

Unsubstantiated Allegations and Organizational Culture

*Eugene Soltes**

ABSTRACT

When organizations investigate allegations of misconduct, they routinely determine that some allegations are unsubstantiated. A variety of factors may contribute to the conclusion that an allegation does not warrant substantiation, including a lack of supporting evidence, false claims against others within the organization, and a failure to conduct a thorough inquiry. This Article examines the potential value of examining unsubstantiated allegations of misconduct to better understand an organization's culture. I show that unsubstantiated allegations provide insight into where future violations may occur, employees' proclivity to engage in subsequent violations, and firm productivity. I conclude by discussing ways that organizations can address and overcome obstacles associated with examining unsubstantiated allegations data to further understand organizational cultures.

INTRODUCTION

When allegations of misconduct arise within organizations, individuals within those organizations are tasked with investigating the potential malfeasance. In some instances, these internal investigations are explicitly required by law (e.g., for allegations of harassment or discrimination). In other instances, the organization's leadership may seek to understand the extent of potential legal or reputational exposure in order to plan an appropriate response and assess whether there are employees who should be sanctioned.

At the conclusion of an investigation, allegations are deemed either substantiated or unsubstantiated.¹ Substantiated allegations of misconduct draw considerable attention since they pose explicit legal, reputational,

* Harvard Business School.

1. Depending on an organization's process, when one case encompasses multiple allegations or an allegation including multiple issues, the case may conclude with the allegations deemed "partially substantiated."

and business threats. By contrast, unsubstantiated allegations—specifically those allegations for which the investigative process did not collect evidence to convincingly support the veracity of the claim—tend to warrant no correctional response or a limited correctional response. The term “unsubstantiated” is used ubiquitously within organizations despite its lack of specificity, encompassing both allegations that are entirely unfounded and those that are simply lacking adequate evidence to support substantiation. Allegations that are deemed unsubstantiated typically produce no further action out of respect for employee privacy, potential litigation concerns around employment, and a popular perception that unsubstantiated allegations indicate an absence of wrongdoing.²

In this Article, I examine the value associated with more deeply understanding the nature, type, and frequency of unsubstantiated allegations within organizations. Specifically, I provide several pieces of empirical evidence showing how unsubstantiated allegations can provide insight into an organization’s culture and business performance. Given the differing goals of an internal organizational investigation process versus a public legal process, I argue that organizations should place greater attention and emphasis on drawing inferences from unsubstantiated allegations when assessing risks and corporate culture.

I. INTERNAL INVESTIGATIONS WITHIN ORGANIZATIONS

A. The Impetus for Internal Investigations

When facts or information come to light suggesting that an employee or several employees have engaged in conduct that runs counter to law or organizational policy, organizations respond by investigating the allegations. These investigations are conducted within the company, using internal personnel and resources, to uncover facts and evidence, assess the veracity of the allegations, and determine the appropriate next steps.³ In some instances, an investigation is mandated by public policy or regulation. For example, for allegations involving harassment by a supervisor, the Equal Employment Opportunity Commission (EEOC) Enforcement Guide notes: “[I]f the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment

2. To the extent that internal investigations and compliance processes mimic legal processes, penalizing those who have been found “not guilty” may be problematic. *See generally* Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017). Further concerns with the European Union’s General Data Protection Regulation and related data privacy regimes are also implicated.

3. Depending on the nature of the allegation and the internal capacity to conduct the investigation, organizations may use external counsel or investigation firms.

complaint, the employer has not discharged its duty to exercise reasonable care.”⁴

A variety of situations or “alerts”—including whistleblower allegations, regulatory investigations, audit and risk assessments, and media reports—can prompt internal investigations. The types of allegations that lead to investigations are wide-ranging and most often a function of the industry and geographic and jurisdictional scope in which a business operates. Some of the most frequent allegations that lead to internal investigations include allegations of bribery, antitrust violations, financial misreporting, improper gifts, records falsification, discrimination, harassment, environmental violations, theft, and quality control issues. Multiple internal functions including legal, compliance, human resources, and security can receive allegations or find circumstances that prompt internal investigations.

B. Investigation Process

Once an allegation or concern that warrants an investigation comes to light, investigators must develop a plan to examine the claim. Depending on the nature of the allegation, certain types of individuals may have more appropriate experience for collecting evidence and assessing the veracity of the claims. For example, discrimination claims are often handled by individuals with human resources experience, while concerns about financial misreporting are examined by individuals with accounting and auditing experience.

Once the investigative team is established with those individuals most appropriately qualified to examine the allegation, an investigative plan is developed. If the allegations are against senior members of management or the investigation is likely to encounter public scrutiny (e.g., by regulators, media, or shareholder litigation), external resources such as external counsel or an investigative firm may be brought in to create additional independence and credibility in undertaking the investigation. To the extent that these resources are significant, the investigation may no longer be conducted internally, but is only “internal” in that the conduct arose within the organization and the organization itself—rather than an external party such as a regulator or enforcement agency—is directing the investigation.⁵

4. U.S. EEOC, *Notice No. 915.002: Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/BVF5-DPNX>].

5. An external regulatory or enforcement agency could request or require that the company conduct an internal investigation, but such interventions have recently encountered some pushback. *See, e.g., United States v. Connolly*, No. 16 Cr. 370, 2018 WL 6985208, at *1 (S.D.N.Y. Dec. 19, 2018).

The depth of an investigation and the level of resources dedicated to it are typically a function of the complexity, severity, and risk (both legal and reputational) associated with the allegations. Some investigations require only a perfunctory examination of the claim, while others require collecting physical evidence, examining electronic data, and interviewing employees (witnesses, victims, and accused parties). Investigators ask a variety of questions during this fact-finding, including who engaged in the conduct, where it occurred, whether the activity has stopped, and how often it occurred. While there is no requirement that an internal investigation be completed within a particular timeframe, many organizations set benchmarks (e.g., 60 days) for completing internal investigations.

C. Investigation Conclusion: Substantiated Versus Unsubstantiated

After the facts and evidence are collected and evaluated, the internal investigative team will conclude that allegations are substantiated, unsubstantiated, or partially substantiated.⁶ Although each organization sets its own standards for the level of evidence needed to substantiate an allegation, “preponderance of the evidence” has become the de facto standard within many organizations. When a case is partially substantiated, this means that some portion of the allegations in the case is substantiated, but some portion is unsubstantiated.

Once the investigation concludes, the final step before closing the case is selecting the appropriate corrective and remedial actions. Responses may include training, suspension, warnings, or termination. The organization may also find that certain processes are lacking, prompting changes in internal controls, training, communications, management, and incentive design. Notably, for most organizations, disciplinary action is often reserved only for cases in which substantiated violations have occurred, while preventative action (e.g., adjusting an internal control) may be taken in response to both substantiated and unsubstantiated claims.

II. REEXAMINING UNSUBSTANTIATED ALLEGATIONS

While all investigations that are classified as unsubstantiated appear identical in terms of their conclusion, this Part describes the heterogeneity of these claims based on the underlying reasons why the allegations are found to be unsubstantiated. As this Part discusses, some of the reasons that allegations go unsubstantiated are less benign than others and

6. Some organizations also find some investigations “inconclusive.”

motivate an examination of how unsubstantiated allegations can impact an organization's culture.

A. Frequency of Unsubstantiated Allegations

For organizations that operate at scale (i.e., across multiple legal jurisdictions with thousands of employees), some amount of malfeasance is inevitable. I examine the amount of corporate misconduct that arises within several large organizations.⁷ I find that publicly observed and sanctioned misconduct is uncommon, with less than 0.5% of publicly traded organizations in the United States facing a criminal sanction from 2001 through 2017.⁸ Civil matters are somewhat more common, with 1% and 4.6% of firms facing an U.S. Securities and Exchange Commission (SEC) enforcement action or securities lawsuit, respectively, in a given year.⁹ This data suggests that malfeasance is rather infrequent among publicly traded firms. However, when I examine data from within three Fortune 500 organizations, none of which faced recent serious criminal or civil sanctions, I find a substantiated issue (i.e., one that could be charged if reported or detected by regulatory or enforcement authorities) twice a week on average.¹⁰ Notably, this estimate still understates the total amount of misconduct since the data covers only those issues that were detected and substantiated by management.

This data provides some indication that substantiated misconduct occurs with a degree of regularity. If unsubstantiated allegations are infrequent or rare events within organizations, it would be challenging to draw inferences from them. However, several pieces of data indicate that unsubstantiated allegations occur with even greater frequency than substantiated misconduct.

NAVEX Global (NAVEX) is one of the largest corporate hotline providers and annually releases statistics on the substantiation rates of allegations made through whistleblowing hotlines.¹¹ Although investigations can arise from sources other than hotlines, the hotline data provides an indication of the number of unsubstantiated claims across a large and diverse set of firms.¹² For the 2,738 organizations in the NAVEX

7. Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923 (2019).

8. *Id.*

9. *Id.*

10. *Id.*

11. For the data published in 2018, see CARRIE PENMAN & RAINA HATHORNE, NAVEX GLOBAL, 2019 ETHICS & COMPLIANCE HOTLINE BENCHMARK REPORT (2019) [hereinafter NAVEX REPORT].

12. I analyze NAVEX data and internal data for three firms in *The Frequency of Corporate Misconduct*, *supra* note 7. The substantiation rate for investigations across the three sample firms in

dataset, 42% of claims were substantiated—leaving the majority (58%) unsubstantiated in 2018.¹³ This is similar to numbers from prior years, with 56% and 60% of hotline allegations unsubstantiated in 2017 and 2016, respectively.¹⁴ NAVEX also indicates that substantiation rates vary across allegation types, with a median 50% substantiation rate for issues related to accounting, environment, and misuse of corporate assets, but only 40% for allegations related to human resources and discrimination.¹⁵

According to the NAVEX data, the average firm received 377 allegations of misconduct in 2018.¹⁶ Thus, the average firm had 218 allegations raised on their hotline that were unsubstantiated (fully or partially), indicating that most scaled organizations have a considerable number of unsubstantiated events.¹⁷

B. Are Unsubstantiated Allegations the Same as Disproven Claims?

The frequency with which organizations encounter unsubstantiated allegations raises the question of whether “unsubstantiated” should be understood to mean having no substance or foundation (as is commonly presumed), or whether further attention is needed to determine the distinct underlying reasons why allegations may not meet the standards for substantiation.

1. “Not Substantiated” Versus “Unable to Substantiate”

To the extent that an investigator relies on a preponderance of evidence standard when deciding to substantiate an allegation (or an even higher standard, like “beyond a reasonable doubt”), there will be allegations where there is not enough evidence or data for investigators to conclude with sufficient confidence that a violation occurred. Separate from any lack of effort or resources in conducting the investigation, a lack

the study are similar to the NAVEX rates (30%–40% across sample firms) and also include non-hotline sources of investigations.

13. See NAVEX REPORT, *supra* note 11, at 24. NAVEX data on substantiated reports includes both partially and fully substantiated claims.

14. *Id.* at 24. The data for 2017 and 2016 are published in the NAVEX Global 2018 Hotline & Incident Management Benchmark Report and 2017 Hotline & Incident Management Benchmark Report, respectively. See CARRIE PENMAN, NAVEX GLOBAL, 2018 ETHICS & COMPLIANCE HOTLINE AND INCIDENT MANAGEMENT BENCHMARK REPORT (2018); CARRIE PENMAN & EDWIN O’MARA, NAVEX GLOBAL, 2017 ETHICS & COMPLIANCE HOTLINE & INCIDENT MANAGEMENT BENCHMARK REPORT (2017).

15. See NAVEX REPORT, *supra* note 11, at 25. NAVEX also shows that the rate of substantiation varies between anonymous and non-anonymous reporters: anonymously reported allegations have a 35% substantiation rate versus a 50% substantiation rate for reports from identified individuals. *Id.*

16. See *id.* at 3.

17. *Id.* The NAVEX analysis covers 1,032,953 reports received across 2,738 organizations and excludes organizations that received fewer than 10 reports in 2018. *Id.*

of evidence as a reason a claim goes unsubstantiated reflects limitations in what information is available to examine and verify the claim. These limitations can include a lack of witness accounts, conflicting witness accounts, insufficient or unclear information from anonymous reporters, and barriers to accessing information due to regulatory restrictions (e.g., privacy constraints in some countries, or the inability to transfer information from one jurisdiction to another). The investigators may have a hunch that the violation actually occurred, but without better information or additional facts, the investigation concludes with the allegation being unsubstantiated.¹⁸ Notably, the lack of substantiation is the appropriate conclusion of a full and complete investigation since it is simply what the available information merits. However, in such instances where the investigator has not proven that the allegation did *not* occur, a more precise and appropriate framing would be “unable to substantiate.” The allegation may or may not have occurred as was reported, but ultimately, this is not conclusively known. As a further distinction, cases in which adequate evidence supports that the allegations either are untrue or do not represent a legal or policy violation could be classified more precisely as “not substantiated.”

2. Additional Limitations

An inability to substantiate an allegation—assuming that the investigation was conducted in a fair and appropriately thorough manner—does not represent a failure of the investigative process. Rather, it is simply a result of the natural limitations of the investigative process. However, a more serious concern is whether an internal investigation was not conducted in a fair or thorough manner. A number of different biases can arise that can compromise the ability to substantiate an allegation, even when the evidence merits substantiation. For example, if investigators are balancing numerous cases simultaneously and have incentives to finish each case within a limited time, they may be induced to insufficiently investigate an allegation and close the case prematurely as unsubstantiated. Other variables can create bias in investigations and substantiation rates, including experience, gender, seniority, and expertise. Ultimately, to the extent that any characteristics associated with individual investigators or their workloads impact the substantiation of a case, the outcome is biased because it does not rest solely on the underlying facts surrounding the allegation. When such biases arise, at least some of the

18. One additional reason that an allegation may be unsubstantiated is that investigators judge the allegation to be low-risk and do not merit a more thorough investigation.

cases that are determined to be unsubstantiated would likely be deemed substantiated if those biases were not present.¹⁹

C. Why Are Unsubstantiated Allegations Reported?

When allegations are unsubstantiated because the conduct does not represent a violation of law or organizational policy, it is necessary to consider three conditions that lead to such issues being reported and investigated in the first place.

1. Non-Allegations

Integrity hotlines, or “helplines,” draw a diverse set of reports and inquiries. Some allegations are frivolous and inappropriately reported to the hotline as violations of law, policy, or ethical principles. For example, an employee may feel that a new supplier to the cafeteria does not provide sufficiently nutritious lunch offerings. While this still might be a worthwhile issue for the firm to address to sustain employee morale, calling the whistleblowing hotline to prompt an internal investigation of the issue would fall outside the normal scope of issues to appropriately report via a hotline. In some instances, employees may call the hotline either because they incorrectly believe it is the appropriate channel for addressing their concerns (thus making it an employee communication issue) or because they are struggling to find another appropriate channel to report their grievance or concern. In such cases where allegations have no merit from any legal, compliance, or code-of-conduct perspective, firms will close these cases as unsubstantiated. However, these inquiries may be most precisely termed “non-allegations” from the standpoint of assessing potential violations.²⁰

2. False Allegations

A second reason why an employee may report an ultimately unsubstantiated allegation is deliberate misinformation. Consider a case where an employee reports that his or her coworker spends much of the day on the company computer posting on social media and doing personal shopping. After an investigation of the employee’s computer usage, the facts do not substantiate any computer misuse. Instead, the allegation appears to have been raised to unfairly damage the reputation or promotion prospects of a fellow employee. In many instances where deliberate

19. When biases occur, it is also possible that some allegations are incorrectly substantiated that actually should be deemed unsubstantiated.

20. An employee may also report a concern or a potential issue or risk that has not actually yet occurred (e.g., a safety issue that could arise if additional processes are not put into place).

misinformation is reported, reports are made anonymously and in such a vague manner that it is difficult to conclusively determine whether or not the claims have substance. As another example, say that an anonymous caller alleges that a senior manager has repeatedly made racist and derogatory remarks to that employee. The organization is then obligated to investigate. However, while the anonymous reporter provides the manager's name and specific dates and remarks, the reporter chooses not to provide additional information. After speaking to the manager, who denies making the remarks, investigators then consider the sensitive manner of interviewing other employees who may have observed the reported conduct or similar conduct. To the extent that the allegations are false, the investigation itself can damage the reputation and standing of the manager as well as subject the manager to a time-consuming investigative process. In this case, reporting this misinformation can cause harm to the manager while having no negative professional impact on the anonymous reporter.

In such instances involving deliberate misinformation, firms will close these cases as unsubstantiated, but these allegations may be more precisely termed "false allegations" if sufficient evidence demonstrates that the allegations are untrue and that the motives for the underlying reports are dubious.

3. Subjectively Substantiated Allegations

The third reason contributing to unsubstantiated allegations is that employees may believe that a violation of law, policy, or ethical principles has occurred, but upon investigation and evaluation of evidence, the claim is unsubstantiated. These cases may be more precisely termed "subjectively substantiated." Such cases may occur when the evidence is insufficient to substantiate the claim—although the reporter, either correctly or subjectively, believes a violation occurred. For instance, if a manager makes an inappropriate remark to an employee, but there are no corroborating witnesses or physical evidence (e.g., video) and the manager denies making the comment, the allegation will typically be deemed unsubstantiated even if it is true.

Subjectively substantiated allegations can also arise when an employee's and an organization's definitions of misconduct differ. This may occur because the employee relies on an intuitive feel of what inappropriate conduct looks like, while the firm relies on a more technical legal definition. As an example, an employee may observe a "bribe" being paid by a colleague, but upon careful investigation, the payment is a facilitation payment, which is permitted under the Foreign Corrupt

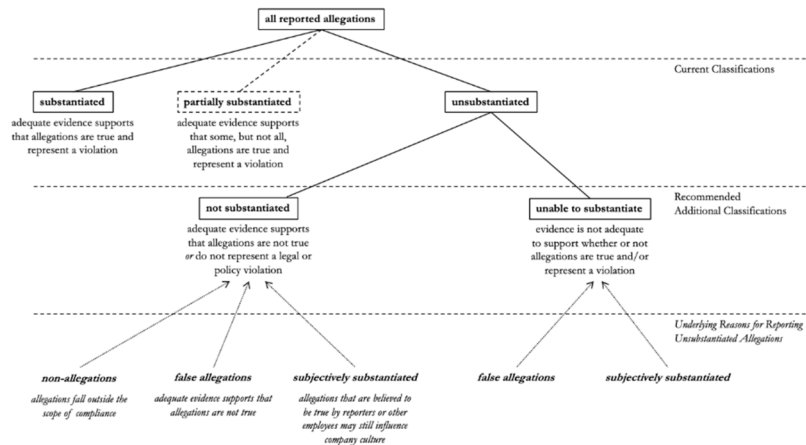
Practices Act and company policy.²¹ While this payment could be viewed as ethically corrupt, as it is not a violation of company policy or law, it would ultimately be considered an unsubstantiated allegation. However, from the perspective of the reporter, the allegation is both truthful and subjectively substantiated despite the firm's conclusion to the contrary. As discussed in greater detail below, subjectively substantiated allegations are especially significant in potentially impacting an organization's culture since the position of the firm will likely differ from that expected by some of its employees.

4. Conditions Versus Classifications

Note that while these further distinctions between non-allegations, false allegations, and subjectively substantiated allegations help explain why unsubstantiated claims arise, they would be less useful as a formal system of classification within an organization. False allegations in particular may be difficult to identify, especially when made through vague, anonymous reports. Moreover, such cases already fall within the broad "unsubstantiated" classification that is frequently presumed to indicate false or frivolous claims. Both false allegations and subjectively substantiated allegations may also overlap with both the unable to substantiate and the not substantiated distinctions introduced earlier. The examples of subjectively substantiated allegations above show that they may arise both when evidence is lacking to substantiate, and when evidence is sufficient to show that the alleged behavior occurred but ultimately does not represent a violation of law or firm policy. The classifications and conditions described are summarized in Figure 1, below.

21. *See* Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(b) (2018).

Figure 1. Classifications and Underlying Reasons for Reporting Unsubstantiated Allegations.



D. The Substance of Unsubstantiated Allegations

As the previous examples begin to show, the conclusion that an allegation is unsubstantiated should not necessarily relieve concern about the underlying conduct that prompted reporting the allegation. Consider the following two cases that courts ultimately dismissed in whole or in part. The first, *Alfano v. Costello*, is an example of conduct that was extremely disrespectful and deeply detrimental to organizational culture, but not a violation of law.²²

Georgiann Alfano worked for the New York Department of Correctional Services and reported a number of incidents in support of a hostile work environment, four of which were sex-based and explicitly addressed by the court: (1) a supervisor “told Alfano that she should not eat carrots, bananas, hot dogs, or ice cream on the job because she did so in a ‘seductive’ manner”; (2) in the presence of other employees, Alfano later found a carrot and two potatoes in her workplace mailbox arranged in the shape of male genitals, and another supervisor responded by laughing; (3) fellow employees posted a note in the visiting room that read, “[C]arrots will not be allowed in the visiting area due to [Alfano’s] strong liking for them”; and (4) she found a note in her mailbox with a cartoon of one of her supervisees making sexual comments, following an allegation that Alfano had had inappropriate physical contact with the supervisee (for which she had been investigated and cleared).²³ Ultimately, despite the ill-

22. *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002).

23. *Id.* at 370.

colored nature of the conduct by Alfano's colleagues, the court found that the conduct failed to be sufficiently severe or pervasive to violate Title VII of the Civil Rights Act of 1964.²⁴

Another example, *Acosta v. Hilton Grand Vacations Company*, indicates how a manager can be deeply disrespectful to his subordinates, while still not falling afoul of the corresponding regulation that seeks to restrict discriminatory conduct in the workplace.²⁵ Laura Acosta was a saleswoman for a global hotel company.²⁶ In the course of her employment, her supervisor, Kevin Kahler, told her "that if she lost some weight she may get a man."²⁷ He also made inappropriate comments on her breasts and a planned breast reduction surgery.²⁸ He made other comments about her hair color, religion, and Hispanic heritage.²⁹ After she was fired, she filed suit.³⁰ In the course of discovery, both Acosta and a company HR Manager testified that Kahler "was rude and degrading to both male and female employees on a regular basis."³¹ Acosta described Kahler as an "equal-opportunity jerk," meaning that he did not discriminate in his demeaning remarks.³² Thus, and perhaps perversely, his conduct was not judged to be a violation of anti-discrimination law.³³ The court accordingly granted the bulk of the hotel chain's summary judgment motion, finding that Kahler's comments about Acosta's body, hair color, religion, and Hispanic heritage were not "severe or pervasive" enough to constitute harassment or discrimination.³⁴

In these two examples, the individuals involved in the allegations apparently did not violate any laws or regulations on the whole, according to the courts' determinations. Depending on the specific code of conduct at a firm, such conduct could violate internal policy and result in reprimands or other corrective actions, but in many instances firms are not inclined to substantiate based solely on the fact that the conduct did not feel right to another individual employee. Nevertheless, as the court cases illustrate, this type of conduct can create environments that adversely impact employees' ability to be comfortable and productive in the workplace, and therefore such conduct would not be viewed positively

24. *Id.* at 376.

25. *See* *Acosta v. Hilton Grand Vacations Co.*, No. 4:15-cv-00495, 2017 WL 1173583 (D.S.C. Mar. 30, 2017).

26. *Id.* at *2.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at *1.

31. *Id.* at *3.

32. *Id.*

33. *Id.* at *7.

34. *Id.* at *4, *10.

within most well-meaning organizations. If the conduct is publicized outside the organization, it may also affect the firm's reputation.

In some ways, deeming an allegation unsubstantiated is analogous to being found "not guilty" in a criminal proceeding. Notably, not guilty does not necessarily imply innocence in that the defendant may still have committed the crime. Rather, the finding simply means that evidence is insufficient, or the prohibited conduct does not specifically match the underlying conduct needed to convict an individual. Moreover, not guilty does not mean that an accused individual's conduct did not adversely impact someone else's well-being. Severe harm could potentially be done, but in a way that either does not violate a specific statute or such that insufficient evidence is left to demonstrate the accused individual's culpability for the harm.

III. UNSUBSTANTIATED ALLEGATIONS IN THE CONTEXT OF ORGANIZATIONAL CULTURE

In this Part, I examine how unsubstantiated allegations have the potential to provide deeper insight, both current and predictive, into an organization's employees. In this way, I connect information gained from data on unsubstantiated allegations to the broader culture of an organization.

A. Defining Corporate Culture

Researchers have long noted the challenges of clearly and succinctly defining organizational culture due to the variety of ways in which it is conceptualized.³⁵ In *Organizational Culture and Leadership*, Schein provides one definition:

The culture of a group can be defined as the accumulated shared learning of that group as it solves its problems of external adaption and internal integration; which has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, feel, and behave in relation to those problems.³⁶

A considerably more concise definition was offered by Marvin Bower, the management consultant who helped lead the transformation of McKinsey and Company. Bower described culture simply as "the way we

35. See, e.g., EDGAR H. SCHEIN WITH PETER SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 3–6 (5th ed. 2016) (discussing in detail how to define, capture, and impact organizational culture).

36. *Id.* at 6.

do things around here.”³⁷ This definition focuses on the observed behaviors associated with cultures rather than underlying thoughts or artifacts.

Notably, these definitions of organizational culture do not offer a way to measure the quality of an organization’s culture. There are many different types of culture that can potentially serve to be the “right” culture depending on the nature of the organization’s goals and its industry, thus making it challenging to generalize what constitutes “good” culture. For instance, the Medellín cartel heavily trafficked narcotics for over two decades, supported by an organizational culture that was effective in facilitating the objectives of a drug cartel.³⁸ However, this notion of the right culture would be entirely unsuitable for most legitimate enterprises.

While specifically characterizing the elements of effective cultures for corporate enterprises is the focus of a considerable body of research, one basic notion that can be inferred from this work is that effective cultures promote sustainable, productive enterprises. The venture capitalist Ben Horowitz observed a common pattern among companies that failed: “If the employees knew about the deadly problems, why didn’t they say something? Too often the answer is that the company culture discouraged the spread of bad news, so the knowledge lay dormant until it was too late to act.”³⁹ According to Horowitz, one important element that defines successful cultures is one in which bad news can travel fast and the organization “rewards—not punishes—people for getting problems into the open where they can be solved.”⁴⁰ When an organization stifles its employees’ ability to express concern (a notion related to psychological safety), the organization ultimately inhibits its own sustainability and success.⁴¹

Organizations also differ in how they respond to allegations and concerns. Organizations that consistently and appropriately discipline those who violate policy are broadly described as supporting organizational justice. Treviño and Weaver find that employees’ willingness to report misconduct increases when employees believe there

37. EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE COLLAR CRIMINAL* 134 (2016).

38. Peter S. Green, *The Syndicate: How Cocaine Traffickers from Medellín Transformed the Multibillion Dollar Global Drug Trade*, Wall St. J., <https://www.wsj.com/ad/cocainenomics> [<https://perma.cc/964H-THQU>].

39. BEN HOROWITZ, *THE HARD THING ABOUT HARD THINGS: BUILDING A BUSINESS WHEN THERE ARE NO EASY ANSWERS* 67 (2014).

40. *Id.* In explaining the openness of an environment to voice concern openly, Horowitz is alluding to the notion of psychological safety.

41. For more on psychological safety, see generally AMY C. EDMONDSON, *THE FEARLESS ORGANIZATION: CREATING PSYCHOLOGICAL SAFETY IN THE WORKPLACE FOR LEARNING, INNOVATION, AND GROWTH* (2019).

is organizational justice and ethics program “follow-through.”⁴² Thus, how an organization responds to allegations of misconduct also contributes to its cultural climate.

B. Drawing Inferences from Unsubstantiated Allegations

In this Section, I present preliminary data on how unsubstantiated allegations have the potential to adversely impact an organization’s culture.

1. Unsubstantiated Allegations and Productivity

A firm’s ability to produce goods and services efficiently is critical to its growth and success. An organization’s culture contributes to its ability to produce efficiently, to the extent that employees feel comfortable and engaged working in that environment. Conversely, if employees feel that they are not treated respectfully within the work environment, their ability to work productively may be impaired. Moreover, if other employees observe that senior leadership does not respect fellow employees by disciplining responsible parties appropriately when incidents arise, these employees may also feel disrespected. As discussed previously, even allegations that are unsubstantiated may still be subjectively substantiated to the reporting employee. Thus, when an organization does not respond to an allegation (e.g., by sanctioning the respondent), it can be viewed unfavorably by the reporter and his or her colleagues.

I examine the association between differential action taken in response to unsubstantiated allegations and organizational productivity by examining data provided by a multinational manufacturing company.⁴³ Allegations related to employee conduct and relations (e.g., discrimination or harassment) are the focus of the analysis, given the broader impact these have on organizational culture. The sample organization permits allegations to be made through a variety of channels, including phone, e-mail, mail, or in-person to the organization’s compliance or human resource personnel.⁴⁴ Allegations are investigated and conclude with a designation of substantiated or unsubstantiated.⁴⁵ Substantiated allegations

42. See generally Linda Klebe Treviño & Gary R. Weaver, *Organizational Justice and Ethics Program “Follow-Through”: Influences on Employees’ Harmful and Helpful Behavior*, 11 BUS. ETHICS Q. 651 (2001).

43. The data was provided to the author under the agreement that the firm would remain anonymous. The company provided data on allegations (both substantiated and unsubstantiated), the actions taken, and production levels at each plant for the five-year period 2013–2017 [hereinafter Allegation Data].

44. *Id.*

45. *Id.*

result in disciplinary actions that may include warning, demotion, salary or incentive reduction, resignation, suspension, or termination.⁴⁶ Substantiated as well as unsubstantiated allegations can result in corrective or preventive actions that seek to affect employees' future behavior.⁴⁷ These include counseling, coaching, and process modification.⁴⁸ With unsubstantiated allegations, the company may also decide to take no action.⁴⁹ The company utilizes "global efficiency" (GE), defined as operating time divided by hours used, as its key performance indicator in measuring productivity.⁵⁰ Each month a goal is set based upon operating conditions.⁵¹ Deviation from this target, specifically deviation under the efficiency index target (GE target), is viewed as an adverse event undermining the firm's productivity and profitability.⁵²

To examine the association between actions in response to allegations and the company's production efficiency, ordinary least squares (OLS) regressions are run on the independent variables "disciplinary action," "corrective action," and "no action," which are defined as the number of allegations for which disciplinary action, corrective action, or no action were taken by the company, respectively, in a given country in a month. The dependent variable is "production efficiency," defined as deviation from the firm's targeted GE (i.e., GE-GE target).⁵³

The regression indicates that when some corrective action is taken in response to an unsubstantiated allegation, there is no associated negative impact on production efficiency. In contrast, when no corrective action is taken, the coefficient is -0.002 (in time t and $t+1$, where t is when the allegation was reported). A 0.2% decrease in GE translates to approximately sixteen hours of lost operating time per production site, or 15.6 tons of lost production. This negative impact is statistically

46. *Id.*

47. *Id.*

48. *Id.* In rare instances (less than 2% of all instances), unsubstantiated allegations can also result in moderate disciplinary action (e.g., verbal warning). *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The plant production data describes the available hours for production at each plant and the hours the plant was used to produce goods (i.e., operating time = hours the plant is in use, including maintenance hours, delays, stoppages, and losses). *Id.*

53. Time (year-month) fixed effects and country fixed effects to control for the potential time trend and country-specific pattern in production efficiency and standard errors are clustered by time and country to adjust for within-cluster correlation. *Id.* For more detail on OLS regressions, see generally JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* (2d ed. 2010).

significant up to two months beyond the allegation going unsubstantiated.⁵⁴

It should be noted that this analysis provides an association between differential actions taken following unsubstantiated allegations and firm productivity. While fixed effects are included to control for potential variation at the country and time level, there are sources that could impact production efficiency that are not readily controllable but could impact a causal interpretation. For example, if governance quality or management degrades at a particular plant facility, the organization may be less prone to take action, which could also cause the decline in production efficiency (i.e., the source of the production efficiency decline is not the lack of action, but the worsening governance and supervision). Fixed effects, however, help mitigate the potential for such bias in the model to the extent that such an impact would be time-varying at the country level.

Despite this potential limitation, this preliminary evidence indicates that unsubstantiated allegations around employee conduct can have an economically significant impact on firm productivity. Notably, these results suggest that this adverse impact is evident only when the company does not seek to take corrective, preventive action (as opposed to disciplinary action). In this way, the evidence is consistent with the notion that these allegations, while not substantiated as strict legal or code violations, can negatively impact organizational culture because the allegations are subjectively substantiated to those who feel victimized or wronged. Thus, formulating a plan to address unsubstantiated allegations is still important to protect the underlying organizational culture and thereby preserve the firm's production efficiency.

2. Unsubstantiated Allegations and Reporting Behavior

In order to identify and remediate misconduct, leaders within an organization (including legal, compliance, and human resources leaders) must be aware of the alleged violation. A considerable body of evidence

54. The specific models are:

	(1) <i>Production efficiency (t-2)</i>	(2) <i>Production efficiency (t-1)</i>	(3) <i>Production efficiency (t)</i>	(4) <i>Production efficiency (t+1)</i>	(5) <i>Production efficiency (t+2)</i>
<i>Disciplinary action</i>	-0.008 (-1.205)	0.003 (0.316)	-0.012 (-1.264)	0.002 (0.374)	-0.002 (-0.453)
<i>Corrective action</i>	-0.002 (-0.705)	-0.002 (-1.491)	0.002 (1.331)	0.001 (0.545)	-0.002 (-1.352)
<i>No action</i>	-0.001 (-0.676)	-0.002 (-1.448)	-0.002*** (-3.283)	-0.003*** (-3.511)	-0.001*** (-4.009)
Observations	1,675	1,716	1,759	1,765	1,772
R-squared	0.589	0.618	0.593	0.628	0.629
Fixed effects	Time, country	Time, country	Time, country	Time, country	Time, country
Clusters	Time, country	Time, country	Time, country	Time, country	Time, country

Allegation Data, *supra* note 44.

indicates that tips, most often provided through a company's integrity hotline, are among the leading—if not *the* leading—source for identifying potential misconduct. Dyck, Morse, and Zingales examined over two hundred cases of fraud and found that misconduct is more frequently detected and reported by employees than by auditors, analysts, or the media.⁵⁵ Relatedly, the Association of Certified Fraud Examiners found that nearly 40% of all cases of misconduct are detected through tips provided internally to organizations, and these tips also reduce the duration of misconduct.⁵⁶ For frauds detected through tips, the median investigation duration is seventeen months, whereas frauds detected by external auditors or law enforcement last twenty-four and thirty-six months, respectively.⁵⁷ Thus, making employees comfortable with raising potential allegations of misconduct has the potential to mitigate the adverse impacts of corporate misconduct by improving detection and reducing the duration of any misconduct.⁵⁸

Employees are, however, less prone to report if they feel that their allegations will not be investigated. Put differently, to the extent that an employee consumes his or her time and takes on the stress that comes with reporting, they want to believe that their concerns will be respected and investigated appropriately.

Data from Gartner, a consulting firm, describes how employees who feel that their allegations will not be investigated are less prone to report. Employees from twenty-one companies (with a total of nearly 350,000 respondents) were asked about whether they observed misconduct in the

55. Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2225 tbl.2 (2010).

56. ASS'N OF CERTIFIED FRAUD EXAM'RS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE 4 (2016).

57. *Id.* at 25.

58. Recent work has documented issues that potentially inhibit reporting tips. For example, 20% of firms have impediments to reporting concerns anonymously on their company hotlines. Eugene Soltes, *The Difficulty of Being Good: The Efficacy of Integrity Hotlines 3* (Apr. 2019) (unpublished manuscript) (on file with the University of Chicago Booth Business School), <https://research.chicagobooth.edu/-/media/research/arc/docs/jar-annual-conference-papers/soltes-conference-paper.pdf?la=en&hash=9273582F7E64ADB83A41B8787708171EAD4F90AD> [https://perma.cc/F7X9-EG2B]. While this shows that hotlines can be functionally designed to inhibit reporting, another issue is people's psychological willingness to report. Publicly traded firms, following the Sarbanes-Oxley Act (SOX), are required to have an anonymous hotline to report potential concerns related to auditing and accounting. Extensive work in psychology that supports that individuals are more prone to feel comfortable reporting a potential allegation of misconduct—and therefore actually report—if they can do so anonymously. See Marcia P. Miceli, Janet P. Near & Terry Morehead Dworkin, *A Word to the Wise: How Managers and Policy-Makers Can Encourage Employees to Report Wrongdoing*, 86 J. BUS. ETHICS 379, 380 (2009); see generally Gael McDonald, *Business Ethics: Practical Proposals for Organizations*, 25 J. BUS. ETHICS 169 (2000); Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131 (1999).

prior year, and if so, whether they reported the misconduct they observed (Table 1).⁵⁹ As shown in the table, employees reported observed misconduct less than half the time.⁶⁰

Table 1. Employees observing and reporting misconduct.

Type of Misconduct		Employees who observed misconduct (% of employees)	Employees who reported observed misconduct (% of employees who observed misconduct)
HR-Related	Harassment	7.7	43.4
	Inappropriate Behavior	8.6	42.7
	Alcohol and/or Drug Abuse	2.7	36.1
	Discrimination	4.9	32.6
	Preferential Treatment	9.8	27.2
Legal Violations	Health and Safety Policy	2.2	39.7
	Data Privacy	1.2	39.1
	Environmental Regulation	0.9	38.5
	Business Information	0.9	31.7
Misuse of Corporate Assets	Conflicts of Interest	5.5	33.9
	Misuse of Time/Resources	5.2	35.0
	Stealing	1.7	45.9
	Fraud	1.4	42.8
Sales and Finance Violations	Improper Sales	1.4	40.8
	Inappropriate Gifts	1.4	27.4
	Accounting Irregularities	1.3	39.6
	Improper Payments	0.8	35.3
	Insider Trading	0.3	33.2

59. See generally Eugene Soltes, *Where Is Your Company Most Prone to Lapses in Integrity?*, HARV. BUS. REV., July–Aug. 2019, at 51 (describing a survey process to understand similar hot spots within an organization).

60. Gartner reports these statistics in a proprietary presentation titled “Culture’s Impact on Risk and Business Performance.”

Critically, employees were asked about their reasons for not reporting any alleged misconduct that they observed (as typically required in the company code of conduct).⁶¹ These responses are shown in Table 2. Notably, four of the response categories related to the belief that company would not substantiate the concern, even if it was actually a substantiated violation, due to a belief that the investigation process is flawed.⁶² Of all employees who observed misconduct that they did not report, 14.4% indicated that they “did not think the company would do anything,” 8.9% indicated that they “heard stories from others that nothing happens,” 7.7% indicated that they “raised concerns previously but nothing happened,” and 3.2% indicated that they “did not think anyone would believe the claim.”⁶³ Together, more than one-third of the respondents did not report alleged misconduct because they believed the company would not address their concerns seriously.⁶⁴

Table 2. Reasons for not reporting misconduct.

Reason for not reporting	Employees citing reason
Fear of retaliation	29.3%
Expect no action	14.4%
Not enough information	12.8%
Do not want to be involved	10.3%
Person involved was senior	9.9%
Heard that nothing happens	8.9%
Raised concerns previously but nothing happened	7.7%
Assumed the company knew	7.1%
Did not want to get anyone fired	6.5%
Not certain it was a violation	5.8%
Don't know why	5.3%
Resolved it myself	3.7%
Did not think anyone would believe the claim	3.2%
Not sure how or where to report	2.9%
Assumed someone else would report	2.7%
Knew the person involved	1.5%
May jeopardize company's financial goals	1.4%

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

As described in Part II, cases may ultimately be found to be “unsubstantiated” for a variety of reasons unrelated to whether the alleged conduct actually did or did not occur.⁶⁵ To the extent that an allegation is unsubstantiated but believed to be substantiated by the reporter (i.e., subjectively substantiated), employees are more prone to believe that the investigative process is flawed and therefore choose not to report the allegation. Significantly, even if the organizational investigative process does not actually have flaws (such as bias or insufficient resources), differences in perceptions between reporters and investigators (e.g., about what should be a substantiated violation) could still lead reporters to believe that the investigative process is flawed.

This data suggests that when employees are more prone to believe that an organization will not substantiate allegations that are brought to management’s attention, it will adversely impact employees’ willingness to report. Given the value of the internal reporting mechanism for more quickly addressing potential issues, this inhibits the process from serving as a maximally effective preventive and remediation tool. While allegations should not be substantiated when it is not appropriate to do so, this analysis nonetheless suggests that employee psychology can be impacted when allegations are unsubstantiated. Part IV discusses several approaches organizations have taken to mitigate perceptions that the investigation process does not respect employees’ concerns, even when cases are unsubstantiated.⁶⁶

3. Unsubstantiated Offenders and the Proclivity to Engage in Misconduct

Organizations routinely seek to identify “hot spots,” or parts of the organization that are more prone to have employees engaging in violations. This approach is based on the idea that misconduct is, in part, predictable based on past conduct. For instance, if employees who engage in misconduct are not sanctioned, they—and potentially others—are likely to repeat their actions and create additional cases of misconduct. If the company sanctions these employees, they are less likely to repeat their misconduct; they are explicitly prevented from future violations if they are terminated, or implicitly prevented if they are given opportunities to change their behavior in the future.

As discussed previously, some unsubstantiated allegations may represent actual misconduct that was unsubstantiated, for instance, due to lack of adequate supporting evidence. Thus, there is the potential for even

65. *See supra* Part II.

66. *See infra* Part IV.

unsubstantiated allegations to have predicative power. One way to investigate the relationship between past unsubstantiated allegations and future substantiated misconduct is to compare the rate of substantiated violations for employees with and without prior unsubstantiated allegations against them.⁶⁷ For one global manufacturing firm analyzed by the author, this analysis showed that employees were nearly twice as likely to have substantiated allegations against them if they had previously been subject to any unsubstantiated allegations.⁶⁸ This finding suggests that unsubstantiated allegations do in fact have predictive value in understanding future misconduct within organizations. Notably, the power of this prediction is likely to increase if allegations that are “not substantiated” (i.e., those where adequate evidence demonstrates the claims are untrue or not a violation, as opposed to “unable to substantiate”) are excluded.⁶⁹

C. Obstacles to Utilizing Unsubstantiated Allegations Data

Although organizations are not internally subject to all the same considerations and restrictions as a judicial process in relying on inferences drawn from unsubstantiated allegations, there are still several concerns that organizations face in utilizing this data.

The first is the litigation risk associated with discovery in subsequent legal matters. Future legal challenges related to prior allegations can draw these investigations back into the limelight. Moreover, even if the subsequent matter is unrelated to the subject of the unsubstantiated allegation, documents related to the unsubstantiated allegation may still be produced in litigation (advertently or inadvertently) in view of the breadth of civil discovery rules. These allegations could then serve as a diversion in the discovery process, be used to impeach witnesses, or distract the jury. Practically, the only way to eliminate this risk entirely is to create a policy that deletes unsubstantiated cases after a predetermined period of time.

In practice, organizations tend not to destroy past investigation outcome data.⁷⁰ Having an unusual “document retention policy” that

67. An implicit assumption in this comparison is that any differences are not merely a consequence of closer monitoring or more thorough investigation of employees who have previous unsubstantiated allegations against them.

68. The data was provided to the author under the agreement that the firm would remain anonymous. *See* Allegation Data, *supra* note 44.

69. In support of the view that prior substantiated conduct has predictive power, employees who had a prior substantiated violation were more than three times more likely to have another substantiated violation (assuming they were not terminated after the first violation), compared to employees who did not have a prior substantiated allegation against them. *See* Allegation Data, *supra* note 44.

70. One reason is that deletion is technically difficult because the data (i.e., hotline and case management software) is hosted by a third party and would require coordination with the third party

purges such data could result in damage to the organization. Moreover, the firm is unlikely to receive credit from enforcement agencies for having an effective compliance program if such data is purged.⁷¹ Thus, organizations generally retain data on unsubstantiated allegations, and the question effectively becomes if and how the information will be further utilized.

A second related concern, particularly for employers with EU citizens as employees but also for essentially any company offering goods or services to EU citizens, is the General Data Protection Regulation (GDPR), which was passed in May 2018.⁷² Related to corporate internal investigations, the European Data Protection Supervisor issued guidance on processing personal information:

[W]hen an initial assessment is carried out but it is clear that the case should not be referred to [regulators] or is not within the scope of the whistleblowing procedure the report should be deleted as soon as possible (or referred to the right channel if it for example concerns alleged harassment). In any case, personal information should be deleted promptly and usually within two months of completion of the preliminary assessment, since it would be excessive to retain such sensitive information.⁷³

Taken at face value, this guidance suggests that keeping data around substantiated or unsubstantiated allegations is untenable given that “personal information must not be kept for a longer period than necessary having regard to the purpose of the processing.”⁷⁴ While the way that firms respond to unsubstantiated allegations is still evolving as companies await additional guidance, in practice, firms are following this guidance strictly by deleting data en masse. The German Data Protection Authority has provided some guidance, On Whistleblowing Hotlines,⁷⁵ that specifically

to destroy. More commonly, firms will seek to avoid producing investigation outcomes in court or to regulatory bodies by seeking to cover investigations under attorney–client privilege.

71. Firms can receive reduced sanctions for violations if their compliance programs are nonetheless judged to be “generally” effective. See U.S. DEP’T OF JUST. CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 13 (2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [<https://perma.cc/X749-RM5G>]. For a discussion of “effectiveness,” see Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 967 (2018).

72. See generally Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

73. EUR. DATA PROT. SUPERVISOR, GUIDELINES ON PROCESSING PERSONAL INFORMATION WITHIN A WHISTLEBLOWING PROCEDURE 9 (2016), https://edps.europa.eu/sites/edp/files/publication/16-07-18_whistleblowing_guidelines_en.pdf [<https://perma.cc/DS7K-N8QA>].

74. *Id.*

75. DATENSCHUTZKONFERENZ, ORIENTIERUNGSHILFE DER DATENSCHUTZAUF SICHTSBEHÖRDEN ZU WHISTLEBLOWING-HOTLINES: FIRMENINTERNE

guides firms on the collection of personal data when it comes to fraud, auditing, bribery, insider trading, and environmental concerns.⁷⁶ However, the prior analysis, indicating that there is future information content to past allegations, suggests that firms could argue that there is value to retaining and processing this data to mitigate subsequent misconduct.

Finally, there may be competing internal cultural reasons that make utilizing information on unsubstantiated allegations undesirable. While there may be aggregate insights that can be gained by understanding patterns in unsubstantiated allegations, for those who have faced these allegations, it is possible that undue inferences could be drawn without proper controls. For example, a vindictive allegation might be made against a manager without basis (i.e., a false allegation). If this specific allegation was later acted upon or leaked (e.g., in a data breach), it could unfairly tarnish the reputation of the manager. In addition, the sense that employees are being unfairly surveilled could corrode a sense of privacy and respect within the workplace.⁷⁷

Broadly, these concerns are not so much about whether unsubstantiated allegations data should be retained (as practically it is, with the exception of firms that destroy data per GDPR guidance), but whether and how much it should be used to draw further insight into employee conduct and culture. A limited focus on understanding where there may be otherwise overlooked hot spots that deserve further attention from compliance and culture leaders—rather than use for targeting specific employees—can help mitigate these concerns about privacy, fairness, and organizational culture. Nevertheless, sensitivity to the potential legal and cultural concerns of drawing inferences from unsubstantiated allegations should be understood in order to appropriately manage the analysis.

WARNSYSTEME UND BESCHÄFTIGTENDATENSCHUTZ (Nov. 14, 2018), https://datenschutz.hessen.de/sites/datenschutz.hessen.de/files/OH_Whistleblowing-Hotlines_Stand_14_11_2018_1.pdf [<https://perma.cc/5GJM-PBPV>].

76. For a thoughtful discussion of reporting and privacy issues, see Vera Cherepanova, *Yes, GDPR Has Already Changed the Whistleblowing Landscape*, FCPA BLOG (May 22, 2019, 8:08 AM), <http://www.fcpablog.com/blog/2019/5/22/yes-gdpr-has-already-changed-the-whistleblowing-landscape.html> [<https://perma.cc/CB6A-JCRA>].

77. Technology leaders in surveillance and monitoring have not always provided reassurance that their applications appropriately manage privacy and have considered the potential moral quandaries posed by advanced artificial intelligence surveillance in monitoring technology. For example, Tang Xiao'ou, founder of the artificial intelligence firm SenseTime, stated, "We're not really thinking very far ahead, you know, whether we're having some conflicts with humans, those kind of things. . . . We're just trying to make money." David Ramli & Mark Bergen, *This Company Is Helping Build China's Panopticon. It Won't Stop There*, BLOOMBERG BUSINESSWEEK (Nov. 26, 2018), <https://www.bloomberg.com/news/articles/2018-11-19/this-company-is-helping-build-china-s-panopticon-it-won-t-stop-there> [<https://perma.cc/LF27-MU9W>].

IV. PRACTICAL CONSIDERATIONS WITH ALLEGATIONS DATA

One of the challenges linked to unsubstantiated allegations is the often-adverse impact they have on reporters who believe either that the allegations ought to have been substantiated or that the investigations process was not thorough.⁷⁸ These concerns reflect, at least in part, a lack of communication between reporters and investigators. At many organizations, the investigations process is a “black box” where weeks, or even months, pass before the investigation is concluded—at which time the reporter often only learns of the conclusion or sanction “through the grapevine” (i.e., through observation or rumors rather than a direct procedural follow-up). This considerable information asymmetry creates skepticism about the process, particularly when the outcome differs from the reporting party’s expectations (e.g., the person subject to the allegations is not fired).

Several firms have sought to improve communication and reduce the information asymmetry between investigators and reporters by providing greater transparency and soliciting feedback around the investigations process. Boeing, for example, provides reporters with information about how an investigation concludes.⁷⁹ Many legal and compliance leaders are averse to this practice because they fear increased liability from offering too much information to employees. Boeing’s experience suggests that this concern is exaggerated, given that they have not experienced significant additional issues associated with providing case outcome information to reporters. At the same time, by adding greater clarity to the process, Boeing creates greater reassurance that employees’ concerns are taken seriously and respected. The legal concerns with transparency, while valid, appear to take primacy because the risk is concrete, while the significant negative impacts of employee skepticism toward the reporting process and the allegations that consequently go unreported are not well-known and not measured.

By examining unsubstantiated allegations, organizations may also begin to identify individuals who have drawn repeated concerns, offering opportunities to uncover patterns of behavior. Notably, understanding why individuals have repeat unsubstantiated allegations extends beyond strict legal and business reputation concerns to broader business management concerns, given the externalities associated with such allegations.⁸⁰ Suppose a high-performing manager has four allegations of harassment by subordinates, all of which are unsubstantiated. To all four of the employees who reported these allegations, their concerns may be subjectively

78. *See supra* Section III(B)(2).

79. From field-based research conducted by the author. *See* Allegation Data, *supra* note 44.

80. *See supra* Section III(B)(1).

substantiated. Even though the manager has done nothing to warrant discipline, since all four investigations concluded as unsubstantiated, the manager is clearly making some employees uncomfortable. As described earlier, the manager's behavior could hinder productivity and thus may still need to be addressed. Moreover, holding all else equal, these prior allegations suggest that the manager is more prone to engage in a future substantiated violation.⁸¹ Thus, prior unsubstantiated allegations may be incorporated as another factor in models identifying the relevant risk associated with different employees and groups. While unsubstantiated allegations are not normally viewed as a component of "internal threat" models, the preliminary evidence provided here suggests that they may offer predictive power in risk modeling.

For many organizations, examining compliance data to draw analytic insight (rather than for case-by-case legal and compliance purposes) continues to be a time-consuming process for which firms lack adequate capability. In this regard, however, organizations have opportunities to improve the quality of their data during management changes, service provider changes, and structural changes (e.g., mergers and acquisitions activity) by thinking ahead about what insights could be drawn from structuring data differently. How unsubstantiated allegations are "coded" provides one such opportunity.

Concluding an investigation as "unsubstantiated" is ambiguous in that it does not offer clarity on why this conclusion was reached. Instead of concluding cases as "unsubstantiated," a more descriptive classification would bifurcate this conclusion as either "unable to substantiate" or "not substantiated." The designation "not substantiated" would then be reserved for cases in which adequate evidence supports that the allegations are either untrue based on a company's standard for investigations (e.g., preponderance of evidence) or not a violation of law or company policy, while "unable to substantiate" would acknowledge the ambiguity associated with the investigative process and observing behavior.⁸² Separation of these allegation types can provide additional insight into the respondent and the potential predictive value of unsubstantiated allegations. Allegations that are not substantiated are less prone to provide insight into the respondent, whereas those that are unable to be substantiated are more likely to reflect, on average, some legitimate concerns around conduct that simply cannot be supported due to the lack of available evidence. However, organizations have historically not coded

81. *See supra* Section III(B)(3).

82. In cases involving false allegations, the investigators may consider further indicating that that is the reason for the case concluding as unsubstantiated.

the unsubstantiated allegations with sufficient detail, thereby losing insights that could be drawn from this data.⁸³

CONCLUSION

In this Article, I explored the use of unsubstantiated allegations data to better understand an organization's culture. This data offers one rich source of legal and compliance data that organizations already have access to but historically have not analyzed in any comprehensive or rigorous manner. This essay points out the potential value for compliance leaders who consider their unsubstantiated allegations not simply as legal records but instead as data sources that can be used to more proactively develop approaches to managing and mitigating the impact of misconduct on an organization's well-being.

83. One might seek to go further and make a distinction between "false allegations" and "subjectively substantiated" allegations that are unsubstantiated. This, however, would prove to be challenging especially in cases with anonymous reporters who reveal little about their intentions or motives, since it requires ascertaining the mindset of reporters. Even if a reporter turns out to be clearly incorrect in an allegation, the motive for reporting could be genuine and appropriate. Thus, while there is a conceptual difference between "false allegations" and "subjectively substantiated" (even when not substantiated), without specific information to indicate that the report was knowingly made incorrectly, this distinction is difficult to capture in practice.