

Oregon
State
Bar

CLE
Seminars

Investigating Sexual Harassment and Other Misconduct



Thursday, June 27, 2019
9 a.m.–4 p.m.

5.5 General CLE credits

INVESTIGATING SEXUAL HARASSMENT AND OTHER MISCONDUCT

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SCHEDULE

Presented by Michael Johnson, *Clear Law Institute*

8:00 Registration

9:00 Advanced Interviewing Techniques

- ◆ Using a journalistic rather than prosecutorial interview style
- ◆ The “Cognitive Interview,” the most widely researched interviewing technique in the world
- ◆ How to respectfully challenge a witness whose answers contradict other witnesses or the evidence

10:15 Break

10:30 Examining Credibility

- ◆ Strategically approaching “he said/she said” cases or cases when there are no eyewitnesses
- ◆ Spotting verbal and nonverbal cues to deception and truthfulness
- ◆ Deception cues: science vs. myth

Noon Lunch

1:00 Legal Requirements of Workplace Investigations

- ◆ What to do if an employee refuses to be interviewed
- ◆ Circumstances when the names of witnesses should be revealed
- ◆ Factors to consider in imposing discipline

2:30 Break

2:45 Writing Investigative Reports

- ◆ What to include (and not include) in the report to ensure that it is legally defensible
- ◆ Best practices for documenting facts and credibility determinations
- ◆ Maintaining applicable attorney-client privilege

4:00 Adjourn

FACULTY

Michael Johnson, *Clear Law Institute*. Mr. Johnson is CEO of Clear Law Institute and a former U.S. Department of Justice attorney. He has trained thousands of lawyers and other professionals how to effectively interview witnesses and spot scientifically validated signs of deception. He has provided training to organizations such as Google, the United Nations, the World Bank, and the Washington, DC, Metropolitan Police Department. Mr. Johnson is a graduate of Duke University and Harvard Law School.

Investigating Sexual Harassment and Other Misconduct

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About Michael Johnson

- CEO of Clear Law Institute, which provides hundreds of online HR, compliance, legal, and investigations courses
- Former attorney in the US Department of Justice
- Has provided investigations seminars for dozens of Fortune 500 companies and organizations such as Google, the EEOC, and the World Bank
- Graduate of Duke University and Harvard Law School



Overview

- Interviewing techniques
- Assessing credibility
- Legal and practical considerations in investigations
- Writing investigative reports

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INTERVIEWING TECHNIQUES

Interview style

- Primary goal is simply to get the person to talk
- Introduction and setting expectations
- Background questions
- Sound of silence
- Structuring question topics
- Journalist, not a prosecutor
- Be suspicious but don't show suspicion
- Avoid confession-seeking techniques

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Cognitive Interview ("CI")

- The CI is the most widely researched investigative interviewing technique
- Frequently used in interviews of victims and eyewitnesses
- All police officers in the UK are taught the CI and it's used by the FBI and many other North American law enforcement agencies

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Cognitive Interview

- The CI happens to include many of the questioning techniques found to increase cognitive load and thus help spot deception
- Not a prescribed set of questions, but more like tools in your toolbox
- You can use elements of the CI in your questioning, depending on the situation

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Stages of the Complete CI

- Introduction/Rapport
- Free Narrative
- Drawing
- Follow up questions
- Reverse order technique
- Use of unexpected questions
- Challenge
 - ▣ Strategic use of evidence
- Review

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Introduction/rapport building

- Start with casual conversation on non-threatening topics

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Free Narrative

- “Please tell me everything you can and give me as much detail as possible.”
- Studies have shown that asking for long, narrative responses makes it easier to spot deception cues (Colwell 2007)

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Liars usually provide a “bare-bones” account

- Details are the enemy of the liar
- Liars may accidentally report details that contradict evidence or what they’ve earlier said
- Liars may accidentally report details that only the guilty perpetrator would know (Colwell 2007)

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Stress the need for details

- Need to emphasize with the witness the need to report details, as it goes against normal conversational rules

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Ways to encourage truth tellers to say more

- Be supportive
- Mann (2013) study
 - ▣ Second interviewer took notes and remained silent during the interview and was either:
 - Supportive (nodding head and smiling)
 - Suspicious (frowning)
 - Neutral
 - ▣ Only in the supportive condition did truth tellers provide significantly more details than liars

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Consider using mimicry of the witness

- In one study, second interviewer mimicked the posture and mannerisms of the witness
- Truth tellers gave more details than liars, but only in the condition when they were mimicked (Shaw 2015)

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Request for drawing

- “Now that you’ve told me what happened, I’d like you to draw the event. Drawing the event can give you another opportunity to recall details that you may have forgotten. It can also help me get a better understanding of exactly what happened.”

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Drawings can be hard for those who are being deceptive

- Drawings give truth tellers another opportunity to tell the story and display what occurred, which often results in additional details
- Compared to truth-tellers, liars tend to:
 - ▣ Provide few, if any, additional details in the drawing
 - ▣ Have greater difficulty in making the drawing
 - ▣ Display more inconsistencies between their previously provided verbal free narrative and the drawing

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Follow-up questioning

- Ask for clarification and elaboration
 - ▣ In contrast to truth tellers, deceivers typically don't elaborate much or offer more details
- Can ask about sensorial details, which are more difficult for liars to make up
 - ▣ "Take a moment and think about the event again. Is there anything else you may have seen, heard, or felt during this experience?"
 - ▣ "Where was each person standing?"

