The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability, and Exemptions

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I. INTRODUCTION

Bankruptcy courts, facing a surge in claims stemming from employment discrimination, are slowly exploring the impact of this area of law on case administration. An inherent conflict exists between the policies underlying employment discrimination and bankruptcy laws. On the one hand, employment discrimination laws seek to protect employees by making them whole for losses suffered, while at the same time deterring management from discriminating again. Conversely, the bankruptcy reorganization process stresses rehabilitation of the debtor and equality of distribution among the claimants. Although the Bankruptcy Code (the “Code”)$^1$ affords some protection to victims of discrimination, their claims are not afforded special treatment under the bankruptcy laws. Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of Title VII of the Civil Rights Act of 1964$^2$ and state discrimination statutes. The swelling tide of insolvencies involving parties to discrimination lawsuits warrants an analysis of both the treatment of employment discrimination claims in bankruptcy and the impact of these claims on the bankruptcy process.$^3$

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3. There is a dearth of publications on the topic and related topics. See generally Mette H. Kurth, An Unstoppable Mandate and an Immovable Policy: the Arbitration Act and the Bankruptcy Code Collide, 43 UCLA L. Rev. 999 (1996) (discussing the conflict between the statutory grant of jurisdiction to bankruptcy courts and the mandate of the Federal Arbitration Act, 9 U.S.C. §§ 1-17 (1994), that arbitration provisions be strictly enforced and concluding that a narrower assertion of bankruptcy court jurisdiction is appropriate to resolve the seeming statutory conflict).
This article begins with a basic review of the bankruptcy process and the Code's scheme for payment of claims. Initially, this article will discuss the priority status of discrimination claims. Thereafter, the application of the automatic stay to employment discrimination claims and possible grounds for stay relief are examined. These issues arise in cases involving both corporate and individual debtors. Finally, this article will explore the potential methods to except employment discrimination claims from the debtor's discharge, including present day principles of collateral estoppel and the ability to exempt employment discrimination claims in bankruptcy. These are issues unique to bankruptcy cases involving individual debtors.4

The primary aim of this article is to provide a road map for practitioners representing both creditors and debtors in bankruptcy cases involving employment discrimination claims. It will also offer lawmakers a few brief suggestions on resolving the conflict between employment and bankruptcy laws.5

II. BASIC BANKRUPTCY PRINCIPLES AND PRIORITY OF PAYMENTS TO CREDITORS

The Code is a compilation of federal statutes contained in Title 11 of the United States Code governing the bankruptcy process.6 A bankruptcy case may be commenced voluntarily by an eligible debtor filing a petition for relief.7 The voluntary petition constitutes the "order for relief."8 In other words, no court action is necessary for many provisions of the Code that afford the debtor "relief" from creditors to spring into effect. A case may also be commenced involuntarily by the requisite number of eligible creditors filing a petition against a debtor under

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4. A companion paper contemplated by the author will explore the estimation of discrimination claims in bankruptcy, the potential for an award of attorneys' fees in favor of discrimination claimants, allowance of punitive damages, grounds for appointment of a trustee where management engages in employment discrimination, a trustee's standing to prosecute employment discrimination claims, and related confirmation issues.

5. At the time of writing this paper the proposed amendments to the Code are in utter flux because the Democrats assumed control of Senate, the United States is at war against terrorism, and the biggest bankruptcy case in history, In re Enron Corp., is fostering criticism of the proposed amendments. Last year, the House of Representatives and Senate passed different versions of a bill to revise the Code, neither of which will impact the treatment of employment discrimination claims. See S.R. 420, 107th Cong. (2001); H.R. 333, 107th Cong. (2001).

6. Cases commenced prior to October 1, 1978 are governed by the now repealed Bankruptcy Act of 1898, as amended, Pub. L. No. 95-598, 30 Stat. 544 (repealed 1978) [hereinafter the "Act"].


8. Id. The so-called "order for relief" provides the debtor with the fundamental relief available under the Code, such as imposition of the automatic stay.
In an involuntary case, an "order for relief" is entered by the court when the case is not controverted or after trial when the petitioning creditors establish that the debtor is not paying its debts as they become due where such debts are not the subject of a bona fide dispute. Within fifteen days after entry of the "order for relief," the debtor must file its schedules and statements of financial affairs. These are official forms that identify all the debtor's creditors and describe the debtor's assets and liabilities. The commencement of the case creates a bankruptcy estate, which includes all of the debtor's legal or equitable interests in property as of that date. Individual debtors, however, may exempt certain property from the estate. Exempt property is not subject (during or after the bankruptcy case) to any of the debtor's debts that arose, or are determined to have arisen, before the commencement of the case.

In his schedules, the debtor must identify all property, including lawsuits, he claims as exempt. Objections to the debtor's claimed exemptions must be timely filed or the exemption will not be allowed.

The Code contains five chapters pursuant to which a debtor may seek relief, to wit, chapters 7, 9, 11, 12, and 13. Chapter 7, the most frequently utilized chapter, provides for liquidation of the debtor's non-exempt assets by a trustee appointed from a panel of private trustees.

The chapter 7 trustee is charged with administering the estate, which includes: liquidating the assets; accounting for property received; investigating the financial affairs of the debtor; and objecting to the allowance of the debtor's claimed exemptions.
Chapter 11 involves a reorganization of the debtor's debts through a plan of reorganization confirmed (approved) by the court. Unless a trustee is appointed by the court, the debtor remains in possession of its assets and is referred to as a debtor-in-possession. The debtor-in-possession is charged with administering the chapter 11 case, which includes investigating the: acts; conduct; assets; liabilities; and financial affairs of the debtor and filing a plan.

Both corporations and individuals are eligible to seek relief under chapters 7 and 11. This Article addresses employment discrimination claims in relation to these two chapters available to both non-municipal corporations and individuals.

In addition to the exemptions for individual debtors, the Code affords certain other fundamental relief to debtors — the automatic stay and the discharge. The automatic stay is imposed at the time a case is commenced barring, inter alia, the commencement or continuation of any judicial or administrative actions against the debtor. The automatic stay, however, does not operate to stay the commencement or continuation of proceedings by governmental units to enforce their police or regulatory power or to enforce nonmonetary judgments.

20. 11 U.S.C. § 1121 (1994). A plan providing for liquidation of the debtor's assets is permitted. 11 U.S.C. § 1123(b)(4) (1994). Often, a chapter 11 liquidating plan is preferred to a liquidation under chapter 7 because in a chapter 11 liquidation plan the debtor's assets may be sold as a going concern, thereby increasing their value. Also, although the debtor-in-possession continues to incur operating expenses, the expenses of a trustee are eliminated.
24. The remaining chapters apply only to individuals with regular income, municipalities and family farmers. 11 U.S.C. § 109(e) (1994). Chapter 13 provides for adjustment of the debts of an individual. Only individuals with regular income that owe on the date of the filing of the petition noncontingent, liquidated, unsecured debts of less than $269,250 and noncontingent, liquidated, secured debts of less than $807,750 are eligible to seek relief under chapter 13. See also 11 U.S.C. § 109(e) (1994). Chapter 9 provides for the adjustment of debts of a municipality. Only a municipality is eligible to seek relief under chapter 9. See also 11 U.S.C. § 109(c) (1994). Chapter 12 provides for adjustment of the debts of a family farmer with regular annual income. Only a family farmer with regular annual income is eligible to seek relief under chapter 12.
27. 11 U.S.C. §§ 362(b)(4), (b)(5) (1994 & Supp. V. 1999). The automatic stay does not bar proceedings by the Equal Employment Opportunity Commission (EEOC) and state human rights commissions. See EEOC v. McLean Trucking Co., 834 F.2d 398 (4th Cir. 1987) (recognizing that suits by EEOC against debtor to redress alleged unlawful age and racial discrimination were brought under agency's police and regulatory power and are not stayed); EEOC v. Hall's Motor Transit Co., 789 F.2d 1011 (3d Cir. 1986) (ruling that proceeding by EEOC against debtor alleging racial discrimination not stayed); EEOC v. Rath Packing Co., 787 F.2d 318 (8th Cir. 1986) (holding that suit by EEOC alleging sex discrimination is not stayed); In re Mohawk
A chapter 7 discharge relieves the debtor of all debts arising before the date of the order for relief.\(^{28}\) Under chapter 7, only individuals are eligible to receive a discharge.\(^ {29}\) Under chapter 11, the debtor is relieved of all debts arising before confirmation of a plan.\(^ {30}\) In certain circumstances, claims arising against individual debtors before the filing of the petition (pre-petition claims) are deemed nondischargeable and as a result the debtor is not relieved of his obligation to pay those debts.\(^ {31}\)

In both chapter 7 and 11 cases, every creditor may file a proof of claim attesting to the amount it alleges it is due from the debtor.\(^ {32}\) Such a claim is deemed allowed unless a party in interest timely objects to the claim.\(^ {33}\) In a chapter 11 case, a proof of claim is deemed filed when it is listed in the debtor’s schedules, unless the claim is listed on the schedule as disputed, contingent, or unliquidated.\(^ {34}\)

The Code establishes a scheme for prioritizing creditor’s claims against the estate.\(^ {35}\) Administrative expenses, defined as “the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case,” are paid first.\(^ {36}\) “Gap” claims arise in involuntary cases. These are claims resulting from the debtor’s ordinary course of business or financial affairs after the commencement of the case, but before the appointment of a trustee or the order for relief (whichever is earlier).

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\(^{31}\) 11 U.S.C. § 523 (2000). Debts that are nondischargeable include: (i) certain pre-petition taxes; (ii) monies obtained through false pretenses, a false representation, actual fraud, or through use of a written financial statement that is materially false, published by the debtor with intent to deceive and reasonably relied upon by the creditor; (iii) alimony, maintenance, and child support; and (iv) debts for willful and malicious injury by the debtor to another entity or to the property of another entity. See infra Part V for a discussion concerning the nondischargeability of employment discrimination claims based on the willful and malicious exception.


\(^{36}\) 11 U.S.C. § 503(b)(1)(A) (1994) (emphasis added). Unless the holder of the claim agrees otherwise, these claims must be paid on the effective date of the plan. 11 U.S.C. § 1129(a)(9)(A) (1994). The effective date is defined in the plan, not the Code, and is typically thirty days following the confirmation order becoming final and nonappealable.
Gap claims are paid second. Unsecured claims for pre-petition wages, salaries, and commissions not exceeding $4,650 that were earned within ninety days before the date of the filing of the petition or of the date of the cessation of the debtor's business (whichever occurs first) are paid third. Unsecured claims for contributions to employee benefit plans not exceeding $4,650 arising from services rendered within 180 days before the date of the filing of the petition or of the date of the cessation of the debtor's business (whichever occurs first) are paid fourth. Other unsecured claims are paid only after these priority claims are satisfied.

The rationale for the Code's priority scheme is that the costs incurred in administering the bankruptcy case for the benefit of the creditors should be paid first; followed by claims arising pre-petition (such as claims for wages and other employee compensation) that enabled the debtor to remain in business for the benefit of its creditors; followed by other claims of a special nature such as alimony, child support, and taxes. Administrative expense status is the coveted position among creditors, including holders of claims stemming from employment discrimination, because general, non-priority, unsecured claims are paid only to the extent the estate has assets to pay them after payment of administrative expenses and other priority claims.

Therefore, an analysis of the priority status of employment discrimination claims begins with analysis of whether such claims are entitled to administrative expense status.

III. Administrative Expense Priority

Administrative expenses are defined in section 503(b)(1)(A) of the Bankruptcy Code as, *inter alia*, the "actual, necessary costs and expenses of preserving the estate, including wages, salaries . . . for ser-

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37. 11 U.S.C. § 502(f) (1994) (defining gap claim); 11 U.S.C. § 507(a)(2) (1994) (setting out priority of gap claims). See generally In re Unit Parts Co., 9 B.R. 380 (Bankr. W.D. Okla. 1981) (explaining in dictum that a claim stemming from unfair labor practices occurring between the time the involuntary petition was filed and the time the order for relief was entered may have priority directly behind administrative expenses).

38. 11 U.S.C. § 507(a)(3) (1994). In a chapter 11 case, these claims must be paid in full on the effective date unless the class of holders have accepted the plan and agree to deferred cash payments equal to the amount of the claim. 11 U.S.C. § 1129(a)(9)(B) (1994). See also 11 U.S.C. § 1126 (1994) (acceptance of plan). Claims are unsecured where the creditor does not have a lien on property in which the bankruptcy estate has an interest or a right of setoff under the Code. 11 U.S.C. § 506(a) (1994).

39. 11 U.S.C. § 507(a)(4) (1994). The sums paid a creditor for wages under section 507(a)(3) of the Code plus amounts paid on behalf of such employees to any other employee benefit plan are deducted from the $4,650 cap. Id. The additional claims receiving priority treatment are not relevant to this article, although it should be noted that certain pre-petition tax obligations are entitled to priority status. 11 U.S.C. § 507(8) (1994).

services rendered after the commencement of the case. . . .”

Claims incurred postpetition typically include: the debtor-in-possession or trustee’s professional fees; postpetition taxes; wages and contributions to employee benefit plans earned postpetition; and claims of vendors doing business with the debtor-in-possession. Granting administrative status to parties doing business with the debtor and administering the estate encourages third parties to perform services for and supply goods to the debtor-in-possession or trustee. This furthers the goal of increasing the monies available for distribution to the unsecured creditors. Otherwise, employees, vendors, and professionals, wary of not being paid for their goods and services, will refuse to transact business with a bankrupt debtor. This makes it impossible for individuals and companies to reorganize and hinders the ability to attract competent professionals to administer bankruptcy cases.

Whether damages stemming from employment discrimination are entitled to administrative expense priority depends on when the discrimination occurred, postpetition or pre-petition.

A. Priority Status for Employment Discrimination Claims Stemming From Postpetition Misconduct

The Bankruptcy Code does not provide any specific protections to creditors with claims stemming from employment discrimination. Nevertheless, damages, back pay, and front pay awards arising from discrimination occurring postpetition should be afforded administrative expense status since fairness dictates that employees discriminated against postpetition by a debtor-in-possession or trustee be made whole before the general unsecured creditors for whose benefit the debtor continues to operate. Also, the payment of discrimination claims incurred during the bankruptcy case, like traditional tort claims, is part of the debtor’s cost of doing business.

In the landmark decision of Reading Company v. Brown, a case arising under the former Bankruptcy Act (the “Act”), the United States


42. In re Palau Corp., 139 B.R. 942, 944 (B.A.P. 9th Cir. 1992), aff’d, 18 F.3d 746 (9th Cir. 1994). Notwithstanding, all too often cases are deemed administratively insolvent meaning that there are insufficient funds to satisfy the holders of administrative claims. In such cases, the unsecured creditors do not receive any distribution.


44. Reading construed section 64(a)(1) of the previously repealed Act which provided administrative expense priority for “the costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition. . . .” Bankruptcy Act of 1898, Pub. L. No. 95-598 § 64(a)(1), 30 Stat. 544-563 (1898) (repealed 1978). The current administrative expense priority in the Code is almost identical to the Act. The Code, however, eliminates the language “subsequent to the filing of the petition” from the Act and
Supreme Court held that tort claims arising during a chapter XI arrangement (analogous to a chapter 11 reorganization under the Code) constituted "actual and necessary" expenses entitled to administrative priority.\(^4\) In that case, the petitioner, Reading, sought administrative priority for a claim arising from a fire caused by the undisputed negligence of the receiver in the chapter XI arrangement.\(^4\) After the debtor, Knight Realty, filed bankruptcy, the receiver was elected the trustee in the bankruptcy.\(^4\) The trustee, together with the United States, which held a claim for unpaid prearrangement taxes superior to the unsecured claims but inferior to the administrative claims, sought to expunge Reding's claim on the ground that it was not incurred as an expense of administration.\(^4\)

The bankruptcy court disallowed Reding's claim as an administrative expense.\(^4\) The court also held that the claim was not provable as a general unsecured claim since it did not arise prior to the arrangement.\(^4\) The latter ruling was not challenged by either party.\(^4\) The district court affirmed the ruling of the bankruptcy court and the en banc Court of Appeals for the Third Circuit affirmed the district court's decision.\(^4\)

Construing the provisions for administrative expense priority contained in section 64 of the Act, the Third Circuit reasoned that the "words 'actual and necessary' require that the expenses be proximately related to the preservation of the estate and that they must be reasonably anticipated as a cost of operating the business."\(^5\) The court stated that not "every post-petition event giving rise to a cost, expense or liability" is entitled to administrative status.\(^5\) Thus, because Reading's tort claim stemming from the receiver's negligence was not anticipated nor proximately related to the preservation of the estate, it was not entitled to administrative status.\(^5\)

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\(^4\) Reading, 391 U.S. at 482.
\(^5\) Id. at 473-74.
\(^6\) Id. at 473.
\(^7\) Id. at 474-75.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id. at 474. Thus, the bankruptcy court finding that the claim was neither an administrative expense nor an unsecured claim provided no means of redress to Reading for the admittedly negligent act of the receiver during the bankruptcy case.
\(^14\) Id. at 628.
\(^15\) Id. at 627.
\(^16\) Id. at 628.
The United States Supreme Court reversed, rejecting the contention that administrative priority should be limited to expenditures without which the debtor's business could not be carried on because "fairness to all persons having claims against an insolvent" is the statutory objective.\(^5\) Reading "did not merely suffer injury at the hands of an insolvent business: it had an insolvent business thrust upon it by operation of law."\(^6\) Indeed, the trustee continued operating the debtor's business in the chapter XI arrangement and it was during this time that the fire occurred.\(^7\) Thus, the Court reasoned that the petitioner should collect ahead of those creditors for whose benefit the continued operation of the business occurred.\(^8\) Noting that the Act did not specifically define "actual and necessary" in the context of administrative expenses,\(^9\) the Court found that "actual and necessary" costs should include "costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible."\(^10\) The Court further noted that the cost of insurance is an administrative expense and if a receiver or debtor-in-possession is encouraged to obtain adequate insurance, the claim insured against should be payable in full.\(^11\) Although Reading involved a tort claim, its reasoning is fully applicable to employment discrimination claims. No reported decision explores its application in this context, however.

Relying on Reading, the First Circuit in Spunt v. Charlesbank Laundry, Inc. (In re CharlesBank Laundry, Inc.),\(^{52}\) held that an attorney's fee award for postpetition services rendered to creditors stemming from the debtor's intentional act of violating an injunction entered prepetition is entitled to administrative priority.\(^{53}\) The injunction at issue enjoined the debtor from operating its laundry to the detriment of the plaintiffs and others.\(^{54}\) Fairness dictated that damages stemming from the intentional act of violating the injunction be paid ahead of pre-reorganization claims.\(^{55}\)

Notwithstanding the increase in employment discrimination claims in bankruptcy, only one decision, Kapernekas v. Continental Airlines,

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\(^6\) Reading, 391 U.S. at 478.

\(^7\) Id. at 473.

\(^8\) See id. at 478.

\(^9\) Id. at 476.

\(^10\) Id. at 483.

\(^11\) Id.

\(^52\) 755 F.2d 200 (1st Cir. 1985).

\(^53\) Id. at 203.

\(^54\) Id. at 201.

\(^55\) Id. at 203.
Inc. (In re Continental Airlines, Inc.),\textsuperscript{67} directly addresses administrative priority for such claims. This case, however, dealt with the priority of damages accruing postpetition stemming from a pre-petition injury, and thus the case lacks precedential value for postpetition discrimination.\textsuperscript{68} Nonetheless, analogous decisions construing the administrative expense status of severance pay claims based on length of employment as well as the status of claims based on violations of the Worker Adjustment and Restraining Notification Act (WARN) are instructive.

There is a split of authority among the courts of appeals on the issue of the treatment of severance pay claims based on the length of employment that stem from an employee’s postpetition termination of employment. The majority view adheres to the central purpose of the administrative expense priority, holding that severance pay claims based on length of employment will be accorded administrative status only to the extent that services are rendered postpetition.\textsuperscript{69} In the seminal case espousing the majority view, \textit{In re Mammoth Mart},\textsuperscript{70} which was decided under the Act, the First Circuit held that severance claims should be afforded administrative claim status only to the “extent that the consideration supporting the claimant’s right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.”\textsuperscript{71} The claimants in the case of \textit{In re Mammoth Mart} were employees of the debtor/discount department store chain who were dis-

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\bibitem{68} \textit{Id.} at 209. In other reported decisions involving employment discrimination claims the court was not required to explore the issue of administrative priority. \textit{See}, e.g., \textit{Kresmery v. Serv. Am. Corp.}, 227 B.R. 10 (Bankr. D. Conn. 1998) (employment discrimination claim arising postpetition premised on a violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-234 (1994), was discharged by confirmation of employer’s bankruptcy plan where employee failed to seek administrative priority); \textit{McSherry v. Trans World Airlines, Inc.}, 81 F.3d 739 (8th Cir. 1996) (determining that claim premised on violation of the ADA arose pre-petition when termination occurred, not post-petition when right to sue letter from the EEOC was received); \textit{In re Paolino}, No. Civ. A. 93-6346, 1995 WL 548989 (E.D. Pa. Sept. 11, 1995) (recognizing that issue of whether a sexual harassment claim gives rise to an administrative expense is “novel,” however, resolution was unnecessary since the court only needed to determine if the bankruptcy judge abused his discretion in approving the settlement providing for administrative priority of postpetition employment discrimination claim). \textit{See also} \textit{Official Com. of Unsecured Creditors v. United Healthcare Sys., Inc. (In re United Healthcare Sys., Inc.)}, 200 F.3d 170 (3d Cir. 1999) (holding that debtor-in-possession who failed to give employees notice of lay-off under the Worker Adjustment Retraining Notification Act (WARN) was not an employer under WARN, thus, precluding the award of administrative expense priority for WARN damages and the court did not review the propriety of awarding administrative expense priority for the claims).
\bibitem{69} \textit{See \textit{In re Roth Am., Inc.}}, 975 F.2d 949 (3d Cir. 1992); \textit{Lines v. Sys. Bd. of Adjustment No. 94 Bhd. of Ry. Airline & Steamship Clerks (In re Health Maint. Found.)}, 680 F.2d 619 (9th Cir. 1982); \textit{Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)}, 536 F.2d 950 (1st Cir. 1976); \textit{In re Public Ledger, Inc.}, 161 F.2d 762 (3d Cir. 1947).
\bibitem{70} 536 F.2d. 950 (1st Cir. 1976).
\bibitem{71} \textit{Id.} at 954.
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charged after the filing of the petition under chapter XI. Each claimant received up to four weeks severance pay and sought administrative expenses status for additional severance pay, asserting that it had been the debtor’s policy prior to its chapter XI to pay severance pay of one week’s salary for each week of employment “subject to no maximum.” The First Circuit held that the additional severance claims were properly denied administrative priority because no part of the claims arose from services performed for the debtor-in-possession.

The In re Mammoth Mart court relied on the Supreme Court’s decision in Reading, maintaining that only where the “debtor-in-possession’s actions themselves . . . give rise to a legal liability” is the claimant entitled to the priority of the cost and expense of administration. Because the four weeks’ severance pay fully compensated the claimants for the services performed postpetition for the benefit of the debtor-in-possession, and since the additional severance sought was premised on the number of weeks the claimants were employed pre-petition, the additional severance claims were denied administrative priority.

By contrast, In re Mammoth Mart expressly rejects the minority view espoused by the Second Circuit in the case of In re Straus-Duparquet. According to this decision, severance claims stemming from a postpetition termination are entitled to administrative priority status because they represent compensation for the termination of employment as incident to the administration of the bankruptcy case. The claimants, union employees of the debtor, were fired by the debtor approximately one month after the bankruptcy petition was filed. Reasoning that severance pay was not earned from day-to-day but accrued whenever termination occurred, the Second Circuit held that the severance pay was an expense of administration.

The most recent court of appeals decision addressing the intersec-

72. Id. at 952.
73. Id.
74. Id. at 955.
75. Id.
76. Id. at 952. The Ninth Circuit adopted the majority view in the case of In re Health Maintenance Foundation, 680 F.2d 619 (9th Cir. 1982). In this case, which was decided under the Act, the debtor operated several health maintenance organizations and employed both medical and hospital staff members represented by a union. Id. at 619. It was undisputed that the severance claims were earned before the bankruptcy filing. Id. at 621. In denying administrative status for these claims the Ninth Circuit relied upon In re Mammoth Mart, reasoning that “none of the consideration supporting [the] claims was either supplied to or beneficial to the trustee.” Id.
78. Id. at 651.
79. Id. at 650-51.
80. Id. at 651.
tion of severance pay claims and the Code sides with the majority view. The Court of Appeals for the Third Circuit in the case of *In re Roth America*, relying on cases decided under the Act and the language of the Code, held that granting administrative expense priority to severance pay claims based on length of employment is consistent with section 503(b) of the Code to the extent that the "benefits were earned by services rendered post-petition." In the facts of *In re Roth America*, a union representing workers employed by a debtor/toy manufacturer both pre-petition and postpetition sought administrative expense priority for severance pay following the cessation of the debtor’s business and layoff of all workers approximately six months after the debtor sought relief under chapter 11. The administrative claim was limited to the pro-rata portion of the severance earned during the six months of the bankruptcy.

Ironically, the minority view appears to comport with the Supreme Court’s reasoning in *Reading* because an employee terminated postpetition, like the tort victim in *Reading*, “had an insolvent business thrust upon it by operation of law.” Fairness dictates that the terminated employee is entitled to his complete severance package.

Decisions adopting the majority view on severance claims provided the precedent for a more recent line of bankruptcy cases involving claims under WARN. In the case of *In re Beverage Entertainment*, for example, the court held that a WARN claim arising from postpetition actions of the debtor is entitled to administrative priority. The court analogized WARN violations occurring postpetition to the two following categories of severance pay claims arising out of postpetition termination: (i) those payable where an employee is terminated without receiving the predetermined amount of notification; and (ii) those payable based upon the length of time the employee has worked for the employer. The court concluded that the first category is granted administrative expense priority since the severance is fully earned at the time of postpetition termination. The court adopted the majority view for the second class of severance claims, requiring that the sums are earned postpetition.

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81. 975 F.2d 949 (3d Cir. 1992).
82. Id. at 958.
83. Id. at 950-51.
84. Id. at 951, 958.
88. Id. at 115-16.
89. Id. at 115.
90. Id.
WARN claims, the bankruptcy court held that the employees’ WARN claims were entitled to administrative expense status since the claims arose and were earned after the filing when employees were terminated without notice.91

In another WARN case, the court allowed a back pay award arising under WARN as an administrative expense priority, where the debtor halted its operations postpetition and laid off plant employees including union workers.92 The bankruptcy court, in an attempt to satisfy the administrative expense requirement that wages represent payment for services “rendered” postpetition, concluded that back pay under WARN is deemed “earned” upon termination and are therefore, “in the nature of wages for services rendered” postpetition.93 Alternatively, relying on Reading, which did not involve a claim for “wages” but for the “actual and necessary” expenses of administration, the court found that even if the back pay did not constitute “wages for services rendered after the commencement of the case,” it would still be entitled to priority as an expense of administration since “fairness” dictated that persons injured by the debtor’s continued operation be granted administrative priority.94 The court rejected the debtor’s contention that Reading was limited to tort claims, finding that the decision applied to all costs incident to the operation of a business.95

In the cases concerning postpetition torts, severance pay, and violations of WARN, the courts support granting administrative expense priority to claims stemming from employment discrimination occurring postpetition. It would be inequitable to grant administrative priority to a postpetition tort claimant while relegating back pay awards relating to postpetition discrimination to the ranks of the unsecured creditors. This is especially true where the claimant was performing services at the debtor’s behest when the discrimination occurred. Similar to the tort victim in Reading, the injured employee has had the debtor hoisted upon him or her. Fairness dictates that employees discriminated against postpetition by a debtor-in-possession or trustee be made whole before the general unsecured creditors for whose benefit the business continued to operate. Without employees efforts the debtor would cease to do bus-

91. Id. at 116. See also Barnett v. Jamesway Corp. (In re Jamesway Corp.), 235 B.R. 329 (Bankr. S.D.N.Y. 1999) (stating that although employees were terminated postpetition, employer’s obligation to provide WARN notice arose pre-petition and therefore claims were not entitled to administrative status).
92. Oil, Chem. & Atomic Workers v. Hanlin Group, Inc. (In re Hanlin Group, Inc.), 176 B.R. 329 (Bankr. D. N.J. 1995). Because the debtor operated under the chapter 11, it was subject to WARN. Id. at 332.
93. Id. at 334 (emphasis added).
94. Id.
95. Id.
iness and lose the opportunity of generating future income to pay general unsecured creditors.

In cases involving supervisor misconduct, the rule is the same. The *Reading* decision rests on the principle of *respondeat superior*, which states that the “master” is liable for the negligence of his “servant” when operating for the benefit of creditors with the hope of rehabilitation. The doctrine of *respondeat superior* was the basis for the Supreme Court’s determination that employers (masters) may be liable for the discriminatory acts of their supervisors (servants), notwithstanding the fact that such acts are outside the scope of employment where the employer is negligent.

The allowance of administrative expense status, supported by *Reading*, is unchanged by the nature or amount of the damage claims. Generally, discrimination claimants are awarded as equitable relief in two forms: (i) back pay compensating claimants for wages accruing until an offer for reinstatement; and (ii) front pay compensating claimants for the difference between the wages they actually earned and what they would have earned absent the discrimination.

Back pay awards stemming from postpetition misconduct should be entitled to administrative expense priority under section 503, not only as wages, but as an actual, necessary expense of preserving the estate. It is indisputable that upon reinstatement the wages earned by the employee will be entitled to administrative expense status because the employee is “rendering” services.

96. Reading Co. v. Brown, 391 U.S. 471, 477-79 (1968). In *Reading*, the trustee was deemed to be the debtor’s servant.

97. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758-59 (1998) (holding that an employer is liable for supervisor’s conduct in creating a hostile work environment in violation of Title VII, but employer may assert affirmative defense that the employer exercised reasonable care to prevent and promptly correct sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer).


99. Back pay ceases to accrue if the debtor-in-possession reinstates the claimant. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (stating that employee claiming sexual discrimination forfeited her right to back pay by declining employer’s unconditional offer of reinstatement). Yet, reinstatement may pose difficulties in cases in which the debtor is attempting to streamline its operations. Under chapter 7, reinstatement is generally not an option since the debtor ceases doing business. The trustee, however, may seek permission to operate for a limited time during the liquidation where necessary to preserve the estate.

100. In re Hanlin Group, Inc., 176 B.R. 329 (D. N.J. 1995) (supports this proposition as back pay awards arising from a postpetition WARN violation are construed as an actual, necessary expense of administration).
Front pay awards are indistinguishable from back pay awards and should be treated in the same manner. As the foregoing discussion demonstrates, damages stemming from postpetition discriminatory acts are entitled to administrative expense priority. The next inquiry is whether damages accruing postpetition, but stemming from pre-petition discriminatory acts, are also entitled to administrative priority.

B. Administrative Expense Priority for Damages Accruing Postpetition and Stemming From Pre-Petition Misconduct

Damages stemming from pre-petition misconduct may accrue postpetition where the pre-petition violation is ongoing and back pay, front pay, or compensatory damages are incurred after the commencement of the case. These damage claims should not be entitled administrative expense status as wages because services were not rendered postpetition. It is arguable, however, that back and front pay accruing postpetition are entitled to administrative priority as an actual and necessary expense of administering the estate. This is because the debtor-in-possession has the ability to end the discrimination and the accrual of back and front pay by making an unconditional offer of reinstatement.

The district court in Continental Airlines held that back pay accruing postpetition is not entitled to administrative expense priority where the claimant was wrongfully terminated pre-petition. The claimant, an airline mechanic, went on strike with other Continental employees in August 1983. For approximately nine months during the strike he worked for other airlines performing essentially the same duties as his duties at Continental. In May 1985, at the conclusion of the strike, Continental contacted the claimant advising him he could return to work upon passing a physical exam. After the exam the claimant was advised that his previous back injuries indicated an inability to meet the lifting requirements of the job, precluding him from being rehired.

In June 1985, the claimant filed a charge with the Illinois Department of Human Relations alleging handicap discrimination. On October 17, 1989 an administrative law judge (ALJ) found in favor of the claimant, determining that his disqualification from employment was based on eleven-year old surgery that had not previously affected his ability to perform his job. The ALJ recommended that Continental reinstate the

103. Id.
104. Id.
claimant and award him back pay of $141,709.10, medical expenses, attorney’s fees, and costs. On October 10, 1990, the Illinois Human Rights Commission affirmed the ALJ’s recommendation by adopting it with minor changes. On November 9, 1990, Continental petitioned for rehearing but the petition was denied on February 1, 1991. Thereafter, Continental filed an appeal from the decision of the Human Rights Commission with the Circuit Court of Cook County, Illinois. On December 3, 1990, while its appeal was pending, Continental filed for bankruptcy relief pursuant to chapter 11. On January 28, 1992, the Cook County Circuit Court enforced the order and decision of the Human Rights Commission. Shortly thereafter, the claimant was reinstated by Continental.

In the bankruptcy case, the claimant sought allowance and payment as an administrative expense that portion of his back pay award and other benefits accruing after Continental filed bankruptcy. The bankruptcy court denied the claimant’s motion and the district court affirmed. The court found that the only “wages” entitled to administrative expense priority under the Code were wages earned for actual services “rendered” to the debtor postpetition, which were necessary for the preservation of the bankruptcy estate. That portion of the petitioner’s “back pay” award representing “wages” from the date Continental filed its bankruptcy proceeding did not represent wages for services actually rendered to the bankruptcy estate, precluding administrative priority status.

The court rejected the National Labor Relations Board’s (NLRB) contention that the back pay was entitled to administrative priority as an actual, necessary cost of administration because the violation occurred pre-petition. The court reasoned that Continental’s failure to reinstate the complainant until after it exhausted its appeals, which occurred after it filed for bankruptcy relief, was not a separate violation that arose postpetition. It instead reflected Continental’s legitimate use of the appellate process. The court distinguished Reading on the ground that the tort in Reading occurred postpetition and the cause of action in

105. Id.
106. Id.
107. Id.
108. Id. Continental did not object to treatment of the claim as a general unsecured claim.
109. Id.
111. The NLRB was granted leave to appear as amicus curiae because the back pay claim at issue in the case was similar to back pay orders issued by the NLRB. In re Continental Airlines, Inc., 148 B.R. at 207.
112. Id. at 217.
113. Id. at 216.
the instant case arose pre-petition during the rehiring process when the creditor was wrongfully terminated. The court further found that unlike the tort victim in Reading, the claimant in Continental did not have an insolvent business thrust upon it. If the business in Reading had been forced to close, the fire would not have occurred and the petitioner would not have been injured. Likewise, the claimant awarded administrative expense priority in the case of In re Charlesbank Laundry would not have been injured if the laundry had closed.

Several decisions address the treatment of back pay awards stemming from unfair labor practices. The Bankruptcy Appellate Panel for the Ninth Circuit reached a similar result in NLRB v. Walsh (In re Palau Corporation). This case involved the NLRB’s claim for administrative expense status for a back pay award accruing postpetition and arising from the debtor’s pre-petition unfair labor practice. Narrowly construing section 503(b)(1)(A), which provides for administrative priority for the “actual and necessary” expenses of preserving the estate, the bankruptcy appellate panel found that administrative priority extended only to expenses which “represent ‘services rendered after the commencement of the case.’” The employees’ failure to render services to the debtor was fatal in the NLRB’s attempt to obtain administrative status for its back pay award. The court refused to undertake an analysis of whether the back pay constituted an actual and necessary expense of administration entitled to priority under the reasoning of Reading and In re Charlesbank Laundry. It instead concluded that back pay must be treated like “wages” under the Code. Therefore, to get administrative status, the backpay award must represent services rendered to the debtor postpetition.

In NLRB v. Greyhound Lines (In re Eagle Business Manufacturers), the NLRB asserted that back pay accruing that postpetition resulted from the debtor-in-possession’s refusal to reinstate its employees constituted “constructive wages” entitled to administrative priority

114. Id.
115. Id.
116. 755 F.2d 200 (1st Cir. 1985). The pre-petition injunction violated postpetition in the case of In re Charlesbank Laundry required cessation of the debtor’s business. Obviously, the claimant would not have suffered the injury if the business closed because the debtor would no longer be operating in violation of a court order.
117. 139 B.R. 942 (B.A.P. 9th Cir. 1992), aff’d, 18 F.3d 746 (9th Cir. 1994).
118. Id. at 944 (emphasis added). The court relied on the subsequently vacated decision of In re Wheeling-Pittsburgh Steel Corp., 113 B.R. 187 (Bankr. W. Pa. 1990), that held that employees who do not perform services postpetition are not entitled to allowance of back pay as an administrative expense.
as an actual expense of administration. Furthermore, the failure to reinstate striking employees constituted a continuing "actionable violation" giving rise to a postpetition unfair labor practice.

In Greyhound, following unsuccessful negotiations for a successor collective bargaining agreement and the expiration of the parties’ existing contract, employees of Greyhound went on strike. The NLRB filed a complaint against Greyhound alleging an unfair labor practice following Greyhound’s unilateral implementation of certain terms of its final, pre-contract expiration proposal. Shortly thereafter, Greyhound and several affiliates filed petitions under chapter 11.

