FALSE CLAIMS OF SEXUAL HARASSMENT IN EDUCATION: THE PATH TO AN APPROPRIATE REMEDY FOR THE WRONGLY ACCUSED

I. INTRODUCTION

Keith Bellow was a junior high school physical education teacher when two female students accused him of sexual harassment.[1] In a complaint to the school board, the girls' parents alleged quid pro quo harassment,[2] claiming that Mr. Bellow told one of the students that he would give her a passing grade if she went out with him.[3] The complaint also alleged hostile environment harassment,[4] claiming that Mr. Bellow flirted with the girls, blew them kisses and, on one occasion, put his attendance book in his pants and asked one of them to retrieve it.[5] The school district conducted an investigation and found no evidence to support the parents' allegations.[6] During the investigation, however, someone leaked the story to the press and the news circulated throughout the community.[7]

In recent years, implementing measures to protect individuals from sexual harassment in the workplace has become common.[8] Even more recently, courts have recognized that students in all federally funded educational institutions have a cause of action for sexual harassment at school.[9] But rights

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1. *See* Alfred Charles, *Suits Keep School Sex Feud Alive*, NEW ORLEANS TIMES-PICAYUNE, Mar. 18, 1994, at B1.
2. For a definition of quid pro quo sexual harassment, see *infra* notes 35-36 and accompanying text.
3. *See* Charles, *supra* note 1, at B1.
4. For a definition of hostile work environment sexual harassment, see *infra* notes 35, 37-40 and accompanying text.
5. *See* Charles, *supra* note 1, at B1.
6. *See id.*
7. Mr. Bellow was more fortunate than some falsely accused educators because he was not fired or suspended during the investigation. Additionally, the newspapers that carried the story of the allegations and the investigation also reported that Mr. Bellow was exonerated. *See id.* Even this public reporting of innocence may not erase the stigma that follows an educator who was accused of sexual harassment. *See infra* note 59 and accompanying text.
8. Increasing numbers of employers are now implementing stricter sexual harassment policies with harsher penalties for alleged perpetrators of sexual harassment. This increase is due in part to the notoriety of recent sexual harassment charges such as the Clarence Thomas-Anita Hill hearings and the Bill Clinton-Paula Jones case. *See* Sami M. Abbasi & Kenneth W. Hollman, *Sexual Harassment Doesn't Respect School Boundaries*, CAL. ST. U. BUS. F., Jan. 1, 1996, at 1, *available in* 1996 WL 12539429. Additionally, sexual harassment cases are very expensive to defend and verdicts for a victim of sexual harassment are often large. *See id.* Simultaneously, courts are seeing more sexual harassment claims and affording a greater range of remedies made available by Congress in the Civil Rights Act of 1991. *See id.*; *see also* Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (1991).
9. *See infra* notes 24-25 and accompanying text.

of the alleged harasser are equally important.[10] Current laws and policies leave troubling questions about establishing the proper balance between the rights of the alleged victim and the accused harasser.

False accusations of sexual harassment are especially problematic for educators because an educator's reputation in the community is closely linked to his on-the-job success.[11] Currently, some falsely accused educators seek a legal remedy in defamation actions.[12] These defamation claims[13] are rarely successful though.[14]

This Note explores sexual harassment claims in education and remedies for falsely accused educators. Part II provides a history of sexual harassment claims and the applicable law under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Part III focuses on sexual harassment in educational institutions. Part IV proposes changes to current defamation law and a new federal cause of action that provides a remedy to falsely accused educators.

II. THE HISTORY OF SEXUAL HARASSMENT LEGISLATION AND LITIGATION

A. An Overview

Title VII of the Civil Rights Act of 1964 provides a cause of action for discrimination based on race, color, religion, national origin, and sex.[15] Until

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10. Throughout this Note, the alleged harasser will be a male and the alleged victim will be female. This convention is used for purposes of consistency. It is not meant to imply that men are never victims of sexual harassment. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998).

11. In this Note, the terms educator, teacher, administrator, professor, and school district employee will be used synonymously.

12. Individuals who have been falsely accused of sexual harassment can also bring a lawsuit claiming violation of their First Amendment free speech rights, intentional infliction of emotional distress, and if they are discharged, wrongful termination or breach of contract. *See* Jana Howard Carey & Theresa C. Mannion, *New Developments in the Law of Sexual Harassment from* Meritor *to* Harris, Karibian *and* Steiner, *in* SEXUAL HARASSMENT LITIGATION 1995, at 63 (PLI Litig. & Admin. Practice Course Handbook Series No. 524, 1995). Educators falsely accused of sexual harassment can also bring lawsuits for defamation. *See id.* at 54. Defamation actions are the sole focus of this Note.

13. See *infra* note 60 for a definition of defamation.

14. *See infra* note 65 and accompanying text.

15. Title VII provides:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2 (1994).

Few claims of workplace discrimination were filed for the first ten years after the passage of the

1971, courts only recognized claims under Title VII that alleged hiring, promotion and discharge decisions based on forbidden criteria. That year, in *Rogers v. EEOC*,[16] the Fifth Circuit held that Title VII also protects employees from a hostile work environment caused by discrimination, even if the employee suffers no economic loss.[17] The *Rogers* court interpreted the language of Title VII broadly and held that the "terms, conditions, or privileges of employment" language in Title VII protects an employee's psychological and emotional stability.[18] The court stated that racial or national origin discrimination in the workplace adversely affects these employee interests, even when the employee's continued employment or promotion is not jeopardized.[19] Further, the court held that an employer need not direct the discriminatory practice at the complaining employee for the practice to create a hostile work environment.[20]

The courts first held that sexual harassment was actionable under Title VII in *Williams v. Saxbe*.[21] In *Williams*, the court held that a male

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Civil Rights Act of 1964. As the country became less tolerant of discrimination, however, use of Title VII increased and more claims of workplace discrimination reached the courts. *See* Debra H. Goldstein, *A Basic Understanding of Sexual Harassment*, 57 ALA. LAW. 105, 105-06 (1996).

16. 454 F.2d 234 (5th Cir. 1971).

17. *See id.* at 238. In *Rogers*, the plaintiff, the only Spanish-surnamed American working at an optometrist's office, complained that her discharge and abuse by Caucasian employees was due to her national origin. *See id.* at 236. She also alleged patient segregation and differential treatment depending on national origin. *See id.* at 237. The lower court focused on the charge of patient segregation and did not address the plaintiff's alleged discharge and abuse. At issue was whether the charge of patient segregation was an unlawful employment practice and if the charge triggered an EEOC investigation of the incidents. *Id.* at 236-37.

The court interpreted Title VII broadly and held that patient segregation due to national origin gave the plaintiff a cause of action under Title VII. *See id.* at 237-38. The court reasoned that Congress intentionally did not give a specific set of acts that constituted discrimination because it acknowledged "that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow." *Id.* at 238. Under this reasoning, the court held that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection." *Id.* at 237-38.

18. *See id.* at 238. The court stated that "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" and held that Title VII was intended to eliminate such discrimination. *Id.*

19. *See id.*

20. *See id.* at 238-39. The *Rogers* Court relied on the Supreme Court's interpretation of Title VII in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that the absence of discriminatory intent by an employer does not prevent an otherwise unlawful employment practice from violating Title VII. *See Rogers*, 454 F.2d at 238-39. The court did not hold that patient segregation was a per se discriminatory employment practice under Title VII. Instead, the Court held that the charge was sufficient to trigger an EEOC investigation into the alleged segregation and its effects on the employee's emotional and psychological well-being. *See id.* at 241.

21. 413 F. Supp. 654 (D.D.C. 1976). In *Williams*, the plaintiff alleged that she had a good relationship with her supervisor until she refused his sexual advances. She alleged that after she refused his advances the supervisor "engaged in a continuing pattern and practice of harassment" that included unwarranted reprimands, refusal to provide her with necessary information, refusal to

supervisor's retaliatory actions against a female employee who declined his sexual advances constituted a violation of Title VII.[22] The court concluded that this conduct created the type of discriminatory barrier that Congress intended Title VII to eradicate.[23]

The Supreme Court established a student's right to bring a private action for sex discrimination under Title IX of the Education Amendments of 1972 in *Cannon v. University of Chicago*.[24] In *Cannon*, the Court recognized a student's implied right of action to file suit for sex-based discrimination

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consider her recommendations and proposals, and refusal to recognize her as a competent professional in her field. *Id.* at 655-56. The plaintiff was terminated for her "poor work performance" during this same period according to the defendant employer. *Id.* at 656.

