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## STATEMENT OF FACTS

### A. Procedural Background

This case, which involves a rehearing of a prior appeal that was dismissed because a final appealable order was lacking, presents the Court with an opportunity to stem the continuing erosion of the employment-at-will doctrine due to the application of the tort of wrongful discharge in violation of public policy to a seemingly endless array of fact patterns.

Appellee Randall Dohme (“Dohme”) was terminated from his employment with Appellant Eurand, Inc. (formerly Eurand America, Inc.) following his admitted disregard of a management directive that the employees at Eurand’s facility direct contact with an insurance company employee, who was on site for a two-day review of the premises for the submission of an insurance policy proposal, through specifically-identified individuals. (Supp. at 00094-00097; Dohme Depo. at 248–251, Exhibit DD) The Montgomery County Court of Common Pleas granted summary judgment in Eurand’s favor on the wrongful discharge claim reasoning that a policy favoring workplace safety was not implicated in Dohme’s termination because “Plaintiff’s statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection.” (Appx. at 38)

Dohme appealed the adverse judgment on his claim to the Montgomery County Court of Appeals. The Montgomery County Court of Appeals reversed the ruling of the

trial court and, maneuvering around existing precedent, expanded the wrongful discharge tort beyond its previously-existing bounds. Specifically, ignoring the fact that Dohme did not even suggest in his conversation that an unsafe work environment existed, the Second District found that the potential choice between higher insurance premiums and remedying an unarticulated, unknown workplace safety issue might indirectly advance the public's interest in workplace safety.<sup>1</sup> (Appx. at 21-22) In other words, the Second District concluded that even though Dohme never actually mentioned safety and admittedly did not report his purported concern to either Eurand or a governmental body, he was a common law whistleblower and his termination under these circumstances jeopardized the general public policy of Ohio favoring workplace safety. (Appx. at 27-28).

This Court accepted the appeal of the issues raised by the Second District's ruling in Case No. 2007-0640. However, before issuing its opinion, the Court determined that there was not a final appealable order and dismissed the appeal. *Dohme v. Eurand Am., Inc.*, 2009-Ohio-506 (2009).

Upon its remand to the trial court, the claim that impaired the prior appeal was dismissed with prejudice, and with a final appealable order then present, the case was again appealed to the Second District. (Appx. at 29) On August 20, 2010, the

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<sup>1</sup> When explaining the basis for its conclusion, the Second District stated, “[w]hen an employer directs employees to not speak to an insurance representative inspecting a premises, an implication arises that the employer wishes to cover up defects, including those that create a danger to employees.” (Appx. at 24-25) However, this “implication” is wholly unsupported by the record. Even Dohme characterized Eurand's process of having limited points of contact whenever any third parties entered the facility as routine and standard at Eurand. (Supp. at 00095-00096; Dohme Depo. at 249-250)

Montgomery County Court of Appeals adopted and re-entered its prior decision in the case. (Appx. at 04, 06)

B. Factual Background

Despite Dohme's suggestions to the contrary, this case has a very limited and straightforward factual setting.

Eurand is engaged in the manufacture and sale of drug delivery systems used in the pharmaceuticals industry. (Supp. 00114; Cruz Aff. ¶ 2) Dohme is an electrician by trade who began work with Eurand on January 12, 2001 to supervise its maintenance staff. (Supp. 00003; Dohme Depo. at 20)

During his brief employment with Eurand, Dohme had conflicts with his co-workers and direct reports, failed to perform his duties to management's expectations, was the subject of various employee complaints to management and human resources, and was the subject of a complaint from an independent contractor who was working at the facility who relayed that Dohme had engaged in offensive behavior. (Supp.00004-00033, 00038, 00051-00059, 00106; Dohme Depo. at 43-66, 69, 73-77, 90, 143-151, 153-157, Exhibit A) This conduct resulted in a dysfunctional workplace, shifted reporting relationships, and discipline for Dohme. (Supp. 00034-00037, 00106, 00109; Dohme Depo. at 78-81, Exhibits A, Y) As a further result, Dohme's relationship with his supervisors became adversarial and on July 9, 2002, Dohme was relieved of his supervisory responsibilities. (Supp. 00065-00078, 00085, 00108; Dohme Depo. at 158-171, 204, Exhibit W)

In late 2002, Dohme took a leave of absence from Eurand. (Supp. 00086-00087; Dohme Depo. at 212, 221) Upon his return, Dohme was relieved of all responsibilities

except completing the parts component of the company's yet-to-be-functioning automated maintenance system. (Supp. 00078, 00083-00084, 00088-00092; Dohme Depo. at 171, 191-192, 222, 231-232, 240, 244) As Dohme described it, "[h]e told me he wanted me to concentrate on the spare parts, the location of them, the labeling of them, and get them in the computer and that he didn't want me to do anything other than that, that he wanted me to focus on that until I got done with it." (Supp. 00088; Dohme Depo. at 222)

The "computer" that Dohme referenced in the preceding quote was the MP2 automated maintenance system. (Supp. 00039-00040; Dohme Depo. at 98-99) That software provides a means for tracking maintenance intervals and spare parts. (Supp. 00041; Dohme Depo. at 105) However, MP2 requires that the data be collected and manually input into the system before it can be reliably used for tracking maintenance. (Supp. 00041; Dohme Depo. at 105) At Eurand, MP2 was purchased before Dohme's hire in 2001 and was still not functioning at the time of his termination. (Supp. 00042-00043, 00045; Dohme Depo. at 109-110; 117) As a result, even for the portion of the system that had been input, Eurand was running a duplicate manual system to monitor its maintenance requirements at the time of Dohme's termination. (Supp. 00042-00043, 00082-00084; Dohme Depo. at 112, 190-192)

Dohme's conduct did not improve following his demotion and his defiant behavior peaked in March, 2003. On March 21, 2003, Eurand sent an e-mail to all of its Vandalia employees explaining that on March 24 and 25 an employee of an insurance company would be visiting the premises, and Eurand instructed employees to direct contact with him through certain identified employees. (Supp. at 00094, 00013; Dohme

Depo. at 248, Exhibit DD) Contrary to the suggestion of the Second District, such a memo was standard practice at Eurand and was used any time non-employees visited the facility. (Supp. 00095-00096; Dohme Depo. at 249-250) Dohme understood that the individual visiting the facility was an employee of a private insurance company who was coming to review the building in connection with submitting a bid for providing insurance coverage. (Supp. at 00094-00096; Dohme Depo. at 248-250) Dohme also understood that Eurand did not want him confronting the insurance company employee and acknowledged that this was normal practice at Eurand. (Supp. 00094-00096; Dohme Depo. at 248-250)

