief at p. 15. This would be nothing more than a concise preview of Eurand’s causation and business justification arguments, except that it continues, “There is no public policy in existing law that is applicable to these facts and Dohme’s attempt to rely on the general notion of workplace safety

to satisfy his clarity element must be rejected.” *Id.* at pp. 15-16. In other words, Eurand asks this Court to conclude that Dohme cannot satisfy the clarity element without articulating a public policy that refers in detail to Dohme’s subjective intent and Eurand’s procedures for communicating with insurance inspectors (and adopts Eurand’s conclusions as to those disputed factual issues). According to Eurand, any less specific public policy would be too “generic” to satisfy the clarity element, and permitting such “generic” policies to satisfy even a single element of a four-pronged cause of action would be “dangerous.” *Id.* at 17.

What is the “danger” Eurand fears? Apparently, it is that this Court and the lower courts will permit employees to bring claims of wrongful discharge when they are terminated for raising serious workplace safety concerns. Eurand’s “parade of horrors” is just not very horrible. It begins with the claim that without a more specific clarity requirement, companies will not be permitted to fire workers for complaining about unsafe food being served at a hospital, *id.* at p. 14 (citing *Miller v. Medcentral Health System, Inc.* (Richland Cty. App. 2006), 2006-Ohio-63), or for reporting an unsafe policy permitting alcohol use by workers at a service garage. *Id.* at pp. 14-15 (citing *Krickler v. City of Brooklyn* (Cuyahoga Cty. App. 2002), 149 Ohio App. 3d 97, 103-104). Eurand holds these cases out as prime examples of the chaos that would result from rejecting its Proposition, but these well-reasoned cases are entirely consistent with the strong Ohio public policy favoring workplace safety.

The hypothetical cases Eurand invents to dramatize its concerns are, if anything, even less frightening, by virtue of their sheer implausibility:

An employee’s refusal to work mandatory overtime should not be transformed into a workplace safety concern because employees are more alert in their first hour of work than in their ninth hour. An employee who is terminated for refusing to wear a mandatory uniform that he merely does not like should not be transformed into a workplace safety issue because a happy worker is more attentive than an unhappy worker. The delivery employee who fails to report to work on a rainy day has not

implicated workplace safety because statistics show more traffic accidents occur on rainy days than on dry ones.

Appellant's Merit Brief, p. 16. In crafting these hypotheticals, Eurand has repeated the same error that has pervaded its legal analysis throughout this appeal: conflating the clarity element with the other, distinct elements of the wrongful discharge cause of action. Each of these cases would lack merit, but their weaknesses would have nothing to do with clarity. Instead, they would fail because they could not meet the requirements of jeopardy, causation, and lack of business justification. Indeed, the hypotheticals assume that causation cannot be satisfied; for example, the "unhappy" worker is "terminated for refusing to wear a mandatory uniform," not because he has warned that the uniforms make the workplace less safe.¹

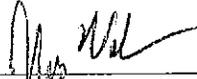
Here, in contrast, Dohme relies on a far more direct causal link to workplace safety than Eurand's fictional plaintiffs. He has produced ample evidence that Eurand fired him because he expressed his safety concerns to the inspector, including threats of retaliation if he continued to point out hazardous conditions. His safety concerns did not involve some logically strained, speculative danger; they involved fire alarm inspections in a workplace that had experienced fires before, including one that had hospitalized him. The only purpose that would be served by forcing Dohme to articulate a more specific source of public policy would be to protect Eurand and other employers from liability for actions that plainly violate the public policy supporting workplace safety that has been stated unambiguously in Ohio statutory law and this Court's precedents. By requesting the reversal of the appellate court's ruling, Eurand is really asking this Court to overrule its own unequivocal precedents and the mandates of the General Assembly.

¹ In light of the discussion of Eurand's factual assertions above, it should also be noted that while none of these claims would fail because of the employees' impure motives, all of them would fail because the employer's motives are not contrary to any Ohio public policy.

CONCLUSION

The appellant's Proposition of Law No. 1 is contrary to the established law protecting employees who raise workplace safety concerns, and contrary to the public interest. The amicus urges this Court uphold the established law, and affirm the judgment of the court of appeals.

Respectfully submitted,



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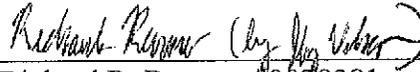
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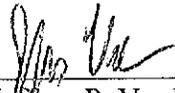
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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply Brief of Amicus Curiae Ohio Employment Lawyers Association in Support of Appellee Randall J. Dohme Concerning Proposition of Law No. I was served by regular U.S. mail, postage pre-paid, on the following persons at the following addresses on this 31st day of October, 2008:

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