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# UNCOMMON COURAGE—RODERICK JACKSON AS *SINE QUA NON* FOR THE RIGHT TO SUE FOR RETALIATION UNDER TITLE IX

CURT L. HAMAKAWA\*

## ABSTRACT

*In 1999, Roderick Jackson was hired by the Birmingham City Schools to teach drivers' education and coach the girls' basketball team at Ensley High School. Soon after arriving and preparing for his first season, Coach Jackson began to notice things that did not sit right with him; things that had nothing to do with the team but rather, with how the team was treated. The girls' team did not receive the same funding, and they did not have the same access to facilities and equipment as the boys.*

*Upset by the discriminatory treatment of his team, Jackson expressed his concerns to his superiors, who told him to "Just play ball!" Being true to his mother's admonition that he should always stand up for what he believed, Jackson continued to press his complaints up the chain of command. Subsequently, he was fired from his coaching position in 2001, but unwilling to accept either the unfair treatment of his players or the backlash he received for complaining about it, Jackson sued the Birmingham Board of Education under Title IX, the federal statute that prohibits discrimination on the basis of sex. Both the trial and appeals courts ruled against Jackson, saying that Title IX did not provide a private right to sue for retaliation for complaints of sex discrimination. On March 29, 2005, however, the Supreme Court, in a 5-4 decision, ruled in his favor, saying that "Teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify the discrimination and bring it to the attention of administrators." The case, *Jackson v. Birmingham Board of Education*, stands for the proposition that an*

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\* Associate Professor of Sport Management and Director of the Center for International Sport Business at Western New England University. The author, in collaboration with Roderick Jackson, is writing a book on Jackson's fight to end gender-based discrimination against the girls' basketball team at Birmingham's Ensley High School. The book is tentatively titled, "Standing Up: The Coach Roderick Jackson Story."

*individual who is retaliated against for speaking out against sex discrimination perpetrated by a recipient of federal education funding has a cause of action under Title IX even if that individual did not experience the original discrimination personally.*

#### UNCOMMON COURAGE

Most people know right from wrong, and probably the vast majority of society believes that when pressed to make the right decision, they will do so with ease and aplomb. While this seems straightforward and uncomplicated in the abstract, it is infinitely less so in situations that call upon one to challenge the status quo, and especially where those who are intent on maintaining the present state of affairs represent powerful interests. Even those who ordinarily might be inclined to speak truth to power shrink in their resolve when their professional reputation, livelihood, or personal safety are at stake. Oftentimes, a rough calculus must first be undertaken to weigh the costs and benefits of “getting involved.” Even those who initially profess their deep conviction to a heartfelt cause sometimes conclude that the effects of waging battle, including sustaining deep psychological scars, are no longer worth their continued engagement.

Enter Roderick Jackson. A son of the South, Jackson was born in 1965 and grew up in Birmingham, Alabama, in the strict traditions of a Southern Baptist family.<sup>1</sup> Jackson’s father died when he was just shy of three years old, so he and his older brother and sister were raised by their mother, Fannie Mae, and their paternal grandparents.<sup>2</sup> Jackson was a good student and even in grade school held an abiding interest in history and civics, where he devoured books, newspapers, and magazines to satiate his appetite for knowledge of the world around him.<sup>3</sup>

Upon his graduation from high school, Jackson joined the U.S. Army Reserve so that he could serve his country and qualify for educational benefits under the G.I. Bill.<sup>4</sup> Jackson found that he liked the discipline that the Army instilled because it gave him a sense of order with a clear chain of command.<sup>5</sup> There was no ambiguity about who gave the orders and who was expected to follow them.<sup>6</sup> Even though Jackson was raised to respect authority, he was also taught to challenge

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1. Telephone Interview with Roderick Jackson (June 16, 2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

decisions and actions that he believed to be morally deficient. His mother, Fannie Mae Jackson, preached long and hard that her son should always “stand up for what you believe.”<sup>7</sup>

Because he had to work several jobs to help his family financially while putting himself through school, Jackson took eight years to complete his studies, eventually earning his bachelor’s degree in physical education (P.E.) from the University of Alabama at Birmingham and becoming the first member of his family to graduate from college.<sup>8</sup> Brimming with the confidence of a 27-year-old, Army-trained, and college-educated man, Jackson was immediately hired as a temporary teacher in the Birmingham City Schools system.<sup>9</sup> In 1993, Jackson was offered his first full-time job teaching P.E. at Councill Elementary School, where he immersed himself into motivating kindergartner-through-fifth graders to develop physically active habits and healthy lifestyles.<sup>10</sup> Four years later, Jackson transferred to Bush Middle School, where he taught P.E. to sixth-through-eighth graders and coached the boys’ basketball team.<sup>11</sup> Jackson quickly earned a reputation as a stern yet successful coach, which two years later led to his hiring as coach of the girls’ basketball team, in addition to a teaching assignment, at Ensley High School.<sup>12</sup>

In addition to his full-time teaching job and seasonal coaching assignment, Jackson worked odd jobs at nights and on weekends to earn extra pay.<sup>13</sup> Incredibly, he also found time to take graduate courses at Alabama State University in Montgomery, where he earned a master’s degree in exercise physiology and athletics administration.<sup>14</sup>

In the fall of 1999, Jackson was thirty-four years old and in excellent health, married to his college sweetheart, and together raising their two children, a ten-year-old daughter and eight-year-old son.<sup>15</sup> As a public school teacher in Birmingham, Jackson was living the middle-class dream, and was grateful for the love and encouragement showered on him by his mother, older siblings, and extended family.<sup>16</sup> He took great comfort in knowing that others were always there for him to turn to

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7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Telephone Interview with Roderick Jackson (June 23, 2009).

16. *Id.*

in times of need.<sup>17</sup> Jackson felt privileged to be in a position to impact young people by making a positive difference in their lives, and began his high school tenure at Ensley with a renewed sense of purpose.<sup>18</sup> As a young student himself, Jackson understood the powerful influence that teachers held over him, which in large part contributed to his decision to become an educator.<sup>19</sup>

Brimming with energy and enthusiasm, Jackson began his first season as the girls' basketball coach at Ensley High School with high hopes that he could imbue his young ladies with something of a transformational experience so that, by the time they graduated, they would be teeming with self-confidence and self-respect.<sup>20</sup>

Ensley High School first opened its doors to students in 1901, and was one of a half dozen high schools in the Birmingham City Schools system overseen by the Birmingham Board of Education (BBOE).<sup>21</sup> At the start of his first season as the girls' basketball coach in 1999, Jackson thought it was interesting that Ensley had two gyms; an old, small, and dingy one constructed in 1908, and a newer, regulation-sized one built in the 1970s.<sup>22</sup> What was disconcerting to him, however, was learning that the girls' team was assigned to practice in the old gym while the boys' team had full reign of the new gym.<sup>23</sup> He was told that "this is the way it has always been done."<sup>24</sup> In addition to the old gym not having a regulation-sized court, the floor was uneven and splintered in spots, the goal rims were shop worn, the backboards were old-style and made of wood instead of Plexiglas, and there was no heat to ward off the winter chill in that bandbox of a building.<sup>25</sup> Apparently, these compromised conditions were good enough for Jackson's team because according to one school administrator, "they're just girls."<sup>26</sup>

Jackson was rebuffed when he inquired about using the newer gym for practice.<sup>27</sup> The athletics director—who was also the boys' basketball

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Val Walton, *School is Out for Aging Ensley High School*, THE BIRMINGHAM NEWS, May 27, 2006, at 6, 9, available at <http://ensley1961.com/ensley-high-closes/>; see also BIRMINGHAM CITY SCHOOLS, <http://www.bhamcityschools.org> (last visited May 28, 2013).

22. Telephone Interview with Roderick Jackson (June 23, 2009).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

coach—said Jackson could use it “when it was not being used by the boys’ team.”<sup>28</sup> Since the boys’ team practiced in the prime afternoon slot right after school and before the dinner hour, that meant that the girls’ team would have had to practice in the evenings, which was not practical for either him or his players.<sup>29</sup> Jackson was livid.<sup>30</sup> He felt the fair and equitable solution was to have the boys’ and girls’ team alternate practices between the two gyms.<sup>31</sup> He could not believe that his team, solely because it was made up of females, was being treated like second-class citizens.<sup>32</sup> He was outraged by the lack of outrage over the fact that this overt discrimination had been institutionalized at Ensley High School.<sup>33</sup> Jackson could not help but wonder, “[w]here were the responsible and fair-minded administrators and teachers?”<sup>34</sup> Surely they must have seen instances or heard stories of this gender-based discriminatory treatment.<sup>35</sup> At basketball games, it was plain to see that the boys’ team had newer and better quality uniforms, as well as warm-up or shoot-around t-shirts, which the girls did not have.<sup>36</sup>

When Jackson asked about getting the same gear for his girls’ team, he was told that there was no money in the budget for such things.<sup>37</sup> Later, Jackson learned that the reason the boys’ team was able obtain certain amenities that were not available to the girls was that the boys’ team received 100% of the net gate and concession receipts, even though the girls’ team played some of their games at the same place and date in conjunction with the boys’ games.<sup>38</sup> Yet another disparity was the transportation provided for away games.<sup>39</sup> The boys’ team was transported by district-provided school buses while the girls had to fend for themselves via private vehicles.<sup>40</sup> Only if the girls’ team had an away game in conjunction with the boys’ team were the female student-athletes allowed to ride the bus.<sup>41</sup>

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

In the summer of 2000, following his first year as a high school teacher and coach, Jackson became aware of a boys' basketball camp program that was being conducted at the high school gym, the proceeds of which went to the Ensley boys' basketball team.<sup>42</sup> Jackson thought this was a brilliant idea and asked his athletics director whether he, Jackson, could run a similar program for the girls, to which the athletics director responded with a terse, "it has not been done before."<sup>43</sup> Given Jackson's tenuous relationship with the athletics director and unproductive past exchanges, he interpreted the athletics director's response to mean that a girls' program would be a bother and challenge to the status quo, and therefore unwelcomed.<sup>44</sup> Jackson was furious.<sup>45</sup> In his mind there was no rational basis for the school to deny him the opportunity to organize a parallel program for girls, and he was beside himself in trying to understand the vehement opposition—no less in the twenty-first century—to his efforts to eliminate gender-based discrimination in a public school program.<sup>46</sup>

Respecting the administrative chain of command, Jackson methodically brought his complaints of discriminatory treatment of his girls' basketball team to the Ensley High School athletics director and principal, where he was told to not make trouble for himself and to "just play ball."<sup>47</sup> Jackson took this to mean that if he knew what was good for him, he should hush his mouth and not rock the boat.<sup>48</sup> Never being a go-along-to-get-along type of person, however, Jackson refused to back down and continued to state his case for the girls' basketball team.<sup>49</sup> Disappointingly, at every turn, Jackson's pleas fell on deaf ears, and no corrective action was ever taken to ameliorate the disparate treatment.<sup>50</sup> Frustrated, but not deterred, Jackson pressed his complaints to the district office, first with the system-wide athletics director and then to a deputy superintendent.<sup>51</sup> However sympathetic some officials might have been toward him for standing up and speaking out against the discriminatory treatment, no one in a position of authority ever came forward to put an end to the institutionalized bias in at least one

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42. Telephone Interview with Roderick Jackson (July 15, 2009).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

interscholastic athletics program that favored males over females.<sup>52</sup>

Jackson never considered himself to be a rabble-rouser, although he was well aware that his unwillingness to be silenced caused his superiors at Ensley great consternation.<sup>53</sup> Still, he could not contemplate abandoning his players, the young ladies who were counting on him to obtain fair and equal treatment for the girls' basketball team.<sup>54</sup> After all, the teenaged girls were not seeking a better situation than the boys; rather, they merely wanted to enjoy the same conditions and benefits.<sup>55</sup> If Jackson succumbed to the subtle intimidation and threats, there would not be anyone else to stand in his place.<sup>56</sup> Besides, he was confident that he was on the right side of the argument because all he was seeking was to level the playing field for the female student-athletes of Ensley High School.<sup>57</sup> For Jackson, this was personal; each of the girls on his basketball team was somebody's daughter, and not a dispensable commodity to be treated in a comparatively inferior manner because of someone's perception of the team's worth or value based on gender.<sup>58</sup> This kind of thinking aggravated Jackson because he felt the slights perpetrated against his team only served to reinforce the stereotype that male sports were more important than female sports, and therefore female sport participants were somehow less worthy and not deserving of equal treatment.<sup>59</sup>

Early in the fall of 2000, Jackson's second year at Ensley, he was asked to report to the athletics director's office.<sup>60</sup> When he arrived, he was met by the principal and athletics director, neither of whom looked very happy.<sup>61</sup> When he innocently inquired, "what's this about?," the athletics director replied, "oh nothing, just a quick meeting."<sup>62</sup> The principal asked Jackson why he was making so much noise over the practice gym situation when no one else had a problem with it.<sup>63</sup> And before Jackson could respond, she told him that she was also concerned that Jackson took the gender inequity issue to the district

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

superintendent's office instead of keeping the matter in house.<sup>64</sup> Jackson was incredulous.<sup>65</sup> First, he was outraged that the principal sought to dismiss the discrimination issue as not being any big deal and, second, that she equated the lack of complaints from others with the absence of a problem.<sup>66</sup> Jackson sought to explain—yet again—why it was unfair and wrong for the boys to receive preferential treatment at the expense of the girls, and that he only went to the district office after his appeals to the athletics director and principal to redress the discrimination fell on deaf ears.<sup>67</sup>

In early spring of 2001, one of Jackson's players came to his office to inform him that she and a couple of her teammates made an appointment to see the principal about the girls' team being denied use of the newer gym for its practices.<sup>68</sup> Jackson was both surprised and impressed that the girls took it upon themselves to plead their case for equitable treatment to the school principal, completely outside of Jackson's awareness.<sup>69</sup> Apparently, the girls knew that their coach was being stymied in his efforts to obtain equitable treatment for his team, so they decided to plead their case directly in hopes that the principal would lend a more sympathetic ear to the female student-athletes themselves.<sup>70</sup> But the girls came away from the meeting disappointed to learn that no such relief was imminent.<sup>71</sup> More foreboding, however, was that the players who came to Jackson's office sensed from their meeting with the principal that Jackson's coaching job might be in jeopardy. One student told Jackson in a hushed tone that he should be careful, otherwise "[t]hey will kick you to the curb, just like they did Langford."<sup>72</sup> "Langford" was Conley Langford, Jackson's predecessor as head girls' basketball coach, who, despite winning an area championship his last year at Ensley, transferred to another school after not making any headway with regard to boys' and girls' program equality.<sup>73</sup>

Predictably, Jackson's incessant complaints about the inferior and inequitable treatment of his girls' basketball team precipitated a response

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

from school officials.<sup>74</sup> In addition to the *sotto voce* suggestions that he not waste his time and energy in fighting this battle, Jackson began to receive negative job-performance evaluations that he believed were in retribution for his refusal to cease his one-man anti-discrimination campaign at Ensley.<sup>75</sup> While he received stellar appraisals before making a *cause célèbre* of his girls' basketball team's predicament, his unfavorable performance reviews coincided perfectly with his vocalization of his team's inequitable treatment.<sup>76</sup> In one such review, he was cited for "lack of discipline" and "not being a team player."<sup>77</sup> It irked Jackson that he was characterized in this light because, first, he knew in his heart that this was not true and, second, the evaluation would be a permanent blot in his personnel file.<sup>78</sup> Jackson always prided himself on being organized and well prepared for his assignments, and as a former military man steeped in the values of unit cohesion, he perceived himself as a consummate colleague and collaborator.<sup>79</sup> At the same time, Jackson knew that derogatory work evaluations were management's way of creating an evidentiary record in support of its case in the event that disciplinary action was called for.<sup>80</sup> It was clear to Jackson what was going on; the athletics director and principal were sending him the message that there would be unpleasant consequences for his refusal to quit complaining about his team's inequitable treatment.<sup>81</sup>

He also believed that the higher-ups resorted to harassment tactics when he was singled out to be drug tested.<sup>82</sup> Since he was never informed that he was suspected of violating the district's drug policy, he assumed that he was designated for testing under a random-selection process.<sup>83</sup> To his knowledge, however, no other teacher or coach was ever randomly drug tested.<sup>84</sup> Even though Jackson's test result was negative, as he expected it would be, he wondered what form the next instance of harassment would take.<sup>85</sup> He also began to entertain

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74. Telephone Interview with Roderick Jackson (July 22, 2009).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

thoughts of paranoia.<sup>86</sup> If the district office signed off on what to Jackson amounted to a no-cause and targeted drug test of a district employee, it signaled the serious light in which it viewed Roderick Jackson as a trouble maker that it hoped to silence.<sup>87</sup> Because Jackson was not a drug user, he was at first not at all concerned about being tested.<sup>88</sup> But the more he thought about it, Jackson wondered how far the district might go in its apparent zeal to demonstrate that he was a bad actor.<sup>89</sup> In a way, he was mildly surprised that the test did not come back positive.<sup>90</sup>

In May 2001, after the conclusion of his second season, Jackson received a letter from the district superintendent, notifying him that his contract as varsity girls' basketball coach at Ensley High School would not be renewed beyond the 2000-2001 school year.<sup>91</sup> The termination letter hit him like a ton of bricks.<sup>92</sup> Even though he was not so naïve to be blind to the fact that his complaints caused his superiors some heartburn, never in his wildest dreams did he think that standing up for his student-athletes in an attempt to rectify an institutional wrong would result in his firing.<sup>93</sup> In a twist of cruel irony, the bottom of the superintendent's letterhead contained the district's motto: "For our children. For our future."<sup>94</sup> As a teacher and coach, Jackson believed that it was his duty to look after the students' best interests and bring incidents of fundamental unfairness to the attention of school officials.<sup>95</sup> As he was initially and continually rebuffed in his efforts, Jackson's response was that he needed to be even more persuasive in convincing his superiors that the girls' basketball team was treated in a discriminatory fashion that was morally wrong, if not illegal.<sup>96</sup> In his mind, all he was doing was giving voice to a team of teenaged female basketball players who had none in this circumstance.<sup>97</sup>

At that moment, reflecting on the impact of the letter, Jackson felt

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Letter from Johnny E. Brown, Superintendent of the Birmingham City Schools, to Roderick Jackson (May 8, 2001) (on file with the *Western New England Law Review*).

95. Telephone Interview with Roderick Jackson (July 22, 2009).

96. *Id.*

97. *Id.*

like he had failed.<sup>98</sup> Inasmuch as he prosecuted his complaint through the administrative channels from the athletics director, assistant principal, and principal to the district-wide athletics director and assistant superintendent, Jackson could not be faulted for not informing those in the chain of command of the disparate treatment.<sup>99</sup> What he failed to do, however, was to convince somebody in a position of authority to care as much as he did about not treating the girls' basketball team in an inferior manner compared to the boys' team.<sup>100</sup> Jackson was incredulous that at the dawn of the twenty-first century, an American public school district was tolerating if not condoning the systematic discrimination against an interscholastic sport team on the basis of gender.<sup>101</sup>

Jackson was disheartened to think that if he, as the responsible adult in charge of the girls' basketball program, could be easily dismissed by a vengeful school district, then it was highly unlikely that his successor would follow a similar course of action in seeking program equality.<sup>102</sup> That the status quo of condoning gender discrimination would remain intact did not sit well with Jackson.<sup>103</sup> In the wake of his termination, Jackson suffered professional embarrassment and personal indignity.<sup>104</sup> He worried that people at the school—students, faculty, and staff—would assume that he was fired because he was not up to the job as a basketball coach; and if that scuttlebutt became rampant throughout the district, it would be difficult for him to secure a coaching job elsewhere.<sup>105</sup> He sensed that even formerly friendly faculty colleagues were reticent to be seen fraternizing with him for fear of associating with someone considered to be damaged goods.<sup>106</sup>

In the days following the receipt of his termination letter, Jackson experienced a roller coaster of emotions.<sup>107</sup> At first, he was mystified as to the rationale for his dismissal, since the superintendent's letter stated only that his contract would not be renewed.<sup>108</sup> In a way, Jackson felt relieved, because he would no longer have to experience the frustration

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Telephone Interview with Roderick Jackson (July 30, 2009).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

of being stymied at every turn and feeling like he was banging his head against the wall.<sup>109</sup> But when he thought about the consequences of his firing on the girls' basketball program, his mental state turned to anger.<sup>110</sup> It made Jackson angry to think that the school and district office engaged in a concerted effort to remove him from his coaching position so that they did not have to redress the discrimination problem.<sup>111</sup> Jackson was determined that even though he was beaten down, he was not about to lie down and roll over.<sup>112</sup> He knew that school and district officials viewed his incessant complaints as a thorn in their sides, and they were hoping that he would just go away quietly and fade from the scene, but Jackson had other plans.<sup>113</sup> He thought about his role as a teacher and the message that accepting the status quo would send to his players.<sup>114</sup> Jackson also thought about his students' parents, who entrust teachers like himself to look after their children's best interests, and who should be able to expect a fair shake in their children's educational experiences.<sup>115</sup>

Near the end of the school year, Jackson found himself in a quandary. Even though he was determined to redress the unequal treatment of the girls' and boys' basketball teams, and convinced that he had to resort to the legal system, he was uncertain how he would go about the process.<sup>116</sup> Since he did not personally know anyone in Birmingham's legal community—never mind a good employment lawyer—he began by simply consulting the yellow pages of the city telephone directory.<sup>117</sup> After a few fits and starts, including speaking to one attorney who told him “he didn't stand a chance going up against the Board of Education,” Jackson finally found a lawyer, Charles Brooks, who was willing to take his case.<sup>118</sup> After conducting some research, Brooks told Jackson, “I think this Title IX thing fits,” and filed Jackson's complaint on July 27, 2001 in the United States District Court for the Northern District of Alabama.<sup>119</sup> The lawsuit asserted that the discriminatory treatment of the girls' basketball team at Ensley High

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2006).

