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Chiaman Wang

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NAME-CLEARING HEARINGS: HOW THIS "REMEDY" FAILS TO SAFEGUARD THE PROCEDURAL DUE PROCESS RIGHTS OF PUBLIC EMPLOYEES ACCUSED OF SEXUAL HARASSMENT

Chiaman Wang*

INTRODUCTION

Although once reluctant to give credit to sexual harassment accusations,¹ courts have become increasingly receptive to sexual harassment complaints.² This change can be partially attributed to the Supreme Court's decision in *Meritor Savings Bank, FSB v. Vinson*,³ which created an affirmative duty on employers to safeguard employees from sexual harassment.⁴ In the past ten years alone, over 140,000 sexual harassment complaints have been filed with the Equal Employment Opportunity Commission (EEOC).⁵ But as the rights of alleged victims become increasingly protected, an important question

* J.D. 2010, Georgia State University College of Law.

1. Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2006). Courts did not recognize sexual harassment as discrimination based on sex until 1976. *See generally* Williams v. Saxbe, 413 F. Supp. 654, 657–61 (D.D.C. 1976).

2. Stuart H. Bompey, *Practical Problems in Investigating Sexual Harassment Claims*, 426 PLI/LIT 141, 145 (1992).

3. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

4. In *Meritor*, the Supreme Court raised the standard for employers while simultaneously lowering the standard for employees alleging sexual harassment. Employees could now bring sexual harassment claims despite an absence of economic or tangible discrimination. *Id.* at 64. On the other hand, employers could be liable for a hostile work environment based on sexual harassment despite creating a grievance procedure and implementing a "no sexual harassment" policy. *Id.* at 72; *see also* Bompey, *supra* note 2, at 145.

5. EEOC, Sexual Harassment Charges: EEOC & FEPA's Combined, FY 1997–FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Apr. 9, 2010) [hereinafter Sexual Harassment Charges]. The number of sexual harassment charges received by the EEOC and the Fair Employment Practices agencies (FEPA) steadily increased during the 1990's. Although the numbers have dropped since the early 2000's, the EEOC and FEPA are still receiving over 12,000 charges each year.

arises: has there been a corresponding decline in the rights of individuals accused of sexual harassment?

Since *Meritor*, courts have consistently emphasized the employers' duty to respond to allegations of sexual harassment with "immediate and corrective action."⁶ The text of Title VII,⁷ or more importantly, the courts' interpretation of Title VII, requires employers to implement anti-sexual harassment policies "immediate[ly] and flawless[ly]" to ensure compliance.⁸ In response to congressional and judicial pressures, employers appear to be "protect[ing] the accusing victim at all costs"⁹ and, as a result, are "overzealous[ly]" disciplining individuals accused of sexual harassment.¹⁰ Without even a preliminary investigation into the allegations, many employers take adverse employment actions against the accused to avoid lawsuits from the accuser.¹¹ Due to the increasingly protected interests of alleged sexual harassment victims, employers are more likely to be held liable for a hostile work environment than for violating the rights of the accused.¹² Consequently, the accused's

6. *Smith v. Oakland Scavenger Co.*, No. CV-94-01354-CAL, 1997 WL 661335, at *3 (9th Cir. Oct. 16, 1997) (quoting *Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997)); *Ballard v. Union Pac. R.R. Co.*, No. 8:06CV718, 2008 WL 1990787, at *5 (D. Neb. May 5, 2008); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 959–60 (S.D. Iowa 1990); see also *Bompey*, *supra* note 2, at 145; Hannah Katherine Vorwerk, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 VAND. L. REV. 1019, 1021–22 (1995).

7. Title VII of the Civil Rights Act of 1964 provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (2006).

8. Vorwerk, *supra* note 6, at 1021–22.

9. Cynthia Wilson Veidt, *Where There's Smoke, There Must Be Fire: Rights of the Accused Sexual Harasser*, 19 REV. LITIG. 71, 73 (2000).

10. Veidt, *supra* note 9, at 74. See Ann Hassenpflug & Robert O. Riggs, *Guilty Until Proven Innocent? Protecting the Rights of School District Employees*, 104 EDUC. L. REP. 981, 981–84 (1996) (highlighting several cases in which public school employees suffered adverse employment actions based on false allegations).

11. *Gibson v. Shelly Co.*, 314 F. App'x 760, 763 (6th Cir. 2008) (noting that plaintiff was terminated before the completion of the investigation into the sexual harassment allegations); *Cotton v. Jackson*, 216 F.3d 1328, 1329 (11th Cir. 2000) (stating that the employer suspended the accused without pay and prohibited him from entering campus just one day after receiving a complaint from the accused); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 776 (9th Cir. 1982) (noting that the teacher was suspended upon his arrival at the meeting, prior to any discussion of the allegations against him); see also Veidt, *supra* note 9, at 74.

12. A hostile work environment is created when a supervisory employee subjects a subordinate employee to severe and pervasive sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780

rights appear “non-existent or [are] of significantly reduced importance” in comparison to the accuser.¹³

However, this trend should not continue.¹⁴ Each year, thousands of sexual harassment accusations are found to be false.¹⁵ In 2009, 12,696 sexual harassment claims were filed against employers with the EEOC, but subsequent government investigations showed that almost half of these complaints lacked merit.¹⁶ In one year alone, 5,695 individuals made sexual harassment allegations without any reasonable basis for their claims.¹⁷ Thus, at least 5,695 individuals were wrongfully accused of sexual harassment.¹⁸

The mere implication of sexual harassment can cause the accused to suffer substantial repercussions.¹⁹ Allegations of sexual harassment have a significant, negative effect on all aspects of an accused’s life.²⁰ Burdened with the label of sexual harasser, the accused carries an “enormous social stigma”²¹ that affects his²² standing in the

(1998). To shield itself from claims by an alleged victim of sexual harassment, an employer must provide “immediate and corrective action” to avoid liability for a hostile work environment. *Smith v. Oakland Scavenger Co.*, No. CV-94-01354-CAL, 1997 WL 661335, at *3 (9th Cir. Oct. 16, 1997); *Yamaguchi v. U.S. Dep’t of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997); *Ballard v. Union Pac. R.R. Co.*, No. 8:06CV718, 2008 WL 1990787, at *5 (D. Neb. May 5, 2008); *Jew v. Univ. of Iowa*, 749 F. Supp. 946, 959–60 (S.D. Iowa 1990). This action must be “reasonably calculated” to end the harassment and to prevent future occurrences of harassment. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 340 (6th Cir. 2008); *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 780 (7th Cir. 2008); *Weger v. City of Ladue*, 500 F.3d 710, 720 (8th Cir. 2007); *Yamaguchi*, 109 F.3d at 1483. In contrast, to shield itself from claims brought by the accused, the employer need only provide the accused with notice of the charges and an opportunity to be heard. *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986); *Zueck v. City of Nokomis*, 513 N.E.2d 125, 127–28 (Ill. App. Ct. 1987).

13. Veidt, *supra* note 9, at 74.

14. Justice Alan D. Oshrin recognized this need in *Starishevsky v. Hofstra University* when he stated that the “process of eliminating sexual harassment must go forward with recognition of the rights of all involved and without the creation of new wrongs.” 612 N.Y.S.2d 794, 796 (1994).

15. Sexual Harassment Charges, *supra* note 5.

16. *Id.*

17. *Id.* Of the 12,510 complaints received by the EEOC, 5,273 were found to have no reasonable cause (45.5%).

18. *Id.*

19. Hassenpflug & Riggs, *supra* note 10, at 988; Vorwerk, *supra* note 6, at 1022, 1050.

20. Hassenpflug & Riggs, *supra* note 11, at 988; Vorwerk, *supra* note 6, at 1022, 1050.

21. *In re King Soopers, Inc. and United Food and Commercial Workers Union*, 86 Lab. Arb. (BNA) 254 (1985) (Sass, Arb.) (stating that it is “not overly dramatic” to say that charges of sexual harassment put the accused’s “life . . . on the line”); Veidt, *supra* note 9, at 72.

22. For purposes of clarity, this Note will assign the male pronoun to the accused because most individuals accused of sexual harassment are male. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Landgraf v. USI Film Prods.*, 511

community, his sense of self, and others' views of him.²³ Indeed, accusations of sexual harassment have been likened to "accusations of witchcraft in colonial Salem."²⁴

This pervasive effect extends from the accused's personal life into his professional life.²⁵ For example, ex-Dean of the University of Georgia, John Soloski states that allegations of sexual harassment against him "tor[e] down in a matter of hours" the academic and professional reputation he "spent 30 years building."²⁶ Once an individual is suspected of sexual harassment, he may be immediately fired²⁷ and lose all future employment opportunities in his field.²⁸ The Supreme Court emphasized that the deprivation of present employment, as well as future opportunity for public employment, "certainly is no small injury."²⁹

Consequently, courts and employers must strike a balance between protecting the rights of the accuser and the accused. To do so, they must ensure that adequate remedies are available to protect the rights of individuals accused of sexual harassment. This Note surveys various claims wrongfully accused sexual harassers may bring against their employers,³⁰ while focusing on name-clearing hearings.³¹ Part I details the remedies currently available;³² Part II explains the purpose and availability of name-clearing hearings;³³

U.S. 244 (1994); *Cotton v. Jackson*, 216 F.3d 1328 (11th Cir. 2000); *Lee v. City & County of S.F.*, 203 F.3d 831 (9th Cir. 1999); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982); *Starishevsky v. Hofstra Univ.*, 612 N.Y.S.2d 794, 796 (1994). However, it is important to note that females have also been accused of sexual harassment in the workplace. *Hicks v. Sheahan*, No. 03-C-0327, 2004 WL 3119016 (N.D. Ill. Dec. 20, 2004); *see also Williams v. Saxbe*, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976) (noting that "a finding of discrimination could be made where a female supervisor imposed" the sexual discriminatory practices).

23. *Hassenpflug & Riggs*, *supra* note 10, at 981; *Veidt*, *supra* note 9, at 72.

24. *Veidt*, *supra* note 9, at 72.

25. *Id.*; *Vorwerk*, *supra* note 6, at 1022.

26. *Andrea Jones, Ex-Dean Sues UGA Chief, Says Name Was Smeared*, ATLANTA J.-CONST., June 28, 2006, at B3.

27. *Vorwerk*, *supra* note 6, at 1022.

28. *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 574 (1972) (finding that a stigmatizing accusation is likely to deprive the accused of future opportunity for government employment).

29. *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 185 (1951)).

30. *See discussion infra* Part I.

31. *See discussion infra* Parts II–IV.

32. *See discussion infra* Part I.

33. *See discussion infra* Part II.

Part III explores the inadequacies of name-clearing hearings;³⁴ and Part IV concludes with proposed modifications to name-clearing hearings that may more adequately protect the rights of the accused.³⁵

I. REMEDIES AVAILABLE TO PUBLIC EMPLOYEES WRONGFULLY ACCUSED OF SEXUAL HARASSMENT

Once a public employee has been wrongfully accused of sexual harassment, he has several claims that he may bring against his employer.³⁶ This Note³⁷ surveys the tort claims of defamation,³⁸ intentional infliction of emotional distress,³⁹ and negligent infliction of emotional distress,⁴⁰ focusing primarily on the accused's constitutional due process claim.⁴¹

Although an accused may bring several tort claims against his public employer, he is unlikely to succeed given the protections afforded to public employers. State or government entities are generally shielded from tort claims under the cloak of sovereign immunity.⁴² Thus, despite the merits of the accused's case, he will be unlikely to succeed on his tort claims.⁴³

34. See discussion *infra* Part III.

35. See discussion *infra* Part IV.

36. *Lee v. City & County of S.F.*, 203 F.3d 831 (9th Cir. 1999); *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1252 (10th Cir. 1998); *Parker v. Hous. Auth. of Kan. City*, 996 F.2d 311 (10th Cir. 1993); *Rosenstein v. City of Dallas*, 876 F.2d 392, 397 (5th Cir. 1989); *Wilcoxon v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 437 F. Supp. 2d 235 (D. Del. 2006); *Moran v. S. Reg'l High Sch. Dist. Bd. of Educ.*, No. 05-1062, 2006 WL 932339 (D.N.J. Apr. 11, 2006); *Cedillos v. Tex. Dep't of Pub. Safety*, No. CIVA SA03CA0427-XR, 2005 WL 589314 (W.D. Tex. Mar. 10, 2005); *Johnson v. City of Menlo Park*, No. C-98-2858, 1999 WL 551241 (N.D. Ca. July 23, 1999); *Motzkin v. Trs. of Boston Univ.*, 938 F. Supp. 983 (D. Mass. 1996).

37. Some other claims an accused may bring, which are not discussed in this Note, include wrongful termination, Title VII disparate treatment, breach of contract, discrimination, and invasion of privacy. See *Lee*, 203 F.3d 831; *Hennigh*, 155 F.3d 1249; *Parker*, 996 F.2d 311; *Moran*, 2006 WL 932339; *Wilcoxon*, 437 F. Supp. 2d 235; *Cedillos*, 2005 WL 589314; *Johnson*, 1999 WL 551241; *Motzkin*, 938 F. Supp. 983.

38. See discussion *infra* Part I.A.

39. See discussion *infra* Part I.B.

40. See discussion *infra* Part I.B.

41. See discussion *infra* Part I.C.

42. *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 640-41 (7th Cir. 2006); *Ahlens v. Schebil*, 188 F.3d 365, 374 (6th Cir. 1999).

