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INSULATING SEXUAL HARASSMENT GRIEVANCE PROCEDURES FROM THE CHILLING EFFECT OF DEFAMATION LITIGATION

Ruth A. Kennedy

Abstract: The threat of defamation liability may undermine the push to encourage private employers to establish internal grievance procedures for handling sexual harassment complaints. Courts have recognized two defenses to defamation claims arising out of employers' sexual harassment investigations: the qualified privilege and the intracorporate immunity rule. Neither of these defenses adequately balances the need to insulate grievance procedures against the desire to protect the reputation of the employee accused of harassment. This Comment proposes the adoption of a new grievance procedure privilege which would ensure the integrity of grievance procedures while maximizing the protection afforded an accused employee.

The specter of defamation suits threatens to undermine efforts to encourage private employers to comply with sexual harassment laws. Courts have sought to reduce sexual harassment by recognizing it as discrimination prohibited by Title VII of the 1964 Civil Rights Act. Thus, Title VII places a duty on employers to prevent and remedy harassment within the workplace, and seeks to foster the creation of internal grievance procedures for handling harassment allegations. Internal grievance procedures are a vital mechanism for ensuring private compliance with discrimination laws. Yet, both employees who lodge complaints in the workplace and employers who investigate such complaints risk becoming defendants in long and expensive defamation suits.

Defamation law must accommodate the competing interests of the employee who lodges a complaint ("the complaining employee"), the employer who investigates a charge of harassment ("the employer"), and the employee accused of harassment ("the accused employee").

2. For ease of narrative, this Comment uses the pronoun "she" when referring to the complaining employee, and "he" when referring to the accused employee. Although most workplace harassment is of women by men, the genders of the complaining employee and the accused employee may vary. See The Supreme Court, 1985 Term—Leading Cases, 100 Harv. L. Rev. 258, 276 n.1 (1986).
3. The accused employee sometimes also sues the supervisor in charge of investigating the sexual harassment claim. Often in such cases the plaintiff uses the theory of respondeat superior to try and hold the employer liable for the investigating employee's statements. See Lawson v. Boeing Co., 58 Wash. App. 261, 266, 792 P.2d 545, 549 (1990).
Accommodation of these varied interests under a single defense is, however, difficult. Courts currently recognize two defenses to defamation suits arising out of private employment disputes: the qualified privilege and the intracorporate immunity rule. Neither of these defenses is adequate. The qualified privilege fails to prevent the threat of a defamation lawsuit from deterring an employee who wishes to lodge a grievance with her employer. The intracorporate immunity rule, on the other hand, too narrowly circumscribes the protection afforded an accused employee.

This Comment proposes that courts adopt a new grievance procedure privilege which incorporates into a single defense the best components of the existing defenses. This new hybrid defense would have as its primary goal the protection of internal grievance procedures for handling harassment allegations. By acting in accordance with an established grievance procedure, both the employer and the complaining employee could limit their exposure to defamation liability. The proposed privilege also would accommodate the needs of the accused employee by defining the scope of protected speech as narrowly as possible within the limitations imposed by the need for an effective grievance procedure.

I. TITLE VII AND PRIVATE COMPLIANCE WITH THE PROHIBITION AGAINST SEXUAL HARASSMENT

Sexual harassment in the workplace violates a strong national policy prohibiting employment discrimination. Since 1976, federal courts have recognized that sexual harassment constitutes impermissible discrimination under Title VII of the Civil Rights Act of 1964. Once recognized as a form of Title VII discrimination, sexual harassment complaints come within the jurisdiction of the Equal Employment Opportunity Commission ("EEOC"). The EEOC handles complaints of

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4. Suits involving public employers and employees are outside the scope of this discussion.
6. See Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). In 1986 the Supreme Court eliminated any lingering doubts that both "quid pro quo" complaints, in which sexual conduct is directly linked to the grant or denial of economic benefits, and "hostile work environment" complaints, in which the conduct creates an intimidating, hostile, or offensive working environment, constitute impermissible discrimination under Title VII. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
Defamation and Sexual Harrassment

people who believe themselves to be victims of Title VII discrimination.\(^8\) When an employee files a complaint with the EEOC, the agency must notify the employer and commence an investigation.\(^9\)

In addition to EEOC enforcement, private compliance and enforcement procedures figure prominently in the scheme to eliminate sexual harassment. The EEOC and the federal courts recognize that Title VII requires an employer to investigate and act upon an employee’s allegations of sexual harassment.\(^10\) When determining an employer’s liability for harassment, courts look favorably upon the fact that an employer has an established procedure for handling sexual harassment complaints.\(^11\) Commentators thus advise employers that, in order to diminish their exposure to liability, they should have a written sexual harassment policy which defines the company’s procedures for enforcing compliance with anti-discrimination laws.\(^12\)

