**A Few Components of Credibility**

*Minnesota Court of Appeals Judge Gordon Shumaker*

Unemployment law judges are required to make credibility determinations in their decisions when there is a material disagreement as to the facts. Assessing credibility can be challenging, and it does not necessarily mean that the ULJ is saying one person is a "liar."

ULJ's are typically dealing with credibility in another sense, in the sense of **accuracy.** In other words, the ULJ listens to the testimony and determines who is more likely giving a more accurate version of events. A ULJ may consider witnesses who actually saw or heard what happened, for example, as more likely to give an accurate version of events than witnesses who are retelling a story they learned from another (giving hearsay testimony).

There are many factors to consider in assessing accuracy, including the following:

* Ability and opportunity to know the facts;
* Ability to recall the facts;
* Plausibility of the testimony; and
* Recitation of the facts.

**Ability and opportunity to know the facts:**

* Did the witness have personal capability or capacity to know the facts? Or did he have an impairment or impediment of some sort that would make it unlikely that he could have acquired the knowledge he claims?
* Opportunity has to do with "positioning," that is, was the witness in a place and at a time and so situated that she could actually gain the knowledge she claims to have? Also, is it the witness's job to be percipient, that is, to keenly observe?
* Under this category, we might explore physical, mental, and emotional issues—if there are any. We also explore environmental issues. And we explore circumstances. A ULJ's assessment of credibility then might depend on determining whether the witness was physically, mentally and emotionally able to perceive, whether the witness was in a position to actually do so, and whether the circumstances were such that accurate perceptions were possible, likely, or highly probable.

**Ability to recall the facts**

* This is a test of memory, and we all have varying degrees of recall ability.
* Inability to recall significant facts reflects on overall accuracy and credibility.
* Selective recall, remembering only certain details, and excessive recall, that is, remembering even trivial and minor details, might impact the credibility of the witness.

**Plausibility of the facts**

* Is the witness describing a series of events that is likely to have occurred? Unlikely to have occurred? If the witness describes something that is far-fetched or unreasonable, it may not be believable.

**Recitation of the facts**

* Witnesses who are not very verbal, articulate, or who are not competent English speakers, should not be judged to exhibit a lack of credibility on that basis alone.
* If the witness is clear and offers precise testimony on all the positives but vagueness on all the negatives, that contrast might reflect on credibility.
* In answering questions, if the witness is evasive, there arises a credibility concern.
* If the witness's vocabulary does not seem to fit the person, a credibility concern might be proper.
* If the witness is uncertain or hesitant about key facts, accuracy is implicated.
* If the witness refuses to concede indisputable facts, his or her credibility might be questionable.

*-Adapted from a handout prepared by Minnesota Court of Appeals Judge Gordon Shumaker*

Video Exercise



**What are your impressions after watching this video clip? What is the message of the video? How did the video change the way you look at credibility factors?**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*Excerpt from an email regarding credibility by former unemployment law judge and current Minnesota law enforcement officer Joe Cox.*

1. “I feel…” Many times this phrase is used because the interviewee wants to focus on their emotions (which were probably genuine) as opposed to what did or did not occur.  “The employer says when they fired you for stealing, you did not deny it and that you said you knew this (being fired) was coming…”  “I feel like they were out to get me.  I felt like I was going to be fired no matter what I said.” As opposed to, “Wrong, I didn’t say that.  I told my boss he was a liar and a jerk.  I didn’t steal and I didn’t admit to it.  It didn’t happen.”  The emotion is true: he did feel paranoid and guilty.  He did feel like he was going to be fired.  Because he was paranoid, guilty, and going to be fired.
2. “I would never…” You can almost always preface this with the unspoken phrase “*If I had it to do all over again*,”.  “Did you leave work at 3:00 but write 4:30 on your time card?” “I would never jeopardize my job by doing something like that intentionally.”  As opposed to, “No.”
3. The course materials sort of touch on this next one, but it seems to be extremely common in our hearings: The interviewee answers the question they wanted you to ask, not what was actually asked.  This just happened to me in this morning’s hearing.  “Did you have your supervisor’s approval to take the afternoon of January 31 off as vacation?” “I put that afternoon as vacation for me on the master calendar way back in October.  My supervisor knew it was there.”  With a little more digging, I discovered that, yes, indeed, the afternoon off was placed on the master calendar a long time ago, but unilaterally and without specific approval.  When the supervisor noticed it about a week before his own business trip that was also previously scheduled, he denied the vacation request, they discussed it, and the applicant agreed not to take the afternoon off (then did anyway when the boss was out-of-town).  The applicant wanted me to ask, “Do you think it was unfair for your boss to rescind vacation time you presumed was approved?  Why?”  Those are the questions she answered.  The answer to the actual question should have been “No” or, at best, “Originally, but the approval I thought was implied was later rescinded.”

I hope you found these helpful.  I feel like they are important.  I would never waste your time intentionally.

-Joe Cox

Credibility discussions in state cases

# **Connecticut:**

* **Stewart v. Bridges A community Support System, Inc.** - Board of Review, 4/13/17 - The Board of Review elevated the claimant's first-hand testimony over the employer's hearsay evidence where the employer did not produce any first-hand witnesses and the employer's investigatory notes revealed that the alleged witnesses provided inconsistent accounts of what they observed.
* **Turner v. Sonic of Milford, LLC** - Board of Review, 9/19/14 - The Board elevated the employer's explicit detailed hearsay evidence over the claimant's inconsistent first-hand testimony.

# **Colorado:**

"[Employer] Halliburton argues, however, that the evidence rebutting [Claimant] Miller’s testimony that he reported the accident is so overwhelming that Miller’s testimony lacks credibility as a matter of law. We disagree. It may be

that the testimony of a particular witness, although direct and unequivocal about a particular point, could be so overwhelmingly rebutted by hard, certain evidence directly contrary to the testimony that a hearing officer or other fact finder would err as a matter of law in believing the testimony of the witness. We are not faced with such an extreme situation here."

*Halliburton Services v. Miller,* 720 P.2d 571 at 578 (Colo. 1986).

# **Maryland**

From a word document titled "Credibility" regarding Maryland law:

* "Assessing relative credibility involves substantially more than attempting to discern which witness is more truthful. It relies more heavily on other factors, particularly the competence of witness to have observed, understood, and now relate the events in his or her testimony. A witness may be completely truthful, as they understand it, and at the same time, be completely wrong. Determining the relative credibility of witnesses’ testimony is not an exercise in deciding who is lying; rather, the focus should be on which witness is more competent. Credibility is enhanced by corroborating evidence, by prior consistencies, and by probabilities or logic. It is further enhanced by competence factors which include a lack of bias, proximity of time and space, ability to observe, understand and relate, and by the conditions under which an observation is made. Credibility and competency are diminished by the opposite of any of these. All these factors must be considered when determining whether any evidence is more, or less, credible and, thus, entitled to more or less evidentiary weight."

*1-13 Maryland Evidence Handbook §1300*provides:

* Credibility is not distinguishable from bias. Proof of bias is one way to attack a person's credibility. Credibility is not synonymous with veracity. Veracity is only one aspect of credibility. Anything introduced in support of the argument that your opponent's witnesses should not be believed is an attack upon their "credibility" because credibility is the total sum of several individual characteristics that mix into the factfinder's analysis.

# **Minnesota**

From MN UI Appeals precedent manual:

When evaluating the credibility of a witness, the following factors may be relevant:

1. Will a witness gain or lose if this case is decided a certain way? 2. What is the witness's relationship to the parties? 3. How did a witness learn the facts? How did he or she remember and tell the facts? 4. What was his or her manner? 5. What was his or her age and experience? 6. Did the witness seem honest and sincere? 7. Was the witness frank and direct? 8. Is the testimony reasonable compared with other evidence? 9. Are there any other factors that bear on believability and weight? In addition, you should rely upon your own experience, good judgment, and common sense.

*Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007) (quoting 4 *Minnesota Practice*, CIVJIG 12.15 (2006)).

*See Googe v. Capstone Services, LLC*, No. A13–2138, 2014 WL 3558180 at \*4 (Minn. App. July 21, 2014) "Merely stating that testimony is more plausible or more persuasive is simply a different way to say that a witness is credible. The ULJ must discuss factors bearing on credibility."

There was not substantial evidence on the record to support a finding that an applicant worked 32 hours or more per week solely based upon a negative credibility finding that her testimony was not believable that she only worked 30 hours per week at her liquor store and friends and family volunteered the rest of the time. *Coons v. Dep't of Emp. & Econ. Dev.,* A13-1672, 2014 WL 1516683 at \*3 (Minn. App. April 21, 2014).

# **New York:**

Excerpts from the State of New York Unemployment Insurance Appeal Board decisions

* Appeal Board No. 581567 A (filed 9/9/14):
  + "MK testified that she had been subject to continuing harassment from the claimant since she was first hired; even alleging that she would hide from the claimant at shift change, so that she could leave the building without him seeing her. Upon further consideration of MK's testimony, we find it to be internally inconsistent and, hence, not credible."
  + "MK only worked the same shift as the claimant when asked by the program director if she was available to do so. At the hearing, MK admitted that she had a choice in whether she would work the night shift; we do not find it credible that she would choose to work the night shift if she was so afraid of the claimant that she would hide from him at shift change."
  + "Finally, the timing of her complaint is suspect: She only complained to management after the claimant reported that she left early, which resulted in her being questioned by the residential services manager, an event which occurred a month after the [alleged sexual harassment] incident itself."
* Appeal Board No. 572233 (filed 8/30/13)
  + "The company president admitted to knowing about her allegations in early July, yet did not fire the claimant until early September. Moreover, the company president was extremely inconsistent about his reason for discharging the claimant, testifying variously that he decided to fire the claimant because of documents about the claimants sexual activity that he found on the computer, because the claimant was frequently late to work, because of inappropriate e-mails to the claimant from the claimant's wife, and because the claimant had sexual intercourse with the bookkeeper at the office. In fact, he even testified that he did not remember why he had decided to fire the claimant."
  + "In addition, the termination letter does not mention sexual harassment at all, instead referring to various reasons for the discharge, including matters that had been occurring over the period of a year."
* Appeal Board No. 574247 (filed 11/5/13)
  + "The credible evidence further establishes that the claimant lost her employment because she falsely represented to the employer that her home had been severely damaged by Hurricane Sandy. The claimant has denied having done so. She admitted to sending some of the text messages, but denied sending others and testified to not recalling whether she sent yet other text messages. She also testified that when she was talking about damage to a home, she was actually referring to a house in Suffolk County, belonging to a friend, where she had been residing since June 2012. . . . The claimant's testimony was also inconsistent in other respects: She testified she did not know the name of the town in Suffolk County where she was residing, even though she also testified that she had been living there for at least four months."
* Appeal Board No. 549792 (filed 9/21/10)
  + "Finally, and most significantly, the testimony of the executive director and the office manager are inconsistent. As noted above, the executive director testified after the claimant gave notice, the argument between the two continued and that she finally decided she'd had enough and told the claimant to leave. The office manager, whose office was only a few feet away from the executive director's office, testified that the executive director came into her office to make a photocopy; while doing so, she spoke to the claimant - who was standing just outside the door - and stated that she was accepting the claimant's two-week notice but that today would be her last day. The office manager also testified that she did not hear anything else. However, if the claimant had been arguing as heatedly as the executive director suggests, it is not credible that the office manager would not have heard anything else. Moreover, we find it quite incredible that the executive director would have just stepped into a different office to make a photocopy if she was, in fact, in the middle of a heated argument. We also note that there was no testimony from the executive director about going into the office manager's office to make a photocopy."

Group exercise – first grade drawing

*Warning: Don't look ahead. Exercise is two pages*



What does the picture depict?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Letter from first-grade teacher to parent:

|  |
| --- |
| Dear Mrs. Smith, |
| Your daughter drew the enclosed picture when I asked the students to draw a picture of what they wanted to be when they grew up. She told me that it was a picture of you at work and that she wanted to be like you. I am concerned about the implications of this picture and want to schedule a meeting with you to discuss it. |
| Sincerely, |
| Mrs. Jones |

Response from parent:

Dear Mrs. Jones,

I wish to clarify that I am not now, nor have I ever been, an exotic dancer.

I work at Home Depot and I told my daughter how hectic it was last week before the blizzard hit. I told her we sold out every single shovel we had, and then I found one more in the back room, and that several people were fighting over who would get it. Her picture doesn’t show me dancing around a pole. It’s supposed to depict me selling the last snow shovel we had at Home Depot.

From now on I will remember to check her homework more thoroughly before she turns it in.

Sincerely,  
Mrs. Smith

**Gut check** - Did you get it right? Did your explanation match the mother's explanation? Would your initial impression have changed if you knew the context – that the mother worked at Home Depot and that it was the winter?