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Reverse-order technique

- "We are going to try something that sometimes helps people remember more details. I'd like you to tell me what happened, but this time start from the end and go to the beginning."
- Truth tellers provide more detail

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Reverse order technique

- Research shows that deceptive persons have unusual difficulty telling their fabricated stories backwards
- Recalling a story backward increases cognitive load, and the deceptive subject's cognitive resources already are being strained to maintain the consistency of the story.
- Studies have shown that people are better able to spot deception when person is required to tell story in reverse order

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Reverse order study (Evans 2013)

- Participants asked to tell what they did last Saturday night
- Half of participants instructed to tell what they did in reverse order
- % of lies accurately detected
 - ▣ Control: 18%
 - ▣ Reverse Order: 75%

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Try to ask unexpected questions

- If you ask an unexpected question and the person is lying, the person will have to make up a story on the spot.
- Come back to the topic later in the interview
- Unexpected questions can be useful where you have two people giving a joint alibi and they are being interviewed separately

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Scenario

You believe that Tom stole \$100 from Lisa's cubicle while Lisa was out to lunch yesterday. The suspect, however, presents an alibi. He says he was having lunch with a friend at that time. You are going to interview Tom and his friend separately. What questioning techniques would you use?

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Types of unexpected questions

- Temporal (Vrij 2009)
- Spatial (Vrij 2009)
- Asking the same question twice in different formats—verbally describe visual layout then draw it (Leins 2012)

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Results from a study using this scenario

- On the basis of consistency of the answers to the spatial questions, 60% of truth tellers and 80% of liars could be correctly classified
- On the basis of consistency of the drawings, 80% of truth tellers and 75% of liars could be correctly classified. (Vrij 2009)

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Watch out for embedded lies

- Rather than making up everything, the liar may tell an otherwise truthful story but change an important aspect, such as when it occurred
- Ask questions that relate to that specific day and time

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Strategic use of evidence (SUE)

- Providing information at the beginning of an interview can allow the smart suspect to craft an alibi on the spot that is consistent with the evidence

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SUE studies

- Hartwig (2005) study: accuracy rate for observers
 - ▣ Early disclosure: 42.9%
 - ▣ Late disclosure: accuracy of 61.7%
- SUE study—police trainees who were taught SUE interviewing techniques outperformed untrained colleagues 85% vs. 56% in spotting deception (Hartwig 2006)

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Challenge stage

- Don't challenge the person until the very end
- At the end, confront the person with inconsistencies, incriminating statements, and/or incriminating evidence
- At the challenge stage, present the evidence in a “drip” (piece by piece) manner instead of trying to overwhelm the person with all of the incriminating evidence at once
- Increases the likelihood that person will make additional inconsistent statements, because they are not allowed to give a comprehensive explanation to all your evidence

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Style of challenge

- Remain respectful, even soft-spoken
 - ▣ “Help me explain this...”
- Use pauses to keep the focus on the subject

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Direct challenge at the very end

- Example: “I think that you have not been truthful with me”
- Most truthful subjects will give a firm denial and then offer additional information to support their story
- Liars tend to not provide additional information. Instead, they may deflect an answer with responses like, “I’m sorry you don’t believe me” or “Why would I lie?” (Geiselman 2012)

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Geiselman (2012) study of Cognitive

At the end of each stage of the interview, study participants were asked to rate how deceptive or truthful they thought the person was being.

1 = Very likely deceptive

8 = Very likely truthful

4.5 = midway point

Event	Rapport	Narrative	Drawing	Follow-Up Q's	Reverse Order	Challenge
True	<u>5.34</u>	5.17	5.17	5.49	<u>7.17</u>	<u>7.70</u>
False	<u>4.84</u>	4.17	3.34	2.84	<u>1.49</u>	<u>1.49</u>

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ASSESSING CREDIBILITY

Overview

- Analyzing “he said/she said” cases
- How good are you at detecting lies?
- Common errors in lie detection
- Approach for spotting signs of deception and truthfulness
- “Hot Spots”: Verbal content, verbal style, voice, body

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Analyzing ‘he said/she said’ cases

Scenario

Jennifer's assistant, Tony, complains that Jennifer frequently makes sexual comments to him at work. Tony also alleges that last week Jennifer tried to kiss him in her office. Jennifer denies the allegations completely. You investigate the matter and you believe that Tony is being truthful. However, you can find no eyewitnesses to support Tony's allegations.

Could the employer legitimately conclude that Jennifer is guilty and discipline her?

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Why try to reach a conclusion even in "he said/she" cases?

- What message do you send to potential victims or whistleblowers?
- What message do you send to potential wrongdoers?
- But what if I get sued?

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Credibility Assessment Factors

- Illogical inconsistencies
- Corroboration
- Motive to falsify
- Past record
- Content of the story and how the story is told

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How good are you at detecting lies?

Polling Question: Are you good at detecting lies?

I believe I can correctly identify if a person is lying or telling the truth the following percentage of time:

- a) 25%
- b) 50%
- c) 75%
- d) 90%
- e) 100%

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Did Kevin show any “cues” to deception?

- If so, what were they?

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Video of Kevin's Interview



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Polling Question: Kevin is:

- A. Innocent
- B. Guilty

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Polling Question: Which are predictors of deception?

- a) Gaze aversion
- b) Person is fidgety
- c) Places hand over mouth when speaking
- d) All of the above
- e) None of the above

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Examining “cues to deception”

- We tend to pay attention to “cues to deception” that have not been scientifically validated and are not reliable predictors of lying
- Three factors that impact how people may behave when lying
 - ▣ Emotion
 - ▣ Cognitive effort
 - ▣ Attempted impression management
- Research has not supported anxiety-based approaches to spotting deception

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How well does the average person spot lies?

- The average person can correctly spot what percentage of lies? (Bond 2006)
- People who received training on deception cues taught in the most common interviewing/interrogation technique used by U.S. and Canadian law enforcement officers correctly spotted what percentage of lies? (Kassin 1999)
- Average person does better at spotting lies by just hearing the person or by both hearing and seeing the person's face? (Leach 2016)

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Avoiding common errors in lie detection

Common Errors in Lie Detection

- Inaccurate beliefs about which deception cues are valid
- Belief in “Pinocchio’s nose”
- Poor interviewing styles
- Misinterpreting source of cues (“Othello” error)
- Confirmation bias
- Fundamental attribution error

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Dangerous Decisions Theory (DDT)

- People often make snap, intuitive judgments about a person’s general trustworthiness upon first seeing the person’s face.
- Judgments often based on inaccurate facial appearance heuristics (e.g., attractiveness, symmetry, baby-faced, ethnicity) (Porter & ten Brinke 2009)

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6-step approach to spotting deception and truthfulness

- ① Let them talk (information-interviewing style)
- ② Try to establish a baseline
- ③ Actively listen and look for only scientifically-validated cues
- ④ Don't jump to conclusions
 - No such thing as Pinocchio's nose
 - Consider alternative hypotheses for each cue
- ⑤ If you find a cue to deception, probe further to see if more cues are found
- ⑥ Analyze content of the overall statement

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Verbal Content

Listen especially for:

- Contradictions with evidence or other witness testimony
- Corroboration

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Drew Peterson



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Deception cues from Peterson video

- Equivocation/Qualifier
- Illogical inconsistency
- Indirect answers
 - ▣ Liars may choose to provide irrelevant information that does not answer the question posed
 - ▣ Helps them avoid directly answering the question while appearing cooperative (Matsumoto 2013)

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Length of responses and details

- When asked to give a narrative, liars tend to provide shorter and less detailed responses
 - ▣ Liars tend to give shorter, carefully crafted responses with fewer details (DePaulo 2003)
 - ▣ Liars tend to provide fewer additional details during the follow up questioning

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Consistency of story when retelling

- A logical inconsistency or direct contradiction would obviously suggest deception
- Problems with “consistency heuristic”
 - ▣ Deceptive statements tend to be at least as consistent as truthful statements
 - ▣ Liars may simply repeat their initial statement
 - ▣ Truthful witnesses reconstruct from their memory a previously experienced event (Granhag 1999)

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Lack of memory

- Saying “I don’t remember” suggests that the person is being:
 - ▣ A. Truthful
 - ▣ B. Non-truthful

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“Not that I recall”

- Q: Alice, have you ever run your fingers through Ronald’s hair?
- A: Not that I recall.

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Lack of memory

- Suspicious in situations where you’d expect the person to remember if it occurred
- But, in some situations, admitting to a lack of memory can actually be a sign of truthfulness
 - ▣ Impression management: Liars tend to assume that truth-tellers remember everything and are reluctant to admit to not remembering details

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Qualifiers and deflection

- Q: Henry, have you ever accepted a gift from a vendor?
- A: Not really. Speaking of gifts from vendors, you should hear about the gifts that Todd and Mark have accepted.

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Bill Clinton

- JIM LEHRER: No improper relationship. Define what you mean by that.
- BILL CLINTON: Well, I think you know what it means. It means that there is not a sexual relationship, an improper sexual relationship, or any other kind of improper relationship.
- JIM LEHRER: You had no sexual relationship with this young woman?
- BILL CLINTON: There is not a sexual relationship. That is accurate.

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Paltering

- Paltering: Actively using truthful statements to create a misleading impression

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Congressman Anthony Weiner



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Verbal content cues to deception from Weiner video

- Repeating of words and phrases
- Indirect answers
- Using passive voice instead of active voice

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Passive voice

- Allows person to make a misleading but truthful statement
- Allows liar to hide his or her identity as the actor (Matsumoto 2014)

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Computer analysis of witness testimony

- Computer linguistic program compared transcripts of persons convicted of perjury and persons who had later been exonerated based on DNA evidence
- Truthful witnesses
 - ▣ Used I-pronouns more
 - ▣ Used longer words
 - ▣ Described events in greater detail
 - ▣ More complex thinking (sentence structure)
- Computer correctly classified 76 percent of cases
- *The Secret Life of Pronouns*, James Pennebaker

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Verbal Style

Pauses

- When question calls for a narrative response, liars tend to pause longer before they answer a question and during the middle of telling their story (Vrij 2008)
- Only suspicious in relation to baseline

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Rate of speech

- In high-stakes lies where people are telling complicated stories, people are more likely to slow down when they lie (Vrij 2001)

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Potential vocal cue

- Pitch
 - ▣ Liars more likely to use a higher pitched voice (Vrij 2008; Villar 2012)
- Only look at changes from the baseline
- Consider whether there's an alternative explanation

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Body

Being fidgety

- Being fidgety is a sign of nervousness or stress, not deception
- Research show that on average liars are *less fidgety*
 - ▣ Impression management
 - ▣ Cognitive effort (Vrij 2008)

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Use of illustrators

- Illustrators are arm, hand, and finger movements used to illustrate speech
- Research suggests liars on average show a decrease in illustrators
 - ▣ Impression management
 - ▣ Cognitive effort (Vrij 2008)

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Eye contact

- Meta-analyses of research studies have revealed that liars don't significantly differ from truth tellers in total amount of time spent looking at the target of their lie (DePaulo 2003)

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Deliberate eye contact

- In two studies, Mann (2012 and 2013) found liars engage in more “deliberate eye contact”
 - ▣ Holding gaze for an unnaturally long time
 - ▣ Not looking away while speaking
- Why engage in deliberate eye contact
 - ▣ Impression management—trying to appear convincing
 - ▣ Increased need to monitor target's reaction

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Neuro-Linguistic Programming (NLP)

- NLP claims that looking up and to the left suggests truth-telling and looking up and to the right suggests lying
- No empirical research has supported this theory
- 2012 study (Wiseman) found no differences between liars and truth tellers in public pleas for missing relatives
 - ▣ Also found no differences in laboratory studies

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Blinking

- Anxiety associated with increased blinking
- ten Brinke and Porter (2011) “public plea for missing relatives” study found liars blinked more

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Blinking

- Cognitive load is associated with decreased blinking. Several studies have associated decreased blinking with deception
- Mann (2002) found that serious crime suspects decreased blinking while lying
- Leal & Vrij (2008) found that in an investigative interview, liars tended to blink less while lying followed by a compensatory effect of a flurry of blinking after answering (77% of liars and only 15% of truth tellers showed this pattern)

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Things to keep in mind

- Let them talk
- Try to establish a baseline
- Actively listen and look for only scientifically-validated deception cues
- Don't jump to conclusions
- If you find a deception cue, probe further to see if more cues are found
- Analyze content of overall statement

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LEGAL AND PRACTICAL CONSIDERATIONS IN INVESTIGATIONS

Section overview (1 of 2)

- Standard of Proof
- Asserting the attorney-client privilege
- Choosing the investigator(s)
- Interviewing decisions
- Searching an employee's workspace, computer, personal belongings, and social media sites
- Responding to an employee's refusal to cooperate

Section Overview (2 of 2)

- Responding if the accused brings an attorney, co-worker or friend to the interview
- Tape-recording phone conversations
- How much detail about witness statements should you give the accused?
- How to determine the appropriate disciplinary action
- Can you discipline employees for discussing the investigation with others?
- How much detail about the results of the investigation should you share?

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Standard of Proof

Standard of Proof

- Standard of proof in a workplace investigation is not like a criminal prosecution
- Employers typically use the “more likely than not” standard
- Courts generally look to see if you:
 - ▣ Did a good faith investigation
 - ▣ Reached a reasonable conclusion

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Attorney-client privilege

- What is the attorney-client privilege?
- What steps should you take to be able to later assert the privilege?
 - ▣ Appointing memo
 - ▣ Labeling documents
- Is the attorney-client privilege applicable to all types of internal investigations?

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Make sure investigator(s) are qualified for the particular type of investigation

- Objective
- Well-trained in investigative techniques
- Knowledgeable of the relevant laws or policies
- Would be a good witness in court

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How many investigators should be present during an interview

- In most cases, a single investigator is sufficient
- Advantages of having a second person in the room
 - ▣ Can take notes
 - ▣ Can testify if the witness later denies making a statement
 - ▣ Can make it harder to attack the objectivity of the investigation
 - ▣ Can alert the investigator if he or she doesn't ask important questions or doesn't follow up on unclear responses
- Use a language interpreter, if necessary, in serious cases

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Interviewing decisions

- Should I interview non-employees?
- In what order should I conduct the interviews?
- When should I notify the accused that he is under investigation?
- Where should interviews take place?
- Are phone interviews acceptable?
- Should I allow the employee to review and edit my interview notes?
- Should you keep handwritten notes?

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Separating the parties

- Separating the parties while you investigate may be required in some cases. Options include:
 - ▣ Warning to both parties to stay away from each other
 - ▣ Asking for a volunteer to work from home or a different location
- Occasionally you may have to remove a party against their wishes by asking person to work from home or a different location or take administrative leave with pay
 - ▣ Err on the side of removing the accused instead of the complainant

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Workplace Searches: Scenario (1 of 2)

One morning someone anonymously calls Betsy's supervisor, Sanjay, and reports that Betsy is selling drugs at work. The caller says that Betsy keeps the drugs in her office. When Betsy leaves the office for lunch, Sanjay and a corporate security officer walk into Betsy's office and look around. Seeing nothing, they open her desk and a filing cabinet but find no evidence of drugs.

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Scenario (2 of 2)

While they are there, they see that her employer-provided computer is on. They look through her corporate emails and find an email that suggests that she is selling drugs at work. They then notice a piece of her personal luggage in the office. They open the luggage and find a small bag of cocaine.

Betsy is fired. She sues claiming invasion of privacy and wrongful termination. Will she win her lawsuit?

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Workplace searches

- Invasion of privacy claims
 - ▣ Did the employee have a “reasonable expectation of privacy” in the item(s) searched?
 - ▣ Did the employee’s privacy interest outweigh the employer’s need to do the search?
 - Was there “reasonable suspicion?”
- Does the employer have a search policy that has been communicated to employees?
- Case-by-case analysis may be required
- Why not just call the police?

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Facebook, social media, personal email searches

- Searches of social media can be helpful in some cases, especially where relevant people have public profiles
- Don’t log into personal social media or personal email accounts, even if the person has accessed these accounts on their work computer

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Scenario

Jenny says that she and Amy were having lunch at a restaurant when they saw Noah dining with a vendor who is bidding on a large contract. Jenny says that she and Amy saw the vendor hand Noah an envelope that was full of cash.

When you go to talk to Noah, he says that he will not talk and refuses to answer any questions. When you try to talk to Amy, she says that she doesn't want to get involved and doesn't want to be interviewed.

How do you respond to each?

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Dealing with refusals to cooperate

- Tell the accused, "There are often two sides to a story. But if we don't hear your side, what do you think our conclusion will be?"
- No "Fifth Amendment" right to remain silent. If you don't talk, we can:
 - ▣ Use your refusal to talk against you in making our credibility determination
 - ▣ Discipline, even fire, you for being insubordinate
- All employees can be required to cooperate

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Scenario

Noah agrees to be interviewed about the bribery allegations against him. However, he demands to have his attorney, his co-worker, and his mom present at the interview. How do you respond?

95 |

Can an employee demand to have someone present during the interview?

- Attorney
 - ▣ No right to have an attorney present, even if the matter is criminal in nature
- Co-worker
 - ▣ Unionized employees have a *Weingarten* right to have a union rep present
- No right to have friend or relative present
- Must check your collective bargaining agreements and civil service rules to see if you have given employees any of these rights

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Scenario

You suspect that Kurt is sharing proprietary information with a competitor. You secretly monitor all of his calls from his office phone, including ones with the competitor and Kurt's wife. Is this legal?

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Secretly tape-recording a phone conversation

- Federal law: one-party consent
- State law: in some states, must have all-party consent
 - ▣ States that require all party consent: California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington
 - Oregon requires all-party consent for face-to-face conversations.

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Scenario (1 of 2)

Jenny says that she and Amy were having lunch at a restaurant when they saw Noah dining with a vendor who is bidding on a large contract. Jenny says that she and Amy saw the vendor hand Noah an envelope that was full of cash. When you interview Amy, she acknowledges seeing this occur but asks that you keep her name out of it.

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Scenario (2 of 2)

After completing your investigation, you conclude that Noah accepted a bribe, relying in large part on Jenny and Amy's testimony. Noah says that he never took money from a vendor and demands to know who are the witnesses against him and what did they allege occurred? Who should you identify as a witness?

- a. Jenny
- b. Amy
- c. Both
- d. Neither

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How much detail about the allegations should I give the accused?

- Should never identify the person who came forward with the complaint as the whistleblower
 - ▣ But sometimes the whistleblower is also a witness
- Should strive to not reveal the identity of witnesses, but this isn't always possible
 - ▣ Sometimes it will be obvious to the accused who the witnesses are
- Cannot promise witnesses confidentiality, only that you will keep the matter as private as possible

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Scenario (1 of 2)

Samantha files a racial harassment complaint against her co-worker, Denise. The investigator interviews Samantha and Denise separately. At the end of each interview, the investigator tells Samantha and Denise that they are not allowed to discuss the allegations with anyone. The investigator later learns that both Samantha and Denise subsequently discussed the allegations with other employees.

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Scenario (2 of 2)

Should the employer discipline:

- a. Samantha
- b. Denise
- c. Both
- d. Neither

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Discipline for discussing the investigation with others

- Employers should be very cautious about disciplining employees for discussing the investigation with others
 - ▣ NLRA
 - ▣ EEOC
- Should examine the need for an order to not discuss the matter on a case-by-case basis
- Should discipline for the “content of the speech” not just because they spoke to someone

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Scenario (1 of 2)

Anthony, a supervisor, has been with the company for 8 years and has never been disciplined for any misconduct. One day, Anthony forwards to several employees an email that contained a link to a website where people could rate the attractiveness of celebrity women in bikinis. Some of the employees who received the email were offended.

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Scenario (2 of 2)

Which disciplinary action should Anthony receive?

- a. Oral reprimand
- b. Written reprimand
- c. Suspension
- d. Termination

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Factors to consider in imposing discipline

- Severity
- Frequency
- Position of the accused
- Past record
- Internal disciplinary policies and procedures

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Scenario

Amy alleges that Tina became irate with her, pushed her down in her chair, and threatened to slap her. You investigate and conclude that Tina is guilty. Based on your investigation, Tina is given a two-week suspension.

Amy and an employee you interviewed during the investigation separately come to ask you what happened with the investigation. What do you tell Amy? What do you tell the other employee?

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Communicating the results of the Investigation

- Not required to tell whistleblowers the results of the investigation
- For alleged victims, tell them:
 - ▣ Whether you were able to substantiate their claims
 - ▣ If so, that you've taken appropriate corrective action designed to stop the misconduct and deter future misconduct
- Most employers won't reveal whether corrective action included disciplinary action
- Consider how much information to share with the workforce

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WRITING INVESTIGATIVE REPORTS

Overview

- Report structure and legal considerations
- The six-step writing process
- The rules for clear and concise writing
- How to overcome “writer’s block”

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Report Structure and Legal Considerations

Report basics

- What's the purpose of the report?
- Who is entitled to see a copy of the report?
- Will the report be protected by attorney-client privilege?

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Employee Hotline Report

Report Type: Initial Report **Source:** Phone

Date/Time Oct. 22, 2012 **Priority:** B

Received: 13:55 ET **Follow-up** N/A

Allegation Class
HR/General Concern Category 2

Location Details
Arlington, VA

Party Type	Party Name	Party Job Title
Caller	Jose Juarez	Software Developer
Subject	Betty Brown	Program Manager
Witness	Lisa Loeb	Software Developer

Report Summary

Caller complains that his supervisor, Betty Brown, yelled at him, told him he was a “lazy Mexican,” and pushed him in the supply room a few weeks ago.

Use the report to help structure your investigation

- Analysis
 - ▣ What are the questions you have to answer?
- Facts
 - ▣ What are the facts that are relevant to that analysis?
 - ▣ Credibility assessments, if applicable
 - Illogical inconsistencies in the story
 - Past record
 - Motive to falsify
 - Corroboration
 - Behavior during the interview
- Helps determine what topics to address with each witness

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Report structure

- Sample structure
 - ▣ Table of Contents
 - ▣ Executive Summary
 - ▣ Findings
 - Topic 1
 - Topic 2
 - ▣ Scope of Investigation
 - ▣ Appendices (if necessary)

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Executive Summary

Betty Brown did not yell at Jose Juarez, call him a “lazy Mexican,” or push him

In reaching this conclusion, we considered, among other things, the following:

- Brown denied the claim and there were no other witnesses.
- Kurt Kellogg, who sat outside the supply room at the time of the alleged incident, did not hear any yelling. Kellogg saw Brown leave the supply room and she didn’t appear to be upset.
- Juarez spoke with Kellogg immediately after he left the supply room. He told him only that Brown had complained about a mistake he made and did not mention the alleged yelling, racial slur, or push.
- Juarez has a possible motive to falsify the claim as Brown threatened to put him on a Performance Improvement Plan (PIP) if he didn’t improve his performance immediately.
- Juarez did not mention the alleged incident to anyone until he called the employee hotline three weeks later, a few days after Brown threatened to put him on a PIP.

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Investigation Scope

Investigation Scope

Juarez called the employee hotline on October 22, 2012. In addition to Jose Juarez, we interviewed Lisa Loeb, Betty Brown, and Kurt Kellogg. We also reviewed relevant documents, including:

- Loeb's notes from the September 17 meeting
- Juarez and Loeb's time sheets for September
- All emails for September to or from Brown, Loeb, or Juarez
- Brown, Loeb, and Juarez's personnel files

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Appendices

Appendices

- A. Hotline complaint form
- B. Email from Brown to HR Representative Paula Peoples dated October 21, 2012.
- C. Loeb's notes from the September 17 meeting
- D. Email from Loeb to Brown and Brown's reply (both on Sep. 28, 2012)
- E. Juarez and Loeb's time sheets for September

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Document formatting

- Place extra space after each paragraph
- DON'T USE ALL CAPS
- Don't underline (use bold or italics instead)
- Rarely use footnotes

121 |

Narrative vs. Summary of Interviews

- Editing exercise:
 - ▣ To conduct this investigation, I interviewed 5 people. I have summarized each of their interviews below.
- Write a narrative where you tell the story in the same way a journalist would in a newspaper article.

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Include only relevant facts

- Editing exercise
 - ▣ Lisa Griggs began working for our company on April 21, 2001 in our San Jose, CA office as an IT Consultant. On September 14, 2007, she was transferred from San Jose to Chicago, Illinois. One month before the alleged incident, she was promoted to the position of Program Manager.

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Document sources of all facts

- Editing exercise
 - ▣ Maria was not bothered when Brandon put his arms around her while they were dancing.
 - ▣ Brandon was drinking a lot at the party.
- You need to provide the source of every factual assertion you make in a report.

124 |

Avoid vague conclusive statements

- Be cautious with the use of adjectives and adverbs.

- Editing exercise
 - ▣ It was a cold night.

 - ▣ At the office holiday party, Brandon was very drunk.

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Legal conclusions

- Editing exercise:
 - ▣ Brandon's gift of \$25 to the customs official violates the Foreign Corrupt Practices Act and the UK Bribery Act.
 - ▣ Betty did not commit harassment because even if she called Jose a "lazy Mexican" it would not be so severe or pervasive as to violate Title VII.

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Recommendation for disciplinary actions

- Editing exercise
 - ▣ Because this is the second time that Lucy has committed sexual harassment, I recommend that she be terminated.

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The Writing Process

Why people struggle to write investigative reports

- Why people procrastinate in writing an investigative report
- Two poor approaches to writing
 - ▣ Polish each sentence before you move onto the next sentence
 - ▣ Just “get it down on paper” and then try to edit it

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The six steps of the writing process

1. Visionary (Ideas)
2. Architect (Document)
3. Builder (Paragraphs)
4. Carpenter (Sentences)
5. Interior Decorator (Words)
6. Critic (Revision)

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1. Visionary

Visionary

- Most writing problems are thinking problems
- You must think through the message you want to convey clearly before writing
- Keep it as concise as possible
 - ▣ Understand how technology has changed the way people read

2. Architect (Document)

Outline in detail before you begin to write

- Juarez's alleges...
- Brown denies...
- No witnesses
 - ▣ Kurt didn't hear anything though he was sitting outside the supply room
 - Walls are thin
 - Often hears people talking the in the supply room
- Neither person looked upset when left the supply room
- Juarez has a possible motive to falsify
- Juarez didn't tell anyone about the alleged incident

3. Builder (paragraphs)

Paragraph essentials

- Address one topic per paragraph
- Keep average paragraph under 150 words
- Try to start each paragraph with a topic sentence that connects the previous paragraph to the new paragraph

Lead with your conclusion: Editing exercise

- The Maintenance Department will be doing a series of tests in our office building tomorrow to check the structural soundness of our building. In last month's earthquake, the building was shook in a manner that could have caused damage to the building's pipes and electrical system. While we don't expect that there is any damage, it's better for us to check it out. As a result, employees cannot report to the building tomorrow and instead should either work from home or take unscheduled leave. We value the safety of our employees.

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4. Carpenter (Sentences)

Sentence length and structure

- Use sentences of variable length but the average length should be under 25 words
- Place the information that you want to emphasize at the end of the sentence—this is usually the new information
- Editing Example:
 - ▣ “Javier accepted two Super Bowl tickets from a sales rep while attending a conference in Los Angeles in January 2012.”

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Favor the active voice

- Passive voice: Be verb followed by a past participle
- Actor voice: Actor-action-recipient of the action
- Editing exercise:
 - ▣ “The employee was dismissed by the manager.”

 - ▣ “Testimony was taken from four employees that they had been yelled at by Larry.”

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Don't make a verb into a noun

- Verbs are more concrete and help the reader focus on the action in the sentence
- Editing exercise
 - ▣ “I conducted the investigation of the sexual harassment allegations.”
 - ▣ “She provided a description of...”
 - ▣ “We took into consideration...”

141 |

Use real names and avoid formal language

Editing exercise:

- “Glenda Rodriguez (“Complainant”) and Steve Barnes (“Respondent”) went to an industry conference last week. According to the Complainant, the Respondent made several comments of a sexual nature to her during the conference that caused her great offense. The investigator interviewed the Complainant and Respondent.”

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Avoid words that you wouldn't normally say

Editing exercise:

- Exited
- Testified
- Observed
- Accompanied by
- Subsequent to
- Prior to
- In the event that

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5. Interior Decorator (Words)

Leave out unnecessary words

Editing exercise

- An adequate number of
- At the present time
- During such time as
- For the reason that
- In the event that
- Is able to
- Notwithstanding the fact that
- On the ground that
- The fact is that

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Minimize the use of the word “of,” which often indicates a wordy construction

Editing exercise

- He committed acts of an unethical nature.

- The managers of the department spoke with the employees of the union.

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6. Inspector (Revise)

Revision process

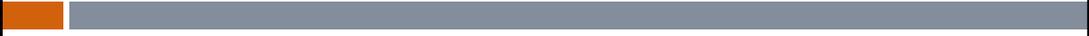
- “There is no great writing, only great rewriting.”
Justice Louis Brandeis
- Break editing process into multiple stages
- Ask another set of eyes to look at it
- Allow some break of time between writing and editing
- Edit final version in print

Overcoming Writer's Block

How to overcome "Writers' Block"

- Outline the report throughout your investigation
- Break writing process into the 6 steps discussed above
- Put in calendar each day a specific time to write
- Avoid distractions
- 15 minutes to "prime the pump"

Questions?



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Sample Investigation Report with Comments

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Investigation Report

TO: Josh James, V.P., Ethics and Compliance
FROM: Will McAllister and Tonya Robinson, Investigators
SUBJECT: Allegations against Betty Brown for harassment and mischarging
DATE: October 29, 2012

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Executive Summary	1
Findings	2
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B. Betty Brown directed Jose Juarez and Lisa Loeb to mischarge their time	4
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Comment [1]: Include a table of contents, especially if document is more than 6 pages in length. Make the page numbers “clickable” so that the reader can go to the selected section when reading the document electronically.