II. SEXUAL HARASSMENT DEFAMATION SUITS

In recent years, some employees investigated for sexual harassment have started to bring defamation claims.\(^13\) While accused employees usually sue their employers,\(^14\) they have also begun to sue the

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10. See, e.g., Bundy v. Jackson, 641 F.2d 934, 947 (D.C. Cir. 1981) (holding that an employer is liable for harassment if it failed to take appropriate corrective measures); 29 C.F.R. § 1604.11(d)-(f) (1992).
11. See Juarez v. Ameritech Mobile Communications, Inc., 746 F. Supp. 803 (N.D. Ill. 1990), aff’d, 957 F.2d 317 (7th Cir. 1992); Strickland v. Sears Roebuck & Co., 693 F. Supp. 403, 406 (E.D. Va. 1988), aff’d, 846 F.2d 74 (4th Cir. 1988); see also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (finding that while the presence of a grievance procedure policy did not automatically insulate an employer from liability, the presence of a policy was clearly relevant to the issue of employer liability).
13. See cases cited infra notes 14–15. This rise in sexual harassment-related defamation suits is part of a dramatic increase in the number of workplace defamation claims filed over the past decade. See Ann M. Barry, Comment, Defamation in the Workplace: The Impact of Increasing Employer Liability, 72 Marq. L. Rev. 264 (1989); John B. Lewis et al., Defamation and the Workplace: A Survey of the Law and Proposals for Reform, 54 Mo. L. Rev. 797 (1989).
complaining employees.\textsuperscript{15} Both employers and complaining employees have invoked the protection of the qualified privilege and the intracorporate immunity rule when trying to defend against the defamation suit.

\textbf{A. Elements of Defamation}

Defamation is made up of the twin torts of libel and slander. Libel is defined as written defamation, while slander is defamation communicated orally.\textsuperscript{16} A communication is defamatory if it harms someone's reputation so as to lower him in the estimation of the community, or to deter people from associating with him.\textsuperscript{17} In order to establish a prima facie case of defamation, the plaintiff must prove that the defendant made a false and defamatory statement concerning him and that the defendant published the statement to a third party.\textsuperscript{18}

\textbf{B. Defamation Defenses in the Workplace}

Defamation law has long recognized the need to protect the free flow of information in order to advance important societal interests.\textsuperscript{19} The courts, therefore, developed a structure of immunities and privileges designed to encourage and protect certain speech.\textsuperscript{20} These defamation defenses rest upon the idea that when a defendant's otherwise actionable

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\textsuperscript{16} W. Page Keeton et al., \textit{Prosser and Keeton on the Law of Torts} § 111, at 771 (5th ed. 1984). The distinction between libel and slander can have a bearing on the damages which a plaintiff must establish in order to recover. \textit{Id.} § 112, at 786. For a discussion of how the distinction affects workplace defamation suits, see Barry, \textit{supra} note 13, at 268-70.

\textsuperscript{17} Restatement (Second) of Torts § 559 (1976); see also Keeton et al., \textit{supra} note 16, § 111, at 774.

\textsuperscript{18} Restatement (Second) of Torts § 558 (1976). The plaintiff also must establish that the statement was actionable irrespective of special damages or that the publication caused special damages. \textit{Id.} In addition to establishing the common law elements, a plaintiff must consider the evolving constitutional law regarding defamation suits. For a review of the role of constitutional law in defamation suits in the employment context, see Richard J. Larson, \textit{Defamation at the Workplace: Employers Beware}, 5 Hofstra Lab. L.J. 45, 52–55 (1987), and Lewis et al., \textit{supra} note 13, 816–17.

\textsuperscript{19} Keeton et al., \textit{supra} note 16, § 114, at 815. For details regarding the type of societal interests deemed important enough to warrant protection by a defamation privilege, see \textit{id.} § 115, at 824–25.

\textsuperscript{20} \textit{Id.} § 114, at 815.
communication seeks to advance an important societal interest, the law should protect that communication, even at the expense of a defamed individual.\(^2\) In addition to generally available defenses such as truth, courts apply two defenses specifically to workplace defamation claims:\(^2\) the qualified privilege and the intracorporate immunity rule.

1. **The Qualified Privilege**

The qualified privilege\(^2\) protects statements made in an attempt to further important societal interests.\(^4\) Whether a situation warrants application of the privilege is a question of law to be determined by the court.\(^5\) Once the privilege is established, the defendant loses its protection only by acting in a manner inconsistent with the interest which gave rise to the privilege.\(^6\) The burden is on the plaintiff to show that the defendant abused the privilege.\(^7\)

The plaintiff can establish abuse by showing that the defendant either acted with malice or published the statement excessively.\(^8\) The necessary standard for malice varies among states. Some jurisdictions apply the actual malice standard,\(^9\) while others require proof of common

\[^{21}\] Id.
\[^{22}\] In cases involving federal officials charged with defamation for statements made in the course of sexual harassment investigations a third defense of absolute immunity has been recognized. See, e.g., Henley v. Rusiecki, 1987 WL 10296 (N.D. Ill. Apr. 27, 1987); Arruda v. Stanzione, 1990 WL 17149 (D.R.I. Feb. 21, 1990). Defenses, such as truth, which are generally recognized in all defamation suits, are also applicable to workplace defamation suits. See, e.g., Gillson v. State Dep't of Natural Resources, 492 N.W.2d 835 (Minn. Ct. App. 1992).

\[^{23}\] Also referred to as a conditional privilege. E.g., Lawson v. Boeing Co., 58 Wash. App. 261, 267 n.13, 792 P.2d 545, 549 n.13 (1990); Restatement (Second) of Torts § 593 (1976).

\[^{24}\] See Keeton et al., supra note 16, § 115, at 824.

\[^{25}\] See, e.g., Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 386-87 (5th Cir. 1987); Miller v. Servicemaster by Rees, 851 P.2d 143, 145 (Ariz. Ct. App. 1992); see also Keeton et al., supra note 16, § 115, at 835; Restatement (Second) of Torts § 619 (1976). Courts have recognized a qualified privilege in a variety of situations including when the publication is for the protection of the defendant's own legitimate interests or the publication is used to protect legitimate interests of a third party. Keeton et al., supra note 16, § 115, at 825-30.

\[^{26}\] Keeton et al., supra note 16, § 115, at 832-36. The issue does go to the jury if the facts which gave rise to the privilege are in dispute. Id.

\[^{27}\] E.g., Garziano, 818 F.2d at 388; Tipps Tool Co. v. Holifield, 67 So. 2d 609, 618 (Miss. 1953); Daywalt v. Montgomery Hosp., 573 A.2d 1116, 1119 (Pa. Super. Ct. 1990); see also Keeton et al., supra note 16, § 115, at 835.

\[^{28}\] Garziano, 818 F.2d at 388; Miller, 851 P.2d at 145; see also Keeton et al., supra note 16, § 115, at 832-35.

\[^{29}\] To establish actual malice, the plaintiff must prove that the defendant had knowledge of the statement's falsity or acted with reckless disregard for the truth of the statement. See, e.g., Prysak v.
law malice. The test for abuse of the privilege through excess publication is whether the defendant communicated the allegedly defamatory statement to persons who did not share the interest or duty which gave rise to the privilege. The issue of whether a privilege has been abused is usually for the trier of fact; the court, however, can resolve the issue if only one conclusion can be drawn from the facts.

2. The Intracorporate Immunity Rule

Several jurisdictions observe the intracorporate immunity rule, which holds that communications within a corporation do not constitute publication to a third party, and thus are not actionable under defamation law. Unlike the qualified privilege, proof of malice cannot destroy this defense. To qualify for the rule’s protection, the defendant need only prove that the communication in question was made in the regular course of business. Once a defendant has satisfied this condition, courts dismiss defamation claims on pre-trial motions.


30. See, e.g., Gazette, Inc. v. Harris, 325 S.E.2d 713, 727 (Va. 1985), cert. denied 472 U.S. 1032, and cert. denied, 473 U.S. 905 (1985); see also Keeton et al., supra note 16, § 115, at 833–35. The definition of common law malice varies among jurisdictions. Some jurisdictions require a showing of negligence, while others require proof of ill will or spite. See Lewis et al., supra note 13, at 827.


34. Note, supra note 33, at 905.

35. E.g., Hellesen, 370 S.W.2d at 344.

A growing number of jurisdictions have abandoned the intracorporate immunity rule. Several cogent reasons have been put forth to support abrogating the rule. Perhaps the most compelling is the recognition that damage to a corporate employee's reputation within the workplace can be just as devastating as the injury caused by the spreading of defamation in the wider community.

III. EXISTING PROTECTIONS INADEQUATELY INSULATE GRIEVANCE PROCEDURES FROM THE CHILLING IMPACT OF DEFAMATION LIABILITY

The threat of defamation claims has important implications for the efficacy of Title VII. Employers' internal grievance procedures play an important role in Title VII enforcement. If employers hesitate to fully investigate complaints or employees are afraid to notify employers of potential problems, then private enforcement will be undermined. To avoid such a result, employers and complaining employees must be able to limit their exposure to defamation litigation by following proper procedures. If they have followed correct procedures any resulting defamation suit should be dismissed on summary judgment.

