UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re WILLIAM PARKE BARRY, Debtor.	Case No. LA 01-48011 TD Adv. No. LA 02-01475 TD Chapter 7 MEMORANDUM OF DECISION
CARRIE QUINN, Plaintiff. v. WILLIAM PARKE BARRY, Defendant.	DATE: March 30, 2006 TIME: 9:00 a.m. PLACE: Courtroom 1345

Plaintiff Carrie Quinn by her adversary complaint seeks nondischargability, pursuant to Section 523(a)(6) of the Bankruptcy Code, of a debt created by a state court verdict and judgment of sexual harassment entered in 2001 against Defendant William Parke Barry. While the state court jury, in its special verdict, also found that the Defendant did not intend to cause Plaintiff emotional distress, the Ninth Circuit memorandum disposition herein notes, “The jury’s findings did not reach the question

of whether Barry intended to cause Quinn any harm at all, i.e., the harm of being subjected to offensive pornographic images."

This adversary is here on remand from the United States Court of Appeals for the Ninth Circuit after review of a district court order reversing my summary judgment ruling in favor of the Plaintiff Carrie Quinn. The Ninth Circuit concluded that the district court correctly reversed my summary judgment order in favor of Ms. Quinn but that the district court "erred in ordering summary judgment in favor of Barry." The Ninth Circuit remanded this matter "to the bankruptcy court to determine whether the debt is for a 'willful injury' for dischargeability purposes."

On remand, the adversary was tried by written declaration pursuant to my trial setting order, subject to such live cross-examination as might be requested by either side. Ms. Quinn was cross-examined at trial about her written trial declaration and attached exhibits. Mr. and Mrs. Barry filed written trial declarations and exhibits. Plaintiff waived cross-examination, subject to an oral agreement with Defendant to read into the record Mr. Barry's response to request for admission number 2 in the prior state court suit and paragraph 22 of Mr. Barry's answer to the state court complaint filed by Ms. Quinn. Four written trial declarations were admitted in evidence along with all exhibits offered by each side, including marked portions of a transcript of Mr. Barry's October 19, 2000 state court deposition attached as Exhibit A to Plaintiff's Declaration of Gregory B. Scher. The following are my findings of fact and conclusions of law.

As of 1994, Ms. Quinn's family and Mr. Barry's family had been longtime friends and had shared numerous holidays and important family and community events with each other over 25 years or so. Mr. Barry, who is a generation older than Ms. Quinn, was the owner and chairman of the board of a consulting company. In late 1994, he approached Ms. Quinn's father and expressed an interest in hiring Ms.

Quinn. Shortly after, Ms. Quinn met with Mr. Barry, discussed the job, an offer was extended by Mr. Barry, and Ms. Quinn accepted and went to work as Mr. Barry's administrative assistant.

Ms. Quinn, who was then in her late twenties, was the only woman regularly working at Mr. Barry's company and reported directly to Mr. Barry. She reported to nobody else though her written job description (Plaintiff's Exhibit A) suggested otherwise. She assisted Barry in setting up sales appointments, preparing client lead forms, qualifying client leads, filing paperwork and purchasing office supplies, among other office duties. Over the years, her work required her to retrieve potential client folders from a credenza that Mr. Barry kept in his private office. Mr. Barry would call from outside the office to ask Ms. Quinn to pull a potential client folder from his credenza and set up an appointment. In addition, Ms. Quinn regularly was required to retrieve other office supplies from Mr. Barry's credenza and to set up client files or to work with office records in Mr. Barry's credenza or forms that were stored there. It is significant that Mr. Barry also kept a lockable file cabinet in his private office and also had a large desk there, neither of which Ms. Quinn needed access to in order to fulfill her duties as directed by Mr. Barry.

In 1995, while going about her normal duties, Ms. Quinn found a few loose pictures of topless and nude women mixed in among the files in the credenza. This happened again two or three times over the next couple of years. In 1997, the company moved from Los Angeles to Pasadena. Ms. Quinn was asked to pack the materials in Mr. Barry's credenza. When she did so she saw more pictures of nude women. Later that year, Ms. Quinn had a baby and when only she and Mr. Barry were present, Mr. Barry commented about how large her breasts had become. Ms. Quinn testified that as time went by, the number of pictures increased and she began to find open magazines with pictures of nude women in the credenza.

In 1998, the company moved again. Plaintiff's Exhibit B displays the layout of the company's office in the 1998-1999 time period which was similar to the two prior office layouts that Ms. Quinn worked in. By 1998, Mr. Barry had begun to make collages by cutting magazine pictures out and pasting them on sheets of paper that he would put into plastic sheet protectors and clip into a 3-ring binder, usually left in the lower right credenza drawer. At that time, the pictures became more graphic and began to depict nude men and women engaged in explicit sex acts, including bondage, female urination and simulated violence. In addition, Mr. Barry then began to move the pictures around, apparently in an effort to get Ms. Quinn's attention. For example, Ms. Quinn began to observe that when she would go into the credenza on her own volition to perform her regular duties, she would see no pictures. Later the same day, when Mr. Barry would phone Ms. Quinn from outside the office to ask her to retrieve information from a particular file or to perform some other Barry-directed work assignment with a particular file, she would find offensive pictures in the file that she was directed to by Mr. Barry, though the pictures had not been present in the file earlier in the day. In addition, Ms. Quinn observed that the offensive pictures changed from day to day. At the same time, Ms. Quinn found that the number of loose pictures increased and now had to be moved by her in order to perform her Barry-directed office duties.

Matters became worse from Ms. Quinn's perspective in 1999. Mr. Barry began making crude sexual remarks to Ms. Quinn when the two were alone. For example, he commented on the size of her breasts. He asked her if she had bladder or yeast infections. After Mr. Barry's wife had breast cancer surgery, he said to Ms. Quinn, "I just left my wife on a gurney with a probe sticking out of her boob," and then added, "Do you think it was vanilla milk or chocolate milk?" On more than one occasion, Mr. Barry said to Ms. Quinn, "In all my excitement, I have to go down the hall to the little

boys' room." On several occasions he said to her, "Turn down the air conditioning; I have a major shrinkage going." Sometimes, after making such comments, he would stick his tongue out and touch the tip of his nose with it. Mr. Barry also began to approach Ms. Quinn uninvited and from behind while she was working at her desk and massage Ms. Quinn's back and shoulders.

Finally, in December 1999, Ms. Quinn spoke to her husband for the first time about what was going on in her work place experiences with Mr. Barry and Mr. Barry's pictures and magazines and she decided to quit. After making that decision and discussing her concerns with another senior male employee of the firm, she went to the company offices on the afternoon of December 24 with her husband to retrieve her personal belongings. While there, she and her husband took the photographs of the pictures in Barry's credenza that were admitted in evidence over Defendant's objection as Plaintiff's Exhibit C.

Mr. Barry's written testimony challenged several details of Ms. Quinn's written testimony. For example, as to the testimony of Ms. Quinn that Mr. Barry touched her inappropriately, Mr. Barry testified on redirect at trial that Ms. Quinn never indicated to him that she did not want him to touch her shoulder or that she found such touching to be offensive. I note that his sworn written testimony filed with the court on March 6, 2006, said: "I have never rubbed her back or shoulders or touched her." (William Barry Trial Declaration, 4:8-9.) However, Barry admitted, in paragraph 22 of his answer to Quinn's state court complaint read into the record at trial here by stipulation, ". . . he touched Plaintiff's shoulders on occasion when he spoke to her as she sat at her computer for the purposes of catching her attention and/or to indicate approval of something she had done."

Mr. Barry's written testimony also challenged whether there was any need for Ms. Quinn to access information in the files in Mr. Barry's credenza or to unpack the

credenza drawers when the business was relocated. He claimed there were no pictures of men and that there were no pictures of violence or bondage. He said that he asked her about breast feeding "so [he] could make appropriate accommodations in her work schedule" and otherwise "never made any reference to her breasts." He testified that Ms. Quinn complained to him during a physically uncomfortable, outside-the-office work assignment that she had a yeast infection.

Finally, Mr. Barry acknowledged the inappropriateness of taking such [sexually explicit] material to the office but said that he "never had any knowledge that anyone, including Ms. Quinn, had seen the material until after [Ms. Quinn's resignation] in December 1999." His written declaration states: "Had Ms. Quinn complained or even commented to me I would have immediately removed the material and destroyed it." He shredded all the pornography immediately upon receiving a December 29, 1999 fax from Ms. Quinn's attorney (Defendant's Exhibit A).

