

# SECTION 5: AFFIRMATIVE CONSENT

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## 5.1 AFFIRMATIVE CONSENT

Affirmative consent is the standard to which EMU holds its students and employees. Affirmative consent refers to consent to engage in sexual activity that is:

- a. informed, meaning knowingly given by both parties;
- b. voluntary, meaning freely given, not forced or coerced; and
- c. active, meaning that through the demonstration of clear words or actions, a person has indicated permission to engage in mutually agreed-upon sexual activity.

In the context of this definition, sexual activity is defined as sexual intercourse and/or sexual contact.

Sexual intercourse is any intentional penetration, however slight, with any object or body part (as described below), performed by a person upon another person. Sexual intercourse includes:

- a. vaginal penetration by a penis, object, tongue, or finger;
- b. anal penetration by a penis, object, tongue, or finger; and
- c. any contact, no matter how slight, between the mouth of one person and the genitalia of another person.

Sexual contact is any intentional sexual touching, however slight with any object or body part (as described below), performed by a person upon another person. Sexual contact includes:

- a. intentional touching of the breasts, buttocks, groin, or genitals, whether clothed or unclothed, or intentionally touching another with any of these body parts; or
- b. making another touch you or themselves with or on any of these body parts.

Nonconsensual sexual contact refers to sexual contact that is enacted upon one party by another party without the person(s) committing the act having obtained affirmative consent.

A person who wants to engage in a specific sexual activity is responsible for obtaining affirmative consent for that activity. Lack of protest does not constitute affirmative consent. Lack of resistance does not constitute affirmative consent. Silence and/or passivity also do not constitute affirmative consent. Relying solely on non-verbal communication before or during sexual activity can lead to misunderstanding and may result in a violation of this policy.

It is important not to make assumptions about whether a potential partner is consenting. In order to avoid confusion or ambiguity, participants are encouraged to talk with one another before engaging in sexual activity. If confusion or ambiguity (including emotional and/or physical freezing) arises during sexual activity, participants are encouraged to stop and clarify a mutual willingness to continue that activity.

### 5.1.1. FORCE

Affirmative consent cannot be obtained by force. Force includes the use of physical violence, threats, intimidation, and/or coercion.

Physical violence means that a person is exerting control over another person through the use of physical force. Examples of physical violence include but are not limited to hitting, punching, slapping, kicking, restraining, choking, and brandishing or using any weapon.

Threats are words or actions that would compel a reasonable person to engage in unwanted sexual activity. Examples include threats to harm a person physically, to reveal private information to harm a person's reputation, or to cause a person academic or economic harm.

Intimidation is an implied threat that menaces or causes reasonable fear in another person. A person's size alone does not constitute intimidation; however, a person's size may be used in a way that constitutes intimidation (e.g., blocking access to an exit).

Coercion is the use of pressure to compel another individual to initiate or continue sexual activity against that individual's will. Coercion can include a wide range of behaviors, including intimidation, manipulation, threats, and blackmail. A person's words or conduct are sufficient to constitute coercion if they wrongfully impair another individual's freedom of will and ability to choose whether or not to engage in sexual activity. Examples of coercion include, but are not limited to:

- a. threatening to "out" someone based on sexual orientation, gender identity, or gender expression
- b. threatening to harm oneself if the other party does not engage in the sexual activity
- c. grooming an individual for the purposes of relationship violence and/or sexual misconduct.

In evaluating whether coercion was used, the university will consider the frequency of the application of the pressure, the intensity of the pressure, the degree of isolation of the person being pressured, the duration of the pressure, and the power differential between parties.

### **5.1.2. INCAPACITATION**

Affirmative consent cannot be gained by taking advantage of the incapacitation of another, where the person initiating sexual activity knew or reasonably should have known that the other was incapacitated.

Incapacitation describes an individual who lacks the ability to make informed, rational judgments about whether or not to engage in sexual activity and therefore cannot consent to sexual activity. A person who is incapacitated is unable, temporarily or permanently, to give affirmative consent because of mental or physical helplessness, sleep, unconsciousness, or lack of awareness that sexual activity is taking place. A person may be incapacitated as a result of the consumption of alcohol or other drugs, or due to a temporary or permanent physical or mental health condition.

#### **5.1.2.1. Incapacitation and the Use of Drugs or Alcohol**

Incapacitation may result from the use of alcohol and/or drugs. Incapacitation is a state beyond drunkenness or intoxication. Warning signs that a person may be approaching incapacitation may include:

- a. slurred speech
- b. vomiting
- c. unsteady gait
- d. odor of alcohol
- e. combativeness
- f. emotional volatility

Incapacitation as a result of the consumption of alcohol and/or drugs impairs decision-making abilities, diminishes awareness of consequences, compromises one's ability to make informed judgments, and limits one's capacity to understand the implications and consequences of an act. It is not possible for a party to obtain affirmative consent from someone who is incapacitated. It is not possible for someone who is incapacitated to give affirmative consent. If there is any doubt as to the level or extent of an individual's intoxication or impairment, sexual contact or activity should not be initiated or should be immediately stopped.

In evaluating affirmative consent and in cases of alleged incapacitation, the university asks two questions: (1) did the person initiating sexual activity know that the other party was incapacitated? and if not, (2) should a sober, reasonable person in the same situation have known that the other party was incapacitated? If the answer to either of these questions is "yes," affirmative consent was absent, and the conduct a violation of this policy.

### **5.1.3. OBTAINING AFFIRMATIVE CONSENT**

Affirmative consent to one form of sexual activity does not, by itself, constitute affirmative consent to another form of sexual activity. For example, one should not presume that affirmative consent to oral-genital contact constitutes affirmative consent to vaginal or anal penetration. Affirmative consent to sexual activity on a prior occasion does not, by itself, constitute affirmative consent to future sexual activity. In cases of prior relationships, the manner and nature of prior communications between the parties and the context of the relationship may have a bearing on the presence of affirmative consent.

Affirmative consent may be withdrawn at any time. An individual who seeks to withdraw affirmative consent must communicate, through clear words or actions, a decision to cease the sexual activity. Once affirmative consent is withdrawn, the sexual activity must cease immediately.