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Whistle-blowing and the Continued Expansion of Title IX in Jackson v. Birmingham Board of Education

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WHISTLE-BLOWING AND THE CONTINUED EXPANSION OF TITLE IX IN JACKSON V. BIRMINGHAM BOARD OF EDUCATION

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I. INTRODUCTION

Those who report individual or organizational violations of federal or state laws to their supervisors or to the government face major risks, and individuals who wish to report alleged wrong-doings should take great pause while considering the potential ramifications of the decision before notifying authorities or superiors of misconduct. By exposing wrong-doing, revealing fraudulent, unethical or illegal misconduct by an individual or organization, whistle-blowers often rise to villainous heights for going public with their findings.[1] However, once the smoke clears whistle-blowers can also become heroes.[2] Whether an organization is privately owned, publicly traded or a branch of government, whistle-blowers have had quite an impact on public perceptions of management strategies and organizational policies in recent years.[3] Enron and

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[1] Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 950 (2002) (citing Robert Lipsyte, *What Happens after the Whistle Blows? A Tennessee Professor's Allegations of Athletic Abuses Haunts her Life*, N.Y. TIMES, July 20, 2000, at D1-D2 (describing the experience of Dr. Linda Bensel-Meyers at the University of Tennessee after blowing the whistle by alleging instances of student-athlete tutoring concerns)).

[2] Assuming that the smoke clears, some whistle-blowers have reached levels of idolization nationally and internationally. *See, e.g.*, Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 30 (three women were named Time Magazine's Persons of the Year 2002 for their exposure of corporate improprieties: FBI Agent Coleen Rowley, WorldCom Vice President Cynthia Cooper, and Enron Vice President Sherron Watkins).

[3] *See generally* Elletta Sangrey Callahan et al, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT'L L. 879 (2004) ("Whistleblowing is viewed as a mechanism to regain societal control over the large organizations that have come to dominate the global community.").

WorldCom serve as two recent examples in which whistle-blowers acted as the catalyst for change in corporate and accounting strategies.[4]

Regardless of the whistle-blowers' intent, the present danger of retaliation by supervisors, co-workers and others can prove quite intense and even debilitating for those who report internal violations.[5] In some instances, the whistle-blowers become targets of wide-spread organizational retaliation.[6] Supervisors or other administrators who manage whistle-blowers have retaliated in various ways, including terminating employment, reducing promotion opportunities, effectuating a demotion, reducing advancement opportunities, and otherwise implementing actions that adversely affect the emotional or financial health of the individual blowing the whistle.[7]

It was somewhat inevitable and certainly timely that the United States Supreme Court faced a whistle-blowing case in the sports context – *Jackson v. Birmingham Board of Education*.[8] *Jackson* involved retaliation by a local school board against the girl's high school basketball coach in Birmingham, Alabama. Adding an interesting sports law

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[4] *See generally* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes–Oxley Act for Employment Law*, 79 WASH. L. REV. 1029 (2004) (arguing that the Sarbanes–Oxley Act does not provide adequate protection to whistleblowers); Julie Jones, *Give a Little Whistle: The Need for a more Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH L. REV. 1133 (2003) (arguing broad interpretation of the whistleblower exception to employment-at-will to foster an environment that encourages employees to share information about an employer's illegal activities); Keith Russell, *Dollar General's Woes End Quietly*, NASHVILLE TENNESSEAN, Apr. 10, 2005, http://www.tennessean.com/business/archives/05/03/68047712.shtml?Element_ID=68047712 (describing the involvement with accounting issues by corporations other than Enron and WorldCom, such as Dollar General, Qwest Communication International, Inc., Computer Associates, Health South, Bristol-Myers Squibb Co., and other publicly traded companies) (last visited Oct. 9, 2005).

[5] *See generally* David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109 (1995) (explaining a study of whistleblowers conducted in the early 1990s that showed that 82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% attempted suicide).

[6] Bucy, *supra* note 1, at 952.

[7] *See generally* Rosalie Berger Levinson, *Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech*, 79 TUL. L. REV. 669 (2005) (tracing the development of Supreme Court doctrine applied to determine when retaliatory action constitutes an infringement of the free speech rights of government employees).

flavor to whistle-blowing, the context of the allegations and subsequent retaliatory action was in the arena of Title IX – the gender-equity law enacted in 1972.[9] Ironically, *Jackson* was not about retaliation against a female for whistle-blowing. Rather, the whistle-blower was a male coach, Roderick Jackson (hereinafter "Coach Jackson"), who reported Title IX violations to a female supervisor about bias and inequity against his female basketball players.[10] According to the coach, he was stripped of his coaching duties as a result of his complaints of bias and inequity against that the girls' basketball team because the girls did not receive equal funding or access to athletic equipment and facilities.[11]

Coach Jackson sued under Title IX of the 1972 Education Amendments alleging that the Birmingham Board of Education retaliated against him for reporting the discrimination against the girls' basketball team.[12] The issue before the Supreme Court was whether the private right of action implied by Title IX encompassed retaliation claims.[13] In a 5-4 decision, the Court held that the private right of action does encompass retaliation claims where the funding recipient retaliates against an individual because he

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[8] Jackson v. Birmingham Bd. of Educ., 125 S. Ct. 1497 (2005).
[9] Andrew Santillo, *Comment, National Wrestling Coaches Association v. United States Department of Education: The Potential Takedown of the Current Application of Title IX to Intercollegiate Athletics*, 13 TEMP. POL. & CIV. RTS. L. REV. 187 (2003).
[10] The irony in Coach Jackson's circumstances is that most Title IX claims and legal scholarship focuses on complaints by women and girls against men and boys in terms of inequity in intercollegiate sports. *See* Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REV. 149 (1994) (demonstrating that allegations by the male coach in *Jackson* are ironic because most sports law Title IX claims and legal scholarship focus on complaints by women and girls against men and boys in terms of inequity in intercollegiate sports); Jocelyn Samuels & Kristen Galles Fall, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11 (2003) (describing the goal of Title IX as being a remedy for discrimination against women and girls in educational athletics); Andrew J. Boyd, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 T. MARSHALL L. REV. 257 (2003) (arguing that the ways in which Title IX has been applied and enforced has benefited women's sports programs and harmed men's sports).
[11] *See Jackson*, 125 S.Ct. at 1503.
[12] *See id*.
[13] *Id*.

complained about sex discrimination.[14] The Court further concluded that Title IX "is broadly worded [and] * * * does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint."[15]

Reasonable minds may differ as to whether *Jackson* will have a significant impact on the nature and number of legitimate claims of Title IX violations in the elementary, secondary and post-secondary environments. Although *Jackson* continues to broaden the interpretation of Title IX, the practice of whistle-blowing in the workplace, which is often referred to as a *qui tam* action, is not a new concept in the law. It is worth noting that *qui tam* actions occur frequently in just about every employment context.[16] For example, section 806 of the 2002 Sarbanes-Oxley Act fosters whistle-blowing in the business law context.[17]

So, in what instances other than in the Title IX context would whistle-blowing be relevant in sports law? After all, the most prolific American athletic organizations are privately regulated, including the United States Olympic Committee (USOC) and the National Collegiate Athletic Association (NCAA).[18] Further, Congress has traditionally

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[14] *Id*.
[15] *Id*. at 1507.
[16] *See generally* James B. Helmer, Jr., *How Great is thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act*, 68 U. CIN. L. REV. 737 (2000) (provides an interesting discussion of *qui tam*).
[17] 18 U.S.C. § 1514A(a) (2002) (providing whistleblower protection for employees of publicly traded companies).
[18] *See* San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987) (United States Olympic Committee is not a "state actor" though it is a corporation chartered and regulated by the federal government, receives direct subsidies from the government, and is given exclusive commercial use of the word "Olympic" by statute); NCAA v. Tarkanian, 488 U.S. 179 (1988) (holding that the NCAA's regulation of college athletics does not constitute state action). Reporting of violations of rules and other improprieties among these leagues and organizations has its own place in legal scholarship as well, particularly involving the NCAA and its myriad of evolving policies, rules and regulations. *See, e.g.*, Frank J. Ferraro, *When Athletics Engulfs Academics: Violations Committed by University of Minnesota Basketball*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 13 (2003). *But See*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (non-profit statewide athletic associations constitute state action).

refused to micro-manage athletics, an exception being anti-trust violations.[19] Internal violations of those organizations' rules are addressed from within by their governing bodies or the organizational members themselves. Therefore, when an individual blows the whistle on a violation in the sports context the enforcing party is often not the government; rather, it is the league or membership organization itself.[20] Regardless, whistle-blowers may take a more active role in sports law sooner than one might think. Therefore, it is important to recognize and explore the force of relevant law in this area.

The purpose of this article, then, is three-fold. First, the article offers a concise overview of the history, purpose and development of Title IX in order to provide historical and legal insights to the Court's decision in *Jackson*. Second, the article offers an in-depth examination of the *Jackson* decision to demonstrate that blowing the whistle on Title IX violations now extends protection to persons who report those violations. Finally, the article examines whistle-blowing outside of the context of Title IX for those who are involved in aspects of sports law, administration, and participation.[21]

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[19] Associated Press, *Selig, Tagliabue, Stern, Bettman Called for Hearing*, ESPN.COM, May 12, 2005, http://sports.espn.go.com/espn/news/story?id=2058738 (last visited Oct. 10, 2005) (Congress becomes more involved in the rules and enforcement of drug-testing issues in light of recent issues and steroid scandals). Congress has enacted the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (1988), the Football Merger Act of 1966, 15 U.S.C. § 1291 (1966), and the Curt Flood Act of 1998, 15 U.S.C. § 26b (2004). *See* Edmund P. Edmonds, *Over Forty Years in the On-Deck Circle: Congress and the Baseball Antitrust Exemption*, 19 T. MARSHALL L. REV. 627 (1993).

[20] *See* Welch Suggs, *The NCAA's Scapegoat Question*, THE CHRON. OF HIGHER EDUC., May 6, 2005 (describing the Enforcement Staff and practices of the NCAA) (on file with the author). The Enforcement Staff of the NCAA, made up of 19 investigators and 5 directors of enforcement, is sometimes referred to as G-men and terminators looking to "nail" member school programs for alleged rules violations. The Enforcement Staff makes its own report then submits it to the Committee on Infractions. The article also cites three individuals who took the blame-and subsequently sued-for rules violations by NCAA member schools thereby being defamed and becoming scapegoats and blacklisted in the field among respective turmoil that was akin to a soap opera. While the NCAA does not have subpoena power, clearly the federal and state governments do. Further, violations of federal or state law by a coach, player or institution does not protect perpetrators merely because of their status as a member of the NCAA.

