Making Credibility Determinations in Internal Investigations

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MAKING CREDIBILITY DETERMINATIONS

The Equal Employment Opportunity Commission's (EEOC) guidance on conducting investigation directs employers, or those who are investigating on behalf on employers, to make credibility determinations when there are "conflicting versions of relevant events." (Equal Employment Opportunity Commission's Enforcement Guidance; Vicarious Employer Liability for Supervisor Harassment,1990.)Further discussion in the Guidelines make abundantly clear that simply surrendering to a result of "he said, she said, and therefore we don't know." Is an unacceptable conclusion to draw without first rigorously analyzing the conflicting versions of facts, the qualities of the statements, and assessing the likelihood of one version being more or less believable than the other . This calls for a fundamental understanding of the mechanics of assessing credibility and the ability to make nuanced, but significant observations.

It is important to open a discussion of credibility issues by acknowledging that most investigations do not involve one party who is baldly lying and one who is telling the entire truth. Rather, each person comes to an investigation with their own particular perspective colored by their world view, history and experiences. To expect that each investigation will conclude with a confirmation of one version and a complete dismissal of another is to minimize the complexities and nuances of human behavior and conflict. An employee who, in good faith, reports that they have been subjected to ongoing, subtle bias based on their race or ethnicity, may be correct; however the behavior might be so subtle as to fail to rise to a level that the alleged offenders can be held accountable. An employee may believe they have done nothing wrong because their behavior is largely inadvertent or habitual, as the individual who has been leering at women unpunished for two decades. Two versions of events may differ broadly because of the assumptions a witness has made, or information they have acquired before or since the incident. While the term "truth" and "the facts" are used throughout this chapter, the reader should be mindful that these terms do not imply that an individual whose statement is later contradicted or recalibrated by evidence is necessarily engaged in intentional falsehoods.

SECTION 1: WHO IS TELLING THE TRUTH?

Workplace investigations are frequently characterized by strong emotions including fear, anger, anxiety and frustration. Particularly in matters of harassment, discrimination or bullying, the investigative interview might be the very first time the complainant has explained the totality of their their experiences; for the accused, they may linger on the fear that each word they speak might result in serious consequences, either just or unjust. Because investigators must assess the credibility of parties and witnesses, understanding how this emotional component might affect the veracity of information is the first step in making credibility determinations.

When a human being is suffering with pain, either physical or psychic, we are wired to communicate in a manner that will get the attention of someone who can provide assistance. In the event of physical pain, we might scream; in a sustained crisis, we use words and vocalizations that will convey our emotional reality to others. This is why an investigator needs to understand that a distressed interviewee often *initially* explains their circumstances in a manner that is likely to be exaggerated. To do this, the interviewee may magnify facts that are favorable to them, omit items that might be mitigating, exaggerate the frequency or intensity of events or overstate the impact of certain interactions. This occurs because reflexively, the interviewee is seeking to ensure that the interviewer hears *the interviewees side,* not an objective recitation of the facts as an objective party might parse them. Thus, an interviewee might say "(The respondent) did this so many times, I can't even count them. It was the most horrible thing I have ever experienced." Interviewers should recognize this for what it is and neither attempt to moderate the statement ("The most horrible thing? Really?") or try to force the interviewee to "stick to the facts"

by pressing for details. Rather, in the first telling, it is appropriate for the interviewer to demonstrate empathy by naming the emotion underlying the statement ("I am sorry things have been so hard for you." "I can see that you are angry.") The validation serves to let the interviewee know that you have recognized their level of distress and allows them to relax the hyperbole that may accompany high levels of emotionality. Only after this emotional validation should the interviewer begin scanning for credibility. This is why it is a best practice to allow a distressed individual to first tell their story without interruption before attempting to ascertain facts. From a credibility perspective, changing exaggerated overstatements in the first telling to credible facts in the second should be expected and not presumed to be a general indication of an interviewee's credibility.

KEY POINT: ***There are three stages to individual's recounting events or situations; "my side," or the most self-serving version, "the facts," or what they can remember doing, seeing, hearing or saying and "the truth," the elements that they ignored and omitted in the first two recitations.***

In many investigations, interviewees have very different perspectives on things, and it is not unusual to have several parties describe the same event differently, particularly if it involves interpreting nonverbal behavior. One witness may report that someone "stomped out of the room," while another witness reports that the person exited without any notable display of emotion. A third might say the person left the room and "seemed to be in a hurry." These variations in interpretation are not a matter of truth or lying, but represent the diversity of human experience and the context in which behavior is viewed. For investigative purposes, the important question is whether the person is reporting a *reasonable* understanding of what they saw or whether they are an unreliable witness due to bias, disturbance or other factors.

