

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 98-34323

CHARLES LLOYD HARRISON  
KATHY ANN HARRISON  
a/k/a KATHY ANN SPURGEON

Debtors

KATHY ANN HARRISON

Plaintiff

v.

Adv. Proc. No. 01-3097

EDUCATIONAL CREDIT  
MANAGEMENT CORP.

Defendant

**MEMORANDUM**

APPEARANCES: HORACE M. BROWN, ESQ.  
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Attorney for Plaintiff

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Attorneys for Defendant

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

Before the court is the Complaint of Kathy Ann Harrison (Debtor) filed on July 23, 2001, whereby the Debtor seeks a hardship discharge of her student loans pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2001). The parties filed a Stipulation of Debtor and Educational Credit Management Corporation accompanied by twelve exhibits. A trial was held on February 11, 2002, at which time nine additional exhibits were stipulated into evidence.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

## I

The Debtor and her husband filed their Voluntary Petition under Chapter 13 on September 28, 1998. Upon the Debtors' motion, their case was subsequently converted to Chapter 7 on April 20, 2001. The Debtors received their discharge on August 8, 2001.

The Debtor has seven outstanding student loans which totaled \$22,165.00 as of the date of her bankruptcy filing. Defendant Educational Credit Management Corporation (ECMC) is the assignee of each loan.

The subject loans financed the Debtor's enrollment in the nursing program of Hiwassee College from 1993 through 1996.<sup>1</sup> After earning mostly failing grades, the Debtor discontinued her education and has not found meaningful employment in the field of nursing. Since she dropped out of college in 1996, the Debtor has held approximately twenty different jobs, staying at no one

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<sup>1</sup> The Debtor and her husband each have only an eighth grade education, although the Debtor at some point received a G.E.D.

position for more than a few months. Her highest paying job has been at \$8.10 per hour. She made no payments on her student loans other than \$3,557.13 paid through her Chapter 13 Plan.<sup>2</sup>

The Debtor, now 38 years old, is under medical care for diabetes and depression for which she takes five different medications. She testified that the diabetes, which was first diagnosed in 1999, leaves her fatigued, shaky, and nauseated. She has two daughters, ages twelve and seven, who live with her and her husband. The Debtor receives \$340.00 per month in child support for the seven-year-old child only.<sup>3</sup> Her twelve-year-old daughter is under medical care for chronic asthma and allergies.<sup>4</sup>

The Debtor and her husband are both employed at Wal-Mart in Madisonville, Tennessee, earning \$6.52 and \$6.76 per hour, respectively. As did the Debtor, her husband also testified to a history of low-wage employment and frequent job changes.

The Debtor and her husband are currently scheduled for thirty and thirty-two hours, respectively, per work week by Wal-Mart. Both testified that they anticipate the possibility of reduced hours in the future due to "slow downs." The Debtors testified that they have recently

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<sup>2</sup> As of the date of trial, the Debtor's student loan debt totaled \$24,088.90, with interest continuing to accrue at \$4.03 per day.

<sup>3</sup> The Debtor testified that the seven-year-old's father has frequently missed payments since commencing child support in July 2001. No child support is received for the twelve-year-old because the whereabouts of the father are unknown.

<sup>4</sup> Prescription medication for the Debtor and her daughter is currently paid for in full by government health care. As the family changes from public to private insurance in the next year (assuming her husband remains employed with Wal-Mart for fifteen months), the Debtor anticipates a prescription co-pay expense of more than \$70.00 per month.

looked for, and been unable to find, higher paying jobs. They live from paycheck to paycheck and even then do not have sufficient earnings to take care of the family's needs.

The Debtors' net income is in the range of \$1,875.00 to \$1,950.00 per month,<sup>5</sup> plus the \$340.00 due monthly for child support.<sup>6</sup> The family's monthly expenses are estimated at approximately \$2,150.00.<sup>7</sup> The Debtor states that her income may be further reduced in the near future due to time spent caring for her elderly mother, who suffers from emphysema and Alzheimer's disease.<sup>8</sup> The Debtor testified that as her mother's disease progresses, she anticipates quitting work altogether to devote full time to her mother's care.

The Debtors live in a government housing project, in an apartment furnished with borrowed items. They do not maintain a bank account. They do not have telephone service in their names<sup>9</sup> and are behind in their cable bill. They own one car, a used 1994 Ford Taurus in need of repair. They had, until the date of trial, been driving without auto insurance.

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<sup>5</sup> Exhibit 20, a chart of the Debtors' Wal-Mart earnings by pay period, evidences an average monthly net income of \$1,873.82. Included in that average, however, are the minimal earnings for the two-week training period at the commencement of each Debtor's employment. Removing those first paychecks from the calculation results in a slightly higher, and more realistic, average monthly income.

<sup>6</sup> This figure assumes regular payment of the child support obligation which is by no means certain. *See supra* n.3.

<sup>7</sup> The court notes that the Debtors have a \$58.00 monthly cable bill and "recreational expenses" of approximately \$100.00 per month. The Debtors testified that the recreational component of their budget includes \$4.18 per day for cigarettes, which in fact comes to more than \$125.00 per month.

<sup>8</sup> This would not be the first time that family obligations have disrupted the Debtors' employment. During their Chapter 13 bankruptcy, the couple suddenly moved to Louisiana for a period of months due to problems with another of the Debtor's daughters. Also, Mr. Harrison lost a job in March 2000 due to car trouble while visiting a brother ill with cancer.

<sup>9</sup> As a Christmas present, the Debtor's mother is paying for some type of telephone service for one of the children.

## II

Student loan debts are nondischargeable under the Bankruptcy Code “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents[.]” 11 U.S.C.A. § 523(a)(8) (West Supp. 2001). A number of tests have been judicially crafted to measure or define the concept of “undue hardship.” See *Cheeseman v. Tennessee Student Assistance Corp. (In re Cheeseman)*, 25 F.3d 356, 359 (6<sup>th</sup> Cir. 1994); see also *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6<sup>th</sup> Cir. 1998) (“Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness.”).

The Sixth Circuit has declined to adopt any single test, instead encouraging courts to “look to many factors.” See *Hornsby*, 144 F.3d at 437. Among the factors endorsed by the Sixth Circuit are those set out in the Second Circuit’s *Brunner* test, under which a debtor must 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.

*Id.* (quoting *Cheeseman*, 25 F.3d at 359 (quoting *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam))). The debtor bears the burden of proof

by a preponderance of the evidence. See *Daugherty v. First Tenn. Bank (In re Daugherty)*, 175 B.R. 953, 955 (Bankr. E.D. Tenn. 1994).

Under the first of the *Brunner* factors, courts look to "current income and expenses and whether the debtor is maximizing employment opportunity and resources, while minimizing expenses." *Markley v. Educational Credit Management Corp. (In re Markley)*, 236 B.R. 242, 247 (Bankr. N.D. Ohio 1999). *Brunner's* second prong requires that the debtor's financial adversity must "be more than a temporary state of affairs." *Swinney v. Academic Fin. Servs. (In re Swinney)*, 266 B.R. 800, 805 (Bankr. N.D. Ohio 2001). If it is likely that the debtor's financial situation will improve, then the debt should not be discharged. See *Markley*, 236 B.R. at 247. Conversely, "if the inability to repay will extend well into the future, then it is likely that requiring payment would be an undue hardship." *Id.*

Lastly, in analyzing the final *Brunner* factor - good faith - courts weigh the following considerations:

- (1) the portion of the loan actually repaid by the debtor;
- (2) whether a debtor's failure to repay the obligation is truly from factors beyond the debtor's reasonable control;
- (3) whether the debtor has realistically used all her available financial resources to pay the debt;
- (4) whether the debtor has, in fact, attempted to repay the student loan at all;
- (5) the length of time after the student loan first becomes due that the debtor seeks to discharge the debt; and
- (6) the percentage of the student loan in relation to the debtor's total indebtedness.

*Wilcox v. Educational Credit Management (In re Wilcox)*, 265 B.R. 864, 870 (Bankr. N.D. Ohio 2001).

After weighing these many factors, the court finds that repayment of the ECMC debt would impose an undue hardship on the Debtor and her dependent children. The Debtor's current low-wage job is consistent with her employment history. Her income is unpredictable at best and the prospects of significant improvement are severely limited by her education and health.<sup>10</sup> The Debtor's current financial adversity is "more than a temporary state of affairs." *Swinney*, 266 B.R. at 805.

The Debtor's current standard of living is minimal. She lives in government housing, uses borrowed furniture, and shares a high-mileage vehicle in need of repair. Her monthly budget is largely devoid of unnecessary expenditures. While the couple's smoking is certainly not the wisest use of their limited "recreational" funds, the unlikely elimination of that expense would allow the Debtor to do little more than keep up with the daily interest accruing on the student loans.<sup>11</sup>

Through her Chapter 13 Plan, the Debtor has repaid approximately fifteen percent of the ECMC debt. Although she made no prior or subsequent attempts at repayment, the record discloses no point at which her income was sufficient for her to do so. In light of the Debtor's education and her personal and family health concerns, it is unrealistic to think that circumstances

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<sup>10</sup> It is certainly conceivable that the Debtor or her husband could find higher-wage employment in the future. However, one benefit of the couple working for the same employer is that they are able to car pool. Working for different employers could well create the need for a second car, the expense of which would likely equal or outweigh any additional income from the job change. Also, a further potential benefit of the couple's current employment arrangement is the availability of health insurance for the family.

<sup>11</sup> See *supra* n.2 and 7.

will significantly change in the future. As noted, the Debtor's prospects of financial rehabilitation are, to this court, nonexistent. The court cannot envision a repayment scenario, in whole or in part, that would accomplish anything other than to drive the Debtor and her family into further financial hardship thus limiting their ability to acquire even the basic necessities of life such as food and clothing.

In sum, the court finds that repayment of the Debtor's student loans would impose an undue hardship on the Debtor and her dependent children. Her debt to ECMC is accordingly dischargeable. An appropriate judgment will be entered.

FILED: February 20, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

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**J U D G M E N T**

For the reasons stated in the Memorandum filed this date, containing findings of fact and conclusions of law as required by FED. R. CIV. P. 52(a), incorporated into this adversary proceeding by FED. R. BANKR. P. 7052, it is ORDERED, ADJUDGED, and DECREED that repayment of the Plaintiff's student loan obligations to the Defendant would impose an undue hardship on the Plaintiff and her dependents. The Plaintiff's obligations are accordingly discharged in their entirety pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2001).

ENTER: February 20, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE