

SEXUAL MISCONDUCT, EMPLOYMENT REFERENCES, AND HIRING IN HIGHER EDUCATION: IS IT TIME FOR THE DUTY OF CARE TO EVOLVE?

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INTRODUCTION

In March 2016, the University of South Florida (USF) received striking news.¹ A current professor, Samuel Bradley, was under investigation for allegations of sexual misconduct² with former students at the university where he had previously worked.³ Bradley had resigned during the investigation and USF failed to discover any of this information during the hiring process.⁴ When USF became aware of the allegations, which had been disclosed by news media, the university placed Bradley on administrative review and eventually terminated him.⁵

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1. Liz Farmer, *Former Texas Tech Professor Had Intimate Relations with Students, Report Says*, DALLAS NEWS (Mar. 2016), <https://www.dallasnews.com/news/news/2016/03/26/former-texas-tech-professor-had-intimate-relations-with-students-report-says> [<https://perma.cc/JU6T-AFDT>].

2. For purposes of this paper, sexual misconduct refers to sexual harassment and sexual violence.

3. *Id.*

4. *Id.*

5. *Id.*; Anastasia Dawson, *USF Fires Top Administrator Who Was Hired Despite Serious Lapses at Previous Job*, TAMPA BAY TIMES (July 1, 2016),

Around the same time, USF experienced another similar situation. One of their professors, Marc Santos, was under investigation after a student filed a sexual harassment complaint alleging retaliation and stalking after a sexual relationship with the married professor soured.⁶ While the investigation was ongoing, Santos left USF and accepted a position at the University of Northern Colorado (UNC) in June 2016.⁷

Given the recent experience with Bradley, one might infer USF would be forthcoming regarding Santos's open investigation. However, USF did not disclose this information, reasoning "[i]t would be the responsibility of the prospective employer seeking to hire a candidate to request this information," and UNC never asked specifically about such behavior.⁸ Interestingly, another university had posed targeted questions about Santos to USF and USF faculty informed the university of the pending investigation, leading the university to stop its pursuit of Santos as a candidate.⁹

USF's actions seem inconsistent given it reshaped its own policies to mandate improved reference checks as a condition of employment after its failure to follow consistent hiring practices resulted in the Bradley incident.¹⁰ Should there be a duty to provide readily available information relevant to sexual misconduct? Should UNC's failure to ask about sexual misconduct investigations prohibit it from receiving highly relevant information, particularly in an era of heightened Title IX and #MeToo concerns?

Currently, universities and other employers have limited duties to disclose negative information regarding a current or former employee to prospective employers, but are those duties being reshaped? Sexual misconduct has been forced into the spotlight in the #MeToo era. This attention has redefined employment law in many respects,¹¹ but more comprehensive duties to disclose have yet to emerge. Without a legal

<http://www.tampabay.com/news/education/college/usf-fires-top-administrator-who-was-hired-despite-serious-lapses-at/2283758> [<https://perma.cc/HY4V-GP2A>].

6. Tyler Silvy, *Incoming University of Northern Colorado Professor Left Former Job Amid Sexual Harassment Investigation*, GREELEY TRIB. (July 12, 2016), <https://www.greeleytribune.com/news/local/incoming-university-of-northern-colorado-professor-left-former-job-amid-sexual-harassment-investigation/> [<https://perma.cc/6T9U-GJKJ>].

7. *Id.*

8. *Id.*

9. *Id.*

10. Policy 0-616, *Emp't References – Providing and Obtaining Emp't References Info.*, Univ. of S. Fla. Sys. (Mar. 9, 2017), <http://regulationspolicies.usf.edu/policies-and-procedures/pdfs/policy-archive-0-616-030917.pdf> [<https://perma.cc/QZE3-LFG3>].

11. *See, e.g.*, Zuni Corkerton, *#MeToo Has Forever Changed the Ground Rules for Employers*, BIZJOURNALS (May 31, 2018, 6:00 AM), <https://www.bizjournals.com/columbus/news/2018/05/31/metoo-has-forever-changed-the-ground-rules-for.html> [<https://perma.cc/X9UZ-J57Z>].

mandate, in 2018, the University of Wisconsin System (UW) drafted policies requiring campuses to ask about and share information with other campuses regarding incidents of sexual misconduct during the hiring process.¹² As part of this policy initiative, outside employers are proactively informed that sexual misconduct information can be obtained from human resource offices, if such information exists.¹³ Given the emergence of new sexual misconduct policies like UW's—and with how readily available information is today—it is hard to imagine that the duty to disclose will not evolve.

Part I of this paper examines social landscapes impacting the reference check context. Parts II and III analyze the legal framework surrounding reference checks and how the UW System policy expands upon employers' duties. Finally, the paper concludes with a call to action for other universities to implement similar policies in the spirit of ending practices that result in “passing the harasser.”

I. CAMPUS SEXUAL MISCONDUCT AND THE UW SYSTEM RESPONSE

Coined in 2006 by Tarana Burke to support young women of color who had survived sexual violence, “Me Too” has grown in public prominence since late 2017 when the New York Times exposed accusations of sexual assault against media mogul Harvey Weinstein.¹⁴ Days later, actress Alyssa Milano, unfamiliar with the roots of the phrase, requested her Twitter followers to reply with “me too” if they had experienced sexual misconduct.¹⁵ #MeToo instantly went viral, reaching eighty-five countries and being used in over 1.7 million tweets within a month¹⁶ and included in over nineteen million tweets within a year.¹⁷ This global #MeToo discussion has shown how sexual misconduct permeates every faction of society. Whether within Hollywood, athletics, medicine,

12. Heather LaRoi, *UW System to Recommend More Robust Hiring, Reference Check Policies*, UNIV. OF WIS. SYS. (Aug. 21, 2018), <https://www.wisconsin.edu/news/archive/uw-system-to-recommend-more-robust-hiring-reference-check-policies/> [https://perma.cc/62AU-4J7N].

13. *Id.*

14. Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHI. TRIB. (Mar. 7, 2019, 2:10 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htlmlstory.html> [https://perma.cc/6RSC-5WNV].

15. *Id.*

16. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017, 12:43 PM), <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/> [https://perma.cc/699T-MYN6].

17. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), <http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/> [https://perma.cc/VV2C-U2K5].

academia, politics, or just an average neighborhood, victims are bringing their accounts of sexual misconduct out of the shadows and into the public eye.

Higher education has failed to evade this pandemic. Despite a high prevalence of sexual misconduct within higher education, universities—like other employers—have yet to meaningfully change hiring policies to combat the issue. Instead, employers continue to maintain reference check policies that limit the information disclosed to the bare minimums. Bucking this trend, the UW System implemented new reference check policies that could be used as a national model for other employers looking to reduce opportunities for harassers to slip under the radar.¹⁸ These policies are essential.

A. Sexual Misconduct in Higher Education

Data collection regarding sexual misconduct on college campuses faces significant limitations.¹⁹ Most acts of sexual misconduct go unreported.²⁰ In fact, data suggests less than 10% of incidents on campuses are reported.²¹ Despite such difficulties, many studies have illustrated that, going back well over a decade, sexual misconduct has been commonplace within campus life. For instance, a 2005 study found that almost two-thirds of college students experience some degree of sexual harassment, with over half of college students having been the target of unwanted sexual comments, jokes, gestures, or looks.²² In regards to sexual violence, a 2007 study reported nineteen percent of women and six percent of men respondents were victims of attempted or completed sexual assault while attending college.²³

In 2018, The National Academies of Sciences, Engineering, and Medicine released a report detailing the “influence of sexual harassment in academia on the career advancement of women in the scientific, technical, and medical workforce.”²⁴ According to the report, “[i]n 2017 alone, there were more than 97 allegations of sexual harassment [against faculty members] at institutions of higher education covered in the

18. See LaRoi, *supra* note 12.

19. BONNIE S. FISHER ET AL., U.S. DEPT. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 2 (2000).

20. See *id.* at 23.

21. CATHERINE HILL & ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 4 (2005).

22. *Id.* at 14.

23. CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY, 5-1, 5-5 (2007).

24. NAT’L ACADS. OF SCIS., ENG’G, AND MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 17 (Paula A. Johnson et al. eds., 2018) [hereinafter NASEM Report].

media.”²⁵ Moreover, surveys conducted by the University of Texas and Pennsylvania State University Systems discovered twenty to fifty percent of female students in science, engineering, and medical based programs experienced sexual harassment from university faculty and staff.²⁶ Students are not the only individuals experiencing high rates of victimization on campuses. The report highlights that “the academic workplace (i.e., employees of academic institutions) has the second highest rate of sexual harassment at 58 percent . . . when comparing it with military, private sector, and the government.”²⁷

Other reports reveal the problem of serial sexual harassment by faculty members. One study, reviewing 300 cases of faculty sexual harassment, found more than half (fifty-three percent) involved a pattern of serial behavior with multiple victims.²⁸ To make matters worse, the alleged sexual misconduct was purely verbal in only fourteen percent of cases, while fifty-three percent involved allegations of various degrees of unwanted sexual touching.²⁹ The National Academies report acknowledged similar findings that “respondents and other colleagues often clearly knew which individual had a history of sexually harassing behavior” resulting in campuses being “replete with cases where offenders are an ‘open secret’ but are not sanctioned” as the repeated misconduct has become normalized.³⁰

B. No Comment Policies and the UW System Response

Although full and unfettered references was once a routine expectation, employers began to step away from such practices in the 1980s.³¹ At that time, concerns over liability resulted in employers shifting to formal “no comment” policies which limited references to merely confirming dates of employment, job duties, and salary history.³² As discussed in the next section, much of this liability concern is misplaced.

The UW System has taken steps to do the opposite. In 2018, the system drafted comprehensive hiring and reference check policies that

25. *Id.* at 14.

26. *Id.* at 59–60. Variation in rates depended on major and level of education.

27. *Id.* at 1–2. The military was the highest at sixty-nine percent. *Id.*

28. Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 743–44.

29. *Id.* at 742.

30. NASEM Report, *supra* note 24, at 52.

31. Markita D. Cooper, *Beyond Name, Rank, and Serial Number: “No Comment” Job Reference Policies, Violent Employees and the Need for Disclosure-Shield Legislation*, 5 VA. J. SOC. POL’Y & L. 287, 292–93 (1998).

32. *Id.* at 293.

explicitly address sexual misconduct.³³ First, every final candidate must be asked prior to hire whether they were ever found to have engaged in, are currently being investigated for, or left a position during an investigation into accusations of sexual misconduct.³⁴ Second, similar questions must be asked to the final candidate's most recent employer and all previous UW System institutions or state agencies in which the candidate was employed within the past seven years.³⁵ The idea is to ask very direct questions that will illicit relevant sexual misconduct information about candidates.

The new policies also expand the information an employing institution must disclose to a hiring employer. For instance, “[w]hen a supervisor or agent of management is contacted by a potential employer for a reference check of a current or former employee, the supervisor or agent must notify the potential employer, even if they do not ask, of the appropriate UW System institution contact for any questions related to employee misconduct.”³⁶ The designated institutional contact—generally a trained human resources officer—must then disclose any sexual misconduct.³⁷ Additionally, the employee's personnel file must be shared with another UW System institution or state agency upon hire.³⁸ Because personnel file policies were also updated to guarantee consistent documentation of findings of sexual misconduct, such transfer acts as another check in the process for the receiving institution.³⁹

The UW System hopes to be “leading the charge” on the issue.⁴⁰ These disclosures go well beyond the simple confirmations associated

33. See LaRoi, *supra* note 12.

34. UPS Operational Policy: TC1, Recruitment Policy, Univ. of Wis. Sys. 3 (Jan 1, 2019), https://www.wisconsin.edu/ohrwd/download/2018-12-10-UPS-OP-TC-1-Recruitment_FNL.pdf [<https://perma.cc/XV3U-LXRS>] [hereinafter TC1].

35. *Id.* at 3.

36. *Id.* at 4.

37. *Id.* at 4, 12. Such disclosures do not encapsulate unsubstantiated allegations. *See id.*

38. *Id.*

39. See UPS Operational Policy: HR13, Personnel Files, Univ. of Wis. Sys. (Jan. 1, 2019), https://www.wisconsin.edu/ohrwd/download/2018-12-10-UPS-OP-HR-13-Personnel-Files_FNL.pdf [<https://perma.cc/YGA6-DAML>].

40. Colleen Flaherty, *U of Wisconsin System Proceeds with Plan to Disclose Misconduct Findings Against Employees to Their New Employers*, INSIDE HIGHER ED, (Sept. 25, 2018, 3:00 AM), <https://www.insidehighered.com/news/2018/09/25/u-wisconsin-system-proceeds-plan-disclose-misconduct-findings-against-employees> [<https://perma.cc/K3Q5-C5LT>]. UW did not find any similar university policy after conducting a nationwide assessment during the policy drafting stages. See Kelly Meyerhofer, *UW Schools to Share Personnel Files With Each Other, State Agencies as Soon as January 2019*, WIS. ST. J. (Aug. 22, 2018), https://madison.com/wsj/news/local/education/university/uw-schools-to-share-personnel-files-with-each-other-state/article_f06ff37b-06c5-5dc2-a911-26e3ed2f6987.html [<https://perma.cc/FY8Z-ULD6>] (“Employees from UW-Eau Claire, UW-Oshkosh, UW-Milwaukee, UW-Madison, and System administration formed a work group to write the

with no comment policies and signal a strong commitment to combating sexual misconduct.⁴¹ In this vein, the policy can be used as a model for other institutions, some of which have already expressed interest in adopting Wisconsin's policy changes.⁴²

II. REFERENCE CHECK LEGAL FRAMEWORK

The reference check legal framework is characterized by a two-sided battle over negative employment information. On one side of this “tug-of-war” for employment information resides the current employer, nervous to disclose such information for fear of a potential defamation lawsuit brought by a disgruntled former employee.⁴³ However, balancing this pull is a conflicting desire to have full and accurate information to prevent negligent hiring decisions.⁴⁴ The following section discusses competing sources of liability facing employers as they decide whether to provide an employment reference.

A. Defamation

Exposure to a defamation lawsuit by a former employee upset with negative information shared with a prospective employer remains a key concern for many employers.⁴⁵ In fact, it is believed some highly publicized and costly defamation lawsuits spurred the movement towards no comment policies in the 1980s.⁴⁶ However, the attention to defamation liability in the reference check context is quite overblown.

The common law tort of defamation consists of four elements. To create liability for defamation there must be: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.⁴⁷

new policy. The group surveyed personnel file and reference check policies at 37 institutions and found few existing documented policies to serve as a model.”).

41. *See id.*

42. *Id.*

43. *See* Jennifer L. Aaron, *The Tug-of-War With Employment Information: Does Louisiana Revised Statutes 23:291 Really Help Employers Stay Out of the Mud?*, 58 LA. L. REV. 1131, 1131 (1998).

44. *Id.*

45. Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 719, 721 (2015).

46. Cooper, *supra* note 31, at 293.

47. RESTATEMENT (SECOND) OF TORTS § 558 (Am. Law Inst. 1977).

A statement is defamatory if it “harm[s] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁴⁸

Employers have multiple defenses available to counter defamation lawsuits brought against them. Truth and consent are two absolute defenses to such a lawsuit.⁴⁹ If a defendant can prove that a negative statement was in fact true, then the defendant has overcome the presumption that all defamatory statements are untrue and is protected.⁵⁰ Likewise, “the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.”⁵¹

Employers may also be protected by a qualified privilege.⁵² Such protection generally comes from state employment reference immunity statutes.⁵³ For example, Wisconsin law provides that when a current employer provides a reference to a prospective employer, the current employer is “presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from all civil liability that may result from providing that reference.”⁵⁴ The presumption of good faith can be rebutted by showing that the employer “knowingly provided false information” or “made the reference maliciously.”⁵⁵

Like Wisconsin, most states have such immunity statutes to encourage employers to provide relevant information during reference checks.⁵⁶ Although some immunity statutes authorize the conditional disclosure of information regarding reasons for termination, eligibility for rehire, and even disciplinary actions, until recently, no state statute explicitly protected the disclosure of sexual misconduct information to a prospective employer.⁵⁷ In 2018, California passed Assembly Bill 2770 broadening the scope of a “privileged publication or broadcast” to include an employer’s response within a reference check as to “whether the employer would rehire a current or former employee and whether or not a decision to not rehire is based on the employer’s determination that the

48. RESTATEMENT (SECOND) OF TORTS § 559 (Am. Law Inst. 1977).

49. John W. Belknap, *Defamation, Negligent Referral, and the World of Employment References*, 5 J. SMALL & EMERGING BUS. L. 113, 118 (2001); Restatement (Second) of Torts § 583 (1977).

50. Belknap, *supra* note 49, at 118.

51. RESTATEMENT (SECOND) OF TORTS § 583 (Am. Law Inst. 1977). For more information on consent in the defamation context, see Long, *supra* note 43.

52. Long, *supra* note 45, at 725.

53. *Id.*

54. WIS. STAT. § 895.487(2) (2019).

55. *Id.*

56. Barbara Kate Repa, *State Laws on References and Statements by Former Employers*, NOLO (Apr. 19, 2019), <https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter9-6.html> [<https://perma.cc/43T4-96D6>].

57. *See id.*

former employee engaged in sexual harassment.”⁵⁸ These protections should lead to more complete information for prospective employers in states where they exist.

B. Negligence in the Hiring Process

Employers can experience potential liability beyond defamation lawsuits following the disclosure of negative information.⁵⁹ An employer must be sure to not act negligently in the hiring process.⁶⁰ Generally speaking, negligent conduct that gives rise to common law tort liability consists of four traditional elements: (1) a legally imposed duty to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the conduct and resulting harm; and (4) actual loss, harm, or damage.⁶¹ Within the reference check context, liability for negligence may take the form of negligent referral and negligent hiring.⁶²

1. NEGLIGENT REFERRAL

Under common law tort principles, an individual generally has no affirmative duty to warn another individual of potential injury by a third party.⁶³ This principle extends into the hiring process, as employers owe no duty to provide a reference—whether positive or negative.⁶⁴ If the employer chooses to supply any kind of reference, the information must be accurate and cannot misleadingly omit important negative information known by the employer.⁶⁵

An individual owes a duty to act on behalf of another, however, if a special relationship exists between the parties.⁶⁶ *Tarasoff v. Regents of the University of California*⁶⁷ exhibits an affirmative duty to warn based on a special relationship. In *Tarasoff*, a college student was murdered after a patient told the university psychologist about his desire to kill the

58. Assem. Bill 2770, 2017–2018, Reg. Sess. (Cal. 2018).

59. Frank J. Cavico et al., *The Tort of Negligence in Employment Hiring, Supervision and Retention*, 1 AM. J. OF BUS. & SOC’Y 205, 205–06 (2016).

60. *Id.*

61. *Id.*

62. *See infra* Section II.B.1, II.B.2.

63. RESTATEMENT (SECOND) OF TORTS § 315 (Am. Law Inst. 1965).

64. *See Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997) (validating no comment policies).

65. *See* RESTATEMENT (SECOND) OF TORTS § 311 (Am. Law Inst. 1965); *Jane Doe v. McLean Cty. Unit Dist. No. 5 Bd. of Drs.*, 2012 IL 112479, ¶ 35, 973 N.E.2d 880, 891–92 (Ill. S.Ct. 2012).

66. RESTATEMENT SECOND OF TORTS § 315(b) (Am. Law Inst. 1965).

67. 551 P.2d 334 (Cal. 1976).

student.⁶⁸ The court determined that the psychologist's relationship to either the patient or the intended victim was sufficient to require action to warn, despite the general common law rule against such a duty.⁶⁹

Cases have also addressed a duty to warn specifically within the employment reference context. For example, in *Cohen v. Wales*,⁷⁰ a school board positively recommended a former employee looking to become a teacher at a new school district and failed to disclose a previous charge of sexual misconduct.⁷¹ Eleven years later, the teacher sexually assaulted another student at that school district.⁷² The court held that, absent a special relationship, the school board owed no duty to warn the other school district about the previous sexual misconduct during the reference check.⁷³ However, in *Randi W. v. Muroc Joint Unified School District*,⁷⁴ a case decided a decade later, the court came to a different result despite a very similar fact pattern.⁷⁵ In *Randi W.*, a school official was hired after receiving positive recommendations by former school districts despite previous incidents of sexual harassment.⁷⁶ The official then sexually assaulted a student at the new district.⁷⁷ In this case, the court held that an employer providing a reference for a former employee owes a duty to others to not misrepresent the facts in describing the qualifications and character of such employee if those misrepresentations would create a substantial and foreseeable risk of physical injury to third persons.⁷⁸ Overall, such cases "are fact-specific and draw very narrow lines."⁷⁹

2. NEGLIGENT HIRING

Although the flow of information during the hiring process may be constrained by no comment policies, an employer has a legal duty to conduct an appropriate investigation into a prospective employee.⁸⁰ Overall, this duty is one of reasonable care within the hiring process.⁸¹ An employer breaches this duty when it has notice that hiring a particular

68. *Id.* at 339–40.

69. *Id.* at 343.

70. 518 N.Y.S.2d 633 (N.Y. App. Div. 1987).

71. *Id.* at 633.

72. *Id.* at 633–34.

73. *Id.* at 634.

74. 929 P.2d 582 (Cal. 1997).

75. *Id.* at 584.

76. *Id.* at 584–86.

77. *Id.* at 585.

78. *Id.* at 591.

79. Belknap, *supra* note 49, at 122.

80. Cavico, *supra* note 59, at 208.

81. *Id.*

employee creates a risk of danger to third parties but hires that individual anyways.⁸²

In such cases, an important point of analysis is determining how much care is reasonable. Courts have held that the nature of the hired employee's prior conduct, the type of job functions to be conducted, and who the employee will interact with are all important factors to weigh in determining whether an investigation was appropriate in a given circumstance.⁸³ Thus, in some circumstances, a heightened risk of harm can increase the degree of reasonable care required to avoid a negligent hiring claim.⁸⁴ However, such a heightened duty has not always been present in cases involving sexual misconduct by a teacher against a student.⁸⁵

III. REDEFINING REFERENCE CHECK RESPONSIBILITIES

In light of the #MeToo movement, a reasonable question exists regarding the extent of the duty of care imputed to employers. Stated differently, now that employers know that sexual misconduct is far more rampant than previously understood, can the duty of care related to reference checks remain unchanged? Already, the #MeToo movement has "forever changed the ground rules for employers"⁸⁶ as employers and legislatures have been forced to review policies regarding sexual misconduct.⁸⁷ Reference check policies, however, have largely remained unchanged. Although the California immunity statute is a move in the right direction, commentators suggest the privilege remains limited and continue to advocate for no comment policies to fully avoid liability.⁸⁸ In the interest of improving overall employee safety, the UW policy described above can serve as an important first step in expanding the

82. *Id.*

83. *Id.*

84. *Id.*

85. *See Bell v. Harge*, 81 F. App'x. 943, 945 (9th Cir. 2003) (finding a school district did not violate ordinary care in conducting investigation into a substitute teacher who sexually touched a student, when district did nothing more than rely upon a criminal history check that failed to reveal a prior out-of-state sexual misconduct incident).

86. Corkerton, *supra* note 11.

87. *See, e.g.,* Rebecca Beitsch, *The Me Too Movement Has Changed Our Culture. Now It's Changing Our Laws.*, HUFFINGTON POST (July, 31, 2018, 2:26 PM), https://www.huffpost.com/entry/metoo-has-changed-our-culture-now-its-changing-our_b_5b60a511e4b0eb29100e5998 [<https://perma.cc/GE49-WYVL>] (discussing limiting nondisclosure agreements, improving rape kit testing, and expanding statute of limitations for sex crimes).

