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: June 12 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-30416
	)	
Ronda K. Saffle,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3081
	)	
Ronda K. Saffle,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
United States Department of Education, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION

This adversary proceeding came before the court for trial upon Plaintiff Ronda Saffle's Complaint against substituted Defendant Educational Credit Management Corporation[1] ("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. §§

[1] American Education Services and the United States Department of Education were originally named as defendants. Upon a motion and order to substitute parties [Doc. ## 7, 9], ECMC was substituted as the party defendant.

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 the court may hear and decide. 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 ECMC cannot be discharged as an undue hardship.

FINDINGS OF FACT

I. Plaintiff's Student Loans

Between 1991 and 1996, Plaintiff executed approximately ten or twelve promissory notes to finance her education at Owens Community College ("Owens"). Although there was no testimony regarding the original amount of the loans, in May 2003, Plaintiff obtained a Federal Consolidation Loan, consolidating all of her student loan debt at that time. As of January 30, 2006, the total amount due and owing ECMC, which presently holds the student loan debt at issue, was $56,511.65, including $53,913.49 in principal and $2,598.16 in interest that is accruing at an annual rate of 8%, or $11.82 per day. [Def. Ex. B].

Plaintiff testified that she received a deferment on repayment of her loans for one year after graduating from Owens. She then began making payments on her student loans and continued to do so for approximately one year. However, in 1999, she ceased making payments. At that time, she sought and received a forbearance after she became separated from the father of her children and was reduced to a single income. Her loans have been in forbearance since that time.

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

Plaintiff is an articulate forty-six year old woman who is the mother of three adult children. At the time of trial, two of her children were living with her, Courtney, age 25, and Jerron, age 19. Plaintiff testified that her oldest daughter, Amber, had just recently moved out of Plaintiff's home and that Courtney had just graduated from nursing school and anticipated moving out soon. Plaintiff's son, Jerron, had received his General Education Diploma in November 2005 but was not yet working.

Plaintiff received an associate degree in applied science in the dietetic field in 1996. She became a registered dietetic technician ("DTR") and has worked at Harborside HealthCare ("Harborside") for the

past nine years. She is currently the director of dietetics at Harborside, earning an annual salary of $41,995 or $3,499 per month.[2] Plaintiff's position at Harborside requires her to be on call 24 hours per day and often requires her to work weekends. However, because she is a salaried employee, she receives no overtime pay. After payroll deductions for taxes, insurance, and for her flexible medical account,[3] her net monthly income is $2,123.

Although Plaintiff received income tax refunds of between $3,755 and $4,299 in years 2001 through 2003, she does not anticipate continuing to receive such substantial amounts. The substantial refunds received in those years were in large part due to the earned income credit, the child tax credit, and education credits, which she did not qualify for in 2004 or 2005, and were used to complete various home repairs that were necessary to bring her previously condemned house to a habitable state. Her income tax refund in 2004 was $724, and Plaintiff testified that her 2005 refund was approximately the same amount.

Plaintiff had previously worked part-time at Home Depot as a second job for approximately fourteen months. She testified that she used the money earned working that job to purchase a new furnace and to pay doctor bills that were overdue and that had been incurred before she began contributing to the flexible medical account. However, she had to quit her job at Home Depot due to an injury to her Achilles tendon, which resulted in her being unable to stand on hard surfaces for lengthy periods of time. Her injury has not affected her position at Harborside, however, since much of her work involves paperwork that allows her to sit. Plaintiff testified that recently she has been applying for another part-time position as a unit clerk in a hospital, a position that also involves sitting much of the time. At the time of trial, she had not yet received any response to her applications.

Plaintiff's expenses, as reported in her Schedule J filed with her petition and updated by her testimony at trial, indicates current monthly expenses of $2,635. Her expenses include, among other things, a mortgage payment of $545, a car payment of $312 for her 2001 Cougar, and $240 for car insurance. Plaintiff testified that she has decreased her expenses for recreation from $67 to $30 and for clothing from $175 to $20. Her monthly food expense also decreased from $600 to $400 when her oldest daughter,

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[2] Plaintiff testified that she earned $17.10 per hour, which would reflect an annual salary of $35,568. However, her most recent pay stub indicates that she earns $20.19 per hour, which reflects an annual salary of $41,999. [Def. Ex. N]. The court finds that the pay stub more accurately reflects Plaintiff's actual salary and assumes that, because this trial occurred shortly after the first of the year, Plaintiff had not accounted for any increase in her salary that she testified occurred annually.

[3] Plaintiff explained that the flexible medical account consists of pre-tax dollars withheld from her pay used to reimburse her for medical expenses that are not otherwise covered by her insurance.

Amber, moved out. However, several expenses are significantly higher than reported on her Schedule J. Plaintiff testified that her gas and electric expense has increased from $205 to $330, her transportation cost is approximately $200 per month rather than the $90 originally reported, and that she has an additional combination expense of $82 for telephone and internet, which is required for her work at Harborside.

Nevertheless, Plaintiff anticipates that several expenses will decrease in the near future. She explained that $100 of her monthly car insurance expense is due to her son, Jerron, being covered under her policy while he is living in her home. This expense will be eliminated if he moves out or when he begins working and paying for his own insurance. Plaintiff also testified that she anticipates her food expense to decrease to approximately $250 after Courtney and Jerron move out. With these modifications, Plaintiff's monthly expenses will decrease to $2,385. In addition, Plaintiff testified that her car will be paid in full in two years and her home will be paid in full in ten years.

Plaintiff testified that she plans to go back to school to become a dietician. According to Plaintiff, she could complete her schooling in one and a half years going part-time and using her current position as an internship. She testified that Harborside would pay for twenty percent of the schooling and would likely hire her after completing her education. Plaintiff further testified that working as a dietician would double her current salary.

LAW AND ANALYSIS

Plaintiff 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).[4] 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

[4] Section 523(a)(8) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005("BAPCPA" or "the Act"), effective October 17, 2005. However, Plaintiff's bankruptcy case was filed before the effective date of the Act. Therefore, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, § 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

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. 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).

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*, and *Miller v. Pa. 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.*

Before *Oyler* and *Miller*, courts in the Sixth Circuit at times found equitable adjustment of student loan debt to be appropriate when the debtor had a present inability to pay their entire student loan debt but did not satisfy the second or third prong of the *Brunner* test, that is, they failed to show that their financial adversity was likely to persist for a significant portion of the repayment period or that they had made good faith efforts to repay the loans. *See, e.g., Flores v. United States Dept. of Education (In re Flores)*, 282 B.R. 847 (Bankr. N.D. Ohio 2002); *Garybush v. United States Dept. of Education (In re Garybush)*, 265 B.R. 587 (Bankr. S.D. Ohio 2001). Under *Oyler* and *Miller*, however, all three prongs of the *Brunner* test must now be satisfied for the court to find undue hardship. *See also Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677 (6th Cir. 2005). As undue hardship must exist with respect to any part of a

student loan debt that is discharged, equitable adjustment of the debt can only come into play under the court's analysis of the first prong of the *Brunner* test.

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 discussed above, Plaintiff's current net monthly income is $2,123. Her current monthly household expenses of $2,635 exceed her income by $512. To the extent that some of Plaintiff's household expenses are due to the fact that two of her adult children are living with her, Plaintiff anticipates that her expenses will soon decrease by approximately $250 when Courtney and Jerron move out. Even with such a decrease, Plaintiff's expenses will still exceed her income by $262. The court finds that Plaintiff's remaining expenses are reasonable and are not out of line with maintaining a basic standard of living. Plaintiff is therefore presently left with no monthly disposable income with which to make a payment on her student loan debt. Although in two years she will not have a car payment of $312 as her car will have been paid in full, her income will then exceed her listed expenses by only $50. With interest accruing at a rate of $11.82 per day, this amount would not even pay the interest expense on her student loan for the month and more appropriately should be applied as a small cushion for emergencies and unexpected expenses that are not included in her listed expenses. The court finds that Plaintiff has met the first prong of the *Brunner* test.

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 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. . . "). A debtor must show additional circumstances indicating that her distressed state of financial affairs is likely to persist for a significant portion of the repayment period. *Oyler*, 397 F.3d at 386. "Such circumstances must be indicative of a 'certainty of hopelessness, not merely a present inability to fulfill financial commitment.'" *Id.* (citing *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993)). Although a debilitating medical condition is such a circumstance frequently present in successful "undue hardship" cases, it is not a prerequisite to satisfying

the second prong of the *Brunner* test. *Chime v. Suntech Student Loan (In re Chime)*, 296 B.R. 439, 445 (Bankr. N.D. Ohio 2003). Rather, as long as the debtor can demonstrate some circumstance that makes it unlikely that she will be able to pay her student loans for a significant portion of the repayment period, the second prong of the *Brunner* test has been satisfied. *Id.*; *Alderete v. Educational Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1205 (10th Cir. 2005). 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.* This requirement thus gives effect to the clear congressional intent – exhibited by the 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).

In this case, Plaintiff testified that she plans on furthering her education in order to become a dietician, which she testified she could complete in one and a half years. If she does so, Plaintiff believes Harborside will hire her as a dietician and she anticipates her salary doubling at that time. According to Plaintiff, Harborside will pay for twenty percent of her education costs. Although it does not appear that Plaintiff is able to pay for the remaining eighty percent, there is no evidence that she would not be eligible for a federal student loan. Her student loans are not in default, having sought the administrative remedy of a deferment and then forbearance. Plaintiff will also be able to continue working at Harborside during such schooling and use her position there as an internship.

On these facts, the court concludes that a brighter financial future is on the horizon for Plaintiff, and that the lack of financial resources with which to repay her existing student loans is a temporary state of affairs. In so finding, the court has also considered 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 schooling to be a dietician. Plaintiff has currently obtained a forbearance, and will presumably be entitled to a student deferment while she completes her education. The increased income as a dietician that Plaintiff anticipates is not unlikely since she has worked at Harborside for nine years and is confident that she would be able to obtain a position as a dietician there after graduating. The significant increase in her income that is anticipated will allow her to repay her existing student loans while maintaining a basic standard of living.

Plaintiff has done an admirable job as a single parent of raising her three children (and some others

as well) and supporting their educational development. As they have now all reached the ages and circumstances where they are able and legally expected to support themselves, Plaintiff will be in a position to devote her physical, emotional and financial resources to improving her personal circumstances and making arrangements to repay her student loan debt. The record shows no future, systemic impediment to her doing so. Even in her current position with Harborside, Plaintiff anticipates receiving routine, periodic salary raises. She has the demonstrated ability and willingness to hold certain types of part time second jobs. Plaintiff testified that every time she got ready to start trying to repay her student loan debt, something else happened, citing the need to buy a new furnace on one occasion and other needed home repairs. These are not, however, the sort of long term, irremediable circumstances that the *Brunner* test contemplates as satisfying the second element of the test. 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 only a 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 was granted a deferment during the first year after completing her associate degree. She then made payments on her loans for approximately one year. Because of a change in her circumstances, she sought and received a forbearance. Her loans have continued to be in forbearance since that time. 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.

Plaintiff having failed to meet all three prongs of the *Brunner* test, the court cannot find that payment of her existing student loan debt, or any part thereof, would be an undue hardship. To the extent that Plaintiff's circumstances change such that she is not able to pursue avenues to increase her income as is now anticipated, or that she experiences 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.[5]

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

[5] 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 appropriate avenue for temporary administrative relief outside of bankruptcy available in some cases.