

the dischargeability of his student loan debt under 11 U.S.C. § 523(a)(8). Defendant United States Department of Education ("Defendant") filed an answer (the "Answer") on September 4, 2003. Almost three months later, Defendant filed a motion for summary judgment (the "Motion"). Plaintiff has not opposed the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that

[t]he judgment sought shall be rendered forth-with if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056. Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *Structurlite Plastics Corp. v. Griffith (In re Griffith)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257). That is, the nonmoving party has an

affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

D I S C U S S I O N

Facts

Plaintiff asserts in the Complaint that his monthly income barely suffices for the necessities of life. Plaintiff further asserts that he has no current or anticipated available income in excess of his necessary living expenses or other resources with which to pay the student loan debt and that any repayment would constitute great hardship to Plaintiff. Plaintiff neither received a degree in the profession for which he sought education nor is employed in that field. Finally, in the Complaint, Plaintiff states the current amount due on his student loan obligation, including interest, fees and collection costs, is Ten Thousand Twenty-Four and 52/100 Dollars (\$10,024.52). (Compl., ¶ 6.) Accordingly, Plaintiff concludes his student loan obligation is dischargeable under 11 U.S.C. § 523(a)(8).

In the Answer, Defendant denies the majority of Plaintiff's assertions for lack of knowledge or insufficient information, but specifically denies the original amount of Plaintiff's student loan obligation and the outstanding balance.

In the Motion, Defendant states that Plaintiff's current student loan balance amounts to Three Thousand Seven Hundred Five and 84/100 Dollars (\$3,705.84).¹ Defendant further asserts that Plaintiff has failed to prove that he is entitled to a student loan discharge and, there-fore, summary judgement should be granted in favor of Defendant.

Plaintiff is 37 years old, married and has a six year old son. (Def.'s Mot., Ex. B.) Plaintiff has been unemployed since January 28, 2003 when he was laid off from SBC. (Id.) Prior to his layoff, Plaintiff worked for SBC for 18 months, earning up to Twenty-Two and 31/100 Dollars (\$22.31) per hour, and prior to that worked for Northcoast Energy from 1992 through April 2001. (Def.'s Mot., Exs. B & J.) Plaintiff collected Three Hundred Eighty-Two Dollars (\$382.00) of unemployment per week for a period subsequent to being laid off, but no longer receives such benefits. (Id.) Plaintiff's spouse was employed by Humility House from 2000 to March 2003 and has been employed by Trumbull Memorial Hospital since March 17, 2003. (Id.) Her hours and salary vary, with a minimum of working 16 hours a week at a rate of Fifteen and 46/100 Dollars (\$15.46) per hour,

¹Defendant's Motion includes a certificate of indebtedness, signed on June 23, 2003, indicating Plaintiff owed \$4,011.31. (Def.'s Mot., Ex. A.) Without providing any proof of payment, Defendant stated in the Motion that it received an additional \$400.00 student loan payment on or about August 8, 2003. (Def.'s Mot., Attach. # 1, at 2.) However, in Plaintiff's response to interrogatories, he indicated that he last made a student loan payment in the amount of \$50.00 over one year before the alleged payment. (Def.'s Mot., Ex. B, ¶ 14.) Thus, the Court cannot discern the actual amount of outstanding student loan debt owed by Plaintiff.

totaling Two Hundred Forty-Seven and 36/100 Dollars (\$247.36) a week before taxes and hospitalization. (Id.) Debtors' tax returns indicate that for the years 2000, 2001 and 2002, Debtors earned Forty-One Thousand Two Hundred Ninety-Eight Dollars (\$41,298.00), Forty-Nine Thousand Seven Hundred Ninety-Five Dollars (\$49,795.00) and Fifty-One Thousand Nine Hundred Sixty-Six Dollars (\$51,966.00) respectively. (Def.'s Mot., Exs. D, E & F.) Plaintiff made no claim that he, his wife or his son suffer from any medical disabilities. Finally, Plaintiff claims his family expenses amount to Two Thousand Six Hundred Eighty-Five Dollars (\$2,685.00), including Twenty-Four Dollars (\$24.00) for internet access, Sixty Dollars (\$60.00) for a cell phone and Seventy-Five Dollars (\$75.00) for cable. (Def.'s Mot., Ex. B, ¶ 16.) In addition, on or about April 1, 2003, Plaintiff invested Four Thousand Dollars (\$4,000.00) in a 36-month second chance IRA. (Def.'s Mot., Ex. G.)

Legal Analysis

Summary judgment is proper because there are no genuine issues of material fact in dispute, and Defendant, the moving party, is entitled to judgment as a matter of law. Although Plaintiff and Defendant dispute the exact amount of Plaintiff's outstanding student loan debt, the issue is not material. A fact is material if it could affect the determination of the underlying action. *Anderson*, 477 U.S. at

248. The legal analysis required to evaluate whether Plaintiff is entitled to a discharge of his student loan debt does not hinge upon the amount of debt owed in the case at bar. Although circumstances could arise in which a huge discrepancy in the outstanding balance would impact the determination of the dischargeability of student loan debt, no such circumstances exist in this case. The discrepancy between the two outstanding balances is only Six Thousand Three Hundred Eighteen and 68/100 Dollars (\$6,318.68), and Defendant, the creditor, is asserting the lesser of the claimed amounts owed. If the parties cannot agree to the exact outstanding balance, state court can resolve the issue.

Section 523(a)(8) of the Bankruptcy Code provides that a student loan debt is not discharged "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 523(a)(8). This provision of the Code was enacted "to prevent indebted college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves of the obligation to repay their student loans." *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 436-37 (6th Cir. 1998) (citing *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994)).

Since Congress has not defined what constitutes an

"undue hardship," courts have devised various tests to determine whether an "undue hardship" exists. *Hornsby*, 144 F.3d at 437. The United States Court of Appeals for the Sixth Circuit has adopted a multi-factor approach, beginning with a three-prong analysis announced by the Second Circuit in its *Brunner* case:

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

Cheesman, 25 F.3d at 359 (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987)). Additional considerations include "the amount of the debt . . . as well as the rate at which the interest is accruing" and "the debtor's claimed expenses and current standard of living, with a view toward ascer-taining whether the debtor has attempted to minimize the expenses of himself and his dependents." *Hornsby*, 144 F.3d at 437 (quoting *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)). Before considering the first prong of the *Brunner* test, it should be noted that the debtor bears the burden of demonstrating, by a preponderance of the evidence, that he or she qualifies for a hardship discharge. *Dolph v. Pa. Higher Educ. Assistance Agency*, 215 B.R. 832, 836

(B.A.P. 6th Cir. 1998).

The first prong of the *Brunner* test requires Plaintiff to demonstrate that he cannot maintain a minimal standard of living based on current income and expenses. *Cheesman*, 25 F.3d at 359. The minimal standard of living requirement essentially provides that debtors cannot allocate any of their financial resources to their educational loan creditors after providing for their basic needs. *Flores v. United States Dep't of Educ. (In re Flores)*, 282 B.R. 847, 853 (Bankr. N.D. Ohio 2002). The minimal standard of living requirement does not require debtors to live in abject poverty before a discharge is warranted, but it does require that debtors make some lifestyle adjustments in order to maximize income and minimize expenses. *Hornsby*, 144 F.3d at 439. Thus, analysis considering the first prong must necessarily focus on (1) Plaintiff's current income and (2) Plaintiff's current expenses.

As described in Plaintiff's answers to the interrogatories, his current monthly income is based on his wife's salary from Trumbull Memorial Hospital. Plaintiff failed to provide the average number of hours per week that his wife works, but stated that she is guaranteed 16 hours of work a week at Fifteen and 46/100 Dollars (\$15.46) per hour, totaling Two Hundred Forty-Seven and 36/100 Dollars (\$247.36) per week before taxes and hospitalization. Thus, Plaintiff's minimum monthly income, for

a household of three, currently totals Nine Hundred Eighty-Nine and 44/100 Dollars (\$989.44). Yet Plaintiff claims monthly expenses totaling Two Thousand Six Hundred Eighty-Five Dollars (\$2,685.00). Although several of the claimed expenses seem excessive, such as a Sixty Dollar (\$60.00) cell phone bill and a Seventy-Five Dollar (\$75.00) cable bill, Plaintiff's monthly expenses exceed his household income by over One Thousand Dollars (\$1,000.00) per month. Under these circumstances, the Court is satisfied that Plaintiff cannot currently maintain a minimal standard of living for his family if required to repay his student loans.

The second prong of the *Brunner* test requires debtors to demonstrate that their current state of affairs is likely to persist for a significant portion of the repayment period. To be discharged there should be evidence that debtors' financial situation is unlikely to improve in the foreseeable future. *Cheesman*, 25 F.3d at 360 (The court found that debtors' financial situation proved unlikely to improve even if both spouses were employed using their degrees.); see *Rice*, 78 F.3d at 1150; *Balaski v. Educational Credit Management Corp.* (*In re Balaski*), 280 B.R. 395, 399 (Bankr. N.D. Ohio 2002) (The court found that debtor suffered from severe physical deformity and other ailments precluding future improvement in his financial situation.).