On the second day of the insurance agent's visit, Dohme was called by Eurand's receptionist who was looking for another individual, an identified contact point for the appraiser. Dohme was not asked to do anything by the receptionist. However, Dohme seized upon the opportunity to make contact with the vendor. Dohme testified, "I said I will try to find him but I'll come down and greet him." (Supp. 00097-00098; Dohme Depo. at 251-252) When Dohme sought out the insurance company employee he did not merely "greet" the individual. Instead he immediately took out papers and, as Dohme describes it, "I just said you might want to find out what happened with that inspection, and that was the end of the conversation." (Supp. 00097; Dohme Depo. at 251) Contrary to the inference suggested by the Second District, Dohme did not contend to the agent that the inspection was not completed and he certainly did not suggest that he feared the building was unsafe. Rather, Dohme stated only that he believed that the record of the

inspection was removed to make it look as if he did not input it. To that end, Dohme specifically testified:

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

(Supp. at 00099-00100; Dohme Depo. at 253-254)

In short, Dohme feared only that he was being "set up" for a performance deficiency and told the insurance employee only that - "I told Mr. Lynch, somebody made this disappear and I'm afraid they're trying to make it look like I wasn't doing my job." (Supp. 00101; Dohme Depo. at 255) This was consistent with Dohme's past view that he was being "railroaded" out of Eurand. (Supp. 00053; Dohme Depo. at 145) As the Trial Court correctly noted, "Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection." (Appx. at 38)

Eurand terminated Dohme's employment for his confrontation of the insurance agent in contradiction of its directive. (Supp. 00093, 00102-00103; Dohme Depo. at 247, 256, 259)

In past arguments, Dohme has attempted to suggest that a small, isolated 2001 fire at Eurand's facility played some ill-defined role in his motivation for the contact with the insurance representative. Dohme's own testimony undercuts this contention.

As a pharmaceutical manufacturer, Eurand had an extensive fire monitoring system. This system was maintained by an independent vendor – not by Dohme or any Eurand employee. (Supp. 00078, 00080-00081; Dohme Depo. at 171, 186-187) Further, Dohme was relieved of any responsibility for even contacting the vendor for the fire prevention system before he began a leave of absence more than six months prior to his termination. (Supp. at 00088-00092, 00100; Dohme Depo. at 222, 231-232, 240, 244, 254) Thus, Dohme had no actual knowledge of, or involvement with, any issues concerning fire safety in 2003 that could have triggered a genuine concern at that time.

It is also established in the record that Eurand was frequently inspected by fire officials. Further, Dohme acknowledges that no violations were ever found during those inspections. (Supp. 00048-00049; Dohme Depo at 137-138) More specifically, Dohme testified about his discussions with the Captain and Head Fire Investigator/Inspector of the Vandalia Fire Department (and his neighbor):

Q. Do you know if Mr. Francisco ever went back out and reinspected?

A. He's been in the building several times, but I don't think he reinspected that pump or that suite.

Q. Did he tell you that he had never issued any safety violations or code violations to Eurand?

A. He didn't say.

Q. Do you believe that he found violations inside of Eurand?

A. He didn't find any, no.

(Supp. at 00048-00049; Dohme Depo. at 137-138)

In other words, Dohme was well aware that the fire alarm system was well-maintained and functioning, and that there were no heightened fires risks at Eurand, at the time he confronted the insurance appraiser.

Perhaps most telling is that through 299 pages of deposition testimony regarding solely his employment with Eurand and his termination, Dohme failed to make a single mention of the August 2001 fire that he now contends was his motivation and there is no reference whatsoever to a 2001 fire in Dohme's Complaint that he filed in this case.<sup>2</sup>

Finally, even Dohme does not contend that he mentioned the 2001 fire or any fear of an unsafe environment to the insurance appraiser he confronted. (Supp. at 00097-00100; Dohme Depo. at 251-254) Rather, Dohme admits he was terminated only for his conversation with the insurance representative and admits he said only what has been recited above—that he feared he was being set up to make it look like he was not performing his job. (Supp. at 00104; Dohme Depo. at 264) Supposition by Dohme and the Second District regarding what could have been intended but was not said, or what

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<sup>2</sup> In contrast, Dohme's Complaint and deposition are full of references to a small fire isolated in a pump's mechanical system that had occurred in 2002 when Dohme was on vacation. (Complaint at ¶ 30; Supp. 00045-00047; Dohme Depo. at 117-119) However, Dohme had admitted in his deposition that he was happy with how that issue was addressed and that he did not raise any concern about that issue with the insurance appraiser. (Supp. 00050, 00105; Dohme Depo. at 142, 282) With those issues not available to support his newly-developed whistleblower theory, Dohme appears to have chosen an after-the-fact substitute for his motivation.

had occurred in the past but remained unstated on March 25, 2003, has no relevance to the case.

## ARGUMENT

The Second District's decision in this case represents an open-ended, ill-defined expansion of the concept of whistleblowing that grossly expands a limited exception to the at-will doctrine to previously unthinkable extremes. This Court must reign in this erosion and firmly reinstate the principle that employment at will is the norm in Ohio.

This Court has long recognized that “[t]he traditional rule in Ohio and elsewhere is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee’s rights, and a discharge without cause does not give rise to an action for damages.” *See Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 67 (citations omitted). The tort of wrongful discharge in violation of a public policy, which was adopted in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St. 3d 228, is a limited exception to the presumed at-will employment relationship.

The decisions following *Greeley* have generally been restricted to refining certain elements of the tort or to addressing specific applications. However, as one appellate court has noted, the development of the claim has not been a direct path and many issues remain unresolved. *See Coon v. Technical Construction Specialties, Inc.* (Summit Cty App. 2005), 2005-Ohio-4080 at ¶22 (“It is clear from the legal history of public policy wrongful termination causes of action that treatment of such claims has changed over time.”). This case

provides the vehicle to establish further definition and direct guidance on the parameters of the tort and the analysis to be employed.

The elements of the wrongful discharge claim are well-settled and nothing in the Propositions of Law raised in this case alters them in any way. To establish a claim for wrongful discharge in violation of public policy a plaintiff must establish the following elements: (1) that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) that plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) that the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 384; *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70 citing *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. 397, 398-399. The bounds and analysis applicable to the clarity and jeopardy elements, both issues of law, are involved in this appeal. *Collins*, 73 Ohio St. 3d at 70.

More specifically, Dohme has asserted that he was, in effect, a common law whistleblower who, without raising his concerns to either his employer or a governmental body and without actually expressing a concern over workplace safety, is entitled to all of the protections normally associated with such a status. The wrongful discharge exception must not be contorted to this extreme. Rather, the Propositions of Law proposed by Eurand strike the proper balance between the interests of Ohio's employers and its

employees and reaffirms the limited role of this exception to the employment at-will doctrine.

**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. 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. More specifically, the Court should use this case to clarify that, although the general proposition of promoting workplace safety is without question one that is embraced by Ohio, to satisfy the clarity element of the wrongful discharge claim the employee must identify a *specific* safety policy in existing Ohio law that is implicated by his termination rather than merely making a passing reference to advancing general workplace safety. Without this clarification, the appellate courts of Ohio will continue to misread *Pytlinski* and expand the circumstances to which the limited exception applies.

