

 **Nobody Likes Remands!**

Shelley Kahn  
Supervisory Attorney  
Office of Federal Operations

Amy Risley  
President  
Resolution Services, LLC

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 **EEOC Statistics**

Approximately 1 out of every 10 closed cases are remanded back to the agency.

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 **Why are remands so painful?**

- Blow out timeframes
- Cost the agency (employer) and EEOC in resources
- Witnesses retire, relocate, disappear and forget!
- Documents are lost, destroyed, or moved to the OPM for archiving
- Justice delayed is justice denied

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**Reasons for remands**

- Improper acceptance/dismissal
- Lack of adequate investigation
- Improper legal analysis in FAD

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**Procedural Decision Errors**

- Improper dismissals (substantive errors)
- Fragmentation of claims
- Lack of adequate documentation for dismissal

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**Improper Dismissals**

- Dismissals allowed for...
  - Timeliness
  - Abuse of process
  - Failure to state a claim
  - Mootness
  - Claiming a proposed action
  - Withdrawal
  - Election of other forum
  - Filed in Federal District Court
  - Failure to cooperate

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## Common Dismissal Errors

- Examples
  - Fragmentation of harassment claims
  - Dismissing timely reasonable accommodation claims
  - Failing to send complete files to support dismissals
  - Failure to state a claim dismissal based improperly on merits
  - Improper collateral attack dismissals

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## Fragmentation of Claims: Hostile Work Environment

- Remember, must include all incidents that would constitute “one unlawful employment practice” even those incidents that are untimely

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## Discrete Acts: HWE

- Timely – can be a claim
- Untimely – can be supporting evidence of a hostile work environment
- Potential Examples:
  - Appointment/hire
  - Assignment of duties
  - Awards
  - Coerced resignation
  - Conversion to full time
  - Demotion
  - Disciplinary Action

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## Potential Discrete Acts cont'

- Duty hours
- Evaluations/tests
- Pay
- Promotions/non-selection
- Reasonable accommodations
- Reassignment-request denied
- Reinstatement
- Reprimand
- Suspension
- Termination
- Terms/conditions of employment
- Time and attendance
- Training

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## Non-discrete Acts: HWE

- Typically, do not create a claim in and of themselves
- May be untimely, so long as they constitute one unlawful employment practice

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## Lack of adequate documentation

- What documents are needed for...
  - Dismissal for untimely filing ( Notice of Final Interview, certified receipt proving date of mailing/delivery, proof of posters in the workplace, etc.)
  - Dismissal for abuse of process (documents to support allegation of abuse of process-actual complaints, evidence of lack of good faith)
  - Dismissal for election of forum (filed a grievance, federal court, etc.)(copies of the initial grievance/complaint filings, copy of MSPB appeal or civil action complaint)

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**Inadequate Investigation  
Common Errors**

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**Disability Claims**

- Gathering enough information to determine whether C is a qualified individual with a disability
  - Medical documentation & Release
  - Testimony from Complainant (asking the right questions to elicit sufficient information)
  - Performance appraisal
  - Position description
  - Other info to show if they were qualified

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**Disability claims**

- Using the correct legal analysis
  - Disparate Treatment
  - Failure to provide reasonable accommodation
  - Direct threat

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## Non-selection Claims

- Interview all individuals who played a role in the selection
- Be sure management is specific with rationale for selection decision
- Comparative applications are essential (including protected traits)
- Make sure you gather all documentation necessary (vacancy announcement, applications, rating sheets)

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## Harassment Claims

- Don't forget to investigate "supporting evidence" (untimely but relevant incidents)
- Gather additional testimony of co-workers and others in "he said/she said" claims
- Include documentation of incident, if possible
- Be sure to have alleged harasser respond to specific allegations
- Investigate the liability issue

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## Other Investigation Errors

- Failure to document why an important witness was not interviewed
- Failure to document why documentation is missing
- Failure to ask management to respond directly to allegation of discrimination
- Failure to ask about each basis of discrimination individually

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## Other Investigation Errors

- Failure to ask for comparative information for **similarly situated** individuals
- KEY: Who was treated BETTER than Complainant
- Examples
  - Non-selection
  - Performance Appraisal
  - Career ladder promotion
  - Discipline

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## Comparative Info cont'

- Disability cases are tricky
  - Disparate Treatment
  - Failure to accommodate

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## Final Agency Decision Errors

- Analyze each basis and each claim
- Absent direct information to the contrary, assume C has made a prima facie case and decide on the merits
- Use Supreme Court, Federal Courts of Appeals and OFO decisions for case precedent
- Cite to the ROI when discussing facts
- Apply applicable legal theories

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**Final Agency Decision Errors**

- Do not avoid issuing a finding of discrimination, when warranted
- Make adverse inferences, as necessary
- Remand for further investigation, as necessary
- Make sure everything you say is supported by specific evidence in the record.

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**• ANY QUESTIONS?**

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