School violated Title IX of the Education Amendments of 1972, the federal law that prohibits sex discrimination in educational programs that receive federal funds.<sup>120</sup> Title IX in relevant part provides: “No 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 . . . .”<sup>121</sup>

After being advised that the complaint was unlikely to survive a challenge for lack of standing under the statute (because as the plaintiff, Jackson was not subjected to discrimination on the basis of his sex), Brooks filed an amended complaint three days later on July 30, 2001, alleging that Jackson’s termination as the Ensley High School girls’ basketball coach was in retaliation for his complaints of discrimination under Title IX.<sup>122</sup>

The defendant, BBOE, moved to dismiss the case for failure to state a claim, asserting that Title IX did not provide a private right of action for retaliation.<sup>123</sup> In his report, the magistrate judge hearing the motion, Michael Putnam, cited an Eleventh Circuit precedent holding that Title IX did not prohibit retaliation,<sup>124</sup> and the district court adopted the report and recommendation of the magistrate judge to dismiss the complaint.<sup>125</sup>

On February 25, 2002, Jackson learned from Brooks that his case had been dismissed on the grounds that Title IX did not provide a right to sue for retaliation for complaining about sex discrimination.<sup>126</sup> After waging a two-and-a-half-year administrative and legal battle, and draining his bank account of thousands of dollars in attorneys’ fees, Jackson was devastated by the bad news.<sup>127</sup> He was physically and emotionally spent, and his financial resources were equally tenuous, but he was certain that he could not quit the fight.<sup>128</sup> He had invested too

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120. Telephone Interview with Roderick Jackson (July 30, 2009).

121. 20 U.S.C. § 1681(a) (2006).

122. Telephone Interview with Roderick Jackson (July 30, 2009); Amended Complaint, Jackson v. Birmingham Bd. of Educ., 2002 WL 32668124 (N.D. Ala. Feb. 25, 2002) (No. CV-01-TMP-1866-S).

123. Defendant’s Motion to Dismiss at 2-3, Jackson v. Birmingham Bd. of Educ., 2002 WL 32668124 (N.D. Ala. Feb. 25, 2002) (No. CV-01-TMP-1866-S).

124. See generally Holt v. Lewis, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff’d*, 109 F.3d 771 (11th Cir. 1997).

125. Petitioner’s Brief on Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit at 5-6, Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333 (11th Cir. 2002) (No. 02-1672).

126. Telephone Interview with Roderick Jackson (July 30, 2009).

127. *Id.*

128. *Id.*

much of himself in an important cause for him to throw in the towel.<sup>129</sup> He appreciated the fact that those girls were somebody's daughters, and having two school-aged children of his own, he wanted to believe that another person in a position of responsibility would not abandon his kids if confronted by a similar situation.<sup>130</sup> Besides, he knew that the young ladies who were his former players were counting on him.<sup>131</sup> In addition, whenever he felt tempted to give up the fight because of the personal costs and hardships to his family, he was reminded of his mother, Fannie Mae, and her oft-repeated counsel that echoed in his head: "Stand up for what you believe."<sup>132</sup>

Not knowing if his lawyer could have done a better job and, even so, whether that would have made any difference given the law and case precedent in the Eleventh Circuit, Jackson was at a crossroads.<sup>133</sup> He wondered whether he should stick with Brooks and together ride out the appeals process, or whether he should wipe the slate clean and proceed to find another lawyer, if that was even feasible.<sup>134</sup> Of course, money was a big factor and his anemic savings did not leave him with many options.<sup>135</sup> Shortly after instructing Brooks to file a notice of appeal from the judgment/order of the district court—which Brooks did on March 5, 2002—Jackson informed Brooks that he wanted to go in a different direction. In Jackson's mind, his decision to discharge Brooks was akin to switching quarterbacks after a tough loss.<sup>136</sup> In his gut, Jackson felt that a change of legal counsel was warranted, but as a practical matter, Jackson could no longer afford to pay thousands of dollars more in attorneys' fees.<sup>137</sup> Jackson knew that Brooks was not going to work for free, so if he wanted to continue the fight for fairness and equality in the basketball programs at Ensley, it was glaringly obvious that he would have to carry the ball himself on appeal.<sup>138</sup> Jackson was unsure what he was getting himself into, but he was willing to give it a try and take the case as far as he possibly could.<sup>139</sup> Most people would be intimidated to the point of paralysis by the daunting

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

prospect of representing themselves in a court of law, but Jackson was motivated by his single-minded devotion to the plight of his female student-athletes.<sup>140</sup>

