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United States v. Burke: The Taxation of Damages Recovered in Title VII Discrimination Actions

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Note

United States v. Burke: The Taxation of Damages Recovered in Title VII Discrimination Actions

Introduction

In May 1992, the Supreme Court held in *United States v. Burke*,[1] that damages received in settlement of an action brought under Title VII of the Civil Rights Act of 1964[2] must be included in the recipient's gross income for purposes of calculating taxable income.[3] This holding resolved an inter-circuit conflict, as the District of Columbia Circuit in *Sparrow v. Commissioner*,[4] had held that damages recovered in a Title VII discrimination action must be included in income,[5] while the Sixth Circuit in *Burke v. United States*,[6] held that such damages were not subject to income tax.[7]

The injuries that result from the kind of discrimination that Title VII was intended to prevent are generally considered "tort-type" in nature.[8] However, the holding in *United States v.*

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1. 112 S. Ct. 1867 (1992).

2. Title VII prohibits discrimination in the workplace by making it unlawful to discriminate in hiring, discharge, or promotions on the basis of race, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1) (1988). *See infra* notes 153-63 and accompanying text.

3. *Burke*, 112 S. Ct. at 1874.

4. 949 F.2d 434 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 3009 (1992).

5. *Id.* at 440.

6. 929 F.2d 1119 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

7. *Id.* at 1123-24.

8. *See, e.g.*, Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 562 (5th Cir. 1979) ("An action based upon the federal antidiscrimination statutes is essentially an action in tort."); Wilson v. Garcia, 471 U.S. 261, 276 (1985) (holding that injuries resulting from violation of federal anti-discrimination statute 42 U.S.C. § 1983 are "personal injuries"); United States v. Burke, 112 S. Ct. 1867, 1879 (1992) (O'Connor, J.,

Burke stands in contrast to the general rule that damages received in an action based on a tort or tort-type injury are excludable from the recipient's gross income.[9] The majority's decision, as well as the concurring and dissenting opinions, address but do not fully resolve two main issues: 1) whether Title VII damages are of a tort-like nature; and 2) in deciding whether Title VII damages are tort-like, whether the focus should be on the type of injury for which the plaintiff brings his cause of action, or the type of remedy that is available to the plaintiff.[10] The Court's internal disagreement and inconclusive holding[11] indicate that future Title VII damage recipients may be able to exclude damage awards or settlements from their gross incomes.

This article will address:

I. The section 104(a)(2) exclusion under the Internal Revenue Code and its specific applicability to recoveries for personal injuries.
II. The purposes and remedies of various federal anti-discrimination statutes, including:
   (A) 42 U.S.C. § 1983
   (B) 42 U.S.C. § 1981
   (C) The Age Discrimination in Employment Act
   (D) The Equal Pay Act
   (E) Title VII prior to the 1991 Amendments
   (F) Title VII as amended in 1991, and the tax treatment of recoveries under each of the statutes.
III. The holding of *United States v. Burke* and its effect on the tax treatment of Title VII recoveries.
IV. An analysis of the holding of *Burke*, for claimants under Title VII as it originally read, and as amended.
V. A conclusion regarding the future applicability of *Burke* in light of the 1991 amendments to Title VII.

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dissenting) (stating that "[f]unctionally, [Title VII] operates in the traditional manner of torts: courts award compensation for invasions of a right to be free from certain injury in the workplace.").

9. Treas. Reg. § 1.104-1(c) (1993); *see also* Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

10. *Burke*, 112 S. Ct. 1867 (1992).

11. The majority only addressed the status of recoveries under the unamended Title VII. *Burke*, 112 S. Ct. at 1872 n.8. Title VII was amended in 1991 to provide for jury trials (a traditionally tort procedure) and remedies that are more tort-like, such as compensatory and punitive damages. 42 U.S.C. § 2000e-5 (1988 & Supp. III 1991), *as amended by* 42 U.S.C. § 1981a (Supp. III 1991).

I. The Section 104(a)(2) Exclusion

Section 104(a)(2) of the Internal Revenue Code provides that gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness."[12] Disputes about the meaning of the term "personal injuries" have been the subject of varying judicial and Treasury Department interpretations since section 104(a)(2) was enacted.[13] The term "personal injuries" is subject to very broad interpretation.[14] Since 1922, however, the courts and the IRS have accepted that the term encompasses not only physical injuries, but also non-physical injuries, such as damage to reputation.[15] In *Threlkeld v. Commissioner*,[16] a new "personal injury

12. I.R.C. § 104(a)(2) (1993).

13. *See, e.g.*, Seay v. Commissioner, 58 T.C. 32, 40 (1972), *acq.* 1972-2 C.B. 3 (deciding whether damages for "personal embarrassment" constituted damages for personal injury that would qualify for § 104(a)(2) exclusion); Roosevelt v. Commissioner, 43 T.C. 77, 77 (1964) (deciding whether amounts received for release of liability for potential invasion of privacy are excludable under § 104(a)(2)); Sol. Mem. 1384, 2 C.B. 71 (1920); Sol. Op. 132-I C.B. 92-93 (1922) (deciding *inter alia*, whether under the predecessor of § 104(a)(2), alienation of affections could be considered a personal injury, and whether damages or settlement proceeds received on account of libel or slander could be excluded); *see also infra* notes 14-18 and accompanying text.

Solicitor's Opinions, found in the Internal Revenue Bulletin, are the equivalent of today's Revenue Rulings. They are not binding legal authority, but evidence the position the Service takes on a particular issue, given a particular set of facts. *See* I-1 C.B. Table of Contents Page (1922).

Note that the statutory language of § 104(a)(2) was first codified in the Revenue Act of 1918 as § 213(b)(6). The original language read: "[gross income does not include] [a]mounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness." Revenue Act of 1918, § 213(b)(6), 40 Stat. 1065-66 (1919). For a general, historical discussion of the interpretation of § 104(a)(2) and § 213(b)(6), see J. Martin Burke & Michael K. Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need for Limits*, 50 MONT. L. REV. 13 (1989).

14. The applicability of the term "personal injuries" to physical injuries is clear on its face. *See* Burke & Friel, *supra* note 13, at 13. However, it has also been expanded to include non-physical injuries such as defamation, Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988); personal embarrassment and injury to personal reputation, Seay v. Commissioner, 58 T.C. 32, 40 (1972), *acq.* 1972-2 C.B. 3; and injuries arising from discrimination, Curtis v. Loether, 415 U.S. 189, 195-96 n.10 (1974).

15. Sol. Op. 132, I-1 C.B. 92 (1922). Eisner v. Macomber, 252 U.S. 189 (1920), affirmed the position that income was limited to the "gain derived from capital,

test" was enunciated: "[e]xclusion under section 104 will be appropriate if *compensatory damages* are received on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law."[17] This test has never been challenged by the IRS.[18]

However, in Treasury Regulation § 1.104-1(c), the IRS provided official interpretation of the word "damages," as used in section 104(a)(2). The regulation states, "[t]he term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution."[19] Excludable recoveries are therefore limited to tort or tort-type claims; a recovery on a contract theory is includable in the recipient's gross income.[20]

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from labor, or from both combined." *Id.* at 207 (citation omitted). However, the promulgation of Solicitor's Opinion 132, in 1922, expanded the scope of *Eisner*, and held that damages recovered for non-physical, but personal injuries should be excluded from gross income. Burke and Friel, *supra* note 13 at 16-17. The non-physical, but personal injuries that Solicitor's Opinion 132 specifically dealt with were the injuries resulting from alienation of affections, defamation of personal character, or the surrendering of custody of a minor child. Sol. Op. 132, I-1 C.B. 92 (1922).

16. 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988). *Threlkeld* involved the issue of whether damages received in settlement of a suit for malicious prosecution were required to be included in the recipient's gross income. *Id.* at 1297. Threlkeld asserted in his complaint that the suit caused him to be subjected to "indignity, humiliation, inconvenience, . . . pain and distress of mind, . . . [and] injury to his professional . . . and . . . credit reputation[s]." *Id.* at 1295-96. Under a new test for the § 104(a)(2) exclusion, the court found that the damages should have been excluded. *Id.* at 1308. Under Tennessee state law, the law of the forum in which the malicious prosecution action was brought, an action for malicious prosecution was an action for personal injuries. *Id.* at 1307.

17. *Id.* at 1308 (emphasis added). Note that the ability to recover punitive damages may indicate that the claim protects tort-type rights, but punitive damages do not qualify for section 104(a)(2) exclusion. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641, 103 Stat. 2106, 2379 (1989); *see infra* note 384.

18. *See, e.g.*, Rickel v. Commissioner, 900 F.2d 655, 659-61 (3d Cir. 1990); Pistillo v. Commissioner, 912 F.2d 145, 148-50 (6th Cir. 1990); Miller v. Commissioner, 93 T.C. 330, 337 (1989), *rev'd on other grounds*, 914 F.2d 586 (4th Cir. 1990).

19. Treas. Reg. § 1.104-1(c) (1993).

20. According to the Second Restatement of Contracts, "[t]he traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach."

In the absence of clear guidance from the IRS or from the courts, problems have arisen in deciding if a recovery is includable because of uncertainty as to whether the underlying action sounds in tort or in contract. Discrimination in the workplace is one such situation. There is some dispute as to whether a recovery for such discrimination is in contract or tort.[21] It has been argued that the nature of a discrimination suit is similar to any other suit based on a dignitary tort, in which case the recovery would be a tort-type recovery, and therefore would fall under the section 104(a)(2) exclusion.[22] However, the IRS has argued that discrimination in the workplace arises from an em-

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RESTATEMENT (SECOND) OF CONTRACTS Ch. 16 Introductory Note (1981). Generally, when there has been a breach of contract, the court will protect the expectation of the injured party by attempting to put him "in as good a position as he would have been in had the contract been performed, that is, had there been no breach." *Id.* § 344 cmt. a. The court may also, as needed, protect the injured party by compensating him for his reliance on the promise of the breaching party, or protect the injured party by not allowing the breachor to be unjustly enriched because of the injured party's actions in reliance on the promise of the breachor. *Id.* § 344 cmts. c, d. Taxable income results from fully performed contracts, therefore it also results from court-imposed contract remedies.

The law of torts, however, is somewhat different. "While the law of contracts gives to a party to a contract, as damages for its breach, an amount equal to the benefit he would have received had the contract been performed, the law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position *prior to the tort*." RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (emphasis added) (citation omitted). It is for this stated purpose that compensatory damages are awarded. *Id.* Tort law is also used to determine rights. *Id.* § 901(b). Perhaps the biggest distinction from contract law, however, is that one of the stated purposes of tort law is "to punish wrongdoers and deter wrongful conduct." *Id.* § 901(c). Punitive damages can be awarded, and can be awarded in greater or lesser degrees, depending on the culpability of the tortfeasor. *Id.* § 901 cmt. c. Under contract law, however, "'[w]illful' breaches have not been distinguished from other breaches, [and] punitive damages have not been awarded for breach of contract . . . ." RESTATEMENT (SECOND) OF CONTRACTS Ch. 16 Introductory Note (1981).

In certain cases, tort law can also be used to "vindicate parties and deter retaliation or violent and unlawful self-help." RESTATEMENT (SECOND) TORTS § 901(d) (1979). This stated purpose of tort remedies is achieved in certain cases of dignitary torts, such as defamation, invasion of privacy, or interference with civil rights. *Id.* § 901 cmt. c. Often a major purpose of such a suit is "to obtain a public declaration that the plaintiff is right and was improperly treated." *Id.*

21. This is the source of much of the controversy among the Justices in United States v. Burke. *See infra* notes 266-304 and accompanying text.

22. *See, e.g.*, Pistillo v. Commissioner, 912 F.2d 145, 147 (6th Cir. 1990) (plaintiff claiming that damages recovered in an age discrimination suit based on wrongful termination were a recovery for personal injury, and were therefore excludable); *infra* notes 99-113 and accompanying text.

ployment arrangement, and therefore, the recovery is a contract recovery, which does not enjoy the benefit of section 104(a)(2) exclusion.[23] The IRS has given no formal guidance on the issue; it has been left to the courts for determination.

II. Federal Anti-Discrimination Statutes: Their Purposes, Remedies, and the Excludability of Their Recoveries From Gross Income

A. *42 U.S.C. § 1983*

There are several federal statutes that provide remedies for victims of discrimination.[24] For example, 42 U.S.C. § 1983 provides for the institution of an action at law or at equity for any deprivation of a person's rights under color of state law.[25] The purpose of this statute, like that of 42 U.S.C. § 1981, is to give effect to the Fourteenth Amendment to the Constitution.[26] Section 1983 allows for the enforcement of Constitutional guarantees in federal, as well as in state courts, as Congress did not believe that state courts were vigorously acting to give effect to Constitutional mandates.[27] Therefore, § 1983 provides for the

23. *See, e.g.*, Rickel v. Commissioner, 900 F.2d 655, 657 (3d Cir. 1990) (Commissioner arguing that settlement amount in age discrimination suit was more akin to recovery for breach of employment contract than to recovery for tort-type injury); *see infra* notes 86-98 and accompanying text.

24. *See infra* notes 25-38 and accompanying text for a discussion of 42 U.S.C. § 1983; *infra* notes 58-65 and accompanying text for a discussion of 42 U.S.C. § 1981; *infra* notes 78-85 and accompanying text for a discussion of the Age Discrimination in Employment Act; *infra* notes 131-39 and accompanying text for a discussion of the Equal Pay Act; *infra* notes 153-63, 244-53 and accompanying text for a discussion of Title VII.

25. 42 U.S.C. § 1983 (1988). The specific language of the statute reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." *Id.*

26. Thompson v. New York, 487 F. Supp. 212, 220 (N.D.N.Y. 1979). Section One of the Fourteenth Amendment guarantees that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

27. Snyder v. Blankenship, 473 F. Supp. 1208, 1210 n.3 (W.D. Va. 1979), *aff'd*, 618 F.2d 104 (4th Cir.), *cert. denied*, 446 U.S. 942 (1980).

creation of a federal cause of action and remedy to prevent or deter improper conduct by the states and their officials.[28] It is a remedy for those who have suffered a Constitutional tort,[29] and, like other federal civil rights statutes, tries to accomplish two goals: compensation and deterrence.[30] Section 1983 provides a vehicle "to recover damages for injury wrongfully done to the person."[31]

The remedies permitted under § 1983 are very broad.[32] Equitable remedies such as reinstatement,[33] back pay,[34] or injunctions[35] are permitted in § 1983 actions. So too are legal remedies, such as compensatory[36] and punitive damages.[37] In fact, nominal and punitive damages are permitted even if the plaintiff has suffered no actual harm.[38]

Generally, recovery under § 1983 has been found to be compensation for personal injuries, and therefore excludable from gross income under Internal Revenue Code section 104(a)(2). For example, in *Wilson v. Garcia*,[39] the Supreme Court held

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28. Roberts v. Rowe, 89 F.R.D. 398, 401 (S.D. W. Va. 1981).

29. International Soc'y for Krishna Consciousness, Inc. v. City of Evanston, 411 N.E.2d 1030, 1036 (Ill. App. Ct. 1980), *cert. denied*, 454 U.S. 878 (1981). Black's Law Dictionary defines "constitutional tort" as, essentially, a violation of the command of 42 U.S.C. § 1983. BLACK'S LAW DICTIONARY 1489 (6th ed. 1990).

30. Burnett v. Grattan, 468 U.S. 42, 53 (1984).

31. Madison v. Wood, 410 F.2d 564, 567 (6th Cir. 1969).

32. Donahue v. Staunton, 471 F.2d 475, 483 (7th Cir. 1972) (holding that federal courts may use any available remedy to make good the wrong done), *cert. denied*, 410 U.S. 955 (1973).

33. *See* Moore v. Tangipahoa Parish Sch. Bd., 594 F.2d 489, 493 (5th Cir. 1979).

34. *Id.*

35. *See, e.g.*, Thrasher v. Missouri State Highway Comm'n, 534 F. Supp. 103, 105 (E.D. Mo. 1981) (actions awarding injunctive relief under § 1983 are permissible even where the costs of the relief must be borne by the state), *aff'd*, 691 F.2d 504 (8th Cir. 1982), *cert. denied*, 460 U.S. 1043 (1983).

36. *See, e.g.*, Endress v. Brookdale Community College, 364 A.2d 1080, 1097 (N.J. 1976) (holding that compensatory damages could be recovered, even in absence of showing of actual pecuniary loss); Ruhlman v. Hankinson, 461 F. Supp. 145, 151 (W.D. Pa. 1978) (stating that compensatory damages for emotional distress could be recovered in civil rights action), *aff'd*, 605 F.2d 1195 (3d Cir. 1979), *cert. denied*, 445 U.S. 911 (1980).

37. *See, e.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268-69 (1981); Bradshaw v. Zoological Soc'y of San Diego, 569 F.2d 1066, 1068 (9th Cir. 1978).

38. Washington v. Official Court Stenographer, 251 F. Supp. 945, 947 (E.D. Pa. 1966).

39. 471 U.S. 261 (1985).

that a claim brought under the auspices of § 1983 was a claim for personal injuries.[40] The issue before the Court was the appropriate state statute of limitations in an action based on an unlawful arrest.[41] Since there was no federally prescribed statute of limitations for § 1983 actions, the Court utilized the "settled practice . . . [of] adopt[ing] a local time limitation as federal law if . . . not inconsistent with federal law or policy to do so."[42]

The Supreme Court affirmed the decision of the Tenth Circuit Court of Appeals, and found that the appropriate statute of limitations was three years, a state of New Mexico limitation of action on "an injury to the person or reputation of any person."[43] The Court found this statute of limitations most appropriate because § 1983 actions are based on personal injuries.[44] In fact, the Court specifically stated that all § 1983 actions "are best characterized as personal injury actions . . . ."[45]

Similarly, in *Bent v. Commissioner*,[46] despite the contentions of the Commissioner that the recovery by an improperly

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40. *Id.* at 278 (citing Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972)). "In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'" *Almond*, 459 F.2d at 204.

41. *Wilson*, 471 U.S. at 262-63. The plaintiff in *Wilson* sued a New Mexico State Police officer and the New Mexico State Police Chief, alleging a violation of § 1983, after the officer had unlawfully arrested the plaintiff, beat him, and sprayed him with tear gas. *Id.* at 263. The Chief of Police was named in the suit because of allegations of deficient training of the officer, and an alleged failure to intervene to stop the officer's known "violent propensities." *Id.* (quoting Appellant's Brief at 6-7).

The plaintiff filed his claim two years and nine months after the alleged incident occurred. *Id.* Section 41-4-15(A) of the New Mexico Tort Claims Act provided: "Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death." *Id.* at 263 n.2 (quoting N.M. STAT. ANN. § 41-4-15(A) (1978)). However, § 37-1-8 provided: "Actions . . . for an injury to the person or reputation of any person [must be brought] within three years." *Id.* at 264 n.4 (quoting N.M. STAT. ANN. § 37-1-8 (1978)). And, § 37-1-4 provided: "[A]ll other actions not herein otherwise provided for and specified [must be brought] within four years." *Id.* at 264 n.5 (quoting N.M. STAT. ANN. § 37-1-4 (1978)). Under § 41-4-15(A), plaintiff's claim would have been barred, although it would not have been barred under either of the other two sections.

42. *Id.* at 266-67.

43. *Id.* at 280 (quoting N.M. STAT. ANN. § 37-1-8 (1978)).

44. *Id.* at 278-80. "Had the 42d Congress expressly focused on the issue decided today, we believe that it would have characterized § 1983 as conferring a general remedy for injuries to personal rights." *Id.* at 278.

45. *Id.* at 280.

46. 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987).

dismissed high school teacher was in the nature of wages,[47] the Tax Court decided that violations of § 1983 were intended to create tort liability rather than contractual liability.[48] Therefore, the § 1983 claims were in the nature of personal injury claims and eligible for the benefit of the section 104(a)(2) exclusion.[49] The court also stated that the consideration of lost wages in establishing a recovery did not make the claim a contract claim, but rather was an evidentiary factor in determining the amount of the recovery.[50]

In *Wulf v. City of Wichita*,[51] the court held that even if a recovery under § 1983 is for back pay, it will be found non-taxable because the nature of the underlying claim is tort-type.[52] In *Wulf*, the court was evaluating the award made by the federal district court to a former police lieutenant who had been wrongfully terminated in violation of his First, Fifth, and Fourteenth Amendment rights.[53] On appeal, the defendants challenged a "tax enhancement figure" that the district court had imposed, in the mistaken belief that the award would be taxable because it

47. *Id.* at 243. The Commissioner claimed that the settlement payment received by Bent constituted the difference in wages he would have received had he not been wrongfully terminated, and the amount he actually received. *Id.* Although the settlement agreement did not allocate any part of the settlement to wages or damages, the parties agreed that the consideration of damages should include wage differential, commuting differential, differential in benefits, attorneys' fees, and a nominal amount for physicians' bills and medications. *Id.* at 241-42.

48. *Id.* at 246-49.

49. *Id.* at 248-49.

50. *Id.* at 251. "[C]onsideration of a taxpayer's lost wages is appropriate in disposing of a sec. 1983 claim for redress of injuries resulting from violations of the First Amendment, as well as in disposing of an employment contract claim." *Id.* at 250.

51. 883 F.2d 842 (10th Cir. 1989).

52. *Id.* at 873.

53. *Id.* at 846. Wulf was president of the Fraternal Order of Police, a lodge whose members were also members of the Wichita City police force. *Id.* at 847. The lodge had come under fire for having a raucous party, at which Wulf was not present. *Id.* Resignations of several of the lodge officers, from their positions as officers of the lodge, had been suggested by the chief of the police force. *Id.* Upon refusing to resign, Wulf was given, in effect, a professional demotion. *Id.* at 848. Believing this demotion unwarranted, he drafted a letter to the Attorney General, indicating serious misconduct on the part of the Wichita police force. *Id.* at 850. Wulf was dismissed after the letter had appeared in the local newspaper, and the chief of police called for an internal investigation about the letter, at which investigation Wulf refused to discuss the matter without the presence of an attorney. *Id.* at 852-53.

was back pay.[54] The court stated that "[t]he award of backpay [sic] compensated him for the economic injury resulting from the denial of his Constitutional rights."[55] Further, the court found that even though it was an award of back pay, it was still an award of damages "on account of personal injuries," and was not taxable.[56] Therefore, the appellate court reversed the district court's award to the extent that it contained a figure that increased the award to compensate for the taxes for which it believed Wulf was liable.[57]

B. *42 U.S.C. § 1981*

Federal anti-discrimination statute 42 U.S.C. § 1981 was enacted to effectuate the purposes of the Fourteenth Amendment.[58] It provides that all persons, regardless of race, should have the same benefits under the law, to "make and enforce contracts, to sue, to be parties, give evidence" and to enjoy the protections of the law over their persons and their property.[59] Section 1981 protects against discrimination by non-governmental entities, as well as against discrimination under color of state law.[60]

Section 1981 proscribes discrimination in the workplace[61] and has been held to extend beyond the right to con-

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54. *Id.* at 871.

55. *Id.* at 873.

56. *Id.* (quoting Bent v. Commissioner, 835 F.2d 67, 71 (3d Cir. 1987)).

57. *Wulf*, 883 F.2d at 873.

58. Martinez v. Fox Valley Bus Lines, Inc., 17 F. Supp. 576, 577 (N.D. Ill. 1936). Section One of the Fourteenth Amendment guarantees that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

59. 42 U.S.C. § 1981(a) (Supp. III 1991). The statute provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." *Id.*

60. 42 U.S.C. § 1981(c) (Supp. III 1991).

61. Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971) (holding that § 1981 and the Fourteenth Amendment prohibit any discrimination in employment based on race, even if it is discrimination against whites), *cert. denied*, 406 U.S. 950 (1972).

tract.[62] In fact, § 1981 has been held to be "in the nature of a tort remedy."[63] As such, its remedies are not limited to those that are equitable,[64] but can include compensatory and punitive damages.[65]

Suits brought under § 1981 have also been characterized as suits for personal injury. In *Goodman v. Lukens Steel Co.*,[66] plaintiffs claimed that their employer and their union had discriminated against them on the basis of race, and brought an action alleging violations of § 1981.[67] Since § 1981 does not have its own statute of limitations, the district court was re-

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62. Mahone v. Waddle, 564 F.2d 1018, 1028 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). The Third Circuit stated that:

> [t]o read the language of the statute as applying only to the right to contract ignores the clear and vital words of the majority of its provisions. Despite the sparsity of precedent, a natural and commonsense reading of the statute compels the conclusion that section 1981 has broad applicability beyond the mere right to contract.

Id.

63. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986) (citing Goodman v. Lukens Steel Co., 777 F.2d 113, 119-20 (3d Cir. 1985), *aff'd*, 482 U.S. 656 (1987)), *aff'd*, 481 U.S. 604 (1987). *Goodman* states that § 1981 is based on the Thirteenth Amendment, which forbids slavery. *Goodman*, 777 F.2d at 119. Therefore, the *Goodman* court found it "difficult to imagine a more fundamental injury to the individual rights of the person than the evil that comes within the scope of that amendment." *Id.* The court then noted that the Supreme Court approved state personal injury statutes of limitations for § 1981 cases. *Id.*

64. *See* Collier v. Philadelphia Gas Works, 441 F. Supp. 1208, 1213 (E.D. Pa. 1977) (holding that plaintiff entitled to equitable, as well as legal relief upon establishing a cause of action under § 1981); Wade v. Mississippi Co-op Extension Serv., 424 F. Supp. 1242, 1254 (N.D. Miss. 1976) (finding that defendants were subject to back pay liability under § 1981, unless Eleventh Amendment precluded such relief).

65. *Collier* stated that "[a]n individual who establishes a cause of action under section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." 441 F. Supp. at 1213 (quoting Johnson v. Ry. Express Agency, 421 U.S. 454, 460 (1975)). *See also* Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263 (8th Cir. 1985) (compensatory damages available under § 1981); Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 883 (8th Cir.) (punitive damages available under § 1981), *cert. denied*, 434 U.S. 891 (1977). Compensatory and punitive damages are recoverable only in tort actions. *See supra* note 20 and accompanying text.

66. 482 U.S. 656 (1987).

67. *Id.* at 658-59. Plaintiffs' claims against the union included charges that the union did not diligently prosecute wrongful discharges of certain members, that the union did not assert challenges against employers made on the basis of discrimination, and that the union was a passive supporter of the employer's discriminatory practices. *Id.* at 659-60

quired to use an analogous state statute of limitations.[68] The district court found the most appropriate statute of limitations to be the six year period for contract, trespass, and replevin actions.[69] The Third Circuit Court of Appeals reversed the district court, and found that the appropriate state statute of limitations was one applicable to personal injury actions.[70]

The Supreme Court affirmed the decision of the Third Circuit, finding that the appropriate state statute of limitations for a § 1981 action was the statute applicable to personal injury actions.[71] The Court noted that "[s]ection 1981 has a much broader focus than contractual rights. The section speaks not only of personal rights to contract, but personal rights to sue, to testify, and to equal rights under all laws for the security of persons and property . . . ."[72] While § 1981 deals with the right to contract, its purpose is to prohibit discrimination in the contractual process on the basis of race.[73] Therefore, because § 1981 is part of an anti-discrimination scheme, the Supreme Court found that it involved "fundamental injur[ies] to the individual rights of [people]."[74]

There are no existing cases which explicitly state that all § 1981 recoveries are excludable from income. However, in *Johnson-Waters v. Commissioner*,[75] the Tax Court noted in its decision a concession made by the government that at least part of the taxpayer's settlement recovery was excludable under section 104(a)(2), because it constituted a recovery for a tort-type injury pursuant to § 1981.[76] The court noted the apparent correctness of the government's concession in a footnote, stating

68. *Id.* at 660.

69. *Id.* at 659.

70. *Id.* at 660.

71. *Id.* at 662.

72. *Id.* at 661.

73. *Id.*

74. *Id.*

75. 1993 T.C.M. (RIA) 1693 (1993).

76. *Id.* at 1695. The taxpayer's original action alleged violations of § 1981, § 1988, and Title VII, based on the denial of a promotion. She sought relief in the form of "lost wages, lost benefits, lost retirement, [and] lost future wages in the event that reinstatement was not ordered. . . ." *Id.* at 1694.

that pursuant to *Goodman*, actions brought under § 1981 "could address tort-type injuries."[77]

C. *Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (ADEA) forbids discrimination by employers in the hiring, discharge, or compensation of employees on the basis of age.[78] There are, however, exceptions if age is a bona fide occupational qualification,[79] or if the company is operating in a foreign land whose laws would be violated if persons over a certain age were permitted to work.[80] An employer may not correct discriminatory practices by reducing the wages of employees who were not subject to the discrimination in order to equalize wage differentials.[81]

Congress's stated purpose for the enactment of the Act is to "promote employment of older persons based on their ability rather than [their] age; to prohibit arbitrary age discrimination

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77. *Id.* at 1695 n.2 (citing Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)). The Supreme Court in *Goodman* noted the similarity of the characterization of § 1981 injuries to the characterization of § 1983 injuries in Wilson v. Garcia, 471 U.S. 261 (1985). *Goodman*, 482 U.S. at 661. Based on this holding from *Goodman*, claims under § 1981 are analogous to "personal injury" claims under § 1983, as characterized by *Wilson*. In Metzger v. Commissioner, 88 T.C. 834, 853, *aff'd*, 845 F.2d 1013 (3d Cir. 1988), it was held that pursuant to *Goodman*, violation of the command of § 1983 was the equivalent of an injury to the individual rights of a person. *Metzger* held the same analysis was applicable to § 1981 actions. *Id.*; see *infra* notes 165-78 for a complete discussion of *Metzger*. Once it has been established that there has been a recovery for "personal injuries" in a suit prosecuted for injury to "tort or tort-type" rights, or to legal rights that are "more analogous to a tort-type right than to any other legal category of rights," the recovery should be excludable under § 104(a)(2) of the Internal Revenue Code. Since § 1983 recoveries are recoveries for personal injuries and excludable, Bent v. Commissioner, 87 T.C. 236, 248 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987), so too should be recoveries under § 1981.

78. 29 U.S.C. § 623(a)(1) (1988). This statute makes it unlawful for an employer to: "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Id.*

79. A bona fide occupational qualification is a qualification of an employee that is reasonably necessary for the normal and efficient operation of a business. 29 U.S.C. § 623(f)(1) (1988); *see, e.g.*, Orzel v. City of Wauwatosa Fire Dep't, 697 F.2d 743 (7th Cir.) (deciding whether being younger than age 55 constituted a bona fide occupational qualification for firemen in the city of Wauwatosa, Wisconsin), *cert. denied*, 464 U.S. 992 (1983).

80. 29 U.S.C. § 623(f) (1988).

81. *Id.* § 623(a)(3).

in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[82] Case law subsequent to its enactment has specifically held that the purpose for its enactment, as well as the enactment of Title VII, is to eliminate discrimination in the workplace.[83]

Enforcement provisions allow for the recovery of back pay, and for recovery of liquidated damages equal to the amount of back pay due, provided the violation of the Act was willful.[84] There is also a broad provision that allows an aggrieved party to bring a civil action "for such legal or equitable relief as will effectuate the purposes of . . . [the Act]."[85]

The issue of whether recovery under the ADEA could be excluded from gross income pursuant to section 104(a)(2) was addressed in *Rickel v. Commissioner*.[86] In this case, the plaintiff, although qualified, was not awarded the position of president of the company for which he was working.[87] The new president, who was twenty years younger than plaintiff, terminated plaintiff because of the desire to have someone younger assume plaintiff's position in the company.[88]

Plaintiff brought suit under the ADEA, but the case was subsequently settled for an $80,000 lump sum plus $25,000 in each of the succeeding four years.[89] Plaintiff did not include any

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82. *Id.* § 621(b).

83. Lorillard v. Pons, 434 U.S. 575, 584 (1978). The Court also noted that the substantive provisions of the two statutes were identical, as "the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Id.*

84. 29 U.S.C. § 626(b) (1988 & Supp. III 1991). The section provides that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [section 16 of the Fair Labor Standards Act]: *[p]rovided*, [t]hat liquidated damages shall be payable only in cases of willful violations of this chapter." *Id.*

Section 16 of the Fair Labor Standards Act, codified at 29 U.S.C. § 216(b), provides, in part, that any violating employer "shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. § 216(b) (1988).

85. 29 U.S.C. § 626(c)(1) (1988).

86. 900 F.2d 655 (3d Cir. 1990).

87. *Id.* at 656.

88. *Id.*

89. *Id.* at 656-57. The settlement agreement did not specify how much of the settlement represented back pay or how much represented liquidated damages. *Id.* at 657.

of these amounts in his gross income. The IRS determined there was a deficiency against him for the tax on $105,000, which was not included in his income for 1983 and 1984.[90] The Tax Court held that one-half of the recovery was includable, and one-half was excludable pursuant to section 104(a)(2).[91] The Third Circuit reversed the Tax Court in part, and held that the entire amount of the recovery was excludable.[92]

In its decision to reverse in part, the Third Circuit applied the test for personal injury from *Threlkeld v. Commissioner*.[93] The court determined that age discrimination was more analogous to a personal injury tort claim than to a contract claim.[94] The court stated:

> we do not believe that the ADEA and federal employment discrimination statutes in general, are usefully viewed as a Congressional attempt to rewrite the terms of employment contracts. . . . [N]othing in the statutes suggests or hints at such an intention. . . . But more importantly the scope of these statutes goes beyond the mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g., refusal to hire contexts.[95]

The court also relied on a long history of case law as support for the proposition that discrimination in the workplace is a personal injury.[96] Finally, the court dismissed the argument that

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90. *Id.* at 657. The Commissioner claimed that this amount represented either back pay or punitive damages, neither of which were excludable from gross income. *Id.*

91. *Id.* The Tax court utilized this reasoning because plaintiff's claims were one half for back pay, and one half for liquidated damages. *Id.* at 661. The back pay award was to be treated as damages in lieu of wages, which was in the nature of a contract recovery, and the liquidated damages were to be treated as compensation for a tort or tort-type injury. *Id.*

92. *Id.* at 667.

93. *Id.* at 658-63; *see supra* notes 16-17 and accompanying text.

94. *Rickel*, 900 F.2d at 662-63. The *Rickel* court relied for this proposition on the characterization of another federal anti-discrimination statute in Byrne v. Commissioner, 883 F.2d 211 (3d Cir. 1989). The *Byrne* court stated that a discrimination suit "alleges the violation of a duty owed the plaintiff by the defendant employer which arises by operation of the [Fair Labor Standards] Act. This duty is independent of any duty an employer might owe his employee pursuant to an express or implied employment contract; it arises by operation of law." *Rickel*, 900 F.2d at 662 (quoting *Byrne*, 883 F.2d at 215).

95. *Id.* at 662.

96. *Id.* at 662-63. Some of the cases the court cited to support its proposition were: Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987) (holding that § 1981

the plaintiff was receiving better tax treatment than he would have received had he not been subjected to discrimination in the first place.[97] The court also found no justification for treating victims of personal injury differently, depending on whether the personal injury arose from a physical or from a non-physical injury.[98]

A similar situation arose in *Pistillo v. Commissioner*.[99] Plaintiff had been subject to frequent disparaging remarks during the course of his employment with Cleveland Tool and Supply Company.[100] He was eventually discharged and replaced by a younger employee, and remained unemployed for the duration of his suit.[101] Pistillo sued Cleveland Tool, seeking declaratory and injunctive relief, back pay, and attorney's fees.[102] A jury found in his favor, but Cleveland Tool appealed.[103] Pending the appeal of the case, the parties reached a settlement.[104] Pistillo did not include the settlement amount in his income, based on section 104(a)(2), and the Commissioner subsequently issued a notice of deficiency.[105] Although the Tax Court held that the

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bars racial discrimination, which is "a fundamental injury to the individual rights of a person"); Dillon v. AFBIC Dev. Corp., 597 F.2d 556, 562 (5th Cir. 1979) ("An action based upon the federal antidiscrimination statutes is essentially an action in tort."); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1143 (4th Cir. 1975) ("an action brought under statutes forbidding racial discrimination is fundamentally for the redress of a tort"). *Id.*

97. *Id.* at 664.

98. *Id.* The court also noted that it was merely complying with Treasury Regulation 1.104-1(c), which was responsible for interjecting tort and contract consideration into the § 104(a)(2) excludability analysis. *Id.*

99. 912 F.2d 145 (6th Cir. 1990).

100. *Id.* at 146. Pistillo had been referred to as "old" and having "gray hair" in a disparaging manner. He was also told that he was "unable to relate to his younger clients." *Id.*

101. *Id.*

102. *Id.* at 146-47. He specifically requested an order:

> 1) declaring that Cleveland Tool had discriminated against him on the basis of his age; 2) granting him a preliminary and permanent injunction enjoining Cleveland Tool from abridging his rights; 3) requiring Cleveland Tool to reinstate him to the position he had held on April 6, 1979, and to pay him all wages, including overtime, that he would have received in the normal course of his employment . . . ; and 4) granting him reasonable attorneys [sic] fees.

Id.

103. *Id.* at 147.

104. *Id.*

105. *Id.*

amount should have been included in his gross income, the Sixth Circuit reversed.[106]

Relying on *Rickel v. Commissioner*,[107] the court determined that Pistillo's claim under the ADEA was analogous to the assertion of a tort-type right to redress personal injuries.[108] The court stated that "whether Cleveland Tool paid Pistillo a portion of the settlement award to compensate him for pain and suffering or lost back pay [was] irrelevant to the § 104(a)(2) inquiry."[109] The court also stated that Pistillo's lost wages, even though a non-personal consequence, were still the result of a personal injury.[110] Finally, as in *Rickel*, the court dismissed the argument that allowing excludability would put the plaintiff in a better position than if there had been no discrimination.[111] The court reasoned:

> [j]ust as the common law punishes tort-feasors, the ADEA punishes employers who practice age discrimination . . . . To effectuate the purposes of both the ADEA and the [Internal Revenue Code], we must make the victims of arbitrary age discrimination whole by providing equal recognition to the substantial indignities and personal injuries they have suffered.[112]

The court thus concluded that Pistillo's recovery was excludable under the provisions of section 104(a)(2).[113]

The Tax Court agreed with excludability for an ADEA recovery in *Downey v. Commissioner*.[114] The taxpayer, a former pilot for United Airlines, was forced to retire at age sixty, despite a Federal Aviation Administration Rule that would have permitted him to continue working on the flight crew, although not as a pilot.[115] The taxpayer stood to lose nearly $90,000 of

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106. *Id.* at 150-51.

107. 900 F.2d 655 (3d Cir. 1990).

108. *Pistillo*, 912 F.2d at 149. The court applied the *Threlkeld* test, and found that age discrimination invaded the rights that Pistillo was granted by being a person in the eyes of the law. *Id.* at 149-50.

109. *Id.* at 150 n.6.

110. *Id.* at 150.

111. *Id.*

112. *Id.*

113. *Id.*

114. 97 T.C. 150, 173 (1991), *aff'd on motion for reconsideration*, 1992-93 T.C. Rep. (RIA) 336 (1993).

115. *Downey*, 97 T.C. Rep. at 153-54. The FAA rule, also known as "the age 60" rule, precluded persons 60 years of age or older from serving as airline captains

accrued sick leave if forced into retirement.[116] Thus, he sued under the ADEA, seeking, *inter alia*, reinstatement, back pay with interest and liquidated damages.[117]

The case was eventually settled for $120,000, one-half of which was allocated to liquidated damages, and one-half of which was allocated to non-liquidated damages.[118] The taxpayer then included on his 1985 federal income tax return only the $60,000 attributable to the non-liquidated portion of the settlement.[119] The government determined that all $120,000 should have been included in the taxpayer's income.[120]

The Tax Court first determined whether the taxpayer's claim under the ADEA sounded in tort, and then, whether the injury that he had suffered as a result of the age discrimination was personal.[121] Citing *Pistillo v. Commissioner*,[122] the court stated that claims under the ADEA are "in the nature of tort or tort-type claims."[123] Further, the court found that "invidious discrimination, including age discrimination, is a personal injury for purposes of section 104(a)(2)."[124] After making these two critical determinations, the court found that the entire settlement amount, $120,000, was excludable from the taxpayer's gross income.[125] In fact the court went on to overrule its prior decisions that "backpay [sic] or nonliquidated damages based on backpay [sic]" received pursuant to a claim under the ADEA were not excludable under section 104(a)(2).[126] The court stated

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or first officers. However, the FAA rule would permit such persons to serve on flight crews as second officers. *Id.* at 153.

116. *Id.* at 154.

117. *Id.*

118. *Id.* at 155. The agreement further provided that the non-liquidated amount would be "subject to all tax withholdings and deductions as required by law." *Id.*

119. *Id.* at 156.

120. *Id.*

121. *Id.* at 164.

122. 912 F.2d 145 (6th Cir. 1990).

123. *Downey*, 97 T.C. Rep. at 165.

124. *Id.* (citing Burke v. United States, 929 F.2d 1119, 1121-22 (6th Cir. 1991)); see *infra* notes 180-210 and accompanying text for a complete discussion of *Burke's* disposition by the district court and by the Sixth Circuit.

125. *Downey*, 97 T.C. Rep. at 165.

126. *Id.* at 168-69. The Tax Court was overruling its own decisions in both *Rickel* and *Pistillo* in order to make its rulings "more consistent with [its] decisions in *Metzger* . . . and *Threlkeld* . . . ." *Id.* at 168; see *infra* notes 165-78 and accompanying text for a complete discussion of *Metzger*.

that United's liability to the taxpayer arose not because of the breach of a contractual obligation, but because of the breach of the anti-discrimination mandate of the ADEA.[127] Finally, the court concluded that even the liquidated damages portion of a recovery under the ADEA would be excludable.[128]

Upon motion by the government, the case was reheard in light of the Supreme Court's holding in *United States v. Burke*.[129] However, the decision in favor of the taxpayer was affirmed.[130]

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127. *Downey*, 97 T.C. at 169.

128. *Id.* at 170. The government had argued that the liquidated damages portion of the recovery was equivalent to punitive damages, and was therefore not excludable under § 104(a)(2). *Id.* The court stated, however, that the liquidated damages allowable under the ADEA "are intended to compensate the victim of age discrimination for certain nonpecuniary losses and, thus, are excludable from gross income under section 104(a)(2)." *Id.* The court made this finding despite the holding of the Supreme Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), that the "ADEA's legislative history 'indicates that Congress intended for liquidated damages to be punitive in nature.'" *Downey*, 97 T.C. at 171 (quoting *Thurston*, 469 U.S. at 125). The *Downey* court did not "believe the Supreme Court [in *Thurston*] to have concluded that, from the recipient's perspective, receipt of liquidated damages under the ADEA represents anything other than compensation from those losses that are hard to calculate." *Id.*

129. Downey v. Commissioner, 1992-93 T.C. Rep. (RIA) 336, 336 (1993); see *infra* notes 258-304 and accompanying text for a complete discussion of United States v. Burke.

130. *Id.* at 338. The court distinguished Title VII because of the wider range of remedies available to ADEA claimants, which are not available to Title VII claimants, including the availability of "both unpaid wages and 'liquidated damages.'" *Id.* The court noted that the liquidated damages provision in the ADEA served both compensatory and punitive functions, indicating that a claim under the ADEA was tort-like in nature. *Id.* The court thus found that discrimination under the ADEA constituted a tort-like personal injury for purposes of § 104(a)(2), and therefore, its prior decision was correct in holding all of the taxpayer's recovery excludable from gross income. *Id.*

The court's decision was not unanimous, however. Judge Cohen, who dissented in *Downey I*, agreed with the result, as the majority addressed only the status of the liquidated damages portion of the recovery. *Id.* (Cohen, J., concurring). However, Judge Cohen believed that the majority in *Downey II* was going too far in its construction of *Burke*. He stated that nothing in the *Burke* opinion indicated that adding a liquidated damages component to a back pay award would make the sum excludable *in toto*. *Id.*

Judge Halpern, who wrote the majority opinion in *Downey I*, also concurred in the result of *Downey II*, agreeing that the remedies available to the taxpayer in *Downey* were "sufficiently broad to render his injury 'tort-like,' as that term is used in *Burke*," because the liquidated damages served to compensate the taxpayer for the non-pecuniary losses that he suffered, and to deter future discriminatory conduct. *Id.* at 339 (Halpern, J., concurring). Judge Halpern disagreed with the hold-

D. *Equal Pay Act*

The Equal Pay Act, also known as section 206(d) of the Fair Labor Standards Act, prohibits sexual discrimination in the workplace by imposing sanctions for the payment of disparate wages on the basis of sex.[131] There is an exception to the provision if the wage differential is based on a legitimate seniority or merit system, or on legitimate differences in quality or quantity of work, or on any factor other than sex.[132] The employer is not permitted to equalize the disparity in wages by reducing the wages of the more lucratively compensated employee or employees.[133] Violations of the Equal Pay Act are deemed to result in damages recoverable in the form of unpaid wages.[134]

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ing of the majority in *Downey II* to the extent that the majority believed that discrimination under the ADEA was, in all instances, a tort-like personal injury. *Id.* Halpern noted that liquidated damages were available only in cases of willful violations of Title VII, and that if a violation was not willful, the claimant was limited to back pay relief, which was found insufficient in *Burke* to justify exclusion under § 104(a)(2). *Id.*

Judge Laro concurred in part and dissented in part because he believed that while the liquidated damages portion of the recovery constituted a recovery for a tort or tort-like injury, any amount that represented the non-liquidated damages portion was properly considered a contractual recovery and not excludable under § 104(a)(2) and *Burke*. *Id.* at 343 (Laro, J., concurring in part and dissenting in part). He felt that recoveries should be bifurcated into tort recoveries and contractual recoveries, the former being excludable and the latter not. *Id.* at 342. An action seeking back pay, and arising out of an employment agreement, was essentially a contract action, according to Judge Laro. *Id.* Thus, in cases where there was a non-willful violation of the ADEA, and the claimant was limited to back pay in his recovery, Laro felt that as in *Burke*, the back pay recovery was in the nature of a contract recovery, and should be included in the claimant's gross income. *Id.* at 343-44.

131. 29 U.S.C. § 206(d)(1) (1988). The statute forbids discrimination by an employer:

> between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . .

Id.

132. *Id.*

133. *Id.*

134. *Id.* § 206(d)(3). The language of subsection (d)(3) specifically provides that "[f]or purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter." *Id.*

Cases interpreting the Equal Pay Act have stated that its intended purpose is to correct discriminatory wage practices and eliminate sexual discrimination in the workplace.[135] Several of these cases state that providing equal pay for equal work serves the Congressional purpose of correcting the social and economic consequences of disparate wages, including the stereotypical misconceptions of the value of a woman's work.[136]

To achieve its purposes, the Equal Pay Act permits victims of sexual discrimination to recover back pay.[137] As an additional measure, the Equal Pay Act has a liquidated damages provision, where an employee can recover an additional sum equal to his or her back pay if the employee can prove the employer violated the statute.[138] There is no requirement of showing additional harm to the employee. However, the trial judge has the option of disposing of the liquidated damages if he finds that the employer reasonably believed he was in compliance with the Act.[139]

The issue of the excludability from gross income of a recovery under the Equal Pay Act was addressed in *Thompson v.*

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135. *See, e.g.*, Hodgson v. Food Fair Stores, Inc., 329 F. Supp. 102, 104 (M.D. Pa. 1971); Shultz v. American Can Co., 424 F.2d 356, 360 (8th Cir. 1970).

136. Bence v. Detroit Health Corp., 712 F.2d 1024, 1029 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 656 (5th Cir. 1969). Congress's purpose can be gleaned from a statement by Representative Donahue during the legislative debate surrounding the enactment of the Equal Pay Act:

> We all realize that the origin of the wage rate differential for men and women performing comparable jobs is the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work. This antiquated concept has been long and completely demonstrated to be false and it is indefensible from every standpoint. This being so, we may wonder why this legislation is necessary. . . . The answer is . . . that discrimination in wage payments, on the basis of sex alone, continues to exist. . . .

Shultz, 420 F.2d at 656 (quoting CONG. REC. 9,212 (1965) (statement of Rep. Donahue)).

137. 29 U.S.C. § 216(b) (1988).

138. *Id.* § 216(b). The section provides, in part, that "[a]ny employer who violates . . . [§ 206 or § 207 of this Equal Pay Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." *Id.*

139. 29 U.S.C. § 260.

Commissioner.[140] The plaintiff was a member of a class who had filed a sexual discrimination suit against its employer based on unequal pay for equal work.[141] Her share of the recovery was $66,795.19 for back pay under the Equal Pay Act and Title VII, and a like amount for liquidated damages under the Equal Pay Act.[142] She included the back pay award in income, but not the liquidated damages amount.[143] The Commissioner assessed a deficiency for the liquidated damages amount, and the plaintiff subsequently petitioned for a refund of the tax paid on the back pay award.[144]

The Tax Court determined that the back pay portion of the award was properly included in income, but the liquidated damages portion should have been excluded.[145] The Fourth Circuit subsequently affirmed.[146] The Tax Court properly concluded that "back pay . . . received under the Equal Pay Act is not in the nature of damages for a tort or tort-type right," but rather is more in the nature of a payment for a contract violation.[147] The Tax Court asked the question, "in lieu of what were the dam-

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140. 89 T.C. 632 (1987), *aff'd*, 866 F.2d 709 (4th Cir. 1989).

141. *Id.* at 633. Plaintiff was an employee of the Government Printing Office, and as a member of the class action suit, alleged that the office employed no women in management positions in the production department, and that few women were employed as "craftsmen," for which they would have received substantially higher wages than they would have received as "non-craftsmen." The class also alleged that much of the work performed by non-craftsmen was the same as work performed by craftsmen. *Id.* at 634-35.

142. *Id.* at 637.

143. *Id.* at 641.

144. *Id.* at 642. Plaintiff based her claim to the refund on the Tax Court's holding in Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988). Under *Threlkeld*, exclusion is appropriate under § 104(a)(2) when there is an "invasion of the rights that an individual is granted by virtue of being a person in the sight of the law." *Id.* at 1308. *See supra* notes 16-17 and accompanying text. The plaintiff in *Thompson* claimed that the amount she received was on account of personal injuries. *Thompson*, 89 T.C. at 643.

145. *Id.* at 648-50.

146. *Thompson*, 866 F.2d at 712.

147. *Thompson*, 89 T.C. at 646. The Tax Court reasoned that:

> [t]he claim which was allowed was for back pay because the work petitioner had done warranted that pay. . . . [T]here is nothing in Threlkeld v. Commissioner that converts a claim for back pay, because an individual has been underpaid for the work he has done, into a claim for damages for a personal injury merely because the suit which involves such a claim may also have involved a tort-type action for personal injuries.

Id. at 646-47.

ages awarded," and stated that if the answer was "wages," then the amount could not be excluded under section 104(a)(2).[148] With respect to the liquidated damages award, the Tax Court made the inquiry whether it was compensation for personal injury or whether it was part of the back pay award.[149] The fact that the recovery was measured by the amount of back pay due to plaintiff was not the controlling factor.[150] Rather, the fact that the liquidated damages were paid on account of sexual discrimination that was not in good faith[151] was the factor that weighed in favor of excluding them from income under section 104(a)(2).[152]

E. *Title VII, Prior to the 1991 Amendments*

Title VII of the Civil Rights Act of 1964 is targeted specifically at discrimination in the employment context.[153] Title VII makes it unlawful for an employer to discriminate in hiring, discharge, or promotions on the basis of race, color, religion, sex, or national origin.[154] A Title VII violation can be based on disparate impact,[155] or by a showing that an individual's personal

148. *Id.* at 647 (quoting Fono v. Commissioner, 79 T.C. 680 (1982), *aff'd*, 749 F.2d 37 (9th Cir. 1984)).

149. *Id.* at 649. The court stated that if the liquidated damages had been awarded under Title VII, instead of the Equal Pay Act, then the amounts would have been damages for personal injury, and thus excludable. *Id.* at 648.

150. *Id.* at 649. The court relied on *Threlkeld* for the proposition that the amount of income lost is an accurate measure of plaintiff's injury. *Id.*

151. Good faith sexual discrimination may occur where gender is a bona fide occupational qualification. *See supra* note 79 and accompanying text. *See also* International Union v. Johnson Controls, 499 U.S. 187 (1991) (deciding whether gender was a bona fide occupational qualification where job involved exposure to lead, and could cause potential infertility problems).

152. *Thompson*, 89 T.C. at 650.

153. 42 U.S.C. § 2000e (1988 & Supp. III 1991).

154. *Id.* § 2000e-2(a)(1) (Supp. III 1991). The specific language of § 2000e-2(a)(1) provides: "[It shall be an unlawful employment practice for an employer] to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.*

155. *Id.* § 2000e-2(k)(1)(A) (Supp. III 1991). This provision provides:

> An unlawful employment practice based on disparate impact is established under this title only if:
>
> i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demon-

characteristics were "a motivating factor for any employment practice."[156]

Courts have stated the essential purpose of Title VII to be the eradication of discrimination by employers against employees in the workplace.[157] Other asserted purposes include achieving equal employment opportunities and, significantly, making victims of discrimination whole.[158] The aim is a remedy for wrongs done to the individual, but public policy is also served by Title VII when discrimination is removed from the work environment.[159]

Title VII has traditionally provided only equitable remedies for its victims.[160] The statutory remedies available include injunctive relief, affirmative action, reinstatement, back pay, "or any other equitable relief as the court deems appropriate."[161] Historically, compensatory and punitive damages have not been

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strate that the challenged practice is job related for the position in question and consistent with business necessity. . . .

Id.

156. *Id.* § 2000e-2(m). "Except as otherwise provided in [Title VII], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *Id.*

157. *See, e.g.*, Silver v. KCA Inc., 586 F.2d 138, 141 (9th Cir. 1978); Martin v. Delaware Law Sch. of Widener Univ., 625 F. Supp. 1288, 1298-99 (D. Del. 1985), *aff'd*, 884 F.2d 1384 (3d Cir.), *cert. denied*, 493 U.S. 966 (1989).

158. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 876 (11th Cir. 1986).

159. *Id.*

160. 42 U.S.C. § 2000e-5(g) (1988 & Supp. III 1991). Note, however, that Title VII was amended in 1991 to provide for legal remedies as well. See *infra* notes 244-55 and accompanying text for a discussion of the 1991 amendments.

161. 42 U.S.C. § 2000e-5(g) (1988 & Supp. III 1991). The text of the statute reads:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Id.

available.[162] Further, unlike tort plaintiffs, jury trials were also not available for Title VII plaintiffs.[163]

Although damages under certain of the other federal anti-discrimination statutes have been found to be excludable,[164] the same treatment has not always been accorded to Title VII plaintiffs. There have been conflicting holdings in different Circuit Courts of Appeal and in the Tax Court on the issue of whether Title VII damages should be excludable.

In *Metzger v. Commissioner*,[165] a college professor who was denied tenure[166] confronted her employer with a barrage of charges in both state and federal courts, beginning with a charge of breach of contract in the state court.[167] In federal court, she asserted violations of the Equal Pay Act, 42 U.S.C. § 1983, 42 U.S.C. § 1981, and Title VII.[168] She eventually set-

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162. *See, e.g.*, Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 263 (8th Cir. 1985) (holding compensatory damages are available under § 1981, but not under Title VII); Robinson v. Caulkins Indiantown Citrus Co., 685 F. Supp. 233, 234-35 (S.D. Fla. 1988) (finding there can be no compensatory or punitive damages under Title VII). Note again, however, that Title VII was amended in 1991 to provide for compensatory and punitive damages. *See infra* notes 244-55 and accompanying text.

163. Curtis v. Loether, 415 U.S. 189, 196-97 (1974) (stating that although the Court would not pass on the issue, the courts of appeals had instructively held that jury trials were not required in actions for reinstatement and back pay under Title VII). The statement that jury trials are not available for Title VII plaintiffs was made in *dicta*, as the Court was deciding the issue of jury trials for Title VIII plaintiffs. *Id.*

164. *See supra* notes 39-57, 66-77, 86-130, 140-52 and accompanying text.

165. 88 T.C. 834 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988).

166. Tenure is a system whereby a teaching institution's faculty members are appointed, such that their employment will continue until retirement, barring any unusual circumstances, such as gross incompetence. *Id.* at 836.

167. *Id.* at 838-40. Metzger claimed she was denied tenure and concurrently dismissed in violation of the rules provided in the faculty handbook of the school, which required that notice of non-reappointment be given at least twelve months prior to the expiration of the professor's current term of employment. *Id.* at 836-37. Metzger was notified, by a letter dated February 28, 1972, that her employment would terminate with the expiration of her contract on August 31, 1972. *Id.* at 837. Metzger's breach of contract claim was based on the wages she lost from the time of her termination, at age 43, until retirement, and the loss of tuition grants for her two children. *Id.* at 838. She also claimed an inability to mitigate her damages because there was no need for a professor with her qualifications in the field of Spanish instruction in the area in which she was living. *Id.* Metzger also brought a claim with the state Human Relations Commission, alleging discrimination in her workplace on the basis of sex and national origin. *Id.* at 839.

168. *Id.* at 840. Metzger also claimed damages resulting from violations of 42 U.S.C. § 1985(3) and § 1986, and Executive Order 11246 *as amended by* Executive

tled all causes of action with her employer for $75,000.[169] The settlement provided that one-half of the amount represented her wage claims, and one-half was in satisfaction of all other claims.[170] Metzger then attempted to exclude from her income one-half of the settlement, or $37,500.[171] The Commissioner asserted that the entire $75,000 was includable in income.[172]

The Tax Court disagreed.[173] As in *Bent v. Commissioner*,[174] the court concluded that any amount in settlement of a § 1983 claim was excludable because such claims are for personal injury, and are of a tort-type nature.[175] For the same reasons, the court found any § 1981 recovery to be excludable.[176] The court then evaluated Metzger's Title VII claim and found that while the potential relief may be different, the injuries that Metzger complained of under Title VII were essentially the same injuries she complained of under § 1981.[177] Because all of Metzger's

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Order 11375. *Id.* The relief sought in conjunction with the federal claims was: 1) declaratory relief, stating that the college had violated these federal statutory provisions; 2) an injunction against the college to prevent further discrimination; 3) her reappointment; 4) back pay; 5) $300,000 in punitive damages; 6) reasonable attorney's fees and costs. *Id.* at 841. She also sought relief for her pendent state claims: 1) her reappointment; 2) back pay; 3) $300,000 in punitive damages. *Id.*

169. *Id.* at 845.

170. *Id.* at 842.

171. *Id.* at 845.

172. *Id.* at 846.

173. *Id.*

174. 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d. Cir. 1987). *See supra* notes 46-50 and accompanying text.

175. *Metzger*, 88 T.C. at 851. The court found the ultimate holding in *Bent* analogous (that gross income does not include amounts received from § 1983 actions), although *Bent* involved a First Amendment right to free speech, and *Metzger* involved claims of racial and sexual discrimination. *Id.*

176. *Id.* at 852-53. The court stated:

> [Section 1983 derives from the Fourteenth Amendment] which recognizes the "equal status of every person;" that all persons shall be accorded the full privileges of citizenship; and that no person should be deprived of life, liberty or property "without due process." As the Court said, "[a] violation of that command is an injury to the individual rights of the person." Those concepts apply equally to actions under section 1981.

Metzger, 88 T.C. at 852-53 (citations omitted) (quoting Goodman v. Lukens Steel Co., 777 F.2d 113, 119 (3d Cir. 1985), (quoting Wilson v. Garcia, 471 U.S. 261, 277 (1985), *aff'd*, 482 U.S. 656 (1987))).

177. *Id.* at 856. The court stated:

> [M]uch of what is prohibited under the one statute is prohibited under the other. Accordingly, although the relief sought under one statute may in some cases be different from the relief sought under the other statute, the

federal causes of action were tort-type actions, the court found that at least $37,500 of the settlement, the amount for which Metzger sought exclusion, was entitled to the benefit of the section 104(a)(2) exclusion.[178]

The Sixth Circuit Court of Appeals also found Title VII damages to be excludable in *Burke v. United States*.[179] Plaintiffs, female employees of the Tennessee Valley Authority (the "Authority"), including Therese Burke, brought suit[180] under Title VII of the Civil Rights Act of 1964, claiming that the Authority maintained pay rate schedules that discriminated unfairly on the basis of sex.[181] The discrimination suit was subsequently settled.[182] The Authority agreed to distribute the recovery to the plaintiffs, provided that it could withhold federal income and social security (FICA) taxes.[183]

The plaintiffs brought suit in the United States District Court for the Eastern District of Tennessee for refunds of the federal income and social security taxes withheld from the recovery.[184] The federal district court found that the plaintiffs' original claim was for a recovery in the nature of back pay relief, and was not for personal injuries.[185] Therefore, the court

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> injuries complained of are often essentially the same. . . . [W]e conclude that the injuries for which [Metzger] sought relief under [Title VII] . . . are as much personal injuries as those for which [she] sought relief in the [§ 1981, § 1983, etc.] proceeding[s].

Id.

178. *Id.* at 858. The court noted that since Metzger had not sought to exclude any greater amount, it did not have to determine whether any greater amount would be excludable. *Id.*; *see* Burke & Friel, *supra* note 13, at 32.

179. 929 F.2d 1119 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

180. The original suit was entitled Hutcheson v. Dean (Civ. Action No. 3-85-119 (E.D. Tenn.)). *Hutcheson* was eventually settled, and the plaintiffs, with the exception of Hutcheson, brought suit in federal district court, seeking refunds of the amounts withheld by the Authority for federal income tax. *Burke*, 112 S. Ct. at 1869.

181. *Burke*, 112 S. Ct. at 1869. In their complaint, the plaintiffs sought an injunction, as well as back pay for all affected female employees. *Id.*

182. *Id.* The settlement agreement provided for $4,200 to go to Plaintiff Hutcheson, and $5,000,000 to go to the rest of the plaintiffs. *Id.* The $5,000,000 was to be divided among them based on pay rates and length of service. *Id.*

183. *Burke*, 929 F.2d at 1120. Taxes were withheld from all plaintiffs' recoveries, except 1) Hutcheson's $4,200 lump-sum recovery; 2) "monies left over as undeliverable to named individuals, which were turned over to the union;" and 3) the left over monies that were later redistributed by the union to other employees. *Id.*

184. United States v. Burke, 90-1 U.S.T.C. 83,744.

185. *Id.* at 83,749.

determined that the recovery should have been included in the plaintiffs' incomes.[186] The court did recognize, however, that pursuant to *Metzger*, a situation could arise where a Title VII recovery would be excluded from gross income consideration because the damages awarded or settled upon were not for the purpose of providing back pay.[187] However, that was not the situation in *Burke*.[188]

The Sixth Circuit reversed, relying on the test for excludability under section 104(a)(2) that had been first enunciated in *Threlkeld v. Commissioner*.[189] This test states that the only criterion for a recovery to be excludable, is that it be obtained as a result of a personal injury.[190] Whether or not the injury is personal is based on the origin and character of the claim, not the results of the injury.[191]

The *Burke* court then looked to existing case law to support the proposition that Title VII actions are actions for personal injury, and are tort-like in nature. Thus, the court found section 104(a)(2) to be applicable and the award excludable from the plaintiffs' gross income.[192] The court rejected the Commis-

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186. *Id.* The court supported its conclusion with language from the complaint, which stated a desire to remedy past wage deficiencies, and certain provisions in the settlement agreement, namely: 1) that the settlement should be allocated on the basis of rates of pay and length of service, and 2) that the employer was to withhold any relevant federal income and social security taxes from the distributions of the settlement to the plaintiffs. *Id.*

187. *Id.* at 83,748.

188. *Id.* at 83,749.

189. Burke v. Unites States, 929 F.2d 1119, 1123 (6th Cir. 1991) (citing *Threlkeld*, 87 T.C. 1294, 1299 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988)).

190. *Threlkeld*, 87 T.C. at 1299. As stated in *Threlkeld*:

> [W]hether the damages received are paid on account of 'personal injuries' should be the beginning and the end of the inquiry. To determine whether the injury complained of is personal, we must look to the origin and character of the claim and not to the consequences that result from the injury.

Id. (citations omitted). "Exclusion under section 104 will be appropriate if compensatory damages are received on account of any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law." *Id.* at 1308.

191. *Id.* at 1299.

192. *Burke*, 929 F.2d at 1123. The court relied on Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990), for the proposition that damages recovered in an age discrimination suit under the ADEA were excludable, because they were compensation for personal injuries. *Id.* The *Burke* court then stated that the Commissioner had not sustained the burden of proving that damages recovered for age discrimination were distinguishable from damages recovered for sex discrimination under Title VII. *Burke*, 929 F.2d at 1123.

sioner's theory that Title VII damages were different from damages recovered for other forms of discrimination,[193] focusing instead on the fact that Title VII actions are used for the purpose of resolving personal injuries.[194] The court also rejected the government's contention that allowing the exclusion would put the plaintiffs in a better position than they would have been in had they not been subjected to discrimination.[195] Relying on *Pistillo v. Commissioner*,[196] the court decided that because the plaintiffs had suffered a dignitary tort, they should be entitled to the same preferential tax treatment with respect to their damages as any other tort plaintiff.[197] By focusing explicitly on

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The court also said that the Commissioner had not sustained the burden of proving why the injuries received because of sex discrimination were distinguishable from injuries received because of other non-physical, but tortious conduct that was entitled to § 104(a)(2) excludability. *Id.* In support of this proposition, the court cited: *Threlkeld*, 87 T.C. at 1308 (injuries to taxpayer's professional reputation due to a malicious prosecution excludable as personal under § 104(a)(2)); Roemer [v. Commissioner], 716 F.2d [693] at 700 [(9th Cir. 1983)] (compensatory damages received in a taxpayer's defamation suit were excludable as personal injuries under § 104(a)(2)); Byrne v. Commissioner, 883 F.2d 211, 216 (3d Cir. 1989) (relying on *Bent* [v. Commissioner, 835 F.2d 67 (3d Cir. 1987)] and *Roemer* to extend the applicability of the § 104 exclusion to a retaliatory discharge claim under the Fair Labor Standards Act and a wrongful discharge claim under state law). *Id.*

193. The Commissioner distinguished actions based on Title VII from other discrimination actions because Title VII only provided for backpay as a remedy, disallowing either compensatory or punitive damages as a form of relief, both of which are intended "to make the plaintiff economically whole." *Id.* at 1122. The significance of only allowing backpay as a form of relief, according to the Commissioner's argument, is that since "back pay damages simply compensate plaintiffs for income they would have received absent the discrimination, these awards are economic rather than 'tort or tort-type' damages and therefore not excludable under § 104." *Id.*

194. *Id.* at 1122-23. The court relied to a great extent, in making this determination, on Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990), where the Sixth Circuit found that a claim made under the ADEA constituted a claim for personal injuries, even if the claim involved an attempt to recover lost wages. *Id.* at 1122. *See supra* notes 99-113 and accompanying text for a more detailed discussion of *Pistillo*. The court also relied on Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990), another age discrimination case, in which the entire amount of the settlement was held excludable under § 104(a)(2), despite the fact that some of the compensation provided for in the agreement represented back pay. *Burke*, 929 F.2d at 1122-23; see *supra* notes 86-98 and accompanying text for a discussion of *Rickel*.

195. *Burke*, 929 F.2d at 1123.

196. 912 F.2d 145 (6th Cir. 1990); *see supra* notes 99-113 and accompanying text.

197. *Burke*, 929 F.2d at 1123. The court stated:

the existence or absence of a tort, the court deemed it unnecessary to distinguish between the age discrimination in *Pistillo* and the sex discrimination in *Burke*, or to consider the differing federal statutes under which these cases were brought.[198]

The lone dissenter distinguished *Pistillo*, however, stating that the cases from which *Pistillo* derived its holding were "clearly distinguishable" from the factual situation in *Burke*.[199] The dissent also criticized the majority's use of the *Threlkeld* test, finding instead that *Threlkeld* held that a personal injury aspect to a case does not indicate that the case is entirely about personal injury.[200] In such a case, the entire recovery may not be excludable from gross income.[201] Instead, the dissent found that *Threlkeld* requires courts to look to factors such as pleadings, evidence, and any written settlement agreement to determine if the case completely pertains to personal injury.[202]

The dissent in *Burke* also distinguished *Metzger v. Commissioner*.[203] The dissent noted that the desire of the plaintiffs in *Burke*, unlike the plaintiff in *Metzger*, was to obtain back pay.[204] The plaintiffs in *Burke* had made appropriate allegations in

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> Pistillo did suffer invidious age discrimination. Pistillo endured his employers' indignities, insults and age discrimination; suffered a dignitary tort; and was personally injured, . . . Pistillo is now entitled to receive federal tax treatment *equal* to that received by the typical tort victim who suffers physical injury and, as a result, receives a settlement award.

Id. (quoting *Pistillo*, 912 F.2d at 150).

198. *Id.*

199. *Id.* at 1124 (Wellford, Senior Circuit J., dissenting). Judge Wellford noted that *Pistillo* relied on Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) (involving a termination in violation of the First Amendment); Bent v. Commissioner, 835 F.2d 67 (3d Cir. 1987) (involving primarily a First Amendment claim and only partially a lost wages claim); Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983) (dealing with defamation damages). *Id.* Judge Wellford described these cases as "clearly distinguishable" from *Burke*, a sex discrimination case. *Id.* He found it significant that *Wulf* and *Bent* involved "*wrongful terminations* based upon free speech considerations," while *Burke* involved "no termination and a straightforward wage differential demand." *Id.* (emphasis in original). He thought *Roemer* inapplicable simply because it involved defamation and not sex discrimination. *Id.*

200. *Id.* at 1125.

201. *Id.*

202. *Id.*

203. *Id.*; *Metzger*, 88 T.C. 834, *aff'd*, 845 F.2d 1013 (3d Cir. 1988); see *supra* notes 165-78 and accompanying text for a complete discussion of *Metzger*.

204. *Burke*, 929 F.2d at 1126 (Wellford, Senior Circuit J., dissenting).

their complaint seeking back pay.[205] Metzger, on the other hand, had sought declaratory relief stating that her employer had violated the applicable anti-discrimination statutes, an injunction to prevent further discrimination, reappointment, back pay, punitive damages, attorney's fees, and costs.[206]

Finally, the dissenting judge looked to *Thompson v. Commissioner*.[207] He relied on the analysis of *Thompson*, where the plaintiff, like the plaintiffs in *Burke*, asserted a tort-type claim for personal injuries, but was really prosecuting a claim for back pay, "for earned, but unpaid, wages."[208] Judge Wellford stated that Title VII plaintiffs are unlike tort plaintiffs in that tort plaintiffs do not assert claims for earned wages, but rather assert claims for wages that they will not be able to earn as a result of the tortfeasor's action.[209]

Although the Third and Fourth Circuits have allowed Title VII plaintiffs to exclude the amount of their recoveries from gross income, other courts have not shown the same deference. In *Hodge v. Commissioner*,[210] the plaintiffs, a class of truck drivers, originally brought suit against their employer claiming a violation of Title VII, because they believed they were denied promotions on the basis of race.[211] Notably, there was no claim of personal injury, and there was no request in the complaint for personal injury damages.[212] The parties settled the action,[213] basing the settlement amount on the wage differential between their present jobs and the jobs for which they were denied promotion.[214]

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205. *Id.* at 1126 n.3.

206. *Metzger*, 88 T.C. at 841.

207. 866 F.2d 709 (4th Cir. 1989); see *supra* notes 140-52 and accompanying text for a complete discussion of *Thompson*.

208. *Burke*, 929 F.2d at 1125 (Wellford, J., dissenting).

209. *Id.*

210. 64 T.C. 616 (1975).

211. *Id.* at 617. Plaintiffs alleged that they did not get transfers to better, long distance routes from their current positions on city routes, because of racial considerations. *Id.*

212. *Id.*

213. *Id.* at 618. The District Court had granted summary judgment for the plaintiffs' employer in the discrimination suit. *Id.* at 617. However, the Tenth Circuit Court of Appeals "reversed and remanded for the determination of three issues, one of which was the amount of back pay to which the plaintiffs were entitled." *Id.* The parties then settled the action. *Id.* at 618.

214. *Id.*

Hodge, one of the class members, sought to exclude from gross income one-half of the amount of his settlement, based on section 104(a)(2), alleging that this portion represented compensation for personal injuries.[215] He argued that the purpose of Title VII was to secure recovery for the injuries resulting from job discrimination, including, "psychic, mental, and emotional damage."[216] Even though all or a portion of the recovery may be designated as back pay, Hodge argued that this designation was unimportant, because the true purpose of Title VII was to assure a remedy for the personal injuries resulting from discrimination.[217] The Commissioner argued that the entire settlement amount should be included in income because it represented wages.[218]

The Tax Court agreed with the Commissioner, and held that back pay recoverable under Title VII is taxable in the year in which the wages are, or were due.[219] The court reasoned:

> [h]ad there been no discrimination against the petitioner, he would have received a better job without a lawsuit and would have paid more taxes on increased pay as received. . . . Use of the adjective "back" in the phrase "back pay" indicates a recovery of wages which should have been paid but were not.[220]

In reaching its ultimate conclusion, however, the court relied on the lack of a request for personal injury damages in the complaint,[221] and on the formula used to determine the amount of the recovery, as it was based exclusively on the differential be-

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215. *Id.* at 618-19. Hodge's actual contention was that the entire amount should have been excludable as a recovery for personal injury damages, or in the alternative, that at least one half represented personal injury damages. *Id.* at 620.

216. *Id.* at 618.

217. *Id.* at 618-19.

218. *Id.* at 620.

219. *Id.* at 619. "We find no support for petitioner's contention that all or a portion of a recovery under [T]itle VII of the Civil Rights Act of 1964 which is designated back pay is, in reality, a recovery for personal injury damages." *Id.*

220. *Id.*

221. *Id.* at 620. It should be noted however, that the court does not address the issue of whether, if the amounts received by Hodge and the other class members were characterized as personal injury damages, rather than back pay, the amounts would then be excludable from gross income under § 104(a)(2). *Id.* at 619 n.7. The court stated:

> [h]ad personal injury damages constituted a part of the judgment, we are confident that [Hodge] would have done far more than he did to assure himself of success in any dispute with the respondent over excluding his recov-

tween the pay the plaintiffs should have received, and the pay they actually received.[222]

The District of Columbia Circuit Court of Appeals agreed with *Hodge* in *Sparrow v. Commissioner of Internal Revenue*.[223] The plaintiff in *Sparrow* was a computer specialist employed by the Department of the Navy until he was given a notice of removal that forced him to resign his position.[224] He then filed a complaint against the Navy under Title VII, alleging racial discrimination.[225] The case was eventually settled, and the Navy paid Sparrow in three installments in the years 1982 through 1984.[226] Sparrow did not report any of these amounts in his gross income since he believed they were excludable under section 104(a)(2).[227] The Commissioner assessed a deficiency for the years in question.[228]

The Tax Court found that the nature of the payments that Sparrow received was "compensation" for back pay and for the differential in salary between what he received, and what he would have received, absent any discrimination.[229] The Tax Court based its findings on the language and legislative history of Title VII. It found that because Title VII only authorized equitable remedies, the payments could not be considered damages, such that they would get the benefit of the section 104(a)(2) exclusion.[230] The District of Columbia Circuit affirmed.[231]

The D.C. Circuit began its analysis by stating that "damages," as the term is generally accepted, including for section 104(a)(2) purposes, is a remedy at law, not equity.[232] The court

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ery. Specifically, the final settlement should have contained an allocation between back pay and damages, not a single lump sum.

Id. at 621.

222. *Id.* at 620.

223. 949 F.2d 434 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 3009 (1992).

224. *Id.* at 434.

225. *Id.* at 434-35.

226. *Id.* at 435.

227. *Id.*

228. *Id.*

229. *Id.* at 436.

230. *Id.* at 436-37.

231. *Id.* at 441.

232. *Id.* at 437. The court cited a long line of cases indicating this general acceptance of damages as a remedy at law, and not equity, including: Freiderich-

then analyzed whether an award of back pay under Title VII could be considered damages for section 104(a)(2) purposes.[233] The court found that the award of back pay could not be considered damages, and must be included in income.[234]

In reaching this decision, the court utilized several factors. First, the court looked at the language of Title VII, specifically, the capacity of the court to impose any *equitable* remedy it deems appropriate.[235] Next, the court noted that every circuit that has addressed the issue has found that Title VII disallowed the legal remedies of compensatory and punitive damages, and limited relief only to equitable remedies.[236] The court also noted the Supreme Court's differing treatment of legal and equitable remedies.[237] Therefore, the court utilized both the intent of

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sen v. Renard, 247 U.S. 207, 208 (1918) (holding that damages, a remedy at law, was available, although equitable relief was not); Javierre v. Central Altagracia, 217 U.S. 502, 508 (1910) (holding that where damages, a remedy at law, was available, an injunction, equitable relief, was inappropriate); Curtis v. Loether, 415 U.S. 189, 196 (1974) ("[A]ctual and punitive damages . . . is the traditional form of relief offered in the courts of law."). The court also noted that plaintiffs seeking legal remedies have the Seventh Amendment Constitutional right to a jury trial. *Id.* at 198; Ross v. Bernhard, 396 U.S. 531, 534 (1970); Capital Traction Co. v. Hof., 174 U.S. 1, 13 (1899); Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

233. *Sparrow*, 949 F.2d at 437.

234. *Id.* at 438.

235. The relevant language of Title VII that the court recited stated:

> the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees with or without back pay . . . *or any other equitable relief* as the court deems appropriate.

Id. at 437 (quoting 42 U.S.C. § 2000e-5(g) (Supp. III 1991)).

236. *Id.* at 437-38 (citing Cumpiano v. Banco Santander Puerto Rico, 902 F.2d 148, 159 (1st Cir. 1990); Carrero v. New York City Hous. Auth., 890 F.2d 569, 581 (2d Cir. 1989); Mitchell v. Seaboard Sys. R.R., 883 F.2d 451, 453 (6th Cir. 1989); Bennett v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987); Protos v. Volkswagen of Am., Inc., 797 F.2d 129, 138 (3d Cir.), *cert. denied*, 479 U.S. 972 (1986); Patzer v. Board of Regents, 763 F.2d 851, 854 n.2 (7th Cir. 1985); Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 992 n.2 (8th Cir. 1984); Walker v. Ford Motor Co., 684 F.2d 1355, 1363-64 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981); Shah v. Mount Zion Hosp. & Medical Ctr., 642 F.2d 268, 272 (9th Cir. 1981); Pearson v. Western Elec. Co., 542 F.2d 1150, 1152 (10th Cir. 1976)).

237. *Id.* at 438. "[N]ot all awards of monetary relief are properly characterized as the 'legal relief' traditionally awarded in courts of law." *Id.* (citing Curtis v. Loether, 415 U.S. 189, 196 (1974)). Further, "[b]ecause the available remedies are equitable, a Title VII plaintiff has no right to a jury trial." *Id.* (citing Robinson v.

Congress in enacting Title VII,[238] and extensive case law, which stated that back pay awards, including those under Title VII, are taxable.[239]

The court in *Sparrow* also countered the rationale of the Sixth Circuit in *Burke v. United States*, by stating that *Burke* was "irreconcilable with Title VII precedent," and a misinterpretation of *Threlkeld*.[240] The court found that the Sixth Circuit looked only at the *Threlkeld* personal injury test,[241] and completely ignored the requirement of section 104(a)(2) that the recovery be one for damages.[242]

The difference in the holdings of the circuits and the Tax Court did not mark the end of the inquiry for recipients of damages in Title VII actions. There have been two events subsequent to the decisions in these cases that may eventually yield a

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Lorillard Corp., 444 F.2d 791, 802 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969)).

238. *Id.* at 440. "The remedies available under Title VII exist to make whole the employee discriminated against, that is, to place him in the same position he would have been in but for the discrimination, but not to compensate beyond that." *Id.* The court cited the Congressional Record for further support as to the purpose of Title VII:

> the Act is intended to make the victims of unlawful discrimination whole, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of . . . but also requires that the persons aggrieved by the consequences and effects of the unlawful employment practice be, *so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*

Id. at 441 (citing 118 CONG. REC. 7168 (1972)). The *Sparrow* court went on to state that "[t]he taxing of a back pay award is consistent with the purpose of Title VII because it places the employee who has been discriminated against in the same position as if he had not been discriminated against, no more and no less." *Id.*

239. *Id.* at 438 (citing Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (back pay, as distinguished from liquidated damages portion of award, includable in gross income); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) ("damages that constitute a back pay award under Title VII are not exempt under § 104(a)(2)"); Coats v. Commissioner, 36 T.C.M. (P-H) 1642 (1977); Hodge v. Commissioner, 64 T.C. 616 (1975); Sears v. Atchison, Topeka & Santa Fe Ry., 749 F.2d 1451 (10th Cir. 1984) (trial court properly included tax component in Title VII award)).

240. *Id.* at 439; *Burke*, 929 F.2d 1119 (6th Cir. 1991); *Threlkeld*, 87 T.C. 1294, *aff'd*, 848 F.2d 81 (6th Cir. 1988).

241. *Sparrow*, 949 F.2d at 439; *see supra* notes 16-17 and accompanying text.

242. *Sparrow*, 949 F.2d at 439. The court stated that the Sixth Circuit's action in labeling a back pay award as damages was inappropriate, and reiterated the position that not all awards of monetary relief constitute damages, especially those awards that are for back pay pursuant to Title VII. *Id.*

uniform result with respect to the excludability of Title VII recoveries. The first is the 1991 Amendment to Title VII, discussed below. The second is the decision of the Supreme Court in *United States v. Burke*,[243] discussed at length in part III.

F. *Title VII, as Amended*

Title VII was amended in 1991.[244] Among other things, Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace."[245] Title VII was amended by the addition of 42 U.S.C. § 1981a.[246] Section 1981a provides that if an aggrieved party brings an action under Title VII for unlawful and intentional discrimination in the workplace, he or she can recover compensatory and punitive damages in addition to the equitable remedies provided by the unamended Title VII.[247] However, to recover compensatory and punitive damages under amended Title VII, the complaining party must first be unable to obtain a recovery under § 1981.[248]

Compensatory damages under amended Title VII are awarded exclusive of any back pay recoverable under the enforcement provisions of unamended Title VII.[249] Punitive damages are recoverable 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."[250] There is, however, a statutory maximum of $300,000 in total

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243. 112 S. Ct. 1867 (1992).

244. Civil Rights Act of 1991, Pub. L. No. 102-166, tit. I, § 101, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a (Supp. III 1991)).

245. *Id.* § 2(1). The stated purposes of the amendment included, "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* § 3(4).

246. *Id.* § 102.

247. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991).

248. *Id.*; *see supra* notes 58-65 and accompanying text for a discussion of the purposes of enactment, and requirements to obtain relief under § 1981.

249. 42 U.S.C. § 1981a(b)(2) (Supp. III 1991). This section specifically provides: "Compensatory damages awarded under this section shall not include backpay [sic], interest on backpay [sic], or any other type of relief authorized under" Title VII, 42 U.S.C. § 2000e-5(g) (1988 & Supp. III 1991). *Id.*

250. 42 U.S.C. § 1981a(b)(1) (Supp. III 1991).

compensatory and punitive damages that can be awarded under amended Title VII.[251]

The final amendment of significance for Title VII plaintiffs (and defendants) is the provision that permits jury trials.[252] If a plaintiff seeks compensatory or punitive damages under § 1981a, any party may demand a jury trial.[253]

It remains to be seen whether the additional provisions of Title VII will be retroactively applied to cases that were pending at the time that the amendments were enacted. The Supreme Court has recently heard arguments in an effort to resolve the issue.[254] Cases heard in both the Fifth and Sixth Circuit Courts of Appeals have held that the provisions should not be applied retroactively.[255]

III. *United States v. Burke*

The Supreme Court granted certiorari to resolve an intercircuit conflict,[256] and in a five person majority decision, held that damages received in settlement of a Title VII action are not properly excludable from gross income based on section 104(a)(2) of the Internal Revenue Code.[257]

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251. 42 U.S.C. § 1981a(b)(3) (Supp. III 1991). The cap is graduated, depending on the number of people the respondent employs. *Id.* Employers with 15 through 100 employees are limited to $50,000. *Id.* § 1981a(b)(3)(A). Employers with 101 through 200 employees are limited to $100,000. *Id.* § 1981a(b)(3)(B). Employers with 201 through 500 employees are limited to $200,000. *Id.* § 1981a(b)(3)(C). Employers with 501 or more employees are limited to $300,000. *Id.* § 1981a(b)(3)(D).

252. *Id.* § 1981a(c).

253. *Id.* § 1981a(c)(1).

254. Linda Greenhouse, *Ginsburg at Fore in Court's Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at A1, B8.

255. Landgraf v. USI Film Prod., 968 F.2d 427, 433 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993) (holding that retroactive application of the compensatory and punitive damage provisions of Title VII amendments would cause "manifest injustice"); Harvis v. Roadway Express, Inc., 973 F.2d 490, 496-97 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993) (finding that the legislative history of the Title VII amendments, as well as a policy against retroactive application of new legislation indicate that retroactive application of the new Title VII provisions would "adversely affect substantive rights and liabilities").

256. United States v. Burke, 112 S. Ct. 1867, 1870 & n.3 (1992); *see supra* notes 1-7 and accompanying text.

257. *Id.* at 1874.

A. *Procedural History*

The district court in *Burke* found that the plaintiffs had originally made a claim for back pay, not for personal injuries, and that the amount recovered in settlement was therefore not excludable under section 104(a)(2).[258] The Sixth Circuit reversed.[259] The Sixth Circuit relied on the *Threlkeld* personal injury test, and came to the ultimate conclusion that the injuries suffered by Title VII plaintiffs were equivalent to personal injuries, warranting exclusion under section 104(a)(2).[260] Although the holding in *Burke*[261] was in unison with the holding in *Metzger v. Commissioner*,[262] it was in conflict with the holdings of both the Tax Court in *Hodge v. Commissioner*,[263] and the D.C. Circuit in *Sparrow v. Commissioner*.[264] The Supreme Court granted certiorari to resolve the conflicting holdings.[265]

B. *Majority Holding*

The majority agreed with the Sixth Circuit's focus on the nature of the claim underlying the damage award received by plaintiffs.[266] The majority then analyzed whether a Title VII action addressed a tort-like personal injury by focusing on the remedies that are available to Title VII plaintiffs, as compared to the remedies that are available to traditional tort plaintiffs.[267] The Court noted that unlike tort plaintiffs, Title VII plaintiffs are not entitled to either compensatory or punitive

258. *Id.* at 1869; *see supra* notes 180-88 and accompanying text for a complete discussion of the district court's disposition of the *Burke* plaintiffs' claims.

259. *Burke*, 929 F.2d at 1123-24.

260. *Id.*; *see supra* notes 189-209 and accompanying text.

261. *Burke*, 929 F.2d at 1123-24.

262. 88 T.C. 834 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988); *see supra* notes 165-78 and accompanying text.

263. 64 T.C. 616 (1975). *See supra* notes 210-22 and accompanying text.

264. 949 F.2d 434 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 3009 (1992); *see supra* notes 223-42 and accompanying text.

265. *Burke*, 112 S. Ct. at 1870 and n.3.

266. *Id.* at 1872. "The fact that employment discrimination causes harm to individuals does not automatically imply . . . that there exists a tort-like 'personal injury' for purposes of federal income tax law." *Id.* at 1873.

267. *Id.* at 1872-73. The Court stated: "[T]he concept of a 'tort' is inextricably bound up with remedies. . . . Thus, we believe that consideration of the remedies available under Title VII is critical in determining the 'nature of the statute' and the 'type of claim' brought by respondents for purposes of § 104(a)(2)." *Id.* at 1872 n.7.

damages.[268] Although the case was decided in 1992, the Court was forced to analyze the case pursuant to Title VII as it read prior to the 1991 amendments because the case was originally brought in 1990.[269] Plaintiffs who sue under Title VII, as it existed prior to its amendment, are limited in their recovery to back pay, injunctions, and other equitable relief.[270] To bolster its analysis, the Court also noted that unlike tort plaintiffs, plaintiffs in a Title VII action are not entitled to jury trials.[271]

The Court focused on the "remedial scheme" of Title VII and its purpose of restoring the victims to the positions they would have occupied absent the discrimination.[272] The remedial scheme of pre-amendment Title VII made no provision for compensating the plaintiffs with any of the remedies traditionally available to victims of personal injuries, such as damages for emotional distress or pain and suffering.[273] Comparing the taxability of relief granted under other federal anti-discrimination statutes, such as 42 U.S.C. § 1983 or 42 U.S.C. § 1981 was

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268. *Id.* at 1873.

269. *Id.* at 1874 n.12.

270. *Id.* at 1873. Title VII, prior to its amendment, provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g) (Supp. III 1991).

271. *Burke*, 112 S. Ct. at 1872. The majority cited Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969), and Curtis v. Loether, 415 U.S. 189, 192-93 (1974), to support its assertion.

272. *Burke*, 112 S. Ct. at 1873. In describing the potential relief available under Title VII prior to its amendment, the Court stated:

> [a]n employee wrongfully discharged on the basis of sex thus may recover only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits; similarly, an employee wrongfully denied a promotion on the basis of sex . . . may recover only the differential between the appropriate pay and actual pay for services performed, as well as lost benefits.

Id.

273. *Id.*; *see supra* note 20.

futile in the Court's opinion, because these statutes contained different remedial schemes than Title VII.[274]

The plaintiffs in *Burke* argued that the 1991 amendments to Title VII, which allow jury trials and recovery of both compensatory and punitive damages, indicate that Congress did, in fact, intend for Title VII to address personal injuries that are tort-type in nature.[275] Although the Court acknowledged these changes, it ultimately rejected plaintiffs' argument, as these changes "signal[ed] a marked change in [Congress's] conception of the injury redressable by Title VII, and [could not] be imported back into analysis of the statute as it existed at the time of [the] lawsuit."[276] The Court thus reached the ultimate conclusion that damages received in settlement of a Title VII suit

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274. *Burke*, 112 S. Ct. at 1874 n.11. The Court noted that Title VII's remedial scheme was modeled on the back pay provisions of the National Labor Relations Act, and that recoveries under the Act could constitute "wages" for purposes of the social security tax, pursuant to Social Sec. Bd. v. Nierotko, 327 U.S. 358 (1946). *Id.* at 1874 n.10. For an overview of remedies available under § 1983, see *supra* notes 32-38 and accompanying text. For an overview of remedies available under § 1981, see *supra* notes 64-65 and accompanying text.

275. *Burke*, 112 S. Ct. at 1874 n.12.

276. *Id.* The Court, therefore, did not address the issue of whether future Title VII plaintiffs suing under the statute, as amended in 1991, would be able to exclude from gross income the amount of their recovery. *See supra* notes 254-55 and accompanying text.

In Lieb v. Commissioner, 1993 T.C.M. (RIA) 1846 (1992), the Tax Court relied on *Burke* in deciding whether to grant summary judgment to a taxpayer who wished to exclude a settlement received in a sex discrimination action. The court denied the taxpayer's motion, pursuant to *Burke*, because there was a factual issue as to whether any part of the taxpayer's settlement constituted a claim for back pay under Title VII. *Id.* at 1847. That part would be includable in the taxpayer's gross income. *Id.* The acts of discrimination at issue in *Lieb* arose in 1986 however, prior to the effective date of the amended Title VII. *Id.* at 1846.

Similarly, in Johnson-Waters v. Commissioner, 1993 T.C.M. (RIA) 1693 (1993), the Tax Court held that at least part of the taxpayer's settlement was attributable to a Title VII recovery, and therefore includable in income pursuant to *Burke*. *Id.* at 1695. The taxpayer in her original action had alleged a violation of Title VII and sought to recover the compensation she would have received had she not been denied the promotion to which she was entitled. *Id.* at 1694. However, her attorney, in a letter to the taxpayer's former employer, attempted to allocate no portion of the settlement to back pay. *Id.* The Tax Court dismissed this allocation as a "self-serving statement on behalf of [taxpayer] to mitigate [her] Federal tax liabilities . . . ." *Id.* Note that this case was also brought prior to the amendments to Title VII.

Although these cases have been decided since *Burke*, they both involved claims occurring prior to the 1991 amendments. However, the amendments, and consequently the holding of *Burke*, may be applied retroactively depending on the

are not excludable under section 104(a)(2) of the Internal Revenue Code.[277]

C. *Justice Scalia's Concurrence*

Justice Scalia concurred in the result, but faulted the reasoning of the majority, and focused instead on an issue that was not raised by either party during the course of the proceedings.[278] He stated that the plaintiffs' recovery should not be excludable from gross income because the IRS's long standing interpretation of "personal injury" as analogous to a tort or tort-type injury is incorrect.[279] Justice Scalia stated that "personal injuries," instead of encompassing tort-type violations, should be read more narrowly to encompass only physical injuries.[280]

To support his analysis, Justice Scalia utilized the maxim of statutory interpretation, "*noscitur a sociis*,"[281] which would

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outcome of cases currently pending in the Supreme Court. *See supra* notes 254-55 and accompanying text.

277. *Burke*, 112 S. Ct. at 1874. This holding reversed the Sixth Circuit's holding in Burke v. United States, 929 F.2d 1119 (6th Cir. 1991), and also may have impliedly overruled Metzger v. Commissioner, 88 T.C. 834 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988). However, *Metzger* was a more complex case because the plaintiff sought relief under several anti-discrimination statutes, and the tort and contract portions of her settlement were not specifically allocated to any particular anti-discrimination claim or claims. *See supra* notes 165-78 and accompanying text for a more complete discussion of *Metzger*.

278. *Burke*, 112 S. Ct. at 1877 (Scalia, J., concurring). Justice Scalia acknowledged that his focus was uncharacteristic of traditional judiciary etiquette. *Id.* However, he felt that:

> there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it particularly when the judgment will reinforce error already prevalent in the system.

Id.

279. *Id.* at 1875.

280. *Id.* at 1875-76. "[I]ts more common connotation embraces only physical injuries to the person (as when the consequences of an auto accident are divided into 'personal injuries' and 'property damage'), or perhaps, in addition, injuries to a person's mental health." *Id.* at 1875 (footnote omitted).

281. *Id.* (emphasis added). The term has been defined: "[i]t is known from its associates." BLACK'S LAW DICTIONARY 1060 (6th ed. 1990). "[W]hile not an inescapable rule, [the maxim] is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Burke*, 112 S. Ct. at 1875 (Scalia, J., concurring) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

require "personal injuries" to be read in conjunction with "sickness," as it is written in the statute.[282] He pointed to the early interpretation of section 213(b)(6) of the Internal Revenue Code for support, wherein the definition of personal injuries was limited to physical injuries only.[283]

For additional support of his proposition, Justice Scalia noted that, in other contexts within section 104(a), the term "'personal injuries or sickness'" is used to refer only to injuries to a person's physical or mental health.[284] Scalia also noted that section 104(a)(2), as a tax exemption, is subject to the customary rule of a narrow construction (for example, if the IRS did not specifically exclude the item from gross income consideration, it should be included).[285] Based on his interpretation of "personal injuries" and the default rule of narrow construction for tax exemptions, Scalia concluded that the plaintiffs' settlement payment was not subject to the section 104(a)(2) exclusion.[286]

D. *Justice Souter's Concurrence*

Justice Souter also concurred in the result of the Court's decision.[287] While he noted that Title VII actions had definite

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282. *Burke*, 112 S. Ct. at 1875 (Scalia, J., concurring). Justice Scalia then noted that the dictionary definition of "sickness" denoted only "a '[d]iseased condition; illness; [or] ill health.'" *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2329-30 (2d ed. 1950)).

283. *Burke*, 112 S. Ct. at 1875 n.2 (Scalia, J., concurring).

284. *Id.* at 1876. Scalia points to:

> [1] § 104(a)(1) (gross income does not include "amounts received under workmen's compensation acts as compensation *for personal injuries or sickness*" (emphasis added)); [2] § 104(a)(3) (gross income does not include "amounts received through accident or health insurance *for personal injuries or sickness*" (emphasis added)); [3] § 104(a)(4) (gross income does not include "amounts received as a pension, annuity, or similar allowance *for personal injuries or sickness* resulting from active service in the armed forces . . . or as a disability annuity payable under . . . the Foreign Service Act").

Id. (emphasis added). Scalia reasoned that § 104(a)(2), read in the context of these other provisions of § 104(a), clearly indicated that § 104(a)(2) was only meant to apply to physical injuries. *Id.*

285. *Id.* There is support for this proposition in case law. *See, e.g.*, United States v. Centennial Sav. Bank FSB, 111 S. Ct. 1512, 1519 (1991); Commissioner v. Jacobson, 336 U.S. 28, 49 (1949).

286. *Burke*, 112 S. Ct. at 1876.

287. *Id.* at 1877 (Souter, J., concurring).

similarity to dignitary tort actions,[288] he also observed notable similarities to contract actions.[289] Justice Souter stated that the back pay provisions of Title VII resembled a contract measure of damages.[290] He also noted the similarity of the requirements of the Title VII provisions to provisions that customarily arise in an employment contract.[291]

Justice Souter, however, thought it unnecessary to decide which argument was stronger, that is, whether Title VII recoveries were more in the nature of tort or contract.[292] Instead, he utilized the default rule also stated by Justice Scalia, that since exclusions from income are to be narrowly construed in the absence of a contrary, express provision in the Internal Revenue Code, the recoveries under Title VII should be included.[293]

E. *Dissent Holding*

The dissenters, Justices O'Connor and Thomas, disagreed with the majority's focus on remedies as being determinative of the type of injury suffered by plaintiffs.[294] The dissenters felt that the best measure of whether an injury is a "tort-type" injury is to focus on the nature of the statute and the type of claim that is brought under the auspices of the statute.[295] As applied to Title VII, they argued that the nature of that statute is to provide protection from a tort injury because it awards "com-

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288. *Id.* "There are definite parallels between, say, a defamation action, which vindicates the plaintiff's interest in [his] good name, and a Title VII suit, which arguably vindicates an interest in dignity as a human being entitled to be judged on individual merit." *Id.* Justice Souter also cited cases decided under federal anti-discrimination statutes 42 U.S.C. § 1983 and 42 U.S.C. § 1981 to support the theory that there are parallels between tort actions and actions based on federal anti-discrimination statutes. *Id.* (citing Wilson v. Garcia, 471 U.S. 261, 277-78 (1985) (§ 1983); Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987) (§ 1981)).

289. *Id.* at 1877-78.

290. *Id.* at 1877. "Back pay . . . is quintessentially a contractual measure of damages" and limitation of recovery to back pay "counts against holding [plaintiffs'] statutory action to be 'tort-type.'" *Id.*

291. *Id.* at 1877-78. In fact, Justice Souter stated that the Title VII provisions could be considered implied terms in every employment contract. *Id.* at 1878.

292. *Id.*

293. *Id.* This proposition finds support from the holdings of other Supreme Court cases. *See supra* note 285 and accompanying text.

294. *Id.* at 1879 (O'Connor, J., dissenting).

295. *Id.*

pensation for invasions of a [person's] right to be free from certain injury in the workplace."[296] Title VII also provides a public policy incentive to employers to keep their workplaces free from the potential effects of such injuries.[297]

The dissent then compared Title VII to other anti-discrimination statutes such as 42 U.S.C. § 1983 and 42 U.S.C. § 1981, to demonstrate their tort-type nature, as they are principally intended to combat the invasion of personal rights.[298] Once again, if plaintiffs can establish that the damages received were in settlement of a tort-type claim for personal injuries, the damages will be excludable under section 104(a)(2).[299]

The dissent also disagreed with the majority on three other issues. First, with respect to the majority's assertion that the non-taxability of the recovery would be a windfall to plaintiffs, the dissent noted that the non-taxability of the recovery would merely put Title VII plaintiffs on an equal footing with any other tort plaintiff who had suffered a personal injury.[300] The plaintiffs should therefore be permitted to exclude from gross income the amount of their recovery.[301] Second, the dissent failed to see any connection between whether an injury was tort-like and whether the plaintiff was entitled to a jury trial.[302]

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296. *Id.* The dissent stated that Title VII "fundamentally differs from contract liability," which is intended to ensure that people perform their promises. *Id.* It also distinguished quasi-contractual liability, which is designed to prevent unjust enrichment. *Id.* Title VII is instead designed to "compensate employees for injury they suffer and to 'eradicat[e] discrimination throughout the economy.'" *Id.* (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).

297. *Id.* at 1879). "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of [discrimination].'" *Id.* (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

298. *Id.* at 1879-80. In conducting its analysis, the dissent relied on Wilson v. Garcia, 471 U.S. 261 (1985) (finding that the closest state law equivalent to a § 1983 action was a tort claim for personal injuries); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) (finding that the closest state law equivalent to a § 1981 action was an action based on personal injuries). *Burke*, 112 S. Ct. at 1879-80.

299. I.R.C. § 104(a)(2) (1993).

300. *Burke*, 112 S. Ct. at 1880 (O'Connor, J., dissenting).

301. *Id.*

302. *Id.* The dissent stated that the Court had never expressly ruled on the issue of whether Title VII plaintiffs were entitled to a jury trial. *Id.* Further, the dissent criticized the majority for placing any emphasis at all on the issue of whether plaintiffs were entitled to a jury trial, as that issue seemed to have no relevance to § 104(a)(2) excludability. *Id.* The dissent, however, in interpreting

Finally, the dissent noted the broadening effect of Title VII, as evidenced by the 1991 amendments.[303] This lent support to the argument that the purpose of Title VII was not to give plaintiffs a contractual remedy to recover back pay, but rather, to counter the negative effects of discrimination in the workplace.[304]

IV. The Effect of *United States v. Burke* and the 1991 Amendments to Title VII on the Excludability of Title VII Recoveries

United States v. Burke held that Title VII recoveries were not properly excludable from gross income under section 104(a)(2) of the Internal Revenue Code.[305] In reaching this conclusion, the majority focused primarily on the remedial scheme of Title VII.[306] However, the 1991 amendments to Title VII resulted in drastic changes to the remedial scheme, as they permit the traditional tort remedies of compensatory and punitive damages.[307] Therefore, while *Burke* may have drastic effects on recipients of Title VII damages prior to the amendments the effects may not be as drastic for recipients after the amendments, or for claimants whose cases were pending at the time of the amendments.[308]

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the reasoning of the majority, assumed that the majority raised the issue of jury trials as a means of demonstrating that Title VII claims are equitable rather than legal in nature. *Id.* Based on this reasoning, the dissent again criticized the majority because the IRS's definition of "damages," as the prosecution or settlement of a legal suit based on tort or tort-type rights, makes no distinction between actions at law and suits in equity. *Id.* at 1880-81.

303. *Id.* at 1881.

304. *Id.* The dissent argued that even before the 1991 amendments, Title VII reached more than just economic aspects of discrimination. *Id.* Title VII has always attempted to counter the severe psychological and emotional effects that discrimination in the workplace might have. *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986)). Therefore, in enacting the 1991 amendments, Congress was acknowledging that additional, tougher remedies were needed to "effectuate . . . [Title VII's] settled purposes." *Id.*

305. *Burke*, 112 S. Ct. at 1874.

306. *Id.* at 1872-73.

307. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991).

308. Although it remains to be seen whether the Supreme Court will give Title VII retroactive effect, it would seem to be unlikely as no circuit court of appeal that has heard the issue has given Title VII retroactive effect. *See supra* notes 254-55 and accompanying text. In addition, there is a policy against retroactive application of new legislation. *See supra* note 255. However, all references in this analysis to Title VII claimants after the effective date of the 1991 amendments

A. *Title VII Recoveries and Settlements Prior to 1991 Amendments*

The decision in *United States v. Burke* resolved the inter-circuit conflict and held that recoveries in Title VII actions must be included in income.[309] Although the majority did not address recoveries after the effective date of the 1991 amendments,[310] its holding regarding recoveries and settlements prior to the 1991 amendments was unequivocal.[311] This holding impliedly overrules *Metzger v. Commissioner*.[312] In *Metzger*, the court determined that the injuries that the plaintiff claimed under Title VII were as much personal injuries as those claimed under 42 U.S.C. § 1981.[313] Therefore, the court held that at least the one half of the recovery that the plaintiff sought to exclude, was properly excludable.[314]

However, *Metzger* was a "hybrid" Title VII case in that the plaintiff claimed injuries under other federal anti-discrimination statutes in addition to Title VII, and was somewhat unusual in that the plaintiff only sought to exclude half of her recovery.[315] The court in *Metzger* might have been faced with a completely different issue had Metzger attempted to exclude her entire settlement. In such a case, the court would be forced to decide what, if any, portion of the settlement represented the Title VII claims, which would be includable under *Burke*. The court would then have to decide what portion of the settlement represented recovery under 42 U.S.C. § 1983 claims or 42 U.S.C. § 1981 claims. This portion would be excludable under section 104(a)(2) pursuant to *Bent v. Commissioner*[316] and *Wulf*

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shall also include Title VII claimants whose cases were pending at the date of enactment of the new legislation, should the Supreme Court decide to give Title VII retroactive effect.

309. *Burke*, 112 S. Ct. at 1874.

310. *Id.* at 1874 n.12.

311. *Id.*

312. 88 T.C. 834 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988); see *supra* notes 165-78 and accompanying text for discussion of *Metzger*.

313. *Metzger*, 88 T.C. at 856.

314. *Id.* at 858.

315. *Id.* at 841-42.

316. 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987) (holding that recoveries under 42 U.S.C. § 1983 represent personal injury recoveries that are permissibly excluded under I.R.C. § 104(a)(2)). *Id.* at 249.

v. Commissioner.[317] However, this situation did not arise in *Metzger* because the plaintiff had conceded that one half of the recovery was includable, as it represented wage claims.[318]

In future situations where a claimant has recovered or settled a Title VII action which was brought in conjunction with other federal anti-discrimination sections prior to the 1991 amendments to Title VII, the court will enjoy a certain amount of discretion in deciding whether the payments are excludable. Pursuant to *Burke*, the recovery is includable to the extent that it represents payment for, or settlement of, Title VII claims.[319] Multiple claims will require additional fact finding. However, ultimate allocation of the recovery by the court between Title VII violations and other violations may be somewhat arbitrary. The requirement of includability of Title VII recoveries could also be overcome through clever draftsmanship of the settlement agreement, allocating nothing to Title VII, and everything to § 1983 or § 1981, despite the nature of the actual violation.

In sum, *Burke* laid down a bright-line rule with respect to recoveries that are exclusively for Title VII claims brought prior to the 1991 amendments.[320] However, the rule is not as clear if multiple claims are brought under the auspices of several federal anti-discrimination statutes. Excludability is still appropriate for recoveries and settlements under § 1983,[321] § 1981,[322] the ADEA,[323] and portions of recoveries under the Equal Pay Act.[324] The question becomes what part of an unallocated recov-

317. 883 F.2d 842, 873 (10th Cir. 1989) (holding that even back pay recoveries under § 1983 are excludable from gross income treatment).

318. *Metzger*, 88 T.C. at 842.

319. *Burke*, 112 S. Ct. at 1874.

320. *Id.*

321. *See* Bent v. Commissioner, 87 T.C. 236, 249 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987); *supra* notes 46-50 and accompanying text.

322. *See* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Johnson-Waters v. Commissioner, 1993 T.C.M. (RIA) 1693 (1993) in conjunction with Wilson v. Garcia, 471 U.S. 261 (1985); Bent v. Commissioner, 87 T.C. 236 (1986); Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989). *See supra* notes 39-57, 66-77 and accompanying text.

323. *See, e.g.*, Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990); *see supra* notes 86-98 and accompanying text.

324. *See* Thompson v. Commissioner, 89 T.C. 632, 632 (1987), *aff'd*, 866 F.2d 709 (4th Cir. 1989) (holding that the liquidated damages portion, but not the back pay portion of recovery under the Equal Pay Act is excludable under § 104(a)(2)); *see supra* notes 140-52 and accompanying text.

ery is attributable to Title VII, and what part is attributable to another statute.

B. *Title VII Recoveries and Settlements After the 1991 Amendments*

1. *Title VII as Compared to Other Federal Anti-Discrimination Statutes*

The majority's holding in *Burke* was limited to Title VII as it existed prior to the 1991 amendments.[325] The majority interpreted these amendments as signalling a "marked change in [Congress's] conception of the injury redressable by Title VII . . . ."[326] The dissent, however, viewed the amendments as Congress's method of effectuating the purposes of Title VII.[327] In any event, the change in the nature of the remedies available suggests that if the same factual situation as *Burke* were again decided by the Supreme Court, applying the amended version of Title VII, the vote would be seven to two in favor of *excludability*, rather than seven to two in favor of includability.[328]

Title VII was unique among the federal anti-discrimination statutes because its remedial scheme was limited to only equitable remedies.[329] Such is no longer the case. Since there is now provision for both compensatory and punitive damages,[330] Title VII more closely resembles the remedial schemes of § 1983, § 1981, and the ADEA, all of which allow for legal as

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325. *Burke*, 112 S. Ct. at 1874 n.12.

326. *Id.*

327. *Id.* at 1881 (O'Connor, J., dissenting).

328. In reaching its holding, the majority analyzed the remedial scheme of Title VII, and determined that since it did not allow damages as a traditional tort remedy, but merely equitable relief, a Title VII claim was not a claim that would be excludable under § 104(a)(2). *Id.* at 1872-73. Title VII now permits both compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991). If the determination turns on remedies, the five members of the majority would presumably join the two members of the dissent, who stated that Title VII recoveries should be excludable on other grounds. Justices Scalia and Souter, who concurred in the result, would now constitute dissenters, since neither would allow excludability in the absence of clear guidance from the I.R.S. *Burke*, 112 S. Ct. at 1876 (Scalia, J., concurring); *Id.* at 1878 (Souter, J., concurring).

329. 42 U.S.C. § 2000e-5(g) (Supp. III 1991); *see supra* notes 160-63 and accompanying text.

330. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991).

well as equitable relief,[331] and all of which permit the entire recovery to be excludable, regardless of a back pay component.[332]

a. *Title VII as Compared to 42 U.S.C. § 1983*

Section 1983 was enacted to provide a federal remedy for the protection of the Constitutional guarantees of the Fourteenth Amendment.[333] Therefore, it protects against the deprivation of rights, privileges, or immunities, under color of state law.[334] Deprivation of rights occurs in a case of discrimination, and is therefore actionable under § 1983.[335] Like Title VII, § 1983 acts as a protection against discrimination. Like the amended Title VII, its remedial structure is broad, allowing for the recovery of equitable as well as legal remedies.[336] Claims brought under § 1983 are recognized to be claims for personal injury, pursuant to *Wilson v. Garcia*.[337] Therefore, recoveries have been held to be excludable from gross income.[338]

Title VII and § 1983 share a mutual purpose of protection against discrimination. Further, the 1991 amendments to Title VII have made its remedial scheme more closely analogous to that of § 1983. Therefore, because § 1983 recoveries are excludable from gross income, it would be consistent to find Title VII recoveries excludable. Failure to do so would grant tax benefits to those who had suffered sex discrimination under color of state law, but not to those who have suffered sex discrimination

331. *See supra* notes 32-38 and accompanying text with respect to the remedial scheme of § 1983; *supra* notes 64-65 and accompanying text with respect to the remedial scheme of § 1981; *supra* notes 84-85 and accompanying text with respect to the remedial scheme of the ADEA.

332. *See* Bent v. Commissioner, 87 T.C. 236, 249 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987) (holding § 1983 damages excludable); Goodman v. Lukens Steel Co., 482 U.S. 656, 669 (1987) (finding that § 1981 injuries are personal injuries); Rickel v. Commissioner, 900 F.2d 655, 656 (3d Cir. 1990) (holding back pay and liquidated damages recovered under ADEA are excludable because they are compensation for personal injuries); Pistillo v. Commissioner, 912 F.2d 145, 150 (6th Cir. 1990) (same).

333. Thompson v. New York, 487 F. Supp. 212, 220 (N.D.N.Y. 1979); *see supra* note 26 and accompanying text.

334. U.S. CONST. amend. XIV, § 1.

335. *See, e.g.* Metzger v. Commissioner, 88 T.C. 834, 851-52 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988).

336. *See supra* notes 32-38 and accompanying text.

337. 471 U.S. 261 (1985); *see supra* notes 39-45 and accompanying text.

338. Bent v. Commissioner, 87 T.C. 236, 249 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987); Wulf v. City of Wichita, 883 F.2d 842, 873 (10th Cir. 1989).

in a private workplace. This would be true regardless of the equivalency of harm resulting from the discrimination. Even if the discrimination in the private workplace was more purposeful and harmful, discrimination under color of state law would still get preferential tax treatment.

b. *Title VII as Compared to 42 U.S.C. § 1981*

Among the protections afforded by § 1981 is the right of all persons, regardless of race, "to make and enforce contracts."[339] It's protection extends to the workplace.[340] Although § 1981 protects contractual rights, it is more "in the nature of a tort remedy."[341] Its remedies are therefore not limited merely to the equitable, but can also include compensatory and punitive damages.[342] According to *Goodman v. Lukens Steel Co.*,[343] the characterization of § 1981 claims is similar to that of claims under § 1983.[344] Pursuant to *Wilson v. Garcia*,[345] these claims would therefore be characterized as claims for personal injuries, which are excludable under section 104(a)(2).[346] In addition, in *Johnson-Waters v. Commissioner*,[347] the Tax Court seemed to concede that § 1981 provided a remedy for injuries to tort-type rights, which recoveries are properly excludable under section 104(a)(2).[348]

Title VII also protects contractual rights by allowing claimants to recover wages that have been earned, but not yet paid.[349] Title VII, as amended, provides further protection by allowing compensatory and punitive damages,[350] arguably providing a further means of deterrence to keep employers from

339. 42 U.S.C. § 1981(a) (Supp. III 1991); *see supra* notes 57-62 and accompanying text.

340. Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *see supra* note 61 and accompanying text.

341. Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987); *see supra* note 63 and accompanying text.

342. Collier v. Philadelphia Gas Works, 441 F. Supp. 1208, 1213 (E.D. Pa. 1977); *see supra* notes 64-65 and accompanying text.

343. 482 U.S. 656 (1987).

344. *Id.* at 661.

345. 471 U.S. 261 (1985).

346. *Id.* at 276.

347. 1993 T.C.M. (RIA) 1693 (1993).

348. *Id.* at 1695 n.2; *see supra* notes 75-77 and accompanying text.

349. *See, e.g.*, Hodge v. Commissioner, 64 T.C. 616, 619 (1975).

350. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991).

discriminating in the workplace. Because Title VII and § 1981 provide similar protections of a person's right to contract, the act of discrimination under Title VII should be considered as much a personal injury as it is under § 1981, thereby justifying section 104(a)(2) exclusion. It would be inconsistent to tax the recovery gained from the protection afforded against discrimination in the context of Title VII, but not in the context of § 1981. Therefore, to the extent § 1981 recoveries, which include recoveries for back pay, are excludable, so too should Title VII recoveries be excludable.

c. *Title VII as Compared to the ADEA*

Under the ADEA, Congress intended to prohibit age discrimination in employment.[351] The ADEA was enacted because Title VII did not extend to age discrimination.[352] Unlike Title VII prior to its amendment, however, the ADEA allows for a recovery of more than just back pay; it also allows for a recovery of liquidated damages equal to the amount of the back pay if the violation of the ADEA was willful.[353] Recoveries under the ADEA have been found by more than one Circuit Court of Appeals to constitute a recovery for personal injury that is excludable under section 104(a)(2), regardless of whether any part of the recovery constitutes back pay.[354] Although Title VII is intended to prohibit sex discrimination in the workplace, and the ADEA is intended to prohibit age discrimination in the workplace, they are aimed at the same essential goal—the prevention of discrimination. The amendments to Title VII parallel the ADEA. There is now a provision for the legal remedy of punitive damages, which is similar to the ADEA's provision for liquidated damages that Congress intended to be punitive in nature.[355]

The Tax Court has had the opportunity to reevaluate its position on back pay recoveries under the ADEA in light of the

351. 29 U.S.C. § 621(b) (Supp. III 1991); *see supra* notes 78-83 and accompanying text.

352. *See supra* note 83 and accompanying text.

353. 29 U.S.C. § 626(b) (Supp. III 1991).

354. Rickel v. Commissioner, 900 F.2d 655, 666-67 (3d Cir. 1990); Pistillo v. Commissioner, 912 F.2d 145, 150 (6th Cir. 1990).

355. *See, e.g., Rickel*, 900 F.2d at 666.

Supreme Court's holding in *Burke*.[356] Despite the similarity between the ADEA and Title VII, the Tax Court held, albeit not unanimously, in *Downey v. Commissioner* (*Downey II*), that back pay recoveries under the ADEA are properly excludable from income.[357] Since recoveries, including back pay, are excludable under the ADEA, they should also be excludable under Title VII, as amended.

d. *Title VII as Compared to the Equal Pay Act*

The Equal Pay Act is the exception to the rule on excludability in federal anti-discrimination statutes, as demonstrated by *Thompson v. Commissioner*.[358] Pursuant to *Thompson*, the back pay component of a recovery is includable in income, as it is considered in the nature of a contract violation.[359] The part of a recovery constituting liquidated damages, however, is excludable.[360]

The Equal Pay Act utilizes essentially the same remedial scheme as the ADEA, allowing for the recovery of back pay, as well as liquidated damages in an amount equivalent to the back pay award.[361] Moreover, the Equal Pay Act and the ADEA share common purposes: the Equal Pay Act is primarily aimed at eliminating sex discrimination in the workplace,[362] and the ADEA is aimed at eliminating age discrimination in the workplace.[363] Despite similar purposes, and despite the same remedial schemes, *Thompson*, decided under the Equal Pay Act, stands in contrast to both *Rickel v. Commissioner*[364] and *Pistillo v. Commissioner*.[365] These cases provide that recoveries under

356. Downey v. Commissioner, 1992-93 T.C.M. (P-H) 336 (1993).

357. *Id.* at 338.

358. 89 T.C. 632 (1987), *aff'd*, 866 F.2d 709 (4th Cir. 1989).

359. *Id.* at 646.

360. *Id.* at 650. Although measured by the amount of back pay due, the liquidated damages portion is paid because the employer discriminated against his employees in bad faith. *Id.*

361. 29 U.S.C. § 216(b) (Supp. III 1991). Note, however, that the ADEA, unlike the Equal Pay Act, contains a requirement of willful discrimination by the employer in order to qualify for the liquidated damages award. 29 U.S.C. § 626(b) (Supp. III 1991).

362. 29 U.S.C. § 206(d) (Supp. III 1991).

363. 29 U.S.C. § 621(b) (Supp. III 1991).

364. 900 F.2d 655 (3d Cir. 1990).

365. 912 F.2d 145 (6th Cir. 1990).

this common remedial scheme are entirely excludable under section 104(a)(2), regardless of any back pay component.

These three cases were decided by different Circuit Courts of Appeals.[366] Therefore, the Third and Sixth Circuits in deciding *Rickel* and *Pistillo*, were under no obligation to follow the 1989 *Thompson* decision. The *Rickel* and *Pistillo* decisions left *Thompson* as somewhat of an aberration in the anti-discrimination remedial scheme provided by § 1983, § 1981, and the ADEA. However, even if *Thompson* is not an aberration, it would at least support the proposition that any compensatory or punitive damages recovered under Title VII would compensate for the personal injury of discrimination, rather than make up for earned but unpaid wages, and would therefore be excludable.

2. *The Effect on the Taxation of Title VII Recoveries Caused by Changes in Title VII's Remedial Scheme*

Comparing the similarities of Title VII to other federal anti-discrimination statutes may be of some use in determining the future for the excludability of Title VII recoveries. However, the ultimate question still comes down to whether Title VII is an action for personal injuries based on tort or tort-type rights, such that it would justify exclusion of the recovery under section 104(a)(2). In reaching the conclusion that Title VII was not an action for personal injuries based on tort or tort-type rights, the majority in *Burke* focused on the remedial scheme of Title VII.[367] The Court noted that Title VII as it existed at the time of the suit, limited claimants to equitable remedies, including back pay.[368] Awarding back pay to an employee is not a means of punishing the employer; rather, it is a means of restoring the claimant to the position he or she would have occupied absent the discrimination.[369] In this sense, an award of back pay is similar to a contract remedy.[370]

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366. *Thompson*, 4th Circuit; *Rickel*, 3d Circuit; *Pistillo*, 6th Circuit.

367. *Burke*, 112 S. Ct. at 1872-73. *See supra* notes 266-77 and accompanying text.

368. *Burke*, 112 S. Ct. at 1873.

369. *Id. See generally* Hodge v. Commissioner, 64 T.C. 616, 619 (1975).

370. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a. (1981); *supra* note 20.

However, there are other considerations in the remedial scheme of Title VII, not considered by the *Burke* majority, which would lend support to finding a Title VII claim more in the nature of tort than contract. Beyond compensating plaintiffs, tort remedies also serve the purposes of "punish[ing] wrongdoers and deter[ring] wrongful conduct."[371] While this is done through punitive damage awards, it can also be done through equitable relief.[372] For example, the issuance of a declaratory judgment, stating that a particular employer discriminates against women in the practice of hiring, may serve as a deterrent. Declaratory judgments also serve a remedial purpose unique to tort law, that of vindicating the plaintiff's rights.[373] Deterrence may also come through the potential for back pay awards or injunctive relief, which effectively give discriminatory practices the stamp of judicial disapproval.

The dissenting justices in *Burke* focused on the nature of the claim, rather than on the remedial scheme available.[374] Provisions for compensatory and punitive damages strongly indicate that the nature of the claim sounds in tort. In the absence of such damage provisions, however, the court must resort to other information in determining the nature of the claim. For example, in assessing the primary purpose of Title VII, to eliminate discrimination in the workplace by employers against employees,[375] it becomes apparent that Title VII is more closely related to the tort law purpose of deterring wrongful conduct than it is to the contract law purpose of protecting the promisee. Additionally, the contention that Title VII is grounded in tort is strengthened because the aim of Title VII parallels tort law in attempting to make the victim whole.[376]

However, discussion of whether the appropriate method of analysis is "remedial scheme" or "nature of the claim," has become somewhat moot with respect to Title VII, in light of the 1991 amendments. The *Burke* dissent, using "nature of the

371. RESTATEMENT (SECOND) OF TORTS § 901(c) (1979).

372. *Burke*, 112 S. Ct. at 1873.

373. RESTATEMENT (SECOND) OF TORTS § 901(d) (1979).

374. *Burke*, 112 S. Ct. at 1879 (O'Connor, J., dissenting).

375. *See, e.g.*, Silver v. KCA Inc., 586 F.2d 138 (9th Cir. 1978); *see supra* notes 157-59 and accompanying text.

376. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 876 (11th Cir. 1986); *see supra* note 158 and accompanying text.

claim" analysis, found Title VII to be an action to compensate for personal injury in tort or tort-type claims.[377] Conversely, the majority applied a "remedial scheme" analysis, and determined that based on Title VII's remedial scheme, it was not aimed at protecting tort-type rights.[378]

The 1991 amendments to Title VII seem to counter the biggest obstacles that the majority found for disallowing the section 104(a)(2) exclusion for Title VII recoveries. The majority argued that the remedies provided by Title VII were not traditional tort remedies that would warrant the 104(a)(2) exclusion.[379] That distinction no longer exists, as compensatory and punitive damages are both permitted under the amended Title VII.[380] The majority also noted that unlike traditional tort plaintiffs, Title VII plaintiffs are not entitled to jury trials.[381] That distinction also no longer exists, as any party can require a jury trial in a Title VII action if compensatory or punitive damages are requested by the plaintiff.[382]

The Court also refused to compare Title VII to other federal anti-discrimination statutes where exclusion of the recovery was allowed, because of Title VII's differing remedial scheme, which permitted only equitable relief.[383] This difference has also been abrogated by the amendments, since allowing both legal and equitable relief has made Title VII more akin to other federal anti-discrimination statutes, such as 42 U.S.C. § 1983, 42 U.S.C. § 1981, and the ADEA. Whether Congress was reconceptualizing its interpretation of Title VII, or was enacting stronger remedies to help effectuate established purposes is irrelevant. Under either scenario, Title VII recoveries—at least recoveries for compensatory damages[384]—should now qualify for section 104(a)(2) exclusion under both the *Burke* majority's

377. *Burke*, 112 S. Ct. at 1878-79 (O'Connor, J., dissenting).

378. *Id.* at 1874.

379. *Id.* at 1873.

380. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991).

381. *Burke*, 112 S. Ct. at 1872.

382. 42 U.S.C. § 1981a(c)(1) (Supp. III 1991).

383. *Burke*, 112 S. Ct. at 1874 n.11.

384. Note that although the capacity to recover punitive damages indicates that the cause of action exists to protect tort-type rights, punitive damages do not qualify for the § 104(a)(2) exclusion. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641, 103 Stat. 2106, 2379 (1989); *supra* note 17.

"remedial scheme" analysis and the dissent's "nature of the claim" analysis.

Although the arguments seem to support finding recoveries under amended Title VII excludable from gross income for purposes of calculating taxable income, arguments persist that favor such recoveries remaining includable. The most persuasive argument is that *Burke* is the law. The Supreme Court did not say that recovery under the old Title VII would be includable and recovery under the amended Title VII would be excludable. While the amendments to Title VII suggest that Title VII recoveries will eventually be considered excludable, the result in *Burke* has not been superseded by statute or overruled by the Supreme Court. Therefore, lower courts may disregard the holding of *Burke*, in light of the 1991 amendments, but they do so without the benefit of affirmative guidance from the Supreme Court. Some lower courts may not believe that the amendments, standing alone, are a sufficient basis to rule contrary to *Burke*.

There is also an argument that while compensatory damages under Title VII may be excludable, any award of back pay must still be included pursuant to *Thompson v. Commissioner*.[385] Under *Thompson*, the true nature of a contract claim for back wages does not change because the claim also involves a tort-type claim for personal injuries.[386] If the damages are recovered in lieu of wages, then that amount is not properly excludable under section 104(a)(2).[387] This proposition also has support in case law.[388] For example, in *Hodge v. Commissioner*,[389] the Tax Court held that back pay recoverable under Title VII is not properly excludable from gross income consideration.[390] *Hodge* also implied that if the plaintiff had classified the recovery as personal injury damages, rather than as back

385. 89 T.C. 632, 648 (1987), *aff'd*, 866 F.2d 709 (4th Cir. 1989).

386. *Id.* at 646.

387. *Id.* at 647.

388. *See* Sparrow v. Commissioner, 949 F.2d 434, 440 (D.C. Cir. 1991) (Title VII back pay award is not properly excludable), *cert. denied*, 112 S. Ct. 3009 (1992); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1580 (5th Cir. 1989) (same), *cert. denied*, 493 U.S. 1019 (1990); Coats v. Commissioner, 46 T.C.M. (P-H) 1642, 1644 (1977) (back pay is compensation and thereby included); Hodge v. Commissioner, 64 T.C. 616, 620 (1975) (same).

389. 64 T.C. 616 (1975).

390. *Id.* at 619.

pay, the recovery would more likely have been excludable.[391] These cases support the proposition that Title VII recoveries containing a back pay component may be includable in gross income, to the extent that the recovery constitutes back pay.

However, as noted previously, many courts disregard the existence of a back pay component when the claim evinces a tort-like personal injury.[392] In fact, the Tax Court, even in light of the Supreme Court's holding in *Burke*, has found that back pay recoveries under the ADEA are excludable from income.[393] Thus, the argument that back pay recoveries remain includable in gross income, pursuant to *Burke*, may not be viable. This is particularly true since the recent amendments have expanded the nature of injury addressable by Title VII to encompass tort-like personal injuries.[394] Thus, recoveries under Title VII, whether back pay or traditional tort recoveries, should now be excludable from gross income.

C. *An Alternative Theory for Deciding Excludability Under the 1991 Amendments*

In *Burke*, Justices Scalia and Souter concurred in the result that the Title VII recovery was properly included in income for reasons other than the tort/contract analysis utilized by the majority and the dissent.[395] Both justices felt that *Burke* could have been more simply, but still correctly decided by using a default rule that statutory exclusions from income are to receive a narrow construction.[396] There is support for this proposition in case law.[397] However, in *Burke*, there was not enough support among the justices to utilize the rule in deciding the case. Thus, this theory of determination, while valid, will probably

391. *Id.* at 619-20 n.7.

392. *See, e.g.*, Wulf v. City of Wichita, 883 F.2d 842, 873 (10th Cir. 1989); *supra* notes 51-57 and accompanying text.

393. Downey v. Commissioner, 1992-93 T.C. Rep. (RIA) 336 (1993).

394. *See supra* notes 244-53 and accompanying text.

395. *Burke*, 112 S. Ct. at 1876 (Scalia, J., concurring); *id.* at 1878 (Souter, J., concurring).

396. *Id.*

397. *See, e.g.*, United States v. Centennial Sav. Bank, FSB, 111 S. Ct. 1512, 1519 (1991); Commissioner v. Jacobson, 336 U.S. 28, 49 (1949); *see supra* note 285 and accompanying text.

not play any significant role in the ultimate decision of whether Title VII recoveries are excludable.

V. Conclusion

The Supreme Court's holding in *United States v. Burke*, that recoveries in a Title VII action are not properly excludable from income, does not appear as though it will remain law for very long. The 1991 amendments to Title VII lend strong support to the theory that Congress desires Title VII plaintiffs to be treated as other tort plaintiffs, by providing them with provisions for compensatory and punitive damages and jury trials. Until the judiciary decides otherwise, however, *Burke* remains the law, and requires that any recovery incident to a Title VII action be included in the recipient's gross income.

Michael J. Minihan