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TAX TREATMENT OF DAMAGES AWARDED FOR AGE DISCRIMINATION

by

GERALD A. MADEK*

I. INTRODUCTION

Since the inception of anti-discrimination laws, the degree to which victims should be compensated has been a subject of debate. Legislators have always been acutely aware of competing pressures in this area. Civil rights advocates have persistently lobbied for generous compensatory awards for emotional distress, while businesses have lobbied just as persistently against these awards which threaten their ability to do business profitably. The result of these competing pressures has been a set of anti-discrimination statutes offering inconsistent remedies.

Some statutes, like Title VII of the Civil Rights Act of 1964 (Title VII),¹ representative of the first generation of anti-discrimination laws, did not allow plaintiffs to recover damages for intangible harm. They offered merely back pay and other equitable relief. (This law was amended in 1991).² Others, like Title VIII of the Civil Rights Act of 1968 (Title VIII),³ a second generation law, offer successful plaintiffs broad compensatory damages. Still others, like the Age Discrimination in Employment Act (hereinafter ADEA),⁴ amended in 1978,⁵ another second generation law, are neither as restrictive as Title VII nor as generous as Title VIII. While the ADEA goes beyond the equitable relief offered by Title VII, offering victims of age discrimination liquidated damages equal to back pay awarded, these damages are not clearly labeled as compensatory, as they are in Title VIII.

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1. 42 U.S.C. §§ 2000e - 2000e-17 (1988 & Supp. V 1994).

2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

3. 42 U.S.C. §§ 3610-3614 (1988 & Supp. V 1994). *See id.* at § 3613(c) (fair housing remedy provisions are tort-like allowing for jury trials, awards of compensatory, and punitive damages).

4. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1994).

5. *Id.* Section 626(b) specifically addresses remedies for age discrimination. *Id.*; *see also* H.R. CONF. REP. NO. 950, 95th Cong., 2d Sess. 13-14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 521, 528, 535.

Predictably, the lack of consistency in the remedial framework among these civil rights laws has led to inconsistent tax consequences for successful plaintiffs. In general, the judicial history of this struggle reflects an attempt to balance the social mandate to discourage discrimination with the economic mandate to adequately fund the government. This balancing act has been particularly difficult with statutes like the ADEA where the nature of the remedies offered is unclear. In fact, the most recent judicial debate to be settled involves the tax status of ADEA awards. The U. S. Supreme Court, in *Commissioner v. Schleier*, recently resolved this issue in favor of the government's right to tax these awards.⁶ To explicate the resolution of this conflict between workplace rights and the right of the government to tax earnings, this paper examines the Supreme Court's Title VII decision in *United States v. Burke*,⁷ the resultant conflict in the circuit courts over ADEA awards,⁸ and the resolution of this conflict by the Supreme Court in *Schleier*. While it apparently ignores the link between punitive damages and torts and obfuscates the causal link between discrimination and personal injury, this decision definitively tilts the scales in favor of the government's right to tax. In so doing, *Schleier* sharply limits taxpayers' ability to exclude from income discrimination awards under the ADEA and other second generation statutes.

II. TAX LAWS

a) Internal Revenue Code

The government's right of taxation has been defined broadly from the outset. Thus, the Internal Revenue Code (IRC) defines gross income as "all income from whatever source derived."⁹ The Supreme Court has consistently affirmed the interpretation that the tax code is meant to apply to "any 'accessio[n] to wealth'" which does not qualify for exclusion under a specific exclusionary provision of the IRC.¹⁰ The relevant exclusionary provision for

6. 115 S. Ct. 2159, 2167 (1995) (holding ADEA recovery not excludable from gross income unless two-prong test is met).

7. 504 U.S. 229, 241 (1992) (holding back pay awards in settlement of Title VII claims not excludable from gross income).

8. Compare *Downey v. Commissioner*, 33 F.3d 836, 839 (7th Cir. 1994), cert. denied, 115 S. Ct. 2576 (1995) (holding ADEA settlement payments were not excludable from gross income) with *Schmitz v. Commissioner*, 34 F.3d 790, 796 (9th Cir. 1994), vacated and remanded, 115 S. Ct. 2573 (1995) (holding back pay and liquidated damages received in ADEA settlement were excludable from gross income).

9. I.R.C. § 104 (1988).

10. See *United States v. Burke*, 504 U.S. at 233 (quoting *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)). See generally *Commissioner v. Jacobson*, 336 U.S. 28, 49 (1949) (stating that absent an enumerated exception, gross income means all income, from whatever source derived).

awards under the ADEA is IRC section 104(a)(2), which excludes from gross income “the amount of any damages received (whether by suit or agreement and whether as lump sums or periodic payments) on account of personal injuries or sickness”¹¹

b) Regulations and Rulings

While workplace discrimination clearly inflicts personal injury, the central disagreement over excluding ADEA awards from taxable income has revolved around whether these awards are the *result of*, or *on account of*, personal injury. Largely derivative of the above-described tension between social and economic concerns, this disagreement also stems from the failure of the statute and its legislative history to specifically define personal injury.¹² To rectify the confusion over the definition of these terms, the IRS issued a Regulation which sought to define more closely the meaning of “personal injury” in 104(a)(2). The resultant guideline for determining exclusion of ADEA awards from gross income has been that “the essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor.”¹³ This regulation set the context for determining exclusion of these awards in the principles of tort law.

As a result of these regulations, courts have predictably focused on determining the similarity between tort statutes, anti-discrimination statutes in general, and the ADEA in particular, with emphasis on the remedies provided.¹⁴ Prior to the Supreme Court’s holding in *Burke*, case law clearly held that ADEA actions were “tort-like” for the purpose of determining the validity of tax exclusion under 104(a)(2).¹⁵ The basis for these pre-*Burke* decisions was *Threlkeld v. Commissioner*, which held the test for excluding damages under 104(a)(2) involved determining if these damages were “received on account of any invasion of rights that an individual is granted by being a person in the sight of the law.”¹⁶ This holding classified damages for violation of anti-discrimination statutes in the realm of tort law, which addresses violations arising “by operation of law,” rather than in the category of contract law, which addresses violations of private agreements between parties.¹⁷ How-

11. I.R.C. § 104; *see also Burke*, 504 U.S. at 233.

12. *See* I.R.C. § 104(a)(2); 26 C.F.R. §§ 1.104-1(c), 1.61-14 (1994); H.R. REP. NO. 101-247, 101st Cong., 1st Sess., at 1354-55 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2824-25; H.R. CONF. REP. NO. 101-386, 101st Cong., 1st Sess. 623 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3225-26.

13. *Burke*, 504 U.S. at 233 (quoting *Threlkeld v. Commissioner*, 87 T.C. 1294, 1305 (1986), *aff’d*, 848 F.2d 81 (6th Cir. 1988)).

14. *See Burke*, 504 U.S. at 233-34.

15. *See Schmitz*, 34 F.3d at 792-93.

16. 87 T.C. 1294, 1307 (1986), *aff’d*, 848 F.2d 81 (6th Cir. 1988).

17. *See Schmitz*, 34 F.3d at 793.

ever, the *Burke* decision supplanted the *Threlkeld* test with a more difficult test of whether ADEA actions were tort-like in the context of 104(a)(2). *Burke* focused not on the statutory or contractual basis for claiming personal injury, but on the nature of the remedies provided.

The IRS responded to the *Burke* decision with Revenue Ruling 93-88. This Ruling allowed the exclusion from income of compensatory damage awards for disparate treatment gender discrimination granted under Title VII (as amended in 1991) and for racial discrimination under Title VII and 42 U.S.C. § 1981. This Ruling apparently interpreted *Burke* to make the range of remedies allowable in a statute the sole determinant of whether compensatory awards under a statute were excludable from income. In fact, the Ruling held that awards for disparate impact were excludable from income, while awards for disparate treatment were not. According to the IRS, this is because Title VII allows only for equitable relief for successful disparate impact claims and not for compensatory or punitive damages. Interestingly, the *Schleier* Court criticized this ruling as a misinterpretation of *Burke*. In this context, the Court pointed out that determining a statute to have a tort-like set of remedies does not preclude the necessity of determining that the relevant damages were received "on account of personal injury," as demanded by section 104(a)(2).

Predictably, the IRS suspended Revenue Ruling 93-88 in response to this criticism from the *Schleier* Court. The IRS also indicated that it may modify some of its more favorable positions on exclusion of discrimination awards from income.¹⁸ This reversal on the part of the IRS indicates that the *Schleier* decision sharply circumscribes taxpayer ability to claim tax exclusion for discrimination awards, not only under the ADEA, but also under other anti-discrimination statutes. The following discussion of *Burke* and *Schleier* will examine the nature of this circumscription.

III. THE TAXATION OF TITLE VII AWARDS: UNITED STATES V. BURKE

The first Supreme Court decision in this area, *United States v. Burke*, pertained to a suit involving Title VII.¹⁹ However, as suggested above, this decision also changed the context within which tax treatment of ADEA awards was examined. In addition, the Supreme Court's recent decision in *Schleier*, involving an action under the ADEA, largely revisited the issues

18. See Rev. Rul. 95-45, 1995-34 C.B. 20 (suspending Rev. Rul. 93-88, 1993-2 C.B. 61 and inviting comment regarding *Schleier's* impact on awards received under the civil rights statutes).

19. 504 U.S. 229 (1992), *Rev'g*, 929 F.2d 1119 (6th Cir. 1991).

discussed in *Burke*. Hence, an analysis of the *Burke* decision is necessary to understand the Supreme Court's position on the ADEA.

Burke involved tax treatment of awards made under Title VII for discrimination in wages on the basis of sex. After several female employees charged the Tennessee Valley Authority (hereinafter TVA) with paying female workers less than male workers in violation of Title VII, the TVA settled the claim by offering the plaintiffs the back pay they would have received absent its discriminatory conduct. However, the TVA withheld federal income taxes on this back pay, and the women filed for a refund of the taxes. When the IRS disallowed these claims, they filed suit, claiming section 104(a)(2) excludes back pay awards from their gross income.²⁰

The district court focused on the fact that the respondents sought and received only back pay, not compensatory or other damages. The trial court decided that these awards could not qualify for the section 104(a)(2) exclusion because they constituted merely back pay on which taxes would have been paid had such pay been received in a timely fashion, the money was not "damages received . . . on account of personal injuries."²¹ The Court of Appeals for the Sixth Circuit reversed the district court, finding that these back pay awards were "personal and tort-like in nature," and, thus, met the section 104(A)(2) test.²² In deciding these awards could be excluded from gross income, the Sixth Circuit rejected the IRS argument that because the pre-1991 Title VII statute did not authorize compensatory or punitive damages, it is essentially different from tort statutes.²³ However, a strong dissent sided with the District Court, finding that the TVA's payment of back wages was not compensation for "loss due to a tort."²⁴

To resolve the apparent conflict in the lower courts, the U. S. Supreme Court granted *certiorari*²⁵ and, agreeing with the District Court and the Sixth Circuit dissent, held the back wages paid by the TVA did not qualify for exclusion from gross income under section 104(a)(2).²⁶ In so deciding, the Court focused on the centrality of damages to tort claims, noting that a tort has been

20. *Burke*, 504 U.S. at 232. The employees reasoned that the settlement payments were damages received on account of personal injuries and thus excludable from gross income. *Id.*

21. *Id.*

22. *Burke v. United States*, 929 F.2d 1119, 1121-24, *rev'd*, 504 U.S. 229 (1992).

23. *Id.* at 1121-23; *see also Burke*, 504 U.S. at 231-32, & nn. 1, 8 & 12.

24. 929 F.2d at 1126.

25. *United States v. Burke*, 502 U. S. 806 (1991).

26. *See generally Burke*, 504 U.S. 229. *Compare Burke*, 929 F.2d at 1123 (holding Title VII back pay awards in Sixth Circuit excludable from gross income) *with Sparrow v. Commissioner*, 949 F.2d 434, 441 (D.C. Cir. 1991) (concluding Title VII back pay awards not excludable from gross income), *cert. denied* 505 U.S. 1211 (1992), *and Johnston v. Harris County*, 869 F.2d 1565, 1579-80 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (holding

defined as a “civil wrong, other than breach of contract, for which the Court will provide a remedy in the form of an action for damages.”²⁷ Here, the Court emphasized that the hallmark of *bona fide* tort liability is the “availability of a broad range of damages”²⁸ which may be more than necessary to make the plaintiff financially whole. Such damages can address intangible non-physical injuries such as emotional distress or economic injury and may be punitive in nature.

When comparing Title VII to such tort statutes, the Court found that, since Title VII did not specify a broad range of remedies such as the right to jury trials, and since the available Title VII remedies, such as back pay, injunctions and other equitable relief did not include the compensatory and punitive damages which are the marks of true tort liability, Title VII could not be considered a tort-like statute. Thus, Title VII awards did not qualify for the section 104(a)(2) exclusion.²⁹ The U. S. Supreme Court affirmed the ruling that employment discrimination causes grave harm to its victims, but declined to view such harm as tort-like regarding available remedies. Thus, the Court concluded that back pay awards did not qualify for exclusion from gross income.

The Court conceded, however, that “discrimination could constitute personal injury under section 104(a)(2),” but only under statutes where the range of remedies corresponded more closely than those in Title VII to the broad range of remedies available in traditional tort law.³⁰ Here, by way of example, the Court pointed to Title VIII of the Civil Rights Act of 1968 and other federal anti-discrimination statutes which allow for jury trials, compensatory damages, and punitive damages.³¹ Under such statutes, damages awarded could qualify for exclusion from gross income, since the statute under which the action would be brought, unlike Title VII, would evidence a “tort-like conception of injury and remedy.”³² Interestingly, the Civil Rights

Title VII back pay awards not excludable from gross income) and *Thompson v. Commissioner*, 866 F.2d 709, 712 (4th Cir. 1989) (holding back pay awards not excludable from gross income). There are other pre-*Burke* cases. See also *Commissioner v. Miller*, 914 F.2d 586, 592 (4th Cir. 1990) (finding punitive damages in defamation settlement are not excludable from gross income); *Roemer v. Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983) (holding compensatory and punitive damages awarded in defamation suit excludable); *Kemp v. Commissioner*, 771 F. Supp. 357, 359 (N.D. Ga. 1991) (stating punitive damages received in settlement of civil rights action not excludable).

27. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 2 (5th ed. 1984).

28. *Burke*, 504 U.S. at 235; *Carey v. Piphus*, 435 U.S. 247, 257 (1978).

29. *Burke*, 504 U.S. at 238-39.

30. *Id.*; *Curtis v. Loether*, 415 U.S. 189, 195-96 n.10 (1974).

31. See *supra* notes 1-5 and accompanying text (citing statutes and remedies provisions).

32. See *Burke*, 504 U.S. at 239 (noting that Title VII's sole remedial focus is the award of

Act of 1991 essentially amends the Title VII remedies provisions considered in *Burke*, so that remedies now conform to *Burke*'s guidelines and will presumably qualify for exclusion from gross income.³³ Clearly, the *Burke* Court has specified that the test for whether back pay awards under anti-discrimination statutes can be excluded from gross income rests in the framework for remedies provided in the statute under which an action is brought. If the remedies are similar enough to those available in tort law, the inference can be drawn that injuries sustained under such a statute are also similar enough to the personal injuries traditionally redressed under tort law to qualify for exclusion from income under 104(a)(2). The Court found that the pre-1991 Title VII provisions lacked the range of remedies necessary to meet this test. Thus, personal injuries sustained under this statute could not be deemed the type of personal injuries specified in section 104(a)(2). As such, no awards under pre-1991 Title VII would qualify for exclusion from gross income.

Noteworthy, however, is the fact that the *Burke* dissent took issue with the determinative emphasis the majority placed on remedies available under Title VII. In this context, Justice O'Connor asserted that "the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce."³⁴ Rather Justice O'Connor, joined by Justice Thomas, contended that "the purposes and operation of Title VII are closely analogous to those of tort law, and that similarity [of legislative purposes rather than remedies] should determine excludability of recoveries for personal injury under 26 U.S.C. section 104 (a)(2)." Justice O'Connor emphasized that the harm inflicted by employment discrimination constitutes the type of "personal injury" alluded to in section 104(a)(2), and, so recoveries under Title VII should be excludable from gross income. This position was one she reiterated in her dissent in *Schleier*. The dissent crystallized the issue as whether, in truth, employment discrimination causes real personal injury, not whether the remedies available for employment discrimination are like those available for other types of personal injury, and cited persuasive precedent in support of this position.³⁵

back wages, while tort law remedies intend to redress personal injuries).

33. See *supra* note 2 and accompanying text. The *Burke* Court acknowledged that while the 1991 Act considerably expanded remedies for intentional discrimination, these changes "cannot be imported back into analysis of the [Title VII] statute as it existed at the time" the actionable claim arose. *Burke*, 504 U.S. at 241 n.12.

34. *Id.* at 248-49 (O'Connor, J., dissenting). The dissenting Justices pointed out the shallowness of the majority's assertion that the remedies define the category of law - even though there are many other components of a law to consider when classifying laws. *Id.*

35. See *id.* at 251-52 (O'Connor, J., dissenting); see also *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668-69 (1987) (noting how the Supreme Court considered the purpose, and the rights protected under the law, rather than the recovery available); *Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (noting that federal law protects individuals from tort-like personal injuries).

IV. THE TAXATION OF ADEA AWARDS IN THE CIRCUIT COURTS

Rather than clarifying the issues involved in taxation of recoveries for employment discrimination, the *Burke* decision caused significant confusion among the circuit courts regarding taxation of recoveries under the ADEA. In this context, the same issues surfaced which had surfaced relative to taxation of awards under Title VII. Hence, the circuits became divided over whether personal injury caused by age discrimination in the workplace was sufficiently tort-like to qualify resulting recoveries for exclusion from gross income under section 104(a)(2).

When dealing with suits under the ADEA, however, the courts have been forced to push their reasoning beyond the “comparable remedies” reasoning offered in *Burke* because, as suggested above, the ADEA (as amended in 1978) is a second generation anti-discrimination statute, allowing for jury trials and the award of liquidated damages in an amount equal to the award of back pay. Ostensibly, recoveries under the ADEA should not run into the same roadblocks to tax exclusion as did actions brought under the pre-1991 Title VII statute, since the ADEA evidences more similarity to traditional tort statutes in terms of specified remedies.

Indeed, at first glance, the ADEA meets the *Burke* test for exclusion of recoveries from gross income. However, the sticking point for the courts has been the vagueness of this statute in defining the purpose of the liquidated damages it allows. In truth, the legislative history and the wording of the statute appear to be at odds on this point. Congress, in articulating the reasoning behind drafting the ADEA, made clear that this statute is modeled on the Fair Labor Standards Act (hereinafter “FLSA”).³⁶ Further, in defining the purpose of permitting liquidated damages under the ADEA, Congress cited the Supreme Court’s finding in *Overnight Motor Transportation Company v. Missel*.³⁷ Here, the Court made clear that the award of liquidated damages under the FLSA, and by analogy under the ADEA, was “not a penalty,” but rather a way to provide full compensatory relief for losses that are “too obscure and difficult of proof for estimate other than by liquidated damages.”³⁸

The legislative history of this Act makes clear, then, that the purpose of the liquidated damages it allows is to compensate the plaintiff for “nonpecuniary losses.”³⁹ However, the wording of the ADEA statute itself seems to belie this purpose since it emphasizes that liquidated damages should be

36. 29 U.S.C. § 626(b) (1988 & Supp. V 1994). See H.R. CONF. REP., *supra* note 5, at 535.

37. 316 U.S. 572, 583-84 (1942).

38. *Id.*

39. See H.R. CONF. REP. *supra* note 5, at 535.

awarded only “in cases of willful violations of this chapter.”⁴⁰ The latter wording implies a punitive intent with its emphasis on the motivation of the employer who violates this statute. If the purpose of liquidated damages under the ADEA is not punitive in nature, why would the willful intent of the violator be relevant?

This ambiguity over the purpose of liquidated damage awards under the ADEA was reflected in the circuit court decisions involving exclusion of these awards from gross income to avoid taxation. It should be noted, however, that the U.S. Tax Court has adamantly supported the taxpayers’ position that ADEA recoveries should be excluded from gross income.⁴¹ Indeed, by resolving this ambiguity in *Schleier*, the Supreme Court narrowed more definitively the category of recoveries for discrimination which qualify for exclusion from gross income. However, to understand this most recent Supreme Court case, it is necessary to first examine the conflict which emerged among the courts in cases subsequent to *Burke*.⁴² Most notable was the Ninth Circuit’s exclusion from gross income of liquidated damages under the ADEA⁴³ and the Seventh Circuit’s opposite conclusion regarding this issue.⁴⁴

a) *Schmitz v. Commissioner*

*Schmitz v. Commissioner*⁴⁵ involved a plaintiff in a class action suit against United Airlines for age discrimination. Using the remedies specified in the ADEA, United paid Schmitz a settlement of \$115,050, half of which

40. 29 U.S.C. § 626(b). The ADEA states that its provisions will be enforced in accordance with FLSA. *Id.*

41. *See Burns v. Commissioner*, 67 T.C.M. (CCH) 3116, 3118 (1994) (discussing Tax Court’s belief that awards and settlements are not taxable income).

42. In addition to the Seventh and Ninth Circuit opinions discussed *infra*, district courts in the Seventh and Eleventh Circuits, the Fifth Circuit, and the Tax Court have addressed the same issue. *See Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 960 (5th Cir. 1993) (distinguishing back wages, which are taxable, from back pay awards, which are not, if they redress tort-like injuries); *Drase v. United States*, 866 F. Supp. 1077, 1079 (N.D. Ill. 1994) (ADEA remedies parallel the pre-amendment Title VII and recoveries are not excludable since statute does not redress tort-type injuries); *Shaw v. United States*, 853 F. Supp. 1378, 1382 (M.D. Ala. 1994) (ADEA recoveries not excludable since they are not damages resulting from personal injuries); *Maleszewski v. United States*, 827 F. Supp. 1553, 1557 (M.D. Fla. 1993) (ADEA not a tort-like statute); *Burns*, 67 T.C.M. (CCH) at 3116-18 (upholding exclusion of ADEA recovery); *Fite v. Commissioner*, 66 T.C.M. (CCH) 1588, 1593 (1993) (entire ADEA award excludable).

43. *See Schmitz v. Commissioner*, 34 F.3d at 796.

44. *See Downey v. Commissioner*, 33 F.3d at 840. Prior to *Burke*, three circuits issued opinions on the taxability of ADEA awards. *See Redfield v. Ins. Co. of N. America*, 940 F.2d 542, 549 (9th Cir. 1991) (ADEA damages tort-like, thus excludable); *Pistillo v. Commissioner*, 912 F.2d 145, 150 (6th Cir. 1990) (ADEA settlement excludable); *Rickel v. Commissioner*, 900 F.2d 655, 666 (3d Cir. 1990) (ADEA settlement excludable).

45. 34 F.3d 790 (9th Cir. 1994), *vacated and remanded*, 115 S. Ct. 2573 (1995).

was designated back pay and half of which was designated liquidated damages. Schmitz paid taxes on the portion of the settlement which was back pay, but not on the liquidated damages. The Commissioner of Internal Revenue claimed that the entire award was taxable. Schmitz initially argued that the liquidated damages portion was excludable under section 104(a)(2), then amended his argument to claim, in light of *Rickel v. Commissioner*,⁴⁶ that the entire award was excludable.⁴⁷ The Tax Court held for Schmitz. Upon the Commissioner's appeal, the Ninth Circuit affirmed the Tax Court's holding that the Schmitzs' could exclude the entire amount from their gross income for tax purposes.⁴⁸

In holding for Schmitz, the Ninth Circuit focused on the two-part test for determining the excludability of damages under section 104(a)(2) which it had recently formulated in *Hawkins v. United States*.⁴⁹ That test considers excludable damages where the taxpayer can demonstrate "the underlying cause of action was tort-like within the meaning of *United States v. Burke*" and "that the damages were received 'on account of' the taxpayer's personal injury."⁵⁰ The Ninth Circuit then had to decide if the ADEA created a tort-like cause of action, and whether the back pay and liquidated damages were received "on account of" Schmitz' personal injuries.

Addressing the first part of this test, whether the ADEA created a tort-like cause of action, the court decided, because of its provision for jury trials and liquidated damages, the ADEA did indeed create a tort-like cause of action. Here, the *Schmitz* court agreed with most post-*Burke* and pre-*Schleier* decisions, focusing on the two provisions of the ADEA which, by compensating plaintiffs beyond the exact wages due them, clearly distinguished this anti-discrimination statute from the pre-1991 version of Title VII considered in *Burke*.⁵¹

The Ninth Circuit rejected the Commissioner's claim that ADEA awards do not, under *Burke*, qualify for tax exclusion. The Commissioner claimed such awards do not proceed from tort-like causes of action because the ADEA does not provide for damages for emotional distress and because the ADEA's damages are punitive not compensatory in nature, this latter fact more suggestive of contract principles than tort principles.⁵² In rejecting the Commissioner's position, the court held that a statute did not have to "provide

46. 900 F.2d 655 (3d. Cir. 1990).

47. *Schmitz*, 34 F.3d at 791.

48. *Id.* at 795-96.

49. *Id.* at 792; *see also* *Hawkins v. United States*, 30 F.3d at 1083.

50. *Hawkins*, 30 F.3d at 1083; *see also* *United States v. Burke*, 504 U.S. at 233.

51. *Schmitz*, 34 F.3d at 793-94.

52. *Id.* at 793.

a *complete* spectrum of tort remedies before it may be deemed to redress a tort-type right.”⁵³ Thus, the fact that the ADEA allowed the award of liquidated damages, rather than the fact that it did not specifically provide for emotional damages, was the relevant point for the Ninth Circuit.

Further, the court found that case law and ADEA legislative history suggested that ADEA liquidated damages have compensatory as well as punitive purposes⁵⁴ and that the punitive purpose is more tort-like than contract-like since it seeks to deter violation of a public law-based right.⁵⁵ In light of these points, the *Schmitz* court held that the ADEA, even given the constraints imposed by *Burke*, does indeed create a tort-like cause of action.

When considering the second part of the *Hawkins* test, whether the liquidated damages Schmitz received were “on account of” his personal injury, the Ninth Circuit again decided in the affirmative. The Commissioner claimed that the liquidated damages were received on account of United’s misconduct, instead of on account of any injury suffered by Schmitz, disqualifying these damages from the exclusionary provision of section 104(a)(2).⁵⁶ This position also reinforced the Commissioner’s contention that these damages were punitive and were, thus, disqualified from exclusion. While agreeing that section 104 (a)(2) implies, through the words “on account of,” that a compensatory purpose is necessary for exclusion and that the damages received “must bear some relationship to the taxpayer’s underlying personal injury,” the Ninth Circuit found ADEA liquidated damages have a compensatory purpose and reflect the necessary “on account of” relationship to personal injury.⁵⁷

To bolster this holding, the *Schmitz* court pointed to the traditional purpose of liquidated damages: “to compensate victims for damages which are too obscure and difficult to prove.”⁵⁸ The Court further pointed out that ADEA liquidated damages bear a direct relationship to the underlying personal injury, since they are always equal to the amount of pay lost. Thus, the more significant the claim is, the more significant the liquidated damages are,

53. *Id.* (emphasis added); *see also* *Bennett v. United States*, 30 Cl. Ct. 396, 400 (1994) *rev’d.*, No. 94-5107, 1995 U.S. App. LEXIS 16849 (Fed. Cir. July 10, 1995).

54. *Schmitz*, 34 F.3d at 793; *see also* H.R. CONF. REP., *supra* note 5, at 528, 535.

55. *Schmitz*, 34 F.3d at 793; *see also* *Downey v. Commissioner*, 97 T.C. 150, 160 (1991), (quoting BLACK’S LAW DICTIONARY 1489 (6th ed. 1990)).

56. *Schmitz*, 34 F.3d at 794.

57. *Id.* at 796; *see also* *Commissioner v. Miller*, 914 F.2d at 591; *Bennett*, 30 Cl. Ct. at 401; *Downey*, 100 T.C. at 634.

58. *Schmitz*, 34 F.3d at 794; *see also* *Brooklyn Savings Bank v. O’Neil*, 324 U.S. 697, 707 (1945); *Overnight Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942).

making the "on account of" relationship between the underlying personal injury and the liquidated damages award direct and clear.⁵⁹

Again, while admitting that ADEA liquidated damages do have a deterrent function, the Ninth Circuit held that this fact did not turn compensatory damages into punitive damages. Rather, the Court felt that Congress was attempting to avoid imposing burdensome financial penalties on businesses which did not intentionally violate the ADEA by providing "only victims of willful discrimination should receive obscure and difficult to prove compensatory damages."⁶⁰ Thus, the "wilfulness" requirement for awarding liquidated damages under the ADEA, rather than being primarily punitive in nature, was a method for limiting the economic impact of these awards on business by hitting only the most egregious offenders with the heaviest economic penalties. Further proof of this Congressional intent, the Ninth Circuit pointed out, was that Congress emphasized the compensatory rather than deterrent function of these damages by labeling them "liquidated", and thus nontaxable, rather than "punitive," and thus taxable, damages.⁶¹

The *Schmitz* decision offered a comprehensive framework for allowing ADEA liquidated damages awards the exclusionary prerogative of section 104(a)(2) while respecting the parameters of *Burke*. This decision focused on the ADEA's provision for liquidated damages as proof of the compensatory relationship between the personal injury sustained by the taxpayer and the financial award received. Such a provision is clearly absent from the pre-1991 Title VII statute, the purview of the *Burke* court, and so becomes the obvious vehicle for insulating ADEA awards from the broad taxability suggested in *Burke*. The underlying rationale in the *Schmitz* court, and, in the dissent in the Supreme Court's *Schleier* holding, is that employment discrimination obviously causes personal injury that awards in such cases are clearly compensating for this injury, and, therefore, they should be excludable from gross income for tax purposes. *Schmitz*, along with companion cases *Keller* and *Rice*, were vacated and remanded to the Ninth Circuit by the Supreme Court in light of *Schleier*.⁶²

59. *Schmitz*, 34 F.3d at 795; see also *Rice v. United States*, 35 F.3d 571 (9th Cir. 1994), vacated and remanded, 115 S. Ct. 2573 (1995); *Keller v. Commissioner*, 34 F.3d 1072 (9th Cir. 1994), vacated and remanded, 115 S. Ct. 2573 (1995).

60. *Schmitz*, 34 F.3d at 795.

61. *Id.* at 796.

62. See 115 S. Ct. 2573 (1995). Immediately following *Schleier*, the Court granted certiorari, then vacated and remanded these cases for further consideration. See *infra* notes 65-86 and accompanying text (discussing decisions since *Schleier*).

b) Downey v. Commissioner

As mentioned above, the taxpayer in *Schmitz* was one of a number of United Airlines pilots forced to retire as a result of illegal age discrimination. Many of these pilots engaged in the same struggle with the courts over taxation of their awards as did Schmitz. In fact, the lack of any consistency in the various court decisions over taxing the United awards prompted the Supreme Court to resolve the matter with its holding in *Schleier*. The lack of consistency which prompted the Supreme Court to intervene is starkly illustrated in the Seventh Circuit's decision in *Downey v. Commissioner*.⁶³ Handed down on the same day as the Ninth Circuit's decision in *Schmitz*, *Downey* took the opposite position on taxability of ADEA awards, holding both back pay awards and liquidated damages received under this statute were taxable.⁶⁴

In deciding ADEA awards were taxable, the *Downey* court focused on the first part of the *Hawkins* test, whether actions under the ADEA were tort-like. Finding that such actions were not tort-like, the Seventh Circuit did not proceed to consider whether *Downey's* award was received "on account of personal injury." The *Downey* court implied that the Treasury Regulation suggesting the tort-like test set too low a threshold for determining taxability of ADEA awards which should redress only physical or mental injury.⁶⁵ Nonetheless, the Court found that actions under the ADEA did not even meet this low threshold. In finding these awards ineligible for tax exclusion under section 104(a)(2), the Seventh Circuit relied on *Burke* to characterize the ADEA as insufficiently tort-like. While the *Schmitz* court focused on the ADEA's provision for jury trials and liquidated damages as evidence of a telling difference from Title VII (which allowed ADEA awards to escape the taxation mandated by *Burke*), the *Downey* court found the ADEA's liquidated damages did not shield ADEA awards from taxation.

In so finding, the Seventh Circuit agreed with the *Burke* Court that the necessary marker for tort liability is "the availability of a broad range of damages to compensate the plaintiff for injuries caused by the violation of a legal right."⁶⁶ In addition, the court further emphasized *Burke's* mandate that

63. 33 F.3d 836 (7th Cir. 1994) *cert. denied*, 115 S. Ct. 2576 (1995).

64. 33 F.3d at 840; *see supra* notes 44-63 and accompanying text (discussing *Schmitz*).

65. *Schmitz*, 33 F.3d at 838; *see also* I.R.C. § 104(a)(2); Treas. Reg. 1.104-1(c) (1994). *See generally* *Burke*, 504 U.S. 229 (Scalia, J., concurring).

66. *Downey v. Commissioner*, 33 F.3d 836, 839 (7th Cir. 1994); *see also* *Burke*, 504 U.S. at 235. The circuit courts also split in a related issue, regarding the taxability of punitive damages awards. *Compare* *Horton v. Commissioner*, 33 F.3d 625, 632 (6th Cir. 1994), *aff'g* 100 T.C. 93 (1993) (holding that punitive damages awarded under pre-1989 version of I.R.C. § 104(a)(2) are excluded from gross income) *with* *Hawkins v. United States*, 30 F.3d 1077, 1083 (9th Cir. 1994) (finding punitive damages bore no relationship to actual personal injuries and thus are a non-excludable windfall). *See generally* *Reese v. United States*, 24 F.3d 228,

if a statute is to provide a tort-like cause of action, it must specifically authorize compensation for intangible elements of personal injury such as pain and suffering, emotional distress or humiliation. Since the ADEA does not specify that liquidated damages are to compensate for intangible harms, the *Downey* court reasoned that ADEA actions do not meet the *Burke* test for exclusion of awards from taxation.⁶⁷ In this context, the Seventh Circuit rejected the Ninth Circuit's position that the traditional view of liquidated damages as compensatory is sufficient to render the ADEA capable of producing a tort-like action. Rather, the *Downey* court required these liquidated damages be specifically earmarked as compensation for intangible harms.

Having rejected the Ninth Circuit's view of the ADEA's liquidated damages, the Seventh Circuit offered its own explanation of the purpose for these damages. It postulated that these damages represent a form of prejudgment interest, a type of contract remedy intended to "compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations."⁶⁸ As such, the ADEA's liquidated damages would not be markers of a tort action, but would instead be indicative of a contract action. Thus, awards for violation of the ADEA would be subject to taxation.

There is a seminal difference between the Ninth Circuit's holding in *Schmitz* and the Seventh Circuit's holding in *Downey*. The Ninth Circuit, like the dissent in *Burke*, considered the personal injury sustained as a result of employment discrimination tortious in nature. This was in spite of the fact that the ADEA does not specify its liquidated damages as compensation for tortious personal injury. The Seventh Circuit, on the other hand, like the majority in *Burke*, declined to view the personal injury sustained as a result of employment discrimination as tortious, absent a specific provision in the anti-discrimination statute for damages for tortious injuries. From this conflict flows the disagreement over the nature of liquidated damages provided by the ADEA and the disagreement over whether ADEA awards can be excluded from gross income for tax purposes. To resolve this fundamental conflict over how much to infer from congressional intent in enacting the ADEA, the Supreme Court granted *certiorari* on *Commissioner v. Schleier*.

235 (D.C. Cir. 1994) (punitive damages received in settlement of civil litigation not excludable from gross income); *Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 284 (7th Cir. 1993) (noting ADEA remedies provisions do not include consequential damages).

67. *Downey v. Commissioner*, 33 F.3d at 839.

68. *Id.* at 840; *see also* *Rex Trailer Co. v. United States*, 350 U.S. 148, 151 (1956).

V. COMMISSIONER V. SCHLEIER

The Supreme Court's decision in *Schleier*⁶⁹ involved the same United Airlines settlement considered in *Schmitz* and *Downey* and the same initial progression from the Tax Court to the appeals court. In reviewing the facts of the *Schleier* case against the backdrop of section 104(a)(2) and the *Burke* decision, the Supreme Court agreed with the *Downey* court and held that the entire settlement Schleier received from United Airlines, including back pay and liquidated damages, was taxable as part of gross income.⁷⁰ In determining that ADEA awards are ineligible for tax exclusion under section 104(a)(2), the Court focused on the two-part test utilized by both the Seventh and the Ninth Circuits. Here, the Supreme Court found ADEA awards ineligible for tax exclusion relative to both parts of this test. These awards, according to the Court, were not sufficiently tort-like and were not received "on account of personal injury."

In examining the first issue in the *Hawkins* test, the underlying nature of the claim, the Court found the ADEA's provisions for jury trial and liquidated damages were not sufficient to insulate it from the *Burke* mandate for the broad range of remedies characteristic of tort law.⁷¹ The Court reasoned that simply having *some* tort-like remedies was insufficient to bring a statute's awards within the exclusionary purview of section 104(a)(2). Rather, statutes whose awards will qualify for such tax exclusion must have the primary and critical characteristic of tort-type rights: the availability of compensatory damages.⁷²

In finding that the ADEA failed this first part of the *Hawkins* test, the Court unequivocally rejected Schleier's claim that ADEA liquidated damages are compensatory in nature. Explaining this rejection, the Court cited its finding in *Trans World Airlines, Inc. v. Thurston*⁷³ that Congress intended ADEA liquidated damages to be punitive.⁷⁴ In support of their contention that these damages were at least in part compensatory, the Schleiers cited the Supreme Court's holding in another case, *Overnight Motor Transportation Co. v. Missel*.⁷⁵ In that case, the Court held that liquidated damages under the FLSA

69. Commissioner v. Schleier 115 S. Ct. 2159 (1995).

70. *Id.* at 2167. The lower courts in *Schleier* reached different results. The U.S. Tax Court found that the taxpayers overpaid their taxes because the award was not taxable. See *Schleier v. Commissioner*, 67 Fair Empl. Prac. Cas. (BNA) 1744 (1993), *aff'd without opinion*, 26 F.3d 1119 (5th Cir. 1994).

71. 115 S. Ct. at 2163-67.

72. *Id.* at 2166-67.

73. 469 U.S. 111, 126 (1984).

74. 115 S. Ct. at 2164-65.

75. 316 U.S. 572 (1942).

(on which the ADEA was modeled) “are compensation, not a penalty or punishment” for “damages too obscure and difficult of proof for estimate.”⁷⁶ The plaintiffs further contended that Congress must have known of the *Missel* finding on FLSA damages when incorporating liquidated damages into the ADEA’s remedy scheme, indicating Congressional intent to make ADEA liquidated damages compensatory.⁷⁷

Rejecting the *Missel* precedent in favor of the *Thurston* precedent, the Court emphasized that while the legislative history did support the plaintiff’s argument, this record had been considered in *Thurston* and found insufficiently compelling to prove ADEA damages compensatory. The Court also emphasized that even had Congress known of *Missel*’s characterization of liquidated damages as compensatory for “obscure” injuries, the legislators did not necessarily understand these injuries to be personal rather than economic.⁷⁸

Having established ADEA liquidated damages were not compensatory, the Court pointed to the language in the ADEA which had driven the *Thurston* decision to view these damages as punitive. The *Thurston* Court concluded that the ADEA allowed the award of liquidated damages only in cases where the employer “knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.”⁷⁹ It thereafter asserted that the employer’s intent is only relevant if the damages in question are punitive. If the intent is to compensate victims, the injury sustained by the victim is the only relevant information and not the intent of the employer.⁸⁰ Relying only on the language of the statute, the Court rejected not only evidence in the legislative history, but also the Ninth Circuit’s observation that these liquidated damages could have a mixed purpose, compensatory and punitive. Further, the Court did not accept the Seventh Circuit’s conclusion that these damages are a form of prejudgment interest and, thus, a contract remedy.

Interestingly, in the *Schleier* dissent, Justice O’Connor, joined by Justice Thomas, pointed out that characterizing these damages as punitive rather than compensatory does not necessarily provide compelling evidence that the ADEA is not tort-like. Justice O’Connor emphasized that since punitive damages are available only under tort law, such a characterization of ADEA’s liquidated damages in fact makes that statute tort-like for the purposes of the *Hawkins* test.⁸¹

76. *Id.* at 583-84.

77. 115 S. Ct. at 2165.

78. *Id.*

79. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1984).

80. *Id.*

81. *Schleier*, 115 S. Ct. at 2170 (O’Connor, J., dissenting); *see also Hawkins v. United*

After determining ADEA awards do not qualify for tax exclusion using the first part of the *Hawkins* test, the *Schleier* majority pointed out that even if the ADEA proved sufficiently tort-like, ADEA awards would still not be excludable from gross income. This is because satisfying one part of the *Hawkins* test is not sufficient to activate the protection of section 104(a)(2). Rather, to utilize this code section to exclude awards from gross income, a plaintiff must satisfy both parts of the test.⁸² Again, the dissent offered an opposing perspective on this point, contending that the *Burke* mandate to prove that an action is tort-like is sufficient. Justice O'Connor based this assertion on her view that the Treasury Regulation requiring a tort-like cause of action was meant merely to explain the type of personal injury alluded to in section 104(a)(2), rather than imposing a second condition for avoiding taxation.⁸³

In testing ADEA awards against the second part of the *Hawkins* test, the Court found these awards did not pass the second part of the *Hawkins* test either, since they were not granted "on account of personal injury." To illustrate why ADEA awards cannot be seen as given "on account of personal injury," the Court used recovery for an automobile accident as an example of "a typical recovery in a personal injury case."⁸⁴ The Court pointed out that if the victim in an auto accident suffers medical expenses, loss of wages, pain, suffering and emotional distress, all of these can be traced to the auto accident as cause. Both the financial and intangible harm clearly visit the victim "on account of" the auto accident. The Court emphasized that each negative effect, individually, can be traced to the auto accident as cause, a necessary hallmark of a tort action.

In contrast, the Court held neither the back wages nor the liquidated damages in an ADEA action are directly traceable to a personal injury as cause. Here, the Court postulated that even though loss of wages and other "obscure" injuries visit the plaintiff on account of his or her age or on account of his or her layoff, neither of these causes can be construed as personal injury.⁸⁵ Therefore, the negative effects flowing to the plaintiff in an ADEA suit do not happen to the plaintiff "on account of personal injury." Thus, in the Court's view, the age discrimination case can be clearly differentiated from the typical tort case.

States, 30 F.3d at 1083.

82. See I.R.C. § 104(a)(2); Treas. Reg. § 1.104-1(c).

83. *Schleier*, 115 S. Ct. at 2170-71 (O'Connor, J., dissenting); see also Treas. Reg. § 1.104-1(c).

84. *Schleier*, 115 S. Ct. at 2163-64.

85. *Id.* at 2164 & n.4.

The Court further explained that the reasons for disqualifying back wages from tax exclusion differ from those for disqualifying liquidated damages. When discussing the exclusion of back wages, the Court returned to the auto accident analogy. In the case of an auto accident, the causal line is clear. The accident causes personal injury, which, in turn, causes loss of wages. In the case of age discrimination, however, the discrimination causes both personal injury and loss of wages, but the personal injury does not cause the loss of wages, a fact which is underscored by the lack of relationship between the degree of personal injury and the amount of wages lost.⁸⁶ The obvious reason for the Court's disqualification of liquidated damages from exclusionary status is its characterization of these damages as punitive and not compensatory. Damages which are not compensatory (that is, not meant to compensate for personal injury) are not awarded "on account of personal injury."

In treating the issue of intangible injury versus economic injury, the Court conceded the obvious: an illegal layoff can clearly cause psychological harm comparable to the pain and suffering experienced by an auto accident victim. The Court further conceded that "the intangible harms of discrimination can constitute personal injury and that compensation for such harms may be excludable under section 104(a)(2)."⁸⁷ However, the Court explained, the ADEA does not cover such intangible harms because, as discussed above, the damages it authorizes are not awarded "on account of personal injury." Thus, while discrimination can cause personal injury, this particular statute does not compensate victims for such injuries. Rather, the ADEA makes these victims financially whole and punishes the employer who willfully discriminates.

The dissent viewed the issue of intangible harm differently. In this context, Justice O'Connor contended the Court's concession that the intangible harms caused by discrimination constitutes personal injury logically leads to the conclusion that discrimination causes personal injury. She further reasoned if discrimination causes personal injury, damages received as a result of discrimination are received "on account of personal injury." As suggested above, Justice O'Connor also disagreed with the Court's assessment of ADEA liquidated damages. These differences led Justice O'Connor to conclude that the ADEA allows tort-like actions, so that "amounts received as damages"⁸⁸ under the ADEA should be excludable from gross income under section 104(a)(2). Clearly, the difference between the majority's assessment and the dissent's rests in a different analysis of the causal links between illegal discrimination, resultant personal injuries and financial awards received. In fact, it is difficult to deny the cogency of the dissent's objection to the majority's

86. *Id.*

87. *Id.* at 2165 & n.6.

88. *Id.* at 2170 (O'Connor, J., dissenting).

analysis of causality in ADEA suits.

While both the Seventh and the Ninth Circuits relied on the guidelines set forth in *Burke* to assess the excludability of ADEA awards, the *Schleier* Court was careful to circumscribe the limits of that decision.⁸⁹ In this context, the Court specified that *Burke* only dealt with one part of the *Hawkins* test: whether ADEA awards proceeded from a tort-like action, so that demonstrating the framework of remedies mandated by *Burke* is not sufficient to insulate ADEA awards from taxation. Rather, according to the above conditions, statutes must additionally provide for awards given “on account of personal injury.”⁹⁰

Clearly, to reap the benefits of section 104(a)(2) under *Schleier*, victims of discrimination must bring suit under an anti-discrimination statute clearly requesting those damages which are given “on account of personal injury.” Any anti-discrimination statute which simply allows for liquidated damages, or which imposes a condition of employer willfulness on the award of these damages, will not pass the *Schleier* test for tax exclusion. As evidenced by the Civil Rights Act of 1991, which amends Title VII to provide for jury trials, compensatory damages, and punitive damages,⁹¹ the third generation of anti-discrimination statutes may very well update old anti-discrimination laws so as to avoid this roadblock to tax relief.

Following *Schleier*, the Court vacated and remanded *Schmitz*, *Keller*, and *Rice* for further consideration under its newly enunciated guidelines.⁹² Furthermore, the IRS quickly acted by suspending its Revenue Ruling 93-88 which held that compensatory damages and back pay awarded in Title VII or ADEA actions were excludable from income in certain instances. Presently, the IRS is considering how to treat such recoveries in light of *Schleier*.⁹³ A number of decisions relying on *Schleier* have already been rendered. Some involve facts quite similar to the *Schleier* case,⁹⁴ while others rely on *Schleier*

89. *Id.* at 2166-67; *see also* *United States v. Burke*, 504 U.S. at 232-33.

90. As suggested earlier, the IRS failed to read the *Burke* decision as merely a partial outline for determining whether discrimination awards can be excluded from income, resulting in Revenue Ruling 93-88. The rescission of this ruling by the IRS was in direct response to the *Schleier* Court highlighting *Burke*'s narrow holding.

91. *See supra* note 2 and accompanying text. *See generally* *Burke*, 504 U.S. at 241.

92. *See supra* notes 62 & 90 and accompanying text.

93. *Id.*

94. *See* *Estate of Hillelson v. Commissioner*, 62 F.3d 399 (11th Cir. 1995) (reversing and remanding Tax Court decision that was in favor of taxpayer); *Gates v. Commissioner*, 61 F.3d 915 (10th Cir. 1995) (reversing Tax Court's exclusion from income of entire ADEA settlement); *Bennett v. United States*, No. 94-5107, 1995 U.S. App. LEXIS 16849, at *3 (Fed. Cir. July 10, 1995) (reversing Federal Claims Court judgment excluding ADEA award from income).

by analogy to support decisions to include awards in taxpayers' income.⁹⁵ It is interesting that none of these decisions attempt to circumvent *Schleier* or contain any dissents, suggesting there is currently solid support for the propositions underlying *Schleier*, as well as for the analysis that it set forth.

CONCLUSION

With its decision in *Schleier*, the Supreme Court has settled the issue of taxability of ADEA awards, rendering these awards taxable as part of gross income. However the obscure reasoning which the Court presents to deny a causal link between discrimination and personal injury is sure to leave civil libertarians dissatisfied. Although the Court has, for the moment, circumscribed the potential financial gain to victims of age discrimination and tipped the scale in favor of the economic interests of the federal government, the balance between social policy and economic interest continues to be adjusted. This can be seen in the latest generation of anti-discrimination statutes, which seem written specifically to insulate discrimination awards from taxation. The framers of these more recent statutes, cognizant of the Court's reasoning in *Burke* (as affirmed and elaborated in *Schleier*), have written these laws expressly to avoid the problems ADEA awards encountered with the Supreme Court in *Schleier*. Thus, actions brought under the new anti-discriminations statutes will probably result in non-taxable awards, tipping the balance more in favor of social policy concerns. However, with the strong competing mandates of social equality and fiscal conservatism in the background, this is not likely to be the last adjustment in the balancing act. Rather, Congress and the courts are likely to continue to tinker with the relationship between anti-discrimination statutes and the Internal Revenue Code for some time to come.

95. See *O'Gilvie v. United States*, 66 F.3d 1550, 1557 (10th Cir. 1995), cert. granted, 64 USLW 3635, 64 USLW 3639 (U.S. Mar. 25, 1996) (No. 95-966 and 95-977) (holding punitive damages awarded on account of physical injuries are not excludable from income); *Lane v. United States*, 902 F. Supp. 1439, 1460 (W.D. Okla. 1995) (stating that court "is constrained" by *Schleier* to conclude that punitive damages awarded on account of an insurance company's bad faith are not excludable from income); *Taylor v. Commissioner*, 70 T.C.M. (CCH) 729 (1995) (holding settlement of Title VII claims does not meet *Schleier* criteria for exclusion of award from income); *Osborne v. Commissioner*, 70 T.C.M. (CCH) 247 (1995) (finding taxpayer's settlement was based on breach of contract and so may not be excluded from income).