

Document I:
Background Reading Materials on
Personnel Files and Reference Check

Personnel File & Reference Check Policies – Background Reading Materials

- News articles discussing similar situations regarding sexual harassment and reference checks
 - Colorado
 - <https://www.greeleytribune.com/news/local/incoming-university-of-northern-colorado-professor-left-former-job-amid-sexual-harassment-investigation/>
 - USF & Texas Tech
 - http://www.baynews9.com/fl/tampa/news/2016/6/30/controversial_profes
 - Chicago & Princeton/UNC
 - <https://www.nytimes.com/2016/02/03/us/chicago-professor-resigns-amid-sexual-misconduct-investigation.html>
 - Berklee College of Music:
 - https://www.washingtonpost.com/news/grade-point/wp/2017/11/14/bostons-berklee-college-of-music-reeling-amid-sexual-misconduct-allegations-involving-professors/?noredirect=on&utm_term=.fcfe9f7bf2d0
 - Yale & Columbia
 - <https://www.nytimes.com/2016/07/09/nyregion/a-yale-professor-is-cleared-of-sexual-harassment-but-concerns-linger.html>
- New California law regarding immunity for employer reference checks regarding questions of sexual harassment
 - California AB 2770
 - https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180A_B2770
- National Academy of Science, Engineering, & Medicine Report
 - Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine
 - <https://www.nap.edu/read/24994/chapter/1>
- Wisconsin “Pass the Trash” Legislation (K-12)
 - 2017 WI Act 130
 - <http://docs.legis.wisconsin.gov/2017/related/acts/130>

Articles about Issues at UW System Institutions

- [UW students accuse teachers of sexual harassment in more than half of all campus cases](#) – Karen Herzog, Milwaukee Journal Sentinel
 - <https://www.jsonline.com/story/news/education/2018/01/29/uw-students-accuse-teachers-sexual-harassment-wisconsin/1067883001/>

- [UW-Stevens Point sexual harassment case spurs UW System to review hiring policies](#) – Karen Herzog and Alan Hovorka, USA Today Network-Wisconsin
 - <https://www.jsonline.com/story/news/2018/05/31/uw-stevens-point-sexual-harassment-spurs-uw-system-review-hiring/658084002/>

Articles about UW System Policy Updates

- [No More Passing the Harasser](#) - Colleen Flaherty, Inside Higher Ed
 - <https://www.insidehighered.com/news/2018/09/25/u-wisconsin-system-proceeds-plan-disclose-misconduct-findings-against-employees>
- [UW schools to share personnel files with each other, state agencies as soon as January 2019](#) – Kelly Meyerhofer, Madison.com
 - 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
- [UW System Planning to Present Employee Sexual Harassment Policy to Regents](#) – Rich Kremer/AP, WPR.org
 - <https://www.wpr.org/uw-system-planning-present-employee-sexual-harassment-policy-regents>

UW System Board Materials & Draft Policies

June Board Meeting

- **BOR Meeting Minutes** (BOR Resolution 11038 documenting sexual violence and sexual harassment on pgs. 26-30):
[https://www.wisconsin.edu/regents/download/meeting_materials/2018/june_7-8/June-7-2018-\(Thursday\)-Board-of-Regents-Minutes.pdf#page=27](https://www.wisconsin.edu/regents/download/meeting_materials/2018/june_7-8/June-7-2018-(Thursday)-Board-of-Regents-Minutes.pdf#page=27)

August Board Meeting

- **PowerPoint Presented:** https://www.wisconsin.edu/news/download/bor/Personnel-File-and-Reference-Check-Policy-Presentation-for-BOR_2018-08-24.pdf
- **Video of presentation:**
<https://www.youtube.com/watch?v=7Ku4YbH1cN0&feature=youtu.be&t=3560>
- **BOR Meeting Materials** (Personnel Files and Reference check materials are pgs. 4-23):
[https://www.wisconsin.edu/regents/download/meeting_materials/2018/august_2018/Friday-Agenda-and-Materials-\(August-24,-2018\).pdf](https://www.wisconsin.edu/regents/download/meeting_materials/2018/august_2018/Friday-Agenda-and-Materials-(August-24,-2018).pdf)
- **Minutes from August Board meeting:** (Pg. 24- 28)
[https://www.wisconsin.edu/regents/download/meeting_materials/2018/august_2018/August-24,-2018-\(Friday\)-Board-of-Regents-Minutes.pdf](https://www.wisconsin.edu/regents/download/meeting_materials/2018/august_2018/August-24,-2018-(Friday)-Board-of-Regents-Minutes.pdf)

Document II:
Reference Check Policy 4-Box
(Change Management Tool)

1. Why

- Emergent state and national issue
- Safety and welfare issue
- Several high-profile incidents on UW campuses

2. Benefits

HR 13

- Standardizes content of personnel files
- Defines when and with whom personnel files will be shared
- Ensures appropriate documentation of sexual violence and sexual harassment within personnel files

TC 1

- Ensures consistent disclosure of violations of sexual violence and sexual harassment policies to hiring institutions
- Ensures institutions ask about sexual violence and sexual harassment during the hiring process

3. Loss/Fear

- Concerns about materials in the p-file will affect negotiations or hiring decisions (ex: salary history)
 - Personnel files will not be transferred until **after** hire limiting the amount of non-essential information being transferred. Essential information (including misconduct) should be discovered during the reference check process.
- Inequity (internal vs external)
- Does policy apply to Transfers/promotions
- Is a violation of a sexual violence or sexual harassment policy an automatic disqualifier when hiring?
 - No. Any disclosures will be weighed as part of an evidence-based hiring process (similar to the criminal background check)
- Asking about sexual harassment will hurt recruitment
- Implication of guilt
- False accusations
- How to respond to reference calls?

4. Not changing

HR 13

- Doesn't change who has access to the personnel file
- Doesn't include unsubstantiated allegations of sexual violence or sexual harassment
- Doesn't include investigative materials in the personnel file

TC 1

- Campuses and their employees can still respond to reference checks
- Unsubstantiated allegations of sexual violence or sexual harassment will not be disclosed or asked about during the reference process

Document III:
Personnel File and Reference Check Policy
Implementation FAQs (for HR staff)

HR 13 and TC 1 FAQs

These FAQs are intended for HR administrators to use as a guide when administering the policies contained in [UPS Operational Policy HR 13: Personnel Files \(HR 13\)](#) and [UPS Operational Policy TC 1: Recruitment \(TC 1\)](#). Following the Board of Regent's adoption of Resolution 11038 on June 7, 2018, these two policies were modified to address concerns related to sexual violence and sexual harassment.

Personnel Files

Q1. Who will be responsible for requesting the file?

A: The institutional HR office will be responsible unless otherwise noted by institutional policy.

Q2. When will personnel files be transferred?

A: A copy of the personnel file will be transferred within 30 days of an institution being informed that another UW System institution or other state agency has hired an ex-employee.

Q3. Do I send the original personnel file?

A: No. A copy of the personnel file should be sent for transfer while the original should be maintained by your institution according to the applicable record disposition authority (RDA).

Q4. Who do I contact to get the personnel file from a past State or UW System institution?

A: There is a list of institutional contacts for UW System institutions and State agencies. This list will be posted on the UW System website under [HR 13](#) and [TC 1](#).

Q5. Can supervisors maintain a confidential, local “working” file containing copies of pertinent personnel-related records that the supervisor utilizes on an operational basis?

A: Yes. As long as all of the correct documentation goes into the personnel file, a supervisor may maintain a working file which may include their personal notes. These notes are not considered to be a personnel record so long as they are prepared by the supervisor for their own use and are not shared with anyone else.

Q6. Faculty or instructional reviews are currently stored in the dean's office. What needs to be maintained in the personnel file?

A: Performance reviews (of any type) should be in the personnel file. It is sufficient to keep only the summary of the review in the personnel file. Any supporting materials can continue to be maintained by the dean's office according to the General Records Schedule.

Q7. Will unsubstantiated allegations of sexual violence and sexual harassment be included in the personnel file?

A: No. Only substantiated violations will be included in the personnel file. The only exception is the notice of active investigation letter, which is placeholder letter included in the personnel file until the investigation is complete. Once the investigation is completed, the notice is removed.

Q8. What happens when an employee leaves during the middle of an active investigation of sexual violence or sexual harassment?

A: When an employee leaves during an active investigation, a temporary notice of the active investigation will be added to their personnel file until the investigation is complete. The notice should signify which policy the employee is alleged to have violated but should not include details of the allegation itself.

The campus will continue its investigation into the allegations and the ex-employee will be given the opportunity to continue to participate in the investigation. Regardless of whether the ex-employee chooses to participate, the campus will complete its investigation.

Once the investigation is completed, the notice of the active investigation will be removed from the personnel file. If the ex-employee is found to have violated the policy, it will be documented in the personnel file. If the ex-employee is not found to have violated the policy, no further documentation will be included in the personnel file.

If an employee intends to leave during an active investigation, the best practice is to remind them of personnel files and reference check policies so they are aware of the campuses' responsibility to share this information when contacted for reference checks.

Q9. Why is documentation of the active investigation removed at the conclusion of the investigation?

A: The active investigation notice is only meant as a placeholder until the investigation is completed. If the investigation is ongoing, the letter would be present. Once the investigation is completed, the letter is no longer needed. If a violation occurred, the final determination of the investigation must be added to the personnel file.

Q10. Are there any changes to what documents do or do not go in the personnel file?

A: Yes. Personnel files will now contain any final personnel decision, any settlements or negotiated resolutions (or where they are stored), and any active investigation notices (see question about leaving during an active investigation for more clarification). Additionally, clarification was added on documents that should be excluded from the

personnel file (i.e., medical or FMLA documentation, confidential reference letters, investigation materials).

Q11. If a document is removed from the personnel file, does that mean it can be destroyed?

A: No. The applicable record disposition authority (RDA) must be followed.

Q12. Are investigatory materials included in personnel file?

A: No. Investigatory materials are stored securely outside of the personnel file. The only items related to the investigation that should be included in the personnel file are the notice of investigation (if applicable) and any final personnel decisions related to the investigation.

Q13. Is there a requirement that we retroactively apply the new personnel file content requirements to all personnel files?

A: No. You are not required to retroactively apply the new standard, but it's recommended that you review the personnel file when you get a transfer request particularly for any required documentation about sexual violence or sexual harassment. It may also be helpful to apply the new requirements to any employee with a history of disciplinary problems, though it's not required.

Q14. Can the recruitment documentation remain in the Applicant Tracking System (ATS) instead of the personnel file?

A: The official recruitment file must contain all application materials submitted electronically or via mail per the appropriate record schedule. The successful candidate's resume, letter of application, and relevant application materials must also be placed in the official personnel file.

Q15. Given new requirements, should reference call notes be included in the personnel file?

A: No. Only materials that are listed in the personnel file policy should be placed in the personnel file. Letters of reference and reference call notes should be included in the recruitment file.

Q16. What if HR 13 lists documents that don't exist?

A: If a document does not exist, it does not have to be created just because it is listed in [HR 13](#). Some documents listed as contained in the personnel file list only apply to certain categories of employees. For example, faculty sabbatical leave wouldn't apply to a university staff employee. There is no requirement to create documents that wouldn't normally be created. But if those documents are created, they must be included in the personnel file.

Q17. What are interchange agreements?

A: Agreements used by federal agencies that appoint employees in noncompetitive positions on a temporary, conditional basis. See [Gen 18](#) for more details.

Q18. Should UW System institutions create personnel files for employees on temporary assignment (via interchange agreements) from governmental agencies?

A: No. Under [UPS Operational Policy GEN 18: Temporary Interchange](#), employees who are detailed to a receiving UW System institution shall not be considered employees of that institution. See [Gen 18](#) for more information.

Q19. What are “records relating to a final personnel decision?”

A: “Final Personnel Decisions” is defined in Section 3 (Policy definitions) of [HR 13](#).

Q20. Do investigations need to be completed when an employee leaves mid-investigation? What’s the timeline?

A: Yes. There is currently a Sexual Violence Task Force work group lead by Christopher Paquet creating standardized procedures and timelines related to investigations of sexual violence and sexual harassment.

Q21. Will personnel files from other campuses be combined with personnel files at receiving campus? If yes, does this mean that we can request the personnel file from just the most recent System campus, or do we need to request copies from each campus?

A: Personnel files from previous employers should be combined with the personnel file created at the receiving institution. If upon review, the personnel file from the most recent campus contains all previous personnel files, you don’t need to request copies from those campuses. However, if a previous personnel file is missing, you must contact that campus.

Q22. Who maintains the original personnel file if the employee has a split appointment? If there are two personnel files, do we have to forward copies of all documents to the other employing agency?

A: In the case of concurrent employment between UW System institutions, each institution is responsible for maintaining a personnel file for the employee. If the employee changes positions and there is a request for their personnel file. HR staff at each institution should coordinate the merging of the files for purposes of transfer to another agency.

Q23. Why are we only asking about sexual violence and sexual harassment? Why not ask about other misconduct, violations, or issues?

A: Special emphasis has been placed upon sexual violence and sexual harassment because the UW System contains a large number of vulnerable populations who are particularly affected by this issue. Additionally, nothing prevents hiring administrators from asking questions about other types of misconduct; in fact, it is recommended that they do.

Q24. When an employee works at two UW System institutions under an Inter-Institutional Agreement, do both institutions have to maintain personnel files?

A: No. The personnel file should reside with the employee's primary institution, and the Inter-Institutional Agreement should be placed in the personnel file at that institution.

Q25. Since no long-term solution for secure p-file exchanges has been established, how should p-files be exchanged?

A: System IT is currently developing a temporary technical solution that should be available effective January 1st. Their proposal is to use a simple SharePoint file drop. More information on this solution will soon be made available.

UPDATE: Each UW System institution must provide two contacts who will be able to upload and retrieve p-files via SharePoint.

UPDATE: UWSA IT is developing a PeopleSoft module which will allow campuses to store and transfer personnel files electronically. Until the module is completed, campuses will use the SharePoint p-file transfer site.

Recruitment and Reference Checks

Q26. To which employment categories does this policy apply?

A: Faculty, academic staff, limited appointees, and university staff. This policy does not apply to temporary employees (ad hoc/lump sum), student hourly, or graduate assistants; although it does not prohibit the development of policies applying the new guidelines to temporary employees.

Q27. What if a potential employer does not conduct any reference check? Do I need to reach out to them?

A: No. You don't have an affirmative duty to reach out to potential employers. However, when contacted by a potential employer, you must inform the employer that information about sexual violence and sexual harassment violations will be disclosed upon request and direct the employer to the appropriate contact to respond to those requests (see list of institutional reference check contacts).

Q28. When and who should be asking reference check questions?

A: Each campus will be responsible for determining when and who will ask reference check questions. At a minimum, it must be asked of the final candidate before hire.

Q29. How many employers do I need to contact for reference checks?

A: At a minimum, you must contact the most recent employer as well as any previous State or UW System employers from the past 7 years. Best practice is to ask for three references (at least two of which should be supervisors). For reference checks within the UW or State Agencies see the following list of contacts.

Q30. How do I respond when a reference check comes in for an employee and we no longer have records related to that employee?

A: Inform the requestor that you don't have any files for the potential employee. Sample language: "We do not have any records related to XXX. Their personnel file was destroyed according to the applicable record disposition authority (RDA)."

Q31. If during the reference check it is discovered that the candidate violated a sexual violence or sexual harassment policy, is that an automatic disqualifier for the position?

A: No. The information gathered from the previous employer and from the candidate must be considered. It's recommended that the hiring authority consult with HR and legal before making a final determination. Some points to consider may include relevance of the violation(s) to the open position, amount of time elapsed since violation(s), severity of violation(s), whether there would be direct contact with vulnerable populations, and any other relevant factors.

Q32. What if there is a discrepancy between the candidate's response and the information received from the previous employer?

A: Using a process similar to the process used when a criminal background check reveals that a candidate has committed a crime, institutions should permit the candidate to address any discrepancies or mitigating circumstances. If necessary, legal counsel should be consulted.

Q33. Who is required to use the disclaimer language when contacted for a reference?

A: Anyone acting on behalf of a UW System institution (e.g., supervisors, HR dept) must use the disclaimer. A sample disclaimer is at the top of page 12 of [TC 1](#). Colleagues with no supervisory responsibilities are not required to use the disclaimer.

Q34. Do supervisors and HR representatives always need to read the disclaimer when contacted for a reference?

A: Yes. Whether to give the disclaimer at the end of the call or the beginning is left up to the campus but either way it must always be performed even if they don't ask about it.

Q35. Are all employees required to use the disclaimer when providing a professional reference for a colleague?

A: No. The disclaimer is only mandatory when received by an employee who has direct supervision (ex: approve time, discipline) over an employee or is representing the University such as an HR contact.

Q36. If providing a written reference can the disclaimer be titled or prefaced by something like "Mandatory State Statute Disclaimer" or "As per Wisconsin Board of Regents' Resolution 11038 and [Operational Policy HR13: Personnel Files](#) and [Operational Policy TC1: Recruitment Policies](#), the following disclaimer must be made"?

A: Yes. You may always provide additional clarification.

Q37. Does the disclaimer need to be included on professional letters of recommendation?

A: No. Letters of recommendation do not need to include the disclaimer. Letters of recommendation are generally expected to contain praise and it would be unusual for one to contain performance or conduct issues. However, if the campus reaches out requesting additional written information (ex: questionnaire) or calls for a reference, then the supervisor would need to provide the disclaimer.

Q38. How will the privacy of a victim of sexual harassment be protected when information about the harasser is disclosed by a reference?

A: Only policy violations will be disclosed to the appropriate requesting party. Names or personal identifying information of a victim will not be shared.

Q39. Is the hiring committee doing the reference checks?

A: Each institution will determine who is responsible for doing hiring checks.

Q40. Should responses to required questions for candidates and reference checks be documented and stored somewhere?

A: Yes. A notation or summary of the reference and any relevant determination documentation should be kept in accordance with institutional policy.

Q41. Can notes for reference checking be maintained in Applicant Tracking System (ATS)?

A: Yes. In accordance with any institutional policy, a summary of the reference checks should be maintained as a part of the recruitment file.

Q42. Are verification of employment (VOE) requests considered reference checks?

A: No. Many services (mortgage loan, auto finance, credit card, apartment lease, etc.) require confirmation of employment and/or income. VOE requests are for non-hiring purposes and therefore not considered a reference check. Therefore, there would be no requirement to disclose the campus sexual violence and sexual harassment contact.

Q43. How will we verify that references are being asked the questions about sexual violence and sexual harassment?

A: Each UW System institution should define in its procedures the accountable party and requirements of conducting these checks.

Q44. Do the required questions for the candidate need to be in a specific form (e.g., written, verbal)? Will notes be kept and if so where?

A: No. Each institution should define its policy and practice for obtaining this information, documentation required, and final location of this information.

Q45. Are reference checks required when changing positions within an institution (e.g., waivers, inter-unit transfers, or other job changes)?

A: Yes. Reference checks must be conducted when hiring for a new position even if the person being hired is already an employee at that institution. As the institution should already have all the relevant information, this may be as simple as reviewing the employee's personnel file.

Q46. Are employment contracts already issued affected by the new recruitment and reference check requirements?

A: No. The new requirements will be in effect January 1, 2019; therefore; employment contracts issued before that date are not affected.

Q47. Under [TC 1](#) potential employers should receive an objective evaluation of the candidate's training, experience, skills, and abilities. Does that mean that any potential employer representative who calls is entitled to receive information about the current or former employee?

A: Yes. How detailed the information should be depends on the situation and on institutional policies and practices. Generally, the employee providing the reference has considerable discretion when determining what information should be provided.

Q48. In addition to adding it to applicant tracking system job announcements, should the statement to be used when announcing a vacancy (see [TC 1](#) – App. 4) be included in other job announcements?

A: Yes. The statement that informs applicants that they and their references will be asked about sexual harassment should be added to all announcements that inform applicants of criminal background checks.

Q49. When a reference has been provided to a potential employer by a supervisor, and the potential employer subsequently contacts the HR reference check contact to ask about sexual violence and sexual harassment, should the HR contact answer more than the two required questions?

A: The reference check contact may limit their responses to answering the two required questions.

Q50. What samples of institutional reference check policies have been made available?

A: Appendices 2, 3, and 4 of [TC 1](#) include reference check guidelines, sample questions, and sample language recommendations for questions and disclaimers. Institutions may, of course, share their institutional policies and practices.

Q51. Will GIS ask the required questions for a final candidate when it sends candidates the background check link?

A: Getting GIS to add the required questions (regarding sexual violence and sexual harassment) will be explored. It is hoped that soon there will be an answer to this question.

Update: No. GIS/Hireright will **not** add the required questions to the CBC. Alternative solutions are being explored. Some campuses are successfully using survey tools (Qualtrics, SurveyMonkey) to accomplish this function.

Q52. How does the reference check process apply to instructional academic staff (IAS) who are employed on terminal contracts (often continuously)?

A: Reference checks would be completed when the employee is initially hired. If continuously employed (on terminal contract) with no other employers during that period, institutions would not need to perform the same reference checks for each subsequent contract but rather could review file to ensure no issues arose since last contract. If they were employed outside the institution after the effective date of their last contract, the employer(s) would need to be contacted for a reference.

CLARIFICATION: The new requirements will only affect new hires beginning January 1, 2019, meaning if there is a continuous candidate pool, those candidates are not subject to the new recruitment and reference check requirements if admitted prior to January 1, 2019, unless disqualified or removed from the applicant pool and then readmitted. This does not prohibit UW System institutions from creating and implementing new local recruitment and reference check policies and procedures that require more than TC 1's minimal requirements.

Q53. Can language be added to applicant tracking systems (e.g., TAM and PageUp) that informs potential applicants that if they become final candidates, they – and some of their references – will be asked questions regarding sexual misconduct?

