

## REPORT OF INVESTIGATION AND FINDINGS

### Allegations of Violation of the

### University of California Sexual Harassment and Sexual Violence Policy

November 20, 2014

#### I. Allegations

On September 11, 2014, Office for the Prevention of Harassment and Discrimination ("OPHD") Complaint Resolution Officer Will Mallari (hereafter referred to as "the Investigator") received a complaint from an anonymous female UC Berkeley [REDACTED] ("Complainant") alleging that she had been sexually assaulted by Alan Wong ("Respondent"), while he was working as a massage therapist at UC Berkeley's Recreational Sports Facility ("RSF"). Complainant alleged that in August of 2014 she received a massage from Respondent and that, during the massage, Respondent touched her vagina multiple times with his hands.

#### II. Jurisdiction

The Office for the Prevention of Harassment and Discrimination has campus-wide responsibility for responding to sex discrimination complaints, including sexual assault, and implementation of the University of California Sexual Harassment and Sexual Violence Policy, which includes the investigation and resolution of complaints against UC Berkeley employees.

#### III. Applicable Policy

The University of California Sexual Harassment and Sexual Violence Policy defines Sexual Violence as:

physical sexual acts engaged without the consent of the other person or when the other person is unable to consent to the activity. Sexual violence includes but is not limited to sexual assault, rape, battery, and sexual coercion; domestic violence; dating violence; and stalking.

The policy explains that Sexual Assault occurs:

when physical sexual activity is engaged without the consent of the other person or when the other person is unable to consent to the activity. The activity or conduct may include physical force, violence, threat, or intimidation, ignoring the objections of the other person, causing the other person's intoxication or incapacitation through the use of drugs or alcohol, or taking advantage of the other person's incapacitation (including voluntary intoxication).

The policy defines Consent as follows:

Consent is *informed*. Consent is an affirmative, unambiguous, and conscious decision by each participant to engage in mutually agreed-upon sexual activity.

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Consent is *voluntary*. It must be given without coercion, force, threats, or intimidation. Consent means positive cooperation in the act or expression of intent to engage in the act pursuant to an exercise of free will.

Consent is *revocable*. Consent to some form of sexual activity does not imply consent to other forms of sexual activity. Consent to sexual activity on one occasion is not consent to engage in sexual activity on another occasion. A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be mutual consent to engage in sexual activity. Consent must be ongoing throughout a sexual encounter and can be revoked at any time. Once consent is withdrawn, the sexual activity must stop immediately.

Consent cannot be given when a person is *incapacitated*. A person cannot consent if s/he is unconscious or coming in and out of consciousness. A person cannot consent if s/he is under the threat of violence, bodily injury or other forms of coercion. A person cannot consent if his/her understanding of the act is affected by a physical or mental impairment.

Evidence is weighed by a preponderance standard, or "more likely than not."

### IV. Summary Findings

Based on the evidence gathered, the Investigator determines that Respondent sexually assaulted Complainant, in violation of the University of California Sexual Harassment and Sexual Violence policy. A detailed discussion of this finding is included in Sections VI and VII.

### V. The Investigation and Interim Remedies

In addition to the [REDACTED] Complainant, the Investigator interviewed the employee Respondent and the following individuals: [REDACTED] ("Witness One"), and [REDACTED] ("Witness Two"). The Investigator reviewed Respondent's most recent work schedule and completed massage appointments, as provided by Witness One. The Investigator also visually inspected the premises of the RSF massage studio.

Upon consultation with OPHD, the Recreational Sports Department placed Respondent on a paid administrative leave on September 15, 2014, pending the outcome of this investigation. The administrative leave was first communicated to Respondent by Witness One on September 15, 2014 by hand-delivered letter.

#### A. Interview with the Complainant

On September 9, 2014, the Investigator received a voicemail message from an unknown caller. The sound quality was poor; however, a portion of the recording could be discerned to state, "...don't want to be involved in case in terms of police or court case..." The voicemail system recorded the caller's telephone number. The Investigator left return messages for the caller on September 9 and again on September 11, 2014. On September 11, 2014, the Investigator received a phone call from the unidentified caller. She stated that she "want[ed] to remain anonymous." The Investigator indicated that the caller did have the ability to remain anonymous and scheduled a time to talk with her, over the phone, later that day.

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On September 11, 2014, at approximately 3:30 pm, the Investigator took the anonymous Complainant's statement over the phone. Complainant again stated that she did not want to be involved in a court case or with police. The Investigator explained OPHD policies and procedures and indicated that OPHD would evaluate any information that she chose to provide and would not seek to discover her identity. The Complainant stated that she had been referred to OPHD by [REDACTED], a clinical social worker and confidential counselor at the [REDACTED]. The Investigator conducted a follow-up telephone interview with Complainant on November 14, 2014.

The Complainant stated that on August 27, 2014 at 1:30 p.m. she received an 80 minute massage from a massage therapist at the RSF. She indicated that she had previously scheduled the appointment. She stated that the Respondent was the massage therapist who performed the massage. She stated that, prior to this incident, she had received twelve massages at the RSF since April 2013. Complainant estimated that she received approximately 5 massages from Respondent prior to this incident, in addition to massages from four other therapists.

Complainant described arriving at the RSF massage area and being ushered into the massage room "furthest from the door" by Respondent. Complainant stated that, typically, Respondent would ask her "How can I help you?" At which point they would discuss the areas that Complainant wanted Respondent to focus on during the massage. Complainant did not recall the specifics of that likely interaction on this occasion. However, she did recall Respondent asking her about her recent [REDACTED]

Respondent then left Complainant alone in the massage room. Complainant then undressed, except for her underpants. Complainant then got beneath the blanket on the massage table with her face down. When Respondent came back into the room, he rolled down the blanket to expose Complainant's back and began the massage.

Complainant understood that, based on prior massages with Respondent, Respondent was familiar with the tense areas on her body in which she liked for Respondent to focus. She described these areas as her shoulders and neck. Complainant said that Respondent usually only massaged her above the waist. On this occasion, Respondent spent an uncharacteristic amount of time focusing on her legs. Complainant estimated that approximately one-half to three-quarters of the way through the massage, Respondent began "massaging around [her] crotch." Respondent then "started touching [her] vagina area." Complainant indicated that she was lying with her face up at this time.

Complainant described that Respondent first touched her vagina over her underwear. Respondent then "grabbed [her] underwear in the middle" and used his free hand to touch the bare skin of her vagina "through the leg openings" of her underwear as it was pulled away from her body. Complainant stated that Respondent "rubbed [her] clitoris several times" using an "up and down" motion, but "maybe also side to side." Complainant described that Respondent "touched [her] clitoris as if to [make her] orgasm." Complainant estimated that Respondent touched her clitoris "four times." Complainant also stated that the Respondent touched the "opening" of her vagina. However, Respondent did not penetrate her at any point. She described that, at various times, Respondent touched her vagina from the left side and from the right side, with the blanket covering the opposite leg at each instance.

Complainant initially stated that when Respondent first began touching her vagina, Complainant asked Respondent, "Can you focus on my shoulder?" Respondent replied, "Yes," and moved to

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her shoulder, but then returned to touching her vagina. Complainant later described that she didn't remember saying anything during the unwelcome touching. She said that she "froze." However, she stated that she "wiggled around" to signal that she was not relaxed. She described this movement as moving her legs, but that it was so slight that it may not have been visible. Complainant speculated that because she did not react to Respondent touching her vagina, that he then decided to touch her clitoris and the "opening" of her vagina.

Complainant described that after Respondent touched her vagina, he then wiped it with a towel, as he did after massaging other parts of her body. Respondent massaged her shoulders and neck again after wiping her vagina with a towel. Complainant stated, "He kept pretending it was part of the normal routine." According to Complainant, at the conclusion of the massage, Respondent suggested that she should do stretches, as if nothing unusual had happened.

Complainant described that, after the massage appointment, she was "very confused" as to whether or not Respondent's touching of her vagina was "part of the massage." She said that she contemplated reporting what had happened to "the head of RSF massage," but said that she was afraid they might take Respondent's side or that nothing would be done. Instead, she left the RSF and immediately went to the [REDACTED]. Complainant elaborated [REDACTED] that she went there to seek advice from a neutral "third party."

Complainant said that, during the month following the incident, she "couldn't go anywhere near the RSF" and, in fact, avoided going there for fear of running into Respondent. She also explained that the [REDACTED]

Complainant stated that she does not want for [REDACTED] to know her name. She also expressed the hope that Respondent will not be allowed to work or come back onto campus.

**B. Interview with the Respondent**

The Investigator interviewed Respondent on October 30, 2014 at OPHD.<sup>1</sup> Respondent stated that he has worked as a massage therapist at the RSF for approximately four years. His weekly work schedule is Monday through Thursday from 10:00 a.m. to 3:00 p.m. His employment classification is as an independent contractor.

Respondent said that he is a certified massage therapist and that he received his certification from the California Massage Therapy Council (CMTC) in 2008. He said that he has not been the subject of an investigation related to his certification.

The Investigator read Respondent the statement of allegations that the Investigator previously emailed to Respondent on September 24, 2014 (attached). Respondent said that he understood the allegations. He stated, "I think the allegations are false." Respondent also stated, "Why didn't she make a report that day, right away? Why wait until three weeks later to complain? If

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<sup>1</sup> Respondent requested for OPHD to provide a Vietnamese interpreter during his interview. [REDACTED] of [REDACTED] provided translation services. Locating and arranging the interpreter caused an approximately 5 week delay in the investigation.

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she reported right away, the police probably would have arrested right away. Why now involve me?"

When asked how he calculated the three week timeframe between the alleged incident and the anonymous report, Respondent stated that he meant "close to three weeks because the massage was in August and reported in September.

Respondent stated that he had no recollection of giving any massages in August where anything unusual happened. He said that he sees five people a day, one after another. He further stated, "The most I could remember, my elbow could have hit someone [on their head]. If I did, I would have said 'Sorry.'" When asked, Respondent said it was not possible that he would have bumped or touched someone's vagina. He stated that he has never touched a client's vagina.

Respondent was asked to describe a typical massage. He stated that, when a client arrives, he might ask them, 'How are you? How is your body feeling today?' He explained that "Guests tell me about the area that they feel pain or stress, so I pay more attention there, but never in private area." He described that for a typical 50 minute massage, the client spends 40 minutes face down and 10 minutes face up. For an 80 minute massage, most of the time is also spent face down. Respondent described that sheets and blankets are used to maintain modesty. Respondent said that, when a client is face up, the sheet is pulled up to the client's neck.

Respondent said that the majority of clients leave their underwear on, although it is okay if people remove their underwear. He said that a client's underwear would not be visible to him. He demonstrated that the sheets and blankets cover a client's private areas and extend beyond the underwear line. He also demonstrated that, when massaging a client's legs, he will position the blanket so that it covers the crotch area and several inches below. He said that the highest points he touches on a client's legs are on the quads or on the hamstrings. The lowest he touches on the backside is just below the beltline, and only over the sheet. He said that he has no reason to touch beyond the underwear line. He also verified that he is "not supposed to."

When asked where he might touch a person who wants him to focus on their shoulders, Respondent demonstrated that he would spend the majority of time on the person's shoulder blades and neck. The final 10 minutes he would also massage the client's shoulders and neck while face up. He said he would not have a reason to massage the client's legs. He stated, "No reason because they are complaining about back. I don't touch other areas."

Respondent said that he was instructed by the state never to touch a client's private areas. When asked if he ever had a reason to touch or adjust a client's underwear or the underwear material, he replied, "Never. No, I don't. I have never touched underwear." Respondent continued, "The state specified what I can and cannot do when I got my license. I cannot touch breasts of woman, or private areas of woman and man. As a massage specialist, I have to know where. They didn't give specific name, but gave 'private area.' I have to know where to stay away as a professional."

Respondent also said that no client has ever asked him to touch a private area. Respondent said that if a client were to ask him to touch a private area, he would walk out of the room. He elaborated, "I would tell my supervisor what happened and I would write myself a note that I don't want to see that client again." When asked if he ever wrote such a note, Respondent described one incident in which a male client made a racist comment about him. Accordingly, he

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noted not to see that client again. However, he said he never encountered an unwelcome situation of a sexual nature.

The Investigator told Respondent that, specifically it was alleged that he touched the opening of a client's vagina and her clitoris. When asked if it was possible, Respondent replied, "I don't remember what that person was. I don't remember touching anyone in a private area. With the hard work with 5 people in a day. I don't know if this was the last person, but if so, I was tired and don't remember."

Respondent continued, "Every day is the same. For the first one I am okay, from the second one, body tired. I'm close to [REDACTED] years old, my body not like a young person. There's nothing wrong with my memory. Every day when I work, just hope the end of day so I can go."

When asked why afternoon versus morning was significant to him for his memory, Respondent replied, "Doesn't matter if first or last...want to do best. Never touch private area of customer."

When asked if he uses oil with the massages he performs, Respondent replied that he offers both oil and cream and that the client chooses which product he uses. When asked if he uses towels with massages, he stated that he uses hot towels to apply heat, particularly to a client's back. When asked if he ever uses a towel to wipe a client's body, he replied "No. Never." He explained that he suggests for clients to relax for half an hour after the massage and then to take a shower. He said that, if the massage oil bothers a client, they wipe themselves with a towel. He said, "If the oil bothers them, the customer wipes themselves. I do not wipe them. They use it."

The Investigator expressed that he would not find it unusual if a massage therapist were to use a towel to wipe off massage oil. Respondent replied that "The shower is close to the massage area in the RSF. The customer will go to shower [to clean off the oil] themselves. If they ask for a towel, I give them one."

The Investigator asked if there was a rule against wiping clients with a towel. Respondent explained that there is not a rule against it, but that he did not have time for such a practice. He opined that massage therapists may wipe clients with towels after sport massages because there is a longer break time of approximately 10 to 15 minutes between such massages. By comparison, Respondent stated that he typically only has a few minutes in between clients and, therefore, no time to use a towel to remove excess oil.

When asked to speculate why someone might fabricate such an allegation against him, Respondent replied, "I was surprised. I just read the material from CMTTC that a customer could do a scam like this." When asked what the customer might gain, Respondent replied, "The scam is because that person wanted to blame that I caused injury to get money." The Investigator pointed out how that did not appear to be the case here and asked if Respondent could think of any other reason someone might make this up. Respondent stated, "I can't figure it out. This person just wants to get me fired. If I did a terrible job, report to my supervisor. I don't know what this person gets from [making this complaint]." Respondent also stated that he has "no idea who this anonymous [Complainant] is." Respondent ended, "Bottom line, I didn't do it. Just want to go back to work."

**C. Witness Interviews**

Witness One

Witness One is the [REDACTED] and [REDACTED]. Witness One stated that she [REDACTED] Respondent for approximately one year. Witness One estimated that Respondent has been employed as a massage therapist with Recreational Sports for approximately four to five years. Witness One verified that Respondent has a valid and current California Massage Therapist Certification.

Witness One said that, in the year that she [REDACTED] Respondent, she has not received any complaints against Respondent. Witness One said that she had received approximately three to four "comments" that Respondent "applies too much pressure [with his hands]" when performing massage, but that he is a "good therapist." Witness One opined that Respondent's "customer service" could use improvement in terms of "greetings" and "making clients feel comfortable."

Witness One stated that massage therapists are scheduled to work five hour shifts from either 10:00 a.m. to 3:00 p.m. or from 4 p.m. to 9 p.m.

Witness One stated that Recreational Sports supplies the oil and lotion used by the therapists during massages. Witness One said that it is typical for therapists to use oil or lotion with all massages, including relaxation and deep tissue. Witness One stated that there is no differentiation in time allotments or break periods in between the various types of massages. Witness One then clarified that therapists perform "sport massages" on athletes. Witness One described that sport massages are typically booked in "blocks" of massages by team coaches or trainers. With sport massages, therapists typically perform a 20 minute massage session with a 10 minute break in between athletes.

Witness One said that it is typical for therapists to use warm wet towels to wipe off oil or lotion at the end of each massage. Witness One explained that therapists prepare towels for this purpose at the beginning of each shift.

Witness One stated that she had received a massage from Respondent in the past. She recalled that Respondent used oil or lotion with that massage. Witness One was not certain, but said that she "think[s]" Respondent used a towel at the end of the massage to wipe away excess oil.

Witness One stated that, in order to use the RSF locker room facilities, one must be a member or have a day pass. Witness One further explained that it is possible for clients to book a massage without being members of the RSF or without having purchased a day pass to the RSF. Witness One stated that there would not be an expectation for massage clients to use the locker room or to shower after massages. She said, "It is not a spa-like environment."

Witness Two

Witness Two is the [REDACTED] of Respondent. Witness Two reported that she never received any complaints against Respondent related to any form of harassment or



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discrimination. Witness Two stated that the only feedback she received from a client regarding Respondent was that his deep tissue massages were "too strong."

**D. Review of Documents**

Witness One provided the Investigator with Respondent's work schedule and massage appointment bookings that included the month of August 2014 (see attachment). The schedule reflected that Respondent provided an 80 minute massage on August 27, 2014 at 1:30 p.m. It also reflected that this was Respondent's final of four booked massage appointments for the day.

**VI. Analysis**

Complainant alleged that Respondent touched her vagina multiple times during the massage appointment. Respondent flatly denied the allegation. In this case, each party's credibility is key, and ultimately determinative.

Complainant's choice to remain anonymous must be considered. It is troubling to receive such a serious allegation, with potentially serious consequences for the person accused, from an unnamed complainant. On one hand, less information is available to substantiate Complainant's allegation, such as her purported identity as a UC Berkeley [REDACTED]. On the other hand, there is no apparent motive for Complainant to lie. In fact, Complainant's request to remain anonymous (even to the Investigator and the University) further supports the notion that Complainant stands nothing to gain (such as financial remuneration, as suggested by Respondent) by bringing this complaint. Nor did Respondent suggest any other reasons why Complainant might fabricate this complaint. Moreover, Complainant's description of the RSF massage facility, her knowledge of the [REDACTED] and a specific [REDACTED], and the record of Respondent's completed massage appointments all tend to corroborate Complainant's account.

Complainant expressed that her motivation for coming forward, albeit anonymously, was to prevent Respondent from subjecting others to similar behavior and to avoid encountering him again. Complainant also explained that she did not want to participate in a potential criminal investigation or be compelled to appear in court. Although the Investigator explained that an administrative investigation is quite separate from a criminal investigation, it was clear to the Investigator that even reporting the alleged assault to OPHD was difficult for Complainant and that she sought to avoid any possibility of having to discuss or relive the incident for an indeterminate amount of time.

Not surprisingly, Respondent has much at stake. The potential for discipline (including termination), potential damage to reputation, and potential loss of state licensing credentials are possible motives for Respondent to ingenuously deny the allegations. Still, such potential motives are not uncommon for any employee responding to a policy violation allegation.

The Investigator found portions of Respondent's statement improbable. Respondent seemingly went out of his way to deny his use of towels to wipe oil from clients at the end of massages. The Investigator finds nothing unusual about the general practice of wiping clients with towels. Witness One confirmed that this is a common practice and even thinks that Respondent used a towel to wipe excess oil at the conclusion of her massage with Respondent. Witness One also explained that a client would not necessarily be expected to shower after a massage and may not even have access to the locker room facilities. Yet, Respondent insisted that he leaves it to



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clients to towel off or shower to remove excess oil. The Investigator did not find the Respondent to be credible on this point. Instead, Respondent's statements suggested to the Investigator that Respondent had something to hide about his use of towels on the Complainant—namely, that he touched her vagina using a towel.

During Respondent's interview with the Investigator, Respondent made several statements that suggested he recalled the specific incident giving rise to this complaint. For instance, Respondent asked the Investigator, "Why didn't she make a report that day, right away? Why wait until three weeks later to complain? If she reported right away, the police probably would have arrested right away. Why now involve me?" The Investigator notes that Complainant reported the incident to OPHD on September 11, 2014, fifteen days after the alleged incident date of August 27, 2014. The statement of allegations provided to Respondent did not specify the exact date of the alleged incident, nor did the Investigator verbally share that information with Respondent. Rather, the allegations provided to Respondent stated that the incident occurred in "August of 2014."

Furthermore, when asked if it was possible that he touched a client's vagina, he responded, "I don't remember what that person was. I don't remember touching anyone in a private area. With the hard work with 5 people in a day, I don't know if this was the last person, but if so, I was tired and don't remember." Again, at no time did the Investigator tell Respondent the time of the alleged incident. However, according to Complainant, the massage appointment was from 1:30 p.m. to 2:50 p.m. Respondent's schedule indicates that this was, in fact, Respondent's last appointment of the day, having worked since 10 a.m. Such responses suggest that Respondent had Complainant's reported incident in mind when responding to the Investigator's questions. Because the alleged acts of sexual assault were the only unique details the Investigator gave Respondent about this particular massage appointment, the Investigator finds it more likely than not that Respondent acted as alleged by Complainant.

Specifically, the Investigator finds it more likely than not that Respondent touched Complainant's vagina over her underwear, pulled back Complainant's underwear to touch the bare skin of her vagina, rubbed Complainant's clitoris several times, touched the "opening" of Complainant's vagina, and finally, wiped Complainant's vagina with a towel. As Respondent himself explained, massage therapists are prohibited from touching clients' private parts. Touching a client's vagina is undoubtedly prohibited. Such touching is absolutely not part of a valid massage.

There is no dispute regarding consent. Although Respondent denies the sexual touching altogether, the context of the encounter (a massage) is ample evidence to indicate that Complainant did not consent to Respondent touching her vagina. Such behavior constitutes sexual violence under the University of California Sexual Harassment and Sexual Violence policy. Specifically, the behavior meets the policy definition of sexual assault, because Respondent subjected Complainant to physical sexual activity without her consent.

Finally, the Investigator notes the impact that Respondent's actions had on Complainant. Complainant [REDACTED]

**VII. Conclusion**

Based on information gathered from interviews with the Complainant, Respondent, and witnesses, as well as the review of relevant documents, the Investigator evaluated the record of the allegations as a whole and gave consideration to the totality of the circumstances, including the context in which the alleged incidents occurred. The standard by which the evidence was weighed was "more likely than not." The evidence gathered supports the conclusion that Respondent more likely than not subjected the Complainant to nonconsensual physical sexual activity. It is therefore determined that Respondent violated the University of California Sexual Harassment and Sexual Violence policy.

Based on this conclusion, the Investigator forwards this finding to the Recreational Sports department for further review and disposition. The Investigator further notes the serious nature of this violation and the potential for Respondent to assault others.