

The Discharge of Sexual Harassment Judgments in Bankruptcy Court: An Attempt to Right a “Grave Injustice”

I. INTRODUCTION

In 2004, the United States Bankruptcy Court for the Northern District of New York (the “Bankruptcy Court”) held that a man who sexually harassed an employee can escape liability through bankruptcy because there is no proof that the conduct was intended to cause psychological or economic harm. In *Sanger v. Busch*,¹ Jacqueline Sanger (“Plaintiff” or “Creditor”), a female employee, was continuously sexually harassed by her employer David Busch (“Defendant” or “Debtor”).² She sued under Title VII of the Civil Rights Act of 1964 (“the Act”) for hostile environment and quid pro quo sexual harassment and also under the parallel provisions of the New York State Human Rights Law.³ The Debtor and his employer Albany Air Systems, Inc. (“AASI”) continuously ignored the proceedings until in September 2000 the United States District Court for the Northern District of New York (the “District Court”) entered a judgment against the Debtor totaling \$430,232.20.⁴ After exhausting the appellate process, the Debtor then brought this Chapter 7 suit in the Bankruptcy Court primarily in order to discharge this debt.⁵ The Bankruptcy Court found that, “[a]lthough discharge of their liquidated debts is a *grave injustice* for Title VII claimants, the Bankruptcy Code affords no special treatment for victims of sex discrimination.”⁶ Thus, despite the grave injustice, the Bankruptcy Court concluded that the District Court’s judgment must be discharged because the discharge of the debt under 11 U.S.C. §

1. 311 B.R. 657 (Bankr. N.D.N.Y. 2004).

2. *Id.* at 660-61.

3. *Id.* at 659.

4. *Id.*

5. *Id.*

6. *Id.* at 670 (emphasis added).

523(a)(6) was not for “willful and malicious injury.”⁷

Although the court criticized its own holding as adding “*insult to injury*,” the Bankruptcy Court’s reliance on *Kawaauhau v. Geiger* in evaluating the willful and malicious injury standard ultimately led the court to conclude that the debt was not dischargeable under 11 U.S.C. § 523(a)(6).⁸ In *Kawaauhau v. Geiger*,⁹ the Supreme Court’s major holding was that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6); therefore, the debt arising from the Doctor’s *negligent or reckless* conduct was dischargeable.¹⁰ It was this holding that compelled the Honorable Robert E. Littlefield Jr. (“Judge Littlefield”) to rule that the Debtor’s conduct, though “deplorable,” was nevertheless dischargeable.¹¹

This Note argues that Judge Littlefield’s holding was erroneous and misapplied the standard set down in *Geiger*. What follows is divided into three parts. Section I looks at the Bankruptcy Court’s holding in *Sanger* with an eye to the deplorable nature of the facts as well as an in-depth look at courts that held the other way in a post-*Geiger* world. Section II looks at *Geiger* itself, comparing the inherent differences between medical malpractice and sexual harassment, and it will specifically examine the Court’s holding that “recklessly or negligently inflicted injuries do not fall within the confines of § 523(a)(6),”¹² while arguing how that holding does not apply to the willful and malicious sexual harassment present in *Sanger*. Section III examines the goals of Title VII and the law of sexual harassment, as well as the goals of bankruptcy law and how these goals at times conflict with each other; this section also explores a section of the Bankruptcy Code that makes certain debts nondischargeable. In short, this Note argues that *Sanger*’s holding that a man who sexually harassed an employee can escape a substantial judgment against him by relying on the Supreme Court’s holding in *Geiger* and § 523(a)(6) of the Bankruptcy Code is an erroneous decision. The bankruptcy court misapplied applied the holding in *Geiger* to a sexual harassment setting where the nature of the conduct itself, the intent behind the conduct, and the policy and societal considerations with regard to medical malpractice and sexual harassment

7. *Id.* at 671. Section 523(a)(6) of the Bankruptcy Code provides: “(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.”

8. *Id.* (emphasis added).

9. 523 U.S. 57 (1998).

10. *Id.* at 59.

11. *Sanger*, 311 B.R. at 669.

12. *Geiger*, 523 U.S. at 63.

in respect to the discharge of debts in bankruptcy law are inherently incompatible.

II. *SANGER V. BUSCH*: A GRAVE INJUSTICE REVISITED

Title VII prohibits discrimination in the terms or conditions of employment because of race, color, religion, national origin, or sex.¹³ In June of 2000, Jacqueline Busch, ("Plaintiff" or "Creditor") sued David Busch ("Defendant" or "Debtor") and Albany Air Systems, Inc. ("AASI"), a corporation substantially owned and operated by the Defendant, in district court under both recognized classifications of discriminatory conduct that constitute actionable sexual harassment: quid pro quo and hostile environment sexual harassment.¹⁴ The Defendant elected to repeatedly ignore the district court action, resulting in an entry of default judgment¹⁵ as to liability against the Defendant and a damages proceeding where the Defendant willfully neglected to give himself the benefit of his own presence.¹⁶ The jury, without explanation, awarded the Plaintiff \$150,000 in compensatory damages and \$250,000 in punitive damages, which totaled \$430,232.20 after the Honorable David N. Hurd ("Judge Hurd") awarded the Plaintiff attorney's fees and costs.¹⁷ At first glance it seems that the Plaintiff had achieved a complete victory. Not only was she awarded what the jury determined to be the fair amount of compensatory and punitive damages, but also Judge Hurd awarded her attorney's fees and costs. A close examination of the facts will reveal why the jury believed itself justified in awarding punitive damages and why Judge Hurd believed this case warranted the awarding of attorney's fees and costs to the Plaintiff.

Plaintiff/Creditor worked for AASI for approximately two years prior to her resignation in April 1998. The Defendant/Debtor was the sole managing officer during her second year of employment.¹⁸ The District Court proved that:

[D]uring the employment by the defendant/debtor from April 1998 through June 27, 2000 she had been subjected to a regular, frequent, unwanted, uninvited, and abusive pattern of sexually charged behavior, lewd sexual comments, innuendo, propositions, jokes, and offensive physical contact including the touching of her body by the defendant

13. 42 U.S.C. § 2000e-2(a)(1) (2000).

14. *Sanger*, 311 B.R. at 659.

15. FED. R. CIV. P. 55.

16. *Sanger*, 311 B.R. at 661.

17. *Id.* at 662.

18. *Id.* at 660.

and his exposing his intimate and private body parts to her on one or more occasions.¹⁹

These illustrations of sexual harassment are only the barebones account. It is necessary to flesh them out somewhat in order to fully comprehend the egregious extent of the Debtor's conduct. The Debtor "insinuated that he would give her petty cash and provide an apartment for her if she accepted his sexual advances," and, perhaps most objectionable and illuminating with concern to the mindset of the Debtor, he directed the frequently abused Plaintiff to write a letter advising a client of the business's policy against sexual harassment and then stated to her, "oh well, if they only knew."²⁰ As a result of this frequent harassment, which a pregnancy exacerbated, Plaintiff required counseling on four to six occasions, and, as a result of voluntarily resigning her employment because she had finally reached her limit, she lost her medical insurance, was unable to collect unemployment, and found difficulty securing further employment due to fear of continued abuse and a belief that the Debtor was "going to try to kill [her]."²¹

These facts easily justify the jury's determination that the Plaintiff was entitled to a large award in the form of punitive as well as compensatory damages, and Judge Hurd's decision that the Defendant's conduct was so outside the realm of common decency that Plaintiff was entitled to attorney's fees and costs as well. The purpose of compensatory damages is "to make the plaintiff whole," and the purpose of punitive damages is "to punish a defendant and to deter a defendant and others from committing similar acts in the future."²² This is the best the law can do. The law is unable to make her trust again or to take away her fear, so the law does the best it can in an imperfect world. The law proclaims, here is a monetary award designed to replenish whatever economic damages you suffered, and we will impose a penalty on the Debtor, punitive damages, in order to give you the peace of mind that the law is doing its best to punish unacceptable behavior and deter others in similar circumstances from engaging in inhumane conduct. Under these circumstances, this is as close as the law can come to true justice in its current state; as such, justice was achieved, or so it seemed.

The Debtor then sought to have the judgment discharged; he filed a Chapter 7 petition (the "Petition") on December 24, 2002, and of course listed the Plaintiff's \$430,233 judgment lien.²³ On March 17, 2003, the

19. *Id.*

20. *Id.* at 661.

21. *Id.*

22. *Id.*

23. *Id.* at 660.

Plaintiff commenced a proceeding to except the judgment from discharge pursuant to § 523(a)(6).²⁴ This provision states that, “[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for . . . willful and malicious injury by the debtor to another entity or to the property of another entity.”²⁵ Thus, the Plaintiff turned Creditor sought to have the debt adjudicated non-dischargeable pursuant to this provision. In order to get this ruling the Creditor must prove that the injury she suffered was a result of 1) willful and 2) malicious conduct.²⁶

The Bankruptcy Court ruled that the Debtor’s conduct was malicious as a matter of law. Judge Littlefield noted that “the Second Circuit interpreted ‘malicious,’ as used in § 523(a)(6), to mean ‘wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will.’”²⁷ Malice may be constructive or implied, and implied malice may be demonstrated “by the acts and conduct of the debtor in the context of [the] surrounding circumstances.”²⁸ “[Since] sexual harassment is both illegal and morally reprehensible, it is impossible to conceive of an actionable sexual harassment case against an individual employer where that employer’s conduct could be construed as anything other than ‘wrongful and without just cause or excuse.’”²⁹ Malice was then clearly inherent in concluding that the Debtor was liable for sexual harassment.³⁰ Thus, the Plaintiff’s action under § 523(a)(6) made progress as a matter of law. The malice prong had been defeated, but the willful prong will not yield to common sense and justice so easily.

The Plaintiff now has only to establish that the injury was willful in addition to malicious.³¹ “The terms willful and malicious are separate elements, and both elements must be satisfied.”³² The Bankruptcy Court adamantly, and as will be argued in Section III erroneously, applied the standard the Supreme Court laid down in *Geiger*.³³ The Supreme Court translated the willful prong of § 523(a)(6) in *Geiger* as follows:

24. *Id.*

25. 11 U.S.C. § 523(a)(6).

26. *Id.*

27. *Sanger*, 311 B.R. at 666 (quoting *In re Stelluti*, 94 F.3d 84, 87 (2d Cir. 1996)).

28. *In re Stelluti*, 94 F.3d at 88 (alteration in original) (quoting *In re Stanley*, 66 F.3d 664, 668 (4th Cir. 1995)).

29. *Sanger*, 311 B.R. at 668 (quoting *In re Stelluti*, 94 F.3d at 87).

30. *Id.*

31. In this section, the examination is limited to the holding itself from *Geiger* and the Bankruptcy Court’s application of that holding. *Geiger* itself is examined in detail *infra* Part III.

32. *In re Krautheimer*, 241 B.R. 330, 340 (Bankr. S.D.N.Y. 1999).

33. *Sanger*, 311 B.R. at 665.

The 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. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead “willful acts that cause injury.” Or, Congress might have selected an additional word or words, i.e., “reckless” or “negligent,” to modify “injury.” Moreover, . . . the (a)(6) formulation triggers in the lawyer’s mind the category “intentional torts,” as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend “the consequences of an act,” not simply “the act itself.”³⁴

The Bankruptcy Court interpreted “willfulness” under *Geiger* as the main issue in this proceeding.³⁵ Thus, in order to establish victory in this proceeding, the Plaintiff must establish that the defendant’s conduct was willful, as well as malicious. In a strong tactical move, the Plaintiff sought to rely on collateral estoppel.³⁶ It is generally recognized that the doctrine of collateral estoppel applies to dischargeability proceedings under § 523(a)(6).³⁷ If collateral estoppel is established, the Bankruptcy Court may give preclusive effect to those elements of the prior claim that are identical to the elements required for discharge that were litigated and determined in the prior action.³⁸ The Bankruptcy Court relied on a test laid down by the Second Circuit:

(1) the issues in both proceedings must be identical; (2) the issue in the prior proceeding must have been actually litigated and actually decided; (3) there must have been a full and fair opportunity for litigation in the prior proceeding; and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits.³⁹

The Bankruptcy Court found the first two requirements: 1) the identity of issues and 2) the actual litigation and determination of the issues, the most troubling for the Plaintiff.⁴⁰ The Plaintiff made a compelling argument concerning the identity of the willfulness issue, namely that, because the district court found a “willful violation of federal and state law,” the Plaintiff has shown that the Debtor committed

34. *Geiger*, 523 U.S. at 61-62 (emphasis added) (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. at 15 (1964)).

35. *Sanger*, 311 B.R. at 668.

36. *Id.* at 666.

37. *Grogan v. Garner*, 498 U.S. 279, 284 (1991).

38. *Id.*

39. *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986).

40. *Sanger*, 311 B.R. at 666.

a "willful and malicious injury," which must be excepted from judgment under § 523(a)(6).⁴¹ If one willfully violates the law, it is not a stretch to find that any injuries resulting from the intentional conduct or act were also intentional. However, the Supreme Court's holding that "willful" modifies "injury" and not "act" deviates from this sensible approach.

The willful act of treatment in a medical malpractice context and the willful act of sexual harassment should not be examined in the same way because the injury resulting from medical malpractice is an attempt to heal gone awry, whereby sexual harassment is inherently malicious and can do naught but cause injury. The *Geiger* holding makes sense in the proper context, but that context is certainly not sexual harassment. As a policy matter, individuals should be held liable for the probable consequences of their acts. *Geiger's* holding seems to provide a loophole in the justice system. It is interesting that the Bankruptcy Court found the actual litigation and determination of issues to be a hurdle for the Plaintiff as the Debtor elected not to respond to the District Court action!⁴² When one refuses to entertain a lawsuit and a default judgment is entered against that person all presumptions should go against the defaulting party. "The issue is not whether the party to the prior proceeding offered all of the evidence it proposed to offer, but whether the party had an opportunity to do so."⁴³ It makes no sense to deem an issue not actually litigated when the party defaults. The rules of notice provide that there must exist an actual *opportunity* to litigate all issues, but when that opportunity is spurned all issues must be treated as actually litigated against the defaulting party, in order to discourage defendants from defaulting.⁴⁴ Regardless, the bankruptcy court found that although the Creditor sued under both quid pro quo and hostile environment sexual harassment in the district court, the issue of willfulness is not precluded because neither claim addressed the willfulness element of a § 523(a)(6) claim.⁴⁵

The Plaintiff then tried to satisfy the willfulness prong by arguing that, because the district court imposed punitive damages against the Debtor, the court must have found "willful and malicious injury."⁴⁶ The relevant part of the statute provides that "[a] complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a

41. *Id.* at 666-67.

42. *Id.* at 660.

43. *Thompson v. Kelly (In re Kelly)*, 238 B.R. 156, 161 (Bankr. D. Mo. 1999).

44. *See id.* at 161-62.

45. *Sanger*, 311 B.R. at 667.

46. *Id.*

discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”⁴⁷ The Bankruptcy Court ruled that, despite the District Court’s award of punitive damages and the preceding statute, reckless indifference, though sufficient for an award of punitive damages in cases of *intentional* discrimination under Title VII, is insufficient to establish “willfulness” under *Geiger*.⁴⁸ The court stated, “[I]t is *clear* that intent to injure was not a necessary underpinning for a punitive damages award.”⁴⁹

However, bankruptcy courts throughout the country in a post-*Geiger* world have held the other way in cases involving sexual harassment and punitive damages. In *McDonough v. Smith*, the United States District Court for the Commonwealth of Massachusetts found that “punitive damages are indicative of willful and malicious injury, which preclude discharge of the debt.”⁵⁰ The award of punitive damages, thus, illustrates the depravity of the act.⁵¹ “[A] judgment arising out of a sexual harassment claim is excepted from discharge when it constitutes an obligation stemming from a willful and malicious injury.”⁵²

While both the *Smith* and *Sanger* courts considered *Geiger*, only *Smith*’s reasoning preserved a primary tenet of the justice system: if a man is wronged by the unreasonable acts of another, the law should offer a remedy. In *Smith*, the Plaintiff had her employment privileges revoked, had her job security threatened, and required hospitalization and counseling as a result of the Debtor’s actions.⁵³ In *Sanger*, the Debtor frequently objectified the Plaintiff by offensive physical touching and lewd sexual comments, she lost her insurance, and she also required counseling.⁵⁴ The fact that the Plaintiff had a relationship with the Debtor was immaterial. What is material are the multiple similarities between the two cases: a male in a dominant position exercising his power to create a hostile work environment that had real, significant consequences on the subordinate female employee. The major

47. 42 U.S.C. § 1981a(a) (2000).

48. *Sanger*, 311 B.R. at 668.

49. *Id.* at 669 (emphasis added). It will now be shown just how unclear the determination that “intent to injure was not a necessary underpinning for a punitive damages award” is. *Id.*

50. 270 B.R. 544, 550 (Bankr. D. Mass., 2001) (quoting *Ludwig v. Martino (In re Martino)*, 220 B.R. 129 (Bankr. D. Fla. 1998)).

51. *See id.*

52. *Ludwig*, 220 B.R. at 132; *see also* *Gee v. Hammond*, 173 B.R. 189, 193 (9th Cir. 1994) (holding that a judgment of sexual harassment is excepted from discharge pursuant to § 523(a)(6) because the debtor’s actions were willful and malicious and there was no just cause or excuse for his conduct).

53. *Smith*, 270 B.R. at 546.

54. *Sanger*, 311 B.R. at 660-61.

difference between *Sanger* and *Smith* is that despite having similar facts the results were different. In *Smith*, the Plaintiff was able to use the justice system to attain compensation, whereas in *Sanger*, the Plaintiff's complaints fell on deaf ears because of the Bankruptcy Court's application of the Supreme Court's holding in *Geiger*.

The Debtor in *Smith* cited *Geiger* in order to make the argument that the phrase "willful and malicious injury" only applies to deliberate and intentional injuries.⁵⁵ *Geiger* was a *medical malpractice case* that held a debt was not exempted from discharge because the doctor's actions were negligent or reckless, not intentional.⁵⁶ *Smith* noted that "[the] Supreme Court decision does not save the Debtor because the Debtor's conduct was *deliberate and intentional*, not reckless or negligent as [the Debtor] would like this Court to believe."⁵⁷ The Debtor was consciously aware of the actions he took and the result he desired to achieve: "[t]he Debtor wanted to place pressure on the Plaintiff, so that she would return to him, by revoking employment privileges, humiliating her at work, forcing her to resign, and revoking her severance package."⁵⁸ Thus, *Smith* interpreted the "willful" prong as follows: if the Debtor's actions are inhumane and intentional and cause harm to the Plaintiff then the willfulness prong will be satisfied and the debt will be nondischargeable under § 523(a)(6).⁵⁹

In *Sanger*, the frequent sexual assaults, which included touching her arm with his genitals and propositioning her for sex as well as permitting her co-workers to engage in similar behaviors was inhumane, and, although the Creditor may not be able to legitimately articulate a goal that his behavior was designed to elicit, such terrible treatment of a human being was easily found willful since such behavior can do nothing but damage, belittle, and destroy a once confident persona. *Smith* illustrates two concepts that were lost on the *Sanger* court: 1) it is possible to construe blatant sexual harassment as willful and malicious under § 523(a)(6) and *Geiger*, thereby making the debt nondischargeable,⁶⁰ and 2) punitive damages are indicative of willful and malicious injury that precludes discharge of the debt.⁶¹ *Smith* succeeds in providing a more sensible interpretation of *Geiger* and casts

55. *Smith*, 270 B.R. at 550 (quoting *Kawaauhau v. Geiger*, 523 U.S.57, 61 (1998)); see also *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853, 859 (1st Cir. 1997) (the fact that the injury was caused through negligence or recklessness does not satisfy the malice requirement).

56. *Smith*, 270 B.R. at 550 (citing *Geiger*, 523 U.S. at 64).

57. *Id.* (emphasis added).

58. *Id.*

59. *Id.*

60. *Id.*; *contra Sanger v. Busch*, 311 B.R. 657, 668 (Bankr. N.D.N.Y. 2004).

61. *Id.*; *contra Sanger*, 311 B.R. at 668.

a shadow of doubt over the court's ruling in *Sanger*. *Sanger* did not only err in ignoring the inherently malicious conduct that incurs punitive damages.

Sanger found no authority for treating sexual harassment like an intentional tort in order to find the judgment against the Debtor nondischargeable under § 523(a)(6).⁶² Although the Supreme Court has interpreted sexual harassment as an intentional tort for the purposes of determining an employer's vicarious liability for an employee's unlawful conduct,⁶³ it has not, as required by *Geiger*, found that the harasser must intend to injure his victim.⁶⁴ In stark contrast to *Sanger*, other bankruptcy courts have found ways to treat sexual harassment as an intentional tort,⁶⁵ thereby leaving open the possibility that sexual harassment might satisfy the nondischargeability exception under *Geiger*. One such case is *In re Tompkins*.⁶⁶

Tompkins involved Christine Voss's ("Voss") attempt to find nondischargeable a debt owed to her by John Wendell Tompkins, Jr. (the "Debtor") pursuant to § 523(a)(6) of the Bankruptcy Code.⁶⁷ The debt involved the judicial enforcement of a settlement agreement against the Debtor for \$100,000 that the Debtor sought to discharge in Chapter 7 Bankruptcy proceedings.⁶⁸ The Debtor asserted that the settlement was made for financial reasons and without any admission of guilt as to the facts set forth in the complaint.⁶⁹ At trial Voss testified, among other things, that the Debtor said:

Voss would look great with [a tattoo on her ass] . . . she at one time took an evening job as a barmaid in a high-end establishment, and on occasion the Debtor would come to the establishment and sit and drink for hours . . . on occasion, the Debtor would bring her into the office and lock the door, but then he would only talk about things like the weather . . . she spoke with her medical provider because she was depressed for several weeks and embarrassed that she could not stand up to the Debtor, and, as a result, she took antidepressants . . . debtor

62. *Sanger*, 311 B.R. at 670.

63. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. at 756-60.

64. *Sanger*, 311 B.R. at 670.

65. See *McDonough v. Smith*, 270 B.R. 544, 550 (Bankr. D. Mass. 2001).

66. 290 B.R. 194 (Bankr. W.D.N.Y. 2003).

67. *Id.* at 195-96.; see also 11 U.S.C. § 523(a)(6).

68. *Tompkins*, 290 B.R. at 196-97.

69. *Id.* at 196. As a tactical move, enacting a settlement without any admission of guilt could be quite advisable for the Debtor who seeks to have the debt discharged in Bankruptcy Court because the issue of sexual harassment and its dischargeability must be litigated by a Bankruptcy Court whose day-to-day concern is the equitable distribution of assets among creditors and giving unfortunate debtors a second chance rather than a trial court whose concern is finding justice without consideration of a defendant's fiscal portfolio.

made physical gestures to her, when the customers and other employees could not see him, which consisted of winking, kissy-faces, and what she described as oral sex gestures.⁷⁰

At trial the Debtor's testimony generally denied and mitigated the elements of the sexual harassment claim, explaining that any contact was harmless.⁷¹

It was with this factual background in mind that the Bankruptcy Court decided whether this sexual harassment debt was dischargeable. The court opened its discussion by reviewing nondischargeability under the Supreme Court's interpretation in *Geiger*:

the exception to discharge set forth in Section 523(a)(6) for a willful and malicious injury: (1) covers acts done with the actual intent to cause injury; (2) does not cover deliberate or intentional acts that merely lead to injury; (3) covers intentional torts that require the actor to intend the consequences of an act, not simply the act itself; and (4) does not cover recklessly or negligently inflicted injuries.⁷²

The court then made the poignant observation that, "notwithstanding *Geiger*, Bankruptcy Courts have held that a finding of sexual harassment discrimination under Title VII is inherently an intentional tort that falls within the discharge exception for willful and malicious injury."⁷³ The previous statement illustrates that not only before, but since *Geiger*, bankruptcy courts have found that sexual harassment is within the discharge exception of § 523(a)(6). The court went on to examine the facts under the sexual harassment theories of quid pro quo and hostile work environment. The court concluded that Voss lacked credibility and that, even if the most serious allegations were true, the Debtor's touching of her body in a sexually explicit manner when he passed behind her would still not amount to quid pro quo or hostile work environment sexual harassment.⁷⁴ After concluding that there was no sexual harassment, the court wrote, "[b]y no means, however, does the Court's finding condone any of the Debtor's conduct that may have been as was testified to, which anyone would agree was inappropriate."⁷⁵ The court may not condone the conduct, but neither

70. *Id.* at 197-98.

