

A graduate student sued a professor for sexual harassment. The student alleges that the professor repeatedly made unwanted advances during her two years as the professor's teaching assistant. At trial, the professor testified that he and the graduate student were involved in an on-and-off consensual relationship, and that the graduate student's suit has been brought in retaliation for his refusal to recommend her for a prestigious fellowship. On cross-examination, the graduate student's attorney accused the professor of fabricating the relationship to avoid liability for sexual harassment.

The professor seeks to call the university department chair to testify that the professor told the department chair about his relationship with the graduate student 18 months before the graduate student accused him of harassment.

Is the department chair's testimony admissible?

- A. No, because a prior consistent statement cannot be used to rehabilitate the professor's character for truthfulness.
- B. No, because the testimony is hearsay not within any exception.
- C. Yes, because the testimony rebuts a charge of recent fabrication.
- D. Yes, because the testimony reports the professor's then-existing state of mind.

Explanation:

Nonhearsay statements by declarant-witness

(FRE 801(d)(1))

Prior statement of identification	Identifies person as someone declarant perceived earlier
Prior <i>inconsistent</i> statement	Inconsistent with declarant's current testimony <i>and</i> made under penalty of perjury at former proceeding
Prior <i>consistent</i> statement	Consistent with declarant's current testimony <i>and</i> offered to either: rebut charge of fabrication/improper influence if made before motive arose <i>or</i> rehabilitate declarant's credibility when attacked on other grounds

FRE = Federal Rule of Evidence.

Under the hearsay rule, out-of-court statements are not admissible to prove the truth of the matter asserted therein. However, certain statements are **excluded** from this rule and are considered **nonhearsay**. This includes out-of-court statements made by a **declarant** who has **testified** and is **subject to cross-examination** at trial (eg, the professor) if those statements:

identify a person as someone the declarant perceived earlier

are inconsistent with the declarant's current testimony and were made under penalty of perjury at a former proceeding *or*

are **consistent with** the declarant's **current testimony** and offered to **rebut a charge of fabrication** or improper influence OR to rehabilitate the declarant's credibility when attacked on other grounds.

However, a prior consistent statement may only be used to rebut a charge of *recent* fabrication or improper influence if the statement was **made before a motive** for the alleged fabrication or improper influence **arose**.

Here, the professor seeks to introduce his prior *consistent* statement to rebut a charge that he recently fabricated his relationship with the student. This statement to the department chair was made 18 months before the student accused the professor of harassment—before he had motive to fabricate the relationship. Therefore, the department chair's testimony is admissible nonhearsay (**Choice B**).

(Choice A) The professor's character for truthfulness was not attacked because the graduate student's assertion concerned one instance of dishonesty—not the professor's general propensity for dishonesty. If it had been attacked, a prior consistent statement could not be used to rehabilitate his character for truthfulness because a witness's character may only be supported in the same way it was attacked.*

*A witness's character for truthfulness is attacked by (1) reputation or opinion testimony or (2) specific instances of conduct that are probative of that character. As a result, a party looking to rehabilitate the witness's character for truthfulness must use the same methods.

(Choice D) One hearsay exception applies to statements regarding a declarant's [then-existing state of mind](#). This exception does not apply here because the professor's statement is nonhearsay and does not communicate his emotional, sensory, or physical condition.

Educational objective:

A prior consistent statement is nonhearsay if it (1) was made by a declarant who has testified and is subject to cross-examination, (2) is offered to rebut a charge of fabrication or improper influence, and (3) was made before any motive for fabrication arose.

References

Fed. R. Evid. 801(d)(1) (nonhearsay statements – witness's prior statement).