

Training for Hearing Panelists
and
Appellate Officer

Eastern Michigan University
Rebecca Leitman Veidlinger
May 27, 2022

1

Today we will cover

- **The Policy:** Definitions of key terms
- **Conducting hearings:** Issues of bias and respectful communication with parties and witnesses
- **Doing our jobs:** How to evaluate and weigh evidence
- **Appeals:** The appropriate scope of issues to be considered on appeal and how to consider those issues
- **Bonus Content:** Best practices in administering sexual misconduct hearings sprinkled throughout!

© 2022 Rebecca Leitman Veidlinger

2

Note: Applicable policy and procedures

© 2022 Rebecca Leitman Veidlinger

3

Sexual Assault

- Sexual Contact and/or Sexual Intercourse that occurs without Consent.
- **Sexual Contact** includes touching of the breasts, buttocks, groin or genitals, whether clothed or unclothed, or intentionally touching another with any of these body parts, and/or making another touch you or themselves with or on any of these body parts.
- **Sexual Intercourse** includes (a) vaginal penetration by a penis, object, tongue, or finger, however slight; (b) anal penetration by a penis, object, tongue, or finger, however slight; and (c) any contact between the mouth of one person and the genitalia of another person.

© 2022 Rebecca Lehman Weillinger

4

Consent is

- Informed (knowing);
- Voluntary (freely given); and
- Clearly communicated, through the demonstration of clear words or actions a person has indicated willingness to engage in a particular form of sexual activity.

© 2022 Rebecca Lehman Weillinger

5

Consent is NOT

- Consent cannot be gained by force or coercion. Force is the use or threat of physical violence or intimidation to overcome an individual's freedom of will to choose whether or not to participate in sexual activity. Coercion is conduct, including intimidation and express or implied threats of immediate or future physical, emotional, reputational, financial, or other harm to the Complainant or others, that would reasonably place an individual in fear and that is employed to compel someone to engage in sexual activity.
- An incapacitated individual cannot consent to sexual activity.
- Consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.
- A person who is incapacitated is unable, temporarily or permanently, to give Consent because of physical helplessness, sleep, unconsciousness, or lack of awareness that sexual activity is taking place. A person may be incapacitated as a result of the consumption of alcohol or other drugs, or due to a temporary or permanent physical or mental health condition.

© 2022 Rebecca Lehman Weillinger

6

6/10/21 Revised Consent 2021 ©

More about Consent

- A person who initiates a specific activity is responsible for obtaining Consent for that activity
- Consent is not to be inferred from silence, passivity, or a lack of resistance, and relying on non-verbal communication alone may not be sufficient to ascertain Consent.
- Consent is not to be inferred from an existing or previous dating or sexual relationship. Even in the context of a relationship, there must be mutual Consent to engage in any sexual activity.
- Consent to engage in one sexual activity is not Consent to engage in a different sexual activity or to engage in the same sexual activity on a later occasion.
- Consent to engage in sexual activity with one person is not Consent to engage in sexual activity with any other person.
- Consent can be withdrawn by either party at any point. Once Consent is withdrawn, the sexual activity must cease immediately.

7

6/10/21 Revised Consent 2021 ©

Given the definitions of sexual assault and consent, what are some things you need to know for your determination?

- Who touched whom, how they were touched (i.e., penetration or not), and exactly where on their bodies they were touched
- Who initiated each incident of sexual contact
- What Complainant did or said that made Respondent think they consented to each incident of sexual contact
- What are we not going to ask about?
- And how do we ask about these things?

8

6/10/21 Revised Consent 2021 ©

Incapacitation

- When alcohol or other drugs are involved, it is important to understand the level of impairment that results from a person's level of consumption. The impact of alcohol and other drugs varies from person to person, and a person's level of impairment can change quickly over time. A person's level of impairment is not always demonstrated by objective signs; however, some signs of intoxication may include clumsiness, difficulty walking, difficulty concentrating, slurred speech, vomiting, combativeness, or emotional volatility.
- Evaluating whether another individual is incapacitated requires an assessment of whether the consumption of alcohol or other drugs has rendered that individual physically helpless or substantially incapable of:
 - Making decisions about whether to engage in Sexual Contact or Sexual Intercourse; or
 - Communicating Consent to Sexual Contact or Sexual Intercourse.
- In evaluating Consent where the question of incapacitation is at issue, the University asks two questions: (1) did the person initiating sexual activity know that the other party was incapacitated, and if not, (2) should a sober, reasonable person, in the same situation, have known that the other party was incapacitated? If the answer to either question is yes, then there has not been consent.

9

Given the discussion of incapacitation, what are some things you need to know for your determination?

- What objective signs of impairment did Complainant display?
- What of these signs did Respondent observe themselves?
- What was going on in Complainant's head at time of sexual contact?
- Was Complainant helpless in some way?
- What would a reasonable person have thought about Complainant's observable level of impairment?
- And how do we ask about these things?

© 2022 Rebecca Latham Veillette

10

Intimate Partner Violence

- Intimate Partner Violence includes any act of violence or threatened act of violence that occurs between individuals who are involved or have been involved in a sexual, dating, spousal, domestic, or other intimate relationship.
- Intimate Partner Violence may include any form of Prohibited Conduct under this policy, including Sexual Assault, Stalking, and Physical Assault.
- Physical Assault is attempting, threatening or causing physical harm or engaging in other conduct that threatens or endangers the health or safety of any person or group. In general, Physical Assault will be addressed under this policy if it involves Sexual or Gender-Based Harassment, Intimate Partner Violence, or is part of a course of conduct under the Stalking definition.

© 2022 Rebecca Latham Veillette

11

Given the definition of intimate partner violence, what are some things you need to know for your determination?

- What is the specific relationship (nature, frequency of contact, etc.) between the parties?
- And how do we ask about these things?

© 2022 Rebecca Latham Veillette

12

Stalking

- Stalking occurs when a person engages in a Course of Conduct directed at a specific person under circumstances that would cause a reasonable person to fear bodily injury or to experience substantial emotional distress.
- Course of Conduct means two or more acts, including but not limited to acts in which a person directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person's property.
- Substantial emotional distress means significant mental suffering or anguish.
- Stalking includes "cyber-stalking," a particular form of stalking in which a person uses electronic media, such as the internet, social networks, blogs, cell phones, texts, or other similar devices or forms of contact.

© 2022 Rebecca Latham VerHoffen

13

Given the definition of stalking, what are some things you need to know for your determination?

- Specifics of the alleged contacts (frequency, nature, etc.)
- Impact on the Complainant
- How would a reasonable person view the contacts?
- And how do we ask about these things?

© 2022 Rebecca Latham VerHoffen

14

Sexual or Gender-Based Harassment

- Sexual Harassment is any unwelcome sexual advance, request for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, non-verbal, graphic, physical, or otherwise, when the conditions outlined in (1) and/or (2), below, are present.
- Gender-Based Harassment includes harassment based on gender, sexual orientation, gender identity, or gender expression, which may include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve conduct of a sexual nature, when the conditions outlined in (1) and/or (2), below, are present.
 1. Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of a person's employment, academic standing, or participation in any University programs and/or activities or is used as the basis for University decisions affecting the individual (often referred to as "quid pro quo" harassment); or
 2. Such conduct creates a hostile environment. A "hostile environment" exists when the conduct is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the University's education or employment programs and/or activities.
- Conduct must be deemed severe, persistent, or pervasive from both a subjective and an objective perspective.

© 2022 Rebecca Latham VerHoffen

15

• In evaluating whether a hostile environment exists, the University will consider the totality of known circumstances, including, but not limited to:

- The frequency, nature, severity, location, duration and context of the conduct
- Whether the conduct implicates concerns related to academic freedom or protected speech.

• A hostile environment can be created by persistent or pervasive conduct or by a single or isolated incident, if sufficiently severe. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the conduct is physical. A single incident of Sexual Assault, for example, may be sufficiently severe to constitute a hostile environment. In contrast, the perceived offensiveness of a single verbal or written expression, standing alone, is typically not sufficient to constitute a hostile environment.

© 2022 Rebecca Latham Weillinger

More on Sexual or Gender-Based Harassment

16

Given the definition of sexual harassment, what are some things you need to know for your determination?

- Specific nature of the conduct (e.g., exactly what was said or done)
- Did Complainant initiate or invite the conduct?
- Frequency of the conduct
- Whether conduct was widespread
- Whether a reasonable person would view the conduct as severe, persistent or pervasive
- And how do we ask about these things?

© 2022 Rebecca Latham Weillinger

17

Sexual Exploitation

- Causing the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give Consent to sexual activity.
- Allowing third parties to observe private sexual activity from a hidden location (e.g., closet) or through electronic means (e.g., livestreaming of images) without the consent of all subjects or participants;
- Engaging in voyeurism (e.g., watching private sexual activity without the consent of all participants or viewing another person's intimate parts (including genitalia, groin, breasts or buttocks) in a place where that person would have a reasonable expectation of privacy;
- Recording or photographing private sexual activity and/or a person's intimate parts without the consent of all subjects or participants;
- Disseminating or posting or otherwise sharing images of private sexual activity and/or a person's intimate parts without the consent of all subjects or participants;
- Prostituting another person; or
- Exposing another person to a sexually transmitted infection or virus without the other's knowledge.

© 2022 Rebecca Latham Weillinger

18

Retaliation

Retaliation means any adverse action taken against a person for making a good faith report of Prohibited Conduct or participating in any proceeding under this policy. Retaliation includes threatening, intimidating, harassing, coercing or any other conduct that would discourage a reasonable person from engaging in the processes contained in this policy. Retaliation may be present even where there is a finding of "no responsibility" on the allegations of Prohibited Conduct. A good faith pursuit by either party of civil, criminal or other legal action, even in response to an initial report under this Policy, does not constitute retaliation.

© 2022 Rebecca Letman Veidlinger

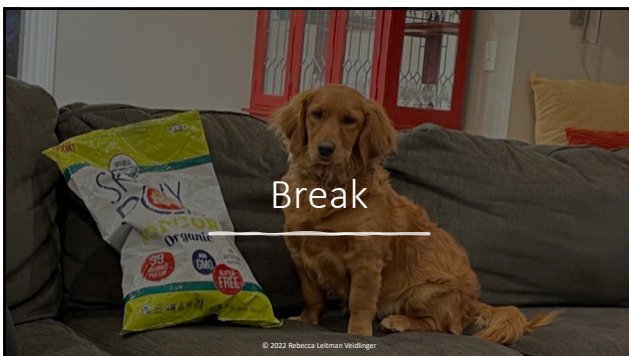
19

Given the definition of retaliation, what are some things you need to know for your determination?

- Timing of alleged protected act and alleged retaliatory act
- Whether Respondent knew of alleged protected act
- And how do we ask about these things?







© 2022 Rebecca Letman Veidlinger

20




21

Asking questions yourselves
To ask the right questions, you must:

-  Know the elements of the prohibited conduct alleged
-  Remember what EMU policy says is off-limits
-  Be familiar with what each party and witness said during the investigation
-  Be familiar with the evidence that was collected
-  Identify the areas that still need development/clarification
-  STRUCTURE YOUR NOTES IN A WAY THAT PUTS ALL OF THAT TOGETHER

© 2022 Rebecca Letman Weidinger

22



Quiz:
What is the point of a hearing officer's questions?


- a) To show how smart the hearing officer is
- b) To find out what each party said happened
- c) To get clarity on portions of evidence that may be unclear that are relevant to the determination
- d) To get details that are relevant to the determination where they are missing from the investigation report
- e) To engage with the parties and witnesses to the extent it assists your credibility determination
- f) C, D and E

© 2022 Rebecca Letman Weidinger

23

What will help you get that information?

- Rapport building: What does this look like at the hearing stage?
- Roadmaps
- Transitions into questions
- Explaining what you are doing
- Using a human(e) style
- General respectful communication



© 2022 Rebecca Letman Weidinger

24


Practice:
How would you ask about . . .

- Alcohol consumption
- Specific details of/surrounding the sexual act
- Respondent described the sexual encounter differently that Complainant did– Complainant as active, initiating participant
- Post-incident initiation of contact by Complainant toward Respondent
- Complainant's 18-month delay in reporting incident

25

Evaluating questions proposed by the parties


Procedures:
“In general, the Hearing Panel will not permit questions that would be irrelevant, more prejudicial than probative, or immaterial. Additionally, the Hearing Panel will not permit questions that would be in violation of state or federal law, including rape shield laws.”



26

Bias

- Bias is not an action; it occurs in a person's head
- What is implicit bias?
- Different kinds of bias



27

advisory commission, COO, B

How can we recognize and mitigate bias?

- Recognize: write out your reasoning for the decision; explain it to your fellow hearing panelists
- Reflect on your first impressions
- Ask questions: Would your view of the person change if they were different/similar to you?
- Think about alternative reasons why a person may be acting the way they are
- Assign someone on the panel to argue the opposing view
- Take notice when you feel strongly about a conclusion
- Take note of your own mood and physical comfort and attentiveness to the material

28

Doing Our Jobs: How to evaluate and weigh evidence

1.

© 2023 Rebecca Letman Weidinger

29

©2023 Rebecca Letman Weidinger


Doing Our Jobs: How to evaluate and weigh evidence (i.e., determining what happened)

If there is a factual dispute, you must make a factual determination of what happened:


- Identify the various versions of what happened
- Identify pieces of evidence that support each aspect of those varying accounts or that contradict those accounts
- Determine the weight you will give each piece of evidence

30


Important concepts




Relevance



Reliability



Credibility




Weight/
probative
value

© 2022 Rebecca Lettman-Vedlinger

31

Determining credibility



32

Appeals

- Procedures: "Either party may appeal the outcome and/or sanction. The appeal will be conducted in an impartial manner. The Associate Vice President for Student Affairs will conduct appeals. A review of the matter will be prompt and narrowly tailored to stated appeal grounds. The limited grounds for appeal are as follows:
 - 1) New information that could affect the finding of the investigator, Hearing Panel or Review Panel, and was not available through the exercise of due diligence when the Party was permitted to present the information;
 - 2) A deviation from University policy or procedure that materially affected the outcome;
 - 3) Sanctions too harsh or too lenient.

© 2022 Rebecca Lettman-Vedlinger

33

Quiz!
Which of these are appropriate bases for an appeal?

- Respondent didn't realize the time-stamped photos on their iPhone would be so important to the matter until they heard the witness's answers to questions at the hearing
- Investigator did not interview Complainant's roommate, who was an eyewitness to the Snapchat message Respondent sent in which they admitted Complainant was passed out during the sexual contact
- Respondent's notice of investigation letter was sent out five days after the notice of investigation letter was sent to Complainant
- Investigation took 400 days to complete
- Sanction of probation does not adequately account for the impact on Complainant

© 2022 Rebecca Leitman Veidlinger

34



Questions?

- Thank you!
- rebecca@veidlinger.com

© 2022 Rebecca Leitman Veidlinger

35