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## SEXUAL HARASSMENT ON CAMPUS: DOES THE ACCUSED HAVE ANY RIGHTS?

Richard C. Cahn\*

### INTRODUCTION

Twenty-five years ago, the term "sexual harassment" was apparently unknown, and sexual harassment was not generally recognized by the courts as an actionable form of sex discrimination.<sup>1</sup> Sexual harassment emerged as a topic of public concern during newsworthy events such as the Clarence Thomas/Anita Hill hearings<sup>2</sup> and as a result of the Tailhook incident.<sup>3</sup>

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1. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 991 (D.C. Cir. 1977) (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971)); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); see also Stanley S. Arkin, *Potential Criminal Sanctions for Sexual Harassment*, N.Y. L.J., Oct. 13, 1994, at 3 (citing Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 HARV. WOMEN'S L.J. 17, 18 (1994)). By 1986, the United States Supreme Court, in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986), held that sexual harassment constitutes gender discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (West 1995).

2. See Arkin, *supra* note 1, at 3; see also Emma Coleman Jordan, *Race, Gender and Social Class in the Thomas Sexual Harassment Hearings: The Hidden Fault Lines in Political Discourse*, 15 HARV. WOMEN'S L.J. 1 (1992).

3. See CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE* v (2d ed. 1994); Arkin, *supra* note 1, at 3; Lieutenant Commander J. Richard Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993).

Articles have abounded about the seriousness of sexual harassment and have even explored the possibility of criminal sanctions for harassers.<sup>4</sup> Precisely because the subject is so emotionally charged, writers have exhibited concern about the rights and reputations of those accused of sexual harassment.<sup>5</sup> An article in *The New York Law Journal* explained:

[E]ven groundless allegations of sexual harassment, like those of rape, can irreversibly damage reputations, ruin careers, or be misused to obtain unduly large financial settlements from those entities that wish to avoid negative publicity. Indeed, while sexual harassment laws can function in some cases as a shield against hideous acts, these laws can also be used as a means of extortion. Combining this already substantial force with the stigma and significant penalties attached to criminal sanction

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4. See Arkin, *supra* note 1, at 7 (stating that "[s]ome jurisdictions have already criminalized certain forms of sexual harassment" but noting that there is a potential First Amendment problem with such criminal sanctions); Chema, *supra* note 3, at 52 (stating that a particular military statute "is an excellent substantive device for enforcing criminal sanctions for conduct in the nature of hostile environment sexual harassment"); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 213-14 (1994) ("France and Spain have imposed criminal sanctions of up to one year in prison for workplace harassment."). But see Monica L. Sherer, Comment, *Symposium: Comment: No Longer Just Child's Play: School Liability Under Title IX For Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2142 (1993) ("Although criminal sanctions have the advantage of the state paying for the prosecution, they may not be suitable for sexual harassment cases."); Russell W. Whittenburg, Comment, *Sexual Harassment: A Jurisprudential Analysis*, 10 CAP. U. L. REV. 607, 613-17 (1981) (stating that criminal sanctions would not likely be effective against sexual harassment because society may view them as attempts to legislate morality).

5. See, e.g., Kathleen Murray, *A Backlash on Harassment Cases*, N.Y. TIMES, Sept. 15, 1990, at 23.

[T]here's a very discernible effort on the part of men who are feeling arbitrarily treated or wrongly accused to bring litigation to clear their name . . . [which] is not surprising . . . given the stigma of the accusation . . . . The assumption with sexual harassment today seems to be that a man is guilty if he has been accused.

*Id.*

could have a synergetic effect, leaving many targets of accusations virtually defenseless.<sup>6</sup>

The Supreme Court's decision in *Harris v. Forklift Systems, Inc.*,<sup>7</sup> refined the statutory definition of gender discrimination by clarifying the circumstances under which an employer may be liable for sexual harassment of an employee.<sup>8</sup> In *Harris*, the United States Supreme Court stated that unlawful employment discrimination "is not limited to economic or tangible discrimination."<sup>9</sup>

In recent years, students and faculty members have perceived sexual harassment to be a significant problem on university campuses. Many institutions of higher education accept federal financial assistance under Title IX of the Educational Amendments of 1972.<sup>10</sup> The United States Department of Education adopted regulations requiring that recipients of federal assistance adopt regulations providing for a "prompt and equitable" resolution of gender discrimination claims.<sup>11</sup> Typically, colleges and universities publish and distribute student handbooks; the policies relating to sexual harassment claims and the procedures for hearing such claims have been added to such handbooks. A focus of such policies has been to announce clearly

6. Arkin, *supra* note 1, at 3.

7. 114 S. Ct. 367 (1993).

8. *Id.* at 371.

9. *Id.* at 370 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)). "The phrase, 'terms, conditions or privileges of employment' [as used in the statute] evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in employment,' which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* (quoting *Vinson*, 477 U.S. at 64).

10. 20 U.S.C. § § 1681, 1687 (1988). Section 1687 provides in pertinent part: "[N]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program" of the college or university receiving such assistance. *Id.*

11. 34 C.F.R. § 106.8(b) (1994). This regulation provides: "Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." *Id.*

that the university will not tolerate gender discrimination. Often, policies and procedures are written in general terms, and sexual harassment claims have been resolved by the application of *ad hoc* procedures.<sup>12</sup> A view is emerging that such procedures are unfair to those accused of sexual harassment.

In an excessive effort to purge the university of sexual corruption, many institutions have violated the rights of the professors involved by neglecting to follow standard procedures. Since sexual harassment is a relatively recent priority, "standard procedures" are themselves new, shrouded, and shaky. Charges of sexual harassment are uncharted territory, and fairness is not necessarily the compass . . . . In *The Lecherous Professor*,<sup>13</sup> authors Billie Wright Dziech and Linda Weiner explain why feminists are not concerned with due process . . . . For Dziech and Weiner, academic freedom and due process are simply more platitudes generated by the old-boy network. They dismiss any concern about fairness with their image of the ranks of male professionals united against the slim victim. To many feminists, like Dziech and Weiner, who are interested in cleansing the university of harassers, a few casualties of justice along the way seem like a small price to pay.<sup>14</sup>

A small number of cases have now reached the state and federal courts, challenging the procedures and results reached in campus sexual harassment proceedings.<sup>15</sup> The courts thus far have been quite critical of the procedures employed.

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12. Black's Law Dictionary defines *ad hoc* as "for this special purpose. An attorney *ad hoc* . . . is one appointed for a special purpose, generally to represent the client . . . in the particular action in which the appointment is made." BLACK'S LAW DICTIONARY 38 (5th ed. 1979).

13. BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR* (2d ed. 1990).

14. *Id.* at 49. See Katie Roiphe, *The Morning After: Sex, Fear and Feminism on Campus* 95-97 (Little, Brown & Co. 1993).