22. *Williams*, 413 F. Supp. at 658. *Williams* was the first case recognizing sexual harassment as a form of discrimination prohibited under Title VII. The case, however, did not provide a clear definition of what constituted sexual harassment and relied on a case-by-case analysis to determine when an "artificial barrier to employment has been applied to one gender and not to the other." *Id.* at 659.

The *Williams* court also did not create different categories or types of sexual harassment. Instead, the court's test, which focused on barriers to employment, implied that sexual harassment must cause the plaintiff to suffer a tangible economic loss. Examples of economic loss include not receiving a deserved promotion or being discharged for refusing to have sexual relations with a supervisor. A plaintiff need not actually suffer these losses; the threat of such a loss is enough to constitute actionable sex-based discrimination. This type of harassment has since been labeled quid pro quo harassment by the courts and the Equal Employment Opportunity Commission ("EEOC"). *See infra* notes 35-36 and accompanying text.

While recent cases have provided different categories of sexual harassment, the courts have yet to provide a clear definition of what constitutes sexual harassment. Despite this lack of clarity, during the 1980s and 1990s the number of Title VII sexual harassment claims steadily increased. This increase in sexual harassment claims may be explained in part by the notoriety of recent sexual harassment cases. *See* Abbasi & Hollman, *supra* note 8.

It should be noted that *Williams* was reversed and remanded by the D.C. Circuit upon a finding that the case was improperly decided on the basis of the administrative record (rather than a de novo trial). 587 F.2d 1240, 1244 (D.C. Cir. 1978). This procedural ruling does not undermine the court's analysis, nor does it negate the ground-breaking nature of the district court's recognition of sexual harassment as a valid Title VII claim. On remand, the court eventually held that the plaintiff had proven sexual harassment. *See* Williams v. Saxbe, 487 F. Supp. 1387 (D.D.C. 1980).

23. *See Williams*, 413 F. Supp. at 657-58. The court rejected the defendant's argument that Title VII protected only women from sex discrimination based on sex stereotypes. The court held that the plain language of Title VII makes sex discrimination illegal whether or not it was based on sex stereotypes. *See id.* at 658. The court also rejected the defendant's position that sex discrimination is only actionable when the employer's policy or practice is applied only to one gender because of that gender's "peculiar" characteristics. *Id.* The court stated that sex discrimination does not depend on a practice being applied due to a characteristic of one's gender. The court stated that "a rule, regulation, practice or policy . . . applied on the basis of gender is alone sufficient for a finding of sex discrimination." *Id.* at 657 (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

24. 441 U.S. 677 (1979). In *Cannon*, the plaintiff alleged that her applications to two medical schools receiving federal funds were denied because of her sex in violation of Title IX of the Education Amendments of 1972. *See id.* at 680. Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1994).

against any educational institution that received federal funds.[25]

In *Franklin v. Gwinnett County Public Schools*,[26] the Supreme Court expanded this implied right of action and explicitly stated that students can bring sexual harassment lawsuits under Title IX.[27] Further, the Court held that a student who prevails in an action for sexual harassment under Title IX can recover damages.[28] The Court reasoned that limiting the remedies available under Title IX to equitable relief was improper because these equitable remedies failed to make the plaintiff whole.[29] The Court concluded that a student sexually harassed by a teacher, administrator, or fellow student in a school covered by Title IX could recover monetary damages from the school district.[30]

Although the Supreme Court in *Franklin* established a student's right to recover monetary damages for sexual harassment, the Court did not address whether the school district could be held vicariously liable for the conduct of an employee without actual notice of the employee's wrongdoing.[31] The Court finally addressed this question in *Gebser v. Lago Vista Independent*

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25. *See Cannon*, 441 U.S. at 717. The Court allowed a cause of action although there is no express authorization for a plaintiff to file a private lawsuit under Title IX. The Court reasoned that Congress's failure to grant the right expressly did not preclude its intent to provide a remedy. *See id.* In reaching this conclusion, the Court examined the four factors in *Cort v. Ash*, 422 U.S. 66 (1975), which are used to determine when an implied right of action exists. *See Cannon*, 441 U.S. at 688-89. These factors are: (1) whether the plaintiff is in the special class the statute was created to protect; (2) whether there is any legislative intent to either grant or deny a remedy; (3) whether implying such a remedy is consistent with the underlying legislative scheme; and (4) whether the cause of action is traditionally a state-law cause of action. *See id.* at 688 n.9. The Court concluded that the *Cort* factors supported implying a private right of action for suits under Title IX. *See id.* at 688-89.

26. 503 U.S. 60 (1992).

27. In *Franklin*, the Court addressed a sexual harassment claim filed by a student who alleged she was sexually harassed by a teacher. *See id.* at 63. The student filed the complaint against the teacher and the school district. *See id.*

28. *See id.* at 76. The *Franklin* Court analogized sexual harassment in federally funded schools to workplace sexual harassment that is actionable under Title VII. The Court stated, "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex.'" *Id.* at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)). Further, the Court stated that this rule should apply when a teacher sexually harasses a student. *See id.*

29. The school district and the United States, as amicus curiae, suggested limiting the available remedies to backpay and prospective relief. *See id.* at 76. The Court disagreed with this suggestion because the plaintiff was a student and was not eligible to receive backpay. *See id.* Further, because the teacher accused of harassing the student no longer worked at the school district, prospective relief was not an option. *See id.* Therefore, the plaintiff had no remedy unless the Court allowed monetary damages. *See id.* In support of this decision, the Court cited *Sullivan v. Little Hunting Park Inc.*, 396 U.S. 229, 239 (1969), which stated that the "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Franklin*, 503 U.S. at 69.

30. *See id.* at 76. The Court stated that sexual harassment of this type was intentional discrimination, and, therefore, monetary damages were appropriate. Further, the school district had notice that it was responsible for monetary damages for intentional discrimination. *See id.* at 74-75.

31. *See id.* at 74-75.

School District.[32] In *Gebser*, the Court concluded that a school district cannot be held vicariously liable for the actions of a teacher under Title IX unless someone within the school district with authority to take corrective measures has actual knowledge of the situation and is deliberately indifferent to the teacher's misconduct.[33] The Court reasoned that because Congress had not specifically spoken to this issue in the statute and because the remedial scheme of Title IX is based upon notice to an "appropriate person" and an opportunity for voluntary compliance, constructive knowledge of a teacher's misconduct was not sufficient to allow a plaintiff to recover for sexual harassment under Title IX.[34]

B. Types of Sexual Harassment Actionable Under Title VII and Title IX

Today, quid pro quo and hostile environment sexual harrassment are actionable under Title VII and Title IX.[35] Quid pro quo sexual harassment is

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32. 118 S. Ct. 1989 (1998). In *Gebser*, the plaintiff, a high school student, was engaged in a sexual relationship with one of her teachers. *See id.* at 1993. This relationship began when she was in the eighth grade and ended approximately a year and a half later when a police officer found the student and the teacher having sexual intercourse and arrested the teacher. *See id.* The school district was unaware of the relationship as the student did not report the teacher's conduct. The only indication the school had that the teacher's conduct was inappropriate was a complaint about some sexually suggestive comments the teacher made in class. *See id.* The school's principal met with the teacher about the comments. *See id.*

After the plaintiff's relationship with the teacher was exposed, she filed a suit under Title IX and various state-law claims against the school district. *See id.* The district court granted the school district's motion for summary judgment and the Fifth Circuit affirmed. *See id.* at 1993-94. The Supreme Court granted certiorari to determine whether a school district can be vicariously liable for a teacher's misconduct under Title IX if the school district lacks actual notice of the misconduct. *See id.* at 1994.

The Supreme Court refused to hold the district liable in the absence of actual notice. *See id.* at 1997. Although sexual harassment under Title IX is generally analogous to that under Title VII (which allows vicarious liability), *see* Franklin v. Gwinnet County Public Schools, 503 U.S. 60 (1992), Title IX has a contractual element absent in Title VII. *See Gebser*, 118 S. Ct. at 1997. Title IX creates a set of contractual obligations, in exchange for which participating schools receive federal funds. *See id.* This scheme differs from Title VII, which requires compliance and does not provide any benefit to institutions who are in compliance. *See id.* at 1997. The Court's central concern was that an entity subject to liability under Title IX should have actual notice that it could be liable for monetary damages, beyond not receiving its federal funds, prior to subjecting the entity to liability. *See id.* 1998-99. Therefore, the Court held that a school district is not liable for sexual harassment perpetrated by a teacher unless an official of the school district with the authority to take corrective action knew about the situation and was deliberately indifferent to the teacher's misconduct. *See id.* at 1993. Thus, while a school district could be held vicariously liable using respondent superior principles under Title VII for the sexual harassment of a teacher by a supervisor, this vicarious liability does not attach in actions brought under Title IX for the sexual harassment of a student absent actual notice.

33. *See id.* at 1993.

34. *Id.* at 1997-2000.

35. Quid pro quo is the oldest recognized form of sexual harassment and is the easiest to define because there is little gray area about what constitutes actionable conduct. *See generally* Jana Howard

a request for sexual favors in return for a promotion, a better grade or job security.[36] In an employment setting, quid pro quo sexual harassment threatens the victim with economic detriment unless she capitulates and engages in sexual relations with a supervisor.[37]

The Supreme Court first recognized hostile work environment sexual harassment in *Meritor Savings Bank v. Vinson*.[38] The Supreme Court in *Meritor* held that hostile work environment sexual harassment occurs when

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Carey, *Overview of Sexual Harassment in the Workplace*, *in* SEXUAL HARASSMENT LITIGATION 1994, at 281 (PLI Litig. & Admin. Practice Course Handbook Series No. 505, 1994). To state a claim of quid pro quo harassment, a victim must show that (1) she is a member of a protected class; (2) she was subject to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) the harassment was based on sex; (4) that she submitted because it was expressed or implied that submission was a requisite for receiving employment benefits or that refusal to submit would lead to her tangible detriment; and 5) the existence of respondent superior liability. *See* Perkovich v. Roadway Express, Inc., 106 F.3d 401, 1997 WL 26457, at *4 (6th Cir. 1997) (unpublished table decision) (citing Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir. 1992)).

The Supreme Court recognized hostile environment sexual harassment more recently, and significant debate still exists about when conduct is actionable because the cases are very fact and circumstance specific. *See, e.g.*, Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

36. *See Meritor*, 477 U.S. at 65; *see also* Equal Employment Opportunity Commission Guidelines, 29 C.F.R. § 1604.11 (1998).

37. *See generally Meritor*, 477 U.S. 57.

38. 477 U.S. 57 (1986). In *Meritor*, the plaintiff alleged that her immediate supervisor suggested that they have sexual relations and that she capitulated because she feared losing her job. She also alleged that he fondled her both during work and after business hours, followed her into the women's restroom, exposed himself to her, and forcibly raped her on several occasions. *See id.* at 60. The plaintiff did not use the company's internal reporting mechanism because it dictated that she report the incidents to the alleged harasser. *See id.* at 73. When she informed the supervisor that she was taking medical leave for an indefinite period, she was fired for taking excessive sick leave. *See id.* at 60.

To make out a prima facie case of hostile work environment sexual harassment, a plaintiff must prove that (1) the employee suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person in the plaintiff's position; and (5) respondent superior liability exists. *See* Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997).

The *Meritor* Court held that the plaintiff had an actionable claim of hostile work environment sexual harassment. *See* 477 U.S. at 67. In recognizing hostile work environment as actionable sexual harassment, the Court noted that the EEOC Guidelines specifically recognize hostile work environment sexual harassment. The Court also noted that this recognition was in accord with existing case law. *See id.* at 66. The Court further stated that nothing in Title VII suggested that hostile work environment harassment should not be prohibited by the statute. *See id.*

The Court also overruled the district court and the D.C. Circuit on the issue of liability. The D.C. Circuit held that an employer is automatically liable for hostile environment harassment engaged in by supervisors. *See* 753 F.2d 141, 149-50 (D.C. Cir. 1985). The Supreme Court, however, did not reach a definitive holding on this issue. Instead, the Court stated that lower courts should look to agency principles when making this determination. *See id.* at 72. Justice Marshall, in a concurrence joined by Justice Brennan, Justice Blackmun, and Justice Stevens, relied on the authorities cited by the majority and concluded that employers were liable for sexual harassment by a supervisory employee. *See id.* at 74-78.

the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[39] Additionally, the victim must find the conduct "unwelcome."[40] The Court stated, however, that the plaintiff need not suffer a tangible economic loss to have an actionable case of hostile work environment sexual harassment.[41]

Although first recognized under Title VII, quid pro quo and hostile environment harassment are also actionable under Title IX.[42] While the actions' names are the same, the definitions and assumptions underlying them are not.[43] Different administrative agencies oversee sexual harassment claims in employment and education,[44] and these agencies have different definitions of the behavior that constitutes actionable sexual harassment.[45]

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39. *Meritor*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

40. *Id.* at 68. The Supreme Court held that the proper test to determine whether sexual harassment occurred was whether the conduct was "unwelcome." *Id.* Making this determination requires that the court determine whether the plaintiff "by her conduct indicated that the sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* The Court also held that a plaintiff's sexually provocative speech and dress are not per se inadmissible. The Court stated that the evidence is relevant to determine whether the conduct was welcome and that the district court must determine admissibility on a case-by-case basis. *See id.* at 69.

41. *See id.* at 64. The Court stated that the phrase "'terms, conditions, or privileges of employment' evinces a Congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

The Supreme Court clarified the definition of hostile work environment sexual harassment in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). In *Harris*, the plaintiff was a woman subjected to continuous sexual innuendoes by the company president. These episodes included suggestions by the company president that he and Ms. Harris go to a local hotel to negotiate her raise. *See id.* at 19. Furthermore, the company president threw objects on the ground in front of female employees and made them bend over to retrieve the objects. *See id.* The company president also commented that Ms. Harris' job should only be done by a man and suggested that a woman was incompetent for the position. *See id.* Ms. Harris quit her job due to the unwelcome sexual innuendoes. *See id.* at 19.

The Supreme Court overturned the lower court's ruling that actionable hostile environment harassment claims require the plaintiff to have suffered injury. *See id.* at 22. The Court held that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 22. The Court also provided a list of factors to determine if the environment is "hostile or abusive." *Id.* at 23. These factors are the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with the employee's work performance." *Id.*

42. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1991). There is no "other" type of harassment specific to schools. *See generally* Abbasi & Hollman, *supra* note 8. Sexual harassment complaints brought against school districts by students are modeled after those brought by employees under Title VII. *See Franklin*, 503 U.S. at 75.

43. Because sexual harassment is an ill-defined, ambiguous term, the Supreme Court, lower state and federal courts, administrative agencies, and various institutions with sexual harassment policies have struggled to define it. *See* Abbasi & Hollman, *supra* note 8.

44. The EEOC has initial jurisdiction over Title VII claims and the U.S. Department of Education Office of Civil Rights ("OCR") oversees Title IX claims.

45. *See* Abbasi & Hollman, *supra* note 8. The standards set by the EEOC and the OCR are

Although the standards are not contradictory, the discrepancies make it more difficult to establish a definition of sexual harassment that educators can use to govern their conduct.[46]

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merely guidelines and are not binding on the courts. But these guidelines are persuasive authority and have been adopted to some extent by many courts, including the Supreme Court. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

The EEOC Guidelines state that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" are behaviors that can constitute sexual harassment in the workplace. EEOC Guidelines, 29 C.F.R. § 1604.11 (1998). The OCR guidelines state, "Sexual harassment consists of verbal or physical conduct of a sexual nature imposed on the basis of sex, by an employer or agent of a recipient, that denies, limits or provides different conditions for the provision of aid, benefits services or treatment under Title IX." Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52172 (Office for Civil Rights 1996).

The main difference between these definitions is that the EEOC definition, unlike the OCR definition, focuses on whether the conduct is unwelcome. School districts must consider this difference when developing sexual harassment policies. The OCR Guidelines definition makes the assumption that verbal or physical conduct of a sexual nature is unwelcome. The rationale behind this decision is that sexual conduct between a student and a teacher is never appropriate and is always unwelcome. *See* Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1361-62 (1996). The OCR standard for teacher-student sexual harassment is similar to that in racial harassment cases where the victim need not prove that the conduct was unwelcome. The assumption is that, unlike sexual attention, there is no form of racial harassment that would be welcomed by the intended target. *See* Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) (finding that racial harassment occurred under Title VII without requiring victim to demonstrate that harassing conduct was unwelcome).

Under the EEOC definition, a target of harassment has an affirmative duty to inform the alleged perpetrator that the harassing conduct is unwelcome. Further, under Title VII there is no actionable sexual harassment unless the conduct was unwelcome to the victim. The rationale behind this distinction is that some sexual advances are welcome. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986).

Educators must be cognizant of the difference between the "welcomeness" requirements under the EEOC Guidelines definition and Title VII jurisprudence and the OCR Guidelines definition and corresponding Title IX jurisprudence. Further, school districts must also consider this difference when forming their sexual harassment policies in order to make students and educators aware of their rights and duties under the law. In a school setting it is important to make clear that responsibilities and rights may differ depending upon whether the alleged victim is a student or an employee. *See generally* Stacy, *supra*, at 1361-62.

46. It also remains unresolved whether acts that could constitute sexual harassment should be viewed using a "reasonable person" or a "reasonable woman" standard. The Ninth Circuit found the reasonable person standard flawed because it perpetuated sexist stereotypes of appropriate behavior. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). The court reasoned that because men and women have different ideas of what is objectionable, conduct that a man may find unobjectionable may be unwelcome and constitute sexual harassment in the eyes of a reasonable woman. *See id.* at 878-80. But in *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the Supreme Court, by its silence, seemed to reject the reasonable woman standard used by the Ninth Circuit and implicitly adopted the reasonable person standard. *See Harris*, 510 U.S. at 22.

III. SEXUAL HARASSMENT IN EDUCATIONAL INSTITUTIONS

A. Why Educators Need Effective Remedies To Allow Recovery After a False Accusation of Sexual Harassment

Educators are especially vulnerable to false claims of sexual harassment because they face an unusually large and volatile class of potential plaintiffs every day: their students.[47] Sexual harassment charges are a devastating means of retaliating against an unpopular teacher or a teacher who has disciplined a student.[48] These retaliatory sexual harassment claims are especially problematic because the negative consequences for the falsely accused teacher are tremendous, while there is no real risk for the accuser.[49]

Because an educator's reputation is both extremely important and easily damaged,[50] a false claim of sexual harassment is especially devastating to an educator's career.[51] Even if the teacher is completely exonerated, he may

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47. Since the Supreme Court made sexual harassment actionable under Title IX, the number of people in an educational institution who can file sexual harassment charges has increased tremendously as both students and teachers can file claims. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

48. This statement is not intended to imply that all claims of sexual harassment brought against teachers are retaliatory. Many students do suffer sexual harassment at the hands of school employees and nothing should be done to hinder valid claims or to curtail the remedies available to these students. But it cannot be denied or discounted that although school authorities are in a position of power over students in the classroom, these same students have a considerable amount of power to damage a teacher's reputation by publicizing false accusations. *See generally* Ann Hassenpflug & Robert O. Riggs, *Guilty Until Proven Innocent? Protecting the Rights of School District Employees*, 104 EDUC. L. REP. 981 (1996) (discussing damage to educator's reputation when student makes false claim of misconduct).

49. A falsely accused teacher can lose his job as a result of the accusation and investigation or, at the very least, suffer damage to his reputation. On the other hand, students and staff members who make false accusations face little to no risk because many sexual harassment policies do not contain disciplinary procedures. Even so, not all authorities recommend policies that contain disciplinary procedures. *See, e.g.*, Mark I. Schickman, *Sexual Harassment: The Employer's Role in Prevention*, COMPLEAT LAW., Winter 1996, at 24, 26 (discussing drawbacks of policy to discipline individuals who make false claims of sexual harassment).

50. A false allegation of misconduct such as sexual harassment can destroy the rapport between a teacher and his students and the community. *See generally* Hassenpflug & Riggs, *supra* note 48 (discussing case of Richard Douglas, an assistant principal accused of sexual abuse who could not return to work in same school district after being cleared of all charges and had to move to another state). Teachers face greater public scrutiny than many professionals because they work intimately with children, and parents are justifiably interested in their children's safety. *See generally* Robert C. Cloud, *Higher Education Administrators, Defamation, and Actual Malice Revisited*, 110 EDUC. L. REP. 7 (1996). A teacher whose reputation is marred by a false claim of sexual harassment faces difficulties finding another teaching job in the same geographic area because few school districts are willing to invite scandal by hiring a "notorious" teacher. Therefore, even if a teacher "wins" and is exonerated of the harassment charges, he still "loses" when he wants to change jobs. *See generally* Hassenpflug & Riggs, *supra* note 48.

51. *See* Hassenpflug & Riggs, *supra* note 48.

face long-term repercussions.[52] These repercussions are costly both financially and emotionally.[53]

B. *Defamation Law as a Current Remedy*

Many actions can lead to allegations of sexual harassment.[54] Allegations of sexual harassment can stem from accusations that an educator offered a better grade or a promotion for sexual favors, made sexually suggestive comments, or touched a student or colleague in a sexual manner.[55] When an employee or student alleges sexual harassment, the school must investigate the complaint.[56] If the school district determines that sexual harassment

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52. Repercussions may include reassignment to a different job within the school district, rejection for supplemental contracts such as coaching positions, and difficulty finding another job.

53. *See* Hassenpflug & Riggs, *supra* note 48, at 987.

54. For example, in February 1992, Graydon Snyder, a professor at the Chicago Theological Seminary, was charged with sexual harassment by a female student. The charge stemmed from Snyder's recounting a story from the *Talmud* to illustrate the differences between sin in Judaism and Christianity. In the story, a man working on the roof of a house in the nude fell from the roof onto a woman below who was also nude. The man and woman accidentally had sexual intercourse when he landed on her. *See* Susan Ellicott, *Talmud Sex Lesson Ends in the Courts*, SUNDAY TIMES (London), May 15, 1994, § 1, at 16. The student claimed that this story was inappropriate and that telling the story constituted sexual harassment because Professor Snyder was condoning brutality toward women. *See* Bernard Levin, Editorial, *Banning Holy Writ*, TIMES (London), July 8, 1994, at 18.

After the charges were filed with school officials, Snyder was investigated by the school's "sexual harassment task force." The task force found that Professor Snyder's behavior was inappropriate and circulated a memorandum to every student and faculty member stating that Snyder had used "verbal conduct of a sexual nature" which "created a hostile or offensive" academic environment. *See* Ellicott, *supra*. Professor Snyder filed a defamation suit alleging that his reputation as a Biblical Scholar had been damaged as a result of the allegation and subsequent memorandum. Professor Snyder's lawsuit was dismissed in August 1994. *See In Circuit Court*, CHI. DAILY L. BULL., Aug. 5, 1994, at 3. Professor Snyder later refiled and the lawsuit was dismissed again in January 1995. *See Nation/World News in Brief*, CHATTANOOGA TIMES, Feb. 1, 1995, at A2.

In 1989, Kirk D. Aiken, an art professor at Moorpark College was accused of sexual harassment by a female colleague, Pamela Zwelhl-Burke. Ms. Zwehl-Burke alleged that Professor Aiken pressed his body against hers and whispered, "I'm so horny, I want you so much," during a class. Ms. Zwehl-Burke complained to school officials and an investigation was conducted. After the investigation, a letter was placed in Professor Aiken's personnel file that stated, "There is evidence to support a finding of sexual harassment." *See* Mack Reed, *Jury Awards Moorpark College Teacher $186,000 in Slander Case*, L.A. TIMES, Aug. 11, 1992, at B1.

