UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re: Amy Anne Mann Debtor. Amy Anne Mann Plaintiff, v. Educational Credit Management Corporation, Defendant.	)	Case No. 01-32714 Chapter 7 Adv. Pro. No. 02-3047 Hon. Mary Ann Whipple

MEMORANDUM OF DECISION

This adversary proceeding was before the court for trial upon Plaintiff Amy Anne Mann's ("Ms. Mann") Complaint against substituted Defendant, Educational Credit Management Corporation ("ECMC"), seeking a discharge of student loan debt as an undue hardship.

This case arose in and is related to Ms. Mann's chapter 7 bankruptcy case. The court has jurisdiction over Ms. Mann's chapter 7 case and this adversary proceeding under 28 U.S.C. §§ 1334(b) and 157(a) and (b) and under General Order 84-1, the general order of reference in this district. Determinations of dischargeability of particular debts are core proceedings that this court may hear and determine under 28 U.S.C. § 157(b)(2)(I). This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of

the sole witness, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that Ms. Mann's student loan debt to ECMC cannot be discharged as an undue hardship to her and her dependent.

Findings of Fact:

The parties stipulated at trial that ECMC, is the holder of two student loan notes executed by Ms. Mann. [Doc. # 12]. The total amount disbursed to Ms. Mann was $48,709.00. [*Id.*]. The total amount due and owing as of March 19, 2002, was $57,017.66, including $56,850.69 in principal (recapitalized) and $166.97 in interest. [*Id.*]. As a benefit of the loans Ms. Mann obtained a Bachelor of Science degree from the University of Toledo in 1994 and a Master of Rehabilitation degree from Bowling Green State University in 1996. [Doc. # 9]. She testified that she took out the student loans to pay for rent and child care. Ms. Mann further testified that she could not recall how many payments she had made on these loans, although she thought she had made some. Likewise, her interrogatory responses, proffered in evidence by ECMC and admitted by the court, state that the number of loan payments she made was unknown, as was the number of deferments or forbearances, if any.

Ms. Mann is 30 years of age and employed full time as an intake specialist at Crosswaeh Community Based Correctional Facility [*Id.*]. She earns $14.67 per hour, which is approximately $29,000.00 gross per year. Ms. Mann testified that her net pay biweekly is $860.00, or approximately $1863.00 per month. She also receives $200.00 per month as child support for her son. Ms. Mann's total net monthly revenue is approximately $2063.00. Her bankruptcy schedules also show her former husband is paying a property settlement, which is not quantified. [Debtor's Schedule B at 1, Case No. 01-32714, Doc. #1]. Ms. Mann does not have any other sources of income now. Her current earnings are the most she has ever earned, with her salary history from prior employers showing that she has generally increased her earnings over time and as she changed employers. [Doc. #9, Answer to Interrogatory 21, and Mann

Trial Testimony]. Ms. Mann has received one raise from her current employer, where she started out earning $14.00 per hour.

Ms. Mann is a single parent who currently lives in Clyde, Ohio with her 12 year old son, Ryan Mann. She pays her parents $200.00 per month to reside in a trailer they own. [*Id*., Answer to Interrogatory 14]. Based upon her appearance in court, she presents herself as professional, well-groomed and articulate. Ms. Mann is in good health. Ryan has ADHD, which results in additional medical expense to her not covered by the medical insurance she has as a benefit at work, including for medications and routine doctor's visits.

In her petition, Ms. Mann scheduled monthly expenses of $2746.00 [Schedule J, Case # 01-32714, Doc. #1], including additional monthly medical expense of $150.00 for Ryan. Her scheduled monthly expenses also included, however, $400.00 per month on existing bills, which have now been discharged, and $410.00 per month on student loan payments, which she cannot identify as actually having been made. If those amounts are subtracted from her total scheduled monthly expenses, the total is $1936.00, which puts her close to a break even position on her monthly budget.

Ms. Mann's testimony and interrogatory responses evinced comparable monthly expense totals, although somewhat different itemized expenses, for example slightly more for food than she scheduled ($300.00 compared to $200.00). Ms. Mann testified that her monthly expenses include a $100.00 monthly contribution she is making to an IRA account, and a $50.00 monthly payment to a friend from whom she has borrowed money. It is not clear whether that was a pre-petition loan or a post-petition loan. Although not identified in her testimony or in her interrogatory responses, her Schedule J lists $130.00 per month for telephone expense, including $60.00 for a cell phone. Ms. Mann has also itemized $100.00 for recreation expenses, including her son's sports expenses, cable and internet access.

