

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:) Case No. 03-24510
)
MARY A. WILLIAMS,) Chapter 7
)
Debtor.) Judge Arthur I. Harris

MEMORANDUM OF OPINION

This case is currently before the Court on the trustee's objection to the debtor Mary A. Williams's claim of exemption (Docket #14), plus additional briefing by counsel for the trustee and counsel for the debtor. At issue is whether the debtor is entitled to exempt the \$25,000 in Voluntary Separation Incentive Pay that she is receiving in installments from her former employer – an agency of federal government. On April 5, 2004, the parties filed Stipulations of Fact (Docket #25). For the reasons that follow, the trustee's objection to the debtor's claim of exemption (Docket #14) is overruled.

STIPULATIONS OF FACT

On April 5, 2004, the trustee and the debtor filed stipulations of fact (Docket #25), which provide in pertinent part as follows:

1. The within bankruptcy case was commenced by the filing of a voluntary petition for relief under Chapter 7 of Title 11 of the U.S. Code on October 31,

2003.

2. At the time of the Meeting of Creditors, the debtor was forty-six (46) years old.

3. On September 30, 2003, the debtor became entitled to receive Voluntary Separation Incentive Pay (the "Severance Pay") in the amount of \$25,000, due to an elimination of the position that she had held at the Defense Contract Management Agency, located in Bratenahl, Ohio.

4. Prior to the elimination of her position, the debtor had been employed with the Defense Contract Management Agency since August 1, 1977.

5. The debtor elected to receive the Severance Pay in installments, at the rate of \$500 per week. The election to receive Severance Pay in installments is irrevocable.

6. On October 10, 2003, the debtor received her first payment of the Severance Pay in the amount of \$1,256.68.

7. The Severance Pay is subject to federal, state and local income taxes.

8. The debtor is entitled to receive the Severance Pay regardless of whether she becomes employed by another employer, other than the federal government.

9. By accepting the Severance Pay, the debtor is not eligible to return to employment with the federal government for a period of five (5) years, unless she

repays the Severance Pay.

10. The Severance Pay is subject to garnishment for indebtedness.

11. The debtor was not entitled to receive said Severance Pay, but had to apply to receive the Severance Pay.

12. The severance pay formula is used to calculate the Severance Pay. The amount of Severance Pay is determined on the basis of an employee's weekly rate of basic pay at the time of separation, years of creditable service and age adjustment allowance, if over forty (40) years old.

13. The debtor is currently unemployed.

14. The debtor has claimed an exemption in said Severance Pay, in the amount of \$24,000, pursuant to the following:

- a. Ohio Revised Code §2329.66(A)(10)(a)
- b. Ohio Revised Code §2329.66(A)(10)(b)
- c. Ohio Revised Code §2329.66(A)(11)
- d. Ohio Revised Code §2329.66(A)(12)
- e. Ohio Revised Code §2329.66(A)(13)
- f. Ohio Revised Code §529.01.

15. The Trustee objects to the debtor's entitlement to an exemption in the Severance Pay pursuant to each of the provisions cited above.

DISCUSSION

The trustee's objection to the debtor's claim of exemption is governed by 11 U.S.C. § 522 and Rule 4003 of the Federal Rules of Bankruptcy Procedure. Under Rule 4003(c) of the Federal Rules of Bankruptcy Procedure, "the objecting party has the burden of proving that the exemptions are not properly claimed." This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

Under Section 522 of the Bankruptcy Code, an individual debtor may exempt from property of the estate certain property listed in Section 522. Pursuant to 11 U.S.C. § 522(b)(1) and Ohio Rev. Code § 2329.662, Ohio has elected to specify its own exemptions, which are listed in Ohio Rev. Code § 2329.66. This section provides in pertinent part:

(A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:

(10)

(b) Except as provided in sections 3119.80, 3119.81, 3121.02, 3121.03, and 3123.06 of the Revised Code, the person's right to receive a payment under any pension, annuity, or similar plan or contract, not including a payment from a stock bonus or profit-sharing plan or a payment included in division (A)(6)(b) or (10)(a) of this section, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the person and any of the person's dependents, except if all the following apply:

(i) The plan or contract was established by or under the auspices of an insider that employed the person at the

- time the person's rights under the plan or contract arose.
- (ii) The payment is on account of age or length of service.
 - (iii) The plan or contract is not qualified under the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1, as amended.

