NO. 123594

IN THE SUPREME COURT OF ILLINOIS

KENRICK ROBERTS,

PLAINTIFF – APPELLEE,

vs.

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

DEFENDANT – APPELLANT.

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

BRIEF OF PLAINTIFF - APPELLEE

Brian R. Holman
Dennis H. Stefanowicz, Jr.
HOLMAN & STEFANOWICZ, LLC
Attorneys for the Plaintiff-Appellee
233 South Wacker Drive, Suite 9305
Chicago, Illinois 60606
(312) 258-9700
BRH@HS-ATTORNEYS.COM

ORAL ARGUMENT REQUESTED

E-FILED
11/30/2018 2:34 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

ISSUE PRESENTED FOR REVIEW 1

STATEMENT OF FACTS 1

ARGUMENT 9

I. The only issue concerning Plaintiff's retaliatory discharge claim is whether the discharge violates a clear mandate of public policy. 9

Fellhauer v. City of Geneva, 142 Ill.2d 495 (1991) 9

Turner v. Memorial Medical Center, 233 Ill.2d 494 (2008) 9

Palmateer v. International Harvester Co., 85 Ill.2d 124 (1981) 9

Price v. Carmack Datsun, Inc., 109 Ill.2d 65 (1985) 9

Wheeler v. Caterpillar Tractor Co., 108 Ill.2d 502 (1985) 9-10

Leweling v. Schnadig Corp., 276 Ill.App.3d 890 (1st Dist. 1995) 9

Carty v. Suter Co., Inc., 371 Ill.App.3d 784 (2nd Dist. 2007)..... 9

Russ v. Pension Consultant's Company, 182 Ill.App.3d 769 (1st Dist. 1989) 9

II. Plaintiff alleged that his termination violated a specific public policy. 10

Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099 10-13

34 C.F.R. § 668.14(a)(1) 10-13

Higher Education Loan Act, 110 ILCS 945/0.01 *et seq.* 13

III. The Appellate Court correctly examined the purpose behind the Higher Education Loan Act to determine the public policy behind its enactment. 13

Barr v. Kelso-Burnett Co., 106 Ill.2d 520 (1985) 13-14

Kelsay v. Motorola, Inc., 74 Ill.2d 172 (1978) 13-14

Palmateer v. International Harvester Co., 85 Ill.2d 124 (1981) 14

Higher Education Loan Act, 110 ILCS 945/0.01 *et seq.* 14-17

Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099 14-19

34 C.F.R. § 668.14(a)(1) 15-16, 18-19

Higher Education Student Assistance Act, 110 ILCS 947/5 16-17

Turner v. Memorial Medical Center, 233 Ill.2d 494 (2008) 18

IV. The Appellate Court correctly concluded that the public policy behind the Federal Higher Education Act of 1965 and Illinois' Higher Education Loan Act was violated by the Defendant's retaliatory termination of Plaintiff's employment. ... 19

Carty v. Suter Co., Inc., 371 Ill.App.3d 784 (2nd Dist. 2007)..... 19

Higher Education Loan Act, 110 ILCS 945/0.01 *et seq.* 19-20, 23

Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099 ..... 19-20, 23

Palmateer v. International Harvester Co., 85 Ill.2d 124 (1981) 20, 22

Michael v. Precision Alliance Group, LLC, 2014 IL 117376 22

Jacobson v. Knepper & Moga, P.C., 185 Ill.2d 372 (1998) 22

Fellhauer v. City of Geneva, 142 Ill.2d 495 (1991) 22-23

Kelsay v. Motorola, Inc., 74 Ill.2d 172 (1978) 22

Turner v. Memorial Medical Center, 233 Ill.2d 494 (2008) 23

V. The Appellate Court correctly concluded that *Turner* is distinguishable from the case at bar. 23

Turner v. Memorial Medical Center, 233 Ill.2d 494 (2008) 23-25

Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099 24

34 C.F.R. § 668.14(a)(1) 24

CONCLUSION 25

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF FILING AND SERVICE 27

ISSUE PRESENTED FOR REVIEW

Whether the Appellate Court correctly held that the Plaintiff's complaint demonstrates a clear mandate of public policy -- the right to obtain the benefits of a post-secondary education through federal and state funded programs -- requiring the reversal of the dismissal of Plaintiff's retaliatory discharge count.

STATEMENT OF FACTS

In March, 2013, Kenrick Roberts ("Roberts") began working for the Board of Trustees Community College District 508 d/b/a City Colleges of Chicago ("City Colleges") as the Clinical Coordinator of the Physician's Assistance Program at Malcolm X College. (A54 ¶ 4.)[1] In or about June, 2014, Roberts was promoted to the position of Program Director of the Physician's Assistance Program at Malcolm X College. (A54 ¶ 5.) In or about November, 2014, Roberts was once again promoted to the position of Director of Medical Programs at Malcolm X College. (A54 ¶ 6.)

As the Director of Medical Programs at Malcolm X College, Roberts' job responsibilities and duties included vetting potential instructors for teaching various courses and curriculum, and ensuring that instructors assigned to teach various courses, including but not limited to, HeaPro 101, met the appropriate accreditation standards and had the correct qualifications to teach their assigned courses and curriculum. (A56 ¶ 13.) Despite this duty, Roberts was intentionally excluded from the process of assigning an instructor to teach HeaPro 101 for the 2015 school year. (A56 ¶ 14.)

[1] The Defendant's Appendix is cited to herein as "A" followed by the page number and the specific paragraph when applicable.

