

# **Retaliation in the Modern Workplace and Federal Laws in the United States of America: Cases and Reflections About the Undermining of Employees' Legal Rights**

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*Employees have the right to assert their federally-protected rights against their employers when they believe a violation of those rights has occurred. However, workplace retaliation poses challenges for employers reporting illegal or discriminatory acts. This study examines federal and common law to better identify the concept of retaliation and the legal protections against it. The cases analyzed in this study are Thompson v. North American Stainless, Burlington Northern and Santa Fe Railway Company v. White, Bragg v. Munster Medical Research Foundation, Inc., and Hutchinson v. City of Oklahoma City. These cases highlight instances of retaliation against employees exercising their legal rights, showcase circumstances where employees won, and look at affirmative defenses employers can raise. The goal is to deepen understanding around retaliation and the current laws surrounding it. Recommendations and possible remedies for workplace retaliation will be discussed in the latter part of the analysis to better understand the options available to future employees and employers regarding this issue.*

*Keywords: retaliation, workplace, legal rights, federal laws, discrimination, complaint, whistleblowing*

## **INTRODUCTION**

Modern-day employees face many unique challenges in today's world, and retaliation is one that many academic researchers have cited (Ahern, 2017; Cavico and Mujtaba, 2011; Costello, 2011; Donnelly, 2016; Green, 2010; Johansson, 2014; Strawbridge, 2012). As awareness of their legal rights and proper exercise grows among most American workers, an unsettling truth emerges. Retaliation against heterogeneous employees exercising their legal rights is a growing problem and a cause for concern in the workplace (Cavico and Mujtaba, 2017; Green, 2012). Though an employee's legal rights in the United States of America (U.S.) are protected by federal, state, and local laws, this does not bar employers from taking adverse employment actions against employees for exercising these rights (Cooper and Mujtaba, 2022). Adverse employment actions can range from interactional acts such as harassment and intimidation to larger adverse actions such as termination (Alvarado and Mujtaba, 2023). With workplace retaliation quickly becoming a concern amid the changing demographics (Singh, 2018), employees must understand their legal

rights, how to properly exercise them, and the elements of a prima facie case for wrongful retaliation from their employer.

By examining four workplace retaliation cases, insights into what retaliation is, the federal rights that protect against it, and what resources are available to employees regarding workplace retaliation will be obtained.

## **RETALIATION**

Before delving into an in-depth analysis of the case law surrounding workplace retaliation, it is important to establish a definition of what retaliation is. As stated by experts in the field,

Retaliation arises in employment when an employee or job applicant is subject to a reprisal by the employer in the form of a materially adverse action because the employee or applicant has filed a claim with the EEOC alleging discrimination or harassment based on the protected categories in Title VII of race, color, national origin, religion, or gender or that the employee or job applicant has complained about such practices (Cavico and Mujtaba, 2017, p. 30).

According to the United States Department of Labor, retaliation occurs when “an employer fires an employee or takes any other type of adverse action against an employee for engaging in protected activity<sup>1</sup>” (U.S. Department of Labor, 2023, para. 2). While this definition is comprehensive, there are a few elements to remember. First, there must be an employer or someone who is a proxy of an employer. Proxies of employers can be managers, supervisors, administrators, or anyone with the ability to take an adverse employment action against an employee. Second, there must be an adverse employment action. Adverse employment actions can range from intimidation and harassment to more serious actions such as demotion, suspension, or termination, noting that this is not a full list of adverse employment actions.

Finally, the employee must be engaged in a protected activity. Protected activities are actions that are permissible from the law. As an example, if an employee reports a hazardous work environment to the Occupational Safety and Health Administration (OSHA), the employer is legally barred from retaliating against the employee who made the report. Within the Occupational Safety and Health Act, there is an anti-retaliation provision outlined in Section 11(c) of the legislation that stipulates “a person may not discharge or in any manner retaliate against an employee because the employee filed any complaint or instituted or caused to be instituted any proceeding under or related to the OSH Act”<sup>2</sup> (OSHA Requirement, 2023). Per OSHA’s retaliation provision, employees possess a legal right to file a complaint with OSHA if they have a good faith belief that the workplace is unsafe. Filing a complaint with OSHA is a protected activity under federal law. If the employer does retaliate against the employee for exercising their federally protected rights, the employer can be liable for wrongful retaliation. As clearly emphasized by Cavico and Mujtaba “Retaliation is illegal; and retaliation law is a very important part of civil rights laws” (2017, p. 30). An employer cannot retaliate against an employee who exercises his/her legal rights and engages in protected activities. If the employer does retaliate, then they leave themselves open to litigation.

