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# A Review of Supreme Court Cases Involving Workplace Retaliation: 2006-2018

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A REVIEW OF SUPREME COURT CASES INVOLVING WORKPLACE  
RETALIATION: 2006-2018

A Thesis  
Presented to  
The Faculty of the Department of Psychological Sciences  
Western Kentucky University  
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In Partial Fulfillment  
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Master of Science

By  
Rachel Quinn Pearson

May 2018

A REVIEW OF SUPREME COURT CASES INVOLVING WORKPLACE  
RETALIATION: 2006-2018

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Employers want to reduce or eliminate claims of employee retaliation whenever possible because of associated negative organizational consequences such as legal liability, various financial costs for the organization, and negative effect on employee morale. As such, it is important to identify the factors that impact the court's decision to rule in favor of the plaintiff or the defendant. The purpose of the present study is to identify factors driving the court's decision, as well as to review the implications of recent Supreme Court holdings for retaliation issues. Supreme Court cases involving a claim of employee retaliation from *BNSF v. White* (2006) to the present were reviewed and coded on factors likely to influence the court's decision. Implications associated with these factors and the implications of relevant Supreme Court holdings are discussed. The ability of the plaintiff to establish all three prongs of a retaliation claim was found to be important for the court to rule in his/her favor. If the retaliatory act meets or exceeds the EEOC deterrence standard, the court tended to favor the plaintiff. Finally, the results suggest that the plaintiff should use the organization's grievance policy, if there is one, as the court tended to rule favorably for the plaintiff when he/she used the available grievance policy. Additional implications are explored and limitations are discussed.



## **Introduction**

Retaliation in organizations creates legal liability for the organization. Retaliation cases have been on the rise, particularly in the last decade. From 1992 to 2008, the number of retaliation cases doubled, and the trend has been continuing (Seidenfeld, 2008). As of 2003, retaliation in the workplace was the third most common type of discrimination about which employees filed a complaint with the Equal Employment Opportunity Commission (EEOC; Solano & Kleiner, 2003). Retaliation has continued to be very prevalent and made up almost a third of the approximately 90,000 employment discrimination claims filed with the EEOC in 2015 (Feldblum & Lipnic, 2016).

In this study, all relevant United States Supreme Court cases from *BNSF v. White* (2006) until January 2018 will be analyzed in order to determine which factors influence decisions in court cases that involve a claim of retaliation. The purpose of this study is to more fully understand how different elements of retaliation claims affect the outcome of the court cases, as well as to explore how the legal system reacts to the different organizational situations. Prior to analyzing court decisions, it is vital to explore what retaliation is; the importance of retaliation; some specific issues such as what constitutes opposition, third party retaliation, and increased favorability for employees; direct costs of retaliation; indirect costs of retaliation; legal liability associated with retaliation; and compliance issues for organizations.

### **What is Retaliation?**

This study primarily focuses on retaliation under Equal Employment Opportunity law, although one reviewed case dealt with retaliation in the context of “whistleblowing” laws. Retaliation under EEO Law occurs when an employee either opposes an illegal

employment practice or participates in filing a formal claim, and the employer subsequently engages in an adverse activity against the employee for those actions (Cavico & Mujtaba, 2011). Employers are not to retaliate against employees who engage in filing a discrimination charge, assist with an investigation, complain about what they believe to be discrimination, do not obey a discriminatory order, or request reasonable accommodation (Seidenfeld, 2008). Retaliation activities may involve suspension, termination, verbal attacks, demotion, and refusal to hire, to name a few.

There are three requirements for retaliation cases specified by Section 704a of Title VII of the Civil Rights Act (1991). In the first prong, the plaintiff must engage in a protected activity by either complaining about a specific illegal employment practice (opposition) or filing a formal claim of discrimination (participation). In the second prong, after engaging in the protected activity, the plaintiff must suffer an adverse employment action from the defendant. Finally, in the third prong the plaintiff must be able to show a causal connection between the protected activity and the adverse employment action. The most common way for the plaintiff to show a causal connection between the protected activity and the adverse action is by temporal proximity. However, when the time period between the two activities is more than four months, courts are split on their decision of considering it sufficient evidence of a causal connection (Daniels & Bales, 2008). Thus, there is a relatively short period of time to establish temporal proximity and, thus, to establish a causal connection. If all three of these requirements are met, there is a basis for a retaliation claim against the employer.

Many employees do not understand the laws protecting them and, due to a number of incentives to stay silent, do not report workplace problems (Alexander &

Prasad, 2014). Courts protect “whistleblowers” who make known discriminatory information about an employer so that employees will not be discouraged from exposing discriminatory acts for fear of associated consequences. In *BNSF v. White* (2006), the United States Supreme Court stated that the original purpose of the anti-retaliation provision was to ensure that employees are free from coercion against reporting unlawful practices (Wright, 2011). As such, employees are encouraged to take action if they believe there are discriminatory practices occurring, and they should not fear repercussions for doing so.

EEO laws are intended to promote a fair workplace and provide employees with remedies under the law if they are violated. The goal of retaliation laws is to reinforce that employment actions should not affect employees’ rights under law. At the same time, retaliation laws are not intended to restrict employers from addressing discipline issues with employees.

There are a number of remedies available to plaintiffs who successfully pursue a retaliation claim and the case is ruled in their favor. These remedies include injunctive relief, compensatory damages, and punitive damages (Cooney, 2016). Plaintiffs also may be able to recover attorney fees. However, through these remedies the plaintiff can only recover damages caused by the organization’s retaliatory actions.

In this review there will be an exploration of the importance of retaliation as well as when retaliation may occur and why (Sanchez, 2007). Retaliation has a number of components that are important to consider such as what constitutes opposition, the issue of third party retaliation claims, and the courts being remarkably favorable to employees (Cavico & Mujtaba, 2011; Miles, Fleming, & McKinney, 2010; Oderda, 2010). Beyond

this, there are direct costs for the organization as well as indirect costs, including decreased employee productivity, increased turnover, and performance issues (Cooney, 2016; Feldman & Lipnic, 2016; Seidenfeld, 2008; Solano & Kleiner, 2003). Legal liability of the organization and compliance with EEO guidance and sound organizational policy are final aspects to note to prompt organizations to avoid retaliation claims (Gutman, Koppes, & Vodanovich, 2011). All of these components will be reviewed in the following pages to provide background information regarding retaliation claims against organizations.

### **Importance of Retaliation**

Retaliation cases are complex, and it is relatively easy for an organization to be taken to court because of a retaliation claim (Sanchez, 2007). Retaliation claims are becoming more frequent as employees are encouraged to stand up for themselves and what is lawful. Because retaliation cases have become much more prevalent over the past couple of decades, clearly they are something organizations need to be aware of and to try to avoid (Seidenfeld, 2008). The increase in retaliation cases should promote organizational concern for guiding workplace behavior because of the associated negative consequences for organizations who are a part of a retaliation case (Miles, Fleming, & McKinney, 2010). Retaliation cases can cost organizations large sums of money and can create legal liability for the organizations (Solano & Kleiner, 2003). Additionally, retaliation claims create issues with low employee productivity, increased turnover, and difficulty evaluating employees' performance. Accordingly, it is in the employer's best interest to avoid retaliation cases.

## **When Does Retaliation Occur and Why?**

Retaliation most often occurs when an employee believes an employment practice is discriminatory, then opposes the employment practice or files a formal complaint, followed by the employer taking adverse action against the employee (Civil Rights Act, 1991). The retaliatory act often takes the form of some kind of harassment (Sanchez, 2007). Retaliation can be purposeful or not; either way it may still be problematic for the employer. As such, employers should have a valid reason for every employment action and be conscious of what unintended impact these actions could have on employees.

### **Opposition**

An important point regarding retaliation claims is how opposition is determined. Opposition that is indirectly and unintentionally conveyed to an employer is just as serious as that which is directly expressed, intentional opposition (Green, 2010). As such, complaints to coworkers or general voicing of disagreement by the employee is protected (Oderda, 2010). Essentially, if opposition reaches a decision-maker at the managerial/supervisory level of the company, it is considered to be opposition. Participation is a formal act, but opposition can take many forms (Cavico & Mujtaba, 2011). Assuming the complaint reaches management, the employer is responsible for opposition occurring and must take action to rectify the issue without engaging in a retaliatory action. In *Hertz v. Luzenac Am. Inc.* (2004), the court held that when the employee got upset and yelled at his supervisor in public about some discriminatory comments, the employee action was protected under the opposition clause because the employee's complaint was communicated to management (Oderda, 2010).

Opposition claims typically are interpreted very broadly so that employees do not feel discouraged from standing up for themselves and receiving the help they need (Oderda, 2010). However, opposition is not protected if it damages the organization's business goals in any way. Opposition also may not be protected if it stands in the way of the employer functioning optimally or disrupts operations.

An issue the courts are left to define is what is meant by opposition. There is little guidance to employers on the line between what constitutes opposition and what does not. It is difficult for organizations to know how to handle employees who have filed claims against them because many reactions can be interpreted as retaliation. As such, in general, if employers believe an employee has opposed a practice, they should be careful to ensure that their actions reflect sound personnel practice (Cavico & Mujtaba, 2011).

### **Third Party Retaliation Claims**

Another important point for organizations is that after the *Crawford v. Metro Government of Nashville* (2009) ruling and the *Thompson v. North American Stainless* (2011) third-party decisions, under civil rights law, those who can act as the plaintiff in retaliation cases has expanded significantly (Cavico & Mujtaba, 2011). Almost anyone "associated" with the employee who opposed or participated can file as the plaintiff. Hegerich stated that retaliation need not be against the person who actually engaged in the participation or opposition, but it can be against someone closely related to that person exercising his/her rights (as cited in Cavico & Mujtaba, 2011). Many courts have determined that relatives have automatic standing to bring a retaliation claim to the table in the stead of the person actually retaliated against (Cooney, 2016). The Court broadly

interprets anti-discrimination laws in order to avoid discrimination occurring against employees.

The EEOC likewise advocates for this broad interpretation. Those the EEOC is protecting includes people actually initiating the discrimination claim, people participating in discrimination case, people opposing workplace discrimination, and those third party individuals who are closely related to the claimant of discrimination (Cavico & Mujtaba, 2011). This broad interpretation suggests that employers should be very careful of their actions because people who are closely related to the employee who opposed or participated can file as the plaintiff and take the employer to court.

An employee who does not have a legitimate claim of discrimination can still prevail in court if an employer engages in retaliatory actions against that employee (Miles, Fleming, & McKinney, 2010). If an employer imposes retaliatory actions against the employee, the court stands in favor of the employee whether or not the initial claim of discrimination made by the employee is sufficient. Because a retaliation claim can favor the employee regardless of whether the initial discrimination claim is upheld, it is the responsibility of the organization to avoid retaliatory acts and keep employees well informed of compliance and the associated consequences of failure to comply.

### **Favorability for Employees**

Here I discuss further the second prong of retaliation that requires the plaintiff to suffer a materially adverse employment action by the defendant after opposing or participating (Gutman et al., 2011). Prior to *BNSF v. White* (2006), there was confusion on what constituted a materially adverse action. There are three theories for this standard, the ultimate employment standard, adverse employment standard, and EEOC deterrence

standard. Ultimate employment consists of employment acts such as hiring, granting leave, discharging, promoting, and compensating, and is analogous to quid pro quo harassment. Adverse employment involves retaliatory acts that interfere with the terms and conditions of employment, and is analogous to hostile environment harassment. EEOC deterrence requires the retaliatory act to deter a reasonable person from engaging in a protected activity, making it the most lenient of the three standards. The EEOC has established guidance regarding what constitutes a materially adverse action and has made it clear that it supports the EEOC deterrence standard.

An important point is that claims that pass the first two prongs of retaliation cases may still fail the third prong. The third prong requires the plaintiff to establish a causal connection between the protected activity and the adverse employment action, even with claims that satisfy the ultimate employment definition (Gutman et al., 2011). As such, because harassment is a very common retaliation complaint and does not need to reach the threshold for a Title VII violation to constitute retaliation under EEOC deterrence, organizations need to be vigilant to avoid harassment claims that may fail to meet the ultimate employment standard, but will be successful retaliation claims under the EEOC deterrence standard.

Despite plaintiffs often failing to establish the third prong in a retaliation claim, courts tend to be very favorable toward employees (Riddell & Bales, 2005). Anti-retaliation provisions are intended to protect employees from discrimination and, as such, courts work to ensure that if there is a legitimate retaliation claim, the employee is protected. However, this favorability to the employees has the potential to be abused by employees who file frivolous claims; this is a significant concern of critics (Seidenfeld,



2008). The leniency of the courts with retaliation claims may enable individuals to file unmeritorious claims and has the ability to be abused. This leniency also may cause employers to settle frivolous claims rather than take the claim to court, resulting in a burden on the employer that should never be a burden.

Employers should be aware of the potential for frivolous claims and work to prevent employees from feeling a claim needs to be made (Seidenfeld, 2008). Organizations using a broad approach to interpreting adverse employment actions helps protect employees from retaliation, helps protect employers from frivolous claims, and gives employers guidance on what behaviors are considered retaliation (Riddell & Bales, 2005).

## **The Direct Cost of Retaliation**

### **Financial Burden**

Retaliation can have a significant direct cost to organizations. The legal liability of being taken to court and found guilty can result in a serious financial burdens for the organization (Solano & Kleiner, 2003). Even when organizations can avoid court and settle, it can be a large burden financially. In 2008 alone, the EEOC attained more than \$111 million for plaintiffs from settlements for retaliation cases (Miles, Fleming, & McKinney, 2010). With the prevalence of retaliation claims with the EEOC, associated settlements are significant, causing serious financial issues for companies. As the extent of the retaliatory acts becomes more egregious, potential employer liability concomitantly increases. It is the employer's responsibility to ensure that employees are informed of compliance and any consequences associated with a lack of compliance in order to prevent retaliatory acts and thus reduce the financial burden on the organization.

## **Indirect Costs of Retaliation**

In addition to the direct cost of retaliation, an organization may also encounter indirect costs. These indirect costs of lower employee productivity, increased turnover, and performance issues are discussed next.

### **Employee Productivity**

Retaliation has a number of implications for organizations, one of which is the impact on the individuals in the organization. When the retaliation case ends in the favor of the plaintiff, there can be a negative impact on employee morale and productivity (Solano & Kleiner, 2003). When employees hear about a retaliation claim against their employer, there can be a sense of discouragement that they are working for an unlawful company that has little respect for its employees. Employees dislike hearing that one of their co-workers was retaliated against by the very company for whom they dedicate their time and energy. The knowledge of retaliation decreases the general morale of the employees who hear about the case and also leads to decreased productivity.

Unproductive employees can cause the company to suffer financially.

### **Increased Turnover**

With decreased employee morale and resultant decreased productivity, comes the possibility of increased turnover (Feldman & Lipnic, 2016). Employees suffer in many ways when there is harassment and retaliation in the workplace. This suffering could be physical or psychological in nature. Experiencing this negativity in the workplace causes employees to withdraw and can result in absenteeism. If employees withdraw further from effects of a negative work environment, it can lead to potential reputational damage for the organization as former employees share why they left their jobs.

## **Performance Issues**

Despite the noted concerns for retaliation claims, avoidance of retaliation should not force employers to disregard the management of employee performance standards in fear that a retaliation case may be brought against them. Unfortunately, employers often are hesitant to take disciplinary action against employees who have filed complaints because of fear that the unrelated personnel action will be perceived as a retaliatory act (Seidenfeld, 2008). It is important for the employer to be very clear with any messages to the employee regarding their employment, such as performance expectations (Miles, Fleming, & McKinney, 2010). Ensuring clarity of employer communication helps to ensure nothing can be brought back to the employer for failure to communicate expectations for employee performance.

Inadequate and non-candid performance evaluations also can be the cause of retaliation claims (Cooney, 2016). As such, employers should honestly evaluate and, if necessary, discipline employees. Employees should fully understand why they received the feedback they did and should be aware of the employer's expectations regarding their performance. The employer also must educate managers on how to handle disciplinary actions with an employee who has filed a complaint and be able to justify any disciplinary action against the employee (Seidenfeld, 2008). If managers cannot justify disciplinary actions, then the employer may be liable for retaliatory actions (Bagenstos, 2013). As such, employers need to be aware of what constitutes discrimination as well as how to handle interactions with employees after a complaint has been filed.

## **Legal Liability**

There can be significant legal liability for organizations. Whether explicit or implicit, all anti-discrimination laws contain an anti-retaliation provision and, as such, it is an important legal concern for employers (Cooney, 2016). Federal statutes specifically prohibiting retaliation include: Title VII of the Civil Rights Act of 1964, 1972, and 1991; the Age Discrimination in Employment Act of 1967 (ADEA); the Americans with Disabilities Act of 1990 (ADA); the Employee Retirement Income Security Act of 1974 (ERISA); the Fair Labor Standards Act (FLSA); the National Labor Relations Act (NLRA); and the Family and Medical Leave Act (FMLA). However, the Supreme Court ruled that retaliation also is a valid claim under anti-discrimination laws that do not contain a specific retaliation clause (*CBOCS West v. Humphries*, 2008; *Sullivan v. Little Hunting Park*, 1969; *Jackson v. Birmingham Board of Education*, 2005; *Gomez-Perez v. Potter*, 2008). Clearly, it is important for employers to attend to issues that could result in retaliation claims.