On or about January 15, 2015, Roberts received complaints that the instructor assigned to teach HeaPro 101 was unqualified to teach the curriculum and course. (A56 ¶ 15.) As a result of these complaints, Roberts met with the HeaPro 101 instructor and questioned her qualifications to teach said curriculum and course. (A56 ¶ 16.) The instructor for HeaPro 101 informed Roberts that she had never taught phlebotomy before, she was unfamiliar with the requirements and certifications necessary to become a phlebotomist, phlebotomy was not her area of expertise, and she did not have any certifications in phlebotomy. Following this meeting it became clear to Roberts that the instructor was unqualified to teach the course. (A56 ¶ 17.)

HeaPro 101 includes instruction of phlebotomy and EKG (electrocardiogram). (A59 ¶ 32.) The National Accrediting Agency for Clinical Laboratory Sciences ("NAACLS") states that in order for a course/curriculum to be accredited and approved for phlebotomy, it must have qualified faculty. Under the NAACLS, in order to be qualified to teach phlebotomy within the phlebotomy or health care basic certificate program, the faculty needs to be a certified professional in that field, must demonstrate knowledge and proficiency in that field, and must demonstrate the ability to teach effectively at the appropriate level. (A59 ¶ 33.) A professor can be certified in phlebotomy by the National Phlebotomy Association ("NPA") or through the American Society of Clinical Pathologists ("ASCP"). The NPA requires recertification on an annual basis and continuing education courses. (A60 ¶ 34.)

The professor appointed to teach phlebotomy -- without Roberts' input -- was not qualified under the NAACLS, as she was not a certified professional in that field, she did not demonstrate the knowledge and proficiency of that field, and she did not demonstrate

the ability to teach effectively at the appropriate level. (A60 ¶ 37.) When the first professor who was unqualified to teach the phlebotomy section of HeaPro 101 abandoned her class, the Defendant replaced her with a professor who was unqualified to teach the EKG portion of the course, as he was not a certified professional in that field, he did not demonstrate the knowledge and proficiency of that field, and he did not demonstrate the ability to teach effectively at the appropriate level. (A60 ¶ 38.)

On or about January 15, 2015, Roberts sent an email to his direct supervisors, Dr. Young and Dr. De La Haye, complaining about the faculty assignment of an unqualified professor. (A56 ¶ 18.) Roberts' January 15, 2015 email states:

> In compliance with the City Colleges of Chicago policy and the College of Health Science credentialing standards and requirements, it is my responsibility as Program Director of HeaPro 101 to review, evaluate and approve the recommendation of each faculty member that is approved to teach in a program which I am the director. Taking into consideration I had no input into the department decision to appoint a nurse to teach HeaPro 101 without my review of the credentials and necessary certifications and licenses put our programs and students at risk. Please note this is a breach of the standards that were developed to ensure that the students obtain the best outcomes moving forward with their education in the medical field. Please note I am very concerned about the direction in which we are traveling and wish to address this matter. (A57 ¶ 19.)

Upon receipt of Roberts' January 15, 2015 email, Dr. Young sent an email to the President and Provost of Malcolm X College stating his concerns about the unqualified professor assigned to teach HeaPro 101 and questioned them how to address the issue. (A57 ¶ 20.)

Following his January 15, 2015 email, Roberts made verbal complaints to Dr. Anthony Munroe ("Dr. Munroe"), President of Malcolm X College, regarding the appointment of an unqualified professor to teach HeaPro 101. He informed Dr. Munroe that he was intentionally excluded from the selection process of this unqualified professor

and that he refused to support the assignment of this unqualified professor. (A57 ¶ 21, A59 ¶ 30.)

On February 25, 2015, Roberts sent an email to the President, Vice President, and Associate Provost again complaining about the unqualified professor assigned to teach HeaPro 101. In addition to stating that the professor admitted never teaching phlebotomy before and not being familiar with the certification requirements for phlebotomists, Roberts stated that he learned from a student that the unqualified professor had abandoned her class (HeaPro 101) and another unqualified professor, who was not properly certified to teach the EKG portion of the course, was assigned to complete the remainder of the course. Roberts further complained that he was excluded from the decisions in selecting these unqualified professors, despite this being one of his job duties and responsibilities as Director of Medical Programs at Malcolm X College. (A57 ¶ 22.)

Upon receipt of Roberts' February 25, 2015 email, Dr. Christopher Robinson-Easley ("Dr. Easley"), Vice President of Malcolm X College, requested that Roberts meet with her that day regarding his complaints contained in his email. (A58 ¶ 23.)

After receiving Dr. Easley's meeting request, Roberts sent an email to Aaron Allen ("Allen"), Executive Director of Labor & Employee Relations, stating that he wanted to document that he felt very uncomfortable about the meeting request considering his complaints regarding the unqualified professor assignment. (A58 ¶ 24.)

On February 25, 2015, Roberts met with Dr. Easley, who was the individual who selected and assigned the unqualified professor to teach HeaPro 101. At the meeting, Dr. Easley was very upset with Roberts in connection with his complaints about the assignment

of the professor teaching HeaPro 101. Dr. Easley expressed no interest in addressing the problem. (A58 ¶ 25.)