Professor Aiken filed a lawsuit claiming defamation against the alleged victim, the vice chancellor, and the school district. The complaint alleged that Ms. Zwehl-Burke unfairly accused Professor Aiken of sexual harassment and that the accusation damaged his "reputation, name and standing in the community." *Id.* A jury found for Professor Aiken and ordered Ms. Zwehl-Burke to pay $1,000 in damages and ordered the district and the vice chancellor to pay $92,500 each to Professor Aiken for the damage to his reputation that the accusation, investigation, and subsequent letter had caused. *See id.* This award was thrown out on appeal when the Second District Court of Appeal in Ventura ruled that the trial judge's jury instructions were erroneous. *See* Dwayne Bray, *Moorpark; Appeal Court Voids Award in Libel Case*, L.A. TIMES, Apr. 22, 1994, at B3.

55. *See* Abbasi & Hollman, *supra* note 8.

56. Federally funded educational institutions without procedures to prevent sexual harassment or

occurred, the institution must handle the situation in accordance with its internal policy.[57] Typically, a sexual harassment investigation involves talking to the alleged victim, the alleged harasser, and anyone else who may have witnessed the conduct.[58] The school district's discretion is important during the investigation because a leak can damage the educator's reputation even if he is exonerated.[59]

When a leak occurs and the accusation is false, the educator can file a defamation lawsuit against both the accuser and the school district.[60] To recover in a defamation action, an educator must prove: (1) a false and defamatory statement concerning him was made to another; (2) an unprivileged publication of the statement or information was made to a third party; (3) the fault of the publisher amounted at least to negligence; and (4) the statement was actionable irrespective of its social harm or that special harm resulted from the publication of the statement.[61]

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discrimination based on sex or institutions that do not enforce their procedures can lose their federal funding. *See* Abbasi & Hollman, *supra* note 8.

57. Attempting to balance the rights of the accused and the accuser places school districts in a precarious position. When an allegation of sexual harassment is made against an employee, the school district must investigate and take reasonable steps to protect the alleged victim from further harassment. If these steps are not taken, the alleged victim can file a lawsuit under Title VII or Title IX against the district for failing to protect her civil rights. The school district is simultaneously obligated to protect the rights of the alleged harasser by performing its investigation in the manner most likely to limit damage to his reputation. If a school district fails to protect the alleged harasser's reputation, the district can face liability for defamation. *See generally* Charles J. Russo et al., *Sexual Harassment and Student Rights: The Supreme Court Expands Title IX Remedies*, 75 EDUC. L. REP. 733 (1992).

58. Qualified privilege allows the school district to release information to necessary third parties without liability when the investigation is conducted in such a manner that only necessary people are informed of the charges. Generally, a necessary person is someone who "share[s] the interest or duty which gave rise to the privilege." Ruth A. Kennedy, Comment, *Insulating Sexual Harassment Grievance Procedure for the Chilling Effects of Defamation Litigation*, 69 WASH. L. REV. 235, 240 (1994) (citing Stockley v. AT&T Info. Sys., Inc., 687 F. Supp. 764, 769-70 (E.D.N.Y. 1988)). Intracorporate immunity allows a school district to inform people other than those who work in the same department with the alleged harasser about the allegation during the investigation. The test for applying this rule is whether the communication was made to an employee in the regular course of business. *See id.* at 240.

Privilege can be pierced by proof of actual malice. But intracorporate immunity is not defeated even if the plaintiff proves actual malice. *See id.* Additionally, both privilege and intracorporate immunity can be pierced if the school district is irresponsible in its investigation and tells parties outside the district about the investigation. *See id.* at 239, 250.

59. *See* Hassenpflug & Riggs, *supra* note 48. "Once mud is slung, it is questionable whether even the fairest policy can offer enough protection to the employee whose reputation and good name have felt the impact of that mud." *Id.* at 988.

60. For the purposes of this Note, the term "defamation" encompasses libel, written defamation, slander, and spoken defamation. *See* McNulty v. Kessler, No. 914375, 1995 WL 809931, at *6 n.12 (Mass. Super. Ct. 1995).

61. *See* Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1397 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)). These elements are used

In many jurisdictions, educators are considered public figures and therefore must also prove that the person or entity responsible for the publication acted with actual malice.[62] Actual malice means that the person who published the statement had the "deliberate intent to inflict harm through falsehood."[63] Therefore, under the actual malice standard, there is no liability for publishing the allegations during the investigation unless the educator can prove actual malice.[64]

C. Current Defamation Law Does Not Provide an Adequate Remedy due to Current Defamation Defenses

The defamation defenses of qualified privilege and intracorporate immunity make prevailing in defamation lawsuits difficult for falsely accused educators.[65] Privilege protects school districts from liability for statements made during the investigation.[66] Privilege applies when the statement was made to protect important societal interests, such as protecting

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throughout the remainder of this Note because they constitute a relatively uniform standard adopted in many jurisdictions. These elements vary from state to state.

62. Tracy A. Bateman, *Who is "Public Figure" for Purposes of Defamation Action*, 19 A.L.R. 5th 1, at 49, 54. In this context, the word "published" does not mean that the school district provided the news media with the information. Rather, it means that the school district distributed the information to nonprivileged individuals. *See* Adler & Peirce, *supra* note 61, at 1400.

In *United States v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that public figures must prove actual malice to prevail in a defamation suit. "Although the Supreme Court of the United States first applied the 'actual malice' standard only to 'public officials,' later cases expanded its application to 'public figures,' i.e., those individuals who thrust themselves, or were drawn, into the debate surrounding an important public controversy." McNulty v. Kessler, No. 91-4375, 1995 WL 809931, at *6 n.15 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967)).

Proof of actual malice is only required in jurisdictions where educators are considered public officials or public figures. *See* Cloud, *supra* note 50, at 10-13, 17-18. This Note will use the term public figure when addressing educators and the actual malice standard. *See also* Bateman, *supra* note 62.

63. Cloud, *supra* note 50, at 11. The Supreme Court has also stated that a plaintiff can prove actual malice by either direct or circumstantial evidence. *See id.* at 22. Such evidence can consist of proof of "threats, rivalry, ill will or hostility." *Id.* The plaintiff can also introduce facts to show "a reckless disregard of [the plaintiff's] rights by the defendant, that the defendant neglected to investigate properly before publication of the statement in question, or that the defendant had reason to question the reliability of his information." *Id.*

64. In other words, the allegations must have been published with the intent to cause harm in order for the educator to succeed with his claim. *See supra* note 62 and accompanying text.

65. The school district is not liable to another district employee for publishing the information because the information is privileged and the employee is "necessary" under intracorporate immunity. Under intracorporate immunity, any person within the corporation, or in education cases, the school district, is considered a necessary party. This doctrine severely limits a falsely accused employee's chances of recovering under a defamation theory as intracorporate immunity is an absolute bar to recovery. *See* Kennedy, *supra* note 58, at 249-50.

66. *See* Cloud, *supra* note 50, at 21. *See generally* Kennedy, *supra* note 58.

individuals from sexual harassment.[67] Once a defamation defendant establishes privilege, the plaintiff must prove that the defendant committed an abuse of privilege.[68]

Intracorporate immunity is the other main defense to a defamation lawsuit.[69] Intracorporate immunity allows communication between individuals within a corporation without liability for defamation because the communication is not considered publication to a third party.[70] When the employer asserts intracorporate immunity, a defamatory statement made during the investigation cannot be a basis for defamation liability if the statement was made to an employee. Intracorporate immunity is a complete bar to recovery that proof of malice cannot destroy.[71] If an employee outside the investigation makes statements to others, the employer loses the protection of the intracorporate immunity rule.[72] The broad application of intracorporate immunity, however, makes it difficult to prove that a statement was made outside the investigation.[73]

D. *Effects of the Inadequacy of Current Remedies for Falsely Accused Educators*

The failure of current laws to protect falsely accused educators has many unwelcome effects for educators and their students. Many educators, even those who work with very young children, are afraid to have even minimal physical contact with their students.[74] Teachers are reluctant to place a helping hand on the shoulder of a struggling student or to return the hug of an affectionate student.[75] They worry that charges made by a hypersensitive or

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67. *See* Kennedy, *supra* note 58, at 239.

68. *See id.* Abuse of privilege is proven by presenting evidence of excessive publication. Excessive publication occurs when the information is shared with nonprivileged individuals. Privilege can also be destroyed by proving actual malice. *See id.* at 239-40.

69. *See id.* at 239. Intracorporate immunity is only available in some jurisdictions. *See id.* at 240.

70. *See id.*

71. *See id.* The key element in this analysis is whether the employer divulged the information to other employees during the course of the investigation. Immunity is only available if the statement occurred as a part of the investigation. *See id.* at 249-50.

72. *See id.*

73. *See generally id.*

74. *See* Karina Bland, *Hands-Off Teaching: Educators Wary, Know Any Touch Can Be Misread*, PHOENIX GAZETTE, Sept. 10, 1993, at A1.

The touching referred to in this section means, for example, a hand on the shoulder of a daydreaming student to return the student's attention to the lesson, a pat on the back to congratulate a student, or returning the hug of a very young student. *See* Editorial, *What Others Might Think: Common Sense Should Be the Guide in Teachers Touching Children*, DES MOINES REG., Mar. 21, 1995, at 10.

75. Some teachers, such as Bob Flanagan, a physical education teacher who previously taught

disgruntled pupil could ruin their careers and leave them with no legal recourse.[76] The increasing number of false claims and the lack of remedies have also curtailed academic offerings and in-class debate.[77] Many teachers say that some subjects are too sensitive and that holding the discussion is not worth the risk.[78]

IV. PROPOSALS FOR CHANGE

A. Changes in School District Sexual Harassment Policies

School districts must take affirmative steps to halt the increasing number of false sexual harassment allegations. However, the district must balance the rights of the alleged victim and the accused harasser to protect the parties, while also protecting itself from liability.[79] To accomplish this goal, the school district must create a sexual harassment policy that clearly defines what does and does not constitute sexual harassment.[80]

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kids square dancing by joining in, no longer feel comfortable demonstrating skills if it involves touching their students. *See* Michael D. Shear, *Gym Teachers Grow Wary of Touching Kids*, WASH. POST, June 19, 1994, at B1.

76. The question "how could we prove our innocence if we had to?" makes teachers especially cautious. *See* Editorial, *supra* note 74.

Some professors report that although formal complaints of sexual harassment are rare, the more common informal complaints can have the same impact. *See* Maura Lerner, *'PC' May Be the New Big Person on Campus*, STAR TRIB., June 13, 1994, at A1.

School administrators and supervisors are encouraging teachers to take a more hands-off approach to teaching. *See* Meg McSherry Breslin, *Student-Teacher Contact is Becoming a Danger: Zone Sex Abuse Cases Cast Glare Even on Innocent*, CHI. TRIB., Mar. 30, 1997, at 1. One such supervisor stated that a teacher's "actions may be positive and very innocent, but others might perceive them as sexual .... We're warning them that if you do touch students, you're taking a risk." Shear, *supra* note 75, at B1.

77. This problem is especially serious for college, graduate school, and law professors who often push students to develop critical thinking skills by playing "devil's advocate" in classroom discussions. Although some professors insist that they should be allowed to speak without consequences, this attitude draws criticism from other professors who encourage a compromise between completely free speech and ultra-sensitivity. *See* Lerner, *supra* note 76.

78. *See id.*

79. *See supra* note 57.

80. Discrepancies in underlying assumptions about welcomeness in the courts' interpretation of sexual harassment under Title VII and Title IX as well as a school district's duty to protect the rights of the accused and the accuser make it difficult to create a policy with a workable definition. *See supra* notes 45, 57 and accompanying text. Further, a policy must be more than a list of prohibited behaviors because *Meritor* requires the totality of the circumstances to be considered before conduct can be termed sexual harassment. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986). To be effective, a policy should provide some examples while emphasizing that the list is not exhaustive.

To effectively address false accusations, the sexual harassment policy should include disciplinary procedures.[81] These procedures should only punish individuals who *maliciously* make false accusations of sexual harassment. The policy should clearly state that the person making the false accusation will be disciplined by the district and subject to civil liability.[82]

B. Changes in the Availability of the Privilege and Immunity Defenses

Changes in the privilege and immunity defenses are necessary to make defamation an effective remedy for falsely accused educators. Reallocating the burden of proving an abuse of privilege is necessary to balance the rights of the accused and the accuser.[83] Under this proposal, after the plaintiff meets his prima facie case for defamation and the defendant asserts privilege, the burden shifts to the plaintiff to prove, by a preponderance of the evidence, that the defendant published defamatory information. The plaintiff can meet this burden by identifying the alleged nonprivileged individuals that the defendant told about the allegations or the investigation.[84] At this point, the burden shifts back to the defendant to prove: (1) that the people informed had a duty that provided them with privilege; or (2) that the defendant did not publish the information.[85] If the defendant cannot meet this burden, the plaintiff prevails.

81. *See* Hassenpflug & Riggs, *supra* note 48, at 987. This proposal does not advocate punishing any individual whose claim of sexual harassment is unfounded. Such punishment would defeat the purpose of Title VII and Title IX because it would deter victims from reporting legitimate complaints of sexual harassment. *See generally* Schickman, *supra* note 49.

82. Under this proposal, individuals should only be disciplined by the school district if the claim of sexual harassment was malicious. In this context, malicious means that the charge was completely unfounded and not supported by any evidence. It is not necessary that the accuser manifest an intent to harm the accused. This standard treads a middle ground between a traditional actual malice requirement and imposing discipline for the party reporting harassment any time the allegation is not supported by sufficient evidence to discipline the alleged harasser. The goal of this standard is to make both parties more accountable for their conduct as both must know which behaviors constitute sexual harassment to avoid discipline.

The district's policy should establish clear-cut penalties for individuals who make malicious false allegations of sexual harassment. The district cannot implement these penalties until an impartial investigation demonstrates that the claim was made maliciously. This investigation is necessary so that the individual who made the sexual harassment allegation cannot claim retaliation by the school district.

83. The current application of qualified privilege does an admirable job of balancing the rights of the plaintiff and the defendant in a defamation action. *See* Kennedy, *supra* note 58, at 243-45.

84. At this point, the plaintiff has the burden to prove that the defendant told *specific* nonprivileged individuals about the allegations.

85. The defendant could also assert that it was not responsible for dissemination of the information. Whichever defense the defendant asserts, the defendant must prove, by a preponderance of the evidence, that she was not responsible for disseminating the information to the specific individuals alleged by the plaintiff.

This standard is more appropriate than the current privilege standard that leaves the entire burden on the plaintiff. This standard insures that school districts and people reporting sexual harassment are not liable for speaking to those with a "need to know" about the allegations.[86] It also better protects the rights of an individual falsely accused of sexual harassment by holding the school district and the accuser accountable for each individual informed about the allegations. This standard protects the rights of the falsely accused educator without endangering the rights of the alleged victim or the school district.[87]

This change in the privilege standard eliminates the need for intracorporate immunity because it limits the people who can legitimately receive information about sexual harassment allegations based on their need to know. This is a much narrower standard than the current "within the corporation" standard.[88] Because the proposed qualified privilege standard serves the same purpose as intracorporate immunity while better protecting the rights of the accused, courts should abrogate the intracorporate immunity defense for school districts.

C. Changes in the Defamation Elements

Courts should not consider educators public figures or public officials and thus should not require them to prove actual malice in defamation actions.[89] Public officials are individuals who occupy an office created by legislative

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86. This need to know is based on whether the person to whom the information is disseminated has a duty to investigate the claim of sexual harassment that would provide them with privilege. *See* Kennedy, *supra* note 58, at 239.

87. This standard poses no threat to the defendant's rights because it places a significant burden of proof on the plaintiff and only places a burden on the defendant if the plaintiff meets this initial heavy burden.

88. Although the current standard limits intracorporate immunity to communication that occurs within the course of the investigation, this limitation is too broad to protect the rights of falsely accused educators. The proposed standard would give school districts an incentive to limit investigations to necessary people, thereby minimizing opportunities for leaks.

