



**INVESTIGATION REPORT
CALIFORNIA STATE
UNIVERSITY
SAN JOSE**

Elizabeth V. McNulty
Evans, Fears & Schuttert LLP
November 30, 2022

Applicable Policies, Standard of Review, and Scope of Investigation

This investigator was retained by the Office of General Counsel to conduct a neutral, privileged investigation pursuant to Executive Order (“EO”) 1115. As provided in the September 12, 2018 (rev.) of the EO 1115 complaint procedure, “EO 1115 implements the intent of the California Legislature as stated in the California Whistleblower Protection Act and the California State University Investigation of Reported Improper Governmental Activities Act.” The Complaint procedure under EO 1115 is for Employees and Third Parties who wish to submit a Complaint that alleges Improper Governmental Activity and/or Significant Threat to Health or Safety that has occurred or is occurring at the CSU.

Improper Governmental Activity means “any activity by the CSU, a CSU department or Employee that is undertaken in the performance of the Employee’s duties, undertaken inside a CSU office, or if undertaken outside a CSU office by an Employee, directly relates to the CSU, whether or not that action is within the scope of employment, and that (1) is a violation of any state or federal law or regulation, including but not limited to corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, malicious prosecution, misuse of government property, or willful omission to perform duty or, (2) is economically wasteful, or involves gross misconduct, incompetence, or inefficiency.”

In determining whether an Improper Governmental Activity has occurred, the Preponderance of the Evidence is the applicable standard for demonstrating facts and reaching conclusions in an investigation conducted pursuant to the EO. The Preponderance of the Evidence means “the greater weight of the evidence, i.e., that the evidence on one side outweighs, preponderates over, or is more than, the evidence on the other side.”

In this matter, an SJSU Athletics Department employee (“Complainant”) submitted an EO 1115 Complaint on May 17, 2020. Complainant alleged that between 2012 and the date of their report, several SJSU administrators were aware of allegations that the former SJSU head Athletic Trainer, Scott Shaw, had inappropriately touched some female student-athletes, but that despite multiple reports and detailed documentation provided, SJSU failed to adequately investigate.

In April 2021, this investigator was asked to assess additional inquiries that, although not raised by Complainant’s EO 1115 Complaint, arose out of Shaw’s alleged misconduct. Specifically, this investigator was asked to investigate the adequacy of the University’s investigation of Shaw’s misconduct in 2009/2010, SJSU’s response to subsequent reports, if any, regarding improper behavior by Shaw and the response and investigation by the SJSU Police Department to any reports pertaining to Shaw. All of these topics and inquiries were reviewed under the Preponderance of the Evidence Standard.

Method of Investigation

Interview meetings were conducted between July 2020 and May 25, 2022, and included 37 witnesses, some of whom were interviewed on several occasions. In addition, thousands of

pages of documents from various sources were obtained and reviewed as well as extensive email files from 10 central witnesses.

Executive Summary

Based upon a preponderance of the evidence, this investigator found:

- 1) The 2009/2010 investigation and report pertaining to Shaw's alleged misconduct was inadequate.
- 2) SJSU failed to properly respond to Complainant's subsequent reports between 2010 and 2018 that the 2009/2010 investigation was inadequate.
- 3) SJSU failed to adequately respond in December 2009 to other evidence that Shaw had allegedly engaged in misconduct.
- 4) There were two separate police reports filed with the SJSU police department by two student-athletes in 2009, neither of which resulted in an adequate investigation or report.

Summary of Key Findings

1) The 2009/2010 investigation and resultant report pertaining to the sexual harassment and/or inappropriate sexual conduct by SJSU athletic trainer, Shaw, was inadequate. The investigator Dunklin was provided with summary statements and contact information for 27 student-athletes, 17 of whom asserted having suffered questionable conduct at the hands of Shaw. However, only 14 of the student-athletes were interviewed and Dunklin listed only one of the student-athletes as a complainant, despite the fact that numerous other student-athletes reported to this investigator that they had endured sexual misconduct at the hands of Shaw. Moreover, numerous of the student-athletes reported to this investigator that the interviews conducted in 2009 were conclusory and accusative and focused not on their allegations, but on the validity of Shaw's pressure point therapy. The final investigation report was insufficient given the gravity of the allegations at 2 pages in length, focused not on the complainant or witness statements but upon the validity of the pressure point therapy used by Shaw and, contained little to no discussion or analysis of the allegations under the applicable standard.

At the conclusion of the 2009/2010 investigation, notice of the final outcome was only given to Shaw and the single student-athlete listed as a complainant, Student-athlete A, and no notice or contact was made with any of the other student-athletes who had reported misconduct. For her part, Student-athlete A testified that she never received the final notice or any correspondence from anyone at SJSU. Neither the SJSU Administration nor the Athletics Department provided any explanation, support, or other communication to any of the student-athletes, neither those interviewed nor those whose names were provided and not

interviewed. Shaw was allowed remain in his position with little to no limitations, save those placed arbitrarily by Complainant for his own team. Based upon the lack of communication from the University, the student-athletes were largely left to guess the outcome of the investigation until Complainant informed them that the university had exonerated Shaw and determined his therapy was appropriate. Several of the student-athletes who were interviewed discussed feelings of anger, frustration and, regret at having come forward only to be marginalized and ignored. It is not surprising that the student-athletes did not attempt to re-report or take additional steps to hold Shaw accountable given the summary dismissal they felt SJSU had given their serious complaints. The only protection afforded to the student-athletes came from Complainant who established a rule that no members of a team over which Complainant had oversight would receive treatment from Shaw or the student-athletes themselves who warned each other to avoid Shaw. Given the totality of the circumstances, under a preponderance of the evidence, the investigation was inadequate.

2) Despite numerous reports by Complainant between 2010 and 2018 that the underlying Shaw investigation was inadequate, and repeated expressed concerns by Complainant over Shaw's continued employment and interactions with female student-athletes, SJSU failed to properly evaluate the allegations and failed to assess the adequacy of the underlying investigation. On several occasions between 2010 and 2018, Complainant raised concerns to appropriate administrators regarding the adequacy of the 2009/2010 investigation and continued concerns regarding Shaw's access to and conduct toward female student-athletes. In 2018, Complainant asked SJSU's Title IX office to revisit the investigation of Shaw. Complainant shared with Title IX staff a compendium of information regarding Shaw's misconduct and SJSU's failure to re-open the investigation. The Title IX office ignored Complainant's report and the information and failed to re-open the investigation or follow up in response to the stated concerns and, did not maintain or preserve a copy of the compendium of materials that Complainant had submitted. Under a preponderance of the evidence, this investigator determined that SJSU failed to properly or adequately respond to these subsequent reports.

3) At the time of the initial 2009/ 2010 investigation and thereafter, there were additional allegations asserted that Shaw engaged in sexual misconduct with student-athletes.

- a. At the time of the initial reporting in December 2009, student-athletes on teams not overseen by Complainant, reported alleged misconduct by Shaw. Specifically, Complainant noted that SJSU failed to separately evaluate these claims at the time of the original investigation. SJSU should have addressed these reports and investigated the claims.
- b. A former SJSU coach, Employee A, reported that in 2009, he was informed that one of his student-athletes, Student-Athlete B, had been inappropriately touched by Shaw. He directly approached Shaw and informed him that his conduct was not appropriate and also informed his supervisor, Employee B. Employee B did nothing to address or investigate the report, and nothing

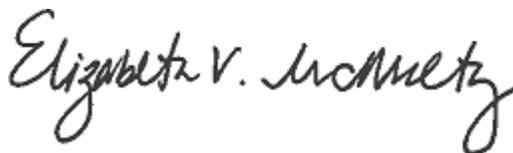
more was done by Employee A. The failure of either Employee A or B to take further steps to file a formal report was not reasonable.¹

4) Three separate police reports were alleged to have been filed with the SJSU's University Police Department ("UPD") two in 2009 and one in 2013. The first 2009 report was filed by Student-Athlete C and Student-Athlete D and was available and reviewed as part of this investigation. The second 2009 police report was allegedly filed by Student-Athlete A. No report was located and there was insufficient evidence to substantiate that a report had in fact been filed. With respect to the Child Abuse Neglect and Reporting Act (CANRA) report that Complainant claims to have filed in 2013 with respect to (then) minor, Student-Athlete C, while Complainant produced a copy of what he claims to have filed, the UPD had no copy and Complainant had no transmission copy.

- a. The 2009 report concerning Student-Athletes C and D resulted in minimal, if any, investigation by the SJSU UPD, resulting unsupported conclusions. Based upon the report and scope of the response by SJSU UPD (or more accurately the lack of response), the police investigation and follow up under a preponderance of the evidence were inadequate.
- b. There was insufficient evidence to establish that the 2009 report allegedly filed by Student-Athlete A was either filed or received by the UPD. Thus, no determination could be made regarding the adequacy of any response or follow up by SJSU UPD.
- c. Complainant reported that he filed a 2013 CANRA report. However, there is no record of the report having been filed or received by SJSU UPD and the copy produced by Complainant does not have a facsimile confirmation page or transmission information. Given the absence of evidence, this investigator could not make a determination regarding the adequacy of any UPD response or follow up.

Sincerely,

EVANS FEARS & SCHUTTERT LLP



Elizabeth V. McNulty

¹ Employee A initially reported that he was informed by Student-Athlete B that she was inappropriately touched by Shaw in 2011 but later confirmed that the misconduct occurred during the pre-season of Student-Athlete B's freshman year which was 2009. While this clarification means that SJSU was not aware of this additional claim after the completion of the Dunklin report and prior to the 2019 NCAA disclosure, it also makes clear the very real ramifications of Dunklin's failure to investigate the existence of other potential assaults in the other sports teams receiving treatment by Shaw and overall inadequacy of the original investigation.