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Barbara J. Fick

Notre Dame Law School, barbara.j.fick.1@nd.edu

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Does Title IX Protect Academic Whistle Blowers?

by Barbara J. Fick

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Case at a Glance

Title IX requires gender equality in federally funded educational programs; it is unclear, however, whether the statute also protects those who complain that programs are violating this equality mandate. This case will provide the answer to that question.

Barbara J. Fick is an associate professor of law at Notre Dame Law School in Notre Dame, Indiana; fick.1@nd.edu or 574-631-5864.

Title IX of the Education Amendments of 1972 is aimed at securing equality of the sexes in the educational context. It prohibits discrimination on the basis of sex in any educational program or activity receiving federal funds. The statute provides that if the government agency that disbursed such funds finds that the program has engaged in sex discrimination, the agency will terminate federal funding.

Title IX has been successfully used to challenge inequality in scholarships, recruiting, equipment, and facilities for women's sports at educational institutions, as well as to attack sexual harassment of women students in high schools and colleges.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court dealt with the question of whether Title IX also provides (in addition to the agency remedy of termination of funds) an implied private cause of action for individuals who have been discriminated against on the basis of sex by an educational program. The Court held that a student who had allegedly been denied admission to medical school

because of her sex could maintain a cause of action under Title IX and seek a private remedy to redress the violation of her rights.

The rationale underlying the *Cannon* decision was based on the application of a four-part test, first proposed in *Cort v. Ash*, 422 U.S. 66 (1975), for determining the circumstances for implying a private cause of action into a federal statute that does not expressly provide for such enforcement. More recently, the Supreme Court has revisited the issue of the criteria for implying a private right to sue in *Sandoval v. Alexander*, 532 U.S. 275 (2001). The *Sandoval* decision arguably constitutes a narrowing of the circumstances for importing a private cause of action into a federal statute. The Court eschewed reliance on three of the four factors enunciated in *Cort*, holding that legislative intent is the only basis upon which a private right of action may be inferred.

ISSUE

Does Title IX's ban on discrimination allow a private individual to sue

JACKSON V. BIRMINGHAM BOARD
OF EDUCATION
DOCKET NO. 02-1672

ARGUMENT DATE:
NOVEMBER 30, 2004
FROM: THE ELEVENTH CIRCUIT





for retaliation when a recipient of federal funds engages in adverse action against that individual because of his complaints that the recipient is violating Title IX?

FACTS

Roderick Jackson has been an employee of the Birmingham Board of Education (the Board) since 1993. He was employed as both a physical education teacher and coach of the girls basketball team. In December 2000, Jackson began protesting that the girls basketball team was being denied equal funding and equal access to equipment and facilities as compared to the boys team. Shortly thereafter, he began receiving negative evaluations and, in May 2001, he was removed as coach. Jackson continues to be employed in his position as a tenured physical education teacher.

Jackson filed a lawsuit against the Board in federal district court for the northern district of Alabama. He alleged that the Board had retaliated against him in violation of Title IX because of his complaints that the girls basketball team was receiving unequal treatment based on sex. The Board filed a motion to dismiss on the ground that Title IX's implied private cause of action as recognized in *Cannon* does not include claims of retaliation.

The district court judge referred the motion to a magistrate judge, who recommended that the Board's motion be granted, finding that Title IX does not create a private cause of action for retaliation. The district court judge adopted the magistrate's recommendation. Jackson appealed, and the Eleventh Circuit Court of Appeals affirmed the dismissal of the complaint. *Jackson v. Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2002).

The Eleventh Circuit viewed the question presented as whether Title IX implies a private cause of action and remedy for retaliation. The court determined that the answer to that question was governed by the Supreme Court's holding in *Sandoval*, requiring courts to look solely to statutory intent. The court noted that to determine statutory intent, it is to look to the statutory text for "rights-creating language" and to examine the statutory enforcement mechanism. Only if these two indicators are inconclusive should a court review legislative history and the context surrounding the passage of the statute.

Applying this criteria, the Eleventh Circuit found that the express language of the statute does not create a right to be protected from retaliation. "Nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations. Indeed, the statute makes no mention of retaliation at all." *Jackson*, 309 F.3d at 1344. Secondly, the enforcement mechanism provided by the statute (the withdrawal of federal funds), and the administrative requirements that must be fulfilled before the imposition of any penalty (attempt at voluntary compliance, agency hearing, congressional and judicial review) militate against implying a private cause of action; providing such explicit enforcement mechanisms suggests Congress intended to preclude other means.

While acknowledging that the administrative regulations issued under Title IX prohibit retaliation, the court found such regulations could not be the basis for implying a private right of action. Regulatory language cannot create a right that Congress did not enact in the statute, and the statutory language clearly does not create such a right.

Jackson filed a motion for rehearing *en banc*, which was denied. Jackson then filed a petition for writ of *certiorari* with the Supreme Court, which the Court granted. *Jackson v. Birmingham Board of Education*, 124 S.Ct. 2834 (2004).

