

THE UNIVERSITY OF TENNESSEE  
AT CHATTANOOGA

IN RE: COREY MOCK )  
Chancellor of the University of  
Tennessee at Chattanooga )  
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FINDINGS OF FACT AND CONCLUSIONS OF LAW

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This Appeal is before the Chancellor of the University of Tennessee at Chattanooga (“UTC”) as the Agency Head under Tenn. Code § 4-5-301 *et seq.* of the Uniform Administrative Procedures Act, and the rules promulgated thereunder. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These Findings of Facts and Conclusions of Law are issued in accordance with Rule 1720-1-5-.01 of the Rules of the University of Tennessee, Chapter 1720-1-5-.01 *et seq.* (“UT Rule”) and Tennessee Code § 4-5-315 and are based upon the entire record on appeal. *See* Appeal Exhibit 1.

I. **PROCEDURAL BACKGROUND**

1. On [REDACTED], the UTC Dean of Students (“Dean”) charged Mr. Mock with violating Standard of Conduct No. 7, UT Rule 1720-02-05-.04, that prohibits UTC students from engaging in sexual assault and/or sexual misconduct. It provides:

Sexual assault or misconduct. “Sexual assault” is defined as any sexual act or attempt to engage in any sexual act with another person without the consent of the other person, or in circumstances in which the person is

unable to give consent due to age, disability, or an alcohol/chemical or other impairment. "Sexual misconduct" is defined as any intimate touching of another person, or forcing a person to engage in intimate touching of another, without the consent of the other person, or in circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment. It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity. Consent is given by an affirmative verbal response or acts that are unmistakable in their meaning. Consent to one form of sexual activity does not mean consent is given to another type of sexual activity. (emphasis added).

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**II. STANDARD OF REVIEW**

11. UT Rule 1720-1-5-.01(d) and Tennessee Code § 4-5-315 authorizes the Agency Head to “exercise all the decision making power that [he] would have had [if he] presided over the hearing [himself], except to the extent that the issues subject to review are limited by law or rule of the University or by the Agency Head upon notice to all parties.” See UT Rule 1720-1-5-.01(d) and Tennessee Code § 4-5-315.

12. “In effect, the review conducted by [the Agency Head] is *de novo* on the record.” See McClellan v. Bd. of Regents, 921 S.W.2d 684, 690 (Tenn. 1996).

13. The Agency Head is “not circumscribed in any way by [the] initial order ...[and] may make [his] own factual determinations.” See McEwen v. Tennessee Dept. of Safety, 173 S.W.3d 815, 822 (Tenn. Ct. App. 2005).

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#### IV. CONCLUSIONS OF LAW

1. This is a contested proceedings under Tenn. Code § 4-5-301, and must be conducted out “in accordance with [the Uniform Procedures Act], other applicable law, and the [R]ules of the [University of Tennessee, Chapter 1720-1-5 et seq.].” See T.C.A. § 4-5-301. The “other applicable law” includes, Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 et seq., and its implementing regulations.

2. Under Title IX, colleges and universities have a duty to respond to complaints of sexual assault “prompt[ly], fair[ly] and impartial[ly].” 20 U.S.C. §1092(f)(8)(B)(iv)(aa); 34 C.F.R. § 106.8(b). When a school knows or reasonably should know of possible sexual violence, it must take immediate and appropriate steps to determine what occurred. See U.S. Dept. of Education, Office of Civil Rights (“OCR”), August 4, 2011 Dear Colleague Letter: Sexual Violence at 4.

3. The obligations under Title IX advance and enforce UTC’s duty to provide “a safe learning environment for all of its students.” See Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault, at 11 (April 2014).



4. UTC, like others, has a duty to “ensure that the school community has a clear understanding of what constitutes sexual misconduct [and] the potential consequence for such conduct.” Id.

5. The recent focus on sexual assault on campuses by the White House, Congress and OCR has resulted in heightened attention and care about how colleges and universities define and respond to allegations of sexual assault and address issues of “consent” that are typically associated with sexual assault allegations. Specifically, colleges and universities have attempted to curb sexual assault on their campuses by modifying their sexual assault policies to include an affirmative consent standard for consent, referred to as “Yes Means Yes.” See Colb, S., *Making Sense of ‘Yes Means Yes,’* Verdict (Oct. 29, 2014), <http://verdict.justia.com>; Bazelon, E., *The Meaning of Yes.* *The New York Times*, p. 13 (Oct. 26, 2014); Misner, J., *California Shifts to ‘Yes Means Yes’ Standard for College Sex*, *The Chronicles of Higher Education* (Sept. 29, 2014), <http://chronicle.com/article/California-Shifts-to-Yes/149057/>.

6. Although there is inherent ambiguity in determining consent, the affirmative consent standard is, in part, an effort to change the culture of sexual relations on a campus and to “clear up the ambiguity surrounding consent.” See Wilson, R., *How ‘Yes Means Yes’ Already Works on One Campus*, *The Chronicles of Higher Education* (Sept. 29, 2014), <http://chronicle.com/article/How-Yes-Means-Yes-Already/149055/>.

7. A “Yes Means Yes” policy “requires that, for sex to be considered consensual, it must have been consented to by the woman in advance.” See Nicholas Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 *V and L. Rev.* 1321, 1347 (2005).

8. “Under an affirmative consent standard, the law presumes that a woman does not grant consent unless she is asked and agrees to sexual contact.” Id. The burden is on the initiator to ensure consent, and silence is not “indicative of a willingness to engage in sexual [intercourse].” Id.

9. A “Yes Means Yes” policy is far from simplistic and the nuances and difficulties associated with determining consent remain, which is especially true when alcohol is involved. That is why consent must be judged on a “case-by-case” basis and on the totality of the circumstances. See Misner, supra.

10. UTC has a “Yes Means Yes” policy that requires consent to be “given by an affirmative verbal response or acts that are unmistakable in their meaning,” and places the burden on the “person initiating sexual activity to ensure the other person is capable of consenting to that activity.” See Standard of Conduct No. 7, UT Rule 1720-02-05-.04.

11. Here, [REDACTED] the burden of proof is on the Dean to produce evidence that persuades the finder of fact by a preponderance of the evidence. In this Appeal, no live proof was presented to the Agency Head. As a result, the credibility determinations of the ALJ are given “substantial deference.” See McEwen, 173 S.W.3d at 823. The Dean has the burden of proving, by a preponderance of the evidence, that Mr. Mock violated Standard of Conduct No. 7. See UT Rule 1720-1-5-01(12)(d); Mock’s Brief at 3; UTC’s Brief at 12.

12. The term “‘preponderance of the evidence’ means evidence that causes [a decision-maker] to conclude that an allegation is probably true, or that ‘convince[s] [the decision-maker] that the allegation is more likely true than not true.’” See Tenn. Prac. Pattern Jury Instr. § 2.40 (2012 ed.).

13. Under Standard of Conduct No. 7, the elements of “Sexual Assault” include:

- i. “Any sexual act or attempt to engage in any sexual act with another person,” and either
- ii. “In circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment.” (“It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity”); or
- iii. “Without the consent of the other person.” (“Consent is given by an affirmative verbal response or acts that are unmistakable in their meaning. Consent to one form of sexual activity does not mean consent is given to another type of sexual activity”). See UT Rule 1720-02-05-.05.

**A. “Any sexual act or attempt to engage in any sexual act with another person.”<sup>2</sup>**

14. [REDACTED]

[REDACTED]

**B. “In circumstances in which the person is unable to give consent due to age, disability, or an alcohol/chemical or other impairment” (“It is the responsibility of the person initiating sexual activity to ensure the other person is capable of consenting to that activity”).**

15. [REDACTED]

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**C. "Without the consent of the other person."**

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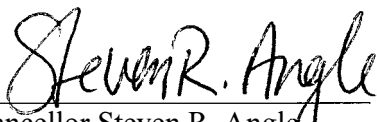
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26. Based on the foregoing, Mr. Mock violated UTC's Standard of Conduct No. 7.

This the 2<sup>nd</sup> day of December, 2014.

  
Chancellor Steven R. Angle  
University of Tennessee at Chattanooga