

ORIGINAL

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.

CASE NO. 10-1621

Defendant-Appellant,

vs.

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

RANDALL J. DOHME

Court of Appeals
Case No. 23653

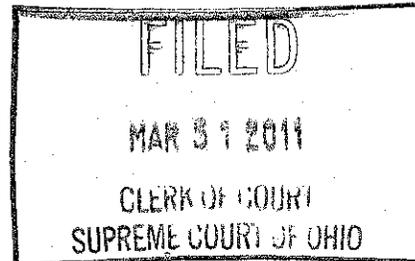
Plaintiff-Appellee.

MERIT BRIEF OF RANDALL J. DOHME

Todd D. Penney (0059076)
11025 Reed Hartman Highway
Cincinnati, Ohio 45242
(513) 948-2040, Ext. 219, telephone
tpenney@smbllaw.net

COUNSEL FOR APPELLANT EURAND, INC.

David M. Duwel (0029583)
Todd T. Duwel (0069904)
130 W. 2nd Street, Suite 2101
Dayton, OH 45402
(937) 297-1154, telephone
todd@duwellaw.com



COUNSEL FOR APPELLEE RANDALL J. DOHME

Donald R. Keller (0022351)
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2300
dkeller@bricker.com

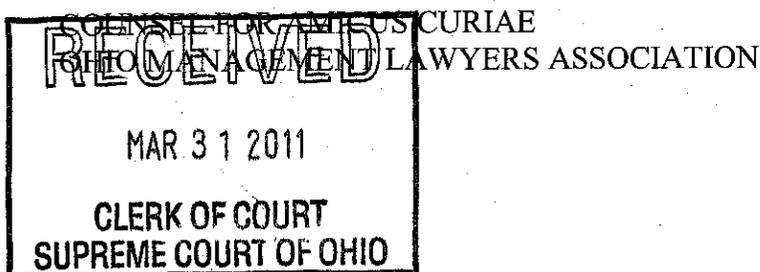


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii-iv
PROCEDURAL HISTORY	1-2
STATEMENT OF THE FACTS	2-11
ARGUMENT	11-20
A. <u>Appellant's Propositions of Law</u>	
<u>Proposition of Law No. I:</u>	16-20
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.	
<u>Proposition of Law No. II:</u>	16-20
To satisfy the jeopardy element of a wrongful discharge claim upon an alleged retaliation voicing concerns regarding workplace safety an employee must voice the concerns to a supervisory employee of the employer or to a governmental body	
<u>Proposition of Law No. III:</u>	15-19
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.	
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bickers v. W. & S. Life Ins. Co.</i> (2007), 116 Ohio St.3d 351, 879 N.E.2d 201	12
<i>Collins v. Rizkana</i> (1995), 73 Ohio St.3d 65, 652 N.E.2d 653	14
<i>Greeley v. Miami Valley Maintenance Contrs., Inc.</i> (1990), 49 Ohio St.3d 228, 551 N.E.2d 981	11
<i>Kulch v. Structural Fibers, Inc.</i> (1997), 78 Ohio St.3d 134, 677 N.E.2d 308	1, 14
<i>Leininger v. Pioneer National Latex</i> (2007), 115 Ohio St.3d 311, 875 N.E.2d 36	11
<i>Painter v. Graley</i> (1994), 70 Ohio St.3d 377, 639 N.E.2d 51	13, 14
<i>Pytlinski v. Brocar Prods., Inc.</i> (2002), 94 Ohio St.3d 77	<i>passim</i>
<i>Schade v. Carnegie Body Co.</i> (1982), 70 Ohio St.2d 207	8
<i>Wiles v. Medina Auto Parts</i> (2002), 96 Ohio St.3d 240, 773 N.E.2d 526	17
 Statutes	
R.C. 3737.82	13
O.A.C. 1301:7-7-01	13
29 C.F.R. 1910.164	13
29 C.F.R. 1910.165	13
 Misc. Authorities	
Clarence Seward Darrow, Bradley, Daniels & Jones, The International Dictionary of Thoughts (1969), J.G. Ferguson Pub. Co. 429	16
H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie? (1989), 58 U.Cin.L.Rev. 397	18

PROCEDURAL HISTORY

In this matter, the Second District Court of Appeals construed a specific and particular set of facts against an already clearly defined public policy exception to an employee's at-will employment. The appellate court promoted the importance of evaluating a totality of the circumstances rather than a singular, misconstrued event. Though Eurand America Inc. may disagree with the appellate court's ultimate construction of these facts, the court cannot be fairly accused of confounding precedent or unnecessarily expanding its' breadth.

Rather, the Second District expressly turned to "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.'" See, Opinion at 9, citing, *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308; *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St.3d 77, 89, 2002-Ohio-66. After identifying several other factually applicable statutory sections, the court concluded, "There is a clear public policy favoring workplace safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy." See, Opinion at 9.

Eurand's Brief is overreaching and far beyond the finite scope of issues before the Second District. Confirming this assertion, since the Second District's original 2007 Opinion that first prompted Eurand's requested certiorari, no Ohio court has cited *Dohme* for the substantive propositions raised. Nor has Ohio's wrongful discharge public policy tort spawned the expanse cautioned by Eurand. Rather, *Dohme* is but one decision amidst

the panoply of Ohio public policy authority that has been decided on its particularized set of facts.

STATEMENT OF FACTS

Though this appeal turns on whether the public policy of Ohio is supported by protecting an employee who makes his concerns about workplace safety known to his employer, and depends on more than an employee's personal motivations, the entirety of the workplace circumstances help contextualize Eurand's actions. Indeed, it lends to the consistent and open dialogue between the parties.

During the latter months of 2000, and the early days of January 2001, Eurand actively courted Dohme to assume its engineering supervision position, which had experienced incredible turnover over the course of the previous several years, *e.g.*, six supervisors in seven years. (Kevin Winter Depo. at 76) At that time, Dohme was employed with Chapel Electric as a general foreman, and had worked on-site at Eurand's facility for approximately ten months. (Randy Dohme Depo. at 20) He was charged with supervising 24 Chapel employees assigned to the Eurand plant, was well compensated, and was protected by his bargaining unit position at Chapel. (Id. at 20, 21)

Accordingly, Dohme did not quickly accept Eurand's offer "to solve its problems in maintenance." (Dohme Depo. at 22, 26-27, 31) Rather, Dohme investigated the possibility for three weeks, making a point to speak with each maintenance technician then employed. (Id. at 28) Though his observations revealed that Eurand's maintenance department was "disorganized," Dohme was buoyed by the fact that all the technicians were receptive to his hire, and the consistent representations made by Eurand's representative, Tim Grinstread, that Dohme would be afforded significant leeway to "shore

things up” and to establish some rules and guidelines in the maintenance department. (Id. at 26, 28, 31)

Dohme began working for Eurand on January 12, 2001 as the engineering supervisor, and was initially responsible for organizing the maintenance department, helping implement a preventive maintenance plan, facilitating interaction between other departments, and providing customer service. (Id. at 35-36) Within a month or two, however, and apparently reflective of Dohme’s performance, Eurand consistently added responsibilities beyond the scope of “traditional maintenance,” and more in line with a “facility management” role. (Id. at 37-38)

During this period of time, maintenance technician Ralph Lindon, the longest tenured employee in the department, began a series of events and disturbances that materially and purposefully affected Dohme’s supervision of the maintenance department (just like he had done to the previous six since-departed supervisors.) As Eurand employee, Kevin Winter testified, “[Lindon] is the center of all the commotion. If something is not right in the shop, it always seems to go back to him.” (Winter Depo. at 23) Worse, and inexplicable, a different set of rules was consistently applied to Lindon’s conduct. (Id. at 69-71)

Confronted one day by a frustrated Winter, Bert Cruz, the director of engineering, advised that if he challenged Lindon, it would end his career with Eurand. (Id. at 70; Dohme Depo. at 92-93) Lindon clearly possessed (and presumably still possesses) an unspoken leverage over the company. (Winter Depo. at 71)

Per Grinstead’s instructions from the time Eurand pursued Dohme’s hire, the imposition of maintenance department rules, regulations and discipline was a core requirement. But, when Dohme attempted to implement the same, Lindon and Tolliver

balked, and Eurand never backed Dohme. Regardless, “[Dohme] never gave up.” (Winter Depo. at 29) Dohme tried to spend time with each [technician] * * * I know he took [Lindon] to a ballgame. * * * I know he offered [Tolliver] some football tickets. He was trying individual things also away from work, * * * to have good relations and in hopes that would help the relations inside the company.” (Id. at 28)

Dohme also repeatedly requested input from his superiors and the human resources department’s intervention and assistance to deal with the “commotion.” *See, e.g.*, (Dohme Depo. at 67-71; Dohme Deposition Exhibits B, C, and E, filed by Eurand at Docket Entry # 15) Not only was the requested relief not provided, Karen Waymire, director of Eurand’s human resources department, specifically advised the technicians to document *their* manufactured concerns *about* Dohme. (Dohme Depo. 52; Tolliver Depo. at 40-42) Like his real concerns expressed about workplace safety, Dohme’s inability to supervise has been unfairly portrayed, and inaccurately described.

Had Eurand consistently applied the company regulations to each employee, and had it permitted Dohme to accomplish the principle task for which he was hired – to “shore up” the maintenance department, the company may have avoided its “sixth or seventh” supervisory change in as many years in its maintenance department, and it may have taken measurable steps towards curing the workplace safety concerns. (Winter Depo. at 76)

Eventually succumbing to technician Lindon’s demands, and “frustrated with Dohme’s ineffectiveness,” Eurand demoted, reassigned and removed Dohme’s supervisory responsibilities on July 9, 2002 (replaced by Toby Larned - an individual with no engineering maintenance experience.) Thereafter, Dohme’s new position was Facilities/CMMS Administrator, which read impressively, but in daily practice, was an

overreaching description of his MP2 responsibilities - a environmental software program that Eurand had failed to install since 1997.

While certainly one component of Dohme's responsibilities during his employment, (Dohme Depo. at 100) the MP2 system never arose to the level of "importance" frequently articulated by Eurand. Summarized fairly, Winter testified when asked if the MP2 was important to the company: "It couldn't have been that important if it had been in place since '97 or '98 and hadn't gone very far [Dohme was hired some four years after its inception]. I think it was - it's necessary, but I don't know how important based on priorities and stuff were getting arisen - how it got followed through because when we get to a certain place where we were getting it in gear [*Cf.*, Winter Depo, at 56-60], the floor would fall out, then it might be another six months, ten months, a year down the road and people realize we got to get this going. We'd get it going and the floor would fall out." (Winter Depo. at 87) Even at the time of this Court's review, the MP2 system, which assists, in part, in administering Eurand's work environment, is still not functioning as intended.

As a result of the continued stressful work environment condoned by Eurand, Dohme was forced to take medical leave. Upon his return, Dohme's already reduced responsibilities were further scaled back and "delegated" to other individuals. For the last three months of his employment, Dohme was the "glorified parts clerk," responsible for tracking the tools/parts that the maintenance department used, but never wavered on his concern of plant safety.

During the two-day field visit by the insurance representative, Peter Lynch, Dohme did not actively seek out the insurance representative, or subsequently engage the

representative to further his own personal interests. In fact, Dohme did not meet Lynch until the second day – and then only at the request of Eurand. (Dohme Depo. at 251-252) Nor was the encounter surreptitious or overtly improper, as it has been portrayed. Instead, Dohme was summoned by Eurand to the lobby to greet and welcome Lynch only after Toby Larned could not be found. (Dohme Depo. at 247, 250)

The trial court concluded that Eurand lawfully terminated Dohme “for disobeying a specific order from his employer to not speak with a representative from a private insurance company.” *See*, Decision at 7. Too much has been made of Eurand’s curious directive, and not enough of Eurand’s incongruent behavior.

Eurand points to a company e-mail as the only basis for its termination of Dohme. (Dohme Depo. at 248, Exhibit DD) In its entirety, the e-mail read:

An inspector for our property insurance firm will be here on March 24 through 25 to do a site survey and risk assessment. He will be working with Engineering, EH&S and Finance. There should be minimal interaction required of other departments. However, this inspection is similar to an external audit, therefore any responses to him should be directed through Toby Larned, Dane Marsee or me.

Asked whether he received this e-mail prior to meeting with the insurance representative (Lynch), Dohme answered, “I’m sure I received it, but I’m not sure if I pulled it up and read it by then or not. They could go back in the e-mail records and see.” (Dohme Depo. at 248) Despite its presumed ready access to Dohme’s company e-mail account, Eurand never demonstrated when Dohme opened and read the e-mail. Given that such timing is critical to the legitimacy assigned by Eurand to Dohme’s termination, and materially relied upon by the trial court, (Decision at 7) the absence of such proof materially affects the determination of whether Dohme violated a company directive.

If Dohme did not read the e-mail until after his interaction with Lynch, he did not violate Eurand's directive, nor was he otherwise operating far a field of his responsibilities. Importantly, the appropriate nexus between Dohme's job duties and his interaction with Lynch has always existed. Stated differently, Dohme was not performing outside the scope of his duties at the time he met with Lynch. But it has always been curious why Eurand even attempted to curtail Dohme's interaction.

Until at least July 2002, Dohme was responsible for overseeing the type of on-site insurance inspections and assessments conducted by Lynch. (Dohme Depo. at 247) At the time of Lynch's visit in March 2003, Dohme's latest job description could still be interpreted to require Dohme's administration, or at least, some level of involvement with the inspection. (Id at 162, Exhibit N, Major Responsibilities, ¶¶ 1, 4, 9, 11, and 14.)

But for the e-mail, as a member of the engineering department, and as the purported Facilities/CMMS (Computerized Maintenance Management System) Administrator, Dohme's interaction with Lynch would have been customary, if not welcomed by the insurance industry. Assuming Dohme had not seen the e-mail before Lynch's visit, he would have expected, and seemingly been expected, to meet with Lynch as part of his job duties. (Dohme Depo. at 162, Exhibit N, Major Responsibilities, ¶¶ 1, 4, 9, 11, and 14.))

And as part of those job duties, he could have properly advised Lynch of the work place safety concerns detailed in the MP2 printouts, which plainly documented overdue fire alarm inspections at the facility. Dohme had already experienced first hand the dangers associated with this defect. *See, e.g.*, Dohme's Affidavit, attached to his Memorandum in Opposition, ¶¶ 3-8. Although a responsible company would welcome

such cautionary counsel, the law nevertheless prohibits any company from terminating an employee for raising these types of concerns.

Even if Dohme had opened and read the e-mail prior to Lynch's visit (which speculation on appeal is moot, *cf.*, *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207), reasonable minds could disagree as to what intervening affect Eurand's inclusion of Dohme during Lynch's visit had on Eurand's allegedly contradictory directive. Eurand's subsequent inclusion of Dohme could reasonably be construed to have caused Eurand's waiver of its' employees restricted access to Lynch. The law routinely contemplates that when one party opens the door, it may no longer control the flow of information through that opening.

Reasonable minds could conclude, and the law would reasonably support, that Eurand proximately caused Dohme's interaction with Lynch, which thereby precluded Eurand's subsequent strict reliance on its e-mail directive. Eurand cannot be permitted to have it both ways.

On the second day of his investigation, Lynch was thought to be waiting in the lobby too long for Toby Larned, who, despite the apparent import of Lynch's visit, could not be located in his office or on site. (Dohme Depo. at 252) Worried about the delay, Eurand called Dohme at his office number, explained the situation, and invited his role. Dohme agreed to greet Lynch on behalf of Eurand. After greeting Lynch, Dohme attempted several times to locate Larned, but never could. (Id.) Eurand did not object or act to prevent Dohme's meeting with Lynch. (Id.)

During the brief interaction, Dohme presented Lynch with certain MP2 printouts, which detailed his long expressed concerns for Eurand's workplace safety.

Because Dohme's job duties had, by this time, become so convoluted due to Eurand's daily manipulation that it was unclear what Dohme should or should not be doing, Eurand jumped on this interaction as a means to rid itself of Dohme. Throughout the final stages of Dohme's employment, and continuing through this litigation, Eurand has continually advanced conflicting and contradictory assertions about Dohme's job duties in an effort to disguise its unlawful conduct. By arguing from this perspective, Eurand cast Dohme as a troublemaker, a violator of company directives, and as an employee intent only on his own self-preservation and job security. But in its contrived process, Eurand has completely ignored the actual content of Dohme's discussion with Lynch – workplace safety.

From Dohme's perspective, he raised reasonable and documented workplace safety concerns to Lynch in effort to promote a cure for the MP2 system - which was never properly utilized during Dohme's employment tenure due to Eurand's inability or refusal to provide effective oversight. While one affect of his discussion with Lynch may have tangentially assisted his self interests, the intended result was to bring attention to his ongoing safety concerns. And this was not an issue created by Dohme to steer Eurand away from his alleged culpability.

Dohme had frequently addressed Eurand's workplace safety issues to those who would listen. On August 17, 2001, the plant caught fire. When Dohme tried to pull the fire alarm in the Old Energy Center, it failed. As a result, Dohme was forced to race to another pull station nearly eighty yards away. Due to the defective system, Dohme was taken by ambulance to the hospital for treatment related to his smoke inhalation. *See*, Dohme's Affidavit, *supra* at ¶¶ 3-5.

Dohme also expressed other workplace safety concerns to Richard Francisco, a captain with the Vandalia Fire Department. (Dohme Depo. 134-141) As a result of those conversations, an investigation of the plant was conducted. (Id.) And while that particular investigation returned no city code violations, given Dohme's considerable concerns, which included cyclohexane leaks (a highly volatile hazardous material), improper exhausting, deteriorating wires leading to the pump in the 1000 gallon suite, etc., (Id.), Francisco advised Dohme to consult with an attorney. (Dohme Depo. at 137) Aside from the investigation above identified, Francisco has been in the building "several" other times. (Id.)

Based on Francisco's recommendation, Dohme's attorneys were involved, and his workplace safety concerns were relayed to Eurand. (Dohme Depo. at 141) Eurand was fully aware of Dohme's several concerns related to workplace safety. Under the law crafted by *Pytlinski, infra*, nothing more is required.

Though Eurand intends to defuse and minimize its workplace safety issues, Dohme's fears were real, documented and routinely expressed to Eurand. Reasonable minds could debate whether Dohme's advocated concerns were proximately related to his discharge, and whether Eurand's sole basis for discharge - Dohme's interaction with Lynch - was more pretext than violation.

Eurand has effectively exploited a few comments made by Dohme during his deposition, which when isolated appear to be more significant than they actually are. And while Dohme's deposition is susceptible to such efforts, these comments cannot operate to eliminate the much broader context described by Dohme during his deposition, and well

understood by Eurand, which enveloped Dohme's interaction with Lynch on March 25, 2003.

ARGUMENT

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

From the beginning of this litigation, Eurand has consistently ignored the specific identity of Dohme's public policy claim, and the undisputed fact that such policy "is manifested ... in a statute ... or the common law." *Leininger v. Pioneer National Latex* (2007), 115 Ohio St.3d 311, 314, 875 N.E.2d 36. Dohme did not loosely allege workplace safety, nor conjure up a "generic" claim. His *Greeley* claim was based on this Court's developed public policy favoring employee advocacy for workplace safety, and specifically, the danger associated with Eurand's administration of its' fire alarm system. *Greeley v. Miami Valley Maintenance Contractors, Inc.* (1990), 49 Ohio St.3d 228, 234, 551 N.E.2d 981, 987; cf. Complaint at ¶¶ 7, 30-33, 37. Further, Dohme's wrongful discharge claim was made with Eurand's full knowledge and understanding of Dohme's internal and external complaints about Eurand's fire safety, and the attendant issues and investigations related thereto.

At all times material, Eurand knew, or should have known, of the "specific facts" that formed the "gist" of Dohme's claim, and cannot ignore such knowledge in order to better a contrived defense. To require any broader "articulation" would ignore the shared

experiences and workplace familiarities each party brought to the lawsuit. Whether *amicus* or some other non-party could appreciate such “articulation” has never been the test.