### **Title VII**

Title VII of the Civil Rights Act is the foundational anti-discrimination law that also applies to retaliation. The anti-retaliation provision in Section 704(a) of Title VII states that it is illegal for an employer to discriminate against employees or applicants because of opposition or participation (Civil Rights Act, 1991). The opposition clause covers any kind of complaint about discriminatory employment practices; the participation clause covers a formal legal complaint. Employees includes both current and former employees of the organization as well as current applicants (*Robinson v. Shell Oil*, 1997).

The *Robinson* ruling had a significant impact on EEOC guidance on retaliation (Gutman et al., 2011). This guidance identified EEOC deterrence as the standard for a materially adverse action. Accordingly, a materially adverse action by the EEOC deterrence standard is defined as one that would dissuade a reasonable worker from making or supporting a charge of discrimination. As such, the retaliation clause prohibits any adverse treatment based on retaliatory motive that is reasonably likely to deter an individual from engaging in protected activity. The *Robinson* ruling set the stage for the *BNSF v. White* (2006) ruling.

After *Robinson*, the EEOC updated the EEOC Compliance Manual of 1998 to indicate why it rejected the ultimate employment and adverse employment standards in favor of the EEOC deterrence standard (Gutman et al., 2011). Recently, the EEOC issued the EEOC Guidance on Retaliation and Related Issues (EEOC Notice Number 915.004, 2016). This document demonstrates that the EEOC rejects the ultimate employment and adverse employment standards in favor of the EEOC deterrence standard; thus the EEOC deterrence standard is what applies to organizations.

The *BNSF v. White* (2006) ruling addressed the definition of what constitutes a materially adverse action (Gutman et al., 2011). The Supreme Court ruled that the plaintiff had suffered a retaliatory action and based this decision on the definition of a materially adverse action under the EEOC deterrence standard. There was concern that, because of this more lenient definition, there would be difficulty in determining trivial harm from significant harm. However, based on rulings post-*BNSF*, including *Thomas v. Potter* (2006) and *Jordan v. Chertoff* (2006), the courts appeared to have no trouble distinguishing between trivial and significant harm (Dunleavy, 2007).

## **Compliance Issues for Retaliation Cases**

In light of the prevalence of retaliation claims, there are numerous actions organizations should take to reduce the likelihood of retaliation. Compliance with EEO guidelines and sound organizational policy is important in preventing and correcting potentially retaliatory actions (Gutman et al., 2011). Sound personnel practice stems from following EEOC guidance on such matters and documenting any and all employment decisions.

In general, organizations should foster an organizational culture where harassment is not tolerated while civility is promoted (Feldman & Lipnic, 2016). This organizational value should be communicated to everyone in the organization, and those in leadership roles should model these values and lead others in the commitment to a civil culture.

There are a number of recommendations for avoiding the potential for retaliatory actions. The first is to adopt anti-retaliation, anti-bullying, and civility policies that are more extensive than EEOC anti-harassment guidance (Gutman et al., 2011). With hostile environment sexual harassment, employers can mount an affirmative defense if they have acted to prevent and promptly correct any harassment and the employee failed to take advantage of opportunities to prevent or limit harassment. However, there is no affirmative defense for retaliation cases as there is for sexual harassment cases; thus, the employer should prevent opposition from ever becoming participation.

The second recommendation is to provide effective internal grievance procedures with due process guarantees so that employees do not feel the need to go outside of the company with retaliation or discrimination issues (Gutman et al., 2011). Internal grievance procedures would help the employees keep any complaints have have about the

company within the company, limiting outside action, and thus additional claims against the organization. Employees also should know their rights regarding the entire process.

The third recommendation is to avoid treating Title VII complainants any differently than they normally would be treated (Gutman et al., 2011). This treatment involves not giving those employees less favorable working conditions, not reducing performance appraisal ratings based on reasons associated with the complaint, and not denying any form of benefits, to name a few. Employees who have complained should be treated as fairly as any other employee. Essentially, there should be extra precaution taken to ensure no trivial or otherwise adverse actions occur against the employee who opposed or participated.

Another recommendation (Gutman et al., 2011) is to train employees to tolerate individual differences due to race, religion, sex, age, disability, and sexual identity (i.e., protected groups identified by EEO law). These differences do not affect business operations and, as such, should not result in any differential treatment. Differences based on protected group status should not come into play in personnel actions or should be addressed in diversity training and a culture of inclusion. A sound policy outlining acceptable activities versus unacceptable activities would be good for an organization to have to supplement training.

Yet another recommendation is to hold supervisors and coworkers accountable for the standards of treating each other appropriately by including this expectation in the performance appraisal process (Gutman et al., 2011). If employees are expected to treat other employees with respect and courtesy and they are evaluated on this formally in the performance review, they are likely to strictly abide by the policies because the policies

impact them directly. Not abiding by the policies should negatively impact employees because failure to abide will be reflected in their performance review and could impact a promotion or result in disciplinary action. Likewise, following the policies should result in a positive consequence.

A final recommendation from Gutman et al. (2011) is to ensure that documentation of EEOC complaints is handled discretely and not placed in personnel files where supervisors can see such complaints. If other employees do not know about the complaints, it is harder to show a causal connection between the complaint and any adverse employment action against the complainant. There should be strict confidentiality of such paperwork.

Aside from Gutman et al.'s (2011) recommendations, Seidenfeld (2008) opined that, although there currently is no such opportunity, in the future employers should be able to have an affirmative defense against certain alleged acts of retaliation similar to the affirmative defense with sexual harassment cases. As such, for retaliatory acts that are not materially adverse, employers should be able to avoid liability if they have appropriate policies in place to prevent and correct any retaliatory behavior, as well as if the employee filing a complaint fails to take advantage of the preventative and corrective opportunities. If employees followed grievance procedures, employers would be able to take preemptive actions to avoid violations of Title VII's retaliation provision.

In summary, retaliation cases have been surprisingly prevalent in recent years. As such, it is important organizations understand what constitutes retaliation as well as how the courts have ruled in the past on retaliation cases. Organizations also need to be aware of the direct and indirect costs that retaliation claims can have for the organization,



regardless of whether claims are settled or taken to court. All laws that protect civil rights also cover retaliation; thus, there is significant potential legal liability on the part of the organization. However, there are a number of actions organizations can take to reduce or even eliminate retaliation claims against them.

### **The Current Study**

The current study examines court cases that involved employee retaliation claims to determine the factors that are likely to influence the ruling of the case in favor of the plaintiff or the defendant. This study lends additional insight into retaliation claims and how organizations can better prevent them. Fourteen Supreme Court case holdings are presented. Eleven of the 14 Supreme Court cases involved an employee retaliation claim and were coded using a coding scheme developed for this purpose. The status of each case on the coded factors is narrated to investigate the hypotheses identified below.

As specified by Section 704a of Title VII of the Civil Rights Act of 1991, there are three essential prongs for the plaintiff to establish a valid retaliation claim. Therefore, it is expected that:

*Hypothesis 1:* The court will rule in favor of the plaintiff if the plaintiff is able to establish all three prongs of a retaliation claim.

As established in the EEOC Enforcement Guidance on Retaliation and Related Issues (2016), the EEOC endorses the EEOC deterrence standard for what constitutes a materially adverse action. The EEOC deterrence standard was used by the Supreme Court in *BNSF v. White* (2006). Therefore, it is expected that:

*Hypothesis 2:* The court is more likely to rule in favor of the plaintiff if the retaliatory act meets or exceeds EEOC deterrence standard.

As stated in the EEOC Enforcement Guidance on Retaliation and Related Issues (2016), it is important for organizations to have policies that include examples of retaliatory acts and proactive steps for avoiding actual or perceived retaliation. Therefore it is expected that:

*Hypothesis 3:* The court is more likely to rule in favor of the defendant if the defendant has an anti-retaliation policy in place.

As established in the EEOC Enforcement Guidance on Retaliation and Related Issues (2016), the EEOC stated that a promising policy to implement in the effort to minimize the likelihood of retaliation violations is an internal reporting mechanism for employees concerns. Likewise, Gutman et al. (2011) recommended incorporating internal grievance procedures to reduce organizational liability. Therefore, it is expected that:

*Hypothesis 4:* The court is more likely to rule in favor of the defendant if the defendant has a grievance policy for employees and the plaintiff failed to use this policy.

## **Method**

### **Criteria for Selecting Cases for Review**

All court cases selected for review are from the Supreme Court level. The researcher found 19 court cases involving retaliation at the Supreme Court level. The Circuit Court level was explored and tens of thousands of cases were found; this volume of cases was deemed unfeasible for this research project. Supreme Court cases set the precedent for all lower courts in the country; thus, future retaliation cases will use this case law when reaching a conclusion. To find relevant cases, LexisNexis and Westlaw, legal document search engines, were used and the relevant documents were obtained

from Westlaw. This review includes all court cases with legitimate employee retaliation claims since and including *BNSF v. White* (2006) until January 2018. *BNSF v. White* was chosen as the starting point due to its status as a landmark retaliation court case. This ruling was of utmost importance for future retaliation cases and has been referenced in numerous cases since its conclusion. Thus, court cases from 2006 to January 2018 were used to restrict the search to only the most recent and relevant cases. The search for cases used such terms as “employee retaliation claims,” “retaliation claims,” and “retaliation.” The cases were then reviewed to confirm that each included a claim of employee retaliation.

### **Coding the Cases**

The identified cases were coded using a coding scheme developed for this research project. The coding scheme was developed because no other study was identified that reviewed court cases addressing retaliation. The coding factors included reflect the retaliation literature and parallel some aspects of the sexual harassment literature. The factors that were coded and the coding scheme may be found in Table 1.

Table 1

*Coding Factors: Case Characteristics*

Coding Factor	Definition	Code	No Information
Prongs of Retaliation	Was retaliation established?	Yes, No	NI
	Did the plaintiff engage in a protected activity?	Participation, Opposition, No	NI
	Did the plaintiff suffer a materially adverse action after engaging in a protected activity?	Yes, No	NI
	Did the plaintiff demonstrate a causal connection between the alleged materially adverse action and the protected activity?	Yes, No	NI
Protected Action	What was the alleged illegal action that the defendant engaged in?	Harassment, Other	NI
	If it was harassment, what type of harassment was it?	Physical, Verbal, Sexual, Other	NI
	Did the court acknowledge that harassment occurred?	Yes, No	NI
EEOC Deterrence	Did the materially adverse action meet the EEOC deterrence standard?	Yes, No	NI
Grievance Policy	Did the defendant have a grievance policy?	Yes, No	NI
	Did the plaintiff use the grievance policy?	Yes, No	NI
	If plaintiff did not use the grievance policy, why not?	Fear of further repercussions, Obstacles, Ineffective complaint process, Other	NI

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Coding Factor	Definition	Code	No Information
Anti-retaliation Policy	Did the defendant have an anti-retaliation policy?	Yes, No	NI
Statute	What statute(s) was the case filed under?		NI
Case Decision	Where was the case decided?	Supreme Court, Appeals Court, District Court	NI
Final Decision	The final decision was for whom?	Plaintiff, Defendant, Settled	NI
Supreme Court Holdings	What were the primary Supreme Court holdings?		NI
Certiorari	Who requested certiorari?	Plaintiff, Defendant	NI
Majority Opinion	Which justice wrote the opinion of the majority?		NI
Majority	Which justices supported the majority opinion?		NI
Dissenting Opinions	Which justices had dissenting opinions?		NI

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## Results

Nineteen cases were found at the Supreme Court level that involved a claim of retaliation. All 19 cases were reviewed and coded according to the coding scheme. Upon review, five cases were excluded for various reasons. *Perry v. Merit Systems Protection Board* (2017) was excluded because it was remanded to the Washington D.C. District Court and this ruling was not published, thus precluding the researcher from knowing the final ruling. *Ortiz v. Jordan* (2011) was excluded because it was a case of prisoner retaliation as opposed to employee retaliation and the Supreme Court did not rule on the issue of retaliation. *Vance v. Ball State University* (2013), *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012), and *Wal-Mart Stores v. Dukes* (2011) were excluded because the Supreme Court did not rule on the claim of employee retaliation and, as such, there were no relevant retaliation holdings from these cases. This resulted in 14 cases remaining; however, only 11 were coded according to the coding scheme. The remaining three cases, *Rent-A-Center v. Jackson* (2010), *Jones v. Bock* (2007), and *Osborn v. Haley* (2007), were included only in a review of court holdings because, although there were relevant holdings, there was no ruling on the retaliation claim (see Appendix B). Thus, 14 cases had important court holdings and, of these, 11 cases were coded according to the coding scheme (see Appendix C).

## Coding

There were three coders, all of whom are industrial/organizational psychology graduate students at Western Kentucky University. Coders were trained on the coding scheme, using one case as practice. Any differences in coding were discussed and consensus was reached on each factor. For each subsequent case, there were two coders.

The first coded the case and the second recoded independently to confirm that the coding was accurate based on the case information. Anywhere there was a situation where there was disagreement on how a case was coded, a licensed industrial-organizational psychologist determined how it should be coded.

For each case, raters indicated *no information* (NI) if the case did not include the necessary information regarding a factor. Raters indicated *not applicable* (NA) for cases where a factor did not apply. The table of coded factors for each case is included in Appendix C. Due to the small number of cases that met the coding requirements, it was determined a statistical analysis was inappropriate. As such, a narrative description of the findings is presented.

For the first factor, whether retaliation was established, seven cases successfully established retaliation as opposed to four cases (*Lane v. Franks*, 2014; *Borough of Duryea, Pennsylvania v. Guarnieri*, 2011; *Gomez-Perez v. Potter*, 2008; *University of Texas Southwestern Medical Center v. Nassar*, 2013) that failed to do so. The protected activity that was engaged in by the plaintiff was split with seven instances of participation and six instances of opposition. There were two cases, *Borough of Duryea, Pennsylvania v. Guarnieri* (2011) and *Gomez-Perez v. Potter* (2008), in which the plaintiff failed to establish that there was an adverse action by the defendant; in nine cases the plaintiff successfully established an adverse action occurred against her/him. In eight cases, a causal connection between engaging in the protected activity and suffering an adverse action was established, most frequently by demonstrating temporal proximity. In two cases, *Gomez-Perez v. Potter* (2008) and *University of Texas Southwestern Medical Center v. Nassar* (2013), a causal connection could not be shown and, in one case,

*Graham County Soil and Water Conservation District v. Wilson* (2010), there was no information included on this factor. Seven cases resulted in a retaliatory action of termination, with one of those cases (*Lawson v. FMR LLC*, 2014) also involving some verbal harassment. There were three claims of verbal harassment, *Lawson v. FMR LLC* (2014), *Green v. Brennan* (2016), and *Gomez-Perez v. Potter* (2008), two of which the courts acknowledged as constituting harassment (*Lawson v. FMR LLC*, 2014; *Green v. Brennan*, 2016).

Eight cases involved an adverse action that met the EEOC deterrence standard for what constitutes a materially adverse action; three cases failed to meet the standard. In two of the three cases, *Borough of Duryea, Pennsylvania v. Guarnieri* (2011) and *Gomez-Perez v. Potter* (2008), the court stated that these “adverse” actions were not adverse at all, but rather trivial everyday inconveniences. In *Borough of Duryea, Pennsylvania v. Guarnieri* (2011), the defendant issued 11 job directives explaining how the job should be conducted. In *University of Texas Southwestern Medical Center v. Nassar* (2013), the plaintiff had a job offer withdrawn due to another employee undermining his offer. None of these proclaimed adverse actions met the EEOC deterrence standard.

Three cases, *Lawson v. FMR LLC* (2014), *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011), and *Green v. Brennan* (2016), explicitly indicated that the defendant had a grievance policy for the employees to use and all three demonstrated that the plaintiff used the prescribed grievance policy. None of the cases involved a plaintiff knowing of the grievance policy and not using it, and none of the cases indicated whether the defendant had an anti-retaliation policy.



Claims were filed under numerous statutes, although five cases were filed under Title VII (see Appendix C). There were also two instances of plaintiffs filing under Section 1983. In addition, there was a claim under Section 1981, 1514A, the False Claims Act (FCA), the Petition Clause, the Fair Labor Standards Act (FLSA), and the Age Discrimination in Employment Act (ADEA).

Seven of the cases (*CBOCS West, Inc. v. Humphries*, 2008; *Thompson v. North American Stainless, LP*, 2011; *Borough of Duryea, Pennsylvania v. Guarnieri*, 2011; *Kasten v. Saint-Gobain Performance Plastics Corp.*, 2011; *Green v. Brennan*, 2016; *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 2009; *University of Texas Southwestern Medical Center v. Nassar*, 2013) were remanded all the way to the District Court, where the final decision was made. Three cases (*Graham County Soil and Water Conservation District v. Wilson*, 2010; *Lane v. Franks*, 2014; *Gomez-Perez v. Potter*, 2008) were remanded to the Appeals Court, and one case (*Lawson v. FMR LLC*, 2014) was decided at the Supreme Court without remand.

The final decision of the court varied with five cases favoring the plaintiff, two favoring the defendant, and four explicitly resulting in a settlement. In most cases the plaintiff requested certiorari, with only three instances (*CBOCS West, Inc. v. Humphries*, 2008; *Borough of Duryea, Pennsylvania v. Guarnieri*, 2011; *University of Texas Southwestern Medical Center v. Nassar*, 2013) of the defendant requesting certiorari.