Although the debtor also asserts that her separation pay is exempt under several other subsections of Ohio Rev. Code § 2329.66 and Ohio Rev. Code § 529.01, the Court finds it unnecessary to address the applicability of these other provisions. Nor does the trustee assert that the Voluntary Separation Incentive Pay at issue involves the three disqualifying characteristics specified in divisions i, ii, and iii of § 2329.66(A)(10)(b).

**Are the Debtor's Severance Payments a Similar Plan or Contract
Within the Meaning of Ohio Rev. Code § 2329.66(A)(10)(b)?**

While the Court has been unable to find a reported decision involving a claim of exemption in the same type of Voluntary Separation Incentive Pay made available to the debtor in this case, the case law involving somewhat analogous situations is instructive. For example, in *In re Phillips*, 45 B.R. 529 (Bankr. N.D. Ohio 1984), Judge Krasniewski determined that Ohio Rev. Code § 2329.66(A)(10)(b) is the applicable statute for exempting severance pay. Judge Krasniewski reasoned that "severance pay is a 'similar plan' based on length of

service that is entitled to exemption under § 2329.66(A)(10)(b) because severance pay like most of the benefits listed is a gratuitous payment by the employer to the employee that is intended to provide income similar to current earnings.” 45 B.R. at 532. In addition, the severance pay at issue in *Phillips*, like the severance pay at issue in the present case, was calculated with a formula that uses a percentage of salary and years of service. *Compare* 45 B.R. at 532 *with* Docket #27 at Exhibit B. Another factor in common to both cases is that the employer, not the employee, made the contributions to the fund and did so according to a definite formula. *Id.* Although the employee in *Phillips* did not have the option of receiving his severance payments in a lump sum, in the present case, the debtor’s prepetition election to receive her severance payments in weekly installments was irrevocable. *Id.*

Another analogous case that supports the debtor’s claim of exemption in the present case is *In re Bell*, 80 B.R. 97 (Bankr. N.D. Ohio 1987). The debtor in *Bell* lost her job after twenty years. Pursuant to the union contract, the debtor was entitled to receive \$100 in severance pay for every year she worked at the company, or \$2,000. Judge Speer held the severance pay was exempt under Ohio Rev. Code § 2329.66(A)(10)(b). Judge Speer noted that, like the situation in *Phillips*, the severance pay was funded by the employer, not the employee,

pursuant to a specific formula. 80 B.R. at 98.

Accordingly, it does not appear that allowing the exemption of severance pay would create an opportunity for abuse, particularly when the exemption is specifically limited to the amount reasonably necessary for the support of the debtor and any dependants of the debtor.

80 B.R. at 98.

The trustee asserts that the facts of the present case are closer to those in *In re Bartholomew*, 214 B.R. 322 (Bankr. S.D. Ohio 1997). In *Bartholomew* the debtor received a salary continuation benefit in a lump sum. The purpose was to assist the debtor in supporting himself while he located another job and also to settle any claim the debtor might have against his former employer for age discrimination. *See* 214 B.R. at 326. In finding the payment not exempt under Ohio Rev. Code § 2329.66(A)(10)(b), Judge Sellers emphasized several factors that distinguish *Bartholomew* from *Phillips* and *Bell*, as well as from the present case. Those factors include the discretionary amount of the payment to the employee – *i.e.*, it was not pursuant to any preset formula, and the fact that it was paid to the employee in a lump sum. *See* 214 B.R. at 326.

While the debtor in the present case voluntarily chose to accept the Voluntary Separation Incentive Pay when her job with the federal agency was eliminated, the Court finds that these severance benefits more closely fit the

severance benefits deemed exempt in *Phillips* and *Bell* than the salary continuation benefits deemed nonexempt in *Bartholomew*. To the extent, if any, that the holding in *Bartholomew* cannot be reconciled with the holdings in *Phillips* and *Bell*, this Court chooses to follow the holdings of the two cases from the Northern District of Ohio.

There is also considerable case law for the proposition that exemptions should be liberally construed in favor of the debtor. *See, e.g., In re Peacock*, 292 B.R. 593, 595 (Bankr. S.D. Ohio 2002); *In re Shaffer*, 228 B.R. 892, 895 (Bankr. N.D. Ohio 1998); *In re Simon*, 71 B.R. 65, 66 (Bankr. N.D. Ohio 1987). This is particularly appropriate in situations where the exemption itself is not open ended, but rather is available only to the extent the funds are reasonably necessary for the support of the debtor and the debtor's dependents. *Accord In re Bell*, 80 B.R. at 98. Therefore, subject to the trustee's claim, discussed below, that the payments are not reasonably necessary for the support of the debtor and her dependents, the Court finds that the debtor's severance pay is exempt under Ohio Rev. Code § 2329.66(A)(10)(b).

Are the Severance Payments Reasonably Necessary
For the Support of the Debtor and Her Dependents?

Under Bankruptcy Rule 4003, the objecting party “has the burden of proving that the exemptions are not properly claimed.” *See In re Cluckey*, 221 B.R. 192, 193 (Bankr. N.D. Ohio 1998). Thus, to the extent that the debtor asserts an exemption under Ohio Rev. Code § 2329.66(A)(10)(b), the trustee has the burden of proving that the fifty weekly payments of \$500 are not reasonably necessary for the support of the debtor and any of the debtor's dependents.

“Reasonable necessity is a factual determination to be made on a case by case determination. . . . The court must consider both present and future needs of the debtor when deciding if this reasonable necessity exists.” 221 B.R. at 193

(citations omitted). Relevant factors include:

- 1) Debtor’s present and anticipated living expenses;
- 2) Debtor’s present and anticipated income from all sources;
- 3) Age of the debtor and dependants;
- 4) Health of the debtor and dependants;
- 5) Debtor’s ability to work and earn a living;
- 6) Debtor’s job skills, training, and education;
- 7) Debtor’s other assets, including exempt assets;
- 8) Liquidity of other assets;
- 9) Debtor’s ability to save for retirement;
- 10) Special needs of the debtor and dependants;
- 11) Debtor’s financial obligations.

221 B.R. at 193-94 (citations omitted).

The trustee asserts that the severance payments are not reasonably necessary because the debtor is only 46 years old, supposedly in good health, and chooses not to seek other employment. The Court does not believe that the few stipulations and other items in the record relevant to this issue are sufficient for the trustee to meet his burden under Rule 4003. According to the debtor's Schedules I and J, the debtor's sole income is the \$500 per week in gross income that she receives in severance payments, and her net pay is almost exactly equal to her monthly expenses of \$1,803. These schedules also indicate that the debtor is divorced and rents an apartment with two dependent children, ages 17 and 21. Given the paucity of evidence relevant to the factors described above, the Court does not believe that the trustee has met his burden under Rule 4003. While the debtor may well be able to seek other employment, the Court does not find it unreasonable for a person to spend up to a year looking for new employment after the person's job has been eliminated, especially after having spent 26 years with the same employer. Under these circumstances, and based upon all the factors identified above, the Court finds that the trustee has failed to meet his burden of proving that the fifty weekly payments of \$500 are not reasonably necessary for the support of the debtor and any of the debtor's dependents.

CONCLUSION

For the foregoing reasons, the trustee's objection to the debtor's claim of exemption (Docket #14) is overruled.

IT IS SO ORDERED.

/s/ Arthur I. Harris 06/02/2004
Arthur I. Harris
United States Bankruptcy Judge