UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	
	CASE NO. 03-55805
KEVIN NORMAN ESLINGER,	
	CHAPTER 7
DEBTOR,	
KEVIN NORMAN ESLINGER,	**ADVERSARY NO. 04-5032**
PLAINTIFF,	JUDGE MARILYN SHEA-STONUM
vs.	
WILLIAM D. FORD DIRECT LOAN PROGRAM,	**MEMORANDUM AND ORDER RE: DISCHARGEABILITY OF STUDENT LOANS PURSUANT TO 11 U.S.C. § 523(a)(8)**
DEFENDANT.	

This matter is before the Court on debtor's complaint to determine dischargeability of his student loans pursuant to 11 U.S.C. § 523(a)(8) [docket #1]. A trial was held in this matter on November 9, 2004, at which the debtor, Kevin Eslinger (the "Debtor"), *pro se*, and James L. Bickett, counsel for the defendant, William D. Ford Direct Loan Programs (the "Program") were present. At trial, the parties submitted as evidence a list of undisputed facts that were the subject of joint stipulations (with exhibits attached in support) and the testimony of the Debtor. The Court then took this matter under advisement.

This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I), over which this Court has jurisdiction under 28 U.S.C. §1334(b) and the Standing Order of

Reference entered in this District on July 16, 1984. Upon consideration of the testimony, arguments, and exhibits adduced at trial and review of the pleadings in this Adversary Proceeding and the corresponding Main Case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are undisputed and were the subject of joint stipulations between the parties [J. Ex. A].

1. The Debtor is 41 years old, unmarried, and the father of four children: Jason, age 14, Chad age 11, Dylan age 3, and Hunter nearly age 2. The Debtor pays monthly child support for Chad and Jason in the amount of $148.00 and $60.00 respectively. These amounts include arrearages.
2. In 1998, the Debtor borrowed $4,995.00 from the Program in order to attend The Ohio Center for Broadcasting. As of May 26, 2004, the Debtor owed the United States Department of Education a total of $6,921.51, comprised of principal and interest. (the "Student Loan Debt").
3. The Debtor did attend and complete the course work at The Ohio Center for Broadcasting in 1998, but the Debtor has since been unable to obtain a job utilizing the training and skills he acquired while in attendance there.
4. In November 1998, the Debtor selected the Income Contingent Repayment Plan[1]

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[1] The ICRP is an alternative repayment option that offers borrowers variable repayment amounts depending on their income and family size. 34 C.F.R. § 685.209(a). Loan payments are adjusted based on these factors, but borrowers must submit evidence of this information annually. *Id.* Under the ICRP, the U.S. Department of Education cancels any balance that remains at the end of the 25 year repayment term. 34 C.F.R. § 685.209(c)(4)(iv).

(the "ICRP") as his preferred means for paying back his Student Loan Debt.

5. In April 1999, the Debtor again reiterated his desire to enroll in the ICRP and submitted the necessary supporting documentation of income and consent to disclosure of tax information as required for participation in the ICRP.

6. In April 1999, the Debtor also submitted a General Forbearance Request to the Program requesting permission to temporarily stop making payments on the loan because he was still unemployed and had not yet been placed in a career in his chosen field.

7. In February 2003, the Debtor submitted another General Forbearance Request to the Program indicating he was earning less than $5,000 per year and had still not been placed by The Ohio School of Broadcasting in a career in his chosen field. At the same time, the Debtor also submitted an Unemployment Deferment Request identifying six employers he had attempted to secure full time employment with in the past six months.

8. Based on records from the Internal Revenue Service (the "I.R.S. records") the Debtor's income for the years 1998-2003 is as follows:

Year	**Income**
1998	$2,111
1999	$2,762
2000	$4,902
2001	$3,991
2002	$6,369

2003	$6,280

The Court makes the following findings of fact in addition to the aforementioned stipulations.

1. The Debtor filed a voluntary petition, *pro se*, for chapter 7 relief on November 5, 2003.
2. The Debtor is not the custodial parent of any of his four children. The Debtor's eldest son, Chad, lives in Pennsylvania and the Debtor sees him infrequently due to the associated travel expenses required to see his son. The Debtor testified he has "shared parenting" with the mother of his son Dylan, and has "liberal and expanded visitation" with his youngest son, Hunter.
3. The Debtor has not made any payments toward his Student Loan Debt since it was incurred in 1998.
4. The Debtor's Schedule I - Current Income of Individual Debtor(s) lists his monthly income as $724 and his Schedule J - Current Expenditures of Individual Debtor(s) lists his monthly expenses as $1,463.
5. The Debtor has a history of stress and anxiety disorder since approximately age 13.
6. In August 2004, the Debtor was involved in an automobile accident in which he sustained a shoulder and neck injury. He is currently in physical therapy for both injuries and did not appear to have any physical disabilities when representing himself at trial.
7. The Debtor was unemployed at the time of the trial and had been unemployed

since approximately July 15, 2004.

8. The Debtor had a total of $14, 865 of unsecured debt listed on his Schedule F - Creditors Holding Unsecured Non-Priority Claims, and he lists his Student Loan Obligation as $6,766 on that same schedule.

CONCLUSIONS OF LAW

Dischargeability of educational loans is governed by 11 U.S.C. § 523(a)(8), which allows discharge of the loans only when repayment "will impose an undue hardship on the debtor and the debtor's dependents." Although the Bankruptcy Code does not define what constitutes "undue hardship," the Sixth Circuit has adopted what is commonly refer to as the *Brunner* Test. *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir.1994); *Tenn. Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433 (6th Cir.1998). The *Brunner* Test requires a debtor establish, by a preponderance of the evidence, the following three elements in order to receive a hardship discharge: that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for himself and his dependents if forced to repay the loan; that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and that the debtor has made a good faith effort to repay the loans. *Brunner v. N. Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987). Because the *Brunner* Test is stated in the conjunctive, failure to meet any one of its elements precludes a debtor from obtaining a hardship discharge. In addition to the *Brunner* Test, this Court can also look to other factors in its assessment of dischargeability, such as the debt amount; the interest rate on the loan; the debtor's

claimed expenses and current standard of living to assess whether the debtor has attempted to minimize his expenses; the debtor's income, earning ability, health, educational background, dependents, age, accumulated wealth, and professional degrees; and whether the debtor has attempted to maximize his income by seeking or obtaining stable employment commensurate with his educational background and abilities.[2] *Miller v. Pa. Higher Educ. Assistance Agency* (*In re Miller*), 337 F.3d 616, 623 (6th Cir. 1987).

Upon review the Debtor's schedules, the Court concludes that, in light of the disparity between the Debtor's monthly income of $724 versus his monthly expenses of $1463, if forced to repay the Student Loan Debt, the Debtor could not maintain a minimal standard of living for himself. Furthermore, the Debtor's IRS records evidence that he is well below the individual poverty level for the years 1998-2003.[3] In light of these findings, the Debtor has met the first element of the *Brunner* Test.

In assessing the second element of the *Brunner* Test, courts have consistently held that temporary or short-term hardship is an insufficient justification for discharge and that, though the situation must not be utterly hopeless, the evidence of a temporary state of financial adversity is inadequate. *Tenn. Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433, 437 (6th Cir.1998) (discussing that "[c]ourts universally require more than temporary financial adversity"); *See also In re Marion* 61 B.R. 815, 818 (Bankr.

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2 Since this Adversary Proceeding was taken under advisement, the Sixth Circuit has expressly adopted the "simpler rubric" of the *Brunner* Test, and no longer affords separate consideration of the factors cited from the *Miller* court. *Oyler v. Educational Credit Mgmt. Corp.* (*In re Oyler*) 397 F.3d 382, 385 (6th Cir. 2005).

3 The individual poverty level was over $8,000 for the years in question. *See* United States Department of Heath and Human Services Poverty Guidelines, 1982 - 2005, available at: http://aspe.hhs.gov/poverty/figures-fed-reg.shtml (omitting Fed. Reg. citations).

W.D. Pa. 1986) (noting that "the difficulties of the borrower must be such that, in looking ten years into the future, there appears no hope of an improved financial picture"). Furthermore, courts often consider the presence of medical problems one of the most significant factors when assessing whether an educational loans warrant discharge in bankruptcy. *In re Dyer*, 40 B.R. 872, 873-74 (Bankr. E.D. Tenn. 1984). Aside from an Unemployment Deferment Request submitted to the Program in February 2003, the Debtor failed to introduce any evidence indicating that he is unable to obtain employment or that his current unemployment is likely to last long term, throughout the years remaining in his loan repayment term. The Debtor, representing himself throughout this Adversary Proceeding, appears to this Court to be intellectually and physically capable of obtaining employment; he is not elderly, and did not submit that he is disabled or ill. Although unable to find a job in his chosen field of study, he has not proven that he is unable to obtain work in any field, nor that he finds himself in this circumstance because of events that are beyond his control. *In re Berry*, 266 B.R. 359, 365 (Bankr. N.D. Ohio 2000) (finding the debtor had not made a "considerable effort" pursuing his chosen career or searching for work outside of that field, therefore he had not done everything within his power to change his circumstances, as required for a hardship discharge). Aside from the Debtor's unsupported testimony that he suffers from stress and anxiety disorders, he presented no evidence that any medical condition, physical or mental, would prevent him from obtaining full-time employment now or in the future. The Debtor does point to the fact that his family size has doubled since he incurred his Student Loan Debt, but neither of the two additional children reside with him, nor was their any assertion that they are

financially dependant upon him for support. In short, the Debtor failed to prove that his current state of unemployment and financial difficulty is anything more than short-term, thus he failed to satisfy the second element of the *Brunner* Test.

Finally, the *Brunner* Test requires the Debtor demonstrate a good faith effort toward loan repayment. Courts often consider participation in alternative repayment programs such as the ICRP when assessing a debtor's good faith and impose a "heavy burden [on debtors] to show good faith" if they have failed to pursue such programs. *Storey v. Nat'l. Enterprise Sys.* (*In re Storey*) 312 B.R. 867, 875 (Bankr. N.D. Ohio 2004); *Martin v. Educ. Credit Mgmt. Corp.*, (*In re Martin*) 2005 WL 419733 at *4 (Bankr. N.D. Ohio Feb. 14, 2005). Here, the Debtor did not make any payments on his Student Loan Debt during the five years that elapsed between completing his course work and filing this bankruptcy. Furthermore, following his initial application to participate in the ICRP, the Debtor has failed to submit the annual documentation required by the Program to evidence his financial inability to pay and his increasing family size. The Debtor has not demonstrated any effort to repay his Student Loan Debt nor has he submitted the documentation necessary to remain current in the ICRP, thus he has failed to satisfy the third element of the *Brunner* Test also.[4]

Because the Debtor has failed to set forth any evidence that would satisfy the *Brunner* Test's second and third elements, he has failed to prove that repayment of his Student Loan Obligation would constitute an undue hardship. Additionally, the Debtor did

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[4] Previous failure to comply with the annual documentation requirements of the ICRP does not preclude a borrower from being reinstated into the ICRP at any point in the future; a borrower need only indicate to the Program that he or she again desires to participate in ICRP and complete the requisite documentation for participation. 34 C.F.R. § 685.200, et seq.

not proffer any evidence germane to the other factors this Court is permitted to assess when determining dischargeability under §523(a)(8). *See In re Miller, discussed supra.*

CONCLUSION

For the reasons articulated in this Memorandum Opinion, the Court finds that the Debtor failed to present the requisite evidence to support his claim that repayment of his Student Loan Debt would constitute an "undue hardship" as defined by the Sixth Circuit. Therefore, this Court finds that, in this bankruptcy, the Debtor's Student Loan Debt is nondischargeable.

IT IS SO ORDERED.

Marilyn Shea-Stonum

MARILYN SHEA-STONUM
Bankruptcy Judge AFL

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of MARCH, 2005, the foregoing Order was sent via regular U.S. Mail to:

S. Norman
Clerk

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