

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

In re

Case No. 99-30161

LESA WALKER WEEKS

Debtor

LESA WALKER WEEKS

Plaintiff

v.

Adv. Proc. No. 99-3034

FIRST TENNESSEE BANK, NATIONAL
ASSOCIATION, THE UNIVERSITY OF
TENNESSEE, TENNESSEE STUDENT
ASSISTANCE CORPORATION

Defendants

MEMORANDUM ON THE DEBTOR'S COMPLAINT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On March 4, 1999, the Debtor filed a Complaint seeking to discharge her student loan obligations pursuant to 11 U.S.C.A. § 523(a)(8) (West Supp. 2000). On April 30, 1999, the University of Tennessee and the Tennessee Student Assistance Corporation (Defendants) filed answers and counterclaims requesting that the court find the student loan obligations nondischargeable and award a money judgment, attorney fees, expenses and collection costs to each of them. The third Defendant, First Tennessee Bank, National Association, was dismissed pursuant to an Agreed Order entered on May 3, 1999. The trial of this matter was held on May 23, 2000. The record before the court consists of the Debtor's testimony, thirty-five exhibits admitted into evidence by the parties, and undisputed facts stipulated pursuant to the Defendants' Stipulation of Facts filed on May 22, 2000.¹

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

I

The Debtor is thirty-two years old. She has a fifteen year old daughter whom she had during a brief marriage many years ago. She and her second husband, Jerry Weeks, were married in 1990 and have an eleven year old son. The couple divorced in 1995 shortly after the death of Mr. Weeks' sister and the loss of his job. They remained divorced for four years. During that time, their relationship continued, but Mr. Weeks failed to pay his child support obligation of \$100.00 each week on a regular basis. Also during that time, in March 1997, the Debtor and Mr.

¹ The exhibits and Defendants' Stipulation of Facts were submitted solely by the Defendants. The Debtor, however, through counsel, announced prior to trial that all exhibits together with the facts set forth in the Defendants' Stipulation of Facts had been prepared jointly and were stipulated.

Weeks received legal custody of his niece's daughter, who was then nine months old. The Debtor filed her Chapter 7 petition in January 1999. She and her husband remarried later that year. They are currently in the process of adopting their niece's daughter, who has lived with them for three years.

The Debtor attended two years of college at Pellissippi State Technical Community College and three years of college at the University of Tennessee. She studied sign language interpretation for most of that time and planned to work as an in-house interpreter for a corporation or other organization after graduation. Her plans were derailed during her final year of school when she learned that employers in her chosen field were no longer hiring full-time interpreters and were beginning to use interpreting services on a temporary basis. To the Debtor, this change meant that work as an interpreter would have been relatively sporadic and would not have provided benefits that had accompanied the full-time positions. After graduating from the University of Tennessee in 1996, she began graduate school in hopes of preparing for another career, but she was not able to complete a master's program.

At that point, the Debtor was divorced and was supporting her children with irregular help from her husband. She worked at Cotton Eyed Joe's and Graybeal Moving in 1997 while attending graduate school. Soon thereafter she took a job with PolyMore Circuit Technologies, L.P. (PolyMore) as a printer in a factory where she earned \$8.00 an hour. After two years, she was earning \$8.85 an hour. The employment was not related to her education.

The Debtor searched for other employment opportunities while at PolyMore, but could not find work for a higher wage. After two years at PolyMore, the Debtor left in order to take a job with the Tennessee Department of Human Services. She has been employed there for one year. Her primary duty is interviewing people in order to evaluate whether they qualify for food stamps and TennCare. Although the Debtor earns less in her current employment than she did at PolyMore, she believes that her current position provides better benefits and more career opportunities.

Mr. Weeks is thirty-five years old. He worked for seventeen years for a drywall company which eventually failed. He went to truck driving school and found employment as a long-distance truck driver. His work requires that he travel Monday through Friday of each week. He earns thirty-two cents for each mile that he drives a truck bearing a load, but must pay all of his own expenses, usually amounting to at least thirty dollars a day. His employer, Great Eastern Cargo Carriers, pays him weekly, but his paychecks do not reflect that he commonly needs to take advances on his pay. The Debtor testified that her husband will not be able to obtain a better trucking job until he has more experience. His experience has been slowed by surgery that he had prior to the trial which prevented him from driving for a period of time. He is not a debtor before this court.

At trial, the Debtor testified about other burdens on her family. In particular, the Debtor testified that her son is a hemophiliac and that he suffers from serious psychological problems. As a result, he frequently needs medical attention, must receive regular infusions, meets with a psychologist, and takes prescribed drugs. The Debtor testified that the psychologist does not file

insurance claims, that she has filed them, and that she is waiting for a response. Each visit costs \$85.00. The Debtor also testified that she pays for her son to attend karate classes, explaining that his doctors have directed him to exercise. In the classes, her son learns self defense and learns how to fall safely.

