SUPREME COURT OF THE UNITED STATES

No. 94–500

COMMISSIONER OF INTERNAL REVENUE, PETITIONER
v. ERICH E. SCHLEIER AND HELEN B. SCHLEIER
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
[June 14, 1995]

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins and with whom JUSTICE SOUTER joins with respect to Part II, dissenting.

Age discrimination inflicts a personal injury. Even under the principles set forth in *United States* v. *Burke,* 504 U. S. 229 (1992), the damages received from a claim of such discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) are received "on account of" that personal injury and therefore excludable from taxable income under 26 U. S. C. §104(a)(2). Unless the Court reads §104(a)(2) to permit exclusion only of damages received for tangible injuries (*i. e.*, physical and mental injuries)—a reading rejected by eight Members of the Court in *Burke* and contradicted by an agency's reasonable interpretation of the statute it administers—the inescapable conclusion is that ADEA damage awards are excludable.

It is not disputed that the damages received by petitioners constitute gross income under 26 U. S. C. §61(a) unless excluded elsewhere; the question is whether such damages fall within §104(a)(2), which excludes from taxable income "the amount of any damages received (whether by suit or agreement and whether as lump sum or periodic payments) on account of personal injuries or sickness . . . ." What constitutes "damages received on account of personal injuries" is not obvious from the text or

history of the statute, and since 1960 Internal Revenue Service (IRS) regulations have defined the phrase with reference to traditional tort principles: "The term `damages received (whether by suit or agreement)' means 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." 25 Fed. Reg. 11490 (1960); 26 CFR §1.104–1(c) (1994).

At one point in time, determining whether damages received from a lawsuit were excludable under §104(a)(2) and the applicable regulation was a fairly straightforward task. In *Threldkeld* v. *Commissioner*, 87 T. C. 1294, 1299 (1986), aff'd, 848 F. 2d 81 (CA6 1988), the Tax Court, in a 15–1 decision, set forth the test as follows:

> "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 of the injury." 87 T. C., at 1299.

Thus, under *Threldkeld*, damages from a lawsuit were excludable under §104(a)(2) so long as they were 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.

Under this standard, ADEA damages surely are excludable. "[D]iscrimination in the workplace causes personal injury cognizable for purposes of §104(a)(2), . . . and there can be little doubt on this point." *Burke*, *supra*, at 249 (O'CONNOR, J., dissenting). We have recognized that "racial discrimination . . . is a fundamental injury to the individual rights of a person." *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987). Such offense to the rights and dignity of the individual attaches regardless of whether the discrimination is based on race, sex, age, or other suspect characteristics. See, *e. g.*, *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 265 (1989) (O'CONNOR, J., concurring in judgment) ("[W]hatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the

individual"); *EEOC* v. *Wyoming*, 460 U. S. 226, 231 (1983) (Age discrimination "inflict[s] on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations"). Thus, prior to 1992, courts generally relied on *Threldkeld* to hold that damages awarded under the ADEA were excludable from income because they were received on account of personal injuries. See, *e. g.*, *Pistillo* v. *Commissioner*, 912 F. 2d 145 (CA6 1990); *Rickel* v. *Commissioner*, 900 F. 2d 655 (CA3 1990); *Redfield* v. *Insurance Co. of North America*, 940 F. 2d 542 (CA9 1991).

Things changed, however, with *United States* v. *Burke*, *supra*. In that case, the Court of Appeals, relying on *Threldkeld*, held that race discrimination violative of Title VII infringes upon a victim's personal rights and thus that damages received therefrom are properly excludable under §104(a)(2). Agreeing that discrimination violates personal rights, this Court nevertheless reversed because the statutory remedies do not "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 (*e. g.*, a ruined credit rating)." 504 U. S., at 239.

I dissented from the Court's decision in *Burke* because "the remedies available to Title VII plaintiffs do not fix the character of the right they seek to enforce," *id.*, at 249, and I remain of that view today. Dean Prosser presciently observed years ago that "[t]he relation between the remedies in contract and tort presents a very confusing field, still in process of development, in which few courts have made any attempt to chart a path." W. Prosser, Law of Torts 635 (3d ed. 1964) (footnote omitted). Three decades later, and despite the Court's attempt to chart a path in *Burke* (or perhaps because of it), whether a

remedy sounds in tort often depends on arbitrary characterizations. Compare *Schmitz* v. *Commissioner*, 34 F. 3d 790, 794 (CA9 1994) (ADEA liquidated damages are tort like because they "compensate victims for damages which are too obscure and difficult to prove"), with *Downey* v. *Commissioner*, 33 F. 3d 836, 840 (CA7 1994) (ADEA liquidated damages, "as the name implies, compensate a party for those difficult to prove losses that often arise from a delay in the performance of obligations—as a type of contract remedy").

The Court today sidesteps these difficulties by laying down a new *per se* rule: an illegal discharge based on age cannot "fairly be described as a `personal injury' or `sickness.'" *Ante*, at 7. To justify this conclusion, the Court offers a hypothetical car crash, the injuries from which cause the taxpayer to miss work. She would be able, in such circumstances, to exclude the recovered lost wages because they would constitute damages received "`on account of personal injuries.'" *Ante*, at 6. By contrast, in the Court's view, ADEA damages are not excludable because they are not "`on account of' any personal injury and because no personal injury affected the amount of back wages recovered." *Ante*, at 7.

This reasoning assumes the wrong answer to the fundamental question of this case: What is a personal injury? Eight Justices in *Burke* agreed that discrimination inflicts a personal injury under §104(a)(2). See 504 U. S., at 239–240; *id.*, at 247 (SOUTER, J., concurring in judgment); *id.*, at 249 (O'CONNOR, J., dissenting). Only JUSTICE SCALIA disagreed, arguing instead that the phrase "personal injuries" under §104(a)(2) "is necessarily limited to injuries to physical or mental health," *id.,* at 244; in his view, employment discrimination, without more, does not inflict a personal injury because it is only a legal injury that causes economic deprivation, *ibid.*

Whatever the merits of this view, it was rejected by the Court in *Burke* and wisely not advanced by the Commissioner in this case, see Brief for Petitioner 10, 25, n. 15.

Although the Court professes agreement with the view that "personal injury" within the meaning of §104(a)(2) comprehends both tangible and intangible harms, *ante*, at 6, n. 4, the Court's analysis contradicts this fundamental premise. The Court's hypothetical contrast between wages lost due to a car crash and wages lost due to illegal discrimination would be significant only if one presumes that there is a relevant difference for purposes of §104(a)(2) between the car crash and the illegal discrimination. But such a difference exists only if one reads "personal injuries," as JUSTICE SCALIA did in *Burke*, to include only tangible injuries. Those physical and mental injuries, of course, differ from the economic and stigmatic harms that discrimination inflicts upon its victims, but it is a difference without relevance under §104(a)(2)—at least in the view of eight Justices in *Burke*, and the view that the Court professes to adopt today, *ante*, at 6, n. 4. The injuries from discrimination that the ADEA redresses —like the harm to reputation and loss of business caused by a dignitary tort like defamation, see *Burke*, *supra*, at 234–235; *id*. at 247 (SOUTER, J., concurring in judgment)—may not always manifest themselves in physical symptoms, but they are no less personal, see *supra*, at 2–3, and thus no less worthy of excludability under §104(a)(2). The Court states: "Whether one treats respondent's attaining the age of 60 or his being laid off on account of his age as the proximate cause of respondent's loss of income, neither the birthday nor the discharge can fairly be described as a `personal injury' or `sickness.'" *Ante*, at 7. This assertion, the key to the Court's analysis, is not reconcilable with the Court's recognition that the intangible harms of illegal discrimination constitute

"personal injuries" under §104(a)(2).

The Court argues that although "the intangible harms of discrimination can constitute personal injury" within the meaning of §104(a)(2), "to acknowledge that discrimination may cause intangible harms is not to say . . . that any of the damages received were on account of those harms." *Ante*, at 9, n. 6. The logic of this argument is rather hard to follow. If the harms caused by discrimination constitute personal injury, then amounts received as damages for such discrimination are received "on account of personal injuries" and should be excludable under §104(a)(2).

Even overlooking this fundamental defect in the Court's analysis, ADEA damages should be excludable from taxable income under our precedents. The Court in *Burke* deferred to the applicable IRS regulation, 26 CFR §1.104–1(c) (1994), and stated that "discrimination could constitute a `personal injury' for purposes of §104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy." 504 U. S., at 239. The Court held that a suit based on Title VII was not based upon "tort or tort type rights," 26 CFR §1.104–1(c) (1991), however, because Title VII does not entitle "victims of race-based employment discrimination to obtain a jury trial at which `both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages may be awarded.'" 504 U. S., at 240 (quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 460 (1975)).

Unlike Title VII, the ADEA expressly provides that any person aggrieved may bring a civil action and "shall be entitled to a *trial by jury* of any issue of fact in any . . . action for recovery of amounts owing as a result of a violation of this chapter," 29 U. S. C. §626(c)(2) (emphasis added). More important, the

ADEA does not limit relief to back wages, but instead authorizes courts to grant the panoply of "such *legal or equitable relief* as will effectuate the purposes" of the Act, 29 U. S. C. §626(c)(1) (emphasis added), and it expressly provides for liquidated damages in addition to back wages, 29 U. S. C. §626(b). The Court emphasizes that liquidated damages under the ADEA are punitive in nature, *ante,* at 8, but it is an emphasis without relevance. Punitive damages are traditionally available only in tort. See 3 Dobbs, Law of Remedies 118 (2d ed. 1993) ("The rule against punitive damages prevails even if the breach [of contract] is wilful or malicious, as long as the breach does not amount to an independent tort"). Thus, whether the liquidated damages available under the ADEA are characterized as compensatory, or as a form of punitive damages, it is clear that the remedies available under the ADEA go beyond Title VII's limited focus on "`legal injuries of an economic character,'" *Burke*, ___ U. S., at ___ (quoting *Albemarle Paper Co* v. *Moody*, 422 U. S. 405, 418 (1975)). Plaintiffs claiming age discrimination, then, are not limited to the "circumscribed remedies available under Title VII," *Burke*, *supra*, at 240, but instead may sue under the ADEA, which appears to be one of the "other federal antidiscrimination statutes offering . . . broad remedies" distinguished by *Burke*, see *id.*, at 241.

These distinctions qualify an ADEA suit as a "tort type" action under *Burke*, and should entitle a prevailing plaintiff to exclude damages recovered therefrom from taxable income under §104(a)(2) and the applicable IRS regulation, 26 CFR §1.104–1(c) (1994). The Court seeks to avoid this conclusion by asserting that our decision in *Burke* and the IRS regulation that it interpreted do not conclusively determine the scope of §104(a)(2). Both, according to the Court, *ante*, at 13, impose a necessary condition that the suit be tort or tort like, but neither

states that this showing is sufficient for excludability under §104(a)(2). This contention is untenable.

The Court's decision in *Burke* makes clear that it was deciding conclusively what §104(a)(2) permits to be excluded. After quoting the language of §104(a)(2), the Court introduced its analysis with the following: "Neither the text nor the legislative history of §104(a)(2) offers any explanation of the term `personal injuries.' Since 1960, however, IRS regulations formally have linked identification of a personal injury for purposes of §104(a)(2) to traditional tort principles." 504 U. S., at 234. The Court then quoted language from the IRS regulation, 29 CFR §1.104–1(c), which identified recovery from a suit "based on tort or tort type rights" as the hallmark of excludability under §104(a)(2). Every member of the Court so understood the opinion—that the scope of §104(a)(2) is defined in terms of traditional tort principles. See *id*., at 246–247 (SOUTER, J., concurring in judgment); *id.*, at 249 (O'CONNOR, J., dissenting). Even JUSTICE SCALIA, who disagreed with the Court that "personal injury or sickness" included nonphysical injuries, see *id*., at 243–244 (SCALIA, J., concurring in judgment), agreed that the IRS regulation is "descriptive of the ambit of §104(a)(2) as a whole," *id.*, at 242, n. 1.

For 35 years the IRS has consistently interpreted its regulation, 29 CFR §1.104–1(c), as conclusively establishing the requirements of §104(a)(2). See Rev. Rul. 85–98, 1985–2 Cum. Bull. 51. This was the interpretation the Commissioner pressed upon us in *Burke*, see Brief for United States in *United States* v. *Burke*, O. T. 1991, No. 91–42, pp. 22–23; formally affirmed after *Burke*, see Rev. Rul. 93–88, 1993–2 Cum. Bull. 61; presented to the courts below, see Brief for Appellant in No. 93–5555 (CA5), p. 28, n. 16; and advanced in the opening briefs before us, see Brief for Petitioner 14, n. 5, 16–17, n. 7. It is only in one sentence in her reply brief that the Commissioner

expressed a view at odds with 35 years of administrative rulings, agency practice, and representations to the courts—a sentence that the Court expands into its holding today.

The Court states that it does not accord the Commissioner's reply brief any special deference in light of the "differing interpretations of her own regulation," *ante*, at 11, n. 7. But ignoring the Commissioner's off-hand assertion in this case does not wipe the slate clean. There still remain 35 years of formal interpretations upon which taxpayers have relied and of agency positions upon which courts, including this one, have based their decisions. Unless the Court is willing to declare these positions to be unreasonable, they cannot be ignored. See *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986). The Court asserts that "`the Service's interpretive rulings do not have the force and effect of regulations,'" *ante*, at 13, n. 7 (quoting *Davis* v. *United States*, 495 U. S. 472, 484 (1990)). That is true; it also says nothing about the deference courts must give to such reasonable interpretations, and a fuller exposition of our precedent indicates that the level of deference is substantial. *Davis* states: "Although the Service's interpretive rulings do not have the force and effect of regulations, we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Ibid.* (citations omitted).

The Court states that the Commissioner "reads the regulation correctly in this case." *Ante*, at 11, n. 7. Even if true, that statement says nothing about whether her interpretation for the past 35 years is reasonable. Both may be reasonable; such is the nature of ambiguity. In any event, I do not agree that the Commissioner's reply brief correctly reads the regulation to impose a necessary, but not sufficient, condition for excludability under §104(a)(2). Although

the regulation purports to interpret the term "damages received (whether by suit or agreement)," that term is unambiguous; it plainly includes all kinds of damages—inflicted on property or person, based on contract or tort, received by suit or agreement. Read in context, the regulation seeks to define the overall ambit of §104(a)(2)—specifically the concept of "personal injuries," the ambiguity of which gives rise to controversies over the scope of the exclusion under §104(a)(2). The regulation is subtitled, "Damages received on account of personal injuries or sickness," and its first sentence reads: "Section 104(a)(2) excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." 29 CFR 1.104–1(c) (1994). In light of the expansive scope of these statements and the futility of any attempt to define only "damages received," the regulation is more sensibly read as defining the entire scope of §104(a)(2).

Finally, the Court states that agency rules and regulations "may not be used to overturn the plain language of a statute." *Ante*, at 13, n. 7. But the language of the statute is anything but plain. As the Court noted in *Burke*, "[n]either the text nor the legislative history of §104(a)(2) offers any explanation of the term `personal injuries.'" 504 U. S., at 234. That is why the IRS promulgated its regulation in 1960 linking the slippery concept of personal injury to traditional tort principles. The Court today stops short of declaring this regulation unreasonable; it merely asserts that the regulation's requirement of a tort or tort like injury is in addition to, not in place of, the statutory requirement that the damages be received "on account of personal injuries or sickness." But, as noted above, it is not clear where besides the definition of personal injury there is room in the statute for the agency to graft on this additional requirement. It is surely more reasonable to read the

regulation as defining an ambiguous statutory phrase, rather than as imposing a superfluous precondition without any statutory basis.

For these reasons, I respectfully dissent.