

Does Bankruptcy Discharge Sexual Harassment Debts?

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While winning a sexual harassment suit against an employer may provide emotional satisfaction, efforts to collect a monetary judgment may have suffered a setback because of a recent bankruptcy court decision.

According to *In re Busch*, a bankruptcy court decision from the Northern District of New York, even if the employer files for bankruptcy relief for the primary purpose of discharging the judgment, the plaintiff judgment creditor may be left in the cold. In fact, it may well be impossible for the harassment victim to claim exemption from discharge under Bankruptcy Code §523(a)(6).

To avoid the discharge of a sexual harassment judgment, the plaintiff must establish, by a preponderance of the evidence, that her injury resulted from willful and malicious conduct of the debtor. Collateral estoppel principles, which prevent re-litigation of an issue decided in another proceeding, apply in discharge exemption proceedings pursuant to §523(a). But the findings in the harassment lawsuit may collaterally estop the victim from demonstrating the debtor's willfulness or malice, and thus may permit discharge of the harassment judgment.

The Law Begins to Change

In finding the plaintiff's debt dischargeable, the *Busch* court relied, in part, on the Supreme Court's decision in *Kawaauhau v. Geiger*. Prior to *Geiger*, most often bankruptcy courts ruled that sexual harassment judgments were exempt from discharge under §523(a)(6). However, since *Geiger*, as *In re Busch* illustrates, the pendulum has begun to swing the other way, much to the chagrin of harassment plaintiffs.

In *Geiger*, the Court held that a medical malpractice judgment based upon debtor's negligent or reckless conduct was not exempt from discharge under §523(a)(6). There the debtor had rendered inadequate medical care for a

foot injury; ultimately plaintiff's leg had to be amputated below the knee. A jury found Dr. Geiger liable and awarded approximately \$355,000 in damages.

In Geiger's subsequent bankruptcy, the bankruptcy court found the malpractice judgment nondischargeable as a debt "for willful and malicious injury," excepted from discharge by 11 U.S.C. §523(a)(6).

The Eighth Circuit, en banc, reversed, holding that the §523(a)(6) exemption from discharge was limited to debts "based on what the law has for generations called an intentional tort." The Supreme Court rejected the argument that the malpractice award fit within the exception because the defendant had "intentionally rendered inadequate medical care to [her] that necessarily led to her injury," and affirmed the Eighth Circuit. The Supreme Court agreed that plaintiff's medical malpractice judgment was dischargeable because it was not based on intentional conduct, but rather on conduct that was negligent or reckless. The Court stated that "nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury."

The 'Busch' Decision

In declining to exempt the plaintiff's sexual harassment judgment from discharge under §523(a)(6), the bankruptcy court in *Busch* explained that bankruptcy statutes must be strictly construed against the complaining creditor and in favor of the debtor.

In *Busch*, the debtor had filed his bankruptcy petition in large part to discharge the judgment — including punitive damages — in a sexual harassment suit brought by the plaintiff, Jacqueline Sanger. Sanger argued that the debtor was collaterally estopped from arguing for discharge, because her harassment judgment was based on a finding of "intentional" employment discrimination.

Specifically, the plaintiff argued, based on *Kolstad v. American Dental Assn.*, that the district court had to have found a "willful violation of federal law" in order to have submitted the option of punitive damages to the jury.

The court rejected that argument, finding no identity of issues in the two proceedings. Indeed, the court held that the jury's award of punitive

damages did not require a finding that the debtor intended to harm Sanger. The court noted that neither the standards for quid pro quo sexual harassment, nor for hostile work environment claims contain the “willfulness” element required by §523(a)(6).

And, because “reckless indifference” is sufficient for an award of punitive damages under Title VII, the punitive award did not imply willful conduct, required under §523(a)(6) or under *Geiger*. (The *Busch* court did find, however, that because of the sparse record from the prior proceeding, it was impossible to determine whether the punitive damages award was based on malice or reckless indifference. Therefore, sans a special verdict sheet or interrogatories, the court could not determine whether the issue was litigated in the previous action.)

In attempting to convince the court that her judgment should be nondischargeable, the plaintiff also argued that the specific acts committed by the debtor constituted an intentional tort, thereby falling under the “intentional tort trigger” of §523(a)(6). Plaintiff relied on *In re Gross*, where the court ruled that damages stemming from a malicious prosecution claim were not dischargeable. Sanger argued that as in *Gross*, the prior lower court findings obviated the need for the instant court to make its own determination of willfulness.

The *Busch* court rejected Sanger’s reliance on *Gross* and found no authority for treating sexual harassment as an intentional tort sufficient to operate as a basis for nondischargeability under §523(a)(6). Despite the Supreme Court’s decision in *Burlington Industries, Inc. v. Ellerth*, which “likened sexual harassment to an intentional tort for purposes of determining whether an employer is subject to vicarious liability for the unlawful conduct of its employees,” the *Busch* court held that sexual harassment was not an intentional tort for purposes of §523.

The *Busch* court explained, a la *Geiger*, that *Ellerth* did not require that the harasser intend to injure his victim. Thus, even accepting all of the acts alleged as true, the *Busch* court was not convinced that the debtor acted with the intention of injuring plaintiff — psychologically, physically or economically.

The *Busch* court quoted *Geiger's* description of the "willful" prong of §523(a)(6) as modifying the word "injury" and hence requiring an actual deliberate or intentional injury. Accordingly, the actor must have intended the "consequences of an act" and not simply "the act itself." While the nature of sexual harassment under Title VII presupposes that defendant's unwelcome sexual conduct is intentional, that does not necessarily lead to the conclusion that the employer's intent was to actually injure the plaintiff.

The Policy Argument

Finally, the plaintiff argued on policy grounds that a debtor should not be able to discharge a sexual harassment judgment because it would undermine the legislative purposes of Title VII: to eliminate gender-based discrimination from the workplace.

Plaintiff's policy argument was also rejected because of the inherent conflict between the purposes behind Title VII and the Bankruptcy Code. The court determined that this paradox was not an issue that it could resolve.

While Title VII seeks to protect employees, deter employers and compensate victims for losses suffered at the hands of the employer, the Bankruptcy Code seeks to rehabilitate debtors and provide equality in distribution to creditors. While the court acknowledged that its decision may "add insult to injury," it nonetheless ordered that the debt must be discharged.

While the *Busch* court relied on *Geiger* as requiring that the debtor intended the injury itself, it did so in direct contradiction of the prior holding of the Bankruptcy Court for the Eastern District of New York in *In re Gross*.

A Different Point of View

The court in *Gross* stated: [The debtor's] interpretation of the *Geiger* case as requiring a specific intent to cause injury for §523(a)(6) nondischargeability, is incorrect. The Supreme Court, in *Geiger*, did not define the precise state of mind required to satisfy the §523(a)(6) willfulness imperative An intentional wrongful act that necessarily causes injury meets the willfulness standard under *Geiger*. 4 COLLIER ON BANKRUPTCY 523.13[1], at 523-92 (Lawrence P. King, et al. eds., 15th ed. 2001).

The question of the requisite state of mind was in fact not answered by *Geiger* and has led to confusion among various jurisdictions, some of which

have determined that conduct constituting an intentional tort is required. The court in *Busch* did, however, recognize that a “minority” of courts, including the First Circuit, have interpreted the willfulness prong by a less stringent standard. For example, in *In re Jones*, the Court of Appeals for the First Circuit held:

Injury inflicted “willfully” and “maliciously,” for debt dischargeability purposes, is one inflicted intentionally and deliberately, and either with intent to cause the harm complained of, or in circumstances in which the harm, was certain or almost certain to result from the debtor’s acts. The First Circuit has interpreted the term “willful and malicious” to mean “an act intentionally committed, without just cause or excuse, in conscious disregard of one’s duty.” (citations omitted).

The First Circuit determined that “a finding of sexual harassment constitutes the requisite injury and is equivalent to a finding of malicious and willful injury for dischargeability purposes under §523(a)(6).” Accordingly, under the First Circuit’s rationale in *In re Jones*, Jacqueline Sanger’s sexual harassment judgment would likely have been found non-dischargeable. Despite the Supreme Court’s decision in *Geiger*, as the various cases cited above indicate, there is likely to continue to be division among the courts, even within New York, as to the standards applicable to discharging a sexual harassment judgment under §523(a)(6).

To resolve this uncertainty, either Congress must step in and provide greater statutory guidance, or the Supreme Court must render another decision on the issue clarifying the requisite state of mind necessary for the willfulness prong of §523(a)(6) of the Code. Pending any such action, the choice of forum will dictate when the bankruptcy court will add insult to the harassment victim’s injury.