THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NY 10036-6689

COMMITTEE ON LABOR AND EMPLOYMENT LAW

DEBORAH E. COLLINS, ESQ.
CHAIR
180 Maiden Lane
New York, NY 10038
(212) 902-1872
Deborah.E.Collins@gs.com
Fax # 212-346-4407

ANDRÉE PEART LANEY, ESQ.
SECRETARY
EEOC, New York District Office
33 Whitehall Street, 5th Floor
New York, NY 10004
(212) 336-3746
andree.peart@eeoc.gov
Fax # 212-336-3624

January 24, 2003

Bernard F. Ashe
7 Bedford Court
Delmar, NY 12054-9718

Charles A. Powell, III
Johnston Barton Proctor et al
1901 6th Avenue N., Suite 2900
Birmingham, AL 35203-2622

Dear Gentlemen:

I Chair the Committee on Labor and Employment Law of the Association of the Bar of the City of New York ("the Committee"). I write to state the Committee's position on the Civil Rights Tax Relief Act (H.R. 840 and S. 917, as introduced in the 107th Congress) ("CRTRA"). The Committee supports CRTRA and urges the House of Delegates of the American Bar Association to support the re-introduction of these bills in the 108th Congress and to work actively for their passage.[1]

CRTRA would benefit both employers and employees. Consequently, it has broad support from both sides of the employment bar, from ADR neutrals, from a diverse group of organizations, and on both sides of the aisle in Congress. Employees would benefit from CRTRA's passage for the obvious reason that CRTRA would allow plaintiffs to keep more of

1 The Committee thanks Bruce Fredrickson and Richard Seymour for providing the Committee with information that facilitated the preparation of this recommendation.

their discrimination awards and settlements. Employers would benefit from CRTRA's passage because (1) employment discrimination cases would be easier to settle for lower amounts, and (2) CRTRA would eliminate the risk to employers of courts enhancing the discrimination awards to prevailing plaintiffs' to compensate plaintiffs for the additional tax burdens that they suffer under the current law. Finally, ADR neutrals, especially mediators, endorse CRTRA because it would make cases easier to settle, and thus enable the parties to avoid the cost, time, energy, effort, stress, and uncertain outcome of continued litigation. The Committee supports each of CRTRA's three substantive provisions. CRTRA would (1) eliminate taxation of emotional distress awards, (2) end the "double taxation" of attorneys' fees, (3) allow employees who receive lump-sum wage awards to be taxed on the award over the number of years for which the awards were designed to compensate the employees.

Emotional distress awards should not be taxed for several reasons. First, as the law stands, the current law makes an arbitrary distinction between the tax treatment of physical injuries and that of non-physical, or psychological, injuries. This distinction should be eliminated because like physical injuries, psychological injuries can have profound consequences and often manifest themselves as physical symptoms. Moreover, while many physical injuries are the result of negligence, such as a slip and fall injury, emotional distress awards in employment cases most often compensate plaintiffs for injuries caused by intentional conduct, and therefore should not receive harsher tax treatment than injuries resulting from less egregious conduct. Additionally, if an employer has the ability to offer, as part of a settlement proposal, a portion of the settlement non-taxed, it can usually successfully settle a case for a lower amount than it otherwise could. Finally, Congress passed the Civil Rights Act of 1991, providing for compensatory damages in employment discrimination cases, in order to expand the remedies available to victims of discrimination and deter unlawful intentional discrimination. Taxation of awards compensating victims of such discrimination is inconsistent with this purpose.

Likewise, prevailing plaintiffs in employment discrimination cases should no longer be taxed on the portion of their award that compensates them for attorneys' fees and costs. Such a tax, on money that the plaintiff never receives, can have absurd consequences, disgorging the plaintiff of a high percentage of her award or settlement. In extreme cases, where litigation lasts years and attorneys' fees are greater than other damages, prevailing plaintiffs can actually owe the government more than they take home. Such results are severe enough to completely obviate the remedial purpose of the anti-discrimination statutes. And like the elimination of taxation of emotional distress, the elimination of "double taxation" allows employers to can put more money in a plaintiff's pocket while taking less out of their own. Additionally, a plaintiff is more likely to be willing to give up her fight if she believes that she is doing so for a fair result. Eliminating taxation of money that the plaintiff never receives is a large step towards that end.

Finally, the income averaging provision is essential to creating tax fairness, facilitating settlements, and eliminating the risk of additional "tax components" in discrimination awards. Currently, a prevailing plaintiff who is awarded back pay must report the entire lump-sum back pay award as taxable income in the year that it is received. This is so even if the award is

designed to compensate the plaintiff for several years of lost wages. The likely result is that the plaintiff will be placed in a higher tax bracket than she would have been in had she not been the victim of discrimination. This result is especially harsh for low wage earners. CRTRA's income averaging provision eliminates this problem, allowing plaintiffs, for tax purposes, to spread a lump-sum back pay award over the number of years for which it was designed to compensate her. It also eliminates the risk to employers that a court will order an enhanced back pay award in order to make the plaintiff whole. Finally, by properly drafting the settlement agreement, employers' attorneys can provide plaintiffs with the benefits of income averaging, thereby reducing the amount of money necessary to settle the claim.

Since the Small Business Job Protection Act of 1996 eliminated the exclusion from taxable income for emotional distress awards, there has been a consistently increasing effort to pass legislation creating fairness in the taxation of employment discrimination awards. CRTRA would go a long way towards doing so.

In 2002, CRTRA had broad bipartisan support in Congress, with numerous co-sponsors in the House of Representatives and the Senate. Unfortunately, other issues took priority and CRTRA was pushed aside. In 2003, it is important that CRTRA is placed back on the agenda and attached to appropriate legislation that is likely to pass. The Committee urges the ABA to stand behind CRTRA and actively lobby for its passage.

Very truly yours,

Deborah E. Collins

cc: Leo Milonas, President, Association of the Bar of the City of New York