

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

In re

LOIS A. KASSEL,
Debtor.

No. 94-21458
Chapter 7

LOIS A. KASSEL,
Plaintiff,

v.

Adv. Pro. No. 94-2132

UNITED STATES DEPARTMENT OF
EDUCATION, THE STUDENT LOAN
MARKETING ASSOCIATION and
TENNESSEE STUDENT ASSISTANCE
CORPORATION,

Defendants.

M E M O R A N D U M

APPEARANCES:

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Attorney for Lois A. Kassel

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Assistance Corporation*

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding involves the question of whether the exception of the debtor's educational loans from discharge will impose an undue hardship upon the debtor. Pursuant to 11 U.S.C. § 523(a)(8)(B), the debtor seeks to discharge five educational (student) loans obtained during 1988 and 1989 while attending East Tennessee State University. The Tennessee Student Assistance Corporation ("TSAC"), who guaranteed repayment of the loans, has filed a counterclaim seeking a nondischargeable judgment against the debtor for the principal balance owing on those loans in the amount of \$12,928.27, together with interest, its costs and attorney fees. The court conducted a trial on June 12, 1995, and, thereafter, a post-trial hearing on August 28, 1995, during which new evidence concerning the debtor's employment status was submitted. Additionally, the parties* filed joint stipulations of facts on June 8, 1995. Upon considering all the evidence, the court concludes that the debtor has not established that excepting the student loans from discharge will constitute an undue hardship for the purposes of 11 U.S.C. § 523(a)(8)(B). This is a core proceeding. 28 U.S.C. § 157(b)(2)(I) and (O).

*Although the United States Department of Education and The Student Loan Marketing Association ("SallieMae") were also named as defendants, the U.S. Department of Justice and U.S. Attorneys Office filed a notice on January 18, 1995, advising that the loans at issue were not owned by the U.S. Department of Education. SallieMae did initially file an answer and counterclaim. However, by order entered June 1, 1995, the attorney for SallieMae was allowed to withdraw upon the stipulation that TSAC would assume the defense of the claims made against SallieMae. According to the stipulations filed by TSAC and the debtor, TSAC paid off the loans in default to SallieMae and is now pursuing a judgment against the debtor based upon, *inter alia*, the payment of those loans.

I.

The debtor filed her chapter 7 bankruptcy case on September 23, 1994, scheduling assets of \$4,143 and liabilities of \$30,690. With the exception of the student loans at issue herein, the debtor received a general discharge of all her indebtedness by order entered January 3, 1995. No indebtedness was reaffirmed by the debtor prior to that discharge.

The debtor, age 43, is unmarried and has no dependants. She obtained an undergraduate degree in psychology in 1976 from Virginia Commonwealth University. Upon graduation, the debtor undertook various labor-oriented jobs outside her field of training. In 1977, the debtor was employed as a counselor with Viva House, a residential facility for female adolescents. After a three-month period, the funding grant was not renewed and the debtor was left without a job. In the fall of 1977, the debtor began a long-term job with the U.S. Department of Labor, where, over a ten-year period, she served as a group leader with the Boxelder Job Corps Center in Nemo, South Dakota, an assistant counselor with the Iroquois Job Corps Center in Medina, New York, and a guidance counselor with the Jacob's Creek Job Corps Center in Bristol, Tennessee. After beginning night classes in pursuit of a masters degree in clinical psychology at East Tennessee State University, and because her hours of work thereafter changed, interfering with that pursuit, the debtor left her job with the Department of Labor in August 1987 to attend graduate school full-time.

While pursuing the masters degree, the debtor used up her retirement savings of approximately \$12,000 which she had accumulated with her previous job. The debtor also worked as a graduate assistant at the university for which she received a small monthly stipend of about \$500 per month from January 1988 through May 1989, when she completed all formal classwork required for the masters degree. The debtor started her internship in clinical psychology in May 1989, for which she again received a \$500 monthly stipend. In December 1989, the debtor completed the internship and began working earnestly on her thesis which was her final step to receiving the masters degree. By that time the debtor had obtained the student loans at issue and used the proceeds, which consisted of a loan in the amount of \$2,000 obtained on June 8, 1988, a loan in the amount of \$5,200 obtained on August 21, 1988, a loan in the amount of \$1,200 obtained on October 14, 1988, a loan in the amount of \$2,550 obtained on April 20, 1989, and a loan in the amount of \$2,627 obtained on September 9, 1989.

On December 11, 1989, the debtor undertook her first full-time job since leaving the Department of Labor to return to graduate school. That employment with the Bristol Regional Counseling Center lasted for two and one-half years, and included positions as a day treatment clinician and an on-call emergency services attendant. From that employment, the debtor earned approximately \$9,600 in gross wages for 1990, \$16,500 for 1991, and \$8,600 for 1992, along with an additional \$200 per month for the on-call emergency services from December 1989 through April 1992. On June

30, 1992, the debtor was terminated by Bristol Regional Counseling Center because she had not obtained her masters degree, which was a prerequisite to her continued employment. The debtor explained that her work schedule had left her little time to complete the thesis. From about August 1990, when the student loan payments first became due, until that termination, the debtor made regular payments upon the student loans.

After losing the job with Bristol Regional Counseling Center, the debtor worked for a couple of months as a laborer with Shelton Construction. She quit that job in September 1992 because of a recurrence of a lower-back problem which prevented her from performing the necessary tasks (lifting and carrying loads of 40 lbs.) for that employment. Thereafter, the debtor went through a period of unemployment until March 1994. Although she sought work both within and outside her field of training during this time, she was unable to obtain employment. Finally, she was hired as a cook at the County Club of Bristol in March 1994, where she was paid \$4.50 per hour. The debtor left that job in early May 1994, when she accepted a position in her chosen field with Highlands Community Services in Bristol, Virginia, as a facility liaison/case manager. The debtor's gross wages for 1994 were \$1,241.58 from the Country Club of Bristol and \$12,726.65 from Highlands Community Services.

At the time of the trial on June 12, 1995, the debtor was still working full-time at Highlands Community Services, although the position originally had only been guaranteed for three months

and was still considered temporary. At that employment, the debtor was working 40 hours a week and receiving an hourly wage of \$10.28, which produced an annual salary of \$21,382.08. The debtor also had an additional part-time job which produced net income of \$35.00 per week. The debtor was unsure about the prospect of continued employment with Highlands Community Services since she had been told that the funding for the position was subject to change, and in any event, her hours were going to be reduced.

After the June 12 trial, but before the court rendered a decision, the debtor petitioned the court to allow the record to be reopened to submit additional evidence concerning this employment. During that post-trial hearing, the debtor introduced a copy of a letter offering her the full-time "provisional position of Facility Liaison/Case Manager with Highlands Community Services effective August 16, 1995." The offer states that the semi-monthly (gross) salary will be \$890.92, and that after federal and state withholdings for taxes, etc., the net pay will be \$687.76 semi-monthly. The letter further provides that the provisional nature of the employment will continue for the first six months, during which time two performance evaluations are to be conducted. Assuming satisfactory performance by the debtor during those six months, the "provisional" status of the position will then be removed. Thus, the effect of the offer was to make the debtor's temporary position at Highlands Community Services permanent at the same annual salary of \$21,382.08, assuming the debtor successfully completes the six-month probation period.

During the approximate two-year period of unemployment, the debtor lost her house to a foreclosure. For a while, the debtor resided with friends. Presently, the debtor shares an apartment with a roommate who has been contributing about \$100 per month toward rent and food, and pays the phone and electric bills which together average about \$80 per month. The rent for the apartment is \$350 per month, and the debtor spends about \$400 per month for groceries.

For transportation, the debtor owns and drives a 1986 Mazda truck which has almost 150,000 miles on it. Recently, she has had to have it repaired and has replaced the tires at a cost of about \$550. She uses the truck not only to travel to and from work, but also during her work which requires some 1000 miles of local travel every month. As the state of Virginia mandates that registered vehicles have liability coverage, and because the terms of her employment also require it, the debtor recently insured the truck for a six-month premium of \$375. The debtor is reimbursed \$225 per month for the use of the vehicle on her job. She anticipates that she will either have to purchase a newer vehicle or spend additional money to keep the truck in good repair.

In addition to the foregoing expenses, the debtor estimates that she will have to spend \$150 per month for gasoline and maintenance for the truck, \$35 per month for wood to heat the apartment and for long distance phone charges, \$50 per month for clothing for her job, \$50 per month for meals outside the home, \$60 per month for recreation, and \$130 per month for miscellaneous

items such as haircuts, cosmetics, vacations, gifts, small appliances, appliance repair, and lawn care.

At the June 12 trial, the debtor testified that she did not have any health insurance due to the temporary nature of her position with Highlands Community Services. The debtor has a medical condition which includes a loss of vision (congenital blindness) in her left eye and chronic glaucoma in her right eye, and because she had no insurance, she has to purchase prescription medicine which costs about \$50 per month, and requires periodic eye exams every three months which cost about \$30 per visit. And although the debtor is not currently experiencing any serious problems, she has a curvature of the spine and a history of disc herniation which limits her ability to perform labor intensive jobs and which causes chronic back pain. Additionally, the debtor has recently learned that she was exposed to tuberculosis and has to visit the health clinic for chest x-rays and cultures every six months.

Fortunately, the debtor has now obtained major medical insurance as a benefit of her full-time employment with Highlands Community Services. The insurance provides that the debtor must pay a deductible of \$250 per calendar year, and, thereafter, 20 percent of allowable charges up to a per year maximum out-of-pocket expense of \$1,500. The debtor must wait a one-year period, however, before any of her pre-existing conditions will be covered under the plan. The insurance does not provide vision or dental benefits. The debtor testified at the post-trial hearing that her

health insurance plan does cover prescriptions at a set fee, so the court assumes that the debtor will no longer have a \$50.00 monthly expense for prescription medicine once the one-year period has passed, although the debtor's testimony in this regard was unclear.

II.

11 U.S.C. § 523(a)(8)(B) provides that an educational loan will not be discharged unless "excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependants." The election to exclude certain educational loans from the general policy of discharge was "based upon the conclusion that the public policy in issue, availability and solvency of educational loan programs for students, outweighs the debtor's need for a fresh start." *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994), *rehearing and sugg. for rehearing en banc denied*, (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 731 (1995). The enactment of § 523(a)(8) was designed "to remedy an abuse by students who, immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans." *In re Cheesman*, 25 F.3d at 359, *quoting Andrews University v. Merchant (In re Merchant)*, 958 F.2d 738, 740 (6th Cir. 1992).

The burden of proof on the issue of undue hardship is by a preponderance of the evidence and rests with the debtor. See *Daugherty v. First Tennessee Bank (In re Daugherty)*, 175 B.R. 953, 955 (Bankr. E.D. Tenn. 1994). In determining what may constitute

an "undue hardship" under § 523(a)(8)(B), various tests have been utilized by the courts. For example, one widely adopted three-part test was set forth in *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*, 831 F.2d 395, 396 (2nd Cir. 1987) (*per curiam*). That test asks whether the debtor currently cannot maintain a minimal standard of living if forced to repay the loan, whether additional circumstances exist which indicate that the present state of affairs will likely continue for a significant portion of the repayment period, and whether the debtor has made a good faith effort to repay the loan. *Id.*

A somewhat similar test espoused by the court in *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981), asks whether anything will be left from the debtor's estimated future earnings to make some payment on the loan without reducing what the debtor and his or her dependants need to maintain a minimal standard of living. In *D' Ettore v. Devry Institute of Technology (In re D' Ettore)*, 106 B.R. 715, 718 (Bankr. M.D. Fla. 1989), the court set forth nine factors taken from various cases, none of which considered alone will prove or disprove undue hardship. Those factors include: (1) a total incapacity now and in the future to pay the loan for reasons not within control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of

the debtor to obtain gainful employment in the area of study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of filing the bankruptcy petition was to discharge the loan; and (9) the ratio of student loan to total indebtedness.

