

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STAN LABER,

Plaintiff-Appellant,

v.

FRANCIS J. HARVEY, Secretary of the
Army,

Defendant-Appellee.

No. 04-2132

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(CA-03-732-1-A)

Argued: October 27, 2005

Decided: February 16, 2006

Before WILKINS, Chief Judge, and WIDENER, WILKINSON,
NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ,
TRAXLER, KING, GREGORY, SHEDD, and DUNCAN,
Circuit Judges.

Reversed in part, vacated and remanded in part, and affirmed in part
by published opinion. Judge Williams wrote the opinion, in which
Chief Judge Wilkins, Judge Wilkinson, Judge Luttig, Judge Michael,
Judge Motz, Judge Traxler, Judge King, Judge Gregory, Judge Shedd,
and Judge Duncan joined. Judge Wilkinson wrote a separate concur-
ring opinion. Judge Widener wrote a separate opinion concurring in
part and dissenting in part. Judge Niemeyer wrote a separate opinion
concurring in part and dissenting in part.

COUNSEL

ARGUED: Jeffrey Howard Greger, Fairfax, Virginia, for Appellant. Charles Wylie Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, Appellate Section, Washington, D.C., for Appellee. **ON BRIEF:** Paul J. McNulty, United States Attorney, Kevin J. Mikolashek, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Captain Steven Michael Ranieri, UNITED STATES ARMY LEGAL SERVICES AGENCY, Arlington, Virginia, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Stan Laber, a civilian employee of the Army, complained to the Equal Employment Opportunity Commission's Office of Federal Operations (OFO) that on two occasions the Army did not give him a job promotion for reasons that violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-16 (West Supp. 2005) (Title VII) and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C.A. § 633a (West Supp. 2005) (ADEA). In particular, Laber asserted that the Army once failed to promote him because of religious discrimination and later failed to promote him because of age discrimination and in retaliation for his prior Equal Employment Opportunity (EEO) filings. The OFO found that the Army had discriminated against Laber on the basis of religion and awarded him certain relief, although it did not award him all he sought. The OFO also found that the Army had neither discriminated against Laber on the basis of age nor retaliated against him.

Laber filed suit in the district court alleging that (1) the OFO's remedy was insufficient to compensate him for the Army's religious discrimination and (2) the Army discriminated against him on the basis of age and retaliated against him. On his first claim, Laber contended that because the OFO found that the Army unlawfully discriminated against him on the basis of religion, he was not required to relitigate the issue of liability in order to seek additional relief on that

claim. The district court granted the Army's motion for summary judgment on both of Laber's claims, concluding that (1) it lacked subject-matter jurisdiction over Laber's claim for additional relief, and (2) (a) Laber's age discrimination claim failed because he had not shown he was qualified for the job in question, and (b) Laber's retaliation claim failed because the hiring officer made the decision not to select him before the officer knew about his prior EEO activity. After the district court's entry of judgment, Laber filed a motion for reconsideration and a motion to amend his complaint, wherein he sought to put at issue the Army's underlying liability on his claim of religious discrimination. The district court denied these motions, and Laber appeals.

In concluding that it lacked subject-matter jurisdiction over Laber's claim for additional relief, the district court overlooked *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993). Those cases stand for the proposition that a federal-employee plaintiff who prevails before the OFO on the issue of liability but is unsatisfied with the OFO's remedial award may file a civil action in the district court seeking additional relief without also putting at issue the OFO's finding of discrimination.

After oral argument to the panel assigned to hear this case, and at the request of that panel, a majority of the active circuit judges on this court agreed to rehear this case en banc to consider the continuing viability of *Pecker* and *Morris*. We now overrule *Pecker* and *Morris* and hold that a federal-employee plaintiff who prevails before the OFO on the issue of liability but who is unsatisfied with the OFO's remedy must place his employing agency's discrimination at issue in order properly to claim entitlement to a more favorable remedial award in the district court. Laber's failure to comply with this rule was not a jurisdictional defect, but it did entitle the Army to summary judgment on his claim for additional relief only. We also conclude, however, that the district court abused its discretion in denying Laber's motion for reconsideration and motion to amend: Laber did not act in bad faith, his proposed amendment would not cause any prejudice to the Army, and the proposed amendment is not futile.

Finally, we hold that the district court correctly granted summary judgment in favor of the Army on Laber's claim of age discrimination

and retaliation. Laber failed to show he was qualified for the job in question and did not demonstrate that the Army's legitimate, non-discriminatory reason for his non-selection was a pretext for retaliation.

For reasons that are more extensively explained herein, we reverse the district court's denial of Laber's motion for reconsideration and motion to amend, vacate the district court's grant of the Army's motion for summary judgment on Laber's claim for additional relief, and remand with instructions to allow Laber to amend his complaint to put at issue the Army's alleged religious discrimination. We also affirm the grant of summary judgment to the Army on Laber's claims of age discrimination and retaliation.

I.

This appeal involves claims arising out of two occasions when the Army denied Laber a promotion. The administrative proceedings were protracted, and our resolution of the appeal requires us briefly to consider those proceedings and the facts that underlie them.

A.

Laber, a male born in 1945, was employed by the Army as an Operations Research Analyst at Fort Sheridan, Illinois. In mid-1990, motivated in part by his Jewish heritage, Laber applied for a position as a Industrial Specialist in Tel Aviv, Israel. During the job interview, the selecting officer, Leo Sleight, asked Laber if he could be objective when dealing with Jewish contractors. Laber answered affirmatively, but Sleight offered the job to another applicant.

Laber filed a formal EEO complaint with the Army alleging that Sleight discriminated against him on the basis of religion in failing to select him for the job. The Army accepted the complaint and, after conducting an internal investigation, concluded that Laber suffered no discrimination. Laber appealed to the OFO.

On December 22, 1998, the OFO reversed and ordered the Army, inter alia, to pay Laber any backpay and benefits for which the Army

determined he was eligible and to appoint Laber as an Industrial Specialist in Israel or find a similar position for him. On January 25, 1999, Laber filed a motion for reconsideration, which the OFO denied on April 11, 2000. In May 2000, the Army determined that Laber was entitled to no backpay because his pay at his current job was higher than it would have been had he been working in Israel and that he was entitled to no overseas benefits because he had not actually been overseas. The Army also offered Laber a position as an Industrial Specialist in Germany, contending that it had no similar positions open in Israel. Laber refused the job in Germany and instead filed a petition for enforcement with the OFO, claiming, *inter alia*, that the Army's backpay and benefits calculations and its job offer were insufficient. Soon thereafter, the Army re-offered Laber the position in Germany, which he accepted, and in doing so, he expressly waived any claim that the Germany position was not compliant with that portion of the OFO's remedial award. He therefore withdrew that portion of his petition for enforcement challenging the Army's Germany job offer.

On January 23, 2002, the OFO issued a decision on the remainder of the petition for enforcement. In relevant part, the OFO determined that the record was unclear with respect to Laber's backpay and benefits arguments, and it required the Army to redetermine whether Laber was entitled to additional backpay and benefits. On or about May 29, 2002, the Army did so and concluded that Laber was entitled to over \$9,000 in additional backpay, but that he was not entitled to receive any overseas benefits. On March 4, 2002, Laber filed a petition for clarification with the OFO, asserting that the Army's benefits and backpay calculations were still deficient. On March 10, 2003, the OFO affirmed that the Army had fully complied with the OFO's December 22, 1998 decision.

B.

The second event giving rise to this lawsuit occurred in 1993. After returning from Germany, Laber was employed as a Management Analyst at the Defense Logistics Agency in Chicago, Illinois when a position for an Operations Research Analyst in the Economic Analysis Division of the Cost and Economic Analysis Agency in Falls Church, Virginia became available. Laber was a "priority candidate" for the

position because of his prior EEO activity.¹ (J.A. at 28, 405.) The parties agree that priority candidates need not compete against other candidates; rather, if qualified for the positions for which they have applied, they must be selected.

The Army's civilian personnel office determined that Laber was "minimally qualified" for the Operations Research Analyst position, (J.A. at 457), and forwarded Laber's application form, Form 2302, to Richard Scott, the selecting officer, for further evaluation. An applicant who is "minimally qualified" is not necessarily qualified for the particular job vacancy, but only satisfies the basic competency requirements for a generic job within the pay grade and title. Scott examined Laber's Form 2302 and concluded, like the personnel office, that Laber was "minimally qualified" for the position. (J.A. at 426.) Scott therefore called Laber to request that he supplement his Form 2302 with additional information regarding his qualifications for the particular position. Laber avers that during this conversation, Scott, who knew that Laber was a priority candidate, asked him whether he had prior EEO activity in order to determine why he had received priority status. Laber further alleges that he informed Scott that he had prior EEO activity and that Scott immediately became short with him and quickly ended the conversation. After reviewing Laber's supplemental information, Scott determined that Laber was not qualified for the particular job. Instead, Scott chose a male candidate under 40 years of age who was not on the priority candidate list.

Laber filed a complaint with the Army alleging age discrimination and retaliation. The Army accepted the complaint, investigated Laber's allegations, and found that Scott had not discriminated against Laber. Laber appealed to the OFO and, on June 25, 2003, the OFO affirmed the Army's findings.

¹It is unclear exactly what type of EEO activity qualifies an employee as a priority candidate. We need not resolve this ambiguity here, however, because the evidence demonstrates, and the Army does not contest, that however he became one, Laber was a priority candidate.

II.

On June 4, 2003, unhappy with the OFO's decision on his religious discrimination claim and anticipating an unfavorable decision on his age discrimination and retaliation claims, Laber filed a pro se complaint in the district court alleging claims of (1) religious discrimination and (2) age discrimination and retaliation.² While Laber alleged as background information that the Army had discriminated against him on the basis of religion, his complaint explicitly refrained from seeking a judicial determination of whether the Army had discriminated against him on that basis. (J.A. at 7 ("Plaintiff is not appealing the finding of [religious] discrimination, but seeks additional relief.")) Because Laber believed that the OFO's finding of religious discrimination settled that issue in his favor, he only sought additional backpay, benefits, and attorney's fees and costs because of the religious discrimination.³ Laber did, however, allege (and put at issue)

²At the time Laber filed his judicial complaint, his age discrimination and retaliation claims were not yet exhausted. Those claims became exhausted, however, on June 24, 2003, when the OFO decided his appeal on those claims.

³Some concern arose at the en banc oral argument over whether Laber's complaint actually put the Army's alleged religious discrimination at issue. We believe, like the district court, that it did not. As noted in the text, while the complaint does state that the Army discriminated against Laber on the basis of religion, it does so only as background information; in other words, while Laber alleges that the underlying discrimination occurred, he explicitly refrained from seeking a judicial determination of the discrimination. Laber's statement that he "is not appealing the finding of discrimination," (J.A. at 7), had the same effect as if Laber simply had not stated that the Army discriminated against him at all.

Other documents in the record support the conclusion that Laber did not put the Army's underlying religious discrimination at issue. In Laber's memorandum in support of his motion for summary judgment, he described his suit in the following manner:

[T]he [Army] has refused to pay Plaintiff his back pay and benefits stemming from Plaintiff's successful [OFO] complaint based on his not being reassigned to a position in Israel that became vacant in 1989. The [OFO] ordered Plaintiff to be made whole but allowed [the Army] to make the relevant determination and found that [the Army] met all of the [OFO's] requirements. . . .

that the Army had discriminated against him on the basis of age and retaliated against him for his prior EEO complaints.

The Army filed a motion for summary judgment, which the district court granted. The district court concluded, *inter alia*, that it lacked subject-matter jurisdiction over Laber's claim for additional relief arising out of the Army's religious discrimination because Laber did not also put the Army's underlying discrimination at issue.⁴ Based on

Plaintiff maintains that [the Army] failed to provide him all of the back pay and benefits he is due for the period 1990 to 2004 and that [OFO's] decision [that the Army has fulfilled its obligations] is in error.

(Mem. in Supp. of Pl.'s Mot. for Summ. J. at 1.) Similarly, in his pre-trial Statement of Uncontested Facts, Laber stated that he "filed [suit] in Federal Court to force the Army to meet its obligations." (Pl.'s Statement of Uncontested Facts at 4.) Likewise, in a filing in support of his motions for reconsideration and to amend, Laber argued that "the bottom line is that [the Army] simply refused to pay the [compensation to which I am due.] Plaintiff respectfully requests the Court to rule on the basis of the make whole issue. . . ." (Supplemental Mem. in Supp. of Pl.'s Motions For Leave to Amend and Recons. at 2.) These statements clarify that Laber's religious discrimination claim was one for additional relief only. In addition, the Army early (and often) characterized that claim as one for "additional compensation." (Mem. in Supp. of Def.'s Mot. For Summ. J. at 1.) Not once before the district court's grant of summary judgment did Laber attempt to disabuse either the Army or the district court of any alleged misunderstanding of his religious discrimination claim.

As discussed below, Laber argued to the district court that he intended to put the Army's religious discrimination at issue. In interpreting a pro se complaint, however, our task is not to discern the unexpressed intent of the plaintiff, but what the words in the complaint mean. And while we must construe pro se complaints liberally, *see Hemphill v. Melton*, 551 F.2d 589, 590-91 (4th Cir. 1977), to hold that Laber's complaint seeks a judicial determination of the Army's alleged religious discrimination, would not be liberal interpretation, but complete rewriting.

⁴It appears from the record that neither party brought *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), or *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), to the district court's attention.

this conclusion, the district court granted the Army's motion for summary judgment on this claim.⁵ In addition, the district court concluded that Laber had not made a prima facie case of age discrimination because he had not shown he was qualified for the job, and that he did not make a prima facie case of retaliation because Scott made the decision not to select him before Scott even knew that he had previously filed discrimination complaints. The district court therefore

⁵Some concern also arose at the en banc oral argument over whether the district court's grant of the Army's motion for summary judgment on Laber's claim for additional relief was actually a dismissal of that claim. Although the district court's opinion is not crystal clear on this point, a review of the record convinces us that the district court did grant summary judgment on that claim. *See In re Tomlin*, 105 F.3d 933, 940 (4th Cir. 1997) ("When an order is ambiguous, a court must construe its meaning, and in so doing may resort to the record upon which the judgment was based." (internal quotation marks omitted)). In its written opinion, the district court concluded that "the [Army was] entitled to *judgment* as a matter of law" on the claim for additional relief. (J.A. at 40-41 (emphasis added).) The district court also indicated that it "granted [the Army's] Motion for *Summary Judgment*" and "direct[ed] the clerk to enter "*JUDGMENT* in favor of the Army" (J.A. at 56a-, 56-c (emphases added).) Likewise, the docket sheet reflects that "*JUDGMENT*" was entered against Laber on the claim. (J.A. at 5.) While the district court also, and confusingly, stated in its opinion that Laber's religious discrimination claim "must be dismissed" because of the lack of subject-matter jurisdiction, (J.A. at 49), the docket sheet demonstrates that the district court did not actually dismiss that claim until after it had already granted judgment to the Army. (J.A. at 5.) The record therefore clarifies that the district court actually did not dismiss Laber's claim for additional relief, but rather granted judgment on that claim to the Army.

Of course, if the district court believed that it lacked subject-matter jurisdiction over Laber's claim for additional relief, the proper course would have been to dismiss the claim instead of granting summary judgment on it. *Cf. Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 819 (4th Cir. 2004) (en banc) (reversing district court's entry of summary judgment and remanding for district court to remand to state court where district court lacked jurisdiction over removed claim). We do not reverse on this ground, however, because we hold, as discussed in detail below, that the district court's conclusion that it lacked subject-matter jurisdiction over the claim for additional relief was erroneous, and it therefore had the power to enter judgment for the Army.

granted summary judgment on Laber's age discrimination and retaliation claims as well.

After the district court entered judgment, Laber filed a motion for reconsideration and a motion to amend. Laber argued, *inter alia*, that he did not intend to put only the question of whether he was entitled to additional relief at issue in his complaint; rather, he contended, he intended also to seek a judicial determination of whether the Army discriminated against him on the basis of religion. Laber attached an amended complaint to the motion to amend. The amended complaint was identical to the original complaint except for one sentence: "Plaintiff *is* appealing the finding of [religious] discrimination. . . ." (Pl.'s Amended Complaint (emphasis added).) The district court construed Laber's motion for reconsideration as a motion under Fed. R. Civ. P. 59(e) and his motion to amend as a motion under Fed. R. Civ. P. 15(a), and denied both motions.⁶

Laber appeals the district court's grant of the Army's motion for summary judgment and its denial of his motions for reconsideration and to amend. We have jurisdiction under 42 U.S.C.A. § 2000e-5(j) (West 2003) and 28 U.S.C.A. § 1291 (West 1993).

III.

Laber first argues that the district court erred in granting summary judgment to the Army on his claim for additional relief arising out of

⁶Laber's motion for reconsideration also challenged the district court's grant of the Army's motion for summary judgment on his claims of age discrimination and retaliation. On appeal, however, Laber's arguments regarding his motion for reconsideration focus only on whether the district court correctly denied his motion to amend his religious discrimination claim. Laber has therefore waived any additional argument that the district court erroneously denied his motion for reconsideration as it pertained to his age discrimination and retaliation claims, *see* Fed. R. App. P. 28(a)(9) (noting that Appellant's brief must contain "contentions and the reasons for them"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 993 n.7 (4th Cir. 1995) (en banc) (declining to address issues that litigant "failed to brief or argue"), and we confine our consideration of Laber's motion for reconsideration to the context of Laber's religious discrimination claim.

the Army's religious discrimination. He contends that Title VII authorizes a federal-employee plaintiff who prevailed before the OFO on the issue of liability but is unsatisfied with the OFO's remedial award to file a civil action alleging only that he is entitled to additional relief.

We review de novo the district court's grant of summary judgment to the Army. *See Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (West 1992); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). We construe the facts in the light most favorable to Laber, the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In examining this argument we first consider the legal background in which the argument arises. Next, we consider the implications of *Chandler v. Roudebush*, 425 U.S. 840 (1976), on our prior cases and hold that *Chandler* requires us to overrule those cases. Finally, we decide that the rule we announce is not one that deprived the district court of subject-matter jurisdiction because it involved the interpretation of a federal law.

A.

1.

As amended, Title VII of the Civil Rights Act of 1964 creates a right of action for both private-sector and certain⁷ federal employees alleging employment discrimination on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C.A. § 2000e-5(f)(1) (West 2003)(private-sector employees); 42 U.S.C.A. § 2000e-16(c) (federal employees).⁸ All employees, private-sector or federal, alleging such

⁷It is undisputed that Laber falls within the class of federal employees protected by Title VII.

⁸Title VII also creates a right of action for state employees, *see, e.g.*, 42 U.S.C.A. § 2000e-5(e) (West 2003), but this right does not figure in this appeal.

discrimination must, however, exhaust their administrative remedies before exercising this right. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), *superceded by statute on other grounds* by 42 U.S.C.A. § 1981(b) (West 2003) (private-sector employees); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 832 (1976) (federal employees). The administrative remedies available for federal employees are significantly broader than the administrative remedies for employees in the private sector. *See generally Moore v. Devine*, 780 F.2d 1559, 1562 (11th Cir. 1986) (discussing differences in administrative remedies for private-sector and federal employees).

An employee in the private sector who believes that his employer has discriminated against him in violation of Title VII must file an administrative charge with the Equal Employment Opportunity Commission (EEOC) against his employer. *See* 29 C.F.R. § 1601.7 (2004). The EEOC investigates the complaint to determine whether there is reasonable cause to believe the employee's allegations. *See* 29 C.F.R. §§ 1601.15, 1601.21. Because the EEOC has no power to order the private-sector employer to take corrective action even if it finds such reasonable cause exists, "it must attempt to eliminate the discriminatory practice through informal methods of conciliation." *Moore*, 780 F.2d at 1562; *see also* 29 C.F.R. § 1601.24. If these attempts fail, or if the EEOC has found no reasonable cause, the EEOC issues the employee a right-to-sue letter explaining that he may bring a "civil action" in federal court seeking judicial review of his discrimination claim. *See* 42 U.S.C.A. § 2000e-5(f)(1); 29 C.F.R. § 1601.28.

A federal employee who believes that his employing agency discriminated against him in violation of Title VII must file an administrative complaint with the agency. *See* 29 C.F.R. § 1614.106. The agency investigates the claim, *see* 29 C.F.R. § 1614.108-109, and, if it concludes there was no discrimination, it issues a final agency decision to that effect, *see* 29 C.F.R. § 1614.110. The employee may then appeal the agency's decision to the OFO. *See* 29 C.F.R. § 1614.401(a).⁹

⁹The federal employee may also opt-out of the administrative process at this point by filing a de novo civil action. *See* 42 U.S.C.A. 2000e-16(c) (West 2003); 29 C.F.R. § 1614.407(a) (2004) (providing that employee may file a civil action within 90 days if no appeal is filed from the agen-

Unlike in the private-sector context, if the OFO finds discrimination, it has the power to order corrective action. *See* 42 U.S.C.A. § 2000e-16(b); 29 C.F.R. § 1614.405. In fact, if the OFO finds that the agency discriminated against an applicant for employment, like Laber, the OFO must award the employee the position for which he applied (or its substantial equivalent) and back pay. *See* 29 C.F.R. § 1614.501(b). The OFO may also award compensatory damages, *see West v. Gibson*, 527 U.S. 212 (1999), and attorney's fees and costs, *see* 29 C.F.R. § 1614.501(e).

While the employing agency has no right to seek judicial review of the OFO's resolution of an employee's claim, the regulations provide an employee two separate avenues into federal court. First, the employee has the right to file a "civil action" seeking judicial review of his discrimination claim if he is "aggrieved" by the OFO's decision. *See* 42 U.S.C.A. § 2000e-16(c) (right of action exists if employee "aggrieved"); 29 C.F.R. § 1614.407(c). This right of action is identical to the right of action possessed by a private-sector employee who has received a right-to-sue letter. *See Chandler v. Roudebush*, 425 U.S. 840, 844-45 (1976) (holding that "federal employees [have] the same right [of action] as private sector employees enjoy").¹⁰ Second, the regulations provide that an employee may,

cy's final decision). Failure to do so does not prejudice the employee's right to file an appeal of the OFO's decision on appeal of the employing agency's findings. *See, e.g.*, 29 C.F.R. § 1614.407(c) (providing that employee may file a civil action within 90 days of OFO's decision on appeal). Laber did not file his civil action at this point in the administrative process.

¹⁰The section creating a cause of action for federal employees provides in full:

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after [180] days from the filing of

in certain circumstances, the contours of which are not relevant here, seek judicial enforcement of the OFO's underlying decision either by filing a suit for "enforcement of the [OFO's] decision," or by "seek[ing] judicial review of the agency's refusal to implement the ordered relief pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*, and the mandamus statute, 28 U.S.C. § 1361." 29 C.F.R. § 1614.503(g). In a suit for enforcement, the issue is not liability or the remedy, as it is in a civil action, but rather whether the federal employer has complied with the OFO's remedial order. *See Scott v. Johanns*, 409 F.3d 466, 469 (D.C. Cir. 2005) ("In . . . enforcement actions, the court reviews neither the discrimination finding nor the remedy imposed, examining instead only whether the employing agency has complied with the administrative disposition."); *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003) (concluding that the "[p]laintiff [was] not seeking enforcement of a final EEOC order" because he "requested more relief than the EEOC awarded").

2.

We have applied these provisions before. In *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), the federal-employee plaintiff filed an administrative complaint against her employing agency alleging unlawful employment discrimination in failing to promote her. *Id.* at 710. The agency agreed that it had discriminated against the plaintiff and indicated it would provide her priority consideration for the next

the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a *civil action as provided in section 2000e-5* of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C.A. § 2000e-16(c) (emphasis added). Section 2000e-5 provides that a private sector employee may also bring a "civil action" alleging employment discrimination. 42 U.S.C.A. § 2000e-5(f)(1).

job opening. *Id.* The plaintiff appealed to the OFO, contending that the agency's remedy was insufficient, and the OFO affirmed the agency's decision. *Id.* The plaintiff then filed suit in the district court seeking, inter alia, a declaration that the agency discriminated against her and an injunction requiring the agency immediately to promote her. *Id.*¹¹ The agency moved for summary judgment, contending that the OFO's award was sufficient, and the district court granted summary judgment to the agency. *Id.*

On appeal, we reversed, holding that the employee was entitled to the declaration because "the [agency is] bound by the [OFO]'s findings of discrimination." *Id.* at 711 n.3. In addition, despite the OFO's determination that the plaintiff was entitled only to priority consideration for the next job opening, we concluded that the plaintiff had demonstrated that she was entitled to an immediate promotion. *Id.* at 712.

In *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), a federal employee filed an administrative claim against his employing agency alleging unlawful discrimination in failing to promote him. *Id.* at 144. The agency agreed that discrimination had occurred, but found that he was entitled to neither the position nor back pay because he would not have been promoted even if there had been no discrimination. *Id.* at 145. Dissatisfied with the remedy, the employee appealed to the OFO, which affirmed. *Id.* The employee then filed a civil action in the district court seeking review of the OFO's determination of discrimination and its remedy. *Id.* The district court granted the employee's

¹¹It is unclear whether the plaintiff in *Pecker* brought a civil action or a suit for enforcement. On the one hand, the court characterized the suit as a "suit to enforce a decision of the [OFO]." 801 F.2d 709, 709 (4th Cir. 1986). On the other hand, the court allowed the plaintiff to seek a greater remedy than awarded by the OFO, a form of relief that, as discussed in Part III.A.1, *supra*, is outside the scope of a suit for enforcement. In the end, the precise type of action at issue in *Pecker* makes no difference. If *Pecker* was a civil action, as we assume in the text, we would overrule its holding allowing federal employee plaintiffs in such actions to litigate before the district courts only the issue of additional relief. If, on the other hand, *Pecker* was a suit for enforcement, its holding that a federal employee plaintiff in such actions may seek greater relief in the district court than that awarded by the OFO was incorrect.