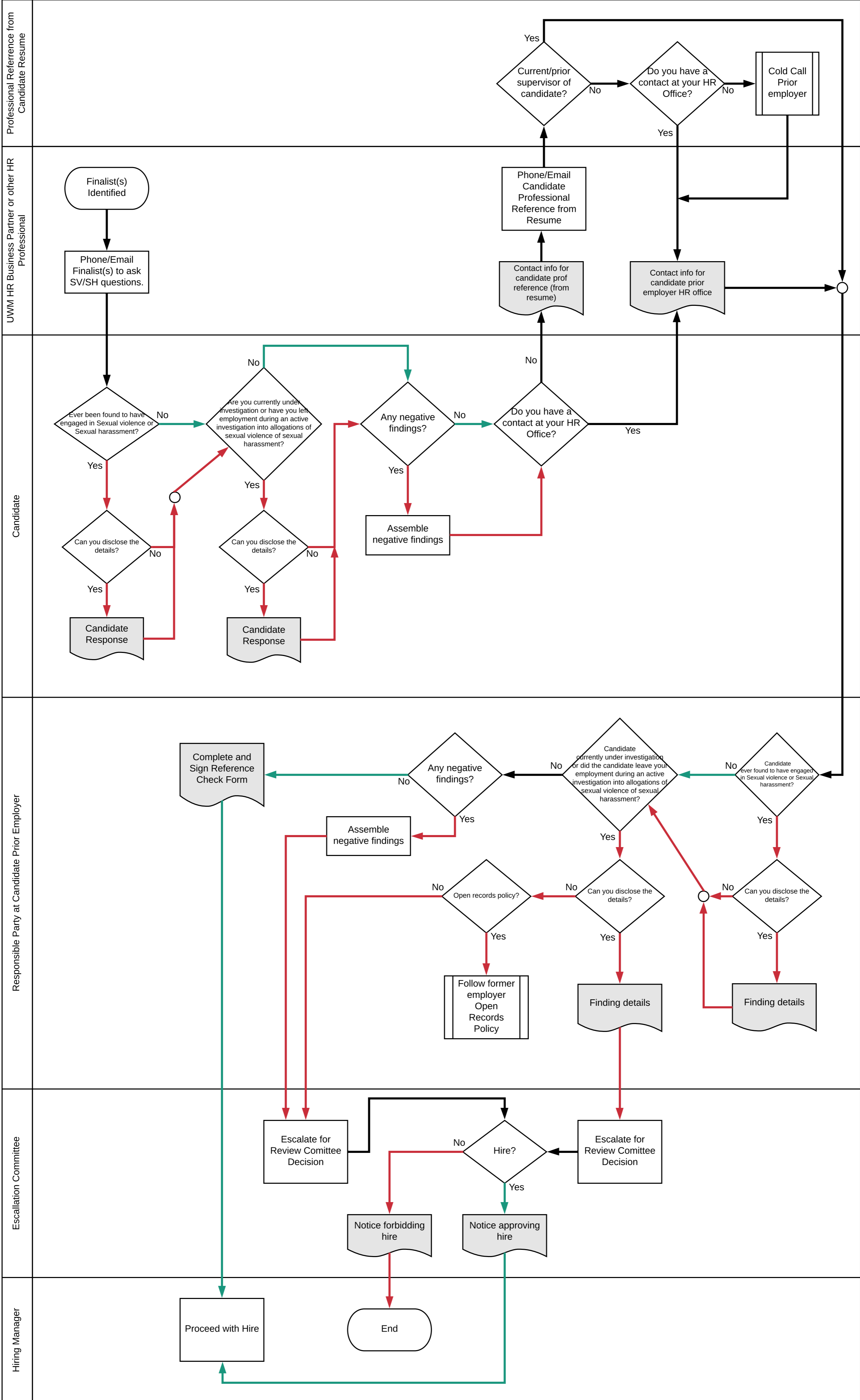
A: Yes. The UW Service Center, however, is only able to update TAM. If you have a different applicant tracking system, you will be responsible for updating it. In the terms and conditions section within TAM, and in the posting library of each institution that uses TAM, the Service Center has added the following to the information already provided about employment, education, and criminal background checks:

All final candidates must be asked, prior to hire, whether they have been found to have engaged in, are currently under investigation for, or left employment during an active investigation in which they were accused of sexual violence or sexual harassment. When conducting employment reference checks, these same sexual violence and sexual harassment questions must also be asked.

Q54. Can questions regarding prior UW/state service be added to applicant tracking systems?

A: Yes. The Service Center will add fields to TAM to allow each applicant to list prior state service and to identify their current supervisor. Institutions that do not use TAM may choose to do the same by revising their own applicant tracking systems.

Document IV:
Reference Check HR Flowchart



Document V:
Template Letters Related to Sexual
Misconduct Investigations

The purpose of this message is to advise you that [Insert institutional office investigating] has received a complaint which alleges that [the Respondent] engaged in conduct which violates [Insert institution]'s Sexual Violence and Sexual Harassment Policy, [Insert Policy #]. [Insert institutional office investigating] is conducting an investigation of this complaint as required by University policy.

Pursuant to UPS Operational Policy HR 13, a copy of this message should be placed in [the Respondent's] personnel file, pending the completion of [Insert institutional office investigating]'s investigation.

The purpose of this message is to advise you that [Insert institutional office investigating] has concluded its investigation of the complaint which alleged that [the Respondent] engaged in conduct which violated [Insert institution]'s Sexual Violence and Sexual Harassment Policy, [Insert Policy #]. The Provost has issued a final decision for that complaint, finding that [the Respondent] violated the Sexual Violence and Sexual Harassment Policy.

Pursuant to UPS Operational Policy HR 13, a copy of this message should be placed in [the Respondent's] personnel file. [Insert institutional office investigating] prior message of [date], advising you that [Insert institutional office investigating] was investigating this complaint, should now be removed from [the Respondent's] personnel file.

The purpose of this message is to advise you that [Insert institutional office investigating] has concluded its investigation of the complaint which alleged that [the Respondent] engaged in conduct which violated [Insert institution]'s Sexual Violence and Sexual Harassment Policy, [Insert Policy #]. Pursuant to UPS Operational Policy HR 13, this message **should not** be included in [the Respondent's] personnel file, and [Insert institutional office investigating]'s prior message of [date], advising you that [Insert institutional office investigating] was investigating this complaint, should now be removed from [the Respondent's] personnel file.

Document VI:
Reference Check Release Form

AUTHORIZATION TO RELEASE INFORMATION

Please read the information on this form carefully and completely.

I have applied for employment with the University of Wisconsin-_____ (“University of Wisconsin”) and have provided information about my previous employment. I authorize the University of Wisconsin to conduct a reference check with my present and/or previous employer(s).

I understand that reference information may include, but not be limited to, verbal and written inquiries or information about my employment performance, professional demeanor, investigations, disciplinary history, rehire potential, dates of employment, and employment history.

My signature below authorizes my former or current employers and references to release information regarding my employment record with their organizations and to provide any additional information that may be necessary for my application for employment to the University of Wisconsin, whether the information is positive or negative.

I knowingly and voluntarily release all former and current employers, references, and the University of Wisconsin from any and all liability arising from their giving or receiving information about my employment history, my academic credentials or qualifications, and my suitability for employment with the University of Wisconsin.

A signed copy of this form may be photocopied, scanned or reproduced as a facsimile or PDF, and these copies will be as effective as a release or consent as the original which I sign.

Name: (please print) _____

Signature: _____

Date: _____

Phone: _____

Email Address: _____

Document VII:
Wisconsin Law Review Forward Article
(prepublication)

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

NEAL SCHLAVENSKY*

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INTRODUCTION

In March 2016, the University of South Florida (USF) received striking news. A current professor, Samuel Bradley, was under investigation for allegations of sexual misconduct with former students at the university where he had previously worked. Bradley resigned during the investigation and USF failed to discover any of this information during the hiring process. 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.¹

Around the same time, USF was experiencing another similar situation. One of their professors, Marc Santos, was being investigated after a student filed a sexual harassment complaint alleging retaliation and stalking after a sexual relationship with the married professor soured.

* J.D. Candidate, Class of 2019, University of Wisconsin Law School. Thanks to University of Wisconsin System attorneys Quinn Williams, Wade Harrison, and Katie Ignatowski for assistance with edits and feedback.

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

While the investigation was ongoing, Santos left USF and accepted a position at the University of Northern Colorado (UNC) in June 2016.²

One might infer given the recent experience with Bradley, 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.³ Interestingly, another university had posed targeted questions and USF faculty informed it of the pending investigation, leading the university to stop its pursuit of Santos as a candidate.⁴

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.⁵ Should there be a duty to provide readily available information relevant to sexual misconduct? Should UNC's failure to pose the question have prohibited it from receiving highly relevant information, particularly in an era of 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 assault and harassment ("sexual misconduct") have been forced into the spotlight in the #MeToo era. This attention has redefined employment law in many respects, but more comprehensive duties to disclose have yet to emerge. Without a legal 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. 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. Time will tell if the UW policies and the #MeToo movement have even more lasting impacts on reference check responsibilities. Given how readily available information is today, it's 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

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

3. *Id.*

4. *Id.*

5. University of South Florida System, Policy 0-616, <http://regulationspolicies.usf.edu/policies-and-procedures/pdfs/policy-archive-0-616-030917.pdf>.

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.⁶ 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.⁷ #MeToo instantly went viral, reaching eighty-five countries and being used in over 1.7 million tweets within a month⁸ and included in over nineteen million tweets within a year.⁹ This global #MeToo discussion has shown sexual misconduct permeates every faction of society. Whether within Hollywood, athletics, medicine, academia, politics, or just an average neighborhood, accounts of sexual misconduct are being brought 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. The need for these policies is clear.

A. Sexual Misconduct in Higher Education

6. Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE, (Mar. 7, 2019), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmstory.html>.

7. *Id.*

8. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017), <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/>.

9. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RESEARCH CENTER (Oct. 11, 2018), <http://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

Data collection regarding sexual misconduct on college campuses faces significant limitations.¹⁰ Most acts of sexual misconduct go unreported. In fact, data suggests less than 10% of incidents on campuses are reported.¹¹ Despite such difficulties, many studies have been illustrative in showing 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.¹² In regards to sexual violence, another study reported 20% of women and 6% of men respondents were victims of attempted or completed sexual assault while attending college.¹³

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.”¹⁴ 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 media.”¹⁵ Moreover, surveys conducted by the University of Texas and Pennsylvania State University Systems discovered 20-50% of female students in science, engineering, and medical based programs experienced sexual harassment from university faculty and staff.¹⁶ 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.”¹⁷

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 (53%) involved a pattern of serial

10. Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEPT. JUST., 2 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

11. See *id.* at 23; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, 4 (2005), <http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf>.

12. Hill & Silva, *supra* note 11, at 14.

13. Christopher P. Krebs et. al., *The Campus Sexual Assault (CSA) Study*, NATIONAL INSTITUTE OF JUSTICE, 5-1, 5-5 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

14. *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine*, THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, 17 (2018) [hereinafter NASEM Report].

15. *Id.* at 14.

16. *Id.* at 59. Variation in rates depended on major and level of education.

17. *Id.* at 1–2. The military was the highest at 69%. *Id.*

behavior with multiple victims.¹⁸ To make matters worse, the sexual conduct alleged was purely verbal in only 14% of cases while 53% involved allegations of various degrees of unwanted sexual touching.¹⁹ 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.²⁰

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.²¹ 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.²² 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 explicitly address sexual misconduct.²³ 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 during an investigation into accusations of sexual misconduct.²⁴ 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.²⁵ The idea is to ask very direct questions that will illicit relevant sexual misconduct information about candidates.