The failure to appoint a qualified professor for HeaPro 101 endangered the students in their ability to receive the proper knowledge and instruction to become a CNA, PCA, Phlebotomist Technician and/or EKG Technician. Additionally, by appointing and maintaining an unqualified professor, the Defendant was in violation of Federal and State grant and financial aid programs requirements. (A261 ¶ 39.) Under Title IV of the Higher Education Act of 1965 ("Title IV/HEA"), Congress established various student loan and grant programs, including the Federal Pell Grant Program ("Pell"), Federal Supplemental Educational Opportunity Grand ("FSEOG"), Federal Direct Stafford Loan Program ("Stafford"), Federal Direct Plus Loan Program ("PLUS"), and Federal Work Study ("FWS") to assist in making available the benefits of postsecondary education to eligible students in institutions of higher education, such as the City Colleges. 20 U.S.C. §§ 1070-1099. (A61 ¶ 40.) The majority of Defendant's students apply for and receive federal Title IV/HEA program assistance to pay for tuition and school related expenses. (A61 ¶ 41.) In order for Defendant's students to apply for and obtain Title IV/HEA program assistance, Malcolm X must be an eligible institution and be permitted to participate in the programs by the United States Department of Education ("DOE"). 34 C.F.R. § 668.14(a)(1). (A61 ¶ 42.)

As a condition to allowing the students at Malcolm X to receive federal funding under Title IV/HEA, the Defendant was required to sign a Program Participation Agreement ("PPA"), whereby the Defendant agreed to comply with certain statutory, regulatory and contractual requirements detailed in 20 U.S.C. § 1094 and supporting

regulations, including 34 C.F.R. § 668.14. (A61 ¶ 43.) 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). (A62 ¶ 44.)

The PPA requires that Defendant "will meet the requirements established by . . . accrediting agencies or associations. . .." 20 U.S.C. § 1094(a)(21). (A62 ¶ 45.) The Defendant's improper appointment and maintenance of an unqualified professor to teach the students at Malcolm X College who were enrolled in class HeaPro 101 was in violation of the requirements established by the accrediting agencies. (A62 ¶ 46.) 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)). (A62 ¶ 47.) The Defendant, by entering into the PPA, not only agreed to meet the requirements established by the nationally recognized accrediting agencies that accredit Malcolm X, but it agreed to provide accurate information to these agencies. 20 U.S.C. § 1094(c)(3)(A). (A62 ¶ 48.) The Defendant provided inaccurate information to the accrediting agencies when it proclaimed that the professor was properly qualified to teach the students at Malcolm X College who were enrolled in class HeaPro 101. (A62 ¶ 49.)

Title IV/HEA also prohibits Malcolm X from engaging in "substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates." 20 U.S.C. § 1094(c)(3)(A). (A62 ¶ 50.) 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"). (A63 ¶ 51.) 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.") (A63 ¶ 52.) The DOE has the authority to enforce the PPA and possesses the ability to terminate Malcolm X from the Title IV/HEA program. 34 C.F.R. §§ 600.41(a)(1); 668.86. (A63 ¶ 53.)

The ability to obtain the benefits of a postsecondary education by Illinois students through the financial help of Federal and State funded programs is an Illinois public policy. (A63 ¶ 54.) The improper appointment and maintenance of an unqualified professor to teach the students at Malcolm X College who were enrolled in class HeaPro 101 violates a mandate of public policy in Illinois. (A63 ¶ 55.) By appointing and maintaining an unqualified professor, the Defendant jeopardized the students that attend the City Colleges from obtaining federal funding under Title IV/HEA, and other State grant and financial aid programs. (A63 ¶ 56.) The vast majority of the students that attend the City Colleges are only able to do so through the financial help of federal funding under Title IV/HEA. (A63 ¶ 57.) If the DOE used its authority to enforce the Defendant's PPA and terminated the City Colleges from the Title IV/HEA program (34 C.F.R. §§ 600.41(a)(1); 668.86), thousands of Illinois students would lose the benefit of obtaining a postsecondary education. (A63 ¶ 58.)

Following his February 25, 2015 complaints and meeting with Dr. Easley, Roberts continued to complain and question the appointment of the unqualified professor assigned to teach HeaPro 101 and Malcolm X College's failure to address and rectify the situation

to Dr. Munroe. (A58 ¶ 26.) In his complaints and refusals to participate and support Defendant's decision to appoint said professor without his knowledge, the Plaintiff explained that he could not and would not participate in the questionable and improper activities that Malcolm X College was involved in and that this issue needed to be addressed immediately, and that he was concerned with the education that the students were receiving from the unqualified professor. (A68 ¶ 74.) Following his complaints and meeting with Dr. Easley, Roberts was kept out of important meetings, discussions and decisions regarding programs that were under his responsibilities as Director of Medical Programs at Malcolm X College. (A58 ¶ 27.)

On or about June 15, 2015, Roy Walker ("Walker"), the Associate Dean of Health Sciences & Career Programs at Malcolm X College, told Roberts that Dr. Easley "has an axe to grind against you" because of Roberts' complaints about the assignment of an unqualified professor to teach HeaPro 101. (A59 ¶ 28.)

On or about June 28, 2015, Dr. Munroe, instructed Roberts to file an EEO Complaint against Dr. Easley for retaliation in connection with Roberts' complaints about the assignment of an unqualified professor to teach HeaPro 101. (A59 ¶ 29.) On June 28, 2015, Roberts completed and filed an Equal Opportunity Complaint Form with the City Colleges EEO Office claiming retaliation and hostile and intimidating work environment against Dr. Easley. (A59 ¶ 30.) On August 7, 2015, Roberts was advised that he was terminated from his Director of Medical Programs position at Malcolm X College. (A59 ¶ 31.)

ARGUMENT

I. The only issue concerning Plaintiff's retaliatory discharge claim is whether the discharge violates a clear mandate of public policy.

"To state a valid retaliatory discharge cause of action, an employee must allege that (1) the employer discharged the employee, (2) in retaliation for the employee's activities, and (3) that the discharge violates a clear mandate of public policy." (A8 ¶ 23); citing, *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 501; (Defendant's Brief p. 16); quoting, *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 500. In the case at bar, "the only issue concerning plaintiff's retaliatory discharge claim is whether it states a violation of a clear mandate of Illinois public policy." (A8 ¶ 24); see, (Defendant's Brief p. 17) ("This matter, which was decided on the pleadings, deals only with the third prong. . .").

This Court discussed the meaning of "clearly mandated public policy":

> There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. [Citation.] Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

Palmateer v. International Harvester Co., 85 Ill.2d 124, 130 (1981); *Turner*, 233 Ill.2d at 500-501; *Price v. Carmack Datsun, Inc.*, 109 Ill.2d 65, 68 (1985); (A8 ¶ 24). What is clear from the Court's discussion is that public policies can be found in "the State's constitution and statues." *Palmateer*, 85 Ill.2d at 130. Additionally, this Court found that public policy can be found in Federal laws that are national in scope. *Wheeler v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 506 (1985); *Leweling v. Schnadig Corp.*, 276 Ill.App.3d 890, 893 (1st Dist. 1995); *Carty v. Suter Co.*, Inc. 371 Ill.App.3d 784, 787 (2nd Dist. 2007); see also, *Russ*

v. Pension Consultant's Company, 182 Ill.App.3d 769, 776 (1st Dist. 1989) ("We believe that an Illinois citizen's obedience to the law, including Federal law, is a clearly mandated public policy of this State under the principles enunciated in *Wheeler* (108 Ill.2d 502)."). Clearly, public policies can be found in both State and Federal laws and statutes.

II. Plaintiff alleged that his termination violated a specific public policy.

"Plaintiff alleges his discharge for complaining about the unqualified instructors violated a specific public policy: 'the right to obtain the benefit of a post-secondary education through federal and state funded programs.'" (A9-10 ¶ 27.) In the Plaintiff's Second Amended Complaint he cited Federal law as the source of the public policy:

Under Title IV of the Higher Education Act of 1965 ("Title IV/HEA"), Congress established various student loan and grant programs, including the Federal Pell Grant Program ("Pell"), Federal Supplemental Educational Opportunity Grand ("FSEOG"), Federal Direct Stafford Loan Program ("Stafford"), Federal Direct Plus Loan Program ("PLUS"), and Federal Work Study ("FWS") to assist in making available the benefits of postsecondary education to eligible students in institutions of higher education, such as the City Colleges. 20 U.S.C. §§ 1070-1099. (A61 ¶ 40.) The majority of Defendant's students apply for and receive federal Title IV/HEA program assistance to pay for tuition and school related expenses. (A61 ¶ 41.) In order for Defendant's students to apply for and obtain Title IV/HEA program assistance, Malcolm X must be an eligible institution and be permitted to participate in the programs by the United States Department of Education ("DOE"). 34 C.F.R. § 668.14(a)(1). (A61 ¶ 42.)

As a condition to allowing the students at Malcolm X to receive federal funding under Title IV/HEA, the Defendant was required to sign a Program Participation Agreement ("PPA"), whereby the Defendant agreed to comply with certain statutory, regulatory and contractual requirements detailed in 20 U.S.C. § 1094 and supporting regulations, including 34 C.F.R. § 668.14. (A61 ¶ 43.) 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). (A62 ¶ 44.)

The PPA requires that Defendant "will meet the requirements established by . . . accrediting agencies or associations. . .." 20 U.S.C. § 1094(a)(21). (A62 ¶ 45.) The Defendant's improper appointment and maintenance of an unqualified professor to teach the students at Malcolm X College who were enrolled in class HeaPro 101 was in violation of the requirements established by the accrediting agencies. (A62 ¶ 46.) 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)). (A62 ¶ 47.) The Defendant, by entering into the PPA, not only agreed to meet the requirements established by the nationally recognized accrediting agencies that accredit Malcolm X, but it agreed to provide accurate information to these agencies. 20 U.S.C. § 1094(c)(3)(A). (A62 ¶ 48.) The Defendant provided inaccurate information to the accrediting agencies when it proclaimed that the professor was properly qualified to teach the students at Malcolm X College who were enrolled in class HeaPro 101. (A62 ¶ 49.)

Title IV/HEA also prohibits Malcolm X from engaging in "substantial misrepresentation of the nature of its educational program, its financial charges, or the employability of its graduates." 20 U.S.C. § 1094(c)(3)(A). (A62 ¶ 50.) 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"). (A63 ¶ 51.) 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.") (A63 ¶ 52.) The DOE has the authority to enforce the PPA and possesses the ability to terminate Malcolm X from the Title IV/HEA program. 34 C.F.R. §§ 600.41(a)(1); 668.86. (A63 ¶ 53.)

The Plaintiff specifically alleged:

67. The Plaintiff complained about the improper appointment and maintenance of an unqualified professor 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.

(A65 ¶ 67.)

The Appellate Court found that in support of the existence of a public policy the "plaintiff cites to Title IV of the Higher Education Act of 1965 (20 U.S.C. §§ 1070-1099d (2012)), which establishes various loan and grant programs to assist students in obtaining a postsecondary education at places like Malcolm X." (A10 ¶ 28.) Additionally, although not cited in the Plaintiff's Second Amended Complaint, the Appellate Court cited the Illinois Higher Education Loan Act (110 ILCS 945/0.01 *et seq*. (West 2016) as additional support of the public policy violated by the Defendant's termination of Plaintiff's employment. (A10-11 ¶ 29.)

III. The Appellate Court correctly examined the purpose behind the Higher Education Loan Act to determine the public policy behind its enactment.

This Court has examined the purpose of the cited law or statute to determine the public policy behind its enactment. "The public policy underlying a statutory or constitutional provision is found by examining the history, purpose, language and effect of the provision." *Barr v. Kelso-Burnett Co*., 106 Ill.2d 520, 527; citing, *Kelsay v. Motorola, Inc.,* 74 Ill.2d 172, 180-85 (1978). "In deciding *Kelsay* this court examined the history and purpose of the Workmen's Compensation Act [citation] to determine the public policy behind its enactment." *Barr*, 106 Ill.2d at 524-25; citing, *Kelsay*, 74 Ill.2d at 179-85. "In

determining that a retaliatory-discharge cause of action was proper, the public policy behind the enactment and enforcement of the Criminal Code of 1961 [citation] was examined, and the court noted that public policy necessarily favored the exposure of violations of the Code." *Barr*, 106 Ill.2d at 525; citing, *Palmateer*, 85 Ill.2d at 132-33.

In the case at bar, the Appellate Court examined the purpose behind the enactment of Illinois' Higher Education Loan Act:

> It is declared that for the benefit of the people of the State of Illinois, the conduct and increase of their commerce, the protection and enhancement of their welfare, the development of continued prosperity and the improvement of their health and living conditions, *it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities and skill*; that to achieve these ends it is of the utmost importance that students attending institutions of higher education located in Illinois have reasonable alternatives to enhance their financial access to such institutions; *that reasonable financial access to institutions of higher education will assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities and skills*; that it is the purpose of this Act to provide a measure of assistance and an alternative method to enable students and the families of students attending institutions of higher education located in Illinois to appropriately and prudently finance the cost or a portion of the cost of such higher education; and that it is the intent of this Act to supplement federal guaranteed higher education loan programs, other student loan programs, and grant or scholarship programs to provide the needed additional options for the financing of a student's higher education in execution of the public policy set forth above." (Emphasis added.) 110 ILCS 945/2 (West 2016).

(A10-11 ¶ 29.) The Appellate Court stated, "[o]ur General Assembly has concluded the purpose of providing public funds for higher education is to provide the fullest opportunity for recipients to learn and develop their 'intellectual and mental capacities and skills.'" (A11 ¶ 29); quoting, 110 ICS 945/2.

The stated purpose of Title IV of the Higher Education Act of 1965 is equivalent to the purpose of the Illinois' Higher Education Loan Act:

> (a) Purpose
>
> It is the purpose of this part, to assist in making available the benefits of postsecondary education to eligible students (defined in accordance with section 1091 of this title) in institutions of higher education by --
>
> (1) providing Federal Pell Grants to eligible students;
>
> (2) providing supplemental educational opportunity grants to those students who demonstrate financial need;
>
> (3) providing for payments to the States to assist them in making financial aid available to students;
>
> (4) providing for special programs and projects designed (A) to identify and encourage qualified youths with financial or cultural need with a potential for postsecondary education, (B) to prepare students from low-income families for postsecondary education, and (C) to provide remedial (including remedial language study) and other services to students; and
>
> (5) providing assistance to institutions of higher education.

20 U.S.C. § 1070(a). Under this purpose, an "eligible student" is a student enrolled "at an institution of higher education that is an eligible institution in accordance with the provisions of section 1094 of this title. . .." 20 U.S.C. § 1091(a)(1). Under section 1094, in order to be an "eligible institution," an institution of higher education must enter into a program participation agreement, and continued eligibility is conditional on compliance with the requirements set forth in section 1094. 20 U.S.C. § 1094(a). The Plaintiff's Second Amended Complaint specifically alleged that the purpose of Title IV of the Higher Education Act of 1965 was violated:

> As a condition to allowing the students at Malcolm X to receive federal funding under Title IV/HEA, the Defendant was required to sign a Program Participation Agreement ("PPA"), whereby the Defendant agreed to comply with certain statutory, regulatory and contractual requirements detailed in 20 U.S.C. § 1094 and supporting regulations, including 34 C.F.R. § 668.14. (A61 ¶ 43.) 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). (A62 ¶ 44.)

The Appellate Court, based upon its examination of the purpose of the Higher Education Loan Act, concluded "it is obvious to this court the purpose of establishing both state and federal loan programs is to ensure individuals without the private means of paying for a college education are given access to funds to better develop themselves intellectually so as to provide a greater contribution to our state and country." (A11 ¶ 29.)

It is clear from the explicit wording of the acts, that the purpose of enacting the Illinois Higher Education Loan Act and the federal Higher Education Act of 1965, was the declaration of the public policy of "the right to obtain the benefits of a post-secondary education through federal and state funded programs." (A10 ¶ 27.); see, 110 ILCS 945/2 (Emphasis added.) ("[I]t is the intent of this Act to supplement federal guaranteed higher education loan programs, other student loan programs, and grant or scholarship programs to provide the needed additional options for the financing of a student's higher education in execution of **the public policy set forth above**."); 20 U.S.C. ¶ 1070(a) ("It is the purpose of this part to assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education. . . .").

Additionally, the purpose of the Illinois' Higher Education Student Assistance Act, 110 ILCS 947/5, is even more explicit in declaring that "the right to obtain the benefits of a post-secondary education through federal and state funded programs" is a public policy of this "State and Nation":

> § 5. Purpose. **The General Assembly finds and declares** that (1) the provision of a higher education for all residents of this State who desire a higher education and are properly qualified therefor **is important to the welfare and security of this State and Nation** and, consequently, **is an important public purpose**, and (2) many qualified students are deterred by financial considerations from completing their education, **with a consequent irreparable loss to the State and Nation of talents vital to welfare and security.** The number of qualified persons who desire a higher education is increasing rapidly, and the physical facilities, faculties, and staffs of the institutions of higher learning operated by, within and for the residents of the State will have to be expanded greatly to accommodate those persons, with an attendant sharp increase in the cost of educating them. **A system of financial assistance of scholarships, grant, and loans for qualified residents of college age will enable them to attend qualified institutions of their choice in the State, public or private**. The adoption of new federal student loan legislation necessitates that the State update and broaden its system of financial student assistance.

(Emphasis added.) 110 ILCS 947/5. Clearly, "the right to obtain the benefits of a post-secondary education through federal and state funded programs" is a public policy of the State of Illinois and of the nation, and is "important to the welfare and security of this State and Nation." *Id.*

Title IV of the Higher Education Act of 1965, Illinois' Higher Education Loan Act, and Illinois' Higher Education Student Assistance Act all declared the public policy that there is "the right to obtain the benefits of a post-secondary education through federal and state funded programs." In Fact, the Appellate Court rejected the Defendant's argument that such public policy does not exist in Illinois:

> Defendant argues that Illinois lacks a clearly mandated public policy regarding the right to obtain public financial aid for a postsecondary education. This argument is disingenuous. There would be no point in enacting either a federal or state statute providing for public financing (through student loans) of higher education if the government did not want its citizens to utilize it. Simply put, if our government did not think providing all citizens with access to funds for higher education was a good idea, it would have not enacted the statutes in the first place.

(A13 ¶ 33.)

The clearly mandated public policy behind these acts is recognizable because it is clearly stated. In fact, there is no room for differing interpretation, the acts clearly declare that individuals have "the right to obtain the benefits of a post-secondary education through federal and state funded programs." As a result, the Defendant should not be surprised that its retaliatory termination of the Plaintiff subjected them to liability. See, (Defendant's Brief p. 14.); *Turner*, 233 Ill.2d at 503:

> [G]eneralized expressions of public policy fail to provide essential notice to employers. The phrase 'clearly mandated public policy' implies that the policy will be recognizable simply because it is clear. 'An employer should not be exposed to liability where a public policy standard it too general to provide any specific guidance or is so vague that it is subject to different interpretations.' [Citations] (stating that requirement of 'well-recognized and clear public policy' 'helps ensure that employers have notice that their dismissal will give rise to liability').

The Defendant was on notice that its retaliatory discharge of the Plaintiff for complaining about appointing and maintaining an unqualified professor would expose them to liability. Clearly, the Defendant knew that the majority of Defendant's students apply for and receive federal Title IV/HEA program assistance to pay for tuition and school related expenses. (A61 ¶ 41.) Additionally, the Defendant knew that in order for Defendant's students to apply for and obtain Title IV/HEA program assistance, Malcolm X must be an eligible institution and be permitted to participate in the programs by the United States Department of Education ("DOE"). 34 C.F.R. § 668.14(a)(1). (A61 ¶ 42.) Accordingly, as a condition to allowing the students at Malcolm X to receive federal funding under Title IV/HEA, the Defendant was required to sign a Program Participation Agreement ("PPA"), whereby the Defendant agreed to comply with certain statutory, regulatory and contractual requirements detailed in 20 U.S.C. § 1094 and supporting regulations, including 34 C.F.R. § 668.14. (A61 ¶ 43.) Despite agreeing to comply with

the PPA requirements, the Defendant knowingly appointed and maintained an unqualified professor, resulting, not only in violations of Federal and State grant and financial aid programs requirements, including the Program Participation Agreement (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), but also a violation of a clearly mandated public policy. (A62 ¶ 44.)

The Defendant cannot dispute that it knew that the DOE has the authority to enforce the PPA and possesses the ability to terminate Malcolm X from the Title IV/HEA program. 34 C.F.R. §§ 600.41(a)(1); 668.86. (A63 ¶ 53.) The result of being terminated from the Title IV/HEA program is that the vast enrollment of students at the City Colleges would not be able to afford their secondary education -- in violation of a clearly mandated public policy.

IV. The Appellate Court correctly concluded that the public policy behind the Federal Higher Education Act of 1965 and Illinois' Higher Education Loan Act was violated by the Defendant's retaliatory termination of Plaintiff's employment.

