IN THE SUPREME COURT OF OHIO

RANDALL J. DOHME, Appellee, v. EURAND AMERICA, INC. Appellant.	:	Case No. 2007-0640 On Appeal from the Montgomery County Court of Appeals, Second Appellate District

MERIT BRIEF OF APPELLANT EURAND AMERICA, INC. ADDRESSING PROPOSITION OF LAW NO. I

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STATEMENT OF FACTS

A. Procedural Background

This Brief is submitted under somewhat unique circumstances. Appellant Eurand, Inc. (formerly Eurand America, Inc.) (referred to in the Brief as "Eurand") originally submitted to the Court three Propositions of Law for its consideration. By entry dated June 20, 2007 the Court agreed to hear Propositions of Law Nos. II and III, but declined to hear Proposition of Law No. I. Propositions of Law Nos. II and III were briefed and oral argument was held in February, 2008. On October 1, 2008, the Court filed an Entry, *sua sponte,* directing the parties to submit merit briefs on Proposition of Law No. I. Eurand submits this Merit Brief in compliance with the Court's October 1, 2008 Entry.

Appellee Randall Dohme ("Dohme") was terminated from his employment with Eurand following his admitted disregard of a management directive that the employees at Eurand's facility direct contact with an insurance company employee, who was on site for a two-day review of the premises for the submission of an insurance policy proposal, through specifically-identified individuals. (Supp. at 70-73, 87; Dohme Depo. at 248–251, Exhibit DD) Dohme alleged that his termination constituted a wrongful discharge in violation of public policy because, citing *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, general workplace safety was implicated. As Dohme reasoned, "[u]nder the law crafted by *Pytlinski,* nothing more *specific* is required." (Dohme Memorandum in Opposition to Summary Judgment at 20-21, italic in original) The Montgomery County Court of Common Pleas granted summary judgment in Eurand's favor on the wrongful discharge claim reasoning that a policy favoring workplace safety was not implicated in Dohme's termination because "Plaintiff's statements did not indicate a

concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance. The only relevance safety has in the instant case is that the missing report contained the results of a fire alarm system inspection." (Appx. at 29)

Dohme appealed the adverse judgment on his claim to the Montgomery County Court of Appeals. The Montgomery County Court of Appeals reversed the ruling of the trial court and expanded the wrongful discharge tort beyond its previously-existing bounds, in part through an expanded reading of *Pytlinski* and *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St. 3d 134.

Specifically, the Second District ignored the fact that Dohme did not even suggest in his conversation that an unsafe work environment existed, ignored that Dohme did not raise actual safety concerns with the government or Eurand, and nevertheless found that the potential choice between higher insurance premiums and remedying an unarticulated, unknown workplace safety issue might indirectly advance the public's interest in workplace safety.[1] (Appx. at 13-14) In other words, the Second District concluded that even though Dohme never actually mentioned safety and admittedly did not report a concern to either Eurand or a governmental body, a termination under these circumstances nevertheless jeopardized the general public policy of Ohio favoring workplace safety. (Appx. at 16-17)

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[1] When explaining the basis for its conclusion, the Second District stated, "[w]hen an employer directs employees to not speak to an insurance representative inspecting a premises, an implication arises that the employer wishes to cover up defects, including those that create a danger to employees." However, this "implication" is wholly unsupported by the record. Even Dohme characterized the process of having limited points of contact whenever third parties entered the facility as routine at Eurand. (Supp. at 71-72; Dohme Depo. at 249-250)

It is this erroneous ruling that Eurand seeks to have reversed in this appeal.

B. Factual Background

Eurand is engaged in the manufacture and sale of drug delivery systems used in the pharmaceuticals industry. (Supp. 88; Cruz Aff. ¶ 2) Dohme is an electrician by trade who began work with Eurand on January 12, 2001 to supervise its maintenance staff. (Supp. 3; Dohme Depo. at 20)

During his brief employment with Eurand, Dohme had conflicts with his co-workers and direct reports, failed to perform his duties to management's expectations, was the subject of various employee complaints to management and human resources, and was the subject of a complaint from an independent contractor who was working at the facility who relayed that Dohme had engaged in offensive behavior. (Supp. 4-33, 38-52, 80; Dohme Depo. at 43-66, 69, 73-77, 90, 143-151, 153-157, Exhibit A) This conduct resulted in a dysfunctional workplace, shifted reporting relationships, and discipline for Dohme. (Supp. 34-37, 80, 83; Dohme Depo. at 78-81, Exhibits A, Y) As a further result, Dohme's relationship with his supervisors became adversarial and on July 9, 2002, Dohme was relieved of his supervisory responsibilities. (Supp. 53-66, 68, 82; Dohme Depo. at 158-171, 204, Exhibit W)

Dohme's conduct did not improve following his demotion and a final act of insubordination resulted in Dohme's termination. Specifically, on March 21, 2003, Eurand sent an e-mail to all of its Vandalia employees explaining that on March 24 and 25 an employee of an insurance company would be visiting the premises, and Eurand instructed employees to direct contact with him through certain identified employees. (Supp. at 70, 87; Dohme Depo. at 248, Exhibit DD) Dohme understood that the

individual was an employee of a private insurance company who was coming to review the building in connection with submitting a bid for providing insurance coverage. (Supp. at 70-72; Dohme Depo. at 248-250)

Facility inspections are routine at Eurand. A facility review by an insurer occurred only months before the one at issue in the case. (Dohme Depo. at Ex. Q) Eurand also has routine inspections by local fire officials to insure its plant's safety. (Dohme Depo. at 137-138) The facility is also reviewed by the Food and Drug Administration. (Dohme Depo. at 249-250) Because of the frequency of review and the need for those involved to have complete and accurate information, Eurand formalized its information delivery process. As Dohme himself explained, the process of having points of contact in such reviews is something "that would normally come out whenever FDA was there or anything like that" and acknowledged that it was a "standard" practice. (Dohme Depo. at 249-250). In short, when Eurand sent an e-mail to all of its Vandalia employees explaining that on March 24 and 25 an employee of an insurance company would be visiting the premises and instructing employees to direct contact with him through certain identified employees, Dohme understood what was expected of him, understood why it occurred, and knew that nothing inappropriate was involved. (Supp. at 70-72, 87; Dohme Depo. at 248-250, Exhibit DD)

On the second day of the insurance agent's visit, Dohme was called by Eurand's receptionist who was looking for another individual, who was identified as a contact point for the agent, to come meet the insurance agent. Dohme testified, "I said I will try to find him but I'll come down and greet him." (Supp. 73-74; Dohme Depo. at 251–252) When Dohme sought out the insurance company employee he did not merely "greet" the

individual. Instead he immediately took out papers and, as Dohme describes it, "I just said you might want to find out what happened with that inspection, and that was the end of the conversation." (Supp. 73; Dohme Depo. at 251) Contrary to the inference suggested by the Second District, Dohme did not contend to the agent that the inspection was not completed or that the facility was somehow unsafe. Rather, Dohme stated that he believed that the record of the inspection was removed to make it look as if he did not perform it. (Supp. at 75-76; Dohme Depo. at 253-254) In short, Dohme feared only that he was being "set up" for a performance deficiency and told the insurance employee only that – "I told Mr. Lynch, somebody made this disappear and I'm afraid they're trying to make it look like I wasn't doing my job." (Supp. 77; Dohme Depo. at 255)

Eurand terminated Dohme's employment for his confrontation of the insurance agent in contradiction of its directive. (Supp. 69, 78, 79; Dohme Depo. at 247, 256, 259) As found by the trial court and acknowledged by the Second District, the record in this case is clear. "Plaintiff's statements did not indicate a concern for work place safety. The plain language of his comments only indicates his own suspicion that the missing report is an attempt by Defendant to set him up for a deficient job performance." (Appx. at 29)

ARGUMENT

Proposition of Law No. I:

To satisfy the clarity element of a wrongful discharge claim an employee must articulate a policy based in existing Ohio law that addresses the specific facts of the incident rather than merely making a generic reference to workplace safety.

Proposition of Law No. I presents the Court with an opportunity to clarify an issue first raised in, but not resolved by, the syllabus of *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, regarding the role of the "workplace safety" public policy in the context of the wrongful discharge tort. More specifically, the Court should use this case to clarify that while the general proposition of promoting workplace safety is without question one that is embraced by Ohio, to satisfy the clarity element of the wrongful discharge claim, the employee must identify a *specific* safety policy implicated by his termination rather than merely making a passing reference to general workplace safety. Without this clarification, the appellate courts of Ohio will continue to misread *Pytlinski* and expand the circumstances to which the limited exception applies.

A. Wrongful Discharge is a Limited Exception to the At-Will Doctrine.

This Court has long recognized that "[t]he traditional rule in Ohio and elsewhere is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee's rights, and a discharge without cause does not give rise to an action for damages." *See Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 67 (citations omitted). To date, Ohio has recognized only

limited exceptions to the at-will doctrine. However, the decision of the Second District in this case is a large stride toward the exception subsuming the rule.

The only exception to the at-will doctrine that is at issue in this case involves the tort of wrongful discharge in violation of a public policy, which was adopted in *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St. 3d 228. To establish a claim for wrongful discharge in violation of public policy, a plaintiff must establish the following elements: (1) that a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); (3) that plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and (4) that the employer lacked an overriding legitimate business justification for the dismissal (the overriding justification element). *Painter v. Graley* (1994), 70 Ohio St. 3d 377, 384; *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 69-70 *citing H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?* (1989), 58 U. Cin. L. Rev. 397, 398-399.

Eurand has challenged Dohme's ability to satisfy both the clarity and jeopardy elements of his claim. Propositions of Law Nos. II and III address the jeopardy element. These issues were briefed in Eurand's original Merit Brief and will not be further addressed here. Rather, this Brief will address only Proposition of Law No. I, which solidifies the previously-recognized position that a plaintiff asserting a claim for wrongful discharge in violation of public policy premised on workplace safety must

articulate a specific public policy concerning workplace safety that exists in the law and is implicated by the facts in the case.

