

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 01-11730-MWV  
Chapter 7

Judith E. Hamilton

Debtor

Judith E. Hamilton

Plaintiff

v.

Adv. No. 01-1169-MWV

HEMAR Ins. Corp. of America, et al.,  
Defendants

*Nancy Michels, Esq.*  
**MICHELS & MICHELS**  
*Attorney for Debtor/Plaintiff*

*Marc McDonald, Esq.*  
**FORD AND WEAVER, P.A.**  
*Attorney for The Educational Resources Institute, Inc.*

*Marc L. Van De Water, Esq.*  
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*Attorney for HEMAR Insurance Corp. of America*

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*Attorney for Educational Credit Management Corp.*

**MEMORANDUM OPINION**

The Court has before it the complaint of Judith E. Hamilton (“Debtor”), in which she seeks a discharge of certain student loans currently held by The Educational Resources Institute, Inc. (“TERI”) on the grounds of undue hardship pursuant to § 523(a)(8) of the United States Bankruptcy Code (the

“Code”).<sup>1</sup> For the reasons set out below, the Court denies the Debtor’s complaint.

### **JURISDICTION**

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).

### **BACKGROUND**

On August 30, 2000, the Debtor filed for bankruptcy under Chapter 7 of the Code and received a discharge on August 29, 2001. On September 20, 2001, the Debtor filed the instant complaint, seeking the discharge of educational loans totaling approximately \$119,600.00 on the grounds of undue hardship.

Of the five Defendants originally named in the complaint, only TERI’s claim remains unresolved. Franklin Pierce Law Center, which was owed \$1,212.41 as of May 10, 2000, defaulted. (Adv. Doc. 22). The Debtor substituted Educational Credit Management Corp. (“ECMC”) for American Student Assistance (“ASA”). (Adv. Doc. 3). Additionally, Sallie Mae Servicing Corp. assigned its claim to ECMC. Both Hemar Insurance Corp. of America (“Hemar”) and ECMC stipulated their claims with the Debtor before trial, and the Court granted the Debtor’s Motion to Approve Stipulations on August 20, 2002.<sup>2</sup> (Adv. Doc. 58).

#### **A. Educational and Employment History**

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<sup>1</sup> Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

<sup>2</sup> By the terms of the stipulations, \$17,000.00 of Hemar’s claim was declared non-dischargeable and payable in monthly installments of \$100.00 per month for one hundred and seventy months without interest. (Adv. Doc. 45, Ex. A). ECMC’s stipulated, non-dischargeable claim was reduced to \$37,000, payable in two hundred and forty monthly installments of \$125.00. However, under the ECMC stipulation, if the Debtor’s total income exceeds \$38,000.00 and she is still making payments to Hemar, the Plaintiff shall make an additional payment equal to four percent of her income in excess of \$38,000.00. See id. If the Debtor has fulfilled her obligation to Hemar, the percentage increases to five percent. See id.

The Debtor is a forty-three-year-old, divorced woman, with a twenty-two-year-old son. An attorney, she is currently a treatment coordinator for Easter Seals, earning approximately \$36,000 annually. She graduated from high school in 1977 and received her Associates Degree from Lane Community College, Eugene, Oregon, in 1983, her Bachelor of Arts degree from Keene State College, Keene, New Hampshire, in 1986, and Juris Doctor degree from Franklin Pierce Law Center, Concord, New Hampshire, in 1993.

After graduating from Keene State with a degree in Human Services, the Debtor worked at Monadnock Family Services, initially earning \$13,000 per year. By 1990, she was earning \$22,000 annually. The Debtor started law school in 1990, financing her education through a series of loans and grants. During law school, the Debtor worked part-time at the law firm of Parent and McQuery. When she graduated, she was employed full-time with the firm, earning \$26,000 annually. By the time she left in September 1995 to start a solo law practice, she was earning approximately \$30,000 per year.

In 1996, while a solo practitioner, the Debtor's total business income was \$46,996 and in 1997, that figure rose to \$58,541. (Pl.'s Exs. 1E and 1F). In 1998, the Debtor's business income totaled \$52,103, but by 1999, her income had decreased to \$44,551. (Pl.'s Exs. 1C and 1D). In 2000, the Debtor began working for Easter Seals, earning \$38,138, which included both her wages and additional business income from a personal injury case that concluded in 2000. (Pl.'s Ex. 1B). In 2001, the Debtor's tax return reflected total income of \$36,882. (Pl.'s Ex. 1A).

To finance her law office, the Debtor took out a Small Business Administration loan from the Bank of New Hampshire (the "Bank"), in the amount of \$30,000 and a \$15,000 line of credit. The Bank subsequently called her line of credit. The Debtor prepared exhibit three, which reflects deducted principal payments on the SBA loan and taxes due, in order to more accurately represent her cash flow while running her practice. (Pl.'s Ex. 3). For the most part, the Debtor still owes the taxes due. In her schedules, the Debtor lists the IRS as holding claims in the amounts of \$1,294.34 for 1996, \$24,832.44

for 1997, \$18,392.11 for 1998 and \$13,190.85 for 1999. (Pl.'s Ex. 5). The Debtor testified that she does not have an agreement with the IRS regarding the amounts owed, but that she is in the process of negotiating one and does not know how much she will owe the IRS until that process is completed.

The Debtor testified that she cannot envision earning any more than she is currently earning now, as she has never really earned more. The Debtor also testified that she has always focused on social work, even when practicing law. However, she would like to teach at a college level. Last fall, she was to teach a class at a community college in Vermont. This part time job was to pay \$2,300 for the semester, in addition to her full-time position with Easter Seals. The Debtor also testified that she had applied for ten to fifteen teaching positions in the last few years, the highest annual salary being \$46,000. Further, the Debtor stated that a full-time teaching at Keene State pays between \$35,000 and \$40,000 per year.

## **B. Medical Issues**

The Debtor has been diagnosed with Fibromyalgia, a medical condition that affects different parts of her body at different times and with varying levels of severity. The only evidence presented on the Debtor's medical condition came from the Debtor's testimony and three medical reports prepared by Dr. John G. Schlegelmilch, M.D., which were admitted at trial as Plaintiff's Exhibit 30. No medical expert testified at trial.

The Debtor testified that her condition, and the medication she takes to manage it, may affect her ability to drive, type, and restrain children.<sup>3</sup> The Doctor's report confirmed that the Debtor's medication may affect her ability to drive, stating that because Flexeril may cause sedation "[s]he should not drive when she is on it." Office Notes dated 10/02/2001 (Pl.'s Ex. 30). However, the Debtor testified that there has been no finding of permanent disability. In addition, Dr. Schlegelmilch noted that he discussed with the Debtor "how lifestyle has a major effect on [Fibromyalgia], including exercise, diet, smoking,

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<sup>3</sup> The Debtor testified that her limitations with regards to restraining children has been an ongoing issue in her present position because she needs to be certified in this area and has not been able to become re-certified because of fibromyalgia flare-ups.

and stress.” Office Notes dated 8/14/2000 (Pl.’s Ex. 30). Dr. Schlegelmilch’s reports also reference a “possible element of depression” and “tobacco addiction.” Office Notes dated 10/4/2000 (Pl.’s Ex. 30). The Debtor confirmed that weight loss is an issue and that her doctor has encouraged her to follow an exercise program and lose weight. However, the Debtor also noted that weight loss has not occurred, adding that some of her medications cause weight gain.

### **C. Expenses**

In her Schedules I and J, Debtor lists a monthly net income of \$2,321.99 and expenses of \$2,714.12, resulting in a negative monthly cash flow of (\$-392.13). The Debtor also lists a payment of \$780.00 per month toward her student loans in Sch. J. At trial, the Debtor introduced a budget into evidence, which reflects a net monthly income of \$2,376.00 and expenses of \$2,497.00<sup>4</sup>, resulting in a negative monthly cash flow of (\$-121.00). (Pl.’s Exs. 6 and 7). There are no student loan payments listed as part of the Debtor’s expenses. However, as a result of the Debtor’s stipulations with Hemar and ECMC, her monthly cash flow deficit has increased to \$346.00. The Debtor testified that the shortfall between her income and expenses will be covered by “squeezing,” for example shopping differently.

The Debtor and another individual, Pamela March, rent a house and usually divide the household expenses in half, but the Debtor pays more when her son is back from school. Additionally, the Debtor hires someone to clean her house twice a month. The Debtor testified that she could possibly do the cleaning herself. The Debtor’s budgeted food amount of \$450.00 includes \$120.00 per month for cigarettes.

The Debtor has allocated \$250.00 for a car payment, \$151.00 for automobile insurance, and \$180.00 for transportation expenses per month. (Pl.’s Ex. 6). The Debtor testified that she drives approximately 40,000-50,000 miles per year and could not perform her job without a vehicle. Although a

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<sup>4</sup> Although the budget lists total monthly expenses of \$2,503.00, the Debtor indicated that her internet fee was reduced to \$15.00, lowering her overall monthly expenses to \$2,497.00.

majority of the mileage can be attributed to business use for which she is reimbursed, the Debtor calculates that her transportation expenses total \$180.00 per month for her personal use. The Debtor testified that she is required to have car insurance for her work.

Lastly, the Debtor's former spouse owes her approximately \$9,000 in back child support. The Debtor testified that payments are sporadic, but that in the two months before trial she had been receiving \$80.00 per week, which went to her son. The Debtor also testified that she splits the cost of her son's tuition with him. She paid \$1,000 for her son's tuition, but she did not include this payment in her monthly expenses. Further, once the Debtor's son is emancipated, certain expenses will decrease such as allocations for food, utilities, and car insurance.

#### **D. Loan History**

As of the petition date, the Debtor owed TERI \$34,832.39. The Debtor consolidated a BEL loan and four LAL loans on April 12, 1997, through the Access Private Consolidation Loan Program in the amount of \$31,015.55. (Pl.'s Ex. 4). This loan was subsequently assigned to TERI. The Debtor originally had taken out fifteen different loans and none of the parties could relate consolidation loans back to specific loans. However, chronologically, among her student loan lenders, TERI is last in line with a consolidation date of 1997.<sup>5</sup> The Debtor made some payments on her consolidated loans with ECMC and Hemar, but then requested hardship forebearances. (Pl.'s Ex. 18 and 20). TERI has not received any payments since the loan was assigned to it in 1999.

Per the Court's Pretrial Scheduling Order dated November 27, 2001, TERI filed its statement of acceptable repayment terms on March 27, 2002. (Adv. Doc. 28). TERI states that it was owed \$37,208.83 as of May 18, 2002 with an initial variable interest rate of 6.85%. TERI proposed to reduce

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<sup>5</sup> The Debtor's other loans, in chronological order, are as follows: Sallie Mae, 1987; Hemar, 1990; ECMC, 1994.

its balance to \$35,000.00, payable at a 5% fixed rate of interest, which equals payments of \$231.00 per month for 240 months, totaling payments of \$55,440.00.

#### DISCUSSION

Section 523(a)(8) provides that an educational loan shall not be discharged, “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents . . . .” 11 U.S.C. § 523(a)(8). Although the Code does not specifically define “undue hardship,” this Court has adopted the three-part test set forth by the Court of Appeals for the Second Circuit in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir. 1987) (per curiam). See Garrett v. New Hampshire Higher Educ. Assistance Found. (In re Garrett), 180 B.R. 358, 362 (Bankr. D.N.H. 1995). The Brunner test requires the Debtor to make the following showing:

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

Brunner, 831 F.2d at 396; In re Garrett, 180 B.R. at 362 (citations omitted). The issue before the Court is whether the Debtor’s circumstances, income, and expenditures establish that payment of her student loan would inflict undue hardship upon her, such that her educational loan is dischargeable under Brunner.

In applying this test to the Debtor’s situation, this Court must first determine whether she can meet her burden of demonstrating that she “cannot maintain ... a ‘minimal’ standard of living for herself and her dependents if forced to repay the loans.” Brunner, 831 F.2d at 396. Based on her current financial condition, the record does support a finding that the Debtor is unable to maintain or would be unable to maintain a “minimal” standard of living if forced to repay the student loans.

