No. 98-1332

In the Supreme Court of the United States

OCTOBER TERM, 1998

BRUCE BABBITT, SECRETARY,
DEPARTMENT OF THE INTERIOR, PETITIONER

v.

SYLVIA CRAWFORD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual may recover compensatory damages in the administrative process against an agency of the federal government for employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Department of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 148 F.3d 1318. The opinion of the district court (App., *infra*, 20a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1998. A petition for rehearing was denied on

November 20, 1998. App., *infra*, 34a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth at App., *infra*, 36a-39a.

STATEMENT

This case concerns whether compensatory damages are among the administrative remedies available to federal employees, or applicants for federal employment, who assert claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against agencies of the federal government. The issue is pending before this Court in *West* v. *Gibson*, No. 98- 238.

1. In 1972, Congress extended Title VII's prohibition against employment discrimination on the basis of "race, color, religion, sex or national origin" to the federal government. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. 2000e-16 (1994 & Supp. II 1996)); see *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 825 (1976) ("Until it was amended in 1972 * * * , Title VII did not protect federal employees."). But Title VII was not to apply to the federal government in precisely the same manner that it applied to other employers. Congress crafted a distinct set of "administrative and judicial enforcement mechanisms," *Brown*, 425 U.S. at 831, for claims of employment discrimination asserted by federal employees and applicants for federal employment.[1]

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[1] Section 2000(e)-16 currently applies to civilian employees or applicants for employment in executive agencies, military departments, the Postal Service, the Postal Rate Commission, the

Congress delegated initially to the Civil Service Commission, and later to the Equal Employment Opportunity Commission (EEOC),[2] the authority to "enforce" Title VII against the federal government "through appropriate remedies, including reinstatement or hiring of employees with or without back pay." 42 U.S.C. 2000e-16(b). At the same time, Congress imposed "certain preconditions," *Brown*, 425 U.S. at 832, on a federal employee's ability to file a civil action in federal district court on a claim of employment discrimination. See 42 U.S.C. 2000e-16(c). The employee first "must seek relief in the agency that has allegedly discriminated against him." *Brown*, 425 U.S. at 832. If the employee is dissatisfied with the agency's disposition of his claim, he may "seek further administrative review with the [EEOC]" or, alternatively, may "file suit in federal district court without appealing to the [EEOC]." *Ibid.* If the employee does appeal to the EEOC, but is dissatisfied with the EEOC's decision, he then may file suit in district court. *Ibid.* An employee also "may file a civil action if, after 180 days from the filing of the charge or the appeal, the agency or [the EEOC] has not taken final action." *Ibid.*

The EEOC has promulgated regulations to govern the administrative processing of claims of employment discrimination against federal agencies. An aggrieved

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Government Printing Office, the General Accounting Office, the Library of Congress, and those units of the judicial branch of the federal government and of the District of Columbia government having positions in the competitive service. 42 U.S.C. 2000e-16(a) (Supp. II 1996).

[2] All responsibility for enforcing equal opportunity in federal employment was transferred to the EEOC from the Civil Service Commission in Reorganization Plan No. 1 of 1978, § 3, 43 Fed. Reg. 19,807 (1978). See 42 U.S.C. 2000e-4 note (1994).

employee first must notify an equal employment opportunity (EEO) counselor at his employing agency of the allegedly discriminatory act. 29 C.F.R. 1614.105(a). If the EEO counselor determines that the matter cannot be resolved informally, the employee is advised of his right to file a formal complaint with the agency within 15 days. 29 C.F.R. 1614.105(d). After conducting an investigation of the employee's complaint, the agency may propose to resolve the matter by offering the employee "full relief." 29 C.F.R. 1614.107(h); see also 29 C.F.R. 1614.501 (listing appropriate relief for various types of employment discrimination). If the agency presents what has been certified by the appropriate agency official as an offer of full relief, and the employee rejects the offer, the agency is required to dismiss the employee's complaint. 29 C.F.R. 1614.107(h). The employee then may appeal to the EEOC or file a civil action in district court.[3]

2. In 1991, Congress authorized awards of compensatory damages in "action[s] brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964." Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 102, 105 Stat. 1072 (codified at 42 U.S.C. 1981a(a)(1)). Section 717, 42 U.S.C. 2000e-16 (1994 & Supp. II 1996), is the provision of the Civil Rights Act of 1964 governing Title VII claims against the federal government, while Section 706, 42 U.S.C. 2000e-5, is the provision governing Title VII claims against other employers. Title VII had previously authorized only

[3] If the employing agency declines to make an offer of "full relief," the employee may request either a hearing on his claim before an EEOC administrative judge or a final decision on the claim from the agency. 29 C.F.R. 1614.108(f).

back pay and other equitable remedies. See 42 U.S.C. 2000e-5(g)(1).[4]

Since 1992, the EEOC has taken the position that "the Civil Rights Act of 1991 * * * makes compensatory damages available to federal sector complainants in the administrative process." *Jackson* v. *United States Postal Serv.*, EEOC Appeal No. 01923399 (Nov. 12, 1992), slip op. 3.[5] The EEOC has announced procedures to ensure that, where appropriate, agencies include compensatory damages in any offer of full relief. If an employee indicates during the administrative process that he has incurred compensatory damages, the agency must request from the employee "objective evidence of the alleged damages incurred." *Ibid.* If the employee presents "objective evidence that he or she has incurred compensatory damages, and that the damages are related to the alleged unlawful discrimination, the agency must address the issue of compensatory damages in its offer of full relief." *Ibid.*

3. In 1993, respondent Sylvia Crawford, an employee of the Department of the Interior's Fish and Wildlife Service, filed an administrative EEO complaint, alleging sexual harassment and retaliation by her supervisors. In the course of the agency's investigation of the complaint, Crawford stated that she had developed physical and emotional problems, which she attributed to the sexual harassment. The agency asked

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[4] The Civil Rights Act of 1991 also authorized awards of punitive damages in Title VII actions against private employers, but not against "a government, government agency or political subdivision." 42 U.S.C. 1981a(b)(1).

[5] See also *Price* v. *United States Postal Serv.*, EEOC Appeal No. 01945860, 1996 WL 600763, at *3 (Oct. 11, 1996); *McCormick* v. *United States Postal Serv.*, EEOC Appeal No. 01954168, 1996 WL 562668, at *2 (Sept. 25, 1996).

Crawford to provide medical records and any other evidence that she might have to substantiate that claim. Crawford did not submit any such evidence. She waived an evidentiary hearing before an EEOC administrative judge and requested a final decision from the agency on her complaint. App., *infra*, 2a-3a.