II. TITLE IX

In the most general sense, Title IX of the 1972 Education Amendments provides a public remedy against gender discrimination by terminating or preventing the distribution of federal funds to the institutions that support discriminatory practices.[22] Initially, Title IX was held to apply only to the "direct beneficiaries of federal financial assistance," meaning students and applicants.[23] However, Congress enacted the Civil Rights Restoration Act of 1987 which subjected all programs and institutions receiving any federal funding to Title IX scrutiny.[24] Congress intended that act to overturn *Grove City Coll. v. Bell*,[25] a landmark case that temporarily excluded collegiate athletic departments from Title IX.[26] With that act, Congress reinforced the motivation behind Title IX to prevent sex discrimination in programs receiving federal funding in all areas, not just in athletics, and to promote gender-equity.[27]

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[21] *See generally* Elletta Sangrey, et al., *Who Blows the Whistle to the Media and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151 (1994) (provides a complete analysis of state statutes, cases and secondary sources).

[22] As of this writing, the author is unaware of any institution that has ever had their funds taken away by the federal government for non-compliance with Title IX.

[23] Junior Coll. Dist. v. Califano, 455 F. Supp. 1212, 1215 (D. Mo. 1978); Islesboro Sch. Comm. v. Califano 593 F.2d 424, 426 (1st Cir. 1979) (Title IX did not apply to employees and only to students, who are the direct beneficiaries of programs that receive federal financial assistance); Romeo Cmty. Schs. v. United States. Dep't of Health, Educ. & Welfare, 600 F.2d 581, 584 (6th Cir. 1979).

[24] 20 U.S.C. § 1687 (2005) (The Civil Rights Restoration Act of 1987). "For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education." That language legislatively overruled *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), which had given hope to athletic departments that desired an exception to Title IX coverage because the Supreme Court narrowly construed Title IX to govern only those programs that receive direct federal financial assistance. *Id*. at 573.

[25] *Grove City*, 465 U.S. at 555 (1984).

[26] *See* Farah S. Ahmed, *Title IX of the 1972 Education Amendments*, 5 GEO. J. GENDER & L. 361 (2004) ("Congress responded by passing the Civil Rights Restoration Act of 1987 (CRRA), amending Title IX to effectively encompass all of the programs or activities of educational institutions that receive any federal financial assistance.").

[27] It is important to note that "gender-equity" does not mean that an institution that receives federal funds must allow members of either sex to participate in any particular sport, offer identical programs to members of both sexes, or that Title IX regulations actually allow institutions to sponsor separate teams for members of each sex as long as the activity is a contact sport or team members are selected based on skill. Further, in *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459 (1999), the NCAA was exempted from Title IX as an "institution" because the receipt of dues from institutions who receive federal funds did not characterize

The wording of Title IX is quite short and provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[28] The Supreme Court and the Office for Civil Right (OCR) have had difficulty interpreting Congress' original intent behind Title IX because little congressional material (e.g., no Committee Report) exists that recorded the drafting of Title IX.[29] Title IX has undergone many changes and interpretations due to its ambiguity. Whether an institution, such as a college or university, is in compliance with the law was established in 1979 as a "policy interpretation" known today more formally as the 'three-part test.'"[30]

Title IX is primarily modeled after Title VI and Title VII of the Civil Rights Act of 1964, both of which prohibit discrimination based on race, color, religion, sex or national origin.[31] Equitable in their intent but sometimes harsh in their application, interpretations involving Title IX have expanded opportunities for women in sports and at

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NCAA as a recipient of federal financial assistance for the purposes of Title IX. *Cf.* Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000) (holding that LSU was liable under Title IX for not adequately accommodating the school's female athletes).

[28] 20 U.S.C.A. § 1681 (2005) (Title IX is comprised of only thirty-seven words).

[29] *See, e.g.,* Cohen v. Brown Univ., 991 F.2d 888, 893 (1st Cir. 1993), *rev'd*, 101 F.3d 155 (1st Cir. 1996) (Congress included no committee report with the final bill).

[30] The original federal agency responsible for Title IX was the Department of Health, Education and Welfare (HEW) which issued the 1975 Regulations and the 1979 Interpretation. The HEW was later divided into the Department of Health & Human Services (HHS) and the Department of Education (DOE). In 1996, the DOE's Office for Civil Rights released its first "clarification" of its Title IX enforcement policies, one being the three-part test. Ahmed, *supra* note 26, at 362-63.

[31] 42 U.S.C. §§ 2000d-2000d-4a (Title VI of the Civil Rights Act of 1964) (applies to federally funded programs). Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§2000e-2000e-5, applies to equal employment opportunities. Technically, Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, while Title VI of the Civil Rights Act of 1964 prohibits "discrimination under any program or activity receiving Federal financial assistance" against any person in the United States "on the ground of race, color, or national origin." *But see* Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999) (Title VI does not apply because NCAA does not receive federal funding).

the same time dismantled numerous men's intercollegiate athletic programs.[32] In 1979, the Supreme Court expanded Title IX to include a private cause of action.[33] While employment discrimination issues most often fall within the purview of Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex or national origin in the workplace, the Supreme Court extended the scope of Title IX to include the prohibition of sex discrimination in the employment practices of educational institutions receiving federal financial assistance as well.[34] Under Title VII, plaintiffs must first file a charge with the Equal Employment Opportunity Commission (EEOC), whereas plaintiffs filing under Title IX need not do so.[35]

OCR promulgated clarifications of Title IX policy in 1979, 1996, 2003 and 2005.[36] The courts have afforded great deference to the regulations and interpretations of administrative agencies such as those OCR policies under Title IX.[37] For example, the Court upheld regulations by the Department of Education that extended Title IX to

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[32] David Klinker, *Why Conforming with Title IX Hurts Men's Collegiate Sports*, 13 SETON HALL J. SPORTS L. 73 (2003). *See also*, Eric Bentley, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J.L. & EDUC. 139 (2004); Danielle M. Ganzi, *After the Commission: The Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543 (2004).

[33] Cannon v Univ. of Chi., 441 U.S. 677, 709 (1979) (although Title IX did not expressly authorize a private right of action, the Court held that the intent of the statute was to provide persons injured a private right of action).

[34] North Haven Bd. of Educ. v. Hufstedler, 456 U.S. 512, 520-35 (1982) (language, history, and purpose of Title IX support the prohibition of employment discrimination based on sex in educational institutions receiving federal financial assistance).

[35] Ahmed, *supra* note 26, at 368.

[36] *See* http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf (last visited Nov. 19, 2005).

[37] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (congressionally delegated agency interpretations must be given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute"). *But see*, Batterton v. Francis, 432 U.S. 416, 425 (1977) ("[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.").

employment discrimination at educational institutions more than twenty years ago.[38] Additionally, the Supreme Court later interpreted Title IX to allow compensatory damages[39] and even allowed Title IX to encompass claims of sexual harassment in educational institutions by authority figures and even other students.[40] Punitive damages under Title IX have been awarded, though rarely.[41] Congress has authorized the award of reasonable attorney's fees to prevailing parties in a Title IX action.[42] Still, several exceptions remain to Title IX's coverage.[43] Further, not all claims under Title IX are successful,[44] and male athletic programs have been slashed in order to comply with Title IX.[45]

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[38] *Hufstedler*, 456 U.S. at 514 (the regulations promulgated by the DOE pursuant to Title IX prohibit federally funded education programs from discriminating on the basis of gender with respect to employment).

[39] *See* Franklin v. Gwinnett Pub. Schs., 503 U.S. 60 (1992) (the court awarded student monetary damages under Title IX for sexual harassment by teacher when teachers and administrators took no action and even discouraged student from pressing charges).

[40] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (school board can be held liable in a private cause of action for student-student sexual harassment because the school board "exercises substantial control over both harasser and context in which known harassment occurs"). *See also*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (school district cannot be held liable for damages under Title IX unless an "appropriate person" had actual notice of the conduct that violated Title IX).

[41] *See* Barnes v. Gorman, 536 U.S. 181 (2002) (punitive damages generally not available for Title IX. "Under Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages…and injunction…forms of relief traditionally available in suits for breach of contract."). *But see* Canty v. Old Rochester Reg' Sch. Dist., 54 F. Supp. 2d 66, 68-70 (D. Mass. 1999) (punitive damages awarded for extreme violation of Title IX when evidence demonstrated that school officials knew about improper sexual conduct of athletic coach dating back to 1970s yet did not fire him until 1997 when he was convicted of rape); Doe v. Oyster River Co-op. Sch. *Dist.*, 992 F. Supp. 467, 482 (D. N.H. 1997) ("all remedies, including punitive damages, are available to private litigants under Title IX."). *Cf.* Doe v. Londonberry Sch. Dist., 970 F. Supp. 64, 76 (D. N.H. 1997) (no punitive damages may be awarded against school district since Title IX did not authorize such awards against municipalities).

[42] Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005).

[43] 20 U.S.C.A. § 1681(a) exempts from Title IX religious schools, military schools, educational institutions who have a traditional and continual admissions policy admitting students of only one gender, social fraternities and sororities, voluntary youth service organizations, boy or girl conference activities, father-son and mother-daughter activities at educational institutions and scholarships awarded in "beauty" pageants are exempt. *See id*.

[44] Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1321 (9th Cir. 1994) (coach of women's varsity basketball team filed suit for being paid significantly lower salary than men's varsity basketball coach but failed because court found male and female head coach positions were not substantially equal). *See also*, Simpson v. Univ. of Colorado, 372 F. Supp. 2d 1229 (D. Colo. 2005) (granting the University of Colorado's (CU) motion for summary judgment on the grounds that the plaintiffs failed to prove their case by a

Title IX represents Congress' attempt to promote gender equity in athletics by providing a penalty for discriminatory practices by institutions that receive federal funding. While brief, the wording of Title IX has become quite powerful; however, it is also ambiguous. Still, it has reshaped the perceptions and landscape of the relationship between women and sports. Numerous clarifications by the OCR have assisted in the interpretation and compliance of Title IX while the patent ambiguities continue to present challenges for the courts.