## **LAWS AND LEGAL RIGHTS**

An employee’s legal rights mainly stem from federal laws. State laws and local laws may further supplement those federally provided legal rights. Referring to the earlier example, filing a report with OSHA is a legal right from the OSH Act. Additionally, federal administrations like OSHA have created whistleblower protections for employees who correctly exercise their legal rights in the workplace. Another consideration is that depending on an employee’s area of employment, they may get more protection under federal law, which are designed to protect them from discrimination harm, injustice, and inequity (Mujtaba, 2023). For example, OSHA is one of the more widely known federal laws that protect most employees, but there are more niche federal administrations for different employment sectors. Some niche federal agencies

include the Mine Safety and Health Administration (MSHA), the Office of Federal Contract Compliance Programs (OFCCP), the Wage and Hour Division (WHD), and the Veterans Employment and Training Service (VETS).

Furthermore, federal laws like the National Labor Relations Act (NLRA) and the National Labor Relations Board (NLRB) grant the right to unionize and protect against retaliation for participating in concerted union activities. It is without a doubt that federal law has granted many legal rights and protections for employees in different areas of employment. These laws aim to protect employees from retaliation by their employers for exercising their legal rights and participating in protected activities. Overall, “Asserting rights protected by U.S. discrimination laws is called “protected activity.... It is unlawful for the employer to retaliate against an employee for engaging in protected activity (Cavico and Mujtaba, 2017, p. 31).

It is important to consider that state laws may further impact an employee and their legal rights. Case law can also add or subtract rights from an employee. Employees equipped with the knowledge of their legal rights and where they stem from can use that knowledge to ensure that they are not treated unfairly by their employers. Concerning workplace retaliation, it is best practice to be aware of the applicable laws that grant protection from retaliation should it ever happen. Given the adversarial nature of litigation, it is better to be informed rather than be ignorant.

## **CASE ANALYSIS**

Case analysis is one of many ways to gain insight on how litigation for workplace retaliation cases is handled. In addition, case analysis also shows some of the elements of a prima facie case for workplace retaliation and some affirmative defenses employers may raise in litigation.

### **Thompson v. North American Stainless, LP**

As previously stated, litigation is likely to follow if an employer decides to retaliate against employees who exercise their legal right. For instance, in the case of *Thompson versus North American Stainless, LP*, the plaintiff took legal action against his employer after his fiancée was retaliated against the plaintiff’s fiancée for filing a gender discrimination charge with the Equal Employment Opportunity Commission (EEOC). This matter was taken all the way up to the United States Supreme Court.

The court ruled that the employer’s conduct of retaliating against the plaintiff’s fiancée was illegal. The plaintiff’s fiancée has the legal right to file a discrimination charge with the EEOC if she had a good faith belief that there is gender discrimination occurring in the workplace. The employer took an adverse employment action, which was termination, against the plaintiff’s fiancée in response to their filing of the complaint. The court used an “objective person” standard to determine whether the employer violated the law. The objective person standard holds that if any reasonable person other than the plaintiff were dissuaded from taking the same actions as the plaintiff, the retaliation is unlawful. When the court applied this standard to the merits of the case, they found that any reasonable person would be discouraged from engaging in a protected activity such as filing a complaint with the EEOC if the fiancée were terminated due to them engaging in this protected activity. Thompson, the plaintiff, used Title VII to support their EEOC claim. Title VII has an anti-retaliation provision prohibits an employer from retaliating against the employee for engaging in a protected activity such as filing a discrimination charge.

The court’s holding was to reverse the decision of the lower court that ruled in favor of the employer and to remand to find out whether the fiancée was fired for engaging in a protected activity. The *Thompson* case highlights the significance of understanding both the law and the legal rights permitted by those federal laws. Had it not been for the anti-retaliation provision in Title VII, the employer would have prevailed in the case rather than the employee.

### **Burlington Northern and Santa Fe Railway Company v. White**

Next, a case with similar issues akin to *Thompson v. North American Stainless, LP* was brought to the United States Supreme Court. In *Burlington Northern and Santa Fe Railway Company v. White*, the plaintiff, Ms. White, was an employee of the railroad company and filed a Title VII action against their employer. The plaintiff claimed that the railroad company retaliated against the plaintiff by reassigning her to a less desirable position that lacked the benefits she had previously been receiving. She then filed a claim with the EEOC alleging gender discrimination and retaliation. This resulted in her employer suspending her without pay for insubordination for thirty-seven days. When she was reinstated to her position, the plaintiff made another charge in federal court stating that, “Burlington’s actions in changing her job responsibilities and suspending her for 37 days amounted to unlawful retaliation under Title VII”<sup>3</sup> (*Burlington N. and Santa Fe Ry. Co. v. White*, 2006).

The Supreme Court’s decision aligned with what the plaintiff had alleged in federal court, and the defendant was held liable for unlawful retaliation against the plaintiff. In this case, there was a difference in adverse employment actions taken by the employer. Although the plaintiff engaged in a protected activity, she was suspended and reassigned to a position different from her original position. The court held that the plaintiff was protected from these adverse employment actions under Title VII’s anti-retaliation provision. One of the key similarities between this case and the Thompson case is that the court continued to use an “objective person” standard when determining whether the employer’s actions constituted unlawful retaliation. The Supreme Court considers that if one person was retaliated against for engaging in protected activities, then it would lead to a domino effect of employees not engaging in any protected activity. It would be logical to assume that people would not report or complain about any illegalities in the workplace out of fear of retaliation from their employer. The United States government aims to avoid that and encourages the practice of whistleblowing through the many avenues of federal laws, statutes, and regulatory codes.

### **Bragg v. Munster Medical Research Foundation**

Though the prior cases highlighted positive outcomes for the employees, retaliation cases do not always favor the employee. In fact, an employer with a solid affirmative defense against retaliatory claims may prevail in court. For example, in *Bragg versus Munster Medical Research Foundation*, the plaintiff, Ms. Catrina Bragg, filed a Title VII claim against their employer after the employer denied the plaintiff a full-time registered nurse position and transferred her to another facility that gave the plaintiff less pay. Bragg brought a claim against her employer, alleging racial discrimination and retaliatory acts. However, the employer had an affirmative defense that would legalize their adverse employment action.

The employer had brought evidence of the plaintiff’s substandard work performance documented in her progress reports and during her progress meetings. Additionally, the plaintiff did not dispute that these meetings did not occur. Furthermore, she admitted that she had several meetings with her supervisors regarding the quality of her work. The affirmative defense that the employer raised was that the reason for the plaintiff’s rejection and her eventual transfer to the other facility that gave her less pay was her substandard work performance. It was not because of her immutable factors such as race or gender that they gave her less pay; rather, her performance was the reason for the denial of the full-time position and the transfer to a different facility. The court ruled in favor of the employer as they could prove that they had a legitimate reason for the employment action. Using the “objective person” standard, the court did not find the employer’s actions against Ms. Bragg were discriminatory. If a worker does not deliver satisfactory performance in his or her job, then the employer is well within their rights to demote or transfer them to another suitable position.

If the employer can state and show evidence of a non-discriminatory reason for taking an adverse employment action, then they may use that as an affirmative defense in litigation. It is important to note that not all adverse employment actions are discriminatory. Adverse employment actions may occur when an employee does not meet the standards necessary for their position. While the plaintiff did engage in a protected activity, the protected activity was not the basis for the employer taking adverse employment action against the plaintiff.

## **Hutchinson v. City of Oklahoma City**

The last case to be analyzed is *Hutchinson v. the City of Oklahoma City*. As opposed to the other cases, this case regards a situation where the plaintiff alleged many violations of federal laws as well as discriminatory treatment. The plaintiff was a Chief Plant Operator at the City of Oklahoma's water treatment facility. It is important to note that the plaintiff is the sole female employee at the facility. Noticing her supervisor's improperly scheduling himself for more overtime, the plaintiff complained to the city's "ethics hotline." She claims that she was retaliated against for reporting her supervisor to the ethics hotline, which created a hostile work environment for the plaintiff. She then filed two EEOC charges against the water treatment facility and the City of Oklahoma for retaliation, discrimination, and violations of the Equal Pay Act. The court moved to summary judgment as it would allow them to review all the facts of the case before deciding on the merits of the case.

For the plaintiff's retaliation claim, the employer claims that there was no adverse employment action against the plaintiff. She did not suffer a pay cut, demotion, reassignment, or termination. The court found that the plaintiff's retaliation claim failed due to the lack of supporting evidence. For the hostile workplace count, the court also found that the plaintiff did not make a strong enough claim showing that the defendant discriminated against her because of her gender. Finally, for the Equal Pay Act count, the court recognized that the plaintiff misinterpreted the language of the Equal Pay Act. The court stated that "the EPA addresses gender-based disparities in pay for work *performed*, not disparities in *opportunity*"<sup>4</sup> (*Hutchinson v. City of Oklahoma City*, 2013).

Because the plaintiff misinterpreted the EPA, her claim under the Equal Pay Act was not valid. The court ruled in favor of the defendant based on the case proceedings. The plaintiff did not suffer any adverse employment action, nor did she have a prima facie case for the claims she brought forth. Even though the plaintiff asserted her legal rights by making complaints and filing EEOC charges, she failed to adequately support any of her claims. Though employees have the right to report wrongdoing in the workplace, there must be sufficient evidence to properly support the claims being made. The defendant could show that the plaintiff did not suffer any adverse employment action and that there was no gender discrimination or unequal pay. Had the plaintiff had evidence to support her many claims, she may have had a viable claim on at least one legal issue.

## **CHALLENGES**

While employees have many legal rights in their arsenal, they must weigh asserting those rights against the risks of doing so. As previously mentioned, retaliatory acts can range from harassment to termination. An employee's financial situation may be severely impacted in the worst-case scenario. In addition, if an employee takes legal action, legal proceedings can be a timely, stressful, and costly venture especially when the legal action comes from federal agencies. In addition to these stressors, the employee takes most of the burden that comes with being wrongfully terminated. Litigation presents an opportunity for employees to be heard and make their claims. However, back pay and reinstatement of position is not guaranteed.

An employer's retaliation may hinder employees from whistleblowing or asserting their legal rights in the workplace. This is further complicated by the state of at-will employment laws where one can be terminated for any reason. When employees must weigh their legal rights against the many risks associated with asserting them, many will find that the risks are far too great unless they can properly support their retaliation claim. In this way, employees may feel like their federal rights are dampened as there is a power imbalance between the employer and the employee.

## **RECOMMENDATIONS**

Addressing workplace retaliation is a challenging venture. Despite this, employees and managers can still take personal action to be prepared if workplace retaliation starts to occur. One of the ways to be prepared is to keep personal records. Recordkeeping is not only part of the operational functions of a business, but it also allows the employee to take stock of their own situation. In addition, having

documentation is beneficial not only for possible litigation but it is also good to assess one's personal career growth. Having a recordkeeping system such as a digital folder or work journal is especially beneficial if an employee needs to provide information to an investigator or their personal attorney. It will make it easier for the employee or the employee's attorney to build a case.

Managers are in a unique position since they are not only employees, but they are also a proxy of an employer. This means that they could take adverse employment action against an employee. As such, recordkeeping is an especially important action to take. Managers are team leaders, and they are crucial to the team's overall health. Managers can keep records pertinent to their position such as team achievements, conflicts, progress reports, and any other information that is relevant to their position. It is also encouraged for managers to note their personal experience as an employee as they are not immune to retaliating against. If there comes a time when a manager must take an adverse employment action, and they are brought into litigation, then it would be beneficial to them to have documentation to show that there was a documented and legitimate reason as to why and steps were taken to try and resolve the issue. Recordkeeping for both employees and managers will help in preparing for the worst- case scenario (Cavico and Mujtaba, 2017). Asserting one's legal rights in the workplace is full of risks, so recordkeeping is one way in which employees and employers can adequately prepare for those risks.

Another recommendation for employees is to organize. As previously mentioned, the NLRA and NLRB grant not only the right to organize as a collective, but it also adds protections to those who organize together. Therefore, it may benefit employees to organize and create a union. There may not be much that employees can do by themselves besides recordkeeping, but employees that are a part of a collective group or union have much more strength and solidarity. It also allows employees to share their knowledge of the legal rights they have. For example, suppose an employee is afraid of disclosing wage information because of company policy. In that case, another employee can share that a company cannot bar an employee from disclosing their wages due to the NLRB making that a protected right. Through organization, employees can share what they know about their legal rights in the workplace. It also allows workers to stand in solidarity with one another in cases of collective bargaining and other collective actions.

Managers may also partake in a union if they desire. Often, managers and unions are at odds with one another. Due to managers' unique position, the relationship between managers and unions can be adversarial. However, since workplace retaliation is a concern that affects every employee, it is more beneficial for the two sides to work cooperatively to solve this greater concern. One employee may not be able to change much in the workplace, but a collective of employees may spark greater change in the workplace and provide support to one another in the case of retaliatory actions by the employer.

A third recommended action is encouraging open dialogue between team members. This recommendation is mostly geared towards managers as they are usually the team leaders and facilitators in the workplace. Some employees may fear speaking up about issues they find in the workplace for fear of being discriminated against or retaliated against. As a result, there is not much open dialogue between team members and team leaders. If employees have a legitimate good-faith concern about something in the workplace, they ought to be able to voice it without being punished for it. Managers can aid in facilitating an environment where there is open dialogue and healthy communication across diverse channels and ranks (Langaas and Mujtaba, 2023). Employees may have concerns about the workplace they wish to voice, and managers are in a special role to help assist their team so they can help them to enjoy a healthy workplace (Mujtaba and Kuzak, 2023). Open workplace dialogue has many benefits such as increased team bonding and raised morale (Mujtaba, 2022). The most notable benefit is team solidarity; at the very least, employees should be safe to disclose issues they have encountered within a team setting. Managers play a crucial role as team leaders and facilitators who can encourage workers to speak about their concerns in the workplace. It takes a collaborative effort between employees and managers to have this kind of healthy and productive environment.

Ultimately, it should be remembered that reasonably criticizing an employee to train the employee, develop the employee, improve the employee's performance, or to avoid future discipline does not constitute a materially adverse action (*Ruth A. Forest v. New York State Office of Mental Health*, 2016). The EEOC offers the following suggestions on how to prevent retaliation: 1) tell employees that retaliation

is prohibited; 2) assure employees that no reprisals or punishment will be imposed for taking lawful actions to oppose discrimination; 3) respond to discrimination concerns, questions, and complaints in a timely and effective manner. 4) ensure that managers and supervisors comprehend their responsibility to stop, address, prevent, and prohibit discrimination and retaliation; and 5) make employees accountable for complying with and enforcing anti-discrimination policies and rules and reporting instances of discrimination (EEOC, Frequently Asked Questions, 2017; EEOC, Press Release, 2015).

## **SUMMARY**

Despite employees' legal rights in today's modern world, workplace retaliation remains a concern for many employees. It is not only increasingly important for employees to know what their federally protected rights are, but they should also know what resources are available to them if they are retaliated against. In today's time, employees must be willing to be informed about what rights they have outside the workplace. Informed employees who know their legal rights and how to assert them are the future of a globally competitive, healthy, and productive workplace.

There are some recommendations for employers and employees to help employers attain a legally sound workplace and to educate employees how to properly exercise their rights under the law (Cavico and Mujtaba, 2017):

### **Employers**

- Train managers, supervisors, human resources personnel, and employees on the employer's policies and procedures to combat retaliation.
- Ensure all employees know that retaliation will not be tolerated at the company or organization.
- Train managers, supervisors, and human resources personnel to properly respond when an employee claims retaliation has occurred.
- "Emphasize that those accused of EEO violations, and in particular managers and supervisors, should not act on feelings of revenge or retribution, although also acknowledge that those emotions may occur" (EEOC, Enforcement Guidance on Retaliation, 2016, p. 23).
- Clarify to everyone that it is illegal to discharge or otherwise retaliate against an employee because the employee has filed a discrimination charge.
- Note that following the organization's policies and procedures regarding discipline in a reasonable manner does not constitute a materially adverse action.

### **Employees**

- Follow the company's or organization's policies and procedures for reporting actual or perceived retaliation.
- Employees must be keenly aware that the employer, regardless of the merits to the underlying retaliation claim, has the legal right to expect the employee to continue to fulfill his or her job duties.
- The EEOC explicitly warns employees that "engaging in EEO activity...does not shield an employee from all discipline and discharge. Employers are free to discipline or terminate workers if motivated by *non-retaliatory and non-discriminatory* reasons that would otherwise result in such consequences" (EEOC, Facts About Retaliation, 2015).
- Complaining about work generally, even if the complaints are justified, does not rise to the level of legal "opposition" unless the complaints are tied to some type of status-based discrimination or harassment.
- The EEOC also explicitly warns employees that "opposition to perceived discrimination does not serve as license for the employee to neglect job duties. If an employee's protests render the

employee ineffective in the job, the retaliation provisions do not immunize the employee from appropriate discipline or discharge” (EEOC, Enforcement Guidance on Retaliation, 2016, p. 7).

- Merely being criticized or reprimanded by one’s boss is not a “materially adverse action” necessary for a retaliation claim unless the criticism or reprimand materially affects the employee in a material way (*Terry Hinton v. Virginia Union University*, 2016).

Retaliation is a significant issue and must be avoided by managers. All leaders are responsible for creating an inclusive and fair organizational culture for everyone in their workplace. Employees must keep properly exercising their rights without the fear of backlash from management since there is protection under the federal, state, and local laws.

## ENDNOTES

1. Retrieved from <https://www.dol.gov/agencies/whd/retaliation>
2. 1977.3 - General Requirements of Section 11(C) of the Act. | Occupational Safety and Health Administration.
3. Burlington N. & Santa Fe Ry. Co. v. White (2006).
4. Hutchinson v. City of Oklahoma City (2013)

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