

Double Jeopardy at the University of California

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Most Americans understand that individuals who have been subject to an authorized disciplinary procedure and have accepted their prescribed punishment shouldn't be investigated and punished a second time for the same offense. This elementary feature of fairness and due process seems to have escaped University of California President Janet Napolitano in her treatment of UC Berkeley law professor Sujit Choudhry, who was, until he resigned last month, also dean of the law school.

In July 2015, Claude Steele, UC-Berkeley's executive vice chancellor and provost, wrote to then-Dean Choudhry concerning the results of an investigation completed by the university's Office for the Prevention of Harassment and Discrimination. OPHD found that from July 2014 to March 2015, Choudhry behaved inappropriately toward Tyann Sorrell, an executive assistant in the department. His misconduct, the investigation determined, "included repeated hugging, kissing on the cheek, and touching on shoulders and arms, was unwelcome and violated the UC Policy on Sexual Harassment and Sexual Violence."

Steele cut Choudhry's salary approximately 10 percent for one year; ordered him to undertake, at his own expense, professional coaching on "maintaining appropriate standards of behavior in the workplace"; and apologize in writing to Ms. Sorrell.

Choudhry's version of events as set forth in the OPHD report differed in important respects from that of the complainant: While he claimed the unwelcome touching occurred "no more than once or twice a week" and had no sexual component, Sorrell insisted that "the hugging and kissing on her cheek" had "quickly escalated into a daily event, occurring five to six times a day" and constituted sexual harassment. The investigation included two witnesses; neither corroborated the complainant's contention about the kind of touching or its frequency.

Nevertheless, Choudhry, who in a distinguished career at the University of Toronto and New York University was never confronted by allegations of sexual harassment, complied with the terms of the provost-imposed punishment while continuing to serve as dean. He had every reason to believe that insofar as Berkeley was concerned, the case was closed.

On Tuesday, March 8, however, Sorrell, filed a lawsuit in Alameda County Superior Court against Choudhry and the university.

Sorrell's suit greatly upped the ante. She alleged that Choudhry deliberately sexually harassed her—and that UC-Berkeley failed to take reasonable steps to prevent his sexual harassment, mishandled her complaint, and retaliated against her. The legal complaint alleges that the conduct of both Choudhry and the university “was intentional, outrageous, malicious, and committed for the purpose of causing Plaintiff to suffer humiliation, mental anguish, and severe physical and emotional distress.”

The lawsuit triggered a series of dramatic events inside the university that were closely reported in the campus newspaper and local press, and covered by major national news outlets.

On March 9, the university put Choudhry on indefinite leave of absence.

On March 10, Choudhry resigned as dean.

On March 11, UC President Napolitano sent a letter to UC Chancellor Nicholas Dirks asking him to ban Choudhry from campus for the rest of the semester and to initiate a new disciplinary procedure that could strip his tenure at the law school and terminate his employment at Berkeley.

There is little doubt why Napolitano has taken this extraordinary step: She is under fire for failing to protect women on campus from sexual harassment. Several high-profile cases of sexual misconduct have rocked her administration. Currently, Berkeley is handling 17 other sexual harassment investigations.

That, however, cannot justify exposing Choudhry to double jeopardy. UC Berkeley has brought no new facts to light about his conduct. Nor has it suggested that its disciplinary procedure departed from university rules and regulations.

Choudhry's case is by no means the first one on an elite campus to be closed and then, in the wake of unwelcome publicity, suddenly reopened. In 2013, following a two-month investigation, Swarthmore College (my alma mater) declined to take action against a male student accused of sexual misconduct. Shortly thereafter, two female students who were unconnected to his case filed a Title IX complaint charging the college with failing to properly investigate and prosecute accusations of sexual misconduct. Swarthmore promptly proceeded to put the male student on trial again. The second time around, the college swiftly found him guilty and expelled him.

In the spring of 2014, under the pseudonym John Doe, the male student sued Swarthmore in federal court for failing to follow its own procedures and for denying him due process. In December of that year, Doe and Swarthmore reached a settlement in which the college vacated its findings of sexual misconduct because of doubts about the impartiality of its procedures.

Unfortunately, UC President Napolitano and the Swarthmore College administration are not outliers. University officials and professors may or may not need additional training to prevent sexual harassment. They certainly require remedial education in the most basic elements of due process and liberty under law.

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