UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re	)	
	)	**JUDGE RICHARD L. SPEER**
Robert Turner	)	
	)	Case No. 03-3145
Debtor(s)	)	
	)	(Related Case: 03-30239)
Robert Turner	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
U.S. Dep't of Education	)	
	)	
Defendant(s)	)	

MEMORANDUM OPINION AND DECISION

This cause comes before the Court after a Trial on the Plaintiff/Debtor's Complaint to Determine Dischargeability. At issue at the Trial was whether the Debtor was entitled to receive a discharge of those obligations he incurred to finance his studies at a truck driving school pursuant to the "undue hardship" standard set forth in 11 U.S.C. § 523(a)(8). After considering the evidence presented at the Trial, as well as the arguments made by the Parties, the Court, for the reasons set forth herein, declines to grant the relief requested by the Debtor.

FACTS

The Debtor/Plaintiff, Robert Turner, is a divorced man, 40 years of age. Through the years, the Debtor has performed various jobs such as shoemaker, pizza-deliveryperson, manager, and laborer. (Def. Ex. B). He has been married twice and has three children from those marriages. He is legally obligated to pay child support, in some form, for all three.

On January 14, 2003, the Debtor filed a voluntary petition in this Court for relief under Chapter 7 of the Bankruptcy Code. Included in his petition was the obligation the Debtor incurred to finance his studies at the truck driving school. Since he incurred the loan, the Debtor has not made any payments. For purposes of the Trial held in the matter, it was established that the principal amount of his education loan was $2,625.00, with a present outstanding balance, due to accruing interest and the imposition of various finance charges stemming from nonpayment, of $5,079.09.

In seeking to discharge his student loan, the Debtor cites a medical basis as support for his claim. The Debtor puts forth that his medical circumstance arose from the combination of two separate events. In January of 1986, the Debtor injured his lower back during the course of employment, when he was pinched under a semi-trailer. The second event, an auto accident, occurred many years later, wherein the Debtor sustained injuries to his upper back. Since the time of his accidents, the Debtor maintains that his continued employment has aggravated his condition.

It is also the Debtor's contention that a causal relationship exists between his medical condition and his financial status. As of October 2003, the Debtor showed his disposable monthly income, after deducting child support, was $628.88. This has since changed. The Debtor took leave from his last place of employment pursuant to the Family Medical Leave Act (hereinafter "FMLA"), leaving him with only two

sources of income: $149.00 per month in food stamps and money put toward his electric bills by a nonprofit organization.

LAW

11 U.S.C. § 523. Exceptions to Discharge

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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[.]

DISCUSSION

The issue before this Court is whether the Debtor is entitled to receive a discharge of his student-loan obligation under § 523(a)(8). Pursuant to 28 U.S.C. § 157(b)(2)(I), a proceeding brought to determine the dischargeability of a particular debt is deemed a core proceeding over which this Court has the jurisdictional authority to enter final orders. 28 U.S.C. § 157(b)(2)(I).

Due to public policy concerns, Congress excluded educational loans from the scope of a bankruptcy discharge under § 523(a)(8). Provided within the statute, however, is an exception if the debtor can show that the repayment of the loan would create an "undue hardship." There is no definition or test

of "undue hardship" in the Bankruptcy Code. But recently, the Sixth Circuit Court of Appeals adopted the following test, known as the *Brunner* test, to determine the existence of "undue hardship":

> (1) 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 of the student loans; and
>
> (3) that the debtor has made good faith efforts to repay the loans.

Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch), 409 F.3d 677, 680 (6th Cir. 2005).

The debtor has the burden to prove each of these elements by a preponderance of the evidence. *Matthews v. Sallie Mae Servicing (In re Matthews)*, 324 B.R. 319, 322 (Bankr. N.D.Ohio 2004), *citing Grine v. Tex. Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 197 (Bankr. N.D.Ohio 2000). And in this particular case, the Debtor's compliance with the first prong is not disputed. Presently, the Debtor's only forms of income are $149 in food stamps and money put toward his electric bill through a nonprofit organization. Therefore, this case turns on an analysis of the second and third prongs.

To meet the second prong, the debtor must show additional circumstances which will prevent repayment for a significant portion of the repayment period. *Lowe v. ECMC (In re Lowe)*, 321 B.R. 852, 858 (Bankr. N.D.Ohio 2004), *citing Mitchell v. U.S. Dep't Educ. (In re Mitchell)*, 210 B.R. 105, 108 (Bankr. N.D.Ohio 1996). In this case, the Debtor uses his medical condition as the basis for this requirement. And, a debilitating medical condition may, and in fact often does constitute an additional circumstance as applied to the second prong of the Brunner test. *In re Lowe*, 321 B.R. 852.

Yet, before a medical condition will serve as a basis for discharge, it must be shown that there exists a close nexus between the condition and the inability to repay the student loan. Normally, this is accomplished by establishing that the medical condition is "sufficiently debilitating to affect their ability to maintain employment, and that such a condition is unlikely to improve." *Id*. at 859. The Sixth Circuit has even taken this one step further, holding that the inability to maintain employment, both now and in the future, must create, "a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *Tirch*, 409 F.3d at 681.

To support the position, as just set forth, that his back injuries are sufficiently debilitating so as to prevent him from maintaining employment, the Debtor submitted the following evidentiary materials:

> Three workers' compensation physician reports dating back to 1991 indicating a back sprain, chronic pain, and limited forward bending. (Ex. No. 1-3).
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> A series of doctor's notes spanning from July of 2003 to June of 2005, each setting forth that, for a specified time period, the patient cannot work due to a neurological condition. (Ex. No. 6-10).
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> A progress report dated April 2005, in which the physician indicated that the Debtor is able to do light lifting. This report indicates that the physician allowed the Debtor to return to work on a trial basis. The physician also indicates he did not return to work, because the company could not accommodate his light-lifting only status. (Ex. No. 5).
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> A generic letter from the physician dated May 2005, which puts forth the following conditions: T11-T12 radiculopathy (herniated disc), as well as lower back pain with facet syndrome in the lumbar spine, and myofascial pain syndrome. (Ex. No. 4).

This evidence, however, in addition to being weak in its persuasive weight, is also questionable as to its admissibility.

First, from strictly an admissibility standpoint, not one of these documents was corroborated by a physician; nor did a physician offer any trial testimony as to either the debilitating nature of the Debtor's condition or its chance of improvement. In *In re Tirch*, the Sixth Circuit Court of Appeals indicated that such a foundation could be necessary prerequiste in an action of "undue hardship" based upon a medical claim, noting that whether "that the bankruptcy court's assessment of the debtor's testimony regarding her mental and emotional health is sufficiently reliable to support the bankruptcy court's findings in that regard, without the necessity of expert corroboration," is not necessary at this time "because the bankruptcy court made no such assessment." 409 F.3d at 681. Even setting this evidentiary concern aside, the Debtor has failed to meet his substantive burden.

The Debtor, although presently prevented from carrying out the tasks of his job due to the condition he puts forth, has not shown that he is completely unemployable. This is required by the Sixth Circuit which necessitates that the Debtor show a certainty of hopelessness in his ability to make any kind of repayment in the future. *Id*. In fact, the Court in *In re Tirch* made much ado concerning the debtor's failure to seek alternative employment.

But in contrast with this standard, the latest progress report provided by the Debtor indicates the physician does think that he will be able to return to work in the future. The physician even suggested a work conditioning program along with the continuation of physical therapy to aid in his successful return. Moreover, the Debtor has not provided any evidence to show that his condition is so extensive that he would qualify for some long-term disability compensation. The Debtor, himself, even testified that he would like to return to work if he were able.

Yet, despite all this, the Debtor has not attempted to find employment in an area, such as management, in which he has prior experience and, more importantly, appears to be a less physically

strenuous line of work. Given the weight of these considerations, the Debtor's future earning capacity cannot be said to be limited by his medical condition to such an extent that there is a "certainty of hopelessness." Consequently, the Debtor has failed to meet the second prong of the Brunner test, effectively meaning that no "undue hardship" exists because all three prongs of the test must be satisfied. However, even if the second prong of the Brunner test had been established, the Debtor has also failed to satisfy the burden under the third and final prong of this test.

Under the third prong, the court examines whether the debtor has made a good faith effort at repaying his loans.[1] Previously, this Court has looked to several factors in determining good faith. Of the applicable factors, only one is discernibly favorable to the Debtor: the Debtor did not obtain any tangible benefit from his educational debt, having failed to complete his truck-driving training. However, this factor is far outweighed in importance by those which bend unfavorably for the Debtor. Most obvious, the Debtor never made any payments toward his loan at anytime. *Lowe*, 321 B.R. 852 (one of the most important and basic considerations in examining the good faith prong of the Brunner test is whether the debtor has made any payments on his student loans).

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[1] An exemplatory list of the different factors this and other courts have used is as follows: (1) whether and to what extent the debtor made any payments (2) whether the debtor attempted to participate in the ICR if it was advantageous (3) whether the debtors current employment is directly traceable, thus showing that the debtor obtained a tangible benefit from her educational loans. (4) whether a debtor's failure to repay a student loan obligation is truly from factors beyond the debtor's reasonable control (5) whether the debtor has realistically used all their available financial resources to pay the debt (6) whether the debtor is using their best efforts to maximize their financial potential (7) the length of time after the student loan first becomes due the debtor seeks to discharge the debt (8) the percentage of the student loan debt in relation to the debtor's total indebtedness.

Another factor closely related and given great importance is whether the debtor attempted to participate in the Income Contingent Repayment plan – this plan allows the debtor to repay the debt with payment amounts based on a percentage of the debtor's income. *Matthews v. Sallie Mae Servicing (In re Matthews)*, 324 B.R. 319 (Bankr. N.D.Ohio 2004). According to the Debtor's testimony, his only attempt to participate in the ICR program was to investigate it, but because of troubles with the internet site, he stated that he did not pursue it further. However, the Court takes this for what it is: a half-hearted attempt that falls well-short of the good faith contemplated by the Brunner test.

The third factor which is unfavorable to the Debtor is whether he used his best efforts to maximize his income within his vocational profile. *Lowe*, 321 B.R. at 857, *citing Flores v. U.S. Dep't of Educ. (In re Flores)*, 282 B.R. 847, 854 (Bankr. N.D.Ohio 2002). "Implicit in this requirement . . . the debtor must establish that they have done everything within their power to improve their financial situation." *Mitcham v. U.S. Dep't of Educ. (In re Mitcham)*, 293 B.R. 138, 146 (Bankr. N.D.Ohio 2003), *citing Berry v. Educ. Credit Mgmt. Corp. (In re Berry)*, 266 B.R. 359, 365 (Bankr. N.D.Ohio 2000). Yet in this case, while the Debtor's physician has excused him from presently performing his current job duties, there is no indication, as was previously pointed out, that the Debtor sought employment commensurate with his previous work experiences, some of which could have been considerably less strenuous on his back. And in this way, the Sixth Circuit in *In re Tirch*, reasoned that if the debtor's employment becomes debilitating, then the debtor should work somewhere more suited to the individual. *Tirch*, 409 F.3d at 681. Thus, for all practicable purposes, this case is indistinguishable.

Formerly, at this point in the analysis this Court would have considered whether a partial discharge should be afforded, despite the lack of undue hardship, pursuant to this Court's equitable powers under 11 U.S.C. § 105(a). However, the Sixth Circuit Court of Appeals recently held that "the requirement of undue hardship must always apply to the discharge of student loans in bankruptcy – regardless of whether

a court is discharging a debtor's student loans in full or only partially." *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 622 (6th Cir. 2004). Therefore, in this case, the issue of a partial discharge is moot, because this Court has already found that the Debtor has failed to establish that the repayment of his student loan would create an "undue hardship" for purposes of § 523(a)(8).

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

ORDERED that the educational-loan obligation(s) held by the Defendant, United States Department of Education, against the Plaintiff/Debtor, Robert Turner, be, and is hereby, determined to be a NONDISCHARGEABLE DEBT.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge