

FRESNO

(559) 225-6700  
FAX (559) 225-3416

IRVINE

(949) 453-4260  
FAX (949) 453-4262

PASADENA

(626) 227-9200  
FAX (626) 227-9202

PLEASANTON

(925) 227-9200  
FAX (925) 227-9202

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

12800 CENTER COURT DRIVE SOUTH, SUITE 300  
CERRITOS, CALIFORNIA 90703-9364  
(562) 653-3200 - (714) 826-5480

FAX (562) 653-3333  
WWW.AALRR.COM

RIVERSIDE

(951) 683-1122  
FAX (951) 683-1144

SACRAMENTO

(916) 923-1200  
FAX (916) 923-1222

SAN DIEGO

(858) 485-9526  
FAX (858) 485-9412

OUR FILE NUMBER:

006159.00010  
11769206.1

December 9, 2013

**VIA EMAIL AND FIRST CLASS MAIL**

**CONFIDENTIAL COMMUNICATION**

Lauren Carella  
Interim Title IX Coordinator  
Occidental College  
1600 Campus Dr.  
Los Angeles, CA 90041

**Re: External Adjudicator's Decision  
Complaint Violation of Occidental College 2013-14 Sexual Misconduct Policy  
Complainant: Jane Doe  
Respondent: John Doe  
Hearing Date: December 7, 2013**

Dear Ms. Carella:

On December 7, 2013, I served as the external adjudicator in the hearing of the above-referenced matter. Based on the evidence received at that hearing, the investigative report and accompanying witness summaries prepared in this matter, and Occidental College's Sexual Misconduct Policy, I provide the following decision.

**I. Introduction**

**A. Procedural Background**

**1. Pre-Hearing Background**

In August 2013, Occidental College (the "College") implemented a new Sexual Misconduct Policy ("Policy"). (A copy of that Policy is attached as Exhibit "1.") Among the conduct prohibited by the Policy is sexual assault of an Occidental student by another Occidental student and Non-Consensual Contact of an Occidental Student with another Occidental Student. (Exhibit "1," Other Forms of Prohibited Conduct, p. 10.) The Policy provides a process to report a complaint of alleged misconduct and to resolve such complaints. (Exhibit "1," Campus Reporting Options, p.22 and Appendix A. Resolving Complaints Against a Student, p. 31.)

02/13/2014

Lauren Carella  
 December 9, 2013  
 Page 2

In the matter at hand, on or about September 15, 2013, *Jane Doe*, the Complainant, reported an alleged violation of the Policy by *John Doe*, the Respondent. The Complaint states that during the early morning of September 8, 2013 the Respondent had sexual intercourse with her without her consent because, at that time, she was incapacitated by alcohol consumption.<sup>1</sup> Pursuant to the Policy, the College initiated an investigation of the reported violation. The College engaged Public Interest Investigations, Inc. ("PII") to conduct that investigation, and PII's lead investigator was Cathleen Watkins.

As the lead investigator, Ms. Watkins was present in all witness interviews, and those witnesses were 1. Genevieve Babcock, 2. Maddie DiMarco, 3. Danielle Dirks, 4. Aidan Dougherty, 5. Liam Driscoll, 6. *Jane Doe*, 7. Jamison Hayward, 8. Angela Peckham, and 9. Chloe Welmond. The Respondent's attorney, Mark Hathaway, did not make the Respondent available to PII for interview. Mr. Hathaway, however, did provide PII with various text messages from the Respondent's phone during the relevant time period. Based on all of this information, PII prepared a written report, along with summaries of the witnesses' testimony, that explained and provided context for the events at issue in this matter. (That report and the witness summaries are attached Exhibit "2" to this decision.)

2. Summary of Hearing Structure and Procedure

The following individuals were invited to be witnesses at the hearing: 1. Genevieve Babcock, 2. Aidan Dougherty, 3. Jameson Hayward, 4. Angela Peckham, 5. Gavin Rose, and 6. Chloe Welmond. Before the hearing, Mr. Hayward stated that he would not be attending the hearing.

