

COMPLAINTS OF SEXUAL MISCONDUCT

INVESTIGATIVE REPORT

FOR TRAINING PURPOSES ONLY – PLEASE KEEP CONFIDENTIAL

COMPLAINT

FILED: 12/15/16
COMPLAINANT: Alice Smith
RESPONDENT: Mark Mitchell

CROSS-COMPLAINT

FILED: 1/26/17
COMPLAINANT: Mark Mitchell
RESPONDENT: Alice Smith

DATE OF INCIDENT: 10/30/2016

DATE OF THIS REPORT: 4/7/17

BACKGROUND

On 1/15/17, I was assigned to investigate a complaint of sexual misconduct filed by Alice Smith against Mark Mitchell. The complaint alleged that the incident occurred on 10/30/16. On 1/26/17, Mitchell had filed a cross-complaint against Smith.

INVESTIGATIVE PROCESS

On the morning of 1/27/17 I interviewed Alice Smith. Based on information received through that interview and her written statement, I then interviewed Smith's witnesses Marnie Macon, Lanie Jones, and Maria Vasquez. On 1/30/17, I interviewed Mark Mitchell, and based on that interview, I then interviewed Mitchell's witnesses Rich Patterson, Jen Lewis, Craig Fishman, and Burt Broommate.

I conducted second interviews with Smith, Mitchell and Macon to obtain additional details and to clarify questions that arose during the initial round of witness interviews. This was also essential because with the filing of Mitchell's cross-complaint, their individual roles had expanded. Mitchell and Smith are now both complainants and respondents, and Macon is the only witness who is closely acquainted with both of them. Furthermore, Smith raised the consideration that under the sexual misconduct policy the cross-complaint might constitute retaliation, because she said it has had a deterrent effect on her pursuit of her complaint. Emails were also exchanged with selected witnesses to clarify and confirm particular points from the interviews.

Every student witness interviewed for this report was advised that I am the only Investigator who will be contacting the witness, and that I have no personal or professional stake in the outcome of any proceedings that may take place. I also explained that it is not my role to offer opinions or recommendations.

LIST OF ATTACHMENTS ... (not necessary for exercise)

WITNESSES

Identified by Alice Smith:
Marnie Macon (friend, at Shiners Bar)
Lanie Jones (roommate)
Maria Vasquez (former girlfriend)

Identified by Mark Mitchell:
Rich Patterson (friend, at Shiners)
Jen Lewis
Craig Fishman
Burt Broommate (roommate)

RELEVANT PROHIBITED CONDUCT

The University Student Sexual Misconduct Policy prohibits sexual violence:

Sexual violence is a particularly severe form of harassment defined as any physical act of a sexual nature based on sex and perpetrated against an individual without consent or when an individual is unable to freely give consent.

Acts of a sexual nature include, but are not limited to, touching or attempted touching of an unwilling person's breasts, buttocks, inner thighs, groin, or genitalia, either directly or indirectly; and/or sexual penetration (however slight) of another person's oral, anal, or genital opening with any body part or object.

Sexual/gender violence may or may not be accompanied by the use of coercion or intimidation, or through advantage gained by the use of alcohol or other drugs.

The Policy also defines and describes conditions for consent to sexual activity:

Consent is an affirmative decision to engage in mutually acceptable sexual activity given by clear actions or words. Students should understand that consent may not be inferred from silence, passivity, or lack of active resistance alone. Furthermore, a current or previous dating or sexual relationship is not sufficient to constitute consent, and consent to one form of sexual activity does not imply consent to other forms of sexual activity.

Conduct will be considered "without consent" if no clear consent, verbal or nonverbal, is given. The perspective of a reasonable person will be the basis for determining whether a respondent knew, or reasonably should have known, whether consent was given. However, being intoxicated or incapacitated does not diminish one's responsibility to obtain consent and will not be an excuse for sexual misconduct.

In some situations, an individual may not be able to freely consent. Examples include, but are not limited to, when an individual is incapacitated due to alcohol or other drugs, scared, physically forced, passed out, asleep, unconscious, intimidated, coerced, mentally or physically impaired, beaten, threatened, isolated, or confined. The perspective of a reasonable person will be the basis for determining whether a respondent knew, or reasonably should have known, whether a complainant was capable of providing consent.

