UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ALBERT W. LAWRENCE — CASE NO. 97-11263

Debtor — Chapter 11

SHARON A. BURSTEIN

Plaintiff

vs. — ADV. PRO. NO. 97-91293A

ALBERT W. LAWRENCE

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This adversary proceeding is before the Court upon the complaint of Sharon A. Burstein ("Plaintiff" or "Burstein") filed on May 30, 1997. The Plaintiff seeks a determination by the Court that the judgment entered against Albert W. Lawrence ("Debtor" or "Defendant") by the New York State Supreme Court for Schenectady County is nondischargeable pursuant to §

523(a)(6) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code").

The trial was held on March 8, 2000 in the United States Bankruptcy Court, Utica, New York. This Court heard testimony from both parties. In lieu of closing arguments, the Court requested the parties provide it with post-trial memoranda of law by April 5, 2000. The Court thereafter took this matter under submission as of that date.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1) and (2)(I).

FINDINGS OF FACT

The Plaintiff was employed by Lawrence Groups, Inc. ("LGI") and/or Lawrence Insurance Group, Inc. ("LIG") from July 1985 to September 1989. The Debtor was the majority shareholder, owner, operator, and Chairman of the Board of LGI and LIG. During her four years of employment in LGI and LIG, Plaintiff reported directly to the Debtor. Plaintiff was promoted from the position of Director of Public Relations to the position of Director of Corporate Communications of LGI on or about February 1, 1987. On approximately April 13, 1987, Plaintiff was promoted again to Director of Investor Relations while continuing her position as Director of Corporate Communications. A year later, about April 13, 1988, Plaintiff was then promoted to Vice-President of Corporate Communication, becoming the first female to hold such

position in the company. During the period between 1987 and 1988, Plaintiff was also responsible for investors' relations for the publicly traded companies of the Lawrence entities. During the period between 1985 and 1989, Plaintiff's salary was increased four times from $45,000 to $90,000. In 1987 and 1988 she also received bonuses in the form of shares in the corporation. In addition, she received several achievement awards for her work in advertising. All promotions and salary raises were authorized by the Debtor.

In July 1988 Plaintiff became pregnant and continued to work full-time until shortly before March 16, 1989 when she gave birth to a baby girl. On April 3, 1989, Plaintiff resumed work part-time and on May 15, 1989, returned to work on a full-time basis. According to the Plaintiff, it was in April 1989 that it was determined that she be given a $10,000 raise, retroactive to January 1989, raising her salary to $90,000 per year. Plaintiff testified that on June 21, 1989, Defendant summoned her to his office to discuss her job. According to Plaintiff, Defendant opined that she should not be traveling and working away from home as much as she was but instead should be at home with her daughter. It was Plaintiff's testimony that she informed the Defendant that she did not want that role and was not in the economic position to be able to do so. At that point, Defendant terminated her job effective July 1, 1989. At the trial, the Defendant testified that his reason for firing the Plaintiff stemmed from a personality conflict and that she had done some things that were not acceptable to some of the other managers.[1]

Plaintiff testified that at the meeting on June 21, 1989, Debtor proposed that the Plaintiff

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[1] At the trial on March 8, 2000, the Court allowed into evidence a portion of a deposition of the Debtor conducted on December 16, 1992. At that time, the Debtor had indicated that he could not recall the content and the circumstances of the meeting on June 21, 1989, when he fired the Plaintiff.

start her own consulting business and indicated that LIG and LGI would be her "first and best client" and would refer clients to her. The Plaintiff testified that between July and September 1989, while continuing to work, she attempted to negotiate a written consultant contract with the Debtor. According to the Plaintiff, the two exchanged correspondence but no agreement was every executed because the Debtor kept changing the terms of the consulting arrangement, including the amount of her compensation and the availability of office and support staff. Plaintiff continued to report to work regularly until September 1989 when Debtor again fired her.

Debtor testified at trial that he vaguely remembered entering into negotiations with Plaintiff to employ her as a consultant and also testified that he had every intention of reaching an agreement with her. However, according to his 1992 deposition, he never completely formulated his intentions to reach an agreement with the Plaintiff that would be binding upon the company.

On May 30, 1990, an action entitled *Lawrence Insurance Group, Inc. and Lawrence Group, Inc. v. Sharon Burstein* (Index No. 90-0950) was commenced in New York State Supreme Court seeking $100,000 in damages against Burstein for allegedly stealing company files and company property ("State Court Action"). *See* Plaintiff's Exhibit 9. Burstein filed third party claims against the Debtor and counterclaims against LIG and LGI seeking damages for wrongful termination due to her gender. *See* Plaintiff's Exhibit 5. The case was tried before a jury that returned a verdict on November 18, 1996, in favor of Burstein holding the Debtor, LGI and LIG jointly and severally liable. By special verdict, the jury found that (1) Burstein proved by a preponderance of the evidence that her gender was a substantial or motivating factor in the decision to terminate her employment and that (2) LGI, LIG and Debtor did not prove by a

preponderance of the evidence that they would have made the same decision on the same day without considering Burstein's gender. *See* Plaintiff's Exhibit 2. Judgment was entered in favor of Burstein on November 21, 1996, in the amount of $502,619.. *See* Plaintiff's Exhibit 4. Included in the award of damages was $320,000 assessed against the Debtor for mental damages. In addition, the Debtor, LGI and LIG were assessed $60,000 each in economic damages.

On February 28, 1997, LIG, LGI and Debtor filed voluntary petitions pursuant to Chapter 11 of the Code. Thereafter, Burstein commenced the instant adversary proceeding against the Debtor seeking a determination that the judgment of $502,619.00, for which the Debtor was jointly and severally liable, is nondischargeable pursuant to Code § 523(a)(6). *See* Plaintiff's Exhibit 8

ARGUMENTS

Plaintiff maintains that the state court judgment is not dischargeable pursuant to Code § 523(a)(6). It is Plaintiff's argument that Defendant intended to injure her by terminating her employment. It is also Plaintiff's argument that Defendant's termination of her was based on Plaintiff's gender and was without cause or justification. Plaintiff contends that the Defendant, in his Answer, admitted to ¶ 25 of the Plaintiff's Complaint, which stated that the jury verdict held the Debtor liable for willful and malicious injuries to the Plaintiff. It is Plaintiff's position that Debtor cannot re-litigate the issue when the jury in the State Court Action found by a preponderance of evidence that gender was the motivating factor for her termination.

Debtor contends that the jury's finding of sexual discrimination in the State Court Action

was based on breach of contract and does not rise to the level of an intentional tort as was addressed by the Supreme Court in *Kawaauhau v. Geiger (In re Geiger)*, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998). Debtor maintains that there was no malice on his part in terminating the Plaintiff and there has been no evidence offered by the Plaintiff to establish that the Debtor had displayed any animosity toward the Plaintiff or any verbal or physical harassment of her. Debtor also argues that he negotiated the consultant contract in good faith and he had no intention to injure the Plaintiff, as evidenced by his offer to the Plaintiff to continue doing work for him/his companies as a consultant.

Defendant contends that despite what the jury found in the State Court Action, the issue of whether Defendant's conduct falls within the willful and malicious injury requisite of Code § 523(a)(6)'s nondischargeability is a matter of federal law to be determined by this Court and not the state court. Debtor's argument is that although there is a collateral estoppel effect to what went on in the State Court Action, there was no determination by the jury of any fact that would preclude this Court from making its own independent determination whether the Debtor's conduct was willful and malicious pursuant to Code § 523(a)(6).

DISCUSSION

The issue before this Court is whether Debtor's wrongful termination of the Plaintiff resulting from sexual discrimination, which led to an award of economic and emotional damages in the State Court Action, falls within the statutory exception of Code § 523(a)(6). While state law determines the validity of a creditor's claim, the issue of nondischargeability is a matter of

federal law governed by the Code. *See Grogan v. Garner*, 498 U.S. 279, 283, 111 S. Ct. 654, 657, 112 L. Ed. 2d 755 (1991) (citation omitted). The Court, however, must give preclusive effect, by way of collateral estoppel, to those elements of the claim which were litigated and determined in the prior State Court Action that are identical to the elements required in considering dischargeability of the debt, provided that the standard applied in the state court action was at a minimum measured by a preponderance of the evidence. *See id.* at 284, 111 S. Ct. at 658.

Code § 523(a)(6) excepts from an individual debtor's discharge "any debt . . . for willful and malicious injury by the debtor to another entity . . . ." 11 U.S.C. § 523(a)(6). In order to prevail, the Plaintiff must establish by a preponderance of the evidence that the injuries caused by the Debtor were both willful and malicious. This requires that the Court focus on two distinct and different elements. *See In re Slosberg*, 225 B.R. 9, 16 (Bankr. D.Me. 1998).

In 1998 the Supreme Court defined the element of "willful" as consisting of "a deliberate or intentional *injury*, not merely a deliberate *act* that leads to injury." *See Geiger*,118 S.Ct. at 977. Thus, Plaintiff must show that the Debtor acted with intent to cause her injury. "[A] debtor who intentionally acts in a manner he knows, or is substantially certain, will harm another may be considered to have intended the harm and, therefore, to have acted willfully within the meaning of § 523(a)(6)." *Slosberg*, 225 B.R. at 19.

While the Debtor may have intended that his termination of the Plaintiff would compel her to spend more time at home raising her child, as Plaintiff alleges, he also had to know that terminating her would undoubtedly result in economic injury. Debtor also had to know that the termination and the uncertainty she encountered in negotiating a consulting contract with him would also cause emotional distress, particularly so soon after having delivered a child. Indeed,

Plaintiff testified that she informed the Debtor that the lack of any written commitment to employ her as a consultant was causing her serious emotional distress. Based on the above, the Court concludes that the Debtor's termination of the Plaintiff and the ensuing economic and emotional injuries caused by the termination was willful.

To succeed with her request that the debt be determined nondischargeable pursuant to Code § 523(a)(6), Plaintiff must also establish the element of malice. Debtor's counsel argues that in connection with the termination of Plaintiff, the Debtor never displayed any animosity towards the Plaintiff and never verbally or physically harassed her. However, "[t]he term 'malicious' means wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *Navistar Fin. Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84, 87 (2d Cir. 1996) (citations omitted). In this case, the jury in the State Court Action found that Debtor's termination of the Plaintiff was wrongful and that her sex was the "substantial or motivating factor in the decision to terminate her." Based on collateral estoppel, this Court concludes that the the Debtor's termination of the Plaintiff was without just cause or excuse. *See In re Fogerty*, 204 B.R. 956, 962 (Bankr. N.D. Ill. 1996); *see also In re Wilson*, 216 B.R. 258, 268 (Bankr. E.D.Wis. 1997) (noting that the debtor's actions in terminating the plaintiff's employment in violation of the Fair Employment Act were wrongful and without justification). Accordingly, the Court concludes that the Debtor's termination of the Plaintiff was malicious.

Based on the foregoing, it is hereby

ORDERED that the debt arising from the judgment entered in favor of Burstein and against the Debtor in the State Court Action is deemed nondischargeable pursuant to Code § 523(a)(6).

Dated at Utica, New York

this 25th day of August 2000

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge