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THE CRITICAL QUESTION OF CREDIBILITY

Thorough, Unbiased Assessments Are Key to Workplace Investigations

By Mike Sandulak and Yvette Davis

Who doesn't like a good criminal investigation television drama? From the various spin-offs of *Law and Order* to *CSI: Crime Scene Investigation*, the characters portrayed in these shows make investigations look easy and exhilarating.

Unfortunately, workplace investigations are rarely the same as those in crime dramas. They can, however, involve similarly challenging issues that require the skills of a trained investigator and not a paid actor.

Conducting workplace investigations seems easy enough: Receive a complaint, gather evidence, conduct interviews, and determine whether a policy or law was violated. Trained workplace investigators, though, know there is more to it than that.

For example, in investigations where you have a "word against word" or "he said/she said" situation, an investigator cannot simply take the evidence provided and make a decision. Rather, this situation requires a trained investigator to make credibility determinations on the parties and witnesses in order to assess the accuracy

of their statements. In such cases, an investigator's factual findings will rely on these reasoned credibility assessments.

To emphasize how important credibility assessments are to investigations, let's take a look back to November 2014, when *Rolling Stone* magazine published an article written by Sabrina Erdely titled, "A Rape on Campus." The article described an alleged gang rape of a freshman female student, identified as "Jackie," at a University of Virginia fraternity house. Major news outlets picked up the story, and the immediate reaction was devastating to the campus.

However, in conducting her investigation, Erdely failed to interview a number of crucial witnesses who might have corroborated or contradicted Jackie's story. Because of this, Erdely did not have a sufficient basis to assess Jackie's credibility, and, after the article was published, Jackie's credibility quickly fell apart. The article was subsequently retracted, and both Erdely and *Rolling Stone* were sued for defamation.

To safeguard against similar missteps



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DIVERSITY & INCLUSION

in workplace investigations, investigators need to be aware of and utilize a number of techniques to conduct objective and fair investigations. Before starting any investigation, an investigator needs to recognize and eliminate his or her own “unconscious biases,” which are hidden predispositions that can take the form of assumptions about people or events that may influence subsequent actions—without the person recognizing the reasons behind these assumptions.

For example, in October 2016, Dr. Tamika Cross, a female black physician, was on a Delta Airlines flight when a flight attendant asked if there was a physician on board to aid an ill passenger. When Cross volunteered, she said the flight attendant told her that she was looking for an “actual physician,” and to put her hand down.

Cross said the flight attendant had made an assumption that because she was a black woman, she could not be a physician. In this case, the flight attendant’s actions could be the result of her own unconscious biases of what a physician looks like.

Note that a common tactic for discrediting a workplace investigation is to attack the investigator’s perceived impartiality. Witness statements and attorney arguments also contain biases for which investigators and defense attorneys must be prepared. It is crucial for investigators conducting fair and impartial investigations to recognize and eliminate unconscious biases.

Next, investigators should consider the following factors to determine the credibility of witnesses and/or parties to the investigation:

The source of information—Was the witness at the event to observe or hear it firsthand or did the witness rely on statements from others?

Corroborating/conflicting statements—Are there witnesses or documents that support or contradict one party’s statement? If there are contradictions, how important are they in the matter? Does the witness support one account of events over another?

Detail/omissions—How general or

specific was a witness’ statement, and were any details supported by evidence? Did a party deny the allegations? Is there evidence to support the allegations? Did anyone leave out important information during the interview? Is there a sensible explanation for the information? Did a party acknowledge an important detail only after being confronted with it?

Inherent plausibility—Does the statement make sense? Does one party’s version of events challenge reasoning or common sense?

Motive—Does a party have a motive to lie about, exaggerate, or disagree with the incident? Is there any history between the witnesses and/or parties that could influence the offered account?

Prior behavior—Is there any evidence of similar behavior or other incidents between the parties? Does the party’s behavior on social media suggest a pattern?

Appearance/behavior—How did the witness appear/ behave during the interview? Did the alleged perpetrator have a strong reaction to the allegations or no reaction at all? Were any unusual reactions?

The above techniques will help investigators make effective credibility assessments and, as a result, better prepare them and their organizations to defend their conclusions and findings in the event of future litigation. An investigator must evaluate the totality of the circumstances when assessing credibility. Careful consideration of the factors above can help the investigator resolve conflicting statements and make reasoned determinations.

It should be noted that the investigator is not necessarily making a determination on whether a party or witness is lying. Rather, the investigator is determining how credible he or she finds an account, based on the evidence provided.

The importance of thorough, unbiased credibility assessments during an investigation cannot be overstated. An investigator never wants to write an email similar to the one Erdely had to write to her editors after she no longer found Jackie credible. The subject line on Erdely’s email simply read: “Our worst nightmare.” ■