68 FLRA No. 146

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R3-77
(Union)

0-AR-4416
(64 FLRA 692 (2010))

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DECISION

September 14, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Agency previously filed exceptions to awards of Arbitrator Robert T. Moore (prior awards) that, as relevant here, directed the Agency to pay the grievant compensatory damages under Title VII of the Civil Rights Act of 1964 (Title VII).[1] In *Pension Benefit Guaranty Corp.* (*PBGC*),[2] the Authority denied most of the Agency's exceptions to the prior awards, but remanded the portion of the prior awards that directed compensatory damages (the earlier damages ruling) to the parties for resubmission to the Arbitrator, absent settlement, to clarify the Arbitrator's bases for the particular amounts awarded. The Arbitrator issued an award on remand (the remand award) that reduced the amount of damages (the reduced damages ruling). There are three questions before us.

The first question is whether two decisions of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that issued after *PBGC* support finding that the Agency cannot be liable to the grievant for a retaliatory failure to investigate the grievant's Title VII complaint. Even assuming that we should consider the Agency's argument regarding these intervening decisions – which we refer to as *Baird I*[3] and *Baird II*[4] – the decisions do not support setting aside the Arbitrator's liability finding. Accordingly, the answer to the first question is no.

The second question is whether the remand award is contrary to law because it allegedly: (1) awards compensatory damages for harms that are not traceable to the Agency's Title VII violation; or (2) is otherwise inconsistent with compensatory-damage awards by the U.S. Equal Employment Opportunity Commission (EEOC) for injuries of similar severity or duration. The remand award expressly states that the reduced damages ruling relates solely to harms traceable to the Agency's Title VII violation, and the Arbitrator found that the revised damages amounts were reasonably justifiable due to the grievant's severely negative physical and psychological reactions over a period of more than six years. As these findings are consistent with the EEOC's compensatory-damages precedent, the answer to the second question is no.

The third question is whether the Arbitrator denied the Agency a fair hearing on remand by: (1) declining to reopen the record for additional evidence following *PBGC*; (2) adopting the Union's proposed findings in full as his remand award; or (3) mailing the remand award to the wrong address. The Arbitrator permissibly exercised his wide discretion in conducting the arbitration proceedings on remand; there is no prohibition on adopting one party's proposed findings as an arbitral decision; and the Agency does not demonstrate that it was prejudiced by the misdirected mailing. Thus, the answer to the third question is also no.

II. Background

The Authority more fully detailed the circumstances of this dispute in *PBGC*,[5] so this decision discusses only those aspects of the case that are pertinent to the Agency's exceptions to the remand award.

A. Prior Awards and the Authority's Decision in *PBGC*

In the prior awards, the Arbitrator found that the grievant, who is female, had a confrontation with a male supervisor (the confrontation) in which the supervisor acted in a "physically threatening" manner toward the grievant.[6] In addition, the Arbitrator found that the supervisor's "tone and proximity" made the grievant

[1] 42 U.S.C. §§ 2000e to 2000e-17.
[2] 64 FLRA 692 (2010).
[3] *Baird v. Gotbaum*, 662 F.3d 1246 (D.C. Cir. 2011).
[4] *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015).
[5] 64 FLRA 692.
[6] *Id.* at 693 (citation omitted) (internal quotation mark omitted).

"uncomfortable."[7] But the Arbitrator also found that the confrontation itself did not violate Title VII.[8]

The Arbitrator found that the grievant quickly complained about the confrontation to Agency management and requested an investigation.[9] But the Arbitrator determined that the management officials with responsibility for investigating the grievant's complaint felt "hostility"[10] and "animus"[11] toward the grievant for her prior testimony at an arbitration hearing regarding equal-employment-opportunity (EEO) matters.[12] The Arbitrator found that these management officials retaliated by ensuring that the investigation of the grievant's complaint was both "incomplete[] and incompeten[t]"[13] – bearing "no resemblance in quality" to investigations of similar allegations.[14] And the Arbitrator concluded that the "refusal of [m]anagement to conduct a serious investigation" violated Title VII "because it was in reprisal for the grievant's [EEO] testimony."[15] After extensively describing the severity and years-long duration of the grievant's negative physical and psychological reactions to these events, the Arbitrator awarded the grievant several hundred thousand dollars in compensatory damages in the prior awards.[16]

As mentioned earlier, the Agency filed exceptions to the prior awards. In resolving those exceptions in *PBGC*, as relevant here, the Authority rejected the Agency's argument that a "failure to investigate an employee's claim of threatening behavior can[not] constitute unlawful retaliation under Title VII."[17] But in response to the Arbitrator's substantial award of compensatory damages, the Authority reviewed several Title VII remedial principles in *PBGC*. Those principles included: (1) an employer "is 'liable only for those damages directly or proximately caused by' the employer's unlawful act";[18] (2) where an "employer's unlawful action is only partially responsible for an employee's damages, 'damages must be reduced accordingly'";[19] and (3) "where an employee 'has a pre-existing condition, the [employer] is liable only for the additional harm or aggravation caused by the discrimination.'"[20] Noting particularly the Arbitrator's statement in the prior awards that "the confrontation and the Title VII violation, '*in combination*[,]' were 'the proximate cause of the grievant's mental and emotional sufferings,'"[21] the Authority stated that there was "no basis" in the record to find that the earlier damages ruling complied with those remedial principles.[22]

Moreover, the Authority found the record insufficient to enable the Authority to "determine the extent to which the grievant's damages were caused solely by the Title VII violation."[23] Accordingly, the Authority found it appropriate to remand the earlier damages ruling "to the parties for resubmission to the Arbitrator, absent settlement, to clarify *whether* and *to what extent* the damages suffered by the grievant were related to the confrontation, and *if* they were so related, the extent to which the damages should be reduced."[24] And, as relevant here, in remanding the earlier damages ruling, the Authority also mentioned an "additional principle[]" that the Arbitrator should consider.[25] Because it appeared that the earlier damages ruling included "nearly $300,000" in compensation, the Authority stated that the Arbitrator should consider whether such an amount was "similar to or greater than amounts that have been awarded in cases involving violations that were significantly different, in terms of severity or their ongoing nature, from the failure to investigate that is at issue here."[26]

B. Remand Proceedings

When the parties could not settle their dispute on remand, they resubmitted the earlier damages ruling to the Arbitrator for clarification, in accordance with *PBGC*. Thereafter, the parties participated in two telephone conferences with the Arbitrator, and a reporter transcribed those conferences.