The parties to this lawsuit were at all times well aware of the relevant circumstances such that the proposed “articulation” would have been superfluous. Interested, yet distant bystanders must be charged to perform their own review of circumstances to determine applicability to their cause. The affected parties need not be required to shoulder the burden of such non-party inquiry. Requiring the same would unravel the development of the tort itself. Borrowing from former Chief Justice Moyer, “because both the text and the underlying logic of [the Second District’s decision], as well as the nature of the tort of wrongful discharge in violation of public policy,” Eurand’s strained interpretation of the Decision below, achieves only personal interest, and not the “public or great general interest” ordinarily required to trigger this Court’s jurisdiction. *Cf. Bickers v. W. & S. Life Ins. Co.* (2007), 116 Ohio St.3d 351, 358, 879 N.E.2d 201.

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

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

and Dan Salain, vice president of plant operations, in order to further explore the safety concerns. Despite the same, Cruz failed to attend the meeting, purportedly upon the earlier expressed sentiments on or about May 30, 2002 that Plaintiff was a “troublemaker” and that Plaintiff’s continued disagreement as to workplace safety concerns would lead to termination”); and ¶ 37 (“On or about March 27, 2003, Plaintiff was wrongfully terminated in contravention of public policy for his perceived role in an on-site insurance adjuster’s discovery of certain violations relative to Defendant’s fire alarm system, which, upon information and belief, jeopardized workplace safety and placed employees in an unreasonable and dangerous setting. Despite reasonable concerns to the aforementioned system, the site and the employees themselves, Defendant actively attempted to prevent employee communication with said adjuster pursuant to an interoffice email sent by management personnel to all employees, including Plaintiff, days prior to the adjuster’s arrival, which expressly prohibited communication with said adjuster”).

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

Dohme’s public policy claim largely mirrored this Court’s analysis in *Pytlinski* (where that plaintiff “claimed that he was discharged in violation of Ohio public policy favoring workplace safety because the discharge was predicated upon his complaints regarding workplace safety,” *Pytlinski, supra*, 94 Ohio St.3d at 79.)

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

“Where the General Assembly has spoken, and in so speaking violated no

Constitutional provision, [courts] must not contravene the legislature's expression of public policy." *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 385, 639 N.E.2d 51.

"Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *Id.* Eurand seeks to silence both this Court and the General Assembly's clear pronouncements on this public policy.

As this Court has consistently held, "We have confidence that the courts of this state are capable of determining as a matter of law whether alleged grounds for a discharge, if true, violate a clear public policy justifying an exception to the common-law employment-at-will doctrine, thereby stating a claim." *Painter*, 70 Ohio St.3d at 383-384. Further, while discussing the origin of the exception to Ohio's at-will employment doctrine, this Court in *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 68-69, 652 N.E.2d 653, observed:

In adopting the exception, it is often pointed out that the general employment-at-will rule is a harsh outgrowth of outdated and rustic notions. The rule developed during a time when the rights of an employee, along with other family members, were considered to be not his or her own but those of his or her paterfamilias. The surrender of basic liberties during working hours is now seen "to present a distinct threat to the public policy carefully considered and adopted by society as a whole. As a result, it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out" (citations omitted).

In *Kulch*, this Court followed the suggestion of the *Painter* Court and applied the analysis of Professor Perritt, who set forth the elements of a wrongful discharge claim in violation of public policy. *Kulch*, 78 Ohio St.3d at 150-151; *Painter*, 70 Ohio St.3d at 384. The elements of the tort do not include a requirement of specificity, or something beyond

traditional notice pleading. Only that the discharge by the employer be related to the public policy. *Pytlinski*, 94 Ohio St.3d at 80.

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

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

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

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

The Second District did no more than what has long been contemplated, intended and favored by this Court. Eurand’s clear attempt to blur the multi-staged analytical framework of any public policy claim, or the deference extended by this Court to the state courts’ concerning their collective construal of the underlying affected policies is inapposite to the direction outlined by this Court. Eurand’s first proposition of law must be denied.

Proposition of Law No. 2: **To satisfy the jeopardy element of a wrongful discharge claim upon an alleged retaliation 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. 3: **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.**

Fundamentally, Eurand's final two Propositions attempt to turn the tort of wrongful discharge in violation of public policy on its head. Despite the "fits and starts" the tort's 20-year history has encountered, Eurand's urged Propositions have never formed this Court's intent. *Cf., Bickers*, 116 Ohio St.3d at 352. Rather, the tort is tailored to Ohio's at-will employees who are the intended beneficiaries of its protection. As recognized by this Court long ago, "Laws should be like clothes. They should be made to fit the people they are meant to serve." *Greeley*, 49 Ohio St.3d at 235, citing, (Clarence Seward Darrow), Bradley, Daniels & Jones, *The International Dictionary of Thoughts* (J.G. Ferguson Pub. Co. 1969) 429. "Children and employees, as others, are entitled to such protections." *Greeley*, 49 Ohio St.3d at 235.

The "jeopardy element" is acutely positioned to assess whether "dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize Ohio's public policy." *Kulch*, 78 Ohio St.3d at 151. If anything, this element involves inquiring into the existence of any alternative means of "promoting the particular public policy to be vindicated..." *Wiles v. Medina Auto Parts* (2002), 96 Ohio St.3d 240, 244,

773 N.E.2d 526. Given Ohio employees at-will employment status, this element constitutes an effective barrier between an employer's unlawful encroachments, and has never turned on overt requirements tailored to guard against an employer's perceived prejudice. Rather, the particular "circumstances" of every wrongful discharge claim should be uniquely examined, as below, to evaluate a plaintiff's harm and the public's interest. Requiring more of an employee in an already employer-leveraged work environment would unfairly "confuse" if not compromise the intended benefits of the tort, and unnecessarily cater to employers who prefer to stick their heads in the sand.

Leininger, 115 Ohio St.3d at 315.

Regardless, due to the inherent similarity in Eurand's second and third Propositions, Dohme has consolidated his response to each as such responses are equally applicable. Both Propositions are predicated upon at least one flawed premise. For this Court to adopt either of Eurand's proposals, it, like Eurand, must unreasonably limit review of the record to a five-minute conversation on March 25, 2005, and ignore the totality of the other circumstances that otherwise caused and contributed to Dohme's claim and shaped the employment relationship.

The relevant circumstances are not limited to Dohme's conversation with an insurance agent, or whether same violated a curious company directive. Such inquiry must also include why Eurand instructed Dohme not to talk to the agent, why Eurand refused to recognize the other occasions Dohme advised Eurand of his workplace safety concerns, and the probative affect of Eurand's ineffective distribution of job assignments and oversight concerning its fire safety equipment.

When the totality of the record is considered, Dohme's actions and conduct plainly satisfy Eurand's final Propositions. But, by ignoring the same, Eurand has occasioned this Court's review of Propositions that are not supported by the record.

Mindful of Dohme's entire work experience at Eurand, and as the record capably establishes, Dohme "voice[d] concerns" to both his supervisor(s) and an appropriate "governmental body." Such advice and conduct by Dohme reasonably "advise[s] and/or apprises the employer that the employee's conduct implicates a public policy." Eurand should not be heard to argue that Dohme's concerns caught the company by surprise, or that Dohme's concerns were only manufactured to fuel Dohme's wrongful discharge claim.

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. H. Perritt, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U.Cin.L.Rev. 397, 398-399. See, *Pytlinski*, 94 Ohio St.3d at 80, fn. 3.

Accordingly, this Court in *Pytlinski* specifically "disagree[d] with any contention * * * that [the employee's] claim fail[ed] because his complaints were not filed with OSHA * * * [I]t is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety." *Pytlinski*, 94 Ohio St.3d at 80. Like *Pytlinski*, Dohme's complaint "clearly sets forth the allegation that [Eurand] retaliated against him for lodging complaints regarding workplace safety." *Id; Infra* at p. 4.