B. The Clarity Element is not Satisfied by a General Reference to Workplace Safety.

The Sixth Circuit has noted, "[t]he Ohio Supreme Court has charted a somewhat jagged course in considering what constitutes a clear public policy for purposes of this tort." *See Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 U.S. App. LEXIS 21784 at *15. As a result of the complexity involved in tightly defining what constitutes a clear public policy, the lower court case decisions vary widely regarding what statement of policy satisfies the clarity element. The adoption of Proposition of Law No. I alleviates some of the confusion that exists in the area by directing that an employee who is asserting a wrongful discharge claim cannot merely rely on the vague notion of "workplace safety" as the basis of the claim but must identify the specific safety policy that is implicated by the facts of the case.

Requiring employees who are claiming the existence of a public policy to identify the policy with specificity is not new. Courts interpreting the wrongful discharge tort have long required the employee asserting the tort to plead and prove the existence of a *specific* statement of law that reflects the public policy at issue. In *Poland Township Bd. of Trustees v. Swesey* (Mahoning Cty. App. 2003), 2003-Ohio-6726, the court explained its interpretation of the requirement as follows:

> It was [plaintiff's] burden to indicate the specific public policy at issue and to establish how that clear public policy was violated by his termination. *Sorensen v. Wise Mgt. Services, Inc.*, 8th Dist. No. 81627, 2003-Ohio-767 (stating that a person seeking to apply the public policy exception to the at-will employment doctrine must state with specificity the law or policy that was violated by his termination); *Gargas v. City of Streetsboro*, 11th Dist. No. 2000-P-0095, 2001-

> Ohio-4334 (stating that the burden to produce specific facts demonstrating that a clear public policy exists and that discharge under the circumstances violates that public policy is the burden of the person claiming he was wrongfully discharged); *Carver v. Universal Well Serv., Inc.* (Aug 20, 1997), 9th Dist. No. 96CA0082 (stating "when pleading this cause of action, a plaintiff must indicate the specific public policy at issue and explain how it was violated.")

See also, Lesko v. Riverside Methodist Hosp. (Franklin Cty App. 2005), 2005-Ohio-3142; *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."). Unfortunately, without much discussion or analysis, some courts have deviated from this requirement when an employee asserts, without more, that "workplace safety" is implicated by his dismissal. However, a general reference to "workplace safety" does not satisfy a plaintiff's burden and the courts' acceptance of such appears to originate from a misreading of prior cases.

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

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

A close reading of *Kulch* confirms its limited application. In performing its analysis of the clarity element, the Court in *Kulch* identified the bases for the public policy involved and specifically stated, "[t]he first main source of expressed public policy can be found in Section 660(c), Title 29, U.S. Code, which specifically prohibits employers from retaliating against employees (like appellant) who file OSHA complaints." *Kulch*, 78 Ohio St. 3d at 151.[2] In other words, the Court in *Kulch* found the existence of a workplace safety policy in a specific statute that applied to the facts of the case – not from the general notion that Ohio values safe workplaces. Thus, contrary to the conclusion of the Second District, *Kulch* does not stand for the proposition that even absent an applicable safety statute or regulation, the general notion of workplace safety is always an independent basis on which to maintain a wrongful discharge claim.

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

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

Thus, the Sixth Circuit concluded, "*Kulch* is typical; the wrongful discharge tort provides the remedy where the statute is silent." *Id.* at *17. Unfortunately, too many Ohio appellate courts have not recognized this limitation, perhaps due to the issuance of the decision in *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77. However, *Pytlinski* also made no pronouncement of a global "workplace safety" public policy.

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

When first accepted by the Court, *Pytlinski* did not involve an analysis of the clarity element of the wrongful discharge claim. Rather, as the Court noted, "Pytlinski presents a single issue for our consideration. We are called upon to determine whether the court of appeals erred in applying the one-hundred-eighty-day limitations period set forth in R.C. 4113.52 to Pytlinski's common-law claim for wrongful discharge in violation of public policy." *Pytlinski*, 94 Ohio St. 3d at 78. However, in resolving that limited issue the Court made statements that significantly impacted the future developments of the wrongful discharge tort. Not the least of this impact concerns the workplace safety public policy.

The members of the Court in *Pytlinski* were presented with a specific fact pattern in which an employee alleged that he was terminated in retaliation for complaining to the management of the company regarding perceived OSHA violations. Thus, the employee in *Pytlinski* had engaged in a form of "whistleblowing." As a result of this whistleblower context, the Court was required to determine whether the employee was limited to basing the public policy on that reflected in Revised Code § 4113.52 (which under *Contreras v. Ferro Corp.* (1995), 73 Ohio St. 3d 244, would require compliance with its procedural requirements) or whether the employee could proceed independent of that section's public policy if he could identify another applicable source of public policy. *Pytlinski*, 94 Ohio St. 3d at 79-80. Relying on *Kulch,* the Court held *only* that the "Ohio public policy favoring workplace safety *is an independent basis* upon which a cause of action for wrongful discharge in public policy may be prosecuted." *Id.*, 94 Ohio St. 3d at 80 (italic added). In other words, the issue resolved in *Pytlinski* was only whether the safety policy reflected in OSHA's anti-retaliation provision could support the claim or whether the

employee had to comply with Section 4113.52 because his claim sounded in whistleblowing.

Contrary to the opinion of some courts, the *Pytlinski* decision did not hold, and the Court did not even discuss, whether a general reference to workplace safety could satisfy the clarity element of the wrongful discharge tort when the facts of a given case did not implicate 29 U.S.C. § 660(c). The limitation of the *Pytlinski* decision is reinforced by the fact that Pytlinski made internal complaints of perceived OSHA violations, an act protected by the OSHA statute's anti-retaliation provision. *See, e.g., Dunlop v. Hanover Shoe Farms, Inc.* (M.D. Pa. 1976), 441 F. Supp. 385; 29 C.F.R. § 1977.9(c). Given this context, there was no need for the *Pytlinski* Court to – and it did not – rely on a general workplace safety policy because there was a specific safety statute establishing the public policy in that case.

In short, neither the holdings nor the reasoning of the *Kulch* and *Pytlinski* decisions mandate that the generic notion of workplace safety will satisfy the clarity element of the wrongful discharge claim irrespective of context. Thus, this Court is not constrained by *stare decisis* in resolving the issue before it.

D. The Rationale of Many Ohio Appellate Court Decisions Supports Proposition of Law No. I.

A few of the appellate courts presented with the issue of whether a general reference to safety satisfies the clarity element have simply referred to the syllabus of *Pytlinski* as mandating such and proceeded without analysis. However, the courts that have analyzed the issue and applied critical analysis have invariably required employees

to identify a *specific* statement of policy applicable to the facts of their case. The Court should endorse such an analysis.

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

The Sixth Circuit reached a similar conclusion in *Herlik v. Continental Airlines, Inc.* (6th Cir. 2005), 2005 U.S. App. LEXIS 21784 , where it too rejected the generic assertion of "safety" as an underlying public policy where a pilot questioned another pilot about potentially unsafe flight techniques.

Courts have also rejected broad-brushed policy claims outside of the workplace safety context. The Eleventh District Court of Appeals recognized the failings of basing a wrongful discharge tort on "a broad societal interest" in *Evans v. PHTG, Inc.* (Trumbull Cty App. 2002), 2002-Ohio-3381. There, an employee claimed that the broad societal interest in preventing the unauthorized practice of medicine satisfied the clarity element of her claim. Relying on both *Kulch* and *Pytlinski*, the court rejected the proposition by reasoning that if the employee wants to assume the protected status of a whistleblower, she must either comply with the dictates of Revised Code § 4113.51 or point to a specific statement of policy in the law that addressed the circumstances of the termination. *Evans,* 2002-Ohio-3381 at ¶¶ 31-38. This is the proper reading of *Kulch* and *Pytlinski* and the same analysis is equally applicable to the broad proposition of workplace safety.

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

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

> any physician or health care worker who complained to anyone about patient care issues at anytime during their employment who is later discharged, could file an action for wrongful termination in violation of public policy. Ohio law does not support such a *sweeping* interpretation of the public policy exception to employment at-will. If we were to hold otherwise, Ohio's long-standing and predominate rule that employees are terminable at-will would disappear.

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

The expansion of the *Pytlinski* decision has significantly eroded the employment at-will doctrine in Ohio because, in practice, nearly any scenario can be construed to implicate workplace safety. An employee who complains about the storage conditions of cafeteria food that is sometimes eaten by employees has implicated workplace safety. *See e,.g., Miller v. Medcentral Health System, Inc.* (Richland Cty App. 2006), 2006-Ohio-63. An employee who relays observations about other employees drinking on the

job has arguably implicated workplace safety. *See, e.g., Krickler v. City of Brooklyn* (Cuyahoga Cty App. 2002), 149 Ohio App. 3d 97, 103-104. And, according to the Second District, talking to your employer's insurance vendor about your own job performance implicates workplace safety. In truth, only an unimaginative attorney cannot formulate a safety implication out of any termination. Such an expansion of a limited exception is unwarranted and should not be premised on misapplied precedent.

The Fifth District Court of Appeals recognized the slippery slope the generic "workplace safety" doctrine presented when it rejected the concept and held, "Appellant has proposed we adopt a very vague public policy of 'employee safety' and 'anti-retaliation' concepts too nebulous to provide guidance for courts, employers, or employees to interpret." *Haren v. Superior Dairy, Inc.* (Stark Cty App. 2004), 2004-Ohio-4436 at ¶ 26. This Court should embrace that rationale and restrict the oftentimes misinterpreted language in *Pytlinski* to the context for which it was originally intended.