The Debtor and her husband also have some health problems and take medication regularly. She testified that pursuant to her health insurance plan she must pay \$15.00 for each doctor visit; that she must pay anywhere from \$5.00 to \$15.00 each month for each medication prescribed to a member of her family; and that there are a total of ten such prescriptions.

The Debtor and her family reside in a trailer owned by her grandmother. The Debtor testified that although she and her grandmother agreed that the Debtor would rent the trailer and eventually purchase it, she has not been able to make regular payments. She testified that she paid \$600.00 to her grandmother in 1999 and that she has not paid anything to her this year. The Debtor also testified that the trailer had been used by a dealer as a model unit and that she has had to replace its stove, dryer, refrigerator, and carpeting.

Transportation has also presented a problem for the Debtor. For several weeks, she has been driving a 1998 Ford Escort. The vehicle belongs to a friend of her mother who has offered to let the Debtor have the car if she will make the monthly payments of \$294.00 which are still owing. Prior to driving the Ford Escort, the Debtor drove her husband's truck, which proved to be unreliable. Before that, the Debtor drove a minivan, which had chronic transmission problems and which she surrendered during her bankruptcy.

The Debtor filed her Statement of Financial Affairs and Schedules in February 1999. Schedule I is based on her 1998 earnings from her work at PolyMore. She listed \$1,640.00 in gross monthly income and \$364.50 in monthly payroll deductions for a net monthly take-home pay of \$1,275.50. She also disclosed that she received \$129.00 in food stamps each month. Based on those figures, her net combined monthly income was \$1,404.50. She noted on Schedule I, however, that her food stamps would be reduced to \$20.00 each month beginning in February 1999 and that her income had included approximately \$170.00 in overtime pay.

In her current employment with the Department of Human Services, the Debtor earns a gross monthly income of \$1,618.00. She earned a raise of approximately \$115.00 a month in July 1999 and testified that she expected to receive another such raise later this year. After withholdings and deductions, including deductions for health, life and accident insurance, the Debtor has a current net monthly income of \$1,030.23, not including any food stamps that she still receives. She testified that the opportunity to earn overtime pay is rare.

The parties stipulated to two payroll documents showing the wages earned by the Debtor's husband in his current job. One document reflects that Mr. Weeks earned \$3,064.64 in the fourth quarter of 1999. The other document reflects that he had a total net income of approximately \$5,550.00 from January 7, 2000, through March 24, 2000. Some weeks he earned over \$700.00, other weeks he earned under \$300.00. The Debtor testified that her husband is responsible for all expenses associated with his work, which total at least \$30.00 each day.

The Debtor listed the following monthly expenses on Schedule J: \$300.00 for rent; \$100.00 for electricity and heating fuel; \$15.00 for water and sewer; \$30.00 for telephone service; \$400.00 for food; \$120.00 for transportation; \$225.00 for car payments; \$70.00 for daycare; \$30.00 for haircuts; \$65.00 for diapers; \$7.00 for her children's swimming events; and \$40.00 for school snack money. Those expenses total \$1,402.00. The Debtor noted on Schedule I that she did not include her family's clothing expenses on Schedule J. Schedule J was written before the Debtor and her husband remarried and reflects the expenses of the Debtor and her children only. The Debtor testified that her husband has his own bills and expenses.

In addition, the Debtor testified that her daycare expense will increase to \$85.00 weekly because the state agency that had subsidized her daycare expense has lost its funding. She now has one child in full-time daycare, which should continue for another year and a half. Following that, the Debtor expects to need part-time daycare services. The Debtor testified that she has accumulated \$750.00 in legal fees related to the adoption of the youngest child and that they are still in the process of adopting her. She also testified that unexpected expenses are common for her family of five.

The Debtor testified that she had an extremely high long-distance bill for the first several weeks that her husband was on the road driving his truck. During those same weeks, her daughter, without permission, placed several long-distance calls to a friend who had moved from the area. The Debtor explained that she has had her long-distance service cancelled in order to avoid those large expenses. In addition, the Debtor testified that her father pays for some of her personal expenses including those related to her own hair, nails, and clothing. The Debtor also

testified that she had given her children the choice of cable television or internet service and that they chose internet service, which they use in part for educational purposes. The family no longer has cable television.

Finally, the parties stipulate the amounts of the Debtor's student loan obligations. The Debtor owes a debt of \$2,270.80 to the University of Tennessee for the principal, interest, late fees and collection fees outstanding for student loans that she obtained through the school. In addition, she owes a debt of \$52,257.57 to the Tennessee Student Assistance Corporation for the principal, interest, late fees and collection fees outstanding for student loans that she obtained through it. The Debtor testified that she attempted to repay her student loans and consolidated them toward that end, but that she still could not afford to pay them.

III

Bankruptcy Code § 523(a) governs the dischargeability of student loans as follows:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

. . . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

11 U.S.C.A. § 523(a)(8) (West Supp. 2000).

The term “undue hardship” is not defined in the Bankruptcy Code, however, the Sixth Circuit has used the following factors for detecting “undue hardship” under § 523(a)(8):

“One test requires the debtor to demonstrate ‘(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . . ; and (3) that the debtor has made good faith efforts to repay the loans.’”

Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 437 (6th Cir. 1998) (quoting *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994)). In addition, the Sixth Circuit has explained that,

A bankruptcy court might also consider, among other things, “the amount of the debt . . . as well as the rate at which interest is accruing” and “the debtor's claimed expenses and current standard of living, with a view toward ascertaining whether the debtor has attempted to minimize the expenses of himself and his dependents.”

Id. (quoting *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)).

Although student loan repayment may be financially burdensome on all debtors with modest budgets, only those debtors with a modest *and* unbalanced budget may receive a complete discharge under § 523(a)(8). *See id.* at 438. Thus, if a debtor minimizes her expenses as much as possible, eliminating frivolous or unnecessary expenditures, but still has a budget deficit, that debtor satisfies the undue hardship factors regarding ability to pay. *See id.* In cases where the debtor has a nondebtor spouse, the court should consider the spouse's income. *See Rice v. United States (In re Rice)*, 78 F.3d 1140, 1150 (6th Cir. 1996); *White v. United States Dep't of Educ. (In re White)*, 243 B.R. 498, 509 (Bankr. N.D. Ala. 1999) (collecting cases).

In *Hornsby*, the Sixth Circuit reversed and remanded the bankruptcy court's decision to discharge the debtors' student loans, concluding that the record did not show that the debtors' circumstances rose to the level of undue hardship. *See id.* The court determined that the debtors' monthly budget surplus of \$200.00 indicated their ability to repay the loans. *See id.* It also criticized the bankruptcy court's failure to question the debtors' expenses, which included a \$100.00 monthly expense for cigarettes and a large long-distance telephone expense, its failure to make a more detailed finding regarding the debtors' good faith, and its failure to consider whether their circumstances would improve over the loan repayment term. *See id.*

The Sixth Circuit also concluded that the bankruptcy court "had the power to take action short of total discharge." *Id.* It found that bankruptcy courts may fashion a remedy using the equitable power granted to them under 11 U.S.C.A. § 105(a) (West 1993).² *See id.* at 439; *see also Cheesman*, 25 F.3d at 360-61 (approving under § 105(a) the bankruptcy court's authority to stay its order discharging student loans and reconsider it after eighteen months). *But cf. Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 129-137 (B.A.P. 8th Cir. 1999) (recognizing a disagreement among the courts as to whether § 105(a) authorizes the use of equitable remedies under 523(a)(8) but finding that the issue was not before it); *United Student Aid Funds, Inc. v. Taylor (In re Taylor)*, 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (disagreeing with the Sixth Circuit's use of § 105(a) "to trump the statutory limitations of § 523(a)(8)"). The court explained that "[i]n a student loan discharge case where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-

² Bankruptcy Code § 105(a) provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

nothing treatment thwarts the purpose of the Bankruptcy Act.” *Hornsby*, 144 F.3d at 439 (footnote omitted).

Although the Sixth Circuit has not defined the scope of a court’s equitable power, it has recognized various equitable remedies fashioned by bankruptcy courts:

Where a debtor's circumstances do not constitute undue hardship, some bankruptcy courts have thus given a debtor the benefit of a "fresh start" by partially discharging loans, whether by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship. We conclude that, pursuant to its powers codified in § 105(a), the bankruptcy court here may fashion a remedy allowing the [debtors] ultimately to satisfy their obligations to [the lender] while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances.

Id. at 440.

Prior to *Hornsby*, the Sixth Circuit decided *Cheesman*. In *Cheesman*, the court approved of the bankruptcy court’s discharge of the student loans of two debtors who were married and had two children. *See Cheesman*, 25 F.3d at 358. It found that a discharge was appropriate under § 523(a)(8) where the debtors had a modest budget and lifestyle, their daughter attended private school with tuition paid mostly by relatives, they had continuing medical expenses related to the treatment of their daughter’s asthma, they showed good faith by making some partial payments, their gross income was slightly above the poverty level for a family of their size, the husband worked as an “early intervention specialist” at a mental health center, and the wife hoped to find employment perhaps as a teacher’s aide. *See id.* at 359-60. The court also noted that the debtors “chose to work in worthwhile, albeit low-paying professions” and that it found “no indication that

they were attempting to abuse the student loan system by having their loans forgiven before embarking on lucrative careers in the private sector.” *Id.* at 360.

IV

In the instant matter, the Debtor’s monthly net income is \$1,030.00. She may receive a monthly raise of \$115.00 later this year and may still be receiving up to \$20.00 each month in food stamps. Her husband’s net income in the last quarter of 1999 was \$3,064.64. For the eleven-week period of January 7, 2000, through March 24, 2000, his net income was \$5,550.00.³ Further, his net income must be decreased by the amount of his work-related expenses of at least \$30.00 daily, for which he is responsible. Although the fluctuating nature of Mr. Weeks’ income prevents the court from pinpointing the family’s total monthly net income, the court concludes that, in their current circumstances, the Debtor and her husband may expect to have a maximum combined monthly net income of approximately \$2,500.00.⁴

The monthly expenses listed on the Debtor’s Schedule J total \$1,402.00. That figure does not include the extra \$270.00 that the Debtor must pay each month for daycare as a result of losing her daycare subsidy. The car payment listed on Schedule J is \$70.00 less than that which she would need to pay in order to purchase the car she now drives and there is no provision for automobile insurance in the budget. Schedule J does not include any of the family’s medical

³ His net weekly income in 2000 has fluctuated and is sometimes under \$300.00.

⁴ This figure is based upon Mr. Weeks earning an average weekly net income of \$504.54, which is the average that he maintained for the first eleven weeks of 2000, and having weekly work-related expenses of \$150.00, or, in other words, of \$30.00 daily for each Monday through Friday that he is on the road.

expenses, including approximately \$85.00 for her son's psychologist, \$15.00 copayments for trips to the doctor's office, or prescription medication of between \$50.00 and \$150.00 each month. The addition of those items brings the Debtor's monthly expenses to at least approximately \$2,000.00.

Further, Schedule J predates the remarriage of the Debtor and her husband, thus it does not reflect the increase in the family's living expenses that occurred after their marriage or any other debts and expenses owed by Mr. Weeks. Also, that figure does not include clothing for the Debtor and her three children. In addition, the Debtor did not provide in Schedule J for the unexpected expenses that inevitably arise in a family with three children. Finally, the Debtor has at least \$750.00 in legal fees and costs associated with the adoption of their youngest child. The adoption is not yet final and it is possible that the expenses associated with it could grow. While the evidence does not establish an exact figure for each of these additional expenses, the court is satisfied that the sum of these expenses and those listed on Schedule J exceeds \$2,500.00 each month. The Debtor's budget is both modest and unbalanced.

The court also finds that several of the undue hardship factors used by the Sixth Circuit are present in this matter. That the Debtor canceled her long-distance telephone service and cable television service demonstrates that she has attempted to minimize her expenses. The evidence at the hearing establishes that she and her family live a frugal lifestyle. Her student loan debt is large, totaling \$54,528.37. The Debtor testified that she consolidated her loans and worked with the lenders in an effort to repay the loans, but that she simply could not afford to do so. There is no evidence that the Debtor is attempting to abuse the student loan system. Further, the court concludes that her circumstances are likely to persist for a significant portion of the loan repayment

period. Employment in the field for which she prepared in college was no longer a viable option when she graduated. Although she tried to improve her circumstances by continuing her education, she was not able to do so. Her current employment provides her with the benefits and flexible schedule that she needs. In addition, her husband has had to start in a new line of work after losing a job that he had for several years.

V

Despite their sincere efforts, the Debtor and her family have a modest and unbalanced budget. Their circumstances are likely to persist for some time. It would impose an undue hardship on the Debtor and her family to except her student loan debts, totaling \$54,528.37, or any portion thereof, from her discharge. Accordingly, the Debtor's student loan obligations will be discharged in their entirety pursuant to § 523(a)(8).

An appropriate judgment will be entered.

FILED: June 15, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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FIRST TENNESSEE BANK, NATIONAL
ASSOCIATION, THE UNIVERSITY OF
TENNESSEE, TENNESSEE STUDENT
ASSISTANCE CORPORATION

Defendants

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), it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Complaint filed by the Plaintiff on March 4, 1999, seeking a determination that the student loan obligations owing the Defendants, University of Tennessee and Tennessee Student Assistance Corporation, are dischargeable because excepting such debts from discharge under 11 U.S.C.A. § 523(a)(8) (West Supp. 2000) will impose an undue hardship on the Debtor and the Debtor's dependents, is SUSTAINED. The Debtor's student loan obligations are DISCHARGED in their entirety.

2. The counterclaims asserted by the Defendants, University of Tennessee and Tennessee Student Assistance Corporation, in their respective answers and counterclaims filed on April 30, 1999, seeking a determination that the Debtor's student loan obligations are nondischargeable under 11 U.S.C.A. § 523(a)(8) (West 2000), are DISMISSED.

ENTER: June 15, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE