

**SEXUAL HARASSMENT ON CAMPUS
ADDRESSING CLAIMS OF FACULTY, STUDENTS AND STAFF**

**Stetson University College of Law
27th Annual National Conference on Law and Higher Education
February 18-22, 2006**

Wendy S. White
Senior Vice-President and General Counsel
University of Pennsylvania

INTRODUCTION

Sexual harassment, involving students, faculty, and staff, raises a number of challenging issues on our campuses. Over the years, the law under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 has developed to make clear that claims both for sexual harassment and retaliation are cognizable by the courts and that colleges and universities have an obligation to develop policies, conduct investigations, impose sanctions, and provide training to address both kinds of claims. While the legal principles have become better understood, the implementation of these rules, policies, and principles, continues to pose significant questions in our communities. This paper will focus primarily on three of these questions:

- (1) How should allegations of sexual harassment or retaliation be investigated on campus and who should do the investigations?
- (2) How should the university respond to requests by the complainant for confidentiality, anonymity or instructions not to proceed with an investigation?
- (3) Is verbal harassment actionable and is there an intersection between sexual harassment and freedom of speech?

First, a review of the relevant case law and legal standards.

I. EMPLOYER LIABILITY FOR SEXUAL HARASSMENT UNDER TITLE VII

A. The Legal Framework

On June 26, 1998, the United States Supreme Court issued two significant decisions concerning sexual harassment in the workplace. These two cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), articulate the fundamental standards for employer liability in a sexual harassment case. In these two cases the Supreme Court held that an employer may be liable for hostile environment sexual harassment even when the employer did not know about the conduct. However, the Supreme Court also outlined an affirmative defense to such a claim. Consequently, the Supreme Court made it easier for certain employees to state causes of action for sexual harassment, but also provided a means for employers to try to shield themselves from liability.

B. Factual Background of *Faragher* and *Ellerth*

The *Ellerth* decision concerned a salesperson, Kimberly Ellerth, who claimed that she was subjected to unwelcome physical advances by her supervisor. Ellerth did not submit to the sexual advances and was in fact promoted with the recommendation of the alleged harasser. Despite the fact that Ellerth knew that her employer had a policy prohibiting sexual harassment, she never complained to the company about the alleged harassment. After receiving her promotion, she resigned, claiming that the sexual harassment constituted unbearable offensive conduct.

The *Faragher* case concerned a female lifeguard, Beth Ann Faragher, who worked part-time during the summers for five consecutive years. During this time Faragher claimed that several male supervisors subjected her to offensive touching and sexually offensive remarks. Faragher apparently did not know of, and had not received a copy of, the employer's anti-harassment policy. Faragher conceded that she did not inform anyone in management of the allegedly sexually hostile atmosphere.

Consequently, both *Faragher* and *Ellerth*, concern cases in which upper management had not been put on notice of the allegedly hostile environment and also where the alleged victim did not suffer any tangible detriments.

C. The Implications of the Supreme Court Decisions

Until the *Faragher* and *Ellerth* decisions, sexual harassment cases were generally divided into two categories: quid pro quo and hostile environment. In these two cases, the Supreme Court minimized the importance of this distinction. Indeed, the Court held, "an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." This holding rejects the negligence standard previously adopted by many courts of appeals and federal district courts that had concluded that an employer could not be held liable for a sexually hostile environment unless the employer knew or reasonably should have known of the supervisor's actions.

Under the vicarious liability standard announced by the Supreme Court, employers are liable for the actions of their supervisors regardless of knowledge. The Supreme Court's analysis divides cases between those in which the plaintiff suffered an adverse employment action (such as discharge, demotion or unfavorable reassignment) and those that do not involve such an adverse action. Under the two Supreme Court cases, employers have no defense where a tangible adverse employment action has been taken. However, where no tangible employment action is taken, employers may rely on a two-pronged affirmative defense. To establish such a defense, the employer must prove by a preponderance of the evidence that: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. The Supreme Court provided some guidance in interpreting these criteria:

“While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.”

Consequently, it is likely that most cases alleging sexual harassment will concern whether an employer's policy is "suitable" and whether the employee fulfilled his or her "obligation of reasonable care to avoid harm."

D. Practical Implication of These Cases: Importance of a Complaint Resolution Procedure

It is important to institute a policy against harassment and an effective complaint procedure for many reasons:

- Under *Ellerth* and *Faragher* the existence of a policy and procedure is clearly relevant.
- A policy may enable employers to avoid imposition of injunctive relief and monetary damages from constructive discharge claims.
- A policy may encourage victims of perceived harassment to complain earlier than if no policy is in effect, avoiding or weakening potential hostile environment claims.
- Should an employee fail to utilize the process, failure to do so can be used as a defense to liability, particularly on the issue of "welcomeness" of sexual advances.
- As to the allegations of harassment by co-workers, employer liability may depend directly on the employer's knowledge of the conduct and the corrective action taken.
- Perhaps most importantly, a policy may help eradicate harassment in the workplace.

E. Developing and Publishing a Harassment Policy

(1) General Criteria of Effective Policy

An effective preventive program should include an explicit policy against harassment which is clearly communicated to employees and effectively implemented. The objectives of any policy should be to discourage acts considered to be harassment; to encourage employees to report incidents they consider to be harassment at the earliest possible state; and to provide protection for the employer

against claims of unreported harassment. To achieve these goals, the policy should familiarize all employees with the definition of harassment and the forms that it can take, clearly state that harassment is prohibited and will be punished, and instruct victims on the course of action they should take. A harassment policy must be carefully tailored to the needs and circumstances of a given workplace. The language should be understandable to employees at all levels of the workforce.

(2) Separate Sexual Harassment Policy

The Supreme Court specifically recommended in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that a separate sexual harassment policy be enunciated, apart from a general non-discrimination policy that may already appear in manuals or handbooks. Employers should consider circulating an addendum to their current handbook if a new edition will not be printed in the near future. Copies of the written policy should then be appropriately disseminated so that employees, both potential victims and potential harassers, in every phase of the employer's operation are fully aware of it. In addition to the handbook, possible methods of publication include web-sites, personnel manuals, posted notices, and circulated memoranda, as well as seminars or short oral presentations.

(3) Development of Reporting Procedure

Employers should develop a reporting procedure for employees to register complaints. Recognizing that many employees will be reluctant or embarrassed to complain about harassment, the procedure should be calculated to encourage victims to come forward with a complaint. The EEOC Guidelines stress that employer procedures should ensure confidentiality as much as possible and protect victims and witnesses against retaliation. Employers should consider incorporating a statement to this effect in their written policies to encourage prompt reporting of perceived harassment. (Confidentiality will be discussed further in Section V below).

The written policy should make it clear to all employees that complaints of harassment can be brought to the attention of a designated management representative other than the employee's immediate supervisor. This will maximize the likelihood that employees will feel comfortable utilizing at least one of the established channels of review. This is particularly important since the immediate supervisor may, in fact, be the harasser. Possible alternatives for review include the Personnel or Human

Resources Departments, Affirmative Action Office, Ombudsman, representatives designated by Deans or the administration, or specifically trained individuals within the institution.

Finally, the policy should detail how complaints will be handled. (This point will be discussed in more detail in Section IV below.)

II. UNIVERSITY LIABILITY FOR SEXUAL HARASSMENT STUDENTS UNDER TITLE IX

A. The Legal Framework

Title IX prohibits sex discrimination by recipients of federal education funding. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court held that there is a private right of action, giving individuals the ability to enforce Title IX's prohibition on intentional sex discrimination. Then, in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court authorized the courts to award monetary damages for intentional violations of Title IX. In *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), the Court made clear that the private right of action included claims against a school district for deliberately ignoring a teacher's sexual harassment of a student, and in *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999), the sexual harassment of a student by another student.

B. Implications

As a result of the Supreme Court authority, colleges and universities can be sued for damages if they are aware of sexual harassment involving students – either by a faculty member, staff member or another student, and do not properly address the harassment claim. Thus, just as it was important under Title VII to have a separate sexual harassment policy for employment related issues, with clear procedures for implementation and enforcement, it is equally important to have such a policy for student complaints.

III. RETALIATION

A. The Legal Framework

1. **Title VII.** Increasingly, claims for sexual harassment are brought so as to include claims for retaliation against the employee, by the institution, for raising an underlying complaint. The law under Title VII always contemplated such claims. Section 704 of Title VII explicitly provides that it is an “unlawful employment practice” for an employer to retaliate against an employee because he has “opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].”

2. **Claim Elements.** In order to state a claim for retaliation under Title VII, the employee must demonstrate:

(a) Participation in a protected activity

(b) Adverse action by the employer (such as discipline, termination, refusal to hire, denial of job benefits, demotion, threats, reprimands, negative performance evaluations, harassment)

(c) Causal connection between the protected activity and the adverse action

It is not necessary for an individual making a claim of retaliation to also claim actual discrimination against him or her by the employer.

3. **The Challenge of These Cases.** Courts have recognized the difficulty that retaliation presents. Thus, a malcontent with no valid grievance can pose as a victim of invidious discrimination, and may sometimes trivialize, thwart, or even pervert the aims of the anti-harassment laws. By the same token, an unscrupulous employer who has engaged in discriminatory practices may sometimes falsely depict a person with a legitimate complaint as a meritless trouble-maker; the effects of the employer’s wrongful conduct may then be compounded by the undeserved *ad hominem* condemnation of and calumny against a plaintiff who deserves better. However that may be, these issues can only be sorted out at trial. *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 793 (Ct. App. D. C. 2001).

4. Illustrative Cases.

Carter-Obayuwana v. Howard University, 764 A.2d 779 (D. C. App. 2001). Tenured associate professor of education alleged sex discrimination by university administrators in teaching assignments, and retaliation for her complaints of sex discrimination by temporary salary reduction and failure to reappoint her to the Graduate Faculty. Appellate court reversed summary judgment for the university on plaintiff's retaliation claim and remanded for trial on issue of whether salary reduction was motivated by retaliation for plaintiff's complaints to university administration of allegedly sexist treatment by her supervisor.

Lutz v. Purdue University, 133 F. Supp. 2d 1101 (N.D. Ind. 2001). Visiting associate professor whose annual contract was not renewed after a second year of teaching claimed sexual harassment and retaliation under Title VII. Court ruled that plaintiff had not been harassed by one incident of offensive material on his computer, and that there was no relationship between his complaint of harassment and the university's decision not to reappoint him, given substantial evidence of student complaints about his teaching and peer observation that ratified those complaints.

5. **Title IX.** Until recently, the question whether there was a private right of action to sue for retaliation under Title IX remained unsettled. In 2005, however, the issue was resolved in *Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005). In this case, Justice O'Connor, writing for the majority, held that even though there was no explicit provision in the language of Title IX permitting claims for retaliation, the statute was sufficiently broad to cover such claims. The Court concluded that retaliation against a person who speaks out against sex discrimination is intentional discrimination on the basis of sex, within the meaning of the statute.
6. **Implications.** Retaliation claims have become almost standard in all employment related complaints, because (1) it is easier to prove retaliation than it is to prove intentional discrimination and (2) it is more difficult to train supervisors to avoid retaliation than to avoid discrimination. Now that it is clear that retaliation claims are equally available under Title IX, we can expect more retaliation claims in this arena as well.

IV. RESPONDING TO CLAIMS OF SEXUAL HARASSMENT

A. Conduct an Investigation

1. Once the policy has been incorporated into a faculty, staff, and/or student handbook, or otherwise disseminated to the community, the university must follow through by investigating complaints registered. Proper handling of a complaint is critical in avoiding liability for harassment. For example, in *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989), the court of appeals held that the employer was not strictly liable for a "hostile environment" created by the plaintiff's supervisor because the company took prompt remedial action when notified of the harassment. Many other cases emphasize the importance of conducting a prompt investigation in response to sexual harassment complaints. These cases make clear that the employer (the university) may be able to successfully defend a lawsuit, as a matter of law, without a trial, if the institution has promptly investigates and takes remedial action.

Harvill v. Westward Communication, L.L.C., 2005 U.S. App. Lexis 27268 (5th Cir. 2005) (Plaintiff Molly Harvill brought suit for sexual harassment, constructive discharge, and retaliation under Title VII. Plaintiff did not, for some time, report the alleged harassment, except to her immediate supervisor who did not adequately respond to the allegations. Months later, plaintiff notified the CEO and Director of Human Resources, as set forth in the company policy. The Director of Human resources conducted an immediate investigation. The court held: Once the CEO and Director of Human Resources were notified of plaintiff's claims, the company acted swiftly in taking remedial measures and the harassment ceased. For that reason, the plaintiff had not raised a genuine issue of fact on the prompt remedial action element of her prima facie hostile work environment claim. Therefore, the court affirmed the district court's grant of summary judgment for the employer.)

Swanson v. Livingston County, 2005 U.S. App. Lexis 937 (6th Cir.2005) (Plaintiff correction officer complained of harassment by her co-worker. Her lawsuit was dismissed on summary judgment as the court held that the department adequately responded to the complaint by conducting an investigation and taking remedial action – advising co-worker to cease contact with complainant and posting a notice of sexual harassment policy. Court also dismissed

retaliation complaint on the ground that plaintiff was suspended for a rule violation, not for filing complaint.)

Hamilton v. Onsite Companies, Inc., 2005 U.S. App. Lexis 1254 (8th Cir. 2005) (Plaintiff employee alleged rape by a co-worker. The employer immediately investigated and, even though the results of the investigation were inconclusive, within 4 business days removed the co-worker from the work site and reprimanded him. The court held that the employer's response was sufficient.)

McCurdy v. Arkansas State Police, 375 F.2d 762 (8th Cir. 2004) (Summary judgment upheld where court found that employer took swift and effective action to insulate the employee from further harassment the moment that the employer learned of the harassing conduct.)

Lee-Crespo v. Schering-Plough Del Caribe, Inc., 354 f.3d 34 (1st Cir. 2003). (Summary judgment in favor of the employer was upheld on appeal where the court found that although the complainant may have been subject to incivility, the employer acted quickly in response.)

B. Determine Who Will Conduct the Investigation

1. In a college or university setting, determining what office should conduct an investigation is critically important. The answer will depend, in part, on whether the complainants and/or alleged harassers are faculty, students or staff. Choices may include (and there are no doubt other possibilities):

- Office of Human Resources
- Office of Student Conduct
- Ombudsman
- Academic Dean or Department Chair
- Office of Affirmative Action
- Office of General Counsel or Outside Counsel

2. The decision as to whether to have a lawyer conduct the investigation is an important one. If a lawyer acts as the investigator, the university may succeed in protecting the results of the investigation as privileged or protected by work-product. On the other hand, the institution may want to use the investigation as part of its defense to any lawsuit that is filed, and in that case, there will be waiver of privilege issues to address.

3. The case law does not indicate whether courts consider the handling of the complaint by inside managers or outside independent investigators to be the most effective.

Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) (employer required by court to adopt plaintiff's proposed Procedures for Making, Investigating and Resolving Sexual Harassment and Retaliation Complaints, except for provision requiring independent investigator; court not persuaded that sexual harassment reporting system needed permanent outside monitor to guarantee its performance or instill employees confidence).

4. The one point that is clear is that if inside individuals are used to conduct investigations, the institution should train those individuals carefully in the handling of complaints or reports of harassment. Basic skills must include the ability to ask questions which may be somewhat sensitive, the ability to listen and take notes, the ability to withhold judgment and the ability to reassure the complainant of the sincerity of the institution's investigation.

C. Interview the Alleged Victim

The investigator(s) should conduct a personal interview with the perceived victim in a confidential setting to obtain a complete understanding of the nature of the allegations. The interview should explore, at a minimum, the following:

- Identity of alleged harasser.
- Specific details of each event that complainant believes was inappropriate including date, location, witnesses, and exactly what was said and done.
- Nature and past history of relationship between alleged victim and harasser.
- Whether anyone in the community has previously complained and to whom.
- Whether anyone else knew of or joined in harassment.

- Degree to which alleged harasser's behavior was welcome or unwelcome.
- Degree to which complainant conveyed to alleged harasser that behavior was unwelcome.

The tone of the interview should reassure the complainant that the university is serious about protecting members of the community from harassment. This is important not only for the case at hand, but for future cases in which victims may allege that the university's procedures and practices did not encourage victims to come forward. For example, in *Jacksonville Shipyards*, the court, in finding the employer's procedures ineffective, cited numerous examples of past investigations when the Company's conduct demonstrated a lack of seriousness or sincerity.

D. Interview the Alleged Harasser

1. As with the perceived victim, the interview should be confidential and non-confrontational. In addition to specifically addressing each of the allegations made, it should explore, at minimum the following:

- Assessment of the institution's constructive knowledge of harassment.
- Assessment of pervasiveness of hostile or abusive environment.
- Assessment of "welcomeness" of conduct.
- Determination of an appropriate remedy.

2. The accused must also be warned that any retaliation against the alleged victim is unlawful and will result in discipline.

3. A question to consider is whether an attorney conducting the investigation has a legal or ethical obligation to inform the accused that the attorney represents the university and not the accused. In general, lawyers are well advised to make this disclosure. Universities also must consider whether they will allow an accused harasser to have his or her own attorney present at the interview.

E. Review Written Records

In many cases, university records should be reviewed (including email). If the university has been documenting previous investigations, review of the investigation records and the personnel files of those involved may reveal relevant information. For example, a review might reveal past allegations against the accused made by other members of the community or a propensity on the part of the alleged victim to lodge groundless complaints. Where the accused is the supervisor responsible for preparing the alleged victim's performance evaluations, the evaluations may reveal clues about the relationship between the two individuals. For example, a sudden unexplained drop in evaluation scores could reveal a quid pro quo situation.

F. Interview Other Employees

An employer must decide how broad-based its investigation will be, particularly where both the perceived victim and the accused state that there are no witnesses and the victim's allegations do not refer to harassment of others. Factors to consider are:

- The need to assess credibility.
- The need to assess liability for hostile environment claims.
- The need to determine an appropriate remedy.
- Confidentiality.
- Defamation.
- The obligation to rid the community of harassment.
- The fear of creating a record of other acts of harassment.

G. Document the Investigation

It is clear that the university should document its attempts to investigate harassment. This will be, in part, the record on which the institution's liability for harassment is evaluated. However, the university should consider whether it wants to have written statements prepared after each interview and whether these statements will be read and signed by the interviewees or whether a summary record after the investigation is completed is preferable.

H. Determine Whether Inappropriate Behavior Occurred

1. Obviously, after investigation, the university must resolve the complaint in some fashion. The institution should make two determinations: (1) Whether actionable harassment occurred and (2) whether inappropriate behavior, in violation of the institution's policies, which should be disciplined, occurred.

2. In cases of quid pro quo sexual harassment, this should be relatively straightforward. In attempting to ascertain whether a hostile environment was created, the University must determine whether the conduct was sufficiently severe or pervasive to create an abusive working or academic environment. It may be helpful for the university to consider the following:

- Was the incident an isolated occurrence not significant or severe enough to create an abusive environment?
- Have there been repeated incidents possibly directed to other member of the University community creating a pattern of offensive conduct?
- Did the incident involve physical, as opposed to verbal, abuse?
- What was the relationship of the people involved?
- Were the comments hostile or derogatory?
- Did the complainant's conduct indicate that the sexual advances were welcomed or encouraged (as opposed to whether the complainant's participation was voluntary)?
- What role, if any, did alcohol play in the conduct?

Even where an institution concludes that actionable harassment did not occur, it should consider whether inappropriate behavior occurred which should result in discipline.

I. Take Appropriate Corrective Action

Where an institution concludes that inappropriate behavior has occurred, corrective action should be taken in compliance with its published policy. This may include counseling, discipline, transfer or termination. Obviously, the corrective action should reflect the severity of the conduct.

At this stage, the institution must keep in mind the rights of the accused. Disciplinary action can be taken only where the investigation adequately has substantiated that inappropriate behavior occurred. If there are insufficient findings after the investigation to conclude that the allegations are more probably true than not, the complainant and the accused should be notified of the results of the investigation. In the absence of some additional evidence to buttress the complainant's allegations of harassment, generally, no discipline should be taken. Universities should be aware that persons disciplined in response to inadequately substantiated allegations of harassment may have causes of action against the institution.

J. Re-publicize Policy

It is important for the university community to understand the sexual harassment policy and procedures and to be clear that the University takes the policy seriously. For those reasons, it is important to periodically re-publish the policy.

K. Court decisions illustrate appropriate and inappropriate responses by employers:

- *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) (employer may, to avoid liability for failing to remedy a hostile environment, have to remove alleged harassers from workplace if they cannot be scheduled to work at another location or during different hours).
- *Spencer v. General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990) (lower court's directed verdict for employer on respondeat superior grounds and its refusal to issue injunction against employer found appropriate where, in response to isolated incident of harassment, employer immediately transferred plaintiff to job of equal grade, launched investigation which eventually resulted in harasser's resignation, and instituted extensive company-wide sexual harassment policy; such actions reflected bona fide, committed effort by employer to combat sexual harassment).
- *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for harassment where it responded immediately to complaint by issuing written warning to

harasser following thorough investigation and subsequently monitored harasser's conduct for improvement).

- *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1987) (employer's response constituted immediate and appropriate corrective action where employer investigated charges, reprimanded guilty employee, placed him on probation, and warned him that further misconduct would result in discharge; second co-worker who had witnessed harassment was reprimanded for not intervening or reporting incident).
- *Foster v. Township of Hillside*, No. 90-4030, 1992 WL 3504 (D. N.J. January 6, 1992) (court found employer insulated from liability for police sergeant's alleged harassment of dispatcher where employer hired independent investigator to look into charges and began its own study and sergeant told to stay away from dispatcher pending investigation).
- *Robinson v. Jacksonville Shipyards*, 136 LR.R.M. 2920 (M.D. Fla. 1991) (employer did not respond to complaints of sexual harassment with prompt and effective remedial measures, even though offending graffiti and pictures were removed after complaint was made, where in other instances no action was taken or action was taken after considerable delay, and employer neither sought to identify perpetrators of incidents nor took steps to communicate with other male employees concerning nature of offending behavior and need to show respect to female employees).
- *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wis. 1984) (despite plaintiff's numerous complaints throughout four years of "outrageous" harassment, employer took no remedial action other than to hold occasional meetings to remind employees of company's policy against offensive conduct, and supervisor never conducted investigation nor disciplined any employees until plaintiff filed an EEOC charge).
- *Morris v. American Nat'l Can Corp.*, 730 F. Supp. 1489 (E.D. Mo. 1989), aff'd, 941 F.2d 710 (8th Cir. 1991) (employer failed to take effective remedial actions to end sexual harassment by plaintiff's supervisor and co-workers to police themselves, failed to interview plaintiff, issued mild rebukes and left supervisor in control).

Although corrective action is usually considered only in situations where the allegations are proved, many employers have begun to question what measures should be taken when the allegations are disproved. The court-ordered policy in *Jacksonville Shipyards* provides that allegations which prove to be groundless will result in discipline.

V. CONFIDENTIALITY

Introduction

The university faces a serious dilemma in cases – which are not infrequent --where the complainant requests that his or her allegations be treated strictly confidentially and no further action be taken by the institution. The complainant may, alternatively want an investigation but not be willing to have her or his identity disclosed in the process. The problem, of course, is that if the university cannot promise some sort of confidentiality, victims of harassment will be discouraged from coming forward. Indeed, the EEOC requires that confidentiality be a part of an institutions sexual harassment policy. On the other hand, if the university is made aware of allegations of sexual harassment, and the decision not to investigate is made, that decision is made at the institution's later peril. The university has an independent legal obligation to eradicate harassment in the community and therefore has responsibilities to the community as a whole, as well as to the individual making the report. And while the victim may want anonymity, a fair and adequate investigation will, in the end, preclude withholding the perceived victim's name. The question, then, is how to proceed when the institution is presented with this kind of scenario.

A. The Case Law on Need to Investigate. There is very limited case law on the question of an institution's obligation's with respect to confidentiality and, further, its obligation to investigate reported allegations where the victim does not want to proceed. Courts have made clear, however, that in order to effectively address sexual harassment complaints, it is important that employers assure employees that all information related to allegations will be treated with appropriate confidentiality whenever possible during the management of the complaints. See *Wallence v. Treadwill*, 165 F.R.D. 43, 47 (D.Pa. 1995). Maintaining confidentiality “encourages victims to come forward and report prohibited conduct” and “ensure[s] the accuracy of ensuing investigations into such allegations.” *Payton v. New Jersey Turnpike Authority*, 691 A. 2d 321, 148 N.J. 524, 540-41 (N.J. 1997).

1. Additionally, maintaining confidentiality is important because disclosing allegations of sexual harassment can carry with it the risk of defamation or tortious interference with contract claims. *See Malik v. Carrier Corp.*, 202 F.3d 97 (2d. 2000) (employee brought several claims against his employer and a corporate officer; the defamation claim was dismissed because there was no evidence that the employer acted with malice; the tortious interference with contract claim was dismissed because there was no evidence that the officer acted for her own benefit during the investigation of the sexual harassment allegation).
2. The dilemma, however, is that under *Faragher* and *Ellerth*, the institution may have a duty to investigate the allegations of harassment, especially should additional allegations come to light later. As one court characterized this “Catch 22”: *Gallagher v. Delaney*, 139 F.3d 338, 348 (2d Cir. 1998). “If an alleged victim of sexual harassment asks a person of authority to whom she has reported the harassment to keep it confidential, and the employer attempts to reduce the emotional trauma on the victim by honoring her request, it risks liability for not quickly and effectively remedying the situation.” *Id.*
3. At least one court has found no duty to investigate allegations of harassment if it is honoring a request by the victim to keep the matter confidential. Thus, in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997) the circuit court absolved employer New York University of liability finding that the employer acted reasonably in honoring an employee’s request that her sexual harassment complaint be kept confidential and that no action be taken. Because there was no indication that a risk of serious physical or psychological harm existed and there were no knowledge that other victims involved, it was reasonable for the employer to honor the employee’s request and not take immediate action to remedy the harassment. The court put a great deal of emphasis on the facts of the *Torres* case, making it clear that slightly different factual circumstances would have produced a different result.

See also Hardage v. CBS Broadcasting, Inc., 427 F.3d 1177 (9th Cir. 2005) (Court upheld summary judgment for the employer where employee had specifically requested that the employer not take any action, making clear that he wanted to handle the situation by himself).

4. On the other hand, in *Wixted v. DHL Airways*, 1998 U.S. Dist. LEXIS 4601 (D. Ill., 1998), the court rejected defendant employer's argument that it was reasonable for it to hold off investigating a sexual harassment complaint because the employee that made the complaint specifically asked her supervisor not to report the conduct and that if he did, she would deny the charges. . The court distinguished the facts of the case from *Torres* finding that the sexual harassment at issue was much more serious than in *Torres*. The allegations involved threats of serious physical harm and there was evidence that the employer had knowledge of previous complaints made by other employees. The court denied employer's motion for summary judgment, leaving it to a jury to decide whether the employer should have breached the employee's trust by investigating the claim.

5. In short, while the law is not clear, a University may be held to have been required to investigate allegations of sexual harassment over the objection of the alleged victim where the alleged conduct inflicted, or may have inflicted, serious physical or psychological harm or where other complaints had been made about the alleged harasser suggesting a pattern of sexually harassing behavior.

B. The Dilemma Created by Confidential Reporting. The second prong of the rule discussed above, as to when a university should investigate over the objection of the complainant, raises serious practical and operational issues – especially in large institutions where complaints may be lodged against the same person but in different offices and the information never gets aggregated. The problem is compounded where the university promises confidentiality, so there is not only no mechanism for sharing information, but a bar against any such sharing.

1. There are no simple solutions.
2. There are, however, ways that an institution can address this problem, at least to some extent.
 - (a) One mechanism to address this tension is to make sure that the University's sexual harassment policy clearly distinguishes between those offices that have the responsibility to investigate and those that don't. Some offices on campus are there to provide support to the victim, explain her or his options in proceeding further, and offer counseling. Such offices may include a Women's Center, a Counseling Center, the Chaplain, or Victim Support in Public Safety. If a victim wants to talk about an

experience, wants help in understanding her or his choices and the implications of those choices, but has not yet determined whether to come forward, then the policy should so provide. The counselors should make clear that the conversation is confidential, and short of some serious and immediate threat of serious harm to others in the community, no action will be taken by the university based on the information.

- (b) On the other hand, certain offices should be clearly designated as offices that will respond to complaints by conducting an appropriate investigation. These offices may include: Affirmative Action; Human Resources; the Dean of Students; the Academic Dean; Office of Student Conduct and so on. The policy should make clear that if a community member contacts one of these offices, the university will have an obligation to proceed in some way – formally or informally, depending upon the university policy and the wishes of the complainant.
- (c) If this distinction is made known to the community, victims can make rational choices about where to go and whom to tell. The problem, of course, is the world is never that simple. Community members may have different expectations, regardless of how clear the policy is. In addition, if a student or junior faculty member seeks out a more senior faculty member or department chair, as a friend, how is that faculty member to respond? If the faculty member makes clear that the conversation will be reported to the Dean, as may be required by the policy, the victim may never come forward and the school will never learn of the harassing conduct. If the faculty member does not report the conduct, then the alleged harasser may continue his or her unacceptable behavior and not until there is a major crisis will the institution have the information it should have had earlier.
- (d) Even recognizing the limitations of a policy that makes clear what is treated as confidential and what is not – and what “confidential” means, the university is well served to (1) adopt a clear policy; (2) educate the community as to what the policy provides; and (3) help both those in the “confidential offices” and the “reporting offices” to understand their roles and responsibilities.

VI. SEXUAL HARASSMENT VS. FREE SPEECH

A second challenging issue in resolving certain sexual harassment allegations is determining whether the conduct complained of is sufficient to constitute sexual harassment. How severe or offensive must the conduct have been? Is one incident enough? And if offensive speech is the only issue, can that ever be enough? Finally, when do sexual harassment, hostile environment theories impinge on principles of free speech?

A. What is the standard to be applied?

1. In order for sexual harassment to be actionable under Title VII, it must be “so severe or pervasive as to alter the conditions of [the victim’s] employment and create an abusive working environment.” *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998).
2. What this means is that workplace conduct is not measured in isolation, instead, “whether an environment is sufficiently hostile or abusive must be evaluated by reviewing all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it interferes with an employee’s work performance.” *Faragher* at 787-88. Off hand comments, teasing, and isolated incidents are not enough.
3. A single incident of harassment may, however, be sufficient if the effect on the complainant is profound. *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 62 (D. Mass. 1997).

B. Free Speech or Sexual Harassment

1. *Clark County School District v. Shirley A. Breeden*, 532 U.S. 268 (2001)
In *Clark County School District*, Shirley Breeden met with her male supervisor and another male employee to review psychological evaluation reports of four job applicants. In the report of one of the four applicants there was a reference to the fact that the applicant had once commented to a female co-worker: “I hear making love to you is like making love to the Grand

Canyon.” At the meeting, the supervisor read the comment out loud and said to Ms. Breeden, I don’t know what that means.” The other male employee then said – “I’ll tell you later” and both men chuckled. Ms. Breeden complained of a hostile work environment and filed suit. Ms. Breeden was later transferred, an employment action she claimed was retaliatory, and she amended her complaint to add retaliation.

The Ninth Circuit Court of Appeals held in favor of Ms. Breeden, reversing the summary judgment granted in favor of the school district by the District Court. The Supreme Court, in a record-breaking short opinion, reversed. The Court held that : “No reasonable person could have believed that the single incident recounted above violated Title VII’s standard.” The Court also upheld the District Court on the retaliation claim finding no evidence that Ms. Breeden’s complaint was a cause of the transfer.

2. *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965 (7th Cir. 2004). In this case, the employee complained that she was sexually harassed by her co-workers who used vulgar language toward her in the workplace. The court rejected the claim on summary judgment, and the court of appeals upheld the decision, on the ground that the co-workers’ vulgar language did not establish a hostile work environment, the co-workers treated everyone poorly – there was no difference between how the plaintiff was treated and other male employees.