The district court refused to expand the administrative expense priority to constructive wages, finding such a holding required the court to ignore the requirement that the expense be for actual and necessary wages. The court also found that the estate received no benefit, thus, precluding administrative priority. The court did not distinguish Reading’s reasoning that in some cases fairness dictates the granting of administrative priority. Finally, because the alleged unfair labor practice occurred pre-petition, the court opined that the "mere fact" that the alleged damages arose postpetition did not alter the character of the claim.

In another back pay case stemming from a pre-petition employment relationship which ceased prior to the chapter 7 bankruptcy filing, the bankruptcy court found that the claim for back pay accruing postpetition was not entitled to administrative priority where the estate received no postpetition benefit and did not damage the employees. In the case of In re Sher-Del Foods, Inc., the NLRB contended that the debtor’s failure to negotiate postpetition elevated the back pay award to an expense of administration. In rejecting the NLRB’s position, the court found that the back pay award was "prepetition in character." Although In re Continental Airlines is a district court decision, the District Court of Delaware is especially influential in bankruptcy cases. That district attracts an inordinate number of cases because of its reputation for expeditiously handling cases and the favorable treatment

121. Id. at 433.
122. Id. The NLRB subsequently conceded that the failure to reinstate did not authorize the filing of an unfair labor practice charge.
123. Id. at 422.
124. Id. at 435.
125. Id.
126. See supra note 50 and accompanying text.
127. Id. at 433-34.
129. Id. at 362.
130. Id.
afforded corporations under the Delaware corporate statutes. In re Continental Airlines correctly rules that administrative expense priority status is precluded for back pay, front pay, or compensatory damages accruing postpetition from a pre-petition violation where these damage claims are in the nature of “wages” because the services for being compensated were not “rendered” to the debtor-in-possession. Treating back pay as wages under section 503(b)(1)(A) is absurd because the terminated employee is unable to render services to the debtor-in-possession because he is no longer employed by the debtor-in-possession.

The decisions in the cases of In re Continental Airlines and In re Eagle Business Manufacturing ignore the Supreme Court’s mandate in Reading, which states that fairness dictates that persons injured by acts of a debtor-in-possession or bankruptcy trustee are entitled to administrative expense priority. There is no requirement that the debtor receive a benefit—only that the claimant have suffered an injury at the hands of an insolvent debtor. The Court instructed that in discrimination cases, reinstatement of the injured employee brings the employer into “voluntary compliance . . . ending discrimination.” The In re Continental Airlines and Eagle Business Manufacturing courts mistakenly analogize the postpetition accrual of back pay to the commission of a postpetition tort, admonishing that similar to a tort, the discriminatory act must occur postpetition for administrative expense priority to inure to the claimant. This conclusory analysis ignores the unique damages available in employment discrimination cases and the unilateral power of the employer to end the discrimination. In Reading, no act of the trustee could reverse the fire damage suffered by the petitioner. Conversely, in employment discrimination cases it is within the employer’s power to stop the accrual of damages by voluntarily ending its discriminatory conduct through reinstatement. The equitable relief in the form of back pay and front pay accrues each day only because the employer wrongfully fails to reinstate the claimant.

131. Many corporations are able to seek bankruptcy relief in the District of Delaware by taking advantage of the venue provision permitting a debtor to file in its place of incorporation. See 28 U.S.C. § 1408 (1994).

132. Pursuant to the doctrine of expressio unius est exclusio alterius, the inclusion of the word “rendered” in both sections 503(b)(1)(A) and 507(a)(4)(A) and its exclusion in section 507(a)(3)(A) demonstrates the drafters’ intent that services must be rendered as a condition to “wages” in order to be allowed as an administrative expense pursuant to section 503. See generally United States v. Miami Univ., 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

133. In chapter 11 cases involving pre-petition discriminatory conduct, the claimant was never employed by the debtor-in-possession because he was terminated pre-petition, before the creation of a debtor-in-possession. In chapter 7, cases, the cessation of the debtor’s business precludes the employee from rendering the requisite service.

In re Continental Airline's logic that administrative status in Reading and In re Charlesbank Laundry was permissible because in both of those cases the claimants were injured by the debtors' continued operations actually supports granting administrative priority for back pay accruing postpetition in employment discrimination cases. It is the continued operation of the business, without the reinstatement of the claimant, which causes the postpetition injuries — but for the debtor's failure to reinstate and voluntarily end the unlawful discrimination, the claimant would have a job.\(^\text{135}\)

In re Charlesbank Laundry further supports the granting of administrative expense priority. In that decision, the First Circuit reasoned that administrative expense priority for attorneys fees accruing postpetition was warranted under Reading's fairness rationale because the claimants' lives were "adversely affected" by the debtor's continued operation in violation of the pre-petition injunction.\(^\text{136}\) Back pay accruing postpetition should be entitled to administrative priority because the lives of the victims of the discrimination were adversely affected by the debtor's continued failure to offer reinstatement.

Alleviating debtor-in-possessions and operating trustees from the incentive of "voluntary compliance" by relegating back pay accruing postpetition in employment discrimination cases to pre-petition unsecured status hoists a debtor-in-possession upon unsuspecting discriminatees. This thereby guts Title VII's goal of eliminating discrimination in the workplace through voluntary compliance. Absolving the employer of its obligation to issue back pay accruing post-petition as an administrative expense undermines the anti-discrimination laws. It does so by providing employers an incentive not to reinstate discrimination victims, but rather to usurp discriminatees to the ranks of the general unsecured creditors whom may ultimately obtain only a small fraction of the value of their claims.\(^\text{137}\)

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\(^{135}\) Administrative expense priority should not be allowed where the business is closed because the debtor-in-possession no longer has the power to reinstate the claimant.

\(^{136}\) In re Charlesbank Laundry, Inc., 755 F.2d 200, 202 (1st Cir. 1985).

\(^{137}\) The unfair labor practice and WARN cases are distinguishable as follows: (i) none of those cases involved Title VII claims; (ii) the Supreme Court's decision in Ford Motor Company, finding that employment discrimination continues each day the employer fails to reinstate and voluntarily end the discrimination, mandates treating back pay accruing postpetition in discrimination cases as an administrative expense; (iii) In re Sher-Del Foods did not involve an operating debtor making reinstatement impossible; and (iv) In re Eagle Business Manufacturing's holding that a benefit must ensue to the debtor to award administrative expense priority is at odds with Reading's holding that administrative costs include expenses incident to the debtor's operation, not only costs without which rehabilitation would not be possible. Also, on appeal the NLRB in the case of In re Eagle Business Manufacturing argued that the date on which the wages accrued was at issue, not the date on which Greyhound refused to reinstate (abandoning the argument that failure to reinstate constitutes an ongoing unfair labor practice).
Damages stemming from pre-petition acts ordinarily not entitled to administrative expense priority may still be entitled to priority as pre-petition wages. Otherwise, these claims will be deemed unsecured, receiving payment only after the priority claims are paid in full.

C. Priority Status for Damages Accruing Pre-Petition

Back pay, front pay, and damages stemming from pre-petition acts may be eligible for priority as wages in amounts up to $4,650, pursuant to section 507(a)(3) of the Code. The Code requires that these “wages” are earned within ninety days of the date the petition was filed or the date of the cessation of the debtor’s business. Because the pre-petition wage priority status is capped at $4,650, this relief may be inconsequential since the remaining portion of the award will be deemed unsecured.

The priority claim for unsecured pre-petition wages pursuant to section 507 is distinct from the “wage” claim allowed as an expense of administration pursuant to section 503. Section 507 concerns pre-petition wages and grants a priority in the capped amount for wages “earned” during the ninety days prior to the filing of the bankruptcy case. In contrast, section 503 concerns postpetition wages and grants administrative expense status to claims arising postpetition in favor of a claimant “for services rendered” to the debtor-in-possession or trustee.

While a few cases discuss administrative priority for wage claims stemming from an employer’s statutory and tort liability, even fewer address wage claim priority for these claims. For example, In re Continental Airlines and In re Palau are inapplicable to pre-petition, unsecured, priority wage claims since the issues in these cases were whether the claims were entitled to administrative expense priority under section 503(b)(1)(A) of the Code (governing wages earned postpetition), not whether the claims were entitled to wage priority under section 507(a)(3) of the Code (governing wages earned pre-petition). Decisions concerning claims arising from pre-petition unfair labor practices and WARN violations provide the most fertile ground for growth of understanding the wage claim priority.

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138. 11 U.S.C. § 507(a)(3) (1994). See supra notes 96-97 and accompanying text. The priority for unsecured pre-petition wages is capped at $4,650 because employees are likely to quit after a few weeks if they are not being paid. The cap also act to protect middle income wage earners, not highly compensated employees.


142. See, e.g., In re Cargo Inc., 138 B.R. 923 (Bankr. N.D. Iowa 1992); In re Riker Indus.,
Back pay awards stemming from a pre-petition unfair labor practice are not entitled to different treatment compared to any other wage claims. In Nathanson, the NLRB unsuccessfully argued that its claim for back pay as an agent for employees who were “discriminated against” by their employer was entitled to priority as a debt owing to the United States pursuant to section 64 of the Act. The Court found that Congress never intended to grant priority for all unpaid wages; rather it provided that back pay be allowed as a priority only if earned within three months before the filing and in the maximum sum of $600.

Another wage priority case, even more closely analogous to those involving claims for back pay resulting from employment discrimination, involves a claim resulting from violation of a collective bargaining agreement. In the case of In re N & T Association, without significant discussion the district court concluded that a portion of a back pay award stemming from the debtor’s violation of a collective bargaining agreement more than one year prior to the commencement of the bankruptcy case was entitled to priority. The court limited the priority claim to the “wages accruing” during the ninety days before the filing of the petition. The court declined to address whether the wages would be entitled to administrative expense status since none of the wages accrued post-petition.

The bankruptcy court allowed wage priority for WARN claims in the case of In re Cargo. These claims arose approximately six weeks before the debtor filed for bankruptcy relief pursuant to chapter 7, as a result of a plant closing effected without providing the required statutory notice. The trustee asserted that wages awarded under WARN are statutory penalties (not wages earned within ninety days of the commencement of the case) and are intended to punish employers. The trustee contended that the WARN statutory scheme did not require that


144. Id. at 27. The nature of the unfair labor practice is not described in the Supreme Court or lower court decisions. See Nathanson v. NLRB, 194 F.2d 248 (1st Cir. 1952); In re Mackenzie Coach Lines, 100 F. Supp. 489 (D. Mass. 1951).
145. Id. at 29.
147. The nature of the violation is not discussed in the opinion.
149. Id. See In re Sher-Del Foods, Inc., 186 B.R. 358, 362 (Bankr. W.D.N.Y. 1995) concluding that back pay stemming from a pre-petition unfair labor practice and accruing during the ninety days proceeding the bankruptcy filing was entitled to wage priority subject to the applicable dollar amounts).
wages earned from employment obtained after the plant lay-off be deducted from the WARN damages to demonstrate the statute's penal nature, and that these WARN damages were separate and distinct from wages payable under ordinary circumstances.\(^\text{152}\) Rejecting this contention, the court analogized claims for pre-petition WARN violations to severance pay claims representing payment in \textit{lieu} of notice, which are deemed earned upon termination and entitled to priority. Therefore, in the court's view, WARN damages were remedial, not punitive.\(^\text{153}\) The court refused to find that the employees must have been employed continuously during the statutory ninety day period.\(^\text{154}\) The court noted that a contrary ruling would permit employers to close plants without notice, wait ninety days, and then file bankruptcy, thereby precluding employers from obtaining wage priority status for the damages incurred by the employer's WARN violation.\(^\text{155}\)

In the case of \textit{In re Riker Industries}, the court extended priority wage status to injuries of employees from pre-petition WARN violations. The debtor's liability stemmed from the debtor's cessation of business without the requisite WARN notice one week prior to the filing of an involuntary petition against the debtor.\(^\text{156}\) The chapter 7 involuntary petition was filed on April 27, 1990. The debtor consented to an order for relief on May 7, 1990.\(^\text{157}\) Relying on the rationale of \textit{In re Cargo}, and reasoning that WARN is intended to provide employees an opportunity to adjust to the loss of employment, the court granted wage priority status to the employees.\(^\text{158}\)

There is no basis for distinguishing pre-petition back pay awards arising from pre-petition contractual and WARN violations from pre-petition back pay arising from pre-petition employment discrimination. Back pay awards arising from pre-petition employment discrimination should receive priority as a pre-petition wage claim. The timing of the violation is irrelevant because the employer's back pay liability continues accruing during the ninety day period absent an offer of unconditional reinstatement.\(^\text{159}\) Thus, where the termination occurs prior to the ninety days preceding the filing, and by analogizing Title VII back pay awards to WARN and severance claims, one must conclude that back pay accruing during the ninety days before the filing should likewise be

\(^{152}\) \textit{Id.} at 923.  
\(^{153}\) \textit{Id.} at 927. \textit{See supra} discussion concerning severance pay at Part III.A.  
\(^{154}\) This period has since been amended to 180 days. 11 U.S.C. § 507(a)(3) (1994).  
\(^{155}\) \textit{In re Cargo Inc.}, 138 B.R. at 928.  
\(^{157}\) The debtor's operations ceased on April 20, 1990. \textit{Id.} at 824.  
\(^{158}\) \textit{Id.} at 827.  
given wage claim priority. But, in cases where the employee is offered reinstatement during the ninety day period, the back pay ceases to accrue and priority status should only be allowed for back pay accrued within the ninety days and prior to the offer of reinstatement. Finally, back pay accruing prior to the ninety day period is not subject to any priority treatment under the Code. Front pay is indistinguishable from back pay and should be granted pre-petition wage priority status in the same manner.

Questions of the priority of an employment discrimination claim become meaningful only after the claim is liquidated and "allowed" in a bankruptcy case. Often, a debtor will file bankruptcy prior to the liquidation of a pre-petition discrimination claim. Unless the parties agree to allowance of the claim, the parties cannot determine what portion of the claim, if any, is entitled to pre-petition wage priority. Because the automatic stay bars the creditor's continuation of his discrimination action against the debtor, stay relief must be sought in the bankruptcy case.

IV. STAY RELIEF TO LIQUIDATE EMPLOYMENT DISCRIMINATION CLAIMS

The automatic stay bars, inter alia, the commencement or continuation of any judicial or administrative actions against the debtor. This statutory bar stays private plaintiffs from commencing, or continuing lawsuits or collection efforts against the debtor. Accordingly, private

160. Except in chapter 7 cases with no assets (where the creditors will not receive any distribution in the liquidation), claims must be liquidated enabling a pro-rata distribution to the creditors. Under Chapter 11 (unless the claim is estimated), liquidation is essential since the dollar amount of claims are used in determining if a class of claimants has accepted the plan. 11 U.S.C. § 1126 (1994).

161. A settlement as to the allowance of a claim requires court approval. Fed. R. Bankr. P. 9019. See Jeffrey v. Desmond, 70 F.3d 183 (1st Cir. 1995) (explaining that when determining whether to approve settlement of an employment discrimination claim the bankruptcy court considers: (i) the probability of success in the litigation; (ii) the difficulties, if any, to be encountered in collection; (iii) the complexity, expense, inconvenience, and delay attendant to the litigation; and (iv) the interest of the creditors and a proper deference to their reasonable views) (citations omitted).

162. Often, stay relief will be sought only after the debtor has filed an objection to the creditor's proof of claim since the claim is deemed allowed until an objection is lodged. 11 U.S.C. § 502(a) (1994).

163. 11 U.S.C. § 362(a)(1) (1994 & Supp. V. 1999). The automatic stay does not operate to stay the commencement or continuation of proceedings by governmental units to enforce such unit's police or regulatory power or to enforce nonmonetary judgments. 11 U.S.C. § 362(b)(4) (1994 & Supp. V. 1999). The stay is inapplicable to proceedings by the EEOC and state human rights commissions because of their status as governmental units with police and regulatory powers. See supra note 27.
claimants must seek to stay relief before continuing to prosecute discrimination claims.

Relief from the automatic stay may be obtained by showing "cause."164 Although the term is not defined in the Code, case law establishes that cause includes the bankruptcy court's lack of jurisdiction to determine a matter.165 Bankruptcy courts lack jurisdiction to decide "personal injury tort claims."166 The courts are split on the question of whether claims actually constitute "personal injury tort claims," and only some employment discrimination claims are deemed to fall within the exception. Notwithstanding the court's lack of jurisdiction to decide these claims, the automatic stay still applies.167 In cases where a discrimination claimant is seeking stay relief for "cause," the underlying issue may be whether the claim constitutes a personal injury tort claim.

Some courts apply a broad definition of "personal injury tort." The broad approach defines "personal injury tort" as private or civil wrongs for which damages are recoverable. This includes damage to an individual's person and invasions of personal rights, such as mental suffering.168 Other courts assume a narrow approach that requires either a physical, mental, or emotional trauma or a bodily injury.169 The narrow approach includes mental distress claims without bodily injury where the claim is the gravamen of the complaint.170

In the case of In re Thomas, creditors filed three separate motions seeking relief from the automatic stay to continue separate state court

166. 28 U.S.C. § 157(b)(5) (1994). The Code provides that personal injury tort claims shall be tried in the district court in the jurisdiction where the claims arose or where the case is pending, as determined by the district court in which the bankruptcy case is pending. Id. In conjunction with the overhaul of the Code triggered by the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (finding that the expanded jurisdiction to the bankruptcy courts contained in the Bankruptcy Reform Act of 1978 was unconstitutional), the Code was amended by the Federal Judgeship Act of 1984 to remove personal injury tort claims from the grasp of the bankruptcy courts. Where the estimation of a personal injury tort claim is necessary for plan confirmation, the bankruptcy court may preside over the estimation. 11 U.S.C. § 157(b)(2)(B) (1994). Determinations for purposes of distribution, however, must be made by the district court. Id.
169. In re Cohen, 107 B.R. 453, 455 (Bankr. S.D.N.Y. 1989). The narrow approach is often criticized since the federal statutory exemptions include certain payments "on account of personal bodily injury." This demonstrates that Congress never intended to require bodily injury and knew how to similarly limit the personal injury exception. In re Vinci, 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989) (debtor's § 1983 civil rights claim did not fall within the personal injury tort exception because it did not involve a trauma or bodily injury). See discussion regarding exemptions infra at Part VI.
actions. All of these actions involved intentional infliction of emotional distress. In one case, the causes of action associated with the intentional infliction of emotional distress allegedly arose as a result of acts of sexual harassment and offensive touching by the debtor. After determining that the complaint fit within the broad and narrow definitions of “personal injury tort” (because both definitions include intentional infliction of emotional distress as a personal injury tort), the bankruptcy court found that it lacked jurisdiction and granted stay relief for cause.

In contrast, two more recent decisions adopt a narrow view of “personal injury tort” in employment discrimination cases. In the case of In re Interco, Inc., the court applied the narrow interpretation of “personal injury tort,” finding it could maintain jurisdiction to decide a federal age discrimination suit. In the court’s view, where a mental distress claim does not involve physical injury, the claim for mental distress must be the gravamen of the complaint.

Likewise, the bankruptcy court in In re Cohen held a tort claim for a statutory violation of a New York State anti-discrimination law did not fall within the personal injury tort exception. The court, relying on legislative history, construed the statute narrowly and held that the claim was “not a claim for a ‘personal injury tort’ in the traditional, plain-meaning sense of those words.” The court distinguished employment discrimination claims from injuries resulting from “a slip and fall” or a psychiatric impairment beyond mere shame and humiliation. A “tort without trauma” could not fall within the statutory exception.

Lack of jurisdiction is not the only “cause” for lifting the automatic stay, thereby allowing employment discrimination claimants to proceed. In one case, public policy considerations supported lifting the automatic

172. Id. at 842. But see In re Vinci, 108 B.R. at 439.
174. Id. (citing Bertholet, 126 B.R. at 416) (explaining that jurisdiction would too easily be lost if a mental distress claim not involving physical injury is not the gravamen of the complaint). The In re Interco, Inc. court relied on In re Vinci for the proposition that a tort requires a trauma or bodily injury to fall within the statutory exception for a personal injury claim. Id.
176. Id.
177. Id.
178. Id. (citations omitted). The court also reasoned that the present case was directly related to the plaintiff’s unliquidated damage claim in the bankruptcy case because the court needed to determine liability and damages, and resolve the issue of whether the alleged tortious conduct was willful and malicious. Finding that judicial efficiency and fairness would be served if the entire controversy as to liability, damages and dischargeability were adjudicated in one proceeding, the court determined it should be that “officer.” Id. Yet, the court could have opted to grant stay relief for a determination of liability and damages, and, thereafter held a trial as to the possibility of discharge.
stay to permit a harassment case to continue since the bankruptcy estate would not incur great prejudice and the hardships tipped in favor of the creditor.\textsuperscript{179} Prior to the debtor's bankruptcy petition, the creditor alleged several incidents of harassment and she sought stay relief to pursue her action in the district court.\textsuperscript{180} The court granted stay relief, noting the "strong public policy" of resolving sexual harassment claims without undue delay.\textsuperscript{181} These grounds, however, are far less certain than the traditional lack of jurisdiction.

The ability to obtain stay relief to prosecute an employment discrimination claim depends largely on whether the court adopts the narrow or broad approach when defining personal injury tort. Clearly, under the broad approach, employment discrimination claims will be covered as they constitute private or civil wrongs for which damages are recoverable. If the court adopts a narrow approach, discrimination claims that do not involve bodily injury or trauma may not be covered unless the gravamen of the complaint is a mental distress claim.\textsuperscript{182}

Many creditors object to having their claims determined in a bankruptcy court because they fear that damage awards will be undervalued to assure that funds are available for a meaningful distribution to all creditors. Others fear that their claims will be prejudiced by bankruptcy judges who may lack experience in handling discrimination cases. Discrimination plaintiffs should always contemplate an employer's bankruptcy filing and make strategic decisions at the pleading stage in an effort to protect their forum selection and to avoid what may be perceived as an inevitable, unjust outcome. This can be accomplished by taking steps during the pleading stage to assure that the claim will fall within the personal injury exception (e.g., making a mental distress claim the gravamen of the complaint).\textsuperscript{183}

V. ALTERNATIVES TO STAY RELIEF

Plaintiffs desiring to pursue their discrimination claims outside the bankruptcy court may not be limited to seeking stay relief. Creditors may also request that the court abstain from hearing the action if state

\begin{itemize}
\item \textsuperscript{180} Id. at 922.
\item \textsuperscript{181} Id. at 924.
\item \textsuperscript{182} Relying on In re America West Airlines, Inc., a discrimination claimant could attempt to convince the court that public policy exists to support the granting of stay relief.
\item \textsuperscript{183} The plaintiff's forum selection may not be protected in the employer's subsequent bankruptcy if the claim is considered a personal injury tort and prompts the district court where the bankruptcy case is pending to determine where the discrimination case should be tried. See supra note 152. Employment discrimination claims filed both pre-petition and postpetition are subject to removal to the district court where the civil action is pending if the district court has jurisdiction of such claims under 28 U.S.C. § 1452 (1994).
\end{itemize}
law claims are involved. The district court may withdraw the reference for cause shown and thereby assume jurisdiction of the claim. The propriety of combining a motion to abstain and/or withdraw the reference with a motion for stay relief should be considered when the claimant desires to preserve his forum selection.

Often after liquidating a pre-petition claim, the discriminatee finds most of his claim will be discharged in the employer's bankruptcy case. In some instances, these claims will be excepted from the debtor's discharge.

VI. EXCPTING EMPLOYMENT DISCRIMINATION CLAIMS FROM THE DEBTOR'S DISCHARGE

After a creditor's discrimination claim is liquidated, he may find that only a small portion of his claim, if any, is entitled to priority status. Thus, that creditor has been relegated to unsecured status with little prospect for a meaningful distribution. When the claim is against an individual in bankruptcy, such as an individual employer or supervisor, the creditor may succeed in having the claim excepted from the debtor's discharge. This thereby enables the creditor to pursue the debtor after the discharge is granted.

Since the exceptions to possibility of discharge only apply to individual debtors, the issue of whether to except an employment discrimination claim from discharge arises only in cases involving a debtor who is an individual employer or where the debtor is held personally liable to the plaintiff. Although a majority of circuits, including the Second Circuit, have held that supervisors are not "employers" within the meaning of Title VII and, therefore, are not subject to individual liability under Title VII, complainants may still recover judgments against these...
individuals under state anti-discrimination laws and tort theories.

In an effort to protect creditors injured from a debtor's willful and malicious conduct and to preclude debtors from avoiding liability for their willful acts by filing for bankruptcy relief, the Code contains a specific discharge exception for these claims. The Code provides that the discharge of an individual debtor does not discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity."\(^{187}\) Prior to the Supreme Court's decision in \textit{Kawaauhau v. Geiger},\(^{188}\) bankruptcy courts generally excepted sexual harassment claims from discharge pursuant to section 523(a)(6) of the Code, notwithstanding that the circuit courts of appeals were split on the meaning of both the "willful" and "malicious" prongs.\(^{189}\) The Geiger court fully resolved the dispute among the circuits of whether "willful" required a showing of actual intent to cause injury, or, deliberate acts that cause injury by holding that a debtor must intend to cause the injury resulting from his misconduct.\(^{190}\) The Court left unresolved, however, the issue of whether the creditor must still establish malice, and if so, whether "special malice," "implied malice," or "no just cause or excuse" is required to be established under section 523.

The petitioner in \textit{Geiger}, a patient of the debtor, Dr. Paul Geiger, Ltd., 55 F.3d 1276 (7th Cir. 1995); Lenhardt v. Basic Inst. of Tech., 55 F.3d 1276 (8th Cir. 1995); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583 (9th Cir. 1993); Haynes v. Williams, 88 F.3d 898 (10th Cir. 1996); Cross v. Alabama State Dept. of Mental Health Retardation, 49 F.3d 1490 (11th Cir. 1995). In the Fourth Circuit, supervisors may be individually liable in Title VII cases where they wield significant control over the plaintiff and their conduct cannot be categorized as a plainly delegable duty. Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989), rev'd in part, aff'd in relevant part, 900 F.2d 27 (4th Cir. 1990). The First Circuit has not ruled on individual liability. See Suarez v. Pueblo Int'l Inc., 229 F.3d 49 (1st Cir. 2000); Barbosa v. Baxter Healthcare Corp.; No. Civ. 00-1546(HL), 2000 WL 1739309, at *1 (D. P.R. Nov. 15, 2000).


\(^{189}\) The majority of the reported decisions construing the dischargeability of employment discrimination claims concern sexual harassment claims. See \textit{In re Liccio}, Nos. Civ. A 96-624, Civ. A 96-8167, 1997 WL 158197, at *1 (Bankr. E.D. Pa. Mar. 31, 1997) (holding that claim based on sexual harassment stemming from offensive touching and unwelcome comments was nondischargeable under willful and malicious exception to discharge); \textit{In re Wilson}, 216 B.R. 258 (Bankr. E.D. Wis. 1997) (holding that claim based on employee's loss of employment because she resisted debtor/employer's sexual advances was nondischargeable under section 523(a)(6)); \textit{In re Sotelo}, 179 B.R. 214 (Bankr. S.D. Cal. 1995) (hostile environment sexual harassment claim nondischargeable). See also \textit{In re Gee}, 173 B.R. 189 (B.A.P. 9th Cir. 1994) (debt based on sex discrimination was nondischargeable because it arose from willful and malicious misconduct); \textit{In re Miera}, 926 F.2d 741 (8th Cir. 1991) (holding that male employee established judgment stemming from battery in the form of a kiss was willful and malicious and nondischargeable). Cf. \textit{In re Harris}, No. 94 C 7496, 1995 WL 476676 (N.D. Ill. Aug. 7, 1995) (explaining that since creditor failed to prove that debtor acted with the requisite willfulness and malice, excepting creditor's sexual harassment claim from discharge was precluded).

\(^{190}\) \textit{Geiger}, 523 U.S. at 61.
sought treatment for a foot injury. The debtor admitted the petitioner to the hospital and prescribed oral penicillin, notwithstanding that he knew intravenous penicillin was more effective. The petitioner was then left in the care of other physicians when the debtor departed on a business trip. These other doctors transferred her to an infectious disease specialist. Upon his return, the debtor canceled the transfer and discontinued all antibiotics because he mistakenly believed that the infection had subsided. The petitioner’s right leg was amputated below the knee after her condition deteriorated.

A jury awarded the petitioner and her husband damages in the approximate sum of $335,000. The debtor carried no malpractice insurance and moved to another state where his wages were garnished. Thereafter, the debtor filed for bankruptcy. The bankruptcy court found the debtor’s treatment was willful and malicious because it fell far below the appropriate standard of care. The Eighth Circuit, en banc, found that the exception to dischargeability for willful and malicious injury requires an intentional tort, rather than negligent or reckless misconduct. The Supreme Court granted certiorari to resolve a split among the circuits of whether the dischargeability exception covers acts done intentionally which cause injury, or only acts done with the actual intent of causing injury.

Justice Ginsburg, writing for a unanimous Court, held that section 523 requires a showing of a deliberate and intentional injury and “not merely a deliberate or intentional act that leads to injury.” Negligent or reckless conduct is insufficient to support nondischargeability. Because the debtor’s conduct in prescribing the petitioner’s treatment was negligent, as opposed to an intentional act by the debtor to cause the amputation of the petitioners’ leg, the claim was dischargeable.

While the Court framed the issue in Geiger as dealing with the scope of the “willful and malicious injury” exception, only the meaning of the word “willful” as a modifier to “injury” is addressed in the ensu-

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191. Id. at 59.
192. The debtor testified that he understood the patient desired to minimize her treatment costs.
193. Id.
194. Id.
195. Id.
196. Id.
197. Id.
198. Id. at 59-60.
199. Id. at 60.
201. Geiger, 523 U.S. at 60-61.
202. Id. at 61.
203. See id. at 61-64.
Because the Court never explicitly states whether its holding applies to only the "willful" requirement or both the "willful and malicious" prongs, however, confusion has arisen amongst the bankruptcy courts concerning the necessity of fulfilling the malice requirement. Although the majority of the subsequent decisions interpret Geiger as resolving only the meaning of "willful," the Supreme Court's phrasing of the issue in broad terms inclusive of the malice element has caused some courts to question whether both the willful and malicious requirement were examined in Geiger.  

A. The Collapse of the Malice Prong

The Fifth Circuit Court of Appeals became the first circuit to address whether Geiger collapsed the willful and malicious prongs into one when it concluded in Miller v. J.D. Abrams, Inc. that, in light of Geiger, the "willful and malicious" prongs were now a "unitary concept." The court reversed the bankruptcy court's grant of summary judgment excepting from discharge a state court judgment for $1 million which was based on a jury verdict finding the debtor had misappropriated his former employer's proprietary information and misused its trade secrets. The court reasoned that what is required to establish "implied malice," is a showing that the act is done intentionally and deliberately in knowing disregard of another's rights (a showing "quite close" to Geiger's standard for willful injury). Otherwise, a "special malice"
standard that would require a motive to harm would make nondischargeability unduly rare. Thus, the approach of requiring a showing of no just cause or excuse was "displaced" by Geiger. Both the willful and malice elements under Miller now require proof of a deliberate and intentional injury.

The day after the Miller decision, a bankruptcy court in Maine recognized the "temptation" of collapsing the willful and malice requirements but refused to render the malice requirement meaningless. In Slosberg, the claimant sought to except from the debtor's discharge damages awarded after a jury trial following a default imposed as a discovery sanction. The claimant contended that the bankruptcy court was collaterally estopped from relitigating the issues of willful and malicious. The underlying claims stemmed from the debtor/attorney's malpractice. The bankruptcy court adopted the standard of malice specifically rejected by Miller, the showing of no just cause or excuse, and found that the default did not establish that the debtor acted willfully or with the requisite malice since the complaint contained alternative claims and included allegations of negligence.

In an effort to give meaning to the malicious requirement, bankruptcy courts in the Eighth Circuit are clinging to pre-Geiger decisions interpreting malice as involving situations where the debtor targets the creditor to suffer the "harm" resulting from the debtor's tortious act, as opposed to the creditor's "injury." It is unclear, however, how to distinguish between "targeting the creditor to suffer harm" and Geiger's requirement that the debtor "intend" the consequences of his act, to wit, the harm.

In Thompson v. Kelly (In re Kelly), a post-Geiger decision, the

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208. Id. at 605. The court rejected the definition of implied malice requiring no bad motive on the part of the debtor. Id. Yet, the court's definition of implied malice still requires a lesser showing (only deliberate intent to commit the act not to cause the injury), than necessary under Geiger to establish willfulness.


210. Id. at 16.

211. The damage trial was held following the court's defaulting the debtor as a discovery sanction. Id. at 12.

212. Id. at 22.

213. Fischer v. Scarborough (In re Scarborough), 171 F.3d 638 (8th Cir. 1999) (former husband sought to except from discharge judgment against former wife based on malicious prosecution and abuse of process; collateral estoppel applied, because the jury determined the issues of willfulness and malice under instructions which met the Geiger standards for willful and malicious conduct intended to harm the creditor); Hobson Mould Works v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999) (adopting targeting at the creditor test for malice) (relying on the pre-Geiger decision of In re Long, 774 F.2d at 875).

214. 238 B.R. 156 (Bankr. E.D. Mo. 1999). Details of the underlying factual allegations concerning the nature of the harassment are omitted from the decision.
court found malice under the “targeting the creditor” standard where the
debtor/employer sexually harassed his employee. The court determined
that the debtor knew or should have known that his sexual “intentional
tort” would cause the harm.\textsuperscript{215} Although the court’s rationale that the
intentional act of harassment was sufficient to show malice supported
the view that the concept of “targeting the harm” and “intending the
consequence of the act” are equivalent concepts, the court, relying on
pre-\textit{Geiger} decisions, proceeded through the machination of analyzing
the malice requirement.\textsuperscript{216}

In another post-\textit{Geiger} decision involving a sexual harassment
claim, the court determined that the plaintiff’s hostile environment, sex-
ual harassment damage award was nondischargeable.\textsuperscript{217} The court in
the case of \textit{In re Martino} relied on the state court’s findings of “willful
indifference” to conclude that the debtor’s conduct was both willful and
malicious.\textsuperscript{218} It is not clear whether the court considered the require-
ments of willful and malicious separately, but it appears the court con-
sidered the elements in concert.

Some bankruptcy courts, relying on decisions that predate \textit{Geiger},
continue to interpret malice as meaning wrongful and without just cause
or excuse, even in the absence of personal hatred, spite, or ill will.\textsuperscript{219}

In the case of \textit{In re Howcraft}, the court interpreted \textit{Geiger} as quali-
fying malicious to require a traditional intentional tort, the exact mean-
ing the court in \textit{Geiger} assigned to the willful prong.\textsuperscript{220} The creditor in
\textit{In re Hawcroft} sought to except from the debtor’s discharge damages
stemming from a civil claim for assault and intentional infliction of
emotional distress filed following the debtor’s conviction on charges of
assault and aggravated felonious sexual assault.\textsuperscript{221} Interestingly, the
debtor acknowledged his conduct was willful under \textit{Geiger}, yet the court
still addressed whether his conduct was malicious.

\textsuperscript{215} Id. at 161.
\textsuperscript{216} Id. Although the court cites the post-\textit{Geiger} case of \textit{In re Halverson}, 226 B.R. 22, 29
(Bankr. D. Minn. 1998), for the proposition that malice means targeting the creditor to suffer the
harm, \textit{Halverson} relies on the pre-\textit{Geiger} case of \textit{In re Long}, 774 F.2d at 875, 881.
\textsuperscript{218} Id. at 133. The court also relied on pre-\textit{Geiger} cases finding sexual harassment claims
nondischargeable. \textit{See also In re Bower}, 151 F.3d 1028 (4th Cir. 1998) (without citing \textit{Geiger},
the court limited inquiry to nondischargeability of claim for intentional infliction of emotional distress
by finding that the debtor lacked the requisite number of employees to qualify as an employer
under Virginia’s Human Rights Act, the basis of the cause of action for sex discrimination in the case).
\textsuperscript{219} \textit{See, e.g., In re Luppino}, 221 B.R. 693, 700 (Bankr. S.D.N.Y. 1998) (former employer
sought to except from the debtor/former employee’s discharge debts based on the debtor’s receipt
of commercial bribes and breach of duty of loyalty to his employer).
\textsuperscript{221} Id. at 845.
Whether the willful and malicious prongs require separate showings may be inconsequential, since the creditor should succeed in establishing malice by proving that the debtor intentionally and deliberately caused the injury under the Geiger standard. The question then arises of how the creditor demonstrates the requisite intent to injure.

B. Intentional and Deliberate Injury Under Geiger

The Geiger Court compared the requirement of showing an intentional and deliberate injury to a showing of an intentional tort finding that section 523(a)(6) "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.'"222 Although Geiger holds the debtor must have specific intent to cause the injury, it did not define the requisite state of mind of the actor.223 Some courts interpret Geiger as requiring conduct that constitutes an intentional tort.224 The Fifth Circuit in the case of In re Miller found that Geiger did not specifically require an intentional tort. The court found the label of intentional tort too "elusive to sort intentional acts that lead to injury from acts intended to cause injury."225 Geiger was interpreted as requiring either objective certainty of harm or subjective motive to do harm.226

223. Id. at 57. See also 4 Collier on Bankruptcy ¶ 523.12(1) (15th ed. rev. 1998).
225. In re Miller, 156 F.3d 598, 603-04 (5th Cir. 1998).
226. Id. at 604. The Sixth and Ninth Circuits follow In re Miller's objective substantial certainty or subjective motive approach to finding willfulness. In re Baldwin, 245 B.R. 131, 135 (B.A.P. 9th Cir. 2000); Markowitz v. Campbell (In re Markowitz), 190 F.3d 455, 464-65 (6th Cir. 1999) (remanding to lower court for determination of whether attorney committing malpractice desired to cause the consequences of his actions or believed that the consequences were substantially certain to result from his actions). The Eighth Circuit holds that willfulness means deliberate or intentional injury. In re Madsen, 195 F.3d 988, 988 (8th Cir. 1999) (creditor satisfied elements of collateral estoppel establishing that its judgment for misappropriation of trade secrets was nondischargeable under the willful and malicious exception). But see In re Englehurst, No. 99-3339, 2000 WL 567959, at *2-3 (10th Cir. Sept. 8, 2000) (unpublished opinion) (criticizing the approach of In re Miller as ignoring the history of intent jurisprudence by failing to appreciate that the notion of subjective, substantial certainty extends the scope of intent beyond "evil motive" without extending it so far as to include consequences outside the actor's "ken"); ABF, Inc. v. Russell, 262 B.R. 449, 454 (Bankr. N.D. Ind. 2001) (asserting In re Miller formulation is too rigorous to the extent it focuses on the debtor's knowledge or belief that his actions would cause harm; willfulness standard set forth in Geiger may be met by something less than a showing that the debtor's actions were motivated by a specific desire to harm the creditor).
C. Dischargeability of Disparate Treatment Claims

Although disparate treatment claims under Title VII are often described as intentional torts, it is not clear if this convenient label supports a finding of nondischargeability under Geiger's strict standard.\textsuperscript{227} Arguably, the complainant's burden of showing that the debtor intended to cause the injury is met where an applicant is denied a job in violation of Title VII or the Americans with Disabilities Act because the employer clearly intended to injure the applicant by denying him employment and the employer knew the result of its unlawful decision would deprive the applicant of wages, prospective advancement, and other benefits. Similarly, an employer's failure to promote an employee or provide benefits because of an employee's race, religion, sex, age, national origin, or disability, knowingly deprives the employee of earned opportunities. In these cases the employer's objective certainty to do harm or subjective motive to harm is easily established, since the employer knew his acts would result in the injury. Excepting disparate treatment claims from the debtor's discharge comports with the purpose of the discharge exception — assuring debtors remain accountable for damages caused by their deliberate and intentional acts to injure another person.\textsuperscript{228}

D. Dischargeability of Sexual and Racial Harassment Claims

In contrast to disparate treatment claims, employers may not appreciate the consequences of their acts of racial or sexual harassment since employers may not intend to cause the psychological or physical injuries resulting from this type of discrimination.

The Supreme Court likened sexual harassment claims to intentional torts in \textit{Ellerth}, noting that sexual harassment under Title VII "presupposes intentional conduct."\textsuperscript{229} The Court further likened these discrimi-

\textsuperscript{227} See Kolstad v. Am. Dental Assoc., 527 U.S. 526 (1999) (stating punitive damages may be awarded in intentional discrimination cases where the employer recognizes the perceived risk that its actions will violate federal law); \textit{In re Kelly}, 238 B.R. 156, 160-61 (Bankr. E.D. Mo. 1999) (stating sexual harassment is an intentional tort). \textit{See also} North Bank v. Cincinnati Ins. Cos., 125 F.3d 983 (6th Cir. 1997) (insurance company claimed no obligation to pay for defense of employment discrimination claim since policy excluded intentional torts; without determining whether employment discrimination constituted an intentional tort, the court found that the policy drafted by the insurer was ambiguous and discrimination was covered); Ortland v. County of Tehama, 939 F. Supp. 1465, 1470 (E.D. Cal. 1996) (deciding plaintiff must prove intent under California's civil rights laws).

\textsuperscript{228} Disparate impact claims require no showing of intent and therefore, will not fall within the willful and malicious discharge exception. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (finding discriminatory intent not required to show violation of Title VII where requiring high school education or passing of standardized general intelligence test as condition of employment was not significantly related to successful job performance and both requirements disqualified black applicants at a substantially higher rate than white applicants).

\textsuperscript{229} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998).
nation claims to an intentional tort by analogizing an employer’s liability for the harassing conduct of its supervisors to vicarious liability theories for intentional torts. The Court, however, did not find that the harasser must intend to injure his victim, as required by Geiger, thus leaving open the possibility that it can be shown that the harasser solely intended to commit the act which lead to the injury. This latter interpretation of the harasser’s motive precludes the courts from excepting harassment claims from discharge because the willful element is lacking. Yet, the courts continue to except these claims from the debtor’s discharge.

Without significant discussion, one bankruptcy court held that sexual harassment constitutes an intentional tort. In re Martino, the post-Geiger decision excepting a harassment claim from discharge, relied on the state court’s findings that the conduct was willful and malicious without addressing whether the harasser intended to injure the plaintiff.

In harassment cases, the nature of the injury may dictate whether the claim is nondischargeable. Employers engaging in sexual and racial harassment may appreciate that their conduct may cause harm in the form of lost job opportunities. Yet, they may never intend to cause non-job related injuries such as depression, nausea, sleeplessness, emotional distress, or loss of consortium. In quid pro quo cases, employers clearly appreciate the injury of denying an employee a job, promotion, or other tangible job benefit upon his/her refusal to exchange sexual favors since the employer knows with substantial certainty that the employee’s failure to exchange the sexual favor will result in a tangible injury — loss of a job opportunity. Where the exchange of sexual

230. Id.
231. In re Kelly, 238 B.R. at 162.
233. In the case of In re Smith, 270 B.R. 544 (Bankr. D. Mass. 2001), the court excepted the creditor’s sexual harassment claim from discharge without any discussion of Geiger, finding that the debtor knew the consequences of his actions as evidenced, inter alia, by the jury’s award of punitive damages. The creditor’s injuries included anxiety and depression. Id. at 546. Because the jury did not have a special verdict form, the bankruptcy court did not know under what theory of sexual harassment the liability was determined. Id. at 547-48.
234. The classification of sexual harassment cases as either quid pro quo or hostile environment began with academicians and was adopted by the judiciary. Ellerth, 524 U.S. at 752. The terms do not appear in Title VII, yet serve a useful purpose of illustrating the difference between cases involving a threat which is carried out and offensive conduct in general. Id. at 753. Quid pro quo harassment involves a demand for sexual favors linked to the grant or denial of a tangible job benefit. Meritor Sav. Bank. v. Vinson, 477 U.S. 65 (1986); Ellerth, 524 U.S. at 752-53. See 29 C.F.R. § 1604.11(a). Hostile environment harassment involves sufficiently pervasive or severe harassment based on sex, which unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive working environment. Meritor Sav. Bank, 477 U.S. at 65-66.
favors is made, and the employee keeps his job but suffers psychological harm, however, it may be impossible to show the employer knew the employee would suffer a psychological injury. This is so, notwithstanding that the employer intended the harm which would result if the exchange was not made, e.g., loss of a promotion. Arguably, in the employer’s mind the potential injury to the employee by virtue of his conduct was limited to the loss of an employment opportunity. Unless the employer appreciates that quid pro quo harassment may cause employees emotional or other physical harm, the claimant will be unable to establish the debtor’s requisite substantial certainty that the harm would occur.  

Seemingly in quid pro quo harassment cases, willfulness can only be shown if the debtor is the actor and intends to cause the tangible job detriment or other psychological or physical injury. Where the debtor is not the actor, but is vicariously liable to the claimant for his supervisor’s actions, it will be impossible to establish the requisite intent unless the claimant shows the debtor advised the supervisor to engage in the misconduct.

The unique nature of hostile environment sexual and racial harassment cases may preclude plaintiffs from making the requisite showing of intent to cause the injury. In hostile environment cases, it is difficult to show the employer deliberately intended to cause the injury resulting from a workplace poisoned with sexual innuendo or racial hostility. Although, the employer may intend to create a sexually or racially charged atmosphere in the workplace, the employer may not intend to cause the plaintiff psychological or physical injury. Although, in hostile environment cases involving supervisor misconduct, an employer is liable unless it successfully establishes the affirmative defense set forth in Ellerth, the debtor’s willfulness must still be shown under section 523. A showing that the supervisor intended to cause the injury, making the employer liable, still does not establish intent on the part of the

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235. The employer’s knowledge of the potential injuries may be established by showing that the employer participated in a diversity training program during which the injuries associated with harassment were discussed.

236. In determining whether a supervisor’s quid pro quo harassment is within the scope of his employment, Ellerth adopted the Restatement’s “aided in the agency relation” rule, finding that where a tangible employment action is taken against the plaintiff by a supervisor, the supervisor is acting for the employer and the employer is absolutely liable. Ellerth, 524 U.S. at 758-59.

237. In re Baldwin, 245 B.R. 131, 136 (B.A.P. 9th Cir. 2000) (debt stemming from debtor’s assisting other defendants in violently striking and injuring creditor satisfied Geiger’s willful requirement). See also In re Moore, 1 B.R. 52 (Bankr. C.D. Cal. 1979) (finding that individual debtor, as overall manager of corporation’s property, is responsible for discrimination against residents culminating in unjustifiable eviction of residents, notwithstanding that no showing was made that the debtor personally engaged in the misconduct).

employer, unless the employer knew about the harassment. In cases involving co-worker harassment, the employer’s liability is premised on traditional negligence principles requiring the plaintiff to show the employer knew or should have known of the harassment. Again, unless the employer had actual knowledge of the wrongdoing, it will be difficult to establish willfulness since the employer was not the actor and, without knowledge, could not have intended to cause the injury. Notwithstanding that under Geiger a showing of negligence is insufficient to establish willfulness, the plaintiff’s showing that the conduct was notorious, thereby establishing that the employer knew of the misconduct, might be sufficient to impute intent to injure to the employer for dischargeability purposes. In that case, the employer’s intention to cause the injury can be gleaned from his awareness of the discriminatory acts.

Certainly, where the individual harasser is the debtor, a stronger showing for excepting the debt from discharge can be made. Often, the issues of malice and willfulness are determined in the state court and are entitled to preclusive effect in a subsequent bankruptcy case. Although the application of the doctrine of collateral estoppel is not unique in bankruptcy, the doctrine has significant import in actions to determine dischargeability since the findings of the state court may preclude a subsequent inquiry into willfulness or malice by the bankruptcy court.

VII. COLLATERAL ESTOPPEL PRINCIPLES

The principle of collateral estoppel applies in bankruptcy cases. Where an issue is litigated under state law, the collateral estoppel principles of the relevant state apply.

A creditor may avoid relitigation of the issues of willful and malicious under section 523(a)(6) of the Code by showing that the jury instructions in a state trial required a finding of willful and malicious under the same standards considered under the discharge exception. Conversely, the failure to make findings of intent following a trial in state court will prompt a trial on the issue in the bankruptcy court. The

239. The requirement that the conduct be severe or pervasive supports a showing of intent to injure.
judgment creditor in the case of *In re Betts* seeking to declare an administrative law judge’s workman’s compensation award nondischargeable. Although the evidence supported the inference that the defendants either negligently or recklessly disregarded their duty to provide workman’s compensation insurance, no demonstration of the requisite willful intent to injure required under section 523(a)(6) was made by the administrative law judge. The failure to make the requisite determinations in the state court proceeding required a determination of the issue by the bankruptcy court.

Creditors should always anticipate a bankruptcy filing by the defendant and take steps to protect their interests. The decision in *Geiger* makes it imperative that findings from the lower court and those contained in settlement documents are drafted to accomplish the goals of the parties. Plaintiffs in discrimination actions seeking to avoid a subsequent discharge of their claims in bankruptcy, and the uncertainty and expense associated with a trial to determine dischargeability, should attempt to draft findings of fact and conclusions of law reflecting that the debtor intended to cause the creditor’s injury and acted with the requisite malice. Because the courts are still grappling over the meaning of malice, a creditor should insist on findings encompassing the different standards of malice applied by the bankruptcy courts, to wit: implied malice, special malice, and targeting the harm. The creditor should always include the parties’ agreement that the debt is nondischargeable under section 523(a)(6) in any settlement documents.

