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# ‘Pass the Harasser’ Is Higher Ed’s Worst-Kept Secret. How Can Colleges Stop Doing It?

By Sarah Brown and Katherine Mangan | JUNE 27, 2019

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Luis Sinco, Los Angeles Times, Getty Images

Colleges have long balked at sharing information with other institutions about employees’ disciplinary history because administrators fear defamation suits and bad publicity. That’s changing.

A professor or administrator commits sexual harassment, resigns quietly, and gets a new job at a different institution. This phenomenon, known as “pass the harasser,” is common in academe, and it’s come under increasing scrutiny during the #MeToo movement.

In some cases, the college on the receiving end is aware of the previous misconduct and makes the hire anyway, wooed by the person’s credentials. In others, the college doesn’t know about the harassment because institutions don’t share that information. Often, colleges sign confidential settlement agreements with employees who’ve committed harassment, moving them on without

anyone outside of that institution knowing what they’ve done.

But the pressure is building on colleges to stop allowing harassers to move from job to job with no consequences. A few institutions are testing out new policies to try to bolster their reference checks, keep harassers off their campuses, and inform other colleges about employees’ past misconduct.

State lawmakers are also stepping into the fray in an effort to crack down on what they see as secrecy in the handling of sexual-misconduct complaints. Title IX, the federal gender-equity law, requires colleges to investigate such complaints, but it doesn't compel them to share the information with police or prospective employers. Some lawmakers want to see that required at the state level.

In Washington State, lawmakers plan to meet with university leaders and victims' rights groups over the summer to consider ways to make the hiring process more transparent. They announced that effort after *The Seattle Times* described how a former athletics administrator at the University of Washington moved on to another college after being found responsible for sexually assaulting a volleyball player in his truck.

The university reached a settlement with the alleged victim, agreeing to pay up to \$20,000 for therapy as long as she waived any claims against the university. The employee, Roy Shick, then senior associate athletic director, resigned, and his colleagues were told he had moved on to another opportunity. A year later, he was hired as vice president for advancement at Grand Canyon University, which knew nothing about the findings against him. Grand Canyon put him on administrative leave and then fired him after the Seattle newspaper alerted the Arizona college about Shick's background, and the university conducted its own inquiry.

University of Washington officials say they were following proper internal procedures in their handling of Shick's case. The investigation continued after he left and a "do not rehire" notation was put in his file. But because a university doesn't have legal standing to find someone guilty of an actual crime, those notations don't show up in a criminal background check.

That's why some colleges are tweaking their hiring processes to account for institutional investigations. Still, plenty of barriers — legal and otherwise — keep colleges passing their harassers down the line.

Colleges have long balked at sharing information with other institutions about employees' disciplinary history because administrators fear defamation suits and bad publicity. That creates incentives to keep complaints quiet. Some faculty leaders also worry that professors' privacy could be violated, and that unproven allegations against the innocent could sink their chances of moving on with their career.

### **Not Reported to the Police**

The situation involving Washington and Grand Canyon is just the latest high-profile example of a university passing along a harasser.

Grand Canyon officials said they conducted a background check before hiring Shick, but since the matter was never reported to the police, the incident didn't show up.

It's unclear whether Grand Canyon asked whether Shick had any misconduct complaints against him, but that's the only way it would have received that information. The University of Washington's policy calls for releasing such information only if it's specifically requested.

Washington State passed a law aimed at preventing public schools from passing on harassers, but no such law yet exists for colleges. Some state lawmakers want to extend those protections to higher education, and they will be meeting with university leaders over the summer to discuss it.

Rep. Gerry Pollet, a Seattle Democrat who serves on a House committee on college and work-force development, believes that public universities should be required to report credible allegations of sexual assault to the police, regardless of the victim's wishes. That way, he said, it would be treated as the serious crime that it is, and it would also show up when an outside institution conducts a background check on a prospective employee.

"If there's evidence of someone stealing a few hundred dollars from the athletic department, there's no doubt the athletic department would report to police," he said. "I find it ironic and sad that something far more serious isn't treated the same way."

He would also like to see interstate higher-education consortia agree on common standards for reporting sexual misconduct. "We need to have an assurance that people who are predators aren't being moved from institution to institution."

Ana Mari Cauce, president of the University of Washington, said the university would be re-examining its reporting procedures and working with legislators to increase transparency in ways that are fair to everyone.

"Victim and survivor advocates generally believe, often passionately so, that allowing for confidential reporting that protects the privacy of survivors is critical to encouraging them to come forward," she wrote in a prepared statement. "Balancing their privacy needs while holding harassers and abusers accountable can be like walking a tightrope."

**On the Receiving End**

Most colleges don't have standardized policies on reference checks and sharing information about past discipline when faculty members and administrators are going through the hiring process. But a few institutions are working on it.

Sheila O'Rourke, senior campus counsel at the University of California at Davis, knows all about confidential settlement agreements that colleges sign with employees who have committed misconduct.

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“I have to say, I’ve drafted a lot of these in my day,” O’Rourke said, in a presentation this week at the annual conference of the National Association of College and University Attorneys. “And I’m embarrassed, looking back, at the number of people I’ve separated or assisted with that separation.”

The university was inspired to crack down after “bitter experience in really short succession hiring two faculty members from prestigious peer institutions who had engaged in egregious misconduct,” she said. “We had no information about any of that during the entire hiring and vetting process.”

While checking references, the university has started asking previous employers whether faculty applicants have committed harassment or research misconduct.

“One of the things that’s held us back is this notion that sexual misconduct is outside of scholarship, it’s outside of teaching, so it’s not properly part of how we evaluate faculty candidates,” O’Rourke said.

All job postings now include a statement indicating that Davis officials will request information about past policy violations. Applicants must sign a form authorizing those institutions to release the documents — even if they have signed a confidential settlement agreement with that institution.

As it’s currently a pilot program, O’Rourke said, the university checks the form only for finalists for tenured faculty jobs, not for other faculty or staff candidates. If they don’t sign it, their applications won’t be considered. The hope, she said, is to dissuade harassers from applying for Davis jobs altogether.

But past harassment doesn’t automatically disqualify faculty members, she said. The university considers the nature of the misconduct, how long ago it happened, and whether people have taken steps to improve their behavior.

During the first year of the program, she said, 16 finalists went through a reference check. Twenty-six institutions were contacted for information, and only one did not respond — a foreign university, O’Rourke said. The others reported that the faculty members in question had no history of disciplinary problems.

The University of Wisconsin system took similar steps this year after several Wisconsin campuses came under fire for their handling of harassment cases.

In one case, a former assistant dean of students and Title IX coordinator at the Stevens Point campus committed harassment, moved on to a similar job at Knox College in Illinois, and then was hired back into the Wisconsin system, at the Eau Claire campus. Neither of the hiring institutions knew about his misconduct at Stevens Point. He resigned once UW-Eau Claire learned about his disciplinary history.

Now the system has explicit policies on documenting harassment in personnel files, disclosing harassment to other institutions, and ensuring that Wisconsin campuses ask about harassment during the hiring process, said Quinn Williams, general counsel for the system, during the NACUA conference.

## **Under Investigation? Just Resign.**

Of course, an employee would have a documented disciplinary history only if the institution finished its investigation and made a finding of responsibility. Many professors and administrators resign before investigations are completed.

“We advise people when there’s an allegation to get out and start looking for a new school before there is a finding. We don’t have a lot of faith in the ability of schools to conduct fair investigations,” said Joshua A. Engel, a lawyer who represents faculty members and students accused of harassment. Engel has also taught criminal law and consulted with the federal government on Title IX matters.

“An allegation is just that, an allegation,” he said. If colleges are required to report any level of accusation, he said, “it would privilege even the most spurious or flimsy accusation from a student upset about a grade.”

Human-resources officials tend to err on the side of withholding information, Engel said, because they don’t want to risk a defamation lawsuit. But colleges that are doing a thorough job of vetting faculty candidates should reach out to colleagues and others who might be more forthcoming.

Generally speaking, an investigation process should remain confidential until it’s completed, said Brett A. Sokolow, chief executive of TNG, a risk-management firm that works with colleges. But that’s assuming the accused person sticks around. What happens if a person quits and applies for other jobs? What, if any, ethical obligation does the former employer have to warn the other colleges about pending investigations?

“The ethical litmus test is whether you have a good-faith belief that the employee poses an ongoing risk of harm,” Sokolow, who is also president of the Association of Title IX Administrators, wrote in an email. “You may be able to determine that well before an investigation is ‘complete’ from a procedural perspective, depending on where you are in the evidence-gathering process. If so, it’s ethical to share that information as necessary to avert the harm.”

University of Wisconsin campuses have started asking prospective faculty and staff hires whether they’re the subject of active investigations. Wisconsin campuses are now also required to finish all investigations, regardless of whether their employees resign before they’re done. “You don’t interrupt them midway through and settle them out,” Williams said. “You go all the way to the end.”

If a Wisconsin faculty or staff member under investigation becomes a candidate for a job at a different college, the Wisconsin campus will disclose that investigation if the hiring institution asks during a reference check, he said. And Wisconsin will share the outcome of the investigation if the hiring institution follows up.

“We don’t have an affirmative obligation that we’ve set to say, We will now, once it’s done, send it out,” Williams stressed. It’s on the other college to ask Wisconsin.

Complicating matters for administrators trying to decide what information to divulge is that states have different standards for sharing information, said Peter F. Lake, director of the Center for Excellence in Higher Education Law and Policy at Stetson University. If a professor who’s under investigation applies for 10 jobs in 10 states, the university sharing the information about a pending investigation would have to consider the implications across many boundaries.

He sees a potential for complaints of age discrimination, since older professors generally cost more to keep on and, given their years at the institution, are more likely to have had interactions that offended someone. That could make them vulnerable to claims from disgruntled colleagues or students that could derail their chances of moving on, Lake said. The university on the receiving end doesn’t have to give a reason, he said, for declining to interview someone.

“Given today’s climate,” Lake said, the attitude of a hiring institution is “if there’s even so much as a single hair in the food, I’m sending it back to the kitchen.” Requesting information about harassment investigations “may be an excellent tool to filter out” serial harassers who move from place to place, Lake said. “But it could also be a tool to oppress people.”

Some faculty members sound alarms about privacy and defamation when colleges try to increase transparency around disciplinary investigations.

The American Association of University Professors hasn’t taken a position on how campus misconduct inquiries are handled. But the association considers blanket criminal background checks, which would turn up information reported to police, “a disproportionate invasion of privacy relative to the potential benefit,” said Hans-Joerg Tiede, associate secretary for academic freedom, tenure, and governance.

Institutions doing any kind of background check, the AAUP says, should inform the candidate of the check and move ahead only after the candidate authorizes it in writing. The candidate should be given a copy of the final report and be allowed to “contest or clarify its accuracy” before any adverse action is taken based on the report, the AAUP says.

Tiede also said the AAUP would be concerned “if administrations reported findings of misconduct and impositions of sanctions in which they did not provide adequate academic due process.”

Williams, of Wisconsin, said university officials weighed the legal risks associated with their policy changes. They concluded that such defamation and discrimination claims are rare in most states — because there are “safe harbor” protections with respect to reference checks, as long as the information is not “malicious or objectively false.” He added: “The law bends towards equity.”

He said colleges hoping to stop passing harassers shouldn’t overestimate the opposition or the legal risks. “One of my suggestions is that if you feel like you’re getting stuck in policy implementation on getting it perfect, don’t get it perfect. Just get it out,” he said. “You can always come back and change it later.”

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*A version of this article appeared in the July 19, 2019 issue.*

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