Sue Barry, Mr. Barry's wife, testified in writing that she was in the company's offices frequently in March and April 1999 when her husband was in the hospital and that she had access to her husband's credenza. She said, "At no time did I see any pornographic material in . . . the credenza." (Sue Barry Trial Declaration, 2:12-18).

On cross-examination Ms. Quinn was asked why she had not previously told Mr. Barry, Mrs. Barry, or the Barry's son Steve who sometimes worked in the office about the pornography. Her answer was convincing: She said, "It was just too awkward to talk about." She also said, "I was scared about losing my job. I had just bought a house. We had a mortgage to pay." As the cross-examination continued, she added, "Toward the end of my employment the pornography became, I felt, violent depictions, and I was not going to approach him [apparently referring to Mr. Barry] alone all by myself."[1] In the end, Quinn resigned from her job, and there is no

[1]A verbatim, chambers-prepared transcript of the referenced portion of the cross-examination exchange is attached as an Appendix to this memorandum.

explanation in the evidence for her resignation, other than Quinn's testimony.

Although there are conflicts between the testimony, written and oral, of the two sides, and cross-examination of the witnesses on disputed points was limited to cross-examination of Quinn, I find Ms. Quinn's testimony to be compelling and convincing and conclude that Ms. Quinn proved her claims by a preponderance of the evidence. She suffered serious embarrassment and jeopardy to her job and her status as an employee. Her embarrassment and jeopardy were aggravated by the social closeness of the community she worked in, the closeness and long-standing relationships of the Barry and Quinn family members, the prominence of Mr. Barry in the community, and the fact that he was the owner of the company, her boss, and her direct and only supervisor. In the end, she resigned from her job and brought suit to seek redress.

By contrast, I find that Mr. Barry's testimony is less credible and inadequate to explain the pattern and practice he pursued, as described by Ms. Quinn, over the 4-year course of Ms. Quinn's employment under his direct supervision and given the private nature of the working relationship between the two of them that he engineered and orchestrated.

Of the two versions of events described, Quinn's and Barry's, Quinn's was the more believable. Her demeanor as a witness at trial, as I observed it, was frank, honest, and forthright, including her acknowledgment of things she didn't know or remember from years ago and several unresponsive answers to cross-examination that I struck from the record on Defendant's objection and motion. In the end, her demeanor added to the force of her testimony. I had little opportunity to observe Mr. Barry's demeanor as a witness because he was not cross-examined, and his testimony on redirect was very brief.

Mr. Barry's attorney claimed in his closing argument that there was no

corroboration for Quinn's story. I do not agree. I find substantial corroboration in the following factors established by the evidence. Barry was the boss. He alone assigned Quinn's duties. He apparently wrote or approved her job description (Plaintiff's Exhibit A). He acknowledged the offensive and inappropriate nature of any employee keeping pornographic material in the office. He had a lockable file cabinet and a private desk in his office, neither of which Quinn needed access to in order to perform her duties. He acknowledged that he kept pornographic material in his office credenza and that it consisted of photographs, several types of magazines, and his binder of picture cutouts kept in plastic sheet protectors. On redirect examination by his lawyer, as well as in paragraph 22 of his April 20, 2000 answer to Quinn's state court complaint, he acknowledged his physical contact with Quinn while she was sitting at her desk, though in his trial brief filed with the court on March 6, 2006, he denied having any physical contact with her. And, finally, he acknowledged he never showed the pornographic material to anybody else and that he shredded all the pornographic material immediately after he received Quinn's lawyer's December 29, 1999 fax complaining of his conduct. While this is a "she said, he said" dispute, I find that the foregoing evidence tends to corroborate Quinn's version of events, especially considering the sequence of events and the graphic nature of the photographs that Quinn and her husband took of the pornography on her last visit to the office to pick up her belongings. The circumstantial evidence undermines Barry's written denial of any intent to harm Quinn. The totality of the evidence leads me to the conclusion that Barry's version of disputed events is less credible and unpersuasive.

Notwithstanding Barry's verbal denials, I conclude that the evidence establishes that Barry had a subjective motive to inflict injury on Quinn. Quinn also has proved that Barry acted with a subjective belief that harm to Quinn was substantially certain to occur. The evidence establishes that by Barry's conduct, Quinn was subjected to

degrading working conditions that placed her at a distinct, unfair, and inappropriate disadvantage to him with respect to her employment. I conclude that Barry's wrongful conduct was intended to degrade and harm Ms. Quinn. The nature of Barry's conduct directed at Quinn was predatory and cannot properly be categorized as negligent or reckless. It was conduct purposefully undertaken by Barry. I further conclude that Quinn was harmed significantly in all the respects outlined in her testimony, and as I have summarized above, from page 6, line 18 through page 7, line 12.

Section 523(a)(6) of the Bankruptcy Code provides:

> (a) A discharge under Section 727 . . . 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.

The Supreme Court, in Kawaauhua v. Geiger, 523 U.S. 57 (1998) held that nondischargeability under § 523(a)(6) does not apply to "debts arising from recklessly or negligently inflicted injuries." Id. at 64. The Court also said: "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Id. at 61.

In Carrillo v. Su (In re Su), 290 F.3d 1190 (9th Cir. 2002), the Ninth Circuit clarified that the willful injury requirement of § 523(a)(6) is met "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct. Id. at 1142. In Su, the Ninth Circuit also said:

> The subjective standard correctly focuses on the debtor's state of mind and precluded application of § 523(a)(6)'s nondischargeability provision short of the debtor's actual knowledge that harm to the debtor was substantially certain.

Id. at 1146 [emphasis added]. In re Su also pointed out:

> To be clear, when we speak of "actual knowledge" we are not suggesting that a court must simply take the debtor's word for his state of mind. In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action. See, e.g., . . . (In re Endicott, 254 B.R. 471, 477, n. 9 (Bankr. D. Idaho, 2000)) ("The use of the term 'objective' is not talismanic nor at odds with Geiger if it is viewed as simply recognizing that a debtor will have to deal with any direct or circumstantial evidence which would indicate that he must have had a substantially certain belief that his act would injure, notwithstanding any subjective denial of knowledge."). This approach, however, remains fundamentally subjective in that it retains its focus on what was actually going through the mind of the debtor at the time he acted.

Id. fn 6.

I conclude that the evidence here, as outlined above at length, establishes that Barry had a subjective motive to injure Quinn and that Barry understood that injury to Quinn was substantially certain to result from his conduct. Notwithstanding his denial of such knowledge, I believe Barry acted with actual knowledge of the consequences to Quinn, as she described them.

While Barry (1) professes (a) ignorance of any concern on Quinn's part and (b) embarrassment at his conduct, and (2) protests that he would have destroyed the offensive material had he ever been told it was offensive to Quinn, his explanations and protest ring hollow in the face of Quinn's convincing account of Barry's 4-year pattern of behavior, especially given her testimony on cross-examination when asked why she did not say anything, to Mr. Barry, Mrs. Barry, or Steve Barry: "It was just too awkward to talk about. . . . I was scared about losing my job. I had just bought a house. We had a mortgage to pay. . . . Toward the end of my employment the pornography became, I felt, violent depictions, and I was not going to approach him alone all by myself."

Defendant's challenge that Quinn never voiced any objection to Barry's conduct

prior to her attorney's December 29, 1999 letter of protest also misses the mark. The issue here is Barry's intentional conduct. The Plaintiff's alleged negligence is not a defense to an intentional tort under § 523(a)(6).

I believe that Barry's conduct also meets the Ninth Circuit test for the "malicious" injury requirement of § 523(a)(6) as separate from the "willful" requirement: "A 'malicious injury' involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." Petralia v. Jercich (In re Jercich), 238 F.3d 1202 at 1209 (9th Cir. 2001) [citations omitted], cert. denied, 533 U.S. 930 (2001).

