

# Credibility, Relevance, and Hearsay

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# What is Credibility?

“**credibility** *n.* (16c) The quality that makes something (as a witness or some evidence) worthy of belief. — **credible**, *adj.*”

--Black's Law Dictionary

“As with any other charge of discrimination, a victim's account must be sufficiently detailed . . . so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.”

--Appendix B: EEOC Guidance



# Credibility Determinations

Credibility may not be determined by:

- A “sense” or “feeling” that someone is dishonest.
- Credibility is not determined subjectively—it’s determined by comparisons to the Record.

Credibility may be determined by:

- Statements that are self-inconsistent;
- Statements that are inconsistent with the Record;
- Statements that are implausible or incoherent in light of the Record;
- (For witnesses) The existence of evidence of a motive to lie; and/or
- (For parties) *Ad hominem* attacks or other “defenses” that are not supported by the record.



# Credibility Determinations

A witness (or party) may be impeached by:

- Questioning whether the witness is impartial;
- Questioning the witness' statements in light of specific Record material;
- Questioning the witness' statements in light of common sense;
- Observing whether the witness gives true and complete answers;



# Credibility is Issue by Issue

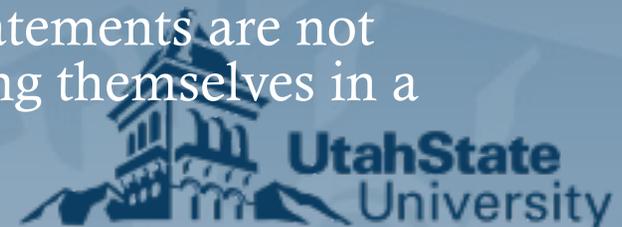
A party (or witness) may be credible on one or more issues and less credible on others. For example:

- A Respondent asserts that there was sexual contact, which is supported by the statements of an impartial witness; however, Respondent asserts that the sexual contact was consensual, which is contradicted by the statement of the treating health practitioner, who asserts that the injuries suffered by Claimant were most consistent with forcible sexual assault.

# Credibility Problems can be Addressed

A witness (or party) may address concerns with credibility by:

- Explaining why they are impartial;
- Explaining how their statements are consistent with specific Record material;
- Explaining why their statements have changed over time (memory is not always perfect);
- (For Witnesses) Explaining why their statements are not complete (commonly, to avoid prejudicing themselves in a parallel criminal proceeding)



# Refusal to Answer (Intro.)

- A witness (or party) who refuses to be subject to cross-examination (relevant questioning by the other party) on any issue loses the ability to have any of their statements (in the hearing or prior to the hearing) considered.
- However, a Respondent's refusal to be subject to cross-examination cannot “solely” lead to an inference that they committed the alleged policy violation.
- Yet: “If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements.”
  - Thus, decision-makers may consider, to some extent, refusals to answer the question of the decision-maker.

# Credibility cannot be based on Party Status

- Credibility determinations may not be based on a person's status as a Claimant, Respondent, or witness. §106.45(b)(1)(ii).
- In general, a Claimant is no more or less credible than a Respondent (or a witness).



# Questions?



# Presentation of Relevant Evidence

- “[T]hroughout the grievance process, a recipient must not restrict the ability of either party . . . to gather and present relevant evidence.” §106.45(b)(5)(iii).
- “The recipient must make all evidence [directly related to the allegations] subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.”  
§106.45(b)(5)(vi)



# What is Relevant?

- **relevant** *adj.* (16c) Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value — that is, rationally tending to persuade people of the probability or possibility of some alleged fact. Cf. [material \(2\)](#), [\(3\)](#).

--Black's Law Dictionary



# Determining Relevance

- Our procedures state: “Evidence is relevant if it tends to make the allegations at issue more or less likely to be true.”

*See also:*

- “Ordinary meaning of relevance should be applied throughout the grievance process.” 85 FR 30247, n. 1018.
- “Fact determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense.” 85 FR 30343



# Always Irrelevant

The following evidence is always considered “irrelevant”:

- Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent;
- Any information protected by a legally recognized privilege without waiver; and,
- Complainant’s sexual predisposition or prior sexual behavior (subject to two exceptions, referred to colloquially as “rape shield protections”)

85 FR 30293 n. 1147

(Cite: Saul Ewing Arnstein & Lehr LLP)



# Sometimes Irrelevant

Everything else.

- Difficult Example: Respondent wishes to ask questions of Claimant to demonstrate that Claimant has made false allegations of sexual harassment in the past.
- Easier Example: Respondent wishes to ask questions of Claimant about Claimant's desire to run for student body president.



# Rape Shield Protections, Predisposition

- All questions and evidence of a complainant's sexual predisposition are irrelevant, with no exceptions. 85 FR 30352.
- Sexual predisposition means: The Claimant's "mode of dress, speech, or life-style." Advisory comment to Fed. R. Evidence 412.



# Rape Shield Protections, Prior Sexual Behavior

- Questions and evidence of a complainant's prior sexual behavior are irrelevant, with two exceptions. 85 FR 30352.
- Prior sexual behavior means: “all activities that involve actual physical conduct, i.e., sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact.” Advisory comments to Fed. R. Evid. 412.



# Rape Shield Protections, Exceptions

- Questions and evidence of a complainant's prior sexual behavior are irrelevant, with two exceptions. 85 FR 30352.
  - Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the policy violation. (Ex. Proof that injuries were caused by another person.)
  - Exception 2: Evidence of prior sexual behavior is permitted if it is about the Claimant and Respondent's history together and is offered to prove consent. 34 CFR § 106.45(b)(6) (Ex. Proof of past consensual intercourse between Claimant and Respondent.)



# Relevance Determination Process

- The Hearing Panel is responsible for determining relevance in real time. Recesses may be taken. Assistance may be provided by a Hearing Officer. Parties must be able to object to Relevance Determinations.
  - Questions are submitted in advance of asking, reviewed by the panel, determinations and rationales are announced, and objections are solicited and considered (one round).
  - No “lengthy or complicated explanation” is necessary.
  - Ex. “Question 11 is irrelevant because it asks for the sexual predisposition of the Claimant.”

# Questions?



# Hearsay Exclusion

- A witness (or party) who refuses to be subject to cross-examination (relevant questioning by the other party) on any issue loses the ability to have any of their “statements” considered.
  - However, a Respondent’s refusal to be subject to cross-examination cannot “solely” lead to an inference that they committed the alleged policy violation.



# What is a “Statement”?

**statement** (18c) 1. *Evidence.* A verbal assertion or nonverbal conduct intended as an assertion.

--Black's Law Dictionary

- “Statements” do not include videos depicting an act because there is no person's intent to make factual assertions
- Police reports, SANE reports, medical reports, other documents and records may not be relied upon to the extent they contain statements of a party who has not been cross-examined

85 FR 30349



# What is “Cross-Examination”?

“Cross-examination” only happens when a party asks a relevant question and only on the relevant topics *asked about*.

- “If a party chooses not to conduct cross-examination of another party or witness, that other party or witness cannot “submit” or “not submit” to cross-examination. Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination. The same is true if a party’s advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions not asked of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the decision-maker is not precluded from relying on that party’s or witness’s statements.” Sep. 5 2020 Q&A.



# Analyzing “Cross-Examination”?

- If no cross-examination: All relevant statements are considered.
- If some cross-examination and the person answers all questions: All relevant statements are considered.
- If some cross-examination and the person refuses to answer one or more questions: All statements are excluded.
- If an irrelevant question is asked, no effect.

# Exclusion Example

Ex. 1: Respondent asks Claimant, “Is there any evidence in the Record at all that the harassment occurred as you have alleged?” Claimant refuses to answer.

- The Claimant’s interview responses, where he describes the allegations and the evidence therefore, are excluded, along with all other statements of the Claimant.

# Exclusion Example

Ex. 2: A nurse specialist performed a SANE exam on Claimant but refused to attend the hearing.

- The written SANE exam finding, where injuries relating to sexual conduct are detailed, is excluded, along with all other statements of the nurse specialist.
- Note that photographs/video taken by the nurse specialist, if any, are admissible.



# Confessions?

Confessions outside of the hearing are hearsay.

- Consequently, in the case of a confession, a rational Claimant might ask no questions. If Claimant asks questions, a rational Respondent will refuse to answer (which exclude the hearsay components of the confession).

# Exception 1: Questions from the Panel

Questions from the Panel do not trigger the hearsay exclusion.

- *If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements (may not rely only if the party or witness does not submit to cross-examination which is done by the advisors). 85 FR 30349.*

Ex. Respondent asks no questions of Claimant. Panel asks Claimant, "What is the best evidence in the Record that the harassment occurred as you have alleged?" Claimant refuses to answer the Panel.

The Claimant's interview responses, where he explains what he believes the best evidence is, may be considered.



# Exception 2: Sexually Harassing Statements

- The hearsay prohibition does not apply if the Respondent's statement itself constitutes the sexual harassment alleged.
- Ex.: Claimant asserts that Respondent said multiple times that Claimant was “sexy,” including in an email. Respondent refuses to submit to cross-examination. Respondent's email may be considered.



# Partial Exception: Intertwined Communications

The hearsay prohibition only applies to the statements of the individual who refuses to submit to cross-examination.

- Complex Example: A text message chain of discussion is submitted into evidence allegedly from the night of a purported sexual assault. In the texts, the Claimant states that she believes “that you didn’t have my consent to touch me,” and Respondent replies, “I’m sorry, I should have known better.”
- Respondent refuses to answer questions about the texts. The texts sent by Respondent are therefore excluded. Claimant is asked about the texts only by the Panel, and she refuses to answer them, citing Respondent’s refusal. Claimant’s texts are not excluded because Claimant has not refused to be cross-examined.

# Hearsay Process

Hearsay decisions should be noted and explained in the panel's report.

- Ex.: “The Panel determined that [Claimant/Respondent/Witness] was subjected to cross-examination by a party and [Claimant/Respondent/Witness] refused to respond to questions. Therefore, the statements of [Claimant/Respondent/Witness] are excluded, including . . . .”

# Questions?



# Thank You!

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