

Berkeley Betrays Due Process Again

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Berkeley has again betrayed the principles of due process in the case of Sujit Choudhry, a professor of law at the University of California’s flagship campus.

In the summer of 2015, Choudhry, then dean of the law school, agreed to a settlement proposed by Berkeley concerning allegations that he had violated university policy on sexual harassment. In March of this year, Berkeley suddenly opened a second investigation on the same conduct. In an April 22 grievance letter, Choudhry asked the appropriate faculty body, the Committee on Privilege and Tenure, to convene a hearing to consider his claim that the second disciplinary process was illegitimate, inflicted substantial harm on him and his professional pursuits, and should be immediately terminated. On May 31, the committee denied his request.

In a supplemental grievance he filed earlier this summer, Choudhry stated, “The very act of instituting a second investigation/process, a year after the prior process and a final settlement violates my rights to fair and equitable treatment.” The rights he invoked are well-grounded in Berkeley’s Faculty Code of Conduct, which provides professors “the right to be judged by one’s colleagues, in accordance with fair procedures and due process, in matters of promotion, tenure, and discipline, solely on the basis of the faculty member’s professional qualifications and professional conduct.”

On August 23, Vern Paxson, a professor of electrical engineering and computer science and chair of Berkeley’s Committee on Privilege and Tenure, wrote to Choudhry telling him that the committee rejected his appeal of its May 31 denial of his request for a grievance hearing.

To understand the absurdity and injustice of Paxson’s reasoning, it is necessary to see the larger, surreal picture.

The second disciplinary process was initiated by UC President Janet Napolitano in mid-March, implemented by Berkeley Chancellor Nicholas Dirks (who, in mid-August, under fire for alleged mishandling of faculty sexual harassment cases, announced his resignation, but will stay in his post until a successor is found), and advised by Berkeley's chief campus counsel Christopher M. Patti and the law firm of Gordon & Rees.

The case's origins lie in a March 2015 email to then-Dean Choudhry from his Executive Assistant, Tyann Sorrell, in which she complained of his kissing and hugging. She also wrote, "I know you don't mean anything by it, other than, perhaps, a warm and friendly greeting." Nonetheless, Sorrell filed a formal complaint with the university. After an investigation, Berkeley's Office for the Prevention of Harassment and Discrimination (OPHD) found a violation of campus sexual harassment policy.

Choudhry had the right to challenge OPHD's findings, which contained dubious inferences based on ambiguous and contradictory evidence. Waiving the right, he accepted a settlement proposed in a July 30, 2015, letter from then-Executive Vice Chancellor and Provost Claude M. Steele. The settlement involved a 10 percent reduction of salary for one year, 6-12 months of professional coaching on workplace conduct at Choudhry's own expense, and a written apology to Sorrell. Steele's letter described these sanctions as "warranted and appropriate for this situation."

Choudhry reasonably believed that accepting the settlement and complying with its terms—which he did in full—closed the case.

But amid controversy raging nationally over other sexual misconduct cases, Sorrell chose to seek additional redress in another venue. On March 8, she filed a civil lawsuit against both Choudhry and Berkeley that alleged that Choudhry acted "maliciously, fraudulently and oppressively, with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice, and in conscious disregard of Plaintiff."

Instead of defending her university's disciplinary process and law school dean, and without access to new evidence, President Napolitano promptly, publicly, and defamatorily accused Choudhry of having "groped" Sorrell, although such predatory conduct was not alleged by Sorrell in her Berkeley complaint nor found in the course of Berkeley's investigation. In a March 11 letter, Napolitano also directed Chancellor Dirks to institute a second round of disciplinary proceedings against Choudhry and to keep him off campus.

Napolitano did not mention the first round of proceedings or Choudhry's complete compliance with the settlement. Apparently presuming Choudhry's guilt, she informed Dirks that, contrary to standard policy, "the University does not intend to defend or indemnify former Dean Choudhry in the litigation currently pending against him and the University brought by Ms. Sorrell."

Choudhry resigned as dean on March 10 but remained a tenured law professor, a position threatened by the second disciplinary process.

On March 18, Choudhry's counsel, Washington lawyer William Taylor, wrote to Napolitano to demand that Berkeley immediately discontinue the second disciplinary procedure. Since the facts concerning Choudhry's conduct hadn't changed, Taylor asserted, a second investigation could only be explained in terms of "the heightened political climate surrounding campus sexual harassment issues and the media spotlight trained on your office and the administration."

Christopher Patti, Berkeley's chief campus counsel, responded with a far-fetched legalistic justification. Patti maintained in an April 6 letter to Taylor that the University Policy on Faculty Conduct and the Administration of Discipline provides for a second disciplinary process: "Faculty members serving in administrative roles may be subject to disciplinary sanctions under this policy in addition to administrative actions, if the faculty member's misconduct in the role of an administrator also violates the ethical and professional standards for faculty set forth in the Faculty Code of Conduct."

This provision allows for additional *sanctions*; it does not mention a second investigation.

Consistent with bedrock principles of due process, moreover, Berkeley's Faculty Code of Conduct frowns on multiple investigations of the same conduct: "Procedures should be developed which encourage a single formal investigation of the allegations leading to the proposed disciplinary action." The code also states, "a hearing should commence within 90 days of the date on which the accused faculty member has been notified of the intention to initiate a disciplinary proceeding." More than 500 days have passed since Sorrell filed her Berkeley complaint.

Furthermore, even if the original disciplinary process dealt only with Choudhry as an administrator—a reasonable approach since the conduct in question exclusively concerned his administrative role—Berkeley gave Choudhry every indication that accepting the university's settlement resolved the case. Berkeley certainly provided no notice that it might impose a second disciplinary process relating to him as a faculty member.

In determining whether Choudhry is entitled to a hearing on his contention that the second disciplinary process is illegitimate and is causing him serious harm, the Committee on Privilege and Tenure is obliged, by Academic Senate Bylaws, to decide whether he "has made out a *prima facie* case." That means it must accept as true Choudhry's allegations and then determine whether they constitute a violation of his "rights and privileges" as a faculty member. Assuming as true Choudhry's assertion that the summer 2015 settlement was a final and complete resolution of Sorrell's complaint, Berkeley's reopening of the case constitutes a

violation—with grave consequences for his professional life—of Choudhry’s Berkeley-conferred right to “fair procedures and due process.” Choudhry is therefore entitled to a hearing on the merits.

To deny Choudhry that hearing, committee chair Paxson responded in his August 23 letter with a subterfuge. “The committee provisionally accepted, in accordance with conducting a *prima facie* assessment, that you had a strong *belief* that the matter had been fully concluded given the resolution of the administrative discipline” (italics in original), wrote Paxson, “however, such a belief does not confer a fundamental right not to be subjected to the second investigation.”

No, the belief doesn’t. But that’s not pertinent. In conducting a *prima facie* assessment, the Berkeley Committee on Privilege and Tenure is not instructed by the university’s Academic Senate Bylaws to recognize the intensity of a grievant’s *belief* about his allegations, but rather to accept *the allegations themselves* as true.

Berkeley’s repeated betrayal of due process has potentially far-reaching ramifications. An institution of higher education that is indifferent to or disdainful of its own rules and regulations and the principles that organize free societies cannot be trusted to provide a truly liberal education, whose leading aim is to prepare students to exercise liberty responsibly under law.

Instead of respecting its published promises of due process, Berkeley has opted, in the case of Sujit Choudhry, to obfuscate, delay, and deceive. It is hard to imagine a reasonable person outside of the university world who would find Berkeley’s conduct toward Choudhry morally defensible. Those committed to the rule of law should hope that if asked to adjudicate the case, state or federal courts will find Berkeley’s conduct actionable.