

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Ohio Management Lawyers Association (“OMLA”) is an Ohio non-profit corporation. Its stated purpose is to provide an organization and forum for exchanging information, discussing issues and problems, and promoting the administration of justice with respect to employment, labor, and other areas of law affecting employers. OMLA respectfully submits this Amicus Brief in support of the Appellant because the judgment of the court of appeals, if affirmed, would present negative consequences for Ohio employers. The court of appeals’ decision below posits a rule that unnecessarily erodes the employment-at-will doctrine by unduly extending the public policy “wrongful termination” tort claim in Ohio to instances in which an employee might point to a tenuous connection to “workplace safety.”

STATEMENT OF THE CASE AND OF FACTS

Amicus Curiae defers to the statement of case and facts as stated by the Appellant’s Brief.

ARGUMENT

This case presents this Court with the opportunity to provide much-needed limitation upon the scope of the common-law “workplace safety” public policy recognized in *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 2002-Ohio-66, as a clear public policy upon which to base a wrongful termination claim. Since this Court created the common-law “wrongful termination in violation of public policy” tort claim over 20 years ago in *Greeley v. Miami Valley Maint. Contractors, Inc.* (1990), 49 Ohio St. 3d 228, the tort has evolved from “an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute” (*Greeley* at 234) to an exception applicable to employment terminations motivated by reasons that are *not* necessarily proscribed by statute. *Painter v. Graley* (1994), 70 Ohio St.3d 377, paragraphs two and three of the syllabus. As long as an

employee could demonstrate facts showing that his or her employment termination “contravened a clear public policy,” which could be “discerned as a matter of law” from non-statutory sources (including “the common law”), the employee could maintain a claim for wrongful discharge in violation of public policy. *Id.* at paragraphs two and three of the syllabus.

Ultimately, as the development of the tort continued, the Court adopted four elements to define a public policy wrongful termination claim:

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. 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 (1995), 73 Ohio St. 3d 65, 69-70, quoting Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. Cin. L. Rev. 397, 398-99 (1989).

In *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, this Court first addressed the scope of the public policy claim in the context of workplace safety. This Court held that the public policy tort claim provides a remedy for an at-will employee who is terminated in retaliation for filing a complaint with the Occupational Safety and Health Administration (OSHA) concerning matters of health and safety in the workplace. *Kulch* at paragraph one of the syllabus. Despite the fact that there was already a statutory scheme in place to protect whistleblowing activity under R.C. 4113.52, this Court in *Kulch* recognized the existence of a tort claim separate and apart from the statutory remedies provided.

Five years later, this Court decided *Pytlinski*, a case in which the Court built upon what it had created in *Kulch*. *Pytlinski* involved an employee who brought a public policy claim premised on the allegation that he was terminated in retaliation for having reported OSHA violations to his employer. *Id.* at 78. Even though the *Pytlinski* plaintiff did not satisfy the requirements of Ohio's whistleblower statute (R.C. 4113.52), this Court expanded the scope of *Kulch* by recognizing the existence of a common-law public policy favoring "workplace safety," which existed separate and apart from the whistleblower statute. Accordingly, this Court recognized a claim for wrongful termination based on the common-law "workplace safety" public policy, allowing a plaintiff to pursue the legal theory that he was fired in retaliation for having reported OSHA violations to his employer.

The lesson from this Court's decisions in *Kulch* and *Pytlinski* is that a claim will lie for wrongful termination in violation of the public policy favoring "workplace safety" where an employer has terminated an employee for reporting safety violations to governmental authorities (as was the case in *Kulch*) or to the employer (*Pytlinski*). But this case takes the "workplace safety" public policy even further. The court of appeals has validated a public policy wrongful termination claim based not on reports of workplace safety violations to people empowered with doing something about those violations, but, rather, on an employee's act of telling an insurance inspector that he feared discipline due to internal records not showing that a specific inspection had been completed. *Dohme v. Eurand America, Inc.*, 170 Ohio App.3d 593, 2007-Ohio-865, at ¶ 5 ("*Dohme I*"), adopted in *Dohme v. Eurand America, Inc.*, Montgomery App. No. 23653, 2010-Ohio-3905. Even worse, the court of appeals has validated *Dohme's* claim amid evidence that *Dohme* was not even complaining that an inspection was not completed; instead, *Dohme*

seemed concerned that the record of an inspection was removed “to make it look like I’m not doing my job.” *Id.* at ¶ 18.