III. JACKSON & TITLE IX

Coach Jackson was a physical education teacher who was transferred to Ensley High School in August 1999. He had been an employee of the Birmingham school district for more than 10 years. Part of his duties included coaching the girls' basketball team. Coach Jackson complained that his team was denied equal access to sports facilities and equipment and that he was even denied a key to the gymnasium.[46] As a result of his complaints, Coach Jackson claimed he received negative work evaluations and was relieved of his coaching duties in May 2001, though he remained a tenured physical education teacher.[47] Regardless, Coach Jackson filed a Title IX lawsuit. The

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preponderance of the evidence that Title IX should apply in the analysis nor did the plaintiffs show that the University was deliberately indifferent to a known risk).

[45] *See, e.g.*, Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999) (elimination of men's soccer and wrestling programs by the university did not violate Title IX); Kelley v. Univ. of Ill., 35 F.3d 265 (7th Cir. 1994) (male swimmers filed suit when their team was eliminated in order to satisfy the "substantial proportionality" prong of OCR Policy Interpretations); Chalenor v. Univ. of N.D., 291 F.3d 1042 (8th Cir. 2002) (the university did not violate Title IX by eliminating its men's wrestling team to improve gender balance in the context of a budgetary contraction); Neal v. Bd. of Trustees, 198 F.3d 763 (9th Cir. 1999) (dismantling men's wrestling team did not violate Title IX).

[46] Jackson v. Birmingham Bd. of Educ., No. CV -01-TMP-1866-S, at 2 (N.D. Al., Jan. 10, 2002).

[47] *Id*.

ultimate outcome in *Jackson* reflects the continuing and expansive interpretation of Title IX.[48]

A. THE DISTRICT COURT

The U.S. District Court for the Northern District of Alabama granted the defendant's motion to dismiss on the grounds that Coach Jackson failed to state a claim for which relief could be granted, that he lacked standing to assert a claim under Title IX, and that his claim was preempted by Title VII of the Civil Rights Act.[49] The court reasoned that Coach Jackson had no standing under Title IX because he was not the direct victim of the alleged gender discrimination.[50] The court recognized that if the Ensley High School girls' basketball team was denied equal opportunities under Title IX then the team, not Coach Jackson was denied the benefits of Title IX; therefore, the team should bring a claim under Title IX. The district court relied heavily on *Holt v. Lewis,* which held that no private cause of action existed for retaliation under Title IX.[51]

B. THE COURT OF APPEALS

Coach Jackson appealed the district court's order to the Eleventh Circuit Court of Appeals, arguing that the Birmingham Board of Education violated Title IX when it retaliated against him by removing him from his coaching position.[52] The issue on appeal was whether an implied private right of action existed under Title IX for

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[48] Parents of students did not have standing to bring personal claims under Title IX prior to *Jackson*, though they have been permitted to bring suit on behalf of their child as the student's next friend. The *Jackson* case, then, may have usurped the precedent with regard to standing. *See, e.g*., Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1010 (5th Cir. 1996) (mother did not have standing to bring a personal claim under Title IX, but only on behalf of her daughters as their next friend); Haines v. Metro. Gov't of Davidson County, 32 F. Supp. 2d 991, 1000 (M.D. Tenn. 1998) (father of elementary school student alleging had standing to assert Title IX claim as student's next friend). *But see*, Doe. v. Oyster River Co-op. Sch. Dist., 992 F. Supp. 467, 481 (D. N.H. 1997) (mother of two middle school students did not have standing to bring a personal claim under Title IX).

[49] *Jackson*, No. Civ-01-TMP-1866-S, at 1, 6.

[50] *Id*. at 4.

[51] 955 F. Supp. 1385, 1388 (N. D. Al. 1995).

individuals who suffer retaliation because they have blown the whistle on sex discrimination suffered by others. The Eleventh Circuit affirmed the District Court's dismissal of Coach Jackson's case, finding that Congress did not intend to extend Title IX to those circumstances. The court relied heavily on *Alexander v. Sandoval*, which resolved the issue of "private right of action" under Title VI of the Civil Rights Act negatively.[53] Because Title IX nearly copies the Title VI wording,[54] the Eleventh Circuit concluded that like Title VI, Title IX did not include a private right of action.[55] Finally, the court found that Coach Jackson did not fall within the class of persons protected by Title IX.[56]

C. THE U.S. SUPREME COURT

The Supreme Court reversed the Eleventh Circuit's decision affirming the District Court's dismissal of Coach Jackson's case, and held that retaliation against whistle-blower constitutes intentional discrimination on the basis of sex under Title IX.[57] The majority opinion, which was written by Justice O'Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, relied heavily on four cases that involved Title IX and broadly interpreted the statute to include a private right of action for intentional sex discrimination.[58] According to the Court, those cases have refined the scope of Title IX by holding that Title IX implies a private right of action to enforce its prohibition of

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[52] Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1335 (11th Cir. 2002).
[53] Alexander v. Sandoval, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under [section] 602.").
[54] Essentially the only difference between Title IX and Title VI is the use of the word "sex" instead of the words "race, color, or national origin." *See* 20 U.S.C.A. § 1681(a) (2005).
[55] *Jackson*, 309 F.3d at 1338-9.
[56] *Id*. at 1346.
[57] Jackson v. Birmingham Bd. of Educ., 125 S.Ct. 1497, 1504 (2005).
[58] *Jackson*, 125 S.Ct. at 1504 (relying on Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999)).

intentional sex discrimination, authorizes private parties to seek monetary damages for the same, and allows a cause of action for deliberate indifference to claims of sexual harassment between students and by teachers.[59]

The Court also noted the differences between Title VII and Title IX. For example, Title VII is silent regarding the conduct that constitutes prohibited discrimination while the latter Title IX is virtually silent on the matter, is broadly worded statute that is to be broadly interpreted, and does not require the victim of the retaliation to be the victim of the discrimination. The Court cited *Cannon v. University of Chicago* in rejecting defendant's argument that *Sandoval* should control, and identified the purpose of Congress in enacting Title IX was to provide individual citizens with effective protection against discriminatory practices.[60] The Court determined that reporting incidents of discrimination is integral to Title IX enforcement and whistle-blowers should be protected under Title IX, especially because teachers and coaches like Jackson are often in the best position to vindicate those rights.[61]

D. THE DISSENT

Justice Thomas authored a dissent and was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy. Justice Thomas asserted that Title IX's plain wording did not authorize claims of retaliation.[62] Further he argued that a difference exists between a claim of sex discrimination under Title IX and a claim of retaliation, the latter not being discrimination on the basis of sex at all. He also claimed that where a

[59] *Id*.
[60] Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).
[61] *See Jackson*, 125 S.Ct. at 1508.
[62] *Id.* at 1510.

party asserts an implied cause of action in a statute such as Title IX, the statute should evince plain intent to provide such an implied cause of action.

The dissent was particularly concerned with the phrase found in Title IX, "on the basis of sex," emphasizing that the natural meaning of the phrase is on the basis of the plaintiff's sex, not the sex of some other person, such as the girls' basketball team.[63] Jackson did not claim that his own sex played a role in the decision to relieve him of his position; therefore, the dissent believed that the majority interpreted Title IX too broadly, and therefore, incorrectly. In the end, the dissent suggested that Congress was unclear on the issue of employment retaliation and that the majority had fashioned a system to encourage whistle-blowing about sex discrimination even though the complainant is a third party to the discrimination.[64]

IV. EMPLOYMENT WHISTLE-BLOWING

The *Jackson* case has thrown whistle-blowing into the context of Title IX and sports law generally. "Whistle-blowing" has been defined generally as the disclosure by organizational members of illegal, immoral, or illegitimate practices under the control of their employers to persons or organizations that may be able to effect action.[65] The term "whistle-blower" refers primarily to an employee who, in good faith, attempts to have the employer stop conduct that the employee reasonably believes to be injurious to the public and a violation of the law either through internal efforts or by disclosing the illegal conduct externally to the press or law enforcement agencies.[66]

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[63] *Id.* at 1510-11.
[64] *Id*. at 1517.
[65] Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 178 (2002).
[66] *See* John A. Grey, *The Scope of Whistleblower Protection in the State of Maryland: A Comprehensive Statute is Needed*, 33 U. BALT. L. REV. 225, 227-228 (2004).

A. WHISTLE-BLOWER PROTECTIONS

The most immediate impact of the *Jackson* case is that those who blow the whistle on alleged violators of Title IX regulations and policies are protected under the law; however, the practice of whistle-blowing is not a new concept in the law and blowing-the-whistle is actually encouraged by what is referred to as a *qui tam* action, an action embodied in the False Claims Act,[67] which authorizes private citizens to bring a suit against defendants who have allegedly defrauded the government of the United States.

To defend those employees who report the alleged "false claims" against the federal government under the False Claims Act (FCA), Congress adopted the Whistle-blower Protection Act (WPA) to provide a defense for federal employees.[68] The WPA also provides that an employer may not adversely act against an employee if a public body requests that the employee participate in either an investigation or a hearing held by a public body.[69] Many states have followed suit with similar legislation.[70] For example, the Michigan Whistle Blower's Protection Act prohibits an employer from discharging or otherwise discriminating against an employee who reports or is about to report an alleged violation of federal or state statute or regulation to a public body.[71]

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[67] False Claims Act, 31 U.S.C. §§ 3729-3733 (1863), as amended by False Claims Amendments Act of 1986, Pub. L. No. 99-562 (those who report violations are actually referred to as "relators" in this act).
[68] In 1989, Congress amended the Civil Service Reform Act of 1978 with the Whistleblower Protection Act of 1989 (WPA). The WPA substantially strengthened the protection for whistleblowers in the federal government. *See* Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.) (2000).
[69] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (initiation of a civil suit on behalf of the United States as a quintessential executive function).
[70] *See* Cherry, *supra* note 4, at 1042. *See also* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistle-blower Protection*, 38 AM. BUS. L.J. 99, 105-30 (2000) (giving an overview of state whistle-blowing laws).
[71] MICH. COMP. LAWS ANN. § 15.361 (West 1981). *See also* John C. Schlinker & Charles F. Szymanski, *Michigan's Whistle-Blowers' Protection Act: A Practitioner's Guide* 74 MICH. BAR J. 1192 (1995) (Effective in 1981, Michigan became the first state to create "a cause of action for employees who,

B. *QUI TAM* ACTIONS

Qui tam, an abbreviation from the Latin expression *qui tam pro domino rege quam pro sic ipso in hoc parte sequitur* that means "he who as much for the king as for himself sues in this matter."[72] *Qui tam* is the name given to a civil lawsuit brought by an informant/whistle-blower under the federal FCA[73] to recover a penalty or fine in which the employer is defrauding the government.[74] Further, it offers a financial incentive to anyone who has knowledge of misconduct to help protect public funds and the integrity of government contracts as a watchdog of sorts.[75] In the end, *qui tam* actions are brought by people who have knowledge of fraud before the government knows of the fraud.[76] Any person or entity that uses or receives federal money could be a defendant in a *qui tam* action.[77] That may also include health care providers involved with Medicare

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as a result of their intent to or actual reporting of suspected violations of law at their workplace, have been discriminated against by their employer.").

[72] Neal v. Honeywell, Inc., 826 F. Supp. 266, 268 (N.D. Ill. 1993) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)).

[73] Enacted in 1863, the FCA allowed the U.S. government and private plaintiffs (relators) to recover damages from any person or organization which knowingly presented or caused another party to present a false or fraudulent payment claim to the government. 31 U.S.C. §§ 3729-3733 (1863) (False Claims Act).

[74] *Qui tam* allows a private citizen to act as "private attorney general" in the effort to prosecute government procurement and program fraud. *See* United States v. Griswold, 26 F. Cas. 42 (D. Or. 1877); s*ee also, e.g.*, United States ex rel. Newsham v. Lockheed Missiles and Space Co., 722 F. Supp. 607 (N. D. Cal. 1989) (rejecting challenge to right of relators to bring *qui tam* action under False Claims Act); Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 (2000) ("[T]he False Claims Act is most frequently used of a handfull of extant laws creating a form of civil action known as *qui tam*.").

[75] Reportable violations of the FCA might include knowingly preparing a false record or statement to get a fraudulent claim paid by the government, conspiring with another individual to have a fraudulent claim paid by the government, or creating or delivering a fraudulent receipt to the government for its property, among other things. 37 U.S.C. § 3729(a)(1) (2005); James B. Helmer, Jr. & Julie Webster Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839 (2003).

[76] Even though the FCA was originally enacted to combat military contractor fraud, it was applicable to all government contractors, federal programs and any other instances involving the use of federal revenue. See Michelle Diament, *Alabama-Birmingham Settles Claims of Overbilling*, THE CHRON. OF HIGHER EDUC., Apr. 29, 2005 (on file with the author).

[77] Consider whether or not an athletic department might be liable in a *qui tam* action in the event federal or state money is utilized directly or indirectly to subsidize its operation or assist its student-athletes, such as the federal Pell grant program.

claims, for example,[78] colleges or universities generally,[79] governmental employees,[80] with some exceptions,[81] and government contractors.[82]

An individual who brings a *qui tam* action is also entitled between fifteen and thirty percent of the award recovered by the government. If the government joins in the suit and the person who brings the action was not involved in the wrongdoing or fraud, then the plaintiff is entitled to an award that is between fifteen and twenty-five percent of the government's recovery. If the government does not join in the suit, then the award will be between twenty-five and thirty percent of the recovered amount.[83]

Qui tam actions have been used as far back as the 13th Century in England where they were popular as a way for private citizens to gain access to royal courts.[84] In the United States, *qui tam* actions have existed since 1776. As a result of the 1986 amendments, *qui tam* actions have increased dramatically and have been an effective and successful means of combating fraud against the government.[85] A defendant who is

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[78] *See generally* Joan H. Krause, *Regulating, Guiding, and Enforcing Health Care Fraud*, 60 N.Y.U. ANN. SURV. AM. L. 241 (2004).

[79] *See, e.g.*, Eric Wills, *Former College President Pleads Guilty to Defrauding Federal Student-Aid Programs*, THE CHRON. OF HIGHER EDUC, May 4, 2005 (on file with the author). *See also*, Goldie Blumenstyk, *Justice Department Supports $1-Billion False-Claims Suit Against U. of Phoenix*, THE CHRON. OF HIGHER EDUC., Jan. 28, 2005 (on file with the author) (U.S. Department of Justice seeks to collect about $1-billion from the nation's largest private institution of higher education after two enrollment counselors contended that the university was violating "incentive compensation" rules regarding enrollment of students. The suit had been dismissed earlier by a district court judge, but the D.O.J. appealed to the Ninth Circuit).

[80] Members of Congress and members of the judiciary, for example.

[81] 31 U.S.C. § 3730(e)(1) (2005) (*qui tam* actions are not permitted by members of the armed services where such actions arise out of such person's service in the armed forces).

[82] *See, e.g.*, U.S. v. Bornstein, 423 U.S. 303, 309 (1976).

[83] *See* 31 U.S.C. § 3730(d)(2) (a *qui tam* plaintiff is rewarded even if the government intervenes and eventually wins or settles the case; *see also* 31 U.S.C. § 3730(d)(1) (*qui tam* rewards are limited to 15%-20% of the government proceeds in cases in which the government intervenes).

[84] *See* Harold J. Krent, *A Symposium on Morrison v. Olson: Addressing the Constitutionality of the Independent Counsel Statute: Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292-303 (1989) (early Congresses delegated law enforcement authority to private individuals through the medium of *qui tam* actions in various circumstances involving seamen, Indian laws, postal regulations, liquor laws, slave trade prohibitions, and so on).

[85] Helmer, *supra* note 16, at 737.

found liable in a *qui tam* case is required to pay three times the amount of damages suffered by the government.[86] The court may also impose a penalty of $5,000 to $10,000 per claim in addition to punitive damages, costs, expenses, and attorney's fees incurred in bringing and prosecuting the lawsuit.[87]

C. SARBANES-OXLEY & SPORTS LAW

While unrelated to Title IX, the recent federal legislation related to whistle-blowers reflects the private attorneys general philosophy[88] that the government cannot be all places at all times to expose fraud.[89] Consequently, in response to the recent corporate scandals of Enron, WorldCom and several others, Congress enacted the Sarbanes-Oxley Act of 2002 (hereinafter "SOX") to minimize future corporate corruption and securities fraud.[90]

SOX requires all publicly traded companies to create internal and independent audit committees and to establish internal procedures to protect the confidentiality of employees who blow the whistle. Section 806 of the Act protects whistle-blowers who report accounting fraud.[91] Under the federal obstruction of justice statute, SOX

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[86] *See* 31 U.S.C. §3729(a)(7) (also known as treble damages).
[87] *Id*.
[88] The term "private attorney general" means that any private party, as opposed to the government, may perform the function of a state or federal attorney general's office as a substitute attorney general if he/she has advanced a public interest on behalf of a significant class of persons. *See* William B. Rubenstein, *On What a "Private Attorney General" is – and Why it Matters*, 57 VAND. L. REV. 1975 (2004). Justice William O. Douglas actually used the term in a dissenting opinion, citing to Judge Jerome Frank's use of the phrase in a Second Circuit decision rendered several months earlier. *See* F.C.C. v. Nat'l Broad. Co., Inc., 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting) (quoting Assoc. Indus. of New York v. Ickes, 134 F.2d 694 (2d Cir. 1943)).
[89] *See* Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511 (2001); Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005) (discussing private enforcement of speech-related regulations).
[90] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 18 U.S.C.) (2002).
[91] 18 U.S.C. § 1514A (2002) (also referred to as section 806 of the Sarbanes-Oxley Act) (providing whistleblower protection for employees of publicly traded companies).

criminalizes retaliation against whistle-blowers in the context of accounting fraud.[92] In addition, in-house, general, and of counsel now have a legal duty to report corporate improprieties – in essence becoming mandatory whistle-blowers.[93] In the professional sports context, SOX also provides protection to employees, shareholders and others in publicly traded sports organizations that may become natural targets for whistle-blowing exposure.[94] Finally, SOX applies to publicly traded athletic-shoe companies, sporting goods stores, and even larger publicly-traded corporations which hold stakes in professional sports organizations.[95]

D. QUESTIONS REMAIN

Several potential issues face the sports world as a result of the Court's decision in *Jackson*. The decision may create a state of paranoia among athletic and educational administrators that their organizations will be filled with double-agents, bounty-hunters and front-line scouts seeking to cash-in by reporting violations of Title IX or other fraudulent schemes against the government. Further, *Jackson* may open the door for a legal feeding-frenzy for Title IX crusaders and their trial lawyers who no longer need to fear retaliation for complaining about gender-inequity. Even if their claims are illegitimate, if the school or other organization wishes to stay out of the public eye, they will be forced to settle claims that now exist under *Jackson*. On a more positive note,

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[92] 18 U.S.C. 1513(e) ("Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.").
[93] 18 U.S.C. § 1514A (2002) (also referred to as section 307 of the Sarbanes-Oxley Act).
[94] *See generally* Brian R. Cheffins, *Playing the Stock Market: "Going Public" and Professional Team Sports*, 24 J. CORP. L. 641, 643 (1999) (addressing the possibility that going public might become a trend in North American major professional sports leagues).
[95] Cheffins, 24 J. CORP. L. at 643; s*ee also*, Robert Bacon, *Initial Public Offerings and Professional Sports Teams: The Regulations Work, But are Owners and Investors Listening?*, 10 SETON HALL J. SPORT L. 139, 141 (2000).

Jackson merely levels the playing field for high school coaches and others who could not make claims before out of fear of retaliation. Only time will tell which of those potentials play out.

V. CONCLUSION

Jackson continues the expansion of Title IX by interpreting a private right of action for individuals who reveal Title IX violations even though they themselves were not subject to sex discrimination. Consequently, *Jackson* exposes the need for sports law practitioners, and others associated within sports, to explore the relevant whistle-blower laws at the state and federal levels. The decision may also create a nightmare of innumerable sports-related lawsuits under Title IX, and other whistle-blower laws at the state and federal levels. Congress may provide a remedy for the Supreme Court's expansion of Title IX by re-writing it for clarification rather than continuing its reliance on the judiciary and the Office for Civil Rights to interpret its rather vague wording. In the meantime, Title IX advocates consider *Jackson* as yet another victory in its serpentine legal history. Whether Coach Jackson can actually prove his claim remains to be seen.