UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Laura L. Matthess,	)	Case No. 98-12955C-7G
	)	
Debtor.	)	
	)	
Laura L. Matthess,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 99-2029
	)	
U.S. Department of Education,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This adversary proceeding is a dischargeability action which came before the court for trial on January 4, 2000. The plaintiff contends that certain educational loans owed to the defendant should not be excepted from discharge pursuant to § 523(a)(8) because to do so would impose an undue burden on the plaintiff. Having considered the evidence offered at the trial, the findings and conclusions of the court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure are hereinafter set forth.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334, and the

General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) which this court may hear and determine.

FACTS

The plaintiff married in 1974 while she was living in Iowa. Two daughters were born of the marriage, one in 1975 and one in 1979. The plaintiff and her husband separated in 1980. The children remained with the plaintiff following the separation. Very little support was supplied by the husband following the separation. Starting in approximately 1981, the plaintiff began receiving benefits pursuant to the Aid to Families with Dependent Children program and continued to do so until 1988.

Plaintiff enrolled in Marycrest College in Davenport, Iowa, in approximately 1984, following two semesters at a community college. In 1987 the plaintiff graduated from Marycrest College with a B.A. Degree in Food Service Management.

During her last three years at Marycrest, the plaintiff obtained the educational loans involved in this proceeding. Upon her graduation, plaintiff executed a promissory note evidencing her student loans, which was guaranteed by the Department of Education under the Higher Education Act of 1965.

Plaintiff's first job following graduation was at a nursing home operated by the Beverly Corporation. Plaintiff was employed as a dietary supervisor. Plaintiff lost this job in 1990 when the ownership of the nursing home changed. Plaintiff then was unemployed for about one and a half years.

In 1992 plaintiff obtained employment as a teacher's assistant in Coralville, Iowa, and worked at this job until 1996. According to the plaintiff, she worked a forty-hour week on this job and earned approximately $10,000.00 per year. During this period, the plaintiff also worked an additional ten hours per week at a part-time job which produced additional income, according to plaintiff's testimony.

In 1996 the plaintiff moved to Greensboro, North Carolina, and obtained employment with the Guilford County Schools, initially doing a combination of dietary and custodial work. During her first two years with the Guilford County Schools, the plaintiff worked a forty hour week had no part-time job. According to the plaintiff she had annual earnings in the range of $10,000.00 to $11,000.00 during her first two years with the Guilford County Schools.

Plaintiff has remained employed with the Guilford County Schools and works as a teacher's assistant. Plaintiff's income has

increased though annual cost-of-living increases in pay.

Plaintiff has not remarried. Both of her daughters have graduated from high school. However, plaintiff's two daughters have continued to live with her and plaintiff continues to contribute to their support even though the daughters are employable adults, being 24 and 20 years of age, respectively, at the time of the hearing.

This adversary proceeding was filed on May 12, 1999, after the Government attached plaintiff's 1998 income tax refund and applied it to the balance owed on plaintiff's educational loans. As of December 20, 1999, the plaintiff owed principal of $12,669.21, plus interest of $3,021.68 on her educational loans.

ANALYSIS

Under § 523(a)(8) of the Bankruptcy Code a discharge under § 727 does not discharge a debt for an educational loan insured by a governmental unit or made under any program funded in whole or in part by a governmental unit "unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . ." It is undisputed that the loans involved in this adversary proceeding are educational loans of the type described in § 523(a)(8) and that the loans have not been repaid by the plaintiff. Hence, the only issue presented

is whether it will impose an "undue hardship" on the plaintiff if the loans are not excepted from discharge.

The term "undue hardship" is not defined in the Bankruptcy Code. The test most frequently used for determining "undue hardship" in the context of § 523(a)(8) is often referred to as the Brunner test and comes from the case of Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987). The cases which have adopted the Brunner test include In re Tena, 155 F.3d 1108 (9th Cir. 1998); In re Faish, 72 F.3d 298 (3d Cir. 1995); In re Roberson, 999 F.2d 1132 (7th Cir. 1993); In Nascimento, 241 B.R. 440 (9th Cir. BAP 1999); and In re Walcott, 185 B.R. 721 (Bankr. E.D.N.C. 1995). The Court of Appeals for the Fourth Circuit, in an unpublished opinion, utilized the Brunner test. See In re Kasey, 187 F.3d 630 (4th Cir. 1999). This is the test which will be utilized in the present case.

Under the Brunner test, the Debtor must make the following three-part showing in order to establish undue hardship for purposes of § 523(a)(8). First, the Debtor must establish that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if required to repay the educational loans. Secondly, the Debtor must show that additional circumstances exist indicating that this state of

affairs is likely to persist for a significant portion of the repayment period of the student loans. Finally, the Debtor must show that she has made good faith efforts to repay the educational loans. Student-loan debtors have the burden of establishing each of these elements and all three elements must be satisfied before a discharge can be granted. If one of the requirements of the Brunner test is not met, the inquiry ends there with a finding of nondischargeability. See In re Faish, 72 F.3d at 306, and In re Roberson, 999 F.2d at 1135. In adopting the Brunner test, the cases have observed that the test is consistent with the policy underlying § 523(a)(8), without being unduly harsh with debtors. In that regard, the Brunner test meets the practical needs of the debtor by not requiring that the debtor live in abject poverty before a student loan may be discharged. At the same time, the Brunner standard upholds the congressional intent of safeguarding the financial integrity of the student loan program by not permitting debtors who have obtained the benefits of an education funded by taxpayer dollars to dismiss their obligation merely because repayment would require some major personal and financial sacrifices. See In re Faish, 72 F.3d 305-06.

Determining whether the plaintiff can maintain a minimal standard of living if required to repay the educational loans

requires an examination of the plaintiff's current income and expenses.

When plaintiff filed her Chapter 7 case on November 17, 1998, plaintiff filed Schedules I and J, reflecting her income and expenses at that time. These schedules, which were offered into evidence by the plaintiff, reflect a gross income of $1,501.00 per month, consisting of plaintiff's $1,401.00 per month salary at the Guilford County Schools and $100.00 per month from a part-time job. Schedule I shows net monthly income of $1,200.00 remaining after payroll deductions. Schedule J shows expenses of $1,270.00 for plaintiff and her two daughters.

Plaintiff testified regarding changes which have occurred in her income and expenses since these schedules were prepared. According to the plaintiff, she has increased her hours of part-time work so that her income from part-time work has increased from $100.00 per month to $300.00 per month, raising plaintiff's net monthly income to approximately $1,400.00. However, plaintiff testified that her monthly expenses also have increased because some of her monthly expenses are now greater and she now has a $125.00 per month car payment, such that her current monthly expenses total $1,435.00. Because of the asserted increase in expenses, plaintiff contends that her minimal living expenses

consume all or nearly all of her net income and she has no present ability to repay the educational loans.

This contention must be rejected for several reasons. One reason for doing so involves plaintiff's income. A debtor seeking to discharge an educational loan may not willfully or negligently cause her default in repaying the loan by engaging in low-paying employment below that commensurate with the education and qualifications obtained though the educational loan, and then claim undue hardship. If the debtor relies upon low income from a job below that ordinarily performed by a person with her education and ability, the debtor must show that continuing reasonable efforts have been made to obtain better paying employment. See In re Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993). In the present case, the plaintiff has not engaged in employment involving the use of her college degree since 1990. Instead, plaintiff's employment has involved lower paying employment as a lunchroom employee, janitorial employee and teacher's assistant. Plaintiff's testimony regarding her efforts to obtain higher paying employment as a college graduate with a degree in food management was vague and unconvincing. Additionally, plaintiff's job at the Guilford County Schools requires that she work only 10 months per year. Plaintiff therefore is available for full-time work the other two months of

the year. There was no showing that plaintiff could not obtain full-time employment during these two months when she is not working for the schools. The income which plaintiff could earn from such employment would be significant and available for payment on her educational loans since plaintiff pays her expenses from the income she currently earns from her job with the Schools and her part-time work.

The second reason for rejecting plaintiff's contention involves her expenses. At least $200.00 of the expenses claimed by plaintiff could and should be paid by the plaintiff on her education loans. Plaintiff admitted that at least $200.00 of her monthly expenses were related solely to the support of her two daughters who continue to live with her without paying their own expenses. Both of these young women are adults, being well past majority. Both of them have completed high school and are capable of supporting themselves. Although there was some indication that one of the daughters was planning to attend college classes, the fact remains that both daughters are adults who are responsible for supporting themselves and are not "dependents" of the plaintiff for purposes of § 523(a)(8). See In re Stebbins-Hopf, 176 B.R. 784, 788 (Bankr. W.D. Tex. 1994); In re Simons, 119 B.R. 589, 593 (Bankr. S.D. Ohio 1990). The court concludes, therefore, that the

plaintiff failed to establish that, based on current income and expenses, she cannot maintain a minimal standard of living if required to repay her educational loans.[1]

An additional reason why plaintiff is not entitled to discharge her educational loans is that she also failed to show that she had made good faith efforts to repay the educational loans. Plaintiff admitted that she has never once communicated with the Government regarding the loans, never sought an extension of her repayment schedule and has never paid one cent on her loans. While plaintiff's evidence showed that there have been periods in her life when she could not have paid anything on the loans and still supported herself and her children, the evidence did not show that such a dire situation has existed continuously since the loans were obtained during 1985-87. Plaintiff's only communication with the Government regarding the repayment of the loans that she elected to obtain was the service of the complaint in this adversary proceeding, and that occurred only after the Government was able to attach a tax refund. Plaintiff's conduct regarding

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[1]Even if plaintiff's continuing support of her adult children could be considered a necessary and minimal expense, it is an expense which surely will end in the relatively near future, when the adult children have had a reasonable opportunity to complete their education.

these loans falls far short of exhibiting good faith efforts to repay the loans.

CONCLUSION

Plaintiff has failed to establish that excepting her educational loans from discharge will impose an undue hardship on the debtor or any dependents of the plaintiff. Therefore, plaintiff's indebtedness for educational loans in the amount of $15,690.89, plus interest from December 20, 1999, is non-dischargeable pursuant to § 523(a)(8) of the Bankruptcy Code. A judgment in accordance with this memorandum opinion will be entered contemporaneously herewith.

This 4 day of February, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

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	)	
Defendant.	)	
	)	

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED AND DECREED as follows:

(1) That the defendant have and recover of the plaintiff the sum of $15,690.89, plus interest from December 20, 1999; and

(2) That the aforesaid indebtedness which is owed to the defendant by the plaintiff is nondischargeable pursuant to § 523(a)(8) of the Bankruptcy Code.

This ___ day of February, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge