

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

In re

Case No. 03-32080

PHILLIP D. NEALON
KISMET ANN NEALON

Debtors

KISMET ANN NEALON

Plaintiff

v.

Adv. Proc. No. 03-3099

BTI SERVICES, EDUCATIONAL
CREDIT MANAGEMENT CORPORATION,
and THE UNIVERSITY OF TENNESSEE

Defendants

MEMORANDUM

APPEARANCES: F. CHRIS CAWOOD, ESQ.
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint to Determine Dischargeability of Student Loan Debts filed by the Debtor, Kismet Ann Nealon, seeking a determination by the court that her educational loans owed to the Defendants, BTI Services, The University of Tennessee (UT), and Educational Credit Management Corporation (ECMC), are dischargeable under 11 U.S.C.A. § 523(a) (8) (West 1993 & Supp. 2004), because it would be an undue hardship for her to repay the loans.¹ The Defendants, UT and ECMC,² argue that the Debtor would not be unduly burdened by repayment of her student loans and ask the court to determine that the debts are nondischargeable under § 523(a) (8).

The trial of this adversary proceeding was held on August 31, 2004. The record before the court consists of seven stipulated exhibits introduced into evidence, along with the testimony of the Debtor.

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

I

From January 1988 through December 1994, the Debtor attended The University of Tennessee, in Knoxville, where she majored in Retailing and Consumer Science and obtained a B.S. degree. The Debtor then attended Webster University in St. Louis, Missouri, from February 1995 until October 1999, obtaining a Master's degree in Human Resources. In

¹ An Order of Default Judgment was entered against BTI Services on August 4, 2004, discharging the Debtor's student loan obligation of \$58,500.00 to this Defendant.

² See *supra* n.1.

conjunction with obtaining these degrees, the Debtor received a student loan from UT in the amount of \$2,250.00 (UT Loan). In addition, between 1988 and 1998, the Debtor obtained thirty-four student loans, totaling \$101,080.63, all of which were guaranteed by the Department of Education (collectively, ECMC Loans). These loans have been assigned to ECMC, as assignee of Tennessee Student Assistance Corporation and USA Servicing Company.

Subsequent to completing her Master's degree in 1999, the Debtor returned to Tennessee. Although she applied for human resources positions, she did not gain employment in that field, instead taking positions with two family centers as a caregiver for patients with developmental disabilities and with one center as a counselor for troubled youth. The Debtor then attended Tennessee Technology Center in Harriman, Tennessee, where she obtained a degree as a Licensed Practical Nurse (L.P.N.) in 2002.

The Debtor has received numerous deferments from both UT and ECMC in connection with her student loan debt. In January 1999, the Debtor made a single payment in the amount of \$48.00 towards the balance of the UT Loan. No additional payments have been made on the UT Loan, and as of the date of trial, the balance owed to UT was \$2,575.48, consisting of \$2,239.38 in principal, \$158.10 in interest, and \$178.00 in collection and late charges. See TRIAL EX. 5. With respect to the ECMC Loans, the Debtor has not made any payments, and as of the date of trial, the outstanding balance owed to ECMC, inclusive of principal, interest, and other charges, is \$185,205.13. See TRIAL EX. 1.

The Debtor filed the Voluntary Petition commencing her underlying Chapter 7 bankruptcy case on April 15, 2003,³ and the Complaint initiating this adversary proceeding was filed on June 12, 2003. In her Complaint, the Debtor avers that she suffers from medical problems, including depression, that she is unable to sustain gainful employment, and therefore, she is unable to pay the UT Loan and the ECMC Loans while maintaining a minimal standard of living.⁴ Accordingly, the Debtor asks the court to find that it would be an undue hardship for her to repay the UT Loan and the ECMC Loans and thus, grant a discharge of her student loan debt, totaling, at trial, \$187,780.61.

Both UT and ECMC argue that the Debtor has no dependants, that she has not attempted to maintain meaningful employment, that she is underemployed by choice, and that she has not made any good faith efforts to pay any of her student loan debt. Accordingly, UT and ECMC maintain that the Debtor has not met her burden of proof that repayment of her student loans is an undue hardship, and she should not receive a discharge of the UT Loan or the ECMC Loans.

II

11 U.S.C.A. § 727 (West 1993) provides for a general discharge of a Chapter 7 debtor's pre-petition debts. Section 727(b), however, limits the discharge to those debts "[e]xcept as

³ The underlying bankruptcy case was filed jointly by the Debtor and her former husband, who is not a party to this adversary proceeding. The Debtor testified that they divorced in October 2003.

