**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**

*Please explain in chronological order the discriminatory events that happened which caused you to start the administrative EEO complaint process. List only the specific facts connected to the issues on appeal. In a procedural appeal, you do not have to try to prove you were discriminated against. Therefore, it’s not necessary to explain what the agency’s rationale was for its discriminatory actions and your reasons why such explanations are pretextual. Rather, you will have to present facts that are relevant to the procedural issues on appeal.*

*For example, if the agency dismissed your EEO complaint because you did not meet a time deadline, you will have to present evidence (such as a photocopy of the package you sent with a stamped postmark date) that shows you were timely.*

*The EEOC Office of Federal Operations will generally only consider information that was provided during the course of the complaint process. This means now on appeal you cannot include new evidence that was not presented earlier.* *The only exception is if you can show that the evidence was not reasonably available before or during the complaint process.*

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

In 2003, Complainant began working as an Administrative Assistant in the Agency’s New York, NY office. Complainant received a Notice of Termination effective April 1, 2021. (Complaint File 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 21).

On May 17, 2021, Complainant electronically filed her formal complaint with the Agency by email and alleged that she was terminated based on age. (Complaint File 25).

On July 1, 2021, the Agency issued a final decision, dismissing the complaint on the grounds her formal complaint was not timely filed. (Complaint File 40). Specifically, the final decision decided that Complainant filed her formal complaint on May 20, 2021 via U.S. Mail based on the postmark, which was outside the regulatory time period.

On July 15, 2021, Complainant electronically appealed the matter to the EEOC Office of Federal Operations via the EEOC Public Portal. This brief was electronically filed with EEOC on July 26, 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**

Procedural final agency decisions on 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**

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

*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.*

EEOC Regulation [29 C.F.R. § 1614.106(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000547&cite=29CFRS1614.106&originatingDoc=I41041548268211e8bbbcd57aa014637b&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) requires a complainant to file a written formal complaint with an appropriate agency official within fifteen (15) calendar days of when the complainant received the notice of the right to file a formal complaint.

**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 page #”; “Report of Investigation page #”; “ROI 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**

1. **The Final Decision incorrectly decided that Complainant filed her formal complaint on May 20, 2021 via U.S. mail when in fact she had electronically filed her complaint on May 17, 2021 via email.**

The date that Complainant received the Notice of the Right to File a Formal Complaint was May 3, 2021 by U. S. certified mail. (Complaint File 21). The Notice informed her to file her formal complaint with the Agency within 15 days of receipt, which was May 18, 2021. (Complaint File 21).

The record shows that Complainant first filed her formal complaint electronically via email on May 17, 2021 (Complaint File 25). This electronic filing was within 15 days of receiving the Notice on May 3, 2021.

Complainant later mailed a copy of her formal complaint to the Agency on May 20, 2021. (Complaint File 30). By deciding that Complainant filed her formal complaint on May 20, 2021 via U.S. mail (postmark date), the final decision incorrectly determined that Complainant had untimely filed her formal complaint when in fact Complainant had timely filed her formal complaint via email on May 17, 2021, within 15 days of receiving the Notice on May 3, 2021.

**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**:

**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.

Jane Doe