

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

In re:

Bk. No. 01-13361-JMD
Chapter 7

Nancy P. Turner,
Debtor

Nancy P. Turner,
Plaintiff

Adv. No. 02-1010 -JMD

v.

New Hampshire Higher Education Assistance Foundation and
University of New Hampshire,
Defendants

*David LeFevre, Esq.
Bossie, Kelly, Hodes, Buckley & Wilson
Attorney for Debtor/Plaintiff*

*Clifford Gallant, Esq.
Beliveau, Fradette, Doyle & Gallant, PA
Attorney for Creditor/Defendant*

MEMORANDUM OPINION

I. INTRODUCTION

The Debtor filed the above captioned adversary proceeding on February 1, 2002 seeking a discharge of her student loan obligations. On November 21, 2002, the Court approved a stipulation between the Debtor and University of New Hampshire (“UNH”) (Doc. No. 25) which resolved entirely the dispute between the Debtor and UNH. On January 23, 2003, the Court held a one day trial regarding the discharge of the Debtor’s student loans held by New Hampshire Higher Education Assistance Foundation (“the Defendant”) and 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 \$64,159.20.¹ The monthly payments on the loans are approximately \$802.57 with a loan term of 120 months. As of the date of trial, the loan held by New Hampshire Higher Education Assistance Foundation (the “Defendant”), guarantor of loans formerly held by Granite State Management & Resources, Inc. In the Pretrial Statement, the parties stipulated to most of the facts in this case. There are three contested issues of fact: the Debtor’s actual income, expenses, and whether she has a disability affecting her ability to generate income. Unless otherwise indicated, the parties stipulated in the Pretrial Statement to the facts described below.

A. College and Work History

The Debtor is a forty-eight year old woman who pursued post secondary and graduate education later in life. The loan in question represents the financing of several educational programs from 1985 through 1993: an associate’s degree in culinary arts/food service management from the Thompson School at the University of New Hampshire (“UNH”), a bachelor’s degree in women’s studies from UNH, and a master’s program in women’s studies at Mankato State University in Minnesota (“Mankato”). In 1993, the Debtor completed her course

¹The parties stipulated in the Pretrial Statement (Doc. No. 26) that as of the petition date the balance due and owing on the consolidated note was \$64,159.20, with an A.P.R. of 8.12%.

work at Mankato, but did not receive her degree because she did not complete the thesis requirement. Around that time, both the Debtor and her youngest daughter were diagnosed with Attention Deficit Hyper Activity Disorder (“ADHD”). About a year later, in 1995, the Debtor and her youngest daughter returned to New Hampshire and have since resided at the Debtor’s parents’ home.

In the fall of 1995, the Debtor became employed as an independent sales representative selling vacuum cleaners for a local Kirby Area Distributor (“Kirby”). In 1995 and 1996, the Debtor had a reported adjusted income of \$2,380.00 and \$9,361.13 respectively. In early to mid 1997, the Debtor became an area distributor for Kirby and remained an area distributor through the middle of 1998. As an area distributor, the Debtor was responsible for the costs associated with an office in Hooksett, NH. For 1997, the Debtor reported gross receipts of \$77,630.00 and an adjusted gross income of \$16,722.00. For 1998, she reported gross receipts of \$92,721.00 and an adjusted gross income of \$7,039.00. In the middle of 1998, the Debtor decided that her area distributorship was not financially viable, so she elected to take a position with Kirby as a sales representative working for the area distributor out of Concord, NH. She held this position through the spring of 2000.

Sometime after leaving her position with Kirby, the Debtor became employed as a full time independent sales representative for Horizon Meat & Seafood of Boston, Inc. (“Horizon”). As of the date of trial, she remained employed in this position. As an independent contractor for Horizon, the Debtor operates from its offices located in Bedford, New Hampshire, purchasing frozen food items and leasing a refrigerated truck from her employer. She then travels throughout New Hampshire selling the product to clients.

B. Income

The Debtor is paid weekly by Horizon, net of any and all applicable credits and truck lease charges. In 2001, the Debtor received \$25,322.00 in “reimbursements of overpayments;” her adjusted gross income was \$8,052.00. At trial, however, the Debtor testified that the \$8,052.00 figure was an error, and that her income for 2001 in fact totaled approximately \$13,000.00.

As of the date of trial, comparable information for the year 2002 was not available, but the parties agree that in 2002, Horizon received payments from the Debtor’s customers totaling \$162,042.00. According to Exhibit 3 and the Debtor’s testimony, her estimated income for 2002 is \$2,000.00.

However, The Defendant disputes the amount of the Debtor’s income. At trial, the Defendant questioned the Debtor at length regarding the details of her income from both Kirby² and Horizon. Specifically, Attorney Gallant reviewed in detail the number of boxes the Debtor typically sells, the amount the Debtor nets per box of meat sold, and the amount of business related expenses the Debtor incurs. The Defendant entered into evidence an e-mail message dated January 2, 2003 written by Dan Benjamin, Chief Financial Officer of Horizon (“Mr. Benjamin”), in which Mr. Benjamin responds to questions posed by the Defendant’s counsel regarding the Debtor’s income. See Exhibit 1. In the e-mail, Mr. Benjamin provides information pertaining the Debtor’s sales for 2002, including a breakdown of cash versus credit transactions, an updated purchase report, and Mr. Benjamin’s “best guess” that Horizon sales representatives in New Hampshire net³

²The Court refrains from summarizing the Defendant’s questioning of the Debtor’s compensation from Kirby as it does not directly inform the Court’s analysis under the Brunner test. The Debtor’s employment with Kirby terminated in August 2000.

³Mr. Benjamin described the amount as net of “amounts due Horizon.” See Exhibit 1.

\$12.00 per box. See id. The Defendant argued at trial that the Debtor's monthly income from Horizon was in the range of \$500.00 to \$600.00 per month rather than \$400.00 as the Debtor claimed.

In addition to the income she receives as an independent sales representative for Horizon, the Debtor also receives a monthly social security payment of \$436.00 on behalf of her minor daughter, who was fourteen at the date of trial.

C. Expenses

Schedule J of the Debtor's bankruptcy petition reflects total monthly expenses of \$2,549.59, which exceeds the Debtor's total monthly income of \$2,316.55. See Exhibit 3.

The Debtor testified at trial that she spends \$80.00 per month for business; \$560.00 per month for food; \$100.00 per month for clothing; \$317.00 per month for medication; \$516.00 per month for transportation; \$219.00 per month for recreation (including movies, newspapers, cigarettes, and hair cuts); \$40.00 per month for car insurance; \$283.59 per month for a 1996 Lumina; and \$436.00 a month for rent.⁴ These expenses include costs for both the Debtor and her daughter.

At trial the Defendant challenged several of the Debtor's claimed expenses, including food, her car, and expenses relating to the truck she leases daily from Horizon. Regarding food expenses, the Debtor explained that she spends about \$10.00 per day for herself, plus food for her family and for customer "giveaways." The Defendant reminded the Debtor that in her deposition the Debtor stated that she spent \$20.00 per day on food. Regarding the truck she leases from Horizon, the Debtor testified that she is responsible for fluids, which totals \$15.00 to \$20.00 per

⁴The Debtor testified at trial that she signs over the \$436.00 monthly social security check to her parents as payment for rent.

day. The Defendant reminded the Debtor that during her deposition the Debtor stated that she paid \$516.00 per month, which includes the \$300.00 monthly truck fee.

The Defendant vigorously challenged the Debtor's claimed car expense of \$283.59 per month for her 1996 Lumina, arguing that the car in fact belongs to the Debtor's father who bears the monthly loan expense. The Defendant introduced evidence that the bill of sale⁵ and loan payments⁶ are in the Debtor's father's name, and that the payment ledger⁷ is in his handwriting. At trial the Defendant asked the Debtor if it is true that the creditor denied the Debtor's request to reaffirm the car loan because the loan is in her father's name. The Debtor did not dispute this assertion. The Debtor testified that she last drove the car a week ago; the Defendant responded that in her deposition the Debtor said she drove the car "rarely."

D. Medical Issues

The Debtor suffers from several physical ailments. In 1985 the Debtor incurred a whiplash injury due to a motor vehicle accident. She continues to suffer from neck