A. Precedent Does Not Mandate the Result Reached by the Second District.

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. However, a review of the specifics of the decision and the underlying facts of the case reveals that the Court in *Kulch* did not intend the sweeping proposition for which it is frequently cited.

It is undeniable that the Court in *Kulch* 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* only 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>3</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 – OSHA’s anti-retaliation provision – not from the general notion that Ohio values safe workplaces. Thus, contrary to the conclusion of the Second District, *Kulch* does not stand for the proposition that even absent an applicable safety statute or regulation, the general notion of workplace safety is always an independent basis on which to maintain a wrongful discharge claim.

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, the Sixth Circuit explained:

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<sup>3</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.

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. See also *Gates v. Beau Townsend Ford, Inc.* (S.D. Ohio 2009) 2009 U.S. Dist. LEXIS 110005 at \*26-\*27 Unfortunately, some Ohio appellate courts have not recognized this limitation, perhaps due to the issuance of the decision in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77. However, *Pytlinski* also made no pronouncement of a global "workplace safety" public policy sufficient for all wrongful discharge claims in all factual settings.

When it was 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 statements that significantly impacted the future developments of the wrongful discharge tort. Not the least of this impact concerns the workplace safety public policy.

The members of the Court in *Pytlinski* were presented with a specific fact pattern in which an employee alleged that he was terminated in retaliation for complaining to the management of the company regarding perceived OSHA violations. Thus, the employee in *Pytlinski* had engaged in a recognized 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 independently support the wrongful discharge claim or whether the employee had to comply with Section 4113.52 because his claim sounded in whistleblowing. This limitation of the *Pytlinski* decision is reinforced by the fact that Pytlinski made internal complaints of perceived OSHA violations, an act protected by the OSHA statute's anti-retaliation provision. *See, e.g., Dunlop v. Hanover Shoe Farms, Inc.* (M.D. Pa. 1976), 441 F. Supp. 385; 29 C.F.R. § 1977.9(c).

Contrary to the opinion of some courts, the *Pytlinski* decision did not hold, and the Court did not even discuss, whether a general reference to workplace safety could always 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.

In short, neither the holdings nor the reasoning of the *Kulch* and *Pytlinski* decisions mandate that the generic notion of workplace safety always will satisfy the clarity element of the wrongful discharge claim irrespective of context. Thus, this Court is not constrained by *stare decisis* in adopting Proposition of Law No. I.

B. Many Existing Decisions Under Ohio Law Support Proposition of Law No. I.

In recognition of its role as a limited exception to the at-will doctrine and the potentially limitless circumstances in which a generic concept like “workplace safety” can be trumpeted without any real relation to existing law, many Ohio and federal courts have mandated specificity when evaluating the existence of a clear public policy.

Proposition of Law No. I embraces this requirement.

The court in *Poland Township Bd. of Trustees v. Swesey* (Mahoning Cty. App. 2003), 2003-Ohio-6726, explained its interpretation of the clarity element requirement, in the context of a case that did not involve workplace safety, as follows:

It was [plaintiff's] burden to indicate the specific public policy at issue and to establish how that clear public policy was violated by his termination. *Sorensen v. Wise Mgt. Services, Inc.*, 8<sup>th</sup> Dist. No. 81627, 2003-Ohio-767 (stating that a person seeking to apply the public policy exception to the at-will employment doctrine must state with specificity the law or policy that was violated by his termination); *Gargas v. City of Streetsboro*, 11<sup>th</sup> Dist. No. 2000-P-0095, 2001-Ohio-4334 (stating that the burden to produce specific facts demonstrating that a clear public policy exists and that discharge under the circumstances violates that public policy is the burden of the person claiming he was wrongfully discharged); *Carver v. Universal Well Serv., Inc.* (Aug 20, 1997), 9<sup>th</sup> Dist. No. 96CA0082 (stating “when pleading this cause of action, a plaintiff must indicate the specific public policy at issue and explain how it was violated.”)

Thus, the *Poland Township* court reiterated what most courts have implicitly concluded – statements of public policy must be specific and tailored to the facts of the case. See also, *Galyean v. Greenwell* (Washington Cty App. 2007), 2007 WL 453273 ¶52 (“We

agree with the trial court's assessment that [the cited statutes] are not sufficiently specific to serve as the basis for Appellant's claim."). The same requirement must be applicable in the workplace safety context.

In *Lesko v. Riverside Methodist Hosp.* (Franklin Cty. App. 2005), 2005-Ohio-3142, the Franklin County Court of Appeals held that to satisfy the clarity element of the wrongful discharge claim it is not enough for a plaintiff to refer generally to a statute or to declare that his conduct was warranted by "safety." Rather, that court has required that a plaintiff demonstrate the existence of a specific public policy in existing law that forms a policy that specifically relates to the facts at hand.

The Fifth District Court of Appeals recognized the slippery slope the generic "workplace safety" doctrine presented when it rejected the concept and held, "Appellant has proposed we adopt a very vague public policy of 'employee safety' and 'anti-retaliation' concepts too nebulous to provide guidance for courts, employers, or employees to interpret." *Haren v. Superior Dairy, Inc.* (Stark Cty App. 2004), 2004-Ohio-4436 at ¶ 26. The Sixth Circuit reached a similar conclusion in *Herlik v. Continental Airlines, Inc.* (6<sup>th</sup> Cir. 2005), 2005 U.S. App. LEXIS 21784, where it too rejected the generic assertion of "safety" as an underlying public policy where a pilot questioned another pilot about potentially unsafe flight techniques.

Courts have also rejected broad-brushed policy claims in other areas of general policy. For example, the Eleventh District Court of Appeals recognized the failings of basing a wrongful discharge tort on "a broad societal interest" in *Evans v. PHTG, Inc.* (Trumbull Cty App. 2002), 2002-Ohio-3381. There, an employee claimed that the broad societal interest in preventing the unauthorized practice of medicine satisfied the clarity

element of her claim. Relying on both *Kulch* and *Pytlinski*, the court rejected the proposition by reasoning that if the employee wants to assume the protected status of a whistleblower, she must either comply with the dictates of Revised Code § 4113.51 or point to a specific statement of policy in the law that addressed the circumstances of the termination. *Evans*, 2002-Ohio-3381 at ¶¶ 31-38. This is the proper reading of *Kulch* and *Pytlinski*.

In *Schwenke v. Wayne-Dalton Corp.* (Holmes Cty App. 2008), 2008-Ohio-1412, the court refused to allow a claim of public policy based upon the general concept that Ohio disfavors the “misappropriation of corporate assets and inappropriate accounting procedures.” Although Ohio surely disfavors such acts just as it disfavors unsafe workplaces, the court found that the generalized claim did not satisfy the clarity element because it was not clearly manifested in specific existing law. *Id.* at ¶¶ 51, 53.

Another example of such a case is *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264. In *Mitchell*, the Franklin County Court of Appeals addressed whether a public policy exists under Ohio law in a situation where a physician wrote letters concerning emergency room overcrowding. In rejecting a blanket “patient safety” exception, the court explained:

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 rule that employees are terminable at-will would disappear.