During the first telephone conference (first conference), the Agency requested an opportunity to "reopen the record" "to obtain clarifying information"[27] – including "medical records" and "depositions" of the grievant and her health-care providers[28] – to address how

[7] *Id.* (citation omitted).
[8] *Id.*
[9] *Id.*
[10] *Id.* (internal quotation mark omitted).
[11] *Id.* at 697.
[12] *Id.* at 693.
[13] Exceptions, Attach. 1, Merits Award at 69.
[14] *PBGC*, 64 FLRA at 693.
[15] *Id.* at 694.
[16] *Id.* at 699.
[17] *Id.*
[18] *Id.* (quoting *Terrell v Cisneros*, EEOC Doc. 01961030 (1996)).
[19] *Id.* (quoting *Merriweather v. Family Dollar Stores*, 103 F.3d 576, 581 (7th Cir. 1996)).
[20] *Id.* (alteration in original) (quoting *Durrant v. West*, EEOC Doc. 01971885, 2000 WL 1368187, at *14 (2000)).
[21] *Id.* (alteration in original) (citation omitted).
[22] *Id.*
[23] *Id.*
[24] *Id.* (emphases added).
[25] *Id.*
[26] *Id.*
[27] Opp'n, Attach. 10, Remand Tr. (Sept. 2, 2010) at 12.
[28] *Id.* at 14, 27 ("deposition"); Exceptions, Attach. 5, Agency's Mot. to Conduct Limited Disc. on Remand at 8 (draft order directing grievant to provide Agency with "complete . . . medical records" and granting Agency opportunity "to schedule . . . depositions").

the grievant's "pre-existing conditions" affected "her reaction to the Agency's failure to investigate."[29] The Arbitrator responded that: (1) "everybody comes into any situation with a certain amount of baggage,"[30] and the grievant's reaction to the Agency's reprisal was not unique in that respect; and (2) he had already rejected the Agency's arguments that any such "baggage" should reduce the grievant's recovery, because under ordinary principles of liability, the Agency had to "take [its] victim as" it found her.[31] Thus, he denied the Agency's request to reopen the record but stated that the Agency could renew that request at the second telephone conference (second conference) if the Agency identified "a glaring hole in the record that . . . need[ed] to be filled."[32]

Between the first and second conferences, the parties both submitted to the Arbitrator proposed findings of fact and conclusions of law, as well as briefs in support of their respective proposals, to clarify the earlier damages ruling.

During the second conference, the Agency renewed its request to reopen or "supplement the record" with deposition testimony,[33] and the Arbitrator reaffirmed his denial of that request because the Agency made "no suggestion of [needing] evidence that was wholly new from what was already in the record."[34] In particular, the Arbitrator found the existing record "quite sufficient" and stated that the Agency was seeking to "rehash[]" its prior argument – which the Arbitrator noted that he already rejected – that "stressors" besides the Title VII violation accounted for many of the grievant's "mental and emotional problems."[35] Moreover, the Arbitrator stated that, since the first conference, he had "looked at" whether any part of the earlier damages ruling should be "carved out as being related solely" to the confrontation, rather than the Title VII violation.[36] And the Arbitrator stated that he had examined whether the earlier damages ruling was "in line with EEOC" precedent.[37] On both of those matters, the Arbitrator stated that he had considered the parties' proposed findings and conclusions, "adopted those" that he found "correct[,] and rejected those" that he found "incorrect."[38]

Then, in the remand award, the Arbitrator endorsed the Union's proposed findings of fact and conclusions of law in their entirety. Among its findings and conclusions, the remand award states that the grievant's "severe emotional distress and loss of life functioning . . . [were] explainable by and due solely to the Agency's retaliatory" violation of Title VII.[39] The remand award addresses the Arbitrator's prior statement that "the confrontation and the Title VII violation, 'in combination[,]' were 'the proximate cause of the grievant's mental and emotional sufferings.'"[40] But the remand award explains that this statement indicated only that the grievant's heightened emotional state after the confrontation "served as a preexisting condition that was exacerbated by" the Title VII violation.[41] And the remand award states that the earlier damages ruling did not include compensation for "the harms visited upon" the grievant by the confrontation alone.[42] According to the Arbitrator, "[r]egardless of whether [the Agency had caused] the grievant's pre-existing fragile emotional state," the Agency had to "take[] the victim as it finds her and . . . pay for the exacerbation . . . caused by the Title VII violation."[43]

Further, the remand award reiterates findings from the prior awards about the effects of the Agency's retaliation on the grievant. In particular, the remand award explains that the grievant: (1) lost the "ability to function normally either at work or at home";[44] (2) depended on her "father and sister to care for her," including bringing "meals to her" in bed – meals that her family "would later find she had not touched";[45] (3) could not enjoy "Christmas . . . relationships with . . . family members" that had previously "been extremely close and meaningful";[46] (4) "seriously deteriorated" in her "physical appearance," including a "neglect of personal grooming and change[in] her general demeanor";[47] (5) "became a recluse" rather than the "charismatic and sociable person she had been";[48] (6) uncharacteristically "missed an important deadline" at work;[49] (7) failed to "muster the effort to bounce back" from the missed

[29] Opp'n, Attach. 10, Remand Tr. (Sept. 2, 2010) at 13.
[30] *Id.* at 15.
[31] *Id.* at 16; *see also id.* at 27-28 (making the same point).
[32] *Id.* at 23-24; *see id.* at 27, 28 (reiterating Agency's burden to identify a "hole" in the record to justify reopening it).
[33] Opp'n, Attach. 10, Remand Tr. (May 24, 2011) at 12 (expressing Agency's desire "to take [physician's] deposition . . . to supplement the record"); *see also id.* at 5, 11 (arguing that remand required opportunity to "supplement" the record).
[34] *Id.* at 5.
[35] *Id.* at 13; *see also id.* at 19 (rejecting what Arbitrator described as Agency's request to "throw[] open the record for more cumulative testimony about outside stressors").
[36] *Id.* at 6.
[37] *Id.*
[38] *Id.*
[39] Remand Award at 2.
[40] *PBGC*, 64 FLRA at 699 (alteration in original) (emphasis omitted) (citation omitted); *see* Remand Award at 4.
[41] Remand Award at 2.
[42] *Id.*; *see also id.* at 4 (providing the same explanation).
[43] *Id.* at 4.
[44] *Id.* at 2.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 3.

deadline, which – along with other incidents of "neglectfulness" – resulted in an annual performance rating that was lower than the ones that she had received in the preceding four years;[50] and (8) sought examination and treatment from psychiatrists, who "diagnosed her as suffering major depression and severe anxiety"[51] and prescribed her a lengthy and "intensive . . . medication regimen."[52] The remand award also restates the Arbitrator's earlier findings that the grievant proved a causal "link" between these negative effects and the Agency's retaliatory conduct, whereas the Agency failed to prove that "other causes of stress in the grievant's life" accounted for the grievant's "life[-]altering plunge into depression and uncontrollable anxiety."[53]

Regarding the consistency of the grievant's recovery of compensatory damages and the recoveries of other victims before the EEOC, the remand award finds a "common thread" in the cases that the parties submitted for consideration regarding "non-pecuniary damages"[54] – that is, an award of damages for "intangible injuries" like "emotional harm" and "loss of health."[55] The common thread is that "the nature and severity of the harm and the duration or expected duration of the harm" are central to the calculation of "an award of non-pecuniary damages."[56] Nevertheless, the remand award also finds that the "EEOC has accepted a wide range of awards falling both well above and well below" the amounts that the Arbitrator incorporated in the reduced damages ruling.[57] In particular, the reduced damages ruling in the remand award provides the grievant with $172,500 for all past and future *non-pecuniary* damages[58] and roughly $12,590 for her *pecuniary* losses[59] – that is, those "quantifiable out-of-pocket expenses" that a victim of discrimination incurs "as the result of . . . discriminatory conduct."[60] As additional support for those amounts, the Arbitrator observed that the duration of the grievant's medical treatment to deal with her injuries was "at least six years,"[61] and that lengthy period of harm distinguished the grievant's case from most of the EEOC decisions on which the parties relied. In all, the reduced damages ruling in the remand award provides the grievant roughly $185,000 in compensatory damages.[62]

The Agency filed exceptions to the remand award, which includes the reduced damages ruling, and the Union filed an opposition to the Agency's exceptions.

II. Analysis and Conclusions

A. The remand award is not contrary to law.

The Agency argues that the remand award is contrary to law in several respects,[63] each of which is discussed further below. When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law de novo.[64] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[65] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[66]

1. The D.C. Circuit's decisions in *Baird I* and *Baird II* do not undermine the Arbitrator's liability determination in the prior awards.

Although the Agency acknowledges that *PBGC* rejected the argument that the Agency could not be liable under Title VII for a failure to properly investigate the grievant's complaint,[67] the Agency argues that the Authority "should revisit" that conclusion[68] based on the D.C. Circuit's decisions in *Baird I* and *Baird II*, which issued after *PBGC*'s remand in this case. According to the Agency, *Baird I* stands for the broad proposition that a "failure to investigate will not support a Title VII claim *unless* the act to be investigated was itself a Title VII violation."[69] And as the Arbitrator found that the confrontation did not violate Title VII, the Agency contends that, under *Baird I*, the Agency cannot be liable

[50] *Id.*
[51] *Id.*
[52] *Id.* at 4.
[53] *Id.* at 3.
[54] *Id.* at 5.
[55] EEOC Enforcement Guidance: Compensatory & Punitive Damages Available Under § 102 of the Civil Rights Act of 1991 (July 14, 1992), 1992 WL 1364354, at *5 (Enforcement Guidance).
[56] Remand Award at 5 (internal quotation marks omitted).
[57] *Id.*
[58] *Id.* at 5, 7.
[59] *Id.* at 6, 7.
[60] Enforcement Guidance, 1992 WL 1364354, at *4.
[61] Remand Award at 5.
[62] *Id.* at 7.
[63] *See* Exceptions at 3, 9, 10, 14-20, 24, 27-28.
[64] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).
[65] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[66] *U.S. DHS, U.S. CBP*, 66 FLRA 567, 567-68 (2012) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 335, 340 (2011)).
[67] *See* Exceptions at 27.
[68] *Id.* at 3.
[69] *Id.* at 27 (emphasis added).

for a failure to investigate the confrontation.[70] Further, in a supplemental submission that it requested leave to file,[71] the Agency argues that *Baird II* "reaffirms" the alleged holdings in *Baird I* that we have just mentioned.[72] We note that, in response to the Agency's supplemental submission, the Union requested leave to file,[73] and did file, an opposition brief.[74]

We assume, without deciding, that the Agency may except to the Arbitrator's earlier finding of liability based on judicial decisions that issued after *PBGC*. And we further assume, without deciding, that the parties' supplemental submissions should be considered. Nevertheless, *Baird I* and *Baird II* do not undermine the Arbitrator's liability determination.

Contrary to the Agency's and dissent's characterization,[75] neither decision relieves the Agency of liability for retaliatory failures to investigate. Rather, the decisions state that a plaintiff cannot succeed on a claim of "retaliatory failure to *remediate*" a Title VII violation, unless the allegedly "uncorrected action" was itself "an adverse action" that could violate Title VII.[76] This case does not involve an alleged failure to remediate; it involves a retaliatory failure to *investigate* a complaint. In this regard, the remand award clearly states that the Arbitrator awarded damages "*solely* [due] to the Agency's retaliatory refusal to *investigate*."[77] Moreover, although the dissent asserts that *Baird II* controls here because it allegedly addressed the Agency's liability for the very events at issue in this case,[78] the decision under review in *Baird II* expressly stated otherwise.[79]

Significantly, both *Baird I* and *Baird II* recognized the continuing force of an earlier D.C. Circuit decision – *Rochon v. Gonzales* – that clearly held that a federal agency may be liable for Title VII "retaliation" due to protected EEO activity[80] where the agency "fail[ed] to investigate" an employee's complaint, *even when* the complained-of conduct did not itself violate Title VII.[81] As such, the holding in *Rochon* belies the Agency's contrary argument. Thus, we reject the Agency's and dissent's contention that the Arbitrator's liability finding is contrary to the legal principles set forth in *Baird I* and *Baird II*.

2. The Agency does not establish that the remand award is contrary to *PBGC* or applicable EEOC precedents.

The Agency asserts that the remand award is contrary to the Authority's remand instructions in *PBGC* and also contrary to the remedial principles that the Authority asked the Arbitrator to consider on remand.[82]

First, the Agency alleges that it is "not credible" for the remand award to find that the earlier damages ruling concerned only those harms flowing from the Title VII violation alone, rather than the confrontation or other factors.[83] But *PBGC* expressly left open this possibility. In particular, *PBGC* asked the Arbitrator to explain "*whether* . . . the damages suffered by the grievant were related to the confrontation."[84] The remand award responds to that clarification request by indicating that none of the damages were related to the confrontation.[85] Although the Agency also asserts that "the Authority [already] *found* that the [earlier damages ruling was] not restricted to those [damages] caused by the failure to investigate,"[86] that is not the case. *PBGC* stated only that the record did "not provide a sufficient basis for the Authority to determine" whether the earlier damages ruling related only to the harms from the Title VII violation.[87] Thus, *PBGC* did not include a determination on that matter.

In addition, the Agency contends that the remand award improperly fails to reduce the amount of damages to account for several other stressors, causes, and pre-existing conditions that the Agency alleges produced the harms that the grievant suffered.[88] But in the prior awards, the Arbitrator rejected the Agency's argument that these other circumstances were proximate

[70] *Id.*
[71] Agency's Mot. for Leave at 1.
[72] Agency's Notice of Supplemental Authority at 2.
[73] Union's Mot. for Leave at 1.
[74] *See generally* Union's Resp. to Agency's Notice of Supplemental Authority.
[75] *See* Dissent at 17.
[76] *Baird I*, 662 F.3d at 1249 (emphasis added).
[77] Remand Award at 2 (emphases added).
[78] Dissent at 16, 17.
[79] *Baird v. Gotbaum*, 888 F. Supp. 2d 63, 68 n.4 (D.D.C. 2012) (stating that plaintiff "does not seek damages for th[e] incident" for which the Arbitrator found the Agency liable, that she did not "include [that incident] in her appeal," and that, consequently, the court "need not analyze it" at all), *aff'd*, *Baird II*, 792 F.3d 166.
[80] 438 F.3d 1211, 1213 (D.C. Cir. 2006).
[81] *Id.* at 1214; *see also id.* at 1219-20.
[82] Exceptions at 3, 6, 13, 15, 18-19, 24.
[83] *Id.* at 19.
[84] 64 FLRA at 699 (emphasis added).
[85] *See* Remand Award at 2, 6.
[86] Exceptions at 6 (emphasis added).
[87] 64 FLRA at 699.
[88] *E.g.*, Exceptions at 3 ("various causes"), 5 ("variety of unrelated 'stressors' and preexisting conditions"), 9 ("other causes"), 11 ("host of other stress factors," "preexisting conditions," and "various causes"); *see also id.* at 18, 19, 20, 22, 23, 24.

causes of the grievant's harms,[89] and the Authority did not disturb that determination in *PBGC*. Further, in the remand award, the Arbitrator continued to reject the Agency's assertion that other stressors proximately contributed to the grievant's suffering.[90] Thus, as the Arbitrator did not find that any of these other stressors were proximate causes of the grievant's symptoms, the Arbitrator had no need to reduce the amount of damages to account for them.

Further, the Agency challenges the Arbitrator's finding that the emotional effects of the confrontation were akin to a pre-existing condition that the Agency's Title VII violation exacerbated.[91] The Agency asserts that such a distinction is "internally inconsistent" because it amounts to a finding that the confrontation was a "significant cause" of the grievant's injuries.[92] However, the EEOC's case law and guidance supports the Arbitrator's distinction between a *pre-existing condition* that makes a victim more susceptible to injury and a *proximate cause* of harm that would support an award of damages. As the Arbitrator repeatedly stated, the Agency must take its victim as it finds her, including any unique susceptibilities to harm that she may have. In that regard, the EEOC's enforcement guidance states that the "fact that the complaining party may be *unusually emotionally sensitive* and incur great emotional harm . . . will not absolve the respondent from responsibility for the *greater emotional harm*."[93] As an example, the guidance states that if three female victims were subject to the same discriminatory conduct but one victim suffered "greater emotional harm" due to her prior experiences as an abuse victim, the respondent would still be liable for all of the damages resulting from the abuse victim's greater emotional harm.[94] The Arbitrator adhered to this concept in the remand award when he found that the confrontation made the grievant uniquely susceptible to emotional harm but that the Title VII violation itself was the actionable injury for which he was awarding damages.[95]

Moreover, the Agency asserts that the remand award is inconsistent with EEOC precedent because the award states that the Arbitrator considered other EEOC decisions, but the award does not identify them by name.[96] However, the Agency fails to identify a legal authority requiring the Arbitrator to cite cases by name to demonstrate that he considered them, and the Authority did not establish any such requirement in *PBGC*. The Agency also asserts that, based on the awards of non-pecuniary damages by the EEOC in allegedly comparable cases, the non-pecuniary-damages amount that the remand award provides is "monstrously excessive."[97] But as the Arbitrator accurately observed in the remand award, although the EEOC emphasizes that any non-pecuniary damages should "reflect the nature and severity of the harm and the duration or expected duration of the harm,"[98] the "EEOC has [nevertheless] accepted a wide range of awards" for seemingly similar injuries.[99] Indeed, the EEOC's enforcement guidance acknowledges that "[d]amage awards for emotional harm vary significantly[,] and there are no definitive rules governing the amounts to be awarded."[100] The EEOC has also held that, "because there is no precise formula by which to calculate non-pecuniary damages," the EEOC's administrative judges may exercise "broad discretion in determining such damage awards."[101] Those remedial principles support a conclusion that the Arbitrator enjoyed broad discretion on remand to determine the amount of the grievant's damages.

Although critical of the Arbitrator's damage-award amounts, the Agency does not show that any of the cases on which it relies with lower damage-award amounts involved harms of similar duration to the harms involved in this case. More specifically: (1) *Minardi v. Chertoff* awarded compensation for harms suffered "during the relevant time" but did not specify the length of "the relevant time" period;[102] (2) *Silldorff v. Potter* adopted an administrative judge's September 2004 damages award regarding reprisal discrimination that occurred in November 2001, so the maximum possible duration of the harms compensated there was less than three years;[103] (3) *Curtis v. Potter* may have involved harms suffered during a period as brief as five months (the period for which backpay was awarded),[104] but certainly no longer than fourteen months (the time between the complained-of

[89] *See PBGC*, 64 FLRA at 694 (recounting Arbitrator's holding that the Agency failed to demonstrate that other "stressors" in the grievant's life had caused her symptoms).
[90] *See* Remand Award at 3.
[91] Exceptions at 22.
[92] *Id.*
[93] Enforcement Guidance, 1992 WL 1364354, at *5 (emphases added).
[94] *Id.*
[95] *See* Remand Award at 2, 4, 6.
[96] *E.g.*, Exceptions at 3.
[97] *Id.* at 16 (internal quotation marks omitted).
[98] Remand Award at 5; *accord Complainant v. Donahoe*, EEOC Doc. 0720100036, 2014 WL 2206545, at*6 (2014) (*Donahoe*) (using the very same wording as remand award to describe importance of severity and duration of harm in calculating non-pecuniary damages).
[99] Remand Award at 5.
[100] Enforcement Guidance, 1992 WL 1364354, at *7.
[101] *Donahoe*, EEOC Doc. 0720100036, 2014 WL 2206545, at *7.
[102] EEOC Doc. 0120082652, 2008 WL 4699866, at *5 (2008); *see* Exceptions at 16 (citing *Minardi*).
[103] EEOC Doc. 07A50020, 2005 WL 689367 (2005); *see* Exceptions at 16 (citing *Silldorff*).
[104] EEOC Doc. 07A30083, 2004 WL 1144563, at *5 (2004); *see* Exceptions at 16 (citing *Curtis*).

incident and the employing agency's order being reviewed);[105] and (4) *Arroyo v. Potter* awarded damages for harms that continued, at most, for less than three years (the time between the complained-of incident and the employing agency's order being reviewed).[106] Thus, those cases do not establish a deficiency in the Arbitrator's damage-award amounts for injuries that required medical treatment for "at least six years."[107]

The Agency also asserts that the grievant's non-pecuniary damages could reach the amounts awarded by the Arbitrator only if the grievant suffered from "severe and ongoing conduct."[108] But that assertion is not consistent with the EEOC's case law. In particular, the EEOC has stated that non-pecuniary "damages are designed to *remedy harm*" that a particular victim "sustained," not to punish the employer "based on . . . the facts of the underlying case."[109] Thus, two cases involving similar underlying facts may not result in similar non-pecuniary-damages amounts if the victims do not experience similar harms in both cases. This case law further supports the Arbitrator's adherence to the principle that the Agency "must take the victim as it found her."[110]

Finally, the Agency contends that the total amount of the reduced damages ruling in the remand award – not merely the non-pecuniary-damages portion – is "still excessive."[111] We note that, despite the Agency's allegation that "the Authority stated [in *PBGC*] that the damages" that the "Arbitrator . . . initially awarded were excessive," that is not the case.[112] Rather, the Authority requested that the Arbitrator "reassess[] damages on remand" to ensure consistency with other compensatory-damage awards.[113] And that request resulted, in part, from the Agency's representations that the Arbitrator had awarded the grievant "nearly $300,000."[114] But as the Agency explains in its present exceptions, the "nearly $300,000" figure drastically overstated the actual damages amount at issue in *PBGC* – all because of a "typo[]."[115] After accounting for that typo and the remand award's reduction of the total damages amount by more than $45,000, the reduced damages ruling currently before the Authority is nearly forty percent less than the figure that the Agency represented, and that the Authority believed, was at issue in *PBGC*. This significant reduction belies any contention that the Arbitrator failed to "reassess[] damages on remand," as the Authority requested.[116]

In conclusion, the Agency has not demonstrated that the remedial award is contrary to law.

B. The Arbitrator did not deny the Agency a fair hearing on remand.

The Agency asserts that several of the Arbitrator's actions on remand denied the Agency a fair hearing.[117] Each assertion will be discussed further below. An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole.[118] However, arbitrators have considerable latitude in the conduct of hearings, and a party's objection to the manner in which the arbitrator conducted the hearing does not alone provide a basis for finding the award deficient.[119] In particular, an arbitrator's exclusion of testimony alone does not establish that the arbitrator denied a fair hearing.[120] In addition, a party's disagreement with an arbitrator's evaluation of evidence, including the determination of the weight to be accorded such evidence, provides no basis for finding an award deficient.[121]

The Agency asserts that the Arbitrator denied it a fair hearing on remand by: (1) denying the Agency "input" on the remand award[122] and denying "*any* hearing on remand";[123] (2) denying the Agency's motion to conduct "limited discovery to supplement the record";[124] (3) "fail[ing] to follow" the remand instructions in *PBGC*, which, according to the Agency, "expressly instructed [the] Arbitrator . . . to [further] develop the

[105] *See Curtis*, EEOC Doc. 07A30083, 2004 WL 1144563, at *1.
[106] EEOC Doc. 07A30065, at *1 (2004); *see* Exceptions at 16-17 (citing *Arroyo*, 2004 WL 414356).
[107] Remand Award at 5.
[108] Exceptions at 18; *see also id.* at 17.
[109] *Welker v. Vilsack*, EEOC Doc. 0120120330, 2012 WL 3144521, at *8 (2012) (emphasis added) (citing *Memphis Cmty. Sch. Dist. v. Stachum*, 477 U.S. 299, 311-12 (1996)).
[110] Remand Award at 4.
[111] Exceptions at 15.
[112] *Id.*; *see also id.* at 2, 7, 15 (making the same inaccurate assertion).
[113] *PBGC*, 64 FLRA at 699.
[114] *Id.*
[115] Exceptions at 1 n.1.
[116] *PBGC*, 64 FLRA at 699.
[117] *See* Exceptions at 3, 7, 10, 12-14, 24-26.
[118] *AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (*Local 1668*).
[119] *E.g., U.S. Dep't of Transp., FAA*, 65 FLRA 320, 323 (2010) (*FAA*).
[120] *Id.* (citing *U.S. Dep't of HHS, SSA*, 24 FLRA 959, 961 (1986)).
[121] *See U.S. Dep't of VA, VA Med. Ctr., Louisville, Ky.*, 64 FLRA 70, 72 (2009) (*VAMC*).
[122] Exceptions at 3.
[123] *Id.* at 10.
[124] *Id.* at 7; *see also id.* at 8, 11-12 (same).

factual record";[125] (4) acting in a "highly improper" manner by adopting the Union's proposed findings verbatim as his remand award;[126] (5) allegedly denying the Agency half of the statutory period for filing exceptions by mailing the remand award to the wrong address;[127] and (6) denying the Agency "due process."[128]

The Agency, Union, and Arbitrator participated in the first and second conferences on remand. In addition, the Agency had the opportunity to submit – and did submit – proposed findings and a brief to the Arbitrator following the remand in *PBGC*. That the Arbitrator rejected the Agency's proposed findings and adopted the Union's does not establish that the Arbitrator denied the Agency "input" on remand.[129] In addition, the Arbitrator's "considerable latitude" in conducting the arbitration proceedings permitted him to deny the Agency's motion to depose witnesses to obtain further testimony[130] or to otherwise reopen the record on remand. In that regard, the Authority has previously held that, when the Authority remands an award for clarification, an arbitrator need not permit the parties to "reopen the record" in order to guarantee them a "fundamentally fair hearing."[131] And although the Agency asserts that *PBGC* "expressly instructed [the] Arbitrator . . . to [further] develop the factual record,"[132] that is not the case. Rather, *PBGC* stated that the record did not permit "*the Authority* to determine" for *itself* whether the damages award complied with the remedial principles discussed in *PBGC*.[133] Thus, *PBGC* did not hold that the Arbitrator would be unable to clarify that matter on remand – by, for example, making additional findings or clarifying his existing findings – without further developing the record.

Turning to the Agency's argument that it was "highly improper" for the Arbitrator to adopt the Union's proposed findings and conclusions verbatim as the remand award,[134] the Agency fails to identify any authority stating that *arbitration awards* are somehow improper where they adopt one party's proposed findings – particularly where an arbitrator received proposed findings from both parties to a dispute, as in this case. In that regard, the cases on which the Agency relies involve *judicial decisions* on appeal,[135] and one concerns a district court's failure to heed an appellate court's *instruction* to hear additional testimony on remand – a circumstance not present here.[136] But even assuming, without deciding, that such decisions apply in the arbitration context, those decisions do not demonstrate that the Arbitrator denied the Agency a fair hearing in this case. In particular, those decisions hold only that adopting one party's proposed findings as the decision of the court "*invites* reversal";[137] but that practice "does not, by itself, *warrant* reversal."[138] For example, in reviewing a decision by the National Labor Relations Board (the Board) in which the Board's administrative law judge adopted the post-hearing brief of the Board's General Counsel "more or less verbatim" to decide an unfair-labor-practice dispute, the D.C. Circuit rejected an argument that "this practice alone demonstrate[d]" a reason for disturbing the Board's decision.[139] Thus, the Agency's fair-hearing argument on this point does not establish a deficiency in the award.

Moreover, although the Agency asserts that the Arbitrator denied it a fair hearing by "failing to serve [the Agency] or its counsel with a copy of the [r]emand" award, the Agency does not explain how the Arbitrator's apparent failure to properly address an envelope demonstrates that the Arbitrator "refused to hear or consider pertinent and material evidence" or "so prejudiced [the Agency] as to affect the fairness of the proceeding as a whole."[140] Notwithstanding the Agency's argument that the Arbitrator's misdirected mailing deprived the Agency of the usual amount of time for filing exceptions to the remand award, under § 7122 of the Federal Service Labor-Management Relations Statute, the Agency's thirty-day period for filing exceptions to the remand award did not begin to run until "the date the award [was] *served on*" the Agency.[141] And the Authority has recognized that, where an arbitrator mails an award that is not deliverable as addressed, service by mail is not "perfected" until that

[125] *Id.* at 13; *see also id.* at 10 (same).
[126] *Id.* at 12.
[127] *Id.* at 9, 14, 25.
[128] *Id.* at 12.
[129] *See VAMC*, 64 FLRA at 72 (a party's disagreement with an arbitrator's evaluation of evidence provides no basis for finding an award deficient).
[130] *FAA*, 65 FLRA at 323 (exclusion of testimony alone does not establish that the arbitrator denied a party a fair hearing).
[131] *NLRB, Wash., D.C.*, 48 FLRA 1337, 1341-42 (1994) (denying fair-hearing exception that challenged arbitrator's denial of "[u]nion's motion to reopen the record"); *see AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723-24 (2006) (remand for clarification did not require arbitrator to hold another hearing).
[132] Exceptions at 13; *see also id.* at 10.
[133] 64 FLRA at 699 (emphasis added).
[134] Exceptions at 12.
[135] *See, e.g., id.* (citing *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 843 F.2d 1395, 1404 (D.C. Cir. 1988)); *id.* at 13 (citing *N. Stevedoring & Handling Corp. v. Int'l Longshoremen's & Warehousemen's Union, Local No. 60*, 685 F.2d 344 (9th Cir. 1982)).
[136] *See N. Stevedoring*, 685 F.2d at 350 (appellate court describing its prior remand order as directing the "district court to *hear testimony* . . . as required by" the pertinent statutory provision (emphasis added)).
[137] *Id.* (emphasis added).
[138] *Berger*, 843 F.2d at 1404 (emphasis added).
[139] *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003).
[140] *Local 1668*, 50 FLRA at 126.
[141] 5 U.S.C. § 7122 (emphasis added).

award is mailed again "with an address that allow[s] for delivery" to the party.[142] Consequently, there is no basis for the Agency's assertion that the Arbitrator effectively denied the Agency the usual amount of time for filing exceptions.

Finally, with regard to the Agency's contention that the Arbitrator's adoption of the Union's proposed findings was a denial of "due process,"[143] the Agency does not explain how this assertion differs from its claim, which we rejected above, that adopting the Union's proposed findings denied the Agency a fair hearing. Thus, we do not address this due-process argument separately.[144]

In sum, none of the foregoing arguments establishes that the Arbitrator denied the Agency a fair hearing.

IV. Decision

We deny the Agency's exceptions to the remand award.

[142] *AFGE, Local 2*, 48 FLRA 1394, 1395-96 (1994).
[143] Exceptions at 12.
[144] *Cf. Bremerton Metal Trades Council*, 59 FLRA 583, 587-88 (2004) (using standard for evaluating fair-hearing exception to deny excepting party's argument that it was "denied due process and, thus, that the [a]rbitrator failed to conduct a fair hearing").

Member Pizzella, dissenting:

Comedian Jerry Seinfeld once noted that there are "different types of cranky. There[']s entertaining cranky, annoying cranky, angry cranky."[1] It is apparent to me, after serving as a Member of the Federal Labor Relations Authority since November 2013, that it is important to be able to make this distinction in the workplace. Many workplace grievances arise out of nothing more than petty annoyances, particularly when agency officials and union representatives are unable to make a distinction between the three.

Rhonda Baird, a long-time (now former) president of NAGE, Local R3-77 at the Pension Benefit Guaranty Corporation (PBGC), apparently believes that a fair number of supervisors and many of her coworkers are annoyingly cranky. On the first, and only, day (November 13, 2002) that Baird worked with a particular, temporary supervisor, Baird prematurely left a meeting.[2] Later, the temporary supervisor and she "exchanged words."[3] This exchange did not end well. The supervisor advanced towards Baird "angrily" repeating words to the effect of "keep pushing it."[4]

Obviously, the temporary supervisor's behavior was annoying, perhaps even boorish, and Arbitrator Roger Moore described his actions as "aggressi[ve]" and that his approach towards Baird could suggest "a threat of physical harm."[5] But Arbitrator Moore was able to see that the temporary supervisor's actions were *not* in reprisal for (and therefore did not violate Title VII of the Civil Rights Act of 1964 (Title VII)[6]) witness testimony that Baird gave seven months earlier in an equal-employment-opportunity (EEO) matter that had not involved either Baird *or* the temporary supervisor.[7]

Nonetheless, from that day in November 2002 until October 2010 (that's right, for almost eight years) every time a PBGC official or coworker annoyed her in any manner, Baird found a way to turn each event into a cause célèbre which she then characterized as an act taken in reprisal for her prior protected activity.[8] According to Baird, all supervisors and many coworkers

[1] David Steinberg, Takes One to Know One, Los Angeles Times, Nov. 30, 2008, availableathttp://www.latimes.com/style/la-mag-nov302008-theear-story.html.
[2] *Pension Benefit Guar. Corp.*, 64 FLRA 692, 693 (2014) (*PBGC*).
[3] *Id.* (citation omitted).
[4] *Id.* (citation omitted).
[5] *Id.* (citation omitted).
[6] 42 U.S.C. §§ 2000e to 2000e-17.
[7] *PBGC*, 64 FLRA at 693.
[8] *Baird v. Gotbaum*, No. 12-5334, 792 F.3d 166, 166, (D.C. Cir. 2015) (*Baird II*).

were not just out to annoy her, but were involved in a conspiracy against her. Along the way, she complained, among other things, that fellow workers circulated emails calling her "psychotic" and claiming that she was experiencing "litigation[-]induced hallucinations";[9] that she was singled out to acknowledge receipt of an email-related memorandum;[10] that a coworker shouted at her and pounded the table when she deposed him concerning one of her many complaints;[11] that she was falsely accused of spreading rumors and distributing anonymous flyers;[12] and that a fellow employee said that she should be "overthrow[n]" as the union president.[13]

And while this case was still working its way through the arbitral process − including an appeal to the FLRA, remand to the Arbitrator, further hearings, a new arbitral remedy, and a new appeal to the FLRA − Baird filed complaints *over the same matters* with two different federal judges and managed to take those cases to the United States Court of Appeals for the District of Columbia Circuit (the court), not just once *but twice.* (I find it troubling that PBGC did not seek to have Baird's federal complaints dismissed pursuant to 5 U.S.C. § 7121(d), which precludes pursuing a claim under both a statutory and a negotiated grievance procedure.)

Just two months ago, on July 7, 2015, in *Baird v. Gotbaum* (*Baird II*)[14] the court determined, once and for all, that all of Baird's claims, including the same November 13, 2002 complaint, which is also at issue here, had no legal merit. In fact, the court was appalled that Baird tried to argue, over and over again, that PBGC was obliged to treat every annoyance that she experienced in the workplace as a separate claim that warranted a new investigation, no matter how "trivial."[15] On this point, the court noted that "[a] trivial incident does not become nontrivial because an employer declines to look into it."[16] Specifically, the court held that when an agency declines to investigate a complaint, that agency violates Title VII only when it declines to investigate a complaint "if the uncorrected action would (if it were discriminatory or retaliatory) be of enough significance to qualify as an adverse action (under the relevant standard)."[17] Affirming its decision in *Baird v. Gotbaum* (*Baird I*),[18] the court further explained: "[i]f certain conduct would not 'dissuade a reasonable worker from making or supporting a charge of discrimination,' neither would an employer's failure to investigate that conduct."[19]

Therefore, I do not agree with Arbitrator Moore's determination that the failure of the PBGC to investigate each and every one of Baird's complaints violated Title VII. However, the Arbitrator did not have the benefit of the court's decision in *Baird I* to guide him when he made that determination. He also did not have the benefit of the court's decision in *Baird II* when he tried to justify an award of over $185,000, following an unprofessional rant which criticized the Authority for daring to reject his first remedy award.[20]

But the majority has no such excuse because it enjoys the benefit of the court's guidance from both *Baird I* and *Baird II*. It is inexplicable to me, therefore, that they could miss entirely what the court actually determined.

The majority attempts to make a distinction − which was not made by either the court or Arbitrator Moore − between a "retaliatory failure to remediate" and a "failure to investigate."[21] The Arbitrator simply concluded that, "had [m]anagement timely acknowledged and addressed [the grievant's] complaint *or prompted an apology from [the grievant's supervisor]*, the vast emotional devastation that was endured by the grievant would have been avoided entirely."[22] Similarly, although the court in *Baird I* used the term "failure to remediate,"[23] that case concerned a "*fail[ure] to investigate*," specifically the "*fail[ure] to conduct timely investigations* into [Baird's] complaints [about harassment by other employees] or [the] . . . *fail[ure] to investigate* her complaints at all."[24] Thus, the court determined that if such "conduct would not 'dissuade a reasonable worker from making or supporting a charge of discrimination,' neither would an employer's *failure to investigate* that conduct."[25]

[9] *Baird v. Gotbaum*, 662 F.3d 1246, 1248 (D.C. Cir. 2011) (*Baird I*), *aff'g in part, vacating in part*, *Baird v. Snowbarger*, 744 F. Supp. 2d 279, 289 (D.D.C. 2010) (*Snowbarger*), *on remand*, *Baird v. Gotbaum*, 888 F. Supp. 2d 63 (D.D.C. 2012), *aff'd*, *Baird II*, 792 F.3d 166.
[10] *Id.*
[11] *Id.*
[12] *Baird II*, 792 F.3d at 169.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 171.
[16] *Id.*
[17] *Baird I*, 662 F.3d at 1249.
[18] 662 F.3d 1246.
[19] *Baird II*, 792 F.3d at 171 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (*Burlington N.*)).
[20] Remand Award at 4.
[21] Majority at 8.
[22] Remand Award at 4.
[23] *Baird I*, 662 F.3d at 1249.
[24] *Snowbarger*, 744 F. Supp. 2d at 289 (emphasis added).
[25] *Baird II*, 792 F.3d at 171 (emphasis added) (quoting *Burlington N.*, 548 U.S. at 68).