However, even if presently deemed required, Dohme's allegations squarely apprised Eurand both pre- and post-litigation, particularly due to the work environment that was defined by the Dohme-Eurand relationship and the parties shared experiences. *Cf.*,

Dohme's Affidavit, attached to his Memorandum in Opposition, ¶¶ 3-8. Dohme also expressed other workplace safety concerns to Richard Francisco, a captain with the Vandalia Fire Department. (Dohme Depo. 134-141) As a result of those conversations, an investigation of the plant was conducted. (Id.) And while that particular investigation returned no city code violations, given Dohme's considerable concerns, which included cyclohexane leaks (a highly volatile hazardous material), improper exhausting, deteriorating wires leading to the pump in the 1000 gallon suite, etc., (Id.), Francisco advised Dohme to consult with an attorney. (Dohme Depo. at 137) Aside from the investigation above identified, Francisco has been in the building "several" other times. (Id.)

Based on Francisco's recommendation, Dohme's attorneys were involved, and his workplace safety concerns were relayed to Eurand. (Dohme Depo. at 141) Eurand was fully aware of Dohme's several concerns related to workplace safety. Under the law crafted by *Pytlinski*, nothing more is required. Though Eurand has sought to shield its workplace safety issues behind the distraction of Dohme's concurrent motivations, Dohme's fears were real, documented and routinely expressed to Eurand. Motivation and safety concerns need not be mutually exclusive.

Finally, despite its feigned benevolence on behalf of all Ohio's employers, Eurand is only asked in this matter to defend against a well-rooted exception to at-will employment already found to exist: workplace safety. Regardless of Eurand's convenient perspective of the state of wrongful discharge law in Ohio, it matters little on the limited issues involved in this case. Nor have such concerns proven true. No Ohio appellate court has relied upon the Second District's *Dohme* Opinion(s) to fashion a decision related to the

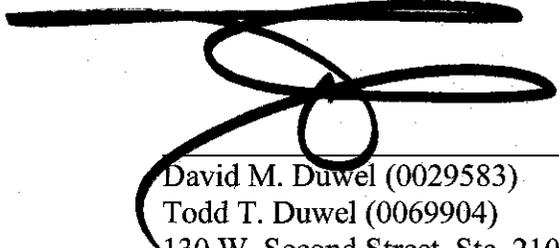
speculative concerns framed by Eurand. Instead, Ohio appellate courts have done precisely what this Court has long instructed; examine each case on its particular merits and determine whether those instances impinge upon Ohio's clear public policy.

CONCLUSION

For these reasons, Dohme respectfully requests that this Court deny each of Eurand's three propositions of law, and reject Eurand's superfluous reach beyond this Court's well-settled jurisprudence. This is a fact-sensitive matter arising from a firmly rooted exception to the employment at-will doctrine based upon a clear public policy that if restricted would jeopardize Ohio's public policy that promotes the rights of employees.

Respectfully submitted,

DUWEL LAW

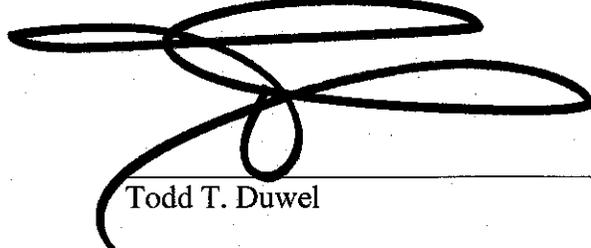


David M. Duwel (0029583)
Todd T. Duwel (0069904)
130 W. Second Street, Ste. 2101
Dayton, OH 45402
PH: (937) 297-1154
FAX: (937) 297-1152

Attorneys for Randall J. Dohme

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Merit Brief of Appellee Randall J. Dohme has been served via regular U.S. mail upon counsel for Eurand, Todd D. Penney, 11025 Reed Hartman Highway, Cincinnati, OH 45242, Defendant's counsel, and Donald R. Keller, 100 South Third Street, Columbus, Ohio 43215, Counsel for Amicus Curiae, Ohio Management Lawyers Association, via regular U.S. mail, this 30th day of March 2011.



Todd T. Duwel

COUNSEL FOR APPELLEE DOHME