

ORIGINAL

IN THE SUPREME COURT OF OHIO

RANDALL J. DOHME,	:	Case No. 2010-1621
	:	
Appellee,	:	
	:	
v.	:	On Appeal from the Montgomery
	:	County Court of Appeals,
EURAND AMERICA, INC.	:	Second Appellate District
	:	
Appellant.	:	

REPLY BRIEF OF APPELLANT EURAND AMERICA, INC.

Todd D. Penney (0059076)
Scheuer Mackin & Breslin LLC
11025 Reed Hartman Highway
Cincinnati, OH 45242
(513) 984-2040 ext. 219
tpenney@smblaw.net

COUNSEL FOR APPELLANT
EURAND AMERICA, INC.

Donald R. Keller (0022351)
Vladimir P. Belo (0071334)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
(614) 227-2300
dkeller@bricker.com
vbelo@bricker.com

COUNSEL FOR AMICUS CURIAE
OHIO MANAGEMENT LAWYERS ASSOCIATION

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

COUNSEL FOR APPELLEE
RANDALL J. DOHME

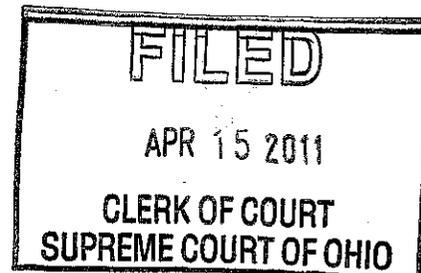


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
ARGUMENT	1
 <u>Proposition of Law No. I:</u>	
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. ...	2
 <u>Proposition of Law No. II:</u>	
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	5
 <u>Proposition of Law No. III:</u>	
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.....	7
CONCLUSION.....	10
PROOF OF SERVICE.....	11

TABLE OF AUTHORITIES

<u>OHIO CASE AUTHORITIES</u>	<u>PAGES</u>
<i>Dean v. Consolidated Equities Realty #3, L.L.C.</i> (Hamilton Cty App. 2009), 2009-Ohio-2480	3
<i>Evans v. PHTG, Inc.</i> (Trumbull Cty App. 2002)..... 2002-Ohio-3381	2
<i>Galyean v. Greenwell</i> (Washington Cty App. 2007)..... 2007 WL 453273	2, 4
<i>Gaskins v. The Mentor Network-REM</i> (Cuyahoga Cty App. 2010), 2010-Ohio-4676	8
<i>Haren v. Superior Dairy, Inc.</i> (Stark Cty App. 2004), 2004-Ohio-4436	2, 4
<i>Kulch v. Structural Fibers, Inc.</i> (1997), 78 Ohio St. 3d 134.....	1, 3, 5, 6
<i>Lesko v. Riverside Methodist Hosp.</i> (Franklin Cty App. 2005), 2005-Ohio-3142	2
<i>Milhouse v. Care Staff, Inc.</i> (Mahoning Cty App. 2007), 2007-Ohio-2709	8
<i>Mitchell v. Mid-Ohio Emergency Services, L.L.C.</i> (Franklin Cty App. 2004), 2004-Ohio-5264	3
<i>Pytlinski v. Brocar Products, Inc.</i> (2002), 94 Ohio St. 3d 77	1, 3, 5, 6
<i>Schwenke v. Wayne-Dalton Corp.</i> (Holmes Cty App. 2008), 2008-Ohio-1412	2
 <u>FEDERAL CASE AUTHORITIES</u>	
<i>Aker v. New York and Co., Inc.</i> (N.D. Ohio 2005)..... 364 F. Supp. 2d 661	8

<i>Herlik v. Continental Airlines, Inc.</i> (6 th Cir. 2005).....	2
<i>Jermer v. Siemens Energy & Automation</i> (6 th Cir. 2005)..... 395 F.3d 655	7, 8, 9 10
<i>Kirk v. Shaw Environmental, Inc.</i> (N.D. Ohio 2010)..... 2010 U.S. Dist. LEXIS 51332	8
<i>Kohorst v. Van Wert County Hosp.</i> (N.D. Ohio 2010)..... 2010 U.S. Dist. LEXIS 124703	8
<i>Sollitt v. Keycorp</i> , (N.D. Ohio 2009)..... 2009 U.S. Dist. LEXIS 74217	8

OTHER STATE AUTHORITIES

PAGES

<i>Birthisel v. Tri-Cities Health Services Corp.</i> (W. Va. 1992)..... 424 S.E. 2d 606	2
<i>Danny v. Laidlaw Transit Services, Inc.</i> (Wash. 2008)..... 2008 Wash LEXIS 951	2, 4
<i>Gardner v. Loomis Armored Inc.</i> (Wash. 1996)..... 913 P.2d 377	2
<i>Turner v. Memorial Medical Ctr.</i> , (Ill. 2009) 233 Ill. 2d 494	2

STATUTES AND CODES

PAGES

29 C.F.R. § 1910.264 - 165.....	4
29 C.F.R. § 1977.9	1, 3, 5, 6
Ohio Revised Code § 3737.82	4
Ohio Admin. Code § 1301:7-7-01	4

ARGUMENT

In *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134, and *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, this Court recognized an exception to the at-will employment doctrine for employees who were terminated in response to having reported specific safety concerns to OSHA and internal management. The public policy upon which both of these decisions turned was found in 29 C.F.R. § 1977.9, which provides express prohibitions against terminating employees who have filed complaints with either their employers or with governmental agencies regarding potential workplace safety violations.

The Second District Court of Appeals seemed to recognize this limitation when, in its opinion in the present case, it quoted the *Kulch* Court's reliance on "the laudable objectives of the federal Occupational Safety and Health Act." (Opinion at 9; Appendix at 20) Yet, in reaching its conclusion in this case, the Second District ignored the fact that Section 1977.9 did not cover the current facts and extrapolated the limited holdings of *Kulch* and *Pytlinski* to conclude that any comment that even indirectly advances the generic notion of workplace safety is sufficient to trigger an exception to the employment-at-will doctrine regardless to whom the comment is made. This potentially limitless assault on the at-will doctrine cannot be endorsed and the original limits of *Kulch* and *Pytlinski* must be restored. The adoption of the Propositions of Law advanced by Eurand, Inc. accomplishes this necessary limitation.

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.

Contrary to Dohme's suggestion in his brief, the clarity element in the wrongful discharge tort is not a meaningless "speed bump" to be easily passed over on the way to allowing a jury to determine whether the employee's termination was just or fair. Rather, under Professor Perritt's model, 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.

To fulfill this important role, a public policy sufficient to satisfy the clarity element of the tort must be specific and tied directly to the conduct involved in the case. General policy statements, however laudable, simply will not suffice because they provide no real guidance to employers. The highest courts of every state to consider the issue have reached this conclusion and every reasoned opinion of the lower courts applying Ohio law have done so as well. *See, e.g., Danny v. Laidlaw Transit Services, Inc.* (Wash. 2008), 2008 Wash. LEXIS 951; *Gardner v. Loomis Armored Inc.* (Wash. 1996), 913 P.2d 377; *Birthisel v. Tri-Cities Health Services Corp.* (W. Va. 1992), 424 S.E. 2d 606; *Turner v. Memorial Medical Ctr.* (Ill. 2009), 233 Ill. 2d 494; *Galyean v. Greenwell* (Washington Cty App. 2007), 2007 WL 453273 ¶52; *Lesko v. Riverside Methodist Hosp.* (Franklin Cty. App. 2005), 2005-Ohio-3142; *Haren v. Superior Dairy, Inc.* (Stark Cty App. 2004), 2004-Ohio-4436 at ¶ 26; *Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 U.S. App. LEXIS 21784; *Evans v. PHTG, Inc.* (Trumbull Cty App. 2002), 2002-Ohio-3381; *Schwenke v. Wayne-Dalton Corp.* (Holmes Cty App. 2008),

2008-Ohio-1412; *Mitchell v. Mid-Ohio Emergency Services L.L.C.* (Franklin Cty App. 2004), 2004-Ohio-5264; *Dean v. Consolidated Equities Realty #3, L.L.C.* (Hamilton Cty App. 2009), 2009-Ohio-2480 ¶12.

