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The Return Of The RICO Whistleblower?

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Call This “A Tale Of Two Title IXs”

In 1970, Congress enacted Title IX of the Organized Crime Control Act of 1970, commonly known as The Racketeer Influenced and Corrupt Organizations Act or “RICO,” 18 U.S.C. § 1961 *et seq.*, which prohibits investing in, acquiring, or conducting any “enterprise” through a “pattern of racketeering activity.” Not long afterwards, in 1972, Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination “on the basis of sex” by recipients of federal education funding, the statute that in the ensuing 30-odd years has come to be known by the nickname “Title IX” all by itself.

Under both statutes, whistleblowers who claimed to have suffered retaliation at their organizations after complaining of statutory violations have sought to bring private civil actions under those statutes, claiming that they suffered injuries essentially as a result of the underlying statutory violation. But a curious distinction has emerged.

In the RICO arena, such claims typically have been dismissed on a narrow view of causation, holding that the injury complained of did not itself result from the underlying statutory violation but rather from the separate act of retaliation. But in the Title IX area, the U.S. Supreme



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Court in its recent decision in *Jackson v. Birmingham Board of Education* (Mar. 29, 2005) took a different view, holding that the retaliation suffered by the whistleblower was sufficiently related to the underlying violation of the nondiscrimination statute that the whistleblower should be allowed to seek relief for his injuries under Title IX itself.

Jackson thus raises the question of whether a re-examination of the RICO whistleblower precedents might soon be in order. Is the holding in *Jackson* a unique product of the Title IX statutory scheme that has no implications in other statutory contexts? Or can we expect to see the return of the RICO whistleblower as a RICO plaintiff in his own right? Answering these questions requires

understanding the rationale behind *Jackson* and the jurisprudence that has developed in the RICO whistleblower context.

Jackson concerned a high school physical education teacher and basketball coach who allegedly was removed from his coaching position in retaliation for his complaints about the school’s unequal treatment of the girls’ basketball team. He sued the school board, alleging that the board’s termination of his coaching duties violated Title IX. The District Court dismissed his claims and the Eleventh Circuit affirmed, holding that Title IX did not provide a private right of action for retaliation because “nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations.”

The Supreme Court in *Jackson* reversed. It held that such a reading of the statute ignored the “import of our repeated holdings construing ‘discrimination’ under Title IX broadly.” Pointing to the plain text of Title IX, the Court held that Title IX “prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional ‘discrimination’ ‘on the basis of sex.’” The Court further held that Title IX “does not require that the victim of the retaliation must also be the victim of discrimination that is the subject of the original complaint.”

The Court held that this interpretation of Title IX was further supported by the fact that allowing claims for retaliation was essential to the fulfillment of the statute’s objectives, saying that it would

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be “difficult, if not impossible” to achieve the objective of Title IX if “persons who complain about sex discrimination did not have effective protection against retaliation.” The Court reasoned that if retaliation were not prohibited, Title IX’s enforcement scheme would “be subverted,” and it should not be assumed that “Congress left such a gap in its scheme.”

Three justices dissented, arguing that the majority’s holding was “contrary to the plain terms of Title IX,” because “retaliatory conduct is not discrimination on the basis of sex.” They contended that the plaintiff’s retaliation claim lacked the connection to actual sex discrimination as required by the statute because the plaintiff claimed that he “suffered reprisal because he complained about sex discrimination,” not because “the sex discrimination underlying his complaint occurred.” Thus, retaliation “cannot be said to be discrimination on the basis of anyone’s sex, because a retaliation claim may succeed where no sex discrimination took place.”

What is striking is that the *Jackson* dissenters’ argument is essentially the same argument that has been used in the RICO context to reject whistleblower claims under that statute. Courts in nearly every circuit have employed a similar causation analysis to claims by self-styled RICO whistleblowers, holding that persons who were fired for reporting RICO violations have no standing to sue under RICO because the necessary causal link between their injury and the RICO violation was too attenuated. *See, e.g., Hecht v. Commerce Clearing House*, 897 F.2d 21, 24 (2d Cir. 1990) (collecting cases); *compare Beck v. Prupis*, 529 U.S. 494, 504 (2000) (rejecting attempt at sidestepping the issue by pleading the claim as injuries from a RICO conspiracy). Faced with the question of whether a terminated whistleblower has suffered an injury “by reason of” a RICO violation, courts consistently have concluded that injury arising from loss of a job was not caused by the RICO violation itself and, even if it was, the RICO violation was too far removed from the loss of the job to have been the proximate cause of the injury.

How does the analysis used by the majority in *Jackson* square with the caselaw under RICO? The plain language of the respective statutes does not seem necessarily to lead to the conclusion that a retaliation claim is viable in the Title IX context but not the RICO

context. Title IX prohibits discrimination “on the basis of sex,” and the Supreme Court has recognized a private right of action to enforce this proscription. RICO in 18 U.S.C. § 1962 prohibits various kinds of conduct involving “a pattern of racketeering activity,” and expressly provides in 18 U.S.C. § 1964(c) that “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor. . . .” (emphasis added). If the termination of a person for complaints about sexual discrimination is deemed to be an action taken “on the basis of sex” under Title IX, is there any reason why retaliatory discharge for blowing the whistle on a RICO violation should not be considered an injury suffered “by reason of” a RICO violation?

RICO perhaps has more of a history of carefully constraining the kinds of links that could support a private claim, perhaps due to concerns about an expansive and seemingly open-ended statute which carried the threat of treble damages. In 1985, the Supreme Court held that RICO’s “by reason of” language required a plaintiff to show that he had suffered injury arising from the conduct that violated RICO. *Sedima, SPRL v. Imrex Co.*, 473 U.S. 479 (1985). Thirteen years later, in *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258 (1998), the Supreme Court further clarified that “by reason of” required not only a showing of injury in fact, but also a showing that the injury was proximately caused by the RICO violation. While *Holmes* acknowledged that the plain language of the RICO statute could be read to confer standing on RICO plaintiffs where the RICO violation merely was the “but for” cause of the plaintiff’s injury, *Holmes* declined to adopt this interpretation. *Holmes* reasoned that “the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover persuades us that RICO should not get such an expansive reading,” finding persuasive the fact that RICO had been modeled on the antitrust statutes, which had been construed by courts to incorporate common-law principles of proximate causation.

In contrast, in the Title IX context, as noted by the *Jackson* Court, “discrimination” has been broadly interpreted to make a “wide range of intentional unequal treatment” redressable under the private right of action. Thus, a funding recipient’s deliberate indifference to sex-

ual harassment of another student has been held to “squarely” constitute discrimination “on the basis” of sex, and likewise for sexual harassment, despite not being explicitly mentioned in the statute.

Notwithstanding the different interpretations given Title IX and RICO, there may be enough similarities between the legislative purposes of the two to suggest that a re-examination of the RICO whistleblower precedents may be in the offing. As with the language of Title IX, the Supreme Court held (in *Sedima*) that Congress intended that the RICO statute was to “be read broadly” to effect its remedial purpose, and that it was designed with a “private attorney general provision[] . . . to fill prosecutorial gaps.” Thus, like the enforcement scheme in Title IX, the fulfillment of RICO’s objectives depends on individuals taking action against the statutorily-proscribed conduct.

The Supreme Court has concluded that in the RICO context, though, that neither of these legislative purposes is frustrated by limiting private civil actions only to those individuals who have been directly injured by a RICO violation. In *Holmes*, the Supreme Court held that Congress’ admonition to broadly construe RICO would not be frustrated by the proximate causation requirement, because “allowing suits by those injured only indirectly would open the door to massive and complex damages litigation” which would “burden the courts” and “undermine the effectiveness of treble-damages suits,” and the “directly injured victims can generally be counted on” to bring suit for RICO’s vindication.

While such considerations may be valid in the commercial context in which most RICO issues arise, the situation may not be completely parallel in the very different context where Title IX discrimination issues typically arise. Thus, while plain language and the legislative purposes behind the two statutes might suggest that a whistleblower in the RICO context should have the same right to bring a claim as a victim of retaliation in the Title IX context, different policy concerns underlying the statutes and their application may provide a basis for continuing to shut out the RICO whistleblower even while his Title IX counterpart can now take his claim to court.