Around the first of June when he was no longer represented by Brooks, Jackson received a letter that was forwarded to him by the Brooks Firm from the United States Court of Appeals for the Eleventh Circuit. The letter referred to the case status of his appeal, which got Jackson's attention and prompted him to call the court of appeals clerk's office.<sup>141</sup> Jackson spoke to a woman who asked him if he was represented by legal counsel, and after Jackson explained that he was appealing *pro se*, the woman told him that he had until June 3rd to file his reply brief, in response to the BBOE's answer brief.<sup>142</sup> Stunned to learn of the imminent deadline, Jackson asked if it would be possible to have "a few more days." To Jackson's surprise—and delight—the woman at the clerk's office called back later that day, giving him an extension until June 13th.<sup>143</sup> Since Attorney Brooks filed the notice of appeal with the court of appeals after his case was dismissed by the district court, the clock was ticking with regard to Jackson's brief filing deadline.<sup>144</sup> As a lay person proceeding to research and write a case brief and appear *pro se* before the court of appeals for oral argument, Jackson faced overwhelming odds that were not in his favor.<sup>145</sup> Meanwhile, the BBOE was represented by two high-powered law firms—Thomas, Means, Gillis & Seay and Waldrep, Stewart & Kendrick—and a phalanx of experienced lawyers.<sup>146</sup>

As Jackson pondered his predicament, he focused on the relatively short time—less than two weeks—that he had to put together a legal brief, an assignment that he did not know the first thing about.<sup>147</sup> As if it was not enough of a Herculean task to put his thoughts to paper with respect to the legal and common-sense arguments that he hoped would sway the court, there were also very specific format requirements for the brief.<sup>148</sup> The paper had to be light, opaque, and unglazed, and the brief

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140. *Id.*

141. Telephone Interview with Roderick Jackson (Aug. 6, 2009).

142. *Id.*

143. *Id.*

144. FED. R. APP. P. 31; 11TH CIR. R. 31-1, available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG12.pdf>.

145. Telephone Interview with Roderick Jackson (Aug. 6, 2009).

146. *Id.*

147. *Id.*

148. FED. R. APP. P. 32; 11TH CIR. R. 32-1 to 4, available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueAUG12.pdf>.

written in black 14-point Times Roman font, with double-spaced text and single-spaced quotations, in addition to one-inch margins on all sides.<sup>149</sup> Further, the brief had to have a cover with 90 lb. paper and be securely bound along the left-hand margin.<sup>150</sup> Since even law firms with experienced lawyers and paralegals with a steady diet of federal appellate court practice sometimes failed to meet the court's strict brief writing and format requirements, it would be something of a miracle if Jackson's brief was in compliance with the court's rules.<sup>151</sup>

Feeling the pressure of the looming deadline by which he needed to file his brief, Jackson went into overdrive, primarily relying on the legal arguments that Brooks had made in his brief to the district court.<sup>152</sup> Jackson basically wrote in his own words a rationale for why the court of appeals should reverse the district court decision and remand his case for trial on the merits.<sup>153</sup> Jackson spent virtually every free moment at the local library and on the Internet, trying to understand the state of the law so that he could explain how the law applied to the facts of the case.<sup>154</sup> To his knowledge and understanding, gender-based discrimination was clearly against the law, but his case hinged on the court accepting the argument that a person who complains about discrimination under Title IX—even if the complaints are on behalf of a third party—should be protected against employer retaliation.<sup>155</sup> Since the district court found that Title IX's private cause of action did not include claims of retaliation, Jackson's task was to question the wisdom of that conclusion and persuade the court of appeals of the folly of that reasoning.<sup>156</sup> For days on end, Jackson could be found at the Subway restaurant near Ensley, where he could eat a sandwich and drink a Diet Coke while he worked on his brief.<sup>157</sup> When his brief was completed, he went to the Kinkos copy center on 20th Street at the 100 Block in Downtown Green to have the ten copies made of his four-page brief that he needed to send along with the original to the court of appeals, in addition to the copy that he needed to send to counsel for the BBOE.<sup>158</sup> Jackson closed his brief with "Prayerfully submitted" before signing and

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149. *Id.*

150. *Id.*

151. Telephone Interview with Roderick Jackson (Aug. 6, 2009).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

mailing it via express/overnight U.S. mail.<sup>159</sup> Because Jackson was nervous about missing the deadline and having his appeal rejected on that technicality, he called the court clerk's office the next day to inquire about the status of his submission.<sup>160</sup> Jackson breathed a sigh of relief when the court of appeals confirmed his filing on June 12, 2002—a day ahead of the deadline—and waited to hear whether his case would be scheduled for oral argument.<sup>161</sup> In the United States Court of Appeals for the Eleventh Circuit, three-fourths of cases are decided on the basis of the briefs only and without oral argument, but because Jackson believed that his strength lay in his ability to sway people in person versus in writing, he was hopeful that the court would grant his request for oral argument.<sup>162</sup>

Jackson waited weeks, and then months, before he finally received notification on September 27, a Friday, that oral argument in his case was scheduled for Monday, September 30.<sup>163</sup> In the intervening months, Jackson thought about and jotted down on paper the points he intended to make to the court if he ever got the chance to appear in person, but that was the extent of his rehearsal.<sup>164</sup> Although Jackson had never set foot inside a courtroom before, and certainly was not steeped in the mechanics and protocol of oral argument in a court of law, he was not at all intimidated by appearing before the three-judge panel.<sup>165</sup> After all, they were just three fellow citizens that Jackson assumed were impartial and open-minded jurists who would be responsive to arguments of common sense and fair play.<sup>166</sup> Jackson felt he could compensate for his lack of legal knowledge and understanding by appealing to their humanistic instincts.<sup>167</sup> Also, Jackson was comfortable speaking in front of an audience, so he did not anticipate any difficulty in making a straightforward argument that his termination as coach was in retaliation for him complaining about the discriminatory treatment of his girls' basketball team.<sup>168</sup> In his view, lawyers representing clients often were

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159. *Id.*

160. *Id.*

161. *Id.*

162. See *About the Court*, UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov/about/index.php> (last visited May 28, 2013); Telephone Interview with Roderick Jackson (Aug. 6, 2009).

163. Telephone Interview with Roderick Jackson (Aug. 12, 2009).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

not as effective in stating a case as the person whose interests were directly affected, because as surrogates, they lacked the emotional appeal of the principals to the dispute.<sup>169</sup> Jackson was confident that if he, as the person directly involved in the case, unleashed his passion in relating how the girls' team was mistreated vis-à-vis the boys' team, and that upon raising this concern to his superiors he was fired as a consequence, the judges could not help but rule in his favor.<sup>170</sup> Besides, he knew that he had to convince only two of the three judges to win the appeal, something that Jackson felt was eminently possible.<sup>171</sup>

On the morning of his hearing, Jackson put on his Sunday best suit and made the hour-and-a-half drive down Interstate 65 to Montgomery, in what was already a rain-soaked and dreary day.<sup>172</sup> Jackson arrived at the Frank Johnson Federal Building and United States Courthouse about ten minutes before the 9:00 a.m. scheduled hearing time, and quickly ducked into the men's room to check his appearance in the mirror before proceeding to the appointed courtroom.<sup>173</sup> When Jackson entered the courtroom, he recognized Attorney Valerie Acoff of Thomas, Means, Gillis & Seay, the prominent law firm with offices in Alabama and Georgia that represented the BBOE.<sup>174</sup> With her on one side of the podium facing the bench were three other lawyers that he did not recognize.<sup>175</sup> Owing to his early morning rise to drive to Montgomery and hustle to the courtroom so he would not be late, Jackson felt a bit ruffled. Meanwhile, his legal adversaries appeared well rested, as if they had spent the night in a local hotel, and had time for a nice breakfast before strolling over to the courthouse.<sup>176</sup>

Jackson acknowledged the BBOE's legal team with a nod of his head and walked to the other side of the podium to take his place at counsel's table.<sup>177</sup> Even though Jackson was not nervous about conveying his points in plain English to the judges, he was in awe of the courtroom setting, with its ornate seal, flags, and majestic, elongated desk that was elevated on a platform so that petitioners and respondents had to look up at the judges.<sup>178</sup> His only familiarity with the inside of a

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

courtroom was from his television and movie viewing preference for legal dramas, which mostly featured trial, and not appellate courts.<sup>179</sup> Jackson did know, however, that he should begin his presentation with “May it please the court.”<sup>180</sup> Jackson felt the judges—Joel Dubina, Stanley Marcus, and Alfred Goodwin—were sizing him up and he assumed that they viewed him as a curiosity representing himself before the court of appeals.<sup>181</sup> Before he knew it, his fifteen minutes had expired, and Attorney Acoff was at the podium presenting the BBOE’s argument, concluding with a request for the court to affirm the district court’s decision.<sup>182</sup> Jackson got the last word in during his five-minute rebuttal, and felt good about his closing.<sup>183</sup> In an unknowing breach of protocol, Jackson started walking towards the door when the clerk bellowed, “All rise.” Jackson stopped, turned around, and stood at attention while the judges filed out the side door near the bench.<sup>184</sup>

Three weeks later, on October 21, 2002, the court of appeals issued a forty-paragraph opinion affirming the district court’s decision and upholding the district court’s conclusion that Title IX did not provide Jackson with a right of action to sue the BBOE for retaliation against him for his complaints of discrimination.<sup>185</sup> In reaching its decision, the court of appeals relied on a recent Supreme Court case, *Alexander v. Sandoval*<sup>186</sup> which held that no private right of action to enforce disparate impact regulations was implied under Title VI of the Civil Rights Act of 1964.<sup>187</sup> Because Title IX was modeled after Title VI with virtually identical statutory language, the court of appeals felt constrained to reach the same conclusion under Title IX, consistent with the Supreme Court’s interpretation of Title VI in *Sandoval*.<sup>188</sup> In short, the court said that Jackson failed to state a claim upon which relief could be granted.<sup>189</sup>

Jackson was overcome by a feeling of despair.<sup>190</sup> Even though he was forthright in his belief that he was correct on the principle of right

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002).

186. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

187. *Id.* at 292-93.

188. *Jackson*, 309 F.3d at 1338-39.

189. Telephone Interview with Roderick Jackson (Aug. 12, 2009).

190. *Id.*

and fairness, after his second-round legal defeat he was completely perplexed by the logic and saneness of the law.<sup>191</sup> Jackson was deflated by the court's decision and exhausted from his three-year ordeal, and wondered if his campaign to stand up for what he believed in had run its course.<sup>192</sup> He felt beaten down to a pulp, and began to second guess his faith in the judicial system as a beacon of probity and rectitude.<sup>193</sup>

Then, at the moment when Jackson felt that his efforts were all for naught, he received a telephone call from Richard Cohen of the Southern Poverty Law Center (SPLC) in Montgomery, who said that the decision in his case was "a terrible ruling" and that the SPLC would like to help.<sup>194</sup> Shortly thereafter, Jackson received a second phone call from Dina Lassow of the National Women's Law Center (NWLC) in Washington, D.C., expressing the same sentiment.<sup>195</sup> Jackson was beside himself with elation.<sup>196</sup> Just three weeks earlier at the court of appeals, Jackson felt that he was in a lonely, local fight for gender equality all by himself, and in the span of a few hours he had two high-profile legal organizations call to offer their legal services to him.<sup>197</sup> With interest shown by these powerful cause-driven entities, Jackson knew that his case had taken on a whole new meaning with broader national implications and more importantly, he finally had the legal firepower to match that of the BBOE.<sup>198</sup>

With Jackson's blessing—and gratitude—the NWLC assumed the lead role in his case, and promptly filed a petition for rehearing en banc with the United States Court of Appeals for the Eleventh Circuit, which was denied on January 13, 2003. Attorney Lassow told Jackson that publicity surrounding the appeals court's decision was generating public outrage and that it was too important a case not to appeal.<sup>199</sup> Jackson was portrayed in the media as an earnest public school teacher and coach who, after standing up and speaking out for the fair treatment of his girls' basketball team, was fired from his coaching job.<sup>200</sup> Meanwhile, the NWLC legal team mobilized to prepare and file the petition for writ of certiorari to the United States Supreme Court, which was granted on

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

June 14, 2004.<sup>201</sup> Given the one percent acceptance rate of certiorari petitions, Jackson was ecstatic when he learned that he—through his attorneys—would have one last chance to vindicate himself in his efforts to obtain gender equality for his female student-athletes.<sup>202</sup> The attorneys were notified of the briefing schedule and the case was set for oral argument on November 30, 2004.<sup>203</sup>

In early November at the NWLC's annual fundraising and awards dinner in Washington, D.C., Lassow told Jackson that the NWLC was bringing in an attorney who previously argued cases before the Supreme Court.<sup>204</sup> Little did Jackson know that the attorney in question was Walter Dellinger, a partner and member of the appellate practice at O'Melveny & Myers, and also a professor at Duke University School of Law.<sup>205</sup> More significantly for Jackson's immediate interests, Dellinger was the acting solicitor general in the Clinton administration during the Supreme Court's 1996-1997 term, during which time he argued nine cases before the Court.<sup>206</sup> Jackson felt that with a person of Dellinger's sophisticated legal knowledge and experience arguing cases before the high Court, his chances for success improved exponentially.<sup>207</sup> Jackson was amused to think that in one fell swoop he went from arguing his own case as a layperson in the court of appeals to having one of the top appellate lawyers in the country represent him in the United States Supreme Court.<sup>208</sup> He felt good about the fact that his case was now in the hands of real pros.<sup>209</sup>

Seated at the middle of the grand and imposing bench in the ornate courtroom with Roman columns and luxurious crimson velvet drapes were Justices Stevens and Scalia, flanked on either side by Justices Kennedy, O'Connor, Thomas, Souter, Ginsburg, and Breyer.<sup>210</sup> Chief Justice Rehnquist was ill, having been diagnosed with thyroid cancer, and so he was not present for oral argument that day.<sup>211</sup> As the most senior Justice in the absence of the Chief Justice, Justice Stevens

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. O'MELVENY & MYERS LLP, <http://www.omm.com/walterdellinger/> (last visited May 28, 2013).

207. Telephone Interview with Roderick Jackson (Aug. 12, 2009).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

presided.<sup>212</sup> Jackson was seated in the first row behind the counsel table, at which Dellinger and Marcia Greenberger, the founder and co-president of the National Women's Law Center, were seated.<sup>213</sup> Seated next to Jackson were his wife, Joni, in addition to Dellinger's wife, Ann, and Lassow.<sup>214</sup>

The lead counsel representing the BBOE was Kenny Thomas, a senior partner at Thomas, Means, Gillis & Seay, who largely argued the merits of the court of appeals' conclusions in hopes that the Supreme Court would agree and affirm the lower court's decision.<sup>215</sup> Although Thomas argued from the strength of the court of appeals' unanimous decision below, Jackson believed that his guy was better.<sup>216</sup> Jackson felt that Dellinger was focused and on point, and his arguments were precise, like a surgeon.<sup>217</sup> Jackson was buoyed by Dellinger's performance, buttressed by his commanding presence, filled with the confidence of someone who had done this many times before.<sup>218</sup>

On March 29, 2005, a local television reporter for Fox 6 WBRC called Jackson at Ensley High School on the classroom telephone and said, "The Supreme Court ruled in your case and guess what? You won!"<sup>219</sup> In a 5-4 decision, the Court held that retaliation by a covered entity against a complainant of sex discrimination constitutes discrimination on the basis of sex, in violation of Title IX.<sup>220</sup> The Court also said that retaliation is a form of discrimination because the victim of retaliation is subjected to differential treatment, and further, it is discrimination on the basis of sex because retaliation is an intentional response to the victim's complaint, which is the allegation of sex discrimination.<sup>221</sup>

*Jackson v. Birmingham Board of Education*<sup>222</sup> stands for the proposition that an individual who is retaliated against for speaking out against sex discrimination perpetrated by a recipient of federal education funding has a cause of action under Title IX, even if that individual did

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 169 (2005).

221. *Id.*

222. *Id.*

not experience the original discrimination personally.<sup>223</sup> Jackson's Supreme Court victory and legacy is a testament to the importance of standing up for what one believes, no matter the consequences.<sup>224</sup>

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223. *Id.*

224. Telephone Interview with Roderick Jackson (Aug. 12, 2009).