First, the Debtor’s monthly expenses exceed her gross monthly income, indicating that the Debtor does not have any surplus income. Second, her expenses appear to be reasonable. Although she is

making various car-related payments, the Court finds that these payments are necessary and not excessive. The Debtor needs an insured vehicle for her position at Easter Seals and she drives approximately 40,000-50,000 miles per year. Additionally, although the Debtor's food/cigarette expense is high, the Court notes that the Debtor did testify she has attempted, unsuccessfully, to quit smoking. Since her other expenses are not excessive, the Court will not take issue with the fact that she chooses to spend more on this discretionary item than on her other expenses.

Under the second prong, however, 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. These additional circumstances must be "extraordinary and exceptional and generally indicate a hopelessness for the indefinite future as to any possibility of repayment." Keilig v. Massachusetts Higher Educ. Assistance Corp. (In re LaFlamme), 188 B.R. 867, 871 (Bankr. D.N.H. 1995); see also Barrows v. Illinois Student Assistance Comm'n (In re Barrows), 182 B.R. 640, 648-49 (Bankr. D.N.H. 1994) ("Current financial adversity, characteristic of all debtors in bankruptcy court, is not a determinative factor in establishing dischargeability"). Although evidence 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 obligation is not as apparent because a debtor cannot satisfy the second prong of the Brunner test when his or her financial distress is self-imposed. Grigas v. Sallie Mae Servicing Corp. (In re Grigas), 252 B.R. 866, 875 (Bankr. D.N.H. 2000).

The Debtor's testimony at trial revealed that she has confined her job search to teaching. The Debtor, however, was a practicing attorney at one time, a field that presumably could offer her more with respect to earnings. Although the Debtor's legal education has not resulted in monetary success thus far and the Debtor desires to be employed in the field that appears to be her passion, her financial circumstances do not afford her such a possibility. The Debtor took a chance and incurred a significant amount of debt in seeking a legal career focused on social work. Although, for the time being, that



chance has not paid off, “a debtor does not have the luxury of remaining underemployed when saddled with debt that created other opportunities.” Grigas, 252 B.R. at 875. It has been stated that “[i]nformed free choice of one’s chosen pursuits is to be respected and even encouraged, but not to the extent of the judicial forgiveness of debt because of hardships that are both foreseeable and voluntarily assumed.” Fischer v. State Univ. of New York, 23 B.R. 432, 434 (Bankr. W.D.Ky. 1982).

Although the Court finds that the Debtor’s underemployment contravenes the second prong of Brunner, the Debtor’s medical condition is a mitigating circumstance. However, based on the medical testimony presented, the Court cannot find that the Debtor’s medical problems are likely to continue, without abatement, for the indefinite future. Although the Debtor did testify about her health problems and her testimony indicates that she expects her health problems to continue into the future, the prospects for managing her illness were not clear. Lifestyle appears to have a major effect on Fibromyalgia. Office Notes dated 8/14/2000 (Pl.’s Ex. 30). Without more substantial corroborating medical evidence, this Court cannot truly determine the nature of the Debtor’s condition, how it impacts her income potential, and her long-term prognosis. What is evident, however, is that her condition does not prevent the Debtor from maintaining full-time employment. Additionally, there has been no finding of permanent disability.

Further, although the Debtor’s tax issues appear to be an ongoing problem, the Debtor’s expenses will fluctuate over time as she will no longer have the SBA loan and her son will become emancipated. The Debtor’s income will also be supplemented by 3% annual raises. The Court finds that the Debtor’s yearly income for the last three years indicates that she has been able to maintain her income as she undergoes treatment for her health problems. The Debtor has not established that given (1) her educational background and (2) some improvement in her ability to manage her health problems, she will not be able to become employed in a more financially prosperous field than her current occupation. Accordingly, the Court finds that the Debtor has failed to meet the second prong of the Brunner test.

CONCLUSION

The Court concludes, based upon the testimony and documentary evidence presented, that the Debtor has not met her burden of proof under the Brunner test. Accordingly, the Debtor's obligations to TERI will not be discharged in this adversary proceeding. This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 16th day of June, 2003, at Manchester, New Hampshire.

/s/ Mark W. Vaughn \_\_\_\_\_

Mark W. Vaughn

Chief Judge