



THE EEOC'S GUIDE TO APPEAL BRIEF WRITING
CHAPTER 4
(entire chapter)

{8/6/2021}

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

Chapter 4: How to Organize Your Brief

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EEOC HANDBOOK
GUIDE TO APPEAL BRIEF WRITING

AUTHOR: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CHAPTER: 4 HOW TO ORGANIZE YOUR BRIEF

SECTIONS: 4.0 through 4.10



4.0 | CHAPTER 4 INTRO

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

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4.1 | 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,	)	
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
----------------------------	--

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

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4.2 | 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.

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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).
---	----------------	---



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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4.4 | 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

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4.5 | 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 judgment decision and remand the matter for a hearing.

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

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

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

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

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

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4.7 | 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.

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4.8 | 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.

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4.9 | 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.

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4.10 | 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

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APPENDIX



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