NOBODY LIKES REMANDS: 2010 EXCEL CONFERENCE

10 WAYS TO MAKE A REMAND LESS LIKELY

WHEN ADDRESSING PROCEDURAL ISSUES:

1. **BE CAREFUL** when **s**aying that a lengthy series of discrete and non discrete actions together fail to state a claim. **AVOID FRAGMENTATION** in harassment cases.

2. **DON'T d**ismiss for abuse of process based on the sheer number of cases filed by the complainant.

3. **DON'T d**ismiss a complaint as a collateral attack on the grievance process merely because a simultaneous grievance has been filed at an agency that permits both EEO complaints and grievances (i.e., United States Postal Service).

4. **DON'T d**ismiss a complaint for failure to cooperate without giving appropriate notice that a dismissal could occur. Be careful with such dismissals in the absence of contumacious conduct and try to issue a Final Agency Decision on the merits whenever sufficient information is available to do so.

5. **DON'T d**ismiss an allegation of a failure to accommodate that continues to date, as untimely just because it was initiated earlier. Similarly, **DON'T d**ismiss allegations of wage discrimination as untimely when the complainant continues to get a reduced paycheck (Ledbetter type cases).

6. **BE CAREFUL WHEN d**ismissing Letters of Warning that are subsequently removed/reduced through the grievance process for failure to state a claim.

7. **DON'T d**ismiss complaints for failure to file a complaint in a timely manner without checking first to see whether the last date of the time period fell on a weekend or holiday.

8. **NEVER f**ail to send complete files to support dismissals. It is not sufficient to just state that something is the case, you need to support it with evidence.

9. **NEVER f**ail to respond to complainant's allegations through evidence in complaint file.

10. **DON'T t**ry a procedural case on its merits before it is investigated and dismiss it for failure to state a claim.

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WHEN ADDRESSING MERITS ISSUES:

1. **MAKE SURE t**hat complaint files forwarded to the Office of Federal Operations are timely and complete. They should include all underlying documents/pleadings necessary to decide summary judgment, compensatory damages and attorney's fee appeals.

2. **MAKE s**ure you respond adequately to requests for comparative employee information; requests for relevant witnesses, and requests for essential documents;

3. **DON'T l**eave damaging allegations of discriminatory remarks hanging in the air. Make sure the appropriate witness responds to them with an admission, denial, or explanation.

4. **BE SURE TO EXPLAIN d**ocuments that need explanation, such as attendance records, back pay or other pay related computations, etc.

5. **HAVE t**he right people/decision makers answer the right questions related to the agency action at issue.

6. **PROVIDE a**ll relevant medical documentation in the agency's possession in disability discrimination cases, regardless of whether they proceed under accommodation or disparate treatment theory. **ASK t**he right questions during the investigation to elicit sufficient evidence of a disability under our regulations.

7. **DON'T** make the files hard to look through. Inadequate organization of a file can lead to a remand. Finding applications of candidates, rating sheets, vacancy announcements in a nonselection case, affidavits of selecting officials/rating panel members, etc., shouldn't be a hunting game. If it can't be found in the record, the case could end up being remanded to get it.

8. **AGAIN, i**t is not sufficient to just state in a Final Agency Decision that something is the case, you need to support it with evidence. If you say it and lack corroborating evidence in the investigative file to support it, that can form the basis for a remand.

9. **MAKE s**ure affidavits are sworn and accurately reflect the witness statements. It does not look good when the investigation contains a pile of unsworn statements. This could indicate that perhaps all relevant witnesses were not contacted by an investigator.

10. **MAKE s**ure complainant has an opportunity to submit rebuttal evidence and have it be included in the investigative file. Include all submissions from complainants related to compensatory damages and attorney's fees.