

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

**In re:
KATHRYN LEE BAXTER,
Debtor.**

**Case No. 04-28394whb
Chapter 7**

OPINION AND ORDER ON § 707(b) MOTION

On October 25, 2004, the Court heard and took under advisement the evidence presented on the motion to dismiss this case under 11 U.S.C. § 707(b), filed by the United States Trustee. This opinion contains the Court's findings and conclusions.

ISSUE

The issue for decision is whether it would be a substantial abuse to permit this Debtor to proceed under chapter 7 of the Bankruptcy Code.

DISCUSSION

The Debtor's schedules reveal no secured debt and only \$12,807 in unsecured debt. The Debtor is a teacher, and her amended schedules of income and expenses reveal relatively little in income over her routine expenses. The United States Trustee's analysis of income asserts that the Debtor has sufficient excess income to pay a substantial percentage of her unsecured creditors in a 3-year chapter 13 plan; however, the Debtor disputed the amount of income. The Court is unable

to resolve the differences in total annual income between the parties' positions, but it would appear that the Debtor could perhaps satisfy some undetermined percentage of her unsecured debt with serious cost-reduction efforts.

The question is whether it would be a substantial abuse to permit this Debtor to remain in chapter 7 rather than dismissing her case based upon a possible ability to pay a significant amount to her unsecured creditors. The authority from the Sixth Circuit instructs us that the "totality of circumstances" must be examined for each debtor, to determine if that debtor has dealt honestly with creditors or is seeking an advantage over them unfairly, and whether the debtor is "needy." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). There has been no contention in this case that Ms. Baxter has been less than honest. In both *Krohn* and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 435 (6th Cir. 2004), the Circuit panels acknowledged that a debtor's ability to pay creditors could alone support a finding that a debtor was not "needy" and that chapter 7 relief would be a substantial abuse. That legal conclusion, however, does not mean that every debtor who on paper has some ability to repay some percentage of unsecured debt is substantially abusing chapter 7 by seeking relief under that chapter. The trial court must evaluate ability to pay in the light of the total circumstances presented in that particular case.

No specific attack on expenses asserted by this Debtor was made, and the Court is unable to find that the Debtor has as much excess income as claimed by the United States Trustee; the proof is simply not clear on that point. Even assuming that this Debtor could reduce some of her monthly expenses for purposes of creating enough income to pay a significant percentage to unsecured creditors, the Court is not persuaded that this particular Debtor is abusing chapter 7 relief.

This is so due to the particular health circumstances faced by this Debtor, who testified that she has several health problems, some of which will require surgery in the near future. She does not have sufficient sick days at her employment to cover her anticipated surgery; thus, she anticipates losing some pay during the next year. The Debtor does have a relatively small amount of unsecured debt, but she also has no significant accumulation of assets. Merely because a debtor does not owe a large amount of debt does not mean that the debtor is not in need of a bankruptcy discharge. A combination of the Debtor's present age and health problems, her impending surgery, little likelihood of significant disposable income, and the lack of excessive expenses leads this Court to find that this Debtor is not abusing chapter 7 relief.

CONCLUSION AND ORDER

Based upon the particular circumstances for this Debtor, the Court concludes that it is not a substantial abuse for this particular Debtor to seek relief under chapter 7 of the Bankruptcy Code. It is therefore **ORDERED** that the motion to dismiss this case is **DENIED**. The case shall proceed under chapter 7.

Service List:

Debtor

Debtor's attorney

United States Trustee

Chapter 7 Trustee

Creditors on Matrix