69 FLRA No. 24

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

and

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

0-AR-4416
(64 FLRA 692 (2010))
(68 FLRA 916 (2015))

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ORDER DENYING
MOTION FOR RECONSIDERATION

January 15, 2016

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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

As relevant here, in *Pension Benefit Guaranty Corp.* (*PBGC I*),[1] the Authority remanded, for clarification, Arbitrator Robert T. Moore's award of compensatory damages under Title VII of the Civil Rights Act of 1964 (Title VII).[2] Later, the Arbitrator issued an award on remand (the remand award) that provided the requested clarification. Then, the Agency filed exceptions to the remand award, and, in *Pension Benefit Guaranty Corp.* (*PBGC II*),[3] the Authority denied those exceptions.

The Agency has now filed a motion for reconsideration of *PBGC II* (reconsideration motion) under § 2429.17 of the Authority's Regulations.[4] The Agency alleges that the Authority erred as a matter of law in *PBGC II* by declining to set aside the Arbitrator's compensatory-damages award based on two decisions of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Because we find that the Agency's arguments concerning these D.C. Circuit decisions do not establish extraordinary circumstances that warrant granting reconsideration of *PBGC II*, we deny the reconsideration motion.

II. Background

The Authority more fully detailed the circumstances of this dispute in *PBGC I*[5] and *PBGC II*,[6] so this order discusses only those aspects of the case that are pertinent to the reconsideration motion.

The Arbitrator found that the grievant had a confrontation with a supervisor (the confrontation) that she reported to Agency management as an alleged violation of Title VII.[7] The Arbitrator found that the confrontation itself did not violate Title VII.[8] But he also found that, because certain Agency officials felt animosity toward the grievant as the result of her prior testimony in an equal-employment-opportunity (EEO) dispute, the Agency failed to properly investigate the complaint.[9] As relevant here, the Arbitrator found that the Agency's failure to properly investigate the grievant's complaint constituted unlawful retaliation under Title VII,[10] and he awarded her compensatory damages.[11]

In *PBGC I*, the Authority addressed the Agency's claim that an "alleged failure to thoroughly investigate a complaint, absent some 'tangible impact upon an ultimate employment decision,'" could not be the basis for Title VII liability.[12] In rejecting that claim, the Authority relied, in part, on a decision of the U.S. Court of Appeals for the Sixth Circuit, which held that an "employer's failure to investigate an employee's claim of threatening behavior can constitute unlawful retaliation under Title VII."[13] Further, the Authority found that the Agency did not establish that the Arbitrator erred in his conclusion that "the failure to properly investigate [the grievant's complaint] had a 'chilling effect not only on her but [also] any other employee who might be called on to testify against the Agency'" in an EEO dispute.[14] But, for reasons not pertinent here, the Authority remanded the Arbitrator's damages ruling for clarification.[15]

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[1] 64 FLRA 692 (2010).
[2] 42 U.S.C. §§ 2000e to 2000e-17.
[3] 68 FLRA 916 (2015) (Member Pizzella dissenting).
[4] 5 C.F.R. § 2429.17.
[5] 64 FLRA 692.
[6] 68 FLRA 916.
[7] *Id.* at 916-17 (citing *PBGC I*, 64 FLRA at 693).
[8] *Id.* at 917 (citing *PBGC I*, 64 FLRA at 693).
[9] *Id.* (citing *PBGC I*, 64 FLRA at 693, 697).
[10] *Id.* (citing *PBGC I*, 64 FLRA at 694).
[11] *Id.* (citing *PBGC I*, 64 FLRA at 699).
[12] 64 FLRA at 695 (quoting Exceptions at 20).
[13] *Id.* at 699 (citing *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347-48 (6th Cir. 2008)).
[14] *Id.* (quoting Merits Award at 88).
[15] *PBGC II*, 68 FLRA at 917 (citing *PBGC I*, 64 FLRA at 699).

After the Arbitrator issued the remand award, the Agency filed exceptions, arguing that the Authority "should revisit" whether a retaliatory failure to investigate a Title VII complaint could be the basis for Title VII liability, based on a D.C. Circuit decision in a case involving the grievant that issued after *PBGC I*.[16] In addition, the Agency filed a supplemental submission regarding a second D.C. Circuit decision involving the grievant, that issued while the exceptions in *PBGC II* were pending before the Authority.[17] In the exceptions and supplemental submission, the Agency argued that these two D.C. Circuit decisions – which the Authority referred to as *Baird I*[18] and *Baird II*[19] – stood "for the broad proposition that a 'failure to investigate [a Title VII complaint] will not support a Title VII claim *unless* the act to be investigated was itself a Title VII violation.'"[20] For purposes of addressing that argument, as relevant here, the Authority assumed, without deciding, that: (1) the Agency's supplemental submission should be considered; and (2) the Agency could challenge the Arbitrator's liability finding a second time based on judicial decisions that issued after *PBGC I*.[21]

But after reviewing *Baird I* and *Baird II*, the Authority found that they did not undermine the Arbitrator's liability finding.[22] First, the Authority noted that these decisions addressed a retaliatory failure to *remediate*, whereas the Arbitrator awarded damages for a retaliatory failure to *investigate*.[23] Second, the Authority found that *Baird I* and *Baird II* recognized the continuing force of an earlier D.C. Circuit decision – *Rochon v. Gonzales*[24] – that clearly held that a federal agency may be liable for a retaliatory failure to investigate, "*even when* the complained-of conduct did not itself violate Title VII."[25] Third, the majority in *PBGC II* disagreed with the dissenting Authority Member's claim, repeated throughout the dissent in this proceeding, that *Baird II* addressed the Agency's liability for the very same events at issue in *PBGC II*. The Authority pointed out that "the decision under review in *Baird II* expressly stated otherwise."[26] In sum, the Authority "reject[ed] the Agency's . . . contention that the Arbitrator's liability finding is contrary to the legal principles set forth in *Baird I* and *Baird II*."[27] Accordingly, as pertinent here, the Authority denied the Agency's exceptions.[28]

The Agency then filed the reconsideration motion, and the Union requested leave to file, and did file, an opposition to the reconsideration motion.

III. Preliminary Matter: Under § 2429.26 of the Authority's Regulations, we consider the Union's opposition to the reconsideration motion.

Section 2429.26 of the Authority's Regulations states that the Authority "may in [its] discretion grant leave to file" documents other than those specifically listed in the Regulations.[29] But if a party wants to file a non-listed document (supplemental submission), then the Authority generally requires the party to request leave to file it.[30] As noted above, the Union requested leave to file, and did file, an opposition to the reconsideration motion. As "it is the Authority's practice to grant requests to file oppositions to motions for reconsideration,"[31] we grant the Union's request here and consider its opposition.

IV. Analysis and Conclusion: We deny the reconsideration motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to move for reconsideration of an Authority decision.[32] The Authority has repeatedly recognized that a party seeking reconsideration of an Authority decision bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[33] In that regard, the Authority has held that errors in its remedial order, process, conclusions of law, or factual findings may justify granting reconsideration.[34] But the Authority will not consider claims raised for the first time in a motion for reconsideration that could have been, but were not, raised in the underlying exceptions to an arbitration award.[35]

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[16] *Id.* at 919 (internal quotation marks omitted) (quoting Exceptions to Remand Award at 3).
[17] *Id.* at 920.
[18] *Baird v. Gotbaum*, 662 F.3d 1246 (D.C. Cir. 2011).
[19] *Baird v. Gotbaum*, 792 F.3d 166 (D.C. Cir. 2015).
[20] *PBGC II*, 68 FLRA at 919 (emphasis added in *PBGC II*) (quoting Exceptions to Remand Award at 27).
[21] *Id.* at 920.
[22] *Id.*
[23] *Id.*
[24] 438 F.3d 1211, 1213 (D.C. Cir. 2006).
[25] *PBGC II*, 68 FLRA at 920.
[26] *Id.* (citing *Baird v. Gotbaum*, 888 F. Supp. 2d 63, 68 n.4 (D.D.C. 2012)).
[27] *Id.*
[28] *Id.* at 924.
[29] 5 C.F.R. § 2429.26.
[30] *See, e.g.*, *SSA, Region VI*, 67 FLRA 493, 496 (2014).
[31] *U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 59 (2012) (citing *U.S. Dep't of the Treasury, IRS, Wash.*, D.C., 61 FLRA 352, 353 (2005)).
[32] 5 C.F.R. § 2429.17.
[33] *E.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000) (*IRS*).
[34] *E.g.*, *Int'l Ass'n of Firefighters, Local F-25*, 64 FLRA 943, 943 (2010).
[35] *E.g.*, *U.S. Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget, Office of Grant & Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (*HHS*)

The Agency argues that the Authority's reasons for finding that *Baird I* and *Baird II* do not control this dispute are legally erroneous.[36]

