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Kulch v. Structural Fibers, Inc.: Clarifying the Public Policy Exception

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KULCH v. STRUCTURAL FIBERS, INC.: CLARIFYING THE PUBLIC POLICY EXCEPTION

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I. INTRODUCTION

Ohio has long been an employment-at-will state. What this means is that the employment of one hired for an indefinite period of time is terminable at the will of either party for any cause, for no cause, or even in gross or reckless disregard of the employee's rights.[2] Under this rule, a discharge without cause does not give rise to damages.[3]

The employment-at-will doctrine, a harsh and inequitable rule, developed during a time when an employee's rights were not considered his own.[4] An exception to the employment-at-will doctrine developed in the mid-twentieth century when the California Court of Appeals in *Peterman v. Local 896, International Brotherhood of Teamsters* held that an employee could not be discharged in violation of public policy.[5] This new "public policy exception"

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[2]Henkel v. Educational Research Council, 344 N.E.2d 118, 121-22 (1976).

[3]Collins v. Rizkana, 652 N.E.2d 653 (Ohio 1995); *see also* Phung v. Waste Mgt., Inc., 491 N.E.2d 1114 (Ohio 1986).

[4]*Collins*, 652 N.E.2d at 657.

[5]Peterman v. Local 396, Int'l Bd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959).

allowed for the recovery of damages when an employee was discharged in contravention of a clear public policy, and thus created a new cause of action for "wrongful discharge."[6]

A majority of jurisdictions have since adopted the public policy exception set forth in *Peterman*.[7] Ohio joined these jurisdictions in 1990 when the Ohio Supreme Court first recognized the tort of wrongful discharge in *Greeley v. Miami Valley Maintenance Contractors, Inc.*[8] There, the court stated that public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute.[9] *Greeley* thus provided the foundation for the tort of wrongful discharge in Ohio.

The *Greeley* court, however, left open a number of important questions: (1) Under what circumstances can the violation of a public policy derived from sources other than a state statute be the basis for an action for damages? (2) What if the discharged employee has failed to comply with any procedural requirements contained in the statute? Finally, and most perplexing, (3) can an action for wrongful discharge be maintained if the public policy in question springs from a statute that already provides a remedy? In other words, does the statute preempt a cause of action for wrongful discharge?

Ohio's courts of appeals have grappled with these issues in the years since the *Greeley* decision.[10] As these cases were appealed to and reviewed by the Ohio Supreme Court, the matters left unresolved by *Greeley* were addressed, but not fully clarified. The preemption question, an issue raised on numerous occasions in the courts of appeals in regard to Ohio's Whistleblower Statute (section 4113.52 of the Ohio Revised Code) and Workers' Compensation Retaliation Statute (section 4123.90 of the Ohio Revised Code), was not addressed directly at all.

The reason these issues were not resolved at once is that the public policy exception has developed on a case by case basis, with the Ohio Supreme Court deciding the issues presented to it as they applied to a particular factual scenario. When *Kulch v. Structural Fibers, Inc.*[11] was accepted for review by the supreme court, the court had before it a case with a set of circumstances raising many of the issues that had been the subject of continual litigation in the courts

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[6] *Collins*, 652 N.E.2d at 657.

[7] *Id.* (*citing* WILLIAM J. HOLLOWAY & MICHAEL J. LEACH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES, 135 n.5 (2d ed. 1993); BNA LAB. REL. RPTR. *Individual Employment Rights Manual*, (1994)).

[8] Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981 (Ohio 1990).

[9] *Id.*

[10] *See infra* note 73 for a list of some Ohio appellate cases deciding the preemption issue.

[11] Kulch v. Structural Fibers, Inc., 677 N.E.2d 308 (Ohio 1997).

of appeals. Consequently, the supreme court could, and did, at last resolve these issues clearly and effectively.

First, *Kulch* laid to rest once and for all the notion that a wrongful discharge claim could not be pursued if it were based upon the violation of a public policy derived from a statute already providing a remedy. *Kulch* established that the public policy exception applied where the remedy provided by a statute was not exclusive or sufficiently comprehensive.[12] Moreover, where the public policy in question is derived from more than one source, each source can provide an independent basis for a wrongful discharge claim.[13]

Kulch dealt specifically with the violation of the public policy having its source in 29 U.S.C. § 660(c)(1) (a provision in the Occupational Safety and Health Act), and section 4113.52 of the Ohio Revised Code (Ohio's Whistleblower Statute).[14] The court concluded that the plaintiff, James Kulch, could maintain a *Greeley* action solely on the basis of the OSHA Act.[15] He could rely additionally on Ohio's Whistleblower Statute as a basis for a wrongful discharge action if he complied with the requirements of that statute and was disciplined as a result.[16] In sum, he could proceed with his wrongful discharge claim under the OSHA Act, the Whistleblower Statute, or both. A double recovery, however, would not be permitted.

In addition to this clarification of the basis on which a cause of action for wrongful discharge may be brought, *Kulch* confirmed the elements essential to a wrongful discharge cause of action. *Kulch* also reaffirmed previous decisions by the Ohio Supreme Court that the public policy in question can stem from a federal statute, the Ohio and United States Constitutions, administrative rules and regulations, and common law.

Kulch, therefore, is a significant case that will have a far-reaching impact in the field of employment law. The decision marks the culmination of a trend in Ohio to expand the public policy exception doctrine and provide much needed protection for the rights of employees.

II. THE DEVELOPMENT OF THE PUBLIC POLICY EXCEPTION

Greeley marked the beginning of a line of Ohio Supreme Court decisions that served to define and clarify the public policy exception to the employment-at-will doctrine. In *Greeley*, the plaintiff was discharged by his employer because his wages had been assigned pursuant to a court order to pay child support.[17] His termination, the *Greeley* court held, violated the clear public policy articulated in section 3113.213 of the Ohio Revised Code that

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Kulch*, 677 N.E.2d at 308.

[17] *Greeley*, 551 N.E.2d at 982.

expressly prohibited an employer from terminating or disciplining an employee because of such a wage assignment.[18] Justice Douglas, who authored the majority opinion in *Greeley*,[19] stated that "[t]he General Assembly has expressed its will that employers be prohibited from discharging employees for the reason upon which appellant [Greeley] bases his cause of action. It is our job to enforce, not frustrate, that policy."[20] The court therefore held that public policy "warrants" an exception to the employment-at-will doctrine when an employee is terminated or disciplined "for a reason prohibited by statute" [21] and that a cause of action for this type of violation may be brought in tort.[22]

Greeley did not decide what sources of public policy other than a statute could underlie an action for wrongful discharge. Justice Douglas noted that:

> Today, we only decide the question of a public policy exception to the employment-at-will doctrine based on violation of a specific statute. This is not to say that there may not be other public policy exceptions to the doctrine, but, of course, such exceptions would be required to be of equally serious import as the violation of a statute.[23]

The Supreme Court, however, later backtracked from Justice Douglas' position, when it held in *Tulloh v. Goodyear Atomic Corp.*[24] that there could be no common law tort for wrongful discharge in the absence of statutory authority. This line of reasoning was reflected in the court's subsequent decision in *Provens v. Stark County Board of Mental Retardation & Developmental Disabilities.*[25] In *Provens*, the court refused to recognize a cause of action for wrongful discharge based on public policy derived from the Ohio Constitution. The *Provens* court disting-

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[18] OHIO REV. CODE ANN. § 3113.213(D) (Banks-Baldwin 1995) provides in pertinent part:

> No payor that is an employer may use a requirement to withhold personal earnings . . . as a basis for a discharge of, or for any disciplinary action against, an employee, or as a basis for a refusal to employ a person. The court may fine an employer who so discharges or takes disciplinary action against an employee, or refuses to employ a person, not more than five hundred dollars.

[19] Justices Sweeney, Brown, and Resnick concurred with the majority opinion in *Greeley*, while Justices Moyer, Holmes, and Wright dissented.

[20] *Greeley*, 551 N.E.2d at 986.

[21] *Id.* at 987.

[22] *Id.*

[23] *Id.*

[24] 584 N.E.2d 729 (Ohio 1991), *overruled by*, Painter v. Graley, 639 N.E.2d 51 (Ohio 1994).

[25] 594 N.E.2d 959 (Ohio 1992).

uished *Greeley*, stating that *Greeley* limited its holding to a public policy emanating from a statute, not the constitution.[26]

Provens imposed other restrictions on the public policy exception as well. The court held that there could be no cause of action for the discharge of a public employee predicated on violations of policies derived from the Ohio Constitution where there are other reasonably satisfactory remedies provided by statutory enactment and the administrative process.[27] The plaintiff in *Provens* alleged that the defendant, Board of Mental Retardation & Developmental Disabilities, had discriminated against, and disciplined her because she had criticized the operation and practices of the Board and had filed charges with the Ohio Civil Rights Commission and the Equal Opportunity Commission.[28] She alleged further that the Board had retaliated against her because she had filed an action for assault and battery against administrative employees of the Board.[29]

The court applied the criteria used by the United States Supreme Court in determining whether a claimant may institute a private cause of action (a so called *Bivens*[30] action) for damages based on a constitutional violation. On that basis, the court in *Provens* found that a private cause of action founded on policies embedded in the Ohio Constitution could not be maintained because there were other meaningful remedies afforded to the plaintiff through statutory enactments and the administrative process.[31]

The *Provens* court noted that the remedies available through the Ohio Civil Rights Commission and the arbitration process provided in the plaintiffs' collective bargaining agreement varied from the remedies that might be available through a private civil action.[32] Nevertheless, the court concluded that the plaintiff, as a public employee, was provided "sufficiently fair and comprehensive remedies."[33] In explanation, the court added that *Bush v. Lucas*,[34] a *Bivens* action before the United States Supreme Court, established that although an alternative existing avenue of relief may provide a less than complete remedy for the wrong suffered, that alone is not sufficient to support

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[26] *Id.* at 966.

[27] *Id.* at 965-96.

[28] *Provens*, 594 N.E.2d at 959.

[29] *Id.* at 960.

[30] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[31] *See, e.g.*, Ohio's discrimination statute, section 4112.02 of the Ohio Revised Code and section 124 of the Ohio Revised Code, providing for the State Personnel Board of Review.

[32] *Provens*, 594 N.E.2d at 959.

[33] *Id.* at 965.

[34] 462 U.S. 367 (1983). The Court in *Bush* declined to recognize a cause of action for the violation of the First Amendment rights of a federal employee given the civil service remedies available. *Id.*

a private cause of action for a constitutional violation.[35] In other words, what *Provens* seems to say, at least where a public employee is concerned, is that when there is an alternative meaningful remedy, there cannot be a separate cause of action for wrongful discharge. This is so notwithstanding the fact that such a remedy may not be as comprehensive as that which could be obtained by a cause of action for wrongful discharge. Under *Provens*, remedies are not cumulative, but, rather, preemptive.[36]

The public policy exception was extended, and *Tulloh* overruled, in *Painter v. Graley*.[37] *Painter* held that the public policy exception was not limited to public policy derived from statute, but could be based on a clear public policy from other sources such as the Ohio and United States Constitutions, administrative rules and regulations, and the common law.[38] The *Painter* court noted the tort of wrongful discharge was not yet fully developed, but that the elements would be defined through the resolution of future cases.[39] The court stated in a footnote that Ohio courts might find useful an analysis by H. Perrit[40] which sets forth the elements of an action for wrongful discharge as follows:

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).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).[41]

Following its decision in *Painter*, the Ohio Supreme Court further defined the parameters of the public policy exception. In *Contreras v. Ferro Corp.*, the court held that the plaintiff's failure to comply strictly with the requirements of Ohio's Whistleblower Statute rendered his claim for wrongful discharge moot.[42] Specifically, the provision of the Whistleblower Statute applicable to

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[35] *Provens*, 594 N.E.2d at 965.

[36] *Id.*

[37] 639 N.E.2d 51 (Ohio 1994).

[38] *Id.* at 52.

[39] *Id.* at 56.

[40] H. Perrit, *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398-399 (1989)

[41] 639 N.E.2d at 57 (emphasis added).

[42] 652 N.E.2d 940 (Ohio 1995).

the circumstances in *Contreras*[43] requires that an employee who becomes aware that his employer committed a criminal offense must give the employer oral and written notice prior to notifying the appropriate public official or agency.[44]

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[43]OHIO REV. CODE ANN. § 4113.52(A)(1)(a) (Banks-Baldwin 1995).

[44]Section 4113.52 provides in pertinent part:

(A)(1)(a) If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within his jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade or business in which he is engaged.

(b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

(2) If an employee becomes aware in the course of his employment of a violation of Chapter 3704, 3734, 6109, or 6111 of the Revised Code that is a criminal offense, the employee may notify directly, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged.

(B) Except as otherwise provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under this section if the employee made any reasonable and good faith effort to determine the accuracy of any information so reported, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under that division. . .

(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) or this section, the employee may bring a civil action for

The plaintiff in *Contreras* failed to give his employer oral and written notice, thereby failing to follow the procedures set forth in the statute.[45]

The *Contreras* court declined to uphold the plaintiff's *Greeley* claim because the claim would have to be based upon the policy embodied in section 4113.52 of the Ohio Revised Code.[46] The court reasoned that the policy underlying the statute was that protection could be afforded the employee only if the employer were provided a reasonable opportunity to correct the violation in question.[47] Because the plaintiff failed to comply with the Whistleblower Statute, the court did not reach the issue of whether the Whistleblower Statute provided an exclusive remedy and preempted the plaintiff's *Greeley* claim.

The Ohio Supreme Court made an initial attempt to address the "preemption" issue in *Collins v. Rizkana*.[48] There, the court determined that a claimant could bring a cause of action for wrongful discharge in violation of public policy based on sexual harassment despite the existence of Ohio's discrimination statute,[49] which already provided an adequate remedy for sexual harassment. Section 4112.02 could not afford the plaintiff recovery in

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appropriate injunctive relief or for the remedies set forth in division (E) or this section, or both, within one hundred eighty days after the date the disciplinary or retaliatory action was taken, in a court of common pleas in accordance with the Rules of Civil Procedure. A civil action under this division is not available to an employee as a remedy for any disciplinary or retaliatory action taken by an appointing authority against the employee as a result of the employee's having filed a report under division (A) or section 124.341 of the Revised Code.

(E) The court, in rendering a judgment for the employee in an action brought pursuant to division (D) of this section may order, as it determines appropriate, reinstatement of the employee to the same position he held at the time of the disciplinary or retaliatory action and at the same site of employment or to a comparable position at that site, the payment of back wages, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies. The court also may award the prevailing party all or a portion of the costs of litigation, and if the employee who brought the action prevails in the action, may award the prevailing party reasonable attorney's fees, witness fees, and fees for experts who testify at trial, in an amount the court determines appropriate. If the court determines that an employer deliberately has violated division (B) of this section, the court, in making an award of back pay, may include interest at the rate specified in section 1343.03 of the Revised Code.

Id.

[45] 652 N.E.2d at 740.

[46] *Id.* at 946.

[47] *Id.*

[48] 652 N.E.2d 653 (Ohio 1995).

[49] OHIO REV. CODE ANN. § 4112.02 (Banks-Baldwin 1995).

Collins because the defendant did not qualify as an employer for purposes of the statute.[50]

The court's holding in *Collins* was predicated on its reasoning that:

> The issue of adequacy of remedies is confined to cases 'where right and remedy are part of the same statute which is the *sole source* of the public policy opposing the discharge. . . . In cases of *multiple* source public policy, the statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature's intent in enacting the statute to preempt common-law remedies . . . .[51]

The public policy against sexual harassment is grounded in a number of statutory sources and thus could be the basis for a common law wrongful discharge claim for sexual harassment.[52] The court noted, however, that another reason why the plaintiff's wrongful discharge claim could be maintained was that she had no other remedy. Moreover, the court affirmed the position it took in *Contreras* that when the statute's own provisions constitute an essential part of the statute's public policy, the policy may not be extracted to nullify the statute's requirements.[53]

Finally, *Collins* formally adopted the four part analysis, suggested as a guideline in *Painter*, setting forth the elements of a wrongful discharge claim.[54] The court left open the question of whether an independent cause of action for wrongful discharge for the violation of a public policy may be maintained where the plaintiff has available an avenue for recovery through the statute from which the public policy at issue is derived.

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[50] Section 4112.02(A) makes it an unlawful discriminatory practice:

> For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Id. Section 4112.01(A)(2) defines an employer as one who employs four or more persons within the state. *Id.*

[51] *Collins*, 652 N.E.2d at 660 (citations omitted).

[52] The sources of public policy the Court found pertinent in *Collins* included OHIO REV. CODE ANN. §§ 2907.06 (prohibiting sexual imposition), 2907.25 (prohibiting prostitution), and 4112.02(prohibiting sexual harassment by an employer).

[53] *Collins*, 652 N.E.2d at 661; *see also* Contreras v. Ferro Corp., 652 N.E.2d 940 (Ohio 1995).

[54] *Painter*, 639 N.E.2d at 57.

III. *KULCH v. STRUCTURAL FIBERS, INC.*

The Ohio Supreme Court's decision in *Kulch v. Structural Fibers, Inc.*,[55] which clarifies and resolves the preemption question, represents the culmination of the development of the public policy exception to the employment-at-will doctrine in Ohio. As such, *Kulch* provides the clarification and predictability long needed in the employment law area.

A. Factual and Procedural History

The plaintiff, James Kulch, was a factory worker for the defendant, Structural Fibers, Inc.("Structural Fibers").[56] Structural Fibers, an operating division of the defendant, ESSEF Corp., manufactured tanks or vessels used in well water systems.[57] After working for the company of approximately fifteen years, Kulch began experiencing serious health problems.[58] He believed that these problems were caused by toxic chemicals in the air at his workplace.[59] His co-workers also experienced health problems.[60] After Kulch complained orally to his employer, the company informed him he could either do his work or find employment elsewhere.[61] He then filed a writer's report with the Occupational Safety and Health Administration (hereinafter "OSHA").[62] Though OSHA failed to find that the chemicals in the air violated any OSHA standards, the agency found other serious violations of the OSHA Act.[63] As a result, OSHA assessed substantial fines against Structural Fibers.[64]

Kulch's co-workers were subsequently asked by the employer to confirm the identity of the individual who had complained.[65] They were warned not to associate with Kulch and threatened that anyone associated with Kulch would "go down" with him.[66] A supervisor threatened Kulch physically for having filed the OSHA complaint.[67] His supervisors began filling up his personnel file

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[55] 677 N.E.2d 308 (Ohio 1997).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] 677 N.E.2d at 308.

[61] *Id.*

[62] 677 N.E.2d at 310.

[63] 29 U.S.C. § 651 (1994).

[64] 677 N.E.2d at 308.

[65] *Id.* at 311.

[66] *Id.*

[67] *Id.*

with lengthy write-ups and entries, sometimes more than one each day.[68] Finally, Structural Fiber's management videotaped Kulch's work performance by means of a hidden surveillance camera.[69] This was the first time in the company's history that an employee's work performance had been videotaped.[70]

Claiming that Kulch was not doing his job and that he had falsified his time card, Structural Fibers terminated his employment.[71] Kulch filed a complaint with OSHA under 29 U.S.C. § 660(c), contending that Structural Fibers had retaliated against him for filing an OSHA complaint.[72] OSHA denied the complaint and Kulch filed a civil suit against Structural Fibers and ESSEF Corp.[73]

Kulch's complaint asserted a cause of action for violation of Ohio's Whistleblower Statute because of his employer's retaliation against him for filing a complaint with OSHA.[74] He additionally alleged causes of action for wrongful discharge in violation of public policy, and, *inter alia*, negligent and intentional infliction of emotional distress.[75] The defendants filed motions for summary judgment and judgment on the pleadings.[76] The motions for summary judgment requested judgment in the defendants' favor on Kulch's Whistleblower and emotional distress claims.[77] The motions for judgment on the pleadings requested judgment on the claim for wrongful discharge.[78]

Granting the defendants' motions, the trial court determined that the Whistleblower Statute preempted the field, precluding a public policy exception for the violation of the statute.[79] In addition, the court ruled that the Whistleblower Act requires an employee to give oral and written notice to the employer in order to come within the protection of the Act.[80] Because Kulch

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[68] *Id.*

[69] 677 N.E.2d at 311.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Because *Kulch* does not modify or create new law as it relates to Kulch's emotional distress claims, this article will not discuss the Supreme Court's rulings concerning these claims.

[76] *Kulch*, 677 N.E.2d at 308.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 314.

[80] *Id.*

failed to provide his employer with written notice, the trial court found that he could not prevail on his Whistleblower claim.[81]

A unanimous panel of the Eleventh District Court of Appeals affirmed the trial court's judgment.[82] The court of appeals agreed with the trial court's analysis that the Whistleblower Statute preempted Kulch's claim for wrongful discharge. While the court of appeals recognized that Section 4113.52(A)(2) of the Whistleblower Statute dispenses with the oral and written notification requirements under certain circumstances, the court refused to review the case under that provision because it concluded that theory was not argued in the trial court.[83]

B. The Supreme Court Opinion

1. Kulch's Whistleblower Claim

Written by Justice Douglas, the majority opinion[84] for the Ohio Supreme Court's decision in *Kulch* relied on *Contreras*[85] when the court held that Kulch could not pursue his Whistleblower claim under section 4113.52(A)(1) of the Ohio Revised Code because he had failed to satisfy the written notification requirement prescribed in that provision.[86] The court found, however, that Kulch could maintain his Whistleblower claim pursuant to section 4113.52(A)(2) of the Ohio Revised Code, a provision of the statute which did not contain the notification requirements of Section 4113.52(A)(1).[87] As for the court of appeal's decision to forego consideration of the Section 4113.52(A)(2) claim, the supreme court took a different view of the matter: the court stated that allegations relevant to a claim brought under this statutory provision were raised in Kulch's amended complaint.[88] Further, the defendants' motion for summary judgment did not challenge Kulch's claim under Section 4113.52(A)(2) and therefore Kulch, contrary to the opinion expressed by the court of appeals, was not obligated to raise the issue in his response to the defendants' motion.[89] Because there were factual issues as to whether Kulch

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[81] 677 N.E.2d at 311-12.

[82] Kulch v. Structural Fibers, Inc., Case No. 93-G-1824 (11th Dist. Ct. App. Feb. 10, 1995).

[83] *Kulch*, 677 N.E.2d at 312.

[84] Justices Resnick and Sweeney concurred, Justice Pfiefer concurred in the syllabus and judgment only, and Justices Moyer, Cook, and Lundberg Stratton dissented in part and concurred in part.

[85] Contreras v. Ferro Corp., 652 N.E.2d 940 (1995).

[86] *Kulch*, 677 N.E.2d at 320.

[87] *Id.* at 322.

[88] *Id.*

[89] *Id.*

had complied with the requirements of the second provision of the statute and as to whether the defendants retaliated against him in a manner prohibited by that provision, the case was remanded to the trial court for further proceedings on the Whistleblower claim issue.[90]

2. Kulch's *Greeley* Claim

The *Kulch* court applied the four part analysis affirmed in *Collins*,[91] in its review of Kulch's claim for wrongful discharge.[92] Specifically at issue were the clarity and jeopardy elements of the analysis.[93] With respect to the clarity element, the court found there were two main sources of public policy prohibiting Kulch's termination because he had complained to OSHA.[94] The first source was 29 U.S.C. § 660(c)(1) which forbids retaliation by employers against employees who file complaints with OSHA.[95] This statute, the court remarked, does not provide an employee with a private right of action, but is a clear expression of public policy warranting an exception to the employment-at-will doctrine.[96] Moreover, the policy behind the statute is consistent with Ohio's public policy favoring workplace safety.

The defendants argued that the OSHA statute could not be a source of public policy for a *Greeley* claim due to their belief that federal statutes could not provide a basis for the public policy exception to the employment-at-will doctrine.[97] The court countered this argument by following *Painter*'s analysis under the clarity element.[98] This element mandates consideration of whether a clear public policy exists in a state or federal statute, constitution, or administrative regulation or in the common law.[99]

The court found the objective of the OSHA Act was consistent with the public policy of Ohio demanding that employees be provided "with a safe work environment and that unsafe work conditions be corrected."[100] This policy is expressed in a number of Ohio's statutes covering the employer's duty to

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[90] *Kulch*, 677 N.E.2d at 308.

[91] *Collins*, 652 N.E.2d at 657-58.

[92] *Kulch*, 677 N.E.2d at 321.

[93] *Id.* at 321, 324.

[94] *Id.* at 321-22.

[95] *Id.* 321.

[96] *Id.*

[97] *Kulch*, 677 N.E.2d at 322.

[98] *Id.*

[99] *Id.*

[100] *Kulch*, 677 N.E.2d at 322.

ensure workplace safety, and in Article II, sections 34 and 35 of the Ohio Constitution.[101]

The second source of public policy identified by the court applicable to Kulch's wrongful discharge claim was the Whistleblower Statute itself.[102] This policy raised a host of issues. First, the court needed to consider its previous holding in *Contreras* that the procedures outlined in the Whistleblower Statute be followed to the letter. Reiterating the reasoning underlying the *Contreras* decision, the court stated that it was the legislature's intent to limit whistleblowing to a narrow set of circumstances.[103] Where there is no compliance with the requirements of the statute, the issue of whether there has been a violation of public policy is moot.[104] Unlike the circumstances in *Contreras*, the *Kulch* court had before it a situation where the plaintiff had arguably complied with the Whistleblower Statute. Thus, it could reach the question of whether Kulch's *Greeley* claim satisfied the jeopardy element of the four part wrongful discharge analysis.

The analysis as to whether the violation of public policy inherent in the OSHA Act was jeopardized by Kulch's termination was easy. The court unequivocally stated there was no question that the policy of providing a safe workplace for employees would be jeopardized if employers could fire employees who reported OSHA violations.[105] This is because terminating such whistleblowers would deter employees from reporting OSHA violations.[106]

The determination of whether the jeopardy element was satisfied with regard to the Whistleblower Act was, as the court itself noted, more difficult.[107] The difficulty arose from the fact that the Whistleblower Statute already contained civil remedies for eligible whistleblowers.[108] Those remedies, the court explained, were "not adequate to fully compensate an aggrieved employee who is discharged, disciplined, or otherwise retaliated against in

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[101] The Ohio statutes cited by the *Kulch* court as mandating workplace safety include, among others: OHIO REV. CODE ANN. §§ 4101.11 (duty of employee to protect employees and frequenters), 4101.12 (employer required to furnish safe environment), 4121.13 (safety and administrative duties of the Administrator of Workers' Compensation), and 4121.17 (Bureau of Workers' Compensation required to investigate petitions concerning unsafe employment or places of employment).

[102] *Kulch*, 677 N.E.2d at 322.

[103] *Id.*

[104] *Id.* at 323.

[105] *Id.*

[106] *Id.* at 324.

[107] *Id.*

[108] *See supra* note 31 setting forth the pertinent provisions of the Whistleblower Statute, including the provision of the Act, 4113.52(E), which lists the remedies available for a violation of Section 4113.52(A).

violation of the statute."[109] The court concluded that allowing a *Greeley* action to proceed would only promote the legislative objectives of the Whistleblower Statute and complement the remedies provided therein.[110] The reasoning behind this conclusion was that the remedies contained in the Whistleblower Statute were limited and failed to provide the complete relief available in a cause of action for wrongful discharge. Specifically, the Whistleblower Statute does not provide for certain compensatory damages or authorize the recovery of punitive damages, and allows the court to decide at its own discretion what kind of award will be recovered in a particular case.[111]

The defendants argued that a wrongful discharge action could not be instituted for the violation of the public policy derived from the Whistleblower Statute because the remedy it provided was exclusive.[112] The court disagreed, citing the principle that "where a statute gives a new right and also prescribes the remedy for its violation, the remedy so prescribed must be taken as exclusive, *unless it appears from the statute that the legislature intended otherwise.*"[113] In other words, the court stated that it is the legislative intent that determines whether the remedy contained in the statute is exclusive.

After reviewing the history and language of section 4113.52 of the Ohio Revised Code, the court held that the legislature did not intend that the remedies prescribed by the statute be exclusive.[114] The court reasoned that there was nothing in the history and language of the statute showing that the legislature intended otherwise.[115] Moreover, it was reasonable to conclude that the remedies contained in the statute were not preemptive given that the Whistleblower Statute was enacted in response to the ruling in *Phung*.[116] *Phung* established that there is no public policy exception to the employment-at-will doctrine when an employee is terminated for reporting that his employer has conducted itself criminally.[117] In addition, the *Kulch* court suggested that, if the legislature intended to provide an exclusive remedy for whistleblowers, it could have stated this explicitly in the statute.[118] The court then asserted its right to recognize a common law cause of action for wrongful discharge,

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[109] *Kulch*, 677 N.E.2d at 324.

[110] *Id.*

[111] *See supra* note 59.

[112] *Kulch*, 677 N.E.2d at 324.

[113] *Id.* at 327 (quoting Dunn v. Kanmacher, 26 Ohio St. 497 (1875)).

[114] *Id.* at 326.

[115] *Id.*

[116] Phung v. Wast Management, Inc., 491 N.E.2d 1114 (Ohio 1986).

[117] *Id.*

[118] *Kulch*, 677 N.E.2d at 326.

stressing that it is the judiciary, not the legislature, that presides over the common law.[119]

After this exhaustive analysis of the issues involved in its review of Kulch's claims, the court arrived at the following holdings:

1. An at-will employee[120] who is discharged for filing a complaint with OSHA regarding matters of health and safety in the workplace is entitled to maintain a common law cause of action for wrongful discharge based on the public policy exception.[121]
2. An at-will employee can maintain a cause of action for wrongful discharge after having been terminated for filing a complaint with OSHA even if he or she has not complied with the requirements of the Whistleblower Statute. Such a cause of action would be predicated on the public policy derived from the OSHA Act.[122]
3. The Whistleblower Statute does not provide an exclusive remedy nor does it preempt a *Greeley* claim.[123]
4. In order to pursue a cause of action for wrongful discharge based on the violation of the public policy expressed in the Whistleblower Statue, the claimant must have complied strictly with the requirements of the statute and must have been disciplined or discharged in violation of the statute.[124]
5. The remedies available for the violation of the Whistleblower Statute and a cause of action for wrongful discharge are cumulative. Therefore, a claimant may maintain a cause of action for violation of the statute, for wrongful discharge, or both, but may not obtain a double recovery.[125]

Accordingly, the Ohio Supreme Court has expanded the public policy exception. In doing so, it has allowed wrongfully discharged employees the ability to obtain full and complete redress for the treatment they received.

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[119] *Id.* at 328.

[120] The public policy exception applies only to at-will employees. *See* Haynes v. Zoological Soc'y of Cincinnati, 652 N.E.2d 948 (Ohio 1995).

[121] *Kulch*, 677 N.E.2d at 328 (overruling *Phung*).

[122] *Id.* at 328-329.

[123] *Id.* at 329.