A. The Chilling Effects of Defamation Suits

Fear of the economic repercussions of a defamation suit may chill employers' efforts to enforce Title VII. Defending defamation suits can be extremely expensive; some estimate that legal costs average between $140,000 and $250,000 for each suit. If the claim goes to trial, defendants incur the full cost of defense whether or not they prevail on the merits. The burden of high legal costs is coupled with fear of large jury awards. Commentators already have noted that the threat of

38. See, e.g., Note, supra note 33, at 765–69; Lowhurst, supra note 37, at 676.
39. See Luttrell, 683 P.2d at 1294.
40. See supra notes 10–12 and accompanying text.
41. See Barry, supra note 13, at 265 n.9.
42. Verdicts of more than one million dollars are not unusual in workplace defamation suits, and some verdicts have reached as much as six million dollars. See Lewis et al., supra note 13, at 798.
increasing defamation liability may cause employers to change their business practices.\textsuperscript{43} If potential liability causes employers to restrict the flow of information necessary for complete investigation of a harassment complaint, efforts at private compliance will be hampered.\textsuperscript{44}

Encouraging complaining employees to use internal grievance procedures is difficult enough without the threat of defamation suits. Employees who believe they are suffering harassment tend to remain silent out of fear of reprisal or in order to avoid embarrassment.\textsuperscript{45} The additional threat of the economic and emotional burden of defending against a defamation suit can only further discourage employees from lodging complaints.

Congress sought to address the deterrent effect of fear when it drafted Title VII. Section 704(a) of Title VII makes retaliation for lodging a discrimination complaint an actionable offense.\textsuperscript{46} The EEOC has recognized that the threat of a defamation suit is just the type of reprisal that can stifle complaints,\textsuperscript{47} and has expressed concern that lawsuits against complaining employees may seriously impede the fight to eliminate employment discrimination.\textsuperscript{48}

The most direct means of preventing defamation suits from stifling complaints and deterring employers from initiating a full investigation is to ensure that suits arising out of good faith efforts at confronting harassment will be dismissed on summary judgment. Early resolution of such claims will lessen the economic impact on both employers and complaining employees. It will also help prevent complaining employees from being deterred by the emotional burden and potential liabili

\textsuperscript{43} The increasing threat of defamation liability has caused some employers to use only neutral language when responding to another employer's request for a recommendation. Larson, supra note 18, at 60–61; Barry, supra note 13, at 300–02.

\textsuperscript{44} Despite the liability that may arise from an employer's failure to fully investigate a harassment claim, it seems likely that the threat of defamation suits can deter full investigation. After all, evidence suggests that defamation law impacts employers' willingness to give negative references despite the growing threat of negligent reference claims. See Larson, supra note 18, at 60–61; Barry, supra note 13, at 300–02. Furthermore, the law should avoid placing employers in the untenable position of risking defamation litigation by complying with Title VII.

\textsuperscript{45} See Wendy Pollack, Sexual Harassment: Women's Experience vs Legal Definitions, 13 Harv. Women's L.J. 35, 52 n.56 (1990). One study indicates that as many as 60 percent of victims ignore sexual harassment, believing that complaining will only cause them further harm. Id.

\textsuperscript{46} Civil Rights Act of 1964 § 704(a), 42 U.S.C.A. § 2000e-3(a) (West 1988).

\textsuperscript{47} EEOC Decision No. 74-77, 1974 WL 3847 (E.E.O.C.) (Jan. 18, 1974).

\textsuperscript{48} Id. at 5–6. As a result of its concern, the EEOC held that any statements made by a complaining employee to the EEOC are absolutely privileged and that filing a defamation suit in response to an employee's EEOC complaint constitutes impermissible retaliation in violation of Section 704(a) of Title VII. Id. at 6.

242
embarrassment of a full trial on the merits. As one court noted, summary judgment is a blunt instrument, but it is also the preferable resolution of a defamation claim if the speech at issue is to be encouraged. 49 Since early resolution of a defamation suit can help prevent the chilling of harassment complaints and investigations, the efficacy of a defense can be evaluated in terms of the defendant's ability to obtain summary judgment after having made a good faith use of grievance procedures.

B. The Inadequacy of the Qualified Privilege in Sexual Harassment Cases

While the qualified privilege is effective in some respects, it does not fully protect the integrity of sexual harassment grievance procedures. The qualified privilege balances well the interests of the employer and those of the accused employee. The privilege offers the accused employee some protection by encouraging employers to make sure that complaints are adequately investigated in order to determine the truth or falsity of the harassment allegations. At the same time, the privilege protects the employer by ensuring that if an employer makes a thorough and good faith investigation of a complaint, any defamation claims will be dismissed on summary judgment. Unfortunately, however, under the privilege a complaining employee who lodges a good faith grievance using correct procedures cannot feel secure that a defamation suit against her will be dismissed on summary judgment.