Requiring employees to identify a specific statement of policy in existing sources of law will provide the needed guidance in this area of law and will restrict the contortion of every fact pattern into a workplace safety case.

E. The Second District Improperly Decided this Case.

Dohme was terminated for disobeying a company directive with his only motivation being his fear he was being "set up" to facilitate his termination. When he acted to prevent the perceived set up, Dohme contacted only a private insurance company representative. There is no public policy in existing law that is applicable to these facts

and Dohme's attempt to rely on the general notion of workplace safety to satisfy his clarity element must be rejected.

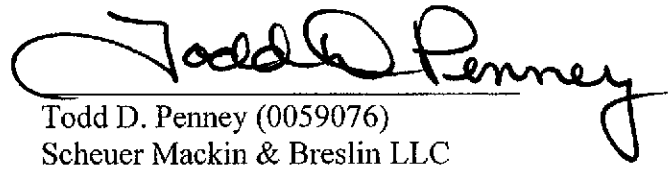
If an employee intends to refer to workplace safety as the public policy supporting the clarity element of his claim, the Court must require the employee to identify a specific statement of policy in existing law that addresses the actual context of the employee's termination. An employee's refusal to work mandatory overtime should not be transformed into a workplace safety concern because employees are more alert in their first hour of work than in their ninth hour. An employee who is terminated for refusing to wear a mandatory uniform that he merely does not like should not be transformed into a workplace safety issue because a happy worker is more attentive than an unhappy worker. The delivery employee who fails to report to work on a rainy day has not implicated workplace safety because statistics show more traffic accidents occur on rainy days than on dry ones. An employee simply cannot rely on the infinite configurations of "workplace safety" to satisfy the clarity element. Instead, he must identify a specific safety policy in existing law that applies to his specific circumstances. To hold otherwise emasculates the employment-at-will doctrine.

In rejecting Dohme's claim, the Trial Court properly held that, "Plaintiff fails to articulate what public policy Defendant violated when it discharged Plaintiff..." (Decision at 7) The record overwhelmingly supports this conclusion.

CONCLUSION

The decision of the Second District is fundamentally wrong and is a dangerous encroachment on the at-will doctrine. Thus, the decision below must be reversed.

Respectfully submitted,



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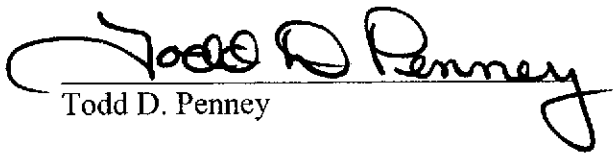
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief of Appellant was sent by ordinary U.S. Mail to Counsel of Record for Appellee, David H. Duwel, 130 W. Second Street, Suite 201, Dayton, OH 45402 and Counsel of Record for Amicus Curiae, Richard R. Renner, Tate & Renner, 505 N. Wooster Avenue, P.O. Box 8, Dover, Ohio 44622 on October 16, 2008.



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APPENDIX

IN THE SUPREME COURT OF OHIO

EURAND AMERICA, INC.	:	07-0640
Appellant,	:	On Appeal from the Montgomery County Court of Appeals,
v.	:	Second Appellate District
RANDALL J. DOHME	:	Court of Appeals Case No. 21520
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT EURAND AMERICA, INC.

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Notice of Appeal of Appellant Eurand America, Inc.

Appellant Eurand America, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals case No. 21520 on March 2, 2007.

The case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee David M. Duwel and Todd T. Duwel, 130 W. Second Street, Suite 2101, Dayton, Ohio 45402 on April 11th, 2007.

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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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

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O P I N I O N

Rendered on the 2nd day of March, 2007.

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Attorney for Defendant

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GRADY, J.

Plaintiff, Randall Dohme, appeals from a summary judgment for Defendant, Eurand America, Inc. ("Eurand"), on Dohme's wrongful discharge claim.

Eurand hired Dohme on January 12, 2001 as an Engineering Supervisor. In August 2001, there was a fire on Eurand's

property. Dohme pulled a fire alarm but the alarm did not activate. Dohme had to run to another fire alarm station to pull the alarm. Dohme was taken to the hospital and treated for smoke inhalation. Subsequently, Dohme reported what he believed to be fire safety problems to a fire captain with the Vandalia Fire Department.

During his first eighteen months with Eurand, issues arose regarding Dohme's interaction with his co-workers and with an independent contractor. On July 9, 2002, Dohme was reassigned to assume the duties of Facilities/Computerized Maintenance Management System Administrator, which included responsibilities relating to Eurand's fire system. On November 4, 2002, Dohme was granted leave by Eurand under the Family Medical Leave Act. He returned to work on a full-time basis on January 20, 2003.

On March 21, 2003, Eurand sent an e-mail message to its employees advising them that an insurance inspector would be visiting Eurand on March 24-25, 2003 to perform a site survey and risk assessment. Dohme believed that the insurance inspector was there to rate how safe the facility was. (Dohme Depo., p. 249.) Eurand instructed its employees not to speak to the inspector, but identified certain employees in the e-mail who had permission to speak to the inspector. Dohme was

not identified in the e-mail as an individual with permission to speak to the inspector.