First, the Agency asserts that *Baird I* and *Baird II* addressed alleged failures to remediate *and* failures to investigate, so the Authority erred in finding that those decisions involved only failure-to-remediate claims.[37] In this regard, the Agency notes that the D.C. Circuit in *Baird II* used the words "remediate" and "investigate" when describing the allegations that it was addressing.[38] But despite the D.C. Circuit's use of the word "investigate" at times in *Baird II*, the court ultimately held that, because "the incidents [that] the [Agency] *failed to remediate* would not themselves" violate Title VII, the alleged remediation failures could not support Title VII liability either.[39] Thus, the D.C. Circuit's holding concerned a failure-to-remediate – not a failure-to-investigate – claim, and the Authority did not err as a matter of law in so finding in *PBGC II*.

Second, the Agency asserts that *PBGC II* was "clearly incorrect" in relying on *Rochon* to find that a failure to investigate a Title VII complaint could support Title VII liability, even when the complained-of conduct did not violate Title VII.[40] In this regard, the Agency admits that *Rochon* recognized Title VII liability in precisely those circumstances – that is, where an agency failed to investigate conduct that did not, itself, violate Title VII – but the Agency asserts that *Rochon*'s logic applies only where the complained-of conduct is "very severe."[41] However, the Agency did not raise this "severity" argument in its exceptions or supplemental submission in *PBGC II*. Rather, the Agency repeatedly asserted that there could *never* be Title VII liability for the failure to investigate conduct that did not violate Title VII.[42] And the Agency made that assertion even though, as the reconsideration motion acknowledges,[43] *Baird I* discussed *Rochon*.[44] Further, the Union's opposition to the Agency's exceptions to the remand award expressly relied on *Rochon* to dispute the Agency's characterization of the D.C. Circuit's case law.[45] Yet the Agency again failed to address that decision in its later supplemental submission. Because the Agency could have previously presented, but did not present, its argument for limiting *Rochon*, we decline to consider that argument for the first time in the reconsideration motion.[46]

But even if we were to entertain further challenges to *PBGC II*'s reliance on *Rochon*, we note that the case law of the U.S. Court of Appeals for the Second Circuit (Second Circuit) would provide additional support for this aspect of *PBGC II*. In particular, citing *Rochon*, the Second Circuit has stated that the "failure to investigate a complaint [may] be considered an adverse action for purposes of a retaliation claim . . . if the failure is in retaliation for some separate, protected act by the plaintiff,"[47] as the Arbitrator found to have occurred in this case. Consequently, the Second Circuit's case law reinforces *PBGC II*'s determination that the Agency could be liable for the retaliatory failure to investigate the grievant's complaint.

Third, the Agency makes a claim,[48] repeated numerous times by the dissent, that *PBGC II* erred in concluding that *Baird II* did not reject Title VII liability for "the very events at issue in this case."[49] In support, the Agency submits a copy of a brief that the grievant filed with the D.C. Circuit as part of the litigation in *Baird II* (*Baird II* brief).[50] The *Baird II* brief requested that the D.C. Circuit reverse certain aspects of the underlying district court decision (following the remand in *Baird I*).[51] We assume, without deciding, that the Agency may rely on this brief for the first time in its reconsideration motion because the Agency may not have reasonably anticipated that the Authority would review the underlying district court decision in *Baird II* when deciding *PBGC II*.

But, after considering the *Baird II* brief, we find that the Agency has not established that the Arbitrator's damages award compensates the grievant for the same claims that were at issue in *Baird II*. In the brief, the grievant asked the D.C. Circuit to find that the Agency's failure to investigate the confrontation, together with numerous other events over several years' time, supported finding the Agency liable for a single unlawful employment practice: a hostile work environment in violation of Title VII.[52] Importantly, as the Agency itself

(citing *U.S. Dep't of HHS, SSA, Kan. City, Mo.*, 38 FLRA 1480, 1483-84 (1991)).
[36] Mot. for Recons. at 5.
[37] *Id.* at 2-3.
[38] *Id.*
[39] 792 F.3d at 171 (emphasis added).
[40] Mot. for Recons. at 4.
[41] *Id.*
[42] *See PBGC II*, 68 FLRA at 919 (describing Agency's assertion as a "broad proposition" that failure-to-investigate liability could not exist without underlying conduct that violated Title VII).
[43] Mot. for Recons. at 4.
[44] *E.g.*, *Baird I*, 662 F.3d at 1249 (citing *Rochon*, 438 F.3d at 1213-14).
[45] Opp'n to Exceptions to Remand Award at 33-34.
[46] *See HHS*, 51 FLRA at 984.
[47] *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 722 (2d Cir. 2010).
[48] *See* Mot. for Recons. at 3.
[49] 68 FLRA at 920.
[50] Mot. for Recons. at 3-4; *id.*, Attach., Tab 2 (*Baird II* Br.).
[51] *See generally Baird II* Br.
[52] *See id.* at 30.

acknowledged in its exceptions to the remand award, a Title VII claim based on a "discrete act" of retaliation is distinct from a claim of retaliatory "hostile work environment,"[53] because the latter claim relies on the aggregate effects of multiple related incidents over a period of time. Accordingly, when it rejected a hostile-work-environment claim in *Baird II*, the D.C. Circuit did not separately address the claim for which the Arbitrator awarded compensatory damages – specifically, the Agency's discrete act in failing to investigate the confrontation, as a means to retaliate against the grievant for her prior EEO activity.

Moreover, as the Authority pointed out in *PBGC II*, the district court decision under review in *Baird II* expressly stated that the grievant's retaliation claims were not before the court. The district court found in this regard that the plaintiff (the grievant in this proceeding) "does not seek damages for [the] incident" for which the Arbitrator found the Agency liable, that she did not "include [that incident]" in her action before the court, that "she has already recovered for [the] incident" in the proceeding before the Arbitrator, and that, consequently, the court "need not analyze it" at all.[54] And although the Agency correctly notes that the plaintiff appealed those findings by the district court,[55] nothing in the D.C. Circuit's *Baird II* decision indicates that the court granted any part of that appeal. Indeed, *Baird II* does not even cite those district-court findings, so there is no basis for concluding that *Baird II* overturned them. Thus, we find that the Agency's claim, repeated by the dissent, lacks merit. Accordingly, the Agency has failed to demonstrate that the Authority erred in *PBGC II* when it concluded that *Baird I* and *Baird II* did not involve "the Agency's liability for the very events at issue in this case."[56]

For the foregoing reasons, the Agency has not established that *PBGC II* erred as a matter of law by declining to set aside the Arbitrator's compensatory-damages award. And, consequently, we find that the Agency has not demonstrated that extraordinary circumstances exist to warrant granting reconsideration of *PBGC II*.[57]

V. Order

We deny the Agency's motion for reconsideration.

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[53] Exceptions to Remand Award at 29 n.5.
[54] *Baird v. Gotbaum*, 888 F. Supp. 2d at 68 n.4.
[55] Mot. for Recons. at 3-4 (citing *Baird II* Br.).
[56] 68 FLRA at 920.
[57] *See IRS*, 56 FLRA at 936.

Member Pizzella, dissenting:

Dr. Norman Vincent Peale, author of the acclaimed *Power of Positive Thinking*, once noted that "you cannot be successful" "without . . . faith in your abilities [and] confidence in your own powers."[1] More currently, pop artist Katy Perry framed this same thought: "[i]f you[] present[] yourself with confidence, you can pull off pretty much anything."[2] And, as I noted in *AFGE, Council of Prison Locals, Local 4052*, former NBA star Charles Barkley, never lacking in confidence in his own abilities, has been recorded as asserting: "I may be mistaken, but I'm never wrong."[3]

When this case came before the Authority for a second time just four months ago,[4] I disagreed with the Majority and explained that I believed the Arbitrator's awards were contrary to law.[5] However, I also observed that when the Arbitrator made his awards, he did not have the benefit of two decisions of the U.S. Court of Appeals for the District of Columbia Circuit (the court). But the Majority could not claim the same excuse. At the time of our decision, the Majority was well aware of those cases – *Baird I*[6] and *Baird II*.[7] Therefore, the Majority knew that the court had determined that the many and repeated complaints of Rhonda Baird (the grievant in this case and the plaintiff in *Baird I* and *Baird II*) were without any merit whatsoever[8] and even went so far as to describe Baird's claims ("*including the one at issue* [*in this grievance*]")[9] as nothing more than "*immaterial* '*slights.*'"[10] According to the court, Baird's complaints described "the kind of conduct courts frequently deem *uncognizable* under Title VII [of the Civil Rights Act of 1964]."[11]

In light of the court's clear ruling, the Agency reasonably asks the Authority to reconsider its decision in *Pension Benefit Guaranty Corp.* (*PBGC II*). In other words, the Agency's request could be paraphrased as follows: Really? Are you serious? Are you certain you do not want to take a closer look at *Baird I* and *Baird II* because those cases involve the *same employee*, include the *same complaint* that is raised before the Authority, and should *control the outcome* here?

Either my colleagues are so confident that they understand Title VII better than the court, or the Majority is just ignoring the court because the Majority knows that the Agency has no recourse to appeal this decision to the court. On this latter point, because of 5 U.S.C. § 7123, the Authority is the last level of review for the Agency.[12] There is no direct appellate review under the circumstances of this case.

As I suggested in my dissent in *PBGC II*, I believe that the Authority should follow the court's decisions in *Baird I* and *Baird II*.[13] But the Majority denies the Agency's request for reconsideration and clings to several propositions, each of which is wholly untenable.

Contrary to what the court decided, the Majority somehow concludes that Rhonda Baird's grievance is more akin to *Rochon v. Gonzales* (*Rochon*) − a case involving the FBI and its failure to investigate "*death threats*" made against one of its agents[14] − than it is to *Baird I* and *Baird II* wherein the court decided that Baird's many complaints had no merit whatsoever. The court flat out rejected the notion that there was *any* comparison between the failure of the FBI to investigate death threats and PBGC's refusal to look into several of the *numerous gripes of a disgruntled employee* seemingly *unable or unwilling to get along with anyone*.[15] Specifically, the court explained that, in *Rochon*, the FBI's failure to investigate "death threats" against one of its agents was "of enough *significance* to qualify" as retaliatory discrimination under Title VII.[16] But, in the case of Rhonda Baird, the court could not find any significance to her numerous complaints which spanned

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[1] http://www.brainyquote.com/quotes/quotes/n/normanvinc132560.html?src=t_confidence.

[2] http://www.brainyquote.com/quotes/quotes/k/katyperry465617.html?src=t_confidence (Perry quote).

[3] 68 FLRA 38, 48 (2014) (*Local 4052*) (Dissenting Opinion of Member Pizzella) (quoting www.barkleyquotes.com/quotes/1071).

[4] Member Pizzella notes that he was not a member of the Authority when *Pension Benefit Guar. Corp.*, 64 FLRA 692 (2010) (*PBGC I*) first came before the Authority.

[5] *Pension Benefit Guar. Corp.*, 68 FLRA 916, 924-926 (2015) (*PBGC II*) (Dissenting Opinion of Member Pizzella).

[6] *Baird v. Gotbaum*, 662 F.3d 1246, 1248 (D.C. Cir. 2011) (*Baird I*).

[7] *Baird v. Gotbaum*, 792 F.3d 166, 166 (D.C. Cir. 2015) (*Baird II*).

[8] *PBGC II*, 68 FLRA at 926 (Dissenting Opinion of Member Pizzella).

[9] *Id.* (citing *Baird II*, 792 F.3d at 169).

[10] *Id*. (emphasis added) (quoting *Baird II*, 792 F.3d at 171).

[11] *Id*. (emphasis added) (quoting *Baird II*, 792 F.3d at 171).

[12] *See U.S. OPM*, 68 FLRA 1039, 1048 (2015) (Dissenting Opinion of Member Pizzella); *NTEU, Chapter 83*, 68 FLRA 945, 959 (2015) (*NTEU*) (Dissenting Opinion of Member Pizzella).

[13] *PBGC II*, 68 FLRA at 924-926 (2015) (Dissenting Opinion of Member Pizzella).

[14] *See Rochon v. Gonzales*, 438 F.3d 1211, 1213-14 (D.C. Cir. 2006) (emphasis added).

[15] *Baird II*, 792 F.3d at 169, 171.

[16] *Id.*, 792 F.3d at 171 (emphasis added) (quoting *Baird I*, 662 F.3d at 1249).

seven years.[17] Unlike the serious allegation in *Rochon*, the court went so far as to describe Baird's numerous gripes, "including the one at issue here,"[18] as nothing more than "immaterial 'slights'" which were "uncognizable under Title VII."[19]

As in *PBGC II*, the Majority attempts to make an odd distinction that was not made by the court. Using the terms "failure to remediate" and "failure to investigate"[20] interchangeably, the court clearly held that that the "relevant standard" − in determining whether a claim that an agency did not look into a complaint constitutes retaliatory discrimination − is whether the complaint is "*of enough significance* to qualify as an adverse action" standing on its own.[21] The court held that the FBI's "failure to investigate the death threats [in *Rochon*] [was sufficient to] violate Title VII."[22] But the court never made any distinction between a "failure to remediate" and a "failure to investigate." The court instead focused properly on whether *the underlying complaint* could stand on its own as an "adverse action" – i.e. "enough significance" – regardless of what the failure is called. The distinction, which the Majority attempts to make, is one of semantics and legally insignificant.

And even though the Majority acknowledges that *Baird I* and *Baird II* "involve[e] the [same] grievant," the Majority steadfastly refuses to acknowledge that the court in *Baird I* and *Baird II* addressed, and rejected, *the same matters* of which Rhonda Baird complains in this grievance.[23] Writing as if the complaints which underlay *Baird I* and *Baird II* had no relationship whatsoever, the Majority describes *Baird I* as just "***a*** D.C. Circuit decision . . . that issued after *PBGC I*" and *Baird II* as just "***a*** second D.C. Circuit decision . . . that issued while the exceptions in *PBGC II* were pending before the Authority."[24] In a point that undergirded both of the court's decisions, the court noted that Baird's "long list of trivial incidents"[25] "involve[d] the same subject matter."[26] Therefore, the court decided it would "bypass" entirely the obvious question of "res judicata"[27] and instead affirmed both district court decisions which found that PBGC's refusal to investigate the meritless claims did not constitute a violation of Title VII.[28]

It is worthy of note that Rhonda Baird is not your ordinary grievant. She was not caught in a confusing process with which she was unfamiliar. To the contrary, Baird is a "lawyer for the [PBGC]," longtime "president of the employees' union and a frequent filer of Title VII claims on behalf of herself and others."[29] It is obvious, therefore, that she knew how to use, and misuse, the multiple administrative processes which were at her disposal and to manipulate those processes to get multiple chances to get a sympathetic ear. She did not find that sympathetic ear in a federal district court judge or two panels of the U.S. Court of Appeals for the District of Columbia Circuit. But Baird has convinced the Majority to ignore the obvious "res judicata" implications in "[t]he sheer volume of [her] allegations . . . [and] a long list of trivial incidents."[30]

As I have discussed in other cases, the Majority should not be so confident in its application of the law – or in the words of Katy Perry, "you can pull off pretty much anything"[31] – and completely ignore clear determinations of the court in order to achieve the result the Majority prefers, a course it can choose simply because that decision is insulated from judicial review.[32] Even more restraint should be exercised when, as here, the court's determination involves the same matters that have been brought before us.

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[17] *PBGC II*, 68 FLRA at 926 (Dissenting Opinion of Member Pizzella) (citing *Baird II*, 792 F.3d at 169).

[18] *Id*. (Dissenting Opinion of Member Pizzella) (citing *Baird II*, 792 F.3d at 169).

[19] *Baird II*, 792 F.3d at 171 (citing *Baird I*, 662 F.3d at 1250).

[20] *PBGC II*, 68 FLRA at 925.

[21] *Baird I*, 662 F.3d at 1249 (emphasis added).

[22] *PBGC II*, 68 FLRA at 926 (citing *Rochon*, 438 F.3d at 1219-20).

[23] *Compare 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)), *with PBGC II*, 68 FLRA at 916-17 (Baird complains about her temporary supervisor acting in "a 'physically threatening' manner toward [her] . . . [which] made [her] 'uncomfortable.'" (quoting *PBGC I*, 64 FLRA at 693)).

[24] Majority at 3 (emphasis added).

[25] *Baird II*, 792 F.3d at 172.

[26] *Id.* at 171 (quoting *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir. 1980).

[27] *Id*.

[28] *Id*. at 172.

[29] *Id*. at 168.

[30] *Id*. at 171-72.

[31] Perry quote.

[32] *See NTEU*, 68 FLRA at 959 (Dissenting Opinion of Member Pizzella) ("there is no other appeal for the IRS . . . [t]hus, this ill-conceived award is bound to go into effect"); *Local 4052*, 68 FLRA at 47-48 (Dissenting Opinion of Member Pizzella) ("the D.C. Circuit has rejected the abrogation standard . . . [u]nder these circumstances, therefore, my colleagues may not simply avoid addressing the D.C. Circuit's rejection of the abrogation standard").

The Majority may be willing to get caught in Baird's machinations and to go against the clear decisions of the court. I am not.

I would grant the Agency's request for reconsideration and vacate the Arbitrator's award in its entirety.

Thank you.