15. See *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir. 1994); *Silva v. University of N.H.*, No. CIV. 93-533-SD, 1994 WL 504417 (D.N.H. Sept. 15, 1994); *Starishevsky v. Hofstra Univ.*, 161 Misc. 2d 137, 612 N.Y.S.2d 794 (Sup. Ct. Suffolk County 1994). These cases give preliminary indications that the courts are treating charges of campus sexual harassment as sufficiently threatening to an accused's position and reputation as to warrant meaningful procedural protections.

Both *Starishevsky v. Hofstra University*<sup>16</sup> and *Silva v. University of New Hampshire*<sup>17</sup> concerned university employees. Starishevsky was a psychologist who was the director of student counseling services at Hofstra University, a private institution;<sup>18</sup> Silva was a tenured professor employed by the University of New Hampshire, a state-owned and operated institution of higher education.<sup>19</sup> *Yusuf v. Vassar College*<sup>20</sup> concerned a charge of sexual harassment leveled against a student at Vassar College, which, like Hofstra, is a private institution.<sup>21</sup> In both *Starishevsky* and *Silva*, the New York Supreme Court, Suffolk County, and the United States District Court for the District of New Hampshire held that the accused employee was entitled to procedural due process protection.<sup>22</sup> In *Yusuf*, the Second Circuit sustained that portion of the student's complaint that alleged equal protection violations.<sup>23</sup> This article will detail these three cases and conclude that specific procedures should be afforded to the accused sexual harasser. Additionally, this article will discuss a fourth case now pending in an Illinois county court.

## I. STARISHEVSKY V. HOFSTRA UNIVERSITY

In *Starishevsky*, plaintiff, a psychologist employed for twenty-eight years by the defendant university, saw an undergraduate

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The courts have also begun to examine more closely the procedures leading to dismissal on sexual harassment charges of public employees in the non-academic sector. *See, e.g.*, *Hameli v. Nazario*, 94-199, slip op. (D. Del. Sept. 2, 1994) (setting aside the termination of a medical examiner employed by the state after charges of sexual harassment were lodged against him by a state employee employed in his office and holding that the accused was entitled to some measure of due process protections).

16. 161 Misc. 2d 137, 612 N.Y.S.2d 794 (Sup. Ct. Suffolk County 1994).

17. No. CIV. 93-533-SD, 1994 WL 504417 (D.N.H. Sept. 15, 1994).

18. *Starishevsky*, 161 Misc. 2d at 139, 612 N.Y.S.2d at 796.

19. *Silva*, 1994 WL 504417, at \*1.

20. 35 F.3d 709 (2d Cir. 1994).

21. *Id.* at 711.

22. *Silva*, 1994 WL 504417, at \*25; *Starishevsky*, 161 Misc. 2d at 138-39, 612 N.Y.S.2d at 796.

23. *Yusuf*, 35 F.3d at 715-16.

woman for a forty-five minute counseling session.<sup>24</sup> Six weeks thereafter, she sent a letter to the defendant's affirmative action officer claiming that plaintiff had kissed her on the lips at the close of the counseling session.<sup>25</sup> When asked to file a response, the plaintiff denied the charge in all respects.<sup>26</sup>

The defendant had promulgated a sexual harassment policy four years earlier that was embodied in a pamphlet distributed on campus.<sup>27</sup> The policy provided that sexual harassment claims would be screened by the affirmative action officer, and if "just cause" was found to proceed, a hearing would be conducted by a special committee composed of certain designated members of the university community.<sup>28</sup> However, in light of the affirmative action officer's finding that there was no evidence of sexual harassment, no hearing panel was then convened.<sup>29</sup>

Six months later, a former university administrator who had been one of plaintiff's colleagues, wrote to the university lawyer claiming that she, too, had been kissed four years earlier by the plaintiff.<sup>30</sup> Her letter was "leaked" to a prominent daily newspaper that subsequently published its contents.<sup>31</sup> She had not made a formal complaint at the time of the alleged incident, although the sexual harassment policy had already been promulgated.<sup>32</sup>

The defendant university reopened the proceedings against plaintiff, publicly announced that it had found "just cause" to proceed with a hearing, and announced that it had convened a special panel for the purpose of hearing evidence on the current charge.<sup>33</sup> However, it was learned during the post-termination litigation that the university's president had given the panel

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24. *Starishevsky*, 161 Misc. 2d at 139, 612 N.Y.S.2d at 796.

25. *Id.*

26. *Id.*

27. *Id.* at 140, 612 N.Y.S.2d at 797.

28. *Id.*

29. *Id.* at 139, 612 N.Y.S.2d at 796.

30. *Id.* at 139 n.1, 612 N.Y.S.2d at 796-97 n.1.

31. *Id.* at 139, 612 N.Y.S.2d at 796.

32. *Id.*

33. *Id.* at 139-40, 612 N.Y.S.2d at 797.

members a secret charge to consider plaintiff's entire record at Hofstra and to make a recommendation as to whether he should remain at the university based upon that record.<sup>34</sup>

Even before the committee began its hearings, the university's president circulated to all members of the Hofstra community, including the special panel members, a memorandum detailing the charge against the plaintiff, who was identified by name.<sup>35</sup> Also included in the memorandum was a description of claims then being made public by the former administrator and another female administrator who was still employed by the university.<sup>36</sup> It included claims that plaintiff had kissed two former colleagues four years earlier, claims that had never been the subject of any formal complaint against plaintiff, and that never became a formal part of the charge that was the subject of the committee's hearing.<sup>37</sup>

During the hearing, and over the vigorous objections of plaintiff's counsel, these two women were permitted to testify extensively about the alleged four-year-old incidents.<sup>38</sup> The plaintiff was permitted to appear with his own counsel, as was the student complainant.<sup>39</sup> The student's lawyer was permitted to cross-examine the plaintiff.<sup>40</sup> At the conclusion of the hearing, two panel members, unbeknownst to plaintiff or his counsel, privately interviewed a student psychology intern who had counseled the student complainant, and reported the contents of their interview to the other panel members.<sup>41</sup>

Notwithstanding the broad scope of the evidence heard by the panel, it reported to the university's president that it was unable to reach a finding of sexual harassment.<sup>42</sup> However, consistent

34. *Id.* at 142, 612 N.Y.S.2d at 798.

35. *Id.* at 140-41, 612 N.Y.S.2d at 797-98.

36. *Id.* at 141, 612 N.Y.S.2d at 797.

37. *Id.*

38. *Id.* at 143, 612 N.Y.S.2d at 799.

39. *Id.*

40. *Id.* In a letter to the panel, the student complainant's attorney likened the proceedings to the "mad hatter's tea party."

41. *Id.* at 143, 612 N.Y.S.2d at 799.

42. *Id.* at 144, 612 N.Y.S.2d at 799.



with the president's secret instructions to its members, the panel recommended that plaintiff's employment be terminated on other grounds.<sup>43</sup> The university's president concurred in the finding of no sexual harassment, but fired plaintiff, allegedly for "unprofessional" conduct.<sup>44</sup> Plaintiff brought a special proceeding under article 78 of New York's Civil Practice Law and Rules,<sup>45</sup> seeking reinstatement and ancillary relief.<sup>46</sup>

The Supreme Court, Suffolk County, found that the plaintiff was entitled under Title IX to procedural due process protections, and that the university had failed to provide him "with a hearing that came close to being fair . . . ."<sup>47</sup> The court specifically held:

Under the Federal law and the Federal regulation once an educational institution accepts federal financial assistance, such educational institution must also accept the responsibility to comply with Federal laws and Federal regulations concerning a complaint of sexual discrimination and comport with our society's notion of fair play. This court expressly holds that under the Federal regulation an educational institution must develop, implement and execute a hearing procedure which is substantially fair in nature. The regulations adopted under congressional mandate must be read to require the adoption of a grievance procedure providing for prompt and equitable

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43. *Id.*

44. *Id.* at 144-45, 612 N.Y.S.2d at 800.

45. N.Y. CIV. PRAC. L. & R. § 7803 (McKinney 1994). This statute provides in pertinent part:

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed . . . .

*Id.*

46. *Starishevsky*, 161 Misc. 2d at 139, 147-49, 612 N.Y.S.2d at 796, 801-02.

47. *Id.* at 138, 140, 612 N.Y.S.2d at 796-97.

resolution of any complaint involving sexual discrimination, and can only have intended to require that an educational institution develop and implement a procedure which is fundamentally fair to both the accused and the accuser.<sup>48</sup>

The court expressly found that the federal regulation<sup>49</sup> mandated fairness to the accused.

These regulations clearly require the creation of a process that will provide fairness to both the accuser and the accused. No other result could have been intended by the Congress nor permitted by the Office for Civil Rights in Education, the Agency charged with adopting regulations appropriate to the enforcement of the statute.<sup>50</sup>

48. *Id.* at 145-46, 612 N.Y.S.2d at 800 (citations omitted).

49. 34 C.F.R. § 106.8(b) (1994).

50. *Starishevsky*, 161 Misc. 2d at 140, 612 N.Y.S.2d at 797. In its decision on reargument, the *Starishevsky* court found further support for an interpretation of the Title IX regulations that mandate fairness to both sides in a sexual harassment proceeding. See OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL 8 (1987). "Frequently, allegations of sexual harassment raise sensitive issues that require confidentiality. If the identity of the complainant and/or the respondents and the allegations themselves were made public prior to any determination, serious problems for the individuals involved, as well as the institutions could result." *Id.*

The Office of Civil Rights Manual asserts that grievance procedures should be designed in order to provide equitability and due process to all parties involved in the grievance. *Id.* at 9-12. Additionally, the manual states that:

The Title IX regulation requires that the grievance procedure provide for the equitable resolution of complaints of Title IX violations. The term "due process" has often been used to refer to one standard for the equitability of such procedures. Due process requires simply that all persons involved in a grievance — both the grievant and the respondent (the party alleged to have violated Title IX requirements) — be provided equal opportunity to present their case and to receive a fair hearing. Equitability and due process are increased by such grievance provisions as those which require written recording of grievances and grievance answers, those which require notification of all involved parties with regard to the various actions within the grievance process, those which guarantee the right of representation to all parties and those which guarantee grievants the rights of appeal.

*Id.* at 15.

Finding that Hofstra failed to provide Starishevsky with a hearing that comported with fundamental notions of fairness and due process,<sup>51</sup> the court ordered Starishevsky's reinstatement notwithstanding the fact that he was an "at will" employee,<sup>52</sup> holding that once Hofstra invoked its sexual harassment procedures in an effort to determine whether plaintiff was guilty

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The court found that the grievance procedure manual also imposed a requirement of confidentiality that Hofstra had violated by circulating to the entire campus community a memorandum from the president outlining the charge against plaintiff, and by including the allegations then being made against him by two other women, that were not the subject of the disciplinary proceeding. *Starishevsky*, 161 Misc. 2d at 142, 612 N.Y.S.2d at 798.

51. *Starishevsky*, 161 Misc. 2d at 138, 612 N.Y.S.2d at 796. The court further held that the hearing process was tainted before the first witness appeared before the Panel by the distribution to its members of the memorandum finding "just cause" to charge the plaintiff with sexual harassment. *Id.* at 141, 612 N.Y.S.2d at 798. The court also found that:

It [was] significant (as well as perplexing) that [Hofstra's president] advised the panel members that their inquiry was broader than the single allegation of sexual harassment; that they were being asked to make a recommendation as to Starishevsky's future employment at Hofstra and that such recommendation need not be based solely on whether a finding of sexual harassment was made. This panel understood it was to weigh all facts and circumstances, including Starishevsky's ability to effectively serve Hofstra and his prior employment record in determining what action, if any, should be taken against Starishevsky. Not only is this instruction from [the president] far beyond the scope and purpose on this inquiry into a single incident of sexual harassment, and in direct contravention of the policy guidelines, which limit the panel's recommendations to a situation where sexual harassment has been found to have occurred, this instruction and the true nature, scope and purpose of the inquiry were not made known to Starishevsky.

*Id.* at 142, 612 N.Y.S.2d at 798. According to the court, plaintiff "could not know that he had to be prepared to defend his entire career at Hofstra, and be successful in that defense, to maintain his employment at Hofstra." *Id.*

52. *Id.* at 149-55, 612 N.Y.S.2d at 802-06. The court held that the federal regulation's mandate of a "prompt and equitable" resolution of sexual harassment complaints constituted an express exception to New York's employment-at-will doctrine. *Id.* at 145, 612 N.Y.S.2d at 803. For commentary on this aspect of *Starishevsky*, see Arthur J. Hamilton and Peter A. Veglahn, *Sexual Harassment and Employment-at-Will: The Intersection of Two Policies*, 45 LAB. L.J. 586 (1994).

of sexual harassment, and, if so, what punishment was appropriate, it was bound by those procedures.<sup>53</sup>

The court found that the university's sexual harassment policy statement and its published grievance procedure created an express limitation on what otherwise would have been an absolute right to terminate plaintiff's at-will employment.<sup>54</sup> The court stated:

Unlike the cases in which the courts have held that broad statements of policy guidelines; enumeration of grounds for termination; description of grievance procedure or a general statement regarding equal employment or non-discrimination do not necessarily constitute such an express limitation, in the case at bar the unambiguous language of the sexual harassment policy statement that "[a]n individual found to be guilty of sexual harassment is subject to disciplinary action for violations of this policy, consistent with existing procedures" and the equally unambiguous language of the grievance procedure that "[i]f the committee determines that the University Policy on sexual harassment has been violated it will . . . make a recommendation . . . for corrective disciplinary measures or appropriate sanctions," must be read to expressly limit the University's right to terminate the employment of an individual accused of sexual harassment and who is processed under the sexual harassment grievance procedure, to individuals who are actually found guilty of the allegations of sexual harassment lodged against such individuals.<sup>55</sup>

Looking to what it termed the "attendant circumstances," the court found that the university was bound by its own sexual harassment procedures and stated that "it is clear that both Starishevsky and Hofstra understood that the inquiry was to be in accord with the grievance procedure contained in the sexual harassment guidelines."<sup>56</sup>

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53. *Starishevsky*, 161 Misc. 2d at 151-52, 612 N.Y.S.2d at 804.