According to Dohme, on March 25, 2003, he was asked by an employee of Eurand to greet the inspector, because another Eurand employee was unavailable to do so. Dohme approached the inspector in Eurand's lobby and presented the inspector with a computer printout that showed overdue fire alarm inspections. A scheduled March 20, 2003 overdue fire alarm inspection was not reflected on the printout. Dohme told the inspector that he may want to check out what happened with that inspection. Dohme testified that he was concerned that he would be blamed for the omission. (Dohme Depo., pp. 250-56.) On March 27, 2003, Eurand fired Dohme.

On June 9, 2003, Dohme commenced a civil action against Eurand, alleging violations of the Fair Labor Standards Act, as adopted and codified in R.C. 4111.01, the Family and Medical Leave Act, and Ohio public policy relating to workplace safety. Pursuant to 28 U.S.C. §§ 1331, 1441, and 1446(b), Eurand removed the action to federal court. On November 29, 2004, the federal court sustained Eurand's motion for summary judgment on the Family and Medical Leave Act claim, and supplemental state claims were transferred to the common pleas court.

Eurand moved for summary judgment on Dohme's two remaining state claims. On November 21, 2005, the trial court granted summary judgment on the wrongful discharge claim and denied summary judgment on the R.C. 4111.01 claim. Dohme elected to voluntarily dismiss his R.C. 4111.01 claim in order to perfect his right to appeal the summary judgment on his wrongful discharge claim. On March 7, 2006, the trial court determined that there was no just reason for delay of any appeal of its summary judgment. Dohme filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY AWARDING EURAND JUDGMENT ON THE ISSUE OF DOHME'S WRONGFUL DISCHARGE CLAIM."

The general rule is that, absent an employment contract, the employer/employee relationship is considered at-will. *Painter v. Graley*, 70 Ohio St.3d 377, 382, 1994-Ohio-334. Thus, the employer may terminate the employee's employment for any lawful reason and the employee may leave the relationship for any reason. Id. There are exceptions to the general rule. In *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228, 235, 551 N.E.2d 981, the Supreme Court held that an exception to the traditional common law

doctrine of employment-at-will exists where an employee is terminated wrongfully in violation of public policy. Public policy is generally discerned from the United States and Ohio Constitutions, statutes, administrative rules and regulations, and common law. *Painter*, 70 Ohio St.3d at 384.

To state a claim of wrongful discharge in violation of public policy, a plaintiff must demonstrate the following four elements: (1) a clear public policy exists and is manifested in a state or federal constitution, statute, administrative regulation, or common law (the "clarity" element); (2) the dismissal of employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the "jeopardy" element); (3) the plaintiff's dismissal was motivated by conduct related to the public policy (the "causation" element); and (4) the employer lacked overriding legitimate business justification for the dismissal (the "overriding justification" element). *Collins v. Rizkana*, 73 Ohio St.3d 65, 69-70, 1999-Ohio-135 (citation omitted). The clarity and jeopardy elements involve relatively pure law and policy questions and are questions of law to be determined by the court. Id. at 70. The jury decides factual questions relating to causation and overriding justification. Id.

The trial court granted summary judgment based solely on Dohme's failure to establish the clarity element. The trial court held that:

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

"Because Plaintiff can articulate no public policy of which Defendant is in violation, the court need not and can not analyze the other elements established by the Supreme

Court in *Painter*. As such, because the court was presented no public policy which prohibits an employer from discharging an employee for disobeying an order, not in violation of any statute or any other regulation, the court finds that no genuine issue of material fact exists as to the basis of Plaintiff's discharge."

The trial court placed great emphasis on Dohme's intentions when he confronted the underwriter. Dohme testified as follows regarding his encounter with the insurance inspector:

"Q: When you approached [the inspector] in the lobby that day, did you identify your role with Eurand?

"A: Yes, I did.

"Q: What did you tell him?

"A: I said something to the fact that here's my card and I had scratched out engineering supervisor and I told him that I used to be engineering supervisor and I'm in charge of the fire safety stuff and also in charge of the computer -- the CMMS system. . . . And he said what's that. I said well, I got the feeling that they're trying to make it look like I'm not doing my job and I got the forms out and I showed him on January 20 the fire alarm was overdue and February 20 the same report and on March

20 it was missing. It didn't say it had been done, not done, it was nowhere in the system. I just said you might want to find out what happened with that inspection, and that was the end of our conversation.

* * *

"Q: And at that point in time, I believe your testimony was earlier you were no longer in charge of the fire alarm?

"A: I wasn't even doing anything with it, but my job description said I still should have been. That's what worried me. When I got my appraisal, it's back here, I got dinged for stuff I wasn't doing the first six months of the year and some things that I shouldn't have been doing the second six months of the year.

I was under the impression that even though this is on my job description, he's still going to hold me accountable for it. That's what I told [the inspector], somebody made this disappear and I'm afraid they're trying to make it look like I wasn't doing my job."

(Dohme Depo., pp. 250-55.)

The trial court stressed the fact that Dohme was not motivated by a desire to report workplace safety issues to the inspector but, instead, to protect himself from complaint or criticism. But the employee's intent is largely irrelevant in

an analysis of the clarity element of a wrongful discharge claim. What is relevant is whether Dohme did in fact report information to the inspector that encompassed a public policy favoring workplace safety. If Dohme did so, then the trial court erred in granting summary judgment.

The Supreme Court has recognized the abundance of Ohio statutory and constitutional provisions that support workplace safety and form the basis of Ohio's public policy, which is "clearly in keeping with the laudable objectives of the federal Occupational Safety and Health Act." *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 152, 677 N.E.2d 308. See also *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 89, 2002-Ohio-66. Ohio's Fire Code includes rules relating to the installation, inspection, and location of fire protection equipment. R.C. 3737.82; O.A.C. 1301:7-7-01, et seq. Further, there are federal laws relating to fire protection and employee alarm systems. 29 C.F.R. § 1910.164, 1910.165. Employers also are subject to inspections from local fire authorities. There is a clear public policy favoring workplace fire safety. Therefore, retaliation against employees who raise concerns relating to workplace fire safety contravenes a clear public policy.

According to Dohme, the information he shared with the

insurance inspector concerned whether or not the fire alarm system was inspected at the appropriate times. Dohme had a prior experience at Eurand when he was injured after a fire alarm malfunctioned. He also had reported prior fire safety concerns to a member of the Vandalia Fire Department. An employee who reports fire safety concerns to the employer's insurance inspector, regardless of the employee's intent in doing so, is protected from being fired solely for the sharing of the safety information.

Eurand argues that Dohme's claim must fail because Dohme did not report the safety issue to a governmental employee. We do not agree. It is the retaliatory action of the employer that triggers an action for violation of the public policy favoring workplace safety. "The elements of the tort do not include a requirement that there be a complaint to a specific entity, only that the discharge by the employer be related to the public policy." *Pytlinski*, 94 Ohio St.3d at 80, n.3 (citation omitted).

Furthermore, Eurand's argument ignores the fact that an insurer's requirements may function to avoid fire safety defects. When such requirements are imposed, or higher premiums are the alternative, an employer such as Eurand is motivated to cure safety defects. The market thus plays a

role different from that of government, which may issue citations, but perhaps more immediate and compelling. And, making the insurer aware of defects through its representative furthers the public interest in effective fire safety measures.

Eurand cites *Branan v. Mac Tools*, Franklin App. No. 03AP-1096, 2004-Ohio-5574, in support of the trial court's decision to grant summary judgment on the clarity element. In *Branan*, the fired employee filed a claim under the whistleblower statute (R.C. 4113.52) based on alleged false imprisonment that occurred during a meeting with supervisors involving the disclosure of the employer's confidential information. No workplace safety concerns were raised in *Branan*. Further, Dohme is not alleging a whistleblower claim. Therefore, *Branan* is inapposite.

Eurand also argues that summary judgment was appropriate because Dohme cannot establish the jeopardy element. The trial court did not specifically address this element, but the trial court's discussion of the employee's self-interest in bringing a concern to the insurance inspector, according to Eurand, arguably implicates the jeopardy element. Because the jeopardy element concerns a question of law, we will address Eurand's argument. According to Eurand, Dohme cannot

establish that the public policy favoring workplace safety is jeopardized by Dohme's discharge from employment. Eurand cites four cases in support of its argument. We find that all four of these cases are inapposite.

In *Jermer v. Siemens Energy & Automation, Inc.* (6th Cir. 2005), 395 F.3d 655, 658, the plaintiff contacted his employer's ethics hotline to report his concerns that his employer's air quality problems had not been addressed. Prior to this contact between the plaintiff and the employer's ethics hotline, the employer had decided to fire the plaintiff due to the plaintiff's prior conduct in the workplace. Unlike *Jermer*, Dohme was not fired for prior conduct, but rather was fired for his conversation with the insurance inspector contrary to Eurand's order to its employees. Of course, it is a question of fact for the jury whether Eurand fired Dohme because he raised safety concerns with the inspector or for reasons unrelated to the safety concerns Dohme raised.

The *Jermer* court also relied heavily on the fact that the plaintiff did not give his employer sufficient notice that he was raising a workplace safety issue. According to *Jermer*, "The Ohio Supreme Court views employee complaints and whistleblowing as critical to the enforcement of the State's public policy, and the Court therefore intended to make

employees de fact 'enforcers' of those policies. Toward this end, the Court granted them special protection from Ohio's generally applicable at-will employment status when the employees act in this public capacity. In exchange for granting employees this protection, employers must receive notice that they are no longer dealing solely with an at-will employee, but with someone who is vindicating a governmental policy. Employers receive clear notice of this fact when actual government regulators arrive to audit or inspect. They should receive some similar notice when an employee functions in a comparable role. Even though an employee need not cite any specific statute or law, his statements must indicate to a reasonable employer that he is invoking governmental policy in support of, or as the basis for, his complaints."

