

# Public Employer

A Littler Mendelson **Time Sensitive** Newsletter

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The United States Supreme Court has ruled that teachers and coaches may sue for retaliation for complaining about sex discrimination under Title IX.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

## U.S. Supreme Court Holds That a Private Right of Action for Retaliation is Implied by Title IX.

By: *Patti White*

On March 29, 2005, a divided United States Supreme Court expanded the scope of Title IX by ruling that a male coach who complained about discrimination against his high school girls' basketball team may sue for retaliation even though retaliation is not expressly mentioned in Title IX. Writing for the majority, Justice Sandra Day O'Connor stated that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private right of action. Retaliation is, by definition, an intentional act... We conclude that when a funding recipient retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX."

Roderick Jackson was hired by the Birmingham, Alabama, public school system to serve as a physical education teacher and girls' basketball coach. After Mr. Jackson was transferred to Ensley High School in August 1999, he discovered that the girls' basketball team was not receiving equal funding or equal access to athletic equipment and facilities. In December of 2000, Mr. Jackson began complaining to his supervisors about the alleged unequal treatment of the girls' basketball team; however, the high school administration did not address his complaints. Mr. Jackson's supervisors began to give him negative performance evaluations, and he was ultimately removed as the girls' basketball coach. Mr. Jackson is still employed by the district as a teacher; however, he no longer receives extra pay for coaching the girls' basketball team.

Mr. Jackson sued the district alleging that the School Board had violated Title IX by retaliating against him for protesting the alleged discrimination against the girls' basketball team. The 11th Circuit Court of Appeals affirmed the District Court's dismissal of his lawsuit on the basis that there

is no language in Title IX prohibiting retaliation. The school district argued that Congress specifically prohibited retaliation when it enacted Title VII; however, there is no such language expressly prohibiting retaliation in Title IX. The United States Supreme Court overruled the 11th Circuit when it found that Title IX's cause of action for retaliation is implied, while Title VII's prohibition against retaliation is express.

The Birmingham Board of Education also argued that even if there were a private right of action for a retaliation under Title IX, that Coach Jackson was not entitled to invoke it because he was not a direct victim of sex discrimination. The Supreme Court stated that Title IX does not require that the victim of the retaliation must also be a victim of the discrimination about which he or she complained.

In the majority opinion, Justice O'Connor stated that it would be very difficult to achieve the purposes of Title IX if teachers or coaches were loathe to report alleged violations for fear of retaliation. She stated that "... if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson v. Birmingham Board of Education*, 544 U.S. \_\_\_\_ (2005).

### The Dissent

The decision in *Jackson, supra*, is a 5-4 decision. Justice Clarence Thomas wrote the dissent and was joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy. The dissent stated that the majority holding is contrary to the plain terms of Title IX because retaliatory conduct is not discrimination on the basis of sex. The dissent also stated that the court normally requires Congress to use express language when it imposes conditions on recipients of federal funding. Justice Thomas stated that the sex-based topic of Mr. Jackson's complaint cannot overcome the fact that retaliation is not based on anyone's sex, especially in this case the complainant's sex.

The dissent found especially significant the fact that the text of Title IX does not mention retaliation, which is expressly prohibited in a number of other statutes including the ADA and the ADEA.

## Recommendations for School and College Administrators.

### **1. Train administrators for colleges, community colleges and public schools.**

In light of the Supreme Court's holding, it is reasonable to expect an increase in retaliation claims by employees who lose their positions as coaches. We recommend that institutes of higher education and public schools provide training to administrators about responding to complaints of Title IX violations and the prohibition against retaliation. As with other complaints of discrimination, it is important for administrators to respond promptly and to investigate any complaints that the school or college is violating Title IX. It is also important to heighten awareness among administrators about the new vulnerability to retaliation claims. We expect that the Office of Civil Rights Compliance (OCR) will be vigilant about investigating retaliation claims and enforcing the prohibition against retaliation.

### **2. Conduct an audit of your practices.**

We recommend that public school and education employers do an audit of their practices with respect to providing financial support, use of facilities and equipment to athletic teams in order to correct any inequities. If the college or school district has not conducted such an audit recently, we suggest that the educational institution investigate to make sure that female sports teams are treated equally with respect to the time that they may access the gym for practice, access to equipment, team travel, and financial support. Often issues arise in the scheduling of practice time between girls' teams and boys' teams in contact sports such as basketball. There should not be separate P.E. classes for boys and girls in public schools unless the classes involve contact sports.

Experienced employment counsel can help higher education and public school employers monitor compliance with Title IX and monitor continuing developments likely to be triggered by this Supreme Court decision.

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