

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

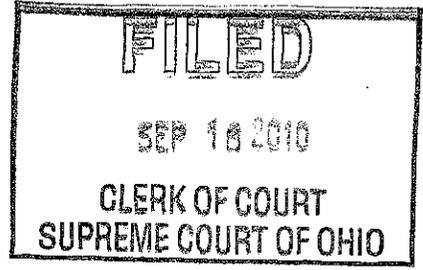
RANDALL J. DOHME	:	<b>10-1621</b>
Plaintiff-Appellee,	:	On Appeal from the Montgomery
v.	:	County Court of Appeals,
	:	Second Appellate District
EURAND AMERICA, INC.	:	Court of Appeals
Defendant-Appellee.	:	Case No. 23653

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT EURAND, INC.

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT  
GENERAL INTEREST

This case involves the re-appeal of an earlier case accepted by this Court, processed to the preparation and circulation of the Opinion, but then dismissed on jurisdictional grounds. *See Dohme v. Eurand Am., Inc.* (2009), 121 Ohio St. 3d 277, 2009-Ohio-509. Subsequent to the remand from this Court, the Second District Court of Appeals adopted by reference its initial opinion, which formed the basis of the original decision of this Court to accept the case, and seemed to pass the resolution of these important issues to this Court by noting “[t]he Ohio Supreme Court having previously accepted Eurand’s appeal of this case has signaled that this case raises issues meriting the High Court’s review. It is likely then that . . . the Court would again assert its jurisdiction.” (Opinion at 4). Because of the significant issues raised by this case, Eurand again asks this Court to accept this appeal.

As the briefs submitted to, and the arguments before, this Court in the initial appeal demonstrated, this case involves issues that reside in gaps in current Ohio jurisprudence concerning the frequently-pled tort of wrongful discharge in violation of public policy. These voids in the law have caused federal and state appellate courts to struggle, and inconsistent results have occurred.

At the heart of this confusion rests the Second District’s expansion in this case of the wrongful discharge tort into a context that heretofore was unrecognized under Ohio law and which conflicts with the decisions of the Sixth Circuit Court of Appeals and other Ohio appellate courts. As a result, the state of the law in this area has never been less clear.

The Sixth Circuit has expressed its need for guidance in this area through quotes like, “[t]he Ohio Supreme Court has charted a somewhat jagged course in considering what constitutes a clear public policy for purposes of this [wrongful discharge] tort” *Herlik v. Continental Airlines, Inc.* (6<sup>th</sup> Cir. 2005), 2005 U.S. App. LEXIS 21784 at \*15 and “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.* (6<sup>th</sup> Cir. 2003), 342 F.3d 593, 599. In response to the Sixth Circuit’s positions on these issues, the Second District found that the conclusions it reached were erroneous, explaining, “[w]e 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” and “[t]he *Herlik* opinion misconstrues Ohio law on this issue.” Yet, the federal courts continue to rule in the same manner, apparently unconvinced by the Second District’s reasoning in this case. *See, e.g. Trout v. First Energy Corp* (N.D. Ohio 2008) 2008 U.S. Dist. LEXIS 102803; *Itill v. Mr. Money Finance Co.* (6<sup>th</sup> Cir. 2009), 309 Fed. Appx. 950. As the forgoing examples demonstrate, few areas of Ohio law need more clarification than the tort at issue in this case.

In the end, although this Court has cautioned appellate courts to be mindful of its early admonition that the public policy exception to the at-will doctrine must be reserved for limited situations, this guidance has not been followed. Rather this “exception” to the at-will doctrine has, in the minds of many, subsumed the at-will rule. This case provides the Court with the vehicle to provide a definitive statement on the applicable analysis for the parties and courts to follow when analyzing the wrongful discharge tort and also

provides an opportunity to delineate the boundaries of the wrongful discharge tort. As such, this Court should again hear this appeal.

### STATEMENT OF THE CASE AND FACTS

In very general terms, this case arises from the termination of Appellee Randall Dohme (“Dohme”) from his employment with Appellant Eurand, Inc. (formerly Eurand America, Inc.). Dohme’s short but tumultuous employment with Eurand ended following his admitted disregard of a management directive that the employees at Eurand’s facility direct contact with a private insurance company employee, who was on site for a two-day review of the premises for the submission of a policy proposal, through specifically-identified individuals.

Dohme filed suit against Eurand asserting, among other things, that his termination constituted a wrongful discharge in violation of the public policy of the State of Ohio favoring “workplace safety.” The Montgomery County Court of Common Pleas granted summary judgment in Eurand’s favor on the wrongful discharge claim reasoning that “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.”

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 some existing precedent and seemingly confused by others, expanded the wrongful discharge tort beyond its previously-existing bounds.

More specifically, ignoring the fact that Dohme did not actually mention workplace safety, did not even claim in his conversation that an unsafe environment existed, and did not make the statement to either a governmental body or an internal supervisor, the Second District found that the potential choice between higher insurance premiums and remedying unspecified workplace safety issues might advance the public's interest in workplace safety. The appellate court then ruled that a termination under these circumstances jeopardized the public policy of Ohio as a matter of law. In reaching this conclusion, the court made three erroneous holdings, each of which is reflected in the three propositions of law below.<sup>1</sup>

Eurand asks the Court to accept the case and adopt these propositions of law.

#### ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: 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.**

In reaching its conclusion, the Second District entered into an area of the wrongful discharge tort that has been the subject of considerable confusion for the courts in Ohio. More specifically, the Second District recognized the generic notion of

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<sup>1</sup> It appears that the motivation for the appellate court's extension of the law was an "implication" that was not argued by Dohme, does not exist in Ohio law, and is contradicted by the evidence in the record. According to the appellate court, "[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."

“workplace safety” as an independent statement of public policy in Ohio even in a context where “safety” was not raised by the employee and where no specific statement of law applicable to the facts exists. Such a conclusion is contrary to Ohio law – to support a wrongful discharge claim, a reference to workplace safety must be to a specific statement of law that matches the facts of the case.

Reduced to its basics, the Second District’s conclusion is, at best, a misreading of precedent or, at worst, a dramatic expansion of this rule of law. Proposition of Law No. I presents the Court with an opportunity to clarify an issue first raised in, but not resolved by, the syllabus of *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, regarding the role of the “workplace safety” public policy in the context of the wrongful discharge tort. Without this clarification, the appellate courts of Ohio will continue to misread *Pytlinski* and expand the circumstances to which the limited exception applies.

The notion of a public policy favoring “workplace safety” first appears in Ohio Supreme Court jurisprudence in *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134. There, the Court noted the existence of “Ohio’s public policy favoring workplace safety” in the context of a wrongful discharge claim. *Kulch*, 78 Ohio St. 3d at 153. However, the Court’s recognition of a workplace safety public policy in the specific context presented in *Kulch* was not a mandate for the seemingly perpetual expansion of the role of safety in the wrongful discharge tort. Rather, *Kulch* recognized the workplace safety public policy in a fact pattern where a specific safety statute was identified and corresponded to the facts at hand.

A close reading of *Kulch* confirms its limited application. In performing its analysis of the clarity element, the Court in *Kulch* identified the bases for the public

policy involved and specifically stated, “[t]he first main source of expressed public policy can be found in Section 660(c), Title 29, U.S. Code, which specifically prohibits employers from retaliating against employees (like appellant) who file OSHA complaints.” *Kulch*, 78 Ohio St. 3d at 151.<sup>2</sup> In other words, the Court in *Kulch* found the existence of a workplace safety policy in a specific statute that applied to the facts of the case – not from the general notion that Ohio values safe workplaces.

The Sixth Circuit Court of Appeals recognized the limitation of *Kulch*'s holding when it interpreted the clarity element of the wrongful discharge tort in *Herlik*, 2005 U.S. App. LEXIS 21784 at \*16, where it explained:

In practice, the Ohio Supreme Court has usually found a clear public policy protecting an employee's activity only when there is a statute that prohibits firing employees for engaging in a particular protected activity. In other words, once a statute provides a right, the court then fashions a cause of action to enforce that right.

Thus, the Sixth Circuit concluded, “*Kulch* is typical; the wrongful discharge tort provides the remedy where the statute is silent.” *Id.* at \*17.

*Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, also made no pronouncement of a global “workplace safety” public policy. When first accepted by the Court, *Pytlinski* did not involve an analysis of the clarity element of the wrongful discharge claim. Rather, as the Court noted, “*Pytlinski* presents a single issue for our consideration. We are called upon to determine whether the court of appeals erred in applying the one-hundred-eighty-day limitations period set forth in R.C. 4113.52 to *Pytlinski*'s common-law claim for wrongful discharge in violation of public policy.” *Pytlinski*, 94 Ohio St. 3d at 78. However, in resolving that limited issue the Court made

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<sup>2</sup> The second source of public policy identified in *Kulch* was Ohio Rev. Code § 4113.52, Ohio's whistleblower's statute, which is not at issue in the present case.

statements that significantly impacted the future developments of the wrongful discharge tort.

The employee in *Pytlinski* had engaged in a form of “whistleblowing.” As a result of this whistleblower context, the Court was required to determine whether the employee was limited to basing the public policy on that reflected in Revised Code § 4113.52 (which under *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, would require compliance with its procedural requirements) or whether the employee could proceed independent of that section’s public policy if he could identify another applicable source of public policy. *Pytlinski*, 94 Ohio St. 3d at 79-80. Relying on *Kulch*, the Court held *only* that the “Ohio public policy favoring workplace safety *is an independent basis* upon which a cause of action for wrongful discharge in public policy may be prosecuted.” *Id.*, 94 Ohio St. 3d at 80 (italic added). In other words, the issue resolved in *Pytlinski* was only whether the safety policy reflected in OSHA’s anti-retaliation provision could support the claim or whether the employee had to comply with Section 4113.52 because his claim sounded in whistleblowing. The *Pytlinski* decision did not hold, and the Court did not even discuss, whether a general reference to workplace safety could satisfy the clarity element of the wrongful discharge tort when the facts of a given case did not implicate 29 U.S.C. § 660(c). Given this context, there was no need for the *Pytlinski* Court to – and it did not – rely on a general workplace safety policy because there was a specific safety statute establishing the public policy in that case. Nevertheless, some courts, including the Second District, have expanded the holding of *Pytlinski* due to the language quoted above.

In contrast with the Second District, other Ohio courts of appeals have concluded that it is not enough for a plaintiff to refer generally to a statute or declare that his conduct was warranted by “safety” or some other general policy. Rather, those courts have required a plaintiff to demonstrate the existence of a specific public policy in existing Ohio law that forms a policy that specifically relates to the facts at hand. *See, e.g., Lesko v. Riverside Methodist Hosp.* (Franklin Cty. App. 2005), 2005-Ohio-3142; *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264 at 22, (“any physician or health care worker who complained to anyone about patient care issues at anytime during their employment who is later discharged, could file an action for wrongful termination in violation of public policy. Ohio law does not support such a *sweeping* interpretation of the public policy exception to employment at-will. If we were to hold otherwise, Ohio’s long-standing and predominate rate that employees are terminable at-will would disappear.”)(*italic in original*). Federal courts addressing this issue have also concluded that general statements of policy are insufficient. *See, e.g., Herlik v. Continental Airlines, Inc.* (6<sup>th</sup> Cir. 2005), 2005 WL 2445947 (rejecting the generic assertion of “safety” as an underlying public policy).

Finally, the highest courts of other states have also rejected the viability of general policy statements and required that if an employee wants to base a claim on a given public policy, the public policy must be articulated in the law with specificity and that the public policy must be related to the specific facts of the case. *See, e.g., Danny v. Laidlaw Transit Services, Inc.* (Wash. 2008), 2008 Wash. LEXIS 951 at ¶55 (Madsen, J. concurring in part dissenting in part); *Gardner v. Loomis Armored Inc.* (Wash. 1996),

913 P.2d 377; *Birthisel v. Tri-Cities Health Services Corp.* (W. Va. 1992), 424 S.E. 2d 606; *Turner v. Memorial Medical Ctr.* (Ill. 2009), 233 Ill. 2d 494.

Ohio cannot allow a cause of action to exist for every termination in which the circumstances can be contorted to suggest “safety” is implicated in some distant setting. Rather, consistent with the authorities cited above, this Court should require employees to identify a specific policy in existing law that addresses the facts of the case. Thus, the appellate court’s reversal of the trial court on this point was in error.

**Proposition of Law No. II: 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 the concerns to a supervisory employee of the employer or to a governmental body.**

Common sense teaches that if a person truly wants to remedy a situation by complaining, the complaint must be made to someone who possesses the ability to directly effectuate the necessary change. Complaints to those who do not possess such ability are ineffective as a practical matter and should be equally inconsequential in the eyes of the law. It is for this reason that every statutory whistleblower provision and every case recognizing some form of a common law whistleblower claim has limited the acceptable recipients of the employee’s complaint to a governmental entity or internal management. The Second District’s decision stands in contrast to this authority.

In this case, Dohme approached a private insurance company representative to suggest he was being set up for a claim of poor performance. Although Dohme was not seeking to advance the safety of Eurand’s workplace with his comments, even if he was

his termination would not have jeopardized a public policy favoring workplace safety because the insurance employee he approached had no direct ability to advance safety at Eurand. The Second District erred in reaching a contrary conclusion.

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 originally 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 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 that the recipient of alleged “whistleblowing” or safety

complaints is irrelevant to the application of wrongful discharge exception and the Second District's conclusion that it did is mistaken.

Further, unlike this case, 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. In the end, the Second District's holding is simply unsupported by Ohio law and is in conflict with the conclusions of other courts.

In *Branan v. Mac Tools* (Franklin Cty. App. 2004), 2004-Ohio-5574, 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 calls to co-workers. In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264, 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.* (6<sup>th</sup> Cir. 2005), 2005 WL 2445947 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 WL 2445947 at 4-5. The appellate court in this case determined that these decisions either misunderstood Ohio law or were factually distinguishable.

The Second District avoided the logical requirement that the “safety” concerns be raised to someone with the authority to address them by reasoning that through indirect market forces workplace safety might eventually be advanced. However, recognizing a chain-of-events theory is surely opening a Pandora’s Box of claims ill-fitted for a “limited” exception to the at-will doctrine.

Only the appellate court in this case has recognized indirect forces as satisfying the jeopardy element of the wrongful discharge claim. This overstatement of the law must be corrected. To satisfy the jeopardy element, an employee who contends that his discharge was prompted by complaints must be required to show that his complaints were to someone within the company or to a governmental agency before the termination will jeopardize a public policy.

**Proposition of Law No. III: 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.**

Before the decision in this case, an Ohio employer could only be held liable under a wrongful discharge claim if it was placed on notice by the employee that a public policy

was implicated. The Second District's decision removes this requirement and allows an employer to be blindsided by after-the-fact justifications.

In *Jermer v. Siemens Energy & Automation* (6<sup>th</sup> 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. Citing *Himmel v. Ford Motor Co.* (6<sup>th</sup> Cir. 2003), 342 F.3d 593, the Sixth Circuit concluded 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 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. The United States District Court for the Northern District of Ohio similarly rejected a public policy claim based upon an employee's ill-defined complaints in *Aker v. New York and Co., Inc.* (N.D. Ohio 2005), 364 F. Supp. 2d 661, 666 ("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.") Dohme's claim must fail for the same reason.

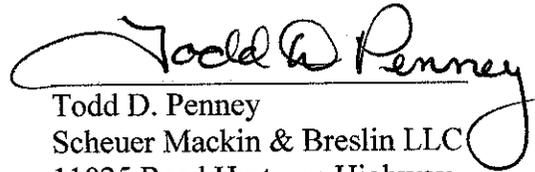
It is beyond debate that Dohme did not intend to advance workplace safety with his conduct and did not even mention safety in his comments to the third-party. Nevertheless, the appellate court's decision imposed a requirement on Eurand to go past what was actually said and done, and calculate what byproduct could eventually develop from what was said and done. No such requirement exists under Ohio law and this onerous burden should not be imposed.

The logic and merit of the positions taken in the *Jermer* and *Aker* decisions are inescapable. In fact, in the original briefs before this Court in this case, neither Dohme nor the amicus opposed this proposition of law. Only the Second District has stood by this position. Employers cannot be expected to evaluate unstated hidden agendas or unintended byproducts. If an employee believes that the workplace is unsafe, for example, it is not unreasonable to require him to indicate so to either the government or the employer before he can maintain a retaliation-based claim. The appellate court's contrary ruling must be reversed.

#### CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. Eurand requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

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".

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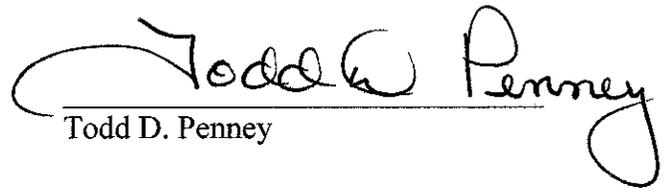
Counsel for Appellant Eurand, Inc.

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to the following counsel for Appellee:

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Todd D. Penney

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IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY

RANDALL DOHME

Plaintiff-Appellant

v.

EURAND AMERICA, INC.

Defendant-Appellee

Appellate Case No. 23653

Trial Court Case No. 2003-CV-4021

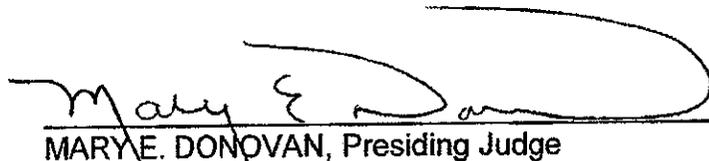
(Civil Appeal from  
Common Pleas Court)

**FINAL ENTRY**

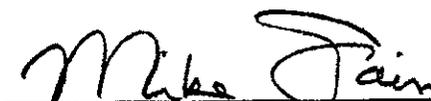
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Pursuant to the opinion of this court rendered on the 20th day  
of August, 2010, the judgment of the trial court is **Reversed** and this cause is  
**Remanded** for further proceedings consistent with the Opinion.

Costs to be paid as stated in App.R. 24.

  
MARY E. DONOVAN, Presiding Judge

  
JAMES A. BROGAN, Judge

  
MIKE FAIN, Judge

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violation of public policy. Dohme alleges that Eurand fired him for expressing concerns regarding the state of the company's fire-alarm system to an insurance inspector visiting Eurand to perform a site survey and risk assessment. In *Dohme v. Eurand Am., Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, we held that the trial court erred when it concluded that no public policy protected Dohme from being fired for sharing information with the inspector that related to workplace safety. But our judgment and opinion were vacated by the Ohio Supreme Court in *Dohme v. Eurand Am., Inc.*, 121 Ohio St.3d 277, 2009-Ohio-506, after it determined that the trial court's order was not final and appealable. After correcting the problem, Dohme again appealed the order. Again and for the same reasons we will reverse.

On June 9, 2003, Dohme brought suit against his former employer Eurand, Inc., alleging violations of Ohio public policy relating to workplace safety, the federal Family and Medical Leave Act, and the Ohio Minimum Fair Wage Standards Act. Soon after, Eurand removed the case to federal court. The District Court granted Eurand summary judgment on the Family and Medical Leave Act claim and transferred the two state-law claims back to the common pleas court. Eurand immediately moved for summary judgment on these two claims. On November 21, 2005, the trial court granted Eurand summary judgment on the claim for wrongful discharge but not on the Minimum-Fair-Wage-Standards-Act claim. Dohme voluntarily dismissed his FLSA claim, which the parties believed would make the trial court's order final and appealable. On March 2, 2007, we reversed the trial court's grant of summary judgment and remanded the case for trial.

Eurand appealed our decision to the Ohio Supreme Court, and, on October 1, 2008, the Court accepted the appeal. The Court agreed to consider three propositions of law:

**Proposition of Law No. I:** 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.

**Proposition of Law No. II:** 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 the concerns to a supervisory employee of the employer or to a governmental body.

**Proposition of Law No. III:** 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.

On February 11, 2009, the Court issued its opinion, but it did not address any of the above propositions. After accepting Eurand's appeal, the Court decided *Pattison v. W.W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio-5276, in which it considered the question "whether a plaintiff that had asserted multiple claims against a single defendant, when some of those claims had been ruled upon but not converted into a final order under Civ.R. 54(B), could create a final, appealable order by voluntarily dismissing pursuant to Civ.R. 41(A) the remaining claims asserted against the defendant." *Dohme*, at ¶3. The Court held that a plaintiff could not create a final, appealable order this way. *Pattison*, at ¶1. Said the Court, "[d]uring the preparation of the opinion in this case [*Dohme*], a through review of the record revealed that following the trial court's order dated November 21, 2005, which granted Eurand America's motion for summary judgment and dismissed

Dohme's discharge-in-violation-of-public-policy claim, Dohme voluntarily dismissed his remaining claim (violations of R.C. 4111.01) without prejudice pursuant to Civ.R. 41(A). The trial court's order entered on March 7, 2006, specifically noted that the November 21, 2005 order was *not* a final, appealable order." *Dohme*, at ¶4. "Thus, Dohme," the Court concluded, "dismissed his remaining claim without prejudice pursuant to Civ.R. 41(A) in order to create a final, appealable order." *Id.* Because the order Dohme appealed from was not a final, appealable order, the Court, on the authority of *Pattison*, vacated our judgment and opinion and remanded the case to the trial court. In the trial court, after the parties settled the FLSA claim, Dohme dismissed it with prejudice, rendering the trial court's November 21, 2005 judgment final and appealable.

Dohme has for the second time appealed that judgment, and he assigns a single error to the trial court's grant of summary judgment on his claim for wrongful discharge. This is not a motion for reconsideration, and we see no significant change in the relevant legal landscape that compels us to disturb our prior decision. We believe our decision in *Dohme v. Eurand Am., Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, is correct and we adopt that decision here in its entirety. Accordingly, for the reasons stated there, the sole assignment of error is sustained.

The Ohio Supreme Court having previously accepted Eurand's appeal of this case has signaled that this case raises issues meriting the High Court's review. It is likely then that, were Eurand to appeal our decision, the Court would again assert its jurisdiction. Nevertheless, now the judgment of the trial court is Reversed, and this case is Remanded for further proceedings.

.....

DONOVAN, P.J., and FAIN, J., concur.

Copies mailed to:

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Todd Duwel

Todd Penney

Hon. Mary Katherine Huffman



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SCANNED

DAVID FOLEY  
CLERK OF COURTS  
MONTGOMERY CO., OHIO

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

FINAL ENTRY

R

Pursuant to the opinion of this court rendered on the  
2<sup>nd</sup> 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*  
\_\_\_\_\_  
JAMES A. BROGAN, JUDGE

*Thomas J. Grady*  
\_\_\_\_\_  
THOMAS J. GRADY, JUDGE

*Mary E. Donovan*  
\_\_\_\_\_  
MARY E. DONOVAN, JUDGE

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FILED  
COURT OF APPEALS  
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RANDALL J. DOHME  
Plaintiff-Appellant

:  
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vs.

: T.C. CASE NO. 2003CV4021

EURAND AMERICA, INC.  
Defendant-Appellee

:  
:

O P I N I O N

Rendered on the 2<sup>nd</sup> day of March, 2007.

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Attorney for Defendant

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.* (6<sup>th</sup> 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.* (6<sup>th</sup> 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.

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