

discharge in accordance with section 523(a)(6)² of the Bankruptcy Code. The Plaintiff's complaint, which incorporates the allegations of her underlying Federal District Court complaint, essentially alleges that she was an employee of Blythe-Nelson, a Texas general partnership of which the Debtor is a general partner. During her employment, the managing partner (James Blythe, a chapter 7 debtor before Bankruptcy Judge Lynn in Case No. 02-40898-DML-7) is alleged to have "initiated a systematic pattern of sexual harassment and humiliation which created great mental anguish on the part of Plaintiff and which substantially affected the conditions, privileges, and terms of her employment." See Exh. C to Plaintiff's Complaint, ¶ 3.02. Plaintiff further alleges that Nelson "had actual knowledge of Defendant Blythe's pattern of sexual harassment . . . and of Plaintiff's significant mental anguish and chose to take absolutely no corrective action whatsoever" *Id.*

Nelson has moved for summary judgment on the ground that as a matter of law, the conduct alleged in the complaint - *ie.*, his failure to act, is not the kind of intentional conduct which section 523(a)(6) requires.³ In other words, Nelson contends that the complaint fails to allege that he was the culpable actor and therefore Plaintiff's section 523(a)(6) complaint must fail.

The Court does not believe that it is appropriate to establish a *per se* rule that an omission, as opposed to an act, can never serve as the basis for a section 523(a)(6) claim. First, under general principles of tort law, an omission is actionable where there is a duty to act. An "act of omission" is defined as "the failure to do something that is legally required; a nonoccurrence that involves the

² Section 523(a)(6) provides that a discharge under section 727 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 . . ." To prevail in a section 523(a)(6) action, a plaintiff must prove, by a preponderance of the evidence, a willful and malicious injury by the debtor to the plaintiff or her property. See *In re DeVoll*, 266 B.R. 81 (Bankr. N.D.Tex. 2001).

³ Both parties submitted evidence outside the face of the pleadings. While technically the motion therefore seeks summary judgment, the parties agree that it is essentially a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), made applicable to this proceeding by Fed. R. Bankr. P. 7012, as the Debtor's principal argument is that the facts alleged in the complaint do not entitle Plaintiff to relief.

breach of a legal duty to take positive action.” *Black’s Law Dictionary* 25 (7th ed. 1999). The leading treatise on the law of torts states that the duty

which arises in many relations to take reasonable precautions for the safety of others may include the obligation to exercise control over the conduct of third persons . . . [t]hus the duty of a carrier toward its passengers may require it to maintain order in its trains and stations, and to use reasonable care to prevent not only conduct which is merely negligent, but also physical attacks . . . on the part of other passengers or strangers. A similar obligation rests upon . . . employers toward their employees

W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 56, at p. 383 (5th ed. 1984).

Second, cases decided after the Supreme Court’s decision in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) continue to recognize that an omission, as opposed to an act, can be “willful and malicious” within the meaning of section 523(a)(6). *See, e.g., In re Jercich*, 238 F.3d 1202 (9th Cir. 2001) (failure to pay wages owed pursuant to employment contract despite ability to do so, and instead using funds for personal investments, was deliberate choice and willful and malicious under 523(a)(6); *In re Vestal*, 256 B.R. 326, 328 (Bankr. M.D. Fla. 2000) (“for an act *or omission* of a debtor to qualify as willful and malicious... a debtor must have intended not only the act *or omission*, but also the injury which resulted”) (emphasis added).

In addition, cases construing section 523(a)(2) of the Bankruptcy Code have held that an omission is actionable under that section. *See, e.g. In re Docteroff*, 133 F.3d 210, 216 (3rd Cir. 1997) (a “finding of fraud does not require an affirmative statement ... [it] may be predicated on a failure to disclose [a] material fact. [C]ourts have overwhelmingly held that a debtor's silence regarding material fact can constitute a false representation" (quoting *In re Van Horne*, 823 F.2d 1285, 1288 (8th Cir.1987))). The *Docteroff* court also concluded that the debtor in the case before it inflicted willful and malicious injury within the meaning of section 523(a)(6) when he intentionally disregarded his duty to disclose his diversion of funds for personal use.

Thus, it is theoretically possible to state a claim under section 523(a)(6) premised upon an omission rather than an affirmative act, and there are conceivably facts under which such a plaintiff would be entitled to relief. Nevertheless, in order to prove such a claim under section 523(a)(6) here, the Court notes that the Plaintiff will have to meet an extraordinarily high burden. She must establish that Nelson's *failure to act* was intentional, as opposed to merely negligent or reckless. *See, e.g. In re Vestal*, 256 B.R. 326 (Bankr. M.D. Fla. 2000) (failure to monitor accounts resulting in injury to plaintiff could theoretically support a claim under 523(a)(6), but debt held dischargeable because plaintiff proved only that the failure to monitor was negligent). She must further show that Nelson's failure to act was with "either an objective certainty of harm or a subjective motive to cause harm." *In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998). It is, of course, premature to know whether the Plaintiff will be able to meet this high burden of proof.

For these reasons, the Motion is denied, without prejudice to a future motion for summary judgment on other grounds should Nelson believe that the Plaintiff lacks evidence in support of her claim.

So Ordered.

SIGNED: August 20, 2002.

Barbara J. Houser
United States Bankruptcy Judge