

aa/rr Atkinson, Andelson
Loya, Ruud & Romo
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2018 EMPLOYMENT LAW CONFERENCE
MISSION: POSSIBLE

HE SAID, SHE SAID: ASSESSING
CREDIBILITY IN WORKPLACE
INVESTIGATIONS

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AGENDA

- How Does the Investigator Resolve Conflicts in Witnesses' Statements?
 - Credibility factors
 - Documentary evidence
- How Can Investigator Bias Affect Credibility Determinations?

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Interview Videos

- Brief Explanation of hypothetical and exercise
- First Interview of Alan Adams
- Interview of Bob Burns
- Second Interview of Alan Adams
- Straw Poll

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How Should an Investigator Resolve Witnesses' Different Versions of an Event?

- **Credibility Factors**
 - Ability to accurately perceive, recollect, or communicate
 - Opportunity to perceive any matter
 - Bias, interest, or other motive
 - Consistent or inconsistent statements
 - Existence or nonexistence and corroboration
 - Admission
 - Inherent plausibility
 - Demeanor

Credibility Factors—Ability to Perceive

- **Ability to Accurately Perceive, Recollect, or Communicate**
 - **Definition:** witness' ability to notice and understand something, remember it, and express his observations to others
 - **Examples:**
 - Intoxicated witness
 - Failure to wear corrective lenses
 - Recent traumatic event
 - Communication not in witness' native language
 - Delayed time
 - Impaired interpretation of meaning of events

Credibility Factors—Ability to Perceive

- **Memory Considerations**
 - Memory is not a recording device, rather reconstructive
 - Carefully consider factors that might have influenced witness' reconstruction
 - Wording of a question can affect person's answer
 - » How long was the movie? 130 minutes
 - » How short was the movie? 100 minutes
 - Interrogation interviewing techniques can produce inaccurate information
 - Leading questions and misinformation—Did you see the broken glass in simulated accident video?

Further Reading: Loftus, Elizabeth, *American Psychologist*, November 2003; Elizabeth Loftus: How reliable is your memory? TedGlobal June 2013

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Credibility Factors—Ability to Perceive

- **Hypothetical Examples:**
 - Alan's forgetting about Bob's comment for months
 - Alan's inability to remember specific dates and times

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Credibility Factors—Opportunity to Perceive

- **Opportunity to Perceive**
 - **Definition:** Extent of a person's opportunity to observe any matter
 - **Examples:**
 - Witness had face to face conversation with subject
 - Witness overhears conversation, in a noisy restaurant, 20 feet away
 - Witness heard comment from third party
 - Witness was "texting" when "overheard" comment
 - Performance evaluation prepared without input from actual supervisor

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Credibility Factors—Opportunity to Perceive

- **Hypothetical Examples:**
 - Door closed, but thin office walls
 - Alan standing by the mailbox area (100-150 feet from Bob's office) vs. by the copier (20 feet from Bob's office)
 - Bob worked half-days at the office for the past six months

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Credibility Factors—Bias, interest, or Motive

- **Bias, Interest, or Other Motive**
 - **Definition:** when relationships or other circumstances could cause witness to be less than objective
 - **Examples:**
 - Witness is Godmother of the accused's daughter
 - Witness and complainant are members of the same small book club
 - Witness and accused are members of the same Bible study
 - Witness and complainant are lunch walking buddies
 - Witness and accused used to date

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Credibility Factors Bias, Interest, or Other Motive

- **Hypothetical Examples:**
 - Alan's "feelings" for Danielle
 - Doesn't want her to date Bob, comment could reduce Danielle's interest in Bob
 - Getting Bob in trouble at work could diminish Danielle's interest in Bob.

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Credibility Factors—Consistent or Inconsistent Statements

- **Consistent or Inconsistent Statements**
 - **Definition:** whether a witness provides the same answers to questions throughout the interview(s) and whether these answers contradict other statements made by him or other witnesses
 - **Examples:**
 - Witness states not present at work on a particular date, but later comments on a conversation he had during break on that date
 - Witness states he needs accommodation of sedentary work—no standing, twisting, or lifting—but later mentions his continued participation in his bowling team
 - Witness states that supervisor yelled at her, which supervisor denies. Other employees report hearing supervisor yell at witness

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Credibility Factors—Consistent or Inconsistent Statement

- **Hypothetical Examples:**
 - Alan said he heard comment while he was at mailbox vs. by copier
 - Alan first said Bob said “Danielle Davidson;” second interview Alan said he just heard Bob use the first name “Danielle”
 - Alan says he and Danielle are just friends
 - Other witnesses state that Alan has romantic feelings for Danielle

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Credibility Factors—Existence or Non-Existence of Corroboration

- **Existence or Non-Existence of Corroboration**
 - **Definition:** whether there is other evidence (e.g., testimony by eyewitnesses, people who saw the person soon after the alleged incident, or people who discussed the incident with him at around the time that it occurred; or written documentation) that verifies the witness’s testimony
 - **Examples:**
 - Witness who claims to have not been at work on a particular day is corroborated by his timecard
 - Witness states has no disciplinary history. Personnel file reveals multiple disciplinary action

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Credibility Factors—Existence or Non-Existence of corroboration

- **Hypothetical Examples:**
 - Alan's allegation that Bob has made similar comments about women in the past
 - Do Bob's employee access card confirm he was or was not in the office when Alan claims to have heard Bob make the comment

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Credibility Factors—Admission

- **Admission**
 - **Definition:** witness admits to something that does not benefit him or corroborate his story, or makes a statement that goes against his own self-interest
 - **Examples:**
 - Accused admits that he calls the receptionist "Hot" to her face on a regular basis
 - Complainant admits that he previously had a consensual romantic relationship with accused
 - Accused admits that she did homework on work time

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Credibility Factors—Admission

- **Hypothetical Example:**
 - Alan does not like Bob because he "gets bad vibes from him"

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Credibility Factors—Inherent Plausibility

- **Inherent Plausibility**
 - **Definition:** whether what the witness has described makes sense, given the surrounding circumstances
 - **Examples:**
 - Complainant states that supervisor grabbed her breast while supervisor was driving, and complainant was in backseat behind front-seat passenger
 - Complainant states that supervisor pinched her buttocks while he was driving and she was in the front seat of his car

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Credibility Factors—Inherent Plausibility

- **Hypothetical Examples:**
 - Alan did not report an alleged offensive statement to Human Resources or anyone else for months
 - Alan “forgot” Bob made this statement for months

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Credibility Factors—Demeanor

- **Demeanor**
 - **Definition:** a witness’s overall appearance, posture, tone of voice, facial expressions, gestures, and other behavioral characteristics
 - **Examples:**
 - Eye contact or lack of eye contact
 - Confidence
 - Finger tapping, twisting in chair
 - Perspiration
 - Blinking
 - Providing lots of details

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Credibility Factors—Demeanor

- **Hypothetical Examples:**
 - Alan Adams' Demeanor:
 - Appears to be very confident
 - Well-spoken
 - Personable
 - Smiles a lot
 - Good eye contact
 - Does not hesitate or exhibit any other nervous tics
 - But what happened to his voice when he told the investigator about overhearing Mr. Burns' comment? (Spoke in a higher pitch and stuttered a bit)

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Credibility Factors—Demeanor

- **Hypothetical Examples:**
 - Bob Burns' Demeanor:
 - Seems to be somewhat shy
 - Soft spoken
 - Appears to be nervous
 - Tapped his fingers on the desk periodically during the interview
 - Frequently looked down at the desk
 - Did not make great eye contact with the investigator
 - Took some long pauses
 - Uncomfortably shifted in his seat

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Credibility Factor—Demeanor

- **Problems with Demeanor Evidence**
 - Studies show that most people cannot do much better than chance in discerning lies
 - Behavioral cues thought to indicate deception are more strongly associated with judgments of deception than actual deception
 - Liars do tell stories that are less logical, less consistent, and contain fewer details than those of truth-tellers
 - Studies show that where the speakers lied, none of the stereotypical face and body "tells" were present
 - Vocal evidence only more accurate predictor of truth

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Documentary Evidence

- **Definition:** written notes and documents, electronic records, etc., that can corroborate a witness' statement(s) (or not)
- **Examples:**
 - Supervisor files, personnel files
 - E-mails, texts, social media—snapchat, instagram, twitter, blogs
 - Building access records
 - Voicemails
 - Policies and procedures
 - Incident notes, diaries, calendars
 - Time cards
 - Expense reports
 - Past Complaints
 - Public records


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Documentary Evidence

- **Hypothetical Examples:**
 - Access card log
 - Floor plan

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Investigator Bias and Credibility Assessments



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Investigator Bias and Credibility Assessments

- **Implicit Bias:** Term to describe when we have attitudes towards people or associate stereotypes with them without our conscious knowledge
 - Harvard Implicit Association Test
 - <https://implicit.harvard.edu/implicit/takeatest.html>
- **Confirmation Bias:** Unconscious tendency to bolster a hypothesis by seeking consistent evidence while minimizing inconsistent evidence

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Investigator Bias and Credibility Assessments

- **Examples of Other Biases**
 - Bias towards the investigator's employer
 - Bias against delivering bad news
 - Bias against workplace complainers or whiners
 - Bias towards quick case closure
 - Bias towards majority rule
 - Bias towards people with whom the investigator sympathizes
 - Bias towards people with power

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Investigator Bias and Credibility Assessments

- How Helen's biases might affect her credibility determinations:
 - Alan is senior to Bob
 - Female attorney over-identification
 - Commonalities with Alan

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Investigator Bias and Credibility Assessments

- **Reducing the Impact of Investigator Bias**
 - Structure processes carefully
 - Consider different theories
 - Acknowledge biases
 - Be wary of assumptions and intuitive decision-making
 - Discuss findings with others
 - Overcome intuition with deliberation
 - A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost and how much does the bat cost?

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Who Do You Believe?

**Mr. Adams
or
Mr. Burns?**


Why?

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Key Takeaways


- The Investigator must systematically assess witnesses' credibility and be able to logically explain that analysis
- A complete credibility analysis may require the investigator's consideration of his or her biases for or against a witness
- The investigator does not have to be "right," but must show that he or she conducted a good faith investigation that is reasonable under the circumstances.

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THANK YOU
For questions or comments,
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**QUESTION
AND ANSWER
SESSION**

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