IMMUNITY FOR PARTICIPANTS IN UNIVERSITY DISCIPLINARY PROCEEDINGS

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Indiana recognizes an absolute privilege for statements made in judicial and quasi-judicial processes, as well as an absolute immunity for individual capacity claims against officers for performance of their roles in judicial and quasi-judicial proceedings. Alongside these doctrines stands a privilege for good faith communications directed at some interest shared between communicator and recipient. In recent years, the courts have applied these long-standing principles of immunity and privilege to protect complainants and participants from civil liability for their involvement in cases of alleged violations of university conduct policies by faculty members. This article will discuss the history and development of these protections through a pair of faculty misconduct cases, as well as the potential application of these protections in the context of claims targeted at individuals involved in student disciplinary proceedings.

I. Judicial and Quasi-Judicial Privilege and Immunity

The doctrine of absolute privilege is rooted in the understanding that "public interest in the freedom of expression by participants in judicial proceedings, uninhibited by the risk of resultant suits for defamation, is so vital and necessary to the integrity of our judicial system that it must be made paramount to the right of the individual to a legal remedy when he has been wronged."[1] Absolute privilege "rest[s] upon the idea that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."[2] This doctrine provides that "judges, counsel, parties and witnesses are absolutely privileged to publish defamatory matter in the

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1 Briggs v. Clinton Cty. Bank & Trust Co., 452 N.E.2d 989, 997 (Ind. Ct. App. 1983) (citing 50 Am. Jur. 2d *Libel and Slander* § 239).

2 Thomas v. Petrulis, 465 N.E.2d 1059, 1061 (Ill. App. Ct. 1984) (quoting William L. Prosser, Law of Torts § 114, at 776 (4th ed. 1971)).

course of judicial proceedings, with the qualification that the statements must be pertinent and relevant to the case."[3]

The courts favor a liberal rule in determining whether a statement is relevant and pertinent:

> An allegation to which privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety. . . . Irrelevancy is not shown by the fact that it was unnecessary to plead the offending allegation[,] and the fact that the alleged libelous matter was stricken from the pleading as irrelevant has been held not to destroy the privilege where it otherwise satisfies the requirement of nontechnical relation to the subject of the controversy.[4]

More recently, the Indiana Court of Appeals expanded upon this understanding of what is "relevant":

> It does not appear . . . that a ruling finding a pleading's allegations to be legally invalid, for res judicata or other reasons, necessarily establishes that the pleading's contents were so palpably irrelevant to the litigation. . . . To the contrary, courts in other jurisdictions have noted that the absolute privilege for statements made during judicial proceedings is not dependent upon the allegations being relevant "in the technical legal sense." In other words, simply because a case is subject to dismissal or summary judgment for being legally unsound does not mean the absolute privilege evaporates. This would improperly eliminate the privilege in a vast number of cases.[5]

"In determining what is pertinent, much allowance must be made for the 'ardent and excited feelings with which a party may become animated by constantly regarding one side only of a controversy.'"[6] Furthermore, "whether the absolute privilege applies is not dependent upon whether allegations were made in an original complaint, or a counterclaim, or a cross claim. In other words, relevancy is not necessarily measured with respect to the pleadings of an opposing party, but with respect to a cause of action or defense raised by the party claiming the privilege."[7]

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[3] *Briggs*, 452 N.E.2d at 997 (citing Stahl v. Kincade, 192 N.E.2d 493, 496 (App. Ind. 1963)).

[4] *Id.* (citing 50 AM. JUR. 2D *Libel and Slander* § 239).

[5] Estate of Mayer v. Lax, Inc., 998 N.E.2d 238, 247–48 (Ind. Ct. App. 2013) (quoting in part Defend v. Lascelles, 500 N.E.2d 712, 715 (Ill. App. Ct. 1986)).

[6] *Briggs*, 452 N.E.2d at 997 (quoting 50 AM JUR. 2D *Libel and Slander* § 236).

[7] *Mayer*, 998 N.E.2d at 248.

The protection of absolute privilege is necessary "because participants in a trial must be able to 'speak with that free and open mind which the administration of justice demands.'"[8] This protection extends beyond the context of strictly judicial proceedings, and has been applied in the context of "proceedings which may be characterized as quasi-judicial, including certain administrative proceedings."[9] The terms *quasi-judicial* and *judicial in nature* are used to "designate a judicial function and to indicate that it is being exercised by a person other than a judge."[10]

Lincoln v. Board of Commissioners was brought by a discharged courthouse custodian who had initiated a grievance procedure pursuant to a personnel policy manual adopted by the Board of Commissioners of Tippecanoe County.[11] Because only "'judicial decisions' of the county board of commissioners may be appealed to the circuit court[,]" the "threshold question" in *Lincoln* was "whether the Board's acts in this case are judicial."[12] Confronted with this question, the court in *Lincoln* presented a set of factors to be used in determining whether a particular proceeding can be deemed quasi-judicial.

> While it is difficult, if not impossible, to define quasi-judicial power and to discriminate between judicial and administrative acts in a way which will be applicable to every case, we find it is the nature, quality, and purpose of the act performed, rather than the name or character of the officer or board which performs it, which determines its character as judicial. Generally, the judicial function consists of: (1) the presence of the parties upon notice; (2) the ascertainment of facts; (3) the determination of the issues; and (4) the rendition of a judgment or final order regarding the parties' rights, duties, or liabilities.[13]

The court then applied these factors to the facts of the proceeding, including that the board of commissioners had "provided notice to the parties, permitted the parties to be represented by counsel, convened a formal hearing, took evidence, judged the credibility of witnesses and weighed the evidence, and then made a decision to affirm the administrator's decision to

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[8] Weissman v. Mogol, 462 N.Y.S.2d 383, 386 (N.Y. Sup. Ct. 1983) (quoting Youmans v. Smith, 47 N.E. 265, 268 (N.Y. 1897)); *see also Thomas*, 465 N.E.2d at 1061.

[9] *Weissman*, 462 N.Y.S.2d at 386 (citation omitted).

[10] Lincoln v. Board of Comm'rs, 510 N.E.2d 716, 721 (Ind. Ct. App. 1987) (citing 1 AM JUR. 2D *Administrative Law* § 161), *abrogated on other grounds by* McDillon v. N. Ind. Pub. Serv. Co., 841 N.E.2d 1148, 1152 (Ind. 2006).

[11] *Id.* at 717.

[12] *Id.* at 719.

[13] *Id.* at 721 (citing 1 AM JUR. 2D *Administrative Law* § 160).

discharge an employee."[14] On these facts, the court concluded that the board was acting "in a quasi-judicial capacity[.]"[15]

Similarly, the New York court in *Weissman v. Mogol* determined that a disciplinary proceeding involving a complaint against a tenured teacher was quasi-judicial in nature.[16] The procedures required that all charges against the teacher be made in writing.[17] If the board of education found that probable cause exists, then a hearing was required to determine the fitness of the teacher.[18] The teacher was entitled to receive notice of the charges and the right to be heard.[19] The teacher and the board had the right to representation and cross-examination, both parties had the power to subpoena witnesses, and all testimony was given under oath.[20] The hearing panel could recommend discipline up to and including dismissal.[21] Both the teacher and the board had a right to appeal the decision.[22] The court found that this proceeding was "adversarial in nature and presumably impartial. The prescribed procedure and the right to judicial review make it clear that such hearings are quasi-judicial in nature."[23]

In *Thomas v. Petrulis*,[24] Illinois addressed whether the EEOC is a quasi-judicial body. The Illinois court provided factors similar to those identified in *Lincoln*:

> Six powers have been isolated as differentiating a quasi-judicial body from that performing merely an administrative function: (1) the power to exercise judgment and discretion; (2) the power to hear and determine or to ascertain facts and decide; (3) the power to make binding orders and judgments; (4) the power to affect the personal or property rights of private persons; (5) the power to examine witnesses, to compel attendance of witnesses, and to hear the litigation of issues on a hearing; and (6) the power to enforce decisions or impose penalties.[25]

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14 *Id.*

15 *Id.* at 722.

16 Weissman v. Mogol, 462 N.Y.S.2d 383, 387 (N.Y. Sup. Ct. 1983).

17 *Id.* at 386.

18 *Id.*

19 *Id.*

20 *Id.* at 387.

21 *Id.*

22 *Id.*

23 *Id.*

24 Thomas v. Petrulis, 465 N.E.2d 1059, 1061 (Ill. App. Ct. 1984).

25 *Id.* at 1062 (citing Parker v. Holbrook, 647 S.W.2d 692, 695 (Tex. Civ. App. 1982); and 1 AM JUR. 2D *Administrative Law* §§ 167–73).

However, the court instructed that "[a] quasi-judicial body need not possess all six powers[.]"[26] "[T]he more powers it possesses, the more likely the body is acting in a quasi-judicial manner."[27] An examination of the powers available to the EEOC and a comparison to other quasi-judicial bodies such as the National Railroad Adjustment Board and New York's Division of Housing and Community Renewal led the court to conclude that the EEOC was likewise quasi-judicial.[28]

In addition, absolute privilege has been applied when a "voluntary action by a citizen is a preliminary to a statutory proceeding[.]"[29] "This rule applies to communications preliminary to a proposed judicial proceeding where the communication has some relation to a proceeding that is reasonably contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding."[30] For this reason, the "Federal statutory scheme which requires a complainant to file a charge [with the EEOC] as a precondition to filing civil suit" was "suggestive of the EEOC's quasi-judicial nature[.]"[31]

II. Qualified Privilege—Comparison to Absolute Privilege

Alongside the doctrine of absolute privilege is that of qualified privilege. "The rule concerning a qualified privilege is that a communication made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged."[32] For instance, to "'enhance[ ] public safety by facilitating the investigation of suspected criminal activity,' communications to law enforcement officers are protected by this qualified privilege."[33]

As the name suggests, qualified privilege is subject to the qualification that the communicator not abuse the privilege. "A communication otherwise protected by a qualified privilege may lose its protection if it is shown that: (1) the communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory state-

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26 *Id.*

27 *Id.*

28 *Id.* at 1062–63 (citations omitted).

29 Weissman v. Mogol, 462 N.Y.S.2d 383, 386 (N.Y. Sup. Ct. 1983) (citation omitted).

30 Van Eaton v. Fink, 697 N.E.2d 490, 496 (Ind. Ct. App. 1998) (citing Restatement (Second) of Torts § 588 cmt. e).

31 *Thomas*, 465 N.E.2d at 1063.

32 Conn v. Paul Harris Stores, Inc., 439 N.E.2d 195, 200 (Ind. Ct. App. 1982) (quoting 18 Indiana Law Encyclopedia, *Libel and Slander* § 52, at 475 (1959)); *see also* Stephen E. Arthur, 9 Indiana Practice, Procedural Forms with Practice Commentary § 28.2 (3d ed. 2018).

33 Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007) (quoting in part Holcomb v. Walter's Dimmick Petroleum, 858 N.E.2d 103, 108 (Ind. 2006)); *see also Conn*, 439 N.E.2d at 200.

ment; or (3) the statement was made without belief or grounds for belief in its truth."[34] "Although the term 'malice' is frequently applied in viewing such acts, it appears the essence of the concept is not the speaker's spite but his abuse of the privileged occasion by going beyond the scope of the purposes for which the privilege exists."[35]

A communicator may invoke either a common interest with the person receiving the communication or a public interest shared more generally with the recipient. The common interest privilege arises where the interest is particular, such that a "school's communication to parents was privileged because both the parents' and the school's interest was particular to a discrete group of children and the alleged defamatory statements [about the termination of a school employee] were relevant to that particularized interest."[36] The public interest privilege, on the other hand, applies to protect communications—whether to law enforcement or to private citizens—in furtherance of the interest of preventing and responding to criminal activity.[37] The public interest privilege exists "to encourage private citizens and victims not only to report crime, but also to assist law enforcement with investigating and apprehending individuals who engage in criminal activity."[38]

III. *HARTMAN V. KERI*—APPLYING ABSOLUTE PRIVILEGE IN A CASE OF STUDENT COMPLAINTS AGAINST A FACULTY MEMBER

The above sections set out the relevant immunities and privileges. What follows is a recitation of the facts and reasoning of the first Indiana case applying absolute privilege in the context of student complaints against a university faculty member.

While *Hartman v. Keri* was ultimately decided in the Indiana Supreme Court, the court of appeals opinion and briefing provide a more robust rendition of the facts involved. Keri was an assistant professor at Indiana University-Purdue University Fort Wayne (IPFW or, simply, "Purdue").[39] Two graduate students, Swinehart and Hartman, filed formal complaints with the university's affirmative action office alleging discrimination, retaliation, and sexual harassment by Keri.[40]

These complaints were brought pursuant to Purdue's Procedures for Resolving Complaints of Discrimination and Harassment (the "Proce-

[34] *Kelley*, 865 N.E.2d at 598 (quoting in part Bals v. Verduzco, 600 N.E.2d 1353, 1356 (Ind. 1992)).

[35] *Id.* (quoting Elliot v. Roach, 409 N.E.2d 661, 673 (Ind. Ct. App. 1980)).

[36] *Id.* at 599 (citing Gatto v. St. Richard School, Inc., 774 N.E.2d 914, 925 (Ind. Ct. App. 2002)).

[37] *Id.* at 600 (citing RESTATEMENT (SECOND) OF TORTS § 598 cmt. f).

[38] *Id.* at 601.

[39] Hartman v. Keri, 858 N.E.2d 1017, 1020 (Ind. Ct. App. 2006), *vacated*, 883 N.E.2d 774 (Ind. 2008).

[40] *Id.*

dures").[41] The Procedures required Purdue to initiate a proceeding to investigate the complaints against Keri.[42] The investigator interviewed the two complainants, the accused professor, three other faculty members, and thirteen current and former students within the same academic program.[43] The investigator's report stated that she had found "that many of the students and former students to whom I spoke found several aspects of [Keri's] behavior inappropriate, and that their accounts were startlingly consistent."[44] At the conclusion of her investigation, the investigator determined that, by the preponderance of the evidence, Keri had violated university policies.[45]

The investigator presented her report to Purdue's Committee on Equity.[46] The committee concurred with the investigator's conclusion, and the chancellor assigned Keri to a research-only role for the following academic year, prohibiting both his teaching and the use of his university office.[47] Keri brought a claim against the two graduate students alleging that the contents of their complaints against him were defamatory.[48] The students moved for summary judgment, claiming absolute and qualified privilege.[49] The trial court denied their motion but certified its order for interlocutory appeal.[50]

On appeal, the students claimed that the trial court erroneously denied summary judgment because statements made in their complaints to Purdue enjoyed both absolute and qualified privilege.[51] The trial court had found that the statements enjoyed qualified privilege, but that a question of fact existed as to whether the students had abused that privilege because of the "apparent dislike" the students had toward the professor they claimed had harassed them.[52] Thus, the students argued, qualified privilege would provide insufficient protection for those complaining of harassment at the hands of their professors if a court could conclude that an expression of dislike was sufficient to raise an inference that the complaint was "primarily motivated by ill will" and thereby defeat a claim of privilege.[53] The students

41 *Id.* at 1020–21.

42 *Id.* at 1021.

43 *Id.* at 1022.

44 *Id.* at 1023.

45 *Id.*

46 *Id.* at 1024.

47 *Id.*

48 *Id.* at 1025.

49 *Id.*

50 *Id.*

51 Appellants' Br. at *10–13 (available on Westlaw and mycase.IN.gov).

52 *Id.* at *27.

53 *Id.* at *28–30 ("There is no requirement that persons making a statement which is protected by a qualified privilege must 'like' the other person. In fact, it is very unlikely that complaints of harassment will ever be completely free from some hostility on the part of the complainant. If the contents of the

took the position that absolute privilege should instead apply both because the statements made were a necessary prerequisite to their possibly bringing a Title VII claim against Purdue and because the procedures set forth by Purdue's policies were quasi-judicial in nature.[54]

The court of appeals first addressed the necessary-prerequisite argument that "had [the students] not filed the Purdue complaints and instead proceeded directly to court against Purdue for a hostile education or work environment, they would be subject to the affirmative defense that they failed to take advantage of Purdue's internal preventative or corrective opportunities."[55] However, absolute privilege applies in this context where the statement is "preliminary to a proposed judicial proceeding . . . that is reasonably contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding."[56] Because this rule "requires a showing of good faith, and the premise of the instant action is that [the students] lacked good faith[,]" the court instead turned to the quasi-judicial question.[57]

The court found initially that the "'nature, quality, and purpose' of the antiharassment proceeding indicates a quasi-judicial nature."[58] This was due in part to the purpose of the proceeding being to "encourage faculty, staff, and students to report and address incidents of harassment."[59] In addition, "each of the four factors specified in *Lincoln* as comprising the judicial function was present in the antiharassment proceeding": Keri was given notice, the investigator identified issues and ascertained relevant facts, and a final judgment would affect the parties' rights, duties, or liabilities.[60]

Keri argued that the procedures in use were inadequate to support a finding that the antiharassment proceeding was quasi-judicial in nature.[61] The court rejected this, finding that the procedures, inter alia, gave the accused an opportunity to respond in writing, excluded claims 120 days old or older as stale, provided an appeals process, and required investigation and protection from knowingly false or malicious charges.[62] Keri's arguments that he had not been permitted representation by counsel and that the investigator lacked subpoena power also failed, as the court found that no author-

written complaints themselves are sufficient to create a genuine issue of material fact, then the policy reasons for encouraging reporting of harassment will be completely defeated.").

54 *Id.* at *15–24.

55 Hartman v. Keri, 858 N.E.2d 1017, 1027 (Ind. Ct. App. 2006), *vacated*, 883 N.E.2d 774 (Ind. 2008).

56 *Id.* (quoting Van Eaton v. Fink, 697 N.E.2d 490, 495 (Ind. Ct. App. 1998)).

57 *Id.*

58 *Id.* at 1028 (quoting Lincoln v. Board of Comm'rs, 510 N.E.2d 716, 721 (Ind. Ct. App. 1987)).

59 *Id.*

60 *Id.*

61 *Id.* at 1028–29.

62 *Id.* at 1029.

ity required these processes in a quasi-judicial setting.[63] The court stated that "we will not 'attempt to convert an administrative board into a little court.' This is especially true in the educational environment."[64]

The court of appeals concluded as follows:

> [I]n determining whether a person is entitled to an absolute judicial privilege, we look to the nature of the function performed and not the identity of the actor who performed it. Here, the antiharassment proceeding sought to investigate claims of harassment in the workplace or educational environment by Purdue employees so that Purdue could take preventive and corrective measures. To be effective, such proceedings require complainants to be free from the prospect of retaliatory litigation for defamation. The absence of an absolute privilege would eviscerate the function of those proceedings and denigrate the integrity of the judicial function those proceedings serve. The grant of a qualified privilege is likewise insufficient in those settings because such privileges require a trier of fact to determine whether the privilege has been abused.[65]

Keri petitioned for transfer (which the Indiana Supreme Court granted) to address the issue of first impression of whether Indiana would recognize absolute privilege in this context.[66] The majority opinion did not directly apply quasi-judicial analysis, stating instead that "in the context of educational institutions, as long as the process is reasonably transparent and fair and affords the subject an opportunity to respond, we think the ultimate issue focuses less on the particular process and more on the recognition of the institution's interest in assuring a proper educational environment."[67] Qualified privilege in this context would be insufficient because "[p]rotecting [the students'] complaints with anything less than an absolute privilege could chill some legitimate complaints for fear of retaliatory litigation."[68] Ultimately, "[i]f Keri has been unfairly treated, his complaint is against Purdue University as the architect and implementer of the policy and procedures, not the students who invoked the process."[69]

63 *Id.*

64 *Id.* (quoting State ex rel. Paynter v. Marion Cty. Sup. Court, 344 N.E.2d 846, 851 (Ind. 1976); and citing Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978)) (alterations omitted).

