

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: COMMISSIONER OF INTERNAL REVENUE,  
Petitioners v. ERICH E. SCHLEIER  
AND HELEN B. SCHLEIER.

CASE NO: No. 94-500

PLACE: Washington, D.C.

DATE: Monday, March 27, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 COMMISSIONER OF INTERNAL :  
4 REVENUE, :  
5 Petitioner :  
6 v. : No. 94-500  
7 ERICH E. SCHLEIER AND HELEN :  
8 B. SCHLEIER :  
9 - - - - -X

10 Washington, D.C.

11 Monday, March 27, 1995

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:01 a.m.

15 APPEARANCES:

16 KENT L. JONES, ESQ., Assistant to the Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf of  
18 the Petitioner.  
19 THOMAS F. JOYCE, ESQ., Chicago, Illinois; on behalf of the  
20 Respondents.

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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 94-500, Commissioner of  
5 Internal Revenue v. Erich Schleier, and Helen B. Schleier.  
6 Mr. Jones.

7 ORAL ARGUMENT OF KENT L. JONES

8 ON BEHALF OF THE PETITIONER

9 MR. JONES: Mr. Chief Justice, and may it please  
10 the Court:

11 Under section 104(a)(2) of the Internal Revenue  
12 Code, damages received on account of personal injury or  
13 sickness are excluded from tax. This case concerns  
14 whether back wages and liquidated damages awarded under  
15 the Age Discrimination and Employment Act are excluded  
16 from tax under this statute.

17 A closely analogous question was presented to  
18 the Court just three terms ago in United States v. Burke.  
19 That case involved application of section 104(a)(2) to a  
20 back wage award on a sex discrimination claim. As the  
21 court concluded in Burke, although employment  
22 discrimination obviously may affect a personal interest,  
23 the statutory back wages remedy involved in that case  
24 compensated only the employee's economic loss. It  
25 provided no compensation for the personal components of

1 the employee's injury, such as pain and suffering and  
2 emotional distress.

3 What the court concluded in Burke was that a  
4 statutory remedy that focuses in this manner on the  
5 economic rather than the personal components of the  
6 employee's injury does not yield damages on account of  
7 personal injury within the meaning of section 104(a)(2).

8 Now, the analysis applied by this Court in Burke  
9 is also applicable to the present case. Under the ADEA,  
10 there are two types of money recoveries, back wages of the  
11 type that this Court concluded were not excluded from  
12 income in Burke, and liquidated damages in an amount equal  
13 to the back wages award but only in cases involving wilful  
14 violations of the act.

15 Pain and suffering, emotional distress, and  
16 other similar personal components of the employee's injury  
17 are not compensable or even admissible in an ADA suit.

18 QUESTION: But you do have a tort-like remedy in  
19 the sense that you have in effect punitive damages, and  
20 that's tort, that's not contract.

21 MR. JONES: The tort-like remedy is to be a  
22 tort-like remedy for a personal injury. In deciding what  
23 was a tort-like remedy in Burke, the Court focused on the  
24 absence of any remedy for the personal components, pain  
25 and suffering. The Court also mentioned jury trials and

1 punitive damages, but those are very weak indicators of  
2 whether the underlying claim is a tort-like claim for a  
3 personal injury.

4 QUESTION: But they get us -- they get us  
5 outside the simple ambit of Burke, though.

6 MR. JONES: No, I don't think so. Actually,  
7 Justice Souter, your concurring opinion in Burke stated  
8 what we believe is the correct interpretation.

9 QUESTION: That was not the majority opinion.

10 MR. JONES: No, you state in your concurring  
11 opinion --

12 QUESTION: I thought it was very good, but --

13 (Laughter.)

14 MR. JONES: What I'm trying to say is that in  
15 your concurring opinion you said that the majority holds  
16 that what determines a tort-like claim is whether -- is  
17 solely whether the claim remedies the personal components  
18 of the employee's loss, and we think that's the correct  
19 interpretation of Burke.

20 As I was saying, punitive damages can be awarded  
21 even in cases involving economic torts, but the indicator  
22 of whether it's a tort for a personal injury is whether it  
23 provides compensation for the personal elements of the  
24 injury.

25 This is a common application of a very basic

1 principle of the tax law, which is that because exclusions  
2 from income are to be narrowly interpreted, the -- in  
3 determining whether the transaction fits within the  
4 exclusion, you have to determine whether it not only meets  
5 the form, but meets the substance of what the statute's  
6 designed to protect, and it's in that respect that the  
7 tort-like remedy has to remedy the personal component of  
8 the injury because if it only remedies the economic  
9 component, then it may in form look like a personal  
10 injury, but in substance it's just an economic award and  
11 should be taxed just like all other economic awards.

12 QUESTION: Mr. Jones, is it not the case that  
13 age discrimination claims are sometimes joined with title  
14 VII claims? For example, sex discrimination claims?

15 MR. JONES: It may be that there are  
16 independently violations of those two separate statutes,  
17 but there's no --

18 QUESTION: But my question is, if you can bring  
19 both claims, as I understand you can, and this will cover  
20 settlements as well as litigated cases, then can't the  
21 parties manipulate themselves in and out of tax  
22 consequences by either putting the damages under title VII  
23 in their settlement papers or under the age discrimination  
24 act?

25 MR. JONES: Here again, you run into the



1 resistance of the Commissioner to mere form as opposed to  
2 substance. There is an ample body of case law addressing  
3 exactly what you're describing. The Secretary, or the  
4 Commissioner, his delegate, looks to the substance of what  
5 the claims were in making the allocation.

6 Now, it is true that the allocation made by the  
7 parties is sort of, if you will, ordinarily respected, but  
8 if there's evidence of what you described as manipulation,  
9 certainly the Commissioner would reallocate the award and  
10 make a deficiency based upon what he -- what she  
11 understands to be the substance of the party's claims.

12 QUESTION: How are Equal Pay Act cases treated  
13 in this regime that the Commissioner is now administering?

14 MR. JONES: I have to admit that's a very  
15 difficult question for me because I'm not 100 percent  
16 confident on the remedial scheme of the Equal Pay Act.

17 I think -- well, let me assume that it's like  
18 the Fair Labor Standards Act. I know that like the ADA it  
19 refers to some of the remedies under the Fair Labor  
20 Standards Act, but if it were like the Fair Labor  
21 Standards Act, where you had liquidated damages that were  
22 automatically awarded as additional compensation, rather  
23 than as, under this statute as a -- only for wilful  
24 violations, even so, that compensation would not be  
25 compensation for the personal elements of the employee's

1 loss in the Commissioner's view.

2 It's an economic compensation. It was -- as  
3 this Court described in the Brooklyn Savings case, it was  
4 compensation for delay in payment of the economic damages.

5 QUESTION: But there's a case where there would  
6 be a total overlap. An equal pay violation would always  
7 be a title VII violation, would it not?

8 MR. JONES: I'm sorry, I really can't answer  
9 that question. I'm just -- I'm not sufficiently familiar  
10 with the scheme, the remedies, or even of the substance of  
11 the Equal Pay Act to help on that.

12 QUESTION: Well, my concern is that you take  
13 this panoply of antidiscrimination laws, title VII, the  
14 Equal Pay Act, the age discrimination act, the  
15 disabilities act, and they all seem to be remedying the  
16 same type of wrong, yet in some cases the award will be  
17 excludable and in other cases they will not, and what  
18 sense does that make?

19 MR. JONES: Well, it makes sense in respecting  
20 the distinctions that Congress drew between those  
21 statutory schemes.

22 We have to -- the Commissioner has to be  
23 concerned with the application of this revenue statute to  
24 all types of claims, and the distinction that we've drawn,  
25 and that the Court drew in Burke, between statutes to just

1     compensate for economic loss and statutes that compensate  
2     in addition for personal loss is important in applying the  
3     statute to all types of remedies.

4             Now, in the area of employment discrimination,  
5     Congress has drawn certain distinctions between different  
6     types of remedies. We're simply respecting the  
7     distinctions that Congress drew, just as this Court did in  
8     Burke.

9             In Burke the Court said that a title VII  
10    recovery, which at that time compensated only for economic  
11    losses and not for personal losses, was not excluded, so I  
12    believe that the question that you're asking was really  
13    anticipated or was indeed the subject of Burke. That's  
14    what the Court concluded in Burke.

15            QUESTION: And even if we take title VII itself,  
16    and now in the post -- was that 1991?

17            MR. JONES: 1991.

18            QUESTION: Even two parts of title VII, I  
19    believe your position is that if it's intent  
20    discrimination then it's excludable, but if it's impact,  
21    then it's not excludable, and those two are often pled in  
22    the alternative.

23            MR. JONES: Certainly.

24            QUESTION: I think it's an intent case, but if I  
25    don't make it on that, then it's an impact case.

1 MR. JONES: It would be inconsistent with Burke  
2 to regard the disparate impact case which provides only  
3 for back wages to be excluded from income.

4 What happened in 1991 was that Congress provided  
5 additional remedies for the intentional discrimination  
6 case, the compensatory damages, including compensation for  
7 these personal components of loss. In doing so, the  
8 Court -- I'm sorry, Congress identified that claim as in  
9 substance as well as in form a remedy for personal  
10 injuries. For disparate impact cases, it provides only an  
11 economic remedy, just as it does under the ADEA, so in  
12 substance what Congress did was leave that as an economic  
13 recovery.

14 QUESTION: So but you're largely, then, leaving  
15 it, at least as far as settlement is concerned, up to the  
16 parties when you have, it could be one or could be the  
17 other, and good faith you could plead one or the other,  
18 but for settlement purposes you'll pick the one with the  
19 advantageous tax consequences.

20 MR. JONES: As I have already explained, the  
21 Service's only tool in that situation is to enforce what  
22 it believes to be the substance of the party's recoveries.

23 Sometimes you can tell. Sometimes it's  
24 relatively visible that there's been a contrivance, but if  
25 there hasn't been a contrivance, I suppose what that would



1 suggest is that the remedy in fact was for the personal  
2 component of the loss, if both were available.

3 Now, if I could get to this case, the courts  
4 below agreed with the framework of analysis that I've  
5 described. They differed only in a conclusion that the  
6 liquidated damages component of the age discrimination act  
7 recovery was in a -- was an indirect, implied form of  
8 compensation for the personal component of the employee's  
9 loss, but that conclusion is not correct.

10 In TWA v. Thurston, the Court explained that ADA  
11 liquidated damages are a double damages device designed to  
12 punish and to deter wilful violations of the act. The  
13 Court explained that the liquidated damages for wilful  
14 violations of the ADA are a direct substitute for the  
15 criminal sanctions for wilful violations of the Fair Labor  
16 Standard Act, from which the ADA remedies were largely  
17 drawn.

18 So the ADA liquidated damages remedy is not an  
19 automatic award given as additional compensation in each  
20 case, as it was under the pre-1946 provisions of the Fair  
21 Labor Standards Act that were involved in the Court's  
22 decisions in Brooklyn Savings and Overnight Motor.

23 And in Thurston, in distinguishing those older  
24 FLSA cases, the Court specifically pointed out that  
25 liquidated damages for wilful violations are a

1 sanctioned -- are a substitute for criminal sanctions and  
2 are punitive in nature.

3 Now, the Seventh Circuit in Downey added  
4 something very useful on this topic. What they pointed  
5 out was, even if you could regard liquidated damages for  
6 wilful violations as somehow compensatory rather than  
7 punitive in nature, they clearly are compensation for the  
8 personal components of the employee's loss. The  
9 availability and amount of liquidated damages under the  
10 ADEA has no bearing whatever on the existence or amount of  
11 the personal component of the employee's loss.

12 ADA liquidated damages are not available on  
13 account of the underlying injury. They're available on  
14 account of the employer's improper state of mind, his  
15 wilful misconduct, and when they're awarded the amount of  
16 the recovery is limited solely by the economic loss of the  
17 employee. The personal components of that loss are given  
18 no consideration.

19 QUESTION: In the law of torts generally, in the  
20 case law on torts and in the treatises, do we often refer  
21 to liquidated damages? I always think of that as a  
22 contract concept.

23 MR. JONES: Well, liquidated damages I think  
24 came out of contracts, but I think that what we have to --  
25 what -- *Lorillard v. Pons* is helpful in understanding

1 what's going on here.

2 In Lorillard v. Pons, the Court pointed out that  
3 when FLSA remedies were drawn into the ADEA, to the extent  
4 that they were drawn in without change they should be  
5 given a similar interpretation, but to the extent they  
6 were drawn in with the change, they should be given a  
7 different interpretation, and in Lorillard v. Pons, the  
8 Court specifically pointed out that liquidated damages  
9 under the FLSA had meant something, but now it's something  
10 different under the ADEA.

11 I think that what happened was that the term  
12 "liquidated damages" just came along from the FLSA, but  
13 the concept was changed into a substitute for the criminal  
14 remedy. I --

15 QUESTION: Liquidated damages in traditional  
16 contract law often means a sum that is awarded because the  
17 actual damages would be very difficult to assess, doesn't  
18 it?

19 MR. JONES: That's correct. I think as an  
20 ordinary contract remedy that would be the concept that it  
21 addresses, but as I pointed out, when it came along into  
22 the ADEA, it really changed its nature, and as the Court  
23 said in Thurston, it became punitive in nature and a  
24 substitute for criminal sanctions.

25 QUESTION: Mr. Jones, as you know, I didn't --

1 in Burke did not think that your regulation making the  
2 line, the tort-like line was within the statute, but we  
3 held that it was.

4 You've given two reasons for saying that this is  
5 not tort-like. One is that it's only on the intentional  
6 violation that these damages are awarded, but some torts  
7 require wilfulness as well. The tort of assault, for  
8 example. You're entitled to damages from that, but it's a  
9 purely wilful tort. If you do not show wilfulness, you do  
10 not recover.

11 MR. JONES: Well, the point that we're -- the  
12 distinction I'm trying to make when I talk about wilful is  
13 whether the resulting award is compensation for the  
14 underlying injury or compensation -- or rather, not  
15 compensation, but punishment for the employer's  
16 misconduct.

17 QUESTION: Well, you could say the same about  
18 assault. I don't know whether you're punishing the injury  
19 or punishing the bad intent. They both have to be there,  
20 and it's the same here.

21 MR. JONES: I think the difference is that when  
22 the statute refers to injury, I think it's in the legal --  
23 context of the legal injury. In an assault, the legal  
24 injury isn't just the harm, it's the occurrence of the  
25 conditions that give rise to the action.



1 Punitive damages are not based upon the legal  
2 injury to the defendant, they're based on punishment of  
3 the improper state of mind of the defendant. I think --

4 QUESTION: These aren't punitive damages.  
5 They're liquidated damages, which as the Chief just  
6 suggested measure a given in lieu -- because damages are  
7 hard to measure, not punishment.

8 MR. JONES: Sometimes, but I think what I was  
9 trying to point out is it's reasonably clear that in  
10 dragging this term along into the ADEA it wasn't  
11 describing the contractual historical notion of liquidated  
12 damages. That's exactly what the Court held in Thurston,  
13 indeed, that this was a punitive sanction designed to  
14 deter and punish.

15 It changed its nature as it moved along, but as  
16 the Seventh Circuit explained, whether you regard it as  
17 compensation or as punishment, it doesn't compensate for  
18 the personal components of the loss. It's like Burke. It  
19 doesn't have the form or the substance of compensation for  
20 the personal components of the employee --

21 QUESTION: But what about a State tort statute  
22 that says, henceforward for certain types of torts --  
23 let's say torts by ski resorts. Some Western States have  
24 limited their tort laws in order to enable ski resorts not  
25 to be sued out of existence. Suppose a State says that

1 henceforward negligence recoveries against ski resorts  
2 cannot include any pain and suffering component. You can  
3 get compensated for your economic loss from -- now, does  
4 that become a nontort?

5 MR. JONES: It becomes -- it -- that's a  
6 question that I think the Commissioner would answer it  
7 becomes a nontort-like remedy for a personal injury.

8 QUESTION: All right, but that's not what I  
9 would consider -- I mean, I don't know what we -- what you  
10 meant by tort-like. You meant the -- I mean the I --

11 MR. JONES: That's right, it is --

12 QUESTION: -- not you personally, Mr. Jones --

13 MR. JONES: I think --

14 QUESTION: -- but the IRS --

15 MR. JONES: Yes.

16 QUESTION: -- invented this tort-like thing, but  
17 I would not consider the touchstone of tort-like to be  
18 whether you are entitled to pain and suffering damages.

19 MR. JONES: Well, again, you have to focus on  
20 just not tort-like, but the context of this is tort-like  
21 remedy for a personal injury.

22 If we unleash the word tort-like from the  
23 context of personal injury, then we include it, I suppose,  
24 perhaps in antitrust remedies, perhaps securities laws,  
25 anything that's not based on contract.

1           What the regulation does is it directs the  
2           distinction to be made between whether the statute is just  
3           providing an economic remedy or is providing a remedy for  
4           the personal components of the loss.

5           There are two other points that I'd like to  
6           briefly make.

7           QUESTION: May I take it that the Commissioner  
8           then, despite Justice Scalia's opinion, had no occasion to  
9           rethink whether it should maintain this tort or tort-type  
10          rights regulation? I mean, if you -- just the words of  
11          the statute, personal injuries or sickness, have been  
12          expanded in that regulation, but that is the Commission's  
13          position, that tort or tort-like rights is the regime,  
14          right?

15          MR. JONES: In two rulings issued by the Service  
16          both before and after Burke, the agency has concluded that  
17          a statutory remedy that provides simply back wages and  
18          liquidated damages in an equal amount and that does not,  
19          like an ordinary tort, provide compensation for personal  
20          components of the loss, is not excluded from income under  
21          the regulation. It is not a tort-like remedy because it  
22          lacks that element of the personal component of loss.

23          QUESTION: But is it not true that even if it  
24          were not a tort-like remedy, if it's a remedy for personal  
25          injuries, you still get the exclusion. Say it's Workman's

1 Compensation, or something like that.

2 MR. JONES: Workman's Compensation comes in  
3 directly under a different part of 104(a), and in fact you  
4 don't have to --

5 QUESTION: What about an insurance recovery,  
6 say, on account of --

7 MR. JONES: Insurance recovery -- a mere  
8 accident comes in under 104(a)(3).

9 QUESTION: So it doesn't have to be a tort, is  
10 what I'm trying to --

11 MR. JONES: Under 104(a)(2) it has to be damages  
12 on account of personal injury, which the Service  
13 interpreted to require there to be a tort or tort-like  
14 compensation or the personal injury, so it's easy to  
15 overrun the various components of the statute.

16 Here we're just talking about the one, and in  
17 deciding whether this kind of recovery has both the form  
18 and the substance of a recovery on account of personal  
19 injuries, the Service has focused on whether it provides  
20 just an economic compensation like any other economic  
21 recovery, or does something more.

22 Now, the Service's interpretation has been -- is  
23 a reasonable one. It's consistent with Burke. Indeed, it  
24 adopts Burke. As the Court said in National Mufflers  
25 Dealers, it's important to give deference to the agency's



1 interpretation to ensure that in these areas --

2 QUESTION: It's --

3 MR. JONES: -- of limitless factual variation  
4 like cases are treated alike.

5 QUESTION: The -- you put your finger on just  
6 the part that's bothering me, that I don't understand this  
7 tort-like notion. What's wrong with saying sure the ski  
8 resort is a tort?

9 Now, you'd have slander of an accountant.  
10 That's a tort, even though there are no damages other than  
11 economic damages. But you also say, why do we have to  
12 bother -- say everything's a tort. Antitrust is a tort,  
13 if it's not contract.

14 Still, the damages have to be on account of  
15 personal injury.

16 MR. JONES: Yes.

17 QUESTION: So you argued both things, so my  
18 question really is, isn't this effort to say is it really  
19 a tort or is it really something else, just a waste of  
20 time?

21 MR. JONES: It's not so much a waste of time as  
22 I will concede that it is -- it tends to create confusion.

23 QUESTION: So why not say, forget IRS reg to the  
24 contrary notwithstanding, forget whether  
25 characteristically it's called under ancient history in

1 Blackstone or something tort, or has some other name.  
2 Call it a tort. Just look to see whether the damages are  
3 on account of personal injury.

4 I'm not saying I agree with what I've just said.

5 MR. JONES: I understand.

6 QUESTION: I just want to get your reaction.

7 MR. JONES: Well, my reaction to that is that  
8 the Service since 1960 has applied this regulation to  
9 pursue the goal that you've described.

10 Now, it could be that it wasn't necessary for  
11 that purpose, but it was adopted for that purpose, and  
12 it's been interpreted in that fashion. It seems to add  
13 a -- it adds one element of direction to the inquiry, and  
14 that is whether the recovery under a tort-like model  
15 includes compensation for things like pain and suffering  
16 and emotional distress, which are tort-like concepts.

17 The current proliferation of conflicting  
18 decisions among the courts of appeals really provides a  
19 compelling justification for deference to the agency's  
20 interpretations, because currently, instead of deferring  
21 to the agency's rulings, the courts are independently  
22 struggling to determine what is a tort-like remedy.

23 QUESTION: If, in fact, the remedy in a title 7  
24 case, let's say, is just back pay and nothing further is  
25 awarded, it's still excludable under the current position

1 of the service, is it not?

2 MR. JONES: If it's a title VII remedy, that for  
3 a --

4 QUESTION: But did you --

5 MR. JONES: -- portion of title VII it provides  
6 additional compensation, then it qualifies as a tort-like  
7 remedy.

8 QUESTION: Even though, in fact, the jury awards  
9 only back pay.

10 MR. JONES: Only back pay, and I think I can  
11 explain that, but it's complicated. In evaluating the  
12 loss involved in a personal injury, the award of the lost  
13 stream of income is a relevant indicator of what was lost,  
14 of the value of what was lost, and so we can't ignore, the  
15 Service can't ignore --

16 QUESTION: You're talking in the traditional  
17 tort --

18 MR. JONES: I'm talking --

19 QUESTION: -- the personal injury type tort --

20 MR. JONES: I'm talking in the traditional  
21 sense.

22 QUESTION: -- but here you've got the exact same  
23 thing that you have in Burke, except now the statute says,  
24 in addition to back pay -- we're not measuring the losses  
25 if we were talking about personal injury automobile

1 accident, it's straight back pay.

2 MR. JONES: No. It's straight back pay less  
3 whatever earnings you made in the interim. It's sort of  
4 like the lost flow of income.

5 QUESTION: Mr. Jones, what do you do about --  
6 remember my ski resort example.

7 MR. JONES: Yes.

8 QUESTION: Which you said isn't a tort because  
9 there's no -- suppose someone's injured under such a  
10 statute and is not killed but is injured to such a degree  
11 that the person becomes ill and cannot go to work. That  
12 comes under this provision, though, doesn't it, because  
13 it's personal injury or sickness. Sickness is okay. If  
14 the only damages you get are for your illness, it's okay,  
15 but if it's a personal injury, somehow it has to be tort-  
16 like. That's a very strange result, isn't it?

17 MR. JONES: That sounds correct, and I also want  
18 to emphasize --

19 QUESTION: It sounds correct that it's strange,  
20 or it sounds --

21 MR. JONES: No, it sounds correct that your  
22 literal interpretation of the statute makes some sense,  
23 but what I want to emphasize is that the hypothetical that  
24 you've postulated doesn't really have enough information  
25 in it for me to feel like I can offer a firm view of how



1 the Service would react to it. I think that there's a lot  
2 of slippage in the way you've described it.

3 QUESTION: I cannot imagine why any  
4 interpretation which applies a different test when the  
5 person just gets sick and is out of work for that reason  
6 and another test where the person loses the job by reason  
7 of the same tort, I just -- that seems to me weird.

8 MR. JONES: There's one other point that I just  
9 have to talk about briefly, because it's a very important  
10 point to the Commissioner, and that is that liquidated  
11 damages should be excluded from income for an additional  
12 reason, which is that their award only for wilful  
13 violations is analogous to punitive damages and private  
14 fines.

15 In Commissioner v. Glenshaw Glass, the Court  
16 concluded that damages on account of personal injury are  
17 by definition compensatory only. Chief Justice Warren  
18 stated for the Court in Glenshaw Glass that punitive  
19 damages are not akin to a return of capital, which was the  
20 original justification for the statute, and that they do  
21 not represent compensation on account of personal  
22 injuries.

23 These statutes are of the type that the Court  
24 has traditionally said are to be narrowly construed. As  
25 we've described in our brief, consistent with the text,

1 the structure and the history of the statute, it should be  
2 interpreted only to exclude compensation on account of  
3 income, on account of injuries, and should not be  
4 interpreted to exclude punitive awards made on account of  
5 the employer's or the defendant's improper state of mind.

6 I would like to reserve the balance of my time  
7 for rebuttal.

8 QUESTION: Very well, Mr. Jones.

9 Mr. Joyce.

10 ORAL ARGUMENT OF THOMAS F. JOYCE

11 ON BEHALF OF THE RESPONDENTS

12 MR. JOYCE: Mr. Chief Justice, and may it please  
13 the Court:

14 One of the central problems of this case was  
15 identified in Justice Ginsburg's questioning with regard  
16 to the 1991 civil rights amendments and the statutes that  
17 emerged from that legislation. In fact, this case  
18 presents the issue what sense does it make to treat  
19 plaintiffs under the ADEA differently from plaintiffs  
20 under other similar Federal antidiscrimination statutes?

21 As I said, the statutes that emerged from that  
22 legislation are a unified scheme embodying congressional  
23 policy against discrimination, against racial, sexual,  
24 disabilities discrimination, as well as against age  
25 discrimination.

1           The fundamental principal of a tax system that  
2 similarly situated taxpayers should be taxed similarly --

3           QUESTION: Burke was a title VII claim, wasn't  
4 it, or a pre-1991 title VII?

5           MR. JOYCE: It was, Mr. Chief Justice.

6           QUESTION: And you're not quarreling with that  
7 decision, I take it?

8           MR. JOYCE: Not at all. In fact, we have relied  
9 on Burke in all of the lower courts.

10          The fundamental principle that similarly  
11 situated taxpayers should be taxed similarly finds direct  
12 application in the post-1991 Federal antidiscrimination  
13 scheme. If a cluster of laws enacted by Congress are now  
14 being interpreted by the Internal Revenue Service to allow  
15 for tax-free damages, as they are in Revenue Ruling 93-  
16 88, what sense does it make to take one element out of  
17 that cluster which Congress and I think an objective  
18 observer would regard as similar and treat it differently.

19          QUESTION: Oh, but Congress treats it -- the  
20 statutes are not fungible. The remedies under this  
21 statute are different from the remedies under other  
22 antidiscrimination statutes.

23          MR. JOYCE: They are different.

24          QUESTION: That's Congress' decision, not ours.

25          MR. JOYCE: They are different, Justice Stevens,

1 but the remedies -- and I emphasize the remedies, because  
2 Burke did speak in terms of remedial schemes. The  
3 remedies of the ADEA are much more similar to the remedies  
4 under post 1991 title VII and the disabilities act than  
5 any of those laws' remedies are to the paradigms of  
6 unlimited State tort liability.

7 QUESTION: Well, can you get -- you can get  
8 punitive damages under title VII as amended, can't you?

9 MR. JOYCE: Yes, you can, Your Honor.

10 QUESTION: Unlimited, and you can't get those  
11 here.

12 MR. JOYCE: If I may correct you, Your Honor,  
13 punitive damages as well as pain and suffering under post  
14 1991 law are kept. One can obtain a maximum under any  
15 circumstances of \$300,000.

16 QUESTION: Yes, but that - you can get \$300,000  
17 if your actual damages are only \$20.

18 MR. JOYCE: That is correct, Your Honor.

19 QUESTION: Whereas you can't do that under this  
20 statute.

21 MR. JOYCE: That is true, Your Honor.

22 QUESTION: So the statutes are not all exactly  
23 alike.

24 MR. JOYCE: I --

25 QUESTION: That's all I'm suggesting. Congress



1 has got a bunch of different schemes, and I think we have  
2 to look at each one separately.

3 MR. JOYCE: I agree with Your Honor that they  
4 are not alike, just as title VII's remedial scheme is not  
5 exactly the same as the disabilities act.

6 QUESTION: Well, maybe the problem is not the  
7 Internal Revenue Code or the IRS. Maybe you should  
8 reformulate your principle that persons similarly injured  
9 should be compensated similarly. That seems a reasonable  
10 proposition to me, and maybe that's the source of the  
11 difficulty.

12 MR. JOYCE: Well --

13 QUESTION: Congress has simply provided an  
14 irrational differential in compensation, but if that  
15 produces an irrational differential in tax law, the  
16 problem is with the origin of the relief.

17 MR. JOYCE: Your Honor, we don't feel that there  
18 is an irrational difference between the ADEA and title  
19 VII, or the disabilities act. As I said, those three  
20 statutes provide for a much more similar remedial scheme.

21 As an example, one can easily imagine a  
22 plaintiff under the ADEA who has a large lost earnings  
23 damage and who, upon a demonstration of wilful misconduct,  
24 will receive far in excess of a plaintiff with similar  
25 lost earnings under title VII, or the disabilities act.

1           That illustrates that these remedial -- that the  
2 range of damages in these three statutes are roughly  
3 comparable, and in fact Mr. Schleier's damages, his  
4 liquidated damages, fall somewhere in the mid-range  
5 between the minimum of \$50,000 required in some  
6 circumstances under title VII and the absolute maximum of  
7 \$300,000.

8           In other words, one could imagine a person with  
9 lost earnings under the ADEA in excess of \$300,000. If  
10 that person shows wilful misconduct, that person will  
11 receive more than \$300,000 in liquidated damages.

12           QUESTION: Yes, but there's another difference  
13 that keeps running through my mind. The nature of the  
14 discrimination is somewhat different. Racial  
15 discrimination, under constitutional principles, we look  
16 at very harshly, gender discrimination somewhere in  
17 between, and age discrimination, if there's any rational  
18 basis for it, it's okay. It's not -- it doesn't have the  
19 same insult associated with it as these other forms of  
20 discrimination do, so it's less of a tort-type kind of  
21 discrimination.

22           MR. JOYCE: Your Honor, I'm in a difficult  
23 position to say whether a plaintiff who is a victim of age  
24 discrimination feels less hurt than other plaintiffs. I  
25 recognize that there is a constitutional prohibition on

1 age discrimination, nor is there one on gender  
2 discrimination.

3           However, Congress and this Court in numerous  
4 decisions, such as EEOC v. Wyoming, Western Airlines v.  
5 Criswell, has recognized the dimension of personal injury  
6 in the age discrimination statute, and that much is clear.  
7 There is a personal injury here. The law could not  
8 produce an award without it. The Internal Revenue Service  
9 concedes as much in this case. There is an injury in this  
10 type of case.

11           QUESTION: The disabilities act comes under, is  
12 under the title VII pattern rather than the age  
13 discrimination pattern, does it not, the Americans With  
14 Disabilities Act?

15           MR. JOYCE: Your Honor, it is probably closer to  
16 the title VII pattern. It is not identical, but it is  
17 much more similar to title VII.

18           QUESTION: But it has a broader panoply of  
19 remedies than the age discrimination act.

20           MR. JOYCE: Broader, Your Honor, yes. Perhaps  
21 not necessarily deeper, but it, like the remedies under  
22 the title VII, permits for a separate count of pain and  
23 suffering and a separate count of punitive damages.

24           QUESTION: To the extent that the core remedy  
25 under the age discrimination act is making up for lost

1 wages, why should that escape income tax?

2 MR. JOYCE: Your Honor, the reason for that is  
3 the reason which I think has ultimately been recognized by  
4 the Internal Revenue Service itself in Revenue Ruling 93-  
5 88.

6 Once you have a tort or a tort-like cause of  
7 action, as the regulations state, once that occurs, any  
8 damages, as the statute says, are excludable, and the IRS  
9 now explicitly applies that principle to lost earnings or  
10 back pay under title VII, the disabilities act, et cetera.  
11 The mere fact that the damages are measured by the  
12 earnings the tort victim would have received does not  
13 prevent the exemption under section 104(a)(2).

14 QUESTION: Well, the statute doesn't talk about  
15 tort-like injuries, does it?

16 MR. JOYCE: No, Your Honor. The statute talks  
17 about personal injuries.

18 QUESTION: Personal injuries.

19 MR. JOYCE: The regulations define that to mean  
20 an action prosecuted involving tort or tort-type rights.

21 QUESTION: Well, certainly if you just look at  
22 the term personal injuries, you think of it, you know, in  
23 terms of the sort of thing that comes as a result of, say,  
24 a typical automobile accident -- you break your arm, you  
25 know, you can't walk right afterwards -- not the sort of



1 damages that you're talking about.

2 MR. JOYCE: Your Honor, historically it is true  
3 that personal injuries have emerged from the tort law, and  
4 many things that we would recognize as torts or tort-like  
5 now did not exist, or would not have been recognized as  
6 causes of action in 1919 when the statute was enacted.

7 QUESTION: Yes, but as I say, the statute  
8 doesn't say tort-like.

9 MR. JOYCE: That is correct, Your Honor.

10 QUESTION: The statute says -- so I don't know  
11 that it's necessarily correct to say that anything you  
12 call tort-like is a personal injury under the statute.  
13 The Internal Revenue Service has said that, and we may  
14 well choose to follow their regulation, but it certainly  
15 doesn't inexorably follow from the statute.

16 MR. JOYCE: We actually agree with that, Your  
17 Honor, because we believe the Court in Burke emphasized  
18 not only must there be a tort-like character in the law,  
19 there has to be a personal injury. If there's no personal  
20 injury, business tort might qualify, and that's clearly  
21 beyond the reach of this exemption. There must be, if you  
22 like, a two-phase test, or a two-step test. There must be  
23 a personal injury.

24 Now, what distinguishes a narrow class of  
25 discrimination laws from certain other causes of action is

1 that Congress has identified by law certain injuries that  
2 are deemed to occur when an act of intentional  
3 discrimination occurs. A person is -- a person's  
4 intangible security is invaded with respect to a  
5 fundamental feature of his or her identity, and that's  
6 what happens in unlawful racial, gender, age  
7 discrimination.

8 QUESTION: Well, what about the tort of  
9 malicious interference with contractual relations?

10 MR. JOYCE: Yes, Your Honor. That tort, which  
11 is --

12 QUESTION: That really is economic, isn't it,  
13 entirely?

14 MR. JOYCE: That is correct, Your Honor, and  
15 that tort is not necessarily within the reach of this  
16 exemption. If one business sues another business citing  
17 that tort, there may be no personal injury.

18 QUESTION: Well, what if I'm a defendant in an  
19 action like that, or a plaintiff in an action, and you  
20 know, I'm not a company, I'm simply an individual. I  
21 certainly sustain some sort of injury.

22 MR. JOYCE: You may very well have, but I  
23 question under your hypothetical whether it is a personal  
24 injury. If it is, then maybe we have something to apply  
25 here, but if not, the statute cannot be invoked.

1 QUESTION: Why isn't it? It interferes with my  
2 right to contract, right?

3 MR. JOYCE: A right to contract is --

4 QUESTION: Is that any less personal than a  
5 right to be employed regardless of my age, or to be  
6 employed regardless of my sex, or --

7 MR. JOYCE: Well, Your Honor, I think what  
8 you're getting at may be that the statute uses the term  
9 personal injury. Personal injury both now and  
10 historically has been something of a term of art. It does  
11 not --

12 QUESTION: Well, I think so, but we've abandoned  
13 that, and in fact it doesn't just say personal injury, it  
14 says personal injury or sickness, but we've abandoned  
15 that.

16 MR. JOYCE: Yes, Your Honor.

17 QUESTION: We've said it means any -- you know.  
18 I mean, I would have thought it meant what the Chief says,  
19 suggests.

20 MR. JOYCE: And this is where the Threlkeld  
21 case, for example --

22 QUESTION: Yes.

23 MR. JOYCE: -- provides a guide. In that case,  
24 which was a lower court opinion, obviously, cited by this  
25 Court in Burke, Threlkeld emphasized there must be some

1 type of fundamental injury to the human identity.

2 QUESTION: To the human identity.

3 MR. JOYCE: Yes, Your Honor, something that  
4 rises to the level of an intangible or a physical invasion  
5 of security.

6 QUESTION: That's too profound for me. I'm not  
7 sure I can cope with that.

8 QUESTION: Can you get that kind of injury when  
9 you fire everybody over 70 years old, that's that kind of  
10 injury?

