

# Guide to Appeal Brief Writing for Unrepresented Complainants before the EEOC Office of Federal Operations

## I. Introduction

This guide helps people without legal training prepare written arguments called appeal briefs. You will find general information, such as time requirements for filing briefs, as well as helpful suggestions for organizing, formatting, and writing a brief.

## II. General Information About Appeal Briefs and Due Dates

### *What is an appeal brief?*

An appeal brief is an optional written document where the parties explain to the EEOC Office of Federal Operations why an earlier decision by a federal agency or EEOC Administrative Judge made a mistake or decided the case correctly. Two briefs may be filed during the appeals process:

- A brief or statement in support of the appeal.

This brief usually sets out the history of the case, explains to the EEOC Office of Federal Operations the mistake or error that the previous decision made, and argues why the previous decision should be reversed.

- A brief or statement in opposition to the appeal.

This brief responds to the arguments raised in the brief in support of an appeal (when filed by a complainant it is responding to an appeal by the agency) and sets out arguments that the previous decision was correct and should be affirmed.

### *Due Dates for Filing Briefs*

- Brief or statement in support of the appeal.

A brief in support of an appeal must be filed **within 30 calendar days** of filing the appeal.

- Brief or statement in opposition to the appeal.

If the agency files an appeal and a supporting brief, you may file a brief in opposition to the appeal **within 30 calendar days** from when you receive the agency's brief in support of its appeal.

- Brief or statement in support of a request for reconsideration.

If you request the EEOC reconsider one of its prior appellate decisions, you can submit a brief or statement to support your request for reconsideration. You must file your brief **at the same time as you file your request for reconsideration.**

### **III. How to File Your Brief**

#### ***Online through the EEOC Public Portal (<https://publicportal.eeoc.gov>)***

The EEOC Public Portal is a secure, web-based application that allows individuals with discrimination complaints against the federal government to submit and receive documents supporting their appeal.

If you use the Public Portal to submit your brief, the Public Portal will automatically notify the agency; you do not need to send a copy to the agency. Even if you did not file your appeal using the Public Portal, you may still file your brief using the Portal.

#### ***Mail by U.S. Postal Service***

Mail your brief to:

Equal Employment Opportunity Commission  
Office of Federal Operations  
P.O. Box 77960  
Washington, D.C. 20013

If you mail your brief to EEOC, you must mail a copy of your brief to the agency at the same time.

### **IV. How to Organize Your Brief**

There is no required format for briefs, but you may find it helpful to organize your brief into the following sections.

#### ***Coversheet***

Because the filing of the appeal and brief can happen separately, a coversheet with identifying information helps ensure that your brief will be paired with the right appeal. A coversheet should have: the names of the parties, the Agency Complaint Number, an EEOC Hearing Number (if applicable), and the EEOC Appeal Number. Here is a sample:

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
OFFICE OF FEDERAL OPERATIONS**

Jane Doe	)	
Complainant,	)	
	)	
vs.	)	
	)	
U.S. Dept. of XYZ (Sub-agency)	)	EEOC Appeal No. 202100ZZZZ
Agency.	)	EEOC Hearing No. (if applicable): N/A
_____	)	Agency Case No. 123-ABC-XXX

Check which brief this is:

- BRIEF IN SUPPORT OF APPEAL**
- BRIEF IN OPPOSITION TO APPEAL**

Your Name:	Jane Doe
Address:	123 Anywhere Lane Anytown, MD XXXXX

***Background Information on Discriminatory Actions; Procedural History of EEO Complaint(s)***

This section should explain in chronological order the discriminatory events that happened which caused you to file an EEO complaint. List only the specific facts connected to the issues on appeal. You may also describe the relevant procedural history of the EEO complaint.

The EEOC Office of Federal Operations will generally only consider information that was provided during the investigation or during the hearing process. This means now you cannot include new facts or evidence that was not presented earlier. The only exception is if you can show that the evidence was not reasonably available prior to or during the investigation or during the hearing process.

If you can, you should include the specific page or pages in the record where that fact can be found. See the section below on citations to the record for more information.

***Standard of Review***

When the EEOC Office of Federal Operations reviews an issue on appeal, it needs some kind of rules or guidelines to determine whether the previous decision made an error. Different kinds of rulings require different kinds of review guidelines. These guidelines are called standards of review. The three most common standards of review are: de novo review, substantial evidence, and clearly erroneous.

This section should state the standard of review the EEOC Office of Federal Operations should apply to your appeal. To determine which standard of review applies, use the table below to match the type of decision being appealed with the corresponding standard of review.

What is being appealed?	Standard of review used on appeal	What the EEOC Office of Federal Operations will do under this standard of review
<p><b>Procedural final agency decision</b></p> <p><i>A final agency decision that dismisses your complaint on procedural grounds (such as failing to state a valid claim of discrimination, untimely contacting an EEO counselor, or untimely filing the EEO complaint).</i></p>	De novo review	The Commission will examine the record without regard to the factual and legal determinations of the previous decision. The Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law.

		Generally, no new evidence will be considered on appeal unless a party shows that the evidence was not reasonably available prior to or during the investigation or during the hearing process.
<p><b>Final agency decision on the merits</b></p> <p><i>A federal agency's final decision that determines you were not subjected to discrimination or finds you were subjected to discrimination but does not give you the remedies you believe you deserve.</i></p>	De novo review	<p>The same as above, except following de novo review, the Commission will the examine the merits of the employment discrimination claims based on a preponderance of the evidence.</p> <p>Under this evidentiary standard, a complainant satisfies the burden of proof by offering evidence that demonstrates their claim of employment discrimination has a greater than 50% chance to be true. In other words, if a complainant can convince the EEOC Office of Federal Operations that discrimination more likely than not occurred, the complainant meets his or her burden of proof, and the Commission will find that discrimination occurred.</p>
<p><b>Summary judgment decision (decision without a hearing) by an EEOC administrative judge</b></p> <p><i>An EEOC administrative judge issues a decision in favor of one party without a full hearing</i></p>	De novo review	<p>Same as above, except the Commission will determine if it was appropriate for the EEOC administrative judge to issue summary judgment. Issuing summary judgment is not appropriate if a case can only be resolved by weighing conflicting evidence.</p> <p>If the Commission finds that summary judgment is appropriate, the Commission will then examine the merits of the employment discrimination claims based on a preponderance of the evidence (see above for an explanation of preponderance of the evidence).</p>
<p><b>Decision by an EEOC administrative judge after a full hearing</b></p>	Substantial evidence for factual findings (including whether there was discriminatory intent)	<p>The Commission will give deference to an administrative judge's post-hearing factual findings based on evidence in the record.</p> <p>For example, an administrative judge finds a management witness' testimony credible based on the demeanor or tone of voice during the hearing. The Commission will</p>

	De novo review for legal determinations	accept the administrative judge’s credibility determination, unless documents or other objective evidence so contradicts the testimony of the witness or the testimony of the witness otherwise so lacks in credibility that a reasonable fact finder would not credit it.  The Commission will review legal determinations made by an administrative judge or agency without presuming that the previous decision-maker was correct in interpreting or applying the law.
<b>A previous appellate decision issued by the EEOC Office of Federal Operations</b>  <i>A party may request that the EEOC Office of Federal Operations reconsider one of its initial decisions.</i>	Clearly erroneous standard	The Commission may reconsider a previous decision if a party demonstrates that the earlier appellate decision involved a clearly erroneous interpretation of material fact or law. Did the previous decision make a clear, obvious error that affected the outcome of the appeal?

Understanding which standard of review will be used will help you make relevant arguments to support your appeal.

For example, say you are alleging that a supervisor subjected you to sexual harassment. Part of your allegations include an incident on May 4 when the supervisor said that you were “my girl” and forcibly kissed you. The supervisor testified that he did not say that phrase on May 4 and he gave you a friendly hug. In terms of the “my girl” reference, he testified that on May 10 he used that phrase to ask a male coworker what movie he was watching: “I asked the coworker whether he was watching Forrest Gump, which is my girl, the phrase was there, or was it Old School, which is my boy.”

**Scenario 1: Appeal from a final agency decision on the merits**

The agency issued a final decision, finding no discrimination because the supervisor’s testimony was more credible.

On appeal, the standard of review is de novo review, which means the Commission does not have to defer to the Agency’s credibility determinations.

In your brief, you can argue in detail why your version is more credible than the supervisor’s version. You may argue, for example, that the supervisor had made prior inconsistent statements; he was biased; the supervisor’s version is contradicted by other coworkers who witnessed the conversation and your

appearance and reaction after the forcible kissing; or the inherent improbability of the supervisor's version of events. See, e.g., Complainant v. Department of the Army, EEOC Appeal No. 0120111865 (July 9, 2014) (finding the supervisor's account, that he juxtaposed the phrase "my girl" with asking whether someone was watching "Forrest Gump" to be implausible.), at [https://www.eeoc.gov/sites/default/files/migrated\\_files/decisions/0120111865.txt](https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120111865.txt)

#### Scenario 2: Appeal from an administrative judge's summary judgment decision

An EEOC administrative judge issued a summary judgment decision in favor of the Agency. The administrative judge found it appropriate to issue summary judgment because there was no genuine issue of material fact, even when all the evidence was considered in the light most favorable to the complainant. The administrative judge then determined that the complainant failed to prove she was subjected to sexual harassment.

On appeal, the standard of review is de novo review, which means the Commission does not have to defer to the administrative judge's factual findings or legal determinations.

In your brief, you cannot simply repeat the same arguments made in scenario 1. Rather, you should argue that the administrative judge made a mistake in granting summary judgment because this case can only be resolved by weighing conflicting evidence.

For example, you can argue that your testimony, and the testimony of other coworkers, establish that on May 4, your supervisor verbally harassed you by trying to claim possession over you when he declared you were "my girl." Moreover, he made unwelcome physical contact by forcibly kissing you. The supervisor testified that this conversation never took place on May 4, and instead refers to a different conversation with a different coworker on May 10. Moreover, he denied kissing you and instead gave a consensual friendly hug. The only way to resolve this conflicting evidence about what happened on May 4 is to hold a hearing. Therefore, you ask the Commission to reverse the administrative judge's summary judgement decision and remand the matter for a hearing.

#### 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:

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

### ***The Law That Should Be Applied***

If you believe that the previous decision applied the wrong law to your case, explain in this section what law should be applied to decide your appeal. Legal authorities may include EEOC regulations, laws passed by the U.S. Congress, judicial decisions, especially those issued by the U.S. Supreme Court, and EEOC federal sector administrative appellate decisions.

It may be difficult for people representing themselves to determine the appropriate law. If you are not able to figure this out, you can skip this section.

### ***Arguments on Appeal***

If you are the appealing party, explain in this section why the previous decision was wrong. For example, did the previous decision incorrectly decide the facts? If so, what facts? If you can, you should include the specific page or pages in the record where that fact can be found. This allows the EEOC Office of Federal Operations to understand whether a factual assertion is accurate. If you do not provide supporting cites for factual statements, it is harder for the EEOC Office of Federal Operations to fairly consider the factual arguments you raise.

If you think the previous decision applied the wrong law, how should the case be decided if the EEOC applied the right law? Do you feel that there are other reasons why the previous decision was wrong? If so, what are they? If making multiple arguments, you may want to use headings to separate each argument.



If you are the party opposing the appeal, explain why the previous decision was correct.

It is important to include all of your arguments in your brief. If you later submit an additional brief, it may not be considered by the EEOC Office of Federal Operations because each party is allowed only one brief.

***Actions that EEOC Should Take in This Appeal***

Explain what you want the EEOC Office of Federal Operations to do to the previous decision: reverse or change the previous decision; affirm or keep the previous decision; or some other action.

Additionally, if the Commission will determine in this appellate decision whether you were discriminated or not, what type of relief do you want if the Commission finds in your favor? The types of relief available are listed in the sample briefs.

***Certificate of Service***

Include the date the brief was sent to OFO and the way you filed it (Public Portal, U.S. Mail, FedEx, etc.) and, if mailed, the date a copy was sent to the agency and how it was sent to the agency.

Here is a sample:

**CERTIFICATE OF SERVICE**

I certify that on **September 15, 2021**, this brief was filed with the EEOC's Office of Federal Operations and served on the Agency, U.S. Dept. of XYZ, via the EEOC Public Portal.

Jane Doe

**V. How to Format Your Brief**

There is no required format for briefs, but you may find helpful the following suggestions for formatting.

### ***Font and Font Size***

For typed briefs, a font size between 12 to 14 will help with legibility and readability.

While the EEOC accepts handwritten briefs, we do not recommend it.

### ***Citations to the Record***

You should follow every factual statement that you make in your brief with a citation to the record. The record contains all of the paperwork filed in the EEO process, which usually includes the report of investigation, exhibits, the administrative hearing transcript, motions, orders, and the final decision or action from the case. Citing to the record will help the EEOC Office of Federal Operations understand whether a factual assertion is accurate. If you do not provide supporting cites for every factual statement, it is harder for the EEOC Office of Federal Operations to fairly consider the issues you raise.

If you refer to documents in:

- the Report of the Investigation, cite to them as (ROI \_\_) and put the page number in the blank;
- an exhibit, cite to them as (Exh. \_\_ at \_\_) and put the exhibit number in the first blank and the relevant page number from that exhibit in the second blank;
- The hearing transcript, cite to them as (Tr. \_\_) and put the page number in the blank.

For example, if you say in your brief, "The Agency denied my request for reasonable accommodation on July 14, 20XX" you should provide a citation to the record to support that statement.

- "The Agency denied my request for reasonable accommodation on July 14, 20XX." (ROI 110). (ROI 110) means that on page 110 of the Report of Investigation, there is a document that supports the statement that you were denied a reasonable accommodation on July 14, 20XX. Page 110 may be an email from the disability program manager informing you of the denial, or an affidavit where your supervisor testified that he told you about the denial in a meeting on that date.
- "The Agency denied my request for reasonable accommodation on July 14, 20XX." (Exh. 2b, at 3). (Exh. 2b, at 3) means that page 3 of Exhibit 2b contains a document that supports the statement that you were denied a reasonable accommodation on July 14, 20XX. Page 3 of Exhibit 2b may

contain an official letter of denial of your reasonable accommodation request.

- “The Agency denied my request for reasonable accommodation on July 14, 20XX.” (Tr. 301). (Tr. 301, 346-47) means that pages 301, 346, and 347 of the hearing transcript contain testimony that supports the statement that you were denied a reasonable accommodation on July 14, 20XX.” Page 301 may be testimony from the disability program manager recounting when the email was sent informing you of the denial. Pages 346 to 347 may be testimony from your supervisor about being copied on the email notifying you of the denial of reasonable accommodation.

When you are citing to documents contained in the Report of Investigation or other parts of the record, you do not need to attach copies of those documents to your brief. The agency is required to submit a copy of the record including: the complaint file, Report of Investigation, and any documents once the case went before an EEOC AJ (if applicable). However, if you believe there is something missing from the agency’s record, please discuss this information in your brief and, if possible, attach a copy of the document or other evidence you believe is missing.

### ***Citations to Case Law***

Case law are legal propositions that are based on administrative appellate and judicial decisions rather than on statutes. You do not need to cite to case law in your brief. But if you are aware of a case supporting your argument, you may cite to it.

Where can you research case law?

- You can read published administrative appellate decisions at <https://www.eeoc.gov/federal-sector/appellate-decisions>.
- Particularly noteworthy administrative appellate decisions are listed at <https://www.eeoc.gov/federal-sector/selected-noteworthy-federal-sector-appellate-decisions>.
- You can review summaries of decisions by topic in the Digest of Equal Employment Opportunity Law, at <https://www.eeoc.gov/digest>.

While there is no required format for citing to a case, this is the way we cite previous EEOC administrative appellate decisions:

- Initial EEOC appellate decision: the name of complainant or pseudonym v. the name of the agency (the name of the subagency is in parenthesis), EEOC Appeal No. \_\_\_\_\_ (date of the decision).

Example: Jones v. U.S. Department of Justice (Federal Bureau of Prisons), EEOC Appeal No. 01996624 (Nov. 1, 2001).

- EEOC decision upon a request for reconsideration: the name of complainant or pseudonym v. the name of the agency (the name of the subagency is in parenthesis), EEOC Request No. \_\_\_\_\_ (date of the decision).

Example: Adams v. U.S. Department of Justice (Federal Bureau of Prisons), EEOC Request No. 05990718 (May 16, 2001).

- EEOC decision upon a petition for review of a decision by the U.S. Merits Systems Protection Board: the name of complainant or pseudonym v. the name of the agency (the name of the subagency is in parenthesis), EEOC Petition No. \_\_\_\_\_ (date of the decision).

Example: Petitioner v. Department of Homeland Security, EEOC Petition No. 0320110053 (July 10, 2014)

When looking for complainant's names in decisions, you may find some published decisions do not list complainants' names. This is because from October 2013 to October 2015, the Commission used the term "Complainant" or "Petitioner" in the caption of cases, rather than complainants' names to protect privacy interests. After October 1, 2015, all federal sector appellate decisions issued for publication use a randomly generated name as a substitute for the name of the complainant. This randomly generated name consists of a first name and last initial, and is assigned using a computer program that selects names from a list of pseudonyms bearing no relation to the complainant's actual name.

## **VI. What To Focus on in Your Brief**

### ***Briefs Involving Appeals from Procedural Dismissals***

If the Agency or AJ dismissed a complaint on "procedural" grounds (such as untimely EEO Counselor contact, failure to state a claim, etc.), rather than making a determination as to whether or not discrimination occurred (on the "merits"), you should not argue the merits of the complaint in your brief. Rather, you should focus on what you believe is improper about the Agency's procedural dismissal.

For example, if the agency dismissed your complaint on the grounds that the formal complaint was not filed within 15 days of receipt of the Notice of Right to File, you should clearly state in your brief why your formal complaint should be considered timely by clearly identifying significant dates, such as receipt of the Notice of Right

to File and the manner and date that the formal complaint was filed. If you have proof of those dates (such as a certified-mail receipt or a copy of an e-mail), attach a copy to your brief and “cite” or reference it in the brief.

Please refer to Attachment I for a sample brief involving an appeal from a procedural dismissal.

### ***Briefs Involving Appeals from Final Agency Decisions/Final Order on the Merits***

If you are appealing a final agency decision or final order on the merits of the complaint that found that discrimination did not occur, your brief should focus on why you believe the agency’s/Administrative Judge ‘s (AJ’s) finding is incorrect. For example, if you believe that the agency/AJ overlooked or misinterpreted a significant fact, the brief should discuss, in detail, what specific facts were overlooked or misinterpreted and should reference specific documents or testimony in the record that support your position. If you believe the agency/AJ misapplied the law, the brief should set forth in detail the agency’s/ AJ’s error. If the decision involved an AJ issuing a merits decision without a hearing (summary judgment), the brief should set forth why the matter should be sent back for a hearing, such as if the AJ needs to make specific credibility determinations or if the record is not adequately developed.

Please refer to Attachment II for a sample brief involving an appeal from a final agency decision on the “merits.”

### ***Brief in Opposition to Appeal***

If an AJ reached a decision that was partly or entirely in your favor, and the agency disagrees with that decision, the agency must file an appeal with the EEOC. The agency will then submit a brief in support of its appeal, and you will have the opportunity to respond by submitting an opposition brief. Your brief should address each of the arguments raised by the agency in its brief.

### ***Briefs Involving Appeals from Final Determinations Finding No Breach of Settlement Agreements or Agency’s Failure to Implement Its Own Decision***

If you are appealing a final determination finding no breach of an EEO Settlement Agreement or an agency’s own decision finding discrimination, your brief should clearly identify what specific provisions of the settlement agreement or agency decision you believe to have been breached and why you believe the agency’s reasoning finding no breach is incorrect; or what remedy the agency promised in its decision that it has not provided.

### ***Briefs in Support of Requests for Reconsideration***

If you are submitting a brief in support of a request for reconsideration, your brief should focus on: a) that OFO’s initial decision involved a clearly erroneous

interpretation of material fact or law; or b) OFO’s initial decision will have a substantial impact on the policies, practices, or operations of the agency.

A fact or point of law is “material” if changing it would affect the outcome of the case. You should clearly specify what material facts/law were misinterpreted in OFO’s initial decision and reference documents and/or testimony in support of your argument. A request for reconsideration is not a second chance at an appeal and you must identify and address what you believe are errors in the original appellate decision upon which reconsideration is sought.

## **VII. Sample Briefs**

Attachments I and II provide sample briefs. Attachment I is a sample brief involving an appeal of a procedural dismissal. Attachment II is a sample brief involving an appeal of a decision on the merits of a claim of discrimination.

## **VIII. Checklist for Filing Your Brief**

You may find the following checklist helpful when submitting your brief.

- ✓ ***Clarity and Conciseness***  
Stay focused on your arguments and avoid providing too much background information or irrelevant information. Avoid using legal jargon.
- ✓ ***Timeliness***  
Pay close attention to the deadlines for filing your appeal and brief. Failure to follow time requirements may result in the denial of your appeal or the EEOC Office of Federal Operations not considering your brief.
- ✓ ***Cite to the Record***  
Reference the documents and testimony in the record that support your arguments.
- ✓ ***Typed***  
Typed briefs are preferred, but not required. If your brief is handwritten, please make sure that the handwriting is legible so that other people will be able to read your handwriting.

✓ ***Inclusion of All Arguments***

Please include all your arguments in your initial brief. Commission regulations do not provide for the submission of supplemental briefs.

## **IX. What Happens After You File Your Appeal and Brief?**

### ***The Parties File Their Briefs***

If you file an appeal, the Agency may submit an opposition brief. At times, EEOC may request additional information or missing documents from the parties.

### ***The EEOC Office of Federal Operations Reads the Briefs, Reviews the Record, Performs Legal Research, and Issues a Decision***

An attorney in the EEOC Office of Federal Operations will be assigned to your appeal. The attorney will carefully review the record that was sent by the agency, read the briefs and understand the arguments raised in those briefs, perform legal research, and issue decisions.

### ***How Long Will It Take for EEOC to Issue a Decision on Appeal?***

Due to the volume of appeals, we cannot predict how quickly you will receive your decision on your appeal. Usually, the EEOC Office of Federal Operations issues a decision on a “procedural” appeals within 6-10 months after the filing of the appeal. A decision on a “merits” appeal, where a previous decision determined whether discrimination occurred, typically takes more time.

If the case is complicated or there is disagreement on the outcome, it may take longer.

### ***How Can I Check the Status of My Appeal?***

If you are registered on the EEOC Public Portal (<https://publicportal.eeoc.gov>), you can check the status of your appeal on the Portal through your account. Telephone and email status inquiries simply provide the same information as is available on the Public Portal.

### ***What Can I Do If I Feel the EEOC’s Appellate Decision Made an Obvious Mistake?***

If you wish to dispute the appellate decision issued by the EEOC Office of Federal Operations, you may file a “request for reconsideration” with the EEOC.

### ***What Happens After the Administrative Appellate Process Is Over?***

- EEOC Office of Federal Operations Decides In Your Favor

If you prevailed on a “procedural” appeal, your complaint will most likely be sent back either to the agency or to an EEOC administrative judge for further proceedings, depending on where your complaint was in the EEO process before it was dismissed. A compliance officer in the EEOC Office of Federal Operations will monitor developments to make sure the Agency complies with the orders in the appellate decision.

If you prevailed on a “merits” appeal, your complaint will most likely be sent back either to the agency or to an EEOC administrative judge to determine what type and amount of relief to award you. If you later disagree with the relief you received, you can appeal the relief ordered to the EEOC Office of Federal Operations. A compliance officer in the EEOC Office of Federal Operations will monitor developments to make sure the Agency complies with the orders in the appellate decision.

- EEOC Office of Federal Operations Decides in the Agency’s Favor

If you did not prevail in your case, you may file a civil action in federal district court. The decision issued by the EEOC Office of Federal Operations will provide information on your right to file a civil action.

However, the question of which federal district court may have personal and subject matter jurisdiction to hear your case is legal in nature, and the answer will depend on the specific circumstances surrounding your situation. Additionally, each federal district court may have its own specific rules and procedures and forms for filing civil actions, so you should contact the clerk of that district court to find out what you need to do to file a civil action. Because of these nuances, and because EEOC is an executive branch agency and the federal district courts are part of the judicial branch with its own procedures and legal rules, the EEOC Office of Federal Operations cannot provide complainants specific instructions in its appellate decisions for where or how to file civil actions.

However, some of these resources may be helpful:

- The US Department of Justice publishes a Civil Resource Manual, and one section talks about where civil actions can be brought against government officers and agencies: <https://www.justice.gov/jm/civil-resource-manual-41-venue-government-officers-and-agencies-defendants>



- The website for the United States Courts has an FAQ that answers some of the most common questions about filing a case in federal court: <https://www.uscourts.gov/faqs-filing-case>
- The United States Courts website has a "federal court finder" where you can search for a federal court by location: <https://www.uscourts.gov/federal-court-finder/search>

## X. Glossary of Terms

<b>Administrative Judge</b>	An EEOC employee who independently decides discrimination complaints of federal employees. An administrative judge will issue a variety of orders designed to ensure fair and expeditious processing of a complainant's case, will analyze the applicable law and the evidence and issue a decision.
<b>Affidavit</b>	A written statement that is signed under the penalty of perjury and sworn to before a person who is officially permitted by law to administer an oath.
<b>Affirm</b>	When the EEOC Office of Federal Operations says that a previous decision was right.
<b>AJ</b>	An acronym for an EEOC Administrative Judge.
<b>Appeal</b>	A review by the EEOC Office of Federal Operations of what happened in a previous decision to determine if any mistakes happened and if the mistakes are significant enough to reverse or remand the decision.
<b>Appellate</b>	Having to do with appeals.
<b>Argument</b>	Section of the brief that explains your side of the case. A brief in support of the appeal uses this section to show how the previous decision made a mistake in deciding the case. A brief in opposition to the appeal uses this section to respond to the opposing party's arguments, and show why the previous decision is correct.
<b>Attorney's fees</b>	If the complainant wins the appeal and is represented by an attorney, the EEOC Office of Federal Operations may order the losing federal agency to pay all or part of the attorney's fees.
<b>Brief</b>	A written statement that each side may give to the EEOC Office of Federal Operations that explains why the EEOC should decide that they are right. A brief presents a party's arguments about the issues on appeal and cites to legal authorities (such as statutes, regulations, or case law) to support their positions. A brief in support of the appeal argues why the previous decision was an error or mistake; a brief in opposition to the appeal argues why the previous decision was correct.

<b>Case law</b>	Legal propositions that are based on administrative appellate and judicial decisions rather than on statutes. You can read published administrative appellate decisions at <a href="https://www.eeoc.gov/federal-sector/appellate-decisions">https://www.eeoc.gov/federal-sector/appellate-decisions</a> . Particularly noteworthy administrative appellate decisions are listed at <a href="https://www.eeoc.gov/federal-sector/selected-noteworthy-federal-sector-appellate-decisions">https://www.eeoc.gov/federal-sector/selected-noteworthy-federal-sector-appellate-decisions</a> .
<b>Citation</b>	This term can have two meanings. First, it is a reference to a legal authority, such as a case that has already been decided by EEOC, a court, a statute, or the United States Constitution. Second, it is a reference to the record or the hearing transcript in the case.
<b>Civil Action</b>	A noncriminal lawsuit that begins with a complaint. The plaintiff is the party filing the complaint, and the defendant is the party defending against the complaint's allegations. The complaint describes the plaintiff's damages or injury, explains how the defendant caused the harm, shows that the court has jurisdiction, and asks the court to order relief.
<b>Complaint File</b>	<p>An electronic document assembled by an agency that includes all various documents and information acquired during fact-finding. The complaint file should include, when applicable:</p> <ul style="list-style-type: none"> <li>• the EEO Counselor's report and all documents generated in the informal process, including the notice of right to file a complaint</li> <li>• the formal EEO complaint and documents submitted by the complainant.</li> <li>• the agency's notice of claims to be investigated; copies of any other documents bearing on delineation of the claims to be investigated; documents pertaining to the partial dismissal of claim(s) and/or the notice of late investigation</li> <li>• documented attempts at resolution, including any settlement agreement reached on any aspect of the complaint; however, documentation should not include the substance of such attempts.</li> <li>• any documentation of appellate activity and any decisions affecting the processing of the complaint if any</li> <li>• the summary of investigation/summary analysis of the facts. The summary should cite to exhibits and evidence and be signed and dated by the investigator.</li> <li>• the investigative evidence and documents.</li> <li>• all pre-hearing submissions, including those relevant to summary judgment, and all discovery documentation, and motions, orders, exhibits, and transcripts.</li> <li>• all submissions from an administrative hearing, including motions, exhibits, and transcripts.</li> <li>• the decision(s) of the Commission's Administrative Judge.</li> <li>• the Final Agency Action and any documentation related to service on the parties.</li> <li>• any miscellaneous material.</li> </ul>
<b>Compliance</b>	An administrative process to make sure a federal agency complies with the orders of EEOC's federal sector administrative appellate decisions.
<b>De novo</b>	A standard of review used by the EEOC Office of Federal Operations when reviewing decisions or actions issued by other federal agencies. The EEOC Office of Federal Operations will consider the issues by taking a fresh look at the case and review the evidentiary documents, statements, and testimony of record, including any timely and relevant submissions of the parties. The Commission will issue its decision based on its own assessment of the record and its interpretation of the law.

<b>Decision</b>	A judgment or order that settles a dispute and decides an issue.
<b>Deposition</b>	An out-of-court statement given under oath by any person involved in the case. Commonly used during the discovery process in preparation for a hearing. Depositions usually consist of an oral examination, followed by cross-examination by the opposing side.
<b>Discovery</b>	A process of exchanging information between the parties about the witnesses and evidence they will present at a hearing. One of the most common methods of discovery is to take depositions. A deposition is an out-of-court statement given under oath by any person involved in the case. It is to be used at a hearing or in preparation for a hearing.
<b>EEO</b>	An acronym that stands for Equal Employment Opportunity
<b>Evidence</b>	Any proof legally presented during an investigation or an administrative hearing through witnesses, records, and exhibits.
<b>Exhibit</b>	A paper, document, or other physical object received by an EEOC administrative judge as evidence during an administrative hearing. Or it can mean a document or an object shown and identified in an investigation or administrative hearing as evidence in a case.
<b>FAD</b>	An acronym for Final Agency Decision.
<b>File</b>	When a person officially gives a paper to a federal agency or the EEOC Office of Federal Operations and that paper becomes part of the record of a case.
<b>Final Action</b>	An agency final action involves agency issuance of a final order to the complainant. The final order informs the complainant whether the agency will fully implement the decision of an EEOC Administrative Judge and contains notice of the complainant's right to appeal to the Commission. The term "fully implement" means that the agency adopts without modification the decision of an EEOC Administrative Judge. If the agency's final order advises the complainant that the agency will not fully implement the decision of the Administrative Judge, the agency must file an appeal of the decision with the Commission simultaneously with issuing the final order to the complainant. In this way, an agency will take final action on a complaint referred to an Administrative Judge by issuing a final order, but it will not be provided with the opportunity of introducing new evidence or writing a new decision in the case.
<b>Final Agency Decision</b>	A decision issued by an agency that either (1) dismisses an EEO complaint on procedural grounds, or (2) examines the evidence after completing an investigation and determines whether complainant was subjected to discrimination.
<b>Final Judgment</b>	Final decision by an EEOC Administrative Judge. This judgment resolves all of the issues that were presented in the administrative hearing.
<b>Final Order</b>	The final order informs the complainant whether an agency will fully implement the decision of an EEOC Administrative Judge and contains notice of the complainant's right to appeal to the Commission. The term "fully implement" means that the agency adopts without modification the decision of an EEOC Administrative Judge. If the agency's final order advises the complainant that the agency will not fully implement the decision of the Administrative Judge, the agency must file an appeal of the decision with the Commission simultaneously with issuing the final order to the complainant.
<b>Finding</b>	When a factfinder, such as a federal agency, an administrative judge, or the EEOC Office of Federal Operations, says something is a fact.

<b>Formal Complaint</b>	A formal discrimination complaint that is filed with an agency’s EEO office. The formal complaint must be a signed statement from the complainant or the complainant's attorney, containing the complainant’s (or representative’s) telephone number and address, and must be sufficiently precise to identify the complainant and the agency, and describe generally the action or practice which forms the basis of the complaint.
<b>Hearing</b>	An administrative proceeding with an EEOC Administrative Judge and opposing sides present. The purpose of a hearing is to make a full and accurate record of the events a complainant raised in the EEO complaint. The EEOC Administrative Judge will then use this record to decide whether discrimination occurred.
<b>IF</b>	An acronym for Investigative File.
<b>Interrogatory</b>	A list of questions one party sends to another as part of the discovery process. The recipient must answer the questions under oath.
<b>Investigation</b>	An investigation of a formal complaint of discrimination is an official inquiry into claims raised in an EEO complaint. EEO investigations may include a variety of fact-finding methods such as interviews, a fact-finding conference, requests for information, interrogatories, and/or affidavits.
<b>Investigative File</b>	<p>A factual record assembled by an EEO investigator that will allow a fact finder to determine whether discrimination occurred. This record is sometimes also called a “Report of Investigation.” The Investigative File should include:</p> <ul style="list-style-type: none"> <li>• a summary of the investigation,</li> <li>• informal counseling documents,</li> <li>• the formal EEO complaint,</li> <li>• all statements, affidavits, and declarations from the investigation,</li> <li>• all documents submitted by the parties.</li> </ul>
<b>Lawyer</b>	A person licensed to practice law. Every state has a Bar Association, which can provide a lot of useful information about the lawyers in its state. Additionally, the National Employment Lawyers Association may have members who can help complainants.
<b>Motion</b>	The document a party files to ask an EEOC Administrative Judge to do something or to permit one of the parties to do something. Typically, one party files a motion. Then the opposing party files an opposition. After reviewing both, the EEOC administrative judge will make a decision on the motion.
<b>Notice of Appeal</b>	A document filed in the EEOC Office of Federal Operations that states you are appealing the previous decision. This document starts the appeal. Complainants should use EEOC Form 573, Notice of Appeal/Petition, available at <a href="https://www.eeoc.gov/federal-sector/management-directive/notice-appealpetition-complainant">https://www.eeoc.gov/federal-sector/management-directive/notice-appealpetition-complainant</a> . Federal agencies must attach copies of EEOC Form 573 to all final actions and dismissals of equal employment complaints.
<b>Oath</b>	All people must swear or affirm to tell the truth if they want their statement or testimony to be considered as evidence. All written statements must be submitted as affidavits to be considered as evidence.
<b>Order</b>	A written or oral decision by an EEOC administrative judge, federal agency, or EEOC Office of Federal Operations that resolves a matter and/or directs the parties to do something.

<b>Party</b>	The technical legal word for the people who are part of a legal case and have a right to ask the EEOC Office of Federal Operations to make a decision on a dispute.
<b>Precedent</b>	A published administrative appellate or court decision in an earlier case with facts and legal issues similar to the dispute currently before the EEOC Office of Federal Operations. The EEOC Office of Federal Operations will generally “follow precedent,” meaning that it uses the principles established in earlier cases to decide new cases dealing with similar facts and legal issues. The EEOC Office of Federal Operations will overlook precedent if a party can show that the earlier case was decided incorrectly or that it differed in some significant way from the current case.
<b>Preponderance of evidence</b>	A type of evidentiary standard. Under this standard, a complainant satisfies the burden of proof by offering evidence that demonstrates their claim of employment discrimination has a greater than 50% chance to be true. In other words, if a complainant can convince a fact finder that discrimination more likely than not occurred, the complainant meets his or her burden of proof.
<b>Prevailing party</b>	The party that wins the case.
<b>Pro se</b>	Latin for “for oneself, on one’s own behalf.” A pro se complainant is a person who does not have an attorney and is representing himself or herself in a case.
<b>Public Portal</b>	The Public Portal is EEOC’s secure, web-based application that allows individuals with discrimination complaints against the federal government to submit and receive documents supporting their appeal.
<b>Record</b>	All of the paperwork filed in the EEO process, which the EEOC Office of Federal Operations will review in the appeal. This usually includes the report of investigation, exhibits, the hearing transcript, motions, orders, and the final decision or action from the case.
<b>Remand</b>	When the EEOC Office of Federal Operations sends an EEO complaint back to a federal agency or EEOC administrative judge for further proceedings.
<b>Report of Investigation</b>	A factual record assembled by an EEO investigator that will allow a fact finder to determine whether discrimination occurred. This record is sometimes also called an “Investigative File.” The Report of Investigation should include: <ul style="list-style-type: none"> <li>• a summary of the investigation,</li> <li>• informal counseling documents,</li> <li>• the formal EEO complaint,</li> <li>• all statements, affidavits, and declarations from the investigation,</li> <li>• all documents submitted by the parties.</li> </ul>
<b>Reverse</b>	When the EEOC Office of Federal Operations sets aside the previous decision. A reversal may be accompanied by a remand to the federal agency or an EEOC administrative judge for further proceedings.
<b>ROI</b>	An acronym for Report of Investigation.
<b>Standard of review</b>	The standard of review is how much weight (or deference) the EEOC Office of Federal Operations gives to the previous decision when reviewing that decision on appeal. There are different standards of review for different kinds of decisions.
<b>Statute</b>	A law passed by the U.S. Congress.

<b>Substantial evidence</b>	<p>A standard of review in which the Commission will give deference to an administrative judge's post-hearing factual findings based on evidence in the record.</p> <p>For example, an administrative judge finds a management witness' testimony credible based on the demeanor or tone of voice during the hearing. The Commission will accept the administrative judge's credibility determination, unless documents or other objective evidence so contradicts the testimony of the witness or the testimony of the witness otherwise so lacks in credibility that a reasonable fact finder would not credit it.</p>
<b>Summary judgment</b>	<p>Summary judgment (also known as a decision without a hearing) is a judgment entered by an EEOC Administrative Judge for one party and against another party without a full hearing. Summary judgment indicates there is sufficient evidence to declare one party the clear winner.</p> <p>In other words, an EEOC Administrative Judge has reviewed the undisputed facts of the case, along with any acceptable evidence provided by each party to support their argument, and sees no point in having an administrative hearing. The EEOC Administrative Judge will then rule on the case based on the facts and evidence.</p>
<b>Testimony</b>	The words spoken during an administrative hearing by witnesses that is evidence.
<b>Transcript</b>	Written version of everything that was said by the parties, the EEOC administrative judge, and any witnesses at the administrative hearing.
<b>U.S. Supreme Court</b>	Located in Washington, D.C., it is the highest court in the United States; the U.S. Supreme Court has final appellate jurisdiction and has jurisdiction over all other courts in the nation.
<b>Witness</b>	A person called by a party to speak under oath about what he or she knows or has observed that is relevant to the case. There are no witnesses used in appeals.

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**OFFICE OF FEDERAL OPERATIONS**

Julie Smith, Complainant

v.

U.S. Dept. of XYZ, Agency

Complainant's Brief

From Julie Smith

123 ABC Way

Garden City, NY 11530

EEOC Appeal No. 202100XXXX

Agency Case No. ABC-123-XYZ

## **PROCEDURAL HISTORY/BACKGROUND**

In 2003, Complainant was hired by the Agency to work as an Administrative Assistant in its New York, NY office. Complainant received a Notice of Termination effective April 1, 2021. (Complaint File at 8). On April 5, 2021, Complainant contacted an EEO Counselor about her termination. At the end of EEO counseling, the Agency sent her a Notice of Right to File a Formal Complaint (Notice). On May 3, 2021, Complainant received the Notice by certified U.S. mail. (Complaint File at 21). On May 17, 2021, Complainant filed her formal complaint with the Agency by email and alleged that she was terminated based on age. (Complaint File at 25). On July 1, 2021, the Agency issued a final decision dismissing Complainant's complaint on the grounds her formal complaint was not timely filed. (Complaint File at 40). On July 15, 2021, Complainant appealed the matter to OFO via the EEOC Public Portal. This brief was filed with OFO on July 26, 2021.

## **ARGUMENT**

- I. The Final Decision made a mistake in finding that Complainant's formal complaint was filed on May 20, 2021.

EEOC Regulation 29 C.F.R. § 1614.106(b) requires the filing of a written complaint with an appropriate agency official within fifteen (15) calendar days after receipt of the notice of the right to file a formal complaint.

Complainant received the Notice by U. S. certified mail on May 3, 2021. (Complaint File at 21). The Notice informed her to file her formal complaint with the Agency within 15 days of receipt. (Complaint File at 21). In its final decision, the Agency found that Complainant filed her formal complaint on May 20, 2021 via U.S. mail (postmark date), outside the 15-day time period.



(Complaint File at 40.). However, the record shows that Complainant first filed her formal complaint with the Agency by email on May 17, 2021. (Complaint File at 25). Complainant later mailed a copy of her formal complaint to the Agency on May 20, 2021. (Complaint File at 30). For these reasons, Complainant timely filed her formal complaint on May 17, 2021 via email, within 15 days of receiving the Notice on May 3, 2021.

**CONCLUSION**

For these reasons, OFO should REVERSE the Agency's final decision dismissing Complainant's complaint and REMAND this matter to the Agency for investigation.

**CERTIFICATE OF SERVICE**

I certify that on **July 26, 2021**, this brief was filed with the EEOC's Office of Federal Operations and served on the Agency, U.S. Dept. of XYZ, via the EEOC Public Portal.

*Julie Smith*

**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**OFFICE OF FEDERAL OPERATIONS**

Jane Doe	)	
Complainant,	)	
	)	
vs.	)	
	)	
U.S. Dept. of XYZ (Sub-agency)	)	EEOC Appeal No. 202100ZZZZ
Agency.	)	EEOC Hearing No. (if applicable): N/A
_____	)	Agency Case No. 123-ABC-XXX

Check which brief this is:

- BRIEF IN SUPPORT OF APPEAL**  
 **BRIEF IN OPPOSITION TO APPEAL**

Your Name: Jane Doe  
Address: 123 Anywhere Lane  
Anytown, MD XXXXX

**BACKGROUND INFORMATION ON DISCRIMINATORY ACTIONS;  
PROCEDURAL HISTORY OF EEO COMPLAINT**

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*Please explain in chronological order the discriminatory events that happened which caused you to file an EEO complaint. List only the specific facts connected to the issues on appeal. You may also describe the relevant procedural history of the EEO complaint.*

*The EEOC Office of Federal Operations will generally only consider information that was provided during the investigation or during the hearing process. This means now you cannot include new facts or evidence that was not presented earlier. The only exception is if you can show that the evidence was not reasonably available prior to or during the investigation or during the hearing process.*

*If you can, you should include the specific page or pages in the record where that fact can be found. (After stating a fact, please give the page in the record supporting that fact by using: "Complaint File at page #" or "Report of Investigation at page #").*

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In 2017, Complainant began working at the Agency's Washington, D.C. facility as a GS-7 Financial Analyst. In 2021, she applied and interviewed for a GS-9 Financial Analyst position under Vacancy Announcement No. XXXX. On March 1, 2021, she learned that the Agency had selected a male applicant instead of her (Complaint File at 13).

On March 12, 2021, Complainant contacted an EEO Counselor to start the EEO process because she was not chosen for the job. (Complaint File at 15). On April 12, 2021, Complainant filed a formal EEO complaint, alleging that she was discriminated because of her sex when she was not selected for the Financial Analyst-GS-9 position. (Complaint File at 23-25). On June 20, 2021, the Agency sent Complainant a copy of the Report of Investigation (ROI) and notice of her right to elect a final agency decision or a

hearing before an EEOC Administrative Judge. Complainant requested a final decision. (Complaint File at 40).

On August 20, 2021, the Agency issued a final decision, finding no discrimination. (Complaint File at 45). The final decision determined that the Agency articulated a legitimate, non-discriminatory reason for hiring the male selectee over Complainant in that the selectee's responses during the interview were more thorough and more detailed than Complainant's responses. The final decision then determined that Complainant failed to prove that the Agency's articulated reason was a pretext for discrimination.

On August 28, 2021, Complainant appealed the matter to EEOC using the EEOC Public Portal. (Complainant File at 60). This brief is timely filed on September 15, 2021.

### STANDARD OF REVIEW

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*When the EEOC Office of Federal Operations reviews an issue on appeal, it needs some kind of rules or guidelines to determine whether the Agency or administrative judge has made an error. Different kinds of rulings require different kinds of review guidelines. These guidelines are called standards of review.*

*When an appealing party argues that the previous decision made a mistake, the EEOC Office of Federal Operations looks first at what the standard of review is for that particular issue. The three most common standards of review are: de novo review, substantial evidence, and clearly erroneous. A detailed discussion about the various standards of review on appeal can be found in Chapter 9, section VI of EEOC Management Directive 110, at <https://www.eeoc.gov/federal-sector/management-directive/chapter-9-appeals-commission>*

*It may be difficult for people representing themselves to determine the appropriate standard of review. If you are not able to figure this out, you can skip this section.*

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#### What is being appealed?

Procedural final agency decision → Use de novo review

## Attachment II-Sample Brief for a Merits Decision

A procedural final agency decision is a decision issued by a federal agency that dismisses an EEO claim or complaint on procedural grounds, such as failing to state a valid claim of discrimination, untimely contacting an EEO counselor, or untimely filing the EEO complaint. The standard of review to use on appeal is **de novo review**.

**Final agency decision on the merits → Use de novo review**

A final agency decision on the merits is a decision issued by a federal agency after it has conducted an investigation. The final decision examines the evidence gathered from the investigation and determines whether complainant was subjected to employment discrimination. The standard of review to use on appeal is **de novo review**.

**Summary judgment decision (decision without a hearing by an administrative judge) → Use de novo review**

A summary judgment decision is issued by an EEOC administrative judge who decides in favor of one party without a full hearing. The standard of review to use on appeal is **de novo review**.

**Decision by an EEOC administrative judge after a hearing → Use substantial evidence standard for factual findings, and de novo review for legal determinations**

The Commission will give deference to an administrative judge's post-hearing factual findings based on evidence in the record. For example, say an administrative judge finds a management witness' testimony credible based on the demeanor or tone of voice during the hearing. The Commission will accept the administrative judge's credibility determination, *unless documents or other objective evidence so contradicts the testimony of the witness or the testimony of the witness otherwise so lacks in credibility that a reasonable fact finder would not credit it.*

The Commission will review legal determinations made by an administrative judge or agency without presuming that the previous decision-maker was correct in interpreting or applying the law.

**Previous administrative appellate decision by the EEOC Office of Federal Operations → Use clearly erroneous standard**

A party may request that the EEOC Office of Federal Operations reconsider one of its initial decision. The Commission may reconsider a previous decision if a party demonstrates that the earlier appellate decision involved a clearly erroneous interpretation of material fact or law. In other words, did the previous decision make a clear, obvious error that affected the outcome of the appeal?

For example, the EEOC Office of Federal Operations issued an initial decision, agreeing with a federal agency to dismiss complainant's appeal because it was untimely filed based on the date of an email complainant sent to the Commission. Complainant requests that the Commission reconsider its initial decision, because the initial decision made an obvious mistake by not using the earlier postmark date when she mailed her appeal.

**Other (please specify):**

**Not sure**

Final agency decisions on the merits of individual complaints shall be reviewed de novo. The de novo standard of review requires that the Commission will examine the record without regard to the factual and legal determinations of the previous decision. The Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law.

### THE LAW THAT SHOULD BE APPLIED

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*If you believe that the previous decision applied the wrong law to your case, tell the EEOC Office of Federal Operations what law it should apply to decide your appeal. Legal authorities may include EEOC regulations, laws passed by the U.S. Congress, judicial decisions, especially those issued by the U.S. Supreme Court, and EEOC federal sector administrative appellate decisions. It may be difficult for people representing themselves to determine the appropriate law. If you are not able to figure this out, you can skip this section.*

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Do you think the previous decision applied the wrong law?  YES     NO     NOT SURE

A claim alleging disparate treatment is examined under the three-part test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this analysis, a complainant initially must establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination (that a prohibited consideration was a factor in the adverse employment action). McDonnell Douglas 411 U.S. at 802.

Next, in response, the agency management witnesses must state a legitimate, non-discriminatory reason for the challenged actions. McDonnell Douglas, 411 U.S. at 802.

Finally, complainant must demonstrate that the agency's action was more likely than not based on prohibited considerations of discrimination. To do so, complainant must show that the agency's reasons for its action were not its true reasons but a sham or pretext to try to mask discrimination. See McDonnell Douglas, 411 U.S. at 804.

In a non-selection case like this, a complainant may show that an employer's reason for the non-selection was pretext for discrimination by demonstrating that her qualifications were "plainly superior" to those of the selectee. Wasser v. Dept. of Labor, EEOC Request No. 05940058 (Nov. 2, 1995).

### ARGUMENTS ON APPEAL

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*If you are the appealing party, tell the EEOC Office of Federal Operations why the previous decision was wrong. For example, did the previous decision incorrectly decide the facts? If so, what facts? If you can, you should include the specific page or pages in the record where that fact can be found. (After stating a fact, please cite to the page in the record by using: "Complaint File at page #"; "Report of Investigation at page #"; "Exhibit A at page #"). This allows the EEOC Office of Federal Operations to understand whether a factual assertion is accurate. If you do not provide supporting cites for factual statements, it is harder for the EEOC Office of Federal Operations to fairly consider the factual arguments you raise.*

*If you think the previous decision applied the wrong law, how should the case be decided if the EEOC applied the right law? Do you feel that there are other reasons why the previous decision was wrong? If so, what are they?*

*If you are the party opposing the appeal, explain why the previous decision was correct.*

**Did the previous decision incorrectly decide the facts?**     YES     NO

**Do you think the previous decision applied the wrong law?**  YES     NO     NOT SURE

**Do you feel there are any other reasons why the previous decision was wrong?**  YES     NO



**I. Complainant established a *prima facie* case of sex discrimination.**

Complainant has established a *prima facie* case of sex discrimination.

Complainant applied for the position in question and was found qualified for the position. Report of Investigation (ROI) at 45-46. However, another applicant was chosen for the position. Unlike Complainant, the applicant chosen was male. (ROI at 48).

**II. Although the Agency articulated a non-discriminatory reason for its actions, other evidence demonstrate that this articulated reason was more likely than not a pretext for sex discrimination.**

**a. The interview panel's notes show that Complainant gave more thorough and detailed answers than the selectee.**

The selecting official and other members of the interview panel stated, in their affidavits, that they hired the selectee because his responses during the interview were more thorough and more detailed than Complainant's responses. (ROI at 100, paragraph 4; 111, paragraph 3).

However, this testimony is contradicted by other evidence. The Report of Investigation contains copies of the interview notes from the members of the interview panel. The notes indicate that Complainant's responses were more detailed and thorough than the selectee's responses. (ROI at 115-119). For example, Complainant's interview responses generally contained multiple detailed examples for each of the Agency's skills-based questions. (ROI at 115-117). The selectee's responses, however, generally contained only one example for each question with little detail. (ROI at 118-119).

Therefore, the interview notes show that the Agency’s articulated reason for hiring the selectee was not its true reason but a sham or pretext to try to mask sex discrimination.

**b. Complainant’s qualifications were plainly superior to the selectee’s qualifications.**

Complainant’s qualifications were plainly superior to the selectee’s qualifications. For example, the record reflects that Complainant served in a year-long detail to the Financial Analyst, GS-9 position and performed all of the functions of this position. (ROI at 124). In addition, the record reflects that Complainant received an “Outstanding” performance evaluation while detailed to the Financial Analyst, GS-9 position. (ROI at 130-135). There is no evidence in the record showing that the selectee served in a detail to the position in question. Therefore, there is no valid, non-discriminatory explanation for why Complainant was not chosen for the job. Based on the evidence, Complainant has established that the Agency’s articulated reason for not picking her was more likely than not a pretext for sex discrimination.

**ACTIONS THAT EEOC SHOULD TAKE IN THIS APPEAL**

For the reasons stated above, the Commission should:

- reverse or change** the previous decision.
- affirm or keep** the previous decision.
- other:**

If the Commission finds in favor of Complainant, the Commission should grant Complainant the following relief:

**Compensatory damages**

Payment to victims of discrimination for out-of-pocket expenses caused by the discrimination (such as costs associated with a job search or medical expenses) and to compensate them for any emotional harm suffered (such as mental anguish, inconvenience, or loss of enjoyment of life).

**Retroactive placement in a job** (please specify): Financial Analyst, GS-9 position

For cases in which the employee or applicant is not selected for a position or promotion due to discrimination, this would include an offer of placement into the position sought, or a substantially equivalent position within the same commuting area. The offer should be made retroactive to the date of the selection in question

In cases involving a discriminatory termination, the agency should offer to reinstate the complainant to his or her former position retroactive to the date of the termination.

**Front Pay**

Front pay compensates an individual when reinstatement is not possible in certain limited circumstances. Front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts.

**Back Pay**

The purpose of a back pay award is to restore to the complainant the income he or she would have otherwise earned but for the discrimination. The most common discriminatory actions generating back pay are: removals, suspensions, denials of promotions, and failure to hire.

**Liquidated Damages**

Liquidated damages are generally monetary awards equal to, and in addition to, the back pay due to the complainant. Such damages may be available for a violation of the Equal Pay Act.

**Restoration of Leave**

Where there has been a finding of discrimination, the complainant is entitled to the restoration of any leave used because of the agency's discriminatory actions.

**Cancel an unwarranted personnel action and restore the employee to the status he or she occupied prior to the discrimination** (please specify):

## Attachment II-Sample Brief for a Merits Decision

An example is canceling a discriminatory termination of complainant and restoring complainant to his or her previous position.

**Expunge adverse materials relating to the discriminatory employment practice from the agency's records** (please specify):

An example is expunging a discriminatory disciplinary action from complainant's personnel records.

**Provide complainant with a full opportunity to participate in the employee benefit that was denied** (please specify):

Examples of employee benefits include training, preferential work assignments, or overtime scheduling.

**Raise a performance rating** (please specify):

When the finding of discrimination involves a performance appraisal, the appropriate relief should include raising the rating to that which the individual would have received absent the discrimination.

**Awards of costs and fees for attorney, expert, or non-legal services**

Complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended and the Rehabilitation Act of 1973, as amended, are presumptively entitled to an award of attorney's fees and costs. A prevailing complainant is entitled to recovery of his/her costs.

Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to attorney's fees at the administrative level.

A prevailing complainant is entitled to recovery of his or her costs. Costs include: witness fees; transcript costs; and printing and copying costs.

A prevailing complainant is entitled to compensation for the work of law clerks, paralegals, and law students under the supervision of members of the bar, at market rates, but not for clerical services.

Reasonable costs incurred directly by a prevailing complainant (for example, one who is unrepresented or who is represented by a non-lawyer) are compensable. Costs must be proved in the same manner as fees are, and the complainant must provide documentation, such as bills or receipts.

**CERTIFICATE OF SERVICE**

I certify that on **September 15, 2021**, this brief was filed with the EEOC's Office of Federal Operations and served on the Agency, U.S. Dept. of XYZ, via the EEOC Public Portal.

Jane Doe