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

19. *Id.*

20. NASEM Report, *supra* note 14, at 52.

21. 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 (1998).

22. *Id.* at 293.

23. Heather LaRoi, *UW System to Recommend More Robust Hiring, Reference Check Policies* (Aug. 21, 2018), <https://www.wisconsin.edu/news/archive/uw-system-to-recommend-more-robust-hiring-reference-check-policies/>.

24. University of Wisconsin System, *UPS Operational Policy: TC1*, 3 (2019), https://www.wisconsin.edu/ohrwd/download/2018-12-10-UPS-OP-TC-1-Recruitment_FNL.pdf [hereinafter TC1].

25. *Id.* at 3.

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.”²⁶ The designated institutional contact—generally a trained human resources officer—must then disclose any sexual misconduct.²⁷ Additionally, the employee’s personnel file must be shared with another UW System institution or state agency upon hire.²⁸ Since 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.²⁹

The UW System hopes to be “leading the charge” on the issue.³⁰ These disclosures go well beyond the simple confirmations associated with no comment policies and signal a strong commitment to combating sexual misconduct. 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.³¹

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”³² for employment information resides the current employer, nervous to disclose such information in fear of a defamation suit brought by a disgruntled former employee. However, balancing this pull is a conflicting desire to have full and accurate information to prevent negligent hiring decisions. The following section discusses competing sources of liability facing employers as they decide whether to provide an employment reference.

26. *Id.* at 4.

27. *Id.* Such disclosures do not encapsulate unsubstantiated allegations.

28. *Id.*

29. University of Wisconsin System, UPS Operational Policy: HR13, (2019), https://www.wisconsin.edu/ohrwd/download/2018-12-10-UPS-OP-HR-13-Personnel-Files_FNL.pdf.

30. Colleen Flaherty, *No More Passing the Harasser*, INSIDE HIGHER ED, (Sept. 25, 2018), <https://www.insidehighered.com/news/2018/09/25/u-wisconsin-system-proceeds-plan-disclose-misconduct-findings-against-employees>.

31. *Id.*

32. 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 (1998).

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. In fact, it is believed some highly publicized and costly defamation lawsuits spurred the movement towards no comment policies in the 1980s.³³ However, the attention to defamation liability in the reference check context appears 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.³⁴ 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.”³⁵

Employers have multiple defenses available to counter defamation suits brought against them. Truth and consent are two absolute defenses to such a suit. 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.³⁶ Likewise, “the consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.”³⁷

Employers may also be protected by a qualified privilege. Such protection generally comes from state employment reference immunity statutes. 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.”³⁸ The presumption of good faith can be rebutted by showing that the employer

33. Cooper, *supra* note 21, at 293.

34. Restatement (Second) of Torts § 558 (1977).

35. Restatement (Second) of Torts § 559 (1977).

36. John W. Belknap, *Defamation, Negligent Referral, and the World of Employment References*, 5 J. SMALL & EMERGING BUS. L. 113, 118 (2001).

37. Restatement (Second) of Torts § 583 (1977). For more information on consent in the defamation context see Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719 (2015).

38. Wis. Stat. § 895.487(2) (2018).

“knowingly provided false information” or “made the reference maliciously.”³⁹

Like Wisconsin, most states have such immunity statutes to encourage employers to provide relevant information during reference checks.⁴⁰ 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.⁴¹ 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 or not the employer would rehire a current or former employee and whether the decision to not rehire is based upon the employer’s determination that the former employee engaged in sexual harassment.”⁴² 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 suits following the disclosure of negative information. An employer must be sure to not act negligently in the hiring process. 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.⁴³ Within the reference check context, liability for negligence may take the form of negligent referral and negligent hiring.

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.⁴⁴ This principle extends into the hiring process, as employers owe

39. *Id.*

40. Barbara Kate Repa, *State Laws on References and Statements by Former Employers*, NOLO (last visited Apr. 19, 2019), <https://www.nolo.com/legal-encyclopedia/free-books/employee-rights-book/chapter9-6.html>.

41. *See id.*

42. AB 2770 (Cal. 2018).

43. Frank J. Cavico et al., *The Tort of Negligence in Employment Hiring, Supervision and Retention*, 1 AM. J. OF BUS. & SOC’Y 205, 206 (2016).

44. Restatement (Second) of Torts § 315 (1965).

no duty to provide a reference—whether positive or negative.⁴⁵ If the employer chooses to supply any kind of reference, though, the information must be accurate and cannot misleadingly omit important negative information known by the employer.⁴⁶

An individual owes a duty to act on behalf of another, however, if a special relationship exists between the parties.⁴⁷ An affirmative duty to warn based on a special relationship was exhibited in *Tarasoff v. Regents of the University of California*, where a college student was murdered after a university psychologist was told by a patient about a desire to kill the student.⁴⁸ The court determined that the relationship of the psychologist 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.⁴⁹

Cases have also addressed a duty to warn specifically within the employment reference context. For example, in *Cohen v. Wales*, a school district 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.⁵⁰ Eleven years later, the teacher sexually assaulted another student at that school district.⁵¹ 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.⁵² However, in *Randi W. v. Muroc Joint Unified School District*, a case decided a decade later, the court came to a different result despite a very similar fact pattern. In *Randi W.*, a school official was hired after receiving positive recommendations by former school districts despite previous incidents of sexual harassment.⁵³ The official sexually assaulted a student at the new district.⁵⁴ 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

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

46. See Restatement (Second) of Torts § 311 (1977); *Jane Doe v. McLean County Unit Dist. No. 5 Board of Directors*, 973 N.E.2d 880, 891–92 (Ill. S.Ct. 2012).

47. Restatement Second of Torts § 315(b) (1965).

48. 551 P.2d 334 (Cal. 1976).

49. *Id.* at 343.

50. 518 N.Y.S.2d 633, 633 (N.Y. App. Div. 1987).

51. *Id.* at 633–34.

52. *Id.* at 634.

53. *Randi W.*, 929 P.2d at 584–86.

54. *Id.* at 585.

substantial and foreseeable risk of physical injury to third persons.⁵⁵ Overall, such cases “are fact-specific and draw very narrow lines.”⁵⁶

2. NEGLIGENT HIRING

Although the flow of information during the hiring process may be constrained by no comment policies, an employer still has a legal duty to conduct an appropriate investigation into a prospective employee.⁵⁷ Overall, this duty is one of reasonable care within the hiring process.⁵⁸ An employer breaches this duty when it has notice that hiring a particular employee creates a risk of danger to third parties but hires that individual anyways.⁵⁹

In such cases, an important point of analysis is determining how much care is reasonable. Courts have shown 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.⁶⁰ Thus, in some circumstances, a heightened risk of harm can increase the degree of reasonable care required to avoid a negligent hiring claim.⁶¹ However, a heightened duty has not always been present in cases involving sexual misconduct by a teacher against a student.⁶²

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”⁶³ as employers and

55. *Id.* at 591.

56. Belknap, *supra* note 36, at 122.

57. Cavico, *supra* note 43, at 208.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *See Bell, IV v. Harge*, 81 Fed.Appx. 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).

63. Zuni Corkerton, *#MeToo Has Forever Changed the Ground Rules for Employers*, BIZJOURNALS (May 31, 2018),

legislatures have been forced to review policies regarding sexual misconduct.⁶⁴ 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.⁶⁵ In the interest of improving overall employee safety, the UW policy can serve as an important first step in expanding the standards of care as they relate to sexual misconduct information within employment reference checks. Such changes are needed in higher education, where sexual misconduct has become normalized and expected. The UW policy could be the much needed catalyst in changing this culture and encouraging universities to take more responsibility in 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.”⁶⁶ Overall, the worry appears more myth than reality.⁶⁷ Regardless, as a matter of public policy, the avoidance of (likely unsuccessful) defamation suits 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, however, 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. The disclosures do not include unsubstantiated allegations which could be construed as false or malicious and thus not be protected under Wisconsin’s immunity statute. Second, all prospective

<https://www.bizjournals.com/columbus/news/2018/05/31/metoo-has-forever-changed-the-ground-rules-for.html>.

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

65. See, e.g., Latham & Watkins, *California Adopts Bills Addressing Sexual Harassment Disclosures in Job References and Paid Family Leave*, (July 17, 2018), <https://www.lw.com/thoughtLeadership/california-bills-sexual-harassment-disclosures-job-references-paid-family-leave>.

66. Flaherty, *supra* note 30.

67. *Id.*

employees are informed that satisfactory reference checks, including questions regarding sexual misconduct, are preconditions to hire. 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. As of yet, a special relationship has not been established between the parties within the employment reference context. Despite many academics calling for such a duty to be created,⁶⁸ “courts are reluctant to impose affirmative duties, and job disclosure cases remain faithful to this pattern.”⁶⁹

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.⁷⁰ 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.”⁷¹ 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

68. See, e.g., Janet Swerdlow, *Negligent Referral: A Potential Theory for Employer Liability*, 64 S. CAL. L. REV. 1645 (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 (1999); Belknap, *supra* note 32; Cooper, *supra* note 21. 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 (2004).

69. Cooper, *supra* note 21, at 320.

70. TC1, *supra* note 24, at 4.

71. *Id.*

physical harm,⁷² a university subject to the UW policy must disclose not only the existence of findings of sexual violence, but also prior findings of sexual harassment which may or may not include a physical harm component. 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.⁷³

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 that most employers operate under. 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.

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 Science, Engineering, and Medicine report found that these three academic fields exhibit four characteristics that increase the potential for sexual harassment: (1) male-dominated environments, (2) organizational tolerance for sexually harassing behavior,⁷⁴ (3) hierarchical and dependent relationships between faculty and others, and (4) isolating environments.⁷⁵ 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.

Given this backdrop, the UW policy adequately adjusts the level of appropriate investigation needed for institutions of higher education to

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

73. TC1, *supra* note 24, at 4.

74. 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), <https://www.insidehighered.com/print/news/2019/03/12/new-paper-says-slapping-faculty-harassers-wrists-compromises-comprehensive>.

75. NASEM Report, *supra* note 14, at 66.

prevent passing a known harasser from one campus to the next. Thus, not only does it seem reasonable to conduct investigations in such a manner, it appears 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 Peterson stated, “The board has a paramount responsibility to ensure the safety of our students and our employees at every institution.”⁷⁶ Like the UW System, other institutions should request more out of their hiring practices concerning sexual misconduct to highlight this goal.

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.⁷⁷

The University of Wisconsin System has already taken such 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 help spur a change in the standards of care owed by employers in a way that provides more information during reference checks than what is currently disclosed under widely used no comment policies.

76. Samantha West, *UW Board of Regents Moves for a Review of Sexual Harassment Policies*, MILWAUKEE JOURNAL SENTINEL (June 7, 2018), <https://www.jsonline.com/story/news/education/2018/06/07/uw-board-regents-moves-review-sexual-harassment-policies/682711002/>.

77. NASEM Report, *supra* note 14, at x.