Often, a debtor is clandestinely planning to file bankruptcy and, requiring additional time for pre-bankruptcy planning, agrees to settle a case on the eve of trial or execution. Often, the debtor will insist that the settlement documents reflect the customary language that the settlement does not reflect any wrongdoing by the debtor. Although such language does not preclude a creditor from excepting the obligation from discharge in a subsequent bankruptcy case, it will necessitate a new trial in the bankruptcy court on the issue of whether the conduct was willful and malicious.

Dischargeability relates to excepting a creditor’s claim from dis-

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245. *Id.* at 649-50. *See In re Miller, 156 F.3d 598, 598 (5th Cir. 1998)* (explaining that issue preclusion did not apply in favor of either party since the jury did not determine whether the debtor acted with fraudulent intent or the objective probability of injuring the creditor).
246. This request, however, may prompt the employer’s consideration of the effect of the agreement in an ensuing bankruptcy case, thereby goading the employer’s refusal to agree to any findings of willfulness or malice. Even if the employer agrees to nondischargeability, the findings of willfulness and malice should still be included in the documents protecting the creditor in the event the bankruptcy court refuses to enforce the nondischargeability clause.
charge and preserving the creditor's rights to prosecute the claim after the case is closed. In contrast to claims held by a creditor, often an individual debtor is the holder of a discrimination claim. Desiring to shield the damages stemming from his cause of action, such a debtor may attempt to exempt this type of claim making the proceeds unavailable to his creditors.

VIII. EXEMPTING DISCRIMINATION CLAIMS IN BANKRUPTCY

The issue of whether a debtor's employment discrimination claim may be exempt from the claims of creditors pursuant to section 522 of the Code must be addressed in the bankruptcy pre-planning stages as the debtor's choice of relief — chapter 7, 11, or 13 — is affected by whether his claim is exempt. If the claim is not exempt, the debtor may delay filing bankruptcy until after collecting the proceeds of his claim and perhaps converting those proceeds to exempt assets before filing. Or, the debtor may opt to seek relief under chapter 11 or 13 by confirming a plan providing for a modest payment to his creditors from future earnings without sacrificing his interest in the discrimination claim. The "best interest of creditors" test, requiring that the debtor affirmatively show that the creditors will receive more under the plan than under a chapter 7 liquidation, may not create an insurmountable hurdle, since it will be difficult to value the discrimination claim at confirmation.

The exemption analysis begins with a determination of whether federal or state law exemption statutes apply. The federal exemptions permit the debtor to exempt a payment, not to exceed $17,425, received by the debtor on account of "personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss..." The conversion of nonexempt assets into exempt assets prior to seeking relief under the Code may constitute a fraudulent transfer subject to avoidance under sections 544(b) or 548 of the Code. Also, a debtor engaging in this type of conduct may face an objection to his discharge pursuant to section 727 of the Code if the trustee prevails in setting aside the transfer as fraudulent under section 548. 11 U.S.C. §§ 544(d), 548, 727 (1994). But see Havoco of Amer. Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001) (holding that conversion of non-exempt assets to constitutionally exempt homestead with the intent to hinder, delay, and defraud your creditors is not voidable as a fraudulent transfer).

The valuation of a debtors' legal claim is conducted through an evidentiary hearing in conjunction with confirmation. 11 U.S.C. § 502(c) (1994) (governing estimation of contingent or unliquidated claims against the bankruptcy estate). The court may opt to hold a "mini-trial" to determine the reasonable value of the claim. Since juries are often unpredictable, the court's estimation may be far off the mark, providing the debtor a windfall after confirmation and liquidation of the discrimination claim.

247. 11 U.S.C. section 522 provides a category of federal exemptions and the right of states to "opt out" of the federal exemptions scheme. Exemptions are only available to individual debtors.

248. The conversion of nonexempt assets into exempt assets prior to seeking relief under the Code may constitute a fraudulent transfer subject to avoidance under sections 544(b) or 548 of the Code. Also, a debtor engaging in this type of conduct may face an objection to his discharge pursuant to section 727 of the Code if the trustee prevails in setting aside the transfer as fraudulent under section 548. 11 U.S.C. §§ 544(d), 548, 727 (1994). But see Havoco of Amer. Ltd. v. Hill, 790 So. 2d 1018 (Fla. 2001) (holding that conversion of non-exempt assets to constitutionally exempt homestead with the intent to hinder, delay, and defraud your creditors is not voidable as a fraudulent transfer).

249. 11 U.S.C. §§ 1129(a)(7), 1325(a)(4) (1994). The valuation of a debtors' legal claim is conducted through an evidentiary hearing in conjunction with confirmation. 11 U.S.C. § 502(c) (1994) (governing estimation of contingent or unliquidated claims against the bankruptcy estate). The court may opt to hold a "mini-trial" to determine the reasonable value of the claim. Since juries are often unpredictable, the court's estimation may be far off the mark, providing the debtor a windfall after confirmation and liquidation of the discrimination claim.

State exemption laws vary with some states permitting debtors to exempt the proceeds of "personal injury actions" and tort claims affecting "personal" rather than "property" interests. Other state exemptions are limited to payment on account of "personal bodily injury" of the debtor. Courts determining the exempt status of discrimination awards under state statutes focus on the statutory language distinguishing between those statutes which require "personal" injury and the more narrow statutes requiring "bodily" injury. The courts unanimously refuse to exempt sexual harassment claims under state statutes requiring "bodily" injury, finding that psychological and emotional injuries do not suffice.

The male chapter 7 debtor in the case of *In re Marshall* sought to exempt the proceeds of his sexual harassment claim under a state law exempting "[r]ights of action for injuries to the person of the debtor." The court held that the injury giving rise to physical damage was insufficient. The initial injury must be to the person such that an injured debtor is deprived from using his human capital to gain a fresh start. Similarly, a chapter 7 debtor's claimed exemption of proceeds from a sexual harassment claim was disallowed in *In re Langa* where the Illinois statute required "personal bodily injury." The court refused to expand the statute to include proceeds of a sexual harassment claim which the court found was "clearly a personal injury."

Acknowledging that Congress intended ambiguous bankruptcy exemptions to be interpreted in favor of the debtor, the court in *In re*
Ciotta refused to narrowly construe the definition of "bodily injury" as requiring permanent bodily injury. Instead, the court found the debtor had the burden of showing she suffered "appreciable physical injury" as a result of the alleged harassing conduct. The debtor in the case of In re Ciotta sought to exempt $28,000 for a pre-petition sexual harassment lawsuit. As of the date of the petition, the case had not yet proceeded to trial. Because the debtor failed to prove she suffered an appreciable physical injury, the court granted her thirty days in which to provide a declaration of a competent witness qualified to attest to this fact.

Courts tend to recognize an exemption for payments relating to harassment claims where the statutory exemption covers proceeds of "personal injury." A sexual harassment claim was deemed exempt under a Maryland statute requiring only personal injury — not bodily injury. The failure of the state statute to limit exemptions to personal "bodily" injury supported exempting claims for injury to the debtor’s psyche, including mental anguish.

The Virginia statute at issue in the case of In re Webb exempted all causes of action for "personal injury." The court reasoned that since the debtor was seeking compensatory damages in her Title VII hostile work environment claim, and Virginia permitted compensatory damage awards in personal injury cases, the proceeds of the harassment claim were exempt. The court, however, did not reach the issue of whether to extend its ruling to all Title VII causes of action.

Where the debtor’s unliquidated sexual harassment claim contains elements of both personal and property damage, the property damage portion of the claim is not exempt. In the case of In re Kininson, a decision applying Missouri’s exemption statute, which exempts property not subject to attachment and execution in the state, the court found that damages recovered by the debtor for injury to her person, including for embarrassment, medical expenses, emotional distress, or other harms to

261. Id. at 633.
262. Id. at 626.
263. Id. at 633-34.
266. Id. (citations omitted).
269. Id. (noting that it “need not decide the more difficult issue of whether all Title VII causes of action are exempt” under Virginia’s exemption statutes).
the person, were exempt because such claims were not subject to attachment.\textsuperscript{271} Recovery realized for loss of wages and punitive damages were deemed non-exempt and, therefore property of the estate.\textsuperscript{272}

The Nebraska statute exempts "proceeds and benefits" for personal injuries, but does not exempt a personal injury "cause of action" or claim.\textsuperscript{273} In applying this statute, the \textit{In re Key} bankruptcy court suggested that the trustee elected to administer the debtor's cause of action for employment discrimination because the Nebraska statute exempting the proceeds and benefits paid as compensation for personal injuries contemplate the liquidation of a cause of action before the exemption could be claimed.\textsuperscript{274} The proceeds of the employment discrimination might include non-exempt proceeds, depending upon whether the statue was construed narrowly to include only proceeds from bodily injury or broadly to cover proceeds from psychological injuries.\textsuperscript{275}

In cases governed by the federal exemption requiring "bodily injury" it appears that the proceeds of any type of discrimination claims are not exempt unless the claimant suffers actual bodily injury. The legislative history supports this interpretation, providing that the exemption is designed to exempt payments relating to "actual bodily injury, such as the loss of a limb. . . ."\textsuperscript{276}

\section*{IX. Conclusion}

The resolution of the inherent conflicts between the deterrent and rehabilitative goals of Title VII and the Code's aim of maximizing distribution to creditors, requires that Congress amend the Code to provide a specific exception to dischargeability for pre-petition claims stemming from employment discrimination or, alternatively that Congress overrule by statute the Supreme Court's decision in \textit{Geiger} codifying willfulness to mean intention to do the act, not cause the injury. In individual cases, a specific discharge exception for discrimination claims will preserve the estate for all the creditors, assuring their equal treatment. The debtor is deterred from engaging in future discrimination because he is not dis-

\begin{itemize}
  \item \textsuperscript{271} \textit{Id.} at 634-35.
  \item \textsuperscript{272} \textit{Id.} The analysis undertaken by the \textit{Kininson} court, allocating damages realized from the exempt claim against damages realized from non-exempt claims, safeguards against the impermissible expansion of the personal injury exemption to cover compensatory damages relating to property damage.
  \item \textsuperscript{273} \textit{In re Key}, 255 B.R. 217, 220 (Bankr. D. Neb. 2000).
  \item \textsuperscript{274} \textit{Id.} at 220. The court recognized that in some cases where the only recovery available would be compensation for personal injuries, it would be known prior to judgment that the proceeds of the cause of action would be exempt. This would permit the trustee to abandon the claim if administration would be burdensome to the bankruptcy estate. \textit{Id.} at 220.
  \item \textsuperscript{275} \textit{Id.}
charged from his obligation to satisfy the discriminatee’s claim. Alternatively, relaxing the standard for establishing willfulness will deter discriminatory conduct because the creditor’s burden of establishing willful and malicious injury will be diminished, thereby enabling discrimination victims to preserve their claims. 277

Amending the Code to provide priority status for pre-petition back pay capped at $15,000, regardless of whether the back pay accrued during the ninety days proceeding the filing, will encourage employers to reinstate employees, or risk further depletion of the bankruptcy estate, which in turn would jeopardize their prospects for reorganization. Additionally, the impact of $15,000 on the creditor body is small, yet provides incentive for the debtor in the ubiquitous chapter 11 clamoring to satisfy priority claims. Also, public policy supports compensating discriminatees before other creditors.

Although amending the Code to provide priority status for back pay accruing postpetition and stemming from a pre-petition violation will encourage the debtor to end the discriminatory conduct through voluntary reinstatement, it may also force employers to reinstate employees with bogus or objectionable claims so as to not risk further accrual of postpetition back pay and the concomitant increase in administrative expenses which must be paid on the effective date. Dissipating estate resources by compensating employees who hold bogus or objectionable claims is contrary to the Code’s goal of equal and fair treatment of creditors and threatens the employer’s ability to reorganize. The allowance of administrative expense status only after a final judicial determination finding the employer unlawfully engaged in discrimination provides incentive to the debtor/employer to reinstate employees where warranted.

The proposed amendments to the Code currently under consideration by Congress focus on raising the barriers for filing chapter 7 and limiting a debtor’s exemptions. Perhaps in the future, under pressure from the NLRB, and as more decisions emerge exploring the disharmony between Title VII and the Code, Congress will probe the conflict.

277. Relaxing the standard may enable other pre-petition tort claimants from excepting their claims from discharge, discouraging the debtor from filing bankruptcy for the purpose of discharging certain tort claims, and perhaps threatening the ability to salvage companies and jobs through reorganization where a substantial portion of the claims are based on tort.