

# **The Investigation as Evidence: When Process Creates Liability**

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*Ski & CLE – Steamboat Springs, Colorado*



# Agenda

## *The Evolution of Litigation Pretext*

**based on the quality of a  
workplace investigation**



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**INVESTIGATIONS**  
L A W G R O U P

# How are Investigations Commonly Used in Litigation?

## *Defense Perspective*

- *Affirmative Defense*
- *Discovery goldmine*
- *Settlement leverage or incentive*
- *Narrative framing for jury*

## *Plaintiff Perspective*

- *Discovery goldmine*
- *Evidence of pretext*
- *Pre-litigation resolution*
- *Drive improvement of the workplace*

**The “good  
enough”  
Investigation**



# **Sham** Investigation as Cover-up (Pretext Evidence)

1. Failure to consider **both sides**

2. Failure to follow up on **important evidence**

“A jury may reasonably conclude that further investigation would have confirmed what [the plaintiff] said.”





3. **Fabricating, ignoring or misrepresenting evidence.**

4. Subjecting **different classes of complainants** to different investigative scrutiny.

5. Circumscribing the **scope** so it leads to the **desired outcome.**

6. **Deviating** from proper investigation process may signal a sham investigation

7. Assigning the investigation to the cowboy Sheriff who answered the phone an inexperienced unqualified investigator.

8. Failure to Investigate at all

9. Not explaining the investigator's assessment of witness credibility



# 10. Abysmally bad investigations can lead to **big verdicts**

Who was assigned to conduct this investigation?

Was this person unbiased?

Timeline manipulation and retaliation blindness.

Report quality and reasoning defects.



**SHRM, the world's largest HR group, has been hit with an \$11.5 million verdict in a racial discrimination lawsuit**

- *Owens v. Circassia Pharmaceuticals, Inc.*, 33 F. 4th 814 - Court of Appeals, 5th Circuit 2022.
- *Jenkins v. Nell*, 26 F. 4th 1243 – (11th Cir. 2022).
- *Smothers v. Solvay Chems. Inc.*, 740 F.3d 530 (10th Cir. 2014).
- *Kramer v. Wasatch County Sheriff's Office*, No. 12-4058 (10th Cir. Feb. 25, 2014).
- *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91 (2009).
- *Castelluccio v. IBM*, 2013 WL 6842895 (D. Conn. Dec. 23, 2013).
- *Franklin v. City of Moss Point, Mississippi*, 2015 WL 12672706 (S.D.Miss., 2015).
- *Harden v. Marion County Sheriff's Dept.* (7th Cir. Aug. 25, 2015).



# What the **EXPERTS** say

- **Why use one?**
- **Case studies**
- **Pros and Cons**

A top-down photograph of a person's hands holding a heart-shaped slice of bread. The person is wearing a white long-sleeved shirt and a black leather watch. The background is a rustic wooden table with various items: a loaf of braided bread in a white cloth, a red apple, several cinnamon sticks, and a small basket of white flowers. The text "Thank you!" is overlaid in a stylized, hatched font.

Thank you!

Presented by:  
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