CASE ANALYSIS

The parties' arguments in this case are somewhat akin to ships passing in the night. Jackson focuses his argument on the issue of statutory interpretation—does the term "discrimination" as used in Title IX include the concept of "retaliation"? The Board, on the other hand, views the salient issue as to whether, in light of the *Sandoval* case, there is an implied private cause of action for retaliation under Title IX.

Jackson begins his argument by asserting that the lower court's discussion and application of *Sandoval* to this case is misplaced. *Sandoval* addressed the question of the criteria to apply when determining if Congress intended a statute to be privately enforced. The Court in *Cannon* has already answered that question with regards to Title IX in the affirmative. Thus, the only question presented by this case is whether Title IX's prohibition against discrimination includes discrimination that takes the form of retaliation.

Jackson then asserts that retaliation is a form of discrimination—it is conduct that treats an individual less favorably than others because that individual has complained about discrimination. The Court in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) held that the statutory ban on discrimination encompasses retaliation. The federal statute at issue in *Sullivan* by its terms prohibited "discrimination" in property transactions; the Court held that such prohibition included a prohibi-

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tion against retaliation for complaining about such discrimination.

Consistent with *Sullivan*, the courts of appeals have interpreted the meaning of discrimination to include retaliation. Neither Title VII nor the Age Discrimination in Employment Act expressly prohibit retaliation against federal sector employees who complain of discrimination, yet the courts have held that the general prohibition against discrimination impliedly includes a ban on retaliation. Similarly, until its amendment in 1992, the Rehabilitation Act did not expressly prohibit retaliation but the courts interpreted its prohibition on discrimination to include retaliation.

Defining discrimination to include retaliation does not conflict with Title IX's requirement that discrimination be "on the basis of sex." To retaliate against someone who complains about sex discrimination is to take action on the basis of sex, since sex is an underlying condition of the complaint.

The circumstances surrounding Title IX's enactment indicate congressional intent to prohibit retaliation. Evidence presented at congressional hearings during the consideration of Title IX included extensive testimony and documents concerning reprisal and retaliation faced by those who complained about sex discrimination. Moreover, the *Sullivan* case had only recently been decided at the time Congress pass Title IX. As the Supreme Court noted in *Cannon*, it is appropriate to assume that Congress was familiar with the *Sullivan* decision and expected Title IX to be interpreted consistently with that decision.

Failure to protect against retaliation would undercut the congressional purposes behind passage of Title IX. Individuals will not be able to assert

their right to be free from sex discrimination (a right recognized in *Cannon*) if they are afraid that they will be subjected to reprisals for asserting that right. Moreover, Congress's goal of ensuring that federal funds are not used to finance discriminatory practices depends in large measure on the willingness of individuals who observe such practices to report them. Individuals are less likely to report such practices if they fear retaliation as a result of such reporting.

The implementing regulations under Title IX have uniformly and consistently interpreted the term discrimination to include retaliation. These regulations are entitled to deference by this Court. The regulations were submitted to Congress for review, which held hearings and discussed proposed changes. Congress, however, did not modify the regulations and they were allowed to become effective.

Finally, contrary to the Eleventh Circuit's and the Board's view, there is no basis for creating a distinction in protecting against retaliation between those who complain about sex discrimination against others and those who complain about sex discrimination against themselves. Such a distinction conflicts with the *Sullivan* decision that protected a white victim of retaliation based on his complaints about discrimination against his black tenant. The civil rights statutes that prohibit retaliation protect all individuals who make complaints about discrimination regardless at whom the discrimination was aimed. Moreover, such a distinction would be difficult to administer in practice. The work of educators and coaches is affected by the experiences of their students. If students are denied access to facilities, equipment, and resources based on their sex, then educators who work with such students are

laboring under more difficult working conditions and thus are victims of the discrimination as well.

The Board takes issue with Jackson's characterization of the case. This case is not solely about defining the meaning of the term "discrimination," but more fundamentally it is about whether the Supreme Court should recognize a new cause of action implied within Title IX.

Applying the *Sandoval* analysis, the sole determinant for implying rights and remedies into any statutory scheme is congressional intent. The express language of Title IX does not address retaliation. When Congress intends to prohibit retaliation, as it did in Title VII dealing with private sector employees, it expressly uses specific language prohibiting discrimination on the basis of an individual's opposition to any practice made unlawful by the statute or on the basis of the individual's participation in the enforcement of the statute. In Title IX, Congress limited its prohibition to discrimination "on the basis of sex."

The creation of an implied remedy also conflicts with congressional intent. Title IX provides for an administrative enforcement mechanism and a specific remedy for violations. By expressly providing a means to remedy Title IX violations, Congress intended to preclude other mechanisms for enforcement.

The regulations cited by Jackson in support of his retaliation claim are beyond the scope of the agency's authority and thus do not provide any evidence of congressional intent to create such a claim. Section 902 of Title IX authorized the Department of Education to create rules to enforce Title IX. The regulations, however, go beyond addressing enforcement issues to create a



new cause of action. As this Court held in *Sandoval*, a regulation cannot create a right that is not based in the underlying statute.

Under the express language of Title IX, educational programs are prohibited from discriminating on the basis of sex. Jackson claims he was removed from his coaching position because he complained about practices that discriminated against the girls basketball team. The action taken against Jackson was not on the basis of sex, but rather, allegedly, on the basis of his complaint. Such a claim is not within the express language of Title IX.

Retaliation is not mentioned anywhere in the text of the statute. To read such a claim into the statutory language amounts to an amendment of Title IX, not an interpretation.

Retaliation and discrimination are two separate legal concepts. A prohibition against discrimination neither expressly nor impliedly prohibits retaliation. Jackson's reliance on *Sullivan* to support such an implication is misplaced. *Sullivan*'s rationale conflicts with the Court's later ruling in *Sandoval* that allows for the recognition of implied rights and remedies only when legislative intent to create such rights is evident. *Sullivan*'s more expansive treatment for the creation of implied rights conflicts with the Court's more recent analysis that reins in the scope of the implied rights doctrine. Thus, although not overruled, *Sullivan* should be limited to its facts.

The textual prohibition against "discrimination" should not be broadly construed. Title IX was enacted under the Spending Clause of the Constitution; normally such statutes are strictly construed. The general rule requires that when Congress places conditions on receipt of federal funds, it must do so unambigu-

ously so that the recipient of such funds understands the limits under which it must operate in order to remain eligible for such funds. The text of Title IX does not provide such clear notice that retaliatory action would jeopardize federal funding.

Jackson asserts that Congress's failure to repeal *Cannon*'s holding at the time it amended Title IX after the *Cannon* decision is evidence of congressional acceptance that a private right of action is implied in Title IX. Such an argument elevates inaction to express action, a result this Court has cautioned against.

The regulations prohibiting retaliation are contrary to the express terms of Title IX and are not, therefore, entitled to deference. The Court has held that it may defer to agency statutory interpretation as found in administration regulations when the text of the statute is ambiguous. Title IX's statutory language is not ambiguous—it clearly prohibits discrimination but makes no mention of retaliation. Moreover, even where a statute is ambiguous, the Court will not defer to agency regulations if they construe the statute in an impermissible manner. The regulations in this case constitute such an impermissible construction.

Finally, even under the regulations, Jackson lacks standing to enforce a retaliation claim. Jackson's complaint related to discrimination against the girls basketball team. His complaint did not relate to discrimination against himself on the basis of his sex, but rather discrimination against others on the basis of their sex. He was not a victim of the discrimination about which he complained. Thus, any retaliation was not on the basis of his sex, and therefore not within the purview of either the statute or the regulations.

SIGNIFICANCE

Title IX and Title VI are generally construed consistently. Thus, any interpretation of Title IX disallowing protection from retaliation would likely be applied to Title VI as well, leaving unprotected those individuals who complain about racial or national origin discrimination by programs receiving federal funds. Moreover, as many lower courts have interpreted the term "discrimination" as used in other civil rights statutes to include retaliation, such interpretation would be subject to attack should the Supreme Court reject the argument in this case.

The failure to include claims of retaliation within the scope of Title IX could impact the overall efficacy of the statute. Within the education context (which is the focus of Title IX's regulatory scheme), the persons most likely to be in a position to identify discrimination are educators and administrators, whereas the persons most likely to be subjected to discrimination are students and minors. If the educators and administrators are left unprotected from reprisals, many will be deterred from "blowing the whistle" for fear of jeopardizing their jobs and careers. Discriminatory practices will be undetected and undeterred.

On the other hand, undue expansion of the scope of Title IX leaves funding recipients vulnerable to a range of liability not contemplated at the time the recipient accepted the funds. Educational institutions at all levels are facing financial hardships. Although a violation of the strictures of Title IX is not to be condoned, the penalty foreseen by fund recipients was loss of federal financial assistance, not compensatory and punitive damages for indeterminate amounts.

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ATTORNEYS FOR THE PARTIES

For Roderick Jackson (Marcia D. Greenberger (202) 588-5180)

For Birmingham Board of Education (Keith Thomas (205) 328-7915)

AMICUS BRIEFS

In Support of Roderick Jackson
American Bar Association
(Robert J. Grey (312) 988-5000)
Birch Bayh (John F. Cooney
(202) 344-4000)

Leadership Conference on Civil Rights (Virginia A. Seitz (202) 736-8000)

National Education Association, et al. (Jeremiah A. Collins (202) 842-2600)

National Partnership for Women & Families, et al. (Caroline M. Brown (202) 662-6000)

New York Lawyers for the Public Interest, et al. (Jeffrey A. Lamken (202) 639-7700)

United States (Paul D. Clement, Acting Solicitor General of the United States (202) 514-2217)

Women's Sports Foundation, et al. (Nancy Hogshead-Makar (904) 680-7784)

In Support of Birmingham Board of Education

Alabama, Delaware, Hawaii, Nevada, Oregon, South Dakota, Tennessee, Utah, and Virginia (Kevin C. Newsome (334) 242-7401)

Eagle Forum Education & Legal Defense Fund (Andrew L. Schlafly (908) 719-8608)

National School Boards Association, et al. (Julie Underwood (703) 838-6722)

National Wrestling Coaches Association (Lawrence J. Joseph (202) 669-5135)

Pacific Legal Foundation (John H. Findley (916) 419-7111)