

7.0 | 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.



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

Check which brief this is:	☒ BRIEF IN SUPPORT OF APPEAL ☐ BRIEF IN OPPOSITION TO APPEAL
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Your Name: Jane Doe
 Address: 123 Anywhere Lane
 Anytown, MD XXXXX

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

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 #").



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

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.

What is being appealed?

- ☐ Procedural final agency decision → Use de novo review

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

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.

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

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):

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

(EEOC Office of Federal Operations. © 2021)