65 *Id.* at 1030 (citations and quotation marks omitted).

66 Hartman v. Keri, 883 N.E.2d 774, 777 (Ind. 2008).

67 *Id.* at 777–78.

68 *Id.* at 778.

69 *Id.* at 779.

In a concurring opinion, Justice Rucker addressed the finding that the antiharassment proceeding was quasi-judicial in nature.[70] A review of the majority opinion reveals that the court must have determined that the proceeding was in fact quasi-judicial because "[o]nly if the proceeding was quasi-judicial is the communication absolutely privileged and thus cannot form the basis for a cause of action."[71]

Justice Rucker compared the *Lincoln* factors to those adopted in other jurisdictions, including "whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and make decisions; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of issues on a hearing; or (6) enforce decisions or impose penalties."[72] "Notably absent from these various formulations is any requirement that a party be (1) represented by counsel; (2) allowed to subpoena witnesses on his own behalf; or (3) allowed to cross-examine adverse witnesses."[73] Because the antiharassment procedure provided the university with authority to exercise all the powers of a quasi-judicial body, Justice Rucker reasoned, the proceeding was quasi-judicial in nature, and the students were entitled to absolute privilege.[74]

IV. *BOARD OF TRUSTEES OF PURDUE UNIVERSITY V. EISENSTEIN*—APPLYING ABSOLUTE PRIVILEGE AND ABSOLUTE IMMUNITY IN A CASE OF INTRA-FACULTY COMPLAINTS

Both the majority and concurring opinions in *Hartman* found that the students' complaints against their professor in a university antiharassment proceeding were protected by an absolute privilege. Almost a decade later, the Indiana Court of Appeals had occasion to revisit the doctrine in applying absolute privilege in the context of complaints brought by faculty members against one of their colleagues.

Board of Trustees of Purdue University v. Eisenstein[75] involves the same antiharassment policies as were examined in *Hartman*. Plaintiff Eisenstein was a professor at a Purdue University satellite campus.[76] During an introduction to Judaism class, one of Eisenstein's students recorded Eisenstein making statements such as "The world would be a better place if someone took a gun and shot a bullet into a Muslim's head" and "Except for raping

[70] *Id.* at 780 (Rucker, J., concurring).

[71] *Id.*

[72] *Id.* (citing Thomas v. Petrulis, 465 N.E.2d 1059, 1062 (Ill. App. Ct. 1984), and Gallegos v. Escalon, 993 S.W.2d 422, 425 (Tex. App. 1999)).

[73] *Id.* at 781 ("Although these certainly are critical features of the judicial process—indeed with constitutional implications—they are not necessarily features of a quasi-judicial proceeding.").

[74] *Id.*

[75] 87 N.E.3d 481 (Ind. Ct. App. 2017).

[76] *Id.* at 487.

four-year-olds, Muslims are not good for anything."[77] After a student dropped his class, Eisenstein posted several anti-Muslim statements on his Facebook page and stated that the student was a "Jew hater."[78]

These statements eventually led to nine complaints from students, faculty, and one student association being made to Purdue about Eisenstein.[79] Subsequently, two of the faculty members filed additional complaints alleging retaliation by Eisenstein.[80] One faculty member reported that Eisenstein confronted her in the hallway and stated, "Now I know why your son committed suicide."[81] The other claimed that Eisenstein had sent an e-mail to the complainant and others stating, "My mother cursed [the complainant] before her death (a true orthodox curse). He knows why. Therefore, there will be no association with him. I consider everything from him to be in and of itself cursed and therefore untouchable."[82]

Purdue assigned an investigator to determine if any of these various complaints revealed violations of the antiharassment policies.[83] The investigator determined that Eisenstein was in breach of policy only for his later retaliatory statements, which resulted in written reprimands being placed in Eisenstein's personnel file.[84] One of the faculty members reported to the faculty senate that Eisenstein had been found to have retaliated against her and that Eisenstein had been reprimanded.[85]

Eisenstein sued the Board of Trustees of Purdue University, the various faculty members who had filed complaints against him, and the chancellor who had issued the reprimands.[86] Subsequently, another faculty member lodged another complaint against Eisenstein. This time, Eisenstein had drafted a personal blog post stating that this (Muslim) professor was "Anti-American" and "the justifier of Islamic hatred and death squads against women, Jews, Gays, Christians, and other infidels."[87] Eisenstein included a link to this blog in the signature line of his official Purdue e-mail account.[88] The chancellor dismissed this complaint against Eisenstein but found that

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77 *Id.* at 489.

78 *Id.*

79 *Id.*

80 *Id.* at 490.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 491.

88 *Id.*

the blog post failed to meet Purdue's civility standards and required Eisenstein to remove the link to the blog from his official university e-mail.[89]

Eisenstein amended his complaint, advancing theories of emotional distress, deprivation of constitutional and civil rights, and defamation, among others.[90] As had occurred in *Hartman*, the defendants in *Eisenstein* moved for summary judgment, the trial court denied the motion but certified the order, and an interlocutory appeal was made.[91]

The court of appeals first addressed Eisenstein's constitutional claims brought under section 1983.[92] After eliminating the claims against the Board of Trustees of Purdue University and the claims for damages against the Purdue officials in their official capacities,[93] the court stated that Eisenstein had failed to allege any continuing constitutional violation that would allow him to maintain an official capacity claim against the individual Purdue officials for any prospective injunctive relief.[94] This left only Eisenstein's individual capacity claims.

Against these claims, the defendants argued that they were entitled to absolute immunity for claims arising from their involvement in a quasi-judicial proceeding.[95] The court closely examined *Hartman*, reiterating that "[a]lthough Purdue's procedure may lack the trappings of a traditional court proceeding, it is orderly and reasonably fair, requires 'appropriate discipline' for those who file knowingly false or malicious complaints, and promises reasonable efforts to restore the reputation of anyone charged with discrimination or harassment that proves unsubstantiated."[96] "Even though the defendants in *Hartman* were students rather than faculty, the same propositions apply here [and] the professors that filed complaints against Eisenstein[ ] are entitled to absolute immunity."[97]

The court of appeals advanced this doctrine one step further by affording absolute immunity to the chancellor in his role as adjudicator:

> It is well-settled that judges are entitled to absolute judicial immunity for all actions taken in the judge's judicial capacity, unless those actions are taken in the complete absence of any jurisdiction. The underlying purpose of the immunity is to preserve judicial independence in the decision-making process. The same

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89 *Id.* (He did not, however, ask Eisenstein to "change the content of his blog or stop posting about Purdue University or its faculty.").

90 *Id.*

91 *Id.*

92 42 U.S.C. § 1983.

93 *Eisenstein*, 87 N.E.3d at 493–94 (holding that the Eleventh Amendment bars these claims).

94 *Id.* at 494–95.

95 *Id.* at 495.

96 *Id.* at 496 (quoting Hartman v. Keri, 883 N.E.2d 774, 778–79 (Ind. 2008)).

97 *Id.* at 497.

> policies that underlie the grant of absolute judicial immunity to judges justify the grant of immunity to non-judicial officers who perform quasi-judicial functions. [The Chancellor] was acting in a quasi-judicial role and is also entitled to absolute immunity.[98]

Eisenstein petitioned for transfer, arguing that the court of appeals had "mistakenly conflated" absolute privilege as seen in *Hartman* with absolute immunity[99] from section 1983 claims "unrelated to defamatory statements."[100] In response, the defendants stated that "the law is well settled that officials acting in a judicial or quasi-judicial capacity have absolute immunity from claims under [section] 1983 and [section] 1985(3). . . . Following *Hartman*, the Indiana Court of Appeals found that the Purdue Policy and Procedures are quasi-judicial."[101] Because the antiharassment proceeding was quasi-judicial in nature, "the defendants were protected by absolute immunity from claims under [section] 1983 and [section] 1985(3) and absolute privilege from claims of defamation."[102] The Indiana Supreme Court denied transfer, with all justices concurring.[103]

V. Potential Use—Student Misconduct Complainants, Witnesses, Investigators, and Adjudicators

Hartman applied absolute privilege in the context of student complaints against faculty. *Eisenstein* extended this privilege to faculty complainants and applied absolute immunity to claims against the adjudicator in a faculty misconduct proceeding. These protections were available to the individual defendants because the disciplinary proceedings at issue were found to be quasi-judicial. However, the analysis and application of the absolute immunity doctrine found in the *Eisenstein* opinion has not been meaningfully expanded since its issuance. The same reasoning that supported absolute immunity for the chancellor in *Eisenstein* may likewise provide

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[98] *Id.* (quoting in part Droscha v. Shepherd, 931 N.E.2d 882, 888–89 (Ind. Ct. App. 2010); and citing Gressley v. Deutsch, 890 F. Supp. 1474, 1491 (D. Wyo. 1994); and Tobin for Governor v. Illinois State Bd. of Elections, 268 F.3d 517, 522 (7th Cir. 2001)).

[99] In affording absolute immunity to the chancellor, the court in *Eisenstein* relied in part on the finding under state law that the disciplinary proceeding was quasi-judicial. It is worthwhile to note that the federal approach is somewhat different. The U.S. Supreme Court has identified a nonexhaustive list of factors to consider in addressing whether an official's action is quasi-judicial so as to merit absolute immunity. *See* Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing Butz v. Economou, 438 U.S. 478, 512 (1978)); *see also* Churchill v. University of Colo. at Boulder, 285 P.3d 986 (Colo. 2012) (applying *Butz* factors to find that university officials were protected by absolute immunity in a faculty discipline case similar to *Eisenstein*). While this article focuses on the state law test, the detailed analysis in *Churchill* suggests that the chancellor would likewise be entitled to absolute immunity under the federal test.

[100] Petition to Transfer at 13 (available on mycase.IN.gov).

[101] Response to Petition to Transfer at 14 (available on mycase.IN.gov).

[102] *Id.* at 15.

[103] 96 N.E.3d 576 (2018).

absolute immunity for the individual participants in student disciplinary proceedings.

The importance of considering this question is evidenced by the rise in litigation surrounding discipline for student sexual misconduct that implicates Title IX,[104] with students alleging that the disciplinary process or outcome is biased by gender. It is not unusual for university students alleging that their schools wrongfully disciplined them to also bring claims against the investigators and adjudicators who were involved in the proceedings, regardless of the rule or policy the student was found to have violated.[105] Since the Department of Education's Office of Civil Rights issued its (now rescinded) 2011 Dear Colleague Letter,[106] "over 200 students have filed lawsuits against colleges and universities alleging their school disciplined them for sexual misconduct without providing due process protections."[107] Title IX plaintiffs alleging that the outcome of a disciplinary proceeding was biased and erroneous have frequently asserted section 1983 claims against the individual investigators and adjudicators.[108] Some individual defendants have successfully challenged individual capacity claims on the basis of qualified immunity.[109] Provided that student disciplinary proceedings—in the sexual misconduct context or otherwise—are similar to the proceedings seen in *Hartman* and *Eisenstein*, absolute immunity may be available as an additional defense.[110]

Due process in school disciplinary proceedings "requires not an elaborate hearing before a neutral party, but simply an informal give-and-take between student and disciplinarian which gives the student an opportunity to explain his version of the facts."[111] This applies equally in the context of

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104 Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, prohibiting discrimination on the basis of sex in federally funded education programs or activities.

105 *See*, *e.g.*, Medlock v. Trustees of Ind. Univ., 738 F.3d 867 (7th Cir. 2013) (student suspended for possession of marijuana brought claims against the university as well as the dean of students, the university provost, and the two student inspectors who searched his room); Hess v. Board of Trs. of S. Ill. Univ., 839 F.3d 668 (7th Cir. 2016) (student expelled for his involvement in a bar fight brought claims against the university, the school's director of student rights and responsibilities, the acting dean of students, and the chancellor).

106 The 2011 Dear Colleague Letter provided guidance aimed at assisting schools in meeting their obligations and remains available as an archived document. However, in September 2017, the Department of Education rescinded both the 2011 Dear Colleague Letter and the set of Questions and Answers on Title IX Sexual Violence, dated April 29, 2014. *See* https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct.

107 83 Fed. Reg. 61462, 61465 (Nov. 29, 2018) (footnote omitted).

108 *See*, *e.g.*, Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019); Marshall v. Indiana Univ., 170 F. Supp. 3d 1201 (S.D. Ind. 2016); Doe v. Miami Univ., 882 F.3d 579 (6th Cir. 2018).

109 *See* Doe v. Purdue Univ., 928 F.3d at 665–66.

110 Notably, Title IX plaintiffs do *not* name the other party (*i.e.*, their accuser) or the witnesses in these discipline cases. *See*, *e.g.*, cases cited *supra*. This is perhaps an acknowledgment that any statements made by these participants would be covered by absolute privilege.

111 Lake Cent. Sch. Corp. v. Scartozzi, 759 N.E.2d 1185, 1190 (Ind. Ct. App. 2001) (quoting Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996)).

sexual misconduct cases, as there is nothing in controlling Indiana or federal law commanding a process in sexual misconduct disciplinary proceedings in addition to or different from the processes in other proceedings. While other courts have held that a student facing expulsion has a right to cross-examination,[112] there is no warrant for such a claim in Indiana. And, while the department of education has advanced proposed Title IX regulations that would require some form of cross-examination in sexual misconduct cases,[113] the Seventh Circuit has opted not to address this issue.[114]

In *Lake Central School Corp. v. Scartozzi*, the Indiana Court of Appeals addressed whether a secondary school student facing expulsion is entitled to representation by counsel.[115] The court examined the Seventh Circuit's opinion in *Osteen v. Henley*,[116] wherein Judge Posner "determined that the federal constitution does not confer a right to counsel upon [a student] in this situation and added that [the Seventh Circuit] doubt[s] that the federal constitution confers a right to counsel upon a student in any student disciplinary proceeding. This is true even though [the student] was charged criminally as a result of [the] incident [leading to his expulsion]. The [Seventh Circuit] concluded that [the student] had no greater right than to *consult* counsel and that he was not denied this right."[117] "By recognizing such a right of students to have a lawyer present who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer would force student disciplinary proceedings into the mold of adversary litigation with its formal rules and procedures. However, when a student appears without counsel, as [the plaintiff] did here, the student, administrators and other participants of the expulsion meeting can concentrate on the student and the issues at hand without the focus being shifted to the attorneys and their legal maneuverings."[118]

The court in *Hartman* held that an absolute privilege defeated the plaintiff faculty member's state law claims of defamation because the anti-harassment proceedings were found to be quasi-judicial.[119] Likewise, the court in *Eisenstein* held that absolute privilege applied as in *Hartman* and that the finding that the proceedings were quasi-judicial gave rise to an absolute immunity from claims of violations of the federal constitution.[120] A

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112 *See*, *e.g.*, Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018).