43. *Naumenko v. United States*, 277 F. App'x 1009, 1010 (Fed. Cir. 2008) (finding that "plaintiff must identify a separate source of substantive law that creates the right to money damages" because his

A. Defamation Claims Against Public Employers

An individual wrongfully labeled as a sexual harasser may bring a defamation claim against his employer.⁴⁴ To succeed on this claim, the accused must show that his employer, without privilege, published a false statement about him, thereby causing him damage.⁴⁵ Although the accused has the right to bring this claim, it is “very difficult” for an accused to successfully establish a defamation claim against his employer.⁴⁶ The difficulty lies in the fact that the burden rests on the accused to show that his employer made statements that were “knowingly false or in reckless disregard of the truth.”⁴⁷

B. Intentional and Negligent Infliction of Emotional Distress Claims Against Public Employers

The wrongfully accused may also bring an intentional infliction of emotional distress claim (IIED) or a negligent infliction of emotional distress claim (NIED).⁴⁸ To succeed on his IIED claim, the accused must prove his employer intentionally caused or recklessly disregarded the probability of causing emotional distress to the accused.⁴⁹ However, the wrongfully accused “almost never”⁵⁰

tort claims were barred by sovereign immunity); *Sydnes v. United States*, 523 F.3d 1179, 1187 (10th Cir. 2008) (finding plaintiff’s intentional infliction of emotional distress claim against the United States, “however strong it may be on the merits,” barred by the Federal Tort Claims Act); *Rector v. United States*, 243 F. App’x 976, 979 (6th Cir. 2007) (finding the United States “not subject to suit for libel, slander, or misrepresentation”); *Supreme Beef Processors, Inc. v. Dep’t of Agric.*, 468 F.3d 248, 252 (5th Cir. 2006) (finding that § 2680(h) of the Federal Tort Claims Act precluded plaintiff from bringing a libel or slander claim against a department of the United States).

44. See *Lee v. City & County of S.F.*, 203 F.3d 831 (9th Cir. 1999); *Wilcoxon v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 437 F. Supp. 2d 235 (D. Del. 2006); *Cedillos v. Tex. Dep’t of Pub. Safety*, No. CIVA SA03CA0427-XR, 2005 WL 589314 (W.D. Tex. Mar. 10, 2005); *Motzkun v. Trs. of Boston Univ.*, 938 F. Supp. 983 (D. Mass. 1996); see also *Bompey*, *supra* note 2; Cynthia L. Remmers, *Sexual Harassment: A Guide to an Employer’s Obligations, Liability and Prevention*, 1997 A.B.A. SEC. LAB. & EMP. L. 7, at 100 (1997); *Veidt*, *supra* note 9, at 89–90.

45. *Veidt*, *supra* note 9, at 89–90.

46. *Id.* at 89.

47. *Anderson v. Boston Sch. Comm.*, 105 F.3d 762, 766 (1st Cir. 1997); *Wulf v. City of Wichita*, 883 F.2d 842, 859 (10th Cir. 1989).

48. See *Lee*, 203 F.3d 831; *Cedillos*, 2005 WL 589314; *Johnson v. City of Menlo Park*, No. C-98-2858, 1999 WL 551241 (N.D. Cal. July 23, 1999), *rev’d in part*, 7 F. App’x 712 (9th Cir. 2001); see also *Veidt*, *supra* note 9, at 90.

49. Francis C. Amendola et al., *Intentional Infliction of Emotional Distress*, 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 144 (2008).

succeeds in his IIED or NIED claim because courts generally do not find the employer's actions sufficiently "outrageous" to find in favor of the accused.⁵¹

C. *Constitutional Due Process*

The Fourteenth Amendment of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."⁵² The purpose of procedural due process⁵³ is to safeguard the accused from "unchecked" and "erroneous" personnel decisions.⁵⁴ Thus, an accused harasser generally asserts that his procedural due process rights have been violated based on his employer's inadequate or non-existent investigation into the sexual harassment complaints.⁵⁵ To state a claim for a violation of procedural due process, the accused must show "(1) that he has a constitutionally protected interest, (2) that the government has deprived the plaintiff of his constitutionally protected interest, and (3) that the particular process the government used to accomplish the deprivation lacked fundamental fairness."⁵⁶ In

50. Veidt, *supra* note 9, at 90.

51. *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 650 (7th Cir. 2006) (finding defendant's decision to not reappoint plaintiff was not extreme or outrageous because plaintiff had been accused of inappropriate behavior); *Dendinger v. Ohio*, 207 F. App'x 521, 529 (6th Cir. 2006) (finding that the lower court correctly entered summary judgment against plaintiff because she failed to establish that defendant's actions were "extreme or outrageous"); *Salinas v. Univ. of Tex. Pan. Am.*, 74 F. App'x 311, 314 (5th Cir. 2003) (holding that summary judgment should be affirmed on plaintiff's intentional infliction of emotional distress claim because defendant engaged merely in "run-of-the-mill employment actions").

52. U.S. CONST. amend. XIV, § 1.

53. Although constitutional due process involves both substantive due process and procedural due process, this Note will not discuss substantive due process. Generally, an accused who has a liberty interest in freedom from stigmatization does not have a substantive due process claim because "no substance exists for the liberty interest beyond the procedures that define it." Harvey Brown & Sarah V. Kerrigan, 42 *U.S.C. 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 *BAYLOR L. REV.* 619, 645 (1995). Because substantive due process claims are generally unavailable to individuals accused of sexual harassment, this Note will focus on procedural due process claims that an accused may bring.

54. J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 *NEW ENG. L. REV.* 931, 937 (1999).

55. Veidt, *supra* note 9, at 82.

56. Brown & Kerrigan, *supra* note 53, at 632; accord Tracy M. Loos, *Name-Clearing Hearings, Gratuitous Remedies, and Common Law Writs of Certiorari—Are They Worth Their Weight in Gold?*, 22 *S. ILL. U. L.J.* 201, 205 (1997); Vorwerk, *supra* note 6, at 1038–39.

essence, the accused must show that his government employer failed to give him a meaningful opportunity to be heard before taking away his property⁵⁷ interest or liberty⁵⁸ interest⁵⁹ via termination, demotion, suspension or constructive discharge.⁶⁰

1. *Property Interest*

In order for an individual to have a property interest in his employment, he must possess a legitimate claim of entitlement to it.⁶¹ This entitlement to employment may be created by statutes, regulations, or implied promises.⁶² An accused commonly establishes a property interest in his employment through “just cause” language in his employment contract⁶³ or via tenure.⁶⁴ If an accused can show that his employer deprived him of a property interest without an opportunity to be heard, he may not only receive monetary damages, but he may also be reinstated into his original position.⁶⁵ However, these remedies are not available to the accused whose liberty, not property, interest has been unconstitutionally violated.⁶⁶

57. See discussion *infra* Part I.C.1.

58. See discussion *infra* Part I.C.2.

59. McGuinness, *supra* note 54, at 934; Vorwerk, *supra* note 6, at 1032.

60. Loos, *supra* note 56, at 204.

61. McGuinness, *supra* note 54, at 942; Vorwerk, *supra* note 6, at 1039.

62. McGuinness, *supra* note 54, at 941, 945. However, “at-will employees” have no protected property interest. *Hill v. Borough of Kutztown*, 455 F.3d 225, 234 (3d Cir. 2006) (quoting *Elmore v. Cleary*, 399 F.3d 279, 282 (3d Cir. 2005)) (“[The] law is clear that an at-will employee does not have a legitimate entitlement to continued employment because [he] serves solely at the pleasure of [his] employer.”); *Beitzell v. Jeffrey*, 643 F.2d 870, 874 (1st Cir. 1981) (“[A] person who holds a job from which he can be removed only ‘for cause,’ has a protected property interest, while one who can be removed ‘at will’ does not.”).