The agency issued a final decision finding that Crawford had been subjected to sexual harassment and retaliation in violation of Title VII. The agency awarded Crawford injunctive relief, costs, and attorneys' fees. The agency did not discuss whether Crawford was entitled to compensatory damages. App., *infra*, 3a-4a.

4. Crawford filed suit in federal district court against the Secretary of the Interior. She sought both a declaratory judgment that the Fish and Wildlife Service had discriminated against her in violation of Title VII and "a judgment against [the agency] for compensatory damages associated with the undue stress suffered by [Crawford] as a result of [its] unlawful employment practices." App., *infra*, 4a.

The district court granted Crawford's motion for partial summary judgment as to liability. But the court dismissed Crawford's claim for compensatory damages. The court held that Crawford had not raised a compensatory damages claim at the administrative level. Accordingly, because she had failed to exhaust administrative remedies, she could not raise the claim in district court. App., *infra*, 10a.[6] The court entered

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[6] The district court also offered a second justification for dismissing the compensatory damages claim: that Crawford could not seek to enforce the favorable part of the agency's decision (*i.e.*, the finding of liability), while at the same time litigating *de novo* the unfavorable part of the decision (*i.e.*, the failure to award compensatory damages). App., *infra*, 10a-11a.

judgment for the injunctive relief, costs, and attorneys' fees specified in the agency's decision. *Id.* at 5a.

5. The court of appeals reversed the dismissal of Crawford's claim for compensatory damages. App., *infra*, 1a-19a. The court concluded that "compensatory damages may not be awarded in the administrative process" on Title VII claims against federal agencies, and consequently that "an employee such as Crawford is not required to raise compensatory damages as part of her duty to exhaust administrative remedies." *Id.* at 18a-19a. The employee instead may request compensatory damages, for the first time, in a Title VII action filed in district court.

The court of appeals based its conclusion that compensatory damages cannot be awarded in the administrative process on a provision of the Civil Rights Act of 1991, which states that "[i]f a complaining party seeks compensatory * * * damages under this section[,] any party may demand a trial by jury." 42 U.S.C. 1981a(c). The court construed Section 1981a(c) as conditioning the federal government's waiver of sovereign immunity for compensatory damages under Title VII on the availability of a jury trial for the federal agency defendant as well as for the plaintiff. App., *infra*, 13a. "Accordingly," said the court, "the waiver of sovereign immunity may not be expanded to make an agency liable for compensatory damages in the administrative process where there is no jury trial." *Id.* at 14a.[7]

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[7] The court noted that an agency, unlike a claimant, cannot bring a civil action to seek to overturn an adverse administrative decision on a Title VII claim. See App., *infra*, 16a (citing 42 U.S.C. 2000e-16(e); 29 C.F.R. 1614.504(a)). An administrative award of compensatory damages against the agency would thus be final.

In support of its conclusion that compensatory damages cannot be awarded in the administrative process, the court of appeals cited the Seventh Circuit's decision in *Gibson* v. *Brown*, 137 F.3d 992 (1998), cert. granted, No. 98-238 (Jan. 15, 1999). App., *infra*, 14a-15a. The court acknowledged that the Fifth Circuit had reached a contrary conclusion in *Fitzgerald* v. *Secretary, United States Department of Veterans Affairs*, 121 F.3d 203 (1997), which the court attributed to the Fifth Circuit's not perceiving Section 1981a(c) to be a limitation on the federal government's waiver of sovereign immunity. App., *infra*, 15a.

REASON FOR GRANTING THE PETITION

On January 15, 1999, this Court granted review in *West* v. *Gibson*, No. 98-238. The question presented in this petition—whether federal employees may recover compensatory damages in the administrative process on Title VII claims against federal agencies—is virtually identical to the question presented in *Gibson*. This petition should therefore be held pending the Court's decision in that case.

This case and *Gibson*, while presenting the same legal issue, do not arise out of precisely the same procedural background. In *Gibson*, after the employee's agency rejected his Title VII claim, the employee took an administrative appeal to the EEOC. The EEOC reversed the agency's decision, finding that the employee had been a victim of discrimination and granting equitable relief against the agency. The employee then filed suit in district court, asserting for the first time a claim for compensatory damages. See *Gibson* v. *Brown*, 137 F.3d 992,993-994 (7th Cir. 1998). In this case, the employee's agency ruled in her favor on her Title VII claim and granted equitable relief. The employee did

not seek administrative review before the EEOC; instead, she immediately filed suit in district court, asserting for the first time a claim for compensatory damages. See App., *infra*, 2a-4a, 28a.

The focus of the Seventh Circuit's opinion in *Gibson* is thus on whether the EEOC may award compensatory damages on an administrative appeal. See *Gibson*, 137 F.3d at 998 ("the EEOC may not order the government to pay compensatory damages"). The focus of the Eleventh Circuit's opinion in this case is on whether an employing agency, acting pursuant to "the EEOC's requirement that an agency award an employee discrimination victim compensatory damages where necessary for 'full relief,'" may award compensatory damages in the first instance. App., *infra*, 15a; see *id.* at 19a ("compensatory damages may not be awarded in the administrative process"). But the legal analysis of the two courts is essentially the same. Both courts based their conclusion that compensatory damages are unavailable in the administrative process on 42 U.S.C. 1981a(c), which they construed as waiving the federal government's sovereign immunity from Title VII compensatory damages claims only for actions in federal court where a jury trial is available. See *Gibson*, 137 F.3d at 996-997; App., *infra*, 14a-15a (citing *Gibson*). Accordingly, if this Court reverses the Seventh Circuit's decision in *Gibson*, the Eleventh Circuit's decision in this case will be severely, if not fatally, undermined.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *West* v. *Gibson*, No. 98-238, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 97-8299

SYLVIA CRAWFORD, PLAINTIFF-APPELLANT

v.

BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Filed: Aug. 6, 1998]

Before: CARNES, Circuit Judge, KRAVITCH, Senior Circuit Judge, and MILLS*, Senior District Judge.

CARNES, Circuit Judge:

In 1993, Sylvia Crawford, a former employee at the Fish and Wildlife Service, a Division of the Department of the Interior (the "Agency"), was sexually harassed by her supervisors and then retaliated against when she complained about it. After Crawford filed an administrative complaint, the Agency issued a final deci-

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* Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

sion finding it had discriminated against her and awarding injunctive relief. Crawford subsequently brought suit in federal district court seeking compensatory damages. The court dismissed her claim at the summary judgment stage of the proceedings. For the reasons set forth below, we reverse.

I. BACKGROUND

Crawford worked for the Agency during the latter part of 1993. On November 8, 1993 and December 28, 1993, she filed Equal Employment Opportunity ("EEO") discrimination claims with the Agency's Office for Equal Opportunity alleging that her supervisors had sexually harassed her and then retaliated against her when she complained. An investigator for the Agency's Office of Human Resources investigated the claims. Among other things, Crawford informed the investigator that she had developed physical and emotional problems from the stress of the sexual harassment. The investigator issued a Report of Investigation in February 1995. By letter dated February 23, 1995, the Agency's Office of Human Resources sent Crawford the report and informed her that she could request a final decision on her claims from the Agency, with or without an administrative hearing before an Equal Employment Opportunity Commission ("EEOC") administrative judge. On March 29, 1995, Crawford requested an administrative hearing.

On May 30, 1995, Judge Davi, the EEOC administrative judge, informed Crawford and the Agency that he had scheduled a pre-hearing conference on July 17, 1995 and a hearing on July 25, 1995. At the pre-hearing conference, the parties discussed their settlement negotiations. The Agency stated that it would not consider monetary settlement for compensatory damages with-

out objective evidence of damages and sufficient causal connection between the alleged discriminatory acts and Crawford's alleged injuries. In addition, the Agency requested Crawford's medical records and any other documents she intended to use at the July 25, 1995 hearing to support her claim for compensatory damages. Crawford's counsel did not provide the Agency with the medical records, but did indicate that two doctors would testify at the hearing to substantiate her claim for compensatory damages.

On July 25, 1995, Crawford's counsel requested a continuance of the hearing. Judge Davi denied the request and proceeded to renew settlement discussions between the parties. The Agency again took the position that it would not pay Crawford compensatory damages without objective evidence of damages and causation. Judge Davi asked Crawford's counsel whether the two doctors he mentioned at the pre-hearing conference would be testifying at the hearing. After learning that they would not be testifying, Judge Davi informed Crawford that the hearing would proceed, but that without substantiating evidence of damages, no compensatory damages would be awarded. Crawford then elected to waive the hearing and requested a final decision from the Agency on her claims. Prior to the issuance of its final decision, the Agency did not request and Crawford did not submit any additional evidence.

The Agency issued its final decision on October 20, 1995. In the decision, the Agency found it had subjected Crawford to sexual harassment and retaliation in violation of Title VII and awarded her injunctive relief, costs, and attorney's fees. However, the decision was silent with regard to compensatory damages. While

acknowledging that Crawford stated that she "developed physical problems from the stress of [her] supervisor's sexual harassment," the decision did not discuss whether she was entitled to compensatory damages for those injuries. The decision also informed Crawford that if she was dissatisfied, she had the choice of filing an appeal with the EEOC or filing a civil action in United States District Court. She chose the latter option.

On January 12, 1996, Crawford filed this lawsuit against Bruce Babbitt in his official capacity as Secretary of the Interior. (For simplicity, we will refer to Babbitt as the Agency). Crawford's complaint referred to the Agency's final decision and alleged that as a result of the Agency's discrimination, she had suffered hospitalization and physical, mental, and emotional distress. The complaint requested that the court (1) enter a declaratory judgment stating that the Agency had discriminated against her in violation of Title VII, and (2) "enter a judgment against the [Agency] for compensatory damages associated with the undue stress suffered by Plaintiff as a result of the unlawful employment practices of Defendant."

After the parties consented to having the case tried before a magistrate judge, Crawford moved for partial summary judgment on the issue of liability. She argued that the Agency's final decision conclusively established the Agency's liability under Title VII and requested that the issue of compensatory damages for her alleged physical and emotional injuries proceed to a jury trial. The Agency responded that since compensatory damages were not awarded as part of its final decision, Crawford could seek either (1) enforcement of the Agency's final decision but forego a claim for compensa-

tory damages, or (2) a *de novo* review of the entire dispute, including liability and damages.

On March 11, 1997, the magistrate judge granted Crawford's motion for partial summary judgment as to liability. In addition, although the Agency had not filed a summary judgment motion, the magistrate judge dismissed Crawford's claim for compensatory damages. The court then entered a judgment which ordered the injunctive relief set out in the Agency's final decision and dismissed Crawford's claim for compensatory damages. After Crawford's motion for reconsideration of that order was denied, she appealed, contending that the magistrate judge had erred in dismissing her claim for compensatory damages. The Agency did not cross-appeal the entry of judgment in Crawford's favor on the issue of the Agency's liability for violating Title VII.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*, using the same legal standard employed by the district court. *See, e.g., Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993). "Summary judgment is appropriate if the record shows no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. When deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the nonmoving party." *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366, 1369 (11th Cir. 1998) (internal citations and quotations omitted).

III. ANALYSIS

The crux of Crawford's claim is that she is entitled to compensatory damages for injuries she suffered as a

result of the Agency's sexual harassment and retaliatory conduct in violation of Title VII. The issue is whether she can rely on the Agency's finding of discrimination to pursue her compensatory damages claim in court, when the Agency did not award her compensatory damages. We begin by discussing the statutory scheme and administrative process which governs a Title VII discrimination claim brought against a federal agency.

A. The Statutory Scheme and the Administrative Process

In 1972, Congress amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to extend its protection against employment discrimination on the basis of race, color, religion, sex or national origin to most federal employees. Specifically, 42 U.S.C. § 2000e-16(a) provides that "[a]ll personnel actions affecting employees or applicants for employment . . . [in federal agencies and other specifically listed areas of federal employment] shall be made free from any discrimination based on race, color, religion, sex, or national origin." A covered federal employee who has been the victim of an unlawful employment practice under Title VII may file suit against her employer in federal district court. *See* 42 U.S.C. § 2000e-16(c). However, before bringing suit, the aggrieved employee must exhaust her administrative remedies. *See Brown v. General Servs. Admin.*, 425 U.S. 820, 832-33, 96 S.Ct. 1961, 1967-68, 48 L. Ed. 2d 402 (1976).

In 42 U.S.C. § 2000e-16(b), the EEOC is granted the authority to enforce § 2000e-16(a)'s prohibition of discrimination in federal employment "through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate

the policies of this section." In addition, the EEOC is given the power to "issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." *Id.* Acting under this grant of authority, the EEOC has promulgated regulations designed to resolve claims of discrimination in federal employment. Under those regulations, the procedures which a federal employee must follow in order to pursue a charge of discrimination against a federal agency are as follows.

A federal employee who believes she has been discriminated against in violation of Title VII must first consult an EEO counselor within the employing agency to try to resolve the matter informally. *See* 29 C.F.R. § 1614.105(a). If that is unsuccessful, the EEO counselor notifies the employee of her right to file a formal administrative complaint with the employing agency itself. *See* 29 C.F.R. § 1614.105(d).

Upon receiving the complaint, the employing agency conducts an investigation in order to "develop a complete and impartial factual record upon which to make findings on the matters raised by the . . . complaint." 29 C.F.R. § 1614.108(b). After completing the investigation, the agency gives the complaining employee a copy of the investigative file. At this point, the agency can make the employee an offer of "full relief." (We will discuss the definition of "full relief" later). If the employee rejects the offer of "full relief," the agency is required to dismiss the complaint. *See* 29 C.F.R. § 1614.107(h). The employee can then appeal to the EEOC or file a civil action in federal district court. *See* 29 C.F.R. § 1614.401(a).

If an appeal is taken to the EEOC, and the EEOC agrees that the agency's offer constituted "full relief,"

then it must dismiss the appeal. *See* 29 C.F.R. § 1614.405. But if the EEOC concludes that the offer did not constitute "full relief," it issues a final written decision. *See id.* "If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included." *Id.* Although an employing agency has no right of appeal to federal court from an EEOC final decision, *see* 29 C.F.R. § 1614.504, the employee, if not satisfied with the EEOC's final decision, may file a civil action in federal district court. *See* 42 U.S.C.2000e-16(c).

Alternatively, if the employing agency opts not to make an offer of "full relief" at the conclusion of its investigation, it must notify the employee that she has a right to either (1) request a hearing on her claim before an EEOC administrative judge, or (2) receive a final decision on the claim from the employing agency. *See* 29 C.F.R. § 1614.108(f).

If the employee elects the first option, the administrative judge conducts a hearing, issues "findings of fact and conclusions of law . . . [and] order[s] appropriate relief where discrimination is found." 29 C.F.R. § 1614.109(g). The employing agency then has sixty days to reject or modify those findings or relief ordered and issue its own "final decision." *See id.* The "final decision" must "consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief." 29 C.F.R. § 1614.110. If the employing agency does not issue a final decision, then the conclusions of the administrative judge and the relief ordered become the agency's final decision. *See* 29 C.F.R. § 1614.109(g). On the other hand, if the employee elects option two, she does not receive a hearing before an EEOC

administrative judge, and the agency must issue a "final decision" within sixty days. *See* 29 C.F.R. § 1614.110.

Should the employee be dissatisfied with any aspect of the agency's final decision, she may appeal it to the EEOC or file a civil action in federal district court. Should she appeal to the EEOC, it must issue a final written decision. 29 C.F.R. § 1614.405. "If the [EEOC's] decision contains a finding of discrimination, appropriate remedy(ies) shall be included." *Id.* Although an employing agency is stuck with an EEOC final decision and cannot have it reviewed in federal court, *see* 29 C.F.R. § 1614.504, an employee, if not satisfied with an EEOC final decision, may file a civil action in federal district court. *See* 29 C.F.R. § 1614.408.

Now, we consider "full relief." When either the employing agency or the EEOC finds that the agency discriminated against the employee, the agency must provide the employee "full relief." *See* 29 C.F.R. § 1614.501(a). According to the EEOC, full relief "shall include, but need not be limited to," nondiscriminatory placement with back pay and interest, elimination of any discriminatory practices, "cancellation of unwarranted personnel action," and full opportunity to participate in [any] employee benefit denied because of discrimination. 29 C.F.R. § 1614.501(a),(c).

In addition, in claims where discrimination occurred after the passage of the Civil Rights Act of 1991, the EEOC requires agencies to award compensatory damages as part of "full relief," but only if the employee presents certain objective evidence of injury. *See Jackson v. United States Postal Service*, EEOC Appeal No.

01923399 (1992).[1] The EEOC has issued a policy guidance statement detailing the type of evidence an employee must present to establish the injuries for which compensatory damages are awarded. *See* EEOC POLICY GUIDANCE No. 915.002 S II(A)(2), at 10 (July 14, 1992). In particular, the policy guidance statement notes that "[n]onpecuniary losses for emotional harm are more difficult to prove than pecuniary losses," and that the EEOC "will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations." *Id.*

B. The District Court's Dismissal of Crawford's Claim for Compensatory Damages

With that overview of the statutory scheme and administrative process governing Title VII claims against federal agencies in mind, we turn now to the issue of whether the magistrate judge erred in dismissing Crawford's claim for compensatory damages. The magistrate judge relied on two grounds in dismissing Crawford's claim for compensatory damages. First, the judge found that Crawford had failed to adequately raise the claim for compensatory damages at the administrative level and was therefore barred from raising it in district court due to her failure to exhaust administrative remedies. Second, the judge ruled that Crawford's reliance on the Agency's final decision in her motion for partial summary judgment

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[1] The EEOC has repeatedly affirmed the *Jackson* decision requiring agencies to award compensatory damages in the administrative process as part of ensuring that a discrimination victim receives full relief. *See, e.g., Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (1993); *Huhn v. Department of the Treasury*, EEOC Appeal No. 059440630 (1995); *Johnson v. Department of the Treasury*, EEOC Appeal No. 01966242 (1977).

precluded her from litigating *de novo* the compensatory damages issue. The magistrate judge observed that, in essence, Crawford was seeking to enforce the favorable parts of the Agency's final decision (the finding of discrimination and the award of equitable relief) while at the same time litigating *de novo* the unfavorable parts (the failure to award her compensatory damages). The judge reasoned that since Crawford had elected to rely on the Agency's final decision, she was bound to its terms. Therefore, the judge concluded, because the Agency's final decision did not award Crawford compensatory damages, she could not recover those damages in the district court.

The magistrate judge's reasons for dismissing Crawford's compensatory damages claim are implicitly premised on the EEOC's position, which we have already described, that an employing agency can award an employee compensatory damages in the administrative process as part of "full relief." If that position is wrong, if compensatory damages cannot be awarded in the administrative process, then neither of the grounds upon which the magistrate judge relied justify dismissal of Crawford's claim for compensatory damages.

As to the magistrate's first ground for dismissing Crawford's claim for compensatory damages, if such relief cannot be awarded in the administrative process to begin with, it follows that an employee's obligation to exhaust administrative remedies cannot include a duty to request it. As for the second ground for dismissal, if compensatory damages cannot be awarded in the administrative process, then the absence of such an award in an agency's final decision cannot preclude a claim for compensatory damages in federal court. If an agency cannot award compensatory damages in the

administrative process, its final decision obviously cannot dispose of a claim for compensatory damages.

It follows that in determining whether the magistrate judge erred in dismissing Crawford's claim for compensatory damages, we must resolve the threshold question of whether compensatory damages can be awarded in the administrative process. We turn now to that issue.

C. Can Compensatory Damages Be Awarded in the Administrative Process?

Crawford's attempt to recover compensatory damages from a United States government agency raises sovereign immunity concerns. The United States, as sovereign, "is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70, 85 L.Ed. 1058 (1941). The Government's consent to be sued "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980). Furthermore, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096, 135 L. Ed. 2d 486 (1996). "[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 2702, 69 L. Ed. 2d 548 (1981).

In 1972, Congress waived the federal government's sovereign immunity for violations of Title VII. However, that waiver was limited in scope; it did not subject federal agencies to liability for compensatory damages. *See* Equal Employment Opportunity Act of 1972,

Pub.L. 92-261, 86 Stat. 103. Not until the Civil Rights Act of 1991 did Congress expand the scope of its previous waiver by subjecting federal agencies to liability for compensatory damages. *See* 42 U.S.C. § 1981a(a) ("In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-5 or 2000e-16] against a respondent who engaged in unlawful intentional discrimination . . . prohibited [by Title VII], the complaining party may recover compensatory . . . damages as allowed in subsection (b) of this section. . . ."). However, Congress expressly conditioned the expanded waiver by providing that the government has a right to a jury trial on the issue of its liability for compensatory damages. *See* 42 U.S.C. § 1981a(c) ("If a complaining party seeks compensatory . . . damages under this section[,] any party may demand a trial by jury."). The effect of that condition is a government agency may not be held liable for compensatory damages unless it has the opportunity to have a jury trial on the issue of its liability for those compensatory damages.

We have previously explained that EEOC decisions—not any statutory provision—requires governmental agencies, when presented with certain objective evidence of injury, to award an employee who is a discrimination victim compensatory damages in the administrative process. In the EEOC's view, doing that is part of the process of ensuring the victim receives "full relief." *See Jackson v. United States Postal Service,* EEOC Appeal No. 01923399 (1992). If the employing agency does not award compensatory damages as part of its offer of "full relief," the employee may appeal to the EEOC, which purports to have the

authority to order the agency to award compensatory damages. An EEOC regulation provides that an award of compensatory damages, whether from the agency in its final decision or from the EEOC on an appeal from that decision, is binding against the agency and cannot be appealed by it to federal court. *See* 29 C.F.R. § 1614.504(a) ("A final decision that has not been the subject of an appeal or civil action shall be binding on the agency."). That regulation is derived from 42 U.S.C. § 2000e-16(c), which provides that only "an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title."

The EEOC's requirement that compensatory damages be awarded in the administrative process as part of "full relief" prevents an agency from obtaining a jury trial on the issue of its liability for compensatory damages. As a result, that requirement is inconsistent with Congress' conditioning waiver of the federal government's sovereign immunity for compensatory damages on the right to a jury trial.

"[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 2702, 69 L. Ed. 2d 548 (1981). In § 1981a, Congress has expressly conditioned its waiver of sovereign immunity on the agency's right to have a jury trial on the issue of its liability for compensatory damages. Accordingly, unless Congress—not the EEOC or the courts—provides otherwise, the waiver of sovereign immunity may not be expanded to make an agency liable for compensatory damages in the administrative process where there is no jury trial. *Cf. Gibson v. Brown*, 137

F.3d 992 (7th Cir. 1998) (holding that the EEOC may not order a federal agency to pay compensatory damages in the administrative process because it would deny the agency its right to a jury trial under 42 U.S.C. § 1981a).

The Agency contends, however, that we should follow the lead of the Fifth Circuit in *Fitzgerald v. Secretary, United States Dept. of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997), and hold that compensatory damages may be awarded in the administrative process. Our fundamental problem with the *Fitzgerald* decision is that it did not confront the sovereign immunity constraints which we find to be controlling on the question of whether compensatory damages may be awarded in the administrative process. The Agency concedes that *Fitzgerald* did not address the sovereign immunity issue, but nonetheless advances four arguments, the first of which was relied on by the Fifth Circuit in *Fitzgerald*, to support its position that compensatory damages may be awarded in the administrative process. We find none of them persuasive.

First, the Agency points out that Congress granted the EEOC broad powers in 42 U.S.C. § 2000e-16 to award "appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies" of Title VII. The Agency then argues that when Congress passed the Civil Rights Act of 1991 and made compensatory damages available to victims of employment discrimination, they became part of the arsenal of remedies that the EEOC was empowered to award. Thus, the Agency concludes, the EEOC's requirement that an agency award an employee discrimination victim compensatory damages where necessary for "full relief" is merely an extension

of the broad power that Congress conferred upon the EEOC.

While we agree that 42 U.S.C. § 2000e-16 gives the EEOC broad power, that power has limits. In this case, Congress' decision to define its waiver of sovereign immunity for compensatory damage claims with the condition that an agency have the right to a jury trial provides such a limit. The EEOC's broad power does not give it the right to extend the scope of Congress' waiver of sovereign immunity by tossing aside an agency's right to a jury trial. The EEOC cannot erase from the waiver of sovereign immunity a condition Congress wrote into it.

Second, the Agency notes that both before and after the passage of the Civil Rights Act of 1991, only an employee, not the federal agency, can challenge the outcome of the administrative process, whether it be the agency's final decision or the EEOC's final decision. Put another way, unless the employee challenges the disposition of his complaint in the administrative process by filing a claim in federal court, the agency is bound by the terms and relief ordered in the agency's or the EEOC's final decision. That one-way appealability rule is expressed in 29 C.F.R. § 1614.504(a) ("[a] final decision that has not been the subject of an appeal or civil action shall be binding on the agency"), and it is derived from Title VII's language which provides that only "an employee . . . if aggrieved by the final disposition of his complaint . . . may file a civil action as provided in section 2000e-5 of this title." 42 U.S.C. § 2000e-16(c). The Agency argues that Congress' awareness of the one-way appealability rule when it made compensatory damages available in the Civil Rights Act of 1991 means Congress, in conditioning the

waiver of sovereign immunity on an agency having a right to a jury trial, must have recognized that an agency would be unable to exercise its right to a jury trial if compensatory damages were awarded in the administrative process.

The problem with this argument is that it assumes away the issue it purports to resolve. The argument assumes that compensatory damages can be awarded in the administrative process and then states that Congress must have recognized that an agency would not be able to exercise its jury trial right if damages were awarded against it in the administrative process. However, the issue being resolved is whether Congress' waiver of sovereign immunity allows compensatory damages to be awarded against an agency in the administrative process where the agency will not have access to a jury trial.

For reasons we have already discussed, we believe Congress' deliberate decision to condition its waiver of sovereign immunity on an agency having the right to a jury trial precludes us from holding that compensatory damages are available in the administrative process. Therefore, an essential premise of the Agency's second argument is wrong. At best, the Agency is arguing that Congress impliedly waived sovereign immunity as to the award of compensatory damages in the administrative process. However, waivers of sovereign immunity are narrowly construed, and are not to be implied. *See e.g.*, *Lehman*, 453 at 161, 101 S.Ct. at 2702.

Third, the Agency argues a holding that compensatory damages may not be awarded in the administrative process will prevent agencies from settling cases in which employees seek compensatory damages, because

paying such damages in settlement would deprive the agencies of their right to a jury trial. That argument is specious. Government agencies are free to agree to settle cases on terms they deem fair and appropriate, and they may waive their statutory rights in doing so. Nothing in 42 U.S.C. § 1981a prevents an agency from waiving its right to a jury trial on the issue of its liability for compensatory damages—whether in settlement or otherwise. However, the choice of whether to waive the right to a jury trial in any particular case is a purely discretionary decision to be made by the agency involved, not by the EEOC. Congress provided federal government agencies with the right to a jury trial on compensatory damages, and only the agency with that right can waive it in a particular case.

Fourth, the Agency argues that the effect of holding compensatory damages are unavailable in the administrative process is to undermine the administrative exhaustion requirement and render the administrative process a nullity. We disagree. Our holding is limited: compensatory damages are not available in the administrative process. Our holding does not affect any other aspect of the administrative process the EEOC has established to address Title VII discrimination claims against a federal agency. A federal employee must still exhaust administrative remedies for all types of relief she seeks other than compensatory damages, the only type of relief for which Congress' waiver of sovereign immunity was conditioned on a federal agency having the right to a jury trial.

D. Summary

To sum up, we hold that because Congress conditioned waiver of sovereign immunity for compensatory damages on access to a jury trial, compensatory dam-

ages may not be awarded in the administrative process in which there is no jury trial and from which a federal agency has no right of review in a forum providing a jury trial. Because compensatory damages may not be awarded in the administrative process, an employee such as Crawford is not required to raise compensatory damages as part of her duty to exhaust administrative remedies. Moreover, an employee's reliance on an agency's final decision cannot be dispositive of a claim for compensatory damages brought in federal court.

IV. CONCLUSION

In light of our holding, the magistrate judge erred in dismissing Crawford's claim for compensatory damages. Accordingly, the part of the judgment concerning compensatory damages is REVERSED, and the case is REMANDED for further proceedings in accordance with this opinion. The remainder of the judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION No. 1:96-CV-102-WLH

SYLVIA CRAWFORD, PLAINTIFF

v.

BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, DEFENDANT

[Mar. 11, 1997]

MAGISTRATE JUDGE'S ORDER

Before the undersigned is plaintiff's motion for partial summary judgement. (Doc. No. 20). The Clerk of Court properly notified the parties of the filing of this motion, of their duty to respond, and of the potential consequences of a failure to respond. The parties have responded and the case is now ripe for review.

STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Pursuant to a shifting burden, the movant must first demonstrate that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only where this

initial burden is met does the onus shift to the non-moving party to demonstrate the existence of a genuine issue as to facts material to the dispute. *Clark v. Coats & Clark*, 929 F.2d 604, 608 (11th Cir. 1991). Specifically, the party opposing summary judgment must then "go beyond the pleadings," presenting admissible probative evidence in the form of affidavits, depositions, admissions and the like, tending to establish "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324.

"Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial." *Shepherd v. ISS Int'l Serv. Sys.*, 873 F. Supp. 1550, 1554 (N.D. Ga. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

A "mere scintilla of evidence" is not sufficient to create a material question of fact capable of defeating a motion for summary judgment. *See*, *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). Instead, "there must be evidence on which a jury might rely." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seago v. North Carolina Theatres*, 42 F.R.D. 627, 632 (E.D.N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967)). *See also*, *Anderson*, 477 U.S. at 252; *Connell v. Bank of Boston*, 924 F.2d 1169, 1178 (1st Cir. 1991); *Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co.*, 149 F.2d 359, 362 (5th Cir. 1945) ("A pretended issue, one that no substantial evidence can be offered to maintain, is not genuine."). In short, "[i]f the evidence supporting Plaintiff's claims is insufficient for a jury to return a Plaintiff's verdict, or is merely colorable or not signifi-

cantly probative, then Defendant is entitled to summary judgment." *Murphy v. Yellow Freight Sys.*, 832 F. Supp. 1543, 1547 (N.D. Ga. 1993) (citing *Anderson*, 477 U.S. at 249).

The court cannot, pursuant to a motion for summary judgment, resolve factual disputes by weighing conflicting evidence. *Brown v. Hughes*, 894 F.2d 1533 (11th Cir.), *cert. denied*, 496 U.S. 928 (1990). Accordingly, summary judgment is improper where the court has even the "slightest doubt" regarding the material facts underlying the claims presented. *Clark v. West Chem. Prods.*, 557 F.2d 1155, 1157 (5th Cir. 1977) (quoting *Insurance Co. of N. Am. v. Bosworth Constr. Co.*, 469 F.2d 1266, 1268 (5th Cir. 1972)); *Armstrong Cork Co. v. World Carpets*, 76 F.R.D. 613, 614 (N.D. Ga. 1977) (citing *Clark*, *supra.*). In short, if "reasonable minds could differ as to the import of the evidence, and a reasonable interpretation of the evidence could lead to a Plaintiff's verdict, then summary judgment is inappropriate." *Murphy v. Yellow Freight Sys.*, 832 F. Supp. 1543, 1547 (N.D. Ga. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

FACT SUMMARY & DISCUSSION

The pertinent facts are minimal and not in dispute. Plaintiff worked for the Fish and Wildlife Service, Department of the Interior. She internally complained of sexual harassment and retaliation. The agency investigated and found that she had been sexually harassed and subjected to retaliation. After the Agency finding, plaintiff timely filed this action, seeking that the Agency be declared in violation of Title VII and enjoined from further violations. She further detailed the agency finding as the source of liability, and seeks compensatory damages.

Defendant has not contested any of plaintiff's "undisputed material facts;" therefor, those facts are controlling. Plaintiff [*sic*; defendant] does contest that, even if plaintiff does seek to enforce an agency decision, she didn't seek compensatory damages at the agency level and therefor is barred from seeking those damages in court.

Plaintiff depends on *Moore v. Devine*, 780 F.2d 1559 (11th Cir. 1986), for the proposition that the final agency determination is binding on this court. In *Moore*, the Court of Appeals held that a final order from the EEOC, finding that a federal employee had been discriminated by a federal agency, was binding on the District Court under certain circumstances. *Id.* at 1562. The Court of Appeals placed great weight on the statutory authority of the EEOC to compel a federal agency to act, in contrast to the limited power the EEOC has over state and private employers. *Id.*

Moore has clarified a previous decision in the same case, *Moore v. Devine*, 767 F.2d 1541 (11th Cir. 1985). That "prior decision held that a final agency or EEOC order that is favorable to a federal employee was not a final adjudication and should be relitigated *de novo* in the district court." *Moore*, 780 F.2d at 1563. Since the EEOC could compel federal employer action, however, the Eleventh Circuit Court of Appeals carved out an exception for EEOC final orders directed at federal employers.[1] *See also*, *Diamond v. Atwood*, 43 F.3d 1538 (D.C. Cir. 1995).

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[1] The Court of Appeals did not permit Moore to rely on the agency decision, since he had not initially requested the court to simply enforce the final agency decision, and more importantly, the EEOC order was legally impossible.

However, the language of *Moore* goes beyond that narrowly carved exception. "Federal district courts have uniformly granted requests for enforcement of favorable final agency and EEOC decisions without requiring *de novo* review on the merits of the discrimination claims, unless the court has found the relief ordered to be outside the EEOC's authority." *Moore*, 780 F.2d at 1563. The Court cited three cases that enforced the final order of the EEOC or its predecessor.[2] None were decisions enforcing the final order of an agency.

However, the very next paragraph of the opinion in *Moore* muddies the waters again. "Were we presented with a straightforward case in which the employee had filed suit in federal court seeking only to enforce a favorable EEOC order, we would be compelled to [grant such relief]." *Moore*, 780 F.2d at 1563.

While the language of the decision arguably could be limited to EEOC decisions, one last portion of the decision provides a test which could be utilized here:

> Our prior decision held that a final agency or EEOC order that is favorable to a federal employee was not a final adjudication and should be relitigated *de novo* in the district court. That would require an employee who has successfully invoked an administrative scheme designed to bind agencies to remedy discrimination to prove his or her entire case again in federal court when the agency refuses to take the ordered corrective action. This result

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[2] *Pearch v. Pierce*, 31 Fair. Empl. Prac. Cas. (BNA) 1403 (D.D.C. 1982); *Marqules v. Block*, 38 Fair. Empl. Prac. Cas. (BNA) 1244 (D. Ore. 1981); *White v. Dept. of Health and Human Services*, 30 Fair. Empl. Prac. Cas. (BNA) 880 (D.D.C. 1981).

> would undercut the utility of administrative dispute resolution provided in the statute and regulations, which gives the employee the option of adjudicating the issue of discrimination in the administrative forum or in the district court.

Moore, 780 F.2d at 1563.

The Eleventh Circuit considered whether (1) the administrative scheme is meant to bind the agency, (2) plaintiff has had to prove her case once already, and (3) whether the employee has chosen to prove her case administratively or judicially.

The Fish and Wildlife Service's internal EEO investigation resulted in recommended remedial steps, such as EEO training, discipline, monitoring of the work place, and the award of attorney's fees. These steps were recommended as a final agency decision, in accordance with 29 C.F.R. § 1614.501. Furthermore, the EEO program is authorized to make final agency decisions under 29 C.F.R. § 1614.102(c)(5). The agency decision is binding. *See also* 29 C.F.R. § 1614.110.

Plaintiff has proven her case already. Plaintiff and defendant both were subjected to the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Plaintiff prevailed. *See* Agency Decision, Doc. No. 20, exh. 1.

After the final agency decision, plaintiff was given the opportunity to choose to seek further recourse through the EEOC or through the Courts. Had plaintiff chosen to enforce the decision through the EEOC, this case would have been identical to *Moore*. Since plaintiff choose [*sic*] to seek judicial remedy, plaintiff has removed one layer of administrative hearings.

Despite the removal of one layer of administrative hearings—removed by plaintiff's choice—the language of *Moore v. Devine* requires this court to impose liability on defendant in this action. The Sixth Circuit has made similar findings in *Haskins v. United States Department of the Army*, 808 F.2d 1192, 1200 n.4 (6th Cir. 1987). The Sixth Circuit also found that "the federal employing agency and the EEOC are empowered to enter final orders which are binding on the employing agency." *Id.* (citing 42 U.S.C. § 2000e-16, 29 C.F.R. §§ 1613.201 *et seq.*). In light of such language, and the rigor of the administrative remedy through which plaintiff has already tried her case, the undersigned finds that *Moore v. Devine* prevents any de novo review of the agency's finding of liability.

Defendant responds by arguing that, since plaintiff did not seek compensatory damages in the administrative regime, she is estopped from seeking them in this judicial regime—specifically, that this court can only review the evidence of damages that are presented administratively. Defendant cites an administrative ruling by the EEOC to support the proposition that compensatory damages are recoverable in the administrative process. *Jackson v. U.S. Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), *req. to reopen den.*, EEOC Request No. 05930306 (Feb. 1, 1993). Since plaintiff is only seeking to enforce the final agency decision, defendant asserts that the issue of liability is not before this court and, therefor, summary judgement [*sic*] is moot. Furthermore, defendant argues that there can be no issue of compensatory damages where it was [*sic*] no evidence of emotional injury is presented below.

The undersigned agrees that an agency is authorized by the regulations to award the type of compensatory

damages that plaintiff seeks. The regulations authorize an agency to compensate "each identified victim on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination." 29 C.F.R. § 1614.501(4); *see also Jackson v. U.S. Postal Service*, EEOC Appeal No. 01923399 (Nov. 12, 1992), *req. to reopen den.*, EEOC Request No. 05930306 (Feb. 1, 1993) (incorporating 42 U.S.C. § 1981a(b)(2) into the administrative regime and allowing the award of compensatory damages); 42 U.S.C. § 2000e-16.

Furthermore, it was plaintiff's burden to prove compensatory damages at the agency level. *See, e.g., Bush v. West*, 1997 WL 40449 (E.E.O.C. Jan. 24, 1997) (complainant has burden to prove costs); *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994) (complainant has burden to prove compensatory damages); *Driscoll v. Dalton*, 1994 WL 731530 (E.E.O.C. Dec. 21, 1994) (same); *Bowman v. Dalton*, 1995 WL 645523 (E.E.O.C. Oct. 20, 1995) (same; however, if complainant puts agency on notice of damages, agency must investigate those damages prior to offering settlement in 'full relief').

The procedure for administrative claimants to seek compensatory damages was established in *Carle v. Department of the Navy*, EEOC Appeal No. 01922369 (January 5, 1993) and *Rivera*, *supra*. While the agency must clarify any unclear allegations or requests, the complainant must make some request for compensatory damages. The agency must request evidence to substantiate the claim for damages prior to making an offer of 'full relief' settlement. If an EEO hearing is held, the complainant has the opportunity to develop the record at that hearing. The claims must be substantiated by objective evidence of both the damages and causation.

Carle at 4-6, Appendix; *Rivera* at *3. *See generally*, 29 C.F.R. § 1614.108 (Agency has duty to investigate and fully develop the record).

There is no evidence that plaintiff requested an EEO hearing. "When a complainant fails to request a hearing, she will not be heard to complain on appeal that the factual record upon which the final agency decision is based is inadequate." Ernest C. Hadley, *A Guide to Federal Sector Equal Employment Law & Practice* 353 (Dewey Publications 1996) (citing *Cosby v. Secretary of the Army*, EEOC Appeal 01900196 (1990)). Under the regulatory framework established by the EEOC and authorized by 42 U.S.C. § 2000e-16(b) and 29 C.F.R. § 1614.101 *et seq.*, plaintiff should have presented her claims for compensatory damages at the agency level or should have requested an EEO hearing. This would have triggered the agency's duty to investigate; however, since plaintiff has not shown that either request was made she is unable to complain about the scope of relief in the Agency's final decision.

Several other circuits have permitted plaintiffs seeking to enforce an agency decision to challenge the adequacy of the agency's remedy. *See Huey v. Bowen*, 705 F. Supp. 1414, 1417-18 (W.D. Mo. 1989) (Agency bound by EEOC decision, district court only able to determine if remedy provided was adequate); *see also Pecker v. Heckler*, 801 F.2d 709, 711 n.3 (4th Cir. 1986) (same). However, those circumstances are distinguishable.

In *Pecker v. Heckler*, *supra*, the Fourth Circuit held that a plaintiff who was dissatisfied with her remedy[3] could 'request an order affirming the EEOC's finding of

[3] Pecker was re-instated to a position different than one she desired.

liability' and still relitigate the remedy. The undersigned finds this case distinguishable, since plaintiff in *Pecker* was seeking to alter a remedy that the agency had provided. Here, plaintiff seeks a new remedy for which no evidence had been heard before. Since both *Pecker* and plaintiff seek to enforce a final agency decision, they are constrained by the four corners of that decision. If the decision is legally faulty, such as if the agency had refused to consider evidence of compensatory damages, then the undersigned would have broader latitude in which to shape relief. However, plaintiff does not contend that the agency's order is faulty; rather, plaintiff contends that the agency's finding was correct and should provide for liability outside of the scope of the EEO investigation.

Plaintiff should have sought compensatory damages in the earlier forum. She cannot rely on *Moore v. Devine* to bootstrap an untimely claim within this EEO process. *Moore* merely sought to enforce an EEOC order, not to expand the scope of that order. Such an expansion would seem to require a *de novo* trial with the Agency decision as admissible evidence. 780 F.2d at 1564 ("We do not hereby suggest that an employee who seeks redress of an agency's refusal to comply with an order requiring further factfinding invariably thereby opens the merits of his or her claim to *de novo* review by the district court. The employee may request enforcement by the district court without requesting and trying the merits of the claim").

The Eleventh Circuit permitted district courts to compel recalcitrant agencies to comply with final agency decisions without *de novo* review, even if more fact finding was needed. Here, there isn't any evidence that the Fish and Wildlife Service refused to comply

with the order. The only fact finding that plaintiff requests would revolve around damages—an issue that plaintiff did not raise at the agency level.

Had plaintiff sought a traditional *de novo* review of the decision, the undersigned may have been empowered to determine liability. Plaintiff cast this action as one enforcing an agency decision, not as de novo review. That choice hobbled this court; reducing its ability to consider new issues. Therefore, plaintiff cannot raise the new issue of compensatory damages in this forum, based on plaintiff's choice "to have the Final Agency Decision enforced." (Reply Brief, Doc. No. 18, pg. 2).

ORDER

On the basis of these findings, the undersigned GRANTS plaintiff's motion for partial summary judgment. (Doc. No. 20). The agency cannot relitigate its own finding of liability; however, neither does it have to litigate any issue outside of the scope of the agency decision. Plaintiff's request of injunctive relief under Title VII is GRANTED; however, as plaintiff's complaint merely seeks to enforce a final agency decision, the unraised issue of compensatory damages is barred by plaintiff's failure to raise it in the administrative process. The claim for compensatory damages is DISMISSED WITHOUT PREJUDICE.

With no issue remaining for trial, judgement [*sic*] shall be entered in favor of plaintiff on the issue of liability; however, damages are not to be awarded in favor of plaintiff. The parties will bear their own costs. Injunctive relief is granted in accordance with the Final Agency Decision of the U.S. Department of the Interior dated October 20, 1995, in which the agency admitted

its violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Department of the Interior and the Fish and Wildlife Service are ORDERED to comply with the provisions of that decision.

IT IS SO ORDERED, this 10th day of March, 1997.

/s/ WILLIAM L. HARPER
WILLIAM L. HARPER
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:96-cv-102-WLH

SYLVIA CRAWFORD, PLAINTIFF

v.

BRUCE BABBITT, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, DEFENDANT

J U D G M E N T

This action having come before the court, Honorable William L. Harper, United States Magistrate Judge, for consideration of plaintiff's motion for partial summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that judgment be entered in favor of plaintiff, Sylvia Crawford, on the issue of liability; however, damages are not to be awarded in favor of plaintiff. The parties will bear their own costs. Injunctive relief is granted to plaintiff in accordance with the Final Agency Decision of the U.S. Department of the Interior dated October 20, 1995. The Department of the Interior and the Fish and Wildlife Service are Ordered to comply with the provisions of that decision.

Dated at Atlanta, Georgia, this 12th day of March, 1997.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ ANDREA THOMAS
ANDREA THOMAS
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
March 12, 1997
Luther D. Thomas
Clerk of Court

By: /s/ ANDREA THOMAS
ANDREA THOMAS
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8299

SYLVIA CRAWFORD, PLAINTIFF-APPELLANT

v.

BRUCE BABBITT, THE HONORABLE, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Filed: Nov. 20, 1998]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__ , _____F.2d _____).

Before: CARNES, Circuit Judge, KRAVITCH, Senior Circuit Judge, and MILLS*, Senior District Judge.

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* Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ EDWARD E. CARNES
EDWARD E. CARNES
UNITED STATES
CIRCUIT JUDGE

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Section 1981a of Title 42 of the United States Code (1994) provides, in pertinent part, as follows:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

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(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or

with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

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(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section–

(1) any party may demand a trial by jury

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(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party means–

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)

* * * * *

Section 717 of Title VII the Civil Rights Act of 1964, as amended, as codified at 42 U.S.C. 2000e-16 (1994 & Supp. II 1996), provides, in pertinent part, as follows:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

* * * * *

(c) Civil action by employee or applicant for employment for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

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 one hundred and eighty days from the filing of 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.

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