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# What Kulch Accomplished, What Kulch Left Out

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# WHAT KULCH ACCOMPLISHED; WHAT KULCH LEFT OUT

An analysis of the rights of terminated whistleblowers in Ohio, as mandated by section 4113.52 of the Ohio Revised Code and interpreted by *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 308 (Ohio 1997).

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## I. INTRODUCTION

At first glance, it may not seem completely unfair. An employee alerts the Occupational Safety and Health Administration (OSHA), the government's watchdog in the employment arena, that he is experiencing health problems as a result of possible code violations by his employer. Then, upon inspection, OSHA finds that while there are no violations that link to the employee's health problems, other unrelated violations do exist and substantial penalties are levied. Subsequently, the reporting employee, now considered a whistleblower, is no longer welcome at that workplace, and is eventually terminated or quits. The general rule is that an at-will employee can be discharged at any time for any or no reason, even in "gross or reckless disregard of any employee's rights."<sup>3</sup>

But this is not the case in Ohio. In the later half of the twentieth century, the wrongful discharge exception to the employment at-will doctrine developed. Under this doctrine, an employer who wrongfully discharges an employee in violation of a clearly expressed public policy, which usually requires being grounded in statute, will be subject to an action for damages.<sup>4</sup> To the benefit of

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<sup>3</sup>*Collins v. Rizkana*, 652 N.E.2d 653, 656 (1995).

<sup>4</sup>*Id.* at 656.

our terminated employee, the Ohio legislature has recognized the public policy concerning discharging whistleblowers. In response, it enacted section 4113.52 of the Ohio Revised Code, commonly called Ohio's Whistleblower Statute, which expressly allows the terminated whistleblower to maintain a cause of action against his employer.<sup>5</sup>

The Ohio Supreme Court has now, in *Kulch v. Structural Fibers, Inc.*,<sup>6</sup> furthered this policy interest by stating the remedies available in Ohio's Whistleblower Statute alone do not adequately compensate the discharged whistleblower. In order to remedy this inadequate compensation problem, the court has decided to allow the terminated whistleblower to bring a common law action for wrongful discharge *in addition to* the cause of action brought under Ohio's Whistleblower Statute. The court has determined that this common law cause of action will provide a more complete array of remedies to more fully compensate the aggrieved whistleblower.

While the court clearly defined the discharged whistleblower's remedies, it failed to properly address exactly what remedies he is entitled to recover. The court ruled that the remedies available under the statutory and common law actions are to be cumulative, while also stating that the discharged whistleblower is not entitled to double recovery.<sup>7</sup> Although theories of the court's intent are introduced, it appears as if it is now left to Ohio's courts to interpret the supreme court's definition of cumulative with no double recovery.

It is undisputed that the *Kulch* decision furthered legitimate public policy interest. However, some of the tools used to construct the decision, including the creation of supportive legislative history and the issuing of threats, probably should not have been used. The ends-justifies-the-means theory may not be appropriate when writing a judicial opinion. In addition, the court left a gaping hole when it neglected to clarify the recovery issue.

Regardless of its imperfections, however, the *Kulch* decision remains good law and has applied to other wrongful discharge situations in the lower courts decision. Furthermore, the supreme court has recently ruled, without an opinion, that an employee allegedly discharged because of age can bring a common law action for wrongful discharge in addition to her statutory claim for age discrimination.<sup>8</sup> From this decision it appears the court is recognizing the plight of not only discharged whistleblowers, but also discharged employees as a whole. By doing so it sends the message that mere statutory relief is no longer sufficient.

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<sup>5</sup>OHIO REV. CODE ANN. §4113.52 (Banks-Baldwin 1997).

<sup>6</sup>677 N.E.2d 308 (1997).

<sup>7</sup>*Id.* at 329.

<sup>8</sup>*Livingston v. Hillside Rehabilitation Hosp.*, 680 N.E.2d 1220 (1997).

## II. FACTUAL BACKGROUND AND HOLDING

James Kulch (hereinafter "Kulch"), was hired in 1976, by Structural Fibers, Inc. (hereinafter "Structural"), a manufacturer of tanks or "vessels" for use in well water systems.<sup>9</sup> In 1990, after experiencing various health problems, Kulch and other employees orally complained to management, who informed the complainants they could either do their job or find employment elsewhere.<sup>10</sup> In January 1991, Kulch filed a written report with OSHA who inspected the plant the following April.<sup>11</sup> While OSHA found that contaminants in the air did not violate standards, several other serious violations were discovered.<sup>12</sup> As a result, OSHA assessed substantial fines against Structural.<sup>13</sup>

In his action, Kulch maintained that Structural retaliated against him with physical threats, excessively writing him up (eleven times between June 7 and October 7, 1991), forbidding employees to associate with him, and by secretly videotaping him at work.<sup>14</sup> Structural finally discharged Kulch on October 17, 1991, justifying the decision by stating that Kulch failed to perform his job properly (allegedly indicated by the videotape) and falsely indicated on his time card that he had performed work not actually completed.

Kulch filed a complaint with OSHA, which the agency eventually dismissed, and a lawsuit against Structural and its parent company, ESSEF Corporation.<sup>15</sup> Among the claims set forth, Kulch alleged violations of Ohio's Whistleblower Statute (as embodied in section 4113.52 of the Ohio Revised Code),<sup>16</sup> wrongful discharge in violation of public policy, and negligent and intentional infliction of emotional distress.<sup>17</sup>

The Geauga County Court of Common Pleas granted Summary Judgment to Structural and ESSEF (collectively "Appellees") on both the Whistleblower's Statute and the infliction of emotional distress claims. The court also granted appellees' motion for Judgment on the Pleadings with respect to the claim for wrongful discharge in violation of public policy.<sup>18</sup> Affirming the trial court on all issues, the Ohio Eleventh District Court of Appeals held that: (1) section 4113.52 of the Ohio Revised Code did not apply since Kulch did not make a written report to his employer concerning the plant's unhealthy conditions, as

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<sup>9</sup>*Kulch*, 677 N.E.2d at 308.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>677 N.E.2d at 311.

<sup>15</sup>*Id.*

<sup>16</sup>OHIO REV. CODE ANN. §4113.52 (Banks-Baldwin 1997).

<sup>17</sup>*Kulch*, 677 N.E.2d at 311.

<sup>18</sup>*Id.*

required by section 4113.52(A)(1)(a) of the Ohio Revised Code; (2) section 4113.52 of the Ohio Revised Code preempts a wrongful discharge claim for violating public policy; and (3) there was insufficient evidence to sustain the claims for infliction of emotional distress.<sup>19</sup> Kulch petitioned the Ohio Supreme Court, which granted his motion for a discretionary appeal. In an opinion written by Justice Douglas, the Ohio Supreme Court affirmed the Eleventh District only to the extent that it found no basis for the infliction of emotional distress claims.<sup>20</sup> The court held that (1) Kulch was afforded protection under section 4113.52 of the Ohio Revised Code;<sup>21</sup> and (2) in addition to the wrongful discharge claim brought under section 4113.52 of the Ohio Revised Code, Kulch was permitted to maintain a common law wrongful discharge claim for violation of public policy against Structural.<sup>22</sup>

### III. VIABLE CAUSES OF ACTION

The court first addressed the issue of the viability of Kulch's claim for protection under Ohio's Whistleblower Statute.<sup>23</sup> Although agreeing with the Eleventh District that Kulch's failure to notify his employer in writing is "fatal to his claim for protection under R.C. 4113.52(A)(1)(a),"<sup>24</sup> the Court accepted Kulch's contention that he was protected under section 4113.52(A)(2) of the Ohio Revised Code. This section addresses the situation where the employee becomes aware in the course of his employment of a violation of chapter 3704 of the Ohio Revised Code (Air Pollution Control Act), chapter 3734 of the Ohio Revised Code (Solid and Hazardous Wastes Act), or chapter 6111 of the Ohio Revised Code (Water Pollution Control Act) that is a criminal offense.<sup>25</sup> Under section 4113.52(A)(2) of the Ohio Revised Code, the employee may directly notify any appropriate public official or agency with regulatory authority over the employer and the industry, trade, or business in which the employer is engaged. There is no requirement that written notification be given to the employer. The court agreed Kulch's complaint involved chapters 3704 and 3734 of the Ohio Revised Code, and thus, had a legitimate claim under section 4113.52(A)(2) of the Ohio Revised Code, availing him to the full protection of the Whistleblower's statute.<sup>26</sup> The court then remanded the claim to the trial court for further proceedings consistent with the opinion.

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<sup>19</sup>Kulch v. Structural Fibers, Inc., No. 1995 WL 89963 at \*4-6 (11th Dist. Ct. App. Feb. 10, 1995)

<sup>20</sup>Kulch, 677 N.E.2d at 329.

<sup>21</sup>*Id.* at 316.

<sup>22</sup>*Id.* at paragraph one of the syllabus.

<sup>23</sup>*Id.* at 313-314.

<sup>24</sup>*Id.* at 315.

<sup>25</sup>677 N.E.2d at 315-16.

<sup>26</sup>The Eleventh District denied Kulch's claim under §4113.52(A)(2) of the Ohio Revised Code, stating that Kulch failed to argue this theory in the trial court and was

The court next addressed Kulch's proposition that in addition to his claim under section 4113.52 of the Ohio Revised Code, he has an independent common law cause of action for wrongful discharge in violation of public policy. In support of his contention, Kulch cited the Court's opinion in *Greeley v. Miami Valley Maintenance Contrs., Inc.*<sup>27</sup> In *Greeley*, an employer discharged an at-will employee after the employer received a court order requiring garnishment of Greeley's wages for child support.<sup>28</sup> Section 3113.213(D) of the Ohio Revised Code prohibits employers from using a child support wage withholding order as the basis for terminating an at-will employee and imposes a fine for employers in violation of the statute but does not provide the discharged employee with a private cause of action.<sup>29</sup> The *Greeley* court recognized a public policy exception to the employment-at-will doctrine and held Greeley could bring a cause of action in tort against his former employer for wrongful discharge.<sup>30</sup>

In determining whether Kulch had a common-law wrongful discharge action, the Court used a four-part test it had developed three years earlier in *Painter v. Graley*.<sup>31</sup> The test is as follows: (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; (2) that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy; (3) the conduct related to the public policy motivated the plaintiff's dismissal; and (4) the employer lacked overriding legitimate business justification for the dismissal.<sup>32</sup> The court found that both section 4113.52 of the Ohio Revised Code and 29 U.S.C. §660(c) embodied a clear public policy favoring whistleblowing,<sup>33</sup> and determined that 29 U.S.C. §660(c) specifically prohibits employers from retaliating against employees filing OSHA complaints.<sup>34</sup> The Court reasoned that public policy is jeopardized in

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not allowed to assert it at the appellate level. The Supreme Court, looking at the language in Kulch's complaint, found that while §4113.52(A)(2) is not specifically mentioned, O.R.C. Chapters 3704 and 3734 and §§4113.51-4113.52 are, providing a reasonable inference that Kulch raised a claim for protection under §4113.52(A)(2).

<sup>27</sup>551 N.E.2d 981 (1990).

<sup>28</sup>*Id.* at 982.

<sup>29</sup>See OHIO REV. CODE ANN. § 3113.213(D) (Banks-Baldwin 1997).

<sup>30</sup>*Greeley*, 551 N.E.2d at 986-87.

<sup>31</sup>639 N.E.2d 51(1994).

<sup>32</sup>*Id.* at footnote 8.

<sup>33</sup>*Kulch*, 677 N.E.2d at 321.

<sup>34</sup>29 U.S.C. §660(c)(1) provides:

No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter [OSHA §651 et seq.] or because of the

situations such as *Kulch's*, where an employee's reporting or complaining is the motivating factor behind his dismissal.

After an indepth analysis, the court held *Kulch* could maintain what it dubbed a *Greeley* claim against Structural for wrongful discharge in violation of public policy in addition to a claim under section 4113.52 of the Ohio Revised Code.<sup>35</sup> The court held "the mere existence of statutory remedies in R.C. 4113.52 does not, without more, operate to bar recognition of appellant's *Greeley* claim for tortious wrongful discharge"<sup>36</sup> in violation of the public policy embodied in section 4113.52 of the Ohio Revised Code.<sup>37</sup>

In addition to expanding the scope of *Greeley*, the court expressly overruled its holding eleven years earlier in *Phung v. Waste Management, Inc.*<sup>38</sup> Dr. Phung, a chemist, was terminated after he reported his employer for disposing toxic waste in violation of the law.<sup>39</sup> The *Phung* court held, in the syllabus, that: (1) "Public policy does not require that there be an exception to the employment-at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of law;"<sup>40</sup> and (2) "An at-will employee who is discharged for reporting to his employer that it is conducting its business in violation of law does not have a cause of action against the employer for wrongful discharge."<sup>41</sup> At the time of the *Phung* decision, section 4113.52 of the Ohio Revised Code was not in existence. The *Kulch* court conceded the Whistleblower's statute, which it believed was prompted by the decision in *Phung*, effectively overruled *Phung*, but specifically stated so itself "in order to avoid any confusion."<sup>42</sup>

Furthermore, the Court announced, "we also recognize a separate exception to the employment-at-will doctrine where an employee is discharged or disciplined for reporting health and safety concerns to OSHA and find this exception to be applicable *regardless* of whether the employee had complied with the dictates of R.C. 4113.52 in reporting such matters to OSHA."<sup>43</sup> In other words, the court's ruling permits discharged whistleblowers to maintain a *Greeley* claim for wrongful discharge in violation of public policy in cases where

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exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U.S.C. 660(c)(i) (1994)

<sup>35</sup>677 N.E.2d at 328.

<sup>36</sup>*Id.* at 324.

<sup>37</sup>*Id.*

<sup>38</sup>491 N.E.2d 1114 (1986).

<sup>39</sup>*Id.* at 1115.

<sup>40</sup>*Id.* at paragraph one of the syllabus.

<sup>41</sup>*Id.* at paragraph two of the syllabus.

<sup>42</sup>677 N.E.2d at 329.

<sup>43</sup>*Id.* at 328.

the employee is precluded from bringing a §4113.52 claim because of non-compliance with the requirements of the statute. The court seems to have been swayed by the clear public policy it found both in both section 4113.52 of the Ohio Revised Code and 29 U.S.C. §660(c).

After some repetitive justification for its decision, the supreme court finally established that a wrongful discharge claim pursuant to Ohio's Whistleblower Statute could co-exist peacefully with the same claim at common law: at least until the issue of recovery arose.

#### IV. REMEDIES

In determining what causes of action could be maintained, the court held that the existence of statutory remedies in section 4113.52 of the Ohio Revised Code does not preclude a *Greeley* claim.<sup>44</sup> In reaching this decision, the court applied a three-part test regarding the remedies available to a discharged whistleblower: (1) an analysis of the actual remedies provided by section 4113.52 of the Ohio Revised Code; (2) an analysis of the legislative history of the Whistleblower's statute; and (3) an analysis of prior case precedent.<sup>45</sup>

The court's view of the remedies provided in section 4113.52 of the Ohio Revised Code were immediately identifiable. "Clearly, the relief available to a whistleblower under a statutory cause of action comes nowhere near the complete relief available in an action based upon the *Greeley* public-policy exception to the doctrine of employment at will."<sup>46</sup> Additionally, at numerous times throughout the opinion, the court draws attention to this insufficiency of remedies in the Whistleblower's statute.<sup>47</sup>

The court carefully examined section (E) of the statute which specifically addresses recovery.<sup>48</sup> Section (E) allows for a court to order, as it deems appropriate, reinstatement of the employee's position or a comparable position, payment of back wages, full reinstatement of fringe benefits and seniority rights, litigation costs, and reasonable attorney, witness, and expert fees.<sup>49</sup> In addition, if a court finds the employer acted deliberately in violating the statute, it may include interest in the award of back pay.<sup>50</sup>

The court expressed concern with what it perceived as shortcomings regarding remedies available in the statute as compared to those available at common law.<sup>51</sup> Some of these shortcomings the court acknowledged were, the

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<sup>44</sup> *Id.* at 324.

<sup>45</sup> *Id.* at 325-28.

<sup>46</sup> *Id.* at 325.

<sup>47</sup> 677 N.E.2d at 325-29.

<sup>48</sup> *Id.* at 325-26.

<sup>49</sup> OHIO REV. CODE ANN. §4113.52(E) (Banks-Baldwin 1997).

<sup>50</sup> *Id.*

<sup>51</sup> *Kulch*, 677 N.E.2d at 325.



statute does not provide for the wide range of compensatory damages that are available in a tort action for wrongful discharge and section 4113.52 of the Ohio Revised Code does not allow the court to award punitive damages: only interest on back pay in the case the employer was found to act deliberately.<sup>52</sup> The court also voiced its dissatisfaction with the language "as it deems appropriate" as possibly showing a distrust in the trial court's ability to adequately compensate a terminated whistleblower.<sup>53</sup> The Appellees argued that the legislative history of the Whistleblower's statute indicates that the General Assembly intended the statutory remedies to be exclusive.

The General Assembly enacted the first version of Ohio's Whistleblower statute in 1988.<sup>54</sup> The Whistleblower statute was then further codified in section 4113.52 of the Ohio Revised Code, presumably patterned after section 124.341 of the Ohio Revised Code, Ohio's whistleblower protection statute for state employees.<sup>55</sup> After its original enactment, section 4113.52 of the Ohio Revised Code was slightly modified.<sup>56</sup> The Appellees argued that had the General Assembly intended to allow additional forms of recovery, it would have included express language pursuant to this intention in the amended version of section 4113.52 of the Ohio Revised Code. While the court acknowledged that the General Assembly considered and rejected a wide range of statutory civil remedies for discharged whistleblowers, the Court determined that the absence of express language is not dispositive of the question whether the remedies in section 4113.52 of the Ohio Revised Code were intended to be exclusive.<sup>57</sup>

The court set forth two arguments supporting its conclusion that the legislative history supports its decision. The court first stated that it found nothing in section 4113.52 of the Ohio Revised Code or its history evidencing the General Assembly's intent to limit whistleblower's remedies to those listed in the statute. "Rather, on the basis of the information available, it is much more reasonable to conclude that the General Assembly enacted R.C. 4113.52 to remedy the defect in the law caused by this court's decision in *Phung*, but never intended to preclude the future development of the common law of this state in the area of whistleblowing."<sup>58</sup>

The court's second argument compared section 4113.52 of the Ohio Revised Code to its ancestor, section 124.341 of the Ohio Revised Code. Although

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<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 325.

<sup>54</sup>142 Ohio Laws, Part II, 3590-93.

<sup>55</sup>OHIO REV. CODE ANN. §124.341 (Banks-Baldwin 1997).

<sup>56</sup>While the court does not specifically identify the modification, it does say that the two versions of section 4113.52 of the Ohio Revised Code are virtually identical. 677 N.E.2d at 325.

<sup>57</sup>*Id.* at 328-29.

<sup>58</sup>*Id.* at 326.

similar, section 124.341(D) of the Ohio Revised Code expressly states the remedy set forth in the statute is the "sole and exclusive remedy" available for a qualifying whistleblower.<sup>59</sup> Section 4113.52 of the Ohio Revised Code contains no such language. The court noted the exclusion of a similar clause in this specific provision of section 4113.52 of the Ohio Revised Code indicated a lack of legislative intent to limit a terminated whistleblower's recovery to the remedies in the statute.<sup>60</sup>

The court concluded its analysis of the legislative history by stating, that it was not the intent of the General Assembly for the remedies in section 4113.52 of the Ohio Revised Code to be exclusive, and because of this presumption, allowing a whistleblower to pursue common law remedies would serve to encourage the legislative objectives of the Whistleblower statute.<sup>61</sup>

The court, using case law precedent, discharged appellees' argument that *Greeley* applies only where an employee is discharged or disciplined for a reason prohibited by a statute which fails to provide the employee with a specific remedy.<sup>62</sup> The Court held that nowhere in *Greeley* is this contention stated or implied and that it is not prepared to limit *Greeley* in this way.<sup>63</sup>

Citing both state and federal authority supporting the proposition that section 4113.52 of the Ohio Revised Code preempts any common law remedies for wrongful discharge, the court dismissed the case, considering the argument to be "wholly inconsistent with the conclusions we reach here today that R.C. 4113.52 has no preclusive effect on appellant's *Greeley* claim for tortious wrongful discharge in violation of public policy."<sup>64</sup>

The court did, however, take time to address one of its own decisions in *Fletcher v. Coney Island, Inc.*,<sup>65</sup> which held that "where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy."<sup>66</sup> *Fletcher* was an African-American who was denied admission to an amusement park, and seeking recovery pursuant to former sections 2901.35 and 2901.36 of the Ohio Revised Code.<sup>67</sup> The *Kulch* court distinguished these two cases, by stating that the *Fletcher* plaintiff had no cause of action in the

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<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>677 N.E.2d at 326.

<sup>62</sup>*Id.* at 324-25.

<sup>63</sup>*Id.* at 324.

<sup>64</sup>*Id.* at 327.

<sup>65</sup>134 N.E.2d 371 (1956).

<sup>66</sup>*Id.* at 374.

<sup>67</sup>*Id.* at 373-74.

absence of the statute, whereas Kulch had a viable common law cause of action.<sup>68</sup>

The court gives final justification for its decision that the Whistleblower's statutory remedies are not exclusive by stating in no uncertain terms, that "the employment-at-will doctrine was judicially created, and it may be judicially abolished."<sup>69</sup> It seems the court is issuing a warning to further inquiries as to its authority to interpret legislation in the area of not only wrongful termination, but possibly at-will employment as a whole.

## V. RECOVERY

Given the time and consideration the court devoted to establishing the principle that a discharged whistleblower can maintain two separate causes of action and is entitled to the remedies of both, remarkably little attention is directed towards clearly defining exactly what type recovery should be made available for the aggrieved employee. In addition, the actual time given to the issue is as confusing as it is brief. The court expressly states that the remedies available pursuant to section 4113.52 of the Ohio Revised Code for violations of the statute and the remedies available for the tort of wrongful discharge are *cumulative*.<sup>70</sup> The next sentence, however, warns that the employee is not entitled to double recovery.<sup>71</sup>

Because the court gives no additional attention to the recovery issue, it leaves undetermined exactly what the court deems to be cumulative, but not double compensation. Moreover, the court's decisions in other similar areas of employment compensation provide little guidance. Based on the *Jones* decision, it would not be unreasonable to see whether "double recovery" language is explicated in the court's decisions in the area of workers' compensation as a guide for pinpointing the recovery a terminated whistleblower is entitled to. The court decided in *Jones v. VIP Development Co.*<sup>72</sup> that an employee who is injured on the job because of the intentional acts of an employer is allowed to maintain a cause of action for workers' compensation (pursuant to section 4123.74 of the Ohio Revised Code) and a common-law action concurrently. So then, the injured employee is entitled to recover from both actions and the employer is not allowed to setoff one award against the other.<sup>73</sup> The *Jones* decision therefore seems to allow a "true" double recovery. Interestingly, in his dissent, Justice Holmes vigorously addressed the issue by stating, "[i]f stacking

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<sup>68</sup>*Kulch*, 677 N.E.2d at 328.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 329.

<sup>71</sup>*Id.*

<sup>72</sup>472 N.E.2d 1046 (1984).

<sup>73</sup>*Id.* at syllabus.

damages from two separate litigations for a single injury does not constitute a double recovery, then our judiciary has misinterpreted the law for centuries."<sup>74</sup>

While *Jones* does not provide a complete model to follow, it does show a distinct difference from *Kulch*, and it appears as if some setoff may be allowed by an employer who wrongfully discharges a whistleblower. Based on the *Jones* decisions then, if *Kulch* was awarded back wages from both his statutory and his *Greeley* claims, Structural would probably not be forced to pay both awards but could set one off against the other, probably paying the greater of the two.

Because the *Kulch* court stated that recovery under the two actions is cumulative, this setoff by an employer would likely only be applicable where the two awards are for the exact same action. For example, if awards from both claims are for back wages alone, the company could probably setoff one award for the other. However, back wages received under one cause of action would most likely not be setoff against attorney's fees awarded under the other cause of action.

Another possible interpretation of the court's definition of recovery may be a hierarchical approach. Given the attention the court took to establish that a discharged whistleblower is entitled to a common law cause of action and the court's focus on a set of remedies offered by a *Greeley* claim, it is entirely possible that the remedies awarded by this type of claim may be given some preference over a statutory cause of action. Because the *Greeley* claim offers a wider variety of remedies than the statutory claim, courts might first look at the damages awarded under the *Greeley* claim. If the damages awarded under the common law are sufficient in a court's view, then damages awarded under the statute may be ignored. If a court, however, viewed any injustice in the remedies awarded under the *Greeley* claim, then they could use damages awarded under the statute to fill in the gap. It is quite possible that a court may act conversely and grant preferential treatment to the statutory remedies and only apply *Greeley* awards if necessary.

Even in the event one of these theories proves to be the actual intent of this Court, difficult questions still remain unanswered. Will punitive damages be offset by any interest awarded on back pay? Is the employee entitled to any compensatory damages if he is awarded back pay and reinstated pursuant to the statute? These are questions that, while not answered by this court in this opinion, will have to be addressed by either this Court itself at another time or by one of Ohio's appellate courts in the near future. This is the uncertainty that was created by the Ohio Supreme Court's decision in *Kulch*.

The decision reached by the court in *Kulch* apparently did not come easy. Nor does this decision appear to be a reflection of the views of the majority of the justices. Justice Douglas filed the majority opinion and was joined by Justices Resnick and Sweeney. Justice Pfeifer filed a separate opinion concurring in the syllabus and judgment only. While the opinion is extremely short and unclear in its purpose, Justice Pfeifer seems to advocate that a "wide

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<sup>74</sup>*Id.* at 1059.

range of reasonable defenses" be available to an employer in order to offset any unfair advantage that employees may gain by the courts' recognition of a common-law cause of action for terminated whistleblowers.<sup>75</sup> Justice Cook filed a separate opinion, in which Chief Justice Moyer and Justice Lundberg Stratton concurred, agreeing in or supporting in the Court's decision to affirm the Eleventh District's finding that there was no basis for the emotional distress claim, but dissenting in the Court's reversal of the Eleventh District. Justice Cook accused the majority of "elevating itself above the General Assembly"<sup>76</sup> and acting "beyond this court's constitutional authority"<sup>77</sup> in recognizing a public policy claim in addition to the Whistleblower's statute.<sup>78</sup> In addition to arguing that the remedy provided for in section 4113.52 of the Ohio Revised Code is exclusive, Justice Cook's opinion also focused procedurally on the appellees' summary judgment motion, stating that Kulch was unable to withstand it.

## VI. CONCLUSION

In the end, the Ohio Supreme Court did create a remedy for a wrongful discharge of an at-will employee. *Kulch* also accomplished the clarification of Ohio's Whistleblower Statute by overruling *Phung*. The allowance of concurrent causes of action serves a public policy interest that is embedded both in statute and in public interest. Some of the convoluted tactics employed by the Court in reaching its decision are questionable to say the least. It almost appears as if the court, working backwards, reached a decision and then created the necessary support around the decision. Some of the low points included pulling favorable legislative history out of the thin air and threatening to abolish employment-at-will in Ohio.

It is uncertain what the court intended when it provided such scant review to the issue of recovery. Possibly the court would rather let the issue be decided by Ohio's courts. Regardless, recovery is an issue that will need to be addressed by some judiciary in the near future if whistleblower's rights are to be solidified in Ohio.

The impact of the *Kulch* decision, however, has already been felt in other areas of employment law. Four months after deciding *Kulch*, the court again reversed the Eleventh District in *Livingston v. Hillside Rehabilitation Hosp.*,<sup>79</sup> and ruled that a discharged employee who brought an age discrimination claim pursuant to former section 4101.17(A) of the Ohio Revised Code<sup>80</sup> could also

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<sup>75</sup>*Kulch*, 677 N.E.2d at 330.

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*Livingston*, 680 N.E.2d at 1220.

<sup>80</sup>Renumbered section 4112.14 of the Ohio Revised Code by Am.Sub.S.B. No. 162, effective October 29, 1995.

maintain a *Greeley* wrongful discharge claim at common law. The court reversed with no opinion, simply stating that the Eleventh District was reversed on the authority of *Kulch*.<sup>81</sup> Interestingly, this decision seemed to gather more support than *Kulch*. Five justices concurred, with only Justices Cook, who filed an opinion, and Justice Lundberg Stratton, who concurred in Justice Cook's opinion, dissenting.

The court seems to be sending a message: statutory relief is not enough to adequately compensate the wrongfully discharged employee. The court in *Livingston* did not even delve into an analysis of the adequacy of the remedies provided by the age discrimination statute. It appears as if the court is prepared to allow the discharged employee to maintain concurrent causes of action, both statutory and common law, where they are available. However, in addition to sending this message, the court is also creating enormous questions as to recovery. While the court may be furthering policy objectives in employment law, and specifically, wrongful termination, this creates an even greater need for the court to address properly the issue of recovery so that Ohio's courts can have a uniform approach to recovery of damages where concurrent causes of action exist. The court's decision in *Kulch* has clearly told Ohio's courts what causes of action apply, but it has left out exactly how to apply them. The Eleventh District, in particular, is curious to know.

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<sup>81</sup>*Livingston*, 680 N.E.2d at 1220.