UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 00-13445-JMD
Chapter 7

Joanna VanderMast,
Debtor

Joanna VanderMast,
Plaintiff

v. Adv. No. 01-1074-JMD

The Educational Resources Institute,
Franklin Pierce Law Center,
New Hampshire Higher Education Assistance Foundation, and
Pennsylvania Higher Education Assistance Agency,
Defendants

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MEMORANDUM OPINION

I. INTRODUCTION

On April 6, 2001, the Debtor filed the above captioned adversary proceeding seeking a discharge of her student loan obligations. On January 29, 2002, the Court held a one day trial regarding the discharge of the student loans. After hearing from all parties and their witnesses the Court took the matter under submission.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor is seeking to discharge educational loans totaling approximately $119,000.00. The monthly payments on the loans are approximately $1,300.00.[1] As of the date of the trial the loans were held by New Hampshire Higher Education Assistance Foundation ("NHHEAF"), The Educational Resources Institute ("TERI"), Pennsylvania Higher Education Assistance Agency ("PHEAA") and Franklin Pierce Law Center ("Franklin Pierce") (collectively the "Defendants").

A. College and Work History

The Debtor is thirty-two years old and was raised in New Hampshire. In September of 1988 the Debtor began taking undergraduate classes at Smith College. Her transcript indicates that

[1] This number does not include any amount for the loans due to Franklin Pierce which were reduced to judgment prior to trial and are currently due and owing for the total amount. Further, the amount included for TERI is based upon the compromise offer that TERI submitted to the Debtor.

she did quite well academically at Smith College. In 1992 she graduated with undergraduate degrees in political science and french. See Exhibit 6. Upon graduating from Smith College the Debtor moved to Connecticut where she worked as a waitress. The Debtor then returned to New Hampshire and continued to work as a waitress. The Debtor subsequently obtained employment as a secretary for an attorney in Concord, New Hampshire. The Debtor worked in her secretarial position for approximately two years earning about $15,000.00 per year.

In the fall of 1995 the Debtor began law school at Franklin Pierce in Concord, New Hampshire. During her first year of law school the Debtor worked as a waitress at the Olive Garden restaurant. During her second year in law school the Debtor took some time off from school and worked as a waitress at a local restaurant. The Debtor also worked at a restaurant during the summer between her second and third years of law school. The Debtor's transcript indicates that the Debtor was able to adequately perform her academic course work at Franklin Pierce. See Exhibit 7. In May of 1998 the Debtor obtained her juris doctorate degree and graduated from Franklin Pierce.

After graduating from Franklin Pierce the Debtor began working at the Disabilities Rights Center (the "Disabilities Center") where she earned between $7.50 and $8.00 per hour. While working at the Disabilities Center, the Debtor also worked as a waitress at Applebees restaurant. The Debtor then changed jobs and began working as a waitress at Café Prove and the Bedford Village Inn. The Debtor also testified that she worked at the Census Bureau for a period of time where she earned $11.50 per hour.

The Debtor testified that in 2001 she worked as a sales person at the Mesa pottery store earing $8.75 an hour and as waitress at Oliver's Restaurant. The Debtor is currently working full time at Oliver's Restaurant and is working one day a week at Mesa. Just prior to trial the Debtor

received a promotion at Oliver's Restaurant. She is now working as a waitress and dining room manager at Oliver's Restaurant. Accordingly, the Debtor will now be earning $5.00 per hour plus the tips she earns while working as a waitress at Oliver's Restaurant.

In 1999 the Debtor's gross income was $9,438.20. See Exhibit 2. In 2000 the Debtor's income rose to $14,930.00. See Exhibit 3. For the year 2001, the Debtor earned about $27,000.00. See Exhibit 4. The Debtor testified that she does not anticipate her income will be going up or down. The Debtor expects to continue holding her current job and sees her position as a long term position. The Debtor specifically testified that she did not attempt to take a bar examination to become eligible to practice as an attorney because she did not believe that she had the motivation necessary to study for and pass such an examination. The Debtor has applied for several paralegal positions over the past few years, but has not had any success in obtaining these positions.

B. Medical Issues

The Debtor testified that at least since graduating from Franklin Pierce she has been unhappy and that things had been bothering her. The Debtor indicated that she had been hospitalized on three separate occasions since 1999. The Debtor was first hospitalized in April of 1999 for six or seven days at Franklin Hospital for a suicide attempt. During this hospital stay the Debtor spent time in the intensive care unit receiving treatment for liver damage related to the overdose she had taken.

The Debtor was next hospitalized in June of 1999. During this hospitalization the Debtor stayed for approximately ten days during which she was meeting with a psychiatrist who was trying to determine what medications should be prescribed for the Debtor. The psychiatrist eventually prescribed two separate medications. The Debtor testified that she was currently taking

both of the medications as of the date of the trial, but that she had not taken them continuously since her June 1999 hospitalization. The Debtor testified that the medications help to improve her mood.

In July of 1999 the Debtor was again hospitalized for another suicide attempt. The Debtor was hospitalized for about five days during which time she received counseling and group therapy for her drug and alcohol abuse. The Debtor indicated that she had been abusing alcohol since she was a teenager and had begun abusing drugs after graduating from Franklin Pierce.

During 1999 the Debtor was attending Alcoholics Anonymous ("AA") meetings on an almost daily basis. The Debtor continued to go to the AA meetings in 2000, but subsequently stopped going to the meetings when she began drinking alcohol again. The Debtor testified that at the time of trial she had not used drugs in approximately eight months, but that she had consumed alcohol about two days prior to the trial date. The Debtor testified that she is an alcoholic and that she has recently been prescribed medication that stops her from drinking.

The Debtor testified that she is currently being treated by a nurse practitioner in Concord as well as a counselor. The Debtor expects to continue seeing the nurse practitioner, but expects to stop seeing the counselor at some point in the future.

C. Expenses

The most recent schedules filed by the Debtor show that she has approximately $91.15 of surplus income per month. See Exhibit 1. At trial, several issues worth noting were raised with regards to the expenses listed on the Debtor's most recent schedule J. Id. The first matter addressed was the Debtor's increase in housing expense. At the time the Debtor filed her bankruptcy schedules she was living at home with her parents. In October of 2001 the Debtor moved out of her parents' home and into an apartment. The Debtor pays $500.00 per month in rent

for her current apartment. The Debtor testified that she voluntarily moved out of her parents' home in October of 2001.

The next item in question related to the Debtor's medical expenses. The Debtor testified that while working at Mesa she is provided with health insurance coverage. However, the Debtor has recently reduced her work schedule at Mesa to one day a week and as a consequence will be losing her health insurance in the very near future. The Debtor further testified that after working at Oliver's Restaurant for one year she will be eligible for health insurance through the restaurant. The Debtor would be required to pay approximately $200.00 per month in order to receive health insurance benefits through Oliver's Restaurant.

The Debtor's schedule J shows that she currently pays approximately $100.00 per month for co-payments not covered by her medical insurance with Mesa. See Exhibit 1. The Debtor testified that once she loses her insurance coverage with Mesa her medical expense will increase to about $400.00 per month. The $400.00 would cover the premiums for COBRA insurance and co-payments.

There was also a question regarding an expense listed on the Debtor's schedules relating to a repayment of a loan to her father. The Debtor's schedules indicated that the Debtor is paying $280.00 per month to her father. The Debtor had been in a car accident and had no insurance to cover the cost of repairing her vehicle so her father paid for the repairs. The Debtor will have to continue making the payments to her father for the repairs for approximately ten more months.

D. Repayment Efforts

The Debtor made about twenty-six payments on the loans she had taken out in order to attend Smith College (hereinafter the "Smith loans"). The Debtor made no other payments on either her Smith loans or the loans she had taken out in order to attended Franklin Pierce

(hereinafter the "Franklin Pierce loans"). However, around the time that she was filing her bankruptcy petition the Debtor did make attempts to contact the holders of the Smith loans and the Franklin Pierce loans in order to work out a payment schedule.[2] The Debtor only received a response from one of the holders, Sallie Mae Servicing Corp. ("Sallie Mae").[3] Sallie Mae instructed her to contact them after the conclusion of her bankruptcy case. See Exhibit 5.

The Debtor testified at trial that based on her current expenses she can not afford to repay her student loans. The Debtor admits that she has approximately $100.00 per month which she could use to pay towards her student loans.

At trial Defendant PHEAA presented a witness who testified about a government program (the "Federal Program") that would allow the Debtor to package all of her Title IV and Perkins student loans into one package where payment would be based upon her current income level. The payments would vary according to her current income and at the end of twenty-five years any amounts not paid would be discharged. The Debtor testified that she had not been presented with this Federal Program at any time prior to the trial, but based upon what she had heard such a program would seem reasonable.

The Court notes that following the trial in this case the Debtor requested that the Court defer ruling on this adversary proceeding for approximately ninety days so that she could explore the Federal Program that had been described at trial. See Doc. No. 69. After the ninety days had passed the Debtor informed the Court that she had filed an application with the appropriate

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[2] The testimony at trial showed that the Debtor did not contact all of the current holders of all of her loans. However, the Debtor testified that she had had trouble determining who held each of the various loans and that she contacted every holder that she could think of at the time.

[3] Sallie Mae was the former owner of a one of the loans now held by NHHEAF.

persons, but that she had been informed that her application could not be processed because she was "in bankruptcy." See Doc. No. 77.

III. DISCUSSION

Under section 523(a)(8)[4] debtors are not permitted to discharge educational loans unless excepting the loans from discharge "will impose an undue hardship on the debtor and the debtor's dependants." In determining what constitutes undue hardship this Court has previously chosen to follow the three-part test set forth in Brunner v. New York State Higher Educ. Servs. Corp., 831, F.2d 395 (2nd Cir. 1995). See, e.g., McClain v. Am. Student Assistance, 272 B.R. 42, 47 (Bankr. D.N.H. 2002); Grigas v. Sallie Mae Servicing Corp., 252 B.R. 866, 874 (Bankr. D.N.H. 2000). Under Brunner the Debtor is required to show:

> 1. That the Debtor cannon maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependants if forced to repay the loans;
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> 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
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> 3. That the Debtor has made good faith efforts to repay the loans.

See McClain, 272 B.R. at 47; Grigas, 252 B.R. at 874.

A. The First and Third Prongs of the Brunner Test

In applying the test to the facts of this case, the Court finds that the Debtor has met the first prong of the test. The Debtor's schedules indicate that the Debtor only has surplus income of $91.15 per month. While the Defendants in this case took issue with various expenses that the

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[4] Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

Debtor listed, the Court finds the arguments to be unavailing. The Debtor cannot be expected to live at home with her parents for the indefinite future and no evidence was presented to indicate that her $500.00 a month rent payment is anything more than that necessary to maintain a minimal standard of living.

The Court also finds that the payments the Debtor is making to her father are necessary for the Debtor to maintain a minimal standard of living. The Debtor's father paid for repairs to the Debtor's vehicle that were necessary after the Debtor was involved in an accident. Clearly the Debtor needs a vehicle to travel to and from work. If the Debtor did not have a means of traveling to and from work, one can assume that the Debtor would lose her source of income. Thus, the payments the Debtor is making to her father for repairs to her vehicle are payments necessary for the Debtor to maintain a minimal standard of living. Furthermore, the Court does note that while the payments to the Debtor's father will be ending in the not-to-distant future, the Debtor will shortly be required to provide her own health insurance. Any such funds that would therefore be available to the Debtor after her father has been repaid will be necessary to cover the costs of the Debtor's health insurance.

In accordance with the above discussion the Court finds that the Debtor is currently maintaining a minimal standard of living and nothing more. Even while maintaining this minimal standard of living it is not possible for the Debtor to generate enough surplus income every month to repay her educational loan obligations. Accordingly, the Court finds that the Debtor has shown that she would not be able to maintain a minimal standard of living if she were forced to repay the educational loans. Therefore, the Debtor has satisfied the first prong of the Brunner test.

With regards to the third prong of the Brunner test, at least some of the Defendants argued at trial that the Debtor had not satisfied this prong because she had not made payments on all of the

loan obligations. The Court finds this argument unavailing. The evidence presented at trial clearly shows that when the Debtor was in a financial position to do so she made payments on her educational loan obligations. While the Debtor did not make payments on loan obligations related to her attendance at Franklin Pierce, the record clearly reflects that after graduating from Franklin Pierce the Debtor suffered from a series of medical problems that prevented her from having the financial ability to make any sort of payments on her educational loans.

The Debtor's post-filing actions also reflect upon the Debtor's good-faith efforts to repay her loan obligations. At the time she filed her bankruptcy petition the Debtor attempted to contact the holders of her loan obligations and work out some sort of a payment plan. Only one holder ever responded to the Debtor and that holder told the Debtor to speak with it after she was out of bankruptcy. Furthermore, when presented with the Federal Program at trial, a program that presented her with an opportunity to repay her obligations in a reasonable manner, the Debtor took the necessary steps to apply to the Federal Program. The Debtor followed up on the program despite the fact that she was under no obligation to do so as the program represents an offer to compromise and the offer was not presented to the Debtor by the time required by the Court's pretrial order. Unfortunately, the Debtor was told that her application could not be processed because she was in bankruptcy.

The Debtor's pre- and post-petition actions clearly show that the Debtor has made good faith efforts to repay her educational loan obligations. While PHEAA argued at trial that the Debtor had not satisfied the third prong of the Brunner test because she had not taken advantage of the above described Federal Program, the Court finds PHEAA's argument to be unpersuasive. The Court first notes that on June 28, 2001, a pretrial order was issued by the Court requiring all loan holders to submit offers of compromise on or before December 21, 2001. See Doc. No. 22 at

4. Clearly the Federal Program, wherein debtors are permitted to pay their educational loan obligations on the basis of their disposable income, is an offer to compromise. The Debtor's undisputed testimony at trial was that none of her loan holders had ever told her about the Federal Program. Clearly, PHEAA failed to meet the deadline set forth in the Court's pretrial order regarding the submission of compromises. Therefore, the Court finds that since PHEAA did not timely present the Federal Program to the Debtor, it cannot claim that the Debtor's failure to take advantage of the Federal Program represents a lack of good faith to repay the educational loans.

Even in the absence of the Court's procedural deadline, the Court finds that PHEAA could not claim that the Debtor's failure to take advantage of the Federal Program represented a lack of good faith on her part to repay her educational loans. If the Defendants wanted the Debtor to take advantage of the Federal Program then why did they not inform her of the program when she wrote to them inquiring about payment options? Simply put, the Debtor cannot be expected to take advantage of a program that has never been disclosed or offered to her until after filing bankruptcy, which apparently made her ineligible for the program. If educational lenders want people to take advantage of the Federal Program instead of seeking to have the loans discharged in bankruptcy then they must inform parties of the program. Furthermore, the Court fails to see how the Federal Program is anything more than mere window dressing. The program purports to give those persons who lack the financial ability to make the required payments on their educational loans a feasible option for making at least some payments on the obligations. The program accomplishes this task by allowing people to repay the loans based upon their income. Yet, those persons in greatest need of the program, those who have filed for bankruptcy protection, are told that they are not eligible for the program while they are in bankruptcy. The Court fails to see how the Debtor's failure to apply for a program for which

debtors in bankruptcy are not eligible, can in any manner be construed as a lack of good faith on her part to repay her educational loans.

For the aforementioned reasons, the Court finds that Defendants claims relating to a lack of good faith on the part of the Debtor are unavailing.[5] The Debtor has satisfied the third prong of the Brunner test.

B. The Second Prong of the Brunner Test

The Court must now turn to the second prong of the Brunner test. The second prong of the Brunner test requires the Debtor to show that her current circumstances are likely to persist for a significant portion of the repayment period. As noted above, the evidence clearly shows that repayment of her student loans is currently a hardship for the Debtor. The evidence regarding the Debtor's future ability to repay her educational loan obligations is not so clear cut. The Court notes that while the Debtor has suffered from substantial health problems for the past several years, the evidence also indicates that prior to the onset of her health problems the Debtor was able to function in an academic environment at an above average level for a sustained period of years. The Debtor performed quite well while attending Smith Collage and was able to adequately perform her academic requirements at Franklin Pierce. Further, in-between attending Smith College and Franklin Pierce the Debtor was able to maintain steady employment. Therefore, while the Debtor has had recent problems creating an inability to pay her educational loans, such problems are relatively short in length when compared to the Debtor's prior ability to function at an above normal level.

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[5] Indeed, the Defendants are fortunate that a lack of good faith in the administration of the educational loan program by the Defendants, and others, is not an element of this case as the evidence would likely result in such a finding.

While the Debtor's recent health problems have occurred during a relatively short time span, if the problems were permanent or likely to continue for the indefinite future, there would be an inability for the Debtor to pay her educational loan obligations without undue hardship for a significant portion of the repayment period. Accordingly, the Court must examine the evidence presented with regards to the expected extent of her recovery and the length of any such recovery. The Debtor did testify about her health problems and her testimony indicates that she expects her health problems to continue into the future. However, the Debtor did not present any evidence from a medical expert regarding the Debtor's prospects of recovery and ability to return to a more normal lifestyle. While the Debtor's opinion with regards to her recovery prospects can be taken into account by the Court, the Debtor's opinion in and of itself is not enough to convince the Court that the Debtor's health problems will continue for a significant portion of the repayment period.

The Court also finds that the Debtor's yearly income for the last three years indicates that she has been able to steadily increase her income as she undergoes treatment for her health problems. In fact, just prior to trial the Debtor had received a promotion from one of her employers. The Court does concede that it is unlikely that the Debtor will be able to practice law in the future given the fact that the Debtor has not taken a bar examination and the fact that law school and her graduation therefrom seem to coincide with the onset of her health problems. However, there is no indication that the Debtor will not be able to obtain work in some other more prosperous field than her current circumstances may permit. The Debtor has not established that given (1) her educational background and record, (2) the improvement in the Debtor's income after receiving, but not yet completing, treatment for her health problems and (3) her demonstrated improvement in her ability to manage those health problems, she will not be able to become employed in a field more financially prosperous than her current occupation as a waitress.

Accordingly, the Court finds that the Debtor has failed to meet the second prong of the Brunner test.

IV. CONCLUSION

As the Debtor has failed to prove that her current inability to repay her educational loans will continue for a substantial portion of the repayment period, the Court finds that the Debtor has failed to meet the requirements for discharging educational loans under section 523(a)(8). Accordingly, the Debtor's obligations to the Defendants will not be discharged in this bankruptcy proceeding. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 27th day of June, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge