THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 99-53717
	)	
ANITA PFOUTS,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
ANITA PFOUTS,	)	**ADVERSARY NO. 00-5020**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
EDUCATIONAL CREDIT MANAGEMENT CORPORATION	)	**MEMORANDUM OPINION RE: DISCHARGEABILITY OF EDUCATIONAL LOANS PURSUANT TO 11 U.S.C. §523(a)(8)**
	)	
DEFENDANT(S).	)	

This matter comes before the Court on plaintiff-debtor's complaint to determine the dischargeability of student loan debt pursuant to 11 U.S.C. §523(a)(8). A trial in this matter was held on October 21, 2002. Appearing at the trial were Morris Laatsch, counsel for plaintiff-debtor and Edward Bailey, counsel for defendant, Educational Credit Management Corporation. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from plaintiff-debtor. Because plaintiff-debtor was facing a December 2, 2002 deadline to either complete her doctoral dissertation or be precluded from receiving a degree, closing arguments were not heard by the Court until February 28, 2003.

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This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and plaintiff-debtor's main chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not disputed by plaintiff-debtor and defendant and are the subject of stipulations.

1. At the time of trial plaintiff-debtor was 63 years old.
2. Plaintiff-debtor is unmarried and has no dependents.
3. Plaintiff-debtor obtained an Associate Degree in Speech and Journalism from Ohio University in 1960.
4. Plaintiff-debtor obtained a Bachelor's Degree in English Literature from Pace University in 1973.
5. Plaintiff-debtor obtained a Master's Degree in African Area Studies from the University of California Los Angeles ("UCLA") in 1980.
6. Plaintiff-debtor completed course work toward a Doctoral Degree in African Area Studies at UCLA from 1980-1983 and also in 1991.

7. As of the time of trial, plaintiff-debtor had not yet completed her dissertation.

8. Plaintiff-debtor received $11,055.11 from the California Student Aid Commission on May 4, 1988 to consolidate her educational loans.

9. As of October 1, 2002 the total amount due and owing for the consolidated loan was $19,179.74.

10. Defendant, a Minnesota nonprofit corporation, is a valid assignee of plaintiff-debtor's consolidated loan and is a student loan guarantee agency under 34 C.F.R. §682.200, that acts as a fiduciary to the United States Department of Education.

11. Plaintiff-debtor's taxable income for the past several years is as follows:

Year 1999	$ 9,457.00
Year 2000	$ 9,105.00
Year 2001	$15, 959.00
Year 2002	$14, 400.00 (estimated)

In addition to the foregoing stipulations, the Court makes the following findings of fact.

1. Plaintiff-debtor currently works for the University of Akron as an senior, adjunct lecturer in the World Civilization Program. Plaintiff-debtor has also taught classes in the anthropology department. Plaintiff-debtor has no administrative duties and she receives no benefits such as health or life insurance.

2. Plaintiff-debtor is compensated at a rate of $800.00 per load hour per semester

and the number of classes she is assigned to teach varies based upon the university's needs.

3. Although plaintiff-debtor has, during her years of teaching, made contributions to the Ohio State Teachers Retirement System, she withdraw a large portion of her contributions in 1991 to pay for studies at UCLA.

4. Plaintiff-debtor spent two years (1993-1995) in the country of Namibia through an independent third-party program. The primary purpose of her time in that country was to conduct research for her dissertation.

5. In June 1999 plaintiff-debtor suffered a mild heart attack. She currently takes two medications to treat her heart condition. One of those medicines costs plaintiff-debtor about $25.00 per month and the other she receives free of charge through an indigency program. Plaintiff-debtor receives free medical treatment from her doctor but has not seen him as often as directed because she has been unable to pay for blood tests which need to be administered prior to her appointments.

6. At the time of her bankruptcy filing plaintiff-debtor lived on the top floor of a multi-level rental home that she shared with several other students and for which she paid $180.00 per month. Plaintiff-debtor now lives alone in a one bedroom subsidized apartment for which she pays approximately $450.00 per month.

7. Plaintiff-debtor completed her dissertation in December 2002 and will be

receiving a Doctorate Degree in African Area Studies from UCLA.

8. Plaintiff-debtor's primary language is English. Plaintiff-debtor is fluent in reading and writing in German. She also has some proficiency in reading and writing in French and Swahili.

9. Excluding the amount due and owing on her student loan, plaintiff-debtor lists $21,131.62 in unsecured debt on her Schedule F.

10. Plaintiff-debtor received a discharge in her main chapter 7 case on April 10, 2000.

DISCUSSION

Pursuant to §523(a)(8) of the Bankruptcy Code, educational loans are not dischargeable in bankruptcy "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents." Congress did not define what constitutes an "undue hardship." Courts, including the Sixth Circuit Court of Appeals, have employed what has come to be known as the *Brunner* test. *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994). Under the *Brunner* test a debtor must prove the following three factors by a preponderance of the evidence in order to be entitled to an "undue hardship" discharge of educational loans:

> [1] that debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans;

[2] that additional circumstances exist to indicate that this state of affairs is likely to persist for a significant portion of the loan repayment period; and

[3] that debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

During closing arguments counsel for defendant conceded that the first factor of the *Brunner* test has been met. Accordingly, it need not be discussed any further. To satisfy the second factor of the *Brunner* test plaintiff-debtor must demonstrate that her current financial adversity is more than a temporary state of affairs. Instead, plaintiff-debtor must show a "certainty of hopelessness." *See, e.g., Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 778 (7th Cir. 2002). Such a showing requires evidence of "additional, exceptional circumstances strongly suggestive of continuing inability to repay over an extended period of time." *In re Roberson*, 999 F.2d 1132, 1137 (7th Cir. 1993); *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987).

During the trial plaintiff-debtor testified that receipt of a doctoral degree could enable her to obtain a full time teaching position. She also testified that only 10 institutions of higher learning in the United States have African studies departments but she could not specifically identify any of those institutions nor had she contacted any regarding potential employment. Plaintiff-debtor stated that she was told by someone on her dissertation committee not to apply for any full time teaching positions unless and until she received her doctoral degree.

Also during the trial, plaintiff-debtor testified that she has not considered any non-teaching positions in which she could apply her extensive education and diverse language skills. Plaintiff-debtor further testified that in the past she has held part-time jobs in the fields of editing, typesetting and proofreading and that this employment was somewhat related to her Bachelor's Degree in English Literature. Since 1998 plaintiff-debtor has not looked for any employment in these fields.

The only justification that plaintiff-debtor offered for her inability to pay her educational loan was her current, limited employment. Because plaintiff-debtor will be receiving a doctoral degree, she may now be eligible to obtain a full time teaching position. The only evidence presented at trial that such full time employment may not be available to plaintiff-debtor was her own self-serving testimony that, due to her age, she would not be hired. Although age may play a factor in her ability to secure a full time teaching post, plaintiff-debtor's testimony in this regard is given no credit by the Court given that she could not name any university having a department in her field and had not made even cursory inquiries into whether any of these institutions are or will be looking for faculty.

In addition to the foregoing, plaintiff-debtor failed in any way to explain why she has not sought employment outside of teaching which would utilize her extensive education and diverse language skills. A mere inability (or choice) to "think outside the box" does not excuse plaintiff-debtor's obligation to fully maximize income in an effort to make payments on her educational loan. *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) ("With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith

effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses.").

Based upon the fact that plaintiff-debtor will soon be receiving her doctoral degree, it appears likely that, with some effort, she may be able to obtain more lucrative employment. However, given that plaintiff-debtor has not even begun to look for such employment, the Court is presently unable to fully evaluate whether or not plaintiff-debtor faces a "certainty of hopelessness" in regards to her current financial condition.

Factor three of the *Brunner* test requires plaintiff-debtor to demonstrate that she has made a good faith effort to repay the challenged loan. To date, plaintiff-debtor has made only six payments totaling $1,145.88 on account of that loan. The first of those payments was made in 1998 and the rest were made in 1999, the last one being in July of that year. Plaintiff-debtor then initiated her chapter 7 case in December 1999. That plaintiff-debtor made only six payments over a period of more than ten years, the last of which was made within six months of her bankruptcy filing, raises serious questions of good faith.[1]

In addition to looking at repayment history, Court's may also consider whether a debtor has availed herself of all available options to repay educational loans even when finances are limited. *See, e.g., Archibald v. United Student Aid Funds, Inc. (In re Archibald)*,

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[1] During trial, plaintiff-debtor stated that she had sought a deferral of payment on her student loan prior to traveling to Nambia but that her application papers were lost by the processing agency. Other than her fairly cursory testimony in this regard, plaintiff presented no other evidence to support this statement. Plaintiff bore the burden of proof on this issue and she failed to carry such burden.

280 B.R. 222 (Bankr. S.D. Ind. 2002); *Swinney v. Academic Fin. Servs. (In re Swinney)*, 266 B.R. 800 (Bankr. N.D. Ohio 2001); *England v. United States (In re England)*, 264 B.R. 38 (Bankr. D. Idaho 2001); *United States Dep't of Educ. v. Rose (In re Rose)*, 227 B.R. 518 (W.D. Mo. 1998). One repayment option available to plaintiff-debtor is the federal income contingent repayment program ("ICRP") in which the amount of required monthly payments is determined and then recalculated yearly based upon the borrower's adjusted gross income. *See* http://www.ed.gov/DirectLoan/pubs/exitborr/exb7.html. Monthly payments will not exceed 20 percent of a borrower's "discretionary income" (which is defined as adjusted gross income minus the poverty level for debtor's family size) and the repayment period under the ICRP can extend for up to twenty five years. *Id*. If a debtor's adjusted gross income is less than or equal to the applicable poverty level then monthly payments would be $0.00. *Id*.

During trial, plaintiff-debtor testified that she received an ICRP application from her counsel but she never completed the necessary forms to apply for the program. Plaintiff-debtor offered no explanation for this inaction. This total and unexplained failure to seek out alternative avenues for repayment of her loan coupled with such a limited payment history is tantamount to a lack of "good faith."

CONCLUSION

Based upon the foregoing the Court finds that, at this time, plaintiff-debtor is not entitled to an "undue hardship" discharge of her student loans as she has not satisfied her burden of proving all three factors of the *Brunner* test. However, because plaintiff-debtor has

not attempted to determine whether she is eligible for enrollment in the ICRP and because she will be receiving her doctoral degree in the very near future, all relevant facts in this case have not been fully developed and a final determination regarding nondischargeability would be premature. Accordingly, the Court is providing plaintiff-debtor the following avenues in which to more fully develop her case:[2]

1. Plaintiff-debtor will be given until **April 30, 2003** to make a full application for participation in the ICRP. This application deadline will not be extended by the Court for any reason.

2. Plaintiff-debtor must provide evidence of a timely and full application for participation in the ICRP to defendant's counsel by not later **than 5:00 p.m. on April 30, 2003**. If plaintiff-debtor fails to make a timely and complete application for participation in the ICRP then judgment will be entered determining that her educational loan is not dischargeable pursuant to 11 U.S.C. §523(a)(8). Counsel for defendant shall be responsible for filing a pleading requesting that the Court enter such judgment and such pleading shall be accompanied by a certification of plaintiff-debtor's non-compliance.

3. Should plaintiff-debtor make a timely and complete application for participation in the ICRP and be accepted into the program, then a finding of "undue hardship" will not be justified in this case and counsel for defendant shall be responsible for filing a pleading requesting that the Court enter judgment in its favor.

4. If plaintiff-debtor makes a timely and complete application for participation in the ICRP but is not ultimately accepted into the program for reasons outside of her control then a re-evaluation of this case will occur at **10:00 a.m. on August 31, 2004**. At this time, plaintiff-debtor will be given the opportunity to present evidence regarding whether she has found alternative employment commensurate with her education and skills. During her search for alternative

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[2] This relief was announced by the Court on February 28, 2003 at the conclusion of counsels' closing arguments. Accordingly, plaintiff-debtor, through counsel, should have been fully apprised of these deadlines on that date.

employment, plaintiff-debtor is expected to keep a detailed journal which should include, at a minimum, (1) a list of every educational institution, government agency and private employer she contacted regarding employment, (2) a record of all resumes she sent out and (3) a record of all follow-up correspondence she made after those resumes were sent out.

5. If plaintiff-debtor is not accepted into the ICRP for reasons outside of her control and if she is still underemployed in August 2004 but can demonstrate that she vigorously pursued every possible option for alternative employment then a finding that she has met the second and third factors of the *Brunner* test may be appropriate. However, any failure by plaintiff-debtor to present a full documentation of her job search will result in the entry of judgment finding that her educational loan is not dischargeable pursuant to 11 U.S.C. §523(a)(8).

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: March 27, 2003