*Id.* at 22 (*italic in original*). This same deterioration of the at-will status of employees will occur if any reference to safety is sufficient to support a wrongful discharge claim.

The unintended expansion of the *Pytlinski* decision has significantly eroded the employment at-will doctrine in Ohio because, in practice, nearly any scenario can be construed to implicate workplace safety. An employee who complains about the storage conditions of cafeteria food that is sometimes eaten by employees has implicated workplace safety. *See e.g., Miller v. MedCentral Health System, Inc.* (Richland Cty App. 2006), 2006-Ohio-63. An employee who relays observations about other employees drinking on the job has arguably implicated workplace safety. *See, e.g., Krickler v. City of Brooklyn* (Cuyahoga Cty App. 2002), 149 Ohio App. 3d 97, 103-104. And, according to the Second District, talking to your employer's insurance vendor about your own job performance implicates workplace safety. In truth, only an unimaginative plaintiff cannot formulate a safety implication out of any termination. Such an expansion of a limited exception is unwarranted and should not be premised on misapplied precedent.

C. The Decisions of Other States' Supreme Courts Support Eurand's Position.

Professor Perritt cautioned in his discussion of the wrongful discharge tort that “[t]he public policy tort can become an amorphous source of just cause litigation unless standards exist for principled decision-making, especially at the summary judgment and pleadings stages.” *See H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. 397, 407. To combat this potential for abuse, Professor Perritt instructed that the clarity element in the wrongful discharge tort plays the important role of placing Ohio's employers on notice of what terminations have the potential for being excepted from the general rule of employment at will. Because of its amorphous character and its role in Professor Perritt's model, the

highest courts of other states have 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 the public policy must be related to the specific facts of the case. This Court should require this too and reject the notion that any claim of workplace safety automatically trumps the at-will doctrine.

Like Ohio, the Supreme Court of Washington also adopted its wrongful discharge tort based upon Professor Perritt's model. As Justice Madsen of the Washington Supreme Court has noted, "[p]ublic policy' is an amorphous concept. Virtually every statute embodies a public policy. However, for purposes of defining the scope of an employer's liability for wrongful discharge, the public policy should be 'clear' in the sense that it provides specific guidance to the employer." *Danny v. Laidlaw Transit Services, Inc.* (Wash. 2008), 2008 Wash. LEXIS 951 at ¶55 (Madsen, J. concurring in part dissenting in part).

Thus, Washington requires that when evaluating the clarity element the court must engage in a detailed comparison of the specific policy presented by the authorities identified by the plaintiff and the specific circumstances of the termination – just as proposed by Eurand in Proposition of Law No. I – to determine if the policy identified applies to the specific circumstances of the termination. *See Gardner v. Loomis Armored Inc.* (Wash. 1996), 913 P.2d 377. Only where a specifically-articulated policy matches the facts of the case will the clarity element be satisfied.

A review of an example of Washington's analysis of this tort is instructive. When presented with the difficult factual setting of addressing the termination of a guard who left his assignment to protect a woman being chased by a knife-wielding attacker, the

court went statute-by-statute and common law doctrine-by-common law doctrine comparing the underlying policy with the facts of the case. *Id.* at 381-384. Although the court ultimately found a clear public policy applicable to the facts of the case, it rejected certain policies proposed by the employee as being too vague or not applying to the specific circumstances of the termination. Thus, the court rejected public policies of “encouraging citizens to help law enforcement,” which generally arose from a number of cited statutes, and of “encouraging good Samaritans,” which the employee claimed arose from the common law rescue doctrine. *Id.* In other words, although the public policies urged by the employee were, in general societal terms, as laudable as the “workplace safety” policy urged in this case, they were not sufficiently specific or related to the facts of the case to satisfy the clarity element of the wrongful discharge tort. Clearly, the Washington Supreme Court believes, as urged by Eurand and as found by the Trial Court, that Professor Perritt’s model for the wrongful discharge tort requires a specific policy that relates to the specific facts of the case to satisfy the clarity element. Dohme cannot meet this standard.

The Supreme Court of Appeals of West Virginia reached a similar conclusion in *Birthisel v. Tri-Cities Health Services Corp.* (W. Va. 1992), 424 S.E. 2d 606. There, the court was asked to recognize public policies favoring good care of patients by social workers and disfavoring the forging of medical records from the state’s licensing statutes and social worker care regulations. The Court rejected this approach to the clarity element and held, “[t]heir general admonitions as to the requirement of good care for patients by social workers do not constitute the type of substantial and clear public policy on which a retaliatory discharge claim can be based.” *Id.* at 613. In fact, the Supreme

Court of Appeals of West Virginia specifically counseled, “[t]he term ‘substantial public policy’ implies that the policy principle will be clearly recognized simply because it is substantial. An employer should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is too vague that it is subject to different interpretations.” *Id.* at 612. “Inherent in the term ‘substantial public policy’ is the concept that the policy will provide specific guidance to a reasonable person.” *Id.* Just as the concept of providing good care to patients is undoubtedly one embraced by West Virginia, the policy of safe workplaces is undoubtedly embraced by Ohio. Nevertheless, both are too general to satisfy the clarity element of the wrongful discharge tort.

Finally, the Illinois Supreme Court also required specificity in the statement of public policy available to support the wrongful discharge tort. *See Turner v. Memorial Medical Ctr.* (Ill. 2009), 233 Ill. 2d 494. In *Turner*, the employee met with a member of the commission auditing the practices of the employer hospital and advised the commission member that one of the hospital’s practices did not meet the applicable standards and, thus, “jeopardized” patient safety. *Id.* at 497-98 (It is noteworthy that this is a far more direct statement of concern than made by Dohme and, unlike in this case, it was made to the entity charged with directly regulating the employer’s conduct.) When the employee was terminated, he filed a wrongful discharge suit and alleged that his termination “violated public policy that encourages employees to report actions that jeopardize patient health and safety.” *Id.* at 498. The Illinois Supreme Court rejected this claim and ruled that the employee could not satisfy the clarity element of the tort.

More specifically, the Illinois Supreme Court held that “[a] broad, general statement of policy’s inadequate to justify finding an exception to the general rule of at-will employment.” *Id.* at 502. The Court then added, “[f]urther, generalized expressions of public policy fail to provide essential notice to employers.” *Id.* at 503. Finally, the court cited examples of general policies that, although undeniably embraced by the state, were too general to support the claim and instructed, “unless an employee at will identifies a ‘specific’ expression of public policy, the employee may be discharged with or without cause.” *Id.* (internal citation omitted.)

Ohio should follow the lead of these states and require that a statement of policy must be specific and applicable to the facts of the case to satisfy the clarity element. The generic notion of workplace safety does not meet this burden.

D. The Second District Improperly Decided this Case.

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. 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 as being too vague.

If an employee intends to refer to workplace safety as the public policy supporting the clarity element of his claim, the Court must require the employee to identify a specific statement of policy in existing law that addresses the actual context of the employee’s termination. 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. An employee simply cannot rely on the infinite configurations of “workplace safety” to satisfy the clarity element. Instead, he must identify a specific safety policy in existing law that applies to his specific circumstances. To hold otherwise undermines the employment-at-will doctrine.

In rejecting Dohme’s claim, the Trial Court properly held that, “Plaintiff can articulate no public policy of which Defendant is in violation . . . .” (Appx. at 39) The record overwhelmingly supports this conclusion.

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

In 2003, the Sixth Circuit noted, “Ohio has yet to adopt a clear analytical framework for analyzing jeopardy, and discussions of this element by Ohio courts are often brief.” *Himmel v. Ford Motor Co.* (6<sup>th</sup> Cir. 2003), 342 F.3d 593, 599. Since that time, Ohio courts have devoted significant attention to the issue of whether a public policy can be jeopardized where adequate statutory relief is available. *See, e.g., Wiles v. Medina Auto Parts* (2002), 96 Ohio St. 3d 240. However, extensive attention to the other

parameters of the jeopardy element or the proper analysis to be employed is not reflected in Ohio jurisprudence. Propositions of Law Nos. II and III will allow the Court to fill the void in this area of law and to specifically address the requirements to gain protection as a common law whistleblower.

To that end, in the specific context of a purported common law whistleblower, this Court must make clear that to satisfy the jeopardy element of the wrongful discharge claim the whistleblower must articulate his concerns to a member of the employer's supervisory personnel or to a governmental body. Expressions of frustrations to other third parties who are without the authority to directly address the issue simply cannot satisfy the jeopardy element as a matter of law.

The cornerstone of the jeopardy element is the determination of whether dismissing employees under circumstances like those involved in plaintiff's dismissal would directly undermine the public policy at issue.<sup>4</sup> Thus, an analysis of both the specific public policy at issue and the specific circumstances of the employee's termination are required when performing the analysis. In the present case, the Trial Court performed just such an analysis when it looked at the specifics of Dohme's conduct and his late-identified public policy and noted:

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<sup>4</sup> The Sixth Circuit surmised that Ohio's reliance on Henry H. Perritt, Jr.'s scholarly work in the adoption of the wrongful discharge tort suggested that Mr. Perritt's thoughts on the jeopardy element would also be adopted. *Himmel*, 343 F.3d at 599. According to Mr. Perritt, the steps of the jeopardy analysis include: (1) determine "what kind of conduct is necessary to further the public policy" at issue; (2) decide whether the employee's actual conduct fell within the scope of conduct protected by this policy; and (3) consider whether employees would be discouraged from engaging in similar future conduct by threat of dismissal. *Id.* at 599 citing *H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. at 408. Whether this Court endorses the use of Mr. Perritt's analysis of the jeopardy element or adopts another approach, under any standard the decision of the Second District in this case must be reversed.

In the instant case, Plaintiff was discharged for disobeying a specific order from his employer to not speak with a representative from a private insurance company. Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff for such action. Although Plaintiff claims that he was discharged for voicing a concern for work place safety, the insurance representative's purpose for being on the premises was to provide Defendant an insurance quote. Moreover, Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing inspection report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection. Based on the facts presented to the court, it appears that due to the deteriorating relations between the parties at the time of the incident, the content of the report would not have changed Plaintiff's basis in making the statements. Plaintiff feared he was being set up for failure, as evidenced by the plain language of his statements, and the lack of any insinuation for work place safety concerns.

(Appx. at 38)

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

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

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

doing so<sup>5</sup>, is protected from being fired solely for the sharing of the safety information.” (Appx. at 21) Not only is this proposition unreflective of the actual facts of the case<sup>6</sup> but it extends the public policy umbrella significantly beyond its prior coverage.

The Second District made this extension of the law without undertaking the analysis suggested by the Sixth Circuit or offering any alternative analytical framework. Instead, the decision that the recipient of whistleblowing is irrelevant was premised on what the Second District believed was an application of the law announced in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, 80. However, *Pytlinski* makes no such pronouncement.

As was previously noted, 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 upon a 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

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<sup>5</sup> The Seventh District Court of Appeals disagreed with this proposition in its decision in *Milhouse v. Care Staff, Inc.* (Mahoning Cty App. 2007), 2007-Ohio-2709 at ¶27, a decision issued subsequent to the one in this case. There, the court found that the employee’s self-serving justification for her insubordination defeated the jeopardy element of her claim.

<sup>6</sup> The record conclusively establishes that Dohme did not report a “safety concern.” Rather, Dohme reported a concern that someone was “trying to make it look like I wasn’t doing my job” by removing an inspection from a report. (Supp. at 00101; Dohme Depo. at 255)

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

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

Prior to the Second District’s decision in this case, no Ohio court had found complaints made to someone outside of internal management of the employer and outside of a governmental agency to be of a sufficient character to enjoy a legally protected status

in the wrongful discharge context. In fact, every claim presenting such a fact pattern was rejected.

In *Branan v. Mac Tools* (Franklin Cty. App. 2004), 2004-Ohio-5574 at ¶40, the Franklin County Court of Appeals addressed whether a public policy was implicated when an employee was terminated due to calls made to a co-worker. The *Branan* court rejected private party contact as a basis of a public policy by noting that the employee “arguably had the right to report the incident to administrative or law enforcement authorities” but found that nothing in the law upon which the policy was allegedly based implicated protection for calls made to co-workers.

In *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264 at ¶19, the Franklin County Court of Appeals addressed whether a public policy exists under Ohio law in a situation where a physician wrote letters to other physicians expressing concerns over emergency room overcrowding and patient care issues. Despite the obvious safety overtones of the letters, the Franklin County Court of Appeals rejected the third-party contact as supporting the claim and “decline[d] to extend the *narrow* public policy exception to the employment at-will doctrine this far.” Finally, in *Herlik v. Continental Airlines, Inc.* (6<sup>th</sup> Cir. 2005), 2005 U.S. App. LEXIS 21784 the Sixth Circuit noted that a public policy could not be jeopardized where the concerns were not expressed to the government or even upper management. *Herlik*, 2005 U.S. App. LEXIS 21784 at \*14.

In short, no court applying Ohio law has adopted the rule of law advocated by the Second District despite repeated opportunities to do so. Proposition of Law No. II will

clarify that only whistleblowing to internal management or government entities enjoys protected status.

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

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

According to the Second District, the public policy at issue in this case is the general advancement of workplace safety. When the facts of the present case are reviewed, it is clear that Dohme cannot satisfy the jeopardy element of his claim. Although the Second District did not refer to any particular analytical framework, it did recognize the logical requirement that it explain how complaining to a third party somehow advanced workplace safety. To fill that void, the Second District reasoned that a complaint to a private vendor hoping to sell a service to the employer may result in indirect market forces eventually making the workplace safer by encouraging the employer to act through the prospect of higher insurance premiums. (Appx. at 21-22) However, not only does this proposition require multiple cause-and-effect reactions that in many instances simply will not occur, but it is surely opening a Pandora's box of potential claims ill-fitted for a "limited exception" to the at-will doctrine. This Court should definitively rule that indirect market forces are not the type of workplace impact that will satisfy the jeopardy element of the wrongful discharge tort.

The United States District Court for the Northern District of Ohio concluded that a finding that the jeopardy element is satisfied "demands that the 'policy itself is at risk if

dismissals like the one in question are allowed to continue.” *Sibley v. Alcan, Inc.* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 22932 at \*39 quoting *Langley v. DaimlerChrysler Corp.* (N.D. Ohio 2005), 407 F. Supp. 2d 897, 909. In other words, the *Sibley* court’s analysis requires that to find that Dohme satisfied the jeopardy element of his claim a court must conclude that if employees are not permitted to violate management directives and contact private insurance companies about the evaluation of their job performance then Ohio’s workplaces will become increasingly unsafe. Such a conclusion is absurd and highlights the shortcomings of the “indirect market forces” analysis.

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

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

the complaint has no opportunity to result in an immediate remedy to an allegedly unsafe situation.

In sum, no matter what analysis is employed, clearly identified public policies are only directly advanced by whistleblowing directed at internal management or governmental entities.

C. The Second District's Holding is an Unworkable Rule of Law.

Finally, the role of the Second District's decision as precedent also warrants its reversal because the ill-defined limits of its reasoning make it, as a practical matter, wholly unworkable for Ohio's employers. Precedent cannot be allowed to stand when it presents an unworkable rule of law. *See, e.g., Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St. 3d 216, 228, 2003-Ohio-5849 at ¶50 ("*Scott-Ponzer* and its progeny defy practical workability.") If left to stand, the Second District's decision will prompt further litigation due to its lack of definition. Does the Second District's rule apply to all third-parties or only to insurance estimators? Do the market forces stemming from a vendor differ from those stemming from the indirect forces associated with the press, a politician, a customer, or an influential member of the community such that an attempt to analogize the holding is invalid? The fact is the Second District offered a potentially limitless rule of law without any discussion of how such a rule would apply or where its limits lay. This is a particularly untenable position for a "limited exception."

It takes little creativity to envision the cases where employees who have complained to relatives, friends, co-workers, neighbors, customers, and the like about unfavorable circumstances at work, and who are subsequently terminated, contend that their actions would have ultimately produced a safer workplace. Under the Second

District's logic, each of these complaining employees is no longer employed at-will because all of the scenarios have the potential to indirectly impact the safety of the workplace. This unprecedented doctrine has no place in Ohio law.

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

**Proposition of Law No. 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.**

The record in this case, as found by the trial court and acknowledged by the Second District, is clear. "Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance." (Appx. at 38) Nevertheless, the Second District's decision suggests that Eurand was required to go beyond what was actually said and done, ignore the motivation of the employee engaging in the conduct, and ascertain what unspoken and indirect implications exist beyond the words and conduct before a response to the conduct can be made. This Court must not impose such extraordinary requirements on Ohio's employers.

Although the doctrine was adopted in another context, it is recognized that an Ohio employer is not required to read its employees' minds when addressing an employee's behavior. *See, e.g., Tripp v. Beverly Enterprises-Ohio, Inc.* (Summit Cty App. 2003), 2003-Ohio-6821 at ¶32 ("her supervisor, should not be required to read her mind to know that this request for aid during a time of increased business actually related specifically to the depression that Appellant had informed him of over six months previously."); *Pfost v. Ohio State Attorney General* (Franklin Cty App. 1999), 1999 Ohio App. LEXIS 1792 at \*8 ("Here, appellant did not communicate to the AG a need for a specific accommodation. Accordingly, appellant 'cannot expect the employer to read her mind and know that she secretly wanted a particular accommodation and [blame] the employer for not providing it.'" (citation omitted)). Rather, an Ohio employer must be permitted to take its employee's conduct for what it is, and the employee's proffered explanation at face value, and respond accordingly.

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

In *Jermer v. Siemens Energy & Automation* (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. In *Jermer*, the employee based his public

policy on complaints concerning poor air quality in the employer's facility. Citing *Himmel v. Ford Motor Co.* (6<sup>th</sup> Cir. 2003), 342 F.3d 593, the Sixth Circuit rejected the claim and explained that:

The question before us is the meaning of the second element, the so-called "jeopardy element." Our interpretation of this gateway element is as follows: although complaining employees do not have to be certain that the employer's conduct is illegal or cite a particular law that the employer has broken, the employee must at least give the employer clear notice that the employee's complaint is connected to a governmental policy. It must be sufficiently clear from the employee's statement that he is invoking governmental policy that a reasonable employer would understand that the employee relies on the policy as the basis for his complaint. Because the employee here never connected his statements . . . to governmental policy or mentioned or in any way invoked governmental policy as the basis of his complaint, we agree with the district court that his case must be dismissed for the failure to show that his dismissal would "jeopardize" Ohio's public policy.

*Jermer*, 395 F.3d at 656.

This rule has been effectively applied in other cases. Relying on *Jermer*, the United States District Court for the Northern District of Ohio rejected a public policy claim based upon an employee's safety complaints. *Aker v. New York and Co., Inc.* (N.D. Ohio 2005), 364 F. Supp. 2d 661. In rejecting the claim, the *Aker* court noted:

Nothing in plaintiff's complaint indicates that plaintiff told defendant that, if she was terminated, defendant would be violating the Ohio public policy favoring workplace safety. Because plaintiff did not put the defendant on notice that her termination would be contrary to Ohio public policy, she has not pleaded facts sufficient to establish the jeopardy element.

*Id.* at 666. See also, *Kohorst v. Van Wert County Hosp.* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 124703 \*17 ("Kohorst cannot establish the jeopardy element of the claim because he did not put the hospital on notice that he was somehow invoking a

government policy when he refused to perform the abdominal CT scan.”); *Sollitt v. Keycorp* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 34328 \*2-\*3.

In *Kirk v. Shaw Environmental, Inc.* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 51332, the court addressed whether the employee had satisfied the jeopardy element of the wrongful discharge tort when the employee complained to his supervisors about a participant in an international business transaction. The court found the general complaints were, like Dohme’s, “decidedly vague” and that the employee “never explicitly stated or even suggested . . . [that the conduct] violated the FCPA or any other law or policy.” *Id.* at \*26. Thus, in reliance on *Jermer*, the court concluded “Plaintiff Kirk does not satisfy the jeopardy element because he did not make clear to his employer that he was invoking public policies as the basis for his complaints.” *Id.* at \*24.

Perhaps most telling on the propriety of the Second District’s decision in this case is the treatment of the same issue by other Ohio Appellate Courts after this case was decided. In *Gaskins v. The Mentor Network-REM* (Cuyahoga Cty App. 2010), 2010-Ohio-4676, the Cuyahoga County Court of Appeals addressed the jeopardy element of the wrongful discharge tort. Despite the availability as authority of the Second District’s decision in this case criticizing *Jermer*, the Cuyahoga County Court of Appeals expressly adopted the *Jermer* analysis and granted summary judgment for the employer because the employee did not place the employer on notice that she was advancing a statutory or public policy interest. *Id.* at ¶¶ 17-18.

Similarly, the Seventh District reached a conclusion contrary to that reached by the Second District in this case in *Milhouse v. Care Staff, Inc.* (Mahoning Cty App. 2007), 2007-Ohio-2709. There the employee suggested that her refusal to follow her

employer's directive protected the employer's patients' interests in the privacy of their records. However, the court rejected this rationale, and noted that "Appellant never told her employer that this was her goal." *Id.* at ¶28. Without the articulation of the public policy the employee purportedly intended to advance, the Seventh District reasoned that the jeopardy and causation elements of the claim are lacking.

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

It is beyond debate that Dohme did not intend to advance workplace safety with his conduct and did not even mention safety in his comments to the insurance agent. (Supp. at 00097-00101; Dohme Depo. at 251-255) Nevertheless, the Second District's decision imposed a requirement on Eurand to go past what Dohme actually said, and beyond what he actually did, and calculate what byproduct could eventually develop from them. No such requirement exists under Ohio law and this Court must not impose this onerous burden. To satisfy the jeopardy element of his claim, an employee must place the employer on notice through his actual words or conduct that he is acting to advance a public interest. Dohme plainly did not do so in this case. Thus, the decision of

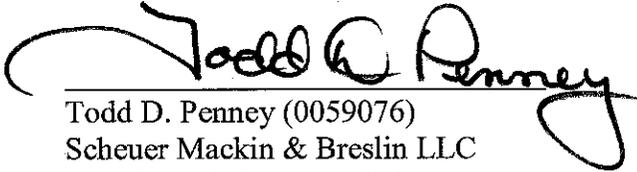
the Second District must be reversed on this ground as well and Proposition of Law No.

III adopted.

**CONCLUSION**

The decision below is fundamentally wrong and is a dangerous encroachment on the at-will doctrine. If permitted to stand, discipline of insubordinate employees stemming from unstated complaints made to disinterested third parties become viable causes of action and the ability of Ohio's employers to compete in an increasingly-difficult global economy is further handcuffed. Thus, the decision below must be reversed.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

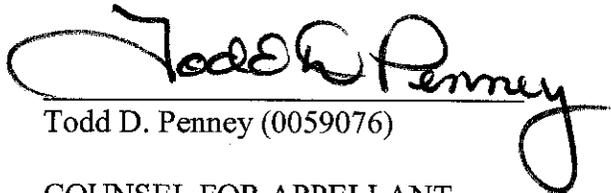
I hereby certify that a copy of this Merit Brief of Appellant was sent by ordinary U.S. Mail to the following Counsel of Record for on March 4, 2011:

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Ohio Management Lawyers Association

A handwritten signature in black ink that reads "Todd D. Penney". The signature is written in a cursive style with a large, looping initial "T".

Todd D. Penney (0059076)

COUNSEL FOR APPELLANT  
EURAND, INC.

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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NOTICE OF APPEAL OF APPELLANT EURAND, INC.

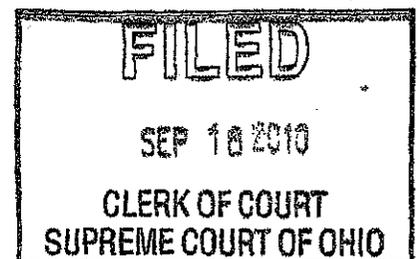
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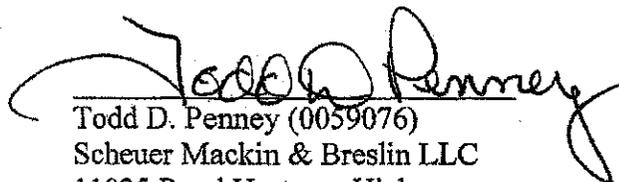


Notice of Appeal of Appellant Eurand, Inc.

Appellant Eurand, Inc. (formerly known as Eurand America, Inc.) hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 23653 on August 20, 2010.

The case is one of public and great general interest.

Respectfully submitted,

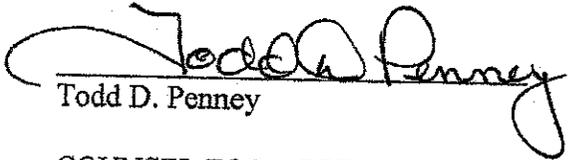


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EURAND, INC.

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee David M. Duwel and Todd T. Duwel, 130 W. Second Street, Suite 2101, Dayton, Ohio 45402 on September 16, 2010.

  
Todd D. Penney

COUNSEL FOR APPELLANT  
EURAND, INC.



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

19

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

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.

MARYE. DONOVAN, Presiding Judge

JAMES A. BROGAN, Judge

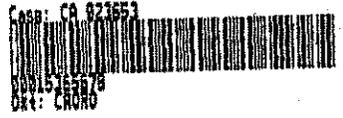
MIKE FAIN, Judge

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Hon. Mary Katherine Huffman  
Montgomery County Common Pleas Court  
41 N. Perry Street  
Dayton, OH 45422



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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)

.....  
OPINION

Rendered on the 20<sup>th</sup> day of August, 2010.

.....  
DAVID DUWEL, Atty. Reg. #0029583, and TODD DUWEL, Atty. Reg. #0069904, 130 West  
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45242  
Attorney for Defendant-Appellee

.....  
BROGAN, J.

Randall Dohme has appealed a trial court's order entering summary judgment in  
favor of Eurand, Inc. (formerly Eurand America, Inc.) on a claim for wrongful discharge in

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

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

Copies mailed to:

David Duwel  
Todd Duwel  
Todd Penney  
Hon. Mary Katherine Huffman



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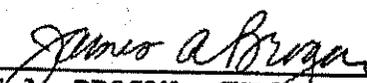
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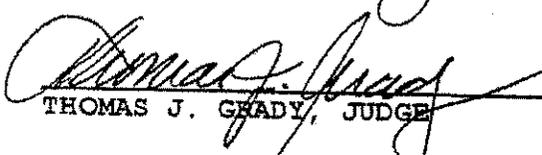
RANDALL J. DOHME	:	
Plaintiff-Appellant	:	C.A. CASE NO. 21520
vs.	:	T.C. CASE NO. 2003CV4021
EURAND AMERICA, INC.	:	
Defendant-Appellee	:	<u>FINAL ENTRY</u>

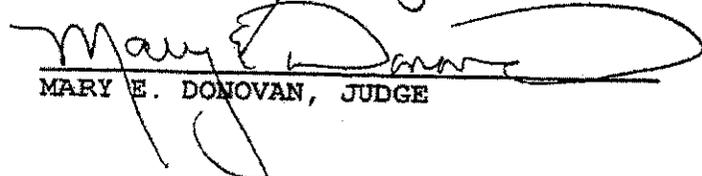
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Pursuant to the opinion of this court rendered on the  
2<sup>nd</sup> day of March, 2007, the judgment of the trial  
 court is Reversed and the matter is Remanded for further  
 proceedings consistent with the opinion. Costs are to be paid  
 as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

  
 \_\_\_\_\_  
 JAMES A. BROGAN, JUDGE

  
 \_\_\_\_\_  
 THOMAS J. GRADY, JUDGE

  
 \_\_\_\_\_  
 MARY E. DONOVAN, JUDGE

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Hon. Mary Katherine Huffman



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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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

O P I N I O N

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

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Attorneys for Plaintiff-Appellant

Todd D. Penney, Atty. Reg. No. 0059076, 11025 Reed Hartman Highway, Cincinnati, OH 45242

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

2

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 fact 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

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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 *Jexmer* 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.

Copies mailed to:

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Hon. Mary Katherine Huffman



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COURT OF COMMON PLEAS  
2009 SEP -2 A 9 49

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CLERK OF COURTS  
MONTGOMERY CO. OHIO

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

RANDALL DOHME,	:	CASE NO. 2003 CV 04021
Plaintiff,	:	
vs.	:	JUDGE HUFFMAN
EURAND AMERICA, INC.,	:	AGREED ENTRY AND DISMISSAL
Defendant.	:	OF REMAINING CLAIM WITH
	:	PREJUDICE - JUDGMENT OF
	:	NOVEMBER 21, 2005 IS NOW
	:	FINAL AND APPEALABLE

This case was originally filed in this Court on June 9, 2003 by Randall Dohme ("Dohme") against Eurand, Inc. ("Eurand"). On July 8, 2003, Eurand removed the case to the United States District Court for the Southern District of Ohio. On November 29, 2004, the District Court granted judgment in Eurand's favor on Dohme's claim under the FMLA and remanded the case to this Court for a resolution of the two state law claims.

On November 21, 2005 this Court entered its Decision, Order and Entry Overruling Defendant's Motion for Summary Judgment in Part and Sustaining Defendant's Motion for Summary Judgment in Part (the "Decision, Order and Entry"). The Decision, Order and Entry resolved and dismissed with prejudice Plaintiff's claim for wrongful discharge in

violation of public policy but left for trial Plaintiff's claim for unpaid overtime under Ohio Revised Code §§ 4111.01 *et seq.*

On March 7, 2006, Dohme dismissed his remaining claim without prejudice to attempt to perfect an appeal of the Decision, Order and Entry, which he thereafter pursued. On February 11, 2009, the Ohio Supreme Court vacated the decision of the Second District Court of Appeals in Dohme's appeal of the Decision, Order and Entry and remanded the case to this Court for resolution of the Ohio Revised Code §§ 4111.01 *et seq.* claim before an appeal of the Decision, Order and Entry could be heard. That is the issue that will be resolved by this Entry.

While the appeal of the Decision, Order, and Entry was pending, on March 5, 2007, Dohme refiled his Ohio Revised Code §§ 4111.01 *et seq.* claim, which was then assigned Case No. 2007CV01837. On December 7, 2007, in Case No. 2007CV01837 this Court ordered that "all documents filed in Case No. 2003 CV 4021 after March 7, 2006, the date on which Plaintiff filed his Notice of Voluntary Dismissal, shall be considered to have been filed in 2007 CV 1837, which represents the refiling of Case No. 2003 CV 4021." On February 1, 2008, this Court entered an administrative dismissal of Case No. 2007 CV 01837 which provides, "[b]ecause pending negotiations will indefinitely stay further proceedings, this case is DISMISSED other than on the merits and without prejudice. This case may be reactivated upon Plaintiff(s) motion for good cause shown, and reactivation will be retroactive to the original filing date." Thus, Case No. 2007 CV 01837 is no longer active.

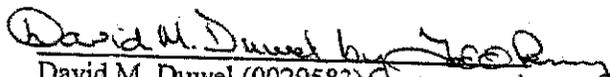
BY AGREEMENT OF THE PARTIES AND FOR OTHER GOOD CAUSE SHOWN, IT IS HEREBY ORDERED that Plaintiff's claims under Ohio Revised Code §§ 4111.01 *et seq.* in Case No. 2003 CV 4021 are hereby dismissed with prejudice.

IT IS FURTHER ORDERED THAT this Court's Decision, Order, and Entry of December 7, 2007 is hereby amended to reflect that Case No. 2007 CV 1837 is also dismissed with prejudice and shall not be subject to reactivation by motion of the Plaintiff as previously ordered. An Entry reflecting the dismissal with prejudice of Case No. 2007 CV 1837 shall be placed in the record of that case.

With the Court having previously dismissed Plaintiff's claim for wrongful discharge in violation of public policy and the parties having resolved his remaining claim with prejudice in this Entry, the Court orders that its November 21, 2005 Decision, Order and Entry is now a final, appealable order. Plaintiff shall pay court costs.

Dated: \_\_\_\_\_

  
Judge Mary Katherine Huffman

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

**RANDALL J. DOHME,**  
  
**Plaintiff,**

**CASE NO.: 2003 CV 4021**

**JUDGE MARY  
KATHERINE HUFFMAN**

**-vs-**

**EURAND AMERICA, INC.,**  
  
**Defendant.**

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

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

**I. FACTS**

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

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

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

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

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

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

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

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

regarding the FLSA violation and wrongful termination.

## II. LAW & ANALYSIS

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

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

### A. FLSA Claim

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

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

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

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

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

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

B. Wrongful Discharge Claim

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

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

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

successfully establish a claim for wrongful termination: (1) that clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the Plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) the Plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the justification element). *Id.* at 384.

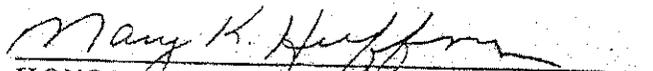
In the instant case, Plaintiff was discharged for disobeying a specific order from his employer to not speak with a representative from a private insurance company. Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff for such action. Although Plaintiff claims that he was discharged for voicing a concern for work place safety, the insurance Representative's purpose for being on the premises was to provide Defendant an insurance quote. Moreover, Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing inspection report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection. Based on the facts presented to the court, it appears that due to the deteriorating relations between the parties at the time of the incident, the content of the report would not have changed Plaintiff's basis in making the statements. Defendant feared he was being set up for failure, as evidenced by the plain language of his statements, and the lack of any insinuation for work place safety concerns.

Because Plaintiff can articulate no public policy of which Defendant is in violation, the court need not and can not analyze the other elements established by the Supreme Court in *Painter*. As such, because the court was presented no public policy which prohibits an employer from discharging an employee for disobeying an order, not in violation of any statute or any other regulation, the court finds that no genuine issue of material fact exists as to the basis of Plaintiff's discharge. In viewing the evidence in a light most favorable to Plaintiff, the non-moving party, this court finds that no genuine issue of material fact exists and Defendant is entitled to judgment as a matter of law.

### III. CONCLUSION

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

SO ORDERED:

  
HONORABLE MARY KATHERINE HUFFMAN

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

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