Controlling the Narrative

Managing the Rumor Mill in an Investigation

Presented by Kate Nearpass
October 5, 2023
AWI Annual Conference, Scottsdale AZ

NEARPASS & KOEGEL PLLC
An Investigations Law Firm

1

Why is the Rumor Mill so Damaging to Investigations?

2

Why are Rumors Damaging to an Investigation?

1. Investigator cannot trust statements from witnesses if they have been influenced by what those witnesses have been told about the allegations, which may or may not be true.
2. Witnesses may develop opinions about how the investigation will conclude, which may be out of line with what is appropriate based on the actual facts.
3. Employees may develop an expectation that they be informed of the outcome of an investigation, which may not be appropriate.
4. Employees (and possibly the community) may develop an "understanding" of the facts that is far different from the actual facts – optics and PR issue when the company declines to share information or take disciplinary action.

3

Confidentiality in an Investigation – What are the Limits?

NLRB

- Relevant to private employers in the U.S. Even non-unionized employers.
- Keep an eye on this – the law tends to change based on administration.
- Important legal theory: "Section 7 Rights" and "Concerted Protected Activity."
- The current rule is *very* new: *Stericycle, Inc.*, 372 NLRB No. 113 (Aug. 2, 2023).
- Investigative confidentiality rules are nearly presumptively unlawful. Permissible only if:
  - The rule advances a legitimate and substantial business interest, and
  - The rule could not be replaced with a more narrowly-tailored one.

4

Confidentiality in an Investigation – What are the Limits?

Title IX

- Relevant to U.S. educational institutions that receive federal funding.
- Current rule is likely to change ***any day***.
- Current, 2020 regulation:
  - A "recipient" (of federal funds subject to Title IX) must "not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence." 106.45(b)(5)(iii).
  - Discussion of allegations may not be done in a way that constitutes retaliation.
  - Discussion of allegation does not mean discussion of *evidence* or *investigation report*.

5

Confidentiality in an Investigation – What are the Limits?

Title IX, cont.

- Proposed regulation allows for MORE confidentiality:
  - A recipient must take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures. These steps to protect privacy must not restrict the parties' ability to obtain and present evidence, including by speaking to witnesses, subject to proposed § 106.71; to consult with a family member, confidential resource, or advisor; to prepare for a hearing, if one is offered; or otherwise to defend their interests.

6

Confidentiality in an Investigation – What are the Limits?

What else is out there?

- California public employers: PERB decision *Los Angeles Community College District*, PERB Decision No. 2404-E (2014) imposed the pre-*Apogee* rule (confidentiality mandates presumptively infringe on employees' right to engage in concerted protected activity).

7

Where do we see the Rumor Mill Running Rampant?

Three common situations:

1. A party takes it upon themselves to conduct their own "shadow" investigation. Usually a respondent but not always.
2. A party goes "public" (actual media or social media) with their story.
3. Non-parties who have no personal connection to the allegations raise new complaint based on rumors.

8

The Rumor Mill – Party Conducting their Own Investigation

- Respondent hires their own attorney or PI to conduct a "shadow investigation" to discredit the complainant.
- Either party tries to do the work of the investigator: contacting witnesses, "prepping" witnesses, taking statements and providing them to the investigator.

9

The Rumor Mill – Party Conducting their Own Investigation

Why is this especially harmful?

- Intimidation of witnesses = fewer witnesses who participate and participate *fully* in the investigation.
- Witnesses who are "interviewed" by an attorney for the respondent may be confused about the process, skeptical of the investigation's neutrality, or simply unwilling to submit to a second interview.
- Witnesses who have already spoken to the respondent or their attorney may have been influenced by the respondent's "spin."

10

How to Minimize the Rumors

Policy Providing Consequences for Interference – Sample Language

Any person who interferes with an investigation is subject to disciplinary action up to and including discharge. Prohibited interference in includes:

- Attempting to coerce, compel, influence, or prevent an individual from providing testimony or relevant information;
- Removing, destroying or altering documentation relevant to the complaint; and
- Knowingly providing false or misleading information to, or withholding information from, the investigator, or encouraging others to do so.

11

Downsides?

- A respondent who has had an opportunity to gather all of their own evidence and share it with the investigator is more likely to feel as though they've been treated fairly.
- A party "priming" witnesses for the investigator may lead to more witnesses being willing to participate in the investigation.

12

The Rumor Mill – Complainant Publicizing their Story

- Complainant declines to file a complaint or declines to participate in an investigation, yet uses personal means (social media, friend networks) to label the respondent as a bad actor.
- Complainant publicly files a lawsuit or goes to the media while an internal investigation is pending.

13

The Rumor Mill – Complainant Publicizing their Story

Why is this especially harmful?

- Respondent is judged by "public" opinion vs on facts gathered in a neutral investigation.
- Witnesses' perceptions or memories may be colored by what they hear/read in the media/social media.
- Witnesses become invested in the outcome of the investigation and may demand more transparency.

14

How to Minimize the Rumors

Policy that Requires Participation – Sample Language

A complainant is expected to actively provide information that will support his or her complaint in the time and manner deemed necessary and appropriate by the company to conduct the investigation. Failure to cooperate with the investigation process in a timely manner may compromise the company's ability to conduct an investigation and address allegations fully. All employees are required to participate and cooperate with investigations. Employees who fail to cooperate and/or participate fully in an investigation may be subject to discipline.

15

How to Minimize the Rumors

A Prompt and Efficient Investigation!

- Complainants are often compelled to seek an alternative outlet for their grievances if they feel that the company is not responding appropriately and quickly.
- If the investigation cannot be prompt, communication is key. Keep in regular touch with the complainant so they feel involved and supported. Update even if the update is "no update"!

16

Practical Tips for Shutting Down the Rumor Mill

Interim Measures

- No contact orders (mutual or unilateral)
- Leaves of absence (for either party)
- Shift/schedule changes
- Change in supervisor

17

Downsides?

- Actively discouraging a complainant from going "public" can create significant PR/optics risks.

18

The Rumor Mill – Non-Witnesses Raising Allegations Based on Rumor

- Employee un-related to an investigation makes demands of employer based on rumors related to an investigation.
- New employee make demands on an employer based on rumors of how a past investigation was handled.

19

The Rumor Mill – Non-witnesses Raising Historical Allegations

Why is this especially harmful?

- Places the employer in a difficult position: confidentiality vs. transparency.
- Employer must choose how much to disclose to correct misconceptions based on rumor.
- Policies regarding confidentiality of personnel information must be taken into account.

20

How to Minimize the Rumors

- Employees and communities expect more transparency in investigation processes than they may be entitled to, but consider adding in more transparency to your process where appropriate.
- Communication is key – even if you cannot disclose details of an investigation, communicating that appropriate steps have been taken may satisfy some of the concerns.
- Consider more transparency into the *process* if not into the specific investigation.

21

Downsides?

- Consider what precedent you are setting if you allow for more transparency – is this consistent with your process? Your policy?
- Employees who were the subject of the investigation may have a claim for violation of their confidentiality.

22

Thank you

nearpasskoegel.com

23

Presents: Cultural Competency in Workplace Investigations

1

1

Presenters:

Roberta Yang, AWI-CH
Law Office of Roberta M. Yang, P.C.

Zaneta Seidel, AWI-CH
Oppenheimer Investigations Group

2

2

Introduction

- Sit with us for a moment, inside an interview room/Zoom.
- You started a new investigation, and you're about to meet and interview one of the parties or a witness whom you've probably not met before.
- You were briefed a little beforehand about the workplace conflict, but you're about to hear this person's perspective on it for the first time.
- You've done investigations before. You've been to the AWI Institute. You know the Guiding Principles. You know what your job is here . . .

3

3

As neutral investigators, our job is to:

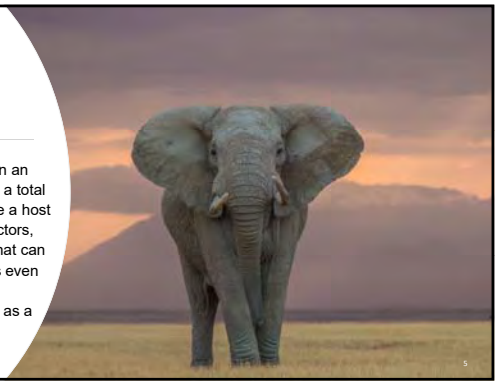
- Build rapport and put the interviewee at ease, so they open up;
- Ask open-ended and non-judgmental questions;
- Get the interviewee's best recollection of issues and events;
- Record the interviewee's account accurately;
- Gather relevant information, including sufficient details to help explain context, motivations, and impact of harm;
- Suspend judgment and operate impartially;
- Avoid causing further harm.

4

4

Elephants in the Room

When you are sitting in an interview, across from a total stranger, there may be a host of subtle and silent factors, visible and invisible, that can shape and sometimes even hinder your ability to effectively do your job as a neutral investigator.



5

5

Silent Factors Might Be

Differences in identity, background, and culture between you and the interviewee:

- Race, gender, gender identity, sexual orientation, immigration status, disability, educational background, socioeconomic status, etc.

Characteristics about the interviewee or their manner of testimony that you misread because you have never dealt with before:

- Neurodivergence, trauma, language barriers, disability, etc.

Relevant aspects of the interviewee's account that you overlook, minimize, or make assumptions about because it is unfamiliar or different from your lived experience:

- Microaggressions, dog whistles, misgendering, etc.

Your own feeling of discomfort and uncertainty as to why you feel that way

6

6

Sometimes we see them, sometimes we don't.

Sometimes we are aware that these silent factors are present in our investigation, and we try to correct for them.

- Your discomfort or the interviewee's alerts you to a difference or an issue between you two.
- The interviewee uses a term or phrase with which you are unfamiliar.
- The interviewee points out a misinterpretation or error you made.
- You use a term, phrase, or approach that the interviewee finds offensive or antiquated.

Other times, we may be unaware of the ways in which these unspoken factors and differences are impacting our investigative process and possibly shaping the outcome of the investigation, unbeknownst to us.

7

7

Elephants in the Room Can Be Detrimental

These silent factors, differences, and potential missteps can impact your success in an interview and your overall success in delivering the gold standard in our profession:

A fair, thorough, timely and well-reasoned investigation.

8

8

What does this have to do with cultural competency?

Cultural competency is our ability as investigators to be aware of, address and take into account in our work the silent tensions and cultural nuances that may be impacting our understanding of the case as well as the participants' experience in the investigative process.

9

9

What Is Cultural Competency?

10

10

Cultural Competency Defined

- There is no one definition of cultural competence.
- Concept was originally defined in the health care context at the organization level:

Cultural competence is defined as a set of congruent behaviors, attitudes, and policies that come together in a system, agency, or among professionals to facilitate effective work in cross-cultural situations.

Cross, T., Bazron, B., Dennis, K., & Isaacs, M. (1989). Towards a culturally competent system of care (Vol. 1). Washington, DC: Georgetown University Child Development Center, CASSP Technical Assistance Center.

- This definition has been adopted and modified in various industries, governmental and academic settings, as an organizational/systemic and individual goal.

11

11

Core elements of Cultural Competency

- Appreciation for cultural diversity among people;
- Self-assessment of one's own culture, beliefs, and norms;
- Awareness and recognition of cultural differences;
- Capacity to understand and effectively respond to cultural differences and nuances;
- Capacity to adapt service to reflect an understanding of cultural diversity.

12

12

Cultural Competency is defined as:

A range of cognitive, affective, behavioral, and linguistic skills that lead to effective and appropriate communication with people of other cultures.

– Wikipedia

13

13

Essentially, cultural competency is EMPATHY.

Your ability to see, understand and apply things from someone else's perspective, despite the cultural differences between you.

14

14

What do we mean by culture?

Culture is a set of values, beliefs, history, expression, language, etc. shared within a community or group of people.

- Everyone has "culture" and is a part of "culture."
- Culture is not black and white – it's layered and complicated.
- Most people have more than one cultural identity, and each of those identities may have its own set of norms and values.
- People within a group or protected category have unique personalities, lived experiences, and self-expressions different from others in the same group or category.
- Caution against relying on generalizations, stereotypes, assumptions.
- Instead, get to know each person's story, values, and beliefs.

15

15

"When cultures collide, it's important to stop and think if the way you're interpreting a situation is the only way it can be interpreted."

– Nkoyo-Ene Effiong,
the Director of Law Practice Management Program for the State Bar of Georgia

16

16

Cultural competency requires investigators to

- Recognize the limits of our own knowledge and life or cultural experiences.
- Ask about and appreciate cultural differences and nuances that may be limiting our understanding of how the parties and witnesses perceive and relate to one another, thereby limiting our understanding of the case.
- Promote fairness in our investigations by considering people's unique perspectives, reactions, backgrounds, and positionality; for example, when we determine credibility and reasonableness in making our findings.
- Understand the conflict in a fuller context and provide clarity and insight on the root causes of it, to help meaningfully address the problem and promote safe and inclusive workplaces.

17

17

Why is Cultural Competency Important in Investigations?

18

18

The Workplace Today…

The workplace is constantly changing, as our society changes.

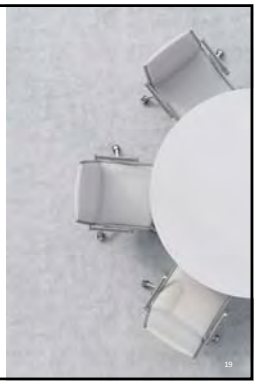
Social, cultural and political movements are driving change in the workplace.

Topics that used to be taboo at work no longer are.

People are showing up in more unique and authentic ways at work.

Workplace norms, values, expressions of identity, conversations, and dynamics are evolving.

The way we understand and assess workplace conduct, relationships, and conflict should evolve as well.



19

19

Core elements of a solid investigation:

NEUTRALITY
Are you neutral if you are unaware of the ways in which your own biases, privilege, and world view may be skewing your understanding of the case?

THOROUGHNESS
Is your investigation thorough if you come across terms and references that are unfamiliar to you and you don't drill down to understand what they mean to the person who said them.

FAIRNESS
Is it fair to assess the reasonableness of people's actions and reactions in the workplace based on traditional norms and expectations (of appropriateness) that may not reflect or capture the experience of individuals in marginalized groups?

20

20

Cultural competency requires self-scrutiny

If our job, as neutral investigators, is to consider and make sense of everyone's perspective on an issue or event, we must self-scrutinize and be honest with ourselves about the ways in which:

- We are not able to fully understand someone else's perspective because it's foreign to our own lived experience;
- We may unfairly assess and weigh certain perspectives that align or don't align with our own world view;
- We may be preventing parties and witnesses from being authentically heard, seen, and understood in our investigations.

21

21

Risk of Not Developing Cultural Competency

- Project your perspective and world view on the parties and witnesses.
- Skew your understanding and analysis of the facts.
- Over-rely on biases, assumptions, stereotypes, implicit and overt.
- Overlook someone's story and end up telling your version of it.
- Hold people from marginalized groups to traditional standards, norms, and expectations that may not reflect their experience.
- Perpetuating or exacerbating harms you are meant to help resolve.

22

22

Ways Cultural Competency Can Show Up In Investigations

23

23

(Missed) Opportunities for Cultural Competency

- Assessing veracity of the complaint
- Accommodating language skills
- Greeting the interviewee
- Commenting on someone's name
- Gathering demographic information
- Reading manner of testimony (neurodivergent, trauma, mental health)
- Understanding cultural references and nuances
- Assuming or minimizing someone's experience, perspective, motive or reaction
- Assessing credibility based on limiting or traditional reasonable person standard

24

24

Before the investigation begins, you might:

- Prejudge the written complaint (vernacular, English language skills)
- Doubt the veracity of the claim
- Be primed by a client/business partner

Consider:
- Inquiring about a possible language barrier
- Retaining an interpreter
- Subgroups and intra-group tensions
- Suspending judgment and following your standard process

25

25

Starting the interview:

- Pay attention to first impressions (your own and the interviewee's)
- Think about how to greet the interviewee
- Decide what demographic information to gather and how

Consider:
- Rapport building is not one-size-fits-all
- Explaining your request for demographic information
- Self-identifying/modeling the protected trait you are requesting
- Asking for everyone's pronouns (not only asking in gender identity cases)

26

26

During the interview:

- Ask about unfamiliar terms and phrases
- Drill down on potentially coded language
- Address the interviewee's discomfort
- When you don't understand, ask questions (don't assume the answer)

Consider:
- What the term or phrase means to the interviewee
- The basis of the interviewee's impressions (experience or assumption)
- Creating openings for the interviewee to express discomfort (about you)

27

27

Report Writing:

- Decide how to capture derogatory terms without causing further harm
- Eliminate charged and outdated language (Caucasian, homosexual)
- Don't "other" or make outliers of certain interviewees (They/Them)

Consider:

- Using footnotes and euphemisms in lieu of offensive terms
- Providing demographic information for everyone or no one (pronouns)
- Whether your language, word choice, stylistic conventions perpetuate any stereotypes, inequities, or harms

28

28

Analysis and Findings

- Show your work and check your bias
- Assess reasonableness based on facts, circumstances and perspectives presented – not on outdated norms, assumptions or your own world view
- Identify stereotypes, trauma, power imbalances, inequities, cultural issues at play

Consider:

- Whether you are applying norms or making assumptions not supported by the evidence
- Whether you are discounting a certain perspective because it is foreign to you
- Having a colleague review your report

29

29

How to Develop Cultural Competency

30

30

Can you truly be culturally competent?

Because culture is so nuanced, complicated, and ever changing, you cannot know or be expected to know everyone's culture or everyone's interpretation of culture.

There is no finish line to cultural competency. It requires continuous learning and cultural humility. It is realizing that your worldview is limited, and you don't know it all, but when something different or novel arises, you are curious and willing to keep learning about it.

31

Developing Cultural Competency

- **Self-Awareness and Self-Scrutiny: Know what you don't know.**
  - Know the limits of your experience and knowledge
  - Understand how your worldview was shaped by your lived experience; introspection
  - Appreciate that other people's worldview was shaped differently than your own
  - Be aware of your biases and privilege
  - Challenge your assumptions about people
- **Cultural Humility and Curiosity:**
  - Be open-minded, empathetic, respectful of others who are different from you
  - Read, explore and build your awareness of other cultures and perspectives
  - Form relationships with people from different backgrounds and lived experiences
  - Collaborate with colleagues - discuss sensitive and novel issues (Local Circles, webinars, affinity groups)

32

Conclusion

33

How to think about cultural competency

- Cultural competency is an enhancement of our core investigative skills.
- Cultural competency is consciousness that helps elevate our interviewing skills, rapport-building, neutrality, analysis, ability to help people feel heard and seen, and client service.
- Cultural competency is how you make a good investigation great and insightful.
- Adding cultural competency to your toolkit gives you the opportunity to conduct a thoughtful and equitable investigation for all parties involved, and to provide useful and insightful information to your client.

34

34

Culturally Competent Practice Tips

Investigation Plan	Avoid prejudging the complaint based on language skills, vernacular, priming Be flexible and conscientious in your approach (e.g. communication style, interview accommodations, assigned investigator)
Interview	Be open and accepting in your investigative process, not exclusionary or off-putting (e.g. Ask how someone would like to be addressed; ask everyone what their pronouns are) Make a good faith effort to clarify and understand interviewee's account from their perspective Acknowledge when something is unfamiliar to you; ask interviewee to explain what they meant Acknowledge missteps on your part; rebuild rapport and trust
Report Writing and Analysis	Write summaries in a neutral voice that accurately reflects the interviewees' accounts Assess and challenge biases, assumptions, hegemonic (evidentiary) norms (e.g. What is reasonable given the circumstances? What is considered professional or appropriate?) Consider and highlight cultural issues and differences that may be at play Check your work and thinking – have a colleague review your report and findings

35

35

Resources

- **Podcasts:**
  - Code Switch
  - Latino USA
  - Asian Enough
  - California Report Magazine
- **TV/Film/Documentary:**
  - The Trans List (2016, Hulu, Amazon Prime)
  - Disclosure (2020, Netflix)
  - Unbelievable (2019, Netflix)
  - Finding Your Roots (PBS)
  - Reconstruction (2019, PBS)
  - 13th (2016, Netflix)
  - The Chair (2021, Netflix)
- **Books:**
  - Authentic Diversity – Michelle Silverthorn
  - Blink – Malcolm Gladwell
  - The Sum of Us – Heather McGhee
  - 1619 Project – Nikole Hannah-Jones
  - Stop Telling Women to Smile – Tatyana Fazlalizadeh
  - Between the World and Me – Ta-Nehisi Coates
  - Think Again – Adam Grant
  - Black on Both Sides: A Racial History of Trans Identity – C. Riley Snorton
  - Transgender History – Susan Stryker
- **Resources/Links:**
  - The Trevor Project – Trans* and Gender Identity
  - Gender Spectrum – Understanding Gender

36

36

Thank You!

37

37

Identifying Risk Factors In Investigations

The Title IX Perspective

Brikitta Hairston, MS
Title IX and Civil Rights Investigator

1

Brikitta Hairston, M.S.

UMass Boston

- BA English and Creative Writing
- MS Criminal Justice, Minor in Title IX and Civil Rights Investigations, research and concentration in Victimology and Origins of the Predator
- Title IX and Civil Rights Investigator
- Training and prevention educator

2

Learning Objectives

- Fundamentals of Title IX Investigations and the administrative process in sexual violence investigations.
- Framework of the DD-12 Risk Factors in sexual violence and the importance of impartiality.
- How the internal or external investigator and attorneys interact with Title IX Investigations.

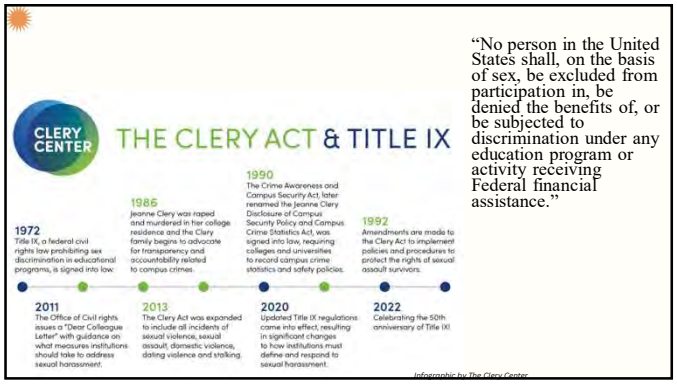
3

What is your job function?

4

What is your Understanding of Title IX Investigations?

5



"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

6

What is...

SEVERE, PERVASIVE

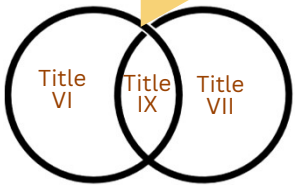
And [or]

OBJECTIVELY OFFENSIVE

- To meet the threshold of a possible policy violation, the incident type must have, if proven, have intentionally targeted an individual based on their perceived membership to a protected class:

Race, gender, sex, religion or religious belief, creed, sexual orientation, disability, veteran or military status, age, marital status.

The intersection of Title VI, VII, and IX can be defined by the administrative process, and threshold for policy violation[s] if proven.



7

The Advisor-Attorney

Depending on the Institution's procedure, an advisor is mandatory in Title IX Investigations.

In some, the Institution must provide the Advisor.

Often, the Complainant or Respondent obtains their own Advisor. This person may or may not be an attorney

How can you prepare an advisor-attorney to step into an administrative process while in your investigative role?

8

A tool for the prevention of sexual violence in higher education that categorizes risk factors in accordance with incidents of sexual violence, and the origins of certain 'deviant' behaviors.

The DD-12 Risk Factors

- *Not intended to make clinical diagnoses.*
- *Designed by Brian Van Brunt and Dr. Amy Murphy.*

9

Risk Factors for Sexual Violence

Objectification and Depersonalization	Obsessive or addictive focus on sex/pornography	Threats and Ultimatums
Misogynistic Ideology	Grooming Behaviors	Using Substances to Obtain Sex
Hardened or Inflexible Point of View	Patterns of Escalating Threat Strategies	Lack of Empathy
Sensation Seeking Behavior	Obsessive or Addictive Thoughts and Behaviors	Past Experience

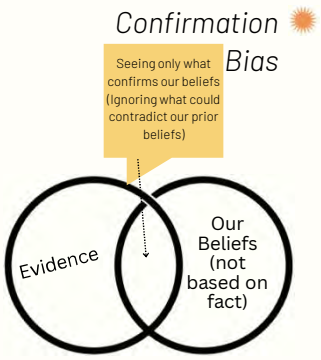
**Designed by Brian Van Brunt and Dr. Amy Murphy*

10

No risk factor is 'riskier' than the other.

Applying risk factors to prevention work is a slippery slope; if used incorrectly, actions can be perceived as surveillance and bias.

Confirmation Bias



11

What happens when your perceived bias speaks before you can?

- *How are you establishing your role to the parties as an investigator?*
- *What is your method for building rapport?*
- *When visible identifiers such as race, gender, etc. can constitute a perceived bias, how do you document your understanding of the biases and your responsibility to impartiality?*

12

Impartiality and High-Risk Investigations

Impartiality can be difficult when DD-12 Risk Factors are identified.

Both parties should be receiving equitable treatment, opportunity, and resources.

But, what if one party has displayed higher risks than the other?

Your job is not to fix the Risk Factors present, but to respond.

13

What Constitutes a High-Risk Investigation?

- When 2 or more incident types overlap.
- If 3 or more DD-12 Risk Factors are presented, the possibility of additional Clery Crimes could be present.
- The presence of certain risk factors can also predicate higher likelihoods of re-offending, even after sanctions are assigned.
- Investigations involving high-priority staff or persons well-known to the investigator.

14

Scenario

Discuss DD-12 risk factors as indicated.

A female graduate students reports that she was sexually assaulted on-campus after a University-sponsored event. She states she does not recall how much she drank but that the Respondent she identified bought all her drinks.
During an Investigatory Interview with the Respondent, he uses the phrase:
"I don't believe the victim was sexually assaulted She is lying, and this has happened to me before. I don't think this "investigation" is serious."

What questions would you ask the Complainant and the Respondent that are impartial and trauma-informed?

15

The Trouble With Impartiality

- The 'respondent' is considered 'not responsible' until proven otherwise under the preponderance of the evidence.
- Title IX Investigations are an administrative process. The Complainant drives the process.
- Being impartial in addressing sexual violence requires you to respond **equitably**, even if what you are seeing suggests otherwise.
- Eliminate the harm of re-traumatization and reduce **the Second Insult.**

16

Discussion

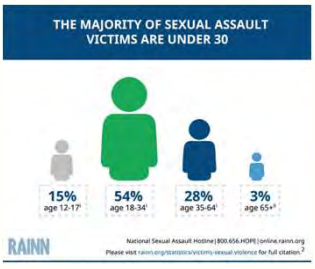
Consider your case history; what Risk Factors have you encountered?

Think of common incident types or patterns in your case history [i.e. stealthing, alcohol facilitated sexual assaults, etc.]

17

Why is Higher Education and the Title IX Process Important for combatting sexual violence?

- Ages 12-34 are the highest risk years for rape and sexual assault (RAINN).



18

Take Away

How can you implement knowledge of the DD-12 Risk Factors in future investigations?

Can you remain impartial, while identifying Risk Factors that could predicate future offenses?

How will you address your bias before it interferes with a high-risk investigation?

Questions?

19

Eradicating sexual violence is a community effort.

- Discern your understanding of Title IX Investigations and the administrative process.
- Reflect on your comprehension of the DD-12 Risk Factors.
- Think ahead: implementing your new knowledge and conducting workplace investigations where the risk factors related to sexual violence are present.

20

Links and Suggested Readings

21

The Tall Task of Impartiality: Understanding 8 Sources of Bias in Workplace Investigation

Dr. Carla MacLean (She/Her)
Kwantlen Polytechnic University, Canada

KWANTLEN POLYTECHNIC UNIVERSITY

I acknowledge and thank the Katzie, Tsawwassen, Kwantlen, and Musqueam First Peoples on whose traditional, unceded, and stolen territories I live, work, and play.

1

Learning Objectives

- **Raise awareness** of expert cognition and how it provides opportunities for bias to influence decisions.
- Accept that bias operates without an individual's awareness and is **difficult to control**.
- Recognise **eight sources of bias** in workplace investigations.
- Consider the sources of bias in your investigations and **strategies to minimise these sources**.

2

COGNITIVE BIAS IN MANY DOMAINS


Dehghani-Tafti & Bieber (2017)


Miller (1984)


Lit, Schweitzer, & Oberbauer, 2011


Elaad et al. (1994)


Dror & Charlton (2006)


Blanck, Rosenthal, & Cordell, 1985


Nakhaeizadeh et al., 2014


Dror & Hampikian (2011)

3

The minds of competent, well intentioned, experts are remarkable and also fallible.

Bias is a *systematic error in reasoning* or logic that occurs as the result of the *automaticity* with which the human mind processes information based on *expectations and experience*.

- Tversky & Kahneman, 1974

4

Placing Bias in Context: Professional Decision Making

5

Credibility of Expert Performance

Biasability

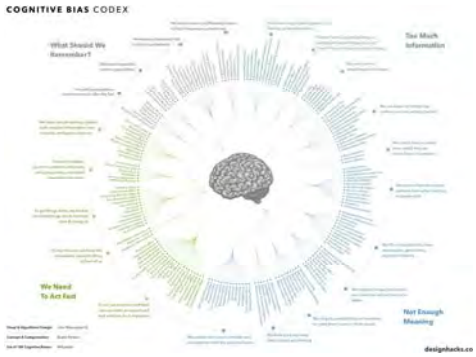
A *systematic* factor (i.e., not random error) that determines judgment other than the objective truth

Reliability

The consistency, reproducibility, or repeatability of decisions, regardless of bias

Dror, I.E. (2016). A hierarchy of Expert Performance (HEP). *Journal of Applied Research in Memory and Cognition*, 5(2), 121-127. doi: 10.1016/j.jarmac.2016.03.001
Dror, I. E., & Murrie, D.C. (2018). A hierarchy of expert performance applied to forensic psychological assessments. *Psychology, Public Policy, And Law*, 24(1), 11-23. doi:10.1037/law0000140 Bulleyes: Chang, Mandel, & Tetlock (2017). Restructuring structured analytic techniques in intelligence. *Intelligence and National Security*. doi: https://doi.org/10.1080/02684527.2017.1400230

6



7

8 Source of Bias

Dror, I. E. (2020). Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias. *Analytical Chemistry, 92* (12), 7998–8004. doi: 10.1021/acs.analchem.0c00704 (Selected as "ACS Editors' Choice").

8

Understanding information

9

Bottom-Up Processing

Incoming Data

Features of the stimulus guide our interpretation of the stimulus

Top-Down Processing

Pre-existing Knowledge

Our cognitive processes contribute to our interpretation of the stimulus

e.g., Context, past experiences, knowledge, expectations

TD = allows effective processing of bottom-up data….but it can also *distort* how data is processed.

10

Information Selectivity

- We process information quickly and efficiently, however….
- We have ***limited mental resources*** and we have to be selective!
- *Can't be avoided* – limited resources, inherent mismatch between demands and resources
- *Don't want to avoid it!*- overall good and efficient
- Largely this happens automatically without conscious awareness.

11

Expertise

- The more experience we acquire, the more these mechanisms develop, and become automatic and unconscious.
- What does this mean?
  - We are an ***active machine*** not a passive assessor of information.
  - Our experiences and knowledge guide our **perceptions and interpretations of information**.

Our rapid use of our resources -- is our intelligence and expertise!
But can also cause problems…

12

The Pweor of Cnotxet

- Context facilitates the processing of information

T/-\E C/-\T IN T/-\E H/-

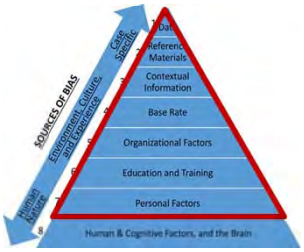
- The same piece of information can get different interpretations, depending on context.

13

LET'S TALK ABOUT CONTEXT

We are an ***active machine*** not a passive assessor of information.

Our experiences and knowledge guide our ***perceptions*** **and** ***interpretations*** **of information**.



14

Data

- How can data cause bias?
  It depends on the data.
- Some data no bias
  - E.g., job description or picture of a desk

- Other data – conveys information that can be biasing.
- E.g., image of a vehicle were the alleged assault took place
- Demographic feature of the client (SES)



15

Data

- Virtual Complainant / Respondent Reports

- Low-quality audio in remote testimony:
  - Witnesses were rated as less credible, reliable, and trustworthy
  - Evaluators had poorer memory for key facts presented by the witness
  - Evaluators weighted witness evidence less in final guilt judgments

★ Audio quality biased evaluators' perceptions of witnesses and their evidence

16

Reference Materials

The materials people reference when viewing information can affect how they interpret what they are looking at.

17

Reference Materials

- What are reference materials? images, documents, or investigative tools
- Ideally, we work linearly – from the evidence to the reference
- Consider: What do you reference when doing your work?
- What have other's referenced when drawing conclusions?

18

Reference Materials

Journal of Safety Research

An illusion of objectivity in workplace investigation: The cause analysis chart and consistency, accuracy, and bias in judgments

72 professional industrial investigators

- Participant's who referenced the SCAT chart when investigating:
  - Allocated more cause to human error
  - Terminated their information search sooner
- The reference tool consistently shaped their judgments

19

Contextual Information

- *"Knowledge is insight. Sometimes objectivity is influenced; however, the benefits of insight outweigh [sic] the possible negative effects."*
- (Industrial Investigator, 2007)

20

Contextual Information

- **Images:**
  - Information with a non-probative image is interpreted as more truthful (Newman et al., 2012)
  - People believed to be more credible witnesses (Derksen, 2020)
- **Order of information:**
- Initially encountered information is weighted more heavily in judgments (Tetlock, 1983) - escalation of commitment
- **Witness opinions:**
  - Biased participants understanding of event cause

TRUST BUT VERIFY: THE BIASING EFFECTS OF UNCHECKABLE INFORMATION IN WORKPLACE INVESTIGATIONS

21

Base Rate Expectations

Base-rate frequency of that outcome, i.e., its probability

What is the likelihood that if you have:

Familiarity builds an understanding of base-rates

- Base rates can be a useful tool in decision making
- BUT…base rates can also be problematic
- Base rates can bias people into believing that evidence *represents* something when it does not.

22

Base Rate

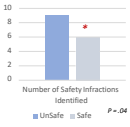
- Prevention Officers know company history:
  - Frequency of past inspections
  - Nature of any violations cited
  - Seriousness of any injuries that have occurred
  - Planned inspection or initiated following a complaint about conditions in the workplace.


Journal of Safety Research

The effect of contextual information on professional judgment: Reliability and biasability of expert workplace safety inspectors

Results

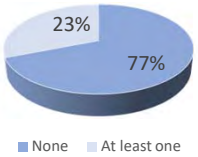
- *Base rate knowledge* affected # of safety infractions identified in the image.



23

What factors affect your observations on the worksite?

- Features of the Worker
- Environmental Factors
- Company Knowledge



24

AWI Base Rate

- What percentage of your investigations have involved respondents who previously have been the subject of a complaint?

Average = 23% of investigations (*SD* = 15)

25

Organizational Factors

Features of the Working Environment

26

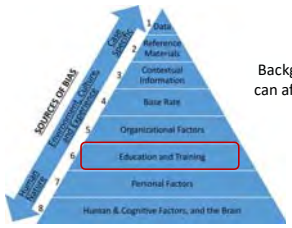
Organizational Factors

- Long working hours, tight deadlines, workload, repeated exposure to emotionally distressing information affect the judgments of professionals (Jeanguenat & Dror, 2018).
  - Time pressure: more intuitive (rather than analytic) processing of information (Fraser-Mackenzie & Dror, 2011; Svenson & Edland, 1987).
  - Pressure to be expedient, compared to thorough, affects criminal investigators' cognitive processing of evidence (Ask et al., 2011).
- Allegiance to the group that hired you


Are Forensic Experts Biased by the Side That Retained Them?

27

Education and Training



Background and training can affect knowledge and goals

28

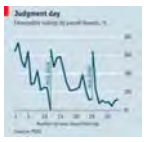
Personal Factors

1. **State**
2. Trait

29

Personal Factors

- Making many diagnostic decisions can be depleting.
- Israeli parole board decisions:
  - Early morning: 75% granted parole.
  - Later day decisions: approx 25%.



- ***Why the difference?***
  - Decision fatigue accumulates over the day
  - Denying parole is a simpler decision (default position – do nothing) than granting parole.

Danziger, S., Levav, J., & Avnaim-Pessoa, L. (2011)

30

Personal Factors: Mental States & Reactions

- Photos: Emotionally arousing or reminiscent of previous work
- Witness/Complainant/Respondent: Emotionally charged with anger or grief
- How might these sources affect on your information collection & processing?

Anger - investigators were less receptive to additional evidence and more persistent in their initial beliefs about the case, compared to sadness

ORIGINAL ARTICLE

Hot Cognition in Investigative Judgments: The Differential Influence of Anger and Sadness

Karl Ask · Pär Anders Granhag

N = 61 Criminal Investigators

31

Confirmation Bias:
An individual's pre-existing beliefs, expectations, motives, and situational context influence the collection, perception, and interpretation of information.

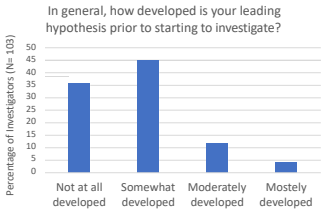
32

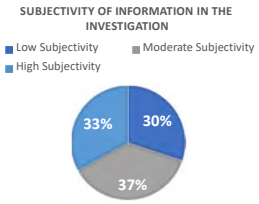
Confirmation Bias & Information Processing

- When **data quality is low** (and therefore ambiguous) people interpret data as consistent with expectation.
- **Disconfirming data** that is noticed can be ignored
- Data that does not easily fit the expectation and cannot easily be ignored is **explained away**.
- **Weighting** of disconfirming data is low.

33

Features of the Workplace Investigation



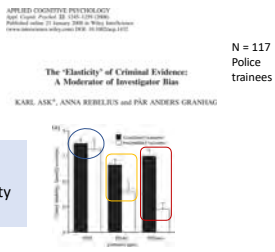


34

How does a working theory bias evidence interpretation?

- Trainees given evidence that was either **consistent** or **inconsistent** with their tentative hypothesis
- DV: Reliability of the evidence
  - DNA
  - CCTV
  - Eyewitness

Risk of biased interpretation of the evidence as subjectivity increases


APPLIED COGNITIVE PSYCHOLOGY

The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias

KARL ASK*, ANNA REBELIUS and PÄR ANDERS GRANHAG

N = 117 Police trainees

35

Witness Questioning

Where or from whom do you usually get information/details regarding the scenario you are investigating?

	Always	Often	Sometimes	Rarely	Never
Complainant	80 (75%)	24	1	1	0
Respondent	72 (68%)	27	2	4	0
Witness	54 (51%)	41	11	0	0

N = 106

36

Interviewing: People chose questions that proved their hypothesis

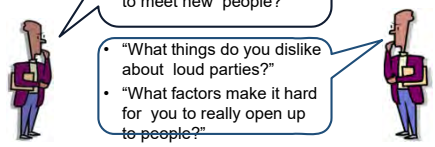
Choose questions that will test if this person is an extrovert?

Questions

- "How would you liven things up at a party?"
- "What kind of situations do you seek out if you want to meet new people?"

Choose questions that will test if this person is an introvert?

- "What things do you dislike about loud parties?"
- "What factors make it hard for you to really open up to people?"



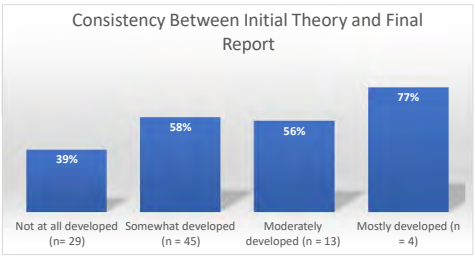
e.g., Snyder & Swann, 1978; Bassok & Trope, 1984

Social Influence

37

Food for thought…

In what percentage of your investigations would you estimate that your initial hypothesis is consistent with the information you find and present in your report?



Pattern
More formed the initial theory prior to investigation
=
More likely to be final investigative finding

38

What can we do about it?

39

1. Awareness

- To reduce the opportunity for biased judgements we must:

1. AWARENESS: Be aware of what information could bias our judgments and how our judgments could be shaped - this is a solid start!

- Remember this 
- Awareness encourages the use of bias countermeasures – context management; tools etc.

40

6 Fallacies

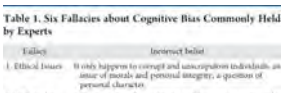
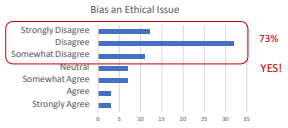


Table 1. Six Fallacies about Cognitive Bias Commonly Held by Experts

Fallacy	Incorrect belief
1. Ethical Issues	It only happens to corrupt and unscrupulous individuals; an issue of morals and personal integrity; a question of personal character.

Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias

- 1. Ethical Issue: Bias is more of an ethical issue than a cognitive one, workplace investigators with personal integrity do not tend to engage in biased judgment.



41

6 Fallacies

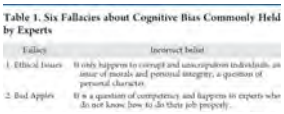


Table 1. Six Fallacies about Cognitive Bias Commonly Held by Experts

Fallacy	Incorrect belief
1. Ethical Issues	It only happens to corrupt and unscrupulous individuals; an issue of morals and personal integrity; a question of personal character.
2. Bad Apples	It is a question of competency, and happens to experts who do not know how to do their job properly.

Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias

- 2. Bad Apples: A *highly competent* workplace investigator (regardless of years of experience) is less likely than a less skilled or capable investigator to be influence by prior beliefs/expectations

42

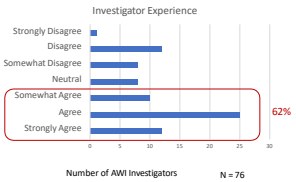
6 Fallacies

Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias

Table 1. Six Fallacies about Cognitive Bias Commonly Held by Experts

Fallacy	Incorrect belief
1. Ethical Issues	It only happens to corrupt and unscrupulous individuals, an issue of morals and personal integrity, a question of personal character.
2. Bad Apples	It is a question of competency, and happens to experts who do not know how to do their job properly.
3. Expert Immunity	Experts are impartial and are not affected because bias does not impact competent experts doing their job with integrity.

- 3. Expert Immunity: An *experienced* workplace investigator is less likely than a new investigator to be influenced by prior beliefs/expectations



43

6 Fallacies

Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias

Table 1. Six Fallacies about Cognitive Bias Commonly Held by Experts

Fallacy	Incorrect belief
1. Ethical Issues	It only happens to corrupt and unscrupulous individuals, an issue of morals and personal integrity, a question of personal character.
2. Bad Apples	It is a question of competency, and happens to experts who do not know how to do their job properly.
3. Expert Immunity	Experts are impartial and are not affected because bias does not impact competent experts doing their job with integrity.
4. Technological Protection	Using technology, instrumentation, automation, or artificial intelligence guarantees protection from human biases.
5. Blind Spot	Other experts are affected by bias, but not me. I am not biased; it is the other experts who are biased.

- 5. Bias Blindspot:
- In your opinion, is cognitive bias a cause for concern in workplace investigation *as a whole*?
- In your opinion, is cognitive bias a cause for concern in your specific area/domain of workplace investigation?
- In your opinion, are your own judgments influenced by cognitive bias?

44

Bias Blindspot

Bias blind spot (Pronin, Lin, & Ross, 2002)

Other professionals show a tendency to acknowledged bias in other domains but not their own, and in other examiners but not themselves.

	Forensic Scientists (N = 403)	Forensic Mental Health Professionals (N = 1099)	AWI Investigators
Is cognitive bias a cause for concern in workplace investigation as a whole	Yes: 71%	Yes: 86%	Yes: 74% (N = 73)
Is cognitive bias a cause for concern in your domain of workplace investigation	Yes: 52%	Yes: 79%	Yes: 68% (N = 72)
Are your own judgments influenced by cognitive bias	Yes: 26%	Yes: 52%	Yes: 68% (N = 57)

N < 20%

45

6 Fallacies


Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias

Table 1. Six Fallacies about Cognitive Bias Commonly Held by Experts

Fallacy	Incorrect belief
1. Ethical Issues	It only happens to corrupt and unscrupulous individuals, an issue of morals and personal integrity, a question of personal character.
2. Bad Apples	It is a question of competency, and happens to experts who do not know how to do their job properly.
3. Expert Immunity	Experts are impartial and are not afflicted because bias does not impact competent experts doing their job with integrity.
4. Technological Protection	Using technology, instrumentation, automation, or artificial intelligence guarantees protection from human biases.
5. Blind Spot	Other experts are affected by bias, but not me; I am not biased; it is the other experts who are biased.
6. Illusion of Control	I am aware that bias impacts me, and therefore, I can control and counter its affect; I can overcome bias by mere willpower.

- 6. Illusion of Control: A workplace investigator who makes a conscious effort to set aside his/her/their prior beliefs and expectations is less likely to be influenced by them.

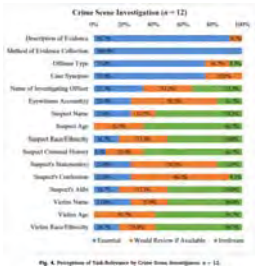
46

2. BLINDING

- Start by: Avoid task-irrelevant information
- What is relevant?
- What is irrelevant?
- Not “everything”
- Depends on circumstances – you decide!
- But…there are clear instances in which information is not relevant, regardless of the domain or circumstances. ….Opinions?

47

Where to begin?

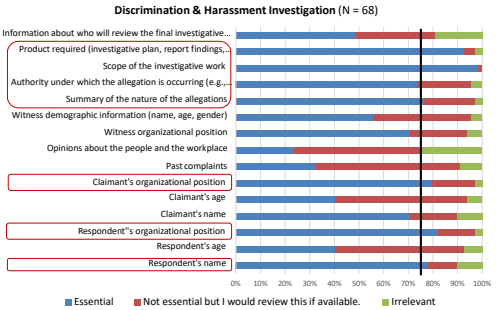


Gardner et al. 2019. *Science and Justice*

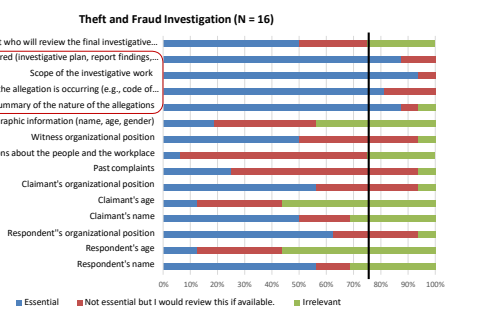
48

Task-irrelevant information in the preliminary call/scoping meeting

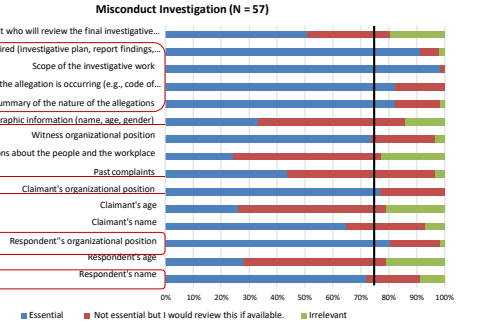
What else shared is irrelevant?



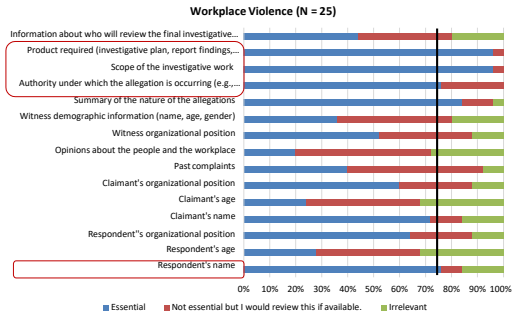
49



50



51



52

3. Linear Sequential Unmasking

What is the center character?

A B 14

Initially encountered information (the A) can:
(i) be remembered well
(ii) influence information processing

53

What can we do about it?

3. LINEAR SEQUENTIAL UNMASKING Extended (LSU-E): (Dror et al., 2015; Dror & Kukucka, 2021)

- Context management technique
  1. What information do I need?
  2. When do I need it?
  3. Can someone be involved in information management?
  4. Ask a colleague for a "fresh look"
  5. Document the process!

54

4. Empirically Vetted, Standardized Tools

- Consider the tools, protocols and methods you are using
- Using standardized methods increases the reliability of decision making
- Tools and protocols proven to not add bias (and in some cases minimize it) is ideal.

Standardized Procedures/Tools	Yes	No
Collection of Documentation	50%	50%
Information Collection from People	52%	48%
Overall Investigation Process	64%	36%

N = 108

55

4. Empirically Vetted, Standardized Tools

- Consider the tools, protocols and methods you are using
- Using standardized methods increases the reliability of decision making
- Tools and protocols proven to not minimize it) is ideal.

- Useful tools for witness interviewing:
  - **Cognitive Interview** (Fisher & Geiselman, 1992)
  - **Self-Administered Witness – Interview Tool (SAW-IT)**
  - (Self-Administered Interview SAI; Gabbert et al., 2009; MacLean et al., 2019)
  - https://www.selfadministeredinterview.com/saw-it-workplace/

56

5. Consider Alternatives

- Illuminate gaps in the available information; dislodge current, possibly flawed, thinking; and develop new insights.
- Used to test how existing information supports or refutes a theory
- Consider how this position could be wrong – "devil's advocate"/"crystal ball" – challenges the status quo

57

Want to learn more?

- Find a pre-print copy on Society for the Improvement of Psychological Science (SIPS)

- Email me: Carla.maclean@kpu.ca

58

Thank you!

KPU KWANTLEN POLYTECHNIC UNIVERSITY

Dr. Carla MacLean (she/her)

Kwantlen Polytechnic University
Canada

Carla.maclean@kpu.ca

59

The Wide World of Workplace Investigations: Recent Case Law and Legislative Developments

October 6, 2023

Presented by:

PHILLIP J. LIPARI, ESQ.
NUKK-FREEMAN & CERRA, P.C.

AMANDA VAN HOOSE GAROFALO, ESQ.
EMPLOYMENT LAW SOLUTIONS, PLLC

1

- NLRB's position on confidentiality and recording rules for workplace investigations continues to evolve
- Recent decisions and EEOC guidance regarding what constitutes a sufficient workplace investigation
- Recent Supreme Court and appellate decisions regarding legal standards likely to be relevant to workplace investigations

2

NLRB LIMITS ON WORKPLACE INVESTIGATION RULES

- ***The NLRB's ever-changing position on confidentiality and recording policies for workplace investigations***
  - *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)
  - *Banner Estrella Medical Center*, 362 NLRB 1108 (2015)
  - *The Boeing Co.*, 365 NLRB 154 (2017)
  - *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019)

3

NLRB LIMITS ON WORKPLACE INVESTIGATION RULES

- ***Starbucks Coffee Co.*, No. 04-CA-252338 (NLRB Feb. 13, 2023)**
  - Under *AT&T Mobility, LLC*, 370 NLRB No. 121 (NLRB 2021), an employee who makes an audio or recording video in the workplace may be engaged in Section 7 protected activity, depending on the facts and circumstances.
  - Here, employees engaged in protected activity because they recorded meetings of managers to preserve evidence should they need it for a future retaliation claim.

4

NLRB LIMITS ON WORKPLACE INVESTIGATION RULES

- ***Stericycle, Inc.*, No. 04-CA-137660 (NLRB Aug. 2, 2023)**
  - NLRB will evaluate workplace rules on a case-by-case basis, finding such rules presumptively unlawful if an employee "could" reasonably interpret the rule to have a coercive meaning (*i.e.*, infringe upon Section 7 rights), from the perspective of an employee who is: (i) economically dependent on the employer, and (ii) contemplates engaging in protected concerted activity.
  - Employers may rebut the presumption that a rule is unlawful by "proving that the rule advances a legitimate and substantial business interest, and that the employer is unable to advance that interest with a more narrowly tailored rule."

5

NLRB LIMITS ON WORKPLACE INVESTIGATION RULES

- **Takeaways**

  - Don't presume employees may lawfully be instructed to maintain confidentiality during the course of all investigations, or not to make recordings in the workplace.
  - Consider tailoring confidentiality instruction to focus on the need to protect the parties and witnesses, and to ensure that the recollection of events is accurate and based on personal knowledge.
  - Consider affirmatively informing employees that the confidentiality instruction is not intended to prevent them from discussing wages, hours, benefits, or other terms and conditions of employment with each other.
  - Ultimately this is usually the employer's, not the (outside) investigator's, call to make.

6

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Mastripolito v. Jefferson Health* – New Jersey, 583 F. Supp. 3d 622 (Feb. 2, 2022)**
  - Plaintiff alleged that employer failed to take appropriate remedial measures after she reported that a coworker sexually assaulted her.
  - The Court began by reiterating the principle that "the law does not require that investigations ... be perfect."
  - Court considered HR investigator's failure to consider evidence regarding alleged harasser's workplace conduct 10+ years prior to incident at issue, and found:
    - evidence of past misconduct toward patient had little probative value
    - evidence of conduct of a somewhat similar nature toward plaintiff's co-worker was potentially probative.

7

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Nelson v. Lake Elmo Bank*, -- F.4th --, 2023 WL 4876450 (8th Cir. Aug. 1, 2023)**
  - Plaintiff (a woman) was fired after being accused of making sexual advances toward a female subordinate at a local bar. Plaintiff claimed she had just been engaging in banter.
  - Plaintiff claimed the HR investigation was a sham.
  - HR had interviewed plaintiff and the subordinate, and concluded based solely on those interviews that plaintiff's conduct violated the harassment policy.

8

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Nelson v. Lake Elmo Bank*, -- F.4th --, 2023 WL 4876450 (8th Cir. Aug. 1, 2023)** *Continued*
- Plaintiff claimed the investigator:
  - Did not interview two witnesses she had identified, and
  - Disregarded evidence about similar past interactions.
- Court found:
  - Employer's decision not to interview all suggested witnesses did not make investigation a "sham"
  - In this case, decision not to interview other witnesses was reasonable because plaintiff admitted to the alleged conduct, and also because it helped maintain confidentiality.

9

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Crosbie v. Highmark Inc*., 47 F.4th 140 (3d Cir. 2022)**
  - Plaintiff was fired following an investigation into alleged inappropriate comments he made to a female co-worker.
  - Plaintiff claimed he was fired in retaliation for whistleblowing concerning fraud.
  - Court agreed that HR investigation into co-worker's allegations was not a sham, noting that HR interviewed:
    - plaintiff and complainant;
    - eyewitness who corroborated the complainant's allegations;
    - employees who knew of past issues between plaintiff and complainant; and
    - a manager knowledgeable concerning the alleged fraud issue.

10

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Owens v. Unified Gov't of Wyandotte Cty/ Kansas City*, 2022 WL 2131117 (D. Kan. June 14, 2022)**
  - Plaintiff was investigated by employer's HR department for not meeting residency requirements for position. After a lengthy investigation, Plaintiff sued, claiming investigation created a hostile work environment.
  - To avoid a conflict of interest, employer hired outside counsel to investigate harassment complaint.
  - Outside counsel conducted two-month investigation and found insufficient evidence to conclude workplace policies were violated.

11

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Owens v. Unified Gov't of Wyandotte Cty/ Kansas City*, 2022 WL 2131117 (D. Kan. June 14, 2022)** *Continued*
  - However, the court found there was sufficient evidence for plaintiff's claim to go to trial because HR investigator:
    - Had not started the investigation by examining documentation, which the written policy referred to as being "important" to an investigation;
    - Failed to respond to plaintiff's inquiry about the investigation status on numerous occasions;
    - Referred to plaintiff's dwelling as a "shack";
    - Conducted more extensive investigation than was typical.

12

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Doe v. Stonehill College, Inc.*, 55 F.4th 302 (1st Cir. 2022)**
  - Plaintiff, a college student expelled for violating the school's sexual misconduct policy, argued that the school's investigation was not fair and thorough.
  - Court criticized investigators for not explaining credibility assessment in written report.
  - Court agreed that evidence suggested investigators had not properly assessed credibility.

13

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- ***Doe v. Stonehill College, Inc.*, 55 F.4th 302 (1st Cir. 2022)**, continued
  - Investigators did not:
    - Consider evidence that complainant was not forthcoming about her prior consensual sexual activity with plaintiff
    - Explain why plaintiff's explanation of Snapchat messages to complainant regarding the incident was not credible
  - Court's concluded that the "investigators' report plausibly reflects a failure to grapple with the complex credibility assessment presented by" the students' conflicting accounts.

14

RECENT DECISIONS REGARDING THE SUFFICIENCY OF INVESTIGATIONS

- Courts continue to admit expert evidence regarding industry standards:
  - ***Shampine v. US Foods, Inc.*, 2022 WL 17098731 (E.D. Tenn. Nov. 21, 2022)** (expert relied on EEOC Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors, the AWI Journal, and the Association of Corporate Counsel's InfoPak on Internal Investigations)
  - ***Mueller v. Daugherty Sys., Inc.*, 2021 WL 3754582 (N.D. Ga. June 14, 2021)** (expert relied on her experience as an attorney, guidelines from SHRM and AWI, and the EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors)

15

EEOC'S GUIDANCE ON "PROMISING PRACTICES" FOR CONDUCTING INVESTIGATIONS AT FEDERAL AGENCIES

- **Federal Agency MUST**:
  - Start "prompt, thorough, and impartial investigation" **no later than 10 days** after "becoming aware" of complaint
  - Take Immediate corrective action that is also "proportionate to the severity of the conduct, the impact on the overall workplace, the disciplinary history of the harasser, and other relevant factors," and ensure the corrective action does not penalize the alleged victim
  - Ensure investigations are not conducted by individuals who have a conflict of interest or bias in the matter
  - Conduct investigative interviews with alleged victim, alleged harasser, and "third parties who could reasonably be expected to have relevant information"
  - Protect the confidentiality of all parties "to the extent possible, consistent with a thorough investigation and with relevant legal requirements"

16

EEOC'S GUIDANCE ON "PROMISING PRACTICES" FOR CONDUCTING INVESTIGATIONS AT FEDERAL AGENCIES

- **Federal agency** should:
  - Have a complaint tracking system that includes information about how long investigations take, and have a general time limit for conducting investigations
  - Provide corrective action within at most 60 days from harassment substantiation
  - Have "standards and procedures for eliminating conflicts of interest in investigating harassment allegations and taking corrective action"
  - Maintain a written report "documenting the investigation, findings, and recommendations"
  - Convey the outcome of the investigation to the alleged victim and alleged harasser, as well as preventative/ corrective actions taken, "where appropriate and consistent with relevant legal requirements"

17

TAKEAWAYS

- Understand the employer's confidentiality instructions to participants, and the rationale for the instructions.
- Interview all relevant witnesses and understand scope of prior investigations in similar circumstances, which are relevant to risk of accusations of overkill or engaging in a "sham."
- Explain rationale for credibility determinations and do not avoid exploring credibility with respect to sensitive but critical issues.
- Start and complete investigations promptly – EEOC may view "best practices" for federal agencies as relevant to private employers.

18

LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS

- ***Groff v. DeJoy*, 143 S. Ct. 2279 (June 29, 2023)**
  - **Issue:** When may an employer deny a religious accommodation?
  - **Answer:** Only when it can show that the burden of granting the accommodation will result in substantial increased costs in relation to the conduct of its particular business.
  - **Takeaway:** Employers may not deny a religious accommodation, such as exempting employees from working on Sundays, because it would impose more than a de minimis cost. Instead, they must provide the accommodation unless it would result in substantial increased costs to the employer.

19

LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS

- ***Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974 (9th Cir. 2023)**
  - **Issue:** Can playing misogynistic, slur-filled music in the workplace, where it can be heard by employees of all genders, create a hostile work environment when the complaint was made by men and women?
  - **Answer:** Yes.
  - **Takeaway:** Be careful in concluding that an employee who engages in conduct that does not target specific employees, or that affects employees of all genders, does not violate policy because they are an "equal opportunity harasser."

20

LEGAL DEVELOPMENTS AFFECTING WORKPLACE INVESTIGATIONS

- ***Mallory v. Norfolk Southern RR Co.*, 143 S. Ct. 2023 (June 27, 2023)**
  - **Issue:** Did a Pennsylvania court have personal jurisdiction over a corporate employer in a suit brought by a non-resident employee solely based on the employer being registered to do business in that state?
  - **Answer:** Yes, because Pennsylvania has a statute requiring that corporations registered to do business in the state consent to jurisdiction in the state, and the statute is valid/ not unconstitutional.
  - **Takeaway:** It is important to consider all jurisdictions in which an employee may sue—and whether those jurisdictions have statutory provisions similar to Pennsylvania's—particularly in matters involving remote employees.

21

SUMMARY OF TRENDS

- NLRB scrutiny of statements to employees in the investigation context
  - ***Stericycle***: investigative confidentiality and other workplace rules must be justified by employer on case-by-case basis
  - ***Sunbelt* Rentals, 372 NLRB 24 (2022)**: reaffirmed *Johnnie's Poultry* rule regarding disclosures to union-represented employees being interviewed in connection with investigating unfair labor charges
- Increased recognition of industry standards for conducting investigation and increased risk if those standards are not met
- Potential increase in claims regarding conduct that does not target specific individuals and affects those outside and inside a protected class

22

- The materials contained in this presentation were prepared for informational purposes only and do not constitute legal advice.
- The information contained herein is not intended to create, and does not create, an attorney-client relationship between this firm and any recipient of the information. Recipients or readers of this information should not act upon any information contained herein without first seeking professional counsel.

23

Hirschfeld Kraemer

We work for employers

Navigating the Trauma-Impacted Witness

Adam R. Maldonado, Esq.

1

1

Presentation Objectives

- I. Define "Trauma"
- II. Identify How Trauma Manifests in the Workplace
- III. Understand Trauma's Impact on a Witness' Memory, Ability to Recall Details & Events
- IV. Provide **Key Tips** for Effective Trauma-Informed Interviewing and Credibility Assessments

2

2

I. What is Trauma?

3

3

Defining Trauma: for Workplace Investigators

- "Trauma refers to an individual's experience during or immediately after a threatening or highly distressing event or series of events in or around the workplace that can influence the individual's ability to recall events."

6

4

Defining Trauma

Caution:

Investigation v. Clinical Diagnosis

7

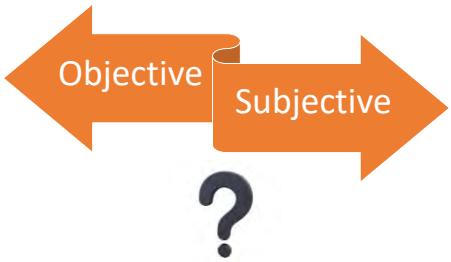
5

II. How Does Trauma Manifest in the Workplace?

8

6

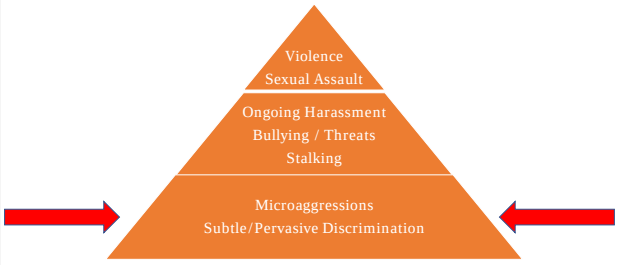
Trauma in the Workplace: Which Standard?



9

7

Trauma in the Workplace: Sources



10

8

III. Trauma, Memory, Recall

12

9

Trauma: Effect on Brain

13

10

Defining Trauma

Caution:

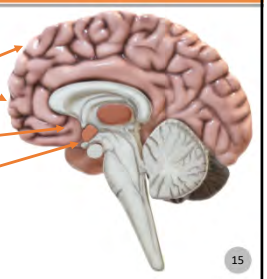
(You're still not a doctor.)

14

11

Trauma: Effect on Brain

- Prefrontal Cortex
- Hippocampus
- Amygdala



15

12

Trauma: Effect on Memory

- Episodic Memory
  Trauma?
- Emotional Memory
  Trauma?

16

13

Trauma: Effect on Memory

Trauma
Scenario

17

14

Trauma: Effect on Memory

Investigation Interview

Trauma Response	Cause*
Hyper-emotional	Amygdala / PFC
Fragmented Details	Hippocampus
Incorrect Details	Hippocampus

18

15

Trauma: Other Common Responses:

- Feelings of **detachment / dissociation /** numbing
- Disbelief, fear, anxiety, grief, disorientation, **denial**
- Irritability, restlessness, outbursts of anger or rage
- Feelings of helplessness, panic, feeling out of control
- **Minimizing** the experience
- Feelings **of self-blame**, guilt, shame

19

16

Trauma in the Workplace

Trauma response not limited to the Complainant.

11

17

IV. Tips for Effective Trauma-Informed Interviewing and Credibility Assessments

20

18

AWI Guiding Principal #8:

"There are many effective ways to conduct witness interviews. The investigator should create an environment that maximizes the likelihood of obtaining reliable information …"

21

19

Trauma Informed Interviewing: Before

Do Your Homework

- Gather (and read) key case materials
- Review prior statements
- Acquire witness backgrounds
- Learn team/org structure
- Visit location (if possible)
- Obtain updated information about the Complainant

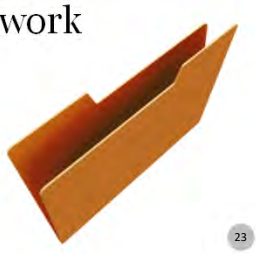
22

20

Trauma Informed Interviewing: Before

Do Your Homework

What if you **don't**?



23

21

Trauma Informed Interviewing: Before

Pre-interview "check-in"

- Critical to building trust/rapport
- Empowerment focused
- Offer options for location, setting, format
- Don't compromise your impartiality

24

22

Trauma Informed Interviewing: During

Interviewing a trauma impacted witness is a *unique* experience.

- *Witnessing* a car crash
- vs. *experiencing* a car crash

25

23

Trauma Informed Interviewing: During

Prologue:

- "How have you been since we last connected?"
- Body Language
- "Is that okay with you?"
- Speech Rate
- Tone/Energy
- Acknowledge
- Disarm
- Physical Set up

26

24

Trauma Informed Interviewing: During

Key Tips: DOs

Where would you like to begin?

27

25

Trauma Informed Interviewing: During

Key Tips: DOs

- Open ended questions
- What are you able to tell me about your experience?
- Tell me more about (the room; the person; etc.)
- What was your **thought process** during this experience?
- What are you able to remember about ...

27

26

Trauma Informed Interviewing: During

Key Tips: DOs

- What were your reactions to this experience?
- What is the most difficult part of this experience for you?
- What if anything can't you forget about your experience?
- Utilize the 5 senses (especially at a road block)

28

27

Trauma Informed Interviewing: During

Key Tips: DOs

- How did you feel when you described the event to ___?
- Encourage supplementation of facts
- Emphasize investigation confidentiality
- Stress no retaliation

29

28

Trauma Informed Interviewing: During

Key Tips: DOs

30

29

Trauma Informed Interviewing: During

Key Tips: Don'ts

- Inflexibility with structure/order
- Distracted/rushed (checking phone, smart watch, etc.)
- Compound questions
- "Why" questions
  - Why didn't you fight back? Why delay reporting?
- Judgmental attitude (unconscious)

31

30

Trauma Informed Interviewing: During

Key Tips: Don'ts

- Committing witness to a story (at end)
- "Kissed" vs what the Respondent did ("put lips on your lips")
- Avoid consensual language ("sexual intercourse")
- Avoid terms of affection ("fondling" / "caressed")
- Avoid terms of mutual participation
- Leave witness in the dark regarding next steps

32

31

Trauma Informed Interviewing:

Critiques?

33

32

Trauma Informed Interviewing: Critiques

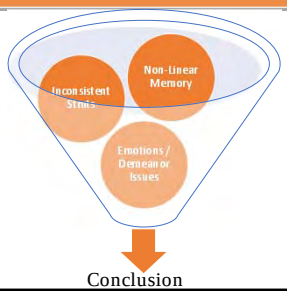
- Preferential treatment
- Using the signs of trauma as evidence of policy violation
- Deference to counter-intuitive behavior
- Failure to clarify inconsistencies
- Failure to explore delay or reluctance to report
- Failure to consider exculpatory evidence such as post-incident communications
- FETI's open-ended approach only used with survivors

34

33

Trauma Informed Interviewing: After

Accessing Credibility:



35

34

Hirschfeld Kraemer

We work for employers

Concluding Thoughts

Adam R. Maldonado, Esq.

amaldonado@hkemploymentlaw.com

(415) 530-8859

36

35