54. *Id.* at 150, 612 N.Y.S.2d at 803.

55. *Id.* at 150-51, 612 N.Y.S.2d at 803 (citations omitted).

56. *Id.* at 151, 612 N.Y.S.2d at 804. The court concluded that it was "fairly inferable that upon completion of the inquiry process and a finding that Starishevsky was not guilty of sexual harassment that Starishevsky would be reinstated to his previous position." *Id.*

Similarly, the court concluded that the university could not, consistent with due process, rely upon information developed at the hearing to terminate plaintiff for misconduct that had not been specifically charged and that which he had no opportunity to prepare a defense.

Hofstra cannot under the guise of processing a sexual harassment complaint pursuant to its own grievance procedures, terminate Starishevsky's employment because of a purported finding that his behavior though not amounting to sexual harassment is "unethical, unprofessional, and inappropriate" under the rules of the American Psychological Association. Had Hofstra wished to charge Starishevsky with conduct in violation of the American Psychological Association rules and proceed under that association's rules, procedures and standards, it could have and should have done so. If Hofstra had concerns regarding Starishevsky's credentials, judgment, professionalism and the University's confidence in him, it could have and should have pursued such concerns through the appropriate University procedure.<sup>57</sup>

In summary, the court stated that:

This court cannot permit Hofstra to process . . . [the] complaint under the grievance procedures; have the panel unable to find that plaintiff's conduct amounted to sexual harassment; have [the president] find that [plaintiff was] not guilty of sexual harassment, and then terminate [his] employment on grounds that were not the basis of the inquiry and as to which [plaintiff] had no opportunity to defend. The grievance procedures and the federal regulations upon which they are founded provide for disciplinary measures or appropriate sanction upon a finding of sexual harassment. There being no such finding there can be no termination of employment.<sup>58</sup>

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57. *Id.* at 152, 612 N.Y.S.2d at 804.

58. *Id.* at 151-52, 612 N.Y.S.2d at 804.

## II. SILVA V. UNIVERSITY OF NEW HAMPSHIRE

In *Silva*, the court, although essentially dealing with a professor's First Amendment rights in the classroom, also sustained a complaint alleging procedural due process violations under the Fourteenth Amendment.<sup>59</sup>

In March, 1992, in the course of lecturing to his class in technical writing, plaintiff, a tenured Instructor of Communications at the Thompson School of Applied Science at the University of New Hampshire, used several vivid metaphors. He compared focusing, the thesis statement in a technical report, to sex:

I will put focus in terms of sex . . . . Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.<sup>60</sup>

In the same class two days later, plaintiff "used Little Egypt's definition of belly dancing to illustrate how a good definition combines a general classification . . . with concrete specifics in a metaphor . . . to bring home clearly the meaning to one who wishes to learn this form of ethnic dancing."<sup>61</sup> He specifically said, "[b]elly dancing is like jello on a plate with a vibrator under the plate."<sup>62</sup> His professorial metaphors soon brought about a series of events that the federal court termed "informal" and "formal" sexual harassment complaint procedures.<sup>63</sup>

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59. *Silva v. University of N.H.*, No. CIV. 93-533-SD, 1994 WL 504417, at \*1, \*23 (D.N.H. Sept. 15, 1994). The *Silva* court did not base its decision on Title IX, but rather upon the Civil Rights Act of 1871, 42 U.S.C.A. § 1983 (West 1994) and 42 U.S.C.A. § 1988 (West 1995). *Id.* at \*1. The university defendant established sexual harassment policies relying principally upon Equal Employment Opportunity Commission's Guidelines on Sexual Discrimination that were issued under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e (West 1995) and 29 C.F.R. § 1604.11 (1994). *Id.* at \*1-2.

60. *Id.* at \*3.

61. *Id.*

62. *Id.*

63. *Id.* at \*26.

On the date of the belly dancing statement, six female students complained to Dr. Jerilee Zezula, an associate professor at the Thompson School, about plaintiff's classroom statements.<sup>64</sup>

The university's Associate Vice President for Academic Affairs, Neil Lubow, met with Zezula and the students who had approached her.<sup>65</sup> Describing the students as "very upset," Lubow made a decision on the spot to replace the plaintiff in the classroom. Lubow's notes of the meeting with the students reflected that he discussed "looking into replacement instructor(s) for Silva."<sup>66</sup>

Within the next several days, eight written complaints were submitted by students to the university, variously describing the complainants as "appalled," "degraded," or "demeaned" by Silva's actions; most of these letters complained about Silva's classroom statements.<sup>67</sup>

Lubow summoned plaintiff to a meeting four days after he had met with the student complainants and Zezula, and for the first time confronted plaintiff with the students' complaints.<sup>68</sup> Plaintiff was given no time to formulate a response.<sup>69</sup>

Immediately following this meeting, the university "created 'shadow' classes so that any of plaintiff's students who wanted to transfer out of his classes could do so, and plaintiff was required to make announcements to his students offering them the opportunity to transfer into one of the shadow classes."<sup>70</sup>

Lubow drafted a letter of reprimand, and two weeks later scheduled a second meeting with plaintiff.<sup>71</sup> At the subsequent meeting, he delivered the "draft" reprimand letter, stating that the students' reports "have been found to be altogether credible," and "[Silva's] behavior [was] in violation of University policy prohibiting sexual harassment . . . and [would] not be

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64. *Id.* at \*4.

65. *Id.* at \*6.

66. *Id.*

67. *Id.* at \*5-6.

68. *Id.* at \*7.

69. *Id.*

70. *Id.* (citing memorandum from Giles to Silva).

71. *Id.* at \*8.

tolerated.”<sup>72</sup> The draft imposed conditions for continued employment of the plaintiff, and several weeks later, without change, was converted into a formal letter of reprimand.<sup>73</sup>

Plaintiff protested the reprimand letter by pursuing the university’s grievance procedures, during the pendency of which he was suspended for failing to meet the conditions for continued employment contained in the reprimand.<sup>74</sup>

However, upon plaintiff’s appeal from the initial denial of his grievance, his suspension was put “into abeyance until the grievance process [was] completed.”<sup>75</sup> Nevertheless, Silva was notified that he would not be scheduled to teach any classes for the fall semester of 1992.<sup>76</sup> Thus ended what the court termed the “informal” sexual harassment proceedings.<sup>77</sup>

In November 1992, plaintiff received notice from the director of his school that a formal complaint of sexual harassment had been filed against him, and that “because of the Panel’s responsibilities[,]” he stated that he was “rescinding the formal letter of reprimand and the sanctions set forth therein.”<sup>78</sup> At the ensuing hearing, before a panel established for that purpose, plaintiff was confronted with a number of claims, of which he had no prior notice.<sup>79</sup>

The panel recommended that the university’s president find plaintiff guilty of sexual harassment and impose a one year leave without pay, and that he be required to “[r]eimburse the university for all costs associated with any and all alterations in teaching assignments . . . [to] participate in approved counseling sessions, [and to] [a]pologize in writing to the [students] for creating a hostile and offensive environment.”<sup>80</sup> The president concurred that plaintiff had violated the sexual harassment policy,

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (quoting Silva’s affidavit).

76. *Id.* at \*9.

77. *Id.*

78. *Id.*

79. *Id.* at \*11.

80. *Id.* at \*13.



and imposed all of the recommended sanctions except that the one-year counseling requirement "was altered to require plaintiff to 'obtain a counseling evaluation . . . and, if prescribed, participate in continued counseling sessions.'"<sup>81</sup>

Plaintiff filed an appeal with an appeals panel, which was made up of two students and three faculty members.<sup>82</sup> The hearing lasted for more than twelve hours and was described by the plaintiff as "chaotic."<sup>83</sup> The student members were eating sandwiches, and the student witnesses were allowed to whisper with one another and send signals to one another during their testimony.<sup>84</sup> A remark that plaintiff made to his advisor was misheard by a student complainant, who jumped up and repeated aloud that plaintiff had made an offensive comment; whereupon three other students jumped up and said that that was what they had also heard.<sup>85</sup> This caused a "total disruption."<sup>86</sup> Shortly thereafter, a student stood up in the middle of the hearing while a fellow student was testifying, walked out of the room and collapsed.<sup>87</sup> Plaintiff described what ensued by stating, "I'll never forget the looks of the people on the panel. Because they looked at her and then they looked at me as if I had caused, you know, this effect."<sup>88</sup> The appeals board sustained the guilty finding and the sanctions imposed by the president.<sup>89</sup>

The court, finding that plaintiff's classroom speech was constitutionally protected and that the speech was a motivating factor in the decision to discipline him, found that plaintiff was likely to succeed upon his claim that his First Amendment rights were violated.<sup>90</sup> Accordingly, plaintiff was granted a preliminary

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81. *Id.* (quoting letter from Nitzschke to Silva).

82. *Id.* at \*14.

83. *Id.* (citing Silva's affidavit).

84. *Id.*

85. *Id.* at \*15.

86. *Id.*

87. *Id.*

88. *Id.* (citing Silva's deposition).

89. *Id.* at \*17. See *supra* text accompanying note 80.

90. *Silva*, 1994 WL 504417, at \*23.

injunction reinstating him to his position.<sup>91</sup> In addition to his First Amendment claim, plaintiff was held to have a property interest in his continued employment, of which he had been deprived as a result of the sexual harassment charges.<sup>92</sup> The court therefore refused to dismiss plaintiff's claim that he was deprived of procedural due process in the conduct of the formal sexual harassment process.<sup>93</sup> The court ruled that "a genuine

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91. *Id.* at \*41. The court held, aside from the irreparable harm arising from the First Amendment violations, that "the University's suspension of Silva without pay, which remains in effect, constitutes an independent basis for finding that Silva has been and continues to be irreparably harmed in this case." *Id.* at \*34.

92. *Id.* at \*24 (citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)). The court also stated that "[a] person's liberty interests are implicated where the person's 'good name, reputation, honor, or integrity is at stake because of what the government is doing to him.'" *Id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). See *Winegar v. Des Moines Indep. Community Sch. Dist.*, 20 F.3d 895, 899 (8th Cir. 1994) ("An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges."). The court in *Silva* continued by stating that:

Plaintiff was charged with violating the University's sexual harassment policy. The court finds and rules that such a charge implicates plaintiff's liberty interests in his good name and reputation because the charge of sexual harassment and the subsequent sanctions imposed by defendants "might seriously damage his standing and associations in his community."

*Silva*, 1994 WL 504417, at \*24 (quoting *Roth*, 408 U.S. at 573). Additionally:

The court finds and rules that Silva's April 1993 suspension without pay from his position as a tenured professor, which remains in effect today, implicates property and liberty interests entitled to constitutional protection. The court further finds and rules that the earlier disciplinary sanctions, as described above, are, in the aggregate, a more than de minimis deprivation of plaintiff's property and liberty interests in his employment as a tenured professor at [the university].

*Id.* Finally, "[t]he court finds and rules that Silva was entitled to the protections of procedural due process before the defendant University significantly altered his employment status in the manner described herein." *Id.* at \*25.

93. *Id.* at \*25. The court relied upon United States Supreme Court authority in analyzing the procedural due process requirements. *Id.* See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("[Due process requires that] a deprivation of life, liberty, or property 'be preceded by

issue of material fact exist[ed] as to whether Silva received adequate notice [during the formal sexual harassment proceedings] that incidents not mentioned in the student complaints and incidents upon which no evidence was presented at the hearings would be considered by the hearing panel and appeals board.”<sup>94</sup> Additionally, the court found that “a genuine issue of material fact exist[ed] as to . . . whether the bias of [one member of the appeals board] compromised the impartiality and independence of the appeals board.”<sup>95</sup> The court noted that “an impartial and independent adjudicator ‘is a fundamental ingredient of procedural due process.’”<sup>96</sup>

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notice and opportunity for hearing appropriate to the nature of the case.” (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Once it is determined that due process applies, the question remains what process is due.”); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (stating that due process requires that a plaintiff receive adequate notice and an opportunity to be heard “at a meaningful time and in a meaningful manner”).

The *Silva* court stated that “[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Silva*, 1994 WL 504417, at \*25 (quoting *Loudermill*, 470 U.S. at 546).

“Beyond the right to notice and hearing, the span of procedural protections required to ensure fairness becomes uncertain, and must be determined by a careful weighing or balancing of the competing interests implicated in the particular case.” *Id.* (quoting *Gorman v. University of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988)).

94. *Silva*, 1994 WL 504417, at \*30.

95. *Id.* at \*33. The court found that the essence of plaintiff’s substantive due process claim was the same as his First Amendment claim, and because the First Amendment “provides an explicit textual source of constitutional protection” against the challenged government behavior, “his claim is best analyzed under the First Amendment rather than under the more generalized notion of substantive due process.” *Id.* at \*34. The court therefore granted summary judgment to the university on plaintiff’s substantive due process claim. *Id.* at \*38.

96. *Id.* at \*30 (quoting *Gorman*, 837 F.2d at 15).

### III. YUSUF V. VASSAR COLLEGE

In *Yusuf*, the Second Circuit decided “important questions as to when college disciplinary proceedings violate federal laws against gender discrimination.”<sup>97</sup> Plaintiff, a male student at a private college, alleged that his roommate, James Weisman, brutally attacked him, and that when he pressed criminal charges, the roommate’s girl friend, Tina Kapur, retaliated against him by bringing false sexual harassment charges.<sup>98</sup> Yusuf claimed that his being found guilty of the sexual harassment charge and receiving a stiffer penalty for the alleged harassment than his roommate received for his battery was an act of gender discrimination, in violation of Title IX of the Education Amendments of 1972.<sup>99</sup>

After Yusuf made a criminal complaint to the Poughkeepsie Police Department resulting in Weisman’s arrest, the College Regulations Panel scheduled a hearing regarding the incident.<sup>100</sup> Prior to the hearing, both Weisman and Kapur tried to dissuade Yusuf from pressing charges.<sup>101</sup> “When Yusuf testified against Weisman at the College Regulations Panel hearing, he was not questioned about the alleged assault and battery, but instead about his relationship with Kapur.”<sup>102</sup> The panel found Weisman guilty of the charges, but gave him only a “suspended suspension” for the semester, so that he could complete his requirements and graduate with his class.<sup>103</sup>

Yusuf was informed that Kapur filed sexual harassment charges against him, but was not informed “of the basis or details of the

97. *Yusuf v. Vassar College*, 35 F.3d 709, 711 (2d Cir. 1994).

98. *Id.* at 712.

99. *Id.* at 713. Title IX of the Education Amendments of 1972 are codified at 20 U.S.C. § § 1681-88 (1988). Yusuf, a Bengali student, also made a race discrimination claim under 42 U.S.C.A. § 1981 (West 1994), but the dismissal of this claim was affirmed by the Second Circuit. *Yusuf*, 35 F.3d at 714.

100. *Yusuf*, 35 F.3d at 712.

101. *Id.*

102. *Id.*

103. *Id.*

charges.”<sup>104</sup> Rather, he was instructed to appear at a hearing at a specified time and place.<sup>105</sup> Four days before the scheduled hearing, Yusuf was permitted to see Kapur’s statement.<sup>106</sup> He then submitted to the Chair of the College Regulations Panel a list of twelve witnesses he wished to call.<sup>107</sup> The Chair told him, however, “that twelve witnesses were too many and reduced the list to seven, deleting several key witnesses in the process.”<sup>108</sup>

At the onset of the hearing, which began at five o’clock in the evening, it was announced that the hearing would end promptly at nine o’clock in the evening.<sup>109</sup> Plaintiff’s “difficulties in presenting his defense were compounded by the fact that his ‘most crucial’ witness . . . was away from campus and could not be present for the hearing.”<sup>110</sup> His attempt to submit a written statement from the witness was rejected.<sup>111</sup>

“Kapur testified that Yusuf had sexually harassed her on two occasions.”<sup>112</sup> She was unable, however, “to identify the dates, other than that they occurred sometime during December 1991.”<sup>113</sup> When plaintiff asked her to be more specific, Nichols, the acting Chair, stated: “We are not concerned with when the event occurred, only whether it could have occurred.”<sup>114</sup> “The panel then settled on December 10, 1991 as the date of one of the incidents.”<sup>115</sup> Plaintiff “attempted to introduce records showing that he was confined to the college infirmary that day,” but the panel refused to allow introduction of the records.<sup>116</sup> The hearing ended “at [nine o’clock in the evening], notwithstanding the fact that Yusuf still had two witnesses from his approved list that had

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104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 712-13.

not yet been called.”<sup>117</sup> The panel found him guilty as charged and banned him from his dormitory and suspended him from college for a semester.<sup>118</sup>

Plaintiff filed a federal action, claiming that Vassar discriminated against him on account of his gender in violation of Title IX by finding him guilty of the sexual harassment charge.<sup>119</sup> The Second Circuit sustained his Title IX claim, finding that “Title IX is enforceable through an implied right of action for monetary damages and injunctive relief.”<sup>120</sup>

Relying upon the legislative history of Title IX and the body of law developed under Title VII, the Second Circuit noted that:

Title IX was enacted to supplement the Civil Rights Act of 1964’s bans on racial discrimination in the workplace and in universities. Because the statutes share the same goals and because Title IX mirrors the substantive provisions of Title VI of the Civil Rights Act of 1964, courts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII.<sup>121</sup>

The court found no reason to doubt the basic proposition that “Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.”<sup>122</sup> The court went on to hold that, in Yusuf’s case, “the complaint

117. *Id.* at 713.

118. *Id.*

119. *Id.* Yusuf’s complaint alleged that: “Defendant has historically and systematically rendered verdicts against males in sex[ual] harassment cases, solely on the basis of sex . . . . Male respondents in sex[ual] harassment cases at Vassar College are discriminated against solely on the basis of sex. They are invariably found guilty, regardless of the evidence, or lack thereof.” *Id.*

120. *Id.* at 714 (citations omitted).

121. *Id.* (citation omitted). See *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316-17 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987); *Sharif by Salahuddin v. New York State Educ. Dep’t*, 709 F. Supp. 345, 360 (S.D.N.Y. 1989).

122. *Yusuf*, 35 F.3d at 715. See Civil Rights Act of 1991, 42 U.S.C.A. § 2000e-2(m) (West 1994) (“[A]n unlawful employment practice is established when . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

alleges events that, if proven, would support an inference of discrimination.”<sup>123</sup>

#### IV. SNYDER V. CHICAGO THEOLOGICAL SEMINARY: ANOTHER CASE TO WATCH

A case involving a claim that campus disciplinary proceedings arising out of allegations of sexual harassment violated the rights of the accused is now pending in the Illinois courts. In *Snyder v. Chicago Theological Seminary*,<sup>124</sup> a tenured professor and former dean on the faculty of the Chicago Theological Seminary alleged that he was a person of good name, fame, and repute in the community and was deservedly held in high esteem by and among his acquaintances, students, professional colleagues and the general public.<sup>125</sup> In March, 1992, during a lecture to his Synoptic Gospels class, he told a story from the Talmud having sexual references.<sup>126</sup> A female student complained to the academic dean that Snyder had told an extremely offensive story in violation of the Seminary's sexual harassment policy.<sup>127</sup>

A female faculty member publicly announced during a chapel service that five years earlier, that plaintiff had hugged her “in a deeply inappropriate way.”<sup>128</sup> At or about the same time, a

123. *Id.* at 715-16.

124. No. 94 L 01423 (Circuit Court of Cook County, Ill. filed Aug. 30, 1994). *Snyder* and *Silva* were described in Kenneth Jost, *Questionable Conduct*, 80 A.B.A. J. 71, 71-75 (Nov. 1994).

125. Second Amended Complaint for Plaintiff at 2, *Snyder v. Chicago Theological Seminary*, No. 94 L 01423 (Circuit Court of Cook County, Ill. filed Feb. 17, 1995).

126. *Id.*

127. *Id.* The Chicago Theological Seminary had adopted a sexual harassment policy defining the offense as including “verbal conduct of a sexual nature” with “the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment.” *Id.* at 3. Application of this policy to the contents of Snyder's class lecture should be found to implicate the same First Amendment rights that formed the underpinning of *Silva*.

128. *Id.* at 3.

female staff member complained that the plaintiff had rubbed up against her in the copy room.<sup>129</sup> Neither the hug nor the copy room incident were ever made the subject of charges against the plaintiff.<sup>130</sup>

About nine months after the offending classroom lecture, plaintiff was summoned to a meeting of the sexual harassment task force.<sup>131</sup> He was specifically told that the meeting was “nothing” and “not to worry about it.”<sup>132</sup> He was “deliberately” not advised to bring counsel and was “deliberately” not presented with either a formal charge or a copy of the letter written by the student complaining about his classroom conduct.<sup>133</sup> He was asked to write a letter saying that he never intended to abuse anyone.<sup>134</sup> Although he objected, he agreed to do so for the good of the community.<sup>135</sup> At this meeting, the task force “considered dismissing plaintiff as a disciplinary option.”<sup>136</sup>

One month later, he was summoned to another task force meeting and again “deliberately” not advised to bring counsel and was “deliberately” not presented with a formal or informal charge.<sup>137</sup> At this meeting, he was asked to write another letter stating that he knew what sexual harassment meant and that he never intended to harass anyone.<sup>138</sup> Plaintiff also objected to writing this letter, stating that his academic freedom was being impaired, but he did so after being implored to do so for the sake of peace in the community.<sup>139</sup>

Two months later, he was summoned to a third meeting of the task force and was handed a copy of a memorandum entitled “Formal Complaint Against Graydon Snyder.”<sup>140</sup> In the

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129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 4.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*



memorandum, it was stated that the task force "has found that Dr. Graydon Snyder engaged in verbal conduct of a sexual nature" that violated the sexual harassment policy.<sup>141</sup> The memorandum also stated that the task force "has issued" plaintiff a formal reprimand.<sup>142</sup> Shortly thereafter copies of the memorandum were placed in the mail boxes of approximately 250 faculty members, staff, and students of the Seminary.<sup>143</sup>

Plaintiff commenced an action in the Illinois State court alleging defamation and claiming personal humiliation and mental anguish.<sup>144</sup> He also claimed that the Seminary had incorporated into its disciplinary manual the American Association of University Professors Statement on Procedural Standards in Faculty Dismissal Proceedings, and that it had violated numerous of its provisions, including the requirement of notice of the charges "with reasonable particularity," sufficient time to prepare a defense, notice of the procedural rights to be afforded to the accused faculty member, the right to the assistance of counsel, and the right to question all witnesses.<sup>145</sup> Snyder's complaint expressly alleged that he was never provided with a copy of the formal charge.<sup>146</sup> Citing reckless disregard of his rights by depriving him of his procedural rights, and by publishing the offending memorandum "to a vastly greater number of people than necessary or appropriate,"<sup>147</sup> Snyder sought compensatory and punitive damages for defamation.<sup>148</sup>

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141. *Id.*

142. *Id.*

143. *Id.* at 5.

144. *Id.* at 6-10.

145. *Id.* at 6-7.

146. *Id.* at 7.

147. *Id.* at 9-10. This allegation is similar to Starishevsky's allegation sustained by the court that the university breached its duty of confidentiality by disseminating a memorandum about the charge to the entire Hofstra community. *See supra* note 50 and accompanying text.

148. Second Amended Complaint for Plaintiff at 10, *Snyder*, No. 94 L 01423.

## CONCLUSION

*Starishevsky* is significant in holding that an employee of a private university accepting federal Title IX assistance is entitled, under federal and state law, to substantial fairness in campus administrative proceedings convened to ascertain his guilt or innocence of a sexual harassment charge.<sup>149</sup> In the words of the *Starishevsky* court, “[t]he process of eliminating sexual harassment must go forward with recognition of the rights of all involved and without the creation of new wrongs. The process must be propelled by a sense of fairness and not motivated by any other less appropriate notions.”<sup>150</sup> Essential elements of such fairness include: fair notice of the specific claim lodged against the accused; the giving of a charge to the hearing panel that clearly limits it to a consideration of that claim; exclusion in such proceedings of evidence unrelated to the specific claim so that the hearing panel is untainted by other claims of misconduct; the opportunity to confront adverse witnesses, necessarily requiring that no evidence relating to the charged claim be received outside of the presence of the charged employee; and a restoration of the employee to the status quo if his guilt is not established to the satisfaction of the panel.

In *Yusuf*, the Second Circuit had no occasion to make a determination as to whether the regulation adopted under Title IX, 34 C.F.R. § 106.8(b), created due process rights independent of gender discrimination claims, an issue ruled upon in the affirmative by the *Starishevsky* court. But it is of particular significance that in *Yusuf*, the Second Circuit strongly implied that Congress’ intent not to interfere with the independence of universities assumed that student discipline would be an outgrowth of a “fair hearing”<sup>151</sup> – the same conclusion that the *Starishevsky* court reached.<sup>152</sup>

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149. *Starishevsky v. Hofstra Univ.*, 161 Misc. 2d 137, 145-46, 612 N.Y.S.2d 794, 800 (Sup. Ct. Suffolk County 1994).

150. *Id.* at 138, 612 N.Y.S.2d at 796.

151. *Yusuf v. Vassar College*, 35 F.3d 709, 715 (2d Cir. 1994). The court held: “We do not believe that Congress meant Title IX to impair the independence of universities in disciplining students against whom the evidence

*Silva* is significant because the court did not hesitate to rule that sexual harassment charges implicate a person's "liberty interests in his good name and reputation because the charge of sexual harassment and the subsequent sanctions imposed by defendants 'might seriously damage his standing and associations in his community.'" <sup>153</sup> The court also ruled that due process requires adequate notice of, and a reasonable opportunity to defend a sexual harassment charge, as well as an unbiased campus tribunal. <sup>154</sup> It found irreparable harm in plaintiff's suspension without pay, which was continuing at the time of its decision. <sup>155</sup> The *Silva* court brought campus sexual harassment procedures squarely within the rubric of other disciplinary proceedings involving public employees, <sup>156</sup> and found campus sexual harassment procedures to be violative of the First Amendment as applied to classroom speech. <sup>157</sup>

These three cases show a growing recognition by the courts of procedural rights that ought to be enjoyed by those accused of sexual harassment. They also suggest that campus procedures to determine sexual harassment claims can easily be devised to avoid or minimize the possibility of legal challenge. As obvious

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of an offense, after a fair hearing, is overwhelming, absent a claim of selective enforcement." *Id.*

152. *Starishevsky*, 161 Misc. 2d at 145, 612 N.Y.S.2d at 800 (stating that "New York law requires that a university's decision to discipline a faculty member (or a student) be predicated on [fair procedures]").

153. *Silva v. University of N.H.*, No. CIV. 93-533-SD, 1994 WL 504417, at \*24 (D.N.H. Sept. 15, 1994) (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

154. *Id.* at \*36.

155. *Id.* at \*35.

156. *Id.* at \*36. This aspect of the court's decision is consistent with *Hameli v. Nazario*, 94-199, slip op. (D. Del. Sept. 2, 1994). For more detail of this case, see *supra* note 15.

157. *Silva*, 1994 WL 504417, at \*19. The court stated "that the [university's] Sexual Harassment Policy as applied to *Silva*'s classroom speech is not reasonably related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation's interest in academic freedom." *Id.* at \*21.

as these procedural safeguards seem, a useful purpose might be served by setting them out here.

The principal provisions of such procedures should be: receipt of specific notice of the particulars of the charge or charges against which the accused is expected to defend<sup>158</sup> and limitation of the ensuing proceedings to those specific charges;<sup>159</sup> specific notification as to the range of penalties that could be imposed should the charge be sustained; delineation of the procedural appeal remedies available, if any; careful selection of an impartial panel to hear the charge, whose members need not be, and perhaps should not be, employed by or otherwise closely associated with the university;<sup>160</sup> strict instructions to the panel members not to hear any evidence or receive any information bearing upon the charge outside of the presence of the accused;<sup>161</sup> granting the accused a reasonable opportunity to

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158. See *id.* at \*25. Setting out the most basic elements of due process, the *Silva* court noted that “[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Id.* (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

159. See, e.g., *Starishevsky*, 161 Misc. 2d at 146, 612 N.Y.S.2d at 800. The *Starishevsky* court concluded that the accused had not received a fair hearing. *Id.* at 146, 612 N.Y.S.2d at 800-01. The court pointed out that the hearing panel was instructed to consider allegations other than the single allegation of harassment upon which the hearing was based, contrary to notice sent to *Starishevsky*. *Id.* Also contrary to what *Starishevsky* had been told, the hearing panel was to consider his future employability and make recommendations that were not solely based on the harassment claim. *Id.* Finding this aspect of the hearing unfair, the court reasoned that “*Starishevsky* could not know that he had to be prepared to defend his entire career at Hofstra . . . .” *Id.* at 142, 612 N.Y.S.2d at 798.

160. See, e.g., *Silva*, 1994 WL 504417, at \*32 (finding a “genuine issue of material fact as to whether the bias of [an appeals board member] compromised the impartiality and independence of the Appeals Board on which she sat so that *Silva* was not afforded a fair hearing”).

161. See, e.g., *Starishevsky*, 161 Misc. 2d at 143, 612 N.Y.S.2d at 799. Two panel members conducted a post-hearing interview of a witness that lasted about one hour. *Id.* The *Starishevsky* court found that “this private interview without the knowledge of *Starishevsky* and without the opportunity for cross-examination cannot be viewed as innocuous.” *Id.*

prepare a defense;<sup>162</sup> allowing the accused meaningful assistance of counsel<sup>163</sup> and the opportunity to question witnesses and introduce documentary evidence;<sup>164</sup> making and preserving an accurate hearing record; strict adherence to the procedural rights

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162. See, e.g., *Silva*, 1994 WL 504417, at \*26. Silva claimed that he was called to a meeting and compelled to respond to sexual harassment charges with only the prior notice that some students had complained about his class; therefore, he had no reasonable opportunity to prepare a defense. *Id.* The court adduced conflicting evidence on this issue. *Id.* Although the court ruled that Silva had been given a reasonable opportunity to prepare a defense, the court deemed it important to note that Silva was subjected to the limited deprivation of the creation of stigmatizing "shadow classes" for those wishing to withdraw. *Id.* at \*28. Thus, in balancing the sufficiency of process received against the nature of the deprivation, the court reasoned that Silva was allowed to continue teaching and received full pay after this informal hearing which preceded a formal hearing. *Id.*

163. See, e.g., *Starishevsky*, 161 Misc. 2d at 141, 612 N.Y.S.2d at 798. The *Starishevsky* court found procedural impropriety where the panel received a "just cause" memorandum indicating Starishevsky's hearing was being reopened because two similar incidents were alleged. *Id.* Furthermore, the memorandum endorsed the accusers' credibility. *Id.* The court pointed out that "[t]his was done without discussion with Starishevsky's counsel who thus, had no opportunity to be heard on the appropriateness of disseminating such memorandum." *Id.*

164. See, e.g., *Yusuf*, 335 F.3d at 712. *Yusuf* provides a striking example of a denial of such fair procedure. Yusuf submitted that he wished to call twelve witnesses, however, he was told that twelve was too many and that he could only call seven. *Id.* The hearing proceeded with Yusuf's key witness unavailable to testify, as the witness was away from the campus at the time. *Id.* Yusuf offered a statement from this unavailable key witness which, in the words of the court, "totally discredited" his accuser; however, it was not admitted, as the panel noted it would not be subject to cross-examination. *Id.* Yusuf was limited to a four-hour hearing. *Id.* When Yusuf asked his accuser to be more specific about the date of the alleged incident, he was told by the panel that it was not concerned with when the event occurred, but whether it could have occurred. *Id.* The panel then settled on a date. *Id.* Yusuf was not allowed to enter records showing that he was confined to a college infirmary on the date of the alleged incident. *Id.* The hearing ended promptly after Yusuf's four hours had expired, notwithstanding the fact that he still had two more witnesses to call. *Id.* at 713. The court found that "[t]he allegations concerning the circumstances surrounding the charge . . . and the conduct of the disciplinary proceeding sufficiently put into question the correctness of the outcome of that proceeding." *Id.* at 716.

previously provided to the accused;<sup>165</sup> and, perhaps, most important of all, strict adherence to confidentiality on the part of all participants in the process, which necessarily includes refusal to make any statements to the press or media, and abstinence from the making of any substantive statement to the campus community regarding the charge.<sup>166</sup>

Should an accused sexual harasser be found guilty after a college or university has adhered to the foregoing simple rules, it is difficult to imagine that a court would thereafter lightly set aside disciplinary action.

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165. See, e.g., *Starishevsky*, 161 Misc. 2d at 145, 612 N.Y.S.2d at 800. Making this point, the *Starishevsky* court stated:

It is a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual that when a university has adopted a rule or guideline establishing a disciplinary procedure, that such procedure be substantially observed and that in conducting the inquiry, the university must proceed in good faith.

*Id.*

166. See, e.g., *id.* at 142, 612 N.Y.S.2d at 798. The *Starishevsky* court noted that Hofstra's sexual harassment procedural guidelines require confidentiality for all members of the campus community in the hearing process. *Id.* The court found that Hofstra made no attempt to respect Starishevsky's privacy, referring to a memorandum issued to the "Hofstra University Community" concerning the charges. *Id.* The memorandum referred to the incident in detail. *Id.*

