

# Letters to the Editor

## Contingent Fees in Anti-Discrimination Cases

Robert W. Wood  
San Francisco, California

I read with interest the article by Scott Meier, "Contingent Fees in Anti-Discrimination Cases: The Bad News for Winners," *Wyoming Lawyer*, April 2005, p. 30. The author does a good job of summarizing what is obviously a rather deplorable situation, where a plaintiff can end up paying tax on moneys paid directly to his or her contingent fee lawyer. However, I think a couple of clarifications are needed.

Although Mr. Meier points out that plaintiffs in discrimination cases are caught by the result in *Banks*, I don't think he makes clear that this tax problem has been solved prospectively by the American Jobs Creation Act of 2004. Since Mr. Meier's overall message is that plaintiffs in contingent fee discrimination cases need to be aware of the additional tax hit on their attorneys' fees, the author needs to draw a great deal more attention to footnote 10, in which he mentions in passing this provision of the Jobs Act. Effective for settlements or judgments after October 22, 2004, discrimination (or any other employment) cases are entitled to an above-the-line deduction for attorneys' fees. That means that it will not matter whether the attorneys' fees represent gross income to the plaintiff, since the plaintiff will receive an above-the-line deduction for the attorneys' fees. An above-the-line deduction does not incur the wrath of the various limitations on miscellaneous itemized deductions, such as the alternative minimum tax.

Of less importance, but still worth mention, are the various respects in which the Supreme Court in *Banks* does not decide the tax treatment of contingent fees. The Supreme Court expressly declines to extend its holding to cases in which injunctive relief is requested, cases in which there is a statutory fee shifting claim, and also does not definitively address the partnership theory ad-

vanced in some of the amicus briefs. That may not matter in discrimination cases, but I think the presence of these exceptions mentioned by the Supreme Court should leave some taxpayers free to engage in planning that may result in contingent fees not constituting gross income to the client in at least some cases. The fact that the Supreme Court leaves open the tax treatment in fee shifting cases is especially significant.

I hope these clarifications are helpful.

## Bar Passage

T. Devon Sharkey  
Brooksville, Florida

I was amused to read a letter from fellow Florida attorney, Tera Peterson, who is also admitted to the Wyoming Bar. I must agree with her assessment of the Wyoming Bar Examination and have previously echoed similar sentiments to colleagues when we have discussed our experiences taking bar examinations across the country. I graduated from Emory University School of Law in 1993, and have been admitted to the state bars of Georgia, Florida, and finally Wyoming.

I took the February 2000 bar examination, and was assisted by an audiotaped lecture series and printed materials; some materials presented by Professor Burman and other faculty at the University of Wyoming College of Law. Professor Burman made himself available to answer several questions I had by telephone, and I very much appreciated that.

To my mind, what made the Wyoming Bar Examination especially challenging was that it very specifically tested on where Wyoming law diverged from the common law. I recall a water law question that touched upon a very recent case dealing with the abandonment of water rights, as well as a torts question dealing with the accumulation of snow.

Someone with a very good "general" knowledge of the law, but not the specific points of Wyoming law, would be very likely to get those questions wrong. The number of topics covered and tested also made the exam a challenge when compared to the examinations of other states.

I can't say that I have enjoyed taking any bar examination, but the Wyoming Bar Examination required me to acquire a far more thorough knowledge of any one state law than I had needed for any previous bar examination. It was also intellectually challenging, and for those reasons I can firmly say that the experience was positive.

Letters to the Editor should be submitted to:

Editor  
Wyoming Lawyer  
P.O. Box 109  
Cheyenne, WY 82003  
Fax: (307) 632-3737  
swilkinson@wyomingbar.org