I conclude that the evidence here also meets the malicious injury test of Jercich. Under the circumstances, and based upon all the foregoing, Barry's conduct was (1) wrongful, (2) done intentionally, (3) necessarily caused injury to Quinn, and (4) was accomplished without just cause or excuse. I conclude that Defendant's evidence is insufficient to demonstrate just cause or excuse for Barry's conduct, especially in light of the fact that had his motive been solely to seek private self-gratification through a process of keeping and looking at pornography rather than a subjective, actual intent to prey upon Quinn, at all times during her employment he could have (1) kept the offensive materials in his lockable, private file cabinet or in his desk, neither of which Quinn needed access to to do her job; (2) kept his hands off her back and shoulders; (3) not voiced inappropriate remarks to Quinn; and (4) he would not have exposed her during the performance of her duties to increasingly offensive pornography and behavior. The fact that he did none of those self-exculpating things but rather actively pursued a course of conduct that was increasingly offensive, embarrassing, and threatening to Quinn, leads me to the conclusion that his conduct was intentionally injurious to Quinn and also maliciously directed by him at Quinn.

The debt established by the state court judgment in favor of Quinn shall be and hereby is deemed nondischargeable.

A separate judgment herein will be entered consistent with the foregoing.

IT IS SO ORDERED.

Dated: 4/11/06

/s/
THOMAS B. DONOVAN
United States Bankruptcy Judge

APPENDIX

Quinn v. Barry, Adv. LA 02-01475 TD

Chambers transcription of a portion of the March 30, 2006, cross-examination of Plaintiff Carrie Quinn by Defendant's Counsel William H. Burd for the approximate period 9:35 a.m. to 9:38 a.m.

Burd: In your declaration you indicate that you, you first saw objectionable material almost right after you started in 1995, correct?

Quinn: Correct.

Burd: Did you ever say anything to Mr. Barry about the material?

Quinn: No.

Burd: Sue Barry frequently was in the offices of Barry & Co., was she not?

Quinn: She was there from time to time. I wouldn't say frequently.

Burd: Let's see, in 1999 Mr Barry was in a serious automobile accident, the last year you were employed. He was in a serious automobile accident and his pelvis was crushed, right?

Quinn: I don't know if it was 1999, the accident. I'm not sure.

Burd: He was out for an extended period of time after the automobile accident, correct?

Quinn: Correct.

Burd: Did you recall Sue Barry being in the office during that time?

Quinn: Correct. She was in the office other times, too. Before the car accident.

Burd: And during 1999, the Barrys' son Steve Barry was also working in the office of Barry & Co., wasn't he?

Quinn: Correct.

Burd: And you were fairly well acquainted with Steve Barry?

Quinn: Correct.

Burd: He played soccer with your brother?

Quinn: Correct.

Burd: Did you ever say, "Steve, you know your Dad's got this stuff in his office that really bothers me. He needs to get rid of it. Will you talk to him?" Did you ever do that?

Quinn: No.

Burd: Did you ever say to Ms. Barry, "Mrs. Barry, you really need to know Mr. Barry is behaving inappropriately. He has stuff in the office that he shouldn't have there." Did you ever say that?

Quinn: No. It was just too awkward to talk about.

Burd: Is it accurate then that the only reason that you never said anything to Steve Barry or to Sue Barry or to Mr. Barry is because it was too awkward to talk about?

Quinn: No.

Burd: Why else? What other reason did you have for not saying anything to any of them?

Quinn: Well, I was scared about losing my job. I had just bought a house. We had a mortgage to pay. And also, I mean, I don't think it's my [pause] what Mr. Barry does in his personal life is his own choice, but I really don't want to be talking about with his family members, you know, descriptive pictures. I mean, I didn't want to say: I don't like looking at vaginas and penises at work.

Burd: You thought it was preferable to file a lawsuit than to say something to Mr. Barry or Sue Barry or Steve Barry?

Quinn: Toward the end of my employment the pornography became, I felt, violent depictions, and I was not going to approach him alone all by myself.

NOTICE OF ENTRY OF JUDGMENT OR ORDER
AND CERTIFICATE OF MAILING

TO ALL PARTIES IN INTEREST LISTED BELOW:

1. You are hereby notified that a judgment or order entitled:

MEMORANDUM OF DECISION

was entered on 4/12/06.

2. I hereby certify that I mailed a true copy of the order or judgment to the persons and entities listed below on 4/12/06.

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Dated: 4/12/06

Clerk