88. *See, e.g.,* Joseph B. Farrell et al., *California Adopts Bills Addressing Sexual Harassment Disclosures in Job References and Paid Family Leave*, LATHAM & WATKINS (July 17, 2018), <https://www.lw.com/thoughtLeadership/california-bills-sexual-harassment-disclosures-job-references-paid-family-leave> [<https://perma.cc/X86T-VKMJ>].

standards of care as they relate to sexual misconduct information within employment reference checks. Such changes are much needed in higher education, where sexual misconduct has become normalized and expected.⁸⁹ The UW policy could be the much-needed catalyst in changing this culture and encouraging universities to take more responsibility for their hiring decisions.

A. Addressing Defamation Concerns

The University of Wisconsin System was not deterred by potential defamation liability when it enacted its new system-wide policies. In fact, the working group tasked with updating the policies “found little evidence of successful defamation claims where the disclosed misconduct findings were based on sound investigations.”⁹⁰ Overall, the worry appears more myth than reality.⁹¹ Regardless, as a matter of public policy, the avoidance of (likely unsuccessful) defamation lawsuits is not an acceptable reason to withhold relevant sexual misconduct information which could prevent an innocent person from being harassed or assaulted.

Given that defamation liability is a prevalent concern, it is notable that the UW policy was drafted to take advantage of the defenses available. First, the policy mandates only the disclosure of actual findings of sexual misconduct or of the fact that an individual left during an active investigation.⁹² The disclosures do not include unsubstantiated allegations which could be construed as false or malicious and thus not protected under Wisconsin’s immunity statute.⁹³ Second, all prospective employees are informed that satisfactory reference checks, including questions regarding sexual misconduct, are preconditions to hire.⁹⁴ Thus, if a prospective employee continues with the hiring process, an argument could be made that they consent to such disclosures. By taking advantage of the defenses available, the policy opens the flow of relevant sexual misconduct information without increasing the threat of liability in a litigious world dominated by no comment policies.

B. Expanding the Duty to Warn

As previously mentioned, an individual is not bound to warn another about potential injury caused by a third party—even if they know of such risk—absent a special relationship between the parties.⁹⁵ As of yet, a

89. See *supra* Section I.A. and accompanying discussion

90. Flaherty, *supra* note 40.

91. *Id.*

92. TC1, *supra* note 34, at 4.

93. WIS. STAT. § 895.487(2) (2019).

94. TC1, *supra* note 34, at 8, 12.

95. See *supra* notes 66–69 and accompanying text.

special relationship has not been established between the parties within the employment reference context.⁹⁶ Despite many academics calling for such a duty to be created,⁹⁷ “courts are reluctant to impose affirmative duties, and job disclosure cases remain faithful to this pattern.”⁹⁸

Although courts may be reluctant, other actors may impose a higher standard of care within their own practices. UW System has raised the bar with their policy changes. Now, all UW institutions, when contacted by a prospective employer, must notify them of the appropriate contact who can disclose information regarding an employee’s sexual misconduct.⁹⁹ This means the university will not be forced to struggle with determining which information to disclose; the policies clearly mandate only the disclosure of “whether the employee has ever been found to have engaged in, is currently under investigation for, or left during an active investigation in which they were accused of sexual violence or sexual harassment.”¹⁰⁰ With this clarity, UW institutions will not need to fear the daunting task of determining whether an employee exhibits a foreseeable risk of harm because a clear, consistent standard has been set.

The UW policy increases the System’s responsibility to warn prospective employers during reference checks in other ways. Although courts have declined to extend negligent reference liability beyond actual physical harm,¹⁰¹ UW System universities must now disclose not only findings of sexual violence, but also prior findings of sexual harassment which may or may not include a physical harm component.¹⁰² In this way, the UW policy properly identifies the seriousness of sexual harassment by university faculty and staff and ensures future employers are aware of the misconduct, even if there is not a foreseeable threat of “physical” harm. The UW policy also mandates that universities inform requesting employers about sexual misconduct information “even if they do not ask” specifically about it during a reference check.¹⁰³

96. Cooper, *supra* note 31, at 320.

97. See, e.g., Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645, 1667 (1991); Susan Oliver, *Opening the Channels of Communication Among Employers: Can Employers Discard Their “No Comment” and Neutral Job Reference Policies*, 33 VALPARAISO U.L. REV. 687, 755 (1999); Belknap, *supra* note 49 at 131; Cooper, *supra* note 31 at 292. For arguments against the establishment of such a duty see John Ashby, *Employment References: Should Employers Have an Affirmative Duty to Report Employee Misconduct to Inquiring Prospective Employers?*, 46 ARIZONA L. REV. 117, 120 (2004).