3. *Russell v. Board of Trustees of the University of Illinois*, 243 F.3d 336 (7th Cir. 2001). Helen Russell was an employee of the University of Illinois at Chicago Hospital. Russell filed suit claiming a hostile work environment based upon offensive comments made by her supervisor to her and to other female employees. According to Ms. Russell, her supervisor told all three supervised employees that they were the “staff from hell.” The supervisor later commented that he found one of the staff member’s style of dress to be “sleazy” and she dressed “like a whore.” He called another employee a “bitch” and told her she was only hired for her looks. He posted a computer generated name sign at the employee’s cubicle that included a picture of a man with a whip. Finally, the supervisor frequently referred to Ms. Russell as “grandma” and told her that he thought that intelligent women were unattractive. The 7th Circuit rejected Ms. Russell’s claim of harassment, concluding that the supervisor’s remarks were offensive and boorish, but not actionable. In the words of the Court, “[T]he discrimination laws do not

mandate admirable behavior from employers, through their supervisors or other employees. Instead, the law forbids an employer from creating an actionably hostile work environment for members of protected classes.” While the comments made by the supervisor to the co-workers are arguably more serious, these comments were not directed at the plaintiff.

4. *Pryor v. Seyfarth, Shaw, Fairweather & Geraldson*, 212 F.3d 976 (7th Cir. 2000). Here the 7th Circuit held that several comments by a male supervisor suggesting that he would like to see his female secretary in sexually provocative outfits were insufficient to create objectively hostile work environment.
5. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). In this case, the Supreme Court held that “the mere utterance of an . . . epithet which engenders offensive feelings in an employee is not sufficient to establish a hostile work environment.”
6. *Marcheterre Fluet v. Harvard University*, Docket 97-SEM-0690 (Commonwealth of Mass. Comm. Against Discrimination, May 29, 2001). This case includes a lengthy factual discussion underlying the claim of the complainant against a professor at the Harvard University Extension School. The complainant was a teaching assistant for the professor. The hearing officer reviewed the extensive e-mail traffic between the complainant and the professor and concluded that the e-mails subjected the complainant to sexual harassment. The hearing officer found that the professor had insisted on discussing personal issues with complainant and that these demands constituted harassment, even though earlier e-mails, in which they discussed personal matters, did not. He found that the professor’s criticism of the complainant’s work was the result of her rejection of him. The officer also rejected the professor’s arguments that his e-mail correspondence was not unwelcome. As for a remedy, the hearing officer rejected the complainant’s claim for constructive discharge on the ground that she did not provide the University with an opportunity to discuss and resolve the matter before she resigned. The hearing officer did, however, award damages for emotional distress against the professor.

C. The Tension between Title VII and Free Speech

1. Commentators have identified a tension between sexual harassment as defined by Title VII and the concern that these rules burden free speech and academic freedom.
2. One group, “Feminists for Free Expression” (“FFE”), urge caution in applying Title VII to offensive language – as opposed to sexually offensive conduct. They argue that “sanitizing workplace speech in defense of women workers enshrines archaic stereotypes of women as delicate, asexual creatures who require special protection from mere words and images.” See FFE’s brief filed in the United States Supreme Court in Harris v. Forklift Systems, Inc. www.well.com/user/freedom/harrasment
3. For a discussion of the intersection between Title VII case law and free speech, see Juliano and Schwab, “The Sweep of Sexual Harassment Cases,” 86 Cornell L. Rev. 548 (March 2001). The Cornell article reports on a comprehensive survey of sexual harassment cases. The survey of cases shows that most of the sexual harassment litigation involves more than claims of pornography or graffiti alone, but instead include allegations that the plaintiff was also the target of personal harassing comments. Even if this is true of litigated/reported cases, however, a number of commentators have argued that hostile environment claims are sufficiently vague to impinge on First Amendment values. See the articles discussed in the Cornell article at notes 157-159.

CONCLUSION

Sexual harassment remains a serious and persistent matter on many of our campuses. While some conduct clearly violates the legal standards in Title VII and Title IX, some conduct is more difficult to characterize and address. Moreover, even conduct that clearly violates the law and/or campus policies, may be challenging to eradicate – because victims are reluctant to report and universities, no matter how hard they try, cannot completely protect victims from the consequences of reporting – especially in the academic environment where mentoring and networking is so critical to career advancement and success. Recognizing that the issues are sensitive and difficult, colleges and universities are well advised to continue to work to develop policies and practices that are effective on

their campuses, to educate the community broadly about these policies and practices, and to implement and enforce the policies in a manner that is as open and transparent as possible.