To the contrary, the majority mistakenly argues that *Rochon v. Gonzales*,[26] rather than *Baird I*, controls this case. *Rochon* could not be more different. In *Rochon*, a Federal Bureau of Investigation (FBI) agent received death threats from a prison inmate.[27] The agent subsequently complained that the FBI refused to look into the threats because of his earlier protected EEO activity.[28] The court held that if *those* allegations were true, the FBI's failure to investigate the death threats would violate Title VII.[29]

Citing *Rochon*, the court in *Baird I* held, and *Baird II* reiterated,[30] that "a claim of discriminatory or retaliatory failure to remediate may be sufficient [to state a violation of Title VII] *if the uncorrected action* would (if it were discriminatory or retaliatory) be of enough significance to qualify as an adverse action (under the relevant standard)."[31] However, the court found that the perceived "slights" experienced by Baird, *including the one at issue here*[32] and the PBGC's failure "to remediate would not themselves constitute a retaliatory hostile work environment."[33] Instead, the court found that "[w]e already considered many of them in *Baird I* and concluded they were immaterial 'slights.' Baird's other allegations are more of the same. They consist of occasional name-calling, rude emails, lost tempers[,] and workplace disagreements – the kind of conduct courts frequently deem uncognizable under Title VII."[34]

I would also conclude that the Arbitrator's award of $172,500 in non-pecuniary damages is "monstrously excessive."[35]

In addressing the question of non-pecuniary damages, the EEOC has observed that,

> [t]here are no 'hard and fast' rules governing the amount to be awarded[,] . . . the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases.[36]

The Arbitrator's award in this case is grossly out of line with similar cases. Cases where employees fell into deep depression after being unlawfully terminated[37] or suffered severe, ongoing harassment for years do not typically support an award of this magnitude.[38]

For these reasons, I would conclude that the remedy is contrary to law.

Thank you.

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[26] 438 F.3d 1211 (D.C. Cir. 2006).
[27] *Id.* at 1213-14.
[28] *Id.* at 1214.
[29] *Id.* at 1219-20.
[30] *See Baird II*, 792 F.3d at 171 (quoting *Baird I*, 662 F.3d at 1249).
[31] *Baird I*, 662 F.3d at 1249.
[32] *Baird II*, 792 F.3d at 169 ("Baird filed her first amended complaint in February 2010. In it, she alleged Title VII claims based on various run-ins with her coworkers between 2002 and 2009. *In November 2002, for example, [the temporary supervisor] verbally assaulted Baird and advanced ominously into her office.*" (emphasis added)).
[33] *Id.* at 171.
[34] *Id.* (quoting *Baird I*, 662 F.3d at 1250); *see also Baird I*, 662 F.3d at 1250 (citing *Burlington N.*, 548 U.S. at 68) ("personality conflicts . . . are not actionable" under Title VII); *Brooks v. Grundmann*, 748 F.3d 1273, 1277-78 (D.C. Cir. 2014) ("the ordinary tribulations of the workplace, [*i.e.*,] a series of petty insults, vindictive behavior, and angry recriminations . . . are not actionable under Title VII" (alteration in original) (citation omitted) (internal quotation marks omitted)); *id.* at 1277 ("isolated expression of frustration" where employee "yelled," "violently threw a book" and "slamm[ed] down his hand" did not support hostile-work-environment claim) (alteration in original); *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) ("sporadic verbal altercations or disagreements do not qualify as adverse actions"); *Forkkio v. Powell*, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002) ("public humiliation," "loss of reputation," and loss of prestige are not actionable)).

[35] *Ward-Jenkins v. Babbit*, EEOC Doc. 01961483, 1999 WL 139427, at *5 (Mar. 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F.2d 827, 848 (7th Cir. 1989); *U.S. EEOC v. AIC Sec. Investigations, Ltd.*, 823 F. Supp. 573, 574 (N.D. Ill. 1993).
[36] *Id.*
[37] *E.g.*, *Fellows-Gilder v. Chertoff*, EEOC Doc. 0720070046, 2008 WL 399388 (Jan. 31, 2008) ($130,000 where complainant was unlawfully terminated, resulting in hospitalization for writing a suicide note and developing plan to commit suicide, as well as need to seek public assistance and move to remote location); *Franklin v. Henderson*, EEOC Doc. 07A00025 & 01A03882, 2001 WL 65202 (Jan. 19, 2001) ($150,000 where, due to being unlawfully forced onto disability retirement, "[a]t age [thirty-seven], [the complainant's] life career choice of working for the agency was over, and his whole world had been built around his job").
[38] *E.g.*, *Burton v. Norton*, EEOC Doc. 0720050066, 2007 WL 788183 (Mar. 6, 2007) ($130,000 where complainant was subjected to a hostile work environment over several years and unlawfully removed from work projects, resulting in major depression and panic attacks); *Santiago v. Caldera*, EEOC Doc. 01955684, 1998 WL 745761 (Oct. 14, 1998) ($125,000 where complainant was harassed on a daily basis for over two years resulting in "depression, anxiety, paranoia, confusion, moodiness, insomnia, social withdrawal, tearfulness, fatigue, loss of libido, loss of self-esteem, and chest and stomach pains, digestive problems, and incidents of shortness of breath"); *Cook v. Runyon*, EEOC Doc. 01950027, et al., 1998 WL 421558 (July 17, 1998) ($130,000 where constant harassment over extended period of time caused complainant to become physically ill with recurring severe headaches, stomach cramps, diarrhea, and severe nervousness with uncontrollable shaking).