By holding that “workplace safety” is a valid public policy upon which Dohme can base a wrongful termination claim, the court of appeals has extended the *Kulch* and *Pytlinski* holdings beyond recognition. The *Kulch* and *Pytlinski* cases each involved complaints by an employee about safe working conditions that were made to persons empowered or authorized to effectuate a change in those working conditions. Here, the court of appeals has taken the extraordinary step of cloaking an employee with protection under “public policy” for talking about a workplace condition with someone having no authority to demand a change in working conditions. This is a remarkable expansion of the wrongful termination tort that does not naturally flow from the lessons this Court taught in *Kulch* and *Pytlinski*.

I. Appellant’s 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.

The court of appeals found Appellee Dohme to have articulated a clear public policy favoring “workplace safety” as the basis of his claim for wrongful termination, based on this Court’s pronouncements in *Kulch* and *Pytlinski*. See *Dohme I* at ¶ 24. Underlying the court of appeals’ ruling was evidence that Dohme told an insurance inspector about his suspicion that a fire inspection report was missing from the company’s records. *Id.* at ¶¶ 18-22. Despite evidence that Dohme revealed his suspicion to the insurance inspector “to protect himself from complaint or criticism” rather than a desire to report workplace safety issues, the court of appeals found Dohme’s motivation irrelevant to the public policy analysis. *Id.* at ¶ 23. What was relevant, said the court of appeals, was “whether Dohme did in fact report information to the inspector that encompassed a public policy favoring workplace safety.” *Id.* And because the

court deemed workplace fire safety to be a public policy embodied in “Ohio’s Fire Code,” the court of appeals found the clarity element satisfied. *Id.* at ¶ 24.

The court of appeals’ rationale unduly broadens the scope of a public policy wrongful termination claim. It allows a plaintiff to use “workplace safety” as a catch phrase to satisfy the “clarity” element, regardless of the circumstances underlying the conduct that led to the employee’s termination. Under the court of appeals’ standard, the plaintiff will satisfy the clarity element as long as there is some theoretical connection, however loose, between the employee’s conduct and the “public policy favoring workplace safety.”

A. The Court Of Appeals Has Expanded The Public Policy Favoring “Workplace Safety” Beyond What This Court Articulated In *Kulch and Pytlinski*.

To illustrate how far the court of appeals’ decision has gone in transforming the public policy tort, one need only look to *Kulch* and *Pytlinski*. In both of those cases, this Court looked to the public policy of “workplace safety” through the lens of what the facts and circumstances of the case were. In *Kulch*, for example, this Court identified two main sources of public policy that satisfied the clarity element in that case—the “policy prohibiting retaliatory discharge” found in OSHA and in Ohio’s Whistleblower Statute (R.C. 4113.52). See *Kulch*, 78 Ohio St.3d at 151-153. The Court deemed retaliation against employees who file OSHA complaints related to unsafe or unhealthy working conditions to be “an absolute affront to Ohio’s public policy favoring workplace safety.” *Id.* at 153. Thus, this Court evaluated the “clarity” of the “workplace safety” public policy with reference to the particular facts at issue—the alleged retaliation against the employee for reporting safety issues to OSHA.

The *Kulch* court examined “public policy” through the lens of statutes that articulated prohibitions against retaliation. Five years later in *Pytlinski*, again in the context of a whistleblower employee, this Court had to examine the clarity element of a public policy

wrongful termination case in which the employee alleged he was terminated for complaining to his employer about perceived workplace safety violations. *Pytlinski*, 94 Ohio St.3d at 78. Unlike in *Kulch*, the plaintiff in *Pytlinski* could not rely upon the Ohio Whistleblower Statute as the source of a “clear public policy” because he had failed to comply with the statute’s requirements, including R.C. 4113.52’s 180-day statute of limitation. *Id.* Nonetheless, this Court found that *Pytlinski*’s claim could proceed. Even though the plaintiff did not adhere to the requirements of R.C. 4113.52, this Court recognized “workplace safety” as an “independent basis” upon which to base a wrongful termination claim. *Id.* at 80. In other words, *Pytlinski* found the clarity element satisfied by the common-law policy favoring “workplace safety.”

Pytlinski’s pronouncement of “workplace safety” as a common-law public policy is the issue at the heart of this case. Despite this Court’s emphasis on “workplace safety” as the “independent source” of public policy, *Pytlinski* should not be read as a pronouncement that the clarity element is satisfied merely by making reference to “workplace safety” in every fact pattern. Indeed, in articulating the common-law public policy recognized in *Pytlinski*, this Court kept its pronouncement in context: “[I]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety. *Pytlinski*’s complaint clearly sets forth the allegation that appellees retaliated against him *for lodging complaints* regarding workplace safety.” (Emphasis added.) *Id.* at 80. Thus, the “workplace safety” public policy was tethered to a specific circumstance—an employee’s complaint to his employer about violations of OSHA regulations. Accord *McKinley v. Standby Screw Machine Prods. Co.*, 8th Dist. App. No. 80146, 2002-Ohio-3112, at ¶ 31.

In finding the clarity element satisfied in *Dohme*’s case, the court of appeals has pulled *Kulch* and *Pytlinski* from their berths. In both of those cases, the clarity element was met

because of a recognized public policy barring retaliation for reporting workplace safety violations. But in both of those cases, the employees reported specific violations to authorities empowered to fix them—to OSHA in *Kulch* and to the employer’s management in *Pytlinski*. Here, the court of appeals has found the “public policy” favoring workplace safety to be implicated even though Dohme’s “report” was to a third party—an insurance inspector—with no authority or ability to vindicate the public policy.

The clarity element should not be satisfied as easily as the Second District Court of Appeals allowed it to be done in Dohme’s case. See, e.g., *Conway v. Euclid Chemical Co.*, 8th Dist. App. No. 85384, 2005-Ohio-3843, at ¶ 39 (rejecting public policy claim based on workplace safety, in part because the employee did not report safety concern to his employer), discretionary appeal not allowed, 107 Ohio St.3d 1698, 2005-Ohio-6763. If courts are to so easily find the clarity element satisfied, this element of a public policy wrongful termination claim, which is supposed to be a matter of law for the court to decide, becomes little more than a pleading exercise in reciting “workplace safety,” regardless of whether the circumstances at issue can truly implicate “workplace safety.” As a result, Ohio employers will potentially be subjected to liability for public policy wrongful termination claims regardless of whether the employee’s acts are truly calculated to vindicate the public policy favoring workplace safety.

This result is not only undesirable as a policy matter, it is contrary to the way the “clarity” element of a public policy wrongful termination claim has been applied in Ohio courts. For instance, in *Dean v. Consolidated Equities Realty # 3 LLC*, 182 Ohio App.3d 725, 2009-Ohio-2480, the First District Court of Appeals decided whether a plaintiff had articulated a viable public policy upon which to base a wrongful termination claim. In that case, the plaintiff argued that he was fired after reporting to his employer (an auto dealership) that a fellow

employee was falsifying customers' credit applications, which violated the public policy against "fraud." *Id.* at ¶ 10.

But even though the *Dean* plaintiff relied on statutory and common-law sources of a general public policy against fraud, the First District found that he had not articulated a sufficiently clear public policy upon which to base a wrongful termination claim. Despite agreeing with *Dean* that Ohio had a "general public policy against fraud," the court nevertheless decided that "the public policy *against the alleged conduct* of [the employer] is not manifested clearly enough to warrant abrogating the at-will employment doctrine." (Emphasis added.) *Id.* at ¶ 12. Thus, the presence of a "general" public policy—such as the general policy of "workplace safety" invoked by *Dohme* in this case—cannot *by itself* satisfy the "clarity element." Rather, the public policy invoked by the plaintiff must be examined in the context of the precise circumstances involved in the case. To do otherwise would be contrary to the rule that any exception to the at-will doctrine must be "narrowly applied." *Id.*

In this case, *Dohme* relies on "workplace safety" as an abstract proposition that is somehow implicated if he was fired (as he alleges) for telling an insurance inspector of his concern that he "would be blamed" for an overdue fire alarm inspection that was not reflected in company records. (See Appellant's Appx. 14.) Even if this Court does not quarrel with the proposition that there is a "clear public policy" favoring workplace safety, a plaintiff must rely on more than "workplace safety" as an abstract public policy proposition. In order to satisfy the clarity element, an employee must establish—as a matter of law for the court to decide—that his or her actions furthered the stated public policy. See *Smith-Johnson v. City of Cincinnati*, 1st Dist. App. No. C-050723, 2006-Ohio-3510, at ¶ 14. Without that crucial context, an abstract public policy like "workplace safety" becomes little more than a catch phrase that is too easily

satisfied, effectively expanding the public policy exception to at-will employment to reach cases that have only a tenuous connection to the public policy being invoked.

B. The Court of Appeals' Approach To The "Clarity" Element Is Tantamount To Judicial Legislation.

Under the "workplace safety" public policy announced by the court of appeals in this case, Dohme was deemed to be protected from being terminated in retaliation for speaking to an insurance inspector. So even though Dohme cannot possibly meet the definition of a protected "whistleblower" under R.C. 4113.52, the court of appeals has effectively cloaked Dohme with protected whistleblower status. Thus, he has received by judicial decision a protection that he could not receive by statute.

To be sure, the court of appeals below is not the first court to have recognized rights that do not exist in statute. Indeed, in *Kulch* and *Pytlinski*, this Court chose not to strictly follow the dictates of the legislature in recognizing a public policy claim premised upon workplace safety. This Court deemed it appropriate as a matter of public policy to recognize a tort claim for wrongful discharge—with the full range of tort remedies—even though the plaintiff in *Kulch* had available to him the remedies provided in R.C. 4113.52 (*Kulch* at 155, 161) and the plaintiff in *Pytlinski* could not bring a *statutory* action at all due to the failure to satisfy R.C. 4113.52's statute of limitation (*Pytlinski* at 78-79).

The court of appeals' decision in this case, however, goes even further than *Kulch* or *Pytlinski* did. In both *Kulch* and *Pytlinski*, the plaintiffs engaged in conduct (i.e., whistleblowing) that fit within the General Assembly's contemplation in R.C. 4113.52. The same cannot be said of Dohme in this case. Yet, the court of appeals has effectively cloaked Dohme with protected whistleblower status when he did not report any specific safety violation to either his employer or to authorities empowered with enforcing fire safety laws. If the

“workplace safety” public policy is to reach as far as the court of appeals allowed, that is a legislative decision for the General Assembly to make.

This Court has cautioned that “it would be inappropriate for the judiciary to presume the superiority of its policy preference and supplant the policy choice of the legislature.” *Bickers v. Western Southern Life Ins. Co.*, 116 Ohio St.3d 351, 357, 2007-Ohio-6751, at ¶ 24. Indeed, in the years since *Pytlinski* was decided, this Court’s decisions have trended toward a reining in of the public policy wrongful termination tort rather than an expansion of it. See *id.* at ¶¶ 23-25 (declining to recognize a common-law wrongful discharge claim when doing so would override the legislature’s policy choice to allow a statutory claim only for retaliatory discharges defined in R.C. 4123.90); *Leininger v. Pioneer Natl. Latex*, 115 Ohio St.3d 311, 2007-Ohio-4921, at syllabus and ¶¶ 22-33 (declining to recognize a wrongful discharge claim based on public policy against age discrimination, finding it unnecessary to expand the scope of statutory remedies already available); *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, at ¶ 20 (declining to recognize wrongful discharge claim based on public policy embodied in federal Family and Medical Leave Act, finding it unnecessary to impose additional remedies when there was “a Congressional balancing of right and remedy that we ought not disturb”) (plurality opinion).

In this case, the disturbance of the statutory balance of right and remedy is particularly pronounced. The court of appeals’ decision allows Dohme to invoke a common-law “workplace safety” public policy to fashion a claim for tort remedies, even though the conduct for which he is suing would not fall within the scope of *statutory* provisions such as the Whistleblower Act. It is anomalous for the judiciary to widen the breadth of a “public policy” claim based on workplace safety when the legislature has chosen only to protect certain categories of

“whistleblowers” in furtherance of that public policy. After all, it is the *legislature*—not the courts—that is the branch of government charged with pronouncing public policy through legislation. Yet, if allowed to stand, the court of appeals’ decision provides authority for the awkward notion that an employee who could *not* establish a statutory claim may be able to obtain remedy in tort, which may provide a greater level of recovery than the statutory remedies enacted by the legislature.

In practical effect, the court of appeals’ decision is far too permissive in what type of action it allowed to fit within the *Pytlinski* “workplace safety” public policy. The court of appeals deemed Dohme’s conversation with the insurance inspector to be sufficient to trigger the prohibition against retaliatory terminations because “the market” played a “more immediate and compelling” role than government in policing the public policy favoring workplace safety. But this rationale substitutes the judiciary’s public policy views for those of the legislature. The General Assembly’s whistleblower protections, as they relate to workplace safety, have extended to employees who make reports to *government* officials or to their *employer*. See, generally, R.C. 4113.52. Though *Kulch* and *Pytlinski* created public policy tort claims for whistleblowers, these decisions were faithful to the General Assembly’s contemplation that an employee report perceived safety violations to people empowered to fix them—government officials or the employers themselves. And this should remain the rule for common-law public policy claims based on workplace safety. To go as far as the court of appeals went in this case stretches *Kulch* and *Pytlinski* beyond recognition.

The court of appeals’ expansion of the wrongful termination tort in this context cuts against the grain of this Court’s post-*Pytlinski* decisions and is tantamount to judicial legislation

in the area of employment law. For this reason, the judgment of the court of appeals should be reversed.

C. Allowing A Generalized Notion Of “Workplace Safety” To Be A “Clear Public Policy” In This Instance Makes The Employer Potentially Liable Without Notice That The Conduct In Question Implicated Public Policy.

While the concept of “workplace safety” is a laudable public policy objective in the broad sense, it does not follow that such a broad abstract policy objective should, without more, satisfy the “clarity” element of a public policy wrongful termination claim in Ohio. But the court of appeals has done exactly that in this case. Rejecting the notion that the specific circumstances underlying the plaintiff’s invocation of the “workplace safety” public policy are relevant, the court of appeals instead took the view that the only relevant factor—at least insofar as the clarity element is concerned—was that “Dohme did, in fact, report information to the [insurance] inspector that encompassed a public policy favoring workplace safety.” (Appellant’s Appx., at 20.) Thus, regardless of the plaintiff’s theory of the case, the court of appeals’ decision allows plaintiffs to satisfy the clarity element by simply tailoring his or her theory of the case to some aspect of “workplace safety.”

The court of appeals’ view of the clarity element is not only inconsistent with Ohio cases, it is also inconsistent with precedent from other states that recognize public policy wrongful termination claims as an exception to the employment at-will doctrine. Cases from other jurisdictions demonstrate how—and why—satisfying the “clear public policy” element for a wrongful termination claim is not done as easily as the Second District Court of Appeals allowed it to be done in this case.

A recent example comes from the Illinois Supreme Court, which visited a similar fact pattern to the one before this Court here. See *Turner v. Memorial Med. Ctr.* (2009), 233 Ill.2d 494, 911 N.E.2d 369. In *Turner*, a terminated employee sued his former employer (a hospital),

alleging that his termination violated Illinois' public policy encouraging employees "to report actions that jeopardize patient health and safety." *Id.* at 498. The Illinois Supreme Court rejected the plaintiff's attempt to rely on "generalized expressions of public policy" as the predicate for his claim. Because "generalized expressions of public policy fail to provide essential notice to employers," the Court held that an employer "should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations." (Internal quotations omitted.) *Id.* at 503, quoting *Birthisel v. Tri-Cities Health Services Corp.* (1992), 188 W. Va. 371, 377, 424 S.E.2d 606, 612 (1992). Accordingly, the Illinois Supreme Court held that a former at-will employee has a cause of action under Illinois law only where the employee "identifies a 'specific' expression of public policy." *Id.* at 504. Generalized expressions of public policy are insufficient, for they fail to provide essential notice to employers that their termination of an employee would run afoul of a recognized public policy. See *id.* What is more, any attempt to evaluate generalized expressions of public policy will inevitably result in erosion, if not elimination, of the at-will employment doctrine itself. *Id.* at 503.

Also instructive is the West Virginia Supreme Court of Appeals' decision in *Birthisel v. Tri-Cities Health Servs. Corp.*, *supra*. Like the *Turner* court, the *Birthisel* court placed importance on a plaintiff's specificity in articulating the public policy claim for the reason that the policy must "provide specific guidance to a reasonable person." *Birthisel*, 188 W.Va. at 377. As the *Birthisel* court made clear, an employer "should not be exposed to liability where a public policy standard is too general to provide any specific guidance or is so vague that it is subject to different interpretations." *Id.* Thus, *Birthisel* stands for the proposition that an expression of public policy must be specific enough to provide guidance to a reasonable person (i.e., the

employer) that termination of an employee under particular circumstances would be actionable as a wrongful termination.

Turner and Birthisel provide valuable insight into how the Court should view this case. Here, Appellee Dohme relies on “workplace safety” as the abstract public policy upon which his claim is based. But without examining that public policy through the lens of the specific circumstances of the case, the mere recitation of “workplace safety” as the public policy gives scant notice to the employer that terminating an employee under the circumstances of this case would be wrongful. To put it in the specific terms at issue, there is nothing in the abstract public policy of “workplace safety” that would put an employer on notice that terminating an employee for disobeying specific instructions not to speak to an insurance inspector unless authorized to do so would run afoul of the public policy related to “workplace safety.” See *Sears, Roebuck & Co. v. Wholey* (2001), 139 Md. App. 642, 661, 779 A.2d 408 (holding that “clear public policy” to support a wrongful termination claim exists only where there was some unambiguous and particularized pronouncement protecting *the specific conduct* in question). Context is crucial to whether the employer is put on notice that a clear public policy is implicated by a decision to terminate an employee’s employment.

Indeed, the Second District’s formulation leaves employers in a horrible position. An employee who might have no basis in fact or no knowledge sufficient to make a credible complaint could be insulated from termination, even though workplace safety is not truly implicated. This is a bizarre extension of the *Pytlinski* holding that is not faithful to the underpinnings of a Greeley claim.

II. Appellant’s 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.

III. Appellant's 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.

This Court has previously indicated that a plaintiff must satisfy the jeopardy element through a showing that the absence of the claim would "seriously compromise" the public policy at issue. See *Wiles*, 96 Ohio St.3d at 244. This is a showing that Dohme cannot make under the circumstances presented in this case. Even if this Court agrees with the court of appeals that the generalized invocation of "workplace safety" was sufficient to satisfy the "clarity element," this Court should still reverse the judgment: as a matter of Ohio law, the circumstances presented here do nothing to "jeopardize" workplace safety.

The United States Court of Appeals for the Sixth Circuit, in evaluating wrongful termination claims brought under Ohio substantive law, has interpreted this Court's precedents in a manner that is faithful to the vindication of the "public policy" that underlies the purpose of having the claim in the first place. In *Jermer v. Siemens Energy & Automation, Inc.* (C.A.6, 2005), 395 F.3d 655, the plaintiff employee investigated employee complaints about the air quality at his employer's facility. 395 F.3d at 656. The plaintiff claimed that his supervisor denied a request for a particular air filter and that he repeated to his supervisor that there remained "issues" about the facility's air quality more than two months before his job was eliminated. The plaintiff asserted a public policy wrongful termination claim under Ohio law, alleging that he was laid off in retaliation for voicing his complaints about the air quality "issues."

Affirming a summary judgment in favor of the employer, the Sixth Circuit reasoned that the "jeopardy" element of a wrongful termination claim was not satisfied under these circumstances. Heeding the notion that the jeopardy element requires a showing that the

articulated public policy “itself is at risk if dismissals like the one in question are allowed to continue” (*Jermer* at 659), the Court reasoned that a termination does not “jeopardize” Ohio public policy unless the employee’s statements “indicate to a reasonable employer that he is invoking a governmental policy in support of, or as the basis for, his complaints.” *Id.* Absent this crucial ingredient, public policy is not implicated—much less jeopardized—by the adverse employment action. As the *Jermer* court explained, this interpretation of the jeopardy element follows naturally from this Court’s cases:

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 facto “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.

Id. at 659.

The court of appeals in this case rejected *Jermer*’s approach in favor of the view that employers “are presumed to be sophisticated enough to comply with the workplace safety laws.” *Dohme*, at ¶ 32. The court of appeals refused to look at the employee’s conduct as being relevant to the jeopardy element inquiry, believing that it “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.” *Id.*

But the court of appeals’ philosophical approach is problematic, for it does not give due consideration of the reasons for having a public policy favoring “workplace safety.” If an employee does not make clear that he is addressing a legitimate safety concern or violation of

safety regulations, it is questionable, at best, to say that the employee's termination would jeopardize the public policy. Even in *Pytlinski*, which created the cause of action based on the common-law public policy of "workplace safety," this Court described the touchstone of the cause of action recognized there as being the "retaliatory action" of the employer for "lodging complaints regarding workplace safety." (Emphasis added.) *Pytlinski*, 94 Ohio St.3d at 80. Thus, the key to the cause of action was the employee's *complaints to management* about the workplace safety issues. See *id.* at 78. See, also, *McDermott v. Continental Airlines* (S.D. Ohio Apr. 11, 2008), No. 2:06-cv-0785, 2008 U.S. Dist. LEXIS 29831, at *37 (Graham, J.) (describing a public policy claim under *Pytlinski* to require a safety complaint to the plaintiff's employer), affirmed (C.A.6, 2009), 339 Fed. Appx 552.

Absent some invocation of the public policy in a manner that puts the employer on notice that the employee is vindicating broader interests than his own, the jeopardy element cannot be satisfied. An employer cannot jeopardize a policy that an employee is not invoking. The court of appeals' opinion departs from this logic, leaving employers open to liability under theories that have only a tenuous (if any) connection to the public policy supposedly invoked.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae OMLA asks this Court to reverse the judgment of the court of appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document, *Brief of Amicus Curiae Ohio Management Lawyers Association*, was served by ordinary U.S. mail to the following counsel for Appellee and Appellant on March 21, 2011:

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