In contrast, neither Dohme nor the Second District has offered a single citation to a court that has reached a contrary position on the issue. Yet, both suggest that the generic notion of workplace safety somehow meets the requirements of the clarity element. This Court should establish that the clarity element requires an employee to identify a specific statement of policy in existing Ohio law that applies to the specific facts of the case.

In *Kulch and Pytlinski*, OSHA's anti-retaliation provision, 29 C.F.R. § 1977.9, provided specific notice to employers that terminating employees who reported potential safety violations to either governmental entities or to the employer was prohibited. Thus, Section 1977.9 provided a clear and workable foundation for the public policy tort. In contrast, there is no guidance provided to employers when the claim is based upon any conduct that may be later argued to have even indirectly advanced the general notion of workplace safety. Simply put, the difference between the conduct and policies in this case and those in *Kulch and Pytlinski* is stark.

To be sure, Ohio values workplace safety. However, it does not necessarily follow that the generic notion of workplace safety is sufficient to always satisfy the clarity element of the wrongful discharge tort. Rather, to satisfy the clarity element, the statement of policy must be clear. As the Washington Supreme Court has noted, "'public 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). It is for this reason that numerous courts have rejected broad-based “safety” notions as sufficient to support the tort. *See, e.g., 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.”); *Haren v. Superior Dairy, Inc.* (Stark Cty App. 2004), 2004-Ohio-4436 at ¶ 26 (“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.”)¹ This Court should make that proposition the law of Ohio.

As was detailed throughout Eurand’s and the Amicus’ merit briefs, nearly any fact pattern is susceptible to manipulation so that “workplace safety” is seemingly implicated. As a result, nearly every employment context would be excepted from the employment at-will rule if the Second District’s holding is affirmed. This susceptibility to manipulation highlights the risks of allowing generic statements of public policy to

¹ The Second District’s passing references to 29 CFR § 1910.164 -.165, Ohio Rev. Code § 3737.82, and Ohio Admin. Code § 1301:7-7-01 is equally ineffective. First, Dohme alleged only that the general public policy favoring workplace safety was the basis for his claim. (Complaint at ¶37) Second, neither the Court nor Dohme suggests how a general reference to Ohio’s fire code or to the federal fire detection system regulations has any relevance to the facts of the case. This case involves the contention that documentation of a completed inspection was removed from a tracking system that even Dohme contends was duplicative and “not properly utilized.” (Brief at 5, 9) None of the referenced provisions has any relevance to these facts. Central to the clarity element is that the policy cited must match the facts of the case. This nexus is missing from the secondary sources of policy suggested by the Second District.

satisfy the clarity element. By doing so, the at-will rule of law quickly becomes the exception.

By adopting Proposition of Law No. I, the Court will not be exposing true workplace safety advocates to increased likelihood of improper termination because claims recognized in *Kulch* and *Pytlinski* remain viable. However, this case does not present conduct within the scope of Section 1977.9. This is not a case where there was a statute that required an inspection to be completed by a certain date and Dohme reported to OSHA or his employer that Eurand did not complete it. If it was, then the specific safety policy articulated in Section 1977.9 would be at issue and Dohme's claim would be viable. Instead, this case presents facts where an employee told an insurance appraiser that he was being set up to look like he had not performed his job. No statutory violation was alleged and no unsafe condition was reported to the government or to the employer. In truth, the trial court correctly found that workplace safety was not even involved. Under these circumstances, a generic reference to workplace safety will not satisfy the clarity element of Dohme's claim.

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 its Brief, Eurand demonstrated that the overwhelming majority of existing authority requires that in order to have the protected status of a whistleblower, an employee must voice his safety complaints to either supervisory employees within the

employer or to a governmental body charged with addressing the concerns. In response, Dohme merely recites the passage from *Pytlinski* that the recipient of the whistleblowing is irrelevant. However, as Justice Cook's concurring opinion in *Pytlinski* reflects, that entire proposition of law has never been endorsed by the Court. *Pytlinski*, 94 Ohio St. 3d at 82. ("Kulch was a plurality opinion, and that portion of *Kulch* that the majority cites as supporting the proposition that the elements of a *Kulch* common-law cause of action based on wrongful discharge in violation of public policy 'do not include a requirement that there be a complaint to a specific entity, only that the discharge by the employer be related to the public policy' garnered only three votes. Because a majority of this court did not join the non-syllabus language on which today's majority relies to make this blanket assertion, *this language is not the law.*" (emphasis in original)) The fact is, 29 C.F.R. § 1977.9 requires that protected complaints be made to the employer or a governmental entity. *Pytlinski* involved such a complaint and *Kulch* involved such a complaint. No Court before or after the Second District in this case has found complaints to third parties enjoy the status of protected whistleblowing. This Court should confirm the rule of law that third-party complaints cannot support a common law whistleblowing claim.

The requirement that whistleblowing be directed to the employer or the government is the product of common sense and practical necessity. If whistleblowing is to be effective, the complaints must be made to someone with the direct ability to address the issue. The employer's management has this ability. Governmental agencies have this ability. Third party vendors do not possess the ability to address or remedy an issue that is, by its very definition, external to them. As the Second District reluctantly

acknowledged when “whistleblowing” is directed to third parties, the best that anyone can hope for is that indirect market forces might, over an undefined period of time, eventually effectuate a change. This is, at best, a haphazard and ambiguous process that is not only ill-defined for guiding employers but results in a potentially limitless group of employees who are now exempted from the general rule of at-will employment.

This Court should reject third-party complaints as a form of whistleblowing and adopt Proposition of Law No. II.

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.

In his Brief, Dohme does not really offer any substantive argument regarding why this Court should not reject the isolated position taken by the Second District and instead adopt the rule of law first proposed by the Sixth Circuit Court of Appeals in *Jermer v. Siemens Energy & Automation* (6th Cir. 2005), 395 F.3d 655, 656, concerning the required contents of public policy “whistleblowing.” Rather, Dohme has instead argued that, when the totality of the circumstances are considered, he satisfied the *Jermer* standard. In the end, both the Second District’s rejection of *Jermer* and Dohme’s “totality of the circumstances” positions must be rejected.

In *Jermer*, the court adopted a logical rule of law that, “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." This proposition should be endorsed as the law of Ohio.

As all of the courts that have followed the *Jermer* rule have reasoned, not requiring the employee to give some indication to the employer of the employee's public-policy contentions places the employer in the impossible position of responding to the unspoken, and perhaps even the unintended. See, e.g., *Gaskins v. The Mentor Network-REM* (Cuyahoga Cty App. 2010), 2010-Ohio-4676; *Aker v. New York and Co., Inc.* (N.D. Ohio 2005), 364 F. Supp. 2d 661; *Kohorst v. Van Wert County Hosp.* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 124703 *17; *Sollitt v. Keycorp* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 34328 *2-*3; *Kirk v. Shaw Environmental, Inc.* (N.D. Ohio 2010), 2010 U.S. Dist. LEXIS 51332; *Milhouse v. Care Staff, Inc.* (Mahoning Cty App. 2007), 2007-Ohio-2709. Such a burden has no place in Ohio law.

