SEXUAL HARASSMENT LAWS COLLIDE WITH ACADEMIC FREEDOM: A SLIPPERY SLOPE FOR COLLEGES AND PROFESSORS

Martin H. Zem*

I. INTRODUCTION

Although the United States Supreme Court has consistently emphasized the importance of "freedom in the community of American universities,"[1] it has never determined the precise scope of First Amendment protection to be given to the classroom speech or behavior of public university or college professors, or their speech or comportment outside the classroom. The Court has recognized, however, that academic freedom is an important First Amendment concern: "[T]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."[2] In recent times, the laudable principles of academic freedom and freedom of speech have crossed swords with federal laws regarding sexual harassment, and internal school policies implemented to comply with the federal laws.[3] Fortunately, at least from the standpoint of the college professor, the courts generally have limited or struck out actions taken by colleges to punish professors whose classroom speech has been deemed to violate the sexual harassment policy of the school. The usual basis for overturning the chastisement of a professor is that the college's sexual harassment policy is vague or of uncertain breadth.

Collateral to the substantive legal issues are important due process considerations. In this regard, it is essential for a college to have procedures in place to deal with sexual harassment charges in order for disciplinary action taken to withstand a legal challenge, and equally important that those procedures be meticulously followed. The specific due process rights of a professor will depend

*Associate Professor, Pace University; LL.M., 1971, New York University; J.D., 1967, Brooklyn Law School; B.S., 1963, New York University.

1. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957).

2 Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

3 Any educational program that is a recipient of federal financial assistance must comply with 34 C.F.R. § 106.8 (1998), which provides:

> Designation of responsible employee and adoption of grievance procedures.
> (a) Designation of responsible employee. Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee appointed pursuant to this paragraph, (b) Complaint procedures 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

upon whether the professor is employed by a private or public college, his or her tenure status, and the terms of the employment contract.

II. SEXUAL HARASSMENT LAWS

Title IX of the Education Amendments Act of 1972[4] provides that "[N]o person in the United States 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 or activity receiving Federal financial assistance...."[5] A college is subject to Title IX if students regularly receive federal loans or subsidies.[6] It was held in *Murray* v. *New York University College of Dentistry*,[7] a 1995 Second Circuit decision, that the liability of a college under Title IX for a professor's conduct creating a hostile-environment sexual harassment situation should be determined under the same standard that applies to hostile-environment sexual harassment claims under Title VII of the Civil Rights Act.[8] Under Title VII, an employer may be liable for the conduct of an employee (1) if the employee is the plaintiffs supervisor and uses "his actual or apparent authority to further the harassment . . . [or] was otherwise aided in accomplishing the harassment by the existence of the agency relationship,"[1] and (2) if the employee is a low-level supervisor who does not rely on his supervisory authority to carry out the harassment, if it "provided no reasonable avenue of complaint or knew of the harassment but did nothing about it."[10]

In a college setting, a professor is likened to a supervisor since he or she has authority to assign, review and grade a student's work, and may be called upon to provide career counseling or an employment recommendation.[11] On the other hand, professors generally are not very high in the college hierarchy. Nevertheless, it has been held that:

> [I]f a professor has a supervisory relationship over a student, and the professor capitalizes upon that supervisory relationship to further the harassment of the student, the college is liable for the professor's conduct. If a professor does not rely upon his actual or apparent authority to carry out the harassment, the college will be liable only if it provides no reasonable avenue for complaint or if it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.[12]

[4] 20 U.S.C. §§ 1681-1688 (1998).

[5] 20 U.S.C. § 1681(a) (1998); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-34 (1982).

[6] Kracunas v. Iona College, 119 F.3d 80, 82 n.2 (2d Cir. 1996).

[7] 57 F.3d 243 (2d Cir. 1995).

[8] 42 U.S.C. §§ 2000e (1998); *see also Murray*, 57 F.3d at 249.

[9] Tomka v. Seiler Corp, 66 F.3d 1295, 1305 (2d Cir. 1995) (quoting Karibian v. Columbia Univ 14 F.3d 773, 780 (2d Cir. 1993).

[10] *Id.* (quoting *Karibian. id.).*

[11] Kracunas v. Iona College, 119 F.3d 80, 86-87 (2d Cir. 1996).

[12] *Id.* at 88.

Generally, professors are held to have supervisory authority over students in their class due to their ability to influence them and control them by means of assignments and the grading process. Consequently, if a teacher sexually harasses a student, that teacher " 'discriminates' on the basis of sex" in violation of Title IX.[13] Moreover, even if it is determined that a professor did not use his or her supervisory authority in furthering sexual harassment, the college will be held liable if it is found that it failed to provide a reasonable means of redress, or a supervisor at a sufficiently high level in the college hierarchy, which would depend upon the particular facts and circumstances, knew about the harassment and failed to take any remedial action.[14] A student subjected to sexual harassment may maintain a private action for damages directly against an educational institution for conduct violating Title IX.[15]

III. WHAT ACTIONS CONSTITUTE SEXUAL HARASSMENT?

Without doubt, the distinction between legitimate pedagogy and sexual harassment is often a fine one and consequently difficult to discern. This is particularly true for such disciplines as drama, dance, music and athletics where touching is frequently employed as part of the teaching process. Clearly, what would be tolerated in classes of this type would be unacceptable in other classroom settings. In such other settings, however, the difficulty in distinguishing between what is appropriate and what is beyond the pale does not involve touching, but merely classroom speech. Under the shield of academic freedom and freedom of speech, can professors say whatever they feel like so long as they assert that the speech used is for pedagogical purposes?

A. A PROFESSOR BATTLES THE UNIVERSITY OF NEW HAMPSHIRE

A 1994 United States district court decision, *Silva* v. *The University of New Hampshire*,[16] demonstrates the limitations on the power of a college to proscribe or circumscribe sexually explicit speech in a college classroom setting. Donald Silva, a tenured faculty member at the University of New Hampshire ("UNH"), initiated an action against UNH seeking various types of relief, to wit: (1) a declaratory judgment that his right to freedom of speech under the First Amendment was violated and that his due process rights under the Fourteenth Amendment were violated; (2) a declaratory judgment that his civil rights were denied under color of state law in violation of United States Code Section 1983; (3) an injunction preventing UNH from preventing Silva from teaching or otherwise punishing him on

[13] *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

[14] Kracunas v. Iona College. 119 F.3d 80, 89-90 (2d Cir. 1996).

[15] *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992); Cannon v. University of Chicago. 441 U.S. 677 (1979); Murray v. New York University College of Dentistry, 57 F.3d 243, 248 (2d Cir. 1995).

[16] 888 F. Supp. 293 (D. N.H. 1994).

the basis of protected speech; (4) damages under United States Code Section 1983 for violation of his rights to free speech and due process; (5) damages under New Hampshire law for breach of contract and breach of the contractual duty of good faith and fair dealing; and (6) reasonable attorney's fees under United States Code Section 1988.[17]

Presently before the court was Silva's motion for a preliminary injunction and UNH's motion for summary judgment. The discussion by the court was in response to these motions.[18]

1. UNH Sexual Harassment Policy

UNH had in place a sexual harassment policy. In essence, it provided that all faculty, staff and students had a right to work in an environment free of sexual harassment. More specifically, the policy stated:

> Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
> —such conduct has the purpose or effect of unreasonably interfering with a individual's work performance or creating a hostile or offensive working or academic environment.
> —submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting that individual.
> —submission to such conduct is made either explicitly or implicitly a term or condition of an individuals employment or academic work. (Section 1604.11 of the EEOC's Guidelines on Sexual Discrimination)
>
> Examples of conduct which may, if continued or repeated, constitute sexual harassment are:
> -- unwelcome sexual propositions
> —graphic comments about a person's body
> —sexually suggestive objects or pictures in the workplace
> —sexually degrading words to describe a person
> -- derogatory or sexually explicit statements about an actual or supposed sexual relationship

[17] The action was brought pursuant to 42 U.S.C §§ 1983 & 1988 (1994), 28 U.S.C §§ 2201 & 2202 (1994) and New Hampshire law. Under § 1983, any person who under color of state law deprives a U.S. citizen or other person within U.S. jurisdiction of rights under the Constitution may be held liable for damages. Attorney's fees may be awarded to a prevailing party under § 1988. A declaratory judgment is available under § 2201. and such other relief as the court may determine is available under § 2202. Damages were also sought under New Hampshire law for breach of contract and of a contractual duty of good faith and fair dealing.

[18] The court listed four factors to consider in determining whether a preliminary injunction should be granted: (1) the likelihood of the movant's success on the merits, (2) the potential for irreparable harm to the movant, (3) the balancing of the relevant equities, i.e., relative hardship, and (4) the effect on the public interest of a grant or denial of the injunction. With respect to whether summary judgment is appropriate, the court stated that the standard is that the movant must show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Silva v. The University ofNew Hampshire, 888 F. Supp. 293,311-312 (D. N.H. 1994).

—unwelcome touching, patting, pinching or leering
—derogatory gender based humor

Anyone who violated the sexual harassment policy was subject to discipline, up to and including dismissal.[19]

2. Sexual Harassment Acts

Silva taught a communications course in technical writing. His class was required for graduation and no other sections were being offered at the time. Several female students in Silva's class filed written complaints against him with UNH for sexual harassment. What were the nature of the complaints? During class, Silva compared focusing the thesis statement with the "sexual relationship between persons and how familiarity and experience are part of the communication, if focus is to occur."[20] Silva also described focus in terms of sex: "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 . . . You and the subject become one."[21] To make a point he used a metaphor, describing a belly dancer as being like a bowl of jelly stimulated by a vibrator. It was also alleged that he said to the class "he would put it in sexual terms so that we could understand it. So he said its like going in and out, side to side, and loosening up so you could find the best target area."[22] Silva admitted that he used the example of the belly dancer and the example of sexual intercourse as an example of "metaphor" and "centering." One of the complainants, without being specific, alleged that Silva made sexually suggestive, or bluntly sexual statements in every class.[23]

Two of the written complaints griped about behavior of Silva outside the classroom. Two students alleged that, while in the library, they approached Silva to ask a question about an assignment. After he answered the question, which was posed by one of the two students, he turned to the other and asked if he could help her. When that other student said "no, I'm with her," Silva retorted "How long have you two been together?" implying a lesbian relationship. Another student alleged conduct during the semester that she felt was "powerful, aggressive, physical intimidation tactics which made me very uncomfortable."[24]

[19] Silva v. The University of New Hampshire, 888 F. Supp. 293, 311-312 (D. N.H. 1994).

[20] *Id* at 298.

[21] *Id.* at 299.

[22] *Id.* at 301.

[23] *Id.*

[24] *Id.*

3. University Response

At a meeting with the Associate Vice President of Academic Affairs and two other administrative personnel, Silva was confronted for the first time with the written complaints of the students. After the meeting, " 'shadow classes' were created so that any of plaintiffs 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."[25] After a second meeting, Silva was given a draft letter of reprimand stating: "[Y]our behavior is in violation of University policy prohibiting sexual harassment . . . and will not be tolerated."[26] The draft letter was later converted into a formal letter of reprimand.

Thereafter, Silva initiated a formal grievance under a six-step procedure set forth in the Faculty Handbook of UNH. At the first step of the grievance process, the grievance was denied and Silva was suspended without pay. After the third step, Silva was notified that UNH would not schedule him to teach any classes the next semester.[27]

The grievance proceeding by Silva was then terminated as a result of the withdrawal of the letter of reprimand. Silva was thereafter notified that seven of the students who had filed complaints had asked that that their complaints be resolved pursuant to the " 'Formal Complaint Section' of our 'Procedures for Resolution of Sexual Harassment Complaints.' "[28] A formal sexual harassment hearing proceeding then took place, followed by another hearing before an appeals board.

During the hearings, the complaining students testified to other incidents asserted to be sexual harassment.[29] A female student doing research in the school library, where Silva was present, stated that she was going to "jump on a computer" before someone else. Another female student who overheard the remark claimed that Silva smiled at her saying, "I'd like to see that!" Another female student stated that she was on her hands and knees in the library looking at a floor level card index. She claimed that Silva's comment to her was: "[I]t looks like you've had a lot of experience down there."[30] Several students testified that Silva had a habit of standing too close when speaking to them which made them uncomfortable and bordered on intimidation. Another female student testified that Silva said to her, "[H]ow would you like to get an A?" Finally, the students claimed they were offended by an alleged time management assignment that required them to reveal personal information about themselves, including what they did, with whom, and what they thought and dreamed about. As it turned out, many students, including the complaining students, transferred out of Silva's class into the shadow class.

The appeals board concluded that "Silva's repeated and sustained comments and behavior of a sexual...nature had the effect of creating a hostile and intimidating

[25] *Id.* at 303.

[26] *Id.*

[27] *Id* at 304.

[28] *Id.* at 305.

[29] *Id.* at 310.

[30] In a prior letter, the same student had alleged that the comment was: "[Y]ou look like you've had alot [sic] of experience on your knees."

academic environment."[31] At the hearings, Silva was unrepentant. He maintained that the students were "immature and in need of better training in the use and interpretation of language."[32] He also stated that "he would behave in a similar manner in the future."[33] After the hearings, the following sanctions were imposed upon Silva by UNH: (1) He was suspended without pay for one year; (2) He was required to begin counseling sessions at his own expense with a licensed and certified counselor selected by UNH. His suspension status was to be removed if the counselor notified the university that Silva was ready to return to the classroom; and (3) He was to make no attempt to retaliate against the students who filed sexual harassment complaints or those who testified against him.[34]

The hearing panel noted that this was the second complaint against Silva in a two- year period. Apparently, Silva had previously received an informal note from the administration regarding several students complaining about sexually explicit stories in his classroom.[35]

4. Court's Analysis

In order to establish a claim under United States Code Section 1983, the plaintiff must prove that there was a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]," and that such conduct was "under color of [state law]."[36] The district court found that the conduct of UNH occurred under color of state law since it was a public institution.

To prove a First Amendment violation, the plaintiff must prove that the classroom speech was constitutionally protected, and that it was a motivating factor in the decision to impose discipline. Consequently, the defendant must show that it would have disciplined the plaintiff the same way even if the speech in question had never occurred.[37] Since the court was convinced that UNH would not have disciplined Silva as it did but for his classroom speech,[38] the only issue was whether the speech was constitutionally protected. The court did not consider the conduct of Silva outside the classroom of which the students complained apparently because it believed that he would not have been disciplined as he was for that conduct alone. In determining whether the classroom speech was constitutionally protected, the court took into account a number of considerations including prior notice, reasonableness, academic freedom, and the balancing of interests.

[31] *Silva*, 888 F. Supp. at 311.

[32] *Id.*

[33] *Id.* at 307.

[34] *Id.* at 311.

[35] *Id* at 307-308.

[36] 42 U.S.C. § 1983 (1998). *See also* Parratt v. Taylor, 451 U.S. 527, 535 (1981); Daniels v. Williams, 474 U.S. 327 (1986).

37 Mt. Healthy City School Dist. Bd. of Hduc. v. Doyle, 429 U.S. 274, 287 (1977).

38. Silva v. The University of New Hampshire, 888 F. Supp. 293, 616-617 (D. N.H. 1994).

a. Prior Notice

Where free speech issues are concerned, teachers must be clearly informed about what is being proscribed. A teacher should not be put in a position where he or she has to guess about the type of conduct that may result in dismissal or other punishment.[39] The specter of being sanctioned clearly acts as a damper on free speech "almost as potently as the actual application of the sanction."[40] Thus, a college is not permitted to "retaliate against speech that it never prohibited."[41]

In the Silva case, the court noted: "[T]he relevant inquiry is: based on existing regulations, policies, discussions, and other forms of communication . . . was it reasonable for the school to expect ... the teacher to know that [his] conduct was prohibited?" Based on this standard, the court concluded that what Silva said in the classroom, referring specifically to the remark about the vibrator, was *not necessarily* a reference to a sexual device.[42] Apparently, the court found the remark about the vibrator ambiguous and gave Silva the benefit of the doubt; it stated that the students complaining were under a "mistaken impression."[43]

It seems odd that the court came to this conclusion since whether the vibrator remark was made by Silva with intentional sexual overtones was never determined. The clear lesson, however, seems to be that if there is doubt about the sexual connotation of speech, free speech will prevail over a sexual harassment charge. Thus, it would appear to take significantly more than the use of sexual innuendo or metaphor to support a sexual harassment charge, at least in a classroom setting.

b. Reasonableness

Our cherished ideal of freedom of speech is seemingly put on an even higher pedestal when it occurs in an academic setting. Nevertheless, limits can be imposed upon what can be said in the classroom. In this context, the Supreme Court has held that schools have the right to "exercise editorial control in school-sponsored expressive activities ... [if] reasonably related to legitimate pedagogical concerns."[44] However, in determining the propriety of regulations or sanctions, the courts take a very practical approach considering " 'the age and sophistication of the students, the closeness of the relation between the specific technique used ... and the context and manner of presentation.' "[45] Thus, any government regulation or school policy proscribing particular types of speech in an academic setting must be *reasonable* under all of the facts and circumstances. Necessarily, this requires a case-by-case inquiry as to whether or not the interests of the school are sufficient to circumscribe the speech of a teacher.

39.Keyishian v. Board of Regents, 385 U.S. 589 (1967) (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).

[40] N.A.A.C.P. v. Button, 371 U.S. 415,433 (1963).

[41] Ward v. Hickey, 996 F.2d 448. 452 (1st Cir. 1993).

[42] Silva v. The University of New Hampshire, 888 F.Supp. 293,313 (D. N.H 1994)

[43] *Id*

[44] Hazelwood School Dist. V. Kuhlmeier, 484 U.S. 260, 273 (1988) (freedom of speech by a student, not a teacher).

[45] *Id.* (quoting Mailloux v. Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971)).

In the *Silva* case, the court made a number of factual findings relative to whether the UNH Sexual Harassment Policy was reasonable: (1) the students were exclusively adults and presumed to have the sophistication of adults, (2) the statements of Silva advanced a valid educational objective, and (3) the statements were made in a professional manner as part of a college lecture class. Silva, the court noted, was disciplined "simply because six adult students found his choice of words to be outrageous."[46] The court observed that speech does not lose its protected status simply because it is embarrassing or offensive to some.[47]

c. Academic Freedom

Most importantly, the court *strongly validated* the principle of academic freedom, particularly with respect to freedom of speech:

> [0]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teacher concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[48]
>
> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.[49]

The court recognized that the ideal of academic freedom should not be a license to vary the content of the curriculum, nor to disrupt the functioning of the institution. Nevertheless, it concluded that the "UNH 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 fails to take into account the nation's interest in academic freedom."

d. Balancing of Interests

Referring to a United States Supreme Court decision, *Connick v. Meyers*,[51] the court in *Silva* also took into consideration a balancing of interests factor. Whether a public employee's speech is protected under the First Amendment must be determined by " 'seeking a balance between the interests of the [employee], as a

46 Silva v. The University of New Hampshire, 888 F. Supp. 293,313 (D. N.H. 1994).

47.Id. at 314.

48. Id.

49 *Id.* (quoting Sweezy v. New Hampshire, 354 U.S. 234,250 (1957)).

50 *Id.* at 314.

51 461 U.S. 138(1983).

citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' "[52]

The defendants argued that, under *Connick*, Silva's speech was not protected because it did not relate to '"matters of public concern.' "[53] Responding, the court recognized that the judiciary should not intrude where an employee's speech is not of any " 'political, social, or other concern to the community,' " and noted that, " 'absent the most unusual circumstances,' " a court should not second-guess " 'a personnel decision ... in reaction to the employee's behavior.' "[54] As to whether or not speech is of public concern, however, the court commented: " '[Wjhether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement . . . "[55] Although the content of Silva's speech was not of public concern, the court held that the "preservation of academic freedom is a matter of public concern."[56] The court also observed that the issue of "whether speech which is offensive to a particular class of individuals should be tolerated in American schools is a matter of public concern."[57]

The court then found that Silva's classroom speech was made for legitimate pedagogical purposes — that the speech was offensive to a particular class of persons was not a basis for it being proscribed. Finally, the court held, that for purposes of the balancing test, the national interest in academic freedom was "overwhelmingly superior" to the interest of UNH in prohibiting the speech.[58] Concluding that Silva was likely to succeed on the merits of his First Amendment claims, UNH's motion for summary judgment as to Silva's First Amendment claims was denied.

B. A Professor Battles San Bernardino Valley College

Another case that curbed the power of a college to discipline a professor for classroom speech with sexual overtones, which was significantly more sexually graphic than the classroom speech of Professor Silva, is *Cohen* v. *San Bernardino Valley College*, a 1996 decision of the Ninth Circuit.[59] This case had been appealed to the Ninth Circuit from a United States district court decision holding that the imposition of discipline on the professor did not violate the First Amendment.

Dean Cohen was a long-standing tenured professor teaching English and Film Studies. A complaint was filed against him by a student who claimed to be offended by his "repeated focus on topics of a sexual nature, [and] his use of profanity and vulgarities . . . The student stated that she believed Cohen's comments were "directed intentionally at her and other female students . . . ,"[60] Specifically, Cohen discussed pornography and played the *devil's advocate.* In a similar manner, he

[52] *Id.* at 142 (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

[53] Silva v. The University of New Hampshire, 888 F. Supp. 293, 315 (D. N.H. 1994).

[54] *Id.* (quoting Connick v. Meyers, 461 U.S. 138, 147 (1983)).

[55] *Id.* (quoting Connick v. Meyers, 461 U.S. 138, 147-148 (1983)).

[56] *Id.* For this proposition, the Court referred to the Keyishian v. Board of Regents, 385 U.S. 589 (1967) and Sweezy v. New Hampshire, 354 U.S. 234 (1957).

57 *Silva,* 888 F. Supp. at 142.

58.Id. at 316.

[59] 92 F.3d 968 (9th Cir. 1996).

60. *Id.* at 970.

discussed obscenity, cannibalism, and consensual sex with children. He told the class that he wrote for Hustler and Playboy magazines, and read some of his articles in class. He also required the students to write essays defining pornography. The complaining student stopped attending class and received a failing grade.[61]

The college had recently implemented a sexual harassment policy and the complaint against Cohen was the first to proceed under it. In relevant part, the policy provided that conduct is prohibited which "has the purpose or effect of unreasonably interfering with . . . academic performance or creating an intimidating, hostile, or offensive learning environment."[62] After a hearing, Cohen was found to have violated the college's sexual harassment policy by creating a hostile learning environment that unreasonably interfered with academic performance.[63] Cohen was ordered to (1) provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines; (2) attend a sexual harassment seminar within ninety days; (3) undergo a formal evaluation procedure in accordance with the collective bargaining agreement; and (4) become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it became apparent that his techniques create a climate which impedes the students' ability to learn.

Cohen was also warned that further violations could lead to further discipline "including suspension or termination."[64] As a result of the discipline imposed on him, Cohen initiated an action in federal district court pursuant to United States Code Section 1983.[65] The Ninth Circuit reversed the district court holding that the sexual harassment policy of the college was "simply too vague." With respect to freedom of speech, the court observed that there is a higher standard: " 'Where the guarantees of the First Amendment are at stake the [Supreme] Court applies its vagueness analysis strictly.' ',[66] The court observed that there are three objections to vague policies where the First Amendment is concerned: (1) they are a "trap by not providing fair warning," (2) they delegate matters to "low level officials" to be resolved "on an ad hoc and subjective basis," and (3) "[A] vague policy discourages the exercise of first amendment freedoms."[67]

The court pointed out that Cohen was being punished for using teaching methods he had used for many years, and that the actions of the college were "best described as legalistic ambush" since Cohen's teaching theretofore "had always been considered pedagogically sound .. .[68] The case was thus remanded to the district court so that it could enjoin the college from implementing further discipline and order the removal of all disciplinary materials from Cohen's file.

It is important to note, however, that the Ninth Circuit's decision simply held that the college's policy was too vague. In fact, the court mentioned that it was not

[61] *Id.*

62. Id. at 971.

[63] *Id.* at 970-971.

[64.] *Id* at 971.

[65] 42 U.S.C. § 1983(1998).

66. Cohen v. San Bernardino Valley College, 92 F.3d 968, 972 (9th Cir. 1996; (quoting Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 512 (9th Cir. 1988)).

67.Id.

68.Id.

deciding whether the college could punish Cohen if its policy regarding sexual harassment had been "more precisely construed by authoritative guidelines."[69]

C. Sexual Harassment Outside of the Classroom and School Liability

Although there may be substantial leeway under the First Amendment, as liberally construed within the milieu of academic freedom, for a professor to use sexually explicit speech and sexual metaphor and innuendo in the classroom, this is not true for such speech directed at students outside of the classroom.

In *Kracunas* v. *Iona College*™ a 1997 decision of the Second Circuit reversing the decision of the district court, Michael Palma, a tenured professor in the English Department, embarked on a sexually explicit discussion of his personal sexual history, fantasies, and opinions with a female student in his class who had come to see him about a grade. This discourse took place not in the classroom, but in his office. He told the student that he could see her naked and that he would likely have sexual dreams about her. A similar incident took place in his office with another student. After the complaints were brought to the attention of the dean of the school, the professor acknowledged his wrongdoing, apologized and claimed he would do anything to rectify the situation. Iona took little action, however, until four to six months after the incident. Apparently unsatisfied with the college's response to their complaints, and the delay, the students brought an action in federal district court under Title IX against the professor and the college for the hostile environment sexual harassment of a student by a professor. A factual finding of the district court was that the conversations alleged by the students had in fact occurred. A further factual finding, however, was that there was no physical contact during the conversations, that the professor made no specific request for sexual favors, and that he made no promises or threats to either student.[71]

Iona moved for summary judgment claiming that it should not be held responsible for the actions of the professor. Further, it argued that the comments of the professor were protected under the First Amendment. The district court granted Iona summary judgment and the students appealed to the Second Circuit, which reversed.

The Second Circuit paid lip service to the importance of academic freedom, but gave short shrift to the argument of Iona "that imputing liability to a college under these circumstances would pose a threat to academic freedom."[72] Here, the court pointed out, the actions of the professor were not "done in good faith as part of his teaching, nor could his conduct be seen ... to further a pedagogical purpose."[73] Referring to a Supreme Court case as authority,[74] the court observed that: "[Harassing conduct fitting this description is not entitled to constitutional

69. Id.

[70] Kracunas v. Iona College, 119 F.3d 80 (2d Cir. 1997).

[71] *See id.* at 85.

[72] *See id.* at 88.

[73] *Id.*

[74] Roberts v. United States Jaycees, 468 U.S. 609 (1984).

protection."[75] The court, however, analyzed in detail the argument of Iona that it should not be held liable for the professor's conduct.

1. School Liability

The Second Circuit saw things differently than did the district court. As the case illustrates, a college is in a quite difficult position if charges are leveled against a professor for sexual harassment and those charges have merit, such as in *Kracunas.* As previously observed, the relationship of a professor to a student is considered comparable to the relationship of a supervisor to an employee since a professor has authority to assign, review and grade the work of the student; additionally, he or she might be asked to provide career counseling and recommendations for employment.[76] Further, an employer may be liable for the actions of an employee under two circumstances: (1) the employee used his actual or apparent authority in furtherance of the harassment, or (2) if the employee did not use his supervisory authority to further the harassment, the employer will be liable only if it did not provide a reasonable process for redress of complaints or was aware, or should have been aware, of the harassment and took no remedial action.[77]

Using these guidelines, the Second Circuit held that whether Iona provided the students with a "reasonable avenue for complaint is a question of fact for the jury."[78] The court commented that the mere existence of a sexual harassment policy does not insulate a college; compliance with the policy is essential. The compliance inquiry Iona had to address was whether it responded to the student complaints in a *timely* fashion.[79] Another factor inveighing against Iona was that it knew about complaints against Palma in the past, but had not taken any remedial action. In this regard, the court opined that: "[A]n educational institution may be deemed to have *constructive notice* of harassment where the harassment is so pervasive that school officials should have known about it."[80]

As the foregoing admonishes, colleges are in a tough bind when sexual harassment complaints arise since every professor is considered an *agent* of the college, and is considered to be in a supervisory position *vis-à-vis* students. Because of this predicament, colleges should attempt to prevent sexual harassment charges from arising in the first place. Consequently, it is essential for the sexual harassment policy of the college to be clearly and regularly disseminated both to faculty and students. Some method of feedback should be instituted in order to determine whether the policy is understood and is being followed. If a college properly redresses a sexual harassment complaint, it should be absolved from liability; however, as *Kracunas* teaches, it is important that remedial action be taken in a *timely* fashion. Of course, in dealing with the sexual harassment complaint, the

[75] Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997).

[76] See *id.* at 86.

[77] *See id.* at 88.

[78] *See id.* at 89.

79. Id.

80.See id. at 91 [emphasis added].

college must be careful not to interfere with the legal rights of the professor, or it could face a lawsuit from that quarter.

Although colleges have to *walk on thin ice* when challenging the conduct of a professor in the classroom, there is significantly more leeway to discipline a professor for inappropriate conduct outside the classroom. *Kracunas* dealt with an action by students. However, it was mentioned that Palma was ultimately suspended from teaching and advising duties, and termination proceedings were instituted against him, although the case did not point out whether he in fact was terminated.

There is little doubt that had Palma brought an action against Iona he would have been unsuccessful. In this regard, an apropos case is a 1995 decision of the Second Circuit, *Logan v. Bennington College Corporation*,[81] Leroy Logan had taught drama for eighteen years at Bennington College until his discharge for alleged sexual harassment in 1990. Logan had *presumptive tenure* which gave a professor a five-year term of employment. The college was obligated to extend the employment for another five-years unless the professor substantially failed to perform his or her duties, or his or her position was eliminated due to exigent financial circumstances or change in educational policy.[82] Logan sued Bennington in United States District Court for failure to follow due process, negligence and breach of contract. Bennington's motion for summary judgment was granted to the extent of dismissing Logan's due process and negligence claims. A jury, however, awarded Logan damages for his breach of contract claim. Both parties appealed to the Second Circuit, which affirmed the dismissal of the due process and negligence claims and remanded the case with instructions to vacate the verdict and jury award against Bennington.

The proceeding against Logan was initiated by a male student who filed a complaint with the college alleging that Logan had forced the student to have sexual relations with him in Wales where Logan was directing a college-sponsored program, known as the *London Program.* After a hearing at which Logan and seven students who participated in the London Program testified, Logan was dismissed. Logan presented no evidence to counter the testimony against him, simply claiming he was innocent.

The Second Circuit promptly disposed of Logan's breach of contract claims which were (1) that he was discharged without cause, (2) that he did not receive appropriate procedural protections, and (3) that the college breached a duty of good faith and fair dealing. Since the court could find no basis for the jury's verdict, it reversed and dismissed all claims against the College.

Clearly, the courts have been quite circumspect in restricting the free-speech rights of professors. Nevertheless, there are limits to what can be said in the classroom, and even in public forums outside the classroom. If certain parameters are overstepped, discipline imposed may be upheld. In *Kracunas* and *Cohen,* it may simply be that the classroom speech of the professors did not rise to a sufficient level of tawdriness. Obviously, navigating between what is and what is not acceptable requires college administrators to be vigilant at the helm. No action taken could

[81] 72 F.3d 1017 (2d Cir. 1995).

[82] In 1987, Bennington had eliminated presumptive tenure. By the date the case was decided by the Second Circuit, Bennington had dismissed nearly one-third of its faculty ostensibly for fiscal reasons.

result in legal proceedings by the student against the college, while inappropriate action taken could result in legal proceedings by the professor against the college.

D. A PARAMETER FOR FREE SPEECH IN ACADEME?

Although not dealing with sexual harassment, a case that perhaps demonstrates the limitations of freedom of speech in an academic setting is the well-publicized case of *Jeffries* v. *Harelson*, a 1995 decision of the Second Circuit.[83]

In 1994, the Second Circuit held that a city university could not fire a non-policy making professor for speaking on issues of public concern unless the speech *actually* disrupted government operations.[84] Thereafter, in an unrelated case, *Waters* v. *Churchill*, the Supreme Court held that the government could fire such an employee based upon a *reasonable prediction* that the speech will cause disruption. The Supreme Court then vacated the judgment in *Jeffries* and directed the Second Circuit to reconsider the case in light of the *Waters* decision. After reconsideration, the Second Circuit held that the professor could be fired and entered judgment for the various defendants, officials at the college, who were being sued by the professor.[86]

Leonard Jeffries was chairman of the Black Studies Department at City College of New York, part of the City University of New York ("CUNY"). Jeffries had given a controversial speech off campus wherein he alleged that New York State's curriculum was biased. He made several derogatory comments about Jews. Thereafter, the administration at CUNY voted to limit his term as department chair to one year, although the usual term was three years. Jeffries sued under United States Code Section 1983 alleging a violation of his First Amendment rights.

Referring to the *Waters* decision, the Second Circuit reversed its prior decision now holding that a government employee can be fired if: "(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.

The gravaman of the case, therefore, was whether or not the defendants in the *Jeffries* case were *motivated* to demote Jeffries by a *reasonable expectation* that the speech he gave would harm CUNY. In this regard, the court held as a matter of law that the potential disruptiveness of Jeffries' speech was enough to outweigh whatever First Amendment value his speech might have had.[88] It is interesting to note that the court agreed that academic freedom is an important First Amendment right. It found, however, that Jeffries' academic freedom was not infringed upon since he was still a

[83] Jeffries v. Harelson, 52 F.3d 9 (2d Cir. 1995).

[84] Jeffries v. Harelson, 21 F.3d 1238 (2d Cir. 1994).

8[5] 511 U.S. 661 (1994) (plurality opinion).

86. Jeffries was only fired as department chair, but still retained his position as a tenured professor.

87.Jeffries v. Harelson, 52 F.3d 9, 13 (2d Cir. 1995).

88. *Id.* In the district court, the jury similarly had found that the defendants were motivated to demote Jeffries due to a reasonable belief of potential harm to CUNY. It should be noted that City College has a very high percentage of Jewish alumni; as a result of Jeffries' speech, donations to City College significantly declined. The fact that City College has many Jewish alumni was no doubt a factor in the court's conclusion that the defendants' belief of potential harm to the college was reasonable.

tenured professor and could still expound his ideas in the classroom.[89] The decision in *Jeffries* is somewhat puzzling. Was the court granting more leeway to what can be said in the classroom, as opposed to what can be said outside the classroom? In other words, was the court implying that had Jeffries made his derogatory comments in the classroom it would not have sanctioned his demotion?

Although *Jeffries* did not deal with sexual harassment, it conceivably introduces a measure by which to judge whether sexually-oriented classroom speech is protected under the First Amendment. Specifically, in determining whether a college is justified in disciplining a professor for sexually-oriented classroom speech, the inquiry arguably should be whether the punishment was motivated by a reasonable belief of harm to the institution. The ambiguous word of art here is *reasonable* since rational people obviously may come to different conclusions based upon the same set of facts. Since the courts give academic freedom special consideration, however, punishment for sexually explicit classroom speech should not be sanctioned unless the conduct continues for an extended period of time and is sufficiently abhorrent so that the perceived harm to the institution seems *likely* to occur, a standard that can be met only by presenting *clear and convincing* evidence. On the other hand, speech outside the classroom arguably warrants less protection. After all, Jeffries' demotion was sanctioned by the court based upon a single speech that he gave off campus. In summary, in the interests of academic freedom, an argument can be made that the bar should be raised for limiting classroom speech, as opposed to speech outside the classroom, in determining whether the belief of harm to the institution is reasonable. Obviously, not everyone in academe will believe that a distinction should be made between classroom and non-classroom speech.

IV. DUE PROCESS

Although perhaps not as interesting as the substantive issues, due process considerations are frequently addressed by the courts when a college initiates sexual harassment proceedings against a professor. The Due Process Clause of the Fourteenth Amendment, which is applicable to state action, "provides that certain substantive rights — life, liberty, and property -- cannot be deprived except pursuant to adequate procedures."[90] The Supreme Court has stated that the term *property* includes a broad range of interests.[91] In this context, it has been held that a tenured professor has a property interest in continued employment.[92] Furthermore, a sexual harassment charge "implicates" a person's "liberty interests in his good name and reputation."[9j] Consequently, for a public college to impose serious disciplinary action against a professor, it must satisfy the standards of the Due Process Clause of the Fourteenth Amendment.

The question always is what process is due in a particular situation. Here, it seems that ambiguity is the rule: "[D]ue process, which may be said to be fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which

89. Id. at 14.

[90] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

91. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[92] Silva v. The University of New Hampshire, 888 F. Supp. 293, 317 (D N H 1994)

93. *Id.*

varies depending upon the nature of the interest afflicted, and the circumstances of the deprivation."[94] A tenured public employee is entitled at a minimum to notice of the charges, an explanation of the evidence to be presented against him or her and an opportunity to be heard. A competing interest considered is the burden imposed on government if due process standards are set at too high a level.[95] In a particular situation, a court may have to address in depth: delay and failure to follow procedures, the notice given, the professor's opportunity to respond, and bias of the persons making disciplinary decisions.[96] There is neither a requirement that a specific procedure be used, nor is a plaintiff entitled to the procedure of his or her choice where more than one procedure is available.[97]

The Fourteenth Amendment applies only to state action. Consequently, a professor at a private institution has less due process protection than does a professor at a public institution. Merely because a state has some involvement with a private institution's sexual harassment policy does not mean that there is a state action. For example, the Second Circuit did not accept a tenured professor's argument that because the college had revised its sexual harassment policy pursuant to an agreement with the Vermont Human Rights Commission, in an unrelated case, a state action was involved.[98] Consequently, it appears that the only due process that a professor at a private institution is entitled to is those due process rights that are contractually granted, or that are otherwise set forth in a faculty handbook or disseminated in some other manner. Review by a court will be limited to whether the college adhered to its pronounced procedures.

V. CONCLUSION

For a variety of reasons, many college professors object to the use of student evaluations to rate classroom performance, or at least object to excessive reliance on them for such purpose. Despite the dissatisfactions that are often voiced, the use of student evaluations now seems to be the rule rather than the exception. Since evaluations have an impact on tenure, promotion, salary increases and, importantly, self-esteem, professors are constrained to keep students in their classrooms contented, and perhaps even laughing. As everyone knows, *sex sells.* So, one way to enliven a class and stimulate interest is to insert a little sex into the act. A professor who does not have a particularly licentious mindset nevertheless might be inclined to use sexually explicit speech, sexual metaphors or sexual innuendo on occasion in order to awaken students from a stupor, or perhaps thinking that this will make his or her class more interesting. But as this paper hopefully admonishes,

[94] *Id.* at 318 (quoting Gorman v. University of Rhode Island, 837 F.2d 7, 12 (1st Cir. 1988).

95. *Id.*

[96] For an extended analysis of due process issues, see *id.* at 317-325.

97.Shub v. Hankin, 869 F. Supp. 213 (S.D. N.Y. 1994), *aff'd*, 66 F.3d 308 (2d Cir. 1995). In *Shub*, the Second Circuit affiirmed the suspension of a professor at a community college who invited female students for drinks, commented on a student's perfume, requested home telephone numbers, asked a female student to go sailing on his boat, touched a female student while asking personal question, and kept objects in his office that suggested that female students were more likely to receive an "A" than male students.

[98] Logan v. Bennington College Corporation, 72 F.3d 1017 (2d Cir. 1995).

professor bewarel Frequent references in the classroom to sex might lead to a sexual harassment complaint by a sensitive student or students. Although the end result may be exoneration, the affliction of responding to a sexual harassment charge, and possibly even enduring a court proceeding, obviously will be quite unnerving.

A college is placed in a quandary when a sexual harassment charge is made to it. If the complaint has merit and the college fails to act, or fails to act expeditiously, it could be sued by the student or students making the charge. On the other hand, if the complaint has no merit and action is wrongfully taken against a professor, it could be sued by him or her. Consequently, colleges are caught between a rock and a hard place when dealing with sexual harassment charges.

Although freedom of speech rights are carefully protected by the courts generally, it seems that such rights are placed upon an even higher pedestal when considered in the context of academic freedom, as illustrated by the *Silva* and *Cohen* decisions. Notwithstanding, it seems clear that professors do not have an unfettered license to orate as they will in the classroom. As this paper initially points out, the precise scope of First Amendment protection to be given to classroom speech has never been determined. Since most professors are not interested in being a test case, sexual harassment laws have to be kept in mind when in front of a classroom, and thus will necessarily operate to censor what can be said.

When a professor sues a college as a result of being disciplined for sexual harassment, the attack is usually two-pronged. There are the substantive issues of free speech and there are also due process considerations. Clearly, public institutions must be careful to assure that justifiable discipline is not overturned on due process grounds. The process due a professor at a private institution appears to be only such as is contractually provided.

Protection under the First Amendment is provided only where there is federal or state action. Nevertheless, it is likely that an attempt to restrict or punish the classroom speech of a professor at a private institution will be scrutinized by a court, if it gets to that level, similarly to the way it would review restrictive or punitive actions by a public institution. As noted, the principle of academic freedom is held in very high regard by the judiciary. Consequently, a court arguably would strike down, solely on the basis of academic freedom, any attempt to unduly limit the classroom speech of a professor at a private institution, or punish a professor for his or her speech.