No. 123594 and 123599

IN THE
SUPREME COURT OF ILLINOIS

KENRICK ROBERTS

Plaintiff – Appellant

v.

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

Defendant – Appellee

On Appeal from the Appellate Court of Illinois
First District No. 1-17-0067
There heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Law Division
Case No. 15 L 9430
The Honorable Judge James Snyder, Presiding

BRIEF OF DEFENDANT – APPELLEE

James P. Daley
James D. Thomas
David M. Novak
Jackson Lewis P.C.
150 N. Michigan Avenue, Suite 2500
Chicago, IL 60601
Telephone: (312) 787-4949
Fax: (312) 787-4995
James.Daley@jacksonlewis.com
James.Thomas@jacksonlewis.com
David.Novak@jacksonlewis.com

ORAL ARGUMENT REQUESTED

E-FILED
12/5/2018 1:44 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff filed three complaints against the Board of Trustees of Community College District No. 508 (the "City Colleges"), each purporting to allege causes of action for common law retaliatory discharge, violation of the Illinois Whistleblower Act, and wrongful termination based on the City Colleges' policies and procedures. Judge Snyder of the Circuit Court of Cook County dismissed the retaliatory discharge and Whistleblower Act counts three times pursuant to Section 2-615 of the Code of Civil Procedure. The wrongful termination count remains to be litigated and might offer relief if Plaintiff proves his case.

Plaintiff appealed the dismissal of the retaliatory discharge and Whistleblower Act counts pursuant to Rule 304. The appellate court on April 16, 2018 reversed the dismissal of the retaliatory discharge count but affirmed the dismissal of the Whistleblower Act count. This Court subsequently granted the petitions for leave to appeal filed by both the City Colleges and Plaintiff.

This case presents the first occasion for this Court to consider the requirements of an actionable claim under Section 20 of the Whistleblower Act. The appellate court affirmed the circuit court's dismissal of Plaintiff's Whistleblower Act count, finding that Plaintiff did not state an actionable claim under Section 20 of the Whistleblower Act because he did not allege the City Colleges offered or demanded that he participate in any allegedly unlawful activity but instead affirmatively alleged that the City Colleges excluded him from such activity. In so ruling, the appellate court reiterated its holding in *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56 (1st Dist. 2011), that the plain language of Section 20 of the Whistleblower Act requires a plaintiff to show that he actually refused

to participate in an activity offered or demanded by his employer that would have resulted in the violation of a state or federal law, rule, or regulation. As the appellate court correctly held, a request or demand by an employer is the necessary predicate for a refusal to perform that activity by an employee. The plain language of Section 20 of the Whistleblower Act cannot support any other interpretation of Section 20's requirements. For these reasons, the dismissals by the circuit court and the appellate court ought to be affirmed.

All issues in this appeal are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

The issue presented for review in Plaintiff's appeal is: Does a plaintiff assert a viable cause of action under Section 20 of the Whistleblower Act if the plaintiff does not allege that his employer requested that he participate in unlawful activity but instead alleges that his employer excluded him from the alleged unlawful activity?

JURISDICTIONAL STATEMENT

The Circuit Court of Cook County dismissed two of the counts of Plaintiff's second amended complaint with prejudice on October 25, 2016. The Circuit Court certified pursuant to Rule 304(a) on December 15, 2016 that there was no just reason for delaying appeal of those claims. The Illinois Appellate Court, First District, entered judgment on April 16, 2018. Plaintiff filed a timely petition for leave to appeal pursuant to Rule 315, which this Court granted on September 26, 2018.

STATUTE INVOLVED

This appeal involves interpretation of Section 20 of the Whistleblower Act (740 ILCS 174/20):

> Sec. 20. Retaliation for certain refusals prohibited. An employer may not retaliate against an employee for refusing to participate in an activity that

> would result in a violation of a State or federal law, rule, or regulation, including, but not limited to, violations of the Freedom of Information Act.

STATEMENT OF FACTS

The City Colleges limits this statement of facts to Plaintiff's Whistleblower Act count although the facts are substantially similar to those set forth in the City College's opening brief on its appeal of the common law retaliatory discharge count. The core events and chronology pleaded by Plaintiff stayed virtually the same throughout his three complaints:

The Board of Trustees of Community College District No. 508 oversees a community college system in Chicago commonly known as the City Colleges of Chicago. Second Am. Compl. Par. 2 (A54, C518).[1] The City Colleges operates seven community colleges in Chicago, one of which is Malcolm X College. *Id.* at Par. 3 (A54, C518). The City Colleges employed Plaintiff as the Director of Medical Programs at Malcolm X College. *Id.* Par. 6 (A54, C518). Plaintiff alleges that his job duties included "vetting potential instructors" to ensure compliance with appropriate accreditation standards and qualifications but states that he "was intentionally excluded from the process of assigning an instructor to teach HeaPro 101 for the 2015 school year." *Id.* Pars. 13-14 (A56, C520). Plaintiff claims that on January 15, 2015 he emailed his direct supervisors, the Dean and Associate Dean of Health Sciences & Career Programs at Malcolm X College, to complain that an allegedly unqualified professor was teaching the HeaPro 101 course. *Id.* Pars. 18-19 (A56-57, C520-521). Plaintiff further alleges that on February 25, 2015 he emailed the President, Vice President, and Associate Provost of Malcolm X College repeating his

[1] All appendix citations are to the City Colleges' appendix in support of its opening brief in consolidated appeal number 123594.

complaint about an allegedly unqualified professor teaching HeaPro 101 and adding that this unqualified professor had abandoned her class and that a second allegedly unqualified professor had replaced her to complete the remainder of the academic term. *Id.* Par. 22 (A57-58, C521-22).

Plaintiff alleges that upon receipt of his February 25, 2015 email the Vice President of Malcolm X College, Dr. Christopher Anne Robinson-Easley, asked Plaintiff to meet with her to discuss his complaints. *Id.* Par. 23 (A58, C522). In a seemingly illogical twist, Plaintiff next alleges that he felt "very uncomfortable" that Dr. Robinson-Easley -- to whom Plaintiff had submitted his complaint -- asked to speak to him about it. *Id.* Par. 24 (A58, C522).

Plaintiff alleges that he met with Dr. Robinson-Easley the same day he sent his second complaint about two allegedly unqualified professors and that Dr. Robinson-Easley was upset with Plaintiff about his complaints. *Id.* Par. 25 (A58, C522). Plaintiff asserts that he was excluded from subsequent meetings and discussions related to his job duties. *Id.* Par. 27 (A58, C522). According to Plaintiff, the President of Malcolm X College instructed Plaintiff to file a complaint pursuant to the City Colleges' Equal Employment Opportunity policy against Dr. Robinson-Easley in late June 2015 for alleged retaliation in connection with Plaintiff's complaints about allegedly unqualified professors. *Id.* Par. 29 (A59, C523).

The City Colleges terminated Plaintiff on August 7, 2015, and Plaintiff contends that the City Colleges did so unlawfully. *Id.* Par. 31 (A59, C523).

Judge Snyder dismissed Plaintiff's Section 20 count three times because Plaintiff did not allege that he actually refused to participate in an activity requested by the City

Colleges that would have violated a state or federal law, rule, or regulation. (C 5-7, 462, 573-74). Following the third dismissal, which was with prejudice, Judge Snyder entered an order finding pursuant to Supreme Court Rule 304(a) that there was no just reason for delaying an appeal of the dismissal of either the common law retaliatory discharge count or the count alleging a violation of the Whistleblower Act.

The appellate court on April 16, 2018 affirmed Judge Snyder's dismissal of Plaintiff's claim under Section 20 of the Whistleblower Act. Relying heavily on its prior decision in *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56 (1st Dist. 2011), the appellate court held that a refusal to participate under Section 20 requires that an employer offer or demand that the employee participate in the allegedly unlawful activity. *Roberts v. Bd. of Trustees of Comm. College Dist. No. 508,* 2018 IL App (1st) 170067, ¶ 38. Based on this standard, the appellate court affirmed the dismissal of Plaintiff's Section 20 claim because "there is no allegation in the second amended complaint that defendant offered or demanded plaintiff's participation in the allegedly wrongful activity. Plaintiff pleads that he was 'intentionally excluded' and allowed 'no input' into the decision to hire or retain the unqualified instructors." *Id.* Although Plaintiff now contends to this Court that the appellate court deviated from *Sardiga*, the appellate court specifically noted that Plaintiff's briefing to that court never even mentioned *Sardiga* and instead argued that "a plaintiff does not need to plead that the defendant specifically asked the plaintiff to perform an unlawful act." *Id.* at ¶ 39. The appellate court declined Plaintiff's request to depart from its prior holding in *Sardiga* and reaffirmed "that in order to state a claim under the Whistleblower Act, there must be a request or demand by the employer that the employee engage in the illegal or unlawful conduct." *Id.* at ¶ 41.

STANDARD OF REVIEW

This Court reviews *de novo* whether complaints should be dismissed under Section 2-615 of the Code of Civil Procedure. *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004); *Chatham Surgicare, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 799 (1st Dist. 2004). The interpretation of a statute's provisions is a question of law reviewed *de novo*. *People v. Davis*, 199 Ill. 2d 130, 135 (2002).

ARGUMENT

This appeal presents the Court with a straightforward question: What does it mean to refuse to participate? Plaintiff asks this Court to find that someone can refuse to participate in an activity in which no one ever asked him to participate. This is absurd. Being asked or ordered to do something is the *sine qua non* for refusal to do it. A refusal presupposes a request. This is the very definition of refusal. Every Illinois court that has considered Section 20 of the Whistleblower Act has found that refusal means just that -- an employee's unwillingness to participate in an activity requested by his employer. Plaintiff not only failed to allege in each of his three complaints that anyone at the City Colleges asked him to participate in the selection process that he believes to be unlawful, Plaintiff affirmatively alleged that the City Colleges excluded him from that process. Plaintiff could not have refused to participate in the activities about which he complained because no one ever asked him to be involved. The logical failing in Plaintiff's position is obvious if one considers the scenario contrary to what Plaintiff alleges he did. The opposite of refusal is agreement. But, by his own allegations, Plaintiff never could have agreed to participate in the selection of the instructors about which he complains because the City Colleges excluded him from the process. Put another way, if Plaintiff was never capable of participating in the activity, how could he refuse to do so?

The Court need not ponder the absurdity of Plaintiff's position for long. The plain language of Section 20 and the ordinary meaning of its words dictate that an employee cannot refuse to participate in an activity that his employer has not requested or demanded. This result is consistent with the other provisions of the Whistleblower Act, Illinois courts' interpretation of "refusal" in other contexts, and the General Assembly's other uses of the concept of refusal. This result is consistent with this Court's prior holdings in the common law retaliatory discharge context and with the decision of every Illinois court that has considered the meaning of Section 20. Finally, this result is consistent with public policy.

When examined in the light of this straightforward requirement, Plaintiff's claim under Section 20 of the Whistleblower Act fails. Plaintiff repeatedly asserts in his complaint that the City Colleges never requested that he participate in the allegedly unlawful activity and instead excluded him from the entire process about which he allegedly complained. Plaintiff's alleged internal complaints cannot form the basis for an actionable Section 20 claim. This Court should affirm the decision of the appellate court.

I. The predicate for a refusal to participate under Section 20 of the Whistleblower Act is that an employer request that an employee participate in an unlawful activity.

The 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. As this Court has consistently held, the starting point for any statutory interpretation is the plain and ordinary meaning of the language of the statute (*Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008) (internal citations omitted)):

> The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. The best indication of the legislature's intent is

> the statutory language given its plain and ordinary meaning. When the language of a statute is clear and unambiguous, it must be applied without resort to other aids of construction.

This Court need look no further than the plain and ordinary meaning of the language of Section 20 to determine that the necessary prerequisite for a claim under that section is that an employer request or demand that an employee engage in an activity that would violate a state or federal law, rule, or regulation. Section 20 of the Whistleblower Act provides:

> Sec. 20. Retaliation for certain refusals prohibited. An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation, including, but not limited to, violations of the Freedom of Information Act.

The City Colleges agrees with Plaintiff that the First District correctly interpreted this provision in *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 62 (1st Dist. 2011) -- the case upon which the appellate court below correctly relied to find that Plaintiff had not stated an actionable claim for violation of the Whistleblower Act. The *Sardiga* court held that to plead a violation of Section 20 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." *Id.* at 61. Although Plaintiff agrees with this portion of the *Sardiga* court's holding (see Pl. Brief at 13), Plaintiff ignores the court's explanation of what constitutes a refusal under the Whistleblower Act (*Sardiga*, 409 Ill. App. 3d at 62):

> Here, the language of the statute is unambiguous. "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. Black's Law Dictionary defines "refusal" as "[t]he denial or rejection of something offered or demanded." Black's Law Dictionary 1394 (9th ed. 2009). Indeed, the very title of section 20, "Retaliation for certain refusals prohibited," suggests that not every refusal qualifies for protection under the Act. 740 ILCS 174/20 (West

> 2004). Furthermore, the Act protects employees who complain to a government agency about an activity that the employee reasonably believes constitutes a violation of a state or federal law, rule, or regulation. 740 ILCS 174/15 (West 2004). Thus, "refusing" means refusing; it does not mean "complaining" or "questioning," as Sardiga would have us believe.

The *Sardiga* court looked to Black's Law Dictionary for the definition of "refusal," which that dictionary defines as "[t]he denial or rejection of something offered or demanded." *Id*. at 62. The current edition of Black's Law Dictionary repeats that definition and offers an example of a refusal that is predicated on something being offered or demanded: "[T]he lawyer's refusal to answer questions was based on the attorney-client privilege." Black's Law Dictionary (10th ed. 2014). Based on the definition of refusal, the *Sardiga* court held that "'refusing' means refusing; it does not mean 'complaining' or 'questioning.'" *Sardiga*, 409 Ill. App. 3d at 62. The *Sardiga* court's interpretation of Section 20 is correct and should be adopted by this Court. Refusal necessarily requires an offer or demand capable of being rejected. Where, as here, an employer never asked an employee to participate in an allegedly unlawful activity, there can be no refusal. An employee who raises concerns about an activity in which he is never asked to participate may be complaining or objecting, but he is not refusing to participate.

Furthermore, Plaintiff's contention that an employee can refuse to participate in an activity when his employer never offers or demands that he do so is inconsistent with the remainder of the Whistleblower Act. The Whistleblower Act contains two primary prohibitions. First, Section 15 prohibits an employer from retaliating against an employee who discloses a violation of law in a legal proceeding or who discloses information about an activity to a government or law enforcement agency that the employee has reasonable cause to believe is unlawful. 740 ILCS 174/15. Second, Section 20 prohibits an employer

from retaliating against an employee who refuses to participate in a violation of a state or federal law, rule, or regulation. 740 ILCS 174/20. This Court has been clear that it must evaluate a 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. Furthermore, a court must not render any statutory language superfluous and instead must give each word, clause, and sentence of the statute a reasonable meaning. *Id.*

Construing Section 20 of the Whistleblower Act as Plaintiff proposes would render Section 15 superfluous. The core of Plaintiff's argument is that an employee can refuse to participate within the meaning of Section 20 simply by complaining or raising concerns about an employer's actions. See Pl. Brief at 20 ("When the Plaintiff became aware that an unqualified professor was teaching HeaPro101, he made numerous **complaints** to his direct supervisors, in which he refused to support the decision to appoint the unqualified professor …") (emphasis added). But, if an employee could fall within the ambit of Section 20's refusal requirement simply by making a complaint or disclosure about an employer's actions, there would be no point to Section 15's protection of complaints and disclosures made in specific situations. Under the Plaintiff's logic, an employee who complained to the government or a law enforcement agency would also be refusing to participate in the employer's actions. Section 15 of the Whistleblower Act would be subsumed by Section 20.

Likewise, Section 15 of the Whistleblower Act represents a legislative determination by the General Assembly that some, but not all, complaints and disclosures by employees are protected by the Act. If the General Assembly had wanted to make

internal complaints about alleged unlawful activity protected by the Whistleblower Act, it easily could have done so. The General Assembly, however, specifically chose to make "retaliation for certain disclosures prohibited." See 740 ILCS 174/15. This is a straightforward application of the rule of statutory construction, *expressio unius est exclusio alterius.* "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 152 (1997). The General Assembly's choice to make two specific types of disclosures protected from retaliation under Section 15 of the Whistleblower Act means that internal complaints without something more cannot be a refusal to participate under Section 20. See *id.* at 153 ("The fact that the legislature did not [include certain language in a statute] cannot be deemed to be inadvertent.").

Moreover, a number of states have done what our General Assembly has not: expressly provide that either refusal or objection to an employer's unlawful activities are protected.

- **Arkansas**: A.C.A § 21-1-603 ("A public employer shall not take an adverse action against a public employee because **an employee has objected to or refused to carry out** a directive that the employee reasonably believes violates a law or rule or regulation adopted under the authority of laws of the state or a political subdivision of the state.") (emphasis added).

- **Idaho**: Idaho Code § 6-2104 ("An employer may not take adverse action against an employee because **the employee has objected to or refused to carry out** a directive that the employee reasonably believes violates a law or a rule or regulation adopted under the authority of the laws of this state, political subdivision of this state or the United States.") (emphasis added).

- **Louisiana**: La. R.S. § 23:967 ("**Objects to or refuses to participate** in an employment act or practice that is in violation of law.") (emphasis added).

- **Massachusetts**: ALM GL ch. 149 § 185 ("**Objects to, or refuses to participate in any activity**, policy or practice which the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment.") (emphasis added).

- **New Hampshire**: RSA 275-E:2 ("The **employee objects to or refuses to participate** in any activity that the employee, in good faith believes is a violation of the law.") (emphasis added).

- **New Jersey**: N.J. Stat. § 34:19-3 ("**Objects to, or refuses to participate** in any activity, policy or practice which the employee reasonably believes …") (emphasis added).

- **New York:** NY CLS Labor § 740 ("**Objects to, or refuses to participate** in any such activity, policy, or practice in violation of a law, rule or regulation.") (emphasis added).

- **Utah**: Utah Code Ann. § 67-21-3 ("An employer may not take adverse action against an employee because the **employee has objected to or refused to carry out** a directive that the employee reasonably believes violates a law …") (emphasis added).

These states made a legislative determination that they would statutorily protect employees who object to OR refuse to participate in an employer's unlawful activity. Illinois has not. This is further support that objecting or complaining (which is what Plaintiff claims is sufficient under Section 20 of the Whistleblower Act) is not the same as refusing to participate (which is what is actually protected under Section 20).

Finally, the definition of refusal used by the court below and the *Sardiga* court -- that refusal requires something to first be offered or demanded -- is consistent with the use of that word in other contexts by this Court and the General Assembly. By way of example: Illinois Supreme Court Rule 207 sets forth the consequences for a deponent's refusal to sign a deposition after having been presented with that deposition. Ill. S. Ct. R. 207 ("If

the deponent … **after examining the deposition refuses to sign it**, or after it has been made available to the deponent by arrangement it remains unsigned for 28 days, the officer's certificate shall state the reason for the omission of the signature, including any reason given by the deponent for a refusal to sign.") (emphasis added). Illinois Supreme Court Rules 213, 214, and 219 provide for the consequences when a party refuses to answer discovery, which necessarily requires that the discovery first be propounded. Ill. S. Ct. R. 213(b) ("Any objection to an answer **or to the refusal to answer an interrogatory** shall be heard by the court upon prompt notice and motion of the party propounding the interrogatory.") (emphasis added); Ill. S. Ct. R. 214(c) ("Any objection to the request **or the refusal to respond** shall be heard by the court upon prompt notice and motion of the party submitting the request.) (emphasis added); Ill. S. Ct. R. 219(a) ("**Refusal to Answer or Comply with Request for Production.**") (emphasis added). The Illinois Vehicle Code provides the consequences for refusal to submit to an intoxication screening, and the Illinois Appellate Court has said "[l]ogic, as well as the language of section 11 - 501.1, suggests that there cannot be a refusal to take a test unless the driver is asked to take the test." *People v. Brennan*, 122 Ill. App. 3d 602, 602 (3d Dist. 1984); 625 ILCS 5/11-501.1. The Illinois Unemployment Insurance Act makes refusal to comply with an employer's lawful order a basis for denying unemployment benefits. 820 ILCS 405/602(A)(5) ("**Refusal to obey an employer's reasonable and lawful instruction**, unless the refusal is due to the lack of ability, skills, or training for the individual required to obey the instruction or the instruction would result in an unsafe act.") (emphasis added).

The *Sardiga* court and the appellate court below got it right. Refusing means refusing; it does not mean complaining or questioning. This Court need not look beyond

the plain language and meaning of Section 20 to answer the question at issue in this appeal. An offer or demand is the *sine qua non* to refusal. No reasonable interpretation of the English language allows a person to refuse to participate in an act in which no one has ever sought his participation.

II. The requirement that an employer request that an employee participate in an unlawful activity is consistent with this Court's common law retaliatory discharge jurisprudence.

Almost twenty years before the enactment of the Whistleblower Act, this Court decided that a plaintiff could state a common law retaliatory discharge claim when his employer allegedly terminated him in retaliation for refusing the employer's instructions to work in an unlawful environment. This decision was the foundation upon which Section 20 of the Whistleblower Act was built and strongly supports the contention that Section 20 is designed to protect employees who actually refuse an employer's request to do something unlawful. See *Advincula v. United Blood Servs.*, 176 Ill. 2d 1, 22 (1996) ("The common law, having been classified and arranged into a logical system of doctrine, principles, and practices, furnishes one of the most reliable backgrounds upon which analysis of the objects and purposes of a statute can be determined.")

In *Wheeler v. Caterpillar Tractor Co.*, the plaintiff's employer informed him that it was installing a new, live radioactive cobalt 60 machine and that he would be expected to operate it. 108 Ill. 2d 502, 504 (1985). The plaintiff requested that he not be required to operate the new machine because he claimed the machine was not properly being operated and could cause serious injury to him. *Id.* The plaintiff further claimed that he did not have adequate training in operating the machine and the manner in which the employer operated the machine violated federal regulations. *Id.* The plaintiff alleged that his employer refused to transfer him and ultimately terminated him for refusing to operate

the cobalt 60 machine. *Id.* This Court summarized the basis of the plaintiff's complaint: "Although somewhat inartfully stated, the complaint alleged that plaintiff was discharged in retaliation for his refusal to work in the handling of cobalt 60 while the operations were being conducted in violation of regulations promulgated by the Nuclear Regulatory Commission and published in the Federal Register." *Id.* at 509. This Court held that the plaintiff could state "a cause of action for retaliatory discharge for refusing to work under conditions which contravened the clearly mandated public policy …." *Id.* at 511.

This Court later reached a similar conclusion in *Blount v. Stroud*, finding that an employer's request that an employee not testify on behalf of a coworker was actionable because "[t]his Court has recognized that actions for retaliatory discharge have been allowed where the employee was discharged for refusing to violate a statute, including a statute which makes the commission of perjury unlawful." 232 Ill. 2d 302, 314 (2009).

Wheeler is the common law precursor to Section 20 of the Whistleblower Act. An employer demanded that an employee participate in an activity that violated federal law. The employee refused and was terminated. Section 20 of the Whistleblower is a codification of this doctrine. See *Callahan v. Edgewater Care & Rehab. Ctr., Inc.*, 374 Ill. App. 3d 630, 634 (1st Dist. 2007) ("it can be reasonably argued that the Whistleblower Act codified the common-law actions recognized in *Palmateer* and *Wheeler* …").

III. The requirement that an employer request that an employee participate in an unlawful activity to state an actionable claim under Section 20 is overwhelmingly supported by the existing case law.

The First and Second Districts 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. *Young v. Alden Gardens of Waterford, LLC,*

2015 IL App (1st) 131887, ¶ 49 ("While it is true that a plaintiff under the Whistleblower Act must identify a law, rule or regulation that **her employer asked her to violate**…") (emphasis added); *Lucas v. County of Cook*, 2013 IL App (1st) 113052, ¶ 28 ("Dr. Lucas failed to establish that the activity Cook County [her employer] wanted her to engage in, *i.e.*, the treating of male patients or to attend training to treat male patients, violated any law, rule or regulation."); *Collins v. Bartlett Park Dist.*, 2013 IL App (2d) 130006, ¶ 28 ("Plaintiff did not allege that he was operating the chair lift **or that defendant ordered him to do something he actually refused to do**. Plaintiff complained to and questioned the decision of Fletcher and Carlson to continue operating the chair lift at full capacity, but such protestations are not a 'refusal to participate' under Section 20 of the Whistleblower Act.") (emphasis added); *Sardiga*, 409 Ill. App. 3d 56 (discussed *supra*).

The First, Second, and Fourth Districts likewise have used an employer's request that an employee engage in allegedly unlawful activity as the predicate in determining whether a plaintiff had established an actionable claim under Section 20. *Corah v. Bruss Co.*, 2017 IL App (1st) 161030, ¶ 16 ("Here, plaintiff suggests that defendant violated section 6(b) of the Workers' Compensation Act by asking plaintiff to file a false AIR report."); *Ulm v. Mem'l Med. Ctr.*, 2012 IL App (4th) 110421 (plaintiff was responsible for certifying medical records but refused to do so because she had concerns about her employer's record keeping practices); *Teschky v. Buschman Residential Mgmt. LLC*, 2012 IL App (2d) 110880-U, ¶ 11 (plaintiff alleged that her supervisor told her to deposit a check that allegedly constituted insurance fraud and to create miscellaneous charges to justify the amount of the check). **No Illinois Appellate Court has ever accepted Plaintiff's contention** that an employee may refuse to participate within the meaning of Section 20 of

the Whistleblower Act by complaining or objecting when his employer has not asked or demanded that he participate in the allegedly unlawful activity.

The 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. In a decision that predates *Sardiga*, the Seventh Circuit held that a plaintiff could not establish a violation of Section 20 because there was no indication he was ever asked to violate the law: "The point is that he did not refuse to use [drugs] -- as far as appears, he was never invited to use them." *Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668, 670 (7th Cir. 2007). A number of federal district courts have found that Section 20 requires a request or demand by the employer that the employee engage in unlawful activity. *Montoya v. Atkore Int'l, Inc.*, 17-cv-3628, 2018 U.S. Dist. LEXIS 177428, *10 (N.D. Ill. October 16, 2018) (finding in the context of a Section 20 claim that "[c]omplaining to one's superiors about an action is not the same thing as refusing to participate in that action … [t]o refuse to participate, the plaintiff must have had the opportunity to participate and rejected that opportunity"); *Armour v. Homer Tree Servs.*, 15-cv-10305, 2017 U.S. Dist. LEXIS 175476, *35 (N.D. Ill. October 24, 2017) (rejecting Section 20 claim because "[t]he record, therefore, at most demonstrates that Armour complained to Reposh about his practice and told him that she could not follow it, not that she actually refused to participate in it by interviewing, hiring, or otherwise considering an African-American applicant"); *Guminski v. Massac County Hosp. Dist.*, 14-cv-00849, 2015 U.S. Dist. LEXIS 9118, *3 (S.D. Ill. January 27, 2015) ("As such, there must be an offer or engagement of an activity in violation of a state or federal law, rule, or

regulation in which the plaintiff has refused to participate in order to sustain a claim under 740 ILCS 174/20.").

In contrast to this overwhelming body of case law holding that Section 20 of the Whistleblower Act requires an offer or demand by the employer that the employee participate in an unlawful activity, Plaintiff erroneously directs this Court only to a single, unpublished federal district court decision for the claimed proposition that an employer need not request or demand that an employee engage in unlawful conduct. See Pl. Brief at 14. But that decision, *Robinson v. Morgan Stanley*, does not hold what Plaintiff claims. *Robinson v. Morgan Stanley*, 06-cv-5158, 2011 U.S. Dist. LEXIS 98522, *21-22 (N.D. Ill. August 31, 2011). The plaintiff in that case claimed that his employer asked him to cover up and remain silent about alleged violations of the law but that he refused to do so by making those complaints. *Id.* This decision therefore supports the City Colleges' contention that a refusal under Section 20 of the Whistleblower Act requires an employer to ask or demand that the employee engage in an unlawful activity.

Plaintiff also devotes a substantial portion of his brief to the notion that the court below departed from the pleading requirements set forth in *Sardiga* for a claim under Section 20 of the Whistleblower Act. Pl. Brief at 15-18. Plaintiff is wrong. Plaintiff quibbles about whether two or three elements are necessary to plead a Section 20 claim but misses the overarching point. *Sardiga* teaches that a plaintiff must allege that he actually refused to participate in unlawful activity to state an actionable claim under Section 20. "Refusal" 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. The court below did not add a pleading requirement. It simply defined a statutory term that is part of one

of the elements a plaintiff must establish to claim relief under the statute. An offer or demand by the employer is a necessary part of the requirement that an employee refuse to participate. Without a request by an employer (or, in this case, the affirmative allegation that the employer specifically excluded the employee from the complained of activity), an employee simply cannot show that he refused to participate. This is the very essence of the refusal requirement.

IV. Plaintiff's policy concerns are misplaced.

Plaintiff asks this Court to use supposed public policy concerns to legislate from the bench and create a cause of action not otherwise found in the Whistleblower Act. The General Assembly never intended the Whistleblower Act to cover every action that a plaintiff may seek to fit within the concept of "whistleblowing." "The most reliable indicator of legislative intent is the statutory language, given its plain and ordinary meaning." *1010 Lake Shore Drive Ass'n v. Deutsche Bank Nat'l Trust Co.*, 2015 IL 118372, ¶ 21. The General Assembly's intent to provide a statutory claim for "whistleblowers" only in certain circumstances is manifest from the titles of the two core substantive provisions in the Whistleblower Act: Section 15 is entitled "Retaliation for **certain** disclosures prohibited." 740 ILCS 174/15 (emphasis added). Section 20 is entitled "Retaliation for **certain** refusals prohibited." 740 ILCS 174/20 (emphasis added).

Despite the General Assembly's clear intent to protect only certain refusals and certain disclosures under the Whistleblower Act, Plaintiff contends that the very purpose of the Act will be eradicated if this Court interprets the language of the Act as it is written. Not so. The only source that Plaintiff cites for this sweeping policy pronouncement (Pl. Brief at 18) is a portion of the *Sardiga* decision that directly undermines Plaintiff's argument: "The Act protects employees who call attention **in one of two specific ways** to

illegal activities carried out by their employer …. **An employee who does not perform either of the specifically enumerated actions under the Act cannot qualify for its protections**." *Sardiga*, 409 Ill. App. 3d at 62 (emphasis added). If Plaintiff believes that the Whistleblower Act should be expanded to include additional conduct, his pleas should be made to the legislature, not this Court.

Plaintiff makes the demonstrably false claim that conditioning a refusal on a request to participate in the activity -- which is the definition of a refusal -- would mean that an employee will "[r]arely, if ever" be able to plead a violation of Section 20 of the Whistleblower Act. Pl. Brief at 19. This Court need look no further than its decisions in *Wheeler* and *Blount* to see the fallacy in this statement. Further, the Illinois reporters are replete with examples of cases in which employees alleged that they were asked to do something that would violate a state or federal law, rule, or regulation. That Plaintiff cannot do so here does not mean no employee ever could. See e.g., *Corah*, 2017 IL App (1st) 161030, ¶ 16 ("Here, plaintiff suggests that defendant violated section 6(b) of the Workers' Compensation Act by asking plaintiff to file a false AIR report."); *Young*, 2015 IL App (1st) 131887, ¶ 50 ("Falsifying a patient's medical record with fabricated results of blood glucose tests would have warranted revocation of Young's license under the foregoing provisions and Werrline's request that Young assist her in that effort clearly solicited Young to engage in conduct that was illegal."); *Lucas*, 2013 IL App (1st) 113052, ¶ 28 ("Dr. Lucas failed to establish that the activity Cook County [her employer] wanted her to engage in, *i.e.*, the treating of male patients or to attend training to treat male patients, violated any law, rule or regulation."); *Teschky*, 2012 IL App (2d) 110880-U, ¶ 11 (plaintiff alleged that her supervisor told her to deposit a check that allegedly constituted insurance

fraud and to create miscellaneous charges to justify the amount of the check); *Ulm*, 2012 IL App (4th) 110421, ¶ 6 (plaintiff was responsible for certifying medical records but refused to do so because she had concerns about her employer's recordkeeping practices). Moreover, contrary to Plaintiff's insinuations, the appellate court's decision below did not require and the City Colleges' position herein does not require an employee to show *scienter* by an employer. Pl. Brief at 19. Nonetheless, an employer must request that an employee participate in an activity that would be unlawful before an employee can refuse to do so.

Finally, Plaintiff's contention that this Court needs to expand the Whistleblower Act to include internal complaints or "an employee who has knowledge of their [sic] employer's illegal or unlawful conduct would remain silent" rings particularly hollow. Pl. Brief at 19. The City Colleges highly doubts that employees diligently research the nuances of Illinois law about protected whistleblowing conduct before complaining about alleged malfeasance by their employers. Nonetheless, an employee so inclined would find nothing to discourage him from taking action against that alleged malfeasance. Even without a request by an employer to participate in unlawful activity, an employee's complaints to a governmental or law enforcement agency about alleged unlawful activity by an employer are protected by the Whistleblower Act. And, more critically, an employee who makes only internal complaints about unlawful actions by his employer is not left without recourse. The tort of common law retaliatory discharge still protects employees who make internal complaints about unlawful conduct. See *Callahan*, 374 Ill. App. 3d at 634-35 ("The common law provides a remedy for … employees discharged for reporting illegal activities to their superiors … The fact that individuals discharged in retaliation for

reporting illegal activities to their superiors have no right of action under the Whistleblower Act does not compel the conclusion that they have no right of action at all."). Plaintiff's persistent efforts to shoehorn the allegations of his complaint into Section 20 of the Whistleblower Act have nothing to with filling some gap in the law; they are a result of one distinguishing factor between the common law and statutory claims: attorneys' fees. The Whistleblower Act provides for them and the common law does not. Public policy cannot override plain statutory language and certainly not when the supposed public policy is rooted in a desire to recover fees and litigation expenses. See *Vicencio v. Lincoln-Way Builders*, 204 Ill.2d 295, 311 (2003) ("Because the issue in this case may be resolved by construction of the applicable statutes and rules, we have not considered the various public policy arguments made by the parties in favor of or in opposition to the ability of a prevailing party to recover these costs. We suggest that such concerns be addressed to the legislature.").

V. Plaintiff did not allege that he refused to participate in an activity that would violate a state or federal law, rule, or regulation.

Plaintiff readily admits that the City Colleges never asked him to participate in an activity that would have violated a state of federal law, rule, or regulation. Indeed, he has consistently alleged throughout this litigation that the City Colleges excluded him entirely from the process he claims to be unlawful. His claim under Section 20 of the Whistleblower Act falls with these admissions.

Plaintiff concedes to this Court what his three complaints in the circuit court made clear: "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." Pl. Brief at 20. The allegations of his second amended complaint reinforce this point:

- In Paragraph 14, Plaintiff admits that he "was intentionally excluded from the process of assigning an instructor to teach HeaPro 101 for the 2015 school year." (A56, C520).

- In Paragraph 19, Plaintiff cites an email written by him on January 15, 2015 in which he stated that he "had no input into the department decision to appoint a nurse to teach HeaPro 101 without my review of the credentials and necessary licenses …." (A57, C521).

- In Paragraph 21, Plaintiff admits he told the President of Malcolm X College that "he was intentionally excluded from the selection process of this unqualified professor and that he refused the support the assignment of that unqualified professor." (A57, C521)

- In Paragraph 22, Plaintiff admits that he "was excluded from the decisions in selecting those unqualified professors, despite this being one of his job duties and responsibilities as Director of Medical Programs at Malcolm X College." A57-58, C521-22).

- In Paragraphs 37 and 63, Plaintiff admits that the allegedly unqualified professor was appointed "without [his] input." A60, C524; A64, C528).

- In Paragraph 72, Plaintiff admits that he "was intentionally excluded from the process of assigning an instructor to teach HeaPro 101 for the 2015 school year." (A66, C530).

- In Paragraph 74, Plaintiff alleges that "he was not involved in the selection of the professor for HeaPro 101 . . . and that he could not and would not participate in the questionable and improper activities that the City Colleges were involved in …." (A68, C532).

Plaintiff has pleaded himself out of court. Plaintiff affirmatively admits that he was not involved in the decision about which he complained and makes no allegation that the City Colleges requested that he engage in the behavior about which he complained. At best, Plaintiff alleges that he preemptively stated that he would not be involved in an activity in which he apparently was not involved. This is insufficient to state an actionable

claim under Section 20 of the Whistleblower Act, and the decision of the appellate court should be affirmed.

Likewise, this Court should affirm the appellate court's decision because the activity about which Plaintiff complained would not have resulted in the violation of a state or federal law, rule, or regulation. Although the appellate court declined to address this issue because it found that Plaintiff could not establish a refusal, this Court "may affirm the circuit court on any basis found in the record." *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005).

As set forth in the City Colleges' brief on Plaintiff's common law retaliatory discharge count, Plaintiff constructs a maze of federal statutes and regulations, superimposes that maze over alleged private rather than public requirements established by private accrediting agencies and professional societies -- none of which is alleged to have and none of which in fact has any control over the City Colleges -- and makes the surprising and unsupported inference that the "ability to obtain the benefits of a post-secondary education by Illinois students through the help of federal and state funded programs is an Illinois public policy." Second Am. Compl. Par. 54 (A63, C527). The City Colleges certainly agrees that that the provision of higher education through public financial aid is in the public interest. Higher education is, after all, the core mission of the City Colleges. But Plaintiff cites nothing that would make unlawful the selection of the instructors at issue.

Plaintiff's virtually incomprehensible maze has eleven paragraphs citing federal statutes and regulations. Whether considered individually or collectively, however, these statutes and regulations do not express clearly or even unclearly a right to obtain public

financial aid for postsecondary education. Nor does the maze yield any specific requirements to which faculty must adhere. The specified behavior relates at best to privately established accreditation and qualification standards and nothing more. See e.g., *Lucas*, 2013 IL App (1st) 113052, ¶ 30 (plaintiff failed to establish that treating male patients or attending training to treat male patients would violate a law, rule, or regulation); *Ulm*, 2012 IL App (4th) 110421, ¶ 36 (plaintiff failed to establish that certifying subpoenaed medical records she thought were stored improperly would be unlawful). Plaintiff has failed to allege that participation in the conduct at issue would have violated any state or federal law, rule, or regulation.

Section 20 of the Whistleblower Act is unambiguous, and this Court should follow the lead of every Illinois court that has treated it as such. 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 in which he refused to participate would result in a violation of a law, rule, or regulation. Plaintiff has alleged neither. The decision of the appellate court was right and should be affirmed.

CONCLUSION

For the reasons set forth herein, the Board of Trustees of Community College District No. 508 respectfully requests this Court to affirm the appellate court's decision that Plaintiff failed to state a cause of action under Section 20 of the Whistleblower Act.

Dated: December 5, 2018

Respectfully submitted,

BOARD OF TRUSTEES COMMUNITY COLLEGE DISTRICT NO. 508

By: /s/ James P. Daley
One of Its Attorneys

James P. Daley
James D. Thomas
David M. Novak
Jackson Lewis P.C.
150 N. Michigan Avenue, Suite 2500
Chicago, IL 60601

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 341(a) is 26 pages.

/s/ James P. Daley

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies on oath that on the 5th day of December, 2018, at Chicago, Illinois, he caused the foregoing **Response Brief of Defendant-Appellant and Certificate of Compliance** to be electronically submitted for filing to the Supreme Court of Illinois consistent with the requirements set forth in the Court's Electronic Filing User Manual and served on the following via email:

Brian R. Holman
Dennis H. Stefanowicz, Jr.
Holman & Stefanowicz, LLC
233 South Wacker Drive, Suite 9305
Chicago, IL 60606
BRH@HS-Attorneys.com

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/ James P. Daley