113 83 Fed. Reg. at 61474–76.

114 Doe v. Purdue Univ., 928 F.3d at 664 n.4.

115 *Scartozzi*, 759 N.E.2d at 1187.

116 13 F.3d 221 (7th Cir. 1993).

117 *Scartozzi*, 759 N.E.2d at 1188 (citing *Osteen*, 13 F.3d at 226).

118 *Id.* at 1190 (citing in part *Osteen*, 13 F.3d at 225).

119 Hartman v. Keri, 883 N.E.2d 774, 780 (Ind. 2008) (Rucker, J., concurring) (explaining that absolute privilege could be applied "[o]nly if the proceeding was quasi-judicial[.]").

120 Board of Trs. of Purdue Univ. v. Eisenstein, 87 N.E.3d 481, 497 (Ind. Ct. App. 2017).

defendant seeking absolute immunity or absolute privilege in the context of student discipline cases must therefore argue that the disciplinary proceedings are quasi-judicial in nature. Justice Rucker reiterated that it is "difficult, if not impossible, to define quasi-judicial power and to discriminate between judicial and administrative acts in a way which will be applicable to every case, [and so] it is the nature, quality, and purpose of the act performed, rather than the name or character of the officer or board which performs it, which determines its character as judicial."[121] Applying the *Lincoln* factors as described above in Section I reveals that a university disciplinary proceeding operated in accordance with governing law is likely to be quasi-judicial in nature:

(1) *The presence of parties upon notice*: Due process in school disciplinary proceedings requires "some kind of notice" and "some kind of hearing."[122] Just as the procedures in *Hartman* and *Eisenstein* required notice to the respondent that a complaint had been filed, student disciplinary proceedings typically require that notice of the allegations be given to the accused student.[123]

(2) *The ascertainment of facts*: Student disciplinary proceedings require the university to develop an understanding of what transpired. In the sexual misconduct context, for example, this involves determining the events and circumstances surrounding claims that some form of sexual harassment or sexual assault has occurred.[124]

(3) *The determination of the issues*: Student disciplinary proceedings allow the university to determine whether there has been a violation of one or more university policies. For instance, a proceeding in the sexual misconduct context is designed to determine if it is more likely than not that sexual harassment or sexual assault occurred.[125]

(4) *The rendering of a judgment or final order regarding the parties' rights, duties, or liabilities*: Student disciplinary proceedings result in some final decision, whether it be discipline of the accused[126] or, if

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[121] *Hartman*, 883 N.E.2d at 781 (Rucker, J., concurring) (quoting Lincoln v. Board of Comm'rs, 510 N.E.2d 716, 721 (Ind. Ct. App. 1987)).

[122] Marshall v. Indiana Univ., 170 F. Supp. 3d 1201, 1207 (S.D. Ind. 2016) (citing Goss v. Lopez, 419 U.S. 565, 578 (1975); and Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 (1978)).

[123] *See* Doe v. Purdue Univ., 928 F.3d 652, 663 (7th Cir. 2019) ("John received notice of Jane's allegations and denied them[.]").

[124] *See id.* at 658 (summarizing factual findings against John Doe).

[125] *See* Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999); Doe v. Galster, 768 F.3d 611 (7th Cir. 2014).

[126] *See*, *e.g.*, *Doe v. Purdue Univ.*, 928 F.3d at 658 (suspension).

> the allegations are found to be false or malicious, of the accuser.[127] In addition, students found to have violated university policies are usually afforded the right to an appeal the determination and resulting discipline.[128]

As with the proceedings in *Hartman* and *Eisenstein*, although a student disciplinary proceeding "may lack the trappings of a traditional court proceeding, it is orderly and reasonably fair [and] requires 'appropriate discipline' for those who file knowingly false or malicious complaints[.]" The arguments and policy considerations underlying the finding that the *Eisenstein* proceedings were quasi-judicial and that the individual participants were therefore absolutely immune from section 1983 and section 1985(3) claims support the conclusion that university investigators and adjudicators taking part in student disciplinary proceedings should likewise be able to claim absolute immunity and absolute privilege against claims brought by the respondent in the proceeding.

127 *See*, *e.g.*, Doe v. Purdue Univ., No. 4:18-CV-89-JEM, 2019 WL 1369348, at *1 (N.D. Ind. Mar. 25, 2019) (expulsions reduced to two-year suspension).

128 *Compare Doe v. Purdue Univ.*, 928 F.3d at 658 (John Doe exercised his right to appeal the decision to Purdue's vice-president of ethics and compliance), *with* Hartman v. Keri, 883 N.E.2d 774, 775 (Ind. 2008) ("The parties are given an opportunity to appeal the investigator's determination to the President of Purdue.").