1. Employers and Accused Employees Under the Qualified Privilege

The qualified privilege sufficiently insulates employers from defamation claims, so that they can conduct reasonable investigations of harassment complaints without fear of liability. Many courts recognize that the qualified privilege attaches to statements made as part of sexual harassment investigations. 50 This privilege is a bar to liability unless the


employer abuses it by acting out of malice, or by excessively publishing the allegedly defamatory statement.51 Establishing abuse is difficult, however, and in most cases in which an employer asserts this defense, the claim against the employer is dismissed on summary judgment.52

The reason why defense summary judgment motions are so often successful lies in the difficulty of establishing that the employer abused the qualified privilege.53 Courts take a stringent approach to the malice standard, requiring that the accused employee produce affirmative proof of malice.54 Courts have rejected plaintiffs’ attempts to meet this burden by making allegations which are easily pled but do not support a clear inference of malice. One court held, for example, that evidence of an employer’s concern regarding potential Title VII liability to the complaining employee was insufficient to create a genuine issue regarding malice.55 Courts likewise have rejected the argument that failure to interview every potentially exculpatory witness constitutes adequate proof of malice.56 As a result, few, if any, accused employees have been able to establish an issue of fact regarding malice when the harassment investigation was at least facially reasonable.57

Despite the difficulty of surviving summary judgment, the possible loss of the privilege through proof of malice offers the accused employee some potentially important protection. Proof that an employer published allegedly defamatory statements after conducting an inadequate investigation of the harassment charges can sometimes be sufficient to create a genuine issue of fact regarding malice.58 At least two courts

52. See, e.g., Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593, 605 (N.D. Ill. 1991), aff'd, 975 F.2d 556 (7th Cir. 1992); Stockley, 687 F. Supp. at 774; Miller, 851 P.2d at 146; Hanly, 603 N.E.2d at 1132.
53. See supra note 27 and accompanying text.
54. See Garziano, 818 F.2d at 389; see generally Stockley, 687 F. Supp. at 770 (holding that a plaintiff must have more than an articulable theory of malice). There is disagreement regarding the level of malice a plaintiff must prove. Some courts have required proof of actual malice. See Garziano, 818 F.2d at 388; Miller, 851 P.2d at 145; Lawson, 58 Wash. App. at 267, 792 P.2d at 549. At least one court has required proof of ill will or spite, that is common law malice. See Hanly, 603 N.E.2d at 1132.
55. Stockley, 687 F. Supp. at 770–71; see also Garziano, 818 F.2d at 389–90 (holding that proof of an earlier dispute with the employer over sick leave and lunch breaks was not sufficient proof of malice).
56. Stockley, 687 F. Supp. at 772; Garziano, 818 F.2d at 389.
57. See cases cited supra notes 50 and 52.
58. The courts which have found that proof of an inadequate investigation creates a question of fact regarding whether the defendant acted with malice were purporting to apply an actual malice
have found that evidence of an inadequate investigation can include proof that the employer failed to interview the accused employee.\textsuperscript{59} One of these courts also found proof of malice in the fact that the employer never interviewed someone who witnessed the incident in question.\textsuperscript{60} Another court found proof that an employer had an ulterior motive for making a defamatory publication combined with evidence of an inadequate investigation was sufficient to sustain a finding of malice.\textsuperscript{61} If more courts begin to recognize that evidence of a seriously deficient investigation is sufficient to create an issue of fact regarding whether an employer acted with malice, then the qualified privilege will offer the accused employee important protection.

The threat of losing the privilege's protection and having to face a full trial on the merits would encourage employers to define and publicize procedures for conducting thorough sexual harassment investigations. A well-run investigation should help protect the reputation of an employee who has been falsely accused. Because the employers can take measures to reduce their risks, the qualified privilege encourages them to fine-tune their grievance procedures rather than abandon their efforts at private enforcement of discrimination laws.

In addition to the protection afforded by the malice standard, the possibility that the employer will lose the protection of the privilege by excessive publication also safeguards the accused employee's interests. Fear of liability based on excess publication encourages employers to

\textsuperscript{59} Babb, 806 F.2d at 756; White, 579 S.W.2d at 674.

\textsuperscript{60} Babb, 806 F.2d at 756.

\textsuperscript{61} White, 579 S.W.2d at 674.
control the scope of publication in order to ensure that only those who have a legitimate reason for being privy to the allegations learn of them. The less pervasive the publication, the less damage that can be inflicted on an accused employee's reputation.

Courts have rejected attempts to infer excessive publication from the mere fact that persons outside the circle of those investigating a harassment complaint know of the allegations. Instead, courts require affirmative proof of an employer's responsibility for excessive publication. As with malice, the necessity for affirmative proof protects the integrity of internal grievance procedures by allowing employers to limit their exposure to liability by training their personnel.

2. Complaining Employees and Accused Employees Under the Qualified Privilege

While the qualified privilege encourages employers to develop well-defined grievance procedures, the threat of defamation liability still deters employees from lodging harassment complaints. By filing the right affidavit, an accused employee can avoid summary judgment in a suit against a complaining employee. As a result, a complaining employee cannot predict whether utilizing internal grievance procedures will lead to a defamation trial.

Whether or not a defamation case arising out of a harassment complaint will go to trial depends in large part on how the accused employee argues the facts. Any complaint of sexual harassment contains two components: an allegation that certain events occurred, and an assertion that such events constituted sexual harassment. If the accused employee files a defamation claim, it is possible that he will admit to the underlying events but contend that they did not constitute harassment. Disputing the legal conclusion of harassment alone is insufficient to overcome the privilege because misinterpreting events does not support a

62. See Garziano v. E.I. Du Pont De Nemours & Co., 818 F.2d 380, 393 (5th Cir. 1987) (holding that an employer is not liable for rumors that are not directly linked to its own publication of the harassment allegations); Stockley v. AT&T Info. Sys., Inc., 687 F. Supp. 764, 771 (E.D.N.Y. 1988) (holding that evidence of an office “grapevine” is not proof of unprivileged communications by an employer); Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593, 607 (N.D. Ill. 1991) (holding that there is no employer liability for communication which could not reasonably be anticipated, such as when a sealed letter is unexpectedly opened by someone other than the addressee or when rumors have spread), aff'd, 975 F.2d 356 (7th Cir. 1992).
63. E.g., Garziano, 818 F.2d at 389.
clear inference of malice. If, however, the accused employee denies the underlying events, his denial will often be sufficient to create a genuine issue of material fact regarding whether the complaining employee acted with malice.

The problem faced by complaining employees was articulated by the court in Lawson v. Boeing Co. Because a complaining employee possesses first-hand knowledge of the events which are said to constitute harassment, the veracity of these factual allegations has a bearing on whether the complaining employee abused the qualified privilege. If the events never happened, then the complaining employee made a knowingly false accusation when she asserted that the events occurred. A knowingly false statement constitutes malice. Noting that at summary judgment a court must view the facts in the light most favorable to the non-moving party, the Lawson court held that an affidavit by the accused employee denying the events alleged in the harassment complaint was sufficient to create a genuine issue of material fact regarding malice. The complaining employee’s motion for summary judgment was, therefore, denied.

The Lawson court’s reasoning has the potential to dissuade employees from alerting their employers to potential problems. It is not unusual for the events which are said to have constituted harassment to have occurred in private. If there were no witnesses to corroborate the complaining employee’s testimony, the issue will be reduced to a “swearing match” between the complaining and accused employees. Even though it may appear that a trial is necessary when malice is so inextricably linked to an evaluation of the parties’ credibility, allowing

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67. Id. at 267–68, 792 P.2d at 549.

68. Id. at 268, 792 P.2d at 549. A knowingly false statement constitutes both actual malice and common law malice. Asserting a knowingly false statement is acting with reckless disregard for the truth. See supra note 29. Asserting such a statement is also indicative of ill-will, spite, or negligence. See supra note 30.

69. See Lawson, 58 Wash. App. at 269, 792 P.2d at 550.

70. In a later opinion, this same court granted a complaining employee’s motion for summary judgment. Lambert v. Morehouse, 68 Wash. App. 500, 843 P.2d 1116 (1993). The Lambert court upheld the reasoning of Lawson. Id. at 506–07, 843 P.2d at 1119. It found, however, that by submitting an affidavit stating, “I did not sexually harass anyone,” the plaintiff had denied only the legal implications of the incident. Id. at 507, 843 P.2d at 1119. The court found that such a conclusory statement was insufficient to survive summary judgment. Id. at 507, 843 P.2d at 1120.

such cases to go to trial will deter even those employees who would file complaints in good faith from using grievance procedures.

Assume for a moment that an employee is repeatedly subjected to unwanted sexual advances by a coworker. Assume also that these overtures take place in private. When considering whether to tell her employer, this employee will be unable to predict the potential consequences of filing a complaint. It is possible that if the accused employee files a defamation suit, he will admit to the underlying events and she will be able to obtain summary judgment. If, however, avoiding a defamation trial is important to her, she will have to trust that the person she believes is harassing her will not deny the events. Given that fear of reprisal and embarrassment have already been shown to deter employees from informing their employers of harassment, there is good reason to believe that employees in this situation will be unwilling to use internal grievance procedures.

Employees in such situations will be better off skipping over internal grievance procedures and taking their complaints directly to the EEOC. When an aggrieved employee lodges a complaint with the EEOC, she is guaranteed absolute immunity from defamation liability. This absolute immunity acts as a complete bar to recovery in a defamation suit brought by an accused employee. Once the court determines that the immunity applies, no further inquiry is made into the motivation and circumstances behind publication.

If complaining employees were to follow this route, efforts to foster private enforcement mechanisms would necessarily be undermined. Yet, undermining internal procedures in favor of official complaints does not result in greater protection for the accused employee's reputation. When the EEOC receives a complaint, it will notify the employer of the allegations and the agency will conduct an investigation. Complaints to the EEOC, therefore, result in publication of the charges within the workplace community. There is no reason to believe that the accused

72. See supra note 45 and accompanying text.
73. The complaining employee also can take her complaint to the appropriate state administrative agency.
75. See, e.g., Wrenn v. Ohio Dep't of Mental Health & Mental Retardation, 474 N.E.2d 1201 (Ohio Ct. App. 1984); see also cases cited supra note 74.
employee’s reputation is damaged less when an employer learns of an allegation from the EEOC than when the allegation comes directly from the complaining employee.

The best way to insulate an accused employee’s reputation from the damage of a defamatory statement is not to force the complaining employee to go to the EEOC, but to encourage her to limit the scope of her publication within the workplace. If proof of excessive publication were the only way to overcome the qualified privilege, then a complaining employee would both be encouraged to use internal grievance procedures and encouraged to limit the scope of her publication. To create an issue of material fact, the accused employee needs affirmative proof of the complaining employee’s responsibility for excess publication. Therefore, if excess publication is defined as publication to persons other than those responsible for handling harassment complaints, a complaining employee could limit her exposure to liability by strictly adhering to the reporting practices laid out in the grievance procedure policy. Meanwhile, by limiting the scope of publication, the potential damage to the accused employee’s reputation would be reduced. Under the qualified privilege, however, the excessive publication standard for abuse is wedded to the more problematic malice standard. As a result, from the perspective of the complaining employee, the entire defense is fatally flawed.

C. The Inadequacies of the Intracorporate Immunity Rule in Sexual Harassment Cases

The problems with the intracorporate immunity rule are almost the exact opposite of those encountered under the qualified privilege. The rule balances well the interests of the complaining employee with those of the accused employee. The rule, however, too broadly defines the protection afforded the employer, leaving the accused employee with less protection than is appropriate.

1. Employers and Accused Employees Under the Intracorporate Immunity Rule

The intracorporate immunity rule effectively encourages employers to enforce anti-discrimination laws. While few courts have addressed whether the rule applies to statements made during the course of a sexual

77. See supra notes 62–63 and accompanying text.
harassment investigation, courts have held uniformly that it protects statements made in an attempt to resolve personnel problems. The only question for a court to resolve when determining whether the rule applies is whether or not statements were made as part of an official investigation. Once the rule is deemed applicable, it acts as a complete bar to recovery.

Although the rule fosters private compliance by insulating investigations from the impact of defamation liability, the rule unnecessarily limits the protection given an accused employee. The rule does pressure employers to limit the scope of publication by shielding only statements made as part of an investigation. This pressure offers protection similar to that afforded by the excessive publication prong of the qualified privilege. However, under the intracorporate immunity rule, the court will not inquire into the issue of malice. Thus, even if an accused employee has affirmative proof of the investigation's inadequacy, the charge will be dismissed on a pre-trial motion as long as the statements were part of an investigation.

Such a harsh standard is unnecessary. As cases involving the qualified privilege have demonstrated, it is possible to require employers to monitor their internal grievance procedures to ensure that investigations are thorough without compromising the integrity of the grievance procedures. Given the importance of an individual's reputation within the workplace, it makes little sense to deny the accused employee a possible avenue of protection.


80. See supra note 35 and accompanying text.

81. See, e.g., Ekokotu, 422 S.E.2d at 904–05.

82. Id. at 905.

83. See supra notes 51–63 and accompanying text.
2. Complaining Employees and Accused Employees Under the Intracorporate Immunity Rule

The intracorporate immunity rule prevents potential defamation liability from deterring employees who wish to lodge complaints. Under the rule a complaining employee can limit her exposure to defamation litigation by lodging her grievance only with the appropriate personnel. By affording her protection similar to that which she would receive if she went directly to the EEOC, the rule encourages a complaining employee to use internal grievance procedures.

The rule also offers the accused employee some protection. If a complaining employee makes a potentially defamatory accusation to someone who does not have a duty to resolve a personnel problem, the protection of the rule is lost. The rule thus serves to control the amount of potential damage to the accused employee’s reputation by limiting the scope of publication.

IV. THE PROPOSAL: A NEW BIFURCATED GRIEVANCE PROCEDURE PRIVILEGE

A new grievance procedure privilege is necessary in order to encourage private compliance with harassment laws without needlessly limiting the protection given to an accused employee. This grievance procedure privilege would meld the advantages offered by both the qualified privilege and the intracorporate immunity rule. This new privilege would be conditional and could be lost through abuse. The defense would, however, bifurcate the standard for abuse, applying one standard to complaining employees and another to employers.