The Policy also prohibits Sex/Gender-Based Harassment:

One form of harassment is unwelcome verbal or physical conduct based on sex that, because of its severity and/or persistence, creates a hostile environment by interfering significantly with an individual's work or education, or adversely affecting an individual's living conditions.

The Policy also prohibits Retaliation:

Retaliation is prohibited under this policy. Retaliation is words or acts taken in response to good faith reporting of sexual misconduct, participation in the University's complaint process or the follow up to a complaint, or otherwise opposing what the individual reasonably believes to be sexual misconduct. Retaliation will be a violation of this policy when it is sufficiently serious (e.g., severe and/or pervasive) to discourage a reasonable person from further such activity. The protection against retaliation applies to both parties and to all witnesses. All persons who believe they have been subjected to misconduct under this policy are encouraged and have the option to seek support, utilize available resources, and come forward with their concern or complaint.

INTERVIEW SUMMARIES

ALICE SMITH

I interviewed Smith on 1/27/17 from 9:20 to 10:15AM. I asked her to relate her activities on the night of the incident, prior to going to Shiners. She said that she and Marnie Macon, a friend from class, met at Smith's apartment that night and spent time having drinks before leaving for the restaurant. They traveled to Shiners and socialized for several hours. She estimated that she had two gin and tonics at her apartment, and two margaritas at the restaurant. I asked her to gauge the effect of the alcohol, and she estimated it was moderate – it made her more outgoing, loud and friendly than she would have been without drinking. She said she felt enough effect that she would not have driven herself that night. Outside at Shiners, Macon introduced her to one of her friends, Mark Mitchell, who was there with a group. Smith said that Macon wandered off, and she stayed out on the patio talking with Mitchell. She said he was stroking her back and hugging her, which was fine with her. She said that Mitchell seemed fairly drunk at the time as evidenced by his being loud and outgoing, but said his manner was similar to many people there, including herself. She did not see him with a drink in his hand the whole time she was with him. After a while, she became tired, and she and Macon made plans to leave. Mitchell said he should come with her. Out of Mitchell's earshot, Smith discussed this with Macon who said, "Yeah, why not? He's hot." Smith said she considered Mitchell "cute and nice," and considering he was acquainted with and endorsed by Macon, decided to go to her apartment with him. Macon drove them in her car.

When they got to her apartment, Smith saw that her roommate, Lanie Jones, was still awake, so she introduced Mitchell to her, and after chatting briefly in Jones' room, went back to her own bedroom. They made out for a while and removed their clothes, although she doesn't remember

exactly how. Mitchell put on a condom that Smith gave him, got on top of her and tried to penetrate her unsuccessfully. She thought perhaps his penis wasn't hard enough. He pulled off the condom and threw it on the floor and said, "Let me try without a condom." She objected and handed him a second and third condom, but he continued to be unable to penetrate her. She finally stated, "Get off me. We're going to bed," and rolled away from him. They both fell asleep. Sometime later, she awoke to him grabbing and squeezing her breasts. She was tired and frustrated with his behavior, so she tried to lay still and not react, hoping that he would fall back asleep. Instead, he then began trying to insert his finger into her vagina. She again resisted by squeezing her legs tightly together and ignoring him. At some point they fell back asleep.

At around 7:30AM, her alarm went off. Mitchell got up, dressed, and left. They did not talk with each other. Smith has had no contact with him since.

Smith got up and spoke with Jones, who was also up. Jones asked about the night, and Smith characterized Mitchell to her as "rape-y," without going into detail. She got in the shower and noticed multiple bruises on her breasts, which she described as "painful." Later on that afternoon, she became more concerned about the experience and texted a former girlfriend, Maria Vasquez, to come over. They discussed the incident and Vasquez encouraged her to take photos of her chest injuries, which Vasquez did with her phone. She said the contusions lasted for several weeks. She also texted Macon in the morning, and without being immediately explicit about their activity, described Mitchell's behavior.