63. The addition of this clause in the employment contract indicates that government employers may not terminate the employee without “just cause.” This clause gives these government employees job security in knowing that they may not be discharged without first being provided due process protections. *Salas v. Wis. Dep’t of Corr.*, 429 F. Supp. 2d 1056, 1076 (W.D. Wis. 2006) (quoting *Milwaukee Dist. Council 48 v. Milwaukee County*, 627 N.W.2d 866, 878 (Wis. Ct. App. 2001) (“An employee who may be dismissed only for ‘just cause’ has a property interest in his continued employment that is protected by the due process clause of the federal constitution. Such an employee is entitled to the ‘full panoply of due-process protections’” (internal citations omitted))); see also McGuinness, *supra* note 54, at 943.

64. McGuinness, *supra* note 54, at 945, 948–49.

65. Vorwerk, *supra* note 6, at 1041.

66. *Id.*

2. *Liberty Interest*

A constitutional liberty interest includes one's right to have the freedom to work and earn a living.⁶⁷ A government employer violates the liberty interest of an accused by terminating him while concurrently publishing stigmatizing comments about the accused.⁶⁸ The comments about the accused's "good name, reputation, honor or integrity"⁶⁹ must relate directly to the accused's competence as an employee.⁷⁰ Comments damaging the accused's professional competence have the potential to destroy the accused's "standing and association in his community" and to exclude the accused from future employment opportunities.⁷¹ In effect, these types of stigmatizing comments deprive the accused of the ability to work and earn a living.⁷² To remedy this wrong, the accused can only protect his interests through name-clearing hearings.⁷³

II. NAME-CLEARING HEARINGS

Name-clearing hearings were created to provide the accused with an opportunity to clear his name in front of an impartial tribunal.⁷⁴ At the hearing, the accused should have the opportunity to refute false allegations of sexual harassment so that he may preserve his future job prospects.⁷⁵ Although name-clearing hearings may provide the wrongfully accused an opportunity to restore his professional

67. *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974); *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996); *Rosenstein v. City of Dallas*, 876 F.2d 392, 395 (5th Cir. 1989); *Brown & Kerrigan*, *supra* note 53, at 641; *Loos*, *supra* note 56, at 205.

68. J. Michael McGuinness, *Litigating Public Employee Procedural Due Process Claims*, 715 *PLI/LIT* 489, 503 (2004).

69. *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 573 (1972); *McGuinness*, *supra* note 68, at 503.

70. *Donato*, 96 F.3d at 631 (quoting *Huntley v. Cmty. Sch. Bd. of Brooklyn, N.Y. Sch. Dist. No. 14*, 543 F.2d 979, 985 (2d Cir. 1976)).

71. Jenny S. Brannan, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 *U. KAN. L. REV.* 171, 187–88 (1998); *see also* *McGuinness*, *supra* note 68, at 504.

72. *Brown & Kerrigan*, *supra* note 53, at 641.

73. *Brannan*, *supra* note 71, at 171.

74. *Donato*, 96 F.3d at 633; Henry J. Friendly, *Some Kind of Hearing*, 123 *U. PA. L. REV.* 1267, 1270 (1975); *Loos*, *supra* note 56, at 207; *McGuinness*, *supra* note 68, at 504; *Veidt*, *supra* note 9, at 82.

75. *Donato*, 96 F.3d at 633.

reputation,⁷⁶ this hearing is not afforded to all individuals wrongfully accused of sexual harassment.⁷⁷ The following section will delineate the requirements necessary to establish a right to a name-clearing hearing.⁷⁸

A. Availability of Name-Clearing Hearings to Accused Sexual Harassers

For an accused to exercise his right to a court-mandated name-clearing hearing, he must first establish the following elements: (1) he was a public employee stigmatized with a false allegation in connection with a decision to terminate employment; (2) his employer publicized or included the stigmatizing charge in his personnel or other file that may be disseminated to future prospective employers; and (3) he was denied the opportunity for a meaningful name-clearing hearing.⁷⁹

As mentioned above,⁸⁰ the stigmatizing comments made by the public employer must go “to the very heart of [the accused’s] professional competence.”⁸¹ Although not all negative charges are stigmatizing,⁸² courts have held that “sexual harassment charges [mar] one’s reputation and marketability, [thus] alleged harassers can

76. Hassenpflug & Riggs, *supra* note 10, at 985; Loos, *supra* note 56, at 215.

77. Arrington v. County of Dallas, 970 F.2d 1441, 1447 (5th Cir. 1992); Rosenstein v. City of Dallas, 876 F.2d 392, 395–96 (5th Cir. 1989); Brown & Kerrigan, *supra* note 53, at 641–42; Loos, *supra* note 56, at 205; McGuinness, *supra* note 68, at 507.

78. See discussion *infra* Part II.A.

79. Cotton v. Jackson, 216 F.3d 1328, 1330 (11th Cir. 2000); Arrington, 970 F.2d at 1447; Rosenstein, 876 F.2d at 395–96; Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 777–78 (9th Cir. 1982); see also Brown & Kerrigan, *supra* note 53, at 641; Loos, *supra* note 56, at 205; McGuinness, *supra* note 68, at 505.

80. See discussion *supra* Part I.C.2.

81. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 631 (2d Cir. 1996) (quoting Huntley v. Cmty. Sch. Bd. of Brooklyn, N. Y. Sch. Dist. No. 14, 543 F.2d 979, 985 (2d Cir. 1976)).

82. Non-stigmatizing allegations include improper or inadequate performance, incompetence, and neglect of duty or malfeasance. See Donato, 96 F.3d at 630; Hade v. City of Fremont, 246 F. Supp. 2d 837, 841 (N.D. Ohio 2003); see also Brown & Kerrigan, *supra* note 53, at 642–43; Loos, *supra* note 56, at 205.

usually establish damage of reputation and foreclosure of employment opportunity.”⁸³

Although the false allegation must be made “in connection” with the accused’s termination, the allegation itself does not have to *cause* discharge so long as there exists a relationship between the two events.⁸⁴ Additionally, whether the allegation is false depends upon the underlying *facts*, not the *finding* of sexual harassment.⁸⁵ If the accused admits to the facts alleged by the accuser, then the accused has no right to a name-clearing hearing despite disputing the finding.⁸⁶

To satisfy the publication element, the accused must show that his employer made the stigmatizing reason for his discharge available to the public.⁸⁷ The stigmatizing comment becomes publicized either when the government employer makes a public statement regarding the allegations⁸⁸ or when the employer places the stigmatizing comments in the accused’s personnel file.⁸⁹ Courts have found the publicity requirement indirectly satisfied when the employer places the stigmatizing statements in the accused’s personnel file because prospective employers undoubtedly will consult the accused’s previous employment records.⁹⁰ However, the publicity element is not satisfied if the employer keeps the accusations of sexual harassment confidential⁹¹ or if the accusations only become available during the course of a judicial proceeding.⁹²

83. Vorwerk, *supra* note 6, at 1039; *see also Hade*, 246 F. Supp. 2d at 843 (“[S]tatements alleging that a public employee engaged in certain unspecified conduct involving sexual impropriety or improper advances are stigmatizing.”).

84. *Rosenstein*, 876 F.2d at 396 n.3 (“The charges must be connected with the discharge but need not actually cause the discharge”).

85. *Codd v. Velger*, 429 U.S. 624, 627–28 (1977); Vorwerk, *supra* note 6, at 1042.

86. *Codd*, 429 U.S. at 627–28; Vorwerk, *supra* note 6, at 1042. For example, if the accused admits that he said an allegedly harassing comment like, “that looks great on you,” he would not be entitled to a name-clearing hearing despite the fact that he disputes that his comment was sexual in nature.

87. Brannan, *supra* note 71, at 172.

88. *Id.*

89. *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631 (2d Cir. 1996); Brown & Kerrigan, *supra* note 53, at 642; McGuinness, *supra* note 68, at 506.

90. *Donato*, 96 F.3d at 631.

91. Brown & Kerrigan, *supra* note 53, at 642.

92. Brannan, *supra* note 71, at 172.

Before an accused can be “denied the opportunity for a meaningful name-clearing hearing,”⁹³ he must first request it.⁹⁴ However, if the accused does not request a name-clearing hearing or if he refuses his employer’s offer for one, then he waives his right to a name-clearing hearing.⁹⁵ The public employer’s duty to make available the name-clearing hearing is minimal; it need only make known to the accused that he may have an opportunity to clear his name upon request.⁹⁶ The duty rests on the accused to request or accept the opportunity for a name-clearing hearing.⁹⁷ The following section of this Note will delineate the requirements needed for a “meaningful” name-clearing hearing.⁹⁸

B. Minimum Procedural Requirements Necessary to Satisfy Procedural Due Process

In order for the name-clearing hearing to be “meaningful,” the government employer need only provide the accused with “some form”⁹⁹ of notice¹⁰⁰ and an opportunity to refute the allegations¹⁰¹ in front of an impartial tribunal.¹⁰²

1. Notice to the Accused

An employer provides sufficient notice to the accused if the notice identifies the substance of the charges against the accused.¹⁰³ Although the description need not be elaborate, it must be adequate to

93. See discussion *supra* Part II.A. para. 1.

94. Brown & Kerrigan, *supra* note 53, at 644; McGuinness, *supra* note 68, at 507.

95. Brown & Kerrigan, *supra* note 53, at 644; Loos, *supra* note 56, at 207.

96. *In re Selcraig*, 705 F.2d 789, 796 (5th Cir. 1983) (finding that the government employer need not initiate the hearing process of its own accord, but need only make known to the accused of its availability).

97. Brown & Kerrigan, *supra* note 53, at 644; McGuinness, *supra* note 68, at 507.

98. See discussion *infra* Part II.B.

99. *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 778 (9th Cir. 1982).

100. *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986); *Zueck v. City of Nokomis*, 513 N.E.2d 125, 128 (Ill. App. Ct. 1987); Loos, *supra* note 56, at 209–10.

101. *Boston*, 783 F.2d at 1166; Loos, *supra* note 56, at 209–11.

102. *Boston*, 783 F.2d at 1166; Loos, *supra* note 56, at 209–10.

103. See *Boston*, 783 F.2d at 1166; *Zueck*, 513 N.E.2d at 128.

apprise the accused of the allegations against him.¹⁰⁴ The employer must provide this notice at a reasonable time before the hearing so that the accused may prepare an adequate response.¹⁰⁵

2. *Opportunity to Be Heard*

The accused is entitled to a meaningful opportunity to be heard if his employer gives him the chance to refute the allegations brought against him.¹⁰⁶ So long as the accused has an opportunity to respond to the charges, either via a general statement¹⁰⁷ or during testimony at the hearing,¹⁰⁸ this requirement is satisfied.¹⁰⁹

3. *Impartial Tribunal*

In order for the name-clearing hearing to be meaningful, the members of the tribunal must be impartial to the charges against the accused.¹¹⁰ Because there is a presumption of fairness and impartiality of the members of the tribunal, the accused must bring forth “demonstrations of extrajudicial bias” to overcome this presumption.¹¹¹ The accused must provide proof of a “personal or financial stake in the outcome . . . or any personal animosity towards the [accused]” to rebut the presumption of impartiality.¹¹² Thus, the involvement of a member of the tribunal in the investigative process alone is insufficient to show that the tribunal lacked impartiality.¹¹³

Based on the above analysis,¹¹⁴ it is clear that the employer’s burden to provide a meaningful name-clearing hearing is minimal,

104. See *Boston*, 783 F.2d at 1166; *Zueck*, 513 N.E.2d at 128.

105. *Zueck*, 513 N.E.2d at 128; Loos, *supra* note 56, at 210.

106. See *Boston*, 783 F.2d at 1166.

107. Loos, *supra* note 56, at 211.

108. See *Boston*, 783 F.2d at 1166.

109. See Loos, *supra* note 56, at 211.

110. *Id.*

111. *Boston*, 783 F.2d at 1166.

112. *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 780 n.10 (9th Cir. 1982).

113. *Id.*

114. See discussion *infra* Part II.A–C.

especially when compared with the burden on employers to protect individuals from a hostile work environment.¹¹⁵

III. FAILURE OF NAME-CLEARING HEARINGS TO SATISFY PROCEDURAL DUE PROCESS

The preceding section merely lists the minimum standards of name-clearing hearings that will satisfy procedural due process.¹¹⁶ At first glance, it appears the accused's rights may be protected because he has the opportunity to refute the allegations against him; however, upon further inspection, name-clearing hearings clearly fail to protect the due process rights of the accused.¹¹⁷ Courts have failed to provide a definitive standard for name-clearing hearings.¹¹⁸ Moreover, the name-clearing hearing does not provide the accused an opportunity to confront his accusers¹¹⁹ or to be heard by an impartial tribunal.¹²⁰ Lastly, the failure of name-clearing hearings to provide any substantial remedy indicates that they are nothing more than a mirage.¹²¹

A. *No Definitive Standard*

Although courts have described due process as a "flexible" notion,¹²² in the sexual harassment context, they appear to side-step

115. To shield itself from claims by an alleged victim of sexual harassment, an employer needs to provide "immediate and corrective action" to avoid liability for a hostile work environment. *Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997); *Ballard v. Union Pac. R.R. Co.*, No. 8:06CV718, 2008 WL 1990787, at *5 (D. Neb. May 5, 2008). This action must be "reasonably calculated" to end the harassment and to prevent future occurrences harassment. *Yamaguchi*, 109 F.3d at 1483. In contrast, to shield itself from claims brought by the accused, the employer need only provide the accused with notice of the charges and an opportunity to be heard in front of an impartial tribunal. *Boston*, 783 F.2d at 1166; *Zueck*, 513 N.E.2d at 128.

116. See discussion *supra* Part II.

117. See Loos, *supra* note 56, at 215.

118. McGuinness, *supra* note 54, at 935.

119. Loos, *supra* note 56, at 207.

120. See Vorwerk, *supra* note 6, at 1041.

121. Loos, *supra* note 56, at 211.

122. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting that due process "is not a technical conception with a fixed content" but a "flexible" process that "calls for such procedural protections as the particular situation demands"); *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 633 (2d Cir. 1996) (defining due process as a "flexible notion," such that "the procedural protection

the daunting, but necessary, task of defining procedural safeguards necessary for name-clearing hearings.¹²³ In other contexts, the Supreme Court has declined to provide strict guidelines or formal procedures¹²⁴ based on the idea that procedural due process challenges should be assessed on a case-by-case basis.¹²⁵

The lack of established guidelines for a meaningful name-clearing hearing results in constant re-litigation of “minor factual distinctions.”¹²⁶ This re-litigation places a huge burden on courts, taxpayers, public employers, and public employees.¹²⁷ Although this economic burden is of great significance, the greatest injustice lies in the disparity of application.¹²⁸ This “ad hoc, unprincipled decisionmaking”¹²⁹ leaves public employers and public employees in a state of “grave uncertainty” as to what procedures they must undergo and expect.¹³⁰ Because no formal procedures exist to instruct employers of their duty to provide meaningful hearings,¹³¹ informal business meetings may be sufficient to satisfy procedural due process for an individual burdened with the ghastly label of “sexual harasser.”¹³²

accorded a constitutional interest is determined by reference to the particular circumstances of a given case”).

123. McGuinness, *supra* note 54, at 935.

124. *Mathews*, 424 U.S. at 335.

125. *Donato*, 96 F.3d at 633; McGuinness, *supra* note 54, at 935.

126. McGuinness, *supra* note 54, at 964.

127. *Id.* at 962.

128. *Id.* at 935.

129. *Id.* at 964.

130. In *Vanelli v. Reynolds School District No. 7*, the court found due process satisfied when the accused was given an opportunity to retain an attorney and cross-examine all the witnesses. 667 F.2d 773, 780 (9th Cir. 1982). However, that court declined to determine whether the accused should always have a right to cross-examine complaining witnesses. *Id.* at 780 n.11. In *Boston v. Webb*, plaintiff was *not* given the opportunity to cross-examine the accuser or witnesses; however, he was able to retain counsel and present witnesses. 783 F.2d 1163, 1166 (4th Cir. 1986). In *Wagner v. Tuscarora School District*, the court found due process satisfied when the accused was given an opportunity to “present his own witnesses and confront his accusers.” 225 F. App’x 68, 71 (3d Cir. 2007). However, the court made no mention about the accused’s right to representation by an attorney. *See id.*; *see also* McGuinness, *supra* note 54, at 935.

131. McGuinness, *supra* note 54, at 935.

132. *Id.* at 211.

B. No Right to Confront Accusers

Another deficiency with the current name-clearing hearings lies in the accused's inability to confront his accuser.¹³³ Sexual harassment claims provide "difficult problems of proof" and resolution of these claims rests greatly on the credibility of the accused and the accuser.¹³⁴ Although an accused sexual harasser has the "opportunity to be heard,"¹³⁵ from the start, he will likely appear less credible than the accuser due to the charge alleged. In trial, the accused generally has the opportunity to confront his accuser to attack the truth of her¹³⁶ testimony.¹³⁷ However, no similar opportunity exists in name-clearing hearings.¹³⁸ The accused has no opportunity to demonstrate the accuser's potential lack of credibility.¹³⁹ Despite this shortfall, courts have found name-clearing hearings conducted in this manner sufficient to satisfy procedural due process.¹⁴⁰

133. Brown & Kerrigan, *supra* note 53, at 643–44.

134. *In re King Soopers, Inc. and United Food and Commercial Workers Union*, 86 Lab. Arb. (BNA) 254 (1985) (Sass, Arb.).

135. McGuinness, *supra* note 54, at 934.

136. More males than females are accused of sexual harassment. *See* cases cited *supra* note 22. Correspondingly, more females than males make accusations of sexual harassment. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000); Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982); Starishevsky v. Hofstra Univ., 612 N.Y.S.2d 794, 796 (N.Y. Sup. Ct. 1994). Additionally, it should be noted that sexual harassment allegations may be made against members of the same sex. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998) (finding that Title VII does not bar sexual harassment claims merely because "the plaintiff and the defendant . . . are of the same sex"); *Williams v. Saxbe*, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976) ("[A] finding of discrimination [could] be made if the supervisor were a homosexual . . . [and] if the supervisor were a bisexual . . ."); *see also* *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Kelleher v. Bank of the West*, No. 07-1002-HA, 2008 WL 3853367 (D. Or. Aug. 14, 2008); *Miller v. Vesta, Inc.*, 946 F. Supp. 697 (E.D. Wis. 1996).

137. *See* FED. R. EVID. 801.

138. Brown & Kerrigan, *supra* note 53, at 643–44.

139. *See id.*

140. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 510, 534 (10th Cir. 1998) (holding that the name-clearing hearing "clearly comports with the due process required by the law of our land" despite plaintiff not having the opportunity to confront his accusers); *Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir. 1986) (finding the right to confront one's accuser should be granted only when the constitutional interest implicated was a "fundamental one of property in continued employment or other entitlement, [or] of liberty from forced confinement or other physical restraint"); *Wagner v. Tuscarora Sch. Dist.*, No. 1:04-CV-1133, 2006 WL 167731, at *7 n.7 (M.D. Pa. Jan. 20, 2006) (noting that, given the circumstances, plaintiff was not entitled to "more process than was provided" despite defendant withholding the names of the accusers and refusing plaintiff the opportunity to confront them).

C. *No Right to an Impartial Tribunal*

At first glance, the accused's "opportunity to be heard" appears to protect his due process rights.¹⁴¹ But how do name-clearing hearings protect the rights of the accused when the individuals presiding over the name-clearing hearing are the same individuals who wrongly labeled him a sexual harasser? The name-clearing hearing process is clearly deficient when the "tribunal that originally terminated the employee's position . . . conducts the name-clearing hearing."¹⁴² Despite the "ultimate decisionmaker[']s" involvement in the investigative proceedings, courts have found that this involvement has no effect on the impartiality of the tribunal.¹⁴³ In fact, courts will only find impartiality when the accused overcomes the presumption that government officials act "conscientiously and fairly."¹⁴⁴ The accused must provide proof of a "personal or financial stake in the outcome...or any personal animosity towards the [accused]" to rebut the presumption of impartiality.¹⁴⁵ However, courts miss a very important point: the accused asks for a name-clearing hearing because of his belief that he has been wrongly labeled a sexual harasser; thus, one can clearly infer that the accused does not trust the individual(s) that have branded him as such. To have those same individuals take part in the name-clearing hearing clearly fails to protect the accused's liberty interest.

141. See Veidt, *supra* note 9, at 82; Vorwerk, *supra* note 6, at 1041.

142. Loos, *supra* note 56, at 211.

143. *Boston*, 783 F.2d at 1166 ("[The] due process requirement of an impartial tribunal [was] not violated *simply* because the ultimate decisionmaker was involved in an earlier stage of investigative or administrative proceedings." (emphasis added)); *Vanelli v. Reynolds Sch. Dist. No. 7*, 667 F.2d 773, 779 n.10 (9th Cir. 1982) (holding that prior participation in the termination proceeding, "without more," failed to show a lack of impartiality).

144. *Boston*, 783 F.2d at 1166.

145. *Vanelli*, 667 F.2d at 780 n.10. The court in *Vanelli* likened prior participation of investigators in the tribunal to judges re-hearing their own decision after reversal and remand. *Id.* However, unlike lower court judges who must follow the orders of judges from higher courts, there exists no corresponding check on investigators sitting on the name-clearing hearing tribunal.

D. No Substantive Remedy

Name-clearing hearings do not provide any substantive remedies for the accused who successfully establishes the falsity of the allegations against him.¹⁴⁶ Unlike traditional tort remedies, name-clearing hearings do not provide a remedy that “compensates or makes [the accused] feel whole.”¹⁴⁷ Despite the potential that the false accusations have been widely disseminated, there exists no corresponding remedy to repair the damage to the accused’s reputation. It is likely that only the individuals present at the hearing will ever know the results of the name-clearing hearing.¹⁴⁸ As a result, the stigma of being labeled a sexual harasser tends to remain with the accused.¹⁴⁹

Moreover, name-clearing hearings provide no opportunity for the accused to regain employment.¹⁵⁰ Even if the accused successfully proves the falsity of the stigmatizing statements, his employer has no obligation to rehire him.¹⁵¹ Additionally, the accused is not entitled to any back-pay for days, months, or even years of work missed due to the false allegations of sexual harassment.¹⁵²

The flaws in the name-clearing hearing described thus far indicate that the procedural protections provided by name-clearing hearings are illusory.¹⁵³ Without any clear procedural guidelines,¹⁵⁴ opportunities to confront the accuser,¹⁵⁵ opportunities to be heard by an impartial tribunal,¹⁵⁶ or any substantive remedies, the name-clearing hearing merely offers the wrongfully accused the opportunity to be heard.¹⁵⁷

146. Loos, *supra* note 56, at 215.

147. *Id.*

148. *Id.*

149. Veidt, *supra* note 9, at 72.

150. See Loos, *supra* note 56, at 209.

151. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 633 (2d Cir. 1996).

152. Loos, *supra* note 56, at 215.

153. *Id.*

154. McGuinness, *supra* note 54, at 935.

155. Brown & Kerrigan, *supra* note 53, at 643–44.

156. Loos, *supra* note 56, at 211.

157. Vorwerk, *supra* note 6, at 1041.

IV. UPDATING THE NAME-CLEARING HEARING TO BETTER PROTECT AN EMPLOYEE'S PROCEDURAL DUE PROCESS RIGHTS

Currently, the concept of a name-clearing hearing is so nebulous that the accused does not know what to expect from the process.¹⁵⁸ This lack of clarity affects not only the accused, but also his employer, the accuser, and ultimately, the courts.¹⁵⁹ To remedy this problem, courts should establish specific procedural guidelines to be followed by employers dealing with workplace sexual harassment accusations.¹⁶⁰ In addition to the minimum right to notice and the opportunity to be heard,¹⁶¹ the accused should also be entitled to (1) confront his accuser,¹⁶² (2) be heard by an impartial tribunal,¹⁶³ and (3) have access to substantive remedies.¹⁶⁴

A. *Confront the Accuser*

As mentioned above,¹⁶⁵ the accused currently does not have the right to confront his accuser at the name-clearing hearing.¹⁶⁶ Courts should include the right to confront the adversarial party in name-clearing hearings to provide the accused an opportunity to challenge the accuser's testimony.¹⁶⁷ This opportunity would allow the accused to demonstrate his accuser's lack of credibility so that he may exonerate himself. This right to confrontation is especially important when factual disputes exist because the accused needs an opportunity to bring attention to any flaws or falsities in his accuser's allegations.¹⁶⁸

158. McGuinness, *supra* note 54, at 964.

159. *Id.*

160. See generally Friendly, *supra* note 74, at 1279–1295; Hassenpflug & Riggs, *supra* note 10, at 987–88; Loos, *supra* note 56, at 211; McGuinness, *supra* note 54, at 963.

161. *Rosenstein v. City of Dallas*, 876 F.2d 392, 395, 400 (5th Cir. 1989); *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986); *Zueck v. City of Nokomis*, 513 N.E.2d 125, 128 (Ill. App. Ct. 1987).

162. Friendly, *supra* note 74, at 1282; McGuinness, *supra* note 54, at 963.

163. Friendly, *supra* note 74, at 1279; McGuinness, *supra* note 54, at 963.

164. See generally Hassenpflug & Riggs, *supra* note 10, at 987.

165. See discussion *supra* Part III.B.

166. *Brown & Kerrigan*, *supra* note 53, at 643–44; Loos, *supra* note 56, at 207.

167. Hassenpflug & Riggs, *supra* note 10, at 985.

168. See *id.*

B. *Impartial Tribunal*

Not only should the accused have the opportunity to confront his accuser,¹⁶⁹ but he should also be able to plead his case to a tribunal comprised of truly impartial individuals.¹⁷⁰ Currently, courts do not find impartiality breached when an individual involved in the initial investigative process sits on the tribunal.¹⁷¹ This presumption of impartiality is unwarranted and extremely prejudicial for the accused. The accused should be afforded the opportunity to present his case in front of an unbiased tribunal comprised of individuals who are independent of the investigative process and who have no vested interest in the outcome of the name-clearing hearing.¹⁷² Without this opportunity, the name-clearing hearing will remain an illusory attempt to protect the accused's right to due process.

C. *Substantive Remedies*

Lastly, name-clearing hearings should provide the accused sexual harasser with actual, substantive remedies. Current name-clearing hearings provide no true remedies for the accused harasser.¹⁷³ To ensure that these hearings genuinely clear the names of accused sexual harassers, the result of the name-clearing hearing should be as widely distributed as the publication of the false accusations.¹⁷⁴ The extent of the remedy would depend on the extent of publicity given to the false accusations.¹⁷⁵ In situations where the employer included the false accusation in the accused's personnel file, the employer would remedy the issue by removing any reference to the charge.¹⁷⁶ Additionally, the employer would include a letter of exoneration and provide a letter of apology to the accused.¹⁷⁷

169. McGuinness, *supra* note 54, at 963.

170. Friendly, *supra* note 74, at 1279; McGuinness, *supra* note 54, at 963.

171. *Boston v. Webb*, 783 F.2d 1163, 1166 (4th Cir. 1986).

172. Friendly, *supra* note 74, at 1279.

173. Loos, *supra* note 56, at 211.

174. *Hassenpflug & Riggs*, *supra* note 10, at 987.

175. *Id.*

176. *Id.*

177. *Id.*

However, in situations where the employer extensively disseminates the false charges, the above remedies would be insufficient to clear the name of the accused.¹⁷⁸ When the employer highly publicizes the false accusations, the accused's reputation is "so tarnished" that a more extensive remedy is necessary to clear his name.¹⁷⁹ In those circumstances, the employer should provide a public apology to the accused.¹⁸⁰ A high ranking individual in the agency or institution should write the letter to be published in the local newspaper or professional journal.¹⁸¹ Only when additional guidelines or remedies are attached to name-clearing hearings will these hearings truly protect the procedural due process rights of individuals wrongfully accused of sexual harassment.

CONCLUSION

Based on the above analysis,¹⁸² it is evident that the current framework for name-clearing hearings provides questionable due process protection to individuals wrongfully accused of sexual harassment.¹⁸³ Each year, thousands of employees are wrongfully accused of sexual harassment,¹⁸⁴ but no substantive remedy is available for these individuals.¹⁸⁵ Allegations of sexual harassment have an overwhelmingly negative effect on those wrongfully accused.¹⁸⁶ This effect pervades both their professional and personal lives¹⁸⁷—the stigma of sexual harassment allegations is extremely difficult to unglue, and the existing law provides inadequate relief for those wrongfully accused.¹⁸⁸

178. *See id.*

179. *See Hassenpflug & Riggs, supra* note 10, at 987.

180. *Id.*

181. *Id.*

182. *See* discussion *supra* Part I–IV.

183. Loos, *supra* note 56, at 215.

184. Sexual Harassment Charges, *supra* note 5.

185. Loos, *supra* note 56, at 215.

186. Veidt, *supra* note 9, at 72; Vorwerk, *supra* note 6, at 1021–22.

187. Veidt, *supra* note 9, at 72; *see also* Hassenpflug & Riggs, *supra* note 10, at 988; Vorwerk, *supra* note 6, at 1021–22.

188. Veidt, *supra* note 9, at 72; Vorwerk, *supra* note 6, at 1022.

It may appear on first glance that the rights of individuals accused of sexual harassment are protected through the availability of name-clearing hearings. However, as discussed above,¹⁸⁹ these hearings are available only in limited circumstances, after the accused has established a *prima facie* case of wrongful allegation.¹⁹⁰ Moreover, a name-clearing hearing is itself an incomplete remedy because it does not provide those wrongfully accused with any substantive relief.¹⁹¹ Additionally, because of the “flexible” nature of the proceedings,¹⁹² the legal setting is fraught with uncertainty—neither the accused nor his employer knows what steps are due to make the hearing “meaningful.”¹⁹³ Even if an employer desires to provide the accused with a fair name-clearing hearing, it may be unable to do so given the lack of available legal guidelines.

This Note has investigated various feasible methods of improving the process¹⁹⁴ so that an employee wrongfully accused of sexual harassment may have the chance to adequately protect his rights and reputation. By setting a clear standard for name-clearing hearings, courts would alleviate a significant number of disputes, both inside¹⁹⁵ and outside the courtroom.¹⁹⁶ Moreover, the overall process would be more fair for the wrongfully accused—not only would he then know what to expect from the process, but should he contest the process, he would also know the likely result in court as well.

Additionally, courts should remove the presumption of fairness for investigators who sit on the tribunal at name-clearing hearings.¹⁹⁷ These individuals clearly have a vested interest in the result of the hearings. In order for the name-clearing hearing to go in favor of the accused, the investigator on the tribunal would have to admit to committing an error. Given the investigator’s clear interest in

189. See discussion *supra* Part II.A.

190. See discussion *supra* Part II.A. for the elements an accused must establish before being able to have the right to a name-clearing hearing.

191. Loos, *supra* note 56, at 215.

192. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 633 (2d Cir. 1996).

193. McGuinness, *supra* note 54, at 935.

194. See discussion *supra* Part IV.

195. McGuinness, *supra* note 54, at 962.

196. *Id.* at 935.

197. Friendly, *supra* note 74, at 1279; McGuinness, *supra* note 54, at 963.

maintaining status quo, courts should remove the presumption of fairness and prohibit investigative personnel from sitting on the tribunal.¹⁹⁸

Lastly, courts should provide the accused a meaningful, substantive remedy for the wrong done to him. The accusation of sexual harassment is no small claim¹⁹⁹ because this allegation has an overwhelming and pervasive effect on the wrongfully accused's life.²⁰⁰ Consequently, he should be provided a substantive remedy for this substantial wrong. The accusations should be completely removed from the accused's personnel file²⁰¹ and, if the allegations have been widely publicized, the accused's employer should provide a public apology.²⁰² This public apology should be disseminated to the same extent as the false allegations against the accused.²⁰³ Only if the benefit of the remedy meets the extent of the wrong will the accused have the chance to return to his life, free from false allegations of sexual harassment.

To better safeguard the rights of the wrongfully accused, the courts must provide some additional protection for these individuals. If the current standard for name-clearing hearings remains the same, the rights of the accused will receive only minimal constitutional due process protection.

198. See discussion *infra* Part III.C.

199. See Hassenpflug & Riggs, *supra* note 10, at 988; Veidt, *supra* note 9, at 72; Vorwerk, *supra* note 6, at 1022.

200. See Hassenpflug & Riggs, *supra* note 10, at 988; Veidt, *supra* note 9, at 72; Vorwerk, *supra* note 6, at 1022.

201. Hassenpflug & Riggs, *supra* note 10, at 987.

202. *Id.*

203. *Id.*