98. Cooper, *supra* note 31, at 320.

99. TC1, *supra* note 34, at 4.

100. *Id.*

101. See, e.g., *Richland School District v. Mabton School District*, 45 P.3d 580, 587 (Wash. Ct. App. 2002).

102. TC1, *supra* note 34, at 4.

103. *Id.*

C. Heightening the Standard of Care

The UW System policy could have implications for the duty of reasonable care in the hiring process associated with negligent hiring claims. A key question in such claims is what constitutes “reasonable” care. The UW System policy pushes this standard far beyond current requirements, given the current “no comment” backdrop under which most employers operate. According to the UW policy, all system institutions must conduct adequate investigations into previous sexual misconduct of a final candidate by asking the candidate directly and performing satisfactory reference checks.¹⁰⁴

The UW policy recognizes institutions of higher education are uniquely exposed to the dangers encountered through the failure to conduct adequate employee investigations. In fact, the National Academy of Sciences, Engineering, and Medicine report found that these three academic fields—science, engineering, and medicine—exhibit four characteristics that increase the potential for sexual harassment: (1) male-dominated environments, (2) organizational tolerance for sexually harassing behavior,¹⁰⁵ (3) hierarchical and dependent relationships between faculty and others, and (4) isolating environments.¹⁰⁶ As discussed above, these conditions have resulted in strikingly high rates of sexual harassment and violence for students while on campus, with many faculty perpetrators being repeat offenders.¹⁰⁷

Given this backdrop, the UW policy adequately adjusts the level of appropriate investigation needed for institutions of higher education to prevent passing a known harasser from one campus to the next. Thus, not only is it reasonable to conduct investigations in such a manner, it is unreasonable for a university to continue policies that do not more directly screen for prior sexual misconduct. In regards to the new policy, University of Wisconsin Board Vice President Drew Petersen stated, “The board has a paramount responsibility to ensure the safety of our students and our employees at every institution.”¹⁰⁸ Like the UW System, other institutions should request more out of their hiring practices concerning sexual misconduct to highlight this goal.

104. *Id.* at 3.

105. For negative consequences regarding organizational tolerance see Colleen Flaherty, *New Paper Says Slapping Faculty Harassers on the Wrists Compromises Comprehensive Prevention*, INSIDE HIGHER ED (Mar. 12, 2019, 3:00 AM), <https://www.insidehighered.com/print/news/2019/03/12/new-paper-says-slapping-faculty-harassers-wrists-compromises-comprehensive> [<https://perma.cc/8H6S-B9X6>].

106. NASEM Report, *supra* note 24, at 65.

107. *See supra* Section I.A.

108. Samantha West, *UW Board of Regents Moves for a Review of Sexual Harassment Policies*, MILWAUKEE JOURNAL SENTINEL (June 7, 2018, 12:16 PM), <https://www.jsonline.com/story/news/education/2018/06/07/uw-board-regents-moves-review-sexual-harassment-policies/682711002/> [<https://perma.cc/23EE-3XKH>].

CONCLUSION

The National Academy of Sciences report states:

[T]he most potent predictor of sexual harassment is organizational climate—the degree to which those in the organization perceive that sexual harassment is or is not tolerated. This means that institutions can take concrete steps to reduce sexual harassment by making systemwide changes that demonstrate how seriously they take this issue and that reflect that they are listening to those who courageously speak up to report their sexual harassment experiences.¹⁰⁹

The University of Wisconsin System has already taken concrete steps by instituting its new system-wide reference check procedures to eliminate sexual harassers freely moving from one campus to another. Other institutions and systems would be wise to follow suit to further demonstrate the importance of changing the sexual misconduct culture associated with higher education. In the end, the UW policy should spur a change in the standards of care owed by employers by providing more information during reference checks than what is currently disclosed under widely used no comment policies.

109. NASEM Report, *supra* note 24, at x.