Regarding the justice that delivered the opinion for each case, most justices delivered at least one opinion, with Roberts being the only one to not deliver an opinion for the court. Sotomayor, Kennedy, and Breyer each delivered the opinion of the court twice. In five cases, there were only one or two dissenting opinions, and there were three

cases (*Lane v. Franks*, 2014; *Thompson v. North American Stainless, LP*, 2011; *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 2009) that involved a unanimous court<sup>1</sup>. However, there were three cases (*Lawson v. FMR LLC*, 2014; *Gomez-Perez v. Potter*, 2008; *University of Texas Southwestern Medical Center v. Nassar*, 2013) that involved three or more chief justices stating dissenting opinions.

### **Results for Hypotheses**

Hypothesis 1 stated that the court will rule in favor of the plaintiff if the plaintiff is able to establish all three prongs of a retaliation claim. Hypothesis 1 was fully supported by five cases, *Lawson v. FMR LLC* (2014), *Graham County Soil and Water Conservation District v. Wilson* (2010), *Thompson v. North American Stainless, LP* (2011), *Green v. Brennan* (2016), and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* (2009). Hypothesis 1 was somewhat supported by two additional cases, *CBOCS West, Inc. v. Humphries* (2008) and *Kasten v. Saint-Gobain Performance Plastics Corp.* (2011), both of which settled. However, there was one instance, *Lane v. Franks* (2014), where the plaintiff did establish all three prongs of retaliation but the court ruled in favor of the defendant on the alternate grounds that the defendant had qualified immunity. Thus, in five of the eight cases in which the plaintiff established all three prongs of a retaliation claim the court found for the plaintiff, supporting Hypothesis 1.

Hypothesis 2 stated that the court is more likely to rule in favor of the plaintiff if the retaliatory act meets or exceeds the EEOC deterrence standard. Of the eight cases

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<sup>1</sup>Note. In *Thompson v. North American Stainless, LP* (2011), the unanimous decision was 8-0 because Justice Kagan recused herself from the case.

where the adverse action met the EEOC deterrence standard, the same five cases that fully supported Hypothesis 1, *Lawson v. FMR LLC* (2014), *Graham County Soil and Water Conservation District v. Wilson* (2010), *Thompson v. North American Stainless, LP* (2011), *Green v. Brennan* (2016), and *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* (2009), also supported Hypothesis 2 as all five were ruled in favor of the plaintiff. Two of the eight cases settled (*CBOCS West, Inc. v. Humphries*, 2008; *Kasten v. Saint-Gobain Performance Plastics Corp.*, 2011), and one, *Lane v. Franks* (2014), was ruled in favor of the defendant. Thus, Hypothesis 2 was supported by five of the six cases meeting EEOC deterrence standard in which there was a ruling.

Hypothesis 3 stated that the court is more likely to rule in favor of the defendant if the defendant has an anti-retaliation policy in place. This hypothesis could not be addressed due to the lack of information in every case regarding whether the defendant had an anti-retaliation policy.

Hypothesis 4 stated that the court is more likely to rule in favor of the defendant if the defendant has a grievance policy for employees and the plaintiff failed to use this policy. All three cases (*Lawson v. FMR LLC*, 2014; *Kasten v. Saint-Gobain Performance Plastics Corp.*, 2011; *Green v. Brennan*, 2016) in which the defendant explicitly had a grievance policy also indicated that the plaintiff used the grievance policy. All three cases found in favor of the plaintiff, thus providing support for Hypothesis 3.

## Supreme Court Holdings

The holdings from the 13 Supreme Court cases relevant to employee retaliation claims are summarized in Table 2<sup>2</sup> and are described below. The implications of each holding may be found in the Discussion section.

The primary holding in *Rent-A-Center, West, Inc. v. Jackson* (2010) was that the provision of an employment agreement which delegated to an arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability was a valid delegation under the Federal Arbitration Act (FAA). The Supreme Court ruled that Title VII retaliation claims must be proved according to traditional principle of but-for causation cited in *University of Texas Southwestern Medical Center v. Nassar* (2013).

*Green v. Brennan* (2016), a constructive discharge case, held that the 45-day clock for a federal employee's constructive discharge claim under Title VII begins running after the employee resigns. As such, in this case, the 45-day limitation period started when the employee gave the Postal Service notice of his resignation.

In *Borough of Duryea, Pennsylvania v. Guarnieri* (2011), the Supreme Court ruled that the municipality's alleged retaliatory actions did not give rise to liability under the Petition Clause.

Three case holdings addressed who is protected against retaliation and the boundaries of retaliation protection. In *Thompson v. North-American Stainless, LP* (2011), the Supreme Court held that the employer's alleged act of firing an employee as retaliation against the employee's fiancée, if proven, constituted unlawful retaliation.

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<sup>2</sup>Note. *Jones v. Bock* (2007) was not included in the table of Supreme Court holdings because the relevant retaliation holding was at the District level. The case is described in detail at the end of the Discussion section.

Table 2

*Supreme Court Holdings*

<b>Case</b>	<b>Court Holdings</b>
<i>Borough of Duryea, Pennsylvania v. Guarnieri</i> (2011)	Municipality's allegedly retaliatory actions did not give rise to liability under the Petition Clause.
<i>CBOCS West, Inc. v. Humphries</i> (2008)	Section 1981 encompasses retaliation claims. Cognizable 1981 claims of retaliation include claim by individual who suffers retaliation for having tried to help another. Cognizable 1981 claims of retaliation include employment-related ones.
<i>Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee</i> (2009)	The protection of the opposition clause of the anti-retaliation provision of Title VII extended to employee who spoke out about sexual harassment, not on her own initiative, but in answering questions during employer's investigation of coworker's complaints.
<i>Gomez-Perez v. Potter</i> (2008)	A federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA.
<i>Graham County Soil and Water Conservation District v. Wilson</i> (2010)	Term "administrative" as used in "public disclosure" bar of the False Claims Act (FCA) was broad enough to include not just federal administrative reports, hearings, audits or investigations, but state and local as well.
<i>Green v. Brennan</i> (2016)	The 45-day clock for a federal employee's constructive discharge claim under Title VII begins running only after the employee resigns. The 45-day limitations period started to run when the employee gave the Postal Service notice of his resignation.
<i>Kasten v. Saint-Gobain Performance Plastics Corporation</i> (2011)	The anti-retaliation provision of FLSA protects oral as well as written complaints of violation of the Act.
<i>Lane v. Franks</i> (2014)	Director's sworn testimony at former program employee's corruption trials was citizen speech eligible for First Amendment protection, not unprotected employee speech. Director's testimony was speech on matter of public concern. Government lacked any interest justifying allegedly retaliatory termination of director, and thus director's testimony was protected by First Amendment, but... President in his personal capacity was entitled to qualified immunity.

<b>Case</b>	<b>Court Holdings</b>
<i>Lawson v. FMR LLC</i> (2014)	Whistleblower protection under Sarbanes-Oxley extended to employees of private contractors and sub-contractors serving public companies.
<i>Osborn v. Haley</i> (2007)	Attorney General could validly certify that federal employee named as defendant was acting within scope of his employment, so as to warrant substitution of United States as defendant pursuant to the Westfall Act, even though the Attorney General's certification rested on understanding of facts that differed from plaintiff's allegations.
<i>Rent-A-Center, West, Inc. v. Jackson</i> (2010)	Provision of employment agreement which delegated to an arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability was a valid delegation under the Federal Arbitration Act.
<i>Thompson v. North American Stainless, LP</i> (2011)	Employer's alleged act of firing employee in retaliation against employee's fiancée, if proven, constituted unlawful retaliation. An "aggrieved" person under Title VII includes any person with an interest arguably sought to be protected by statutes. Employee fell within zone of interests protected by Title VII.
<i>University of Texas Southwestern Medical Center v. Nassar</i> (2013)	Title VII retaliation claims must be proved according to traditional principles of but-for causation.

The Supreme Court also ruled that an “aggrieved” person under Title VII includes any person with an interest arguably sought to be protected by statutes. As such, Thompson fell within the zone of interests protected by Title VII. In *Kasten v. Saint-Gobain Performance Plastics Corporation* (2011), the Supreme Court held that the anti-retaliation provision of FLSA protects oral as well as written complaints of violation of the Act. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* (2009), the Supreme Court ruled that the protection of the opposition clause of the anti-retaliation provision of Title VII extended to employees who speak out about sexual harassment in answering questions during employer’s investigation of coworker’s complaints.

In *CBOCS West, Inc. v. Humphries* (2008), the Supreme Court ruled that Section 1981 encompasses retaliation claims. Cognizable 1981 claims of retaliation include a claim by an individual who suffers retaliation for having tried to help another. Cognizable 1981 claims of retaliation also include employment-related claims. In addition, in *Gomez-Perez v. Potter* (2008), the holding was that a federal employee who is a victim of retaliation due to filing a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA.

In *Osborn v. Haley* (2007), the Supreme Court ruled that the Attorney General could validly certify that the federal employee named as defendant was acting within the scope of his employment, so as to warrant substitution of the United States as defendant pursuant to the Westfall Act even though the Attorney General's certification rested on an understanding of facts that differed from the plaintiff's allegations. The Westfall Act allows for substitution of the United States as defendant in an action where one of its employees is sued for damages as a result of an alleged civil wrong committed by the employee in the scope of his/her employment.

In *Lane v. Franks* (2014), the Supreme Court ruled that the director's sworn testimony at former program employee's corruption trial was citizen speech eligible for First Amendment protection, not unprotected employee speech. The director's testimony was speech on a matter of public concern. In addition, the government lacked any interest justifying allegedly retaliatory termination of the director; thus, the director's testimony was protected by the First Amendment. However, the President in his personal capacity was entitled to qualified immunity.

In *Graham County Soil and Water Conservation District v. Wilson* (2010), the Supreme Court ruled the term “administrative” used in the “public disclosure” bar of the False Claims Act (FCA) was broad enough to include not just federal administrative reports, hearings, audits, or investigations, but state and local as well. In *Lawson v. FMR LLC* (2014), the Supreme Court ruled that whistleblower protection under Sarbanes-Oxley extended to employees of private contractors and sub-contractors serving public companies. The Sarbanes-Oxley Act is a law that expanded requirements for public company boards, management, and public accounting firms. The act introduced major changes to the regulation of corporate governance and financial practice. Section 806 of the act is known as the whistleblower-protection provision, prohibiting an employee or officer of a publicly traded company from retaliating against another employee for disclosing violations of protected conduct, such as numerous forms of fraud.

Finally, *Jones v. Bock* (2007) was decided at the District Court level and, as such, is the only retaliatory holding from the District Court. The Eastern District Court of Michigan ruled that there was no evidence the inmate, Jones, suffered any adverse action taken by the correction officer, as required to support the inmate’s First Amendment retaliation claim. This case was removed from Table 2 describing the Supreme Court holdings because it is only relevant for and only sets the precedent for the Eastern District Court of Michigan. In addition, Jones was an inmate at the prison, not a prison employee.



## Discussion

In order to include as many cases as possible in this review, all court cases at the Supreme Court level that involved a legitimate claim of employee retaliation were included. Of those cases, a few were deemed not applicable due to the lack of a Supreme Court ruling on the significant issue of retaliation. Because in the end, only 14 Supreme Court cases were found and only 11 could be coded using the prescribed coding scheme, statistical analyses were not possible; rather a narrative description of the findings was completed. As such, it is important to discuss the implications of these findings.

### Discussion of Coding Factor Findings

The first coding factor was whether retaliation was successfully established, and seven of the 11 cases did in fact establish retaliation. In all but one case (*Lane v. Franks*, 2014), when the plaintiff was able to demonstrate all three prongs of a retaliation claim (i.e., engaged in a protected activity, suffered a materially adverse action, and demonstrated a causal connection between the protected activity and the adverse action), the plaintiff successfully established that retaliation occurred. This finding is consistent with the requirements for a *prima facie* case of retaliation, and appears to hold true in almost all cases. However, the results suggest that there are other factors that may influence the ruling; thus, it is not guaranteed that establishing a *prima facie* retaliation claim will result in a finding of retaliation.

In nine of the 11 cases, the plaintiff was able to show that he/she suffered an adverse action and, in these cases, the adverse action met the EEOC deterrence standard. Two cases (*Borough of Duryea, Pennsylvania v. Guarnieri*, 2011; *Gomez-Perez v. Potter*, 2008) did not establish an adverse action and failed to meet the EEOC deterrence

standard. As such, it appears to be quite important for the adverse action to rise to the level of the EEOC deterrence standard; otherwise, it will likely be deemed a trivial inconvenience by the court.

In all seven of the cases where the retaliatory action was termination, retaliation was established, with one exception, *Lane v. Franks* (2014). In instances where the retaliatory action was harassment, it was verbal harassment, suggesting that verbal harassment may be the most common form of harassment occurring in the workplace. In addition, when the verbal harassment met EEOC deterrence, retaliation was established and the case was ruled in favor of the plaintiff. These findings suggest that termination is the most common form of an adverse action, with verbal harassment also seeming prevalent. However, verbal harassment alone will not necessarily meet the EEOC deterrence standard, as one of the three verbal harassment cases, *Gomez-Perez v. Potter* (2008), failed to meet the standard; but, all seven cases with the adverse act of termination met the EEOC deterrence standard.

There were two cases that involved a retaliatory action other than termination or harassment (*Borough of Duryea, Pennsylvania v. Guarnieri*, 2011; *University of Texas Southwestern Medical Center v. Nassar*, 2013). The alleged retaliatory actions here were ruled to be trivial everyday inconveniences, suggesting that minor offenses such as issuing job directives and retracting a job offer will fail to meet the EEOC deterrence standard and the action likely is not going to hold up in court as constituting retaliation.

In the three cases in which the defendant had a grievance policy, the plaintiff used the grievance policy. Two of these cases favored the plaintiff and one settled. Thus, when plaintiffs take advantage of a grievance policy, it is helpful for their case. The EEOC

affirmative defense guidelines for sexual harassment also imply the plaintiff should utilize a grievance policy if one is available (EEOC Notice Number 915.002, 1999). However, again, with such a small sample, this conclusion should be regarded with caution.

Although many different statutes were used for the retaliation claims, having claims filed in particular under Section 1981 and the ADEA paved the way for the Supreme Court to rule in favor of these statutes covering retaliation claims. Now, plaintiffs are explicitly covered by these statutes for retaliation claims, making these rulings quite impactful.

The majority of cases (seven total) were remanded to the District Court with three going to the Appeals Court and only one being decided by the Supreme Court, demonstrating that the Supreme Court frequently rules on one particular issue of a case and then remands the case for further deliberation on other issues with that ruling in mind. This pattern was largely expected, although not to the extent of only one case being fully decided at the Supreme Court.

Five cases were ruled in favor of the plaintiff, four cases settled, and only two were ruled in favor of the defendant. This finding suggests that the courts seem to favor the plaintiff in retaliation cases, which would encourage the reporting of retaliation. In addition, this finding suggests to employees that they will be treated fairly if they file a claim of retaliation, which is the purpose of the anti-retaliation provisions.

In eight of the 11 cases, the plaintiff requested certiorari, suggesting that at the Circuit level, the lower courts were more favorable toward the defendant. As such, the plaintiffs fought for their retaliation claim to be seen by the Supreme Court. In five of

these eight cases, the Supreme Court ruled in favor of the plaintiff, and in another of these cases, the case settled. This finding suggests that it was worthwhile for these plaintiffs to seek certiorari.

### **Discussion of Hypothesized Results**

According to Section 704a of Title VII of the Civil Rights Act of 1991, there are three essential prongs for the plaintiff to establish a valid retaliation claim. As such, Hypothesis 1 stating that the court will rule in favor of the plaintiff if the plaintiff is able to establish all three prongs of a retaliation claim was expected to be supported. This hypothesis was either fully supported by the court ruling in favor of the plaintiff or by the case settling. There was only one instance (*Lane v. Franks*, 2014) contradicting the hypothesis, but this ruling was due to the defendant having qualified immunity. As such, Hypothesis 1 was well supported by the findings.

The EEOC deterrence standard was established and used by the Supreme Court in *BNSF v. White* (2006). Thus, Hypothesis 2 stated that the court would be more likely to rule in favor of the plaintiff if the retaliatory act met or exceeded the EEOC deterrence standard. The pattern of case support for Hypothesis 2 was the same as for Hypothesis 1, with the same five cases that fully supported Hypothesis 1 also fully supporting Hypothesis 2, the same two settling, and the same one contradicting. For Hypothesis 2, seven of the eight cases can be considered favoring the plaintiff, including cases that settled. Only one case that met the EEOC deterrence standard was ruled in favor of the defendant, suggesting that the courts are quite favorable toward the plaintiff if the adverse action meets the EEOC deterrence standard.

EEOC Enforcement Guidance on Retaliation and Related Issues (2016) stated that it is important for organizations to have policies that include examples of retaliatory acts and proactive steps for avoiding retaliation. Thus, Hypothesis 3 was that the court would be more likely to rule in favor of the defendant if the defendant has an anti-retaliation policy. However, there was no information in any of the cases to suggest whether there were anti-retaliation policies. As such, Hypothesis 3 could not be addressed.

EEOC Enforcement Guidance on Retaliation and Related Issues (2016) and Gutman et al. (2011) recommended that employers should incorporate internal grievance procedures to reduce organizational liability. As such, Hypothesis 4 stated that the court is more likely to rule in favor of the defendant if the defendant has a grievance policy for employees and the plaintiff failed to use this policy. There were three cases where the defendant explicitly had a grievance policy and, in all three, the plaintiff used the grievance policy. All three cases were ruled in favor of the plaintiff, suggesting that it is favorable for the plaintiffs to use the grievance policy if possible. However, had the plaintiffs failed to use the grievance policy, the rulings may have been different.

### **Discussion of Supreme Court Holdings**

The Supreme Court holdings from each of the 13 cases are included in this review; the implications of these holdings will be discussed next. In *Rent-A-Center, West, Inc. v. Jackson* (2010), the Supreme Court ruled that the provision of an employment agreement which delegated to an arbitrator exclusive authority to resolve any dispute relating to the agreement's enforceability was a valid delegation under the Federal Arbitration Act (FAA). When an employee signs an arbitration agreement with an employer, he/she is agreeing to allow an arbitrator to settle any disputes, thus not

allowing a claim in court. In *Rent-A-Center, West, Inc. v. Jackson* (2010), it was decided that under the FAA where an agreement to arbitrate includes a provision that it is the arbitrator's duty to determine enforceability of the agreement, if the plaintiff challenges the enforceability of the arbitration agreement as a whole, the determination is not up to the court, but rather it is left to the arbitrator to decide. Only if the plaintiff challenges the enforceability of the provision will the courts consider the motion.

It was ruled that Title VII retaliation claims must be proved according to traditional principle of but-for causation cited in *University of Texas Southwestern Medical Center v. Nassar* (2013). As such, there must be a demonstrable causal connection between the adverse action and the negative result. It must then be shown that the negative consequence would not have occurred had the adverse action not occurred. Thus, the adverse action must have been the cause of the resulting event because nothing else could have caused it. This need for but-for causation results in a higher standard for plaintiffs to establish retaliation. The court supported this view because there is no language in the retaliation provision of Title VII to suggest otherwise. The court expressed a concern that that lessening the causation standard would increase the number of frivolous claims, thus decreasing the ability for the courts to handle real issues regarding workplace retaliation.

Another important ruling was *Green v. Brennan* (2016). Here, the court ruled that the 45-day clock for a federal employee's constructive discharge claim under Title VII does not begin running until after the employee resigns. The start date for the clock is intended to be the date of the alleged discriminatory action, which the court determined to be the point that the employee feels compelled to resign. Acknowledging that the clock

does not begin until the date of resignation allows more time for the employee to come forward with a claim of constructive discharge. Prior to this Supreme Court ruling, many employees (including this plaintiff) were not filing a timely constructive discharge claim, and thus were unable to make a case for constructive discharge. Now, employees are more likely to file a claim early enough to have a valid case against their employer.

*Borough of Duryea, Pennsylvania v. Guarnieri* (2011) had a ruling relevant to the Petition Clause. The Supreme Court held that the municipality's alleged retaliatory actions did not give rise to liability under the Petition Clause. The justices stated that a government employer's alleged retaliatory actions against an employee only gives rise to liability under the Petition Clause if the employee's petition is a matter of public concern. This finding suggests that public employees' protection and rights are restricted, particularly when the petition does not meet the public concern standard in retaliation cases alleging a violation of the Speech Clause (Herbert, 2012). Herbert suggested that this case serves as a reminder that statutory and contractual dispute resolution mechanisms can promote workplace harmony in a government workplace due to the case limiting constitutional protection under the Petition Clause and identifying the opportunity for future protective laws.

In *Thompson v. North American Stainless, LP* (2011), the Supreme Court had multiple rulings. First, the court held that the employer's alleged act of firing the employee in retaliation against the employee's fiancée, if proven, constituted unlawful retaliation. The court also held that an "aggrieved" person under Title VII includes any person with an interest arguably sought to be protected by statutes. Thus, the employee fell within the zone of interests protected by Title VII. This case was incredibly important

because it paved the way for third party retaliation claims, allowing a related third party to file a claim of retaliation against the employer even if he/she was not the one to engage in a protected activity. This ruling also affected employers, as now they must pay close attention to employees who are not necessarily engaging in protected activities but are closely related to an employee who has done so (III, Doherty, Lindsay, & Poloche, 2011). As such, these employees should be treated as though they were the ones who engaged in the protected activity and any employment decisions regarding them should be carefully documented and qualified.

In *Kasten v. Saint-Gobain Performance Plastics Corporation* (2011), the Supreme Court ruled that the anti-retaliation provision of the Fair Labor Standards Act (FLSA) protects oral as well as written complaints of a violation of the Act. As such, any complaint against the organization regarding an employment practice, whether oral or written, is protected under the anti-retaliation provision of the FLSA. Due to this ruling, oral complaints can constitute a protected action on the part of the plaintiff. This finding increases the importance of employers taking oral complaints from employees very seriously and ensuring there are no retaliatory actions brought against those employees. This finding also lowers the standard for employees regarding what constitutes a protected action, allowing them to have a case for retaliation even if they do not have written documentation of it.

*Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee* (2009) had the primary holding that the protection of the opposition clause of the anti-retaliation provision of Title VII extended to the employee who spoke out about sexual harassment in answering questions during an employer's investigation of a



coworker's complaints. Because of this ruling, if employees are a part of an investigation into sexual harassment claims, they cannot be retaliated against for the information they provide. Providing information on the issue is protected under opposition and thus constitutes a protected action, meaning employees should not be afraid to participate in an employer's internal investigation for fear of retaliation.

*CBOCS West, Inc. v. Humphries* (2008) was also a highly impactful retaliation case with several holdings. The court ruled that Section 1981 encompasses retaliation claims, that cognizable 1981 claims of retaliation include a claim by the individual who suffers retaliation for having tried to help another, and that cognizable 1981 claims of retaliation include employment-related ones. This ruling definitively declared that Section 1981 encompassed retaliation claims. Section 1981 does not contain the same procedural and administrative requirements that Title VII does, such that plaintiffs are not required to first file a claim with the Equal Employment Opportunity Commission and can bring claims anytime within a four year period following the alleged retaliatory act ("Supreme Court finds anti-retaliation claims cognizable under Section 1981," 2008). There is no cap on punitive and compensatory damages under Section 1981, thus making a retaliation claim under Section 1981 a very generous option for employees.

In *Gomez-Perez v. Potter* (2008), the court held that a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the Age Discrimination in Employment Act (ADEA). Essentially, the Supreme Court stated that the ADEA does prohibit retaliation against federal employees. Although the ADEA does not have a specific anti-retaliation provision, it is much like other statutes that prohibit retaliation without having particular

language regarding retaliation. Thus, federal employees are protected from retaliation under the ADEA.

In *Osborn v. Haley* (2007), the Supreme Court ruled that the Attorney General could validly certify that the federal employee named as defendant was acting within the scope of his employment, so as to warrant substitution of the United States as the defendant pursuant of the Westfall Act, even though the Attorney General's certification rested on an understanding of facts that differed from the plaintiff's allegations. As such, the Westfall Act certification is proper when the federal officer charged with misconduct asserts and the Attorney General agrees that the problematic incident never occurred. The important aspect of the ruling in this review is that the United States can substitute as the defendant in this situation.

In *Lane v. Franks* (2014), the Supreme Court had multiple holdings. The first holding was that the director's sworn testimony at former program employee's corruption trials was citizen speech eligible for First Amendment protection, not unprotected employee speech. The director's testimony was speech on a matter of public concern. In addition, the government lacked any interest justifying allegedly retaliatory termination of the director, and thus the director's testimony was protected by the First Amendment. However, the President in his personal capacity was entitled to qualified immunity. This ruling helped to clarify the distinction between citizen speech and employee speech when it involves subpoenaed testimony (Baumgardner, 2014). This finding provides guidance to public employers by outlining the First Amendment protection for public employees, allowing these employers to contrast employees' First Amendment rights with their own

interests. However, it is still advised that employers be wary of termination based on unnecessary disclosure in subpoenaed testimony.

In *Graham County Soil and Water Conservation District v. Wilson* (2010), the court ruled that the term “administrative” as used in the “public disclosure” bar of the False Claims Act (FCA) was broad enough to include not just federal administrative reports, hearings, audits, or investigation, but state and local as well. As such, this covered Wilson when she raised concerns about the legality of the contracts. This finding now allows employees to engage in this activity on the state level as well, enabling them to report issues of legality on the state level under the FCA.

In *Lawson v. FMR LLC* (2014), the court ruled that whistleblower protection under Sarbanes-Oxley extended to employees of private contractors and sub-contractors serving public companies. This finding suggests that privately held companies that have contracts with public entities need to be wary of the potential for retaliation claims from employees who raise concerns regarding fraud or illegal activity (Colligan, 2014). It also is important for employers in these situations to understand and be able to identify protected complaints from employees in order to appropriately respond to whistleblower complaints.

*Jones v. Bock* (2007) contains the one court holding included in this review that was at the District Court level. Here, the court ruled that there was no evidence the inmate and prison employee, Jones, suffered any adverse action as a result of any action taken by the correction officer, as required to support Jones’s First Amendment retaliation claim. This ruling is specific to this case and, as such, likely will not generalize to many other settings or situations.

## **Limitations**

It is important to note that there were a small number of cases reviewed in this study, and some cases could not be coded according to the coding scheme. Although there have been few Supreme Court employee retaliation cases since 2006, all 14 cases were included in this study. However, only 11 cases could be coded according to the coding scheme, precluding conducting analyses and determining the statistical significance of the results. Future researchers should obtain a larger sample, perhaps by including Circuit level employee retaliation cases, in order to conduct analyses on the coding factors.

Another limitation of this study is that it incorporated only information from documents found in the Westlaw database. Future researchers will likely want to search many different databases for more comprehensive information. Some coding factors in the current study could not be coded because information on these factors was not found in the identified documents. There was no information included in any case regarding whether the defendant had an anti-retaliation policy; in eight cases, there was no information regarding whether the defendant had a grievance policy. However, it is possible these defendants had anti-retaliation and/or grievance policies and the Westlaw documents did not provide this information. Had there been more information regarding these factors, Hypothesis 3 could have been evaluated and the findings would have been more comprehensive.

Future researchers should include cases from a variety of databases and utilize a wider range of keywords. There is the possibility that some cases were overlooked and these improvements may yield better results. It may be beneficial to review Circuit Court

cases involving employee retaliation claims to obtain a larger sample and potentially obtain more retaliation-relevant rulings. There may be additional coding factors that could be included in a future study that may have been overlooked in the current study. It is important to continue researching employee retaliation claims and what influences these rulings because retaliation claims continue to be quite prevalent.

## **Conclusion**

Although this review was not able to provide a quantitative analysis of the cases, the qualitative information obtained is incredibly relevant for future employee retaliation cases. Establishing all three prongs of a retaliation claim appears to be essential for the court to find retaliation and rule in favor of the plaintiff. In addition, it seems to be quite important for the alleged retaliatory action to meet the EEOC deterrence standard for the plaintiff to successfully establish a materially adverse action and for the court to rule in favor of the plaintiff. The holdings suggest plaintiffs should use a grievance policy if the defendant has one. However, there was no information on whether an anti-retaliation provision is influential in retaliation cases. In addition to these findings, each retaliation case included in the review had an important Supreme Court holding that has set the precedent for future retaliation claims.

Future researchers should utilize a larger sample of court cases to enable the possibility of significant findings. The findings based on this review of the coding factors and court holdings suggest that there are a number of factors that influence court rulings on retaliation claims and further research should be conducted to clarify how these factors play a role in court decisions.

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APPENDIX A: LIST OF COURT CASES INCLUDED IN THE STUDY

- Borough of Duryea, Pennsylvania. v. Guarnieri*, 564 U.S. 379 (2011)
- CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008)
- Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271 (2009)
- Gomez-Perez v. Potter*, 553 U.S. 474 (2008)
- Graham County Soil and Water Conservation Dist. V. U.S. ex rel. Wilson*, 559 U.S. 280  
(2010)
- Green v. Brennan*, 136 S. Ct. 1769 (2016)
- Jones v. Bock*, 549 U.S. 199 (2007)
- Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011)
- Lane v. Franks*, 134 S. Ct. 2369 (2014)
- Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014)
- Osborn v. Haley*, 549 U.S. 225 (2007)
- Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010)
- Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011)
- University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013)

APPENDIX B: TABLE OF EXCLUDED CASES

<b>Case</b>	<b>Reason for Exclusion</b>
<i>Hoasanna-Tabor Evangelical Lutheran Church and School v. EEOC</i> (2012)	This case was excluded because the Supreme Court did not rule on the claim of employee retaliation, so there were no relevant retaliation holdings.
<i>Ortiz v. Jordan</i> (2011)	This case was excluded because it involved prisoner retaliation as opposed to the present topic, employee retaliation. The Supreme Court also did not rule on the issue of retaliation.
<i>Perry v. Merit Systems Protection Board</i> (2017)	This case was excluded because it was remanded to the Washington D.C. District Court and this ruling was not published, thus not allowing the researcher to know the final ruling.
<i>Vance v. Ball State University</i> (2013)	This case was excluded because the Supreme Court did not rule on the claim of employee retaliation, so there were no relevant retaliation holdings.
<i>Wal-Mart Stores v. Dukes</i> (2011)	This case was excluded because the Supreme Court did not rule on the claim of employee retaliation, so there were no relevant retaliation holdings.

APPENDIX C: TABLE OF CODING FACTORS FOR EACH CASE

Case	Retaliation	Protected Activity	Adverse Action	Causal Connection	Retaliatory Action	Type of Harassment	Harassment	EEOC Deterrence	Grievance Policy	Used Grievance	No Use of Grievance	Anti-retaliation	Statute	Decided	Final Decision	Certiorari	Opinion	Majority	Dissenting
<i>Borough of Duryea, Pennsylvania v. Guarnieri</i>	No	Participation	No	Yes	Other	NA	NA	No	NI	NI	NI	NI	1983 & Petition Clause	District Court	Settled	Defendant	Kennedy	Kennedy, Roberts, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Thomas	Scalia (partial)
<i>CBOCS West, Inc. v. Humphries</i>	Yes	Opposition	Yes	Yes	Termination	NA	NA	Yes	NI	NI	NI	NI	Title VII & 1981	District Court	Settled	Defendant	Breyer	Breyer, Roberts, Stevens, Kennedy, Souter, Ginsburg, Alito	Thomas, Scalia
<i>Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee</i>	Yes	Opposition	Yes	Yes	Termination	NA	NA	Yes	NI	NI	NI	NI	Title VII	District Court	Plaintiff	Plaintiff	Souter	Unanimous	None
<i>Gomez-Perez v. Potter</i>	No	Participation	No	No	Harassment	Verbal	No	No	NI	NI	NI	NI	ADEA	Appeals Court	Defendant	Plaintiff	Alito	Alito, Stevens, Kennedy, Souter, Ginsburg, Breyer	Roberts, Scalia, Thomas
<i>Graham County Soil and Water Conservation District v. Wilson</i>	Yes	Participation	Yes	NI	Termination	NA	NA	Yes	NI	NI	NI	NI	FCA	Appeals Court	Plaintiff	Plaintiff	Stevens	Stevens, Roberts, Kennedy, Thomas, Ginsburg, Alito, Scalia	Sotomayor, Breyer
<i>Green v. Brennan</i>	Yes	Opposition	Yes	Yes	Harassment	Verbal	Yes	Yes	Yes	Yes	NA	NI	Title VII	District Court	Plaintiff	Plaintiff	Sotomayor	Sotomayor, Roberts, Kennedy, Ginsburg, Breyer, Kagan, Alito	Thomas
<i>Kasten v. Saint-Gobain Performance Plastics Corp.</i>	Yes	Opposition	Yes	Yes	Termination	NA	NA	Yes	Yes	Yes	NA	NI	FLSA	District Court	Settled	Plaintiff	Breyer	Breyer, Roberts, Kennedy, Ginsburg, Alito, Sotomayor	Scalia, Thomas

Note: NI = no information, NA = not applicable.

Case	Retaliation	Protected Activity	Adverse Action	Causal Connection	Retaliatory Action	Type of Harassment	Harassment	EEOC Deterrence	Grievance Policy	Used Grievance	No Use of Grievance	Anti-retaliation	Statute	Decided	Final Decision	Certiorari	Opinion	Majority	Dissenting
<i>Lane v. Franks</i>	No	Participation	Yes	Yes	Termination	NA	NA	Yes	NI	NI	NI	NI	1983	Appeals Court	Defendant	Plaintiff	Sotomayor	Unanimous	None
<i>Lawson v. FMR LLC</i>	Yes	Opposition	Yes	Yes	Termination/Harassment	Verbal	Yes	Yes	Yes	Yes	NA	NI	1514A	Supreme Court	Plaintiff	Plaintiff	Ginsburg	Ginsburg, Roberts, Breyer, Kagan, Scalia, Thomas	Sotomayor, Kennedy, Alito
<i>Thompson v. North American Stainless, LP</i>	Yes	Participation	Yes	Yes	Termination	NA	NA	Yes	NI	NI	NI	NI	Title VII	District Court	Plaintiff	Plaintiff	Scalia	All except Kagan	None
<i>University of Texas Southwestern Medical Center v. Nassar</i>	No	Opposition	Yes	No	Other	NA	NA	NI	NI	NI	NI	NI	Title VII	District Court	Settled	Defendant	Kennedy	Kennedy, Roberts, Scalia, Thomas, Alito	Ginsburg, Breyer, Sotomayor, Kagan

Note: NI = no information, NA = not applicable.