



CAMPUS COMPLIANCE  
Title IX, EEO, AA  
UNIVERSITY OF CALIFORNIA, MERCED  
5200 N Lake Rd  
MERCED, CALIFORNIA 95344-0039  
(209) 228-4620

**Investigation Report**  
**95-2016, 111-2016**

**CONFIDENTIAL**

Prepared by: Jim O'Connell  
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January 16, 2017

**INTRODUCTION:**

The University of California is committed to nondiscrimination in employment and creating and maintaining a workplace and educational environment free of harassment.

**SUMMARY OF ALLEGATIONS:**

On October 11, 2016, Director Salvador received the italicized email below, in which Respondent was identified as allegedly touching a [REDACTED] player on [REDACTED] inner thigh while the athlete and the team were warming up.

A second allegation was reported to Campus Compliance on November 17, 2016. This allegation, forwarded via email, stated, "According to the student on or around November 1, [REDACTED] was watching film in the coach's office when [Respondent] came in to engage in conversation. During the conversation, the student indicated that [Respondent] patted [REDACTED] on the inside of [REDACTED] thigh."

**NOTICE TO PARTIES:**

Respondent was issued a Charge Notice on October 20, 2016 stating that the Office of Campus Compliance received notification of a possible sexual harassment case occurring in the Athletics



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Department. In this notification, the [REDACTED] herein referred to as Witness 1 (W1), sent the following message to the Director of Compliance:

*Mr. Salvador,*

*I wanted to forward information to you regarding a potential complaint of sexual harassment. I did not complete the form available online as it appeared it was for the actual complainant to complete.*

*This information was relayed to me by a member of my staff from a student athlete, not directly from the party involved.*

*What was relayed to us was during a [REDACTED] practice one of our staff, (Respondent), entered the gym while the team was warming up for practice. The reporting individual indicated that (Respondent) slapped a member of the [REDACTED] team on [REDACTED] inner thigh while [REDACTED] was stretching. The team member we spoke to did not witness it the action, but evidently others on the team did and were offended by the action. We have not spoken with the student involved and [REDACTED] has not come forward to our office about the incident. The student involved is [Complainant 1].*

*Please let me know if you need any additional information from me.*

[REDACTED]

Complainant 1 was provided an Acknowledgement of Title IX Complaint on October 20, 2016.

Complainant 2 was provided an Acknowledgement of Title IX Complaint on November 21, 2016.

**Interim Measures:**

October 25, 2016, the following Interim Measures were implemented:

[Respondent] shall not have any contact with any of the UC Merced [REDACTED] team athletes/players until further notice. This includes but is not limited to verbal, online, physical touching or contact through third party intermediaries. This shall apply to attendance at practices or games or any other event/situation where the UC Merced [REDACTED] team athletes/players gather.

If [Respondent] needs to interact in any manner with any of the UC Merced [REDACTED] team athletes/players, he shall first advise David Dunham, the Director of Recreation and Athletics, who shall ensure that the contact is supervised and kept to a minimum.



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On November 17, 2016, Respondent was placed on Investigatory Leave.

**POLICY AND SCOPE:**

Based upon the information revealed during the initial review of the complaint, and subsequent information developed throughout the investigation, the following policies were examined:

**University of California Sexual Violence and Sexual Harassment Policy:**

The University of California is committed to creating and maintaining a community dedicated to the advancement, application and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation, or intimidation. Every member of the community should be aware that the University prohibits sexual violence and sexual harassment, retaliation, and other prohibited behavior (“Prohibited Conduct”) that violates law and/or University policy.

**Sexual Harassment:**

a. Sexual Harassment is unwelcome sexual advances, unwelcome requests for sexual favors, and other unwelcome verbal, nonverbal or physical conduct of a sexual nature when:

i. Quid Pro Quo: a person’s submission to such conduct is implicitly or explicitly made the basis for employment decisions, academic evaluation, grades or advancement, or other decisions affecting participation in a University program; or

b. Consideration is given to the totality of the circumstances in which the conduct occurred. Sexual harassment may include incidents:

i. Between any members of the University community, including faculty and other academic appointees, staff, student employees, students, coaches, residents, interns, and non-student or non-employee participants in University programs (e.g., vendors, contractors, visitors, and patients);

ii. Hostile Environment: such conduct is sufficiently severe or pervasive that it unreasonably denies, adversely limits, or interferes with a person’s participation in or benefit from the education, employment or other programs and services of the University and creates an environment that a reasonable person would find to be intimidating or offensive, in hierarchical relationships and between peers; and between individuals of any gender or gender identity.

Sexual harassment is a form of sex discrimination prohibited by Title IX. Sexual harassment is unwelcome conduct of a sexual nature and can include unwelcome sexual advances, requests for sexual



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favours, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence. In most cases legitimate, nonsexual touching or other nonsexual conduct is not considered sexual harassment, especially if it is consensual. However, nonsexual conduct may take on sexual connotations and rise to the level of sexual harassment depending on the frequency and nature of the physical conduct.

In this case, Respondent has been accused of touching [REDACTED] players on their inner, upper thighs. Based upon the anatomical location of the touching by Respondent, these matters are being evaluated as sexual harassment due to the alleged physical contact by Respondent on a generally accepted “private area”, for no clearly articulated purpose.

If sustained as asserted by Complainants, such inappropriate touching in a personal area of the body would constitute a violation of the policy, even if such touching was not characterized as sexual.

All findings related to this specific policy were determined by a “preponderance of the evidence” standard.<sup>1</sup>

### **STATEMENTS OF PARTIES AND WITNESSES:**

Not all potential witnesses responded to my request to meet and talk, therefore this Report of Investigation (ROI) only contains actual interviews. All suggested witnesses were considered.

#### **Complainant 1:** **November 1, 2016**

I spoke with C1 on the telephone. [REDACTED] said that something had occurred involving Respondent a while ago and that at first [REDACTED] “Didn’t think anything of it”.

I asked what had occurred [REDACTED] said that [REDACTED] is part of the UC Merced [REDACTED] team. [REDACTED] and others were practicing at a University organized [REDACTED] practice session [REDACTED] said that Respondent approached [REDACTED] and slapped [REDACTED] in between [REDACTED] thighs and said to [REDACTED] “How’s it going?”

When asked how this made [REDACTED] feel, C1 said that it made [REDACTED] feel uncomfortable. [REDACTED] said that when this happened, [REDACTED] was standing and believed that people saw it occur.

<sup>1</sup> A standard of proof that requires that a fact be found when its occurrence, based upon the evidence, is more likely than not to have occurred.



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I asked [REDACTED] if this had ever happened before in [REDACTED] time playing [REDACTED] said that [REDACTED] started playing [REDACTED] in the 7<sup>th</sup> grade, and has played year round since that time. [REDACTED] estimated that [REDACTED] had had approximately 16 different [REDACTED] coaches, and none of them have done this to [REDACTED] or other athletes.

[REDACTED] said that Respondent tries to engage in small talk, but that "It makes me kind of uncomfortable being around him".

Although C1 said that [REDACTED] believes that others observed the alleged actions noted above, [REDACTED] did not provide specific names.

**Respondent:**  
**October 27, 2017**

I met with Respondent in KL321. I advised him that he could have a representative of his choice with him if he wanted, and he said that he understood and did not want anyone present.

He said that he often observes [REDACTED] practice, and had been asked by the [REDACTED] coach, W2, to help with the team. When asked about the frequency of his visits to practice, he told me that W2 told him, "Anytime you want to stop in".

I asked if he has walked into practice while the [REDACTED] athletes were stretching, to which he told me that he did not recall.

I asked him if he helped them stretch, or ever touched their thighs during practice. He told me that he often pushes on their thighs to see if they are sore, and will ask them while doing it if they are sore.

When asked to elaborate about this action, he said that he would poke them, and that he had been doing this practice for twenty years. He said that he has done this with [REDACTED] athletes in UC Merced.

When asked when he last did this to a [REDACTED] athlete, he told me that he thought that it was approximately one month earlier.

I asked him further about what he actually did to the athletes. He told me that would slap them in the inner thighs.



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I asked which [REDACTED] athletes he may have done this to. He named a number of [REDACTED] athletes, including C1 and C2. He explained that his style with them is to keep things loose. He said that this might have occurred after W2 asked him to get the team loose.

I asked why he might have done that to C2. He told me that [REDACTED] is, “outgoing, engaging”. I asked why he might have done that to C1. He told me, [REDACTED] is super tentative, super tight. If I did it, it would be to loosen [REDACTED] up”.

He told me, “I use my hands all the time”, explaining that he also communicates with his hands, and deploys them with his speech as well. He told me that touching the students as described above can be “a spur of the moment thing”.

I asked him if he thought it was ok to touch the athletes in the manner described. He told me, “In retrospect, no, it’s not ok”. On this question, later in the interview, Respondent told me, “In my role, it’s not ok. I have to change. I want to change”.

I asked him if he felt capable of stopping this behavior. He told me, “Absolutely”.