On occasion, we are not dealing with variance in perspective, but falsehoods. People lie. They lie for a variety of reasons and in a variety of ways. One study tells us that 48 percent of American workers admitted that they had engaged in one or more unethical and /or illegal action during the past year. (*Study: Work Pressures Prompt Unethical Acts,* Risk Management, 44:9 p.6 1997.) Among the most common transgressions were lying to a supervisor or subordinate, deceiving customers, covering up incidents, taking credit for a colleague's ideas and abusing or lying about sick days.

There is no good way to reliably detect liars, and investigators who believe they can "spot a liar" need to proceed with a good deal of caution. The research on lie-spotting is not terribly encouraging. The "lie detector" is not foolproof. There is no expert or machine that can definitively spot a lie. People who claim to have expertise in this area do no better than those who claim they do not, who in turn do no better than random selection. The only people who show a higher level of consistency in detecting lies are people with a specific type of aphasia that blocks comprehension of speech. This is thought to be because there are subtle changes in people's faces between when they are sincerely expressing something and attempting to replicate something. These changes, called "micro changes" by some, involve slight alterations in facial expression that last less than a quarter second. Even when watching on video and having been trained to spot these changes, it is a rare person who becomes truly adept at spotting them in the face of someone they are not familiar with.

We often think ourselves better at lie spotting than we are – because we subscribe to stereotypes or misperceptions. In a study that asked more than 2,000 people from nearly 60 countries "How can you tell when people are lying?" the number one answer was the same in every country – they avert their gaze. The problem with this, however, is that it is simply not correlated with lying. Liars do not shift around or touch their faces or clear their throats any more than truth tellers.

***KEY POINT*: There is no reliable way to tell if someone is lying based solely on their response to interview questions. Looking to the right or left, clearing of the throat, speaking more slowly is only statistically helpful and NOT helpful when observing a single individual.**

Falsehoods come in a variety of forms, simple denial, omissions, minimization and fabrication. Additionally, liars range from occasional and unskilled to habitual or pathological. Healthy skepticism, a commitment to drill down to detail, asking for multiple recitations of events and asking probing questions are a fundamental requirement to discern falsehoods. The following section addresses the mechanics of credibility assessment..

SECTION TWO: CREDIBILITY ASSESSMENTS,

The Equal Employment Opportunity Commission's (EEOC) guidance on conducting investigations in cases of harassment and discrimination states that credibility assessments are necessary when there are "conflicting versions of relevant events."

The credibility assessment mechanics recommended in this chapter suppose a staged approach to investigative interviewing; beginning with the aforementioned rapport-building and baselining, allowing a relatively uninterrupted narrative, analytic questioning and only then, after the story has been told, beginning the process of testing and, if appropriate, challenging credibility (Sepler, *Finding the Facts: What Every Workplace Investigator Needs to Know,* Ventana, 2008 pp 29-48)

Credibility Assessments have several components; analytical factors, baselining, responses to credibility testing, inherent plausibility or implausibility and corroborative evidence:

2.1 ANALYTIC FACTORS

When considering differing versions of events that cannot be explained by differences in perspective, vantage point or context, several factors should be considered;

- Does any witness have an apparent motive to lie? This could be an underlying relationship that creates a conflict of interest, it could be a fear of job loss or discipline or it could be protecting someone.
- Conversely, does anyone provide information against what appears to be their own interests; for instance, does a witness admit to their own wrongdoing or refute the statement of a close friend?
- Do any of the witnesses have a known history of falsehoods? It can generally be assumed that when multiple witnesses characterize someone as untruthful or a liar, that there is likely a shred of truth to their characterization.
    - While statements such as "don't bother asking her, she will just lie to you," are significant when it comes to fact witnesses beware of concerted efforts to reduce the credibility of a complainant through suggestions the complainant is thin skinned or untruthful. Similarly, allies of a complainant might attempt to impugn the veracity of a respondent in order to bolster the complainant's version. Thus, rather than just taking the statements at face value, the interviewer should ask for specific examples of falsehoods or irrational conduct, and particularly examples relevant to the matter under investigation.
- Has any witness attempted to play games with words and context? Responding to simple questions by parsing the interviewer's words (i.e. "Were you in your office?" "What do you mean by *in?,"*) is a form of evasion and deflection, and should be considered as such.
- Have there been similar concerns raised about the accused in the past? Repeated similar claims by different parties should give weight to the complainant's version of events.

- Does one version of events simply make more sense, and fall in line with the rest of the narrative? Consider the flow of events reported to have taken place before and since the alleged incidents.
    - As with all matters, the investigator should distinguish an analysis of the plausibility of a specific statement from whether the witnesses statement conforms to the investigators own preconceived view of what might have happened. *Confirmation bias* is the tendency to search for, remember, or interpret information in a way that confirms one's beliefs or hypotheses *(*Nickerson, Raymond S. *"Confirmation Bias: A Ubiquitous Phenomenon in Many Guises".* Review of General Psychology **2** (2): 175–220 (June 1998).) One way to control for this type of bias is to very literally, take a break. Whether it is a five minute break or a break for a meal, walking away from the interview and asking oneself what one might be missing, or reviewing the story from notes, can provide a fresh perspective and disrupt the tendency to fit a statement into one's own hypothesis.
- Have all statements been consistent, within reason?
- Does the behavior described fit within plausibility given context, the culture of the organization (as far as it can be discerned) and the circumstances being described? For instance, in a public works investigation in an inner city, a witness who insisted he had never heard profanity on the job was viewed to be less credible than one who said, "…yeah, we swear a lot, but never at anyone…"

PRACTICE TIP: Make notes about credibility observations and other mental impressions separately from interview notes. Credibility observations can be noted contemporaneously or immediately following the interview, and can be used to memorialize your thoughts and subjective impressions. Do not draw conclusions in these notes.

2.2 BASELINING FOR FALSEHOODS

The only way to know if someone is being untruthful by simply observing them is by observing the same person telling the truth. Because it is essential during interviews to build rapport, interviews afford a natural opportunity to baseline an individual by asking them questions to which they can respond comfortably and honestly. These questions might be about work history, the tasks they do on a daily basis, their relationships to others in the workplace, or something as simple as their favorite sports team or vacation spot. Asking questions that you know the answer to allows you to test how the person volunteers truthful information. For instance, if they tell you that they live in a nearby suburb, you might say, "What is the name of that terrific restaurant right off the highway?" as they respond, you have the opportunity to see the person retrieving information easily and truthfully. Does the person change their body posture when doing this? Do they answer quickly or slowly? Do they have a lot of fillers in their speech, or are they succinct? Do they have a particular pitch to their voice?

One technique for base lining is to ask a series of questions that require increasing levels of discernment from the interviewee. For instance, you might ask "What is the part of your job that you most enjoy?" If they were to respond by saying "sales," you might then ask "What part of a sales call is the most important?" Then follow up by asking "What techniques have been most successful for you in sales?" As you are asking for more complex information, you should be able to note the eye movement and body language the subject uses as he or she scan for memory or information and respond truthfully. These observations provide, very literally, the baseline to later observe the subject when you are asking fact questions. Is there a change in their demeanor or vocal tone in response to a specific question? Does their body movement change? Have they slowed down or speeded up, used more precise language or verbal fillers ("um," "er," "well…") or started to insert verbal insulation (*i.e. "*at this point in time," "to the best of my recollection"?) A change from the baseline does not, in and of itself, ensure that you are spotting a lie, but it does contribute to a fuller assessment of whether an individual was or was not

credible. Changes from baseline behavior likely reflect stress, which could be indicative of falsehood. It is worth noting here that baselining applies to the response to a specific line of questioning, and not to the general demeanor of a witness.

Behavior most inclined to go "off the baseline includes"

- Change in speed of response.
- Change in vocal tone.
- Increased hesitations, fillers or uncharacteristic pauses.
- Change in degree of directness, *ie* a change to passive voice.
- Changing the subject or answering questions not asked, when this has not been the pattern before the subject matter arose.
- Flushing or sweating.
- Changing eye contact.
- Increased or decreased body movement.
- Change in emotional tenor.

Key Point: Building rapport with interview subjects, while a proper antecedent to an effective interview, is also critical for building one of the most potent source of truth detection. For both reasons, hurtling immediately into fact questions ("let's just get to the bottom of it,") is less effective than finding ways to create a distinct, introductory portion of the interview.

A) DEALING WITH CHANGES FROM THE BASELINE

The importance of baseline observations was discussed in the prior section. Once an interviewer has made observations of significant deviations from baseline behavior, they should test to see if they can recreate that shift from the baseline. For instance, if, when asking an interviewee about whether someone had witnessed a particular event, the interviewee became notably stiller than at any other time, hesitated to answer, and then asked the interviewer to repeat the question, the interviewer could move on from the subject to determine whether baseline behavior was restored, and if so, to then return to the subject of questioning to observe whether the change occurs again.

While it is sufficient to note a change in behavior from the baseline for purposes of examining credibility, it is also appropriate to provide feedback to an interviewee about your observation. This can be as simple as pointing out that you note they seem "nervous" or "upset" about a topic, or might take the form of a statement and question such as, "Wow, that question seemed to really unnerve you. What is that about?" or "I notice you've been really direct and succinct in answering my questions, and now you seem all over the board. What's going on?" It is up to each interviewer to determine how far they wish to press their observation. For instance, if the individual denies any change in their behavior, the interviewer can test for additional behavior changes, provide feedback on what they have observed, ask for an explanation or begin the subject matter afresh to assess consistency and detail orientation.

Practice Tip: Baseline changes are most often "spottable" in unskilled liars; thus, baseline "tells" are frequently indicative of omissions or false denials ("I didn't see anything.") Sometimes the best way to present this to an interviewee is to say, "Sometimes when I see reactions like yours, it's because someone knows they left something out of what they've told me. Is there anything you'd like to add to you answers in order to be fully truthful?"

B) Response to credibility challenges

Using techniques to challenge the veracity of a witness should be reserved until all fact questions have been asked and answered. Even a mild challenge can begin to erode the fragile trust built by an interviewer careful rapport building and listening. Further, using aggressive techniques to attempt to bully an individual into an admission nearly never work and create new problems for the employer. An employee who believes they have been treated unfairly is inclined to become less engaged and productive. Nevertheless, there are a number of circumstances in which challenging the credibility of a complainant is essential, both to observe their reaction to the challenge and to determine whether their version of events or description of their own behavior alters following the challenge.

1. The eraser method

The simplest type of credibility challenge is the "eraser" method. This method is most useful when a witness has contradicted their own statements, their version of events has altered over time, or they have changed subtle details of the narrative. It is a very low risk challenge to suggest that the interviewer themselves might have erred or misheard something. In essence, by doing this you are giving the interviewee "an eraser," or an opportunity to correct a detail without "leaving a black mark" on their reputation. The interviewer might say, for instance, "Perhaps it is my mistake, but I thought that earlier, you said you did not have lunch that day. Now it seems you did have lunch. Can you help me understand what happened?" The eraser technique is most effective when you are dealing with one or two discreet contradictions, but not if you suspect a pattern of repeated falsehoods. In this instance, the reply of the interviewee was to pause a moment, then appear to have a "lightbulb" moment, and then to say, "Oh, well I had lunch, but at my desk, and what I meant earlier was that I did not go to lunch as I usually do." A follow up probe about what the circumstances were that kept the person from going to lunch actually proved quite fruitful, and the interviewee's cooperation was not compromised. When giving a witness the opportunity to "erase," or gracefully alter or recant a previous statement, the response may be as straightforward as the one described above, or might evoke a denial that the statement was ever made (despite its being carefully documented in contemporaneous notes,) or result in the witness dissembling. Each of these would be a worthy shred of observation to include in one's assessment of witness credibility.

2. Challenging with alternate versions of events

In the case of witnesses providing different versions of events, it is appropriate and necessary to allow each interviewee to respond to the fact that others have described events differently than they have. In the simplest construction, you will have two versions of events that conflict. Each interviewee should be allowed to respond to the discrepancies by being told what they are and then asked whether the alternate version might have some truth to it. It is useful to precede the challenge with a "norming statement," such as "research on eyewitness testimony suggests that people are not always reliable about what they saw. I want to tell you what another individual said that is different from your version of events, and ask you think about whether there might be some accuracy in their version." Once again, watching their reaction to the differing versions is as important as listening to their response. If the witness states the other person is lying, it is always appropriate to inquire as to the likely motive of the other person.

In an interview with multiple witnesses, using numbers strengthens the value of challenging with alternative versions. If one person's version differs substantially from several others, it is important to quantify the question about differences in perspective. This will lead to statements like, "I have spoken to five people who indicate they saw you look at the complainant in what each described an obviously sexual way, yet you deny it. Have you got any explanation for why all of them would independently report seeing that?" Again, watching the reaction is as important as listening to the response.

3. CHALLENGING WITH REPUTATIONAL OR PATTERN/PRACTICE INFORMATION

There are times when, over the course of an investigation, interviewers hear repeated assertions about the truthfulness or propensities of an individual, most often the complainant or respondent. These may be flattering or unflattering, but to the degree they may affect the credibility of the individual, they should be shared. If several witnesses have indicated that someone has had a reputation for filing false complaints, for behaving badly, for being lewd or for being very conservative, it is best to check those observations with those whose credibility could be affected. For instance, in a case in which a respondent in an alleged racially-hostile misconduct matter states that the complainant made inappropriate racial comments themselves, observations by others that they had never seen the individual do so becomes material. Similarly, the person who is thought to be untruthful by many needs to be told that several witnesses suggested that they were a bit fast and loose with the truth, and to ask for their reaction. This is both appropriate for purposes of procedural fairness (if someone has been characterized in a way that negatively affects their credibility they should have an opportunity to respond,) it also allows for the opportunity to gauge the interviewees reaction to the characterization of others by either defending their statement, retracting it, or modifying it.

Practice Tip: A certain percentage of employees are "skilled liars," who lie frequently. These are not pathological liars, as they know the difference between the truth and a lie, but they lie often enough to have gained some fluency in falsehoods. If multiple witnesses report to you that someone has a reputation for lying, it should be seen as fairly probable this is true, but it cannot be assumed that the responses to your questions will be lies – only that you need to test the veracity of the individual carefully and confront them with the characterization that they are a frequent teller of falsehoods.

4. CONFRONTATION REGARDING DEMEANOR AND INTERVIEWER OBSERVATION

It is surprisingly rare to interview a witness or party who is transparently attempting to undermine an investigation by playing games with context, baiting the investigator or behaving in an intimidating manner towards the investigator, but it does indeed occur. Some examples might include the interviewee who responds to the question, "How long have you worked here?" by asking what the interviewer means by the word *worked,* to the executive who suggests the investigator had better be "very, very, careful" about their conclusions,to the individual who answers every question, even simple ones with "I don't remember." the investigator can but does not need, to confront the individual with the behavior for purposes of analyzing credibility. The operationally important consideration is whether such a confrontation will be productive. The individual who yells at the investigator that they never yell or the aggressive individual describing themselves as "timid" might modify their behavior in the moment if they are told that their behavior in the interview seems to contradict their, but it is unclear whether this is a necessary or fruitful exercise. Simply put, the interviewer has made the observation and should include it in their credibility assessment; there is little or nothing that a confrontation will provide in the way of confirmation or refutation. On the other hand, if someone is being evasive or intentionally oblique in their responses, a confrontation might be worthwhile; telling an individual that obfuscation, in your opinion, is often attributable to a desire to avoid the truth might bring about a greater degree of cooperation. These confrontations are "relationship busting," so should be reserved for the final part of an interview (in the latter example, of course, if greater cooperation results, the interview might recommence.)

Practice Tip: There is no value in attempting to bully someone into an admission or to tell an individual that you think they are being untruthful. If this is what you think, it should be noted with other subjective impressions. Admissions most often come as a result of detailed questioning, providing an opportunity to respond to inconsistencies or evidence, and a gradual uncovering of the inevitable truth.

5. CONFRONTATION WITH EXCULPATORY EVIDENCE

There are times when individuals are permitted to tell their version of events while the investigator is in the possession of evidence that appears to partially or fully contradict what the witness is saying. Only after the witness has presented their version of events and the investigator has elicited details should the evidence be produced. In each case, the witness should be given an opportunity to respond directly to the authenticity and relevance of the evidence, and allowed to revise their statement.

C. CORROBORATION AND THE WEIGHT OF EVIDENCE

In the "he said, she said" world of employment investigations, it is a rarity, albeit a pleasing rarity, to find a "smoking gun," such as physical or photographic evidence that makes a particular version of events indisputable. Yet there are many other sources and strengths of corroboration that investigators should consider. Investigators should keep in mind that the standard for employment investigation is the preponderance of evidence, sometimes referred to as "a feather weight" on one side or the other.

Corroboration is *evidence that confirms or supports a statement, theory, or finding.* It includes eyewitnesses (or audio witnesses,) contemporaneous reports, evidence and pattern/practice information.

1. STRONG CORROBORATION:

This includes physical evidence or impartial or uninvolved witnesses providing similar observations or experiences, such as eyewitnesses, surveillance tapes, e-mails, or spreadsheets supporting fully one version of events. It is essential that every effort is made to determine if there is any manner in which to attain this type of corroboration, even if it is partial (for instance, phone records showing that a call was made at a particular date or time, card swipes corroborating location, purchase receipts with date and time to demonstrate location)

2. CONTEMPORANEOUS CORROBORATION

This includes contemporaneous reports to neutral or uninvolved individuals, contemporaneous documentation transmitted to an organizational representative or other credible third party, or a single impartial or uninvolved witness providing similar observations or experiences. Conversations with managers about concerns, letters written to compliance organizations, even reports to therapists that coincide with the timing and nature of events as they were reported give credence to a particular version of events. While calendars, journals, and diaries are strong evidence to examine, it is essential that these be obtained as soon as the investigator is aware that they exist. The investigator wants to assure that the witness had no opportunity to alter or even create such evidence in the interim between learning of it and physically inspecting it. At times, a complainant will tell you that they reported the incident to those outside the workplace; at other times, spouses, friends or others outside the workplace can provide an "alibi" to an accused. These circumstances provide an opportunity to shatter the "he said, she said" stalemate, but only when managed appropriately. The manner of collecting that evidence is key.

2A. COLLECTING CONTEMPORANEOUS CORROBORATION EVIDENCE

If a witness states that they reported an incident immediately to a friend, family member or other non-coworker, this can be considered as corroboration; however the neutrality of the third party is obviously a potential problem. Thus, as soon as an investigator is told of this contemporaneous report, they should seek permission from the witness to immediately contact the person or people to whom it was reported and interview that person prior to the witness having any opportunity to brief them. The interview should be detailed enough that it can rule out the kind of superficial preparation they might have been given. Additionally, cell phone bills or other sources of

corroboration regarding the time and date of the call will strengthen the investigators ability to rely on this corroborative evidence.

3. "Rule out "evidence

This is actual evidence resolving two conflicting versions of the same event or conclusively ruling out the possibility that something transpired as it was described. It might include photographic or technological evidence that someone was not in the workplace at a time they were alleged to misbehave, or corporate records that show an individual was in attendance at a meeting during the time of the alleged bad behavior.

Section 3: The written credibility analysis

A "statement matrix" can be a helpful tool in analyzing credibility, particularly when the investigation has stretched over more than a few days and many witnesses and events are involved. Creating a matrix noting each witness' version of each event in question can assist in determining both quantitative and qualitative factors; the proportion of witnesses whose accounts agree, in whole or in part and the differences in detail or nuance between varying versions of events. In certain instances, a written chronology can also be helpful in parsing out contradictions in timing or sequence. Should the generation of these preparatory documents generate new uncertainties, it is essential that the investigator follow up with relevant witnesses in order to attain full clarity.

There is no fixed format for credibility analyses. The following are provided as illustrative samples of different types of credibility analysis.

Sample written credibility analysis: bullying

In each witness interview, I explained to the witness that a complaint had been made about language and behavior that might have been intimidating or bullying. I explained that intimidation and bullying were not just obnoxious or rude behavior, but behavior that could interfere with someone's ability to do their job or create fearfulness. I asked if they had observed such conduct in the workplace, and each replied affirmatively. When I asked whose behavior had met that standard, Jim Smith was named unanimously. Although many of those witnesses also provided mitigating testimony about Smith's leadership, this unanimity cannot be ignored. Smith's conduct is widely recognized to be far more aggressive, explicit and domineering than the average worker at Acme Corp.

Three individuals reported specific incidents involving Smith's temper rising. Specific behavior attributed to Smith were flailing his arm, raising his voice, getting physically close to the target of his anger and a reddened of the face. During my interview with Smith, I noted his quick intensity as he recalled things that made him angry, and observed him lean into me and vigorously jab his finger towards me to make a point. He stated more than three times "I just get so angry," and even asked lightheartedly "Do you think I need anger management?" This conduct supports the observations of those complaining and describing Smith's demeanor as physically charged; it was clear that in the presence of real anger, that these gestures could easily become intimidating and threatening.

Of a more subtle nature is the consistent report by two witnesses that both Smith and Miller became angry when staff would not adequately "cover up" for Miller's unusual behavior. Both Miller and Smith agreed that they may have used that term, but they disagreed on what expectations that term communicated. That both women holding the support position reported this raises legitimate concerns about the latitude Miller and Smith take with their roles, and the degree to which they expect complicity from their staff.

It must be noted in this matter that the complainant herself faces mild credibility issues; witnesses describe the conflict between her and Smith as more of a give-and-take combativeness than unilateral intimidation by Smith. . Nevertheless, the same witnesses who made the observations about the interplay between Smith and the complainant concurred that Smith's behavior rose to a substantially higher and more aggressive level than did the complainant's.

Witness E was a key witness in this matter. While Witness E is experiencing performance challenges, and while your Human Resources Director directly states that she believes there are credibility problems with Witness E, the incidents Witness E described to this investigator were corroborated by contemporaneous reports and largely admitted to by Smith. Her additional allegations, not included in this report, cannot be evaluated at this time.

SAMPLE WRITTEN CREDIBILITY ANALYSIS: ALLEGED RACE DISCRIMINATION

Several observations about credibility are relevant in this matter. Perhaps the most important one is that there was a high volume of consistent testimony as well as independent corroboration of Johnson's poor level of self-assessment. Johnson's assertion that he was the "top candidate" for a high level network position is not credible; Johnson had been provided consistent and direct written and verbal feedback about deficits in his technical abilities. He was and is on a Performance Improvement Plan in his current position, which is far less demanding than the position he had applied for. Perhaps most important in recognizing a lack of clear self-assessment was Johnson's statement to this investigator that his feedback ratings on the [redacted] Emotional Competence Inventory had been both performance related and "outstanding" from everyone but his direct supervisor, are simply misguided. In fact the Inventory, which measures factors entirely unrelated to job performance, reflects Johnson's overrating of himself in comparison to all others on multiple dimensions, suggests a substantial lack of insight into his own deficits and competence. On all but two clusters, Johnson rated himself far higher than any other raters did, and the rankings from **all** raters resulted in few clusters that were at a target level. While this is a limited inventory, it does paint a picture of a substantial difference in the manner Johnson views himself than others do.

As to statements Johnson attributed to Cooper, it must be said that Cooper appeared rather horrified at the remarks he had allegedly made about Johnson. Cooper appeared genuinely empathetic towards Johnson, and his admission of negligence in properly supervising Johnson in the face of Johnson's health issues appears to support someone who more felt sorry for than felt ill will towards Johnson. His denial of those statements, as well as his version of the conversation that took place between him and Morrow regarding the "top candidate," appears to be credible.

As Cooper was credible in absolutely denying certain statements, and those denials are in direct conflict with Cooper's statements, the corollary is that it appears Johnson fabricated certain statements Cooper allegedly made to him and others about his race.

SAMPLE WRITTEN CREDIBILITY ANALYSIS: ALLEGED SEXUAL HARASSMENT AND RETALIATION (PARTIAL)

To put a fine point on the credibility observations in this investigation, both Robinson and Morrison have credibility challenges. Robinson's emailed communications and several disingenuous descriptions of events demonstrate his loose boundaries in a relationship that was both professional and personal. The constant communication with Morrison, even on her days off, his need for communication with her, and his sometimes childish displays of emotional and social neediness, as well as inappropriate discussion with Robinson regarding the details of several

workplace investigations suggest a lack of clarity on professional boundaries and a propensity to dissemble when asked to account for his own interpersonal behavior. What distinctly does not come across is any personal animus towards Morrison. Even when made aware of all of her allegations, Robinson consistently touted Morrison's stellar qualities and her potential. He minimized the impact of Morrison's expressions of anger and frustration when criticized or offended, although the descriptions of the conduct seemed extreme (yelling and screaming.) Robinson clearly supported Morrison, described her as his right hand person, and was, according to witnesses, adamant that people go to her for answers, and not end run to him. When he did get involved in several projects at the CEO's behest, there is no evidence he at any time offered Morrison up as a sacrificial lamb or was critical of her, her performance or her potential to the CEO.

Morrison has two characteristics that create credibility issues; one is what seems to be a deflection of responsibility for any interactions which did not go particularly well (saying that Robinson "persuaded" her to share her sexual history with employees, encouraging Robinson to come to the international conference despite reportedly having concerns about his conduct, and overstating her performance on the compensation plan), and the second is what appears to be a somewhat distorted view of her own position and the kind of coaching, feedback and accountability that goes with performance at a high level of a traditional corporate organization (when asked if she had a developmental plan, she became highly defensive and stated she did not. When I suggested that such plans were typical for corporate leaders, she stated she did not need one. When it was noted she had been selected as a high potential executive, she stated she believed it was a "target on her back.)

Finally, it is curious, but not unheard of for an employee to wait several years before complaining of unwelcome behavior, and it is also rare for an executive to wait two years to retaliate for rejection of purported advances. What makes this matter difficult to evaluate is that the reported retaliation appears to be behavior that was legitimately intended to help Morrison, and coincides with Morrison's responsibilities expanding to a level where some coaching, feedback, and occasional intervention by one's superiors is both inevitable and valuable, but Morrison alleges was harmful in its delivery and effect.

SAMPLE WRITTEN CREDIBILITY ANALYSIS: NON COOPERATIVE RESPONDENT

The complainant was calm, professional, measured and believable in her statements. Her description of Sullivan's nonverbal as well as verbal conduct provide for a credible report of a single offensive incident, without magnifying or inflating the conduct to attempt to make it appear more serious or explicit than it was.

Each witness, as well as those participating in the initial retention meeting described the complainant as highly respected, highly professional and having a strong record of dealing with adversity well. Her report is found to be highly credible. The report is further supported by her immediate contemporary complaint to Winston, and the observation of one witness who observed that he observed the complainant reacting emotionally to a comment by Sullivan in the place and time she had described the incident occurring.

Unfortunately, this investigator does not know if Mr. Sullivan would admit to or deny this statement, and no conclusions can be made about his credibility. Sullivan was given fair opportunities to participate in this investigation and was alerted that final conclusions would be drawn with or without his perspective. Absent a denial or alternative version of events, there is no basis to refute the accuracy of the complainant's description of the incident.

SAMPLE WRITTEN CREDIBILITY ANALYSIS: ALLEGED SEXUAL ASSAULT/HARASSMENT (PARTIAL)

When describing the incident that allegedly occurred in Jarvis' car, the complainant reported that while driving, Jarvis reached behind her and pulled her head to his crotch area, where he pressed her face against his exposed penis. Pressed to describe the details, she recalled that the lower half of her body remained fully on her seat and the upper part of her body being "in his lap." Both Jarvis and the complainant reported that Jarvis did not at any time park the car during the alleged incident or during the duration of the trip between sites. The complainant recalls that Jarvis stopped the vehicle several times for what she assumed to be stop signs or traffic signals, and states she had been concerned that someone would see what was happening in the car. Upon inspection, Jarvis' vehicle is a late model sports car with bucket seats and a prominent console between seats, including a manual transmission, or stick shift. A photograph and diagram with measurements is attached as Exhibit A. The investigator attempted to accomplish the approximate posture of the complainant during the alleged act and found that without putting both knees on the floor and turning around, it was impossible to replicate the posture. The complainant is roughly the same physical size as the investigator.

Based upon the above, the complainant's description of being pulled into Jarvis' lap without her leaving her seat is virtually impossible, as the console and stick shift would pose a significant obstacle. Furthermore, since the complainant indicates they continued to drive within city limits, but she did not report, when asked details about Jarvis' activity and demeanor, that Jarvis used his free hand to shift the car's transmission at any time during the incident she claims lasted from ten to twenty minutes, the complainant's version of events is not plausible. Asked about the apparent improbability of her physical description, the complainant insists that the event happened in Jarvis' car as picture, and states that she must have "forgotten about the stick shift." When shown a picture of the interior of the car and asked to refer to the picture in explaining what happened, the complainant shrugged and became distressed, saying to the investigator, "well, I guess no one is going to believe me." While it is clear that the complainant's distress is real, her version of events in this instance is not found to be credible based on the physical layout of the vehicle.

SECTION FOUR: INDETERMINATE CREDIBILITY

While investigators have reasonable latitude to make choices as to whether or not their impressions and observations are sufficiently clear to lead to credibility assessments, so too can they determine that credibility determinations cannot be made. There simply are times where the interaction between interviewee and interviewer is not conducive to such observations, as well as situations in which all parties have similar motives to be honest or to lie. In some cases, an investigator might find all of the witnesses unbelievable or all of them equally credible. Saying so is not a failure on the part of the investigator or an investigation. Rather, it is consistent with the duty of an investigator to make findings based upon the weight of the evidence, rather than forcing equally balanced evidence to bias findings in one way or another.