[124] *Id.*

[125] *Id.*

C. The Aftermath

By expanding the public policy exception to include violations of public policy expressed in statutes that provide their own remedies, *Kulch* has provided wrongfully discharged employees access to a greater range of remedies. Further, *Kulch* has afforded these employees the opportunity to maintain a cause of action for wrongful discharge where, prior to *Kulch*, they could not have done so. Indeed, Ohio courts prior to *Kulch* have declined to allow a cause of action for wrongful discharge based upon the violation of public policy found in Ohio's discrimination statute, section 4112.02 of the Ohio Revised Code[126], the Workers' Compensation Act, section 4123.90 of the Ohio Revised Code, and, of course, the Whistleblower Statute.[127] Already *Kulch* has had an impact on current law. In a recent decision, *Livingston v. Hillside Rehabilitation Hospital*,[128] the Ohio Supreme Court ruled that a claimant could bring a wrongful discharge claim based on the violation of the public policy underlying section 4101.17(A) of the Ohio Revised Code.[129] *Livingston* explicitly follows *Kulch*, and further expands the public policy exception. As noted by Justice Cook's dissent, Section 4101.17, Ohio's Age Discrimination Statute, provides for the same range of remedies as an action for wrongful discharge.[130] The only difference is that there is no entitlement to a jury trial under that section. So it is not just a question of access to a broader remedy that appears to be at issue, but rather the opportunity to choose the best avenue to obtain such a remedy.

Kulch also questions the holding in *Provens* that a public employee is precluded from asserting a cause of action for wrongful discharge for the

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[126] *But see Collins*, 52 N.E.2d 653 (Ohio 1995). The *Collins* court held that an employee could bring a cause of action for wrongful discharge based on a violation of the public policy against sexual harassment found in OHIO REV. CODE ANN. § 4112.02 because of public policy and the fact that plaintiff would not have any other remedy available to her if she could not pursue her *Greeley* action. *Collins*, 52 N.E.2d at 653.

[127] *See e.g.*, Schwartz v. Comcorp Inc., 617 N.E.2d 686 (Ohio Ct. App. 1993) (holding that a *Greeley* action based on public policy underlying Ohio's discrimination statutes could not be pursued because these statutes already provided a specific remedy); Moore v. Animal Fair Pet Ctr., 674 N.E.2d 1269 (Ohio Ct. C.P. 1995)(holding that the Workers' Compensation Act, OHIO REV. CODE ANN. § 4123.90, provides exclusive remedy and preempts cause of action for wrongful discharge); Hyatt v. Neaton Auto Parts Mfg., Inc., 660 N.E.2d 529 (Ohio Ct. App. 1995) (Workers' Compensation Act, § 4123.90 provides exclusive remedy); Bear v. Geetronics, Inc., 614 N.E.2d 803 (Ohio Ct. App. 1992) (finding that the Whistleblower Statute preempts a cause of action for wrongful discharge).

[128] 680 N.E.2d 1220 (Ohio 1997).

[129] *See* Leonardi v. Lawrence Indus., Inc., Case No. 72313 (8th Dist. Ct. App. Sept. 4, 1997) (following *Livingston*, 680 N.E.2d 1220).

[130] *Livingston*, 680 N.E.2d at 1221, *see also* Wallace v. Trumball Memorial Hosp., 618 F. Supp. 618 (N.D. Ohio 1997) (holding that plaintiff could maintain a cause of action for wrongful discharge based on a violation of the public policy found in the Americans with Disabilities Act).

violation of a public policy found in the Constitution where comprehensive remedies are already available.[131] *Provens* does not make sense in light of *Kulch* and *Livingston* when the circumstances are such, as they were in *Provens*, that the remedies available to a public employee are not as complete as those available through a *Greeley* action.

The post-*Kulch* issue that will most likely be the subject of the majority of future litigation is whether a particular statute provides an exclusive, as opposed to a cumulative, remedy. Legislative intent is difficult to determine and it is equally difficult to predict how the courts will decide this issue. Yet, given the intent behind the public policy exception to advance the rights of employees who are discharged or disciplined in violation of public policy,[132] it makes sense that the various statutes will be liberally construed to allow for cumulative remedies.

IV. CONCLUSION

Kulch has emerged as the seminal Ohio case in employment law relating to the public policy exception. The decision enables wrongfully discharged employees to obtain both a statutory and common law remedy for the violation of the public policy embodied in a particular statute, including the Whistleblower Statue. Furthermore, a claimant may now pursue a private common law cause of action when his employer has retaliated against him for having filed an OSHA complaint, even if he has not met the procedural requirements of the Whistleblower Statute. In sum, *Kulch* provides wrongfully discharged employees the means to obtain full and fair redress for the wrong done to them, while at the same time promoting the public policies expressed in state and federal statutes, Constitutions, administrative rules and regulations, and the common law.

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[131] *Kulch*, 677 N.E.2d 308.

[132] *Id.*