This prong of the *Brunner* test is difficult to apply because it is impossible to know what the future holds for Plaintiff. That stated, however, it does not appear that Plaintiff has satisfied this prong of the test. In *Cheesman*, the Sixth Circuit Court of Appeals found that the debtors satisfied the second prong, relying on the fact that the debtors' financial position was unlikely to improve even if the unemployed spouse obtained her desired position. *Id.* at 360. Plaintiff has not proven that the same is true in his situation. While Plaintiff and his family cannot currently maintain a minimal standard of living based on their current income and expenses, Plaintiff was able to make payments on his educational loans when Plaintiff was employed. Although Plaintiff failed to receive a degree in the profession for which he sought education and is not employed in that profession, he found employment from 1992 until 2003, and most recently earned Twenty-Two and 31/100 Dollars (\$22.31) per hour. As stated previously, a review of Debtors' tax returns show that for the years 2000, 2001 and 2002, Debtors earned Forty-One Thousand Two Hundred Ninety-Eight Dollars (\$41,298.00), Forty-Nine Thousand Seven Hundred Ninety-Five Dollars (\$49,795.00) and Fifty-One Thousand Nine Hundred Sixty-Six Dollars (\$51,966.00) respectively. The burden falls on Plaintiff to prove that his circumstances satisfy the second prong of the *Brunner* test. Unfortunately, Plaintiff did not address this

question in his Complaint and failed to file a reply to Defendant's Motion. Plaintiff failed to provide any evidence addressing the likelihood he will be unable to obtain gainful employment during a significant portion of the repayment period or to provide evidence of any health problems that will interfere with his ability to earn a living. Accordingly, the second prong of the *Brunner* test is not satisfied.

The third prong of the *Brunner* test requires Plaintiff to demonstrate that he has made good faith efforts to repay his loans. In determining whether a debtor has acted in good faith regarding the repayment of educational loans, courts consider the following factors:

- (1) whether a debtor's failure to repay a student loan obligation is truly from factors beyond the debtor's reasonable control;
- (2) whether the debtor has realistically used all their available financial resources to pay the debt;
- (3) whether the debtor is using their best efforts to maximize their financial potential;
- (4) the length of time after the student loan first becomes due that the debtor seeks to discharge the debt;
- (5) the percentage of the student loan debt in relation to the debtor's total indebtedness[;]
- (6) whether the debtor obtained any tangible benefit(s) from their student loan obligation.

Flores, 282 B.R. at 856; *Bruen v. United States (In re Bruen)*, 276 B.R. 837, 843-44 (Bankr. N.D. Ohio 2001). The record indicates that Plaintiff has made payments to reduce his student loan debt through the Treasury Offset Program. In addition, Defendant acknowledges that Plaintiff has made a good faith effort to repay his student loan debt. Accordingly, the Court finds that Plaintiff has demonstrated good faith efforts to repay his student loan debt.

C O N C L U S I O N

Defendant's motion for summary judgment is granted. Plaintiff failed to carry his burden of establishing that undue hardship will exist if his student loan debt is not discharged. Accordingly, a discharge of his student loan is not appropriate. However, the Court acknowledges that the amount of outstanding student loan debt is unclear. If the parties cannot agree as to the amount, state court can provide resolution.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

CHRIS HESLOP and
LISA HESLOP,

Debtors.

* CASE NUMBER 02-41190

CHRIS HESLOP,

Plaintiff,

vs.

ADVERSARY NUMBER 03-4099

UNITED STATES DEPARTMENT OF
EDUCATION, et al.,

Defendants.

O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States

Mail this _____ day of January, 2005, addressed to:

CHRIS and LISA HESLOP, 411 Taylor Avenue,
Girard, OH 44420.

JEFFREY D. ADLER, ESQ., 973 W. Liberty
Street, Suite C, Hubbard, OH 44425.

RICHARD J. FRENCH, Assistant United States
Attorney, Carl B. Stokes United States Court
House, 801 West Superior Avenue, Suite 400,
Cleveland, OH 44113.

NATIONAL ASSET MANAGEMENT ENTERPRISES, Post
Office Box 723728, Atlanta, GA 31139.

MICHAEL D. BUZULENCIA, ESQ., 150 East Market
Street, Suite 300, Warren, OH 44481.

SAUL EISEN, United States Trustee, BP America
Building, 200 Public Square, 20th Floor,
Suite 3300, Cleveland, OH 44114.

JOANNA M. ARMSTRONG