If the employee is truly seeking to advance a public policy in his or her interactions with the employer, it is neither unreasonable nor burdensome to require that this fact be articulated. By requiring an employee to do so, the employer is then better equipped to analyze the situation. In fact, when an employer is provided with the employee's reason for his or her actions, it is not hard to imagine that a termination could be avoided altogether because, for example, a protest based upon the interests of workplace safety will undoubtedly be viewed differently than protests based upon the employee's isolated self-interest. In short, the balancing of interests that exists at the core of the wrongful discharge tort supports the *Jermer* position.

Just as the Second District's rejection of the *Jermer* rule is unwarranted, so too is Dohme's position that the totality of the circumstances suggest that summary judgment for Eurand was inappropriate under the *Jermer* standard. Although it is beyond debate that Dohme was a disruptive employee who was constantly complaining about nearly every co-worker and every circumstance at work, it does not necessarily follow that any of his many complaints over a two-year period are relevant to his termination. To the contrary, Dohme definitively testified that he was terminated solely as the result of him confronting the insurance appraiser in an effort to protect his performance from being criticized. (Dohme Depo. at 247, 264; Complaint ¶37) Thus, only Dohme's conduct in that incident is relevant to his wrongful discharge claim.

The record on this point is clear. Eurand did not terminate Dohme in 2001 and he did not mention any event from 2001 two years later when he confronted the insurance appraiser. Eurand also did not terminate Dohme in 2002 after his numerous complaints about "ongoing organizational concerns, employee performance, overtime issues, plant safety, and a flawed chain of communication and command" and he did not mention any of those myriad of issues to the insurance appraiser in 2003. (Complaint at ¶7)

Rather, Dohme was terminated on March 26, 2003, the morning after he confronted the insurance appraiser and Dohme testified that this confrontation was the only event that caused his termination. (Dohme Depo. at 247, 258, 264; Complaint ¶37) Thus, it is only Dohme's conduct in connection with his confrontation of the insurance appraiser that is at issue. On that occasion, Dohme clearly did not "at least give the employer clear notice that the employee's complaint is connected to a governmental policy "or that he was" is invoking governmental policy [such] that a reasonable

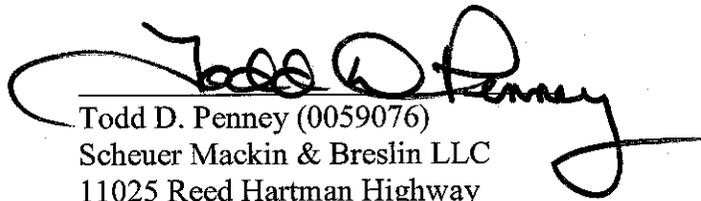
employer would understand that the employee relies on the policy as the basis for his complaint.” *Jermer* 395 F.3d at 656.

The only possible reading of the record – which on this issue is comprised solely of Dohme’s testimony – is that 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 behavior did not put Eurand on notice that Dohme was advancing a governmental policy and, as a result, summary judgment in Eurand’s favor was warranted on this ground alone.

CONCLUSION

For the reasons stated in the Merit Brief and in this Reply, Propositions of Law Nos. I, II, and III should be adopted as the law of Ohio and the decision below must be reversed.

Respectfully submitted,



Todd D. Penney (0059076)
Scheuer Mackin & Breslin LLC
11025 Reed Hartman Highway
Cincinnati, OH 45242
(513) 984-2040 ext. 219
tpenney@smbllaw.net

COUNSEL FOR APPELLANT
EURAND AMERICA, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Brief of Appellant was sent by ordinary U.S. Mail to the following Counsel of Record for on April 15th 2011:

David M. Duwel
130 W. Second Street, Suite 2101
Dayton, OH 45402

Counsel for Appellee Randall Dohme

Donald R. Keller (0022351)
Vladimir P. Belo (0071334)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291

Counsel for Amicus Curiae
Ohio Management Lawyers Association


Todd D. Penney

COUNSEL FOR APPELLANT
EURAND AMERICA, INC.