11 QUESTION: What on earth does that mean?

12 MR. JOYCE: Your Honors have asked two  
13 questions. Over 70 would not be within the reach of the  
14 age statute.

15 QUESTION: Say over 60.

16 MR. JOYCE: Okay. That may very well be, Your  
17 Honor. If you decide to single them out for that act and  
18 violate the law, you have undoubtedly injured them.

19 As to what it means --

20 QUESTION: Yes, but have you injured them in  
21 anything other than an economic way? They lose their job.  
22 Do they get a lower --

23 MR. JOYCE: Oh, I think you may very well have.  
24 Obviously, each case may be slightly different, but when  
25 you fire somebody because he or she is determined



1 arbitrarily to be too old, you're telling that person he  
2 no longer is a productive human being -- it's time to  
3 retire. Go out to pasture, you're no good -- and that's  
4 the injury we think Congress was aiming at.

5 QUESTION: Do you want to say something about  
6 the third -- what seems like a third part of the statute,  
7 that as you've talked about the tort-like nature of the  
8 suit, and I might go along with that for the sake of  
9 argument, the IRS reg defines the words, damages received,  
10 all right, and so the damages have to be damages from a  
11 tort-like suit.

12 MR. JOYCE: Yes, Your Honor.

13 QUESTION: And also it says there somewhere in  
14 this background personal injury, and I'll go along with  
15 that. This is a terrible insult, physical and  
16 psychological harm, et cetera. I'll go along with that.

17 But it also says, and the IRS reg doesn't  
18 address this, that the damages in the tort-like suit have  
19 to be on account of the personal injury, and so if, in  
20 fact, you have a tort suit, but the State, say, limits the  
21 damages in that tort suit so you can't recover for the  
22 personal aspect of the harm, but only the lost wages when  
23 the accountant was insulted and slandered, libeled, how  
24 can that be on account of the personal injury?

25 MR. JOYCE: Let me explain, Your Honor. In that

1 situation, the State circumscribes a remedy, or recognizes  
2 a cause of action, but does not have a separate count for  
3 pain and suffering. Is that tort-like? Is it within the  
4 reach of the exemption?

5 QUESTION: I say yes. Let's assume it's tort-  
6 like, absolutely. Slander of an accountant is a tort, and  
7 let's also assume that in the background the poor  
8 accountant is suffering like mad, as people do when  
9 they're slandered or fired, that if you limit the damages  
10 just to the lost wages, for example, how is it damages on  
11 account of the personal injury?

12 MR. JOYCE: On account of, perhaps somewhat  
13 different from the phrase personal injuries, is not a  
14 precise term of art. However --

15 QUESTION: Yes, but it still suggests that these  
16 personal injuries had something to do with --

17 MR. JOYCE: That is correct, Your Honor.

18 QUESTION: -- on account of, and now that's the  
19 part I'd like you to address.

20 MR. JOYCE: There is a loose notion of causation  
21 underlying that term. If there had been no personal  
22 injury, there would be no damages. That is what we  
23 believe Congress --

24 QUESTION: Simply but-for, and then do you have  
25 authority for that, that it means only but-for?

1 MR. JOYCE: I believe that was not addressed in  
2 the 1918 legislative history. I think most courts that  
3 have adjudicated this, and the IRS itself, now seems to be  
4 relying on this idea in Revenue Ruling 93-88, where it  
5 held that back pay alone in a statute that is otherwise  
6 within the coverage of this exemption is excludable.

7 So if you had a statute that was, as Your Honor  
8 is hypothesizing, otherwise satisfying the elements of  
9 this, there is sufficient causality to cause the measure  
10 of the damage that is expressed in terms of lost earnings  
11 to be within the reach of it, because the statute does  
12 say, any damages on account, so once there is a personal  
13 injury, any means any. That is what we believe, and what  
14 the IRS --

15 QUESTION: Well, never mind the measure, whether  
16 it's measured precisely by the personal injury. Does --  
17 do you have to demonstrate that the personal injury has  
18 occurred? Do you have to show that the individual knew  
19 about the age discrimination?

20 MR. JOYCE: Which individual, the --

21 QUESTION: The individual being discriminated  
22 against in an age discrimination case.

23 MR. JOYCE: You do not have to show,  
24 necessarily, that the person was aware of that.

25 QUESTION: That's the only personal injury.

1 That's the only personal -- the feeling that the  
2 accountant had of being less of a human being.

3 MR. JOYCE: Right.

4 QUESTION: Personal identity, whatever you said.

5 MR. JOYCE: Yes, Your Honor. That injury --

6 QUESTION: If the person didn't even know about  
7 it -- but he's still entitled to damages, isn't he?

8 MR. JOYCE: He is, Your Honor, because --

9 QUESTION: With no personal injury. So it's not  
10 even but-for.

11 MR. JOYCE: I disagree in one respect, Your  
12 Honor, respectfully. Congress presumes an injury to occur  
13 when invidious discrimination in violation of one of these  
14 classifications occurs.

15 QUESTION: Oh, I see, so it doesn't have to be  
16 on account of.

17 MR. JOYCE: It does, Your Honor, because there  
18 has to be an act of discrimination. There must be an act  
19 of discrimination, and there must be injury in this case.

20 QUESTION: But I don't understand your first  
21 answer. You're charging -- in an age discrimination case,  
22 you're charging the employer with discriminating against  
23 you because of your age, so how do you -- how can you not  
24 know about it?

25 MR. JOYCE: Well, I think Justice Scalia is

1 hypothesizing a case in which it is quite possible a  
2 plaintiff may not be aware that the act is a violation of  
3 the ADEA. At least, that was my interpretation.

4 QUESTION: Well, by the time the complaint is  
5 filed she surely does.

6 MR. JOYCE: It is highly likely that by that  
7 point the plaintiff will be aware of it.

8 QUESTION: When -- if you're right that this --  
9 these damages under the age discrimination act should be  
10 treated just like damages for disparate treatment under  
11 title VII, and then we come to the jury, and the question  
12 that the judge asks counsel is, he says, well, this is  
13 excludable from income, I understand. Therefore, I will  
14 tell the jury that the amount that they're going to award,  
15 to the extent it covers back pay, will not be taxed.  
16 Would you agree, if you're right, that that should be the  
17 consequence?

18 MR. JOYCE: Yes, Your Honor. In fact, I also  
19 think that's the law generally that the jury will be  
20 informed of that.

21 QUESTION: Well, isn't there an irony, then, the  
22 one who ends up benefiting from this is the tortfeasor,  
23 because the jury will say, oh, well, we can give less  
24 because what we give is not going to be subject to tax.

25 MR. JOYCE: It is possible that the tortfeasor



1 in the age case just like the tortfeasor in any tort case  
2 may have to pay less to the victims.

3 QUESTION: But doesn't the judge also charge  
4 that they are supposed to make him whole, or her whole  
5 with respect to back wages?

6 MR. JOYCE: That would probably be the charge in  
7 an age case, Your Honor. If I could emphasize, Justice  
8 Ginsburg, in any tort case it is possible we don't know in  
9 advance whether there'll be any incidental benefit to the  
10 tortfeasor, but the tortfeasor may have to pay less money.

11 If the victims are in a very strong bargaining  
12 position they will want a certain sum. They will have a  
13 very strong case, and if the employer or defendant has to  
14 pay that but is relieved in some sense because the primary  
15 beneficiaries are relieved of that tax, we believe that is  
16 an unintended incidental benefit not primarily before  
17 Congress.

18 The regulations we emphasize, Your Honors, must  
19 be interpreted as they speak in terms of tort-like laws,  
20 and this illustrates why they must be interpreted  
21 flexibly. It is not simply tort laws that existed in 1919  
22 or 1956, or any particular date, but a range of tort laws  
23 that must be accommodated under this statute.

24 That would include not only presumed damages  
25 under various State laws or the circumscribed tort

1 remedies hypothesized by some members of the Court today,  
2 but even such causes of action as wrongful death.

3 Wrongful death is a good example of a statute or  
4 a remedy that has in many cases no allowance for pain and  
5 suffering. It is, however, frequently recognized by the  
6 IRS as being within the coverage of this exemption. For  
7 example, revenue Ruling 84-108 recognizes as much.

8 QUESTION: Well, since Lord Campbell's act and  
9 Lord Tenterden's act, wrongful death does compensate for  
10 pain and suffering, doesn't it? I mean, those were  
11 changes in the 19th Century, I thought.

12 MR. JOYCE: Not all tort -- or I believe not all  
13 wrongful death statutes do that, Your Honor. Just as one  
14 example we cited a Colorado statute that was enacted in  
15 our brief.

16 The Federal Employers Liability Act also, I  
17 believe, does not provide a separate count for pain and  
18 suffering, and that illustrates a recognized tort-like  
19 frame, namely those wrongful death statutes that would  
20 apparently not come within coverage, even though the  
21 Government has otherwise recognized such statutes to be  
22 tort-like for purposes of the section 104(a)(2) exemption,  
23 incidentally illustrating, we feel, another inconsistency  
24 between the Government's litigating position in this case  
25 and its published revenue rulings.

1 Your Honor --

2 QUESTION: What kind of statutes are those, now,  
3 wrongful death statutes and any others that --

4 MR. JOYCE: Wrongful death is a particularly  
5 clear example of it, Your Honor.

6 QUESTION: Okay.

7 MR. JOYCE: The ones that I mentioned, the  
8 Colorado statute we cited in our brief, the wrongful death  
9 statute in Revenue Ruling 84-108, the Federal Employer's  
10 Liability --

11 QUESTION: Do you know for a fact that the  
12 Government has allowed deduct -- or nonreporting of income  
13 under those particular statutes that --

14 MR. JOYCE: Well, it's my understanding that the  
15 Revenue Ruling 84-108, which dealt with two wrongful death  
16 statutes -- one is a Virginia statute and one is Alabama.  
17 The Virginia statute, according to the ruling, states that  
18 there shall be compensation only for actual damages.  
19 There wasn't a great deal of detail.

20 The Government in the course of its analysis in  
21 that ruling cited the Norfolk & Western v. Liepelt case,  
22 which is under the Federal Employers Liability Act.  
23 That's cited in our brief. That statute, as well, does  
24 not allow for pain and suffering. The Government,  
25 nevertheless, in Revenue Ruling 84-108, concluded that the

1 Virginia statute --

2 QUESTION: Yes, but isn't that commanded --  
3 forget the regulation provision, wouldn't the plain  
4 language of the statute have compelled that result, if  
5 it's on account of personal injuries?

6 MR. JOYCE: Well, we think so, Your Honor, but  
7 the Government has taken the position for this case that  
8 there is an absolute prerequisite under the Burke analysis  
9 that there be a count for something like pain or  
10 suffering.

11 QUESTION: Well, maybe -- maybe that's  
12 explainable because that's real personal injuries --

13 QUESTION: Yes.

14 QUESTION: -- and real personal injuries you can  
15 get it for anything, but those personal injuries that  
16 qualify as such because they are tort-like, then you make  
17 the investigation. I think that's what Justice Stevens  
18 has suggested.

19 MR. JOYCE: That may be. We feel that that does  
20 not --

21 QUESTION: We didn't say that in Burke. \*Like  
22 was the only category, I guess.

23 MR. JOYCE: Nevertheless, we feel that  
24 illustrates why the Government's insistence on the  
25 presence of a pain and suffering count, as it were, is

1       improper, is incorrect.

2               Indeed, the Government's position in its reply  
3       brief most explicitly seeks deference from this Court with  
4       respect to its view. There is, however, no regulation  
5       addressing the age discrimination statute. There's no  
6       revenue ruling. There's no published announcement. What  
7       the Government is seeking deference to in this case is its  
8       litigating position.

9               QUESTION: Well, isn't it entitled to deference  
10      in interpreting its own regulation?

11              MR. JOYCE: It is entitled to deference with  
12      respect to agency views that first of all interpret a  
13      statute to which Congress has --

14              QUESTION: No, my question was, isn't it  
15      entitled to deference in interpreting its own regulation?

16              MR. JOYCE: Within limits it is, Your Honor. In  
17      this case, we feel the Government is not entitled to  
18      deference because first of all its litigating position is  
19      what it's asking deference to. That position is  
20      apparently at odds with -- not only with statements in the  
21      court below, but published revenue rulings, and  
22      furthermore --

23              QUESTION: Well, has it been inconsistent in its  
24      interpretation of its regulations as applied to this  
25      particular case?



1 MR. JOYCE: Oh, I think so, Your Honor. Just as  
2 an example, the Government does not seem to have a  
3 consistent -- completely consistent view as to whether  
4 liquidated damages are exclusively punitive or not. As  
5 part of its argument, the Government has stated that the  
6 Portal-to-Portal Act transformed FLSA liquidated damages,  
7 therefore affecting ADEA liquidated damages, while  
8 25 years ago it said something different.

9 QUESTION: Well, if the Government -- if it  
10 turned out that we felt the Government were consistent in  
11 interpreting its regulation, would it then be entitled to  
12 deference in this case?

13 MR. JOYCE: From what I've heard, no, because  
14 the Government is going contrary to the decision in Burke.  
15 Burke, I would just for the sake of recapitulation  
16 emphasize that there must be some elements of a tort-like  
17 remedial scheme in addition to a personal injury. The  
18 Court singled out jury trials because of the importance of  
19 damages. It emphasized a range of nonwage damages. It  
20 also cited the existence of punitive damages as one of the  
21 indicia.

22 QUESTION: Yes, but that was on the tort side,  
23 but certainly it did not dispense with the requirement  
24 that the injuries be personal injuries.

25 QUESTION: Absolutely not, Your Honor. The

1 Court in that case and we think in other cases has  
2 presumed certain personal injuries to occur in an act of  
3 invidious discrimination, and the Government has conceded  
4 as much here. What Burke said in addition, and in this  
5 respect adding an additional test beyond that advanced by  
6 Justices O'Connor and Thomas in their dissent, was that  
7 there must be an additional tort-like frame. That frame  
8 the Court in Burke derived from the remedial scheme, and  
9 those elements of the remedial scheme found to be absent  
10 in the Burke case are present here. There are jury  
11 trials, there is a range of nonwage damages, and depending  
12 on how one weighs the compensatory versus punitive aspects  
13 of the ADEA, there in fact is a punitive role for ADEA  
14 liquidated damages, and so that brings this case squarely  
15 within the analysis of the majority in Burke.

16 QUESTION: Well, may I suggest another reading?  
17 Was both the emphasis in Burke on jury trial and the  
18 emphasis on some range of headings of damages intended to  
19 point to a case like the typical tort personal injury case  
20 in which the jury has a considerable degree of discretion  
21 in determining what something is worth, e.g., what pain  
22 and suffering is worth, whereas in a case like this,  
23 number 1, as you said a moment ago, I presume the jury  
24 must be instructed with respect to the wage aspect of the  
25 claim, that they are simply to make the claimant whole,

1 which is pretty much a mathematical exercise if the jury  
2 follows its instructions?

3 And number 2, assuming that it finds wilfulness,  
4 the wilfulness once again is pretty much a matter of math  
5 once the wage claim has been given a figure, isn't that  
6 correct?

7 MR. JOYCE: Yes.

8 QUESTION: And if that is so, is this really the  
9 kind of case which the Court had in mind when it was  
10 pointing to the sort of discretionary valuation that  
11 juries make, and if the answer is no, then perhaps even  
12 though the jury and some panoply of remedy features are  
13 satisfied here, this still wouldn't fall within what Burke  
14 was getting at.

15 MR. JOYCE: Well, the reason I think that is not  
16 the case, Justice Souter, is first of all the Court did  
17 cite the Rickel case, an age discrimination appellate  
18 decision, and the court also had as a background, as it  
19 were, the post 1991 amendments showing how the addition of  
20 certain features to a remedial scheme can apparently  
21 transform the character of the damages.

22 There is a role for the jury in the age case.  
23 The jury not only finds whether discrimination may occur,  
24 but the jury has a role in the determination of wilfulness  
25 on the part of the defendant.

1           As this Court noted in Burke, punitive damages  
2 may be an important part of tort law, both historically  
3 and currently, and so that is why I can't speak precisely  
4 as to what the Court may have had in mind in its majority  
5 opinion. We feel that it was looking largely beyond the  
6 title VII statute at issue in that case. It was looking  
7 for a, as it said, a range of damages. It cited, again, I  
8 think on page 1873 of the opinion, the importance of  
9 having additional damages, including other consequential  
10 damages.

11           QUESTION: But here the range is simply the  
12 liquidated damages double the back pay award. It is  
13 not --

14           MR. JOYCE: That is right, Your Honor.

15           QUESTION: A range is one other remedy.

16           MR. JOYCE: It is one other remedy which, under  
17 prior decisions of this Court, Brooklyn Savings, Overnight  
18 Motor, was held to denote too difficult to measure, too  
19 obscure except for estimate by liquidated damages.

20           QUESTION: But if the Court thought that -- if  
21 the Court thought that jury discretion in a different  
22 sense, discretion in weighing evidence to determine in the  
23 first place whether there had been a discrimination and,  
24 in the second place, whether it was wilful was important,  
25 then there would have been no need, I suppose, to



1 emphasize the range of damages too, and when you get to  
2 the range of damages, isn't that a signal that what the  
3 Court was really talking about was a discretion that goes  
4 beyond the kind of discretion that we talk about in fact-  
5 finding, and points --

6 MR. JOYCE: Well --

7 QUESTION: -- to the kind of discretion that we  
8 speak of in terms of valuation, which does not seem to be  
9 present here?

10 MR. JOYCE: I understand Your Honor's point. I  
11 still don't think that's what the Court really had in  
12 mind, because if that were so, various other presumed  
13 damages such as defamation, defamation per se, that  
14 doctrine, would automatically be excluded from the reach  
15 of this statute, and as I indicated earlier, even other  
16 tort-like statutes such as wrongful death are  
17 automatically beyond the reach, unless they provide a  
18 separate count.

19 QUESTION: No, but in the presumed damages case,  
20 damages are presumed but the jury has to set the amount,  
21 whereas here, the jury does not have that kind of  
22 discretion. The amount we're talking about in cases like  
23 this, if the jury follows its instructions, is essentially  
24 a matter of the arithmetic.

25 MR. JOYCE: It is a matter of arithmetic once



1 there's a finding of wilfulness.

2 QUESTION: Yes.

3 MR. JOYCE: And as to whether, for that matter,  
4 Congress decided to leave the apparent equation of the  
5 degree of reprehensibility to the existence of damages,  
6 though the Court in the Schmitz case, for example,  
7 concluded that that was in fact what was going on, that  
8 there is a presumed association with a degree of bad  
9 conduct on the part of the tortfeasor with those  
10 additional damages suffered by the plaintiff, and there is  
11 a role, a very distinct role for jury discretion in that  
12 case, Your Honor.

13 Mr. Chief Justice, if there are no further  
14 questions, I cede the remainder of my time.

15 QUESTION: Thank you, Mr. Joyce.

16 Mr. Jones, you have 2 minutes remaining.

17 REBUTTAL ARGUMENT OF KENT L. JONES

18 ON BEHALF OF THE PETITIONER

19 MR. JONES: Thank you.

20 Just briefly, Justice Ginsburg, I wanted to  
21 point out that the irony that you referred to may be even  
22 broader than you noted. In addition to the fact that,  
23 under Norfolk and Western, if the recovery were tax-exempt  
24 the jury should be instructed of that, is the fact that  
25 under Brooklyn Savings, if the reward were excluded from

1 tax it would be regarded as compensatory and therefore  
2 prejudgment interest would not be permitted.

3 Currently, pre-judgment interest is allowed on  
4 ADEA claims because the liquidated damages component is  
5 regarded as punitive rather than as compensatory, but if  
6 it were regarded as exempt because it compensated for  
7 personal losses, it would fall precisely within the  
8 Brooklyn Savings holding that precludes prejudgment  
9 interest.

10 There are two steps involved in applying this  
11 statute, as there are in almost every tax statute that  
12 provides an exclusion from income. Because such statutes  
13 have to be narrowly construed, the transaction has to meet  
14 both the form and the substance that Congress describes.

15 The form of such a transaction in this context  
16 is the nature of the claim, the Threlkeld test. The Court  
17 went beyond the form of the claim in Burke and said it  
18 also has to meet the substance of the statute. It has to  
19 provide remedies for the personal components of the loss,  
20 because otherwise, if it just compensates for the economic  
21 components, it doesn't fall within the scope of the  
22 statute as it should be strictly construed. That is the  
23 sum and substance of the Internal Revenue Service's  
24 position.

25 I disagree, and our brief reflects the fact that

1 we disagree with the respondent about whether we had been  
2 inconsistent. I think that our brief -- I'll have to rely  
3 on it for that, but I do want to point out specifically  
4 that since 1972, in rulings involving what was then title  
5 VII provisions and FLSA provisions, the Service ruled that  
6 if the statutory remedy only provides back wages and an  
7 equal amount of liquidated damages and doesn't compensate  
8 for the personal components, then it's not a recovery on  
9 account of personal injuries. It's not a tort-like remedy  
10 within the meaning of the regulation or the statute.

11 QUESTION: May I ask one question? What is the  
12 Service position for recovery in a tort of somebody  
13 driving somebody out of business, predatory contract,  
14 damages are totally economic?

15 MR. JONES: Well, as you've described it, I'm  
16 confident that our position would be that it is an  
17 economic recovery, but I'm not --

18 QUESTION: Okay.

19 MR. JONES: I'm not sure that I can think of an  
20 exact -- a ruling on that point.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

22 The case is submitted.

23 (Whereupon, at 11:01 a.m., the case in the  
24 above-entitled matter was submitted.)  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of*

*The United States in the Matter of:*

*COMMISSIONER OF INTERNAL REVENUE, Petitioner v. ERICH E. SCHLEIER  
AND HELEN B. SCHLEIER.*

*CASE NO.: 94-500*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Don Mani Federico*

(REPORTER)