IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BERNARD MOORE **Civil Action No: 09-CV-30208-MAP**

Plaintiff,

-vs-

WILLIAMS COLLEGE

Defendant.
_____/

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSTION TO MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

Plaintiff Bernard Moore appearing in *pro se* submits a reply to Defendant Williams College opposition to the Motion for Preliminary Injunction and Temporary Restraining Order.

The Supreme Court held *pro se litigants* pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleadings requirements. Boag vs. MacDougall, 454 U.S. 364 (1982) (citing Haines vs. Kerner, 404 U.S. 519, (1972); *see also* Spencer vs. Doe, 139 F.3d 107 (2d Cir.1997)). However, the courts have utilized a less stringent standard in construing the pleadings of a *pro se* litigant. Id.

Said opposition solely based on Dr. Moore's investigation by the U.S. Department of Education that included the recent guilty plea for conduct that occurred prior to his employment at Williams College. Defendant's Opposition asserts that Dr. Moore will be sentenced to federal

prison with federal sentencing guidelines range 33 to 41 months[1] on February 17, 2010[2]. However, at the request of the Government and mutual agreement with Dr. Moore's counsel of record, the sentencing court has continued the sentencing too May 4, 2010 as result of several factual inaccuracies in the "Statement of the Offense" and the potential vs. actual lose amounts that are erroneously alleged in the plea agreement. See (Affidavit of Bernard Moore ¶5). On January 15, 2010, the sentencing court issued more than 86 disposition subpoenas to several financial and academic institutions including but not limited to Williams College. *See (Affidavit of Bernard Moore ¶5).* Defendant's opposition substantially relies on the plea agreement that clearly indicates that the sentencing court is not bound by the plea agreement and provides in pertinent parts:

> It is understood that pursuant to Federal Rules of Criminal Procedure 11(c)(1)(B) and 11(c)(3)(B) the Court is not bound by the above stipulations, either as to questions of fact or as to the parties' determination of the applicable Guidelines ranges, or other sentencing issues. In the event that the Court considers any Guidelines adjustments, departures, or calculations different from any stipulations Contained in this Agreement, or contemplates a sentence outside the Guidelines Range based upon the general sentencing factors listed in Title 18, United States

[1] Pursuant to the Dr. Moore stipulate guidelines by the Government, the sentencing court is not bound by the sentencing guideline range In accordance with 18 U.S.C.S. § 3553(a), a sentencing court must consider the following factors: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed--(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for--(A) the applicable category of offense committed by the applicable category of defendant as set forth in the U.S. Sentencing Guidelines; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense..

[2] Defendant's arguments "the period of time in which Moore would have to cover his own medical expense will be brief indeed, as Moore soon will begin serving his federal prison sentence. Moore's sentencing hearing is scheduled for February 17, 2010" for reason for denying injunctive relief for COBRA continuation of medical benefits. Moreover, Defendant's indicated in their opposition Dr. Moore's will be sentenced to 33 to 41 months of imprisonment any health insurance continuation coverage would be well beyond the 18 months of heath insurance continuation coverage that COBRA could provide. Further state "as a prisoner assigned to a federal penitentiary, Moore will receive healthcare provided by the Federal Bureau of Prisons. Dr. Moore possible sentencing to the custody of the Bureau of Prisons does not address the merits of the claims of being denied COBRA especially since there is a possibly that a sentence of probation or community corrections imposed under 18 U.S.C. §3552(a).

Code, Section 3553(a), the parties reserve the right to answer any related inquiries from the Court.

See Exhibit A (Plea Agreement)

Because Dr. Moore's guilty plea is not a final judgment and the sentencing court is not bound by the Statement of the Offense or the Plea Agreement this Court should not solely rely on the defendant's assertions "[t]he federal sentencing guidelines call for a sentence of 33 to 41 months" imprisonment or any alleged conduct that occurred prior to Dr. Moore employment at Williams College on July 1, 2008 in the Court making a finding of the likelihood of success on the merits in granting injunctive relief.

Regarding Dr. Moore application for employment at Williams College, the application only made reference to whether he had [a]ny prior convictions within the past [f]ive years." (Emphasis added). *See (Affidavit of Bernard Moore ¶¶10, 13).* Dr. Moore's prior conviction was in 1987 in the United States District Court in the Northern District of California more than 23 years ago. *See (Affidavit of Bernard Moore ¶14).* At no time did Dr. Moore ever misrepresent his prior criminal conviction to Williams College as indicated defendant's opposition. It is very clear from the Defendant's opposition that the college has a unwritten policy against hiring or appointing persons with a prior criminal conviction as a faculty members. Yet a public records search reveled there are several faculty members at the Williams College with prior felony convictions. A review of Williams College Faculty Handbook[3] it makes no reference any faculty members with prior criminal convictions that constitutes any grounds for immediate termination or in Dr. Moore's case whether any prior criminal conduct that occurred prior to employment that would be grounds for termination for gross misconduct. *See Affidavit of Bernard Moore*

[3] It unclear whether Williams College has a policy or practice of not hiring anyone persons with a felony especially more than 20 years old.

¶15).

Prior to Dr. Moore's reappointment as a Visiting Assistant Professor in the Department of Political Science at Williams College for the purpose consideration for the appointment job announcement requested:

- Letter detailing teaching experience
- Current scholarly interests
- Curriculum vitae
- Evidence of past teaching success, and
- Three letters of recommendation.

See Exhibit B (Job Announcement).

Williams College only requested that Dr. Moore provide an official copy of his graduate academic records from Claremont Graduate University and Howard University for the consideration for the position. *See Exhibit C (Academic Records).* At no time, did Williams College request any undergraduate academics records from Dr. Moore nor did he submit any documentation or record related to any undergraduate studies. *See (Affidavit of Bernard Moore ¶7).* Furthermore as alleged by Williams College at no time did Dr. Moore present a part of his application for employment any credentials that were fraudulent or which were attained through fraudulent means. *See (Affidavit of Bernard Moore ¶8).* Dr. Moore submit for the Court review his *Academic & Service Learning Portfolio* that including academic records, curriculum vite, research, dissertation committee, teaching, student evaluations and servicing learning, legislative experience and community service learning. *See Exhibit D (Academic Portfolio).*

In order to prevail, for injunctive relief, plaintiff must demonstrate (1) a substantial likelihood of success on the merits; (2) that he will suffer irreparable harm absent the relief requested; (3) that other parties will not be harmed if the requested relief is granted; and (4) that

the public interest supports granting the requested relief. Campbell Soup Co. vs. Giles, 47 F.3d 467, 470 (1st Cir. 1995); Taylor vs. Resolutions Trust Corp., 56 F.3d 1497, 1505 (D.C. Cir. 1995). In determining whether to grant urgent relief, the Court must "balance the strengths of the requesting party's arguments in each of the four required areas." Cityfed Fin. Corp. vs. Office of Thrift Supervision, 58 F.3d 738,747 (D.C. Cir. 1995). "If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." Id. Where a plaintiff cannot show a likelihood of success on the merits, "it would take a very strong showing with respect to the other preliminary injunction factors to turn the tide in plaintiff's favor." Davenport vs. Int'l Brotherhood of Teamsters, AFL-CIO, 166 F.3d 356, 367 (D.C. Cir. 1999). Here, as explained in detail in the Motion for Temporary Restraining Order and Preliminary and above, Dr. Moore has demonstrated an overwhelming likelihood of success on the merits of his claim that Williams College must provide him continuation COBRA benefits.

Dr. Moore has demonstrate a likelihood of success on the merits of his claim that the Williams College is liable for failure to provide plaintiff with the required Notice to elect continuation of coverage under COBRA after a qualifying and wrongfully denying continued health insurance coverage under COBRA. Plaintiff asserts that there is no evidence of gross misconduct on the part of Dr. Moore that took place at Williams College especially during the period of his employment from July 1, 2008 thru November 9, 2009. (Emphasis Added). That Williams College had no basis in law or fact to make such a determination or allegation in deciding to terminate plaintiff for conduct that occurred prior to employment at the College for reasons of "gross misconduct" which warranted depriving him of COBRA continuation of medical benefits. Any new individual health insurance plan would invoke pre-existing condition exclusion of Type 2 Diabetes, Dr. Moore applied for health insurance with Carefirst Blue Shield

Blue Cross and was granted insurance benefits with pre-existing conditions that any treatment associated with diabetes[4] would be excluded from any coverage for 18 months without the benefit of completion of COBRA continuation health plan at. See (Affidavit of Bernard Moore §30).

Moreover, Dr. Moore has shown that, absent relief, he will suffer irreparable harm. He is already foregoing critical medical treatment since the lost his health insurance due to his diagnosis with Type 2 Diabetes[5] and severe physical weakness. *See (Affidavit of Bernard Moore ¶¶22, 23).* Dr. Moore reasserts during a visit to the emergency room his blood sugar level was measured at 670 mg/dL. *See (Affidavit of Bernard Moore ¶24).* For persons diagnosed with Type 2 Diabetes a fasting blood glucose level is recommended at 110 mg/dL, while levels are recommended below 180 mg/dL after a meal. Dr. Moore takes daily Insulin injections to help

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[4] Dr. Moore's Carefirst Blue Cross Blue Shield pre-existing diabetic exclusions are documented as:

- Heart disease and strokes
- Kidney disease
- Blindness or Vision Problems
- Neuropathy
- Foot Complications
- Hypertension
- Skin Complications

See (Affidavit of Bernard Moore ¶31)

[5] Type 2 diabetes is a metabolic disorder in which the body does not respond to the effects of the hormone insulin. This is known as insulin resistance. In addition, some people with type 2 diabetes also may not produce sufficient amounts of insulin in the pancreas.

The role of insulin is to facilitate movement of sugar (glucose) from the bloodstream into the body's cells, where it is used for energy. Insulin also helps the liver to store excess glucose. When the body cannot process and use glucose properly, the body's cells do not get the energy they need. Medically, this is known as an inability to metabolize glucose, which results in an abnormally high level of glucose in the blood, called hyperglycemia.

It type 2 diabetes goes untreated, hyperglycemia damages the body's blood vessels and can lead to many complications that can affect nearly every organ in the body. Complications include kidney failure, diabetic retinopathy and blindness, peripheral neuropathy, serious skin infections, gangrene, cardiovascular disease, stroke, osteoporosis, Alzheimer's disease, hearing damage, hyperosmolar, hyperglycemic, nonketotic syndrome, and death.

keep his blood glucose levels under control, and maintains a strict daily dietary plan. *See (Affidavit of Bernard Moore ¶25).* Maintaining blood glucose levels within a safe range (neither too high nor too low) requires an extremely delicate balancing. Dr. Moore's general practitioner, Elliot Alesko, M.D., has recommended the following treatment twice a month. *See Affidavit of Bernard Moore ¶26).* Dr. Moore visits a nutritionist to monitor his dietary intake on a weekly basis. Ironically, Bernard's efforts to lose weight through calorie restriction has, at times, resulted in a sudden decrease of his blood glucose level to as low as 70 mg/dL. Such a drop requires hospitalization to prevent the risk of diabetic coma, and Dr. Moore has been hospitalized twice already – in mid- 2008 and in 2009 – for this reason. *See (Affidavit of Bernard Moore ¶27).*

Because Diabetes frequently leads to kidney problems, Plaintiff must see a Urologist and Renal Disease Specialist regularly, to monitor his kidney function and hypertension. Plaintiff has previously undergone treatment for acute kidney stones. *See (Affidavit of Bernard Moore ¶28).* Diabetes frequently impairs eyesight as well. Since the filing for injunctive relief, Dr. Moore continues suffered a radical change in his eyesight under treatment of an Ophthalmologist for calibrating changes in his eyesight and to treat any potential degenerative complications. *See Affidavit of Bernard Moore ¶29).* Dr. Moore also must see a Podiatrist four times a year. Two complications commonly resulting from Type 2 Diabetes involve the feet. First, high blood glucose levels *(diabetic neuropathy)* can lead to loss of sensitivity in the feet. Thus, a sore or cut on one's foot may worsen and become infected due to lack of awareness of trauma to this part of the body. Diabetes also causes poor blood flow to the legs and feet (*peripheral vascular disease or* PVD) which makes it hard for a sore or cut to heal properly. *See (Affidavit of Bernard Moore ¶30).* Such injuries frequently become infected and often require medical intervention. Dr.

Moore has already experienced one such injury during a bicycling event. Dr. Moore's Podiatrist examines him regularly to evaluate his feet and monitor the status of his neuropathy and PVD.

In sum, Plaintiff faced irreparable harm in the denial COBRA continuation coverage from Williams College which would create unnecessary medical risks to the treatment of Dr. Moore's Diabetes. *See (Affidavit of Bernard Moore ¶22).* [A]ny new health insurance plans required by Dr. Moore outside of COBRA continuation coverage will subject him to *preexisting condition exclusions* related to Diabetic condition. (Emphasis added) A number of cases have held that the lack of medical or health insurance may involve irreparable harm within injunctive relief standards. Collins, vs. Agrrreko, Inc., 884 F. Supp. 450 (D. Utah 1995). In Cabral vs. Olsten Corp., 843 F. Supp. 701, 703 (D.M.D. Florida 1994), the Court held in a COBRA case that the treat of termination of health insurance benefits constituted irreparable harm. The court relied on Whelan vs. Colgan, 602 F.2d 1060, 1062 (2d Cir. 1979). In the case of Cabral, the plaintiff suffered from breast cancer, obviously a serious and potentially economically devastating medical and personal situation. Plaintiff Cabral had no other insurance and was uninsurable. The merits of this case are in predictions that any new individual health insurance plan would invoke pre-existing condition exclusions of Dr. Moore's Type 2 Diabetes condition.

Dr. Moore remains unemployed now disable, has no other income, and besides his home and car, has no other assets of significant value. The loss of health insurance benefits – particularly for those who are unemployed – constitutes irreparable harm for purposes of a preliminary injunction.[6] At the same time, requiring Williams College to provide continuation

[6] See, e.g., Communication Workers of America, District 1, AFL-CIO vs. NYNEX Corp, 898 F.22d 887, 891 (2d Cir.1990) (the threat of termination of medical benefits to striking workers constitutes irreparable harm); United Steel Workers of America vs. Textron, Inc., 836 F.2d 6, 8 & 9 (1st Cir. 1987) (loss of insurance benefits to retired workers constitutes irreparable harm); Whelan vs. Colgan, 602 F.2d 701, 703 (M.D. Florida 1994) (in a COBRA case, threat of termination of health insurance benefits for uninsured breast cancer patient constituted irreparable harm); Hinckley vs. Kelsey-Hayes Co., 866 F.Supp 1034, 1045 (E.D. Mich. 1993) (retirees established irreparable harm if the court did not order reinstatement of health insurance benefits); U.A.W. vs. Exide Corp., 688 F.Supp 174, 186-87 (E.D.Pa), aff'd mem., 857 F.2d 1464 (3rd Cir.1988); Howe vs. Varity Corp., 1989 U.S. Dist. LEXIS 17521, 1989 WL95595, *13 (S.D. Iowa) ("As a matter of law, the termination of health insurance benefits, particularly to

coverage would have less of an impact on Williams College.

Moreover, Dr. Moore reasserts that Williams College will not be harmed by the granting of this injunction. COBRA does not require employer to pay for continuation coverage.[7] LaFauci vs. St. John's Riverside Hosp., No. 05 Civ. 594 (S.D.N.Y. Aug. 9, 2009); Matthews vs. Delta Air Lines., 1993 U.S. Dist. LEXIS 3472 (D.D.C. Mar. 22, 1993); Compston vs. Automanage, lnc 79 Ohio App. 3d 359 (1992), Charles vs. Des Paines Pub.Co., 1991 U.S. Dist. LEXIS 7806 at *5 n.4 (N.D. Ill. June 4, 1991). lnstead, employers (Williams College) are expressly permitted to charge employees 100 percent of the cost of the group health plan coverage, plus an additional 2 percent, for a total premium of 102 percent of the cost of coverage. This Court should find that the balance of harm weighs in favor of granting Plaintiff's request for a TRO and a Preliminary lnjunction.

Finally, the public interest is served here by requiring Williams College to provide Dr. Moore continuation health coverage. The underlying purpose of COBRA is to ensure that employees who lose their jobs still receive limited health insurance benefits, and an injunction would further that legislative goal. See Phillips vs. Saratoga Harness Racing, lnc., 240 F.3d 174, 179 (2nd Cir.2001) ("COBRA was enacted as a legislative response to the growing number of Americans without health insurance and the reluctance of hospitals to treat the uninsured."); National Cos. Health Ben. Plan vs. St. Joseph's Hosp., Inc., 929 F.2d 1558, 1569 (11th Cir.1991) ("the goal of COBRA…is to provide continuation coverage until group plan participants are able to obtain other coverage"); National Cos. Health Ben. Plan vs. St. Joseph's Hosp. Inc., 929 F.3d. 1558, 1569-70 (11th Cir. 1991) ("the goal of COBRA…is to provide continuation coverage until group plan participants are able to obtain other coverage"). An injunction is consistent with the

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those on a fixed income, constitutes a threat of irreparable harm sufficient to warrant of preliminary injunction"); Johnson vs. Plainville Casting Corp., 1988 U.S. Dist. LEXIS 17076, 1988 WL 167346, * 2 (D. Conn. 1988) ("It is well-settled that the termination of health insurance benefits presents a threat of irreparable harm sufficient to support temporary equitable relief.").

[7] Notwithstanding, employers are expressly permitted to charge employees 100 percent, for a total premium of 102 percent of the cost of coverage.

legislative purpose of COBRA, and thus serves the public interest. See, e.g., Comcast Sch. Holdings, Inc. vs. Villages of Lake-Sumter, Inc., 168 F. Supp. 2d 1338, 1351 (M.D. Fla. 2001) (Injunction consistent with purpose of statute is in public interest).

Said reply is based on the supporting affidavit of Bernard Moore, exhibits thereto filed herewith, the argument and testimony adduced at hearing; and the pleadings and other papers that compromise the record in this action.

Dated: January 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, mailed a true and correct copy of the Plaintiff's Reply to Defendant's Opposition to Motion for Preliminary Injunction and Temporary Restraining Order to the following:

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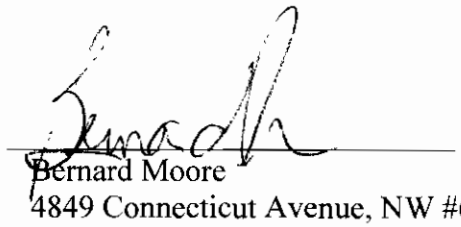
Boston, MA 02199

Mailed at: Washington, D.C.

Executed on January 23, 2010, at Washington, D.C.



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