

Dischargeability under § 523(a)(6)

Ford-Torres v. O'Shea, Adversary No. 07-6084-fra  
Robert O'Shea, Case No. 07-60265-fra7

7/21/10

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Unpublished

Plaintiff filed a complaint in state court against Defendant in 2006 alleging wrongful discharge, intentional infliction of emotional distress, intentional injury of an employee, and battery. The case was removed to the federal District Court and continues as an active case.

Defendant filed bankruptcy in 2007 and this adversary proceeding was filed seeking to determine the dischargeability of Plaintiff's claims against Defendant. Jurisdiction over the claims themselves and the determination of Defendant's liability continues to rest with the District Court.

Based on the evidence presented at trial, the court determined that claims based on certain allegations of the Plaintiff are nondischargeable under Code § 523(a)(6). Insufficient evidence was presented regarding other allegations, and any claims based on those allegations are subject to discharge in Defendant's bankruptcy.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 07-60265-fra7
ROBERT O'SHEA,	)	
	)	
_____ Debtor.	)	
	)	Adversary Proceeding
SHERRILL FORD-TORRES,	)	No. 07-6084-fra
	)	
Plaintiff,	)	
vs.	)	
	)	
ROBERT O'SHEA,	)	
	)	MEMORANDUM OPINION
_____ Defendant.	)	

I. INTRODUCTION

This matter came on for trial on July 14, 2010. Plaintiff was present, and represented by Scott Howell, her attorney. Defendant was present, proceeding *pro se*.<sup>1</sup> After careful consideration of the evidence

<sup>1</sup> At the opening of the trial, Defendant asked that the matter be postponed, claiming that he had insufficient notice of the trial date. He further alleged that, had he been given sufficient notice, he would have produced two witnesses. It was pointed out to the Defendant that he was present at a pre-trial hearing by telephone on February 10, at which time the July 14 trial date was announced. See Document No. 29.

(continued...)

1 and testimony of the parties, the Court concludes that some of the  
2 Plaintiff's claims, as described herein, must be excepted from discharge  
3 in the Defendant's Chapter 7 bankruptcy proceeding.

4 II. PROCEDURAL BACKGROUND

5 The events complained of (and described below) occurred between mid-  
6 August of 2003 and late April 2004. On February 13, 2006, Plaintiff  
7 filed a complaint in the Circuit Court for Marion County against  
8 Defendant and several others, alleging, among other things, wrongful  
9 discharge, intentional infliction of emotional distress, intentional  
10 injury of an employee, and battery. The case was removed to the District  
11 Court on June 26, 2006, and continues as an active case under the  
12 District Court's Case No. 06-CV-00914. There has been no trial on the  
13 merits of Plaintiff's claims in the District Court.<sup>2</sup>

14 Defendant filed a petition for relief under Chapter 7 of the  
15 Bankruptcy Code on February 7, 2007. This adversary proceeding was  
16 commenced by Plaintiff's complaint, filed on May 21, 2007.  
17 The complaint filed in this proceeding seeks to determine the  
18 dischargeability of claims against the Defendant. Jurisdiction over those  
19 claims and the determination of Defendant's liability continues to rest  
20 with the District Court.

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23 \_\_\_\_\_  
24 <sup>1</sup>(...continued)

24 Defendant failed to appear at a duly noticed final pre-trial conference  
25 on June 17, 2010. The motion to continue was denied.

26 <sup>2</sup> Plaintiff's second amended complaint filed in the District Court  
on May 24, 2007, was submitted as Exhibit 1.

1 III. FACTS

2 At all material times, the Defendant was the president of Cascade  
3 Valley Telecom, and the principal supervisor of its employees. Plaintiff  
4 was employed by Cascade Valley Telecom in August of 2003, and was  
5 discharged in April of 2004. Cascade Valley Telecom operated on contract  
6 with Jadent, Inc., an Oregon corporation of which the Defendant's  
7 brother, Tom O'Shea, is a principal owner and employee. Plaintiff  
8 testified that, during the course of her employment, there were several  
9 events or series of events which give rise to claims against Defendant  
10 which should not be discharged in the Defendant's bankruptcy.

11 1. **Backslapping**

12 On two occasions Defendant approached Plaintiff from behind, put a  
13 hand on her shoulder and clapped her with an open hand on the back,  
14 calling out, "How's it going?" or words to that effect. The force of the  
15 backslap was sufficient to cause Plaintiff to experience muscle strain,  
16 headaches, and residual pain for several days.

17 2. **Parking Lot Collison**

18 When Plaintiff emerged between parked cars in the company's parking  
19 lot, the Defendant, in his car, allegedly swerved toward the Plaintiff  
20 forcing her to fend the car off by putting out both hands, which struck  
21 the passenger side window of the Plaintiff's car. The impact was  
22 sufficient to leave bruises on Plaintiff's hands, and cause joint pain  
23 which persists to this day.

24 3. **Oppressive Sexual Banter**

25 On the first week on the job, Defendant approached Plaintiff with a  
26 riddle: "Tell me a number associated with sex." This was the first of a

1 series of sexual and personal innuendo such as:

- 2 • Frequent remarks about female employees' physical characteristics;
- 3 • Frequent remarks that he liked big breasts;
- 4 • Frequent remarks that if a female employee was well-dressed, that
- 5 she was "all dressed up to get lucky later on";
- 6 • Absences of female employees were attributed to sexual activity the
- 7 night before;
- 8 • On occasions when employees sought cash advances on their salaries,
- 9 Defendant would either throw the cash on the floor requiring the
- 10 employee to stoop down to pick it up, or place the cash in the
- 11 zipper of his pants inviting the employee to retrieve it.
- 12 • Defendant announced to Plaintiff that he did not like "fat girls"
- 13 because they did not make good lovers.

14 Plaintiff objected to this behavior, and was told "don't say another  
15 word or you'll be fired." Plaintiff credibly testified that she did  
16 nothing to encourage or initiate such banter, and that the constant  
17 exposure to it has given rise to depression and anxiety attacks.

#### 18 **4. Plaintiff's Termination**

19 In what he attributes to poor banking practices, Defendant's company  
20 frequently failed to make payroll on time, and was delinquent in its  
21 duties to employees respecting withholding taxes and other payroll  
22 deductions. Finally fed up, the employees voted to go on an *impromptu*  
23 strike. At the same time, Plaintiff and one other employee complained to  
24 Mr. Tom O'Shea, the Defendant's brother. He gave Plaintiff some  
25 assurance that he would act on these problems.

26 // // //

1 After the one-day strike, all the employees except Plaintiff and one  
2 other returned to work. Defendant, using profanity which need not be  
3 repeated here, announced that whoever had complained to his brother would  
4 be fired. Plaintiff and the other colleague who had not returned to work  
5 were immediately discharged.

#### 6 IV. DISCUSSION

7 The Bankruptcy Code, at § 523(a)(6), excepts from discharge any debt  
8 "for willful and malicious injury by the debtor to another entity or to  
9 the property of another entity." Claims excepted from discharge under  
10 this provision arise out of "a deliberate or intentional injury, not  
11 merely a deliberate or intentional act that leads to injury." Kawaauhau  
12 v. Geiger, 523 U.S. 57, 61 (1998). The willfulness and maliciousness  
13 elements must be separately analyzed. In re Jercich, 238 F.2d 1202 (9th  
14 Cir. 2001). The willfulness element requires that the debtor had either  
15 a subjective intent to inflict the injury complained of, or a belief that  
16 the injury was substantially certain to occur. See In re Su, 290 F.3d  
17 1140 (9th Cir. 2002). The element of malice requires a showing that the  
18 debtor performed a wrongful act, that he did so intentionally, that the  
19 wrongful act necessarily caused injury, and that the action was without  
20 just cause or excuse. Jercich at 1209.

21 In discharge cases, the burden is on the plaintiff to show, by a  
22 preponderance of the evidence, that the statutory requirements for  
23 exception to discharge have been met. Grogan v. Garner, 498 U.S. 279  
24 (1991).

25 The bankruptcy court must determine in the context of this  
26 proceeding whether the evidence presented at trial meets the legal

1 standards under Code § 523(a)(6) to except a resulting state-law claim  
2 based on that evidence from discharge:

3       **1. Backslapping**

4       Under Oregon law the essential element of a battery is a non-  
5 consensual touching of one person by another. See Stone v. Finnerty, 182  
6 Or.App. 452, 50 P.3d 1179 (2002). The conduct which brings about the  
7 harm must be an act of volition on the actor's part, with the intent to  
8 bring about a harmful or offensive contact. It is not necessary that the  
9 contact do actual physical harm - only that the contact is offensive or  
10 insulting. Bakker v. Baza'r, Inc., 275 Or. 245, 249, 551 P.2d 1269  
11 (1976). The evidence here demonstrates that Defendant struck Plaintiff  
12 with sufficient force to cause pain and lingering aftereffects. The  
13 uninvited application of force to this extent is tortious under Oregon  
14 law, and constitutes a willful and malicious injury under Code  
15 § 523(a)(6).

16       **2. Parking Lot Collision**

17       Plaintiff testified that Defendant swerved his car towards her as  
18 she emerged between two other cars. However, she did not make impact  
19 with the front of the car, but rather the side. Defendant denies any  
20 intention to injure or harass the Plaintiff. The circumstances are  
21 sufficiently murky that the Court cannot find that Plaintiff has  
22 sustained her burden of proof with respect to this incident. It follows  
23 that any claim based on this incident is discharged.

24       **3. Oppressive Sexual Banter**

25       Plaintiff's detailed description of Defendant's boorish and sexually  
26 oriented behavior was met only by a vague general denial at trial.

1 Defendant's behavior is a form of employment discrimination, see ORS  
2 659A.006 et seq., and, given the circumstances of this case, constitutes  
3 an intentional infliction of emotional distress. It is clear that the  
4 Defendant's behavior was both willful and malicious: the remarks, crude  
5 behavior regarding cash advances, and other actions described to the  
6 Court were deliberate, and clearly intended to dominate and distress the  
7 victims of the acts, including the Plaintiff. The actions were  
8 malicious, being wrongful and intentional, done without just cause, and  
9 necessarily injured the Plaintiff. Claims arising out of the Defendant's  
10 workplace conduct are excepted from discharge.

#### 11 4. **Wrongful Termination**

12 Plaintiff was discharged because she reported the Defendant's  
13 misconduct to the Defendant's brother, apparently because brother Tom  
14 O'Shea's corporation was the source of Cascade Valley Telecom's revenues.  
15 Termination of employment in retaliation for efforts to complain of  
16 violations of state or federal law by an employee violates Oregon law.  
17 ORS 659A.199. To the extent the Defendant's actions come within the  
18 ambit of ORS 659A.199 or constitute a common law claim under non-  
19 bankruptcy law, the resulting claim will be excepted from discharge. The  
20 Debtor's conduct constitutes a willful and malicious injury to  
21 Plaintiff's employment interest.

#### 22 V. CONCLUSION

23 As noted, it is the role of the District Court to liquidate  
24 Plaintiff's claims against Defendant. Claims based on the backslapping,  
25 maintenance of a hostile work environment, and wrongful termination of  
26 employment are excepted from discharge to the extent of any damages

1 awarded by the District Court. Any and all remaining claims by Plaintiff  
2 against Defendant are discharged. Plaintiff is, accordingly, enjoined  
3 from pursuing these claims in any further proceeding. 11 U.S.C. § 524.  
4 Counsel for Plaintiff should submit a form of judgment consistent with  
5 this Memorandum Opinion.



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8 FRANK R. ALLEY, III  
9 Bankruptcy Judge  
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