UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 03-34144
	)	
Gregory A. Espen	)	Chapter 7
Karen Sue Espen,	)	
	)	Adv. Pro. No. 03-3342
Debtors.	)	
	)	Hon. Mary Ann Whipple
Karen Espen,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
United States Department of Education, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION

This adversary proceeding came before the court for trial upon Plaintiff Karen Espen's Complaint against Defendant U.S. Department of Education, seeking a discharge of student loan debt as an undue hardship. This case arose in and is related to Plaintiff's chapter 7 bankruptcy case. The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157 (a) and (b) and under the general order of reference in this district. Proceedings to determine the dischargeability of debts are core proceedings. 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 witnesses, 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 Plaintiff's student loan debt to the U.S. Department of Education cannot be discharged as an undue hardship.

FINDINGS OF FACT

During the years 1992 through 1996, Plaintiff completed course work at the University of Findlay and obtained an associate degree in accounting. Since 2002, she has been attending Owens Community Technical College ("Owens") where she is pursuing course work to obtain an associate degree in nursing. Her tuition at Findlay and at Owens was financed, at least in part, by obtaining student loans. The last loan date was in 2002. Since that time, Plaintiff has been applying her wages and income tax refunds to pay for her tuition.

There is no dispute that Plaintiff's student loan debts are of the kind excepted from an individual bankruptcy debtor's chapter 7 discharge by § 523(a)(8). As of September 29, 2003, the total amount due and owing the United States Department of Education was $75,036.55, including $69,864.50 in principal and $5,172.05 in interest. Plaintiff testified that she has made no payments on her loans. However, the status of her loans (i.e. whether the loans were in deferment or subject to a particular payment plan) is unclear for the period from 1997 until February, 2002. *See* Def. Ex. 2, p. 3. But Defendant's "Borrower History and Activity Report" indicates that Plaintiff had a "Grace End Date" of December 31, 2001, and that no payments were past due. *See id.* at 1. In February, 2002, she then requested and was granted an economic hardship deferment and, in light of her attendance at Owens, was granted a student deferment from August 26, 2002, until June 1, 2007. *Id.* at 5.

At the time of trial, Plaintiff is a forty year old married woman with two children ages 14 and 20, both of whom live with Plaintiff. After completing her associate degree in accounting, Plaintiff was unable to obtain a position in that field. Although she sent out numerous resumes, estimated at the better part of 60, Plaintiff received no interviews. However, she sought and obtained other employment that included a position performing secretarial duties in a doctor's office earning $300 per week, a position she kept until the physician moved out of state. She also obtained part-time employment in a factory as an assembler and

full time employment as an inspector at another factory earning nearly $400 per week. But she was laid off after only five months and the factory eventually closed. For the past three years, Plaintiff has worked part-time at Pissanello's Pizza earning $5.15 per hour and performing the duties of cook and cashier, as well as other miscellaneous duties that sometimes require heavy lifting. She testified that during the summer months she works 15 hours per week. But because she is attending school, during the school year she only works 3-4 hours per week. Her average biweekly after-tax pay is approximately $38 during the school year and $150 during the summer months. She is, however, actively seeking other employment that provides more hours, at least during the summer months, and a higher rate of pay.

Plaintiff testified that her husband, who did not graduate from high school, has stable employment earning $14.95 per hour. His biweekly income, after withholding for taxes, health insurance and a 401K loan repayment, is between $807 and $873, depending on the availability of overtime. Her husband is not currently contributing to a 401K plan. Plaintiff's updated Schedule I lists their total monthly net income as $2,080. This amount does not include any income from Plaintiff's 20-year old daughter who is also a student at Owens and does not contribute to the household expenses. In addition to their monthly income, in the past three years, Plaintiff and her husband have received income tax refunds averaging $3,234. She testified that, at least in the past year, she used the income tax refund along with her wages to pay her tuition at Owens so as not to incur any further student loan debt.

Plaintiff's updated Schedule J lists total monthly expenses of $2,342, which includes $335 in medical and dental expenses. Plaintiff suffers from several disorders, including non-insulin dependent diabetes, thyroid problems, gastrointestinal reflux disorder, kidney stones, hypertension, and panic attacks, for which she incurs monthly expenses for both prescriptions and doctor's visits. Her cost for prescriptions, however, does not exceed $100 and, although she sees several different doctors, she does not necessarily see them all every month and when she does, she pays only a co-pay of between $15 and $25 She has been hospitalized numerous times because of kidney stones. Plaintiff has also accumulated approximately $8,000 in post-petition hospital and doctor's bills; she is currently paying the hospital $25.00 per month to retire this debt. The post-petition medical expense accounts for the increase in the Schedule J monthly medical expenses between the time of filing of her Chapter 7 case and trial. Notwithstanding her medical problems,

Plaintiff testified that these conditions have generally not prevented her from working and performing her job duties when she is not hospitalized. Her remaining monthly expenses reflect a very modest lifestyle for the family. Plaintiff does not have any assets or non-exempt equity in assets that could be used to pay her student loan debt. She drives a 1997 Dodge Neon with 93,000 miles, the loan for which will be paid off in May or June, 2005. Although that will help with the family's monthly budget, the age of and mileage on the car predict the need for maintenance or replacement expense in the not too distant future. So there will likely be no material reduction in monthly family expenses when that loan is retired.

As indicated above, Plaintiff is currently pursuing an associate degree in nursing. She testified that she has completed the core curriculum consisting primarily of science courses and is now taking the nursing classes which she will complete by December 2005. Midway through the nursing program, she must take and pass a nursing test. If she fails, she will be required to retake the nursing portion of the program from the beginning. In addition, after graduation, she must take and pass state boards in order to work as a registered nurse. Plaintiff testified that she anticipates no problem in successfully completing the program and passing state boards as she is performing well in school with a cumulative grade point average of 3.17. Her cost to complete the nursing program at this point in time is approximately $4,860 (36 hours X $135 per hour), plus lab fees, books and exam fees. She testified that there is now a shortage of registered nurses and her prospect of obtaining employment in that field after graduation is good. The court also notes that Plaintiff presented herself at trial as articulate and pleasant, characteristics that should help her secure future employment as a nurse.

Plaintiff testified that she believed that, after graduation, she could begin repaying her student loan debt at a rate of $200 per month for a period of ten years and requests that her debt be so modified. However, according to Plaintiff this figure is not based on any concrete estimate of her future income and expenses but simply on what she "believes" she will be able to afford.

LAW AND ANALYSIS

Ms. Espen seeks to discharge her student loan debt based upon the "undue hardship" exception to nondischargeability of such debt in 11 U.S.C. § 523(a)(8). Section 523(a)(8) provides for the dischargeability of a student loan obligation if "excepting such debt from discharge . . . will impose an undue

hardship on the debtor and the debtor's dependents. . . ." The underlying purpose of this provision is "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." *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 436-37 (6th Cir. 1998).

Although the Bankruptcy Code does not define "undue hardship," the Sixth Circuit has recently adopted the test set forth by the Second Circuit in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) in determining the existence of "*undue* hardship." *See Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, – F.3d –, 2005 WL 241268 (6th Cir. Feb. 3, 2005).

> Under the *Brunner* test, the debtor must prove each of the following three elements:
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> (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 of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id. at *1 (quoting *Brunner*, 831 F.2d at 396). In applying the three prongs of *Brunner*, courts may consider, among other things, the following factors:

> (1) the debt amount; (2) the interest rate; (3) the debtor's claimed expenses and current standard of living to evaluate whether the debtor has attempted to minimize expenses; (4) the debtor's income, earning ability, health, education, dependents, age, wealth, and professional degrees; and (5) whether the debtor has attempted to maximize income by seeking or obtaining employment commensurate with her education and abilities."

Id.

A debtor seeking an undue hardship discharge bears the burden of proof by a preponderance of the evidence. *Chime v. Suntech Student Loan (In re Chime)*, 296 B.R. 439, 443 (Bankr. N.D. Ohio 2003). But in cases in which a debtor fails to establish an undue hardship justifying the exception of her entire debt, under *Hornsby*, *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994), and *Miller v. Penn. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616 (6th Cir. 2004), the court must take one further step. 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(a). *Cheesman*, 25 F.3d at 360-61. In *Hornsby*, the Sixth Court appears to require trial courts to undertake

such an analysis. *Hornsby*, 144 F.3d at 440 (reversing decision granting a total discharge of student loan debt and remanding for consideration of a partial remedy under § 105(a)). Recently, in *Miller*, the Sixth Circuit made clear that a partial remedy granted pursuant to the equitable powers of § 105(a) does not eliminate the requirement of undue hardship. *Miller*, 377 F.3d at 622. Section 105(a) authorizes a court to grant a partial discharge only where the undue hardship requirement of § 523(a)(8) is met as to the part discharged. *Id.*

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, if any, before repaying student loan debts. In applying this test, the court must therefore evaluate a debtor's household 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 indicated above, the combined current net monthly income of Plaintiff and her husband is $2,080. Her scheduled monthly household expenses of $2,342 exceed their income by $262. The court finds that the monthly expenses listed represent reasonable monthly expenses for basic maintenance and support of the family, including one minor child with asthma and special educational needs. Plaintiff is therefore presently left with no monthly disposable income with which to make a payment on her student loan debt. The court finds that Plaintiff has met the first prong of the *Brunner* test.

In so determining, the court has also considered the fact that Plaintiff and her husband have received income tax refunds averaging $3,234 per year over the past three years, the bulk of which is due to withholding from her husband's income and not her income. Plaintiff testified that she used the most recent tax refund to pay for her continued education in pursuit of an associate degree in nursing. While in other cases such tax refunds would be resources that should be devoted to repayment of existing student loans, or to routine household expenses so as to free up other monthly income to repay student loans, in this case the court commends Plaintiff's current use of the tax refunds to invest in her education without incurring further student loans. These efforts will improve her marketability, enhance her overall financial situation and provide future resources with which to pay down her existing student loan debt. Moreover, the student loans are now in deferment status due to her continued education and do not require current

payments, although interest continues to accrue. Therefore, the fact of the tax refunds does not change the court's assessment that Plaintiff has proven the first prong of the *Brunner* test.

The second prong of the *Brunner* test requires that a debtor's financial adversity be more than a temporary state of affairs. *Hatfield v. William D. Ford Federal Direct Consolidation Program (In re Hatfield)*, 257 B.R. 575, 582 (Bankr. D. Mont. 2000); *see also Hornsby*, 144 F.3d at 437 ("Courts universally require more than temporary financial adversity. . . "). Implicit in this requirement is that the debtor's financial state be the result of events which are clearly out of the debtor's control. *Kirchhofer v. Direct Loans (In re Kirchhofer)*, 278 B.R. 162, 167 (Bankr. N.D. Ohio 2002). Thus, the debtor must establish that she has taken all steps possible to improve her financial situation. *Id.* The purpose of this requirement is to give effect to the provision in § 523(a)(8) that the student debt to be discharged is causing an "undue" hardship on the debtor. *Id.*

In this case, Plaintiff attempted to obtain employment in the accounting field, her field of study at the University of Findlay, without success. For the past three years she has worked at a minimum wage job at Pissanello's Pizza and is currently only working between 3-4 hours per week during the school year and 15 hours per week during the summer months. Although she worked at higher paying jobs in the past, those jobs were terminated for reasons beyond her control. While Plaintiff is obviously underemployed at this time, she is taking steps to improve her marketability by pursuing an associate degree in nursing, which she anticipates completing by December 2005. Plaintiff testified that she is doing well in school and that the prospect of her obtaining employment thereafter as a registered nurse at higher pay is good. Despite Plaintiff's various health issues, she testified that her health has not prevented her from working and performing her various job duties when not hospitalized.

On these facts, the court concludes that a brighter financial future is on the horizon for Plaintiff and her family, and that the lack of financial resources with which to repay her existing student loans is a temporary state of affairs. Although the court has considered the fact that Plaintiff has incurred approximately $8,000 in medical expenses postpetition, she has received a discharge of debt totaling nearly $30,000. The court also considers the fact that Plaintiff's situation is not one in which, if the student loan debt is not discharged, she will be faced with a forced repayment of the debt before completing her nursing

education since Plaintiff has obtained a student deferment until June 1, 2007. And her 20 year old daughter, who Plaintiff acknowledged lives at home and is helped out financially somewhat by Plaintiff, is also studying on the same track as Plaintiff to obtain a nursing degree. To the extent that some the family's monthly living expenses relate to the 20 year old daughter, those expenses will also be reduced after she obtains nursing employment of her own. Also, after Plaintiff's anticipated graduation in December 2005, any tax refunds or reduced withholding can then be devoted to paying her student loans or to payment of other family expenses, including her medical expenses, thus freeing up Plaintiff's income to pay her existing student loans. As such, Plaintiff has not proven the second prong of the *Brunner* test that her current state of financial affairs is likely to persist for a significant portion of the repayment period.

Finally, under the third prong of the *Brunner* test, a debtor must demonstrate that she has made a good faith effort to repay the loan. The fact that a debtor has made no payments or very few payments on a loan is not dispositive. *Birrane v. Pennsylvania Higher Educ. Assistance Auth. (In re Birrane)*, 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002). Rather, a court should look at the totality of the circumstances in determining a debtor's good fath with respect to the student loan. *Afflitto v. United States (In re Afflitto)*, 273 B.R. 162, 171 (Bankr. W.D. Tenn. 2001).

In this case, Plaintiff testified that she has made no payments on her student loan. Although the status of Plaintiff's loans is not clear for the period from 1997 until December 31, 2001, Defendant's "Borrower History and Activity Report" indicates that Plaintiff's "Grace End Date" occurred on December 31, 2001, and that she has no payments past due. *See* Def. Ex. 2, p.1. In February, 2002, she requested and was granted an economic hardship deferment and later a student deferment until June 1, 2007. Thus, it appears that Plaintiff has maintained contact with Defendant with respect to her loans and has utilized the administrative remedies available to her. The court concludes that Plaintiff has satisfied the good faith prong of the *Brunner* test.

Evaluating the totality of the evidence under the framework of the *Brunner* test, Plaintiff has failed to meet her burden of demonstrating undue hardship that justifies discharge of her entire student loan debt or any part of that debt. While the total amount of Plaintiff's student loan debt is substantial, the evidence is insufficient for the court to conclude that after completing her nursing degree, it will be an undue burden to repay, either voluntarily or involuntarily, the full amount of the debt at the interest rate applicable to her

loans. Although Plaintiff testified that she could only repay $200 per month on the debt after graduating with her nursing degree, her testimony was not based on any concrete estimate of, and she offered no evidence regarding, her future income as a registered nurse. At the time she graduates, Plaintiff will be approximately 42 years old, leaving a significant work life during which repayment may be made. The court cannot find in this case that payment of any part of the existing student loan would be an undue hardship without engaging in sheer speculation lacking support in the record.

Although Plaintiff suggests that her remaining work life is necessarily less than normal in light of her various health problems, according to Plaintiff, her health has not yet prevented her from working and from performing jobs such as a cook and cashier that require her to be on her feet and that sometimes require heavy lifting. The court will not speculate as to whether, at some time in the future, her health will interfere with her ability to work. To the extent that Plaintiff does experience further medical problems or other unanticipated events in the future that impair her ability to earn a living and repay the student loan debt, other relief options may be available.[1]

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

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge

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Section 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). While the court does not encourage repeat bankruptcy filings, under current law, if necessary, undue hardship may be re-evaluated in light of circumstances existing at the time of the later case. And while this court does not subscribe to the position that participation in the Income Contingent Repayment Program is a necessary statutory predicate to a finding of good faith or undue hardship, that program is certainly an available avenue for temporary administrative relief outside of bankruptcy appropriate in some cases.