

# EMPLOYEE AND LABOR RELATIONS ACADEMY

Workplace Investigation Best Practices

*GVHR Breakfast*

*April 5, 2018*

Facilitated by:

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# Anita D. Tinney, Esq.

*The Employee and Labor Relations Academy is a consulting firm focused on training and best practices in Employee Relations, Labor Relations, HR Compliance, Workplace Investigations, Preventative and Proactive Labor Relations and Organized Labor.*

*Anita became Principal Consultant at ELRA after twenty-two years in the private sector as an internal consultant in HR, Operations and Employee and Labor Relations. She has had a very successful career in ER/LR at some of the largest Fortune 100 Companies in the world, including Merck & Co., Inc., Johnson & Johnson World Headquarters, Comcast Cable and AmerisourceBergen Corporation. She has extensive experience in all facets of Employee and Labor Relations in both U.S and Global ER/LR.*

*Anita holds an Employment and Labor Law degree from Temple University and a B.S. in Electrical Engineering from Hampton University. She is Six Sigma certified, a certified Mediator and EEO Investigator, a certified Corporate Trainer, and member of the New Jersey State Bar Association.*

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# BEST PRACTICE #1

Trained investigators

# Importance of Investigator's Credentials

Only 10% of investigations will ever go external (EEOC, litigation, DOL/Agency, Arbitration, Employee Representation)

The first thing opposing attorney will do is establish whether or not the investigator is CREDIBLE

If the opposing attorney can establish a lack of formal training, the case will TURN to be about the investigator, not the allegations

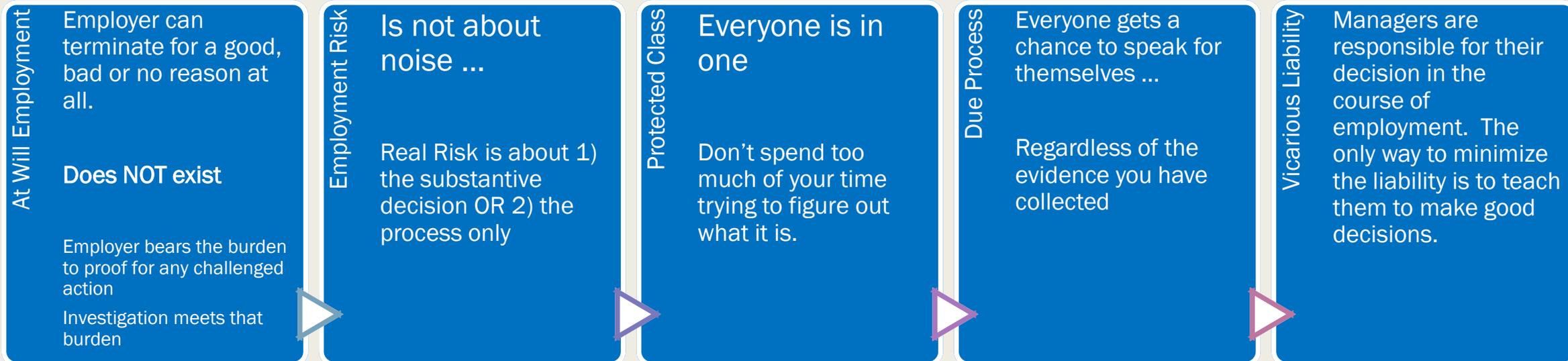
If the Company doesn't think it is important enough to provide training, the Company is NEGLIGENT

If the Company is NEGLIGENT in this regard, it is surely negligent on the EMPLOYMENT DECISION itself

# BEST PRACTICE #2:

Employment terms

# Know these Employment Concepts



# BEST PRACTICE #3:

Standards of proof

# Standards of Proof in the United States

Type of Case	Standard	%	Characteristics
Criminal Cases	Beyond a Reasonable Doubt	99%	Are you guilty or innocent? Investigators can be manipulative or lie
Civil Cases and some Criminal Procedure	Clear and Convincing Evidence	75% (substantially more likely than not)	Whose fault is it? Investigators have some leeway
Civil Cases	Preponderance of the Evidence	51% (more likely than not)	Whose fault is it? Investigators have some leeway
Workplace Investigations	Good Faith Investigation and Reasonable Conclusion	Reasonableness (Reasonable person standard)	Did you conduct a good investigation and come to a reasonable conclusion?

# BEST PRACTICE #4:

The investigation decision

# Three Ways to Manage Workplace Conflict / Complaints

	Consultation	Intervention	Investigation
Definition	Working with an employee or manager to assist them in resolving their own conflict	Intervening in an informal process as a mediator of interpersonal conflict to resolve it before it escalates and creates employment risk	Conducting a formal investigation into an issue, allegation or complaint that carries employment risk for the Company
Legal Implication	None	No apparent implication unless the issue escalates or is mishandled	High, allegation of illegal conduct or the potential employment action is likely to be challenged
Criteria	There is a great potential of resolving the issue and building conflict management capability in employees and managers	The manager is ill-equipped to manage the issue or the employee is unwilling to engage due to lack of trust in management	The allegations are required to be investigated by law. The complaint raises a potential serious violation of Company policy.

***Not every issue or escalation needs to be investigated!***

# BEST PRACTICE #5

CHOOSING THE RIGHT INVESTIGATOR

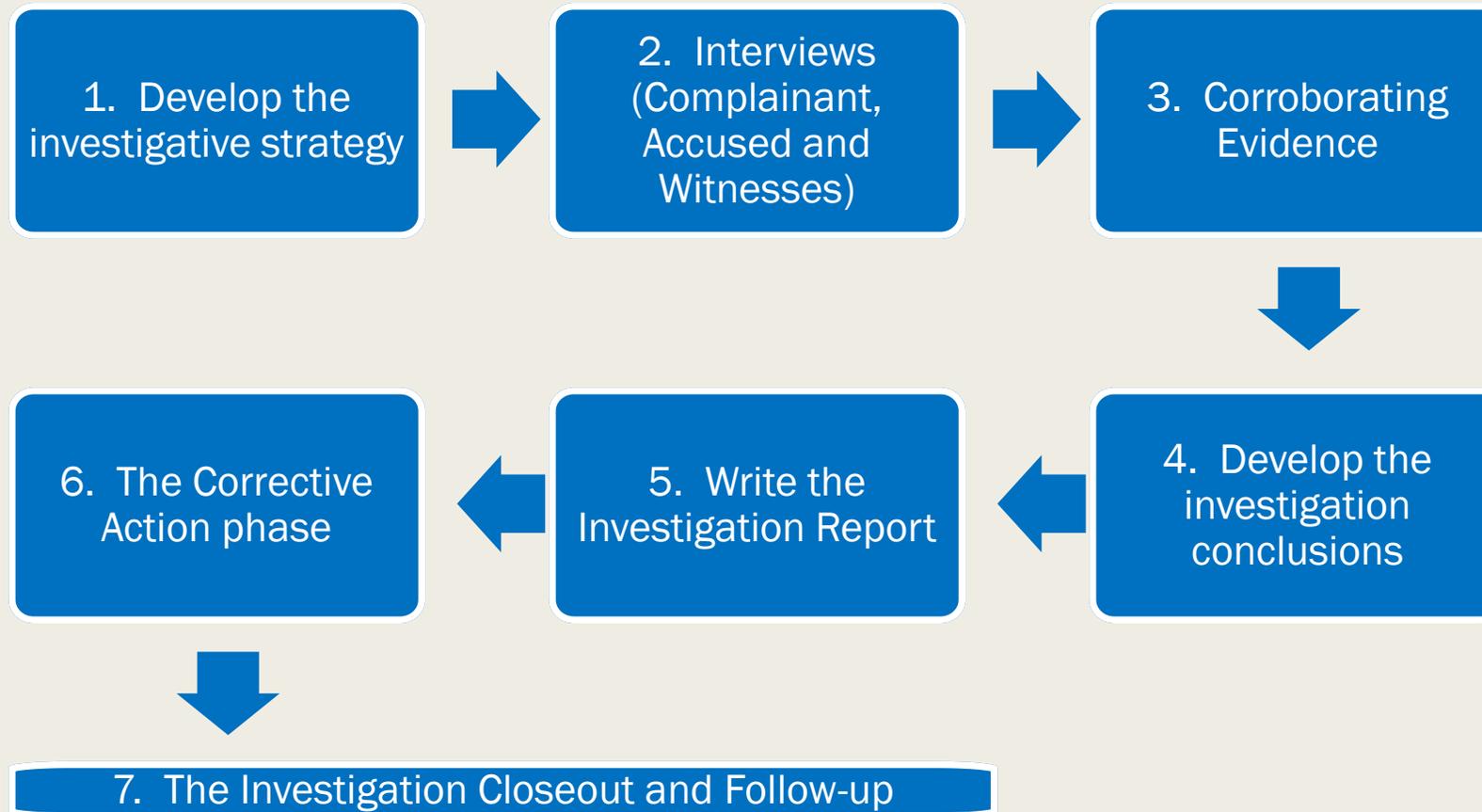
# The Investigator's Role

- An unbiased, objective fact finder (shouldn't be the manager)
- A person who instills confidence in the Company's investigation process
- An effective advocate for speedy resolution of the complaint
- Respects and maintains confidentiality
- Manage the “art” and the “science” of the investigation
  - *Analytical skills and psychology of human behavior*
- Understand and properly apply the principles of employment law and policies
- Identifies root cause of employee behavior to develop corrective solutions

# BEST PRACTICE #6

having a consistent investigative process

# The 7-step Investigative Process



# BEST PRACTICE #7

PLANNING

# The Investigative Strategy

- Summarize the Complaint
- Identify Implicated Policies
- Identify Potential Witnesses
- Identify Potential Documents / Other Evidence You May Need
- Plan your interim steps, if any
- Consider complicating factors and brainstorm mitigating actions, if any
- In Person or Virtual

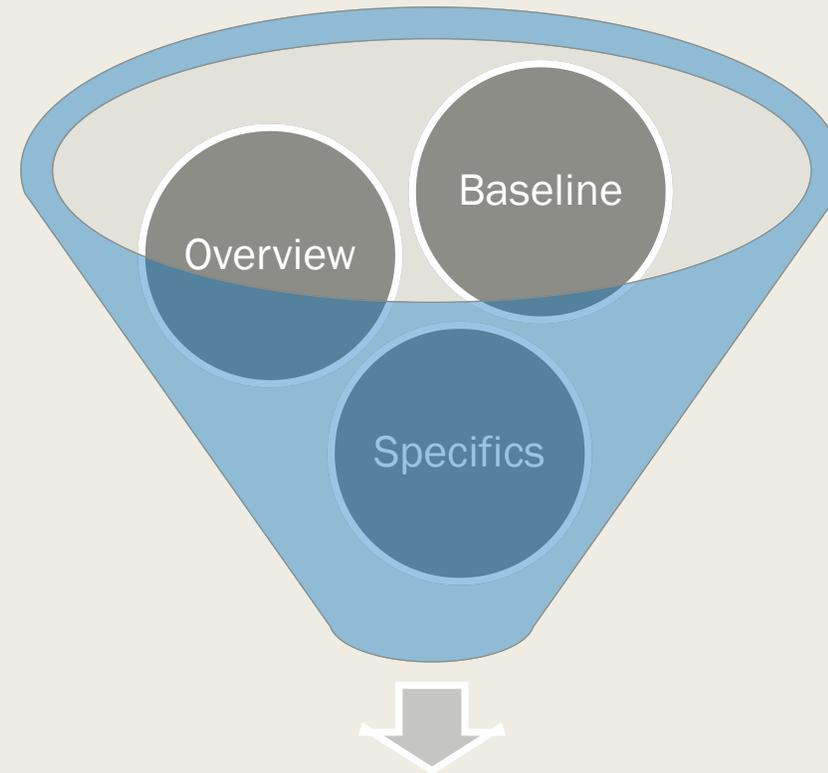
# BEST PRACTICE #8

Productive interviews

# The Structure of Interviewing Productivity

## THE SPEECH

1. Baseline
2. Overview
3. Specifics
4. Opportunity to Refute
5. The Closing



Interview Questionnaire

# The Most Effective Interviewing Order



# Employee's Rights

## ■ Don't Have

- *Fifth Amendment (Right to remain silent vs. duty to cooperate)*
- *Right to counsel during investigation (except employees who have been charged)*
- *Right to confidentiality of investigation*
- *Workplace Privacy (email, voicemail, text, office space, etc.)*
- *Right to record (check state or local law)*

## ■ Do Have

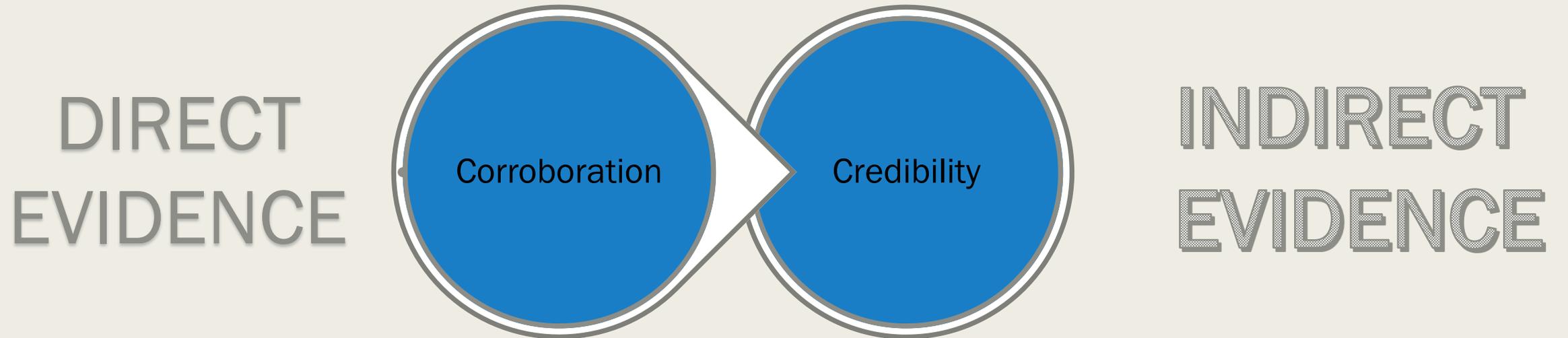
- *Due Process Rights (public policy)*
- *Weingarten rights (right to union representation if potential outcome is corrective action)*
- *Upjohn Warnings for investigations by attorneys*
- *Rights against retaliation (even if the underlying claim is unsubstantiated)*
- *Limited right to discuss details of the investigation (under NLRA)*

# BEST PRACTICE #9

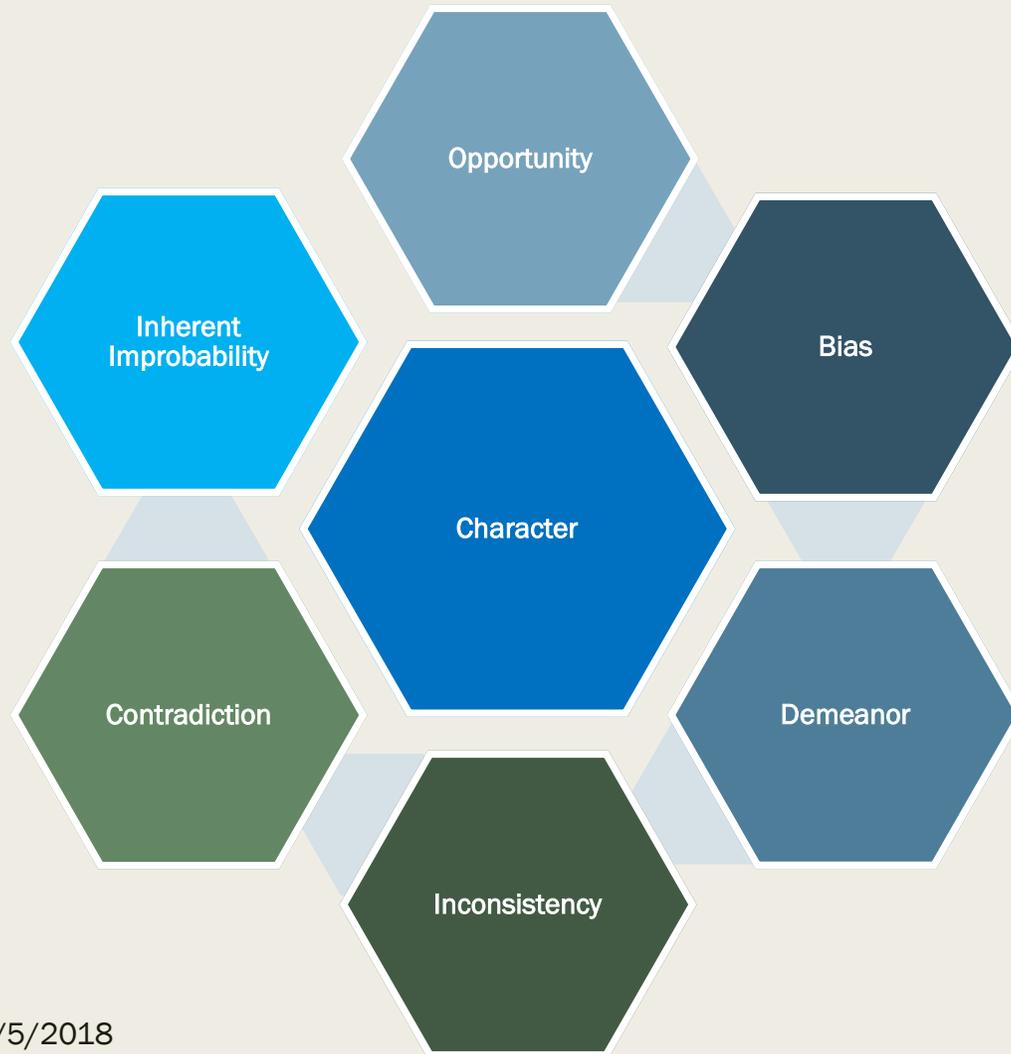
CORROBORATION AND CREDIBILITY

# Corroborate

## The He-Said, He-Said Investigation Analysis



# Assessing Witness Credibility



## Evaluating Credibility

# BEST PRACTICE #10

INVESTIGATIVE WRITING

# #10: The Investigation Report

- Writing is NOT FOR YOU
- Analytical v. Persuasive Writing
  - *Conveys information to the reader in a concise and logical manner (no legalese)*
  - *Articulates and explains relevant vs. determinative facts*
  - *Reaches a conclusion based on the “4 corners” of the document.*

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