

4.3 | 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
Procedural final agency decision <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>	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.



Final agency decision on the merits <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>	De novo review	The same as above, except following de novo review, the Commission will examine the merits of the employment discrimination claims based on a preponderance of the evidence. 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.
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Summary judgment decision (decision without a hearing) by an EEOC administrative judge <i>An EEOC administrative judge issues a decision in favor of one party without a full hearing</i>	De novo review	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. 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).
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Decision by an EEOC administrative judge after a full hearing	Substantial evidence for factual findings (including whether there was discriminatory intent) 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, 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.
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A previous appellate decision issued by the EEOC Office of Federal Operations A party may request that the EEOC Office of Federal Operations reconsider one of its initial decisions.	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?
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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.”

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