The privilege’s primary goal would be to protect the integrity of internal grievance procedures. It would achieve this goal by allowing both employers and complaining employees to limit their exposure to defamation liability by following proper procedures. In order to ensure such control, the privilege would offer the employer a partial immunity

84. The rule’s ability to protect complaints is, of course, contingent on the court’s recognition of the rule’s applicability to complaining employees. Given that some courts have stated that the rule applies only to corporate officers, there is some question whether the rule will be extended uniformly to complaining employees. See, e.g., Snodgrass v. Headco Indus., Inc., 640 S.W.2d 147 (Mo. Ct. App. 1982). The logic of the rule, however, favors such an extension. See Lovelace v. Long John Silver’s Inc., 841 S.W.2d 682 (Mo. Ct. App. 1992).

85. See supra notes 80–81 and accompanying text.

86. See generally Ekokotu, 422 S.E.2d at 904–05.
modeled after the qualified privilege. It would offer the complaining employee a more complete immunity comparable to that which is afforded by the intracorporate immunity rule.

The employer's partial immunity would allow the employer to reduce its exposure to defamation liability. This partial immunity would shield statements from liability unless the accused employee could prove that the privilege was lost through malice or excessive publication. As with the qualified privilege, the accused employee would bear the burden of proof of establishing abuse. As a result, employers could feel confident that the accused employee could not overcome the privilege merely by pleading allegations of its abuse. To avoid summary judgment, the accused employee would have to produce affirmative evidence of the employer's abuse of its privilege.

Under the new privilege, the accused employee could establish a genuine issue of material fact by producing evidence that the investigation was wholly inadequate. Using the adequacy of the investigation as a basis for overcoming the privilege would encourage employers to train their personnel well and to monitor their grievance procedures to guard against abuse. This push towards more thorough investigation would help protect the accused employee from unjust damage to his reputation. At the same time, by giving employers a viable mechanism for decreasing their exposure to defamation liability, this new privilege would prevent the fear of defamation liability from paralyzing private efforts to enforce sexual harassment laws.

The scope of protected publication under the new privilege would be limited to those who share responsibility for investigating an allegation. If an employer established a reasonable grievance procedure, then courts would use the procedure to evaluate whether there was excess publication. An employer would thus be able to minimize its exposure to defamation liability by establishing well-defined procedures and ensuring that its employees were sensitive to the confidential nature of an investigation. If investigatory personnel limited the scope of publication, the potential damage to the accused employee's reputation would be reduced.

The more complete immunity for complaining employees would encourage them to utilize internal grievance procedures. The privilege as applied to complaining employees only could be lost through excessive publication. The new privilege thus would avoid the dangers associated

87. See supra notes 52-55 and accompanying text.
Defamation and Sexual Harassment

with trying to apply the malice standard to complaining employees.\textsuperscript{88} The sole test for abuse of the complaining employee’s privilege would be whether she properly contained the scope of her publication. In essence the new privilege would provide the complaining employee with the same sort of protection she would have received had she lodged her complaint with the EEOC instead of with her employer.

If there were a well-publicized grievance procedure which designated the manner for lodging a complaint, then the proper scope of a complaining employee’s publication would be measured against that policy. If no such policy existed, the court would examine whether the complaining employee had lodged her grievance with an appropriate supervising employee. The privilege thus would provide a complaining employee with a means of reducing her exposure to defamation liability. It also would offer the accused employee some protection by limiting the number of third parties to whom a complaining employee could safely communicate potentially defamatory accusations.

While the new privilege would offer the accused employee substantial protection, it could not guarantee that an accused employee would not be defamed. Under the privilege, there is no way to challenge accusations made by a complaining employee to the designated supervisory personnel even when these statements were made with full knowledge of their falsity. The privilege would attempt to contain the damage done by such statements by limiting the scope of publication and compelling employers to instigate thorough investigations. It could not, however, fully insulate the accused employee from the statement’s damaging impact. The grievance procedure privilege, like all defamation privileges, rests upon the idea that otherwise actionable speech should be shielded from liability in order to advance some important societal interest.\textsuperscript{89} The EEOC and the federal courts have determined that private employers’ internal grievance procedures are an effective tool for fighting sexual harassment.\textsuperscript{90} This proposed grievance procedure privilege would ensure that defamation law does not act as a counterweight to Title VII by impeding the effective implementation of private mechanisms for enforcing the prohibition on sexual harassment.

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88. See supra note 66–75 and accompanying text.
89. Id.
90. See supra notes 9–11 and accompanying text.
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