I re-interviewed Smith from 9:00 to 10:00AM on 2/12/17, after the date she had been informed of the cross-complaint filed by Mitchell. I asked her if she could provide any additional detail to her description of her interaction with Mitchell on the night of the incident. She said that she and Marnie Macon had gone to Shiners that night after pre-gaming at her apartment. At some point after arriving, Macon introduced Mitchell to her while they were outside on the patio. She had neither seen nor spoken to him prior to the introduction. She and Mitchell began talking, and Macon left them and went inside. They remained standing on the patio, and at some point Mitchell placed his hand on the small of her back, and then moved it under her shirt and stroked her back. She said she probably touched him also, since they were standing so close together. They kissed a few times, open-mouthed, but she recalled feeling a little uncomfortable doing that so openly in public. She never saw Mitchell with a drink in his hand, he appeared to be steady on his feet, his eyes were wide open, and his conversation was natural and fully understandable. She said both of them were outgoing and chatty, as were most of the people at that hour in the restaurant.

Near 2AM, Macon returned, and they discussed leaving because they were both getting tired. Mitchell said, "Oh, I'm coming with you," so Smith and Macon communicated with looks and gestures whether Smith should take him home. Macon kind of gestured "thumbs up," and with that encouragement, and since Smith found Mitchell friendly and cute, she agreed. She does not remember seeing anyone else talking with Mitchell or paying attention to their conversation. She asked Mitchell if he wanted to come with her to her apartment, and they walked to Macon's car,

who drove them to her apartment. She said she was neither supporting nor leading Mitchell, and he walked to the car with her normally. They chatted along the way, and she said Mitchell was fully conscious and involved with her. Macon dropped them off at her building and Smith led Mitchell upstairs. She said that he walked on his own, without stumbling or needing assistance. Since Jones, her roommate, was awake, she went in and introduced Mitchell, and he went himself down the hall to Smith's room. She and Jones chatted about the night, and she then went to her bedroom.

When she got to her room, she undressed and thinks she put on a nightgown. Mitchell undressed himself to his boxer shorts. They made out for a while and Mitchell fondled her breasts (he was a little rough, but she didn't complain), then she lay on her back with him straddling her. He removed her gown and underwear. She could see he was erect and may have stroked his penis through his boxers. He said he did not have a condom, so she reached into her nightstand and gave it to him. He removed his shorts, applied the condom himself, and attempted unsuccessfully to penetrate her. After a very brief time, he pulled back, stripped off the condom and re-approached her as if to resume intercourse. She objected verbally and gave him another condom, with which he repeated the previous sequence. This occurred a total of three times, after which they both fell asleep. She did not characterize him as passing out, but said he moved to get comfortable and eventually quieted down, so she thought he was asleep.

She awoke a while later to find him reaching around and strongly grasping and squeezing her breasts. This continued for a few minutes. She did not react or say anything, because she hoped and expected it to stop. He then ran his hand down to her crotch and tried to finger her vagina. She resisted this by firmly squeezing her legs together; again hoping that he would give up. I asked why she hadn't told him to leave at some point, and she said that he was behaving so aggressively she was afraid "he'd get mad and do something bad."

Around 7:30AM her phone alarm sounded. He got up and left. He was gone from the apartment when she got up.

I asked her to describe the marks on her breasts, and she said they were painful bruises. I asked if any of them could have been hickeys, and she said Mitchell did suck on her breast during foreplay, but there were many more marks than he applied that way. She also explained that some of the marks were on the breast undersides. Since he was generally on top of her throughout the foreplay and intercourse, this would have required him to lift them up and contort in order to apply his mouth. She also said that the marks stayed very painful and obvious longer than hickeys would have been.

I asked if she had said words to the effect of, "I'm going to fuck this freshman." She said that although she doesn't remember it specifically, she could have, although the language is "coarser than she normally uses." I asked if she had said words that night to the effect of "I'm going to dip my toe in the freshman pool." She said that while drinking before leaving for Shiners, she

and Macon were joking and talking about hookups later, and she said that phrase jokingly because Macon is a first-year student.

I asked whether the incident has had an effect on her. Smith said that ever since the incident, she has feared seeing Mitchell or having to speak with him. She said, “Doing work has been a real struggle” because she is so distracted and preoccupied with thoughts of the incident. She said it even affected other relationships, citing an instance after the incident when she became so panicked when in the company of a male friend that she had to ask him to leave the room. She said that the filing of Mitchell’s cross-complaint has been a deterring factor for her in seeking a resolution.

MARK MITCHELL

I interviewed Mitchell on 1/30/17 from 8:00 to 9:15. I asked Mitchell to describe his activities during the night of 10/29/16. He said he went to Fullsteam Brewery with his roommate Burt Broommate and a friend Craig Fishman, at around 9:30PM. They split two beer towers (100oz each), and then ordered a tower of high-alcohol IPA (9.3%) that he drank most of. He characterized his level of intoxication as very high – not passing out, but with vision and balance impaired. They then went to Shiners – he doesn’t recall how they got there. He recalls someone buying him a drink there, but does not recall what it was. That was the last alcohol he can remember drinking. He separated from his male friends, but a female acquaintance of his, Marnie Macon, introduced him to her friend Alice Smith. Smith and he talked and made out some at the restaurant. They stroked each other, and Smith made to unbutton his shirt from the top. At some point, he heard her say, “I’m going to fuck this freshman,” and Broommate, who also heard this, warned him not to go with her, saying, “You’re too drunk to go with her.”

Despite that, Mitchell and Smith left with Smith’s friend Macon. He recalled Broommate trying to hold him back from leaving. He does not remember the drive, and does not know the specific destination beyond that it was an apartment. Smith led him into the apartment and to her bedroom. They both removed clothing, but he doesn’t remember exactly how. He took a condom out of his wallet and put it on, but he was semi-erect and it wouldn’t stay on, so he threw it aside. She then took a condom out of her nightstand, which he recalled was to the left of the bed. This and a third condom slid off, he said, because his penis was not erect. He then fell off of her onto his back, and the next thing he remembers is her alarm going off. He hit the snooze delay a couple of times but she got him up, and he remembers her saying, “First years have 8:30 classes. I don’t. You’re an idiot.” She kissed him and he left. He has not seen her, and in fact did not even remember her name until the complaint was filed. He recalls that Smith asked him what her name was at some point in the morning, and got mad when he couldn’t call it.

Mitchell was still very drunk and had no idea where he was or where the bus stop was, so he ordered an Uber and rode to an Italian class. He felt so bad that morning that he texted a friend, Jen Lewis, to take notes for him in another class. He felt drunk enough through the morning that he would not have driven a car.

After he finished his narrative, I asked him clarifying questions. I first tried to determine if there were other witnesses to his interactions at Shiners. Mitchell said that he could not recall anyone else besides the names he already mentioned who saw him at Shiners. I asked whether he saw anyone else at the apartment, and he said that Smith lives in a single unit without a roommate. There was no one else in the apartment when he arrived or left. I asked him to discuss the texts he had provided that discussed his reactions to the incident -- during the next day, he texted to friends his piecemeal memories about the previous night with such comments as “WTF happened last night? I think I was raped...LOL”; “I was trashed”; I was so drunk I don’t remember shit...LOL”; (in answer to “Were you still drunk this morning?”) “Yes. Honestly, I don’t remember Shiners at all”; (in answer to “So you actually don’t remember?”) “Legit, I blacked out.” He explained that some of the apparent light-heartedness, such as “lol” after some statements was just texting style. He was very serious about his confusion at what he had been through.

I asked him to characterize his drinking habits. He said he has been as drunk as he was that night often, and was “pretty close to his limit.” He said that when getting drunk he gets more cocky, happy and talkative, but if extremely drunk he eventually just mumbles. He never gets violent or aggressive, and has no memory of ever being told the day after being very intoxicated of engaging in inappropriate behaviors. He did not perceive that his male friends were as drunk as he was that night, nor was Smith, whom he never saw with a drink.

I asked why he filed the complaint against Smith. He said that he “felt wronged,” and that she “was putting him through a lot of stress.” I asked what he wanted as a resolution to his complaint. He said that he considered himself “pretty popular” with a lot of friends, and he fears for his reputation. He wants the issue resolved as soon as possible to minimize disruption in his life. Ideally, he would like a “no contact” order issued to Smith and a letter of apology from her.

On 2/17/17, I re-interviewed Mitchell from 4:30 to 5:40PM. This was to obtain further detail and memory of the incident, and to get his reaction to information that had been developed in my re-interview of Smith. He referenced one of his text messages to determine that he arrived at Shiners sometime around 11:43PM, when he texted Rich Patterson. He said he had come from Fullsteam after drinking with Craig Fishman and Burt Broommate. He went to Shiners afterward because it is a Thursday night routine. I asked about his interaction with people at the restaurant, and he said that in his condition, he was capable of only focusing on one person at a time, so he doesn’t remember who else may have been around him after Marnie Macon introduced him to Alice Smith. He recalled that he was wearing a button-down shirt (that Smith partially unbuttoned while they talked), and possibly shorts. He has no memory of what Smith was wearing.

They stood and chatted, and he touched her back. They kissed a little. He does not recall that she was uncomfortable kissing. He does not recall any of the discussion of them leaving. He does not remember the ride to Smith’s apartment or what floor Smith’s apartment is on. He remembers the apartment being dimly lit when they entered. He does not remember anyone being in the

apartment, which he again characterized as a single bedroom unit. He doesn't remember exactly how they got naked, but believes there was foreplay, during which he administered hickeys to Smith's breasts with his mouth. He recalls her saying, "You better not give me hickeys," but he has "had a lot of partners and they always enjoy them."

He took out a condom from his wallet and applied it himself to his penis. He penetrated her vagina for five to fifteen seconds, but could not maintain an erection and the condom fell off. She then gave him another from her nightstand, but the same thing occurred twice more. She then told him to go to sleep, which he did. He awoke the next morning from her alarm, and after several snooze alarms, Smith criticized his selection of Friday morning classes and sent him on his way. He said he walked directly out of the apartment, called an Uber and returned to East Campus.

He sent texts shortly after he left Ms. Smith's apartment, to friends about the incident, but did not discuss it widely he said, because "I don't like to discuss my private sex life." I asked how the incident affected him. He said that for the next week he felt like an "object" or a "sex toy" because of the circumstances of the incident, and since then, although he has continued to go out socially, he has developed major trust issues, including "paranoia," when he is around women. He said he has since tried to not get so drunk that he blacks out. He pointed out that at the time of the incident he was in peak shape, but the stress of the investigation has caused him to lose 12 pounds of muscle due to disruption in his appetite and sleep. He fears loss of his reputation, which he characterized as being "pretty popular, with no enemies."

MARIA VASQUEZ, SMITH'S FORMER GIRLFRIEND AND CURRENT FRIEND

I interviewed Vasquez on 1/28/17 from 3:10 to 3:30PM. He said she and Smith had met their first year, dated sophomore year and though not dating now, saw each other several times a week. She said that Smith had texted her on the early afternoon of 10/30/16 and asked if she'd come over. She left her job at the VA Hospital early, and arrived at Smith's apartment about 4PM. She went into her bedroom and saw Smith changing her sheets, which also seemed odd. Smith said, "Last night I was sexually assaulted." She seemed to be making an effort to remain composed. Smith showed her Vasquez her upper chest, which appeared to have a rash, and then showed Smith her breasts, which she said had bruises on them. She advised her to take photos, which she did with her phone. Smith also said that her vagina had been bleeding that day. They discussed seeing a doctor and having a rape kit done, but she demurred. They discussed next steps and Vasquez and Smith's roommate, Lanie Jones, pushed reporting the incident. They continued the persuasion for several weeks during which her bruises ripened and faded. They did not photograph that development.

She said Smith eventually told her that she was filing a complaint and that "her #1 consideration was justice." She told her that she wanted to prevent Mitchell from treating younger students the same way Mitchell had treated her.

MARNIE MACON, SMITH'S FRIEND, MITCHELL'S CLASSMATE AND ACQUAINTANCE

I interviewed Macon on 1/28/17 from 3:30 to 4:15PM. She told me that she and Smith were friends from class. She had been friends with Mitchell since their freshman year began, but more so earlier than recently. They are acquainted, but don't go around together. I asked her to relate her memory of the night of the incident. She said that she went to Smith's apartment, they had some drinks and then drove to Shiners. She saw Mark Mitchell with others, including Craig Fishman and Rich Patterson, on the patio, so they introduced themselves. At some point she went in to dance and left Smith and Mitchell alone on the outside patio talking. Later she came out and said they were "not making out," but stroking and holding each other and kind of dancing or swaying. I asked if she thought it was unusual to have a senior woman hook up with a first-year. She said that Smith just found him attractive, and they had joked earlier at Smith's apartment about hookups, and since Macon is younger than she, Smith said that "I want to dip my toe in the freshman [sic] pool." Macon showed me a text she sent to Smith the morning after when Smith was discussing the incident with her, and Macon apologized for getting them together because she (Macon) had thought he would be a good "toe dip."