We disagree with the *Jermer* court's implication that an employee must make some formal announcement that his statements are being made for the purpose of protecting the public policy favoring workplace safety. Employers are presumed to be sophisticated enough to comply with the workplace safety laws. When an employer directs employees to not speak to an insurance representative inspecting a premises, an implication arises that the employer wishes to cover up defects, including those that create a danger to

employees. Supporting the employer's conduct endorses its efforts to conceal potential dangers. As the *Jermer* court recognized, the Supreme Court views employee complaints as critical to the enforcement of the State's public policy. We would be minimizing the importance of these complaints and the State's public policy were we to concentrate on the employee's intent in raising the safety concern rather than on whether the employee's complaints related to the public policy and whether the employer fired the employee for raising the concern.

In *Aker v. New York & Co., Inc.* (N.D. Ohio 2005), 364 F. Supp.2d 661, the employer had an internal policy regarding shoplifting that was created to minimize the chance of confrontation and physical injury (i.e., ensure workplace safety). The employee ignored the company's policy, which led to an altercation with suspected shoplifters. Id. at 664. Unlike Dohme, the employee did not allege that her termination resulted from a report about unsafe working conditions. Moreover, in *Aker*, the employee's actions actually undermined workplace safety. The same cannot and has not been alleged regarding Dohme's actions in speaking with the insurance inspector.

In *Mitchell v. Mid-Ohio Emergency Services, L.L.C.*, Franklin App. No. 03AP-981, 2004-Ohio-5264, a physician sent letters to a number of individuals regarding an incident at a hospital that raised issues regarding the quality of patient care. In these letters, the physician included confidential patient information, which violated his employer's policies and could have exposed his employer to liability for violating patient confidentiality. Id. at ¶7. The court was confronted with the employee's request to find a clear public policy that employers could not discharge employees who complain about patient care outside the quality assurance chain. Id. at ¶19. This is far from Dohme's situation, which involves the more precise public policy relating to fire safety. *Kulch*, 78 Ohio St.3d at 152; *Pytlinski*, 94 Ohio St.3d at 89.

Further, the *Mitchell* court held that the public policy identified in the statute at issue would be defeated if complaints were not kept confidential. 2004-Ohio-5264, at ¶23 n.5. Here, no argument can be made that the public policy favoring workplace safety would be defeated were employees allowed to express safety concerns to an employer's insurance inspector.

Finally, Eurand cites *Herlik v. Continental Airlines, Inc.* (6th Cir. Oct. 4, 2005), No. 04-3790. In *Herlik*, a pilot

was fired after he raised safety concerns with a co-pilot. The Sixth Circuit noted the Ohio Supreme Court's willingness to find a clear public policy from sources other than legislation, but then noted that the Supreme Court has not actually done so in practice. The Sixth Circuit then espoused a position that public policy prevents a firing only when there is a statute that prohibits firing employees for engaging in a particular protected activity. Id.

The *Herlik* opinion misconstrues Ohio law on this issue. The Supreme Court has made it very clear that a public policy preventing termination of an employee may flow from sources other than a statute that specifically prohibits firing employees for engaging in a particular protected activity. "Ohio public policy favoring workplace safety is an independent basis upon which a cause of action for wrongful discharge in violation of public policy may be prosecuted." *Pytlinski*, 94 Ohio St.3d at 80. The cause of action is not based upon the whistleblower statute, but is, instead, based in common law for violation of public policy. Id.

We do not suggest that Dohme will or should prevail on his claim of wrongful discharge. Rather, we conclude only that the trial court erred in finding that there was not a public policy that protects Dohme from being fired for sharing

information with an insurance inspector that relates to workplace safety. In order to prevail on his claim, Dohme must carry his burden to prove the remaining elements of a wrongful discharge claim.

The assignment of error is sustained. The judgment of the trial court will be reversed and the cause remanded for further proceedings consistent with this opinion.

BROGAN, J. and DONOVAN, J., concur.

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Hon. Mary Katherine Huffman

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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

. . . . . .

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

JAMES A. BROGAN, JUDGE

THOMAS J. GRADY, JUDGE

MARY E. DONOVAN, JUDGE

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Hon. Mary Katherine Huffman

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

RANDALL J. DOHME, Plaintiff, -vs- EURAND AMERICA, INC., Defendant.	CASE NO.: 2003 CV 4021 JUDGE MARY KATHERINE HUFFMAN DECISION, ORDER AND ENTRY OVERRULING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART AND SUSTAINING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN PART

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

I. FACTS

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

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

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

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

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

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

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

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

regarding the FLSA violation and wrongful termination.

II. LAW & ANALYSIS

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

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

A. FLSA Claim

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

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

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

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

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

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

B. Wrongful Discharge Claim

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

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

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

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

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

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

III. CONCLUSION

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

SO ORDERED:

Mary K. Huffman

HONORABLE MARY KATHERINE HUFFMAN

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

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