89. The Supreme Court first adopted the actual malice standard for public officials in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the newspaper published an advertisement protesting claimed abuses of civil rights workers in Alabama and named specific public officials allegedly responsible for these abuses. *See id.* at 256-60. Some of the published information was false and the public officials sued for defamation. The Alabama state courts awarded damages. *See id.* at 256. The Supreme Court granted certiorari to decide "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* The Supreme Court held that "[t]he Constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" *Id.* at 280-81.

enactment or the Constitution.[90] Public figures are individuals who have voluntarily assumed a public role.[91] In *Gertz v. Welch Inc.*,[92] the Supreme Court held that there are two types of public figures. The first are individuals who occupy positions of "such persuasive power and influence that they are deemed public figures for all purposes."[93] The second category of public figures are those who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[94]

The Supreme Court has never ruled on the issue of whether educators are public officials or public figures.[95] But the fleeting public interest that surrounds an educator involved in a sexual harassment investigation does not place the educator in either of the categories established in *Gertz.*[96] Therefore, an educator should not be labeled a public figure and thus should not have the burden of proving actual malice.[97]

D. Proposal for a Federal Cause of Action for Falsely Accused Educators

Currently, no federal statute allows educators falsely accused of sexual harassment to bring an action for damages. Although the Supreme Court has not ruled on the issue, lower courts have failed to recognize a cause of action for individuals falsely accused of sexual harassment under Title VII.[98]

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90. *See* Cloud, *supra* note 50, at 10. To determine when someone is a public official, courts consider the amount of discretion individuals have, whether they perform their responsibilities without anyone other than the law overseeing their decisions, and whether they are required to take an oath of office. *See id.*

91. *See id.* To determine when a person is a public figure, federal courts examine the "nature and extent of an individual's participation in the specific controversy that gave rise to the alleged defamation, and . . . clear and convincing evidence of the person's fame and notoriety and pervasive involvement in the larger society." *Id.* at 10-11.

92. 418 U.S. 323 (1973).

93. Cloud, *supra* note 50, at 12 (citing Gertz v. Welch, Inc., 418 U.S. 323, 351 (1973)).

94. Cloud, *supra* note 50, at 12.

95. *See id.* at 17.

96. Educators do not have a position of persuasive power and influence. This definition of a public figure implies that the general public listens to and respects the opinions of the individual on a wide range of issues. Educators do not meet this definition as their opinions are rarely sought by the general public. When an educator's opinion is sought by a member of the public, it is usually on a specific educational issue. Educators also are not limited-purpose public figures, those who have thrust themselves to the forefront of particular controversies, because the falsely accused educator has been thrust into the public eye. The educator in this position is not attempting to influence the resolution of a controversy. Rather, the educator *is* the controversy. Educators should not be considered public figures because they have had the misfortune of being pushed into the public eye as a result of accusations made by a third party. *See generally* Gertz v. Welch, Inc., 418 U.S. 323 (1974).

97. *See* Cloud, *supra* note 50, at 10-11, 13.

98. In *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994), the plaintiff, a male supervisor, filed suit under Title VII alleging that he was demoted after sexual harassment allegations were made against him. *See id.* at 154. The plaintiff claimed that he was discriminated against on the basis of his sex and

Further, falsely accused educators have no cause of action under Title IX because it protects only targets of discrimination.[99]

To protect falsely accused educators, Congress should enact the False Accusations Against Educators Act ("Act"). Modeled after Title VII, this statute specifically addresses the problems faced by educators and provides both adequate and appropriate remedies.[100] Additionally, the statute provides a uniform standard for defamation claims, whereas the elements for common-law defamation differ by jurisdiction.[101]

To state a claim under the Act against the accusing student, the plaintiff must establish several elements. The plaintiff must prove (1) that he is a member of the protected class,[102] (2) that the allegation of harassment was false,[103] and (3) that the accuser's claim was frivolous.[104] Finally, to make a

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that the statements about the sexual harassment created a hostile work environment. *See id.* at 153. The court held that the plaintiff did not have a cause of action under Title VII, stating, "An allegation that [the plaintiff] was falsely accused of conduct which, if true, might have given rise to a claim of discrimination based on sex by someone else in no way states a cause of action that plaintiff himself was a victim of discrimination based on his sex." *Id.* at 155.

99. *See supra* note 25 and accompanying text.

100. The Act entitles falsely accused educators to a jury trial and allows them to recover both equitable relief and punitive and compensatory damages in a proper case.

101. As stated previously, the elements that a plaintiff must plead and prove to recover for defamation vary according to the jurisdiction in which the suit was brought. *See supra* note 61 and accompanying text. The most important variance is whether or not the plaintiff must prove actual malice.

102. The protected class under the Act encompasses all elementary and secondary school teachers and administrators, including superintendents of school districts and all coaches of school athletic teams and school classified employees such as secretaries. The Act also covers all college and university professors, administrators, and classified employees and professors and administrators of professional schools as well as the classified employees of these institutions.

103. The plaintiff can prove a false allegation by presenting the findings of the school district's investigation. If the investigation is not complete, the court will determine the validity of the allegation. To make this determination, the court uses a summary judgment standard. If there are genuine issues of material fact surrounding the allegation that are proper to submit to a jury, then no cause of action exists under the Act. This is so because if genuine issues of material fact remain, the claim was not malicious because reasonable minds could conclude that the plaintiff sexually harassed the alleged victim. If insufficient evidence exists to present a genuine issue of material fact, a cause of action is available to the plaintiff. The inference is that if there is no issue of material fact, then the allegation may have been frivolous.

If the internal investigation revealed that the sexual harassment allegation was true and the plaintiff has exhausted the internal appeals process, he can request that the court review the finding using a clearly erroneous standard. The court can only reverse the finding of the school district's investigation in the case of clear error. To make its determination, the court applies the legal standard for sexual harassment that is recognized in its jurisdiction.

104. A claim of sexual harassment is frivolous only when reasonable minds must conclude that no sexual harassment occurred. This standard is not as strict as the traditional actual malice standard because intent to harm is not required for a cause of action to exist under the Act. The Act, however, intends to provide a remedy only for those who are falsely accused, not to preclude the filing of meritorious claims through fear of litigation. If there is doubt, and reasonable minds could conclude that the plaintiff's conduct constituted sexual harassment, then no cause of action exists under the Act.

prima facie case, the plaintiff must demonstrate[105] that the defendant told nonprivileged individuals[106] about the allegations.[107]

After the plaintiff makes his prima facie case under the Act, the burden shifts to the defendant. The defendant can provide legitimate reasons for telling the individuals identified by the plaintiff about the allegations.[108] Alternatively, the defendant can present evidence to demonstrate that she was not responsible for disseminating the information.[109]

The ultimate burden is on the plaintiff[110] to prove that the defendant's stated reason was not legitimate.[111] Or, if the defendant has denied all responsibility, the plaintiff must prove that the defendant was responsible for revealing the information.[112] If the plaintiff meets this burden, he can receive

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Courts must take special precautions to protect the rights of the person who made the original allegation. A system that fails to protect these rights undermines the entire purpose of both Title VII and Title IX. The Act should not be construed to halt all sexual harassment complaints against educators. Rather, its sole purpose is to halt *false* allegations and to provide a remedy when a false allegation causes damage. Any doubt about whether the allegation was frivolous should be resolved in favor of the alleged victim of sexual harassment.

105. In the Act, "demonstrate" means that the plaintiff has the burden of presenting credible evidence of the element. But the plaintiff does not have the burden of *proving* the claim.

106. For purposes of the Act, nonprivileged individuals are those who do not have a duty to take action to resolve the situation. *See supra* note 58 and accompanying text and *infra* note 108 and accompanying text.

107. In this situation, the plaintiff cannot simply make broad accusations that the defendant told nonprivileged individuals about the allegations. The plaintiff must present credible evidence that particular individuals were given the information by the defendant. The plaintiff must then demonstrate that the individuals named were not privileged. Further, the plaintiff must present evidence to demonstrate specifically what these nonprivileged individuals learned from the plaintiff.

108. In this situation, there are many individuals who would not be considered privileged because they have no duty to investigate or end the alleged harassment. An exception to the rather narrow need-to-know class should include those people whom the alleged victim has a legitimate reason to inform about the alleged harassment. These individuals include parents, spouses, physicians and counselors. An alleged victim of sexual harassment would be unduly burdened if she could not tell her family or physician about her allegations. This burden could lead to irreparable harm to her health or family relations. This is especially true where children are sexually harassed by educators. The potential harm constitutes a legitimate reason for informing nonprivileged individuals.

109. For example, nonprivileged people who learned of the allegations could testify that the information did not come from the defendant or from anyone that may have learned the information due to the defendant's "leaks."

