NO. 123599

IN THE SUPREME COURT OF ILLINOIS

KENRICK ROBERTS,

PLAINTIFF – APPELLANT,

vs.

BOARD OF TRUSTEES COMMUNITY COLLEGE DISTRICT NO. 508 d/b/a CITY COLLEGES OF CHICAGO,

DEFENDANT – APPELLEE.

On Appeal From
The Illinois Appellate Court, First District
No. 1-17-0067

There Heard On Appeal From
The Circuit Court of Cook County, Illinois
No. 15 L 9430
The Honorable Judge James Snyder, Presiding

REPLY BRIEF OF PLAINTIFF - APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

The Defendant contends that "[t]he only way to interpret Section 20 of the **Whistleblower** Act is that an employer may not retaliate against an employee whom it requests or demands to violate a state or federal law, rule, or regulation because the employee refuses to do so." (Emphasis added.) (Def. Brief p. 7.) If this interpretation is correct then the very purpose of the Whistleblower Act is thwarted. If the employer is permitted to terminate the whistleblower, so long as the employer never makes an overt request or demand that the whistleblower violates a state or federal law, rule or regulation, the Whistleblower Act will provide protection not to the whistleblower, but instead, to the employer. The Appellate Court's interpretation of the pleading requirement of Section 20 of the Whistleblower Act must be rejected.

I. A refusal to participate under Section 20 of the Whistleblower Act does not require an overt request or demand from the employer that the employee participates in its unlawful conduct.

In the case at bar, the Appellate Court held that "in order to state a claim under [Section 20] of the Whistleblower Act, there must be a request or demand by the employer that the employee engage in the illegal or unlawful conduct." (A16 ¶ 41.)[1] In support of this conclusion, the Defendant argues that "[a]n offer or demand is the *sine qua non* to refusal." (Def. Brief p. 14.) Relying on the Black's Law Dictionary definition of "refusal," the Defendant comes to the conclusion that "[n]o reasonable interpretation of the English

[1] All appendix citations are to the Plaintiff's appendix in support of his opening brief and are cited to herein as "A" followed by the page number and the specific paragraph when applicable.

language allows a person to refuse to participate in an act which no one has ever sought his participation." (Def. Brief p. 14.) However, statutory interpretation involves more than singling out the definition of a word -- refusal -- contained within the body of the statute. The Court must evaluate the statute as a whole, "construing words and phrases in context to other relevant statutory provisions and not in isolation." *Murphy-Hylton v. Liberman Management Services, Inc.*, 2016 IL 120394, ¶ 25, citing, *Bowman v. Ottney*, 2015 IL 119000, ¶ 9. The Court should not render any language superfluous, giving each word, clause, and sentence of the statute a reasonable meaning. *Murphy-Hylton v. Liberman Management Services, Inc.*, 2016 IL 120394, ¶ 25, citing, *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15. "Additionally, the court may consider the reason for the law, the problems sought to be remedied, the **purposes** to be achieved, and the consequences of construing the statute one way or another." (Emphasis added.) *Id.*

The purpose of the Illinois Whistleblower Act is as follows:

> The Act protects employees who call attention in one of two specific ways to illegal activities carried out by their employer. It protects employees who either contact a government agency to report the activity or refuse to participate in that activity. An employee who does not perform either of the specifically enumerated actions under the Act cannot qualify for its protections.

Sardiga v. Northern Trust Co., 409 Ill.App.3d 56, 62 (1st Dist. 2011); *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 19. In the case at bar, the Appellate Court quoted this very purpose. (A14 ¶ 37.) As stated in the title, the Whistleblower Act intends to provide protection to **whistleblowers** -- "employees who call attention . . . to illegal activities carried out by their employer." *Sardiga*, 409 Ill.App.3d at 62; *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 19. Without this protection, a potential

whistleblower, an employee who has knowledge of their employer's unlawful conduct, would remain silent, thereby allowing the conduct to continue. The Appellate Court's erroneous pleading requirement defeats the purpose of the Whistleblower Act by, in essence, requiring that the whistleblower participate in the unlawful conduct unless he can plead (and ultimately prove) that the employer made an overt request or demand that he participates in the unlawful conduct. In a true whistleblower scenario -- where it is the whistleblower who calls attention to the illegal activities -- the employer does not typically make an overt request or demand that the potential whistleblower participates in the unlawful conduct. The very purpose of the Whistleblower Act is defeated if the whistleblower is only entitled to protection from retaliation if the employer overtly requests or demands that the whistleblower participates in the employer's unlawful conduct discovered by the whistleblower.

In the case at bar, the facts pled in the Plaintiff's Complaint demonstrate the classic example of the type of whistleblowing activity that the Whistleblower Act was designed to protect. The Defendant conspicuously avoids the facts of this case in its analysis. The Plaintiff, as the Director of Medical Programs at Malcolm X College, was the individual responsible for vetting potential instructors for teaching various courses and curriculum, and ensuring that instructors assigned to teach various courses met the appropriate accreditation standards and had the correct qualifications to teach their assigned courses and curriculum. (A21 ¶ 13.) Despite the fact that vetting instructors was part of the Plaintiff's job duties, he was intentionally excluded from the process of assigning an instructor to teach HeaPro 101 for the 2015 school year. (A21 ¶ 14.) Dr. Christopher Robinson-Easley, Vice President of Malcolm X College, was the individual who selected

and assigned the unqualified professor to teach HeaPro 101. (A23 ¶ 25.) There was no "request or demand" for the Plaintiff to participate in the assignment of the unqualified professor, the assignment was intentionally done behind his back. (A32 ¶ 72.) However, contrary to the Defendant's argument, the assignment of the unqualified professor is not the extent of the unlawful conduct that the Defendant was involved in. In fact, maintaining and allowing the unqualified professor to teach the students is what lead to the continuous violation of the law.

When the Plaintiff became aware that an unqualified professor was teaching HeaPro 101, he made numerous complaints to his direct supervisors, in which he refused to participate by refusing to support the decision to appoint the unqualified professor assigned to teach the students at Malcolm X College who were enrolled in class HeaPro 101, fearing that the following violations were occurring:

a. By appointing and maintaining an unqualified professor, the Defendant was in violation of their accrediting standards and requirements (and in violation of 20 U.S.C. § 1094(a)(21) and 20 U.S.C. § 1094(c)(3)(A)).

b. By appointing and maintaining an unqualified professor, the Defendant was in violation of Federal and State grant and financial aid programs requirements, including the Program Participation Agreement (and in violation of 20 U.S.C. § 1094(a)(21), 20 U.S.C. § 1094(c)(3)(A), and 34 C.F.R. § 668.14).

c. By appointing and maintaining an unqualified professor, the students did not receive the education that they paid for (in violation of 20 U.S.C. § 1094(c)(3)(A) -- "misrepresentation of the nature of its educational program").

d. By appointing and maintaining an unqualified professor, the students enrolled in class HeaPro 101 did not meet the certification requirements for phlebotomists (in violation of 20 U.S.C. § 1094(c)(3)(A) -- "misrepresentation of the employability of its graduates.")

e. By appointing and maintaining an unqualified professor, the students enrolled in class HeaPro 101 were defrauded by the City Colleges.[2] (A32 ¶ 73.)

The Plaintiff did not allege in his Complaint that the Defendant knew that appointing an unqualified professor was in violation of any of the above-listed laws. Dr. Christopher Robinson-Easley's motivation for appointing and maintaining an unqualified instructor is unknown and irrelevant. In fact, it is likely that until the Plaintiff "called attention" to the improper appointment, the Defendant, including the Plaintiff's supervisors, did not know the instructor was unqualified or of the illegality of the appointment. The Plaintiff was the whistleblower that "called attention" to the Defendant's illegal activities. See, *Sardiga*, 409 Ill.App.3d at 62; *Sweeney*, 2017 IL App (4th) 160492, ¶ 19.

If a defendant is unaware that its activities are unlawful, how is the defendant in a position to "request or demand" that a plaintiff participate in the unlawful conduct? Once the Plaintiff blew the whistle on the unlawful conduct, he then had the opportunity to either participate in the known unlawful conduct or refuse to participate in the conduct. See, *Montoya v. Atkore International, Inc.*, 2018 WL 1156245, *4 (N.D. Ill. 2018) ("To refuse to participate, the Plaintiff must have had the opportunity to participate and rejected that opportunity."); *Sardiga*, 409 Ill.App.3d at 61:

> "Refusing to participate" means exactly what it says: a plaintiff who participates in an activity that would result in a violation of a state or federal law, rule or regulation cannot claim recourse under the Act. 740 ILCS 174/20 (West 2004). Instead, the plaintiff must actually refuse to participate.

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[2] "[S]ection 20 includes a party's refusal to participate in an activity that would result in a violation of Illinois common law." *Teschky v. Buschman Residential Management, LLC*, 2012 IL App (2d) 110880-U, ¶ 28.

Following the Plaintiff's complaints, whereby he refused to support or participate in the assignment and maintenance of an unqualified professor, the Defendant retaliated against the Plaintiff by keeping him out of important meetings, discussions and decisions regarding programs that were under his responsibilities as Director of Medical Programs at Malcolm X College. (A23 ¶ 27.) The retaliation ultimately escalated to the termination of Plaintiff's employment. (A33 ¶ 76.) If the termination of the Plaintiff's employment was not done in retaliation of the Plaintiff's "refusal to participate" in the Defendant's unlawful conduct, then what was the motivation behind the Defendant's retaliatory conduct?

Under the provisions of the Whistleblower Act, the Plaintiff had two options when he discovered the Defendant's illegal conduct: (1) contact a government agency to report the activity; or (2) refuse to participate in that activity. See, *Sardiga*, 409 Ill.App.3d at 62; *Sweeney*, 2017 IL App (4th) 160492, ¶ 19. The Plaintiff did not contact a government agency to report the Defendant's appointment and maintenance of an unqualified professor. After all, which government agency would the Plaintiff contact in order to address this type of unlawful conduct? Instead, the Plaintiff refused to participate in the illegal activity by "calling to the attention" of the Defendant the illegal conduct that was occurring, and subsequently refusing to participate in the unlawful conduct. By not participating in the discovered unlawful conduct, the Plaintiff refused to participate in the activity. The Plaintiff's compliance with the statute is his refusal to participate with the unlawful conduct. Short of leaving his employment, how else should have the Plaintiff demonstrated his refusal to participate in the unlawful conduct? The Plaintiff had the opportunity to

participate in the unlawful conduct, but instead he refused "to cover things up," "be quiet," and "look the other way." (A15 ¶ 38.) In other words, he refused to participate.

As the whistleblower, the Plaintiff's actions entitled him to protection under the provisions of the Whistleblower Act. Prior to the Appellate Court's decision, the Plaintiff properly pled a violation of the Whistleblower Act:

> [I]n order to sustain a cause of action under the Act, a plaintiff must establish that (1) he refused to participate in an activity that would result in a violation of a state or federal law, rule, or regulation and (2) his employer retaliated against him because of that refusal.

Sardiga, 409 Ill.App.3d at 61. However, the Appellate Court required the following three (3) elements in order to state a cause of action under Section 20 of the Act:

1. the employer requested or demanded that the employee engage in illegal or unlawful conduct;

2. the employee refused to participate in an activity that would result in a violation of a state or federal law, rule, or regulation; and

3. the employer retaliated against the employee because of that refusal.

(A16 ¶ 41.) Although Defendant argues that the "Plaintiff quibbles about whether two or three elements are necessary to plead a Section 20 claim . . ." (Def. Brief p. 18.), the Defendant's proposed two elements demonstrate that there are in fact three elements:

> To state an actionable claim under Section 20, a plaintiff must allege two things: (1) that he refused to participate in an activity requested by the employer and (2) that the activity he refused to participate would result in a violation of the law, rule or regulation.

(Def. Brief p. 25.) The Defendant's two proposed elements fail to include the element that the employer retaliated against the employee; thus, confirming that the Appellate Court's opinion requires that the Plaintiff plead (and prove) three elements.

The Defendant has not and cannot cite a single Illinois case that requires the three elements that the Appellate Court requires to be pled. The Defendant inaccurately proclaims that "[t]he First and Second District of the Illinois Appellate Court have expressly held that a plaintiff must establish that his employer requested or demanded that he participate in the violation of a state or federal law, rule or regulation to state an actionable claim under Section 20 of the Whistleblower Act." (Def. Brief p. 15.) In fact, the three cases cited by the Defendant, *Young*, *Lucas*, and *Collins*, each cited and quoted the two elements necessary to plead a Section 20 claim established by the *Sardiga* court. (Def. Brief p. 15-16.); see, *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 48; *Lucas v. County of Cook*, 2013 IL App (1st) 113052, ¶ 25; *Collins v. Bartlett Park Dist.*, 2013 IL App (2d) 130006, ¶ 27.

The Defendant inaccurately proclaims that "[t]he United States Court of Appeals for the Seventh Circuit and a number of federal courts in Illinois similarly have held that the plain language of Section 20 of the Whistleblower Act requires a plaintiff to establish that his employer demanded that he participate in unlawful activity." (Def. Brief p. 17.) In fact, the federal courts in Illinois, have followed the two-element requirement in *Sardiga*. The only time that the Seventh Circuit Court of Appeals addressed Section 20 of the Act is prior to the *Sardiga* decision. See, *Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668 (7th Cir. 2008). The *Sardiga* court cited the Seventh Circuit's decision in *Robinson* in support of its analysis and holding. *Sardiga*, 409 Ill.App.3d at 63 ("The court explained that the plaintiff's claim under the Act failed because plaintiff failed to establish that he refused to participate in the illegal activity."). The courts in *Montoya* and *Armour*, both cited the two-element requirement in *Sardiga*. See, *Montoya v. Atkore International, Inc.*,

2018 WL 1156245, *4 (N.D. Ill. 2018); *Armour v. Homer Tree Services, Inc.*, 2017 WL 4785800, *12 (N.D. Ill. 2017); (Def. Brief p. 17.)

The Appellate Court's statutory interpretation of Section 20 of the Whistleblower Act is incorrect and in conflict with the holdings of both Illinois and Federal courts interpreting Illinois law. The cases cited by the Defendant fail to support the Appellate Court's inaccurate conclusion that "in order to state a claim under [Section 20] of the Whistleblower Act, there must be a request or demand by the employer that the employee engage in the illegal or unlawful conduct." (A16 ¶ 41.) Merely defining the word "refusal" is not a complete and proper statutory interpretation of Section 20 of the Whistleblower Act. When the statute is evaluated as a whole, and the Court considers the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another, it becomes clear that a refusal to participate under Section 20 of the Whistleblower Act does not require an overt request or demand from the employer that the employee participates in its unlawful conduct. See, *Murphy-Hylton*, 2016 IL 120394, ¶ 25, citing, *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15.

II. To hold that a violation of Section 20 of the Whistleblower Act requires that the Plaintiff plead (and prove) that the employer made an overt request or demand that the whistleblower participates in the unlawful conduct produces an absurd result.

Under the Appellate Court's interpretation of Section 20 of the Whistleblower Act, an employer is shielded from liability under the Act if the employer terminates the whistleblower for refusing to participate in the unlawful conduct, so long as the employer

does not make an overt request or demand that the whistleblower participates in the unlawful conduct. That is an absurd and unjust result.

In the case at bar, the Plaintiff, the employee who brought attention to the employer's unlawful conduct -- a whistleblower -- was "lawfully" terminated by the employer simply because the employer did not make an overt request or demand that the whistleblower participates in the unlawful conduct. The Defendant supports this absurd result by relying solely on the definition of the word "refusal," and by proclaiming: "[r]efusal means something: A plaintiff must allege that his employer asked or demanded that he engage in an activity and that he denied or rejected that request." (Def. Brief p. 18.) The result of Defendant's logic is that an employer that does not ask or demand that the whistleblower engage in unlawful conduct does not violate Section 20 of the Whistleblower Act; and is free to engage in retaliatory conduct against the whistleblower and continue to engage in the unlawful conduct. Defendant's literal reading of the word "refusal" in the context of Section 20 of the Whistleblower Act, should be rejected. See, *People v. Hanna*, 207 Ill.2d 486, 498 (2003):

> [W]here a plain or literal reading of a statute produces absurd results, the literal reading should yield: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. *** If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." [Citations omitted.] ("Statutes are to be construed in a manner that avoids absurd or unjust result."); [Citations omitted.] (when the literal construction of a statute would lead to consequences which the legislature could not have contemplated, the courts are not bound to that construction); [Citation omitted.] ("The absurd result principle in statutory interpretation provides an exception to the rule that a statute should be interpreted according to its plain meaning").

This Court should follow the principle that statutory language should not be construed to produce an absurd result. Section 20 of the Whistleblower Act was not enacted to permit the employer to retaliate against the whistleblower simply because the employer did not make an overt request or demand that the whistleblower participates in the unlawful conduct. In actuality, the drafters of Section 20 of the Whistleblower Act intended to provide protection to those whistleblowers that brought attention to the employer's unlawful conduct and who refused to participate in said conduct. The whistleblower who brings attention to the unlawful conduct but knowingly continues to participate in said unlawful conduct is not provided protection under Section 20. See, *Sardiga*, 409 Ill.App.3d at 612:

> "Refusing to participate" means exactly what it says: a plaintiff who participates in an activity that would result in a violation of a state or federal law, rule or regulation cannot claim recourse under the Act. 740 ILCS 174/20 (West 2004). Instead, the plaintiff must actually refuse to participate.

If the Appellate Court's interpretation of Section 20 is allowed to stand, then Illinois employers will be permitted to terminate whistleblowers who bring unlawful conduct to the attention of their employer so long as the employer did not make an overt request or demand that the whistleblower participates in the unlawful conduct. This absurd result cannot be the law in Illinois.

CONCLUSION

For the reasons stated herein and in the Plaintiff's opening brief, The Appellate Court's decision affirming the dismissal of Count II (Violation of the Illinois Whistleblower Act) of Plaintiff's Second Amended Complaint should be reversed. The case should be remanded for proceedings consistent with the Supreme Court's order. Plaintiff requests such other and further relief as the Court finds equitable and just.

Respectfully submitted,

s/ Brian R. Holman

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 12 pages.

s/ Brian R. Holman

Brian R. Holman

CERTIFICATE OF FILING AND SERVICE

Brian R. Holman, the undersigned attorney, certifies that on December 18, 2018, the foregoing Reply Brief of Plaintiff-Appellant was filed with the Supreme Court of Illinois, using the court's electronic filing system.

The undersigned further certifies that on December 18, 2018, he served each party to this appeal by emailing the Reply Brief of Plaintiff-Appellant directly to one of its attorneys at the email address specified below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

s/ Brian R. Holman

Brian R. Holman