The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: September 28 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 03-33689
Dawn M. Tietje,	)	Chapter 7
Debtor.	)	Adv. Pro. No. 04-3226
Dawn M. Tietje,	)	Hon. Mary Ann Whipple
Plaintiff,	)	
v.	)	
Educational Credit Management Corporation,	)	
Defendant.	)	

MEMORANDUM OF DECISION

This adversary proceeding came before the court for trial upon Plaintiff Dawn M. Tietje's Complaint against 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 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 that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (2)(I).

This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under

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 ECMC should be discharged as an undue hardship.

FINDINGS OF FACT

I. Plaintiff's Student Loans

There is no dispute that Plaintiff's student loan debt is of the kind excepted from an individual bankruptcy debtor's Chapter 7 discharge by § 523(a)(8). Between November, 1990 and December, 1993, Debtor executed eight student loan notes to finance her education at Northwest Technical College in Archbold, Ohio. After leaving school without completing her degree, she made a few payments on her loans, the amounts of which were not disclosed, and applied for deferments several times. Although the original amount of the eight loans is unclear,[1] in March 1997, Plaintiff consolidated all of her student loan debt which, at that time, totaled $11,048.70. [Def. Ex. D]. The consolidated loan carries a 9% fixed rate of interest. ECMC holds the promissory note on that loan. Capitalized interest on the $11,048.70 resulted in a principal balance of $19,146.62 as of May 11, 2005, plus $1,755 in unpaid and uncapitalized interest, accruing at a rate of $4.72 per day. [*Id.*]. Plaintiff does not dispute that these amounts are due and owing to ECMC. Plaintiff testified that she has made no payments since she consolidated her student loans and that her monthly payment is now $185 per month. At 9% interest, this payment reflects a payment period of 252 months.

II. Plaintiff's Family Circumstances

Plaintiff is 44 years old, married and has four children, three of whom currently live at home, Tiffany, Tim and Jessica, ages 22, 18, and 12, respectively. At the time of trial, Tim's graduation from high school was imminent and he had no definite plans thereafter. He currently is working part-time at Clubhouse Pizza and would like to move out of his parents' home. Tiffany is a high school graduate and works part-time at a daycare. She also, as discussed more fully below, extensively assists her mother in

[1] The only evidence before the court as to the original amounts of the eight loans are copies of notes signed by Plaintiff on November 15, 1990, and October 3, 1991, for Stafford loans in the amounts of $2,625 each. [Def. Ex. A and B].

caring for her father and for her younger sister, Jessica.

Plaintiff's husband, Richard Tietje ("Mr. Tietje"), who weighs over 700 pounds, is 43 years old and has been disabled and unable to work since 1990 due to, among other things, morbid obesity. Both Plaintiff and Tiffany testified regarding Mr. Tietje's condition. He is unable to perform some of the most basic tasks in caring for himself, needing assistance with bathing, using the restroom, and getting food and drinks. Mr. Tietje suffers from cellulitis in both legs, causing open sores on his legs that require antibiotic ointment and dressings to be applied three times per day. It takes two people to complete the dressing changes. Plaintiff testified that due to the cost of the ointment, dressings and sterile gloves, she and Tiffany change Mr. Tietje's dressings only once per day and do so without the use of sterile gloves. Mr. Tietje's breathing also requires the use of a Bi-Pap machine as well as an oxygen tank, paid for in part by their medical insurance and in part by a program to assist low income families.

Plaintiff testified that Mr. Tietje's bedroom is approximately 15 to 20 steps from his chair in the living room and, with the help of a walker, he is barely able to traverse that short distance. Plaintiff also testified regarding the substantial difficulty in moving him when it is necessary to take him to the doctor's office or to the emergency room. She testified that she must enlist the help of approximately ten people to get him in his wheelchair and down the ramp outside their home.

Because Plaintiff works third shift, Tiffany works in the afternoon in order to care for her father in the mornings while her mother sleeps. She works at a daycare center 15 to 20 hours per week, earning $5.50 per hour. She also cleans the house and helps care for her younger sister, which Mr. Tietje cannot effectively do because of his physical condition. Tiffany testified that she feels she is needed at home and that her part-time job allows her to perform the tasks that she has undertaken in their home. Plaintiff and the family rely heavily on Tiffany's help and, in return, Plaintiff does not charge her room and board.

Plaintiff has a history of asthma and has recently developed carpal tunnel syndrome, for which a wrist splint was ordered, and a mild protrusion of the cervical disc at C5-6. Her orthopedic surgeon suggested that she be put on "an aggressive conservative protocol" as treatment for the cervical disc problem. [Pl. Ex. 6, unnumbered p. 5]. She receives allergy shots every two weeks, costing her $25 per office visit, and her doctors have prescribed a number of medications, none of which she regularly takes because of their cost. Plaintiff testified that if she purchased all of the medications prescribed for her and her husband as well as the proper supplies for Mr. Tietje's dressing changes, her cost would be approximately $1,000 per month. But they do not take all of the medications prescribed and, as discussed

above, she does not purchase all of the supplies necessary for the dressing changes because they cannot afford them.

III. Plaintiff's Education, Employment History and Financial Circumstances

Although Plaintiff was pursuing a degree in information processing at Northwest Technical College, she did not graduate. She testified that after failing a class necessary to complete her degree, her financial situation and family circumstances required that she go to work. She has never returned to school.

Plaintiff's relevant work history includes working at several fast food establishments before attending school. After leaving school, she was employed at Walmart, which she left due to being scheduled too few hours. She then obtained employment in a factory job at Campbells Soup Company, and later at LDM Technologies Inc. In both factory jobs, Plaintiff experienced frequent layoffs. Since 2003, she has worked at Vancrest Healthcare Center ("Vancrest"). She sought employment at Vancrest in order to obtain a steady job. After becoming employed at Vancrest, she took classes paid for by her employer to become a state tested nurse's aide. She has since worked in that capacity and currently earns $8.93 per hour.

The evidence includes Plaintiff's income tax returns from 1999 through 2004. [Def. Ex. F - J; Plf. Ex. 9]. Her income has ranged from $15,548, while working as a nurse's aide, to $21,527 while working in a factory position. In 2004, Plaintiff earned $17,720. She testified that her monthly income varies depending on available overtime and the number of hours she is otherwise scheduled to work. Mr. Tietje also receives monthly Supplemental Security Income ("SSI") that varies between $70 and $500, depending on how much money Plaintiff has earned. Because her hours were recently cut due to sick time she had taken and her income decreased to approximately $1,000 per month, Mr. Tietje's SSI was increased to approximately $500 per month. But Plaintiff testified that when she is working full time, his SSI will decrease to approximately $180. While it may vary somewhat, their combined gross income is generally approximately $1,500 per month before any withholding for taxes and health insurance.[2]

In addition to their monthly income, Plaintiff and her husband received a federal income tax refund for 2004 in the amount of $4,800.[3] Similar tax refunds were received by them in previous years. [*See* Def. Ex. F - J]. The bulk of the tax refunds received consisted of the earned income credit ($3,735 for 2004) and

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[2] Withholding from Plaintiff's paychecks includes approximately $217 per month for health and dental insurance and approximately 12% for taxes. [Plf. Ex. 9, unnumbered pp. 1 and 10].

[3] Although the Tietjes' 2004 income tax return indicates that they were entitled to a refund in the amount of $5,043.50, Plaintiff testified that they actually received only approximately $4,800 due to a $500 error found by the Internal Revenue Service.

the additional child tax credit ($1,045 for 2004). In addition, they received a state and local income tax refund in the amount of $363. Similar state and local income tax refunds were also received in previous years. [*Id.*]. Plaintiff testified that the tax refunds are generally used to pay bills that are behind in payment, and to repay family members from whom they have borrowed money during the year to meet their ongoing living expenses. The 2004 refund was also used to pay for necessary car repairs and purchase a washing machine. The family also receives help from food banks, heating and utility assistance programs, and their church. [Def. Ex. K, Response to Int. 11].

Plaintiff's updated Schedule J reflects a spartan lifestyle and understates their monthly expenses. [*See* Plf. Ex. 10]. Total monthly expenses of $1,401[4] include mortgage payments of $520, utility expenses of $257, $400 for food, $120 for transportation, $40 for auto insurance, $10 for newspapers and $54 for cable television.[5] In addition to these scheduled expenses, Plaintiff and her husband are paying $134 per month to the Chapter 13 Trustee as payment of their mortgage arrearages in compliance with their confirmed 60 month Chapter 13 plan, of which 48 months still remain. Thus, in all, Plaintiff's expenses total at least $1,535. Notably, however, there is no amount scheduled for medical expenses or clothing expenses. Plaintiff testified that Tiffany purchases her own clothes, Tim assists in buying his own clothes, and that Plaintiff otherwise shops for clothing at Goodwill Industries. There is also no expense scheduled for a car, which is a 1990 model vehicle that was purchased used for $800, or home maintenance, both of which Plaintiff testified are in need of repair.

Plaintiff filed with her husband a joint Chapter 7 petition for relief on May 12, 2003. Her bankruptcy schedules together with the evidence in this case indicate a total debt of approximately $41,112, of which approximately $20,901 represents student loan debt. The order of discharge in the underlying case was entered on September 17, 2003.

LAW AND ANALYSIS

Plaintiff seeks to discharge her student loan debt based upon the "undue hardship" exception to

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[4] The court has adjusted Plaintiff's total scheduled expenses of $1,586, which includes a $185 student loan payment, to reflect the fact that no student loan payments are actually being made.

[5] The family's stated expenses are less than those permitted under Internal Revenues Service's National Standards for Allowable Living Expenses in all three categories: food, clothing and other items for family of either three ($867) or four ($971), housing and utilities for a family of three ($1,030) or four ($1,184) in Henry County, Ohio and transportation costs in the Cleveland area of the Midwest region ($293 monthly operating costs). Congress has now adopted these standards as a pillar of the new means test in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

nondischargeability of such debt in 11 U.S.C. § 523(a)(8). That section 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. . . ." 11 U.S.C. § 523(a)(8). 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 consistently applied, and 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)*, 397 F.3d 382 (6th Cir. Feb. 3, 2005).

> Under the *Brunner* test, the debtor must prove each of the following three elements:
>
> (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 385 (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."[6]

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).

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

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[6] Before the *Oyler* decision, the Sixth Circuit treated these factors as distinct and independent from the *Brunner* analysis. *See, e.g., Hornsby*, 144 F.3d at 437. But in *Oyler*, the court recognized that the *Brunner* analysis "subsumes" the criteria it had previously analyzed independently and formerly adopted the "simpler rubric of the *Brunner* test." *Oyler*, 397 F.3d at 385.

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.

Plaintiff has satisfied her burden with respect to this prong. In so finding, the court has considered only the income of Plaintiff and her husband. It has not considered Tim's income. He has just graduated from high school, is working part-time at slightly over the minimum wage, and has expressed his desire to move out of his parents' home. Although he helps pay for his own clothing, he does not otherwise contribute to the household expenses. The court also has not considered Tiffany's income. She too works only part-time at slightly over minimum wage. Although Tiffany is not required to pay a monetary sum for the room and board provided by Plaintiff, a point ECMC heavily emphasized at trial, compensation from Tiffany is received through the necessary services she provides to Plaintiff in caring for Mr. Tietje and Tiffany's younger sister. Without Tiffany's assistance, Plaintiff would necessarily incur additional expenses in order to provide adequate care for her husband and supervision for her twelve-year-old daughter while she works third shift and gets some rest when she gets home. As her budget shows, Plaintiff lacks the resources to pay for care from third parties. The physical and emotional burden of caring for Mr. Tietje is nearly unimaginable, and the strain of doing so on both women showed in their physical presences at trial. Without Tiffany's aid, comfort and presence in the home, the family would be hard put just to survive as a unit on a daily basis. Although ECMC suggests otherwise, the court finds it more than reasonable that Plaintiff does not require Tiffany to pay additional sums for living in Plaintiff's home.

In analyzing "minimal standard of living," courts often look to the poverty guidelines published each year in the Federal Register by the United States Department of Health and Human Services.[7] Plaintiff's and Mr. Tietje's gross annual income is approximately $18,000, less than the 2005 Department of Health and Human Services Poverty Guidelines for a family size of four. 70 Fed. Reg. 8373, 8374 (February 18,

[7]These guidelines are used for administrative purposes such as determining eligibility for need-based federal assistance programs. Courts generally take judicial notice of them. *See* Fed. R. Ev. 201(b), Fed. R. Bankr. P. 9017. This court is not adopting these guidelines as the minimal standard of living, but finds them helpful in comparing a debtor's financial situation to others. *See Rutherford v. William D. Ford Direct Loan Program (In re Rutherford)*, 317 B.R. 865, 878-79 (Bankr. N.D. Ala. 2004); *Doe v. Educational Credit Management Corporation (In re Doe)*, 325 B.R. 69, 78 (Bankr. S.D.N.Y. 2005). Although the *Brunner* test does not require the debtor's income to be at or below the poverty line, a debtor whose income falls below the established poverty level presumptively meets the first prong. *Pa. Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1996).

2005).[8] All of the expenses listed by Plaintiff (with the exception of the student loan payment) are necessary to maintain a very minimal standard of living. The only possible excess is the $54 spent monthly on cable television. The court notes, however, that Mr. Tietje is a disabled shut in and Plaintiff's budget provides for no other recreation expense. Also, as discussed earlier, her listed expenses do not include medical expenses, which would be significant if incurred to the extent necessary to provide for the basic medical needs of both herself and Mr. Tietje, nor does it include clothing expenses or car and home maintenance expenses. The income tax refunds received by the Tietjes must necessarily be used to address such basic needs that are not covered in their monthly budget. They have been unable to keep up on their mortgage payments and are now curing arrearages through Chapter 13. At their current level of income, Plaintiff cannot make the $185 monthly payments to service her student loan obligations, with interest alone accruing at more than $1,700 per year, and still support herself, her husband and Jessica.

The court also finds that Plaintiff has met her burden under the second prong of the *Brunner* analysis. Under the second prong, a debtor's financial adversity is required to 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 the requirement that a debtor's state of affairs is likely to persist for a significant portion of the repayment period 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 dischargeability of student loans should be based upon "a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *Oyler v. Educational Credit Mgmt. Corp.*, 397 F.3d 382, 386 (6th Cir. 2005).

In this case, Plaintiff was experiencing frequent layoffs doing factory work and sought out employment that, albeit at a lower hourly rate, would provide a more stable income with which to support her family. She took classes that were necessary to work as a state tested nurse's aide, a position in which she is currently employed. Although Plaintiff attended college, for reasons beyond her control, she did not complete her degree. Having observed Plaintiff and having heard her testimony, the court finds no reason

[8]Given Tim's age and potential imminent departure from the family home, it could be argued that the appropriate comparison is for a family of three. The 2005 Health and Human Services poverty guideline for a family of three is $16,090, which does not change the court's factual or legal findings.

to believe that her employment prospects will improve in the foreseeable future. Plaintiff testified that she could earn more as a home health aid if she had a better, more reliable car. But the family budget has no place for monthly car payments. She cannot feasibly take on a second job or go back to school now. The court believes Plaintiff's testimony that income tax refunds have been used to catch up on necessary living expenses and repay loans from the children and other family members. Plaintiff has maximized her income under the circumstances. Meanwhile, necessary family expenses for medicine and ointments and dressings are going unmet. Moreover, her husband's physical condition and the costs associated with his condition constitute significant additional circumstances indicating that Plaintiff's family circumstances are not likely to change in the foreseeable future. To be blunt, the only thing that would change Plaintiff's circumstances and put her in a position to repay her student loan would be Mr. Tietje's death. Every application of the second prong of the *Brunner* test requires the bankruptcy judge to make a reasoned prediction about a family's financial future based on the evidence. As ECMC aptly points out, discharge is forever. But predicting life and death is a power this court obviously lacks. Under the knowable facts shown by the record, Plaintiff has taken all reasonable steps to improve her financial condition and still faces a certainty of day to day, month to month and year to year hopelessness because of Mr. Tietje's condition that is likely persist through the greater part of the repayment period.[9]

The court must next consider whether Plaintiff has made good faith efforts to repay her student loans. This inquiry "should focus on questions surrounding the legitimacy of the basis for seeking a discharge." *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, – F.3d –, 2005 WL 1525260, *4 (10th Cir. 2005). In this case, Plaintiff has made minimal payments on her student loan obligations and no payments at all since she consolidated her loans in 1997. Nevertheless, this fact alone does not automatically foreclose a finding of good faith. The good faith requirement does not mandate that payments must have been made when the debtor's circumstances made such payment impossible. *See Alston v. United States Dept. of Educ. (In re Alston)*, 297 B.R. 410, 414 (Bankr. E.D. Pa. 2003); *Grove v. Educ. Credit Mgmt. Corp. (In re Grove)*, 323 B.R. 216, 226 (Bankr. N.D. Ohio 2005) (explaining that "a debtor might establish good faith in the absence of any payments by demonstrating that the circumstances are so dire and the future outlook so bleak that nothing short of an immediate discharge of the debt will avoid an undue hardship on

[9]Plaintiff s medical problems, *see* Plf. Exs. 6 and 7, are not the basis for this decision, except insofar as she needs medicines that she cannot routinely take due to lack of resources to buy them.

the debtor or the debtor's dependents"). As one court explained, the good faith standard is really a question of overall good faith in regard to the student loan, and the good faith analysis is driven by the totality of the circumstances. *Afflitto v. United States (In re Afflitto)*, 273 B.R. 162, 171 (Bankr. W.D. Tenn. 2001). Factors courts typically consider in this analysis include the following:

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

Flores v. U.S. Dept. Of Educ. (In re Flores), 282 B.R. 847, 856 (Bankr. N.D. Ohio 2002). Additionally, the availability of advantageous administrative payment alternatives is a relevant factor that must be considered by the court in addressing good faith repayment efforts. *See Tirch v. Pennsylvania Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 682-83 (6th Cir. 2005).

Many of these factors have already been discussed in this opinion. In this case, Plaintiff's inability to repay her student loans is not the result of any factor reasonably within her control. She has sought out stable employment and took additional classes to qualify her for the position she now holds. Nevertheless, her income together with her husband's SSI still does not provide for some of their basic needs, such as home and car repairs and certain prescriptions and medical supplies. The court finds no excesses in Plaintiff's expenditures that would otherwise be available to make payments on her student loan debt.

This also is not a case, about which Congress has expressed particular concern, where a debtor attempts to absolve herself of the obligation to repay her student loans shortly after completing her schooling while the prospect of the increased financial benefits of the education are just over the horizon. Her loans were incurred over ten years ago and, not having completed her degree, there is no anticipation of increased financial benefits resulting from her education. While Plaintiff's student loan debt constitutes approximately fifty percent of the unsecured debt she seeks to have discharged through Chapter 7, her dischargeable debt also includes a large number of medical bills and utility bills. Under the circumstances of this case, the court does not find the fact that Plaintiff's student loan debt comprises fifty percent of her unsecured debt to be indicative of a lack of good faith in dealing with her student loan creditor.

Finally, Defendant offered evidence that Plaintiff could apply for the Income Contingent Repayment

plan ("ICR") and argues that her failure to do so constitutes a lack of good faith. The Sixth Circuit recently explained the ICR plan:

> The Income Contingent Repayment Program permits a student loan debtor to pay twenty percent of the difference between his adjusted gross income and the poverty level for his family size, or the amount the debtor would pay if the debt were repaid in twelve years, whichever is less. Under the program, the borrower's monthly repayment amount is adjusted each year to reflect any changes in these factors. The borrower's repayments may also be adjusted during the year based on special circumstances. See 34 C.F.R. § 685.209(c)(3). At the end of the twenty five year payment period, any remaining loan balance would be cancelled by the Secretary of Education. However, the amount discharged would be considered taxable income.

Tirch, 409 F.3d 677, 682 (6th Cir. 2005) (quoting *In re Korhonen*, 296 B.R. 492, 496 (Bankr. D. Minn. 2003).

In *Tirch*, the Sixth Circuit Bankruptcy Appellate Panel ("BAP") had affirmed the bankruptcy court's judgment granting a partial discharge of the debtor's student loan debt. At trial, Tirch had admitted that she was aware of the existence of the ICR plan but elected not to participate in the program. *Id.* at 680. The BAP determined that Tirch's payments under the ICR plan would be $597.34 per month. Because the bankruptcy court had found that requiring Tirch to pay more than $200 per month would result in an undue hardship, the BAP concluded that Tirch's failure to participate in the program was not probative of her good faith. *Id.* at 682-83.

The Sixth Circuit reversed, finding that the BAP had miscalculated Tirch's payments under the ICR plan and that her payments would have only been $183.66, less than the $200 monthly payment ordered by the bankruptcy court. *Id.* at 683. The court explained that a debtor's decision not to take advantage of the ICR plan, while not a *per se* indication of a lack of good faith, is at least probative of her intent to repay her loans. It further explained that "[i]n cases involving a partial discharge of student loans, 'it is a difficult, although not necessarily an insurmountable burden for a debtor who is offered, but then declines the government's income contingent repayment program, to come to this Court and seek an equitable adjustment of their student loan debt.'" *Id.* at 682 (quoting *In re Swinney*, 266 B.R. 800, 806-7 (Bankr. N.D. Ohio 2001)). The court concluded that Tirch had failed to sustain her burden of proving that she had made a good faith effort to repay her loans because she declined to participate in an ICR plan that would have been advantageous to her. *Id.* at 683.

This case is distinguishable from *Tirch* in several respects. First, this case does not involve the

equitable adjustment of student loan debt that occurs when a partial discharge is granted. The court has concluded that *any* payment on Plaintiff's student loan debt would impose an undue hardship on her and her dependents. Although Defendant offers evidence that Plaintiff's payments under the ICR plan would be zero at this time, its calculations are not based on her income in 2004 and does not include Mr. Tietje's SSI.[10] Based on Plaintiff's income alone in 2004, the court calculates her payment under the ICR plan to be $27.17 if based on a family size of three.[11] Under the circumstances of this case, unlike the case in *Tirch*, even this small payment would cause undue hardship. In any event, even if Plaintiff's initial payment under the ICR is zero, such payments are recalculated yearly. 34 C.F.R. § 685.209(a)(5). The court believes that any increases in Plaintiff's income that might be anticipated in the future and that could otherwise result in a payment obligation under the ICR greater than zero should be used to address the critical deficiencies in Plaintiff's budget of monthly expenses as it now stands, especially in light of Mr. Tietje's physical condition and its attendant costs.

Furthermore, this case is distinguishable from *Tirch* in that there is no evidence that Plaintiff was made aware of the existence of the ICR plan before filing for bankruptcy or before filing her complaint to determine the dischargeability of her student loan debt. As such, her failure to participate in the ICR plan is simply not probative of her good faith in dealing with her student loan creditor or her intent to repay her loans. Plaintiff's minimal payments before consolidation of her student loan debt and her lack of payments after consolidation were the result of dire circumstances making payments impossible. The court finds that Plaintiff has demonstrated good faith.

In light of the foregoing, the court finds that Plaintiff has met her burden of demonstrating an undue hardship under § 523(a)(8) by satisfying each element of the *Brunner* test. A separate judgment effecting this Memorandum of Decision will be entered by the court.

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[10] It is not clear that Mr. Tietje's SSI would not be considered in the ICR calculation. The repayment amount is based upon the adjusted gross income ("AGI") of both spouses. 34 C.F.R. § 685.209(b)(1). Although Mr. Tietje's SSI was not taxable in 2004 and, thus, is not a component of the AGI in the Tietjes' joint income tax return, "if, in the Secretary's opinion, the borrower's reported AGI does not reasonably reflect the borrower's current income, the Secretary [of Education] may use other documentation of income provided by the borrower to calculate the borrower's monthly repayment amount." 34 C.F.R. § 685.209(c)(1).

[11] The court has used the same payment calculator used by Defendant that is found at www.ed.gov/directloan. The court's calculation is based on a loan amount of $20,900, Plaintiff's 2004 adjusted gross income of $17,720 and a family size of three. It is not clear, however, whether adult children living in a debtor's home would be considered in determining the size of the debtor's family.