110. The plaintiff's burden of proof for this element of the case is a preponderance of the evidence standard.

111. The exception to the privilege that allows an alleged victim of sexual harassment to inform her family cannot exist without an accompanying measure to protect the interests of the falsely accused. In the Act, an alleged victim can report the alleged harassment to those individuals previously mentioned. She is legally responsible, however, for any information about the allegations that these individuals disseminate to other individuals if she is named as a defendant in an action brought under the Act. This balancing measure ensures that the alleged victim can receive comfort and support from her family while protecting the alleged harasser by holding her accountable for information that her family leaks.

112. Once again, individuals could testify that they learned the privileged information from the

damages.

The allocation of burdens is the same when the falsely accused educator sues the school district. The educator need not prove, however, that the allegation was false or frivolous. Instead, he must prove that the district knew or had reason to know that the allegation was false or frivolous and that the district did not take steps to protect his reputation.[113] The educator also has the option of proving that the school district incompetently conducted the investigation.[114] The accused educator must also present evidence to demonstrate that the school district informed people who did not have a need to know.[115]

After the plaintiff meets his prima facie case, the burden shifts to the defendant to demonstrate the reasonableness of its actions or to deny responsibility for specific incidents. To articulate the reasonableness of its actions, the defendant can demonstrate that the complaint was not frivolous and that an investigation was appropriate. The defendant must also demonstrate that the people it told about the allegations had a need to know. The defendant can also deny responsibility for specific leaks and present evidence to demonstrate that the leaks originated from a different source.[116]

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defendant or from a source for which the defendant is responsible. The plaintiff can also demonstrate the defendant's responsibility by introducing circumstantial evidence that proves by a preponderance of the evidence that the information originated with the defendant. When the plaintiff presents evidence to refute the defendant's claim that she was not responsible, a question of fact is created that turns primarily on the credibility of the witnesses and should be decided by a jury.

113. The school district cannot be held liable for investigating a complaint that it believed frivolous. Such liability would conflict with the district's duty to protect the rights of victims of sexual harassment. But the district can be liable for not protecting the reputation of the accused as much as possible. Steps that the school district can take to protect the accused include interviewing only those people absolutely necessary to making a determination, explaining to these individuals that they have an obligation to keep the investigation confidential, and not releasing *any* information to outside sources about the allegation.

114. Examples of school district incompetence include discussing the allegations with individuals without a need to know, continuing an investigation for a lengthy period without any evidence that an investigation is warranted, discussing the allegations at a public board meeting prior to making a determination about the alleged harasser's culpability, and providing information to the press about the investigation.

115. *See supra* note 58. The plaintiff can demonstrate that the district carried out an in-depth, extended investigation when no evidence indicated that this type of investigation was necessary. School officials are expected to use their best judgment in these situations. If the school official feels strongly that the allegation is frivolous and a cursory investigation fails to present any evidence that the complaint has merit, then the school district should explain the procedure that it followed to the alleged victim and also to the accused employee. The school district is not obligated to pursue the investigation any further. To do so, without evidence that further investigation is warranted, subjects the school district to liability from the accused teacher if the teacher suffers damage as a result of a continued investigation.

116. This situation is similar to that discussed earlier, *see supra* note 109, where the defendant can present testimony that it was not the source of the leak. Such testimony will present a factual question for a jury, especially in cases where the defendant school district and the individual defendant each

Then, the burden shifts to the plaintiff to contradict the defendant's stated reasons by a preponderance of the evidence. To do so, the plaintiff must prove that the defendant incompetently conducted the investigation and that this incompetence caused the plaintiff to suffer damages.[117] The plaintiff must also prove that the defendant is responsible for the leaks if the defendant has denied responsibility.[118]

The plaintiff is eligible for the same remedies whether he brings an action against the actual accuser or an action against the school district. The types of remedies that the plaintiff can recover, however, depend on whether he proves that the defendant's actions were intentional. If the plaintiff cannot prove intent, he can only receive reinstatement, backpay, and other equitable relief as the court deems appropriate.[119]

When the plaintiff proves that the defendant acted intentionally, he can receive compensatory[120] and punitive[121] damages as well as equitable relief.[122] When the action is against the individual accuser, the defendant must prove that the accuser either intentionally made a frivolous claim or intentionally and with reckless indifference or conscious disregard for damage to the plaintiff told people without a need to know[123] about the allegations.[124] When the action is against the school district, the plaintiff must

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accuse the other of being the source of the leak. As in all negligence cases, if each side presents credible evidence that raises a question of fact, the jury should be allowed to judge the witnesses' credibility and make the final determination of liability.

117. *See supra* notes 57, 113-15.

118. Determining who is at fault where credible evidence is presented by the plaintiff and the defendant is a question for the jury.

119. These damages were modeled after those in Title VII. *See* 42 U.S.C. § 2000e-5(g)(1) (1994).

120. Compensatory damages are designed to compensate the injured party for the injury sustained and nothing more. They replace the loss caused by the wrong or injury. The rationale is to restore the injured party to the position he occupied prior to the injury. *See* BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

121. These damages are above and beyond what would compensate the plaintiff for his loss and are intended to punish the defendant or compensate the plaintiff for the degradation or other aggravation he suffered due to the defendant's conduct. Punitive damages are awarded when the wrong suffered by the plaintiff was exacerbated by "violence, oppression, malice, fraud, or wanton or wicked conduct on the part of the defendant." *Id.*

122. Equitable relief is relief sought through the equity powers of the court, such as seeking specific performance in a contract action as opposed to seeking monetary damages. *See id.* at 539. Reinstatement is an example of equitable relief for an educator terminated after a false accusation of sexual harassment.

123. As discussed previously, the exception to this need-to-know category includes individuals such as the alleged victim's family, for which a legitimate reason exists for informing those individuals. *See supra* note 108 and accompanying text.

124. The standard for determining when an individual defendant can be responsible for punitive damages is if the plaintiff proves that: (1) the defendant knew or should have known that informing individuals without a need to know was likely to cause injury to the plaintiff; and (2) the defendant spread the information with reckless indifference or conscious disregard for the damage her actions

prove that the district intentionally and with conscious indifference or reckless disregard for possible damage to the plaintiff[125] told people without a need to know about the investigation.[126] In each case, the plaintiff who meets this burden can recover compensatory and punitive damages.[127]

A school district can diminish its liability by doing everything possible to limit the damage to the falsely accused educator's reputation. The school district can accomplish this by publicly acknowledging that the allegation was false and by placing documentation to this effect in the teacher's personnel file.[128] A falsely accused teacher must request these remedies upon the completion of the investigation. If the teacher does not request that the record be set straight, he has waived his remedies for loss of reputation and status and any resulting damages under the Act.[129]

V. CONCLUSION

The current remedies available to educators falsely accused of sexual harassment are inadequate. Changes in current laws and a new federal cause of action are necessary to protect falsely accused educators by providing adequate remedies. For these changes to occur, however, school districts, courts, and the legislature must recognize that the current system does not adequately safeguard falsely accused educators. Further, these entities must recognize that falsely accused educators have a right to compensation. School districts must take a stand against employees and students who make false claims. Courts must adopt new common-law standards for defamation

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would cause.

125. The standard for punitive damages against a defendant school district is the same as the standard when the case is against an individual defendant. *See supra* note 124 and accompanying text.

126. The school district does not have an exception to the need-to-know requirement for those with a legitimate reason like the individual defendant. For further discussion of this exception, see *supra* notes 108, 111 and accompanying text.

127. Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. These damages are modeled after 42 U.S.C. § 1981a(b) (1991).

Under the Act, the plaintiff need not suffer actual psychological damage that amounts to a nervous breakdown or similar event to prove emotional damages. The defendant's conduct need only create an environment that a reasonable person would find hostile or abusive. This standard is modeled after the Title VII standard contained in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). Credible testimony from people in the community is sufficient to prove that the plaintiff's reputation suffered.

128. *See* Hassenpflug & Riggs, *supra* note 48, at 986-87. Having the school district merely state that the allegations were false may be inadequate because damage to the educator's reputation has already been done and the stigma of the accusation may remain. *See supra* note 58 and accompanying text.

129. An educator who does not request that the school district take corrective action for the benefit of his reputation can still recover equitable remedies such as reinstatement and any backpay to which he is entitled.

and its defenses. Congress must craft new legislation to protect falsely accused educators. These changes will achieve a balance between the rights of the accused and the accuser that will benefit all parties.

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