The Hearing Officer for this matter was Cherie Scricca. The Complainant and the Respondent were present throughout the hearing. Professor Movindri Reddy was the Complainant's advisor, and she was present throughout the hearing. Amy Munoz, Occidental Associate Vice President, was the Respondent's advisor, and she was present throughout the hearing. Ms. Watkins, the lead investigator, was also present throughout the hearing.

After the Hearing Officer opened the hearing, the external adjudicator advised the parties that she had no prior connection to the College, the Complainant, the Respondent, their advisors, the Hearing Officer, or the Interim Title IX Officer. The external adjudicator then asked Ms. Watkins to present an opening statement. Ms. Watkins presented a brief opening statement during which she summarized the investigative report focusing on the areas of agreement and disagreement. Following the conclusion of Ms. Watkins opening statement, the external adjudicator asked Ms. Watkins questions, and the external adjudicator asked Ms. Watkins questions that the Complainant and Respondent had submitted in writing. After Ms. Watkins' questioning was completed, the Complainant provided an opening statement. After the Complainant completed her opening statement, the external adjudicator asked the Complainant questions, and the external adjudicator asked the Complainant questions submitted in writing by

<sup>1</sup> Both the Complainant and the Respondent are freshman at the College. At the time of the incident, the Complainant was seventeen years-old, and the Respondent was eighteen years-old. With the exception of Professor Dirks, all witnesses in the investigation and the hearing were freshmen at the College.

02/13/2014

Lauren Carella  
 December 9, 2013  
 Page 3

the Respondent.<sup>2</sup> After the Complainant's questioning was completed, the Respondent provided an opening statement.<sup>3</sup> After the Respondent completed his opening statement, the external adjudicator asked the Respondent questions, and the external adjudicator asked the Respondent questions submitted by the Complainant in writing.

Following the Respondent's opening statement, the following witnesses were called in the order listed below: Gavin Rose, Angela Peckham, Aidan Dougherty, Geneviève Babcock, and Chloe Welmond. The external adjudicator asked each witness questions and asked the written questions submitted by the Complainant and Respondent. At the conclusion of those questions, the external adjudicator asked both the Complainant and the Respondent whether either had additional questions. If the Complainant, the Respondent, or both had additional questions, the external adjudicator posed those additional questions to the witnesses.

**B. Summary of the Complaint and the Parties' Positions**

1. Overview of Complaint

This hearing concerned two forms of conduct prohibited by the Policy: sexual assault and non-consensual contact. The two forms of prohibited conduct at issue in this matter, along with their Policy definition, are set forth below:

**Sexual Assault:** Having or attempting to have sexual intercourse with another individual:

- By force or threat of force;
- Without effective consent; or
- Where the individual is incapacitated.

*Sexual intercourse* includes vaginal or anal penetration, however slight, with a body part (e.g. penis, tongue, finger, hand) or object, or oral penetration involving mouth to genital contact.

---

<sup>2</sup> The external adjudicator asked each parties' written questions to the other party and each witness, unless those questions had already been asked and responded to, related to the Los Angeles Police Department investigation, or were not relevant to the subject matter of this hearing.

<sup>3</sup> The Respondent's Advisor, Ms. Munoz, stated to the Hearing Officer that Ms. Carella had told the Respondent that he did not need to prepare an opening statement, and as a result, the Respondent had not prepared an opening statement. Ms. Munoz further advised the Hearing Officer that, despite this alleged instruction by Ms. Carella, the Respondent wished to make an opening statement. In light of this issue, although the Respondent proceeded with his opening statement, the external adjudicator provided the Respondent with additional time before his closing remarks to determine what additional evidence, if any, he wished to present in support of his position.

02/13/2014

Lauren Carella  
December 9, 2013  
Page 4

**Non-Consensual Contact: Having sexual contact with another individual:**

- By force or threat of force;
- Without effective consent; or
- Where the individual is incapacitated.

Sexual contact includes intentional contact with the intimate parts of another, causing another to touch one's intimate parts, or disrobing or exposure of another without permission, intimate parts may include the breasts, genitals, buttocks, groin, mouth or any other part of the body that is touched in a sexual manner.

(Exhibit 1, p. 10.)

As stated previously, the Complainant states that the Respondent engaged in sexual assault and non-consensual sexual contact because he engaged in sexual intercourse with her when she was incapacitated by alcohol consumption. The Policy defines incapacitation as follows:

**Incapacitation:** Incapacitation is a state where an individual cannot make an informed and rational decision to engage in sexual activity because she lacks conscious knowledge of the nature of the act (e.g. to understand the who, what, when, why or how of the sexual interaction) and/or is physically helpless. An individual is incapacitated, and therefore unable to give consent, if s/he is asleep, unconscious, or otherwise unaware that sexual activity is occurring.

Incapacitation may result from the use of alcohol and/or drugs. Consumption of alcohol or other drugs alone is insufficient to establish incapacitation. The impact of alcohol and drugs varies from person to person, and evaluating incapacitation requires an assessment of how the consumption of alcohol and/or drugs impact an individual's:

- decision-making ability;
- awareness of consequences;
- ability to make informed judgments; or
- capacity to appreciate the nature and quality of the act.

Evaluating incapacitation also requires an assessment of whether a Respondent knew or should have known that the Complainant was incapacitated.

(Exhibit 1, p. 13.)

02/13/2014

Lauren Carella  
December 9, 2013  
Page 5

The Policy provides the following guidance regarding alcohol consumption in the context of sexual contact and incapacitation:

**Alcohol and Other Drugs:** In general, sexual contact while under the influence of alcohol or other drugs poses a risk to all parties. Alcohol and drugs impair a person's decision-making capacity, awareness of the consequences, and ability to make informed judgments. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication. If there is any doubt as to the level or extent of the other individual's intoxication or impairment, the prudent course of action is to forgo or cease any sexual contact or activity.

Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual harassment, sexual violence, stalking or intimate partner violence and does not diminish one's responsibility to obtain consent.

(Exhibit I, p. 13.)

The Respondent states that the Complainant was not incapacitated and that he asked for and obtained consent for sexual intercourse from the Complainant. The Respondent admitted that he knew the Complainant had consumed alcohol before the two had sexual intercourse; however, he directed the external adjudicator's attention to the following provision in the Policy, "Consumption of alcohol or other drugs alone is insufficient to establish incapacitation." As discussed below, the Respondent states that the Complainant's conduct showed that, despite her alcohol consumption, she was not incapacitated during the relevant time. Respondent also states that on the evening in question he, too, was significantly intoxicated by alcohol consumption.

## II. Analysis and Findings

### A. Standard of Proof

With respect to the standard of proof for this matter, the Policy states:

The hearing panel will determine a Respondent's responsibility by a preponderance of the evidence. This means that the hearing panel will decide whether it is 'more likely than not,' based upon all relevant information, that the Respondent is responsible for the alleged violation(s).

Thus, the external adjudicator has used the preponderance of the evidence standard in making all findings in this decision.<sup>4</sup>

---

<sup>4</sup> Because the Respondent attempted to raise the outcome of an Los Angeles Police Department investigation that apparently concerned the events and circumstances at issue in the hearing, it is important to recognize that both the elements and standard of proof in a criminal investigation differ from the elements and standard of proof in the Policy.

02 / 13 / 2014

Lauren Carella  
 December 9, 2013  
 Page 6

**B. Sexual Assault**

1. Elements of Sexual Assault under the Policy

In making a determination regarding the Sexual Assault complaint, the following elements were evaluated, in the order listed: 1.) Did sexual intercourse occur between the Complainant and the Respondent during the early morning of September 8, 2013? 2.) Did the Complainant demonstrate conduct or make statements that would indicate she consented to sexual intercourse with the Respondent? 3.) If the Complainant demonstrated conduct or made statements that would indicate she effectively consented to sexual intercourse, was the Complainant incapacitated at the time she demonstrated such conduct or made such statements?, and 4.) Whether the Respondent knew or should have known that the Complainant was incapacitated?<sup>5</sup>

2. Whether sexual intercourse occurred between the Complainant and the Respondent?

In the Investigator's opening statement, she stated that there was agreement that sexual intercourse occurred between the Complainant and the Respondent. The Investigator stated that the basis for that conclusion was Gavin Rose's statement to the investigators. Mr. Rose shared a dormitory room, on the second floor of Braun Hall, with the Respondent. Mr. Rose stated to the Investigators that on the evening in question, when he opened the door to dormitory room he shared with the Respondent, he saw the Respondent having intercourse with a woman, whom based on events earlier in the evening, he understood to be the Complainant. Similarly, at the hearing, Mr. Rose testified that he observed the Respondent naked, on his knees, between the legs of a naked woman, thrusting.

Aidan Dougherty, who also resided on the second floor of Braun Hall, stated to the Investigator and testified that he had a conversation with Mr. Rose during the early hours of September 8, 2013. In that conversation with Mr. Rose, Mr. Dougherty learned from Mr. Rose that 1) the Respondent and the Complainant were in the dormitory room that Mr. Rose shared with the Respondent, 2.) the Complainant and the Respondent were both intoxicated, and 3.) the Complainant had vomited earlier. Mr. Dougherty told the investigators and testified during the hearing that in response to learning this information, he expressed concern to Mr. Rose regarding the Complainant. Mr. Dougherty stated that in response to his expression of concern, Mr. Rose gave him, Mr. Dougherty, the key card and code for his dormitory room and stated that he could go check on the Complainant.<sup>6</sup>

<sup>5</sup> Although the definition of sexual assault under the Policy also includes sexual intercourse obtained by force or threat of force, the external adjudicator finds that "force" or "threat of force" were not factors in this matter. The external adjudicator expressly finds that the Respondent's emails to the Complainant on September 8, 2013 between 12:31 a.m. and 12:55 a.m. do not constitute "force" or "threat of force" under the Policy. Similarly, the external adjudicator finds those emails do not constitute coercion under the Policy.

<sup>6</sup> Mr. Rose told the investigators that he did not give his key card or code to anyone. At the hearing, Mr. Rose credibly testified that he could have given his key card and code for his room to someone and not remember doing

02/13/2014

Lauren Carella  
 December 9, 2013  
 Page 7

Mr. Dougherty stated to the investigators and testified at the hearing that he then proceeded to the Respondent's room and discovered a piece of paper in the area where the swipe card would be placed. (Mr. Dougherty later learned that placement of paper was a signal between the two roommates that the other roommate required privacy for interactions with a woman.) Mr. Dougherty stated to the investigator and testified at the hearing that he removed the paper in the key card area and opened the dorm to the Respondent's room. Mr. Dougherty stated that he observed the Respondent on his bed naked, but with shorts in front of his crotch, and that the Complainant was in the Respondent's bed, under the covers.

Finally, the Respondent testified at the hearing that he had sexual intercourse with the Complainant during the early morning of September 8, 2013.<sup>7</sup>

Accordingly, based on the testimony of Mr. Rose, Mr. Dougherty, and the Respondent the external adjudicator finds that the Respondent had sexual intercourse with the Complainant during the early morning of September 8, 2013.

3. Did the Complainant demonstrate conduct or make statements that would indicate she consented to sexual intercourse with the Respondent?

Angela Peckham, the Complainant's friend, accompanied the Complainant for substantial periods during the evening of September 7, 2013 and the early morning of September 8, 2013. Ms. Peckham stated to the investigators and testified at the hearing that at one point during the evening when she became separated from the Complainant, she discovered that the Complainant had gone to the Respondent's room. Ms. Peckham also told the investigators and testified at the hearing that upon discovering that the Complainant had gone to the Respondent's room, she and her friend, Jameson Hayward, also went to the Respondent's room. While in the Respondent's room with the Complainant, Ms. Peckham observed the Complainant and Respondent kissing and at one point observed the Complainant on top of the Respondent while kissing him. Ms. Peckham also stated to the Investigators and testified at the hearing that the Complainant had taken off her shirt while dancing with the Respondent.

The Complainant and the Respondent also exchanged text messages after Ms. Peckham and Mr. Hayward removed the Complainant from his room and returned the Complainant to her dormitory room. During that period, the Complainant sent a text message to the Respondent asking whether he had a condom, and after he replied that he did she communicated that she would return to his room in "two minutes." Following that exchange, the Complainant

---

so because he does so regularly that he might not remember doing so. The external adjudicator believes that this information sufficiently explains why Mr. Rose did not remember providing his key card and code to Mr. Dougherty on September 8, 2013.

<sup>7</sup> The text messages between the Complainant and the Respondent as well as the text messages between Mr. Rose and the Respondent support the conclusion that the Complainant and the Respondent had sexual intercourse; however, in light of the Respondent's admission coupled with Messrs. Rose and Dougherty's testimony on this issue, an analysis of those text messages to determine whether sexual intercourse occurred between the Respondent and the Complainant was unnecessary.

021312014

Lauren Carella  
December 9, 2013  
Page 8

participated, through text messages with the Respondent, in creating a ruse to avoid Mr. Hayward and her Resident Assistant, who were outside the Complainant's room, so that she could return to the Respondent's room. The Complainant followed the ruse to avoid Mr. Hayward and her Resident Assistant and returned to the Respondent's room.

The Respondent testified that he asked the Complainant whether she consented to having sexual intercourse with him shortly before they engaged in sexual intercourse. Based on the fact that both the Complainant and the Respondent testified at the hearing that they did not recall any conversation between the two when the Complainant returned to the Respondent's room after eluding Mr. Hayward and her Resident Assistant, coupled with the Respondent's level of intoxication, the external adjudicator does not credit the Respondent's testimony on this point.

The external adjudicator, however, finds that the Complainant's text messages, as mentioned above, coupled with her actions in returning to the Respondent's room after that exchange of text messages are conduct and statements that would indicate that she consented to sexual intercourse with the Respondent. Accordingly, the external adjudicator finds that it is more likely than not that the Complainant engaged in conduct and made statements that would indicate she consented to sexual intercourse with the Respondent.

4. If the Complainant demonstrated conduct or made statements that would indicate she consented to sexual intercourse with the Respondent, was the Complainant incapacitated at the time she demonstrated such conduct or made such statements?

Under the Policy, "evaluating incapacitation requires an assessment of how the consumption of alcohol...impact[s] decision-making ability; awareness of consequences; ability to make informed judgments; or capacity to appreciate the nature and decision quality of the act. The evidence that the external adjudicator considered and credited on this issue is set forth below.

Ms. Peckham testified that after the soccer match on September 7, 2013, between 9:30 p.m. and 10:00 p.m., she and the Complainant were in various rooms on the second and third floor of Braun Hall. Ms. Peckham observed the Complainant drink three to four shots of vodka. During that same time, she observed the Complainant drinking vodka mixed with orange juice out of an orange juice bottle. Maddie DiMarco stated to the investigators that she also observed the Complainant drinking shots of vodka during this same time period. Ms. Babcock observed the Complainant drinking the orange juice and vodka drink when the Complainant returned to their room on or about 10:00 p.m. Ms. Babcock observed that the Complainant had been drinking, but was "pretty lucid."

Before 11:00 p.m. on September 7, 2013, the Complainant and Ms. Peckham left the dormitory and campus, and they were walking with a group of the students in search of a party. While the Complainant was walking with that group, Ms. Babcock, who was walking with another group of students, encountered the Complainant. Ms. Babcock observed that, at this time, the Complainant was more impaired than she had been in their dormitory room before she left that

021312014



Lauren Carella  
December 9, 2013  
Page 9

room with Ms. Peckham. At this time, the Complainant approached Ms. Babcock with an uncharacteristically high-pitched voice and was stumbling. The Complainant also fell during this period.

The group of students that the Complainant was with began walking towards to Braun Hall, the dormitory where the Complainant resides, and the group discussed a plan to walk to Mt. Fiji, a hill behind the College. As the students approached Braun Hall, the Complainant advised Ms. Peckham that she was not going to Mt. Fiji because she did not think she could walk up the hill because of her intoxication. After the Complainant made that statement to Ms. Peckham, Ms. Peckham communicated to Mr. Hayward, who was also with that group of students, that she was worried about the Complainant's level of intoxication. Because of that concern, Ms. Peckham and Mr. Hayward, decided to stay behind to take care of the Complainant because of her level of intoxication.

At this time, the Complainant became separated from Ms. Peckham and Mr. Hayward, and encountered Chloe Welmond. At approximately, 11:00 p.m., Welmond walked the Complainant to the front entrance of Braun Hall. Ms. Welmond observed that at that time the Complainant had a hard time walking, was slurring her words, looked very tired, and did not look well. Mr. Hayward told the Investigator at this time, Ms. Peckham told him she was "a little worried" about the Complainant because of her level of intoxication.

After returning to her room, the Complainant went to the second floor of Braun Hall and encountered Mr. Rose. Mr. Rose stated that the Complainant appeared drunk and was leaning up against the wall for support. Mr. Rose then observed the Complainant walk into the dormitory room he shared with the Respondent.

Shortly thereafter, Ms. Peckham discovered that the Complainant was in the Respondent's room. Upon discovering that the Complainant was in the Respondent's room, Ms. Peckham and Mr. Hayward went to the Respondent's room. Ms. Peckham observed that the Complainant was acting "sillier" and "crazy." While in the Respondent's room, Ms. Peckham observed the Complainant drinking swigs of vodka from a vodka bottle. During this time, the Complainant removed her shirt while dancing and was on the Respondent's bed "making out." At this time, because she was concerned about the Complainant's intoxication level, Ms. Peckham attempted to take the vodka bottle away from the Complainant, but the Complainant would consistently retrieve the vodka bottle and continue drinking from it.

In light of the above, Ms. Peckham was concerned that the Complainant did not know what she was doing; therefore, Ms. Peckham began attempting to remove the Complainant from the Respondent's room. Ms. Peckham encountered some resistance in her efforts to remove the Complainant from the Respondent's room. As a result, when the Respondent left his room, Ms. Peckham and Mr. Hayward removed the Complainant from the Respondent's room, and they escorted the Complainant to her dormitory room. Ms. Peckham stated that, although she and Mr. Hayward did not carry the Complainant to her room, the Complainant was walking like an intoxicated person; thus, to escort the Complainant to her room, Ms. Peckham and Mr. Hayward

02/13/2014

Lauren Carella  
December 9, 2013  
Page 10

each linked arms with the Complainant and supported her when they were returning the Complainant to her room.

After Ms. Peckham and Mr. Hayward returned the Complainant to her room, the Complainant sent text messages indicating she was planning to have sex with the Respondent. The Complainant, and the external adjudicator believes on this point, testified that she has no recollection of sending the text messages on September 8, 2013 between 12:31 a.m. and 12:55 a.m. that are Exhibit "4" and "5" to the investigator's report.

After the Complainant left her room to return to the Complainant's room, she vomited in the hallway of the second floor of Braun Hall. Mr. Rose discovered the Complainant vomiting and assisted her by holding back her hair and directing her to the bathroom. The Complainant then returned to the Respondent's room. The external adjudicator recognizes that the fact that Complainant successfully navigated herself, under her own power to the Respondent's room, indicates both that, at the time, she had an awareness of where she was and that her motor skills were sufficiently intact to enable her to walk unassisted. Those factors, however, must be considered not in isolation but along with all of the other evidence regarding the Complainant's condition during the relevant period.

As stated above, neither the Complainant nor the Respondent has a recollection of any verbal communication when the Complainant returned to the Respondent's room. The Complainant subsequently recalled giving the Respondent oral sex; however, the Respondent does not recall this act. The Complainant states, and the external adjudicator believes, she has no recollection of having sexual intercourse with the Respondent.

After the sexual intercourse, when the Complainant left the Respondent's room, she encountered Ms. Peckham who escorted the Complainant to her room. At this time, the Complainant did not mention to Ms. Peckham that she had sexual intercourse with the Respondent. When the Complainant and Ms. Peckham arrived at the Complainant's dormitory room, Ms. Babcock was present. Ms. Babcock stated that Ms. Peckham was supporting the Complainant because the Complainant had trouble walking on her own. Ms. Babcock testified, and the adjudicator believes, that at that time the Complainant was not making sense, was slurring her words, could not unbutton her clothing, and could not drink water without it dribbling down her face.

Ms. Babcock stated that when she left their dormitory room for about ten minutes to shower, when she returned, the Complainant had disappeared. Ms. Babcock contacted the Complainant on her cell phone and after struggling to understand the Complainant, she realized that the Complainant was in Stewart-Cleland Hall. Ms. Babcock went to Stewart-Cleland Hall and discovered the Complainant in her pajamas sitting on a male's lap. Ms. Babcock, with the assistance of a male student who had observed Ms. Babcock struggling to keep the Complainant upright, supported the Complainant in the return walk to Braun Hall. Ms. Babcock stated that at this time the Complainant was, in essence, incoherent, and that when the Complainant returned to their room, the Complainant still could not drink water without the water dribbling down her face. The Complainant testified, and the external adjudicator believes, that she does not recall

02/13/2014

Lauren Carella  
December 9, 2013  
Page 11

these events. Ms. Babcock testified that the Complainant did not mention having sexual intercourse with the Respondent during these events.

The Complainant testified that she learned that she had sexual intercourse with the Respondent when Mr. Dougherty advised her of what he had seen in the Respondent's dormitory during the early hours of September 8, 2013. Mr. Dougherty testified that when he told the Complainant that she had sexual intercourse with the Respondent, she stated that she did not know she had had sexual intercourse with the Respondent, and he believed that statement.

In summary, the evidence shows that the Complainant, who is approximately 5'2" and of normal weight, was already significantly impaired by alcohol no later than 11:00 p.m. on the night of September 7, 2013. Nevertheless, the Complainant continued drinking swigs of vodka from a vodka bottle during the hour to hour and a half. As a result, the Complainant has very little memory of what occurred between the period beginning approximately 11:00 p.m. on September 7, 2013 until she woke up on September 8, 2013. In that regard, the Complainant does not recall creating or sending the text messages contained in the investigators' report during that time period and other events during that period, including having sexual intercourse with the Respondent. Thus, during that period the Complainant's level of intoxication by alcohol was so significant that she experienced "blackouts."

In addition to the blackouts, multiple witnesses—Ms. Babcock, Ms. Peckham, and Ms. Welmond—observed that the Complainant was slurring her speech, stumbling, and not making sense during the relevant time period. Further, the fact that the Complainant removed her shirt while dancing with the Respondent and credibly testified that she would not normally do so when intoxicated caused the external adjudicator to find that by this point in the evening the Complainant's decision-making ability was significantly impaired. The external adjudicator finds that at the time the Complainant and the Respondent had sexual intercourse, the Complainant was not aware of the consequences of her action and she did not have the capacity to appreciate the nature and quality of the act. Accordingly, the external adjudicator finds that the Complainant was incapacitated at the time she engaged in the conduct or statements that indicated she consented to sexual intercourse with the Respondent.

5. Whether the Respondent knew or should have known that the Complainant was incapacitated?

If a respondent did not know or should not have known that the Complainant was incapacitated at the time she engaged in conduct that demonstrated consent for sexual intercourse, a respondent does not violate the College's sexual misconduct policy. This concept, however, must be interpreted along with the provision in the Policy that states:

Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual harassment, sexual violence, stalking or intimate

02/13/2014

Lauren Carella  
 December 9, 2013  
 Page 12

partner violence and does not diminish one's responsibility to obtain consent.<sup>8</sup>

(Emphasis added.) The external adjudicator interprets the emphasized portion of the above sentence to mean that if a respondent is intoxicated, such intoxication does not diminish the requirement of determining whether a complainant is incapacitated as an incapacitated Complainant cannot give consent. Thus, whether a complainant is incapacitated must be determined from the perspective of a sober respondent.

In the instant case, this distinction is critical as the Respondent testified, and the external adjudicator believed this testimony, that on the night of September 7 and the early morning of September 8, 2013, he was more intoxicated than he had ever been. Furthermore, Mr. Dougherty credibly testified that on the evening of September 7, 2013, he observed the Respondent's intoxication as a "7," with a "10" being the highest level of intoxication. Also, Mr. Rose also testified that when the Respondent returned from the water polo team initiation, he, the Respondent, was so intoxicated that he canceled his plans to go out, so that he could watch the Respondent to ensure that the Respondent was safe. The external adjudicator finds that this level of intoxication so impaired the Respondent's ability to assess the Complainant's incapacitation that he did not have actual knowledge of the Complainant's incapacitation. Nevertheless, because the determination of the Complainant's incapacity is from the perspective of the sober respondent, the analysis does not end with that determination.

Rather, the external adjudicator must determine whether the sober Respondent should have known whether the Complainant was incapacitated. In the case at hand, a sober Respondent would have observed and fully appreciated the significance of the following facts: 1.) that the Complainant had vomited shortly before they had sexual intercourse; 2.) that the Complainant was swigging vodka in his room after drinking alcohol throughout the evening; 3.) that the Complainant's taking off her shirt while dancing in his room was inconsistent with her customary behavior; 4.) that the Complainant was slurring her speech, 5.) that the Complainant was having difficulty standing and walking; 6.) that the Complainant's friends, who were present in the room, were concerned that Complainant did not know what she was doing and were trying to remove her from his room because of those concerns. In light of these facts, the external adjudicator finds that a sober respondent would have known that the Complainant was incapacitated at the time she engaged in comments or made statements that indicated consent. Accordingly, the external adjudicator finds that the Respondent should have known that the Complainant was incapacitated.

6. Finding

The external adjudicator finds 1.) that sexual intercourse occurred between the Respondent and the Complaint, 2.) that although the Complainant engaged in conduct and made statements that

<sup>8</sup> From a policy standpoint, the perspective of the sober respondent is advisable as the alternative would result in the respondent's intoxication being a defense to sexual assault.

0211312014

Lauren Carella  
December 9, 2013  
Page 13

demonstrated consent to sexual intercourse with Respondent, she was incapacitated at that time; and 3.) that the Respondent should have known that the Complainant was incapacitated at that time. Thus, the external adjudicator finds that all elements of sexual assault under the College's Policy have been established. Accordingly, the external adjudicator finds that the Respondent has violated the College's sexual misconduct policy.

**C. Non-Consensual Sexual Contact**

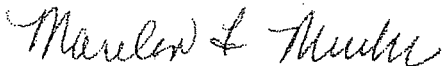
As set forth above, the external adjudicator has found sexual assault as defined in the College's sexual misconduct policy. The elements for a finding of sexual assault under the College's Policy encompass all of the elements of non-consensual sexual contact. Thus, a finding of sexual assault necessarily includes a finding of non-consensual sexual contact. For that reason, and that reason alone, the external adjudicator finds the Respondent also violated the College's prohibition of non-consensual sexual contact as set forth in the Policy,

**III. Conclusion**

Based on the investigative report and summaries of witness statements in this matter and on the testimony received in the hearing on December 7, 2013, the external adjudicator finds that the Respondent engaged in two forms of conduct prohibited by the College's Sexual Misconduct Policy: sexual assault and non-consensual contact.

Very truly yours,

ATKINSON, ANDELSON, LOYA, RUUD & ROMO



Marilou F. Mirkovich

MFM:mfm

Enclosures

02 / 13 / 2014