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Application of the Personal Injury Exclusion to Awards for Sex Discrimination under Title VII: *U.S. v. Burke*, 112 S. Ct. 1867 (1992)

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Note

Application of the Personal Injury Exclusion to Awards for Sex Discrimination under Title VII: *U.S. v. Burke*, 112 S. Ct. 1867 (1992)

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I. INTRODUCTION

Section 104(a)(2) of the Tax Code provides: "[T]he 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" may be excluded from gross income.[1] In *U.S. v. Burke*[2], the Supreme Court held that back pay awards in the settlement of Title VII claims for sex discrimination in the workplace are not "damages

1. 26 U.S.C. § 104(a)(2)(1988).
2. 112 S. Ct. 1867 (1992).

received on account of personal injuries" for the purposes of section 104(a)(2) and are therefore not excludable from gross income.[3] This Note analyzes the holding in *Burke*, and criticizes the reasoning on which it is based. The Note begins with a summary of the facts and the procedural history of *Burke*, then outlines the majority opinion, by Justice Blackmun, and the dissent, by Justice O'Connor.[4] The Note then criticizes the majority's rationale in distinguishing a Title VII claim from a tort claim for personal injuries. The decision departed from precedent by focusing on the remedies available to a Title VII claimant rather than on the nature of the injuries suffered. In a prior decision, *Wilson v. Garcia*,[5] the Court held that the proper approach was to focus on the essence of the injury,[6] rather than on the consequences that flow from it, and held that civil rights claims redress injuries which are personal in nature, and are therefore analogous to tort claims for personal injuries.[7] Several lower court decisions relied on *Wilson* to develop a standard to determine whether an award of damages was excludable from gross income under section 104(a)(2).[8] *Burke* thus not only departed from precedent, but in the process, overturned a series of lower court decisions which had developed a consistent and predictable method for dealing with section 104(a)(2) cases. This note concludes that the Court's focus on remedies was an unwarranted departure from precedent, resulting in a narrowing of the availability of the personal injury exclusion. By going beyond the requirements of the Internal Revenue Code and Regulations, the decision succeeded in complicating and confusing this area of the law, rather than clarifying it.

II. BACKGROUND

A. Facts and Procedural History

Plaintiffs Therese A. Burke, Cynthia R. Center, and Linda G. Gibbs were employed by the Tennessee Valley Authority (TVA) and were members of the Office and Professional Employees Union ("the union"). In 1984, Judy A. Hutcheson, also an employee of TVA, filed a Title VII action against her employer, alleging that TVA had discrimi-

3. *Id.* at 1874.
4. Separate concurrences were written by Justices Scalia and Souter. However, the issues addressed in those opinions are beyond the scope of this note.
5. 471 U.S. 261 (1985).
6. *Id.* at 268.
7. *Id.* at 280.
8. *See* Bent v. Commissioner, 87 T.C. 236 (1986), *aff'd* 835 F.2d 67 (3rd Cir. 1987); Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd* 848 F.2d 81 (6th Cir. 1988); Metzger v. Commissioner, 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3rd Cir. 1988); Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990); Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990).

nated unlawfully in the payment of salaries on the basis of sex. The union intervened on behalf of other affected employees, including the plaintiffs.[9]

Hutcheson and the union alleged that TVA had discriminated against female employees by increasing the salaries of employees in certain male-dominated pay schedules but not increasing the salaries of employees in certain female-dominated pay schedules. They also alleged that TVA had lowered salaries in some female-dominated schedules. The parties reached a settlement, in which plaintiffs and other affected employees received an award for back pay, under a formula based on length of service and rates of pay. Pursuant to the award agreement, TVA withheld federal income taxes from the amounts paid.[10]

Plaintiffs filed claims for refund of the taxes withheld from the settlement payments. The Internal Revenue Service disallowed their claims. Plaintiffs then brought a refund action in the United States District Court for the Eastern District of Tennessee,[11] claiming that the settlement payments should have been excluded from their gross incomes under section 104(a)(2) of the Internal Revenue Code.[12] The District Court ruled that, because plaintiffs sought and obtained only back wages due them as a result of TVA's discriminatory underpayments rather than compensatory or other damages, the settlement proceeds could not be excluded from gross income as "damages received . . . on account of personal injuries."[13]

The United States Court of Appeals for the Sixth Circuit reversed.[14] The Court of Appeals concluded that TVA's unlawful sex discrimination constituted a personal, tort-like injury to plaintiffs, and held that the award of back pay pursuant to Title VII was excludable from gross income under section 104(a)(2).[15]

B. Majority Opinion

The Supreme Court, in an opinion written by Justice Blackmun, reversed the decision of the Sixth Circuit. The Court held that back pay awards in the settlement of Title VII claims are not excludable from gross income.[16] Under section 104(a)(2), "damages received . . . on account of personal injuries or sickness" may be excluded from

9. United States v. Burke, 112 S. Ct. 1867, 1868-69 (1992).
10. *Id.* at 1869.
11. Burke v. United States, No. CIV-1-88-508, 1990 WL 56155 (E.D. Tenn. 1990).
12. 26 U.S.C. § 104(a)(2)(1988).
13. Burke v. United States, No. CIV-1-88-508, 1990 WL 56155 at *4 (E.D. Tenn. 1990).
14. Burke v. United States, 929 F.2d 1119 (6th Cir. 1991).
15. *Id.* at 1119-20.
16. United States v. Burke, 112 S. Ct. 1867, 1874 (1992).

gross income.[17] I.R.S. Regulations define "damages received" to mean "an amount received . . . 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."[18] In order for back pay received in a Title VII settlement to be excluded, then, it must be shown that Title VII redresses tort-like personal injuries. To determine this, the majority compared the remedies available to a Title VII claimant with those available to a tort plaintiff. According to the majority opinion, Title VII does not redress tort-like personal injuries because the remedies available to a Title VII claimant are limited to back pay and injunctive relief, while "one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff."[19] Because the remedies available to a Title VII claimant are not sufficiently broad, redressing only "injuries of an economic character,"[20] a Title VII claim is not a tort type claim for personal injuries. Therefore, Title VII awards may not be excluded from gross income under section 104(a)(2).

C. O'Connor's Dissent

In her dissent, Justice O'Connor argued that the majority's focus on the remedies available to a Title VII claimant versus those available to a tort plaintiff was misguided. According to O'Connor, the focus instead should have been on the nature of the injury and the elements of the claim.[21] O'Connor cited previous Supreme Court cases which addressed the question of which type of state action is most closely analogous to a federal civil rights claim. In both *Wilson v. Garcia*[22] and *Goodman v. Lukens Steel Co.*[23] the Court held that federal civil rights suits, under sections 1983 and 1981 respectively, are analogous to tort actions for personal injuries. In neither of these cases did the Court examine the remedies available in making its determination that a civil rights claim was essentially a claim for personal injuries. Instead, the Court looked to the nature of the injury, and determined that the rights protected by federal civil rights laws were analogous to those protected by state tort laws. O'Connor argued that the same reasoning ought to apply in a Title VII case, as the rights protected under Title VII are of the same character as those protected by sections 1981 and 1983.[24]

17. 26 U.S.C. § 104(a)(2)(1988).
18. 26 C.F.R. § 1.104-1(c)(1992).
19. United States v. Burke, 112 S. Ct. 1867, 1871 (1992).
20. *Id.* at 1873.
21. *Id.* at 1879.
22. 471 U.S. 261 (1985).
23. 482 U.S. 656 (1987).
24. "Discrimination in the workplace being no less injurious than discrimination elsewhere, the rights asserted by persons who sue under Title VII are just as tort-

III. ANALYSIS

A. The Nature of the Problem

As a general rule, under the Internal Revenue Code, "gross income means all income from whatever source derived."[25] Any "accession to wealth, clearly realized, and over which the taxpayers have complete dominion" is "gross income," unless there is a specific statutory exclusion available.[26] The specific statutory exclusion for personal injury recoveries is section 104(a)(2), which 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. . . ."[27] If the claim is based on "tort or tort type rights," the recovery is excludable under section 104(a)(2).[28] Several courts have held that for the purposes of section 104(a)(2), "personal injuries" includes both physical and nonphysical injuries.[29] The essential element of an "exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim against the payor."[30]

Accordingly, the question that needs to be answered in deciding whether to exclude from gross income a settlement award for a Title VII claim is whether a Title VII action constitutes a tort-like claim for personal injuries under the Internal Revenue Code and Regulations.

B. Criticism of *U.S. v. Burke*

1. *"Remedial" Approach*

The Court in *Burke* answered this question by examining the remedies available in a Title VII action and comparing them to those available in a traditional tort action for personal injuries. The Court justified its focus on remedies by relying on *Prosser and Keeton on the Law of Torts*,[31] which defines a tort as "a civil wrong, other than breach of contract, for which the court will provide a remedy in the

like as the rights asserted by plaintiffs in actions brought under §§ 1981 and 1983." United States v. Burke, 112 S. Ct. 1867, 1880 (1992).

25. 26 U.S.C. § 61(a)(1988).
26. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).
27. 26 U.S.C. § 104(a)(2)(1988).
28. 26 C.F.R. § 1.104-1(c)(1992).
29. *See, e.g.*, Pistillo v. Commissioner, 912 F.2d 145, 148 (6th Cir. 1990)(age discrimination); Rickel v. Commissioner, 900 F.2d 655, 658 (3rd Cir. 1990)(age discrimination); Threlkeld v. Commissioner, 87 T.C. 1294, 1297 (1986)(malicious prosecution); Bent v. Commissioner, 835 F.2d 67, 70 (3rd Cir. 1987)(deprivation of first amendment rights); Roemer v. Commissioner, 716 F.2d 693, 697 (9th Cir. 1983)(defamation).
30. Glynn v. Commissioner, 76 T.C. 116, 119 (1981), *aff'd without published opinion*, 676 F.2d 682 (1st Cir. 1982).
31. United States v. Burke, 112 S. Ct. 1867, 1871-72 (1992).

form of an action for damages."[32] Based on this, the majority concluded that "remedial principles thus figure prominently in the definition and conceptualization of torts."[33]

According to the majority, remedies for Title VII claims differ from remedies for tort claims in two respects. First, the remedies available for Title VII claimants are not as broad as those available for tort claimants. "[O]ne of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff 'fairly for injuries caused by the violation of his legal rights.' "[34] He or she may recover for lost wages, medical expenses, diminished future earning capacity, emotional distress and pain and suffering.[35] In contrast, the recovery of a Title VII claimant is limited to back pay, injunctions and other equitable relief.[36] Since this range of remedies is limited, in comparison to those available to a tort victim, a Title VII claim is not a tort type claim for personal injuries.

The second respect in which the remedies differ is that Title VII remedies are for "legal injuries of an economic character."[37] Awards for back wages in a Title VII action are intended only to reimburse a claimant for actual monetary losses.

> An 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. . . The remedy, correspondingly, consists of restoring victims, through backpay awards and injunctive relief, to the wage and employment positions they would have occupied absent the unlawful discrimination. Nothing in this remedial scheme purports to recompense a Title VII plaintiff for any of the other traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other consequential damages.[38]

The Court's approach failed both in its focus on remedies and in its claim that Title VII addresses only "legal injuries of an economic char-

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32. W. KEETON, ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 at 2 (5th ed. 1984).
33. United States v. Burke, 112 S. Ct. 1867, 1871 (1992).
34. *Id.* (quoting Carey v. Piphus, 435 U.S. 247, 257).
35. *Id.* at 1871.
36. 42 U.S.C. § 2000e-5(g) provides in relevant part:

> 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 other 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)(1988).

See also Patterson v. McLean Credit Union, 491 U.S. 164, 182, n.4 (1989)(noting that a plaintiff in a Title VII action is "limited to a recovery of backpay").

37. United States v. Burke, 112 S. Ct. 1867, 1873 (1992)(quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).
38. United States v. Burke, 112 S. Ct. 1867, 1873 (1992)(footnotes omitted).

acter."[39] Previous decisions have established that when making such comparisons, the focus should be on the nature or "essence" of the injury,[40] rather than on the consequences that flow from it. The Court's claim that Title VII addresses only "legal injuries of an economic character"[41] is similarly unsupported by precedent, directly contradicting prior Supreme Court decisions.[42]

2. *The "Essence" Test:* Wilson v. Garcia

Prior to *Burke*, the Court had not addressed the specific issue of whether an award for a Title VII claim is excludable from gross income. As the Court correctly noted, however, this issue turns on the question of whether or not a Title VII claim redresses tort-like personal injuries.[43] This question has been addressed by the Court, in the context of claims under sections 1981 and 1983 of the Civil Rights Act. The standard for determining whether such a claim is "tort-like" was established in *Wilson v. Garcia*,[44] in which the Court looked to the nature or "essence" of the injury to determine that claims for violations of civil rights are analogous to tort claims for personal injuries.

Wilson v. Garcia involved a civil rights claim under section 1983 of the Civil Rights Act of 1871.[45] Plaintiff Garcia brought an action against defendant Wilson, a New Mexico State Police officer, and against the Chief of the State Police. Garcia sought damages for deprivation of his constitutional rights allegedly caused by an unlawful arrest and brutal beating by the officer. The complaint was filed two years and nine months after the claim purportedly arose. The issue in the case was which state statute of limitations period should apply to a civil rights claim under section 1983. The Court decided that the most appropriate limitations period was the three-year period provided by New Mexico statute for personal injury actions,[46] as section 1983

39. *Id.*
40. *See* Wilson v. Garcia, 471 U.S. 261 (1985); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).
41. United States v. Burke, 112 S. Ct. 1867, 1873 (1992).
42. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).
43. United States v. Burke, 112 S. Ct. 1867, 1872 (1992).
44. 471 U.S. 261 (1985). *See also* Goodman v. Lukens Steel Co., 482 U.S. 656 (1987).
45. Section 1983 provides as follows:

> 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.

42 U.S.C. § 1983 (1988).

46. At the time the action in *Wilson* commenced, the New Mexico statute of limitations for personal injury actions provided: "Actions . . . for an injury to the per-

claims are best characterized as claims for personal injuries. The Court reached this conclusion by examining the "essence of the claim."[47]

The essence of a civil rights claim is that it redresses harms to the rights of individuals which are protected by federal law. Such a violation is "an injury to the individual rights of the person."[48]

> ' In essence, section 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under section 1983 which is well-founded results from 'personal injuries.'[49]

The principle thus established by *Wilson* is that, in determining which state action most resembles a civil rights claim under section 1983, the Court should look to the nature of the injury.

In *Goodman v. Lukens*,[50] the Court extended this principle to apply to claims under section 1981 of the Civil Rights Act[51] as well. As in *Wilson*, the Court examined the essence of the claim and concluded that a tort action for personal injuries was the most analogous state action to a federal civil rights claim.[52] Violation of a federal law barring racial discrimination "is a fundamental injury to the individual rights of a person."[53]

In her dissent in *Burke*, Justice O'Connor suggested that sex discrimination in the workplace is just as fundamental an injury to the individual as race discrimination, and ought to be judged by the same standard.

> *Wilson* and *Goodman* held federal civil rights suits analogous to personal injury tort actions not at all because of the damages available to civil rights plaintiffs, but because federal law protected individuals against tort-like personal injuries. Discrimination in the workplace being no less injurious than discrimination elsewhere, the rights asserted by persons who sue under Title VII are just as tort-like as the rights asserted by plaintiffs in actions brought under §§ 1981 and 1983.[54]

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son or reputation of any person [must be brought] within three years." N.M. STAT. ANN. § 37-1-8 (Michie 1978).

47. Wilson v. Garcia, 471 U.S. 261, 268 (1985).

48. *Id.* at 277.

49. *Id.* at 278 (quoting Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972)).

50. 482 U.S. 656 (1987).

51. Section 1981 provides as follows:

> 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.

42 U.S.C. § 1981 (1988).

52. Goodman v. Lukens Steel Co., 482 U.S. 656, 661 (1987).

53. *Id.*

54. United States v. Burke, 112 S. Ct. 1867, 1880 (1992).

By focusing on the remedies available rather than on the nature of the injury, the majority not only departed from the principle laid down in *Wilson*, but also misread the relevant I.R.S. regulation,[55] which defined "damages received" to mean "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights."[56] The rights protected by Title VII (*i.e.*, the right to be free from discrimination in the workplace) are clearly of the same type that the Court had previously declared to be tort type rights.[57] By reading "tort type rights" to mean "tort type remedies," the majority unjustifiably limited the scope of the personal injury exclusion.

3. *Injuries of an "Economic Character"*

The Court's second reason for distinguishing a Title VII claim from a tort claim for personal injuries was that Title VII involves claims for injuries of an "economic character."[58] Unlike awards in traditional tort cases, awards for back wages in a Title VII action are intended only to reimburse a claimant for actual monetary losses.[59] This economic argument directly contradicts prior Supreme Court decisions.

In *Meritor Savings Bank v. Vinson*,[60] a female bank employee brought a sexual harassment suit against her employer under Title VII. The Court, in holding that a claim of hostile environment sexual harassment is a form of sex discrimination actionable under Title VII, rejected the argument that Title VII claims were concerned only with injuries of an "economic character."[61] The Court noted that Title VII claims were intended "to strike at the entire spectrum of disparate treatment of men and women in employment."[62] An employee's protection under Title VII extends beyond the economic aspects of employment to protect employees' emotional and psychological stability.[63]

The Court in *Burke* acknowledged that sex discrimination in the workplace is an "invidious practice that causes grave harm to its victims."[64] However, because the Court focused on the "economic char-

55. 26 C.F.R. § 1.104-1(c)(1992).
56. *Id.*
57. *See* Wilson v. Garcia, 471 U.S. 261 (1985)(claim under § 1983 of Civil Rights Act analogous to a tort claim for personal injuries); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)(claim for racial discrimination under § 1981 of Civil Rights act a tort type claim for personal injuries).
58. United States v. Burke, 112 S. Ct. 1867, 1873 (1992).
59. *Id.*
60. 477 U.S. 57 (1986).
61. *Id.* at 64.
62. *Id.* (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)).
63. *Id.* at 66.
64. United States v. Burke, 112 S. Ct. 1867, 1872 (1992).

acter" of the remedies available to a Title VII claimant rather than on the nature of the injury, it was not willing to consider a claim for damages under Title VII to be a tort-like "personal injury" for the purposes of federal income tax law.[65]

The Court also acknowledged that it was "judicially well-established that the meaning of 'personal injuries'. . . in this context encompasses both nonphysical as well as physical injuries."[66] Further, the Court recognized the similarity between the harm caused by discrimination and that caused by "dignitary" torts such as defamation.[67] By focusing on the dissimilarity between the remedies available however, the Court avoided the problem of distinguishing between the harms caused by dignitary torts (awards which are excludable as personal injuries) and harms caused by sex discrimination (awards which are not excludable as personal injuries).[68] Instead, the Court rested on the distinction between the "economic character" of Title VII remedies and the "broad range" of remedies available for traditional tort claims. Since Title VII did not make available a "tort-like conception of injury and remedy,"[69] such a claim is not sufficiently tort-like for the purposes of section 104(a)(2).

A similar "economic" argument was advanced in *Goodman v. Lukens Steel Co.*[70] In *Goodman*, the argument was made that a claim under section 1981 was not truly tort-like because the rights it protected were primarily economic in character.[71] As in *Meritor Savings*, the Court in *Goodman* rejected this argument, noting that section 1981 has a much broader focus. "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]

The rights protected by Title VII are similarly broad. Title VII makes it "an unlawful employment practice for an employer . . . 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."[73] By accepting

65. *Id.* at 1873.
66. *Id.* at 1871, n.6 (quoting Rickel v. Commissioner, 900 F.2d 655, 658 (3rd Cir. 1990).
67. "[U]nder the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." *Id.* at 1873 (quoting Curtis v. Loether, 415 U.S. 189, 195-96, n.10 (1974)).
68. Justice Scalia, in his concurrence, steers a wider path clear of this obstacle by asserting that even recoveries for nonphysical "dignitary" torts should not be excluded under section 104(a)(2). He acknowledges, however, that this assertion contradicts 26 C.F.R. § 1.104-1(c)(1992), the relevant I.R.S. regulation. 112 S. Ct. 1867, 1876.
69. U.S. v. Burke, 112 S. Ct. 1867, 1873 (1992).
70. Goodman v. Lukins Steel Co., 482 U.S. 656 (1987).
71. *Id.* at 661.
72. *Id.*
73. 42 U.S.C. § 2000e-2(a)(1)(1988).

the argument that Title VII is aimed only at protecting rights of an "economic character,"[74] while acknowledging that sex discrimination in the workplace is an "invidious practice that causes grave harm to its victims,"[75] the Court in *Burke* not only contradicted prior case law, but contradicted itself as well. Sex discrimination in the workplace is a personal injury in the sense that it "causes grave harm to its victims."[76] However, since this "grave harm" can be cured by an award of back wages, the "invidious practice" of sex discrimination must not be a personal injury for the purposes of excluding the award from gross income. This is an untenable position which manages to confuse both the personal injury exclusion doctrine and the law of sex discrimination in the workplace.

C. The Approach of the Lower Courts

Whether or not a personal injury award is excludable under section 104(a)(2) is a question that has arisen on numerous occasions in the lower courts.[77] Through a series of decisions, the Tax Court and the Appeals Courts have developed a consistent approach to deal with this issue.[78] The approach has been to adopt the same standard as that used in *Wilson* and to apply it generally to all cases involving section 104(a)(2). In deciding whether an award for a given claim is excludable under section 104(a)(2), courts look to the "essence" of the claim to determine whether it is a sufficiently tort-like personal injury. If the injury is "personal" in nature, then an award based on that injury is excludable from gross income.

1. *The Tax Court Standard:* Bent, Threlkeld, *and* Metzger

The standard to emerge out of the lower courts was developed primarily in three Tax Court decisions. The first of these is *Bent v. Com-*

74. United States v. Burke, 112 S. Ct. 1867, 1873 (1992).
75. *Id.* at 1872.
76. *Id.*
77. *See, e.g.,* Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990); Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990); Metzger v. Commissioner, 88 T.C. 834 (1987), *aff'd without published opinion,* 845 F.2d 1013 (3rd Cir. 1988); Threlkeld v. Commissioner, 87 T.C. 1294 (1986), *aff'd,* 848 F.2d 81 (6th Cir. 1988); Bent v. Commissioner, 87 T.C. 236 (1986), *aff'd,* 835 F.2d 67 (3rd Cir. 1987).
78. The response in the lower courts has not been entirely uniform. *See, e.g.,* Sparrow v. Commissioner, 949 F.2d 434 (D.C.Cir. 1991) and Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989)(both holding that back pay awards are not excludable under section 104(à)(2)). These decisions rely on the argument that awards of back pay are not "damages" in the sense intended by the I.R.S. This argument was first advanced in Hodge v. Commissioner, 64 T.C. 616 (1975), and has been explicitly rejected in Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990), Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990), Byrne v. Commissioner, 883 F.2d 211 (3rd Cir. 1989), and Bent v. Commissioner, 87 T.C. 236 (1986), *aff'd,* 835 F.2d 67 (3rd Cir. 1987).

missioner,[79] which involved a section 1983 claim under the Civil Rights Act. In *Bent*, a teacher claimed that he had been denied reemployment for reasons which abridged his first amendment rights. The school settled and the teacher received a sum based on his lost wages. The issue in the case was whether the teacher's claim was for a sufficiently tort-like personal injury to qualify for exclusion under section 104(a)(2). To determine this, the court attempted to "ascertain the nature of a section 1983 claim."[80] In making this determination, the court relied on the reasoning in *Wilson*:

> The situation in the instant case is analogous to *Wilson v. Garcia* because in both cases the determinative inquiry involves the characterization of the nature of a section 1983 claim. Although the bottom-line issue (statute of limitations versus application of section 104(a)(2)) is different, the Supreme Court's analysis provides the answer to our inquiry.[81]

The answer in *Bent* was that damages received from a claim under section 1983 were damages received on account of personal injuries and so were excludable from gross income. In affirming the Tax Court decision, the Third Circuit Court of Appeals concluded that a denial of a civil right such as free speech was as much a "personal injury" as a physical assault would be.[82]

In *Threlkeld v. Commissioner*,[83] the taxpayer attempted to exclude a settlement award for a malicious prosecution case from his gross income under section 104(a)(2). The Commissioner denied the exclusion and the taxpayer appealed. The Tax Court, examining the nature of the claim, defined a personal injury as "any invasion of the rights that an individual is granted by virtue of being a person in the sight of the law,"[84] and held that the award was excludable under section 104(a)(2).[85] In reaching this holding, the Tax Court developed the following standard to determine whether a particular claim qualifies for exclusion under section 104(a)(2):

> Section 104(a)(2) excludes from income amounts received as damages on account of personal injuries. Therefore, whether 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.[86]

Metzger v. Commissioner[87] involved claims for discrimination based on sex and national origin under several civil rights statutes,

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79. 87 T.C. 236 (1986), *aff'd* 835 F.2d 67 (3rd Cir. 1987).
80. *Id.* at 246.
81. *Id.* at 248.
82. Bent v. Commissioner, 835 F.2d 67, 70-71 (3rd Cir. 1987).
83. 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).
84. *Id.* at 1308.
85. *Id.*
86. *Id.* at 1299 (citations omitted).
87. 88 T.C. 834 (1987), *aff'd without published opinion*, 845 F.2d 1013 (3rd Cir. 1988).

including Title VII and sections 1981 and 1983. The Tax Court relied on the Supreme Court's reasoning in *Wilson* and on the Third Circuit's reasoning in *Goodman v. Lukens Steel Co.*[88] to conclude that the awards under sections 1981 and 1983 were excludable under section 104(a)(2).[89] The court also allowed the amount awarded under Title VII to be excluded. The court compared the nature of a civil rights claim under sections 1981 and 1983 with a claim under Title VII and found that while the relief provided by the statutes was different, "the injuries complained of are often essentially the same."[90] The court concluded that relief under Title VII, just as under sections 1981 and 1983, constituted damages for personal injuries and was excludable from gross income under section 104(a)(2).[91]

With these three cases, the Tax Court has developed a standard for determining whether or not to exclude an award of damages pursuant to section 104(a)(2). Applying the general principle laid down by the Supreme Court in *Wilson*, the court looks to the nature of the alleged personal injury to determine whether or not the award is excludable. If the injury is, in essence, a personal injury, that is "the beginning and the end of the inquiry."[92]

The Tax Court has used this same standard to examine a variety of different types of claims. What these cases have in common, whether brought under the Civil Rights Act or Title VII, whether for discrimination based on race or sex or national origin, whether based on claims of first amendment violations or defamation or malicious prosecution, is that the injuries alleged in all these cases were personal in nature. These claims were all based on "invasion[s] of the rights that an individual is granted by virtue of being a person in the sight of the law."[93] This makes them "personal injuries" and awards for such injuries should be excludable from gross income under section 104(a)(2).

By applying the *Wilson* rule directly to the language in the I.R.S. Regulation,[94] the standard developed in the Tax Court has the advantage of simplicity that the *Burke* decision lacks. *Burke* complicates the issue by unnecessarily inquiring into the remedies available for each claim. To qualify for an exclusion under the Internal Revenue Code and Regulations,[95] it is required only that an award of damages

88. 777 F.2d 113 (3rd Cir. 1985), *aff'd* 482 U.S. 656 (1987). Metzger was decided before the Supreme Court affirmed the Third Circuit's decision in Goodman v. Lukens Steel Co.

89. Metzger v. Commissioner, 88 T.C. 835, 852-53 (1987).

90. *Id.* at 856.

91. *Id.*

92. Threlkeld v. Commissioner, 87 T.C. 1294, 1299 (1986).

93. *Id.* at 1308 (footnote omitted).

94. 26 C.F.R. § 1.104-1(c)(1992).

95. 26 U.S.C. § 104(a)(2)(1988); 26 C.F.R. § 1.104-1(c)(1992).

be for a "personal injury."[96] The Tax Court, wisely, limits its inquiry to this single requirement.

2. Rickel v. Commissioner

A recent decision by the Third Circuit Court of Appeals adopted the standard developed in the Tax Court decisions and applied it to an age discrimination case. *Rickel v. Commissioner*[97] involved a claim under the Age Discrimination in Employment Act (ADEA).[98] *Rickel* offers an illustration of how the Supreme Court might have decided *Burke*, had they followed the precedent established in *Wilson v. Garcia*. The facts in *Rickel* are virtually identical to those in *Burke*, except that the type of discrimination complained of is based on age rather than on sex. Since the language of the ADEA mirrors the language of Title VII in prohibiting "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment,"[99] the same reasoning ought to apply in both cases.

In *Rickel*, the taxpayer received a settlement award from his former employer and did not report it on his income tax. The amount of the award was $105,000, half for back wages due and the other half for punitive damages.[100] The Commissioner determined that the entire amount of the award was taxable income. Rickel appealed to the Tax Court which found that half the amount was excludable under section 104(a)(2) as punitive damages, but that the other half was taxable, as it was an award of back pay.[101] The Appeals court reversed, holding that the entire amount, including both punitive damages and back pay, was excludable, as the claim was based on a tort-like personal injury.[102]

The Court of Appeals in *Rickel* was presented with an economic argument similar to the one accepted by the majority in *Burke*. The Commissioner argued that the amount of the settlement attributable to back pay should not be excluded, since that amount was in the nature of "economic damages" not covered by section 104(a)(2).[103] The Court of Appeals rejected this argument. "The relevant inquiry . . . is whether the settlement was received on account of personal or nonpersonal injuries, not whether the damages compensate the taxpayer

96. 26 C.F.R. § 1.104-1(c)(1992).
97. 900 F.2d 655 (3rd Cir. 1990). *See also* Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990)(based on nearly identical facts, the Sixth Circuit adopted the holding in *Rickel*).
98. 29 U.S.C. §§ 621-634 (1988 & Supp. II 1990), *as amended by* Act of Nov. 21, 1991.
99. 29 U.S.C § 623(a)(1988).
100. Rickel v. Commissioner, 900 F.2d 655, 657 (1990).
101. *Id.*
102. *Id.* at 656.
103. *Id.* at 661.

for economic losses."[104] The only issue, then, was to decide whether the injury complained of was personal. To determine this, the court turned to the standard developed in *Wilson* and *Threlkeld* and looked "to the nature of the claim and not to the consequences that result from the injury."[105] The court found that age discrimination was analogous to a personal injury and that the taxpayer's claim amounted to the assertion of a tort type right.[106] Therefore, all the damages flowing from the injury were excludable under section 104(a)(2).[107] "[T]he nonpersonal, economic effects of the employer's act of discrimination, *e.g.*, loss of wages, does [sic] not transform a personal tort type claim into one for nonpersonal injuries."[108]

The court decided that Rickel's age discrimination claim under the federal statute was a tort type claim for personal injuries because

> such a suit alleges the violation of a duty owed the plaintiff by the defendant employer which arises by operation of the 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. Thus, the statutory claim seeks to remedy a statutory violation that the law has defined as wrongful.[109]

Deciding that the discrimination against Rickel was a personal injury was the end of the inquiry required by the I.R.S. regulations. Unlike the Supreme Court in *Burke*, the Appeals Court in *Rickel* resisted the temptation to ask one question too many and inquire into the type of remedies involved.

IV. CONCLUSION

In *U.S. v. Burke*, the Supreme Court held that victims of sex discrimination in the workplace, unlike victims of other personal injuries, must pay tax on the awards they receive. This is because Title VII suits do not involve "tort type rights." The Court arrived at this decision by examining the remedies available to Title VII claimants, comparing them to the remedies available to traditional tort victims, and finding them dissimilar.

The focus of the Court's inquiry, on remedies available to victims of sex discrimination under Title VII, went beyond what is required by the Internal Revenue Code and Regulations. It departed from previous Supreme Court decisions, which focused solely on the nature of the injury involved, and not on the remedies available to the victim. The decision in *Burke* also overruled a series of lower court decisions,

104. *Id.* (quoting Byrne v. Commissioner, 883 F.2d 211, 214 (3rd Cir. 1989)).
105. *Id.* at 661.
106. *Id.* at 663.
107. *Id.* at 667.
108. *Id.* at 662.
109. S. Ct. *Id.* at 662 (quoting Byrne v. Commissioner, 883 F.2d 211, 215 (3rd Cir. 1989)).

which had relied on prior Supreme Court rulings to develop a consistent and predictable standard for dealing with section 104(a)(2) cases.

The result is a narrow decision, requiring victims of sex discrimination in the workplace to pay income tax on their damage awards simply because the awards are based on back pay rather than on traditional tort remedies. Under the Internal Revenue Code and Regulations, as interpreted by previous decisions, there was only one question that needed to be answered to determine whether to exclude an award for damages from gross income: Was the award based on a claim for personal injuries? With its decision in *Burke*, the Supreme Court added a second question to the inquiry: Was the award based on strictly economic factors (*i.e.*, back pay), or was it a traditional tort-like damage award? Provided with the opportunity to clarify this area of the law, the Court succeeded in confusing it instead.

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