He said that since he and I last spoke, he had changed things. He said that he tries not to be in private situations with students, and that it has reinforced in him the importance of not putting himself in such a situation.<sup>2</sup>

He explained to me that he was raised in a culture of touching people, and that touching signifies support to him. He told me that he wants to connect with students, but acknowledged that he needs to find a way to do that without touching them.

I asked him if touching the [REDACTED] athletes was in any way sexually motivating or gratifying to him. He told me that it was not sexually motivated, and that he has never said anything sexual to them. Conversely, he said that he does not ever remember any of the [REDACTED] athletes saying anything sexual to him either.

I asked if he had ever had a previous sexual harassment claim against him at any of the other universities he had worked at. He told me that he had worked with athletes at UC Santa Barbara, UC Santa Cruz, New Mexico State, and University of San Francisco and that he had never had a claim of sexual harassment leveled against him.

<sup>2</sup> 2015 case documented as 15-NOBL



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During our meeting, I suggested a number of preventative actions he should consider moving forward. These included always having something in his hands when around students, keeping physical distance between he and [REDACTED] athletes such that he could not impulsively reach out and touch them, and to limit any times that he was alone with [REDACTED] athletes.

**Complainant 2:**  
**November 28, 2016**

I met with C2 in KL319. [REDACTED] told me that [REDACTED] was a member of the UC Merced [REDACTED] team.

[REDACTED] told me that [REDACTED] was at practice and two [REDACTED] were standing and stretching. [REDACTED] said that [REDACTED] was told that Respondent entered the gym, walked up behind C1, and slapped [REDACTED] back and forth between the thighs.

[REDACTED] said that C1 spoke with [REDACTED] after practice about it and told C2 that [REDACTED] was “uncomfortable and weirded out by it”. W4 told [REDACTED] that [REDACTED] observed it happen, as did W3.

[REDACTED] said that “a little over a month ago”, a similar thing happened to [REDACTED] at the hands of Respondent [REDACTED] said that [REDACTED] had been sitting in W2’s office. [REDACTED] said that W2 was in the room, but was watching film.

C2 said that Respondent walked into the office and “slapped” [REDACTED] in between [REDACTED] legs. I asked [REDACTED] how [REDACTED] felt, to which [REDACTED] told me that it felt like “it was more of a greeting”.

I asked [REDACTED] if W2 said anything at that time, and [REDACTED] said that [REDACTED] did not.

C2 said that [REDACTED] spoke with a [REDACTED] athlete, who told [REDACTED] that it was strange and that it had not happened to [REDACTED].

[REDACTED] said that W4 told [REDACTED] after practice, and related to the incident with C1, “You just missed it. Something weird happened”.

[REDACTED] said that W3 told [REDACTED] that Respondent had slapped C1’s legs.

[REDACTED] said that [REDACTED] and others have heard rumors about Respondent, and that he makes inappropriate comments around young [REDACTED] [REDACTED] said that at least one athlete had told [REDACTED] to be careful around Respondent.



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**Witness 4:**  
**November 29, 2016**

I met with W4 in KL319. [REDACTED] told me that [REDACTED] has been on the UC Merced [REDACTED] team for [REDACTED] years.

[REDACTED] said that Respondent is not one of the coaches, and that [REDACTED] initially met him during recruitment to the college.

I asked [REDACTED] if [REDACTED] had any personal interactions with him in the past, and [REDACTED] told me that [REDACTED] had not.

I asked [REDACTED] if [REDACTED] had any personal observations of any interactions between Respondent and other athletes, to which [REDACTED] told me that [REDACTED] had. [REDACTED] said that the team was on a water break. Respondent entered the gym, and approached a [REDACTED] athlete who was standing. [REDACTED] said that he came up behind [REDACTED] and slapped [REDACTED] in between the legs on [REDACTED] upper, inner thighs. When asked about how far up [REDACTED] legs the touching occurred, [REDACTED] told me that it was high, and closer to [REDACTED] waist.

[REDACTED] identified the recipient of this action as C1. [REDACTED] said that [REDACTED] knows that C1 is a [REDACTED] and that [REDACTED] told another [REDACTED] about the incident. [REDACTED] said that C1 said that [REDACTED] was uncomfortable with what he did.

I asked [REDACTED] how close [REDACTED] was to C1 and Respondent when this occurred. [REDACTED] told me that [REDACTED] was approximately 10-12 feet from them, and that [REDACTED] had a clear, unobstructed view.

I asked [REDACTED] how this made [REDACTED] feel. [REDACTED] told me, "It made me feel uncomfortable. It's not an appropriate thing for a coach to do to a student".

[REDACTED] said that C1 told [REDACTED] that it happened to another [REDACTED] athlete as well.<sup>3</sup> [REDACTED] told me that [REDACTED] was unaware of it happening to any [REDACTED] athletes.