71. *Id.* at 198.

72. *Id.* at 199. *Geiger* itself will be examined in Part III with a particular focus to the conflicting policy interests of medical malpractice and sexual harassment in Part IV.

73. *Id.*; see *In re Smith*, 270 B.R. 544, 550 (Bankr. D. Mass 2001); *In re Kelly*, 238 B.R. 156, 161-62 (Bankr. E.D. Mo. 1999).

74. *Tompkins*, 290 B.R. at 201. See in depth discussion of sexual harassment *infra* Part IV.

75. *Id.* at 201; cf. *Sanger v. Busch*, 311 B.R. 657, 669 (Bankr. N.D.N.Y. 2004). The "inappropriate" but not illegal conduct in *Tompkins* resembles the "deplorable" yet dischargeable

does it offer a remedy for the conduct that was at the very least, inappropriate.⁷⁶

The court then turned its attention to the *Geiger* inquiry. With the sexual harassment path closed, Voss's only hope was that the court find that Debtor's conduct satisfied the willful and malicious standard laid down by *Geiger*, namely that the Debtor had actual intent not only to do the act, but also intended the consequences of the act.⁷⁷ The elements of this examination are much more difficult for a plaintiff to prove than sexual harassment. Whereas the sexual harassment inquiry asks only were the elements of a sexual harassment theory intentionally committed and disregards whether the actor intended the consequences of the harassment, the *Geiger* inquiry requires not only the intent to commit an act, but also that the actor intend *all* the actual consequences of the act.⁷⁸ Not surprisingly, the Court determined that the record was insufficient to find that the Debtor's acts intended to cause Voss injury; thus, the debt was discharged.⁷⁹

The most important thing to take away from *Tompkins* is the application of the Bankruptcy Court's two-pronged inquiry: 1) the Court's analysis was consistent with *Geiger* when it applied the Supreme Court's language that the Debtor must intend the consequences of the act and not just the act itself;⁸⁰ and of greater importance, 2) the Bankruptcy Court analyzed whether the Debtor's actions constituted sexual harassment under Title VII because such discrimination is inherently an intentional tort that falls within the discharge exception for willful and malicious injury.⁸¹ This analysis rightly adheres to Supreme Court precedent, yet still offers an opportunity for sexual harassment victims/creditors to have their judgments found nondischargeable under § 523(a)(6) both in accordance with recognized bankruptcy court practice and at an easier standard than the *Geiger* inquiry.⁸² This recognized practice considers the intricacies of a sexual harassment suit and by doing so distinguishes *Geiger*,⁸³ something the *Sanger* court was unable to do.

conduct in *Sanger*. It seems that more than one court has recognized something innately wrong with allowing conduct motivated only by malice to go unpunished.

76. *Tompkins*, 290 B.R. at 194.

77. *Id.* at 201. See *supra* note 72 and accompanying text for the entire standard as laid down in *Geiger*.

78. *Tompkins*, 290 B.R. at 201.

79. *Id.*

80. *Id.*

81. *Id.* at 199-201.

82. *Id.* at 199-202.

83. *Geiger* dealt with the discharge of a medical malpractice debt as opposed to a sexual harassment debt. See *infra* Part III.

Sanger applied a strict *Geiger* analysis and completely disregarded the recognized bankruptcy court practice articulated in *Tompkins*. Judge Littlefield wrote, "the Bankruptcy Code affords no special treatment for victims of sex discrimination."⁸⁴ The court in *Sanger* confined its inquiry to whether the Plaintiff could establish willfulness under *Geiger*.⁸⁵ *Sanger* erroneously allowed the *Geiger* decision to engulf the traditional, commonsense approach bankruptcy courts took to sexual harassment and the dischargeability of debts under section 523(a)(6). *Tompkins's* two-pronged application of both the traditional bankruptcy court practice and the *Geiger* analysis is quite sensible. To understand why *Sanger's* use of *Geiger* analysis to a suit dealing with the dischargeability of a sexual harassment debt is erroneous it is necessary to examine *Geiger* itself.

III. KAWAAHAU V. GEIGER: A MEDICAL MALPRACTICE MONSTER

Margaret Kawaahau ("Plaintiff/Creditor") sought treatment from Dr. Paul Geiger ("Defendant/Debtor") for a foot injury and prescribed oral penicillin in lieu of the more effective intravenous penicillin in order to minimize the cost of treatment in accordance with the Plaintiff's wishes.⁸⁶ The Defendant then departed on a business trip, and within that time Plaintiff's attending physicians attempted to transfer her to an infection disease specialist.⁸⁷ However, upon returning from his trip Defendant canceled the transfer and discontinued Plaintiff's antibiotics because he believed the infection had subsided.⁸⁸ Plaintiff's condition subsequently deteriorated, requiring the amputation of her right leg below the knee.⁸⁹ Plaintiff brought a malpractice suit, and, after a trial, the jury found the Defendant liable and awarded the Plaintiff approximately \$335,000 in damages.⁹⁰

Soon afterward, the Debtor petitioned for bankruptcy, and where the Creditor sought to have the malpractice judgment found nondischargeable because it was a debt "for willful and malicious

84. *Sanger v. Busch*, 311 B.R. 657, 670 (Bankr. N.D.N.Y. 2004). *But see Tompkins*, 290 B.R. at 199 ("Notwithstanding *Geiger*, Bankruptcy Courts have held that a finding of sexual harassment discrimination under Title VII is inherently an intentional tort that falls within the discharge exception for willful and malicious injury." (citing *In re Smith*, 270 B.R. 544 (Bankr. D. Mass. 2001); *In re Kelly*, 238 B.R. 156 (Bankr. E.D. Mo. 1999))).

85. *Sanger*, 311 B.R. at 665-68.

86. *Kawaahau v. Geiger*, 523 U.S. 57, 59 (1998).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

injury” excepted from discharge by § 523(a)(6).⁹¹ The Bankruptcy Court found that the Debtor’s treatment was far below the appropriate standard of care and thus ranked as “willful and malicious”; the District Court affirmed the decision, also finding the debt nondischargeable.⁹² A three-judge panel of the Court of Appeals for the Eighth Circuit reversed, and a divided court sitting en banc affirmed the panel’s position, finding that § 523(a)(6)’s exemption is confined to debts “based on what the law has for generations called an intentional tort.”⁹³ Thus, because a debt for malpractice is not intentional but based on conduct that is negligent or reckless, it remains dischargeable. Because the circuits were divided over the interpretation of § 523(a)(6), the Supreme Court granted certiorari.⁹⁴

The Supreme Court affirmed, holding in the oft cited crux of the case 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.”⁹⁵ Thus, the Creditor’s argument that the Debtor’s knowingly substandard care resulted in foot amputation satisfied the willful and malicious specification of § 523(a)(6) was defeated because, although the Debtor provided poor treatment, he did not *intend* for his patient to lose her foot.⁹⁶ The Supreme Court found support for its logic in the provision itself when it wrote, “Moreover, . . . the (a)(6) formulation triggers in the lawyer’s mind the category ‘intentional torts,’ as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend ‘the *consequences* of an act,’ not simply ‘the act itself.’”⁹⁷

The Court only looked to whether the actor intended the consequences of the act and not at all to the nature of the act itself. The Court’s two examples of the likely consequences of expanding § 523(a)(6) to make more debts nondischargeable illustrates that the Court has not distinguished between: 1) intentional acts that taken in isolation are benign and happen to cause injury and 2) those intentional acts that taken in isolation are abhorrent and happen to cause injury. “Every traffic accident stemming from an initial intentional act—for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic—could fit the description.

91. 11 U.S.C. § 523(a)(6) (2000).

92. *Geiger*, 523 U.S. at 60.

93. *Id.* (quoting *Geiger v. Kawaahau*, 113 F.3d 848, 852 (8th Cir. 1997) (en banc)).

94. *Geiger*, 523 U.S. at 60.

95. *Id.* at 61.

96. *Id.*

97. *Id.* at 61-62 (quoting RESTATEMENT (SECOND) OF TORTS § 8A cmt. at 15 (1964) (emphasis added)).

A 'knowing breach of contract' could also qualify."⁹⁸ Although the Court did not distinguish between intentional acts that are benign or abhorrent, the text of § 523(a)(6) does: an individual debtor is not discharged from any debt "for willful and malicious injury."⁹⁹

Keeping in mind that to be nondischargeable a debt must be willful *and* malicious, the Court's traffic accident and knowing breach of contract examples are irrelevant in an attempt to illustrate how increased nondischargeability would lead to absurd results because both examples lack the malicious element.¹⁰⁰ The Court neglected to examine sexual harassment in this opinion; sexual harassment, unlike a traffic accident, is inherently malicious. The Supreme Court addressed only the willful prong in *Geiger*, but the Second Circuit interpreted the malicious prong to mean "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will."¹⁰¹ *Sanger* applied this interpretation of malicious to sexual harassment quite nicely.

Because sexual harassment is both illegal and morally reprehensible, it is impossible to conceive of an actionable sexual harassment case against an individual employer where that employer's conduct could be construed as anything other than "wrongful and without just cause or excuse. *Thus, malice is inherent in finding that the debtor is liable for sexual harassment.*"¹⁰²

There is little disagreement that sexual harassment satisfies the malice prong, and so now the remaining challenge is to try to interpret how the Supreme Court in *Geiger* would apply the willful prong to a sexual harassment case. The Court found it ridiculous to allow traffic accidents and knowing breaches of contract within the willful prong because even though breaching a contract or turning a wheel is intentional, the injury is unintended, "i.e., neither desired nor in fact anticipated by the debtor."¹⁰³ The most specious reasoning can analogize this reasoning to sexual harassment, that is; the sexual harassment was intentional *but* any and all injuries were neither desired nor anticipated. This inquiry, however, is incomplete.

The supposed goals of these willful acts must be discussed and distinguished. The attempted goal of making a left-hand turn is to direct

98. *Geiger*, 523 U.S. at 62 (citation omitted).

99. 11 U.S.C. § 523(a)(6) (2000).

100. It is conceded that the "knowing breach of contract" example could be found malicious under very specific facts, such as a contract to provide subsistence care in good-faith to disabled persons for a pre-paid fee.

101. *In re Stelluti*, 94 F.3d 84, 87 (2d Cir. 1996).

102. *Sanger v. Busch*, 311 B.R. 657, 668 (Bankr. N.D.N.Y. 2004) (quoting *In re Stelluti*, 94 F.3d at 87).

103. *Geiger*, 523 U.S. at 62.

an automobile to a destination, and it is unfortunate if injury results from that intentional act, yet millions if not billions of left turns are made everyday without incident. A knowing breach of contract attempts to cancel a current deal, usually with the consequences and penalties already foreseen, and enter into a new deal where perhaps the benefits greatly outweigh the penalty of the breach. In today's market economy, knowing breach of contract is a widely accepted business practice and would only be considered malicious under very specific facts.¹⁰⁴ Now consider sexual harassment.

The goals of sexual harassment are to cause embarrassment, injury, and to assert dominance through the hierarchy of the workplace.¹⁰⁵ There is no supposed beneficial or benign goal of sexual harassment. The practice of sexual harassment can do naught but cause an injury. It is not likely that the Supreme Court intended to place the deplorable conduct of sexual harassment in the same category as intentional breach of contract and making left turns; however, the Court did not address sexual harassment directly. Thus, trial courts should distinguish cases as the law and their best judgment permits. Trial courts need not extend *Geiger's* holding to sexual harassment. Even the issue itself was framed in terms of medical malpractice, "The question before us is whether a debt arising from a medical malpractice judgment, attributable to negligent or reckless conduct, falls within [§ 523(a)(6)'s] statutory exception."¹⁰⁶ The Court's framing of the issue in medical malpractice terms, among other things, left ample room for a bankruptcy court to find that debts from sexual harassment are still nondischargeable after *Geiger*. One such case that did just that is *Thompson v. Kelly* ("In re Kelly").¹⁰⁷

In re Kelly upheld the ideals of justice. Ultimately, the court held that the doctrine of collateral estoppel precluded Byron Thomas Kelly ("Debtor") from re-litigating the state court's finding that the debt is nondischargeable.¹⁰⁸ However, it is the Bankruptcy Court's discussion concerning the state court's analysis, and why it was correct, of sexual harassment under *Geiger* that is most interesting. It stood for the proposition that sexual harassment claims are willful and malicious, thus nondischargeable, even in a post-*Geiger* justice system.¹⁰⁹ The court found that throughout the employment relationship the Debtor had

104. See *supra* note 99 and accompanying text.

105. See WILLIAM PETROCELLI & BARBARA KATE REPA, SEXUAL HARASSMENT ON THE JOB 1/7 (Ralph Warner & Marcia Stewart eds., 1992).

106. *Geiger*, 523 U.S. at 59.

107. 238 B.R. 156 (Bankr. E.D. Mo. 1999).

108. *Id.* at 162.

109. *Id.* at 160-61.

sexually harassed, subjected to lewd and inappropriate behavior, and had committed sexual battery against Renee Thompson ("Plaintiff").¹¹⁰ On June 18, 1998, the Plaintiff received compensatory damages against the Debtor totaling \$5000 for pain, suffering, and mental anguish, and an additional \$35,000 in punitive damages.¹¹¹ In bankruptcy court, the Plaintiff then moved for summary judgment to find the debt nondischargeable as a willful and malicious injury under 11 U.S.C. § 523(a)(6).¹¹² In order to survive the motion the Debtor must satisfy the court that there is real factual controversy concerning the issues of willfulness and maliciousness.¹¹³

The court believed that it was clear that the Debtor's acts were both willful and malicious. The Bankruptcy Court properly looked to *Geiger* for guidance and stated that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of Section 523(a)(6)" and "[t]he (a)(6) formulation triggers . . . the category 'intentional torts,' as distinguished from negligent or reckless torts."¹¹⁴ The court continued this analysis, noting that "traditional intentional torts such as assault and battery are generally regarded by bankruptcy courts as being nondischargeable."¹¹⁵ Under Georgia law, "[a] person commits the offense of sexual battery when he intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person."¹¹⁶ Because the court found that the Debtor had committed sexual battery, an intentional tort under Georgia law, and because the Supreme Court intended intentional torts to fit the "willful" prong, it followed that the willful requirement for nondischargeability was satisfied.¹¹⁷

The court also found the malicious prong easily satisfied. Malicious, for the purpose of § 523(a)(6), in the Eighth Circuit, "means that the debtor targeted the creditor to suffer the harm resulting from the debtor's intentional, tortious act," and "[m]alice, or intent to harm, in a sexual intentional tort is self-evident, either because the tortfeasor knows his conduct is certain or almost certain to cause harm, or because he

110. *Id.* at 159.

111. *Id.*

112. *Id.* at 158. A court grants summary judgment if: "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

113. *See* *Lyons v. Bd. of Educ.*, 523 F.2d 340, 347 (8th Cir. 1975).

114. *In re Kelly*, 238 B.R. at 160 (quoting *Geiger* 523 U.S. at 57).

115. *Id.* at 160 (quoting *In re Bumann*, 147 B.R. 44, 47 (Bankr. D.N.D. 1992).

116. GA. CODE ANN. § 16-6-22.1(b) (1981).

117. *In re Kelly*, 238 B.R. at 161.

should know and therefore the intent is inferred as a matter of law.”¹¹⁸ Since sexual harassment, like assault and battery, is an act that can only cause injury, requires a willful act where the tortfeasor intends or must reasonably foresee the act is likely to cause damage, and is inherently malicious, the court’s finding that sexual harassment is an intentional tort, on par with assault and battery, is sensible and just.

The bankruptcy court also looked to the state court’s finding of punitive damages to support the conclusion that the sexual harassment met the willful and malicious prongs.¹¹⁹ Under Georgia law, “punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant’s actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.”¹²⁰ When punitive damages have been awarded at the trial court level, there should be a refutable presumption that the debt is nondischargeable because acts that warrant punitive damages are nearly always heinous in nature. The punitive damage award for the repeated, unwarranted, and unwanted sexual harassment present in *Kelly* is no exception.

Unfortunately, the court in *Sanger*, unlike in *Kelly*, neither utilized the intentional tort, nor the punitive damages, nor the collateral estoppel analysis to conclude that the debt should be nondischargeable. Any one of these three arguments could have done the Plaintiff justice, and yet the *Sanger* court was blind to them. It is important to remember that a Bankruptcy Court does, of course, specialize in bankruptcy. For example, in *Sanger* the court relied upon the following aid from a bankruptcy authority concerning § 523(a)(6), “[i]n determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.”¹²¹ In interpreting bankruptcy law day in and day out it is understandably difficult for a court to acknowledge and appreciate other aspects of law with different policy considerations. For example, as noted in *Sanger*, one of the legislative purposes of Title VII is to “eradicate gender based discrimination from the workplace.”¹²² Unfortunately, strict application of certain bankruptcy maxims, like strict

118. *Id.* (quoting *In re Halverson*, 226 B.R. 22, 29-30 (Bankr. D. Minn. 1998)).

119. *In re Kelly*, 238 B.R. at 161; *see also* *McDonough v. Smith*, 270 B.R. 544, 550 (Bankr. D. Mass. 2001) (finding that punitive damages are indicative of willful and malicious injury, precluding discharge of the debt).

120. GA. CODE ANN. § 51-12-5.1 (1981).

121. *Sanger v. Busch*, 311 B.R. 657, 665 (Bankr. N.D.N.Y. 2004) (quoting COLLIER ON BANKRUPTCY ¶ 523.05, at 523-20 (15th ed. 2003)).

122. *Id.* at 664.

construction of § 523 exceptions, is in direct conflict with certain purposes of Title VII, like the eradication of gender based discrimination in the workplace. This comparison is just the tip of the iceberg. The following section examines how the evolution, goals, and policy considerations of bankruptcy law and sexual harassment are difficult, yet possible, to reconcile.

IV. BANKRUPTCY AND SEXUAL HARASSMENT: CONFLICTING POLICY CONSIDERATIONS RECONCILED

Sexual harassment is about the punishment of horrible deeds. Much is revealed by examining the history of sex discrimination. Sex discrimination was originally included in Title VII as a radical provision added in hopes of killing the Act.¹²³ To the disappointment of those who sponsored that provision, it passed, but as a consequence of the disdain for the provision at the time of its passing it was taken seriously neither by the courts nor by the very agency created for its enforcement: the Equal Employment Opportunity Commission ("EEOC").¹²⁴ As explained further below, it took major Supreme Court decisions and a couple of national scandals for the enforcement of sex discrimination to develop any teeth. At this time, manageable rules are in place to determine employer liability; however, the prospect of having a judgment discharged in Bankruptcy Court remains a barrier for sexual harassment plaintiffs.

Bankruptcy is about the equitable distribution of assets and the forgiveness of certain debts for the honest, although unfortunate, debtor.¹²⁵ Bankruptcy provides a "fresh start" for these individuals but the Bankruptcy Code itself recognizes that not all debts were meant to be forgiven. Section 523(a)(6) of the Bankruptcy Code provides that debts arising from "willful and malicious" conduct should be held nondischargeable. Unfortunately, some Bankruptcy Courts continue to hold that sexual harassment does not satisfy the willful element. Earlier sections have examined the *Sanger* case and other bankruptcy cases involving the discharge of sexual harassment debts that reached more just results. This section examines sexual harassment and bankruptcy in turn, and concludes that finding debts arising from sexual harassment nondischargeable under § 523(a)(6) is further progress in the enforcement of sex discrimination in Title VII, consistent with the sensible bankruptcy policy of aiding "honest" debtors, and a successful

123. PETROCELLI & REPA, *supra* note 105, at 1/20.

124. *Id.*

125. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

merging of Title VII's goal of punishment and bankruptcy's goal of forgiveness.

*A. Sexual Harassment and
the Reluctant Punishment of Atrocious Acts*

As Judge Reinhardt poignantly noted in *Nichols*: “[n]othing is more destructive of human dignity than being forced to perform sexual acts against one’s will.”¹²⁶ Then, considering how destructive sexual harassment is, one would think that the courts would be quick and decisive in the punishment of sexual harassers since the impetus for legal action, Title VII of the Civil Rights Act of 1964,¹²⁷ was established. One would be wrong. It was a full twelve years before any court applied Title VII to find that sexual harassment was actionable.¹²⁸

In *Williams v. Saxbe*,¹²⁹ the court found that a male supervisor who engaged in retaliatory actions against a female employee who refused his sexual advances constituted sex discrimination within the definitional parameters of Title VII.¹³⁰ It is important to note that although the clear language of the Act forbade sex discrimination it took twelve years for a court to apply the language to find a cause of action. The history of the act reveals that this is not surprising at all:

As originally introduced by Congress, the Civil Rights Act of 1964 only prohibited discrimination in employment based on race, color, religion or national origin. *Indeed, sex was not included.* It was attached to the bill at the last moment, when conservative, Southern opponents of the measure introduced an amendment prohibiting discrimination on the basis of sex. They thought that adding sexual

126. *Nichols v. Frank*, 42 F.3d 503, 510 (9th Cir. 1994).

127. 42 U.S.C. § 2000e-2 (2000). The relevant section provides that it “shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”

128. MANE HAJDIN, *THE LAW OF SEXUAL HARASSMENT: A CRITIQUE* 12 (2002). “The law about sexual harassment sneaked into existence quietly on 20 April 1976 in a decision of the federal district court for the District of Columbia.” *Id.*

129. 413 F. Supp. 654 (D.D.C. 1976), *rev’d on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

130. *Saxbe*, 413 F. Supp. at 657. This case was the first time Title VII was used to find sexual harassment actionable. *But see Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977). In *Tomkins*, the same year as *Saxbe*, a woman who refused to have sex with her boss was detained, assaulted, and then fired. A federal judge concluded that the Civil Rights Act was not designed to prevent a “physical attack motivated by sexual desire on the part of a supervisor” just because it “happened to occur in a corporate corridor rather than a back alley.” PETROCELLI & REPA, *supra* note 105, at 1/21 (quoting *Tomkins*, 422 F. Supp. at 556).

equality was so obviously preposterous that it would scuttle the entire bill when it came to a final vote.¹³¹

Discrimination based on sex was not even originally part of the Act! Southern legislators added sex based discrimination to the Act in an effort to destroy it! Given this background, it is not surprising that it took twelve years for any court to construe the Act to provide a cause of action for sex discrimination,¹³² and another ten years after *Williams v. Saxbe* for the Supreme Court to address the issue.¹³³

In *Meritor Savings Bank v. Vinson*,¹³⁴ the Court held that "hostile environment" sex discrimination was actionable under Title VII.¹³⁵ This groundbreaking case "was the first case in which the United States Supreme Court recognized that sexual harassment based on a hostile environment claim is a violation of Title VII."¹³⁶ "In 1986, the Court made one decision that, by and large, endorsed the developments that had taken place in the appellate and district courts up to that point."¹³⁷ The facts that led to this unanimous decision were particularly egregious: "(1) repeated demands for sexual favors from plaintiff's supervisor led to 40 or 50 acts of intercourse; (2) plaintiff's supervisor followed her into the restroom and exposed himself to her; and (3) plaintiff's supervisor forcibly raped her on several occasions."¹³⁸ Given these horrific conditions, it was not unexpected that the Court found the working environment hostile to say the least. It took twenty-two years and appalling circumstances for the Court to issue a ruling on sexual harassment under the Act. After that, it was another dozen years before the Court began playing a more instrumental role in the development of sexual harassment law.¹³⁹ Courts were not the only entity to avoid enforcing sex discrimination as defined in the Act.

The EEOC is the government agency designed to enforce the Act's provisions.¹⁴⁰ Although the Act established the EEOC to enforce its provisions, employment discrimination on the basis of sex being one of them, for many years the agency virtually ignored sex discrimination.¹⁴¹

131. PETROCELLI & REPA, *supra* note 105, at 1/20 (both emphases added).

132. See *supra* notes 128-30 and accompanying text.

133. See HAJDIN, *supra* note 128, at 12. "It took the development of the sexual harassment law ten years to reach the court." *Id.*

134. 477 U.S. 57 (1986).

135. *Id.* at 73.

136. ANJA ANGELICA CHAN, *WOMEN AND SEXUAL HARASSMENT: A PRACTICAL GUIDE TO THE PROTECTIONS OF TITLE VII AND THE HOSTILE ENVIRONMENT CLAIM* 53 (1994).

137. HAJDIN, *supra* note 128, at 12.

138. CHAN, *supra* note 136, at 54.

139. HAJDIN, *supra* note 128, at 12.

140. CHAN, *supra* note 136, at 6.

141. See PETROCELLI & REPA, *supra* note 105, at 1/20.

“The first head of the EEOC . . . considered the sex discrimination provisions of the law a joke, saying that it was ‘conceived out of wedlock.’”¹⁴² Eventually, in 1980, due to pressure from the women’s movement, and under the leadership of Eleanor Holmes Norton, the EEOC issued regulations defining sexual harassment and saying it was a form of sex discrimination that the Act prohibited.¹⁴³ The EEOC provided that:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.¹⁴⁴

It was not until 1986 that the Court endorsed these guidelines in *Meritor*.¹⁴⁵ In *Meritor*, the Court noted that, although courts are not required to follow EEOC regulations, it is proper for courts to look towards the agency’s “experience and informed judgment . . . for guidance.”¹⁴⁶ Finally, twenty-two years removed from the passage of the Act and the sex discrimination provision that was designed to kill it, the Court encouraged lower courts to follow EEOC guidelines; the same EEOC that initially treated sex discrimination as a joke and required sixteen years to pass those guidelines. These facts reveal the uphill battle women have and continue to face when propounding a claim of sex discrimination. Progress is made gradually, and grudgingly. The Court made substantial progress in *Meritor*, but questions remained concerning employer liability.¹⁴⁷ A dozen years later the Court addressed these questions.

In the companion cases of *Burlington Industries, Inc. v. Ellerth*¹⁴⁸

142. *Id.*

143. *Id.* at 1/20-21; *see also* GWENDOLYN MINK, HOSTILE ENVIRONMENT: THE POLITICAL BETRAYAL OF SEXUALLY HARASSED WOMEN 14 (2000) (“It was now the winter of 1980. The Equal Employment Opportunity Commission would soon issue sexual harassment guidelines, and appeals courts were beginning to treat sexual harassment as a serious violation of women’s civil rights.”).

144. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2005).

145. PETROCELLI & REPA, *supra* note 105, at 1/21 (referencing *Meritor Savs. Bank v. Vinson*, 477 U.S. 57 (1986)).

146. *Meritor*, 477 U.S. at 65; *see also* CHAN, *supra* note 136, at 7.

147. CHAN, *supra* note 136, at 54.

148. 524 U.S. 742 (1998).

and *Faragher v. City of Boca Raton*,¹⁴⁹ the Court clarified some remaining questions concerning employer liability. In *Ellerth*, the Court acknowledged that the quid pro quo claim was synonymous with strict liability, which, as a consequence, placed expansive pressure on plaintiffs who sought to profit from pleading cases as quid pro quo actions.¹⁵⁰ After examining quid pro quo and hostile environment sexual harassment the Court and concluded that "[these terms] are helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this are of limited utility."¹⁵¹ The Court has abolished these distinctions as far as they encouraged plaintiffs to plead quid pro quo for strict liability benefits over hostile environment.

The Court adopted a new approach, holding that an employer was strictly liable for a supervisor's sexual harassment of a subordinate, regardless of the label, when the "supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment."¹⁵² However, when no tangible employment action was taken, the employer may assert a two-prong affirmative defense to liability or damages.¹⁵³ The first prong of the affirmative defense is rooted in negligence principles and states "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."¹⁵⁴ The second prong of the affirmative defense requires the plaintiff to mitigate damages by being proactive with the employer and states "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."¹⁵⁵ These companion cases are further progress towards the just enforcement of sexual harassment law:

In making it clear that the grounds for imputing the conduct of the employer are either the fact that the harasser was aided in accomplishing the harassment by the existence of the agency relationship or the employer's negligence or recklessness, the Court explicitly criticized the idea that sexual harassment could generally be regarded as within the scope of the harasser's employment.¹⁵⁶

No longer will companies be able to hide their heads in the sand.

149. 524 U.S. 775 (1998).

150. *Ellerth*, 524 U.S. at 753.

151. *Id.* at 751.

152. *Id.* at 765; *Faragher*, 524 U.S. at 807-08.

153. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

154. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

155. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

156. HAJDIN, *supra* note 128, at 176.

Courts will look directly to the employer's reasonable care in dealing with sexual harassment complaints, and without a procedure to deal with these complaints, the employer will always lose on the second prong because a plaintiff cannot unreasonably fail to take advantage of preventive or corrective measures that never existed. The Court's willingness to address sexual harassment issues did not develop in a vacuum.

Politics played a crucial role in bringing sexual harassment to the attention of the American people and the judiciary. "It was only in 1991, after the rules about sexual harassment had been a well-established part of the U.S. legal system for some time that some kind of public debate about it was triggered by the scandal that surrounded the appointment of Clarence Thomas to the Supreme Court."¹⁵⁷ In 1991, Anita Hill alleged sexual harassment against Clarence Thomas, the very man who would be largely responsible for enforcing those laws.¹⁵⁸ Meanwhile, Paula Jones filed suit against President Bill Clinton in 1994, alleging that, in 1991, while governor of Arkansas, "Clinton had invited her up to his hotel room, where he touched her inappropriately, exposed his penis, asked her to kiss it, fondled it when she would not, implicitly threatened her, and reminded her of his power over her."¹⁵⁹ These nationwide scandals helped educate the public on the truth of sexual harassment law¹⁶⁰ and doubtlessly helped bring sexual harassment back to the Court for further clarification. The most important aspect of bringing a sexual harassment case that Hill and Jones represent is the vehemence, hatred, and hardship frequently experienced by the plaintiffs.

The vicious personal attacks weathered by Anita Hill and Paula Jones are no different from those endured by many women who bring sexual harassment claims, although the attacks against Hill and Jones were far louder and more visible than most. It is disappointing but not surprising that alleged harassers try to defend themselves by discrediting the women who bring charges against them. . . . [F]riends of alleged harassers have propagated ugly speculations about women *who have been brave enough to vindicate their injuries.*¹⁶¹

Although progress has been made, it has not gone far enough. The law must do everything it can to empower the women who have the

157. *Id.* at 11.

158. *Id.* at 11-12.

159. MINK, *supra* note 143, at 115-16.

160. HAJDIN, *supra* note 128, at 12.

161. MINK, *supra* note 143, at 2-3 (emphasis added).

courage to say, "I've been sexually harassed." These women, as Hill and Jones illustrate, are subject to personal attacks and character defamation. These courageous women who bring suit must show the vast majority of women, who stay silent in the face of harassment, that vindication is possible. "Most women who have been sexually harassed on the job never speak about it. Only a small minority take informal action against harassment using company procedures. And, only a *miniscule number* ever make a formal legal complaint with the EEOC or state enforcement agency."¹⁶² The Supreme Court's holdings in *Ellerth* and *Faragher* have made it easier to find employers liable for their atrocious acts.¹⁶³ However, if Bankruptcy courts are allowed to reach the patently illogical conclusion that sexual harassment is not "willful and malicious" under *Geiger*, then, in many cases, all this progress will have been for naught. Learning that discrimination on the basis of sex was added to the Act as a joke,¹⁶⁴ meant to destroy it, and that it took two dramas on the national stage to educate the public about sexual harassment¹⁶⁵ reveals how slowly and reluctantly progress is made. Progress cannot be made when Bankruptcy Courts can find that sexual harassment is not "willful and malicious." To understand the anomalous decision reached in *Sanger* one must examine some of the policies behind Bankruptcy law.

B. Bankruptcy Law and Discharge for the Honest Debtor

Whereas sexual harassment is about the punishment of individuals for heinous conduct, bankruptcy law is about the forgiveness of the *honest* debtor. A primary purpose of bankruptcy law is to "relieve the *honest debtor* from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."¹⁶⁶ This relief is referred to as discharge, and to receive it an individual must make available all his non-exempt property to creditors for distribution.¹⁶⁷ Discharge is crucial for the insolvent debtor:

Indeed, the principal advantage bankruptcy offers a debtor that is an individual lies in the benefits associated with discharge. *Unless he has*

162. PETROCELLI & REPA, *supra* note 105, at 3/5 (emphasis added).

163. *See supra* notes 148-55 and accompanying text.

164. *See supra* notes 131, 142 and accompanying text.

165. *See supra* notes 157-60 and accompanying text.

166. *Williams v. U.S. Fid. & G. Co.*, 236 U.S. 549, 554-55 (1915) (emphasis added).

167. WILLIAM D. WARREN & DANIEL J. BUSSEL, *BANKRUPTCY* 142 (Found. Press 6th ed. 2002) (1985).

violated some norm of behavior specified in the bankruptcy laws, an individual who resorts to bankruptcy can obtain a discharge from most of his existing debts in exchange for surrendering either his existing nonexempt assets or, more recently, a portion of his future earnings.¹⁶⁸

This quote illustrates the awesome power of discharge, namely, that when the financial waters of life become stormy, discharge serves as a life preserver, keeping the debtor afloat. The quote also alludes to the fact that the debtor's behavior while incurring the debt is relevant in determining whether the debt is dischargeable. "The reasons for denying discharge are somewhat varied; most, but not all, are rooted in misconduct by the debtor."¹⁶⁹ Thus, bankruptcy is based on the equitable distribution of assets to creditors and ultimately financial forgiveness of the debtor,¹⁷⁰ provided that the debt is not rooted in misconduct. The Supreme Court articulated this well in the oft cited case of *Local Loan Co. v. Hunt*, "[bankruptcy] gives to the *honest but unfortunate debtor* who surrenders for distribution the property which he owns *at the time of bankruptcy*, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."¹⁷¹ From this quote it follows that the dishonest debtor is not to benefit from bankruptcy. In respect to sexual harassment, however, the dishonest can distort the system to their benefit.

Unfortunately, in *Sanger*, the Bankruptcy court misinterpreted a provision of the Bankruptcy Code designed to filter out the dishonest. The provision was designed to prevent discharge for "willful and malicious injury by the debtor to another entity or to the property of another entity."¹⁷² "The Supreme Court pretty much rewrote the agenda for this section in 1998 in *Kawaahau v. Geiger*, when it held that a medical malpractice judgment grounded in reckless or negligent conduct does not fall within the definition of willful and malicious."¹⁷³ This conclusion goes against one of the aforementioned primary purposes of bankruptcy law, namely, to discharge the debts of *honest* debtors who did not violate any norms of behavior.¹⁷⁴ Judge Littlefield erred on the

168. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 225 (1986) (emphasis added).

169. MICHAEL J. HERBERT, *UNDERSTANDING BANKRUPTCY* 209-10 (1995). "The primary provision [for denying discharge] is section 727(a)." *Id.* Also, more than a dozen types of debt are classified as non-dischargeable under § 523. *Id.* at 215.

170. *Id.*

171. 292 U.S. 234, 244 (1934) (first emphasis added).

172. 11 U.S.C. § 523(a)(6) (2008).

173. JOHN D. AYER & MICHAEL L. BERNSTEIN, *BANKRUPTCY IN PRACTICE* 424 (2002).

174. *See supra* notes 166, 168, 171.

side of bankruptcy when faced with the conflicting policies of punishment in sexual harassment and forgiveness of debt in bankruptcy. Judge Littlefield recognized the "grave injustice" of his ruling yet believed he was bound by the Court's holding in *Geiger*.¹⁷⁵ The ruling was poor not only because it failed to punish the deplorable behavior of the Debtor and thereby offended Title VII, but it also offended the Court's language concerning using bankruptcy to aid the "honest but unfortunate" debtor.¹⁷⁶ These policy considerations suggest that the Bankruptcy Court should have found the debt nondischargeable and other bankruptcy courts have sensibly found such debts nondischargeable.¹⁷⁷

V. CONCLUSION

In *Sanger v. Busch*, Judge Littlefield erroneously applied the Court's test as laid down in *Kawaahau v. Geiger*. Although, according to the Court in *Geiger*, "willful" for the purposes of § 523(a)(6) modifies injury and not act, the *Sanger* court should still have found the debt nondischargeable because of the nature of the conduct that led to debt. The Court's only examples of willful acts that led to unintended injury are 1) a motorist making left turns, and 2) willful breach of contract. Neither example dealt with facts analogous to those found in *Sanger*, offensive touching that damaged the Plaintiff's psyche and an overall abusive environment directly hostile to the stated goals of Title VII. Other bankruptcy courts were able to reach the just conclusion: some by finding that sexual harassment is inherently an intentional tort, others by giving deference to the trial court's finding of willful and malicious in the form of collateral estoppel, and still others allowing the trial court's finding of punitive damages to lend evidence to the finding of willful and malicious conduct.

The evolution of sex discrimination reveals the laborious journey towards adequate enforcement experienced by the provision. It took a dozen years after the Act for any court to first find a claim of sex discrimination actionable and an additional ten for the Supreme Court to address the issue. The mishaps of President William Clinton and Justice Clarence Thomas reveal that sexual harassment permeates the highest

175. *Sanger v. Busch*, 311 B.R. 657, 670 (Bankr. N.D.N.Y. 2004).

176. *Hunt*, 292 U.S. at 244.

177. See *In re McDonough v. Smith*, 270 B.R. 544, 550 (Bankr. D. Mass. 2001) (holding that the trial court's finding of punitive damages helps support a finding of "willful and malicious" and thus finding that the debt arising from sexual harassment is nondischargeable); *Voss v. Tompkins (In re Tompkins)*, 290 B.R. 194 (Bankr. N.D.N.Y., 2003) (analyzing sexual harassment under Title VII and concluding that it is inherently an intentional tort).

offices of the nation, and the ridicule experienced by Paula Jones and Anita Hill exemplifies the hardships experienced by those very few women brave enough to actually come forward and bring suit.

A brief look at bankruptcy policy reveals that discharge was meant to benefit the “honest, but unfortunate” debtor, and not those whose heinous acts resulted in their precarious financial state. This mantra, of aiding only the honest, is pertinently codified in § 523(a)(6); debts arising from “willful and malicious” acts shall be found nondischargeable. Authority figures using their power to belittle, embarrass, and extort sex acts from their subordinates is both willful and malicious. Nothing but harm can come of this conduct. When next presented with an opportunity, the Court should better articulate the “willful and malicious” standard, making sure to include how to construe the test when the debt arises from conduct that is *per se* deplorable. Meanwhile, bankruptcy courts can continue to find that sexual harassment is inherently an intentional tort or rely on the trial courts finding of “willful and malicious” by means of collateral estoppel where applicable.

Great progress has been made in the enforcement of Title VII. The judiciary as well as society is coming to realize that sexual harassment is a willful act that is inherently malicious. Allowing a judgment to be discharged against sexual harassment plaintiffs brave enough to seek a judgment, endure the ridicule that goes along with bringing such a claim, and risk their own and their family’s financial well being is a shocking outcome. The provision that began as merely a political tactic has developed into a legitimate cause of action with a Court imposed liability scheme capable of extracting large judgments from negligent or willfully blind employers. It is disheartening to see that after so much has been won all can be lost in a last ditch effort by the Debtor to discharge the debt in a bankruptcy proceeding. This loophole must be closed.

*David L. Adamson**

* First I would like to thank my parents, Alan and Carol, who instilled in me the ability to capture my dreams if I would only reach out and seize them. My sincerest gratitude to Professor Fruehwald, without his thorough teaching, guidance, and support this work would not have been possible. A heartfelt thanks to the members of the *Hofstra Labor & Employment Law Journal*. Their dedication and attention to detail enhanced the quality and integrity of this Note. The law seeks to achieve justice, and I believe the moral compass within all reasonable men intuitively knows what is just from what is unjust. When reason is combined with this intuitive sense of justice it follows that a resolution both reasonable and just can often be achieved. Adherence to legal principles alone may result in a decision that is reasonable yet unjust. It is my contention, therefore, that before precedent binds a Judge to an unjust decision that the *attempt* to adhere to both what is reasonable and what is just should be made. In this way *grave injustices* might be averted.