"On review, the question we are asked to answer 'is whether the provisions enunciate a public policy that plainly covers the situation to which the plaintiff objects.'" (A12 ¶ 31); quoting, *Carty v. The Suter Co.*, 371 Ill.App.3d 784, 789 (2nd Dist. 2007). The Appellate Court concluded "the public policy behind the federal Higher Education Act of 1965 and Illinois's Higher Education Loan Act would be seriously undermined if defendant is allowed to act in the manner alleged in plaintiff's complaint." (A12 ¶ 31.) The Appellate Court explained:

> The above-cited statutes demonstrate that in accepting public money, an institution of higher education should be able to assist those attending in 'achieving the required levels of learning and development of their intellectual and mental capacities and skills.' 110 ILCS 945/2 (West 2016).
>
> Malcolm X is a public institution of higher learning whose mission and role in society is not to turn a profit but to educated and pass along knowledge to those students enrolled on its campus. In order to receive the benefits from attending class at Malcolm X, many of its students take out loans under the above state and federal programs in order to subsidize, if not entirely fund, their tuition payments. It is axiomatic that in order to accomplish the mission of educating young men and women, defendant must staff its classes with competent individuals who actually possess the knowledge listed in the course syllabus. If defendant accepts loan money but uses it to hire incompetent and unqualified individuals who cannot properly instruct students who are enrolled in classes like HeaPro 101, defendant has essentially defrauded both the student and the taxpayer. The intent behind both the state and federal loan programs would be thwarted because those receiving incompetent instruction would be unable to 'develop their intellectual and mental capacities and skills.' *Id.* The benefit to the State would be nil. This is more than a personal matter but concerns 'what is right and just and what affects the citizens of the State collectively.' *Palmateer*, 85 Ill.2d at 130

(A12-13 ¶¶ 31-32.)

The public policy behind the Federal Higher Education Act of 1965 and Illinois' Higher Education Loan Act -- that individuals have "the right to obtain the benefits of a post-secondary education through federal and state funded programs" -- is undermined by terminating the Plaintiff for complaining about the appointment and maintenance of unqualified professors. As the Director of Medical Programs at Malcolm X College, it was the Plaintiff's job responsibility to vet potential instructors to ensure that the instructors assigned to teach various courses, including but not limited to, HeaPro 101, met the appropriate accreditation standards and had the correct qualifications to teach their assigned courses and curriculum. (A56 ¶ 13.) When the Plaintiff met with the HeaPro 101 instructor and questioned her about her qualifications to teach said curriculum, the

instructor advised the Plaintiff that she had never taught phlebotomy before, she was unfamiliar with the requirements and certifications necessary to become a phlebotomist, phlebotomy was not her area of expertise, and she did not have any certifications in phlebotomy. Since vetting professors' qualifications was the Plaintiff's job, he was aware that the National Accrediting Agency for Clinical Laboratory Sciences ("NAACLS") states that in order for a course/curriculum to be accredited and approved for phlebotomy, it must have qualified faculty. Under the NAACLS, in order to be qualified to teach phlebotomy within the phlebotomy or health care basic certificate program, the faculty needs to be a certified professional in that field, must demonstrate knowledge and proficiency in that field, and must demonstrate the ability to teach effectively at the appropriate level. (A59 ¶ 33.) A professor can be certified in phlebotomy by the National Phlebotomy Association ("NPA") or through the American Society of Clinical Pathologists ("ASCP"). The NPA requires recertification on an annual basis and continuing education courses. (A60 ¶ 34.) As a result, the Plaintiff concluded that the instructor was unqualified to teach the course. (A56 ¶¶ 16-17.)

The Plaintiff's initial complaint regarding the unqualified professor advised the Defendant of the improper and illegal conduct:

> In compliance with the City Colleges of Chicago policy and the College of Health Science credentialing standards and requirements, it is my responsibility as Program Director of HeaPro 101 to review, evaluate and approve the recommendation of each faculty member that is approved to teach in a program which I am the director. Taking into consideration I had no input into the department decision to appoint a nurse to teach HeaPro 101 **without my review of the credentials and necessary certifications and licenses put our programs and students at risk. Please note this is a breach of the standards that were developed to ensure that the students obtain the best outcomes moving forward with their education in the medical field.** Please note I am very concerned about the direction in which we are traveling and wish to address this matter.

(Emphasis added.) (A57 ¶ 19.) As alleged in the Plaintiff's Second Amended Complaint,

> The ability to obtain the benefits of a postsecondary education by Illinois students through the financial help of Federal and State funded programs is an Illinois public policy, which was violated by the Defendant's improper appointment and maintenance of an unqualified professor to teach the students at Malcolm X College who were enrolled in class HeaPro 101.

(A65 ¶ 66.) "The Plaintiff's termination was a direct and proximate result of his complaints regarding the improper appointment of an unqualified professor to teach students at Malcolm X College. . .." (A64 ¶ 61.)

There is a need to protect the Plaintiff from termination for complaining about conduct that is illegal and improper. See, *Michael v. Precision Alliance Group, LLC*, 2014 IL 117376, ¶ 30 (Retaliatory discharge actions have been allowed "where an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as 'whistleblowing.'"); citing, *Jacobson v. Knepper & Moga, P.C.*, 185 Ill.2d 372, 376 (1998). This Court explained that "[t]he rationale is that, in these situations, an employer could effectively frustrate a significant public policy by using it power of dismissal in a coercive manner." *Michael*, 2014 IL 117376, ¶ 30; *Fellhauer*, 142 Ill.2d at 508 ("In both *Kelsay* and *Palmateer*, the court recognized that an employer could effectively frustrate a significant public policy by using its power of dismissal in a coercive manner."). In *Kelsay*, this Court held that a cause of action for retaliatory discharge was necessary to ensure that the public policy behind the enactment of the Workmen's Compensation Act was not frustrated. *Kelsay*, 74 Ill.2d at 182-85. In *Palmateer*, this Court held that a retaliatory discharge cause of action was necessary to ensure that the public policy behind the enactment of the Criminal Code would not be frustrated. *Palmateer*, 85 Ill.2d at 132-33.

In the case at bar, the Appellate Court properly concluded:

> Unlike the statutes in *Turner*, this case does present a clear statutory scheme which defendant's alleged actions sought to frustrate by terminating plaintiff. Both Illinois and the federal government have set up programs to help citizens attend schools of higher education so that those individuals may gain knowledge and better contribute to society. 20 U.S.C. § 1070 *et seq*. (2002); 110 ILCS 945/2 (West 2016). This policy is effectively frustrated when institutions of higher learning terminate those individuals charged with ensuring its instructors have the requisite knowledge to pass onto students. We find plaintiff's complaint demonstrates a clear mandate of public policy and reverse the dismissal of plaintiff's retaliatory discharge count.

(A14 ¶ 36.) Clearly, the Plaintiff's Second Amended Complaint demonstrates that his retaliatory discharge violated the public policy that individuals have "the right to obtain the benefits of a post-secondary education through federal and state funded programs," which the cited provision -- the Federal Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq*. -- clearly mandates. *Turner*, 233 Ill.2d at 505; citing, *Fellhauer*, 142 Ill.2d at 505; *Barr*, 106 Ill.2d at 527.

V. The Appellate Court correctly concluded that *Turner* is distinguishable from the case at bar.

Notwithstanding the Defendant's lengthy string cites, which contain no analysis on how the cases apply to this case, the Defendant relies exclusively on *Turner*. (See, Defendant's Brief at *passim*.) In reaching its conclusions, the Appellate Court analyzed the *Turner* decision:

> In making its argument, defendant cites solely to *Turner*, 233 Ill.2d 494, a recent Illinois Supreme Court case. The plaintiff in *Turner* alleged that he was fired from his position as a licensed respiratory therapist after he informed a surveyor from the Joint Commission on Accreditation of Healthcare Organizations (Joint Commission) that his respiratory department did not conduct "immediate charting" after a patient had been seen in violation of the Joint Commission standard. *Id*. at 497-98. He alleged his discharge for making this report to the Joint Commission

> 'violated public policy that encourages employees to report actions that jeopardize patient health and safety.' *Id.* at 498.
>
> In rejecting the plaintiff's claim, the court concluded plaintiff's actions of informing the surveyor of the hospital's charting practice fell short of the 'supreme court's public-policy threshold articulated in *Palmateer*.' *Id.* at 506. The court found that neither Joint Commission standards nor section 3 of the Medical Patient Rights Act (410 ILCS 50/3 (West 2006)) established a clear public policy that plaintiff's discharge violated. *Turner*, 233 Ill.2d at 505-06.

(A13 ¶¶ 34-35.)

The case at bar is distinguishable from the facts presented in *Turner*. In *Turner*, the plaintiff merely pled a general concept of "patient safety" using loose interpretations of regulations to support his argument. "Plaintiff's complaint fails to cite or even refer to a specific Joint Commission standard in support of this allegation. This allegation fails to set forth specific public policy." *Turner*, 233 Ill.2d at 505. The allegations contained in Plaintiff's Second Amended Complaint demonstrate a public policy that provides specific guidance and is not subject to interpretation -- "the right to obtain the benefits of a post-secondary education through federal and state funded programs."

Additionally, the regulations plaintiff cited to in *Turner* to support his general concept of a public policy in "patient safety" conflicted with other statutes, accordingly, a "clear" public policy could not be discerned. See, *Turner*, 233 Ill.2d at 503. (A clear mandate of public policy will not be found when ". . . a public policy standard is too general to provide any specific guidance or is so vague that it is subject to interpretation.") In the case at bar, the Plaintiff does not plead conflicting statutes and he does not plead a vague general concept, instead, he cites to and references specific, relevant sections of a Federal Statute, 20 U.S.C. § 1094, and its supporting regulations, including 34 C.F.R. § 668.14, which support a clearly mandated public policy -- "the

right to obtain the benefits of a post-secondary education through federal and state funded programs." Accordingly, unlike in *Turner*, the Plaintiff in the instant case pled sufficient facts to support a retaliatory discharge claim. See, (A14 ¶ 36) ("We find *Turner* to be distinguishable from the current case before us. . .. We find plaintiff's complaint demonstrates a clear mandate of public policy and reverse the dismissal of Plaintiff's retaliatory discharge count.").

CONCLUISON

For the foregoing reasons, the Plaintiff-Appellee, Kenrick Roberts, hereby requests that the Supreme Court affirm the Appellate Court's decision reversing the dismissal of the Plaintiff's retaliatory discharge count. 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

HOLMAN & STEFANOWICZ, LLC
By: Brian R. Holman

Brian R. Holman
Dennis H. Stefanowicz, Jr.
HOLMAN & STEFANOWICZ, LLC
Attorneys for Plaintiff-Appellee
233 South Wacker Drive, Suite 9305
Chicago, Illinois 60606
(312) 258-9700
BRH@HS-ATTORNEYS.COM

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, and the certificate of service, is 25 pages.

s/ Brian R. Holman

Brian R. Holman

CERTIFICATE OF FILING AND SERVICE

Brian R. Holman, the undersigned attorney, certifies that on November 30, 2018, the foregoing Brief of Plaintiff-Appellee was filed with the Supreme Court of Illinois, using the court's electronic filing system.

The undersigned further certifies that on November 30, 2018, he served each party to this appeal by emailing the Brief of Plaintiff-Appellee directly to one of its attorneys at the email address specified below:

James Thomas
David Novak
Jackson Lewis
150 N. Michigan, #2500
Chicago, IL 60601
James.thomas@jacksonlewis.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/ Brian R. Holman

Brian R. Holman