Comment [2]: Use descriptive headings that tell the reader your conclusions, not just the topics covered. See A and B under Findings section.

Executive Summary

Software developer Jose Juarez called the employee hotline on October 22, 2012, and alleged that his supervisor, Program Manager Betty Brown, yelled at him, called him a “lazy Mexican,” and pushed him in a supply room on October 1, 2012. ([Appendix A](#))

Comment [3]: The executive summary provides a brief overview of how you learned of the allegations, what your conclusions are, and the most important facts that are relevant to those conclusions.

Comment [4]: Use bold or italicized headings. Only use underlining when you are hyperlinking to another portion of the report, such as an appendix, or to a website.

In our interview of Juarez, he also claimed that during a meeting on September 17, 2012, Brown told him and software developer Lisa Loeb to mischarge time on Project A to Project B during the following two weeks. Because both Project A and Project B are part of a government contract, once we learned of this allegation we immediately contacted the Corporate Ethics Office, our Group Ethics Officer, and Group Counsel. We conducted the rest of the investigation under the attorney-client privilege.

Comment [5]: Cite to appendices, which are attached to the back of the report. You can hyperlink the reference to the appendix to the actual document at the back of the report. This allows the person who is reading the document on a computer or other electronic device to quickly go directly to the referenced document.

We investigated the harassment and mischarging allegations and have detailed the information we gathered in this report’s Findings section. We include below some of the more important findings.

Comment [6]: Use an unjustified right margin. Documents that are fully justified (on the left and the right) are more difficult to read as they have sometimes have unnatural spaces between words.

Betty Brown did not yell at Jose Juarez, call him a “lazy Mexican,” or push him

In reaching this conclusion, we considered, among other things, the following:

- Brown denied the claim and there were no other witnesses.
- Kurt Kellogg, who sat outside the supply room at the time of the alleged incident, did not hear any yelling. Kellogg saw Brown leave the supply room and she didn’t appear to be upset.
- Juarez spoke with Kellogg immediately after he left the supply room. He told him only that Brown had complained about a mistake he made and did not mention the alleged yelling, racial slur, or push.
- Juarez has a possible motive to falsify the claim as Brown threatened to put him on a Performance Improvement Plan (PIP) if he didn’t improve his performance immediately.
- Juarez did not mention the alleged incident to anyone until he called the employee hotline three weeks later, a few days after Brown threatened to put him on a PIP.

Comment [7]: Don’t use ALL CAPS or initial caps for headings, as they slow the reader down. ALL CAPS, in particular, are very difficult to read and the reader may think you’re shouting.

Comment [8]: Use bulleted lists often. Paragraphs are not always the clearest way to convey information.

Betty Brown directed Jose Juarez and Lisa Loeb to mischarge their time

In reaching this conclusion, we considered, among other things, the following:

- Although Loeb denied that Brown gave an order to mischarge time during the September 17 meeting, Loeb’s notes from the meeting say, “A hours to B for next two weeks.”
- Before the September 17, 2012 meeting, Juarez and Loeb were billing 30 hours per week to Project A. Neither billed any hours to Project A during the following two weeks.
- Although an email shows that Brown knew Juarez and Loeb were working on Project A during the two weeks following the meeting, she approved of their time sheets, which included no hours assigned to Project A.
- Brown provided several evasive answers during her interview.

Comment [9]: State findings in factual terms and don’t include legal conclusions such as “in violation of the law.”

Findings

A. Betty Brown did not yell at Jose Juarez, call him a “lazy Mexican,” or push him

Juarez claimed that on October 1, 2012, Brown came into the supply room where Juarez was alone and yelled at him because he had included several incorrect figures in a memo provided to Brown’s supervisor. Juarez claimed that Brown yelled at the top of her voice for at least 30 seconds. According to Juarez, when he asked Brown to “calm down,” she became very upset, called him a “lazy Mexican,” pushed him, and rushed out of the

Comment [10]: Write a narrative where you merge each person’s statement and the relevant documents into a coherent story organized by topic. Don’t just include a summary of each person’s interview.

Comment [11]: Provide the source of every fact you include. This can make for a somewhat awkward writing style, as you begin a lot of sentences with “According to…” or “Juarez said that…”

supply room. Juarez says that he told Brown not to touch him. He left the supply room a few minutes later after he got his supplies.

Brown denied Juarez’s claims. She acknowledged that in the supply room she reprimanded Juarez for the incorrect figures in the memo. She denied, however, that she yelled at him, saying that she wasn’t even particularly upset at him. She said she simply told him that he had to be more careful in his work, as he often makes careless mistakes. Brown denied calling Juarez a “lazy Mexican” or making any reference to his nationality. When asked if she pushed Juarez, Brown said, “No! I never touched him. Is he saying that? He’s lying.”

No one saw the alleged incident, as both Juarez and Brown said they were alone in the supply room. Project manager Kurt Kellogg, who was sitting at his desk outside of the supply room during the time of the alleged incident, says he did not hear any yelling. According to Kellogg, the walls are pretty thin so that he often hears people who are standing by the copy machine in the supply room talking loudly.

Kellogg says he remembers seeing Brown leave the supply room, and that he didn’t notice her being upset. According to Kellogg, a few moments after Brown left, Juarez left the supply room and stopped by his desk. Because Juarez looked concerned, Kellogg asked him if everything was okay. Kellogg says that Juarez responded, “Yeah, I’ve just got to be more careful in my work. I think the boss (Brown) is pretty frustrated with me.” According to Kellogg, Juarez did not seem especially upset or mention anything about Brown yelling at him, calling him a “lazy Mexican,” or pushing him. Given that Juarez and he are good friends, Kellogg said that he would have expected Juarez to tell him about the incident at some point if it had occurred.

Juarez did not share his concerns about the alleged incident with Kellogg or anyone else until he called the employee hotline three weeks later on Monday, October 22. He said that he didn’t tell Kellogg about what happened after he left the supply room because he was still “processing what had occurred.” When asked if before calling the hotline he told any of his co-workers, friends, spouse, or family members about Brown’s actions in the supply room, he said that he had not, saying, “I didn’t want to worry them.”

Juarez has a possible motive to falsify the allegation. Brown and Juarez both told us that on Friday, October 19, Brown told Juarez that she was not satisfied with his performance, particularly his lack of initiative and attention to detail. Brown said that she also told him that if his performance did not improve dramatically, she was going to place him on a Performance Improvement Plan (PIP). If he didn’t successfully complete the PIP, she would fire him. Immediately after their meeting, Brown emailed her HR representative, asking, “I have an employee with significant performance issues. What steps do I need to take?” ([Appendix B](#)).

Comment [12]: Keep average paragraph to under 150 words. (This paragraph is 128 words.)

Comment [13]: Try to start paragraphs with a topic sentence. Address only one topic per paragraph.

Comment [14]: Use sentences of varying length but keep average sentence to under 25 words. In readability formulas, shorter sentences are easier for people to read. You can use short sentences to give emphasis to a sentence. (The sentences in this section of the report average 23 words per sentence.)

Privileged and Confidential

Based on the above, we found that Brown did not yell at Jose Juarez, call him a “lazy Mexican,” or push him.

B. Betty Brown directed Jose Juarez and Lisa Loeb to mischarge their time

During his interview, Juarez said that on September 17, 2012, Brown told Juarez and another software developer, Lisa Loeb, that during the next two weeks they should assign all hours from Project A to Project B. Both projects are part of the same contract with a government client. According to Juarez, Brown explained that they were near the limit for their hours budgeted for Project A, but they had “extra” hours available for Project B. According to Juarez, Brown said that she was getting pressure from her boss to bring both projects in “under budget.” Juarez said that he asked Brown if it was okay to charge hours in this way and she responded that it was fine.

Brown denied telling Loeb or Juarez to assign hours from Project A to Project B during the meeting or at any other time. Brown said that she did not even discuss Project A during the September 17 meeting.

Lisa Loeb, however, remembers that Brown discussed Project A during the meeting. Loeb, though, said that she doesn’t remember Brown saying to charge hours from Project A to B. She said that while Brown discussed the need to work efficiently on Project A as they were near the limit of budgeted hours, she doesn’t think Brown said they should charge hours from Project A to B.

Juarez, of course, has a motive to falsify this allegation against Brown, as discussed above. Loeb, however, may also have a motive to falsify her statement in support of Brown. Loeb and Brown are very good friends, and Brown recently was a bridesmaid in Loeb’s wedding.

Several documents suggest that Brown did order Juarez and Loeb to charge hours worked on Project A to Project B during the last two weeks of September. First, we asked Juarez and Loeb if they took notes during the September 17 meeting. While Juarez did not, Loeb did and, at our request, produced her notebook, which she had with her during the interview. Her notes from the meeting said in part, “A hours to B for next two weeks.” Loeb said she could not remember what she meant in writing this down. ([Appendix C](#))

Emails show that Brown was aware that Loeb and Juarez worked on Project A during the two weeks following the September 17 meeting. On September 28, Loeb sent an email to Brown that said, “Jose and I have been working on Project A for most of the last few days and a few questions have come up. Can we meet?” Betty replied that day, “Sure, just let me know when is a good time.” ([Appendix D](#)).

Despite this knowledge, three days later on October 1, Brown signed off on both Loeb and Juarez’s time sheets, neither of which included any time spent on Project A for the last two weeks in September. (Appendix E). When asked why she signed the documents, Brown said that it was just an oversight, as she was really busy the day she was reviewing their time sheets. Loeb explained that she must have made a mistake when filling out her time sheet, while Juarez said he was simply following Brown’s order.

Finally, Brown gave evasive answers during her interview that suggested she was not being fully forthcoming. When asked if she told Juarez and Loeb to charge hours from Project A to Project B during the September 17 meeting, she responded, “That doesn’t sound like something I would do.” When pressed if she may have said that, she responded, “I’ve always been a great employee and I’m very conscientious about the rules.” When asked again if she may have said this, she responded, “Look, Lisa and Jose are relatively new employees. They probably don’t fully understand the time charging rules.”

Based on the above, we found that Brown directed Jose Juarez and Lisa Loeb to mischarge hours from Project A to Project B. Brown’s actions violate our Code of Ethics and Business Conduct, which requires employees to report time in accordance with their business unit’s time charging policies and procedures.

Investigation Scope

Juarez called the employee hotline on October 22, 2012. In addition to Jose Juarez, we interviewed Lisa Loeb, Betty Brown, and Kurt Kellogg. We also reviewed relevant documents, including:

- Loeb’s notes from the September 17 meeting
- Juarez and Loeb’s time sheets for September
- All emails for September to or from Brown, Loeb, or Juarez
- Brown, Loeb, and Juarez’s personnel files

Appendices

- A. Hotline complaint form
- B. Email from Brown to HR Representative Paula Peoples dated October 21, 2012.
- C. Loeb’s notes from the September 17 meeting
- D. Email from Loeb to Brown and Brown’s reply (both on Sep. 28, 2012)
- E. Juarez and Loeb’s time sheets for September

Comment [15]: Rarely use footnotes. If it’s not important enough to put in the text of the report, it probably can be left out.

Comment [16]: Consider putting the section that describes how you investigated the matter at the end of the report. It’s almost never as important as what you concluded and the facts that support your conclusion.

Comment [17]: Tell who you interviewed and the type of evidence you reviewed. You don’t need to provide a step-by-step account of how you conducted the investigation.

Comment [18]: The report should be written as a stand-alone document so that all relevant information is referenced in the report without the need for the reader to examine other documents. You can, however, include particularly pertinent documents as exhibits. Do not include your interview notes as exhibits.