[REDACTED] said that [REDACTED] had heard of other incidents and comments regarding Respondent, but was unable to provide any specific details.

**Witness 2:**  
**December 7, 2016**

<sup>3</sup> This student was contacted and at the time of this report has not yet responded.





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I spoke with W2 on the phone. [REDACTED] told me that [REDACTED] was the UC Merced [REDACTED] coach. W2 said that [REDACTED] did not recall observing Respondent touching C2 in [REDACTED] office, but acknowledged that [REDACTED] has been in [REDACTED] office.

[REDACTED] said that [REDACTED] had never observed any inappropriate behaviors on the part of Respondent, and did not recall any athletes complaining about him in the past.

W2 stated that Respondent has been helpful to [REDACTED] coaching the team and had nothing negative to say about Respondent.

**Respondent:**  
**December 15, 2016**

The Director of Compliance and I met with Respondent in KL319. He was advised that he had the right to have a representative with him if he wanted, and he said that he understood that and did not want one. He was also advised that he could take a break, or terminate the discussion at any time he so chose. He said that he understood that as well.

He had previously been advised that our office had received notice of a second allegation of misconduct. At the start of our discussion, we told him that it was related to C2. He responded that he “was shocked it was [REDACTED]”

I asked him why he was shocked. He told me that [REDACTED] is “fairly outgoing”, and that [REDACTED] would chest bump other students. I asked if [REDACTED] ever chest bumped him, to which [REDACTED] said that [REDACTED] had not.

I explained that this new allegation had allegedly occurred in W2’s office, to which he told me, “I don’t recall that incident at all”.

I asked him to tell about his perceptions related to C2’s level of honesty. He told me, “I think [REDACTED] is honest. I helped recruit [REDACTED]”

I asked him if, when he touches the [REDACTED] athletes, if there are any sexual connotations attached to those actions. He told me, “It’s not in a sexual manner. It’s about support”, and told me that he thought that this had started with him at UC Santa Barbara.

He said that he understood how others might see this as sexually related behavior. He said, “its a stark reality for me. I don’t think it’s a hard change. I miss-guessed the relationship. I can’t tell you how bad I feel”.



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He said, “I don’t feel very good about that”, and did not want people to feel uncomfortable around him.

In our first meeting on October 27, 2016, I did not disclose the identity of C1. During the meeting of December 15, 2016, I advised him that [REDACTED] was the athlete involved in that previous matter. He then told us, “That one was a lapse in judgment”.

He explained that W2 was having a tough time “loosening up” C1, and that “the whole idea was to find a way to loosen [REDACTED] up”.

I asked about his specific recollection of the incident. He told me, “I see where it was”, explaining that it was in the gym and prior to practice.

He said that he did not recall if other athletes were present, and did not recall any words exchanged between he and C1.

He reflected on C1, and told me, “A bad lapse in judgment. I feel terrible”. Respondent said that he knew that C1 did not have confidence, and, “This didn’t help”. He said that it was a tactic to connect with C1.

He said that there was no malicious intent when he touched [REDACTED]. He added that since the incident, [REDACTED] confidence is getting better. He said that he felt as if C1 believed that [REDACTED] always had to be perfect. He said that he had not observed any avoidance efforts from [REDACTED]. While his comment was acknowledged, we reminded him that sometimes the severe power imbalance might make it difficult for him to detect an outward change in behavior.

I asked him about other athletes that he may have touched in this manner. He provided the name of W5, and said that [REDACTED] was, “Outgoing, dances around a lot”. Respondent said, “[W5] would pinch you on the side” and would have physical contact with him.<sup>4</sup>

I asked him again about his recollection of the incident involving C1. He told us, “There is a high percentage (that it occurred), but I don’t specifically recall”.

I asked him about C1’s level of honesty. He responded, “I would believe (C1)”.

I asked again if he recalled the incident with C2, and he responded, “No”.

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<sup>4</sup> I attempted contact with W5, who had not responded back to my request at the time of this report.



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I asked him if he was attached to the Complainants in this case, to which he told me, “Absolutely not”. I asked him if he found them attractive, and he responded similarly, “Absolutely not”.

We asked if he had anything further he wanted to talk about, and he said that he did not. He told us that he was worried about retaliation. The Director of Compliance told him that he should report any incidents he felt were retaliatory.

**Witness 2:**  
**January 16, 2017**

I spoke with W2 on the telephone. I told [REDACTED] that I wanted to talk to [REDACTED] further about Respondent’s interactions with [REDACTED] athletes on the [REDACTED] team, and what if any help [REDACTED] had asked of Respondent.

[REDACTED] said that [REDACTED] had invited Respondent to attend the practices and that [REDACTED] had asked him for help in dealing with athletes who “got inside their own heads”. [REDACTED] said that Respondent was also helping [REDACTED] with coaching tactics and game management.

[REDACTED] told me that [REDACTED] believed that Respondent had some background in psychology and that [REDACTED] had asked Respondent help [REDACTED] get some of these athletes to focus. I asked [REDACTED] which students [REDACTED] had asked Respondent to help, and [REDACTED] told me that it was typically [REDACTED] athletes. I asked [REDACTED] specifically which students, to which [REDACTED] named Complainant 1 and another [REDACTED] athlete, identified as W3.<sup>5</sup>

W2 said again that no student had ever come to [REDACTED] to complain about Respondent, and that [REDACTED] did not witness anything in [REDACTED] office involving a [REDACTED] athlete and Respondent.

**ANALYSIS:**

**Did Respondent touch Complainant 1 and Complainant 2 in the manner specified?**

In his statements during the two interviews conducted surrounding these allegations, Respondent on both occasions fell short of fully admitting that the incidents occurred as described by Complainants, and as described by at least one eyewitness.

With Respect to C1, Respondent said, “That one was a lapse of judgment”, and “There is a high percentage (that the incident occurred) but I don’t specifically recall”.

<sup>5</sup> I had attempted prior to this interview to speak with W3 regarding this matter, and [REDACTED] did not respond.



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The Respondent did however acknowledge that touching [REDACTED] players in the manner described in the allegations is something that he has done for quite some time, dating back to his time at UC Santa Barbara.

Respondent's lack of clarity contrasts drastically with the statements of the Complainants, who each described the alleged actions of Respondent with specificity and certainty. The veracity of the Complainants is not in question, and even Respondent acknowledged that he considered both of them honest.

On the other hand, Respondent provided many different possible rationalizations for his actions, ranging from loosening up an athlete, checking to see if their muscles were sore, a means to interact with outgoing [REDACTED] athletes, and a means to interact with tentative [REDACTED] athletes.

The statements of the Complainants are consistent and did not lack certainty in their recall or delivery. The one eyewitness who agreed to speak with me was no more than 12 feet from the Complainant and the Respondent when he touched [REDACTED] in the manner described.

There is little doubt that the actions alleged by the two Complainants, provided independent of each other, and in one case confirmed by an eyewitness, occurred as described, and that Respondent is the person responsible for the actions.

**Did the touching noted above, attributed to Respondent, constitute a violation of University of California policy?**

When asked if the touching of the Complainants was sexually motivated, or if he was attracted to the Complainants, Respondent was adamant that there was no sexual connotation to his actions, and that he was not attracted to the Complainants.

With respect to intent and motivation related to the actions of Respondent, even viewed in the light most favorable to Respondent, assuming that the touching of the Complainants on their inner, upper thighs had no sexually motivated *intent*, the *impact* on the Complainants is the same. By all accounts, Respondent has touched [REDACTED] athletes between their legs, in an area described as their upper thighs, and closer to their waists.

It seems reasonable to believe that these actions are sufficiently severe or pervasive to such an extent that they would unreasonably deny, adversely limit, or interfere with the Complainant's participation in or benefit from the education, employment or other programs and services of the University. In this case, participation on the UC Merced [REDACTED] team. It also seems clear that these actions, regardless of intent, created an environment that a reasonable person would find intimidating or offensive.



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In this case, based upon the anatomical location of the touching by Respondent, on the unsuspecting and non-consenting Complainants, his actions satisfy a preponderance of the evidence standard that the actions, regardless of intent, constituted a violation of University policy.

Plainly stated, the actions of Respondent have had a consequential impact on the Complainants, and at least one of the witnesses.

**FINDINGS:**

All findings in this matter were made to the preponderance of the evidence standard.

Based upon the information revealed throughout this investigation, a preponderance of the evidence supports a finding that the actions alleged did in fact occur, that Respondent is the person responsible for those actions, and that the actions violated the University of California Sexual Violence and Sexual Harassment Policy.

Respectfully Submitted,

Jim O'Connell  
Lead Investigator  
UC Merced

David Noble

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

February 1, 2017

Dave Dunham  
Recreation and Athletics  
University of California  
5200 N. Lake Road  
Merced, CA

Mr. Dunham,

Please accept this letter as formal notification that I am resigning my position as Associate Director of Recreation and Athletics at the University of California Merced. My last day will be Wednesday, February 1, 2017.

Thank you for the opportunities provided me during my time with UC Merced.

Sincerely,

David Noble