Ms. Mann filed her chapter 7 voluntary petition for relief on May 1, 2001. [Case # 01-32714, Doc. # 1]. She reaffirmed the debt on her vehicle, a 1998 Chevrolet Malibu, for $256.32 per

month. [Case # 01-32714, Doc. # 4]. The order of discharge in the underlying case was entered on September 19, 2001. [Case # 01-32714, Doc. # 7].

Law and Analysis:

Ms. Mann asks the court to discharge her student loan obligations based upon the "undue hardship" exception to nondischargeability in 11 U.S.C. § 523(a)(8). The term "undue hardship" is not defined in the statute and neither the Supreme Court nor the Sixth Circuit have formally adopted a standard for determining what constitutes "undue hardship." Although, in at least two cases, the Sixth Circuit approved application of a widely used three part test derived from the Second Circuit case, *Brunner v. New York State Higher Educ. Servs. Corp*., 831 F.2d 395 (2nd Cir. 1987). *See Cheesman v. Tennessee Student Assistance Corp*. (*In re Cheesman*), 25 F.3d 356 (6th Cir. 1994); *Tennessee Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433 (6th Cir. 1998). Other bankruptcy courts within the Sixth Circuit have universally relied on the "*Brunner* test" to determine whether a debtor is entitled to an "undue hardship" discharge of student loan obligations. *E.g., Berry v. Educational Credit Mgmt. Corp. (In re Berry),* 266 B.R. 359 (Bankr. N.D. Ohio 2000); *Graybush v. U.S. Department of Educ. (In re Graybush),* 265 B.R. 587 (Bankr. S.D. Ohio 1999).

Under *Grine v. Texas Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 197 (Bankr. N.D. Ohio 2000), the debtor bears the burden of proving by a preponderance of the evidence each of the following three *Brunner* elements:

> (1) the 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; and,
> (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and,
> (3) the debtor has made good faith efforts to repay the loans.

In *Hornsby*, the Sixth Circuit also directed bankruptcy courts to look to other factors that may be appropriate in a specific case. *Hornsby,* 144 F.3d at 437.

The first prong of the *Brunner* test contemplates that a debtor is first entitled to provide for basic needs for food, clothing, shelter, medical care, and transportation for herself and her dependents, before repaying student loan debts. The starting point for applying the test is therefore an evaluation of income and expenses, focusing particularly on what expenses are necessary to realistically maintain a basic standard of living and then determining whether there is income left over with which to pay student loan debts.

As described above, Ms. Mann's current gross annual earnings from her employment are approximately $29,000, or approximately $22,356.00 net. This amount substantially exceeds the standards established by Department of Health and Human Services' 2002 poverty guidelines of $11,940.00 for a family of two. *See* 67 F.R. 6931 (Feb. 14, 2002); *Hornsby*, 144 F.3d at 436 (Sixth Circuit comparing debtors' income to poverty guidelines); *cf. Salinas v. United Student Aid Funds, Inc. (In re Salinas),* 258 B.R. 913, 918 (Bankr. W.D. Wis. 2001) (§ 523(a)(8) does not mandate that debtors fall below federal poverty guidelines before a loan can be discharged as an undue hardship exception). She also receives an additional $2400.00 per year in child support.

Mr. Mann's identified current monthly expenses are approximately the same as her incoming monthly revenue. The court does not doubt that she is in fact making the expenditures reported in her testimony and in her interrogatory responses. And most are not out of line with maintaining a basic standard of living. The court notes that Ms. Mann's housing expense is actually less than what might routinely be reasonable and expected, as her parents are assisting her by renting her a trailer at $200.00 per month. Her lifestyle does not by any means seem lavish. She faces the difficult road of a single parent doing the best she can to provide for her son. Ms. Mann unquestionably faces financial hardship, even with the discharge of her other debts. The question is whether it is undue. *Berry,* 266 B.R.

at 364(debtor must establish more than "garden variety" financial hardship experienced by the majority of debtors). Nevertheless, the court finds that several of Ms. Mann's expenses are excessive and could be reduced to leave her with disposable income with which to make some payment on her student loan debt to ECMC.

Specifically, Ms. Mann is making payments of $100.00 per month into an IRA account. She also pays into a 403B retirement plan, but has no choice about that. Nevertheless, her retirement future is being addressed and there is no justification for her past and future contributions to an exempt IRA account to be subsidized by her student loan creditor. Her total telephone debt is excessive, and while families are entitled to some income diversion for entertainment and recreation, *Myers v. Fifth Third Bank (In re Myers)*, 280 B.R. 416, 422 (Bankr. S.D. Ohio 2002), the court concludes that some savings could be made by Ms. Mann on such expenses.

Under the first prong of the *Brunner* test, it is clear to the court that, under Ms. Mann's current circumstances, she could still afford to make some monthly payment on her student loan debt with some judicious belt tightening, while maintaining a basic and reasonable standard of living for herself and her son. Ms. Mann has not met her burden of proof under the first prong of the *Brunner* test, because her budget is unreasonable in some of the choices she has made and continues to make, especially as to the IRA contributions. *Cf. Horsnby*, 144 F.3d at 438 ("The Hornsbys do not seem to have minimized expenses in every way possible.").

Under the second prong of the *Brunner* test, a debtor's financial adversity is required to be more than a temporary state of affairs. *Hatfield v. William D. Ford. Fed. Direct Consolidation Program* (*In re Hatfield*), 257 B.R. 575, 582 (Bankr. D. Mont. 2000). The purpose of this requirement is to give effect to the clear congressional intent – exhibited by use of the word "undue" in § 523(a)(8) – that a student loan obligation be more difficult to discharge than that of other nonexcepted debts. *Rifino v. United States* (*In re Rifino*), 245 F.3d 1083, 1088-89 (9th Cir. 2001).

Ms. Mann contends that she cannot obtain any employment at a higher salary; however, the court cannot find that the current market conditions will remain the same or that Ms. Mann is unable to obtain secondary employment. Furthermore, the court cannot find that Ms. Mann's son would be unable to earn an income someday, and that he will be emancipated in less than six years. Therefore, the court concludes, based on Ms. Mann's young age, good health, good education, winning personal traits and earning potential, and other evidence presented at trial, that her financial difficulties are temporary and not undue. She has a 35 year working life ahead of her. There are no facts demonstrating that she does not face a brighter financial future, as opposed to a decline or even remaining in the same general financial state. Ms. Mann has not proven the second prong of the *Brunner* test.

Next, under the third prong of the *Brunner* test, the court finds that Ms. Mann has not made a good faith effort to repay the loans. Beyond vague testimony that she thought she had made some payments, there is no evidence of any payments or attempts to deal with her student loan debt outside of bankruptcy, such as through forbearance, deferment, attempted consolidation to reduce the interest rate, or a negotiated repayment plan. There is no evidence that she has kept in communication with her lender, or tried to make partial loan payments instead of contributing voluntary amounts to an IRA account. *Cf. Myers*, 280 B.R. at 424 (third prong of test satisfied, and loan debt discharged, where debtor made partial payment of $30.00 per month); *Afflitto v. United States of America (In re Afflitto)*, 273 B.R. 162, 171 (Bankr. W.D. Tenn. 2001)(overall good faith found despite minimal payments on loan). Although the failure to make any payments on a student loan is not alone conclusive of a lack of good faith, the totality of the circumstances evidenced by the record in this case does not allow the court to conclude that she has acted in good faith in trying to address her student loan debt burden. *Afflitto*, 273 B.R. at 171 (test is really a question of overall good faith in regard to the loan, driven by a totality of the circumstances test). On this record, it appears that Ms. Mann's first stop in seeking relief to address her student loan debts has been bankruptcy court.

Applying the totality of the circumstances in the framework of the *Brunner* test, Ms. Mann has failed to meet her burden of proving that the financial hardship she faces is undue. She has not met her burden of proof on any of the three prongs of the *Brunner* test. But as permitted by the Sixth Circuit in *Hornsby*, this court also analyzes another factor to evaluate undue hardship. Specifically, this court evaluates what the impact of forced collection by the creditor will be on the debtor and the debtor's dependents. Ms. Mann does not now have nonexempt assets that could be liquidated, either voluntarily or on execution, to repay the student loan debt. So her property will not be seized. Nor can the child support paid for Ryan's benefit be seized. O.R.C. § 2329.66(A)(11). Ms. Mann does, however, have wages that can be garnished. ECMC would be permitted to obtain administrative garnishment of her wages, limited to 10% of her disposable pay. 20 U.S.C. § 1095a. At Ms. Mann's current level of pay, an administrative garnishment would reduce her take home pay by approximately $186.00 per month. The court concludes that a reduction at that general level would not render Ms. Mann unable to maintain a basic standard of living, as it approximates the reduction in expenses the court believes that Ms. Mann could effect on a voluntary basis, through stopping her IRA contribution and carefully limiting her telephone and recreation/entertainment expense.

For the foregoing reasons, the court concludes that Ms. Mann has not proven undue hardship justifying the exception of her student loan debt from the presumption of nondischargeability established in § 523(a)(8). Nevertheless, under *Hornsby* and *Cheesman*, the court must take one further step and analyze whether there are any other circumstances justifying an equitable or partial remedy for Ms. Mann. In *Cheesman* the Sixth Circuit authorized trial courts to evaluate undue hardship under § 523(a)(8) in light of and in conjunction with 11 U.S.C. § 105. In *Hornsby,* the Sixth Circuit appears to require trial courts to undertake such an analysis.[1]

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[1] In contrast, other courts understandably hold that § 523(a)(8) simply does not, on its face or otherwise, permit the kind of equitable remedy, such as partial discharge or deferment of collection, that the Sixth

In *Cheesman*, the Sixth Circuit permitted a bankruptcy court to revisit the status of undue hardship factors 18 months after trial under the authority of § 105. More recently, in *Horsnby*, the Sixth Circuit held that the bankruptcy court must consider a range of partial discharge remedies under § 105, noting that a repayment schedule could be changed, interest or attorneys fees could be excused, payment can be deferred, or a case can be reopened. The bankruptcy court in *Hornsby* had discharged a student loan debt on the grounds of undue hardship, under circumstances where it ultimately appeared to the Sixth Circuit that all three prongs of the *Brunner* test were not really met, but that requiring repayment of the entire debt would be an undue hardship, if not an impossibility. The Sixth Circuit reversed the bankruptcy and district court decisions, remanding the case with directions to "fashion a remedy [under § 105] allowing the Hornsbys ultimately to satisfy their obligations to TSAC while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances." *Hornsby*, 144 F.3d at 440. Since *Hornsby*, bankruptcy courts in the Sixth Circuit have consistently granted partial discharges and developed other remedies in undue hardship cases. *Afflitto v. United States (In re Afflitto)*, 273 B.R. 162 (Bankr. W.D. Tenn. 2001) (discharge of accrued and accruing interest, abatement of repayment for one year and opportunity to request further hearing after one year).

The only factor that weighs in Ms. Mann's favor with respect to the court's exercise of equitable discretion under § 523(a)(8) in conjunction with § 105 is the substantial amount of the debt she has incurred. The court believes that, on either a voluntary or involuntary basis, Ms. Mann can repay the existing debt over a 20 to 35 year period. But the debt will continue to accrue interest, with the current rate being 8.25%. The per diem accrual of interest is at the rate of $12.85. [Doc. # 12], or $4690.25 per year. At that rate, given the $2000 to $2400 annual payment level the court has concluded that Ms. Mann

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Circuit not only permits, but seems to require under certain circumstances. *E.g., Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303 (Bankr. S.D.N.Y. 2002) (court rejects an application of the undue hardship exception and holds that the Bankruptcy Code does not permit partial discharge or other equitable remedies, which are "pure judicial activism").

can reasonably undertake, either voluntarily or by administrative garnishment of her wages, the accrual of interest will outstrip payments, and she will continue to fall farther and farther behind for the foreseeable future. The accelerating total will at some point reach an unmanageable amount constituting an undue hardship. The court therefore finds that it is equitably appropriate to terminate the continued accrual of interest on the existing principal debt, but only if Ms. Mann commences some voluntary repayment of her existing principal loan debt. Therefore, if Ms. Mann makes voluntary monthly payments of $150.00 per month on the existing principal amount of her debt of $56,850.69, such payments to commence on a date that is 90 days from the date of this entry, the court finds that it is appropriate to terminate the further accrual of interest on the debt. Should such payments not be made, all interest that would have accrued and will accrue, will become a nondischargeable debt. Nothing in this decision shall be construed to prohibit Ms. Mann from making larger payments or otherwise paying off the existing principal amount of the debt earlier than the approximately 31 years it will take if she makes payments of $150.00 per month.[2]

A separate judgment effecting this Memorandum of Decision will be entered by the court.

Dated:

Mary Ann Whipple
United States Bankruptcy Judge

[2] As the court has articulated above, the court believes that Ms. Mann's circumstances will improve in the future, enabling her to make more substantial payments and pay off the debt in an earlier time frame. Also, § 523(b) provides that a debt excepted from discharge in a prior case under § 523(a)(8) is dischargeable in a later case under Title 11 unless it still falls within the terms of § 523(a). Under current law, Ms. Mann can seek another discharge under chapter 7 in six years. The court certainly does not mean or want to encourage repeat bankruptcy filings, but if necessary the safety net provided by chapter 7 and the ability to re–evaluate undue hardship in light of then existing circumstances currently exists in the current Bankruptcy Code.