



NY's High Court holds hearsay can support findings of campus sexual assault

By Tina Sciocchetti and Zachary Osinski

The Court of Appeals, New York's highest court, recently ruled that hearsay evidence of a complainant's report of sexual assault may constitute substantial evidence in a university disciplinary hearing sufficient to support findings of sexual misconduct, even where contradicted by live testimony of the respondent at the hearing. This holding is important in light of the right afforded complainants under New York's campus safety law to decline participation in disciplinary proceedings. An open question, not addressed by the court's decision, is whether a respondent has a due process right in public university disciplinary hearings to test a sexual assault complainant's credibility through cross-examination.

The case, [Haug v. SUNY Potsdam](#), involved a report by a student complainant to campus police that she had been sexually assaulted. The complainant refused to identify the respondent or to submit to a sexual assault examination, but an anonymous tip subsequently identified the respondent. A university official then contacted the complainant, who provided further details of the encounter. The university thereafter charged respondent with violating its student code of conduct, which required affirmative consent to sexual activity.

The complainant did not appear at the disciplinary hearing, and her account was provided by the campus police officer and university official who had spoken with her. The respondent testified at the hearing, corroborating many of the facts complainant had reported, but providing additional testimony of the complainant's statements and actions during the encounter that he had understood to indicate her consent to sexual intercourse. The respondent also testified, in part, that after receiving a campus-wide rape alert (generated by the complainant's report), he sent the complainant a text message about the alert because he was worried and didn't know if she had reported him.

A university hearing panel found the respondent responsible for code of conduct violations and subsequently expelled him. The respondent commenced an Article 78 proceeding, and in a split 3-2 decision, the Appellate Division court held the university's decision was not supported by "substantial evidence." On the university's appeal, the Court of Appeals disagreed and reversed. The court's Memorandum Opinion provides clear guidance to lower New York courts regarding their role in reviewing a school's hearing process. The court restated the principle that the findings of an

administrative decision-maker (here the university) are entitled to deference on judicial review. Beyond ensuring there is “substantial evidence” to support the decision, the court instructed, a reviewing court has “no right to review the facts generally as to weight of evidence” and cannot substitute its judgment for the university, even if the court would have decided the matter differently. The court emphasized that substantial evidence is a minimal standard—less than a preponderance of the evidence—and “demands only that a given inference is reasonable and plausible, not necessarily the most probable.”

Critical to the outcome of the particular matter before it, the court observed that hearsay evidence is admissible as competent evidence in an administrative proceeding and, if sufficiently relevant and probative, can constitute “substantial evidence” even if contradicted by live testimony on credibility grounds. In this case, the court ruled, the hearsay evidence proffered at the university’s hearing, along with the respondent’s own testimony, provided substantial evidence to support the finding that he violated the student code of conduct. The court further stated the university’s hearing board also could have reasonably interpreted respondent’s actions after the incident as consciousness of guilt and concluded that his version of events was not credible. Concluding that “[u]ltimately, it was the province of the hearing board to resolve any conflicts in the evidence and make credibility determinations,” the court faulted the lower court for improperly reweighing the evidence when it substituted its own factual findings for those of the university. One justice dissented, stating he would have affirmed based on the Appellate Division’s majority opinion.

The court’s decision is a strong signal to lower courts that they should avoid disturbing carefully-weighted disciplinary determinations by colleges and universities that are reasonably supported by the evidence. By instructing lower courts to defer to the credibility determinations and weighing of contradictory evidence by university panels, the court has narrowed the grounds for reversal in cases that hinge on such determinations. Of significance was the court’s approval of sufficiently relevant and probative hearsay evidence as a basis for sexual misconduct findings. As a result, schools should be able to proceed with some confidence in appropriate cases where a complainant or witness declines participation in the hearing but reliable, sufficient hearsay evidence exists to prove a code of conduct violation. The court’s analysis could be interpreted to allow college and university fact-finders to rely entirely on relevant and probative hearsay evidence regarding a complainant’s report, if they find the respondent’s live testimony contradicting the hearsay not credible.

The court’s acceptance of hearsay evidence of the complainant’s report in *Haug* is significant in light of the respondent’s inability to test the complainant’s credibility at the university’s hearing through cross-examination. Several courts, most notably the United States Court of Appeals for the Sixth Circuit, have recently held that when credibility is at issue in a sexual misconduct disciplinary proceeding, the Due Process Clause of the United States Constitution mandates that a public university provide accused students with the opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder. We addressed this trend in a recent [client alert](#).

At oral argument before the court of appeals in *Haug*, counsel for the university argued the lower court’s decision had in effect created a rule that the complainant must be present and testify at a hearing, and respondent’s counsel urged the court to adopt such a rule. The judges showed great interest in this aspect of the case, querying whether a university decision-maker could make credibility determinations without the complainant’s appearance at a hearing, and whether from a policy point of view, it was appropriate to require complainants in campus sexual assault cases to testify at administrative hearings. Ultimately, the court’s decision did not address the issue of

whether a complainant must appear at a public university's disciplinary hearing to allow a respondent the opportunity for cross-examination, finding (as the lower court had) that this due process issue had not been preserved at the administrative level.

Because New York campus safety law (Education Law 129-B) affords students the right to decline participation in a campus sexual misconduct proceeding, it can be expected that New York institutions will likely proceed in appropriate cases without a complainant's participation, relying on hearsay of the sexual assault report. It is therefore quite possible the due process question left open by the *Haug* Court's decision may soon be presented to a New York State or federal court. Such a court will need to decide, when credibility is central to a sexual misconduct determination at a public university, whether sufficiently relevant and probative hearsay evidence in a complainant's report can sustain an outcome, or that due process requires the respondent be afforded an opportunity to challenge the complainant's credibility through cross-examination. We will continue to monitor developments in this area and will provide alerts on significant cases.

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