⁴ On May 19, 2004, the court entered an Agreed Order Regarding Medical Proof in which the Debtor agreed that she was prohibited from basing her claim of undue hardship upon any permanent medical condition.

provided in section 523 of this title” 11 U.S.C.A. § 727(b). Section 523(a), governing the nondischargeability of certain debts, provides, in material part:

(a) A discharge . . . 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). Because student loans enjoy a presumption of nondischargeability, a debtor seeking a discharge thereof must establish that repayment will impose an undue hardship by a preponderance of the evidence. *Siegel v. U.S.A. Group Guarantee Servs. (In re Siegel)*, 282 B.R. 629, 634 (Bankr. N.D. Ohio 2002); *Daugherty v. First Tenn. Bank (In re Daugherty)*, 175 B.R. 953, 955 (Bankr. E.D. Tenn. 1994).

The Bankruptcy Code does not specify what factors constitute an undue hardship, leaving this determination to the courts. *See Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998). In the Sixth Circuit, a debtor seeking to establish that repayment of all or a portion of student loan debt imposes an undue hardship must demonstrate the following factors:

“(1) that [she] 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.”

Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 359 (6th Cir. 1994) (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). The court should also consider “whether there would be anything left from the debtor’s estimated future income to enable [her] to make some payment on [her] student loan without reducing what [she] and [her] dependents need to maintain a minimal standard of living.” *Cheesman*, 25 F.3d at 359 (quoting *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981)).

Likewise, “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 [herself] and [her] dependents’” are important factors. *Hornsby*, 144 F.3d at 437 (quoting *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)) (footnote omitted). Finally, courts should consider “the debtor's income, earning ability, health, educational background, dependents, age, accumulated wealth, and professional degree.” *Rice*, 78 F.3d at 1149 (citations omitted).

The Debtor is 40 years old and is an L.P.N., licensed to practice in the State of Tennessee. She also testified to being unemployed due to emotional and medical problems for which she takes five types of medication daily. She is divorced and has no children.

A

The first factor requires the court to assess the Debtor's standard of living and determine whether she can afford to repay her loans. "The essence of the minimal standard of living requirement . . . is that a debtor, after providing for his or her basic needs, may not allocate any of his or her financial resources to the detriment of their student loan creditor(s)." *Flores v. U.S. Dep't of Educ. (In re Flores)*, 282 B.R. 847, 853 (Bankr. N.D. Ohio 2002). Accordingly, "any analysis . . . must necessarily center around two considerations: (1) the debtor's income; and (2) those expenses which are necessary for the debtor to meet his or her basic needs." *Flores*, 282 B.R. at 853. The bankruptcy court must "ascertain what amount is minimally necessary to ensure that the [debtor and any] dependents' needs for care, including food, shelter, clothing, and medical treatment are met." *Rice*, 78 F.3d at 1151. A debtor earning a modest income and living on an unbalanced budget with no unnecessary or frivolous expenses may be discharged based upon an undue hardship. See *Hornsby*, 144 F.3d at 438 (citing *Correll v. Union Nat'l Bank of Pittsburgh (In re Correll)*, 105 B.R. 302, 306 (Bankr. W.D. Pa. 1989)).

At the time she filed her case, the Debtor was employed as an L.P.N. with Rockwood Care and Rehabilitation Center, earning a net monthly income of \$1,511.79. However, she left that position shortly thereafter and has not since been employed. Accordingly, the Debtor currently has no income, nor has she had any income for 2004. At trial, the Debtor testified that she receives \$141.00 per month in food stamps, and her medical insurance is covered by TennCare. Her monthly expenses total \$1,305.00, consisting of the following:

Rent	\$300.00
Utilities	\$100.00
Phone	\$ 50.00
Cable	\$ 50.00
Personal property insurance	\$ 30.00
Food	\$200.00
Car payment	\$200.00
Gas	\$100.00
Car insurance	\$ 75.00
Clothing	\$ 50.00
Personal items & cleaning items	\$100.00
Entertainment	\$ 50.00

TRIAL EX. 7. At trial, the Debtor testified that she currently lives with her boyfriend, who supports her and pays these monthly expenses for her.

Clearly, this factor weighs in favor of the Debtor. In fact, both ECMC and UT acknowledge that the Debtor has no income, and presently, she is unable to pay any expenses.

B

The second factor is the existence of “additional circumstances” to indicate that the Debtor’s current financial woes will continue into the future. The Bankruptcy Code does not provide a specific list of “additional circumstances” to be considered to indicate the persistence of a debtor’s state of affairs; however, courts should examine whether a debtor has any disabilities, whether the debtor has dependents, the debtor’s age, the debtor’s mental abilities, the debtor’s education, and the debtor’s experience. *See, e.g., Healey v. Mass. Higher Educ. (In re Healey)*, 161 B.R. 389, 396 (E.D. Mich. 1993). The Debtor must establish that her

distressed state of financial affairs [is] the result of events which are clearly out of [her] control; . . . that [she has] done everything within [her] power to improve [her] financial situation[, and] that the hardship [she] is experiencing is actually “undue,” as opposed to the garden variety financial hardship experienced by all debtors who file for bankruptcy relief.

Kirchhofer v. Direct Loans (In re Kirchhofer), 278 B.R. 162, 167 (Bankr. N.D. Ohio 2002) (citations omitted).

Here, the Debtor avers that she suffers from medical problems for which she takes medication.⁵ The Debtor also testified that she takes medication to treat migraine headaches as needed. With respect to her economic outlook, the Debtor testified that she voluntarily left Rockwood Care and Rehabilitation Center, her most recent job as a L.P.N., due to stress and anxiety, and to date, she has not sought any other employment. Although the Debtor testified that she had difficulties performing certain duties associated with her L.P.N. position, she did not offer any proof to indicate why she has not and/or cannot seek another L.P.N. position.

The Debtor has not met her burden of proof that all of the additional circumstances she faces, i.e., her undisclosed medical issues⁶ and unemployment, are out of her control such that they constitute an undue hardship. While the Debtor’s need for medication may be out of her control, her unemployment most certainly is not. The Debtor offered no evidence to convince the court that she was unable to sustain employment. To the contrary, the evidence

⁵ The Debtor offered no testimony concerning the nature of her medical problems. Her lack of testimony on this issue was because of her agreement with UT and ECMC as set forth in the May 19, 2004 Agreed Order Regarding Medical Proof that the “Plaintiff shall be prohibited at trial from proceeding upon a claim of a permanent medical condition as a basis for the claim of undue hardship. The Plaintiff may proceed with proof of her economic inability to repay the student loan debt.”

⁶ See *supra* n.4 and n.5.

suggests otherwise. The Debtor is clearly an intelligent person, having completed course work in three different degree programs through which she obtained Bachelor's, Master's, and L.P.N. degrees. Nevertheless, through her own testimony, the Debtor confirmed that she has voluntarily not sought any employment, as a L.P.N. or otherwise, since leaving her position with Rockwood Care and Rehabilitation Center. The Debtor has not established that her medication precludes her ability to work. And although she testified that she does not currently own an automobile and has not driven for the past six months, the Debtor acknowledged that she still retains a valid Tennessee drivers license. Moreover, when asked what she does during the day, the Debtor testified that she cooks, cleans, and takes walks, all physical activity requiring at least a minimal amount of strength and thought.

Furthermore, the Debtor did not prove that her circumstances are such that they will continue in the future. As recently as 2000, the Debtor attended classes to obtain her L.P.N., while at the same time working and caring for a foster child. This behavior indicates the Debtor's work ethic and suggests that she has the potential to be employed once again. Additionally, the Debtor acknowledged that she holds a current L.P.N. license with the State of Tennessee, having just renewed it for another two years in February 2004.

Based upon the evidence presented, the court finds that the Debtor has not met her burden of proof that the additional circumstances surrounding her current inability to repay her student loans are likely to persist.

C

Finally, the court must focus on whether the Debtor has made a good faith effort to repay ECMC and/or UT. When determining whether a debtor has acted in good faith in attempting to repay the student loan obligation, courts should look to several factors, including:

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

Flores, 282 B.R. at 856 (citations omitted). This list is not exhaustive, and not all factors will apply to all debtors.

In this case, the Debtor has made no efforts at all to repay her student loan obligations. Instead, she has made one payment of \$48.00 to UT and no payments to ECMC. And although ECMC advised her of repayment options through the William D. Ford Program offered by the United States Department of Education, the Debtor testified that she has not applied for it or any other repayment program. As previously stated, the Debtor has not

maximized her earning potential by voluntarily remaining unemployed, even though she possesses a current L.P.N. license. Furthermore, the Debtor has discharged all of her unsecured debts, including more than \$58,500.00 in student loan debt to BTI Services. Taking all of these factors into account, the court does not believe that the Debtor has made a good faith effort to repay the loans.

Based upon the evidence presented, the court cannot find that payment of the Debtor's student loan debt would impose an undue hardship, and the Debtor's student loan obligations owed to ECMC and UT are nondischargeable under § 523(a) (8).⁷

A judgment consistent with this Memorandum will be entered.

FILED: September 3, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁷ Following the Sixth Circuit's opinion in *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 622 (6th Cir. 2004), the court may not consider a partial discharge, based upon equity, absent a finding of an undue hardship. Accordingly, the entire amount of the Debtor's student loans owed to ECMC and UT are nondischargeable.

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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 Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED that the educational loans owing by the Plaintiff to the Defendants Educational Credit Management Corporation and The University of Tennessee are nondischargeable debts.

ENTER: September 3, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE