

STATE OF MAINE
DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)
AGGREGATE MEASURABLE) DIRIGO HEALTH AGENCY'S
COST SAVINGS FOR THE) PRE-HEARING REPLY BRIEF
FOURTH ASSESSMENT YEAR)
(2009))

The Dirigo Health Agency (“DHA”) submits this reply brief to bring to the Board’s attention that legal authority cited by one of the Intervenors in its pre-hearing brief does not stand for the propositions asserted by the Intervenor. Because the procedural orders do not provide for the filing of a reply brief, DHA will not otherwise respond to Intervenors’ briefs. This reply is necessary, however, to prevent the Board from being misled.

In its opening brief, DHA cited a 2001 case from the United States Court of Appeals for the Seventh Circuit that squarely held that statistical significance is not required in adjudicatory proceedings. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362 (7th Cir. 2001). This unanimous opinion, written by widely-respected Judge Posner, explained that statistical significance is an arbitrary concept that may be appropriate for peer-reviewed journals but is not appropriate for adjudicatory proceedings, where fact finders frequently rely upon evidence that is less than 95% reliable. *Id.*

In its brief, the Maine State Chamber of Commerce attempts to rebut *Kadas* by citing nine cases the Chamber asserts stand for the proposition that courts rely upon and have adopted the 95% confidence standard for the judicial context. (Chamber Pre-Hearing Br. at 10-11.) All of these cases predate *Kadas* and thus would have to have

been overlooked by Judge Posner and his colleagues if the cases stand for the proposition asserted by the Chamber. Strikingly, however, not a single one of the nine cases say what the Chamber claims it says.

First, the two Supreme Court cases from 1977 do not say that the 95% confidence level is required for court proceedings. Instead, in dicta in each case the Court merely characterizes the evidence before it, which had a confidence level well in excess of 95%, by referencing the custom used by social scientists. *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977). Indeed, in the *Hazelwood* case, the Court expressly cautioned against using its discussion of statistics the way the Chamber is trying to use it here: “These observations are not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof” *Hazelwood*, 433 U.S. at 311 n.17.

Second, the three First Circuit cases cited by the Chamber do not show that the Circuit requires statistical significance at the 95% level. In the *McCarthy* case, the trial court decided to credit the testimony of the plaintiff’s expert over the defendant’s expert because the only difference in their analyses was the data they used, and the court found the plaintiff’s data more reliable. *E.E.O.C. v. McCarthy*, 578 F. Supp. 45, 48 (D. Mass. 1983), *aff’d*, 768 F.2d 1 (1st Cir. 1985). The court did not make its decision on the basis of statistical significance, and did not say anything about whether statistical significance at the 95% level is required in adjudicatory proceedings. *Id.* The First Circuit affirmed on the same grounds, and similarly did not discuss any statistical significance criteria. *E.E.O.C. v. McCarthy*, 768 F.2d at 4.

The *Fudge* case actually supports DHA's position on statistical significance. Far from requiring a 95% confidence level for court proceedings, the First Circuit noted that statistical significance and judicial significance are two different things, and that evidence that lacks statistical significance, when combined with other evidence, can be used to prove a case. *Fudge v. City of Providence Fire Dept.*, 766 F.2d 650, 658 & n.8 (1st Cir. 1985). The Breyer concurrence, which the Chamber miscites as a concurrence to the *Hilton* case, (Chamber Pre-Hearing Br. at 10), agrees with the majority on this point. *Fudge*, 766 F.2d at 660 (Breyer, concurring).

In the final First Circuit case, *Hilton v. Wyman-Gordon Co.*, the court was asked to decide whether statistical significance at the 95% level is appropriate in the judicial context, but the court expressly declined to decide the issue because the appellant would have lost in any event. *Hilton v. Wyman-Gordon Co.*, 624 F.2d 379, 381-82 (1st Cir. 1980). This case in no way provides support to the Chamber's position.

The Chamber also cites four cases from other circuits as adopting a 95% (or higher) standard, (Chamber Pre-Hearing Br. at 11), but none of them do this. *See Palmer v. Shultz*, 815 F.2d 84, 96-97 (D.C. Cir. 1987) (noting statistically insignificant evidence can be combined with other evidence to prove discrimination); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 161 n.10 (explaining that there is no bright line for statistical significance and that evidence with a lower than 95% confidence level can be used if reliable under totality of the circumstances). The *Proctor & Gamble* case uses statistical significance only in describing the two parties' contentions in a false advertising case concerning the parties' advertisements comparing their products. *Proctor & Gamble v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1083, 1088, 1089-1090 (S.D.N.Y. 1984).

The court did not adopt or even discuss whether statistical significance is an appropriate benchmark for evidence in adjudicatory proceedings. *See id.* at 1090, 1093-94. Finally, the Chamber cites a footnote in *E.E.O.C. v Sears Roebuck & Co.* to suggest that the 95% standard may not be high enough. (Chamber Pre-Hearing Br. at 11.) However, the Chamber does not disclose to the Board that the footnote is not in the opinion of the court, but rather is in a single judge opinion that concurs in part and dissents in part from the majority. *E.E.O.C. v. Sears Roebuck & Co.*, 839 F.2d 302, 362 n. 1 (7th Cir. 1988) (Cudahy, concurring in part and dissenting in part). This is highly misleading. The law of the Seventh Circuit is as stated in *Kadas* and not countered by any of the (earlier) cases cited by the Chamber – statistical significance is an arbitrary concept from another context that should not be imported into adjudicatory proceedings. *Kadas*, 255 F.3d at 362.

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