

4.6 | SCENARIO 3: APPEAL FROM AN ADMINISTRATIVE JUDGE'S DECISION AFTER A FULL HEARING

An EEOC administrative judge conducts a full hearing and listens and observes the witnesses as they testify. After the hearing, the administrative judge issues a decision, finding the supervisor more credible and concluding that there was no sexual harassment.

On appeal, the standard of review is substantial evidence for post-hearing factual findings. This means the Commission will accept the administrative judge's credibility determination, unless the complainant shows one of two things:

- o documents or other objective evidence so contradicts the testimony of the supervisor that a reasonable fact finder would not credit it; or
- o the testimony of the supervisor otherwise so lacks in credibility that a reasonable fact finder would not credit it.

In your brief, you cannot simply repeat the same arguments made in scenarios 1 or 2. Instead, you could try to highlight documents or other objective evidence that casts great doubt on the credibility of the supervisor's testimony. For example, you can point to contemporaneous emails or text messages from the supervisor who consistently expressed his belief that "You are my girl." His subsequent texts after the incident also reference the kiss. Such documentary evidence so contradicts the supervisor's testimony at the hearing that the administrative judge should not have credited it.

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