Whatever test is utilized, the debtor must show something more than a mere financial hardship or present financial adversity since that will exist to some degree in every chapter 7 case. See, e.g., *Ford v. Tennessee Student Assistance Corp. (In re Ford)*, 151 B.R. 135, 139 (Bankr. M.D. Tenn. 1993). Generally, this will require evidence on the debtor's behalf which establishes the presence of "unique and extraordinary circumstances." *Id.* Although the Sixth Circuit Court of Appeals has not adopted any particular test for determining whether "undue hardship" exists, in *Cheesman* the court indicated that a finding of undue hardship may be appropriately based upon three factors: (1) whether the debtor is capable of paying the loans while maintaining a minimal standard of living; (2) whether the debtor's financial situation will improve in the foreseeable future; and (3) whether the debtor is acting in good faith or is attempting to abuse the student loan system by having a loan forgiven before embarking upon a lucrative career in the private sector. See *In re Daugherty*, 175 B.R. at 958, quoting *In re Cheesman*, 25 F.3d at 359-60. Accordingly, the court will utilize these criteria to evaluate and weigh the facts presented in this action.

III.

In considering whether the debtor is capable of paying the student loans while maintaining a minimal standard of living, a comparison of the debtor's estimated future income and expenses is necessary. The monthly net income and expenses of the debtor for the foreseeable future will be approximately as follows:

Income

\$1,375.52	Highlands Community Services employment
\$151.65	part-time employment
\$225.00	vehicle use reimbursement
\$180.00	roommate contribution
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\$1,932.17	

Expenses

\$350.00	rent
\$400.00	groceries
\$62.50	motor vehicle insurance
\$150.00	gasoline and maintenance for truck
\$115.00	utilities
\$50.00	clothing
\$50.00	meals outside home
\$60.00	recreation
\$60.00	medicine and eye exams
\$130.00	miscellaneous
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\$1,427.50	

\$504.67 Excess Income

Considering the fact that the debtor will have about \$500 per month left after expenses, the court cannot conclude that the debtor is incapable of paying some amount toward her student loans and maintaining a minimal standard of living. The debtor concedes as much, but argues that full repayment of the loans would present an undue hardship. The debtor cites the need for a newer vehicle and a potentially worsening medical conditions requiring out-of-

pocket medical expenses not covered by insurance as reasons for having the cushion in her budget. The debtor also testified that her roommate had been "short" on her contributions the last couple of months and, due to her employment situation, she may be unable to continue to make those contributions in the future. Finally, the debtor observes that although her employment at Highlands Community Services is no longer "temporary," her position is by no means safe because the funding for the position is renewed on a yearly basis.

TSAC states that it has offered to lower the payment on the loans to \$100 per month for the first year, increasing to \$150 per month the second year, and thereafter \$200 per month for the remaining six years. Interest will continue to accrue during the repayment period pursuant to the various notes; three of which provide for interest at 8 percent per annum, and the other two a variable rate not to exceed 12 percent per annum and which presently is set at 8.53 percent per annum. Accordingly, TSAC contends that the debtor is capable of meeting this payment schedule while maintaining at least a minimal standard of living.

The court agrees that the debtor is capable of meeting the proposed repayment schedule for the loans without sacrificing a minimal standard of living, particularly considering the fact that the debtor's own projections show that she will have an income cushion of about \$500 per month. Concerning the possibility that the debtor's roommate may be unable to contribute anything toward expenses in the future, the debtor may find someone else to share

expenses in the apartment or move to a less expensive apartment. In any event, the debtor will be able to absorb the lack of contributions for the short term and still maintain a minimal standard of living while paying the reduced installments for the loans. The mere fact that repayment of the loans may impose some hardship upon the debtor is not enough to permit dischargeability. See, e.g., *In re D' Ettore*, 106 B.R. at 718, citing *In re Collier*, 8 B.R. 909, 911 (Bankr. S.D. Ohio 1981).

With respect to the debtor's medical conditions, no evidence was adduced establishing any permanent or continuing disability preventing the debtor from maximizing her income in her chosen field. Indeed, the medical conditions of the debtor existed prior to her return to graduate school. Whether the debtor's present medical conditions could worsen in the future is simply a guess. And as pointed out by TSAC, if the debtor were to become disabled to the extent that she could not be gainfully employed, the debtor would not be without an avenue of relief under the educational loan program. Furthermore, after the one-year period of noncoverage for the debtor's pre-existing medical conditions expires, the debtor's monthly budgeted expense of \$60 for medicine should also decrease, leaving the debtor more room in her budget for other items.

Concerning the debtor's need for a newer vehicle, there also appears to be some room in her budget for trading-up to a newer model vehicle. Assuming that the debtor does in fact trade for a newer vehicle in the next year or so, the monthly budgeted amount for maintenance of the 1986 Mazda truck could be used toward that

monthly payment, assuming the debtor chooses to finance a portion of the purchase price. Over the short term, the debtor's recent major expenditures for repairs and tires for the truck should provide the debtor with extended use of the truck.

The possibility that the debtor may lose her present position at Highlands Community Services in the future due to a funding cut likewise does not provide a sufficient basis of undue hardship. No evidence was presented as to the likelihood of the position being terminated in the future and the court cannot base its ruling on such speculation.

What most limits the ability of the debtor to maximize her income in her chosen field is the fact that she did not complete the last step in obtaining the masters degree, her thesis. The debtor testified she knew that keeping her former job with Bristol Regional Counseling Center depended upon obtaining the masters degree. Nevertheless, the debtor did not chose to complete the work necessary for earning that degree. Now, the debtor has apparently been informed by the university that the thesis had to be completed within six years after completion of her internship which ended in 1989. Since it was not, the debtor states that she would have to retake a majority of the classes in order to complete the degree, which is something she says she cannot afford. While the court is not unsympathetic to the debtor's plight, the fact that the debtor may have nothing to show for the postgraduate work and the loans undertaken to pursue that coursework does not justify a discharge of the educational loans. The debtor contends that the

key toward obtaining more favorable employment in her field is a masters degree, and by not having that key, she will only be able to live a minimal lifestyle for the next several years if forced to repay the loans. However, such a result was brought about by the debtor's own choices made in the past.

In reaching this conclusion, it is unnecessary to continue the analysis with the additional criteria. The court does believe that the debtor is now back on track with her career and that while her financial situation may not improve for quite some time, the long-term prospects are good. Furthermore, the court is not of the opinion that the debtor filed this bankruptcy case for the primary purpose of discharging the loans or that the debtor has acted in less than good faith in attempting to repay the loans in the past.

IV.

In conclusion, the court finds that the debtor has not established that excepting the various educational loans from discharge will impose an undue hardship upon the debtor. Accordingly, TSAC is entitled to a nondischargeable judgment against the debtor for \$12,928.27, together with interest and attorneys fees as provided by the respective loan agreements. The debtor may repay that judgment by the installment method proposed by TSAC. If the debtor and TSAC are unable to agree on the amount of attorney fees, either may petition the court within the next ten days for a determination on this issue. An order will be contemporaneously entered in accordance with this memorandum

opinion.

ENTER: October 25, 1995

BY THE COURT


MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE