Adjudication of Discrimination Complaints

Erika L. Pierson (She/her)

Chief Judge

DC Commission on Human Rights

AGENDA

Session I

- DC Commission on Human Rights
- Public Hearings
- Hearing Process
- Types of Evidence
- Hearsay

Session II

- Documentary Evidence
- Official Notice
- Managing Hearing
- Exhibits
- Burden of Proof
- Surviving Appeal
- Decision Writing

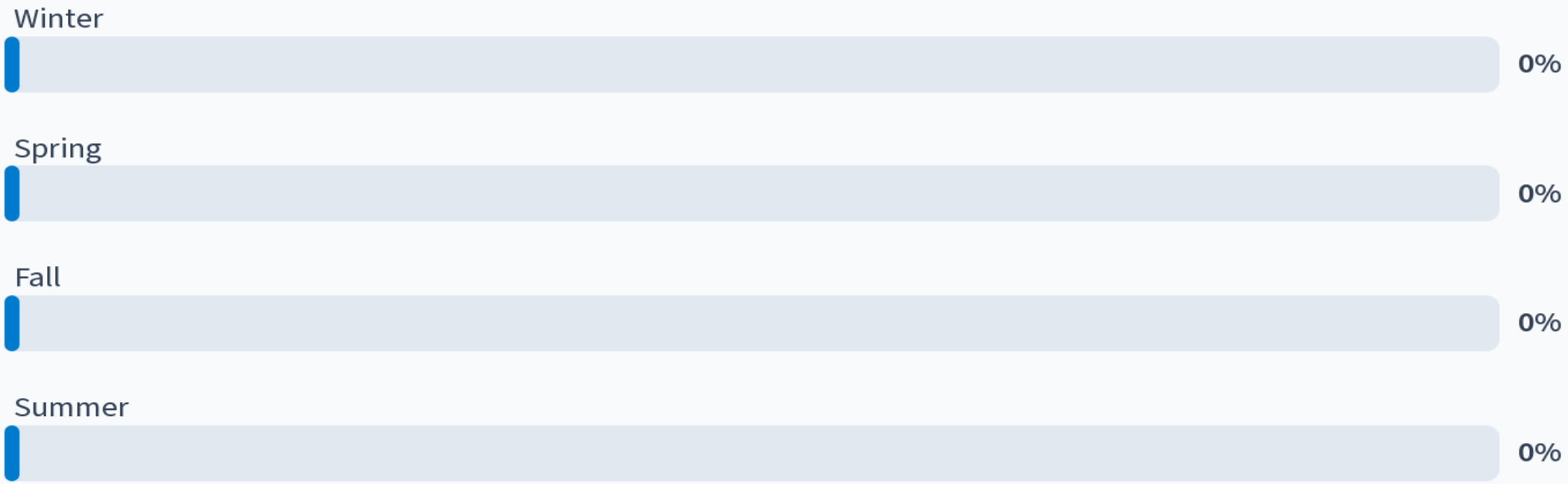
PLEASE JOIN POLL EVERYWHERE FOR INTERACTIVE PRESENTATION

Join by Web **PollEv.com /erikapierson205**

Join by Text Send **erikapierson205** to **22333**

ADJUDICATION OF DISCRIMINATION COMPLAINTS

What is your favorite Season?



Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

Where are you from?

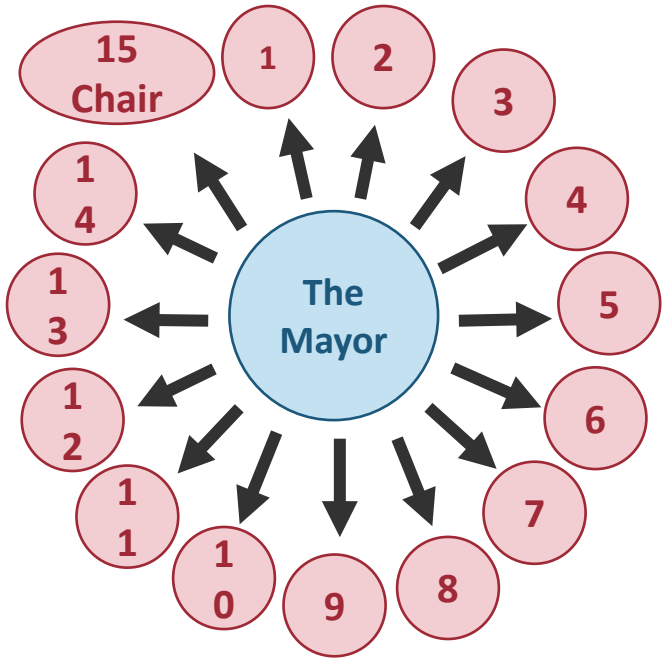
0

Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

Office of Human Rights
DISTRICT OF COLUMBIA

DC Commission on Human Rights

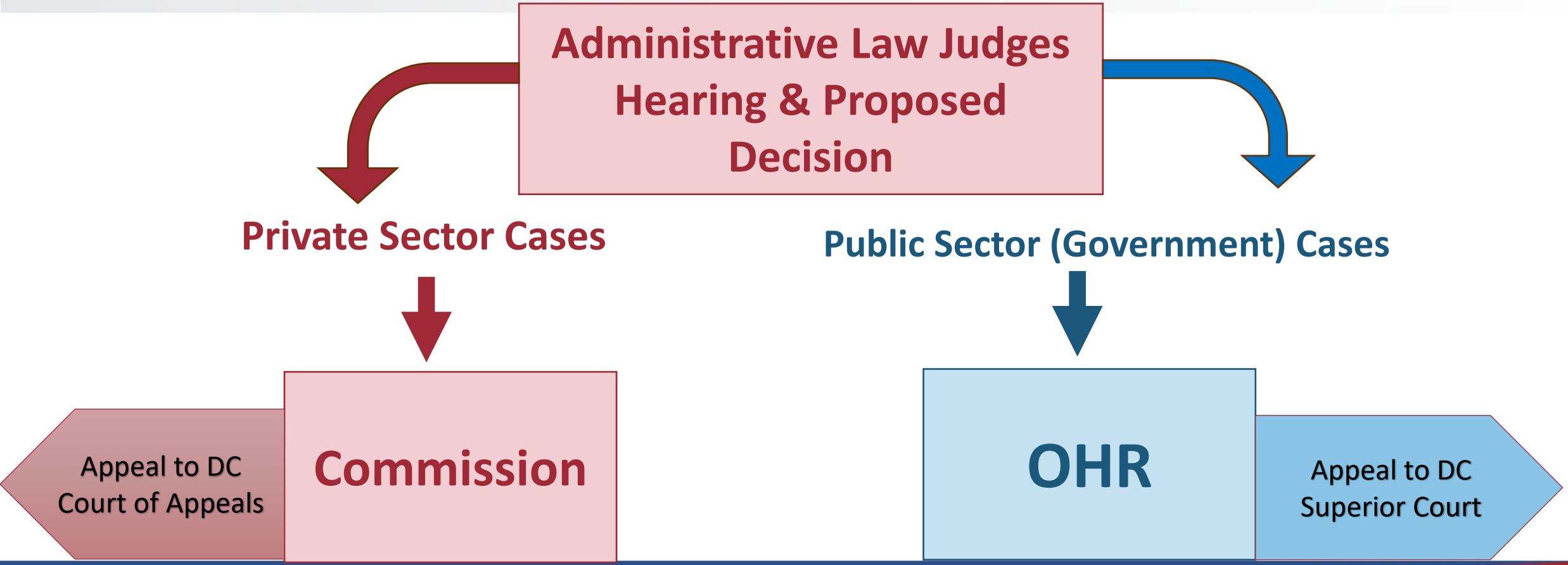
- **Established by statute in 1970,** D.C. Code 2-1401 *et seq.*
- **Part of the Office of Human Rights but independent**
- **15 Commissioners appointed by the Mayor for three-year terms, without compensation**
- **Various backgrounds in human rights**
- **Mayor designates Chairperson**
- **Make final decisions in private sector complaints**
- **Can serve as hearing examiners**



OFFICE OF HUMAN RIGHTS

Investigate	Investigate complaints of discrimination to determine whether there is probable cause. Certifies to independent ALJ for hearing
Mediates	Provide mediation and conciliation opportunities to resolve complaints
Probable Cause	Present probable cause finding cases before the Commission on Human Rights for a public hearing on the merits
Educate	Educate the public about human rights

BIFURCATED PROCESS
Final Decisions



Jurisdiction – D.C. Code § 2-1403.06(b)

- If the parties fail to execute a conciliation agreement, the Office shall certify the case to the Commission for a **public hearing**
- After a finding of probable cause finding the respondent shall answer the charges of such complaint at **a public hearing** before 1 or more members of the Commission or before a hearing examiner. D.C. Code § 2-1403.10.

Public Hearings

What does it mean to have a "public hearing?"

- A trial-like proceeding
- Open to the public
- Governed by the Administrative Procedures Act ("APA")

Roles in Litigation

OHR conducts investigation and issues a probable cause finding

OHR represents the Complaint

(not the Complainant)

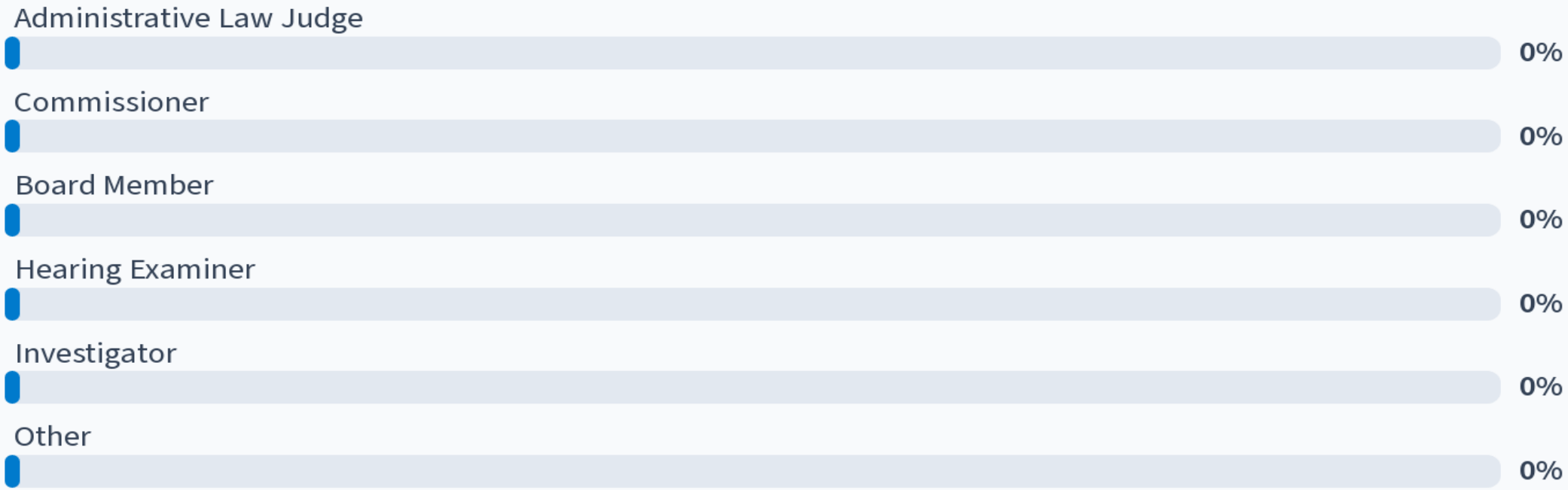
ALJ conducts the hearing and all pre-trial matters

ALJ issues a Proposed Decision and Order

A Tribunal of 3 Commissioners make the final decision

Final Decision is appealable to the D.C. Court of Appeals

How would you best describe your role?



Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

Representation

75% Respondents

35% Complainants

Pro Se Litigants

- Generally, a pro se litigant is entitled to no special treatment, nor substantial assistance from the judge. However, there are exceptions and circumstances which require special care by the judge, meaning that the pro se litigant is not "left to fend entirely for [themself]." Particularly when a remedial statute is involved.
  - Filings by a *pro se* litigant "must be held to less stringent standards than [those] drafted by lawyers"
  - A *pro se* litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance."
  - The trial court has a "responsibility to inform pro se litigants of procedural rules and the consequences of noncompliance," including "at least minimal notice ... of pleading requirements."

Pro Se Litigants

- '[P]ro se litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleadings,
- Important to provide pro se litigants with the necessary knowledge to participate effectively in the trial process. *Padou v. Dist. of Columbia,* 998 A.2d 286, 292–93 (D.C. 2010)
- From a Commission Remand:

> "The Commission should heed this court's admonition that because many litigants seeking relief from the Commission are pro se, the regulation must be interpreted with them in mind, with the goal of ensuring that the system is accessible to individuals who have no detailed knowledge of the relevant statutory mechanism and agency processes."

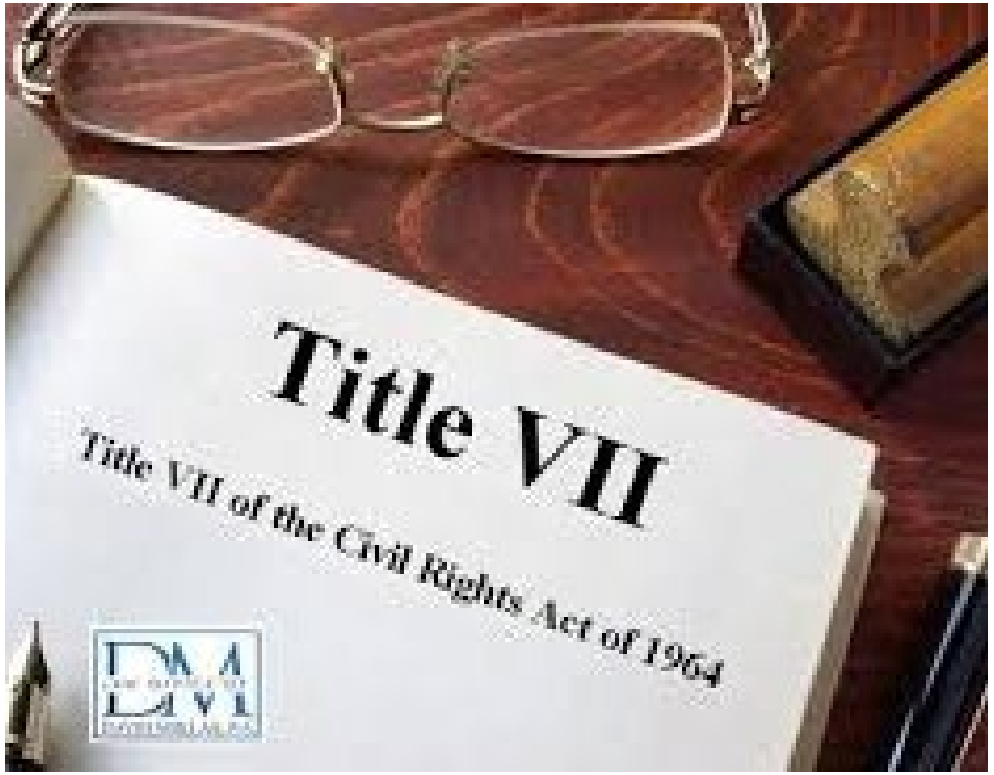
The Commission only enforces D.C. law, but relies on federal case law.

However, the Office of Human Rights assists in the enforcement of Federal Law through partnerships with: EEOC, HUD, and DOJ.

Local Laws v. Federal Laws

- Be aware of differences between local human rights laws which are often more expansive than federal laws, particularly:
  - Causation
  - Burden of Proof

Title VII of Civil Rights Act



- Applies only in **employment** and the following 5 protected Traits:
  - Race
  - Color
  - Sex
  - National Origin
  - Religion
- 15+ employees

D.C. HUMAN RIGHTS ACT of 1977

D.C. Code § 2-1401.01 *et seq*.

23 Protected Traits

This number of traits protected by the DCHRA makes it the most comprehensive human rights laws in the USA

- Gender Identity & Expression
- Marital Status
- Family Responsibilities
- Place of Residence
- Matriculation
- Credit
- Political Affiliation
- Homeless Status (*new in 2023)
- Eviction (*new in 2023)

Areas of Enforcement

What % of Discrimination Cases do Employees Prevail in District Court?

Nobody has responded yet.

Hang tight! Responses are coming in.

Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

Data

District of Columbia	Federal/EEOC	District Court
• 26% Sex/Gender • 25% Race • 18% Disability • 10% Age • 33% Retaliation (not a trait)	• 30% Sex • 30% Race • 22% Age • 50% Retaliation (not a trait)	• 13 % Employer granted Summary J. • 1% Emloyee Prevails • 192 damage awards out of 72,000 cases

Sources: FAST CO. (July 31, 2017), https://perma.cc/54CV-AB3W
OHR FY21 Annual Report: https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/FY21_OHR_Annual_Report.pdf

BY THE NUMBERS FY 19 OHR ENFORCEMENT AT-A-GLANCE

1598

Initial Inquiries in FY19

Initial inquiries are the completed complaint questionnaires received by OHR from a member of the public

450+

DOCKETED CASES

Cases accepted for investigation in FY19

These cases must meet legal requirements and be covered by a District or federal civil rights law

52%

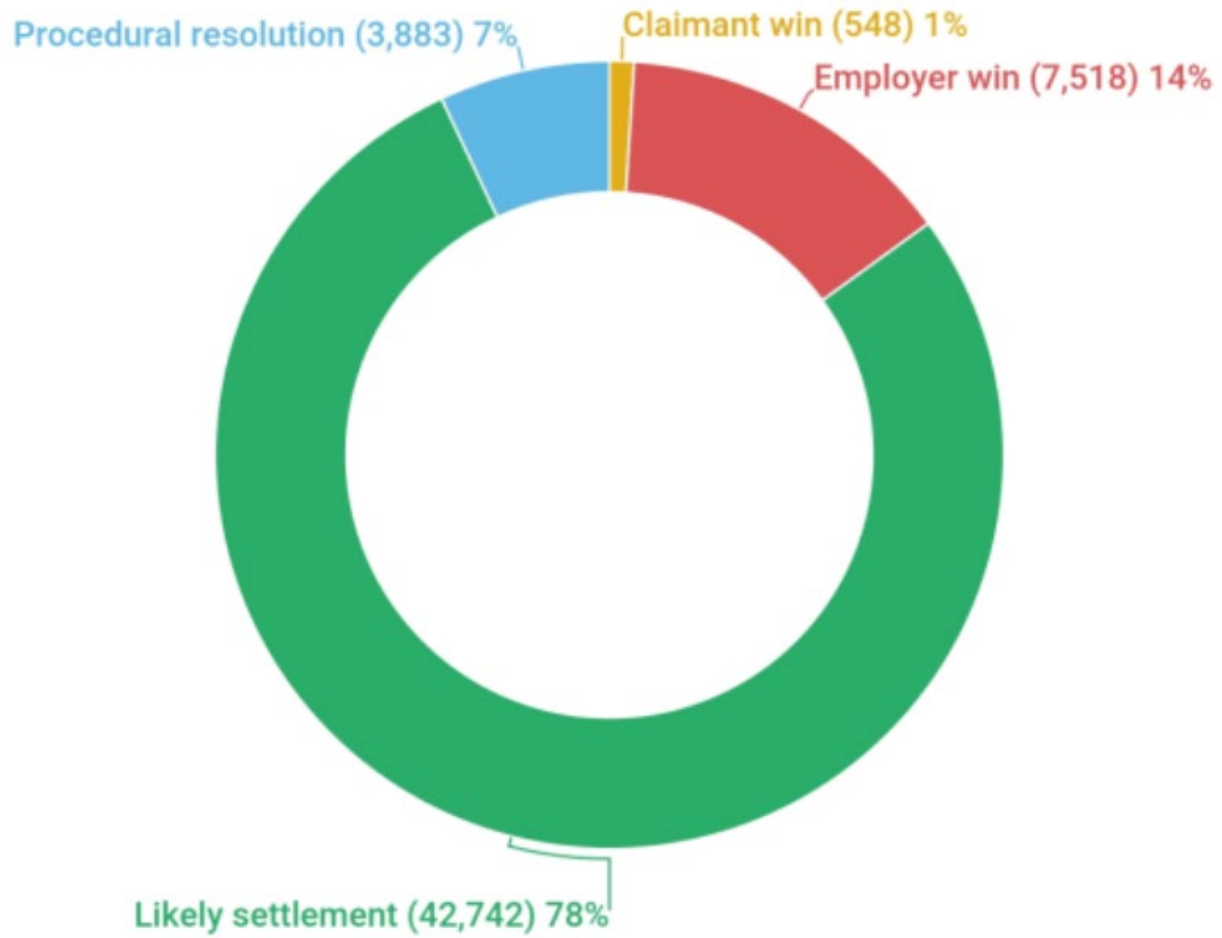
Of cases (246/477) settled through mediation in FY19

2.5

MILLION DOLLARS

in settlements during successful mediations in FY19

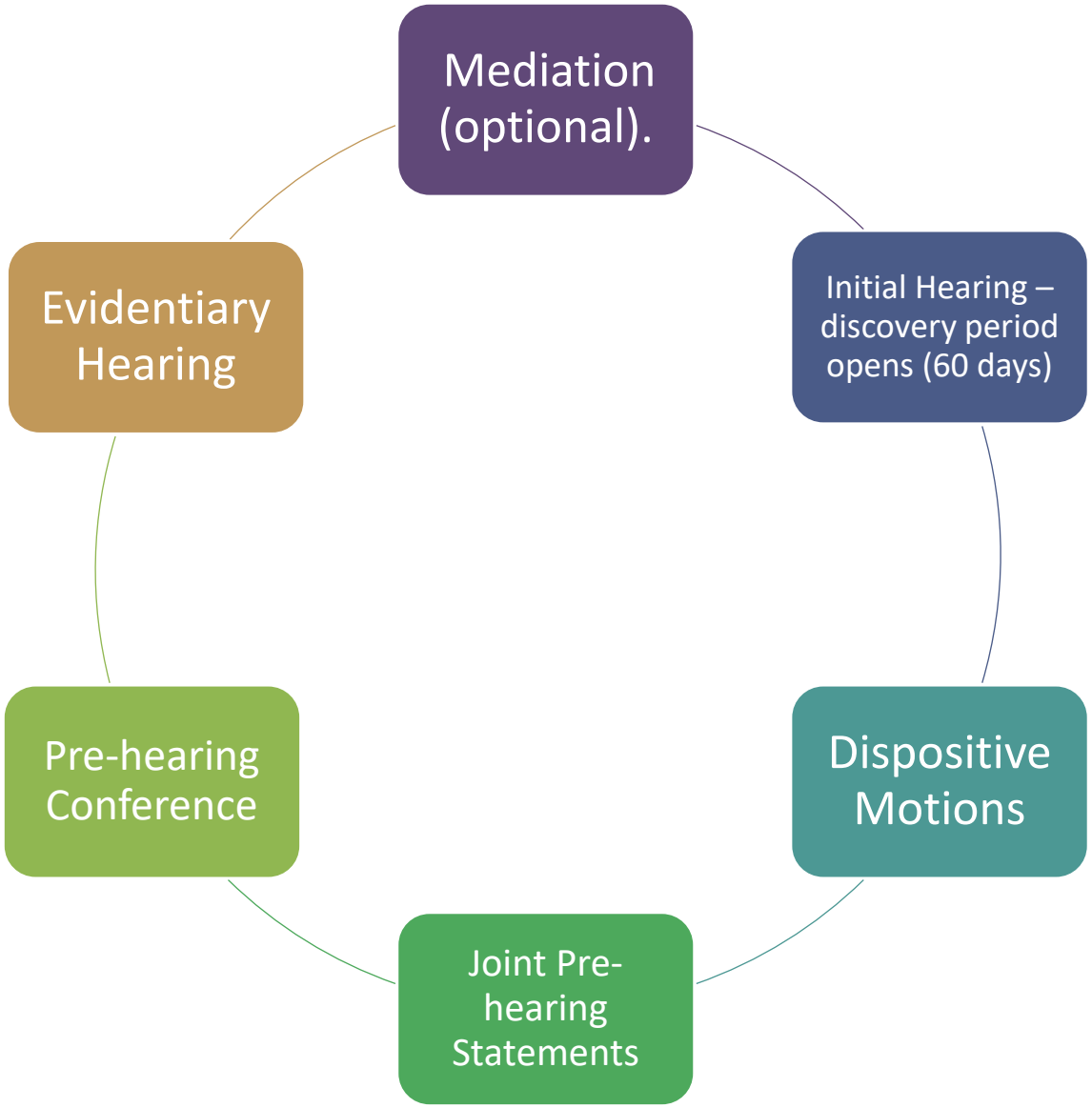
How Federal Employee Discrimination cases are resolved



Out of 54,810 discrimination, harassment, or retaliation cases closed between January 2009 and July 2017. Source: Federal records and Lex Machina

Source: https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits

HEARING PROCESS



Pre-Hearing Conference

- Pre-hearing Statements: Joint or Separate
- Clarification of Issues for hearing
- Relief Sought
- Stipulation of Facts
- Identify Witnesses
- Objections to Witness or Exhibits
- Identification of Experts

Fillable Pre-Hearing Statement Form

B. Claims and Defenses:

Complainant's claims:

Click or tap here to enter text.

Respondent's Claims/Defenses:

Click or tap here to enter text.

C. Facts Stipulated (please number):

1) Click or tap here to enter text.

D. Facts/Issues in Dispute:

1) Click or tap here to enter text.

E. Complainant's Requested Stipulations:

1) Click or tap here to enter text.

F. Respondent's Requested Stipulations:

1) Click or tap here to enter text.

G. OHR's Requested Stipulations:

1) Click or tap here to enter text.

Sample Pre-Trial Statements Requirements and Format

Pre-Trial Statements

Parties to an adversary proceeding **must** file a "Joint Pre-Trial Statement" **at least 14 days before a trial is scheduled to begin**. If the parties are not able to agree on the terms of the Joint Pre-Trial Statement, then each party must file and serve a separate Pre-Trial Statement **at least 14 days before trial**, which must include an affirmation that the party has made diligent, good faith efforts to produce a Joint Pre-Trial Statement, but was unable to do so.

The Pre-Trial Statement must include the following information, under separately numbered headings, and in the following order:

1. The case caption of both the bankruptcy case and the adversary proceeding.
2. A brief procedural history of the case, including the dates: (a) the case was filed, (b) the adversary proceeding was filed, (c) the key pleadings and papers were filed in the case and adversary proceeding, and (d) the pre-trial statement due date.
3. A list of all undisputed material facts.
4. A list of all disputed material facts.
5. A concise statement of each contested legal issue (including whether the Court has jurisdiction to enter final orders on each issue).
6. A summary of all evidentiary issues and any anticipated evidentiary objections.
7. An acknowledgment that any motions *in limine* must be filed contemporaneously with the Pre-Trial Statement and made returnable on the date and time set for the pre-trial conference.
8. Identification of witnesses, including: (a) the name of each witness who will testify, (b) a brief summary of each witness's anticipated testimony, and (c) the projected duration of each witness's testimony.
9. The estimated length of the trial.
10. Any unique circumstances the parties will ask the court to address as part of the trial.

https://www.nywb.uscourts.gov/sites/nywb/files/PRW%20Sample%20Pre-Trial%20Statements.pdf

Exhibit Lists

EX #	ITEMIZED DESCRIPTION	ADM	NOT ADM	STIP	OBJECTIONS

Managing Exhibits – Best Practices

- Label Exhibits
- Assign identifying numbers
  - Complainant: C1 or 100
  - Respondent: R1 or 200
  - Agency: A1 or 300
- Bates Numbering
- Submit exhibits in a single PDF


EVIDENCE
LAW
CASE
DEFENSE
JUDGE
VERIFICATION
CONFIRMATION
ATTESTATION
AFFIRM
DEGREE
ADMISSIBLE
BURDEN
LEGAL
DOUBT
MOTION

Types of Evidence

- Real Evidence = Tangible
- Documentary
- Testimonial
- Judicial notice
- Official Notice
- Recorded evidence
- Stipulations


ADMINISTRATIVE
PROCEDURE ACT

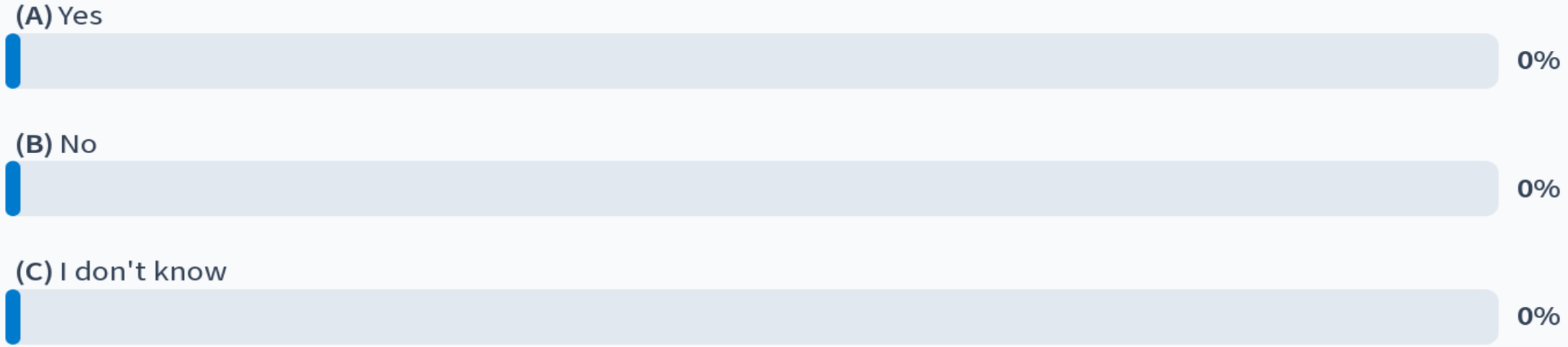
Rules of Evidence – do not apply

It is generally accepted that the rules of evidence which govern the admissibility of evidence in courtroom trials **do not apply to administrative agency adjudications**.

Why?

- Developed for jury trials to keep unreliable evidence from going to jury
- It has been argued that to require an administrative law judge to reject inadmissible evidence "makes no sense" because there is no jury to protect and the agency official is equally exposed to the evidence whether they admit it or excludes it
- Administrative agencies further policy goals that the legislature has decided can be best promoted through a more efficient and speedy process than is available in the traditional judicial arena.

Do the Rules of Evidence Apply in your jurisdiction?



Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

What does it Mean to Have Relaxed Rules of Evidence?

The applicable test at an administrative hearing is not whether certain evidence is admissible under the strict rules of evidence; the standard is **"whether the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs."** *Colorado Dept. of Revenue, Motor Vehicle Div. v. Kirke*, 743 P.2d 16, 20–21 (Colo. 1987)

This standard is not without limits: the rules of evidence cannot be so relaxed as to disregard due process of law and fundamental rights.

Fundamental Fairness Key

Relaxed rules does not mean you cannot apply rules of evidence for the orderly presentation of evidence.

The U.S. Supreme Court has held that "[t]he matter comes down to the question of the procedure's integrity and fundamental fairness." *Richardson v. Perales,* 402 U.S. 389 (1971)

Evidence – APA

5 U.S.C. § 556(d);
D.C. Code § 2-509(e)

- **Any** oral and documentary evidence that is not **irrelevant, immaterial, and unduly repetitious is admissible.**
- Evidence is **relevant** if it tends to prove or disprove a material issue raised by a charge/complaint.

APA Findings of Fact

APA, 5 U.S.C. § 556(d), 557(c)
DCAPA, DC Code § 2-509(e)

Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n, 402 A.2d 36 (D.C. 1979)

To satisfy the requirements of the APA, findings must be based on **reliable, probative, and substantial evidence**

“Reliable” Evidence

Evidence is **reliable** if it is dependable or trustworthy (factors to consider):

- Witness qualified to testify concerning the matter?
- Are statements factual rather than conclusory?
- Whether witnesses are disinterested in outcome of case.

Substantial Evidence

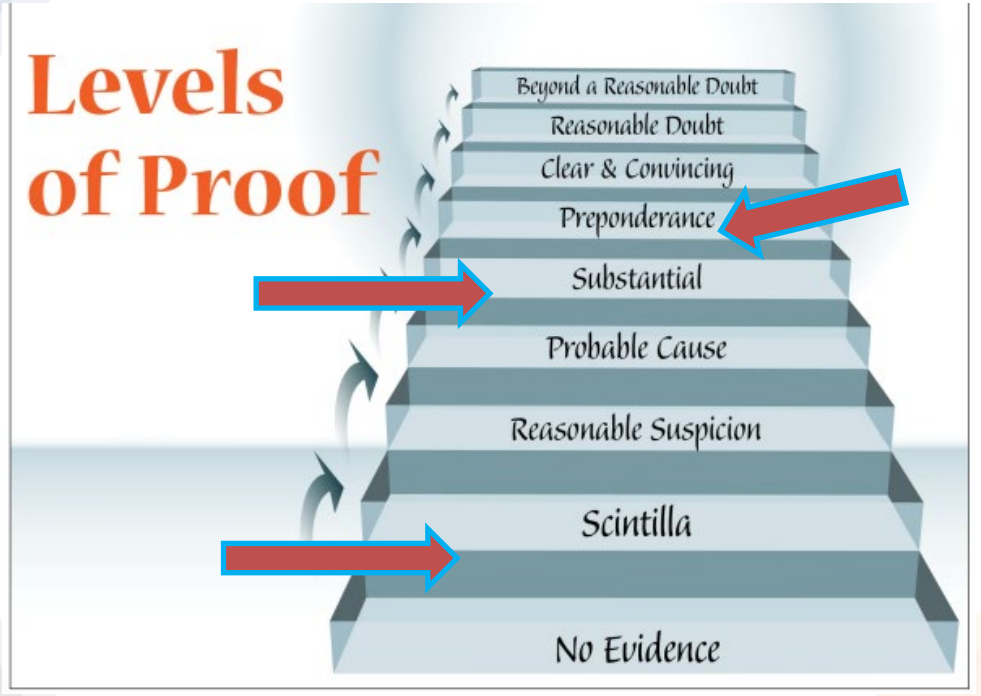
- Under the APA, an agency's factual findings are reviewed under the **substantial evidence standard**. *See Kappos v. Hyatt*, 132 S. Ct. 1690, 1694 (2012);
- The standard, however, is **"extremely deferential"** and a reviewing court must uphold the agency's findings "unless the evidence presented would compel a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.).

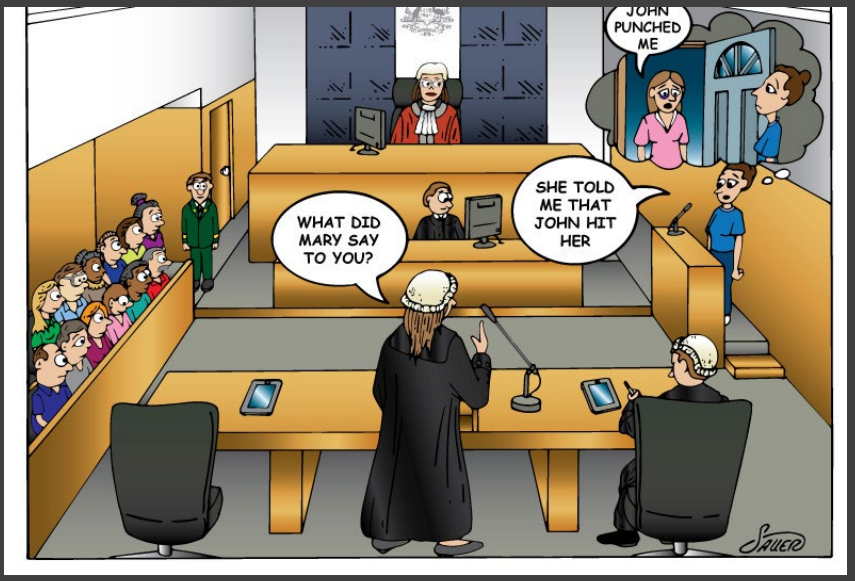
Substantial Evidence

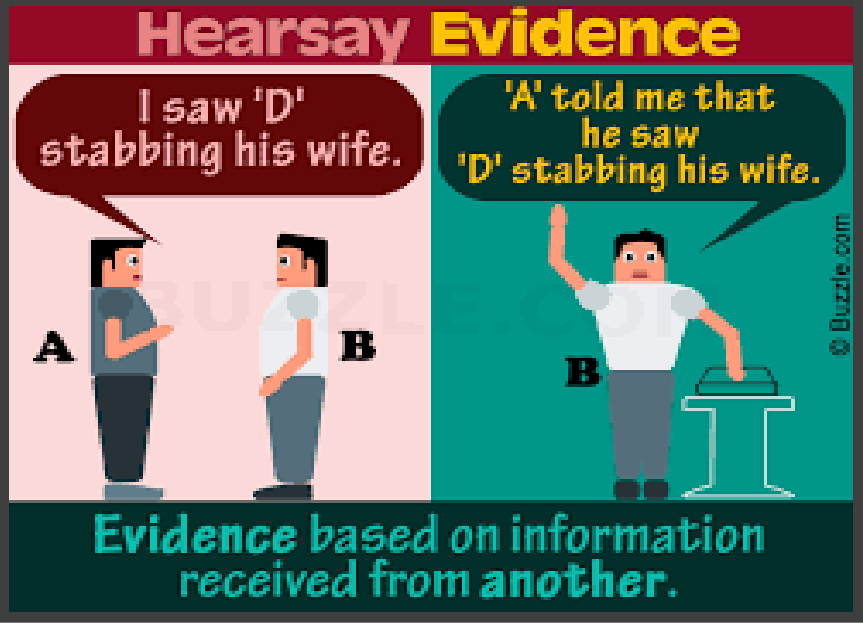
- **Substantial evidence** means **"more than a mere scintilla"** and is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion."
- "Supported by less than a preponderance but more than a scintilla of evidence."

-*Jadallah v. DOES,* 476 A.2d 671,676 (D.C. 1984)

-*Labor Council for Latin Am. Advancement v. United States Envtl. Prot. Agency*, 12 F.4th 234, 244–45 (2d Cir. 2021)




JOHN PUNCHED ME
WHAT DID MARY SAY TO YOU?
SHE TOLD ME THAT JOHN HIT HER
SAUER


Hearsay Evidence
I saw 'D' stabbing his wife.
'A' told me that he saw 'D' stabbing his wife.
A
B
B
© Buzzle.com
Evidence based on information received from another.

Hearsay

An out of court statement offered for the truth of the matter asserted

Evidence based not on a witness's personal knowledge but on another's statement not made under oath

Admissible in administrative hearings

Admissible does not mean reliable. How much weight do you give the hearsay?

Why is Hearsay admissible?

"Because there is no jury to shield, and individual agency members are presumed capable of properly assessing the reliability and weight of evidence, greater flexibility and discretion as to admission are permitted."

No all fact-finders are attorneys

-*Kopff v. Dist. of Columbia Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1385 (D.C. 1977)

SUBSTANTIAL EVIDENCE

Hearsay may constitute substantial evidence in administrative proceedings, with the weight, ranging from minimal to substantial, being accorded after a "case-by-case evaluation of the reliability and the probative value of the evidence."

Its weight is determined by "the item's 'truthfulness, reasonableness, and credibility'."

2 Part Inquiry – Substantial Evidence

Whether the agency "adequately explained how it derived its conclusion"

and

Whether the court believes the agency's conclusion is reasonable on the basis of the record

What makes testimony credible?

Nobody has responded yet.

Hang tight! Responses are coming in.

Start the presentation to see live content. For screen share software, share the entire screen. Get help at **pollev.com/app**

Factors to Consider/Reliability:

- Whether the declarant is biased,
- Whether the testimony is corroborated,
- Whether the hearsay statement is contradicted by direct testimony,
- Whether the declarant is available to testify and be cross-examined, and
- Whether the hearsay statements were signed or sworn.

  – *Gropp v. D.C. Bd. of Dentistry*, 606 A.2d 1010 (D.C. 1992)

LEGAL RESIDUUM RULE

- States that administrative hearing bodies should never ground findings of fact solely on uncorroborated hearsay because uncorroborated hearsay is not "substantial evidence."
- Under the rule, when all the evidence received has been sifted through by a reviewing court, there must be present at least **a residuum or residue of legally competent evidence** that supports the agency's findings.
- Rejected by drafters of model APA and by many states

Can Findings be Based Solely on Hearsay?

- Hearsay can create a special problem when an agency decision is based solely on hearsay.
- Courts subject administrative agency decisions based solely on hearsay to **"exacting scrutiny."** Therefore, although an administrative agency's decision will not be reversed because of the admission of hearsay, administrative decisions based **solely** on hearsay may be reversed due to lack of adequate evidentiary support

- Look at your jurisdiction

Can Findings be Based Solely on Hearsay?

MARYLAND=Yes:

"If such evidence is credible and sufficiently probative, '**it may be the sole basis for the decision of the administrative body.**"
Para v. 1691 Ltd. P'ship, 65 A.3d 221, 248–49 (2013)

DISTRICT OF COLUMBIA = Yes:
Although the Court of Appeals has adopted a flexible approach that rejects any rigid threshold requirement of competent corroborating evidence, administrative findings and conclusions based exclusively on hearsay are **subject to exacting scrutiny.**

WISCONSIN - No:

Requiring corroboration of hearsay by non-hearsay evidence ensures that the evidence is properly tested, thereby ensuring the fundamental fairness of administrative proceedings.
Gehin v. Wisconsin Group Ins. Bd., 692 N.W.2d 572, 592 (WI 2005)

Applying Hearsay

- Be careful crediting uncorroborated hearsay testimony over live, sworn testimony.
- "Where the declarant is available to testify and be cross-examined, the practice of relying exclusively on hearsay is strongly discouraged and should be heavily weighted against the sponsoring party."

  - *Cooper v. Starbucks Coffee Corp.*, 164 A.3d 66, 70 (D.C. 2017)

Hearsay - 2-Step Process

01

Consider the hearsay's reliability and probative value.

02

Once the offered hearsay is deemed sufficiently reliable and probative, consider whether the hearsay's admission contravenes due process.

See Perales, 402 U.S. 389, 402 (1971)

How to Handle Hearsay Objection

Q: Objection, Hearsay

A: Hearsay is admissible in administrative hearings. The witness may testify and the Commission will give the testimony its proper weight.

Invite the Parties to argue weight and NOT admissibility

Part II
Adjudicating Discrimination Complaints

Excluding Evidence: Proffers

- If an attorney is unable to get certain testimony or an exhibit accepted into evidence because of an objection that was sustained, and the attorney has a strong belief that the testimony or exhibit is admissible and is important, the ALJ can be asked to receive a proffer of the evidence.
- The ALJ may allow the witness to answer the objectionable question or will allow the attorney to state on the record the gist of what the witness would have said.
- Preserves the issue for review on appeal.

Documents

- Hearsay documentary evidence must still have a foundation. *See* 5 U.S.C. 556(d) (must show that "real evidence is what it purports to be")
- Does if fall within traditional business records exception?
- If not, is there other testimony sufficient to establish the accuracy of the document? *See Anderson v. Dept. of Transportation, FAA,* 828 F.2d 1564 (Fed. Cir. 1987) (air traffic controller logs were altered during course of strike and thus would not have been admissible as "business records," but were nevertheless admitted when FAA officials testified and explained discrepancies.).
- Documents that lack an adequate foundation have little probative value.
- Anonymous sources generally disfavored and raise questions of fundamental fairness and seriously affects integrity of administrative hearing. *See McLees v. Sullivan,* 879 F.2d 451, 454 (8th Cir. 1989)

Investigative Report

Hearsay? Yes! But is an exception to hearsay under F.R.E. 803(8)(C) – Public Record

Conclusions of law and opinions, not admissible

Argument against admission: inability to cross-examine witness

No 6th Amendment Right

6th Amendment Right to Confrontation only applies in criminal cases

Admissibility of Reports

Reports of Government agencies presumptively reliable

Parties who fail to exercise right to subpoena a witness have effectively waived the right to complain about a denial of the opportunity to cross-examine. *Richardson v. Perales*, 402 U.S. 389 (1971).

The U.S. Supreme Court has held that "[t]he matter comes down to the question of the procedure's integrity and fundamental fairness." *Id.*

F.R.E. 803(8)(C) – Public Records and Reports

Records, reports, statements, or data compilations, in any form, of **public offices** or agencies, setting forth ... (C) in civil actions and proceedings and against the Government in criminal cases, **factual findings** resulting from an **investigation made pursuant to authority granted by law,** unless the sources of information or other circumstances indicate lack of trustworthiness.

Purpose of Report

Does not serve to prove facts in the case

Most useful to challenge credibility or witness or inconsistent statements

Report can be excluded if it is “untrustworthy” or the “prejudicial value outweighs probative value”

The party opposing admissibility has the burden of establishing enough “negative factors” to persuade a court that a report should not be admitted.

BUSINESS RECORDS

Rules of Evidence for Business Records. An exception to hearsay.

The rationale underlying the business records exception is that because the business relies on the accuracy of its records to conduct its daily operations, the court may accept those records as reliable and trustworthy as long as:

(1) The record was made in the regular course of business,

(2) It was the regular course of the business to make such records,

(3) The record was made at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter, and

(4) The original maker has personal knowledge of the information in the record or received the information from someone with such personal knowledge and who is acting in the regular course of business.

Business Records

Some jurisdictions and agencies specifically have relaxed rules for business records in administrative hearings – check your jurisdiction.

Focus is still whether evidence is credible, probative and reliable

Under relaxed rules, it is not necessary to call witnesses to testify to the truth of the entries

Deal with authenticity and admissibility at pre-trial conference

Silent Witness Theory of Admission

- Affords an alternative route to the introduction of photographic evidence in virtually all jurisdictions.
- Photographic evidence may draw its verification, not from any witness who has actually viewed the scene portrayed, but from other evidence which supports the reliability of the photographic product. McCormick on Evidence § 214 at 15.

Judicial Notice v. Official Notice – Facts outside the hearing record

JUDICIAL NOTICE - generally limited to "matters of common knowledge." Derives from Rule of Evidence (FRE 201(b))

OFFICIAL NOTICE - broader, allowing an agency or administrative court to also notice "technical or scientific facts that are within the agency's area of expertise." Derives from the APA

Judicial Notice

Judicial notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well-known, or so authoritatively attested, that it cannot reasonably be doubted.

"generally known within the territorial jurisdiction of the trial court" (e.g. locations of streets within the court's jurisdiction) or

Those that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" (e.g. the day of the week on a certain date).

Simplest, most obvious common-sense facts, such as which day of the week corresponded to a particular calendar date or the approximate time at sunset.

Examples of Judicial Notice

Hinkle v. Hartsell, 131 N.C. App. 833 (1998)

- The public laws of states
- The laws of nature
- Human impulses, habits, functions
- Established medical and scientific facts
- Well known practices in farming, construction work, transportation
- Characteristics of familiar tools, appliances, weapons
- Days, weeks and months in calendar
- Population and areas as shown by census reports
- Important current events, facts of history

Official Notice

- APA allows a hearing officer to take official notice in a final adjudication of certain facts outside of the hearing record. *See* 5 U.S.C. § 556(e); D.C. Code § 2-509(b):
  - **Matters of common knowledge**
  - **Matters that can be verified by sources whose accuracy cannot reasonably be questioned** (judicially cognizable facts)
  - **General, technical or scientific facts within the specialized knowledge of the hearing officer or agency**
- An agency may take official notice of its own records. That does not mean that the agency must accept as true all facts set forth in the documents in its records. *E.g., the date of a filing*. *Renard v. Dist. of Columbia Dept. of Employment Services*, 673 A.2d 1274, 1276 (D.C. 1996)

“Technical or Scientific Facts in an Agency’s Area of Expertise”

- The logic behind this expanded scope of official notice is that since “administrative agencies necessarily acquire special knowledges in their sphere of activity,” certain highly technical facts “may become, to the administrators, as obvious and notorious ‘facts' as facts susceptible of judicial notice are to judges.” *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202–03 (D.C. Cir. 1989)
- **CAUTION**: this does not authorize the agency to use its expertise to compensate for the absence of key evidence not presented or noticed. *Thebaut v. Georgia Bd. of Dentistry*, 509 S.E.2d 125, 131–32 (1998)

Official Notice Procedure

01

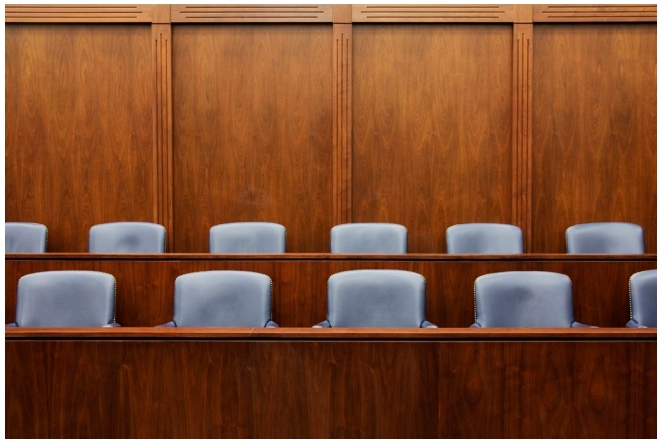
When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, upon request, to **an opportunity to show the contrary**.

02

The **hearing officer must note in its order** that it is taking official notice of a material fact, and it must provide the parties an opportunity to refute that official notice.

HEARINGS

De Novo Hearing



Public and private sector complainants are entitled to a **de novo** hearing: deciding the issues without reference to any legal conclusion or assumption made by the agency

Administrative record is not relied upon, but also not disregarded

The administrative record should be admissible**, for whatever weight the trial judge wishes to accord it,** as one piece of evidence concerning the issues raised in the complaint, but the parties should have the right to conduct discovery and compel the attendance of witnesses to furnish additional evidence. H*ackley v. Roudebush*, 520 f.2d 108, 151 (d.c. cir. 1975)

Evidentiary Hearing

Opening Statements – don't be afraid to limit the time. Opening statements are for juries and not necessary in an administrative hearing where the presiding judge is keenly familiar with the facts of the case.

Direct and Cross Examination – this can get tricky when you have a Complainant and Agency representing the case and where both sides are calling the same witness.

- Complainant's Case in Chief
- Agency's Case in Chief
- Respondent's Case in Chief
- Rebuttal

Rebuttal

Closing Arguments (can be oral or written)

DIRECT EXAMINATION

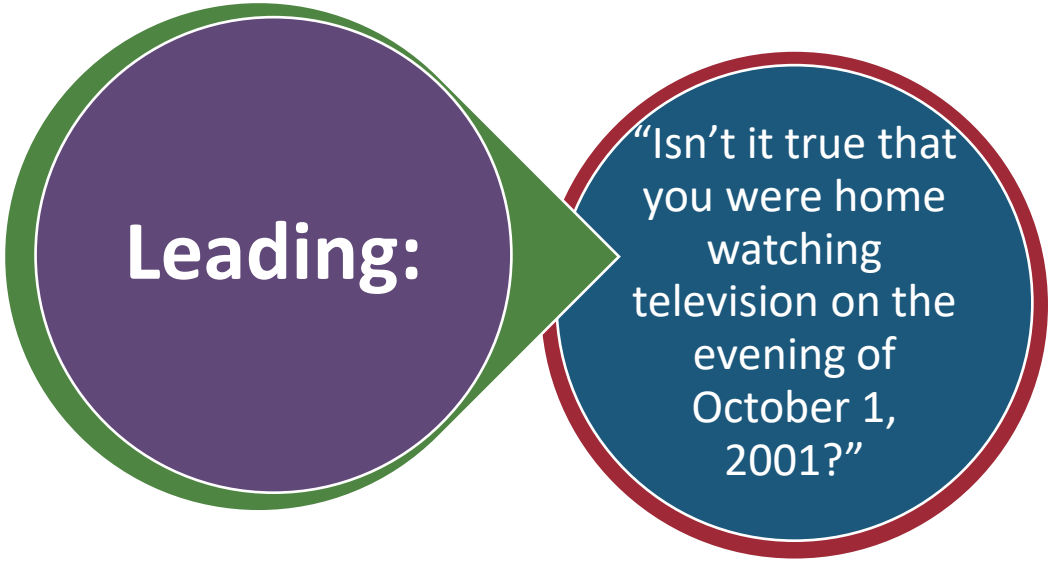
Non-leading questions required

“Would it be fair to say…..? Is a LEADING question because it contains the desired answer.

Making a statement and asking “Is that correct?” is LEADING

Example


Non-Leading:
"What were you doing on the evening of October 1, 2021?


Leading:
"Isn't it true that you were home watching television on the evening of October 1, 2001?"

Questions about Exhibits

- Attorneys often struggle with a line of questions and encounter objections when they are trying to get a witness to find and read a statement contained in an exhibit.
- If the attorney's purpose is to ask questions about an exhibit that has been admitted into evidence, there is no need to use the witness to find, identify, and read the statement. Here, they can lead : "In the agency staff report, there is a statement that the petitioner has already received $12,500 in assistance. Do you agree with that statement?"
- Once an exhibit is admitted into evidence for the truth of the matters asserted, there is nothing improper about speaking directly to the ALJ about the exhibit: "Judge, on page 64 of petitioner's Exhibit 14, which is already in evidence, you will see a list of the uses that….."

FACTS NOT IN EVIDENCE

"Would it surprise you to know that. . . ?"

This form of question is often used to reveal a "fact" not in evidence, which is improper.

Nothing a lawyer says enters the record as evidence unless the lawyer is offering a stipulation.

This form of question is also objectionable because whether the witness is surprised is not relevant.

A witness is not entitled to answer a question that was not asked. Adding an explanation would be answering the question "Why?" which was not asked.

The opposing attorney can ask the "why" question when it is his or her turn to examine the witness.

However, the ALJ has discretion and may allow a witness to immediately explain an answer.

Expert Witnesses

- Medical testimony
- Existence of a Disability
- Compensatory damages: emotional distress, mental health
- Job market analysis (mitigation of damages)
- Employability

Experts Witnesses

- Administrative agencies have greater discretion to allow proposed expert testimony.
- If the expert's opinion "will assist the trier of fact in understanding the evidence or in determining a fact issue," it should be admitted.
- Absent a specific rule, neither the Federal Rules of Evidence nor Daubert apply to administrative hearings. *See e.g., Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin*., 302 Fed. Appx. 115, 121 (3d Cir. 2008)

Treating Physician v. Litigation Expert

In reviewing medical evidence, the ALJ must give preference to the conclusions of a treating physician over those of a non-treating physician who was retained to examine a claimant solely for the purposes of litigation. *Georgetown Univ. v. District of Columbia Dep't of Emp't Servs.,* 985 A.2d 431, 432 (D.C. 2009)

Rebuttal

- What constitutes rebuttal is not understood by many attorneys.
- Proper rebuttal evidence is evidence that refutes a new proposition introduced by the respondent, a proposition not addressed in the case-in-chief.
- **NOT REBUTTAL:**
  - Repetition of evidence that was already presented in the petitioner's case-in-chief, as if for emphasis.
  - Introduction of new evidence to bolster the case, evidence that should have been presented as part of the case-in-chief.

Burden of Proof

“Burden of proof” means the party must prove its case to the “trier of fact”- judge, jury, board - whoever is weighing the evidence

Under the APA, the proponent of a rule or order (the person who wants to change the status quo) generally has the burden of proof.

BURDEN OF PROOF

(Really 2 separate burdens)

Burden of Production

Coming forward with satisfactory evidence of a particular fact in issue

Burden of Persuasion

(aka standard of proof)

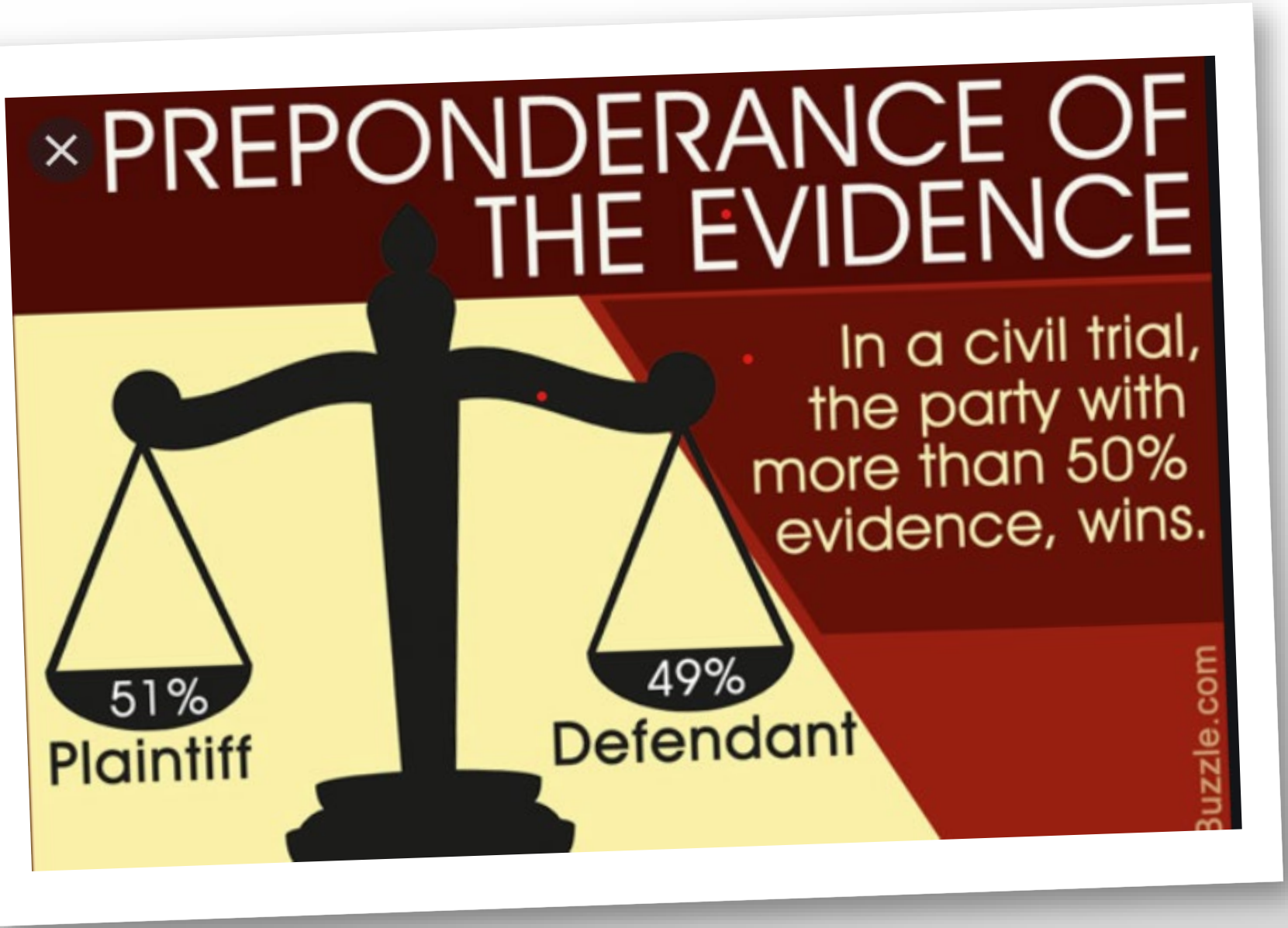
Persuade trier of fact that the alleged facts are true

Standard of Proof/Burden of Persuasion

The extent to which the party with the burden of proof has to prove its case (or an element of its case).

The higher the stakes, the higher the standard of proof

Substantial evidence	*Preponderance of the evidence*	*Clear and convincing evidence*	*Beyond a reasonable doubt*


PREPONDERANCE OF THE EVIDENCE
In a civil trial, the party with more than 50% evidence, wins.
51%
Plaintiff
49%
Defendant
Buzzle.com

Preponderance of the Evidence

- Default for most civil and administrative cases
- ***More likely than not - more than 50% likely to be responsible***
- "A preponderance of the evidence is such proof as leads the fact-finder to find that the existence of a contested fact is more probable than its nonexistence." *Jadallah v. D.C. Dep't of Emp't Servs.*, 476 A.2d 671, 675 (D.C. 1984)

Burden Shifting *McDonnell-Douglas Framework* DISPARATE TREATMENT

Application of McDonnell/Douglas is constantly evolving

Disparate Treatment Cases

Indirect (circumstantial) Evidence

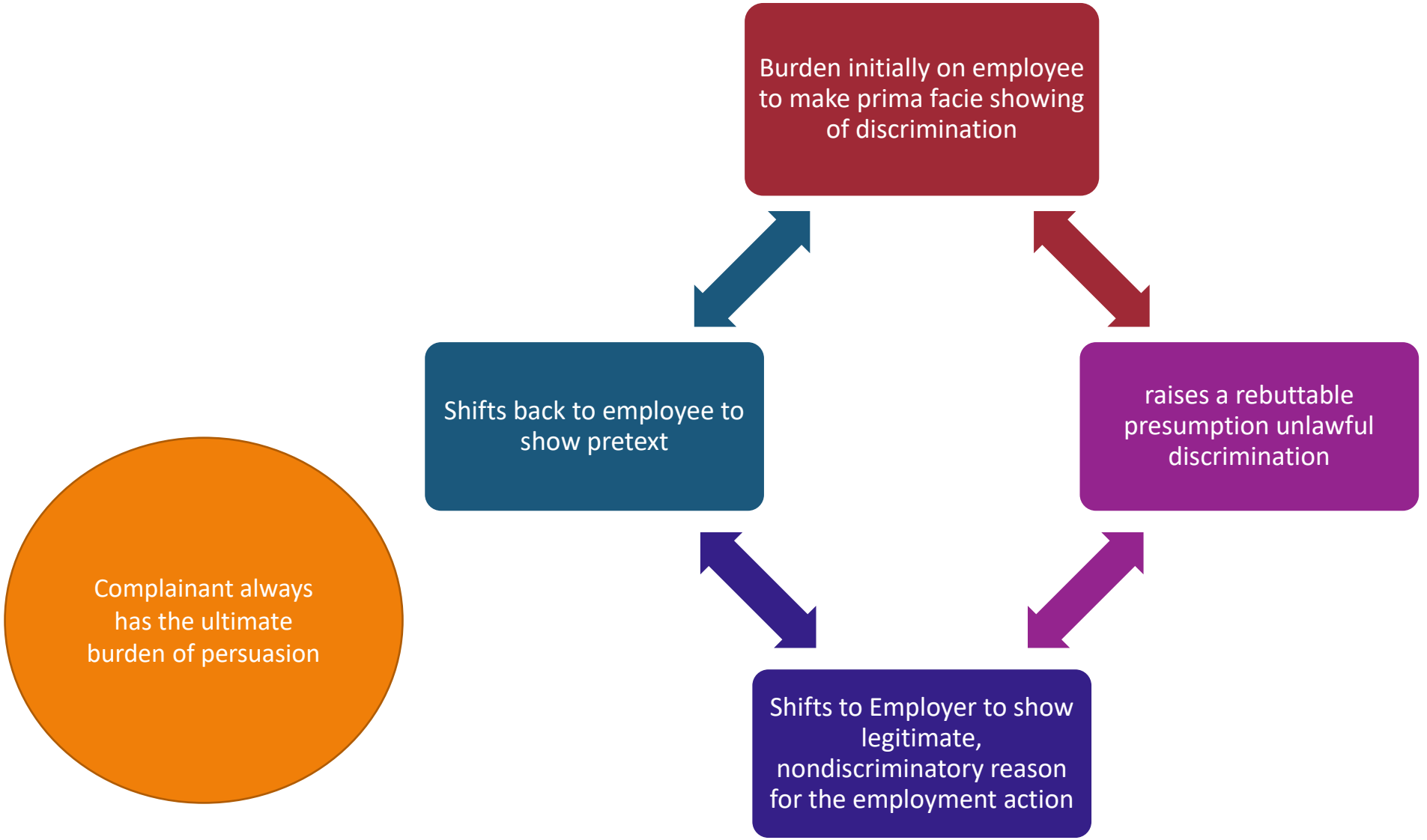
Only applies to single motive cases

Not applicable in mixed motive cases

Should not be used in summary judgment. *See e.g., Quigg v. Thomas Cnty. Sch. Dist.,* 814 F.3d 1227 (11th Cir. 2016)

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

McDonnell Douglas Burden Shifting



Employer's Burden

Pretext is where most complainants lose their case

Employer's burden is one of PRODUCTION only! They do not have to prove the reason is true.

Claimant has to prove the reason is **not true** and discrimination was the true reason for the adverse action.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146–47 (2000)

DISPARATE TREATMENT: *PRIMA FACIE CASE* *MCDONNEL-DOUGLAS BURDEN SHIFTING*

To establish a *prima facie* claim of disparate-treatment employment discrimination, the complaint must establish that he/she:

(1) is a member of a protected class;

(2) is qualified for the position with or without accommodations;

(3) suffered an adverse employment action; and

(4) the unfavorable action was based on a protected trait.

EVIDENCE

Disparate Treatment

offer direct evidence of discrimination

Indirect (circumstantial) evidence raising an inference of discrimination (most common)

Summary Judgment

McDonnell Douglas is not appropriate for evaluating mixed-motive claims at the summary judgment stage. The correct framework is:

1) Whether the defendant took an adverse employment action against the plaintiff; and

(2) Was [a protected characteristic] was a motivating factor for the defendant's adverse employment action

SURVIVING APPEAL

Standards of Review

FINAL DECISIONS APA

APA, 5 U.S.C. § 556(d), 557(c)
DCAPA, DC Code § 2-509(e)

Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n, 402 A.2d 36 (D.C. 1979)

To satisfy the requirements of the APA, the decision must:

1) State findings of fact on **each material**, contested issue;
2) Those findings must be based on **reliable, probative, and substantial evidence**; and
3) The conclusions of law must follow rationally from the findings of fact.

APA Standard of Review

A reviewing court may set aside any action or findings and conclusions found to be:

- (A) **Arbitrary, capricious, an abuse of discretion**, or otherwise not in accordance with law;
- (B) Contrary to constitutional right, power, privilege, or immunity;
- (C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;
- (D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or
- (E) **Unsupported by substantial evidence** in the record of the proceedings before the Court.

Standard for All Administrative Decisions:

A Court of Appeals will affirm an Administrative Court/Agency's decision when

(1) it made findings of fact on each materially contested issue of fact,

(2) substantial evidence supports each finding, and

(3) the conclusions flow rationally from its findings of fact.

– *Williams v. D.C. Dep't of Pub. Works*, 65 A.3d 100, 104 (D.C. 2013)

Standards of Review for Administrative Decisions

De Novo (no deference)

Abuse of Discretion (clearly unreasonable)

Clear Error (applied to factual findings)

Arbitrary and Capricious

Substantial Evidence

Substantial Evidence

- Under the APA, an agency's factual findings are reviewed under the substantial evidence standard. *See Kappos v. Hyatt*, 132 S. Ct. 1690, 1694 (2012);
- The standard, however, is "extremely deferential" and a reviewing court must uphold the agency's findings "unless the evidence presented would compel a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.).

Substantial Evidence

- **"Extremely deferential"**
- Reviewing court must uphold the agency's findings "unless the evidence presented would compel a reasonable factfinder to reach a contrary result." *See Monjaraz-Munoz v. INS*, 327 F.3d 892, 895 (9th Cir.)
- "Because substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion we reverse an agency's decision only when the record is so compelling that no reasonable factfinder could fail to find to the contrary." *Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 704 (D.C. Cir. 2009)

De Novo – Conclusions of Law & Summary Judgment

- An agency's **conclusions of law** are always reviewed ***de novo***
- ***No deference***
- "Within the de novo framework we give a certain amount of deference to an agency's reasonable construction of a statute it is charged with administering.... If an agency's construction is reasonable and consistent with congressional intent, we will accept it." *Maka v. U.S. I.N.S.*, 904 F.2d 1351, 1355 (9th Cir. 1990)

Abuse of Discretion

- Most deferential. Great deference is given
- Reflects the appellate judgment that some things are best left to the trial court
- Applies to discretionary actions of trial court (i.e. objection to admission of evidence, motions to amend petition, expand scope of proceedings, permit discovery)
- Reviewing court will not disturb finding unless there is **mistake of law or erroneous findings of fact**
- **Failure to apply the law correctly is is always an abuse of discretion.**

When Does A Judge, Board or Commission Abuse its Discretion:

Does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact

Rules in an irrational manner

Makes an error of law

Record contains no evidence to support district court's decision

Does not adequately establish the reasoning employed to reach a discretionary decision

Administrative Decision Writing

Type of Decision

- At Commission, ALJ issues Proposed Findings of Fact and Conclusions of Law
- Parties can file exceptions and objections
- Tribunal of 3 Commissioners make final decision
- Appealable to the D.C. Court of Appeals

Administrative Decision Writing

Read	New Judges: read and study as many prior cases as possible for style and content
Summary	Include a summary of proceedings
Templates	Adopt formal for repetitive situations
Peer Review	Have writing checked by others
Focus	Focus on the major thrust of your case – the point on which the case turns one way or the other

Structuring Findings of Fact

- Findings of Fact are the heart of a decision
- Be careful adopting proposed findings of fact from parties: when you blindly adopt findings, you also blindly adopt mistakes!
- Make specific and not merely conclusory findings
- A synopsis or summary of evidence is not fact-finding
- Explain why contrary evidence is being disregarded or rejected
- Facts are only those you found to be true!
- Number your paragraphs

Findings of Fact

"An ALJ must include narrative discussion describing how the evidence supports each conclusion, citing specific facts. The ALJ's logical explanation is just as important" as the finding."

Conclusions of Law

- Should flow inevitably from the findings of fact
- Must address quantum (quality and quantity) of supporting evidence on which based
- Never treat evidence as non-existent. Identify weak evidence and evaluate it.
- Must cover the legal principles and relevant provisions of statute
- Must be consistent with findings of fact

Post Hearing: Commission Review – Private Sector Cases

- The Commission can accept, reject, or modify the proposed decision.
- “If [commissioners] choose to modify or set aside [the hearing examiner's] conclusions they must state that they are doing so and they must give reasons for doing so. To hold otherwise is to ignore the objectives of adversary proceedings before the Commission.”
- Generally, must accept the credibility findings of the ALJ. *Psychiatric Inst. of Washington v. D.C. Comm'n on Human Rights*, 871 A.2d 1146, 1154–55 (D.C. App. 2005

Credibility Findings

When the agency rejects the hearings officer's credibility findings, it must state its reasons and those reasons must be based on substantial evidence.

Appellate courts defer to credibility determinations made by hearings officer unless they are "inherently or patently unreasonable.

What if the Commission Disagrees with ALJ/Hearing Examiner?

- Does your jurisdiction have a rule on standard of review?
- If not, APA applies, and Commission is governed by the same standards in reviewing an ALJ's determinations as it is in reviewing the Board's decision" = **substantial evidence**. *Kohli v. LOOC, Inc.,* 654 A.2d 922, 935 (MD App. 1995)
- Commission cannot simply disagree with ALJ
- Commission must consider whether a reasoning mind could have reasonably reached the conclusions reached by the ALJ.

What if the Commission Disagrees with ALJ/Hearing Examiner?

- A question that is decisively one of law is not entitled to deference by the reviewing body.
- If the determination was not demeanor-based, there was no restraint on the Commission's ability to reconsider the evidence and reach a different conclusion as long as it explains the reasons.
- Demeanor-based findings require Commission to give "sound reasons, based on the record" for overturning ALJ's conclusions. *Long v. Soc. Sec. Admin.*, 635 F.3d 526, 530 (Fed. Cir. 2011)

Constitutional Issues

- ALJs do not have the authority to declare a statute unconstitutional
- ALJ has the authority to determine that an agency is acting unconstitutionally

Prior Decisions

- While there is need for “reasoned consistency” in agency decision, prior decisions of an agency are not normally admissible to prove some fact in dispute.
- An agency has the “right to modify or even overrule an established precedent or approach, for an administrative agency concerned with the furtherance of the public interest is not bound to rigid adherence to its prior rulings.” *Springer v. Dist. of Columbia Dep't of Employment Services*, 743 A.2d 1213, 1221 (D.C. 1999)
- Must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.

Thank You For Your Time!

Our address is:
441 4th Street,
Suit 570 N,
Washington, DC 20001

Call us at:
202-727-4559

OHR.DC.GOV

@DCOHR

@dchumanrights

@DCHumanRights

@DCHumanRights

Office of Human Rights
District of Columbia

WE ARE WASHINGTON DC
GOVERNMENT OF THE DISTRICT OF COLUMBIA
MURIEL BOWSER, MAYOR