When Smith and Mitchell were getting ready to leave Shiners, Smith asked Macon if she "should hook up with him [Mitchell]?" They agreed that he was cute and friendly, and Macon encouraged her, so Macon drove them back to Smith's apartment and dropped them off at the door. She then drove to her dorm on campus.

At 1:58AM, Macon texted Smith to see how she was doing. Smith responded: "Omg he's terrible / Like literally the worst I've had / Ever / We can't even have sex he's incapable." (Note: Smith recalled and confirmed this text exchange in an email to me on 2/23/17. She said she did this while laying with her back to Mitchell after he appeared to fall asleep after intercourse, but before resuming the sexual activity involving squeezing her breasts and fingering her vagina.) She described him to Macon in texts the next morning as "very aggressive," and said that, "He basically sexually assaulted me, and my chest is fucked up."

That same morning, Macon was receiving texts from Mitchell asking her if she knew what happened to him the previous night and saying, "I was trashed." I asked if she was familiar with Mitchell's behavior when he was intoxicated. She said she has seen him drunk often, and described him as two different people when he is very much under the effects of alcohol. She said she has seen him become more aggressive in his behavior. I asked why she did not express reservations to Smith the night of the incident, and she said that her impression of Mitchell at Shiners and in her car was that he was drunk, but not to the point that she had concerns for his welfare or about him mistreating Smith. In fact, she said her texts with Smith the next day showed her surprise and guilt that he had not been a good partner. I asked her again what her impression of Mitchell's state was at Shiners and when she dropped him off, and she said "I think he was just drunk and took the opportunity. He would have hooked up with anyone who asked."

On 2/18/17, I re-interviewed Macon from 4:30 to 5:10PM. I did so because she was the main witness who had familiarity with both principal parties, and had interacted and communicated with both of them before and after the incident. I asked her to more specifically describe her observations of Smith and Mitchell on the night of the incident. She said she knew several friends including Mitchell at Shiners, and introduced Smith to them. Smith began conversing with Mitchell, and standing on the patio with him. They were touching and holding each other's arms while doing so. Macon left them to go inside, and when she returned, they were standing closer together, still talking and holding each other. Macon never saw them kiss, nor notice either of them drinking. Later still, she came back out and let Smith know that she was leaving because she was tired. Smith and she exchanged some comments about whether Smith should hook up with Mitchell, and Macon encouraged Smith to do so. She cannot remember specifics of their conversation, but said it was a typical situation in which people are making plans for the remainder of the night. She said the three of them walked to her car. She said that while it was apparent at this point that Mitchell and Smith had been drinking, it was no more so than many people leaving the restaurant. When Macon last interacted with them when she dropped them off at Smith's apartment, both were talking clearly and their eyes were clear. They were walking arm in arm, not staggering or "in danger of falling down in the street."

Macon said that after semester break, around January 30, she spoke with Mitchell and Burt Broommate in their dorm about the complaint and investigation. She said Mitchell appeared very angry and the two were extremely defensive - to the point she was uncomfortable having the conversation at all with them. Mitchell complained that the investigation was "stressing him out," that he was worried about its effect on him rushing a fraternity, and that it was costing him money paying for an attorney.

LANIE JONES, SMITH'S CURRENT ROOMMATE

I interviewed Jones on 1/28/17 from 4:25 to 5PM. I asked her to recount her knowledge of the incident that is the subject of the complaint. At approximately 2AM, she was awake in her room when Smith returned from Shiners. Since her door was open, she heard Smith offer a person some water and direct him to her bedroom down the hall. As he walked by, he stuck his head in the door, said, "Hi!" and Smith introduced him. He continued down the hall and Smith remained, chatted briefly and explaining that he was a freshman she had met at the bar. Jones said there was nothing remarkable about Mitchell's behavior, and couldn't speculate on his level of intoxication since their interaction was so brief. She did point out that he walked down the hall to Smith's room alone while Smith stayed and chatted and got glasses of water for them. Jones then went to sleep wearing earphones, since the walls of their apartment are so thin and sound transmits. She fell asleep about 15 minutes later. The next morning, she heard activity around 7:30AM. Jones said typically she's up first, and Smith typically sleeps in until 10-11AM. Suddenly, her bedroom door opened and Mitchell walked in. She was startled and said, "Can I help you?" and he said "Oh, I thought it was the front door." He then left her room and the apartment. Jones went out where Smith was making breakfast. She asked about the night and Smith said, "He sucks - worst guy ever." She characterized him to Jones as, "kind of rape-y." She felt that she had been "sexually assaulted." Smith told her that they first tried to have

intercourse but Mitchell wasn't able, so they fell asleep. At some point, she realized that Mitchell had woke up and squeezed her breasts and tried to penetrate her vagina with his fingers. She explained that she resisted by lying in bed with her body tensed up. Smith told Jones that she was in pain and bleeding in her vagina. She also showed Jones visible bruises on her breasts. I asked Jones if they were possible hickeys instead of bruises. Jones said that although there's a similarity, they did not look like hickeys. They discussed whether to see a doctor, but Smith declined. Smith kept describing Mitchell's behavior as "aggressive." Jones asked Smith why she hadn't made Mitchell leave, and Smith responded, "I wasn't going to kick him out on the street in the middle of the night."

That afternoon, Maria Vasquez came over, and she and Smith talked about the incident in Smith's bedroom. The three then discussed together filing a complaint. Smith said she would consider it. She continued to discuss options with Smith over the next several weeks, and said that Smith finally convinced herself to pursue a complaint.

Jones said she did not know Mitchell previously, and would not recognize him today.

RICH PATTERSON, MITCHELL'S FRIEND

I interviewed Patterson on 2/3/17 from 11:00 to 11:15AM. He said he is acquainted with Mark Mitchell through his dorm mate Craig Fishman. He does not know Alice Smith, and said he first heard her name during this interview. He said he had not discussed the complaint with Marnie Macon. I asked him about drinking at Fullsteam on the night of the incident. He does not remember much of the night of the incident, but recalls being only at Shiners with his girlfriend, who was visiting from out-of-town, and that they left earlier in the night than others. He does not remember interacting with Mitchell that night or seeing him in the company of Alice Smith, whom I had described for him.

I asked if he had ever been with Mitchell when he was drinking a lot, and he said he has. He described that as Mitchell drinks, he gets more outgoing and social and laughs more.

JEN LEWIS, MITCHELL'S FRIEND

I interviewed Lewis on 2/3/17 from 2:00 to 2:20. She said she knew Mark Mitchell from her dorm. They are friends but don't go around with the same group. She said that Mitchell texted her the morning after the incident and asked her to take notes in a shared class he couldn't make because he was hungover. She agreed. They were studying together later that day when Mitchell told her about the previous night. He said he had gotten drunk with some of his "guy group" and met a girlfriend of Marnie Macon. He told her that this girl told Mitchell "she was going to fuck him," and Burt Broommate tried to intercede and prevent it. Mitchell said he had awakened in a strange apartment with the woman, and he did not recognize her. He remembered she had given him condoms to have intercourse with her, but he was too drunk to put them on. He said that he was "blacked out" during the encounter. Lewis told me that although Mitchell did not say, "I didn't like it," he seemed "off" to her, visibly upset and depressed. Lewis suggested filing a complaint about the event, and he said, "No, it's fine."

I asked if she had been around Mitchell when he was drinking. She said she has seen him “out of it” when he’s slow to react and physically off-balance.

CRAIG FISHMAN, MITCHELL’S FRIEND

I interviewed Fishman on 2/4/16 from 1:30 to 2:10PM. Fishman said he has known Mark Mitchell from the first day they arrived at the university. He said that on the night of the incident, he, Rich Patterson and Mitchell were drinking at Fullsteam. He recalled that one of the beers was a high alcohol IPA called Seeing Double, and that they drank more than usual. He said that Mitchell especially “drank a lot for him, and in fact for a human.” He said that when they warned him about drinking too much, he said, “I can’t get drunk off of beer.” After drinking at Fullsteam they walked across to Shiners. He characterized Thursday night as a big night at Shiners and because he goes there regularly, the events of the particular night of the incident blend with other similar visits. He said that he may have seen Mitchell in passing while at Shiners but has no specific memory of Mitchell interacting with a woman.

He had lunch with Mitchell the next day, and Mitchell said, “I think I was raped.” He seemed serious about the statement. Mitchell went on to recount that he had gotten “super drunk,” and a girl took him to her apartment. He woke up and saw a condom on the bed, but remembered little. Over the next several days, Mitchell asked what he should do. Fishman told him that from what he had described, there didn’t seem to be any wrong-doing on his part, so “just forget it.”

I asked if he had seen Mitchell get so drunk that he later couldn’t remember what he had done, and Fishman said once during first semester Mitchell drank so much beer and vodka at a daytime party that his friends walked him back to his room and put him in bed. The next day, Mitchell could recall none of it.

I asked Fishman if he knew the process by which Mitchell decided to file a cross-complaint. He said that the situation had become very stressful for him, and Mitchell said “I’m going after her.”

BURT BROOMMATE, MITCHELL’S CURRENT ROOMMATE

I interviewed Broommate on 2/5/16 from 2:00 to 2:45PM. He told me that on the night of the incident he had a few drinks at his apartment before going to Shiners. He ran into Rich Patterson and Mark Mitchell on the patio there. Patterson did not appear drunk, but Mitchell was as drunk as he had ever seen. He couldn’t stand up straight, and he was slurring his speech. Broommate left Mitchell and ran into Marnie Macon and a woman he now believes was Alice Smith. He said Smith was very flirty, and suggested he unbutton his shirt. He ignored her, and didn’t see her again until she and Mitchell came from the restaurant to leave. By this time, Broommate said Mitchell couldn’t speak at all coherently and was “just making noises.” Broommate said Smith was propping him up as they moved along. She had been drinking in his opinion, but wasn’t showing obvious signs of intoxication in her speech or movements. It was at this time that he heard her say, “I’m going to fuck this freshman.” He did not recall anyone else who was in earshot. He specifically did not remember Marnie Macon being in the vicinity. I asked

Broommate why he had tried to prevent Mitchell from leaving with Smith. Broommate said that he thought Mitchell was too drunk to know what he was doing.

Broommate did not see Mitchell again until he returned to the dorm sometime the next day. He seemed upset, and said, "It was weird, she kept giving me condoms," but told Broommate he couldn't "get it up" or perform. Broommate said that Macon had told him that Mitchell had given Smith "a lot of hickeys." He thanked Broommate for trying to prevent him from leaving with Smith. I asked if Mitchell's embarrassment at failing to have sex may have motivated Mitchell's cross-complaint and Broommate said it did not, because he knew it was not the first failure. He said that because he's a drinker, Mitchell has experienced this before.

I asked Broommate to explain what he did know of Mitchell's decision to file a complaint against Smith. He said that Mitchell had explained the incident as his "being taken advantage of." He was fine after the incident and just wanted to move on, but Smith's complaint had hurt his reputation, and caused him to miss class to meet with his lawyer. Mitchell now feels that he is a victim, and that filing the cross-complaint is the best way for him to defend himself.

NOTE: The essential questions to consider for possible policy violations are addressed here in the order in which the complaints were filed.

PER SMITH'S COMPLAINT OF SEXUAL MISCONDUCT ON THE PART OF MARK MITCHELL

For each instance:

Were there acts of a sexual nature?

Did Smith consent to sexual activity?

PER MITCHELL'S COMPLAINT OF SEXUAL MISCONDUCT ON THE PART OF ALICE SMITH

For each instance:

Were there acts of a sexual nature?

Did Mitchell consent to the sexual activity?

Was Mitchell incapacitated to the extent that he could not freely consent?

If Mitchell was incapacitated to the point of being unable to give consent, did Smith know it, or should she have reasonably known it?

PER SMITH'S COMPLAINT OF RETALIATION ON THE PART OF MITCHELL

Does Mitchell's filing of a cross-complaint constitute retaliation?