UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

ROBERT EDWARD LEE HARRIS — Case No. 96-32187-K

Debtor. — Chapter 7

ROBERT EDWARD LEE HARRIS,

Plaintiff,

v. — Adversary Proc. No. 98-828

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM AND ORDER RE PLAINTIFF-DEBTOR'S COMPLAINT TO DETERMINE THE DISCHARGEABILITY OF STUDENT LOAN DEBT AND ORDER ON THE UNITED STATES' MOTION TO WITHDRAW COUNTERCLAIM

This adversary proceeding is before the court on the plaintiff-debtor's complaint to determine the dischargeability of a federal student loan. Debtor asserts that his student loan is dischargeable in bankruptcy because repayment of the loan under the circumstances would impose an "undue hardship" on him as contemplated under 11 U.S.C. § 523(a)(8)(B). [1] Defendant, United States of America ("United

[1] Pursuant to The Higher Education Amendments Act of 1998 § 971, 11 U.S.C. §523(8) (1997 & Supp. V 1999), 11 U.S.C. § 523(a)(8)(B) is now designated 11 U.S.C. § 523(a)(8), as the

States"), contends that the debtor's student loan in question is not dischargeable because repayment of the loan pursuant to the alternate repayment terms proposed by the United States would not impose a hardship on the debtor sufficient to warrant a discharge of that debt under section 523(a)(8)(B) of the Bankruptcy Code.

Based on the testimony at the trial of Mr. Henry Sanders and the debtor, the statements and memoranda of counsel, relevant case law, and the entire case record, the court finds that the debtor's financial situation is unlikely to improve. Considering a totality of the particular facts and circumstances, an alternate repayment schedule is not feasible for this debtor. For this and other reasons, the court concludes that repayment of the debtor's student loan would create an undue hardship sufficient to warrant an absolute or full discharge of the loan under section 523(a)(8)(B).

This is a core proceeding pursuant to 28 U.S.C. § §157(b)(1) and 157(b)(2)(I). The following constitutes the court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

FACTUAL SUMMARY

The relevant background facts are undisputed. Plaintiff-debtor, Mr. Robert Harris, attended Shelby State Community College at Memphis, Tennessee, from 1984 until 1988, where he earned an Associate Degree in business management. He attended Crichton College at Memphis from 1988 through 1992, where he earned a degree in theology and church ministry. Debtor also maintains a license to sell

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Act repealed the seven-year limitation period of section 523(a)(8)(A) for all cases filed on or after October 8, 1998. For purposes of discussion, however, the court will refer to subsections 523(a)(8)(A) and 523(a)(8)(B) as in effect at the time this adversary proceeding was commenced on July 27, 1998, prior to the effective date of the Act.

real estate.

In order to finance his education, the debtor obtained various student loans. At the time that this proceeding was commenced, the debtor owed two student loans to the United States: a Federally Insured Student Loan (FISL) in the amount of $1,322.14, and a Guaranteed Student Loan (GSL) in the amount of $30,100.78.

Debtor testified that, despite his education and diligent efforts to find a job, his search for consistent employment has been unsuccessful. He has, however, gained some income from self-employment from bookkeeping services and the preparation of tax returns for individuals and small businesses, and from the sale of real estate and insurance. Debtor testified that he expects to net approximately $5,100.00 from these services in 1999, and as of June 17, 1999, he had already earned $3,783.00. In addition to this income, the debtor receives social security benefits of $244.00 per month, and is expected to receive a pension benefit from Hunt Wesson in the amount of $161.00 per month.

Debtor lives with his mother and pays $200.00 per month for rent. His other monthly expenses include a car note of $269.18, gasoline and car repairs of $200.00, and car insurance premiums of $206.00. Debtor testified that additional monthly expenses include $8.00 for a beeper service, $49.00 for telephone service, $150.00 for food,[2] and $25.00 for a newspaper subscription. In his post trial memorandum, the debtor also lists monthly expenses of $50.00 for clothing, $20.00 for laundry, $18.55 for TennCare insurance, $7.49 for medication, and $20.00 for barber services. These expenses total $1,223.22 per month.

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[2] The debtor's post trial memorandum indicates that the debtor spends $200.00 per month on groceries.

Debtor is 62 years old and has no dependents. He has been treated for prostrate cancer, and continues to feel ill and tired.

Debtor filed for relief under chapter 13 of the Bankruptcy Code on September 20, 1996, and the case was converted to a chapter 7 case on April 23, 1998. Debtor's chapter 7 case is his fourth bankruptcy filing. The United States notes that the debtor failed to list his student loan debts on his three prior chapter 13 bankruptcy petition schedules.

Debtor filed his complaint to determine the dischargeability of his federally insured and guaranteed student loans on July 27, 1998, asserting that the loans are dischargeable pursuant to 11 U.S.C. §§ 523(a)(8)(A) and 523(a)(8)(B). [3]

The United States has proposed an alternative repayment schedule based on a formula that considers the debtor's adjusted gross income, the variable interest rate, income percentage factors, and the Department of Health and Human Services Poverty Guidelines. The United States contends that the GSL is not dischargeable as repayment of that loan under the proposed alternative repayment terms will not impose an undue hardship on the Debtor.

DISCUSSION

The dischargeability of the debtor's student loan debt is governed by section 523(a)(8)(B) of the Bankruptcy Code. Section 523(a)(8)(B) states:

> (a) A discharge under section 727 . . . of this title does not discharge an

[3] The parties agree that the FISL falls within the seven-year limitations period of former 11 U.S.C. § 523(a)(8)(A) and is dischargable in the debtor's bankruptcy case, so the only issue in this proceeding is the undue hardship imposed on the debtor by repayment of the GSL in the amount of $30,100.78.

> 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
> >
> > (B) 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. § 523(a)(8)(B). Congress did not define "undue hardship," but chose instead to leave that determination to the courts. It is evident, however, that "Congress intended to make discharge of a student loan more difficult to discharge than other types of debt, although not impossible. Congress enacted [section] 523(a)(8)(B) to 'remedy an abuse by students who, immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans.'" *Dolph v. Pa. Higher Educ. Assistance Agency (In re Dolph)*, 215 B.R. 832, 836 (B.A.P. 6th Cir. 1998) (citing *Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 740 (6th Cir. 1992)).

The Sixth Circuit has declined to adopt any one test to determine whether repayment of a student loan will impose "undue hardship" on the debtor [4] and instead considers many factors**.** *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998) (citing *In re Cheesman*, 25 F.3d at 359, and *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)). The *In re Hornsby* court stated the appropriate analysis as follows:

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[4] *But see In re Dolph*, 215 B.R. at 836, where the Bankruptcy Appellate Panel for the Sixth Circuit held that the "Brunner" test, as restated by the Sixth Circuit in *Cheesman v. Tenn. Student Assistance Corp., (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994), is an appropriate test to apply in adversary proceedings regarding the dischargeability of student loans.

> Declining to adopt any one test, we instead look to many factors. We have considered the three factors set forth in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam), which is the test that has been most widely applied: 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." 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."

In re Hornsby, 144 F.3d at 437 (citing *In re Cheesman*, 25 F.3d at 359 and *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)) (footnotes omitted). When the court determines that a debtor's circumstances do not constitute an "undue hardship," the court may nevertheless "giv[e] a debtor the benefit of a 'fresh start' by partially discharging loans, . . . 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" pursuant to the court's powers under 11 U.S.C. § 105(a). *In re Hornsby*, 144 F.3d at 440.

Debtor carries the burden of proof of undue hardship, measured by a preponderance of the evidence standard. *Butler v. Tenn. Student Assistance Corp. (In re Butler)*, No. 95-28281, 1997 WL 35195, at * 1 (Bankr. W.D. Tenn. Jan. 24, 1997).

Considering the factors set forth in *In re Hornsby* and the facts and circumstances existing in this particular case, the court concludes that repayment of the debtor's student loans will impose an undue

hardship on the debtor, and that the loans should be discharged. Looking at the first factor considered in *In re Hornsby*, based on his current income and expenses, the debtor cannot maintain a "minimal" standard of living if forced to repay the loans. Debtor's monthly income is speculative and uncertain, dependent on economic conditions and his ability to generate business. As of June 17, 1999, the debtor had earned only $3,783.00 and was receiving social security benefits of $244.00 per month. Even considering the debtor's expected pension benefit of $161.00 per month, the debtor's monthly expenses of $1,223.22 greatly exceed his monthly income and earnings. In addition, the debtor owns no substantial assets that he might sell to repay the loan, and has no discretionary income to apply toward repayment.

In light of the debtor's age and compromised health, he is unlikely to find permanent and consistent employment that would enable him to improve his current financial situation. In fact, the debtor will likely reach what is generally deemed the age of retirement before he can begin making any significant payments on the principal balance of the loan. Thus, under the second factor set forth in *In re Hornsby*, additional circumstances exist in this case indicating that the debtor's current state of affairs is likely to persist for a significant portion of the repayment period - even under the flexible terms of repayment proposed by the United States.

Although the United States alleges that the debtor's failure to include his student loan debt in his prior chapter 13 cases and his failure to take advantage of flexible repayment options indicates that the debtor has not made a good faith effort to repay the debt, there has been no evidence presented to the court regarding the debtor's payment history or his repayment efforts. The evidence presented indicates, however, that this debtor is not the typical graduating student that the statute was designed to deter - one filing bankruptcy on the verge of a lucrative career. For these reasons, the court finds that the debtor meets

the "good faith" requirement set out in *In re Hornsby*.

In addition, as the *In re Hornsby* Court noted, the court also may consider the amount of the debt and the rate of interest accruing, as well as the debtor's expenses and current standard of living, based on the debtor's attempts to minimize his expenses. The amount of the GSL is $30, 100.78, which includes interest. No evidence has been presented regarding the rate of interest on this loan. Based on the debtor's current monthly income and expenses, it is unlikely that the debtor can significantly reduce the principal amount of the loan at this time or in the foreseeable future.

Further, the debtor resides with his mother, paying a minimal amount of rent, and appears to have no significant unnecessary expenses. Car maintenance is the debtor's primary expense, and the evidence indicates that the debtor is dependent upon his car for generation of his business and income. Debtor appears to the court to have minimized his living expenses.

CONCLUSION AND ORDER

Based upon the factors set forth in *In re Hornsby* and the facts and circumstances existing in this particular case, the court concludes that repayment of the debtor's student loans will impose an undue hardship on the debtor, and that the loans should be discharged. The court further concludes that an alternate repayment schedule is not feasible in this case in light of the debtor's age and physical health, as the debtor's financial situation will not likely improve so that the debtor can make any significant repayment efforts.

In addition, pursuant to the request of the United States, the United States may withdraw its counterclaim and may enter the appropriate order for the record, if it still feels that such action is appropriate. Accordingly,

IT IS SO ORDERED this _____ day of July, 1999.

DAVID S. KENNEDY
UNITED STATES BANKRUPTCY JUDGE

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