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Rethinking In re Busch: Bankruptcy Discharge of Sexual Harassment Judgments under Section 523(a)(6)

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RETHINKING *IN RE BUSCH*: BANKRUPTCY DISCHARGE OF SEXUAL HARASSMENT JUDGMENTS UNDER SECTION 523(A)(6)

I. INTRODUCTION

In 2004, the Equal Employment Opportunity Commission and state and local federal employment protection agencies received almost 14,000 complaints regarding sexual harassment resulting in $50,000,000 in settlements and millions more in judgments.[1] During the twelve-month period ending on March 31, 2004, over 1,600,000 people filed for bankruptcy.[2] The goal of sexual harassment laws is to protect employees by compensating them for their losses and to deter employers from future violations.[3] On the other hand, the Bankruptcy Code focuses on providing the debtor with a "fresh start" and ensuring equality of distribution among creditors.[4] While the underlying policies of bankruptcy and protection against sexual harassment are laudable, considerable tension arises when the victim of sexual harassment becomes the creditor of the harasser's estate.

In *In re Busch*, the United States Bankruptcy Court for the Northern District of New York discharged a sexual harassment verdict for $400,000 in compensatory and punitive damages against the debtor.[5] The Bankruptcy Code states that a debt "for *willful and malicious* injury by the debtor to another entity or to the property of another entity" is nondischargeable.[6] In construing this provision of the Bankruptcy Code,[7] the *Busch* court looked to the United States Supreme Court's decision in *Kawaauhau v. Geiger*.[8] *Geiger* held that the willful prong requires that the debtor must intend to cause injury, not simply intend to perform the act.[9] The *Busch* court held that the actions underlying the sexual harassment verdict were not willful and therefore, the debt was dischargeable.[10]

This Note argues that the *Busch* decision incorrectly applied the *Geiger* standard to find the debtor's actions were not willful. Further, the Bankruptcy Court for the District of South Carolina should reject the *Busch* court's rationale and hold that the majority of sexual harassment verdicts are nondischargeable. Part II discusses *Geiger* and its standard for willfulness. Part III examines the dischargeability of sexual harassment verdicts prior to *Geiger* while Part IV analyzes how courts have applied the *Geiger* standard to sexual harassment verdicts. Finally, Part V provides an in-depth discussion of *Busch* and analyzes how the court

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1. U.S. Equal Employment Opportunity Commission, *Sexual Harassment Charges, EEOC & FEPAs Combined: FY 1992 – FY 2003*, *at* http://www.eeoc.gov/stats/harass.html (last modified Mar. 8, 2004).

2. Table F-2, U.S. Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2004, Administrative Office of the U.S. Courts, *at* http://www.uscourts.gov/Press_Releases/f2table.xls (last visited Feb. 21, 2005).

3. Owen v. City of Independence, 445 U.S. 622, 651 (1980).

4. BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994).

5. Sanger v. Busch (*In re* Busch), 311 B.R. 657 (Bankr. N.D.N.Y. 2004).

6. 11 U.S.C. § 523(a)(6) (2004) (emphasis added).

7. *In re* Busch, 311 B.R. at 664.

8. 523 U.S. 57 (1998).

9. *In re* Geiger, 523 U.S. at 61.

10. *In re* Busch, 311 B.R. at 671. For provisions in the Bankruptcy Code mandating discharge, see 11 U.S.C. § 727 (2004) (Chapter 7 Bankruptcy); 11 U.S.C. § 1141 (Chapter 11 Bankruptcy); 11 U.S.C. § 1228 (Chapter 12 Bankruptcy); and 11 U.S.C. § 1328 (Chapter 13 Bankruptcy).

incorrectly discharged the plaintiff's sexual harassment verdict pursuant to § 523(a)(6).[11]

II. *KAWAAUHAU V. GEIGER:* THE SUPREME COURT'S CONSTRUCTION OF THE WILLFUL AND MALICIOUS EXCEPTION TO DISCHARGE

Prior to the United States Supreme Court's decision in *Kawaauhau v. Geiger*, the majority of United States Bankruptcy Courts held that sexual harassment verdicts were nondischargeable debts pursuant to § 523(a)(6) of the Bankruptcy Code.[12] However, some federal district courts and courts of appeals split on the issue.[13] The Supreme Court's decision in *Geiger* resolved the disparity between the courts and fundamentally altered their analysis by announcing a single test for determining whether a debt is nondischargeable pursuant to the "willful and malicious" exception to discharge in § 523(a)(6).

In *Geiger*, the plaintiff was under the treatment of the defendant-physician for a foot injury.[14] The defendant placed the plaintiff in the hospital and prescribed oral penicillin to guard against infection.[15] Defendant admitted at trial that prescribing intravenous penicillin would have been a more effective treatment. The defendant cited the plaintiff's desire to keep the costs of care low as his reason for prescribing oral penicillin instead.[16] Because the defendant left for a business trip, other physicians assumed care of the plaintiff.[17] These physicians intended to transfer the plaintiff to an infectious disease specialist, but upon return, the defendant believed the infection was cured and thus cancelled the transfer and ceased all treatment.[18] The infection persisted, however, and worsened to the point of requiring amputation of the plaintiff's leg.[19]

The plaintiff and her husband sued the defendant for malpractice. The jury awarded the plaintiff $335,000 in special and general damages and awarded her husband approximately $50,000 in damages for loss of consortium and emotional

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11. 11 U.S.C. § 523(a)(6). Chapter 11 of the United States Code codifies the Bankruptcy Code. Hereinafter, this Note will refer to sections of the Bankruptcy Code by section number only.

12. *See* Gee v. Hammond (*In re* Gee), 173 B.R. 189 (B.A.P. 9th Cir. 1994); Biggers v. Wilson (*In re* Wilson), 216 B.R. 258 (Bankr. E.D. Wis. 1997); Liccio v. Topakas (*In re* Topakas), 202 B.R. 850 (Bankr. E.D. Pa. 1996), *aff'd*, No. 96-8617, 1997 U.S. Dist. LEXIS 4107 (E.D. Pa. Mar. 31, 1997); Avery v. Sotelo (*In re* Sotelo), 179 B.R. 214 (Bankr. S.D. Cal. 1995); Johnson v. Miera (*In re* Miera), 104 B.R. 150 (Bankr. D. Minn. 1989), *aff'd*, 926 F.2d 741 (8th Cir. 1991). *Cf.* Heflin v. Harris (*In re* Harris), No. 94-C-7496, 1995 U.S. Dist. LEXIS 11377 (N.D. Ill. Aug. 9, 1995) (discharging sexual harassment judgment where plaintiff did not prove by the preponderance of the evidence that the debtor's actions were willful and malicious). For a further discussion of these cases, see *infra* Part III.

13. Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability, and Exemptions*, 56 U. MIAMI L. REV. 601, 629. *Compare* Johnson v. Miera (*In re* Miera), 926 F.2d 741(8th Cir. 1991) (affirming bankruptcy court's decision refusing to discharge sexual harassment judgment where debtor committed sexual battery by kissing Plaintiff), *and* Liccio v. Topakas (*In re* Topakas), No. 96-8617, 1997 U.S. Dist. LEXIS 4107 (E.D. Pa. Mar. 31, 1997) (affirming bankruptcy court's decision refusing to discharge sexual harassment judgment where debtor subjected plaintiff to unwanted and offensive physical contact that constituted sexual harassment), *with* Heflin v. Harris (*In re* Harris), No. 94-C-7496, 1995 U.S. Dist. LEXIS 11377 (N.D. Ill. Aug. 9, 1995) (discharging sexual harassment judgment where plaintiff did not prove by a preponderance of the evidence that the debtor's actions were willful and malicious).

14. Kawaauhau v. Geiger, 523 U.S. 57, 59 (1998).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

distress.[20] Lacking malpractice insurance, the defendant petitioned for bankruptcy. The plaintiff requested the bankruptcy court to declare the verdicts against the defendant nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code, because the defendant's actions were willful and malicious.[21]

The bankruptcy court held that the defendant's treatment was far below the standard of care.[22] In its decision, the bankruptcy court discussed the disagreement among jurisdictions as to whether the willful prong of § 523(a)(6) requires an intent to act or an intent to injure.[23] The court discussed several different interpretations of the willful prong and determined that the defendant's conduct was willful, because it constituted a conscious disregard of his duties and necessarily resulted in injury.[24]

On defendant's appeal, a three-judge panel of the Court of Appeals for the Eighth Circuit reversed the bankruptcy court's decision.[25] Upon rehearing en banc, a divided court of appeals again reversed the bankruptcy court and held that a debtor's actions cannot meet the willful prong of § 523(a)(6) unless the debtor "'desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it . . . .'"[26] Plaintiff appealed to the Supreme Court of the United States.

The Supreme Court affirmed the court of appeals' decision reversing the bankruptcy court and discharging the debt.[27] The Court held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."[28] Following the practice of strictly construing exceptions to discharge, the Court reasoned that Congress would have "described instead 'willful acts that *cause* injury'" if the intent was to except from discharge debts resulting from the debtor's intentional acts rather than the debtor's intentional torts.[29] Thus, the Court held that reckless or negligent acts could not satisfy the willful prong of the "willful and malicious" exception to discharge.[30]

III. PRE-*GEIGER* TREATMENT OF SEXUAL HARASSMENT: CONSISTENT NONDISCHARGE OF SEXUAL HARASSMENT VERDICTS

Prior to the Supreme Court's decision in *Geiger*, the overwhelming majority of bankruptcy courts held that injuries caused by a debtor's sexual harassment were "willful and malicious" under § 523(a)(6).[31] These pre-*Geiger* cases are important, because many bankruptcy courts continue to look to them in deciding that sexual

20. Kawaauhau v. Geiger, 523 U.S. 57, 59 (1998).
21. *Id.* at 60.
22. Kawaauhau v. Geiger (*In re* Geiger), 172 B.R. 916, 923 (Bankr. E.D. Mo. 1994).
23. *Id.* at 920.
24. *Id.* at 920–24.
25. Geiger v. Kawaauhau (*In re* Geiger), 93 F.3d 443 (8th Cir. 1996).
26. Geiger v. Kawaauhau (*In re* Geiger), 113 F.3d 848, 852 (8th Cir. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)) (alteration in original).
27. Kawaauhau v. Geiger, 523 U.S. 57, 64 (1998).
28. *Id.* at 61.
29. *Id.* (emphasis added).
30. *Id.*
31. *See supra* note 12 and accompanying text.

harassment verdicts are nondischargeable debts.[32] Further, these cases illustrate a strong judicial history of categorizing sexual harassment as the type of intentional conduct the damages for which Congress sought to withhold from discharge under § 523(a)(6).

In re Gee[33] was the first case to hold a state court judgment for sexual harassment nondischargeable under § 523(a)(6).[34] In *Gee*, the trial court held that the defendant-debtor sexually harassed the plaintiff where he made unwelcome and unsolicited advances toward her that altered the terms of her employment.[35] The court awarded the plaintiff $650 in damages and $13,000 in attorney's fees.[36] The defendant filed for Chapter 7 bankruptcy.[37] The plaintiff petitioned the bankruptcy court to declare the sexual harassment judgment nondischargeable pursuant to § 523(a)(6).[38] The bankruptcy court gave preclusive effect to the state court judgment under the doctrine of collateral estoppel and held that the judgment was nondischargeable.[39] The Bankruptcy Appellate Panel for the Ninth Circuit affirmed.[40]

In its decision, the bankruptcy appellate panel stated that the "willful and malicious" standard for nondischargeability in § 523(a)(6) requires the plaintiff to establish that the defendant "had actual knowledge or the reasonable foreseeability that his conduct might result in injury to the creditor."[41] The bankruptcy appellate panel held that, "[s]ince the bankruptcy court found that it was foreseeable that Gee's advances would injure [the plaintiff], it did not have to consider Gee's subjective state of mind."[42]

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32. *See, e.g.*, Jones v. Svreck (*In re* Jones), 300 B.R. 133, 141 (B.A.P. 1st Cir. 2003) (noting that the appellate court's decision not to discharge a sexual harassment judgment was consistent with *Biggers v. Wilson (In re* Wilson), 216 B.R. 258 (Bankr. E.D. Wis. 1997), a pre-*Geiger* case); Ludwig v. Martino (*In re* Martino), 220 B.R. 129, 132–33 (Bankr. M.D. Fla. 1998) (citing Gee v. Hammond (*In re* Gee), 173 B.R. 189, 192–93 (B.A.P. 9th Cir. 1994)) (finding that "a sexual harassment claim is excepted from discharge when it constitutes an obligation stemming from a willful and malicious injury").

33. 173 B.R. 189 (B.A.P. 9th Cir. 1994).

34. In *Johnson v. Miera (In re Miera)*, 104 B.R. 150 (Bankr. D. Minn. 1989), *aff'd*, 926 F.2d 741 (8th Cir. 1991), the court held that a state court judgment based on sexual harassment and sexual battery was nondischargeable. However, in that case, the plaintiff based his petition to except the debt from discharge on the sexual battery being a willful and malicious act. The plaintiff-court reporter, Neil Johnson, brought sexual harassment and battery claims against the defendant-debtor Alberto Miera, a Minnesota state district court judge. The trial court found that the judge had kissed his court reporter on the lips without consent and "had made other unsolicited and unwanted sexual overtures to him." *Id.* at 153. The trial court awarded the court reporter judgments for sexual harassment and battery, but the plaintiff only petitioned to exclude the battery judgment. *Id.* at 153 n.2.

35. Hammond v. Gee (*In re* Gee), 156 B.R. 291, 292 (Bankr. W.D. Wash. 1993).

36. *In re* Gee, 173 B.R. at 191. The bankruptcy appellate panel later held that the award of attorney's fees was improper. *Id.* at 193–94. Overturning the award of attorney's fees, however, does not affect the § 523(a)(6) analysis.

37. *Id.*

38. *Id.*

39. *In re* Gee, 156 B.R. at 294.

40. Hammond v. Gee (*In re* Gee), 173 B.R. 189, 194 (B.A.P. 9th Cir. 1994).

41. *Id.* at 192 (citation omitted). The court used this language to describe the malicious prong of § 523(a)(6), while stating that the willful prong requires that the act be "deliberate or intentional." *Id.* However, a comparison between the *Gee* court's analysis of the malicious prong and the Supreme Court's analysis of the willful prong in *Geiger* is useful, because both courts required specific intent on the part of the debtor in order for the debt to be nondischargeable pursuant to § 523(a)(6). For a case applying the *Gee* court's interpretation of § 523(a)(6) to except a sexual harassment judgment from discharge, see *Avery v. Sotelo (In re* Sotelo), 179 B.R. 214 (Bankr. S.D. Cal. 1995).

42. *In re* Gee, 173 B.R. at 194.

In re Topakas[43] also held that a claim for sexual harassment was nondischargeable pursuant to § 523(a)(6). In *Topakas*, the plaintiff alleged that the defendant "rubbed his groin area against her buttocks," "grabbed her between the legs near her crotch," made lewd and sexually suggestive comments towards her, and created a sexually abusive work environment.[44] After the plaintiff filed her sexual harassment suit, but before trial, the defendant filed for Chapter 7 bankruptcy and listed the plaintiff as an unsecured creditor.[45] Thus, unlike *Gee*, no underlying state court judgment collaterally estopped the defendant from litigating the sexual harassment claim in the bankruptcy court. Therefore, the bankruptcy court heard testimony and reviewed the underlying facts of the sexual harassment case. The court held, without liquidating the plaintiff's damages, that the plaintiff's claims were nondischargeable under § 523(a)(6).[46]

Like the court in *Gee*, the *Topakas* court required the plaintiff to prove that the debtor acted with the intent to injure or with substantial certainty that injury would result from his actions for the resulting debt to be nondischargeable.[47] The defendant claimed that he did not intend any harm, but the court refused to accept that "grabbing a woman's crotch and touching her breast [without consent] . . . would ever be deemed appropriate . . . and unlikely to produce any injury."[48] Furthermore, the court stated that "[t]he Debtor cannot credibly claim ignorance of violations of the claimants' rights . . . nor ignorance of the repercussions of his actions . . . ."[49] The court held that the defendant "willfully and maliciously" caused the plaintiff physical and emotional injuries, and therefore, that the sexual harassment claim was nondischargeable.[50]

Finally, the court in *In re Wilson*[51] held a sexual harassment judgment nondischargeable where a state agency, whose decision a circuit court and court of appeals subsequently affirmed, held that the defendant-debtor sexually harassed the plaintiff.[52] In *Wilson*, the plaintiff alleged that the defendant held her down and reached underneath her dress and pantyhose, solicited her for sex on numerous occasions, and terminated her because she refused to sleep with him.[53] A state agency found that the defendant sexually harassed the plaintiff and awarded the plaintiff damages for lost future wages and attorney's fees.[54] Defendant subsequently filed for bankruptcy, and the plaintiff petitioned the bankruptcy court to declare the judgment nondischargeable pursuant to § 523(a)(6).[55]

The *Wilson* court applied a less strict standard for "willful and malicious" under § 523(a)(6) than the courts in *Gee* and *Topakas*. The court held that "[a] 'willful' act is one that is deliberate and intentional, and a 'malicious' act is one that is wrongful and taken without just cause or excuse, even though without ill will."[56]

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43. Liccio v. Topakas (*In re* Topakas), 202 B.R. 850 (Bankr. E.D. Pa. 1996), *aff'd*, No. 96-8617, 1997 U.S. Dist. LEXIS 4107 (E.D. Pa. Mar. 31, 1997).
44. *Id.* at 853–54.
45. *Id.* at 852–53.
46. *Id.* at 859.
47. *Id.* at 860. *See also supra* note 41 and accompanying text.
48. *Id.* at 861.
49. Liccio v. Topakas (*In re* Topakas), 202 B.R. 850, 861 (Bankr. E.D. Pa. 1996), *aff'd*, No. 96-8617, 1997 U.S. Dist. LEXIS 4107 (E.D. Pa. Mr. 31, 1999).
50. *Id.* at 862.
51. 216 B.R. 258 (Bankr. E.D. Wis. 1997).
52. *Id.* at 269.
53. *Id.* at 261–63.
54. *Id.* at 263.
55. *Id.*
56. *Id.* at 267 (citations omitted).

The *Wilson* court applied the doctrine of collateral estoppel to give preclusive effect to the underlying decision and found that the defendant's actions were deliberate, as they clearly led to the plaintiff's injuries.[57] In addition, the court found that the defendant's actions were malicious in that the plaintiff's wrongful termination was without justification.[58]

Gee, *Topakas*, and *Wilson* demonstrate that pre-*Geiger* courts considered sexual harassment the type of conduct that Congress meant to discourage through § 523(a)(6). Furthermore, *Gee* and *Topakas* applied a standard that required the debtor to have a specific intent to injure to establish "willful and malicious injury" under § 523(a)(6), which is identical to the *Geiger* standard.[59] The pre-*Geiger* courts clearly were able to harmonize the goal of narrowly construing exceptions to discharge with the goal of effectively compensating the victims of sexual harassment.

IV. POST-*GEIGER* TREATMENT OF SEXUAL HARASSMENT: NEW STANDARD, SAME RESULT

Geiger eliminated the "deliberate and intentional" test for willful conduct under § 523(a)(6) that many courts used prior to *Geiger* and supplanted it with the requirement that the debtor specifically intend to injure the plaintiff.[60] However, even under this strict standard, the majority of bankruptcy courts have still held sexual harassment judgments nondischargeable pursuant to § 523(a)(6).[61] These courts have continued to recognize that sexual harassment is the type of conduct Congress intended to except from discharge under § 523(a)(6).

In *In re Jones*,[62] the Bankruptcy Appellate Panel for the First Circuit affirmed the bankruptcy court's decision excepting the plaintiff's sexual harassment judgment from discharge pursuant to § 523(a)(6).[63] The appellate panel held that the defendant-debtor's actions in making "'frequent, substantial sexual comments about [the plaintiff], concerning her dress and breasts, as well as inappropriate staring, rubbing, and touching'" constituted "willful and malicious" conduct under the *Geiger* test.[64] The court found that the defendant's refusal to comply with the plaintiff's requests to stop harassing her, along with the defendant's interference with the plaintiff's ability to work, evidenced an intent to injure.[65]

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57. Biggers v. Wilson (*In re* Wilson), 216 B.R. 258, 268 (Bankr. E.D. Wis. 1997).
58. *Id.*
59. *See* Gelfand, *supra* note 13, at 632–33.
60. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).
61. *See* Jones v. Svreck (*In re* Jones), 300 B.R. 133 (B.A.P. 1st Cir. 2003); McDonough v. Smith (*In re* Smith), 270 B.R. 544 (Bankr. D. Mass. 2001); Merriex v. Beale (*In re* Beale), 253 B.R. 644 (Bankr. D. Md. 2000); Thompson v. Kelly (*In re* Kelly), 238 B.R. 156 (Bankr. E.D. Mo. 1999); Ludwig v. Martino (*In re* Martino), 220 B.R. 129 (Bankr. M.D. Fla. 1998). *Cf.* Voss v. Tompkins (*In re* Tompkins), 290 B.R. 194 (Bankr. W.D.N.Y. 2003) (holding a sexual harassment judgment dischargeable pursuant to § 523(a)(6)).
62. Jones v. Svreck (*In re* Jones), 300 B.R. 133 (B.A.P. 1st Cir. 2003).
63. *Id.* at 140. The bankruptcy court applied collateral estoppel to give preclusive effect to a state agency's decision finding that defendant sexually harassed the plaintiff. The bankruptcy court held that the state agency's findings were sufficient to prove that defendant's actions were "willful and malicious" under § 523(a)(6). *Id.* at 137.
64. *Id.* at 139, 141.
65. *Id.* at 140.

The *Jones* court relied on *In re Smith*[66] in holding that the defendant's conduct was "willful."[67] In *Smith*, the plaintiff recovered state court judgments against the defendant for quid pro quo and hostile work environment sexual harassment.[68] The court found that the defendant's actions were willful under the *Geiger* test, because he "knew the consequences of his actions"[69] and "knew exactly what he was doing and what he wanted to accomplish."[70] That is, the court found that the defendant's conduct in conditioning the plaintiff's employment on sex was intentional and that he clearly contemplated the consequences of the plaintiff losing her job and suffering other injuries.

In re Martino[71] is another case in which the bankruptcy court applied the *Geiger* test and held a sexual harassment judgment nondischargeable pursuant to § 523(a)(6).[72] In *Martino*, the trial court found that the debtor directed abusive and obscene language toward the plaintiff, showed sexually explicit films during working hours, hired a stripper to perform at work during working hours, and directed other inappropriate sexual conduct toward the plaintiff.[73] As a result, the plaintiff suffered emotional and physical injuries including loss of sleep, hair loss, and the onset of shingles.[74] The trial court held the defendant guilty of sexual harassment and awarded the plaintiff compensatory damages and $50,000 in punitive damages.[75] The defendant subsequently filed for bankruptcy, and the plaintiff petitioned the bankruptcy court to declare the judgment nondischargeable pursuant to § 523(a)(6).[76]

The bankruptcy court granted the plaintiff's motion for summary judgment and held that the trial court's decision precluded the defendant from relitigating the issue of whether or not his actions were "willful and malicious."[77] The court found that, because the "[d]efendant 'acted with a willful indifference to the rights of the plaintiff with respect to the plaintiff's claim of sexual harassment,'" and injury necessarily resulted, his actions evidenced a specific intent to injure.[78] Furthermore, the court held that the trial court's award of punitive damages evidenced that the defendant's actions were "willful and malicious" and thus precluded the discharge

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66. McDonough v. Smith (*In re* Smith), 270 B.R. 544 (Bankr. D. Mass. 2001).

67. Jones v. Svreck (*In re* Jones), 300 B.R. 133, 140 (B.A.P. 1st Cir. 2003).

68. *In re Smith*, 270 B.R. at 546–47. An employer is guilty of quid pro quo sexual harassment when the employer conditions employment or benefits on submission to sexual conduct. 29 C.F.R. § 1604.11(a) (2004). An employer is guilty of hostile work environment sexual harassment when the employer's conduct has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* For a further discussion of the requirements for quid pro quo and hostile work environment sexual harassment, see Marie T. Reilly, *A Paradigm for Sexual Harassment: Toward the Optimal Level of Loss*, 47 VAND. L. REV. 427, 452, 457 (1994).

69. *In re Jones*, 300 B.R. at 140.

70. *Id.* (quoting *In re Smith*, 270 B.R. at 550).

71. Ludwig v. Martino (*In re* Martino), 220 B.R. 129 (Bankr. M.D. Fla. 1998).

72. *Id.* at 133. The Eleventh Circuit applied the same standard for "willful and malicious" that the *Geiger* decision later set forth. *Id.* at 132 (citing Hope v. Walker (*In re* Walker), 48 F.3d 1161 (11th Cir. 1995)).

73. *Id.* at 130.

74. *Id.*

75. *Id.* at 130–31.

76. Ludwig v. Martino (*In re* Martino), 220 B.R. 129, 130 (Bankr. M.D. Fla. 1998).

77. *Id.* at 132 (Bankr. M.D. Fla. 1998) (citing *In re* Gee, 173 B.R. 189, 192–93 (B.A.P. 9th Cir. 1994).

78. *Id.* at 133.

of the underlying debt.[79] Therefore, the sexual harassment judgment against the defendant was nondischargeable pursuant to § 523(a)(6).[80]

Finally, the bankruptcy court in *In re Beale*[81] held that a sexual harassment judgment, where the trial court awarded punitive damages, was nondischargeable under § 523(a)(6).[82] In *Beale*, the court precluded the defendant from relitigating the issue of whether or not his actions were "willful and malicious" where the trial court's decision supported a finding of willful and malicious conduct.[83] The court held that, where the jury was required to find "'by clear and convincing evidence, that [the act or acts of the defendants] . . . were conducted willfully, with evil motive and actual malice'" in awarding punitive damages, the award of punitive damages satisfied the "willful and malicious injury" standard under § 523(a)(6).[84]

The above cited cases demonstrate that the overwhelming majority of post-*Geiger* courts consider sexual harassment willful and malicious conduct. However, one court discharged a sexual harassment claim pursuant to § 523(a)(6) where the plaintiff failed to prove that the defendant acted willfully under the *Geiger* test. In *In re Tompkins*,[85] the United States Bankruptcy Court for the Western District of New York refused to preclude the defendant from relitigating whether or not his conduct was willful and malicious under § 523(a)(6) where the plaintiff and defendant had entered into a settlement agreement.[86] Thus, the bankruptcy court reviewed the record from the underlying sexual harassment claim and held that the defendant did not possess the intent to injure the plaintiff that the *Geiger* test required.[87]

In *Tompkins*, the plaintiff worked for the defendant at a jewelry store. The plaintiff testified that, during her employment, the defendant would, among other things, "grab her hips or arms in a sexual caressing manner when walking behind . . . the jewelry counter[,] compliment her . . . [,] make comments about his ex-girlfriend's breasts[,] . . . [and] make other comments that she did not believe were appropriate for the workplace."[88] The plaintiff testified she made clear to the defendant that his actions were unwelcome, and that the defendant's conduct forced her to quit her job and subsequently caused her to suffer from depression.[89] The defendant denied directing any sexual conduct toward the plaintiff.[90] The defendant also denied ever signing the settlement agreement.[91] However, when the defendant filed for bankruptcy, he listed the plaintiff as an unsecured creditor.[92]

The court held that the defendant's actions did not rise to sexual harassment. The court held that the defendant's actions did not constitute quid pro quo sexual harassment, because the plaintiff "never testified that there had been a sexual assault, a request for sexual favors, or a threat made and carried out when sexual

79. *Id.*
80. *Id.*
81. Merriex v. Beale (*In re* Beale), 253 B.R. 644 (Bankr. D. Md. 2000).
82. *Id.* at 650.
83. *See id.*
84. *Id.*
85. Voss v. Tompkins (*In re* Tompkins), 290 B.R. 194 (Bankr. W.D.N.Y. 2003).
86. *Id.* at 199.
87. *Id.* at 201.
88. *Id.* at 197.
89. *Id.* at 197–98.
90. *Id.* at 198.
91. Voss v. Tompkins (*In re* Tompkins), 290 B.R. 194, 198 (Bankr. W.D.N.Y. 2003).
92. *Id.* at 196.

favors or liberties were requested by the Debtor and subsequently denied by her."[93] The court also held the defendant's actions did not constitute "hostile work environment" sexual harassment, because the plaintiff's claims were exaggerated and not credible, and even if the plaintiff's claims were true, the defendant's actions were sufficiently isolated to find that they did not create a hostile work environment.[94]

The absence of sexual harassment did not automatically preclude the court from finding the underlying judgment nondischargeable.[95] The court noted that, "absent [the] finding of sexual harassment . . . that some Courts have found *necessarily makes the conduct and resulting damage fall within the discharge exception*, [the plaintiff] must demonstrate that the Debtor's conduct was willful and malicious as required by the *Geiger* standard."[96] The court held that the record did not support such a finding and discharged the debt.[97]

V. *IN RE BUSCH*: AN UNFORTUNATE APPLICATION OF *GEIGER*

A. Summary of the Case

In *In re Busch*,[98] the United States Bankruptcy Court for the Northern District of New York held a sexual harassment judgment dischargeable pursuant to § 523(a)(6).[99] Despite a jury verdict awarding the plaintiff over $400,000 in compensatory and punitive damages, the trial court refused to apply collateral estoppel to preclude the defendant from litigating the issue of whether or not his conduct was willful and malicious.[100] Instead, the court reviewed the record and held that the plaintiff failed to prove by a preponderance of the evidence that the debtor's conduct was willful and malicious under the *Geiger* standard.[101]

In *Busch*, the plaintiff worked from 1996 to 1998 at a company that the defendant owned and controlled.[102] In July 2001, the plaintiff filed suit against the defendant-debtor for sexual harassment.[103] The defendant received service through the plaintiff's complaint, but he neglected to answer, and, therefore, the court held him in default on the issue of liability.[104] At an inquest to determine damages, the plaintiff testified that the defendant had committed numerous acts of sexual harassment:

> including repeated attempts to kiss her . . .; attempting to put his hands underneath her shirt; joking about getting an apartment where they could "fool around"; unzipping his pants and exposing his genitals; . . . exposing and touching his genitalia to her arm on two occasions; and insinuating that he would give her petty cash

93. *Id.* at 200. For a discussion of the requirements for quid pro quo and hostile work environment sexual harassment, see *supra* note 68.
94. *Id.* at 201.
95. *Id.*
96. *Id.* (emphasis added).
97. Voss v. Tompkins (*In re* Tompkins), 290 B.R. 194, 201 (Bankr. W.D.N.Y. 2003).
98. Sanger v. Busch (*In re* Busch), 311 B.R. 657 (Bankr. N.D.N.Y. 2004).
99. *Id.* at 671.
100. *Id.* at 668.
101. *Id.* at 671.
102. *Id.* at 660.
103. *Id.*
104. Sanger v. Busch (*In re* Busch), 311 B.R. 657, 660 (Bankr. N.D.N.Y. 2004).

> and provide an apartment for her if she accepted his sexual advances.[105]

The plaintiff testified that, as a result of the defendant's conduct, she sought counseling, quit her job, lost her unemployment benefits, lost her health insurance, "experienced difficulty finding other employment because she feared placement in a similar work environment[,] and she was afraid to go outside her house at night because she feared that the Debtor was 'going to try and kill [her].'"[106]

At the conclusion of the plaintiff's case, the judge explained to the jury that it could award punitive damages if the plaintiff proved by a preponderance of the evidence that "the defendants' conduct was malicious or [sic] reckless disregard of the plaintiff's rights."[107] The judge further explained that "[c]onduct is malicious if it was accompanied by ill will or spite or *for the purpose of injuring another*."[108] The judge instructed that "[c]onduct is a reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others."[109] The jury awarded compensatory damages of $150,000, punitive damages of $250,000, and attorney's fees and costs of $100,000, but did not explain what standard it applied in awarding punitive damages.[110] The judge denied the defendant's motion to vacate the judgment.[111]

The defendant filed for bankruptcy shortly after the trial concluded.[112] The plaintiff petitioned the bankruptcy court to except the judgment from discharge pursuant to § 523(a)(6).[113] Plaintiff twice moved for summary judgment seeking to give preclusive effect to the prior judgment.[114] The bankruptcy court denied her motions and found that a genuine issue of material fact existed as to whether or not the defendant's actions were willful and malicious, because "the jury charge was too ambiguous to support findings of willfulness and malice by the Debtor."[115] Thus, the bankruptcy court scheduled a trial to determine if the debtor's conduct fell within § 523(a)(6).

At trial, the plaintiff chose not to testify and instead relied on the record from the underlying sexual harassment trial.[116] The defendant testified that the plaintiff was a family friend who was close to his wife, and that she continued to be close to his family after the alleged sexual harassment occurred.[117] The defendant denied sexually harassing the plaintiff and denied forming the intent to injure her.[118] The defendant further testified that the plaintiff was dissatisfied with her compensation and requested a pay raise before she left her job.[119] The defendant's wife corroborated his testimony.[120]

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105. *Id.* at 660–61 (citations to trial transcript omitted).
106. *Id.* at 661 (alteration in original) (citations to trial transcript omitted).
107. *Id.* at 662 (alteration in original) (quoting trial transcript).
108. *Id.* (emphasis added).
109. *Id.*
110. Sanger v. Busch (*In re* Busch), 311 B.R. 657, 662 (Bankr. N.D.N.Y. 2004).
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 663.
116. Sanger v. Busch (*In re* Busch), 311 B.R. 657, 663 (Bankr. N.D.N.Y. 2004).
117. *Id.*
118. *Id.*
119. *Id.* at 665.
120. *Id.*

In analyzing whether or not the defendant's conduct fell within the willful and malicious injury standard of § 523(a)(6), the court held as a matter of law that "malice is inherent in finding that the debtor is liable for sexual harassment."[121] Thus, the court's decision to discharge the debt turned on whether the defendant's conduct met the *Geiger* test for "willfulness."[122] The bankruptcy court rejected the plaintiff's contention that a substantial certainty of harm can satisfy the willful standard from *Geiger*.[123] First, the court held that willfulness was not a necessary element of the underlying sexual harassment claim, because sexual harassment does not require that the defendant intend to injure the plaintiff.[124] In addition, the court held that sexual harassment was not an intentional tort for the purpose of nondischargeability under § 523(a)(6).[125] Finally, the court stated that, "[e]ven if the acts of sexual harassment occurred exactly as alleged, nothing in the District Court [a]ction or in this proceeding convinces the court that the Debtor intended to do so."[126] The court reasoned that no evidence suggested that the defendant intended to injure the plaintiff, because "intent to cause . . . [injury to plaintiff] by forcing her to resign . . . would have been contrary to the Debtor's self-interest so long as the Plaintiff's relationship with the Debtor's family extended beyond her employee status."[127] The court concluded that the defendant "'acted with specific intent to advance his own prurient interests at the expense of [the plaintiff's] right to be free from sexual attack and harassment,'" but, nevertheless, that this intent did not satisfy the *Geiger* standard for "willfulness."[128]

B. Where the Court Went Wrong

The *Busch* court incorrectly applied the *Geiger* test for "willful" conduct and erred in discharging the sexual harassment claim pursuant to § 523(a)(6). First, the court erred in holding that a substantial certainty of harm cannot satisfy the *Geiger* test for "willfulness."[129] Second, the court confused the defendant's motive to act with his intent to act. In addition, the court erred by not treating the defendant's underlying actions as intentional torts to satisfy the "willful" standard.[130] Had the court properly addressed these three issues, it likely would have reached the proper conclusion that the debt was not dischargeable.

1. Substantial Certainty of Harm

The *Busch* court rejected the view that actions substantially certain to cause harm are "willful" under the *Geiger* test.[131] In describing the "willful" prong of § 523(a)(6), the *Geiger* court, quoting the Restatement (Second) of Torts, § 8A, noted that "[i]ntentional torts generally require that the actor intend 'the *consequences* of

121. *Id.* at 668.
122. *See* Sanger v. Busch (*In re* Busch), 311 B.R. 657, 669 (Bankr. N.D.N.Y. 2004).
123. *Id.* at 669–70.
124. *Id.* at 669.
125. *Id.* at 670.
126. *Id.*
127. *Id.*
128. Sanger v. Busch (*In re* Busch), 311 B.R. 657, 670 (Bankr. N.D.N.Y. 2004) (citation omitted).
129. *Id.* at 669–70.
130. *Id.* at 670.
131. *Id.* at 669.

an act,' not simply 'the act itself.'"[132] The Restatement further states that an act is intentional when "the actor desires to cause [the] consequences of his act, *or* . . . he believes that the consequences are substantially certain to result from it."[133]

Most post-*Geiger* courts have accepted, without question, that the presence of a substantial certainty of harm can satisfy the "willful" prong of the *Geiger* test.[134] In many sexual harassment cases, the harassers do not act with specific intent to injure their victims.[135] However, in many cases, including *Busch*, the nature of the predicate acts evidences that the harasser knew or should have known that harm was substantially certain to result.[136] In *Busch*, the defendant clearly should have known that, as a potential consequence of his actions, the plaintiff would leave her job and suffer emotional distress.[137]

2. *Motive v. Intent*

The *Busch* court held that, although the defendant "acted with specific intent to advance his own prurient interests at the expense of [the plaintiff's] right to be free from sexual attack and harassment," this intent did not satisfy the *Geiger* standard for "willfulness."[138] Advancing his own prurient interests may have constituted the defendant's motive to act, but was not his intent.

Defining the line between intent and motive in tort law is not easy. Prosser states:

> "Intent" is the word commonly used to describe the desire to bring about the physical consequences . . . ; the more remote objective which inspires the act is called "motive." . . . .
>
> Intent, however, is broader than a desire to bring about physical results. It must extend not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what he does. . . . [W]here a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with . . . as though he had intended it.[139]

Otherwise stated, "Whereas motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial."[140] One classic example that

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132. Kawaahua v. Geiger, 523 U.S. 57, 61–62 (1997).

133. RESTATEMENT (SECOND) OF TORTS § 8A (1965) (emphasis added).

134. *See, e.g.*, Jones v. Svreck (*In re* Jones), 300 B.R. 133, 140 (B.A.P. 1st Cir. 2003) (holding that a substantial certainty of harm satisfies the "willful" requirement of § 523(a)(6)).

135. *See* Gelfand, *supra* note 13, at 636–37.

136. *See, e.g.*, Jones v. Svreck (*In re* Jones), 300 B.R. 133, 139–40 (B.A.P. 1st Cir. 2003) (explaining that the defendant's interference with the plaintiff's ability to work by making "frequent, substantial sexual comments about [the plaintiff], concerning her dress and breasts, as well as inappropriate staring, rubbing, and touching" evidenced specific intent to injure, and further stating that the defendant should have known that conditioning plaintiff's employment on sex would result in her losing her job).

137. *See supra* note 105 and accompanying text (recounting the blatant harassment in which the defendant engaged).

138. Sanger v. Busch (*In re* Busch), 311 B.R. 657, 670 (Bankr. N.D.N.Y. 2004) (citation omitted).

139. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 31–32 (4th ed. 1971).

140. BLACK'S LAW DICTIONARY 813 (7th ed. 1999).

distinguishes motive from intent is the man who fires aimlessly into a crowd. The man may fire the gun for a number of reasons and sincerely hope that he hits no one, but since he knows that injury is substantially certain to result, his acts are intentional.[141]

Similarly, even if the defendant in *Busch* acted only to fulfill his "prurient" interests, a reasonable man in the defendant's position should have known that repeatedly sexually assaulting an employee would result in the employee leaving the job and suffering some distress. Therefore, the *Busch* court erred in holding that the defendant's desire for sexual gratification did not establish a specific intent to injure. Instead, the court should have focused on whether the defendant, or a reasonable person in the defendant's position, should have known that his actions would result in harm.

3. *Plaintiff's Acts as Intentional Torts*

Finally, even if the sexual harassment did not meet the *Geiger* test, the acts underlying the plaintiff's claim against the defendant constituted intentional torts and therefore satisfy the "willful" standard. In *Geiger*, the court held that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts."[142] Thus, a debt predicated on the debtor's intentional torts is nondischargeable under § 523(a)(6). By repeatedly trying to kiss the plaintiff, exposing himself, and touching the plaintiff, the defendant committed at least assault and battery and possibly sexual assault and sexual battery. The *Busch* court erred in failing to hold that these intentional torts made the sexual harassment judgment nondischargeable.[143]

VI. CONCLUSION

The Bankruptcy Court for the District of South Carolina has not yet heard a case involving the dischargeability of sexual harassment verdicts. However, as the number of bankruptcy filings and sexual harassment complaints continues to climb, the issue is bound to arise. At such time, South Carolina should reject the *Busch* court's interpretation of *Geiger* and side with the majority of courts in holding that most sexual harassment verdicts are nondischargeable debts. These courts have struck a critical balance between the goals of sexual harassment and the policies behind the Bankruptcy Code that the *Busch* court should not be allowed to upset.

Andy Gaunce

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141. *See* PROSSER, *supra* note 139, at 31–32.

142. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998).

143. Interestingly, the court in *Johnson v. Miera (In re* Miera), 104 B.R. 150 (Bankr. D. Miss. 1989), a pre-*Geiger* case, used this approach to hold a sexual harassment judgment nondischargeable. The court held that the plaintiff, by kissing the defendant without his consent, committed a sexual battery. *Id.* at 153. The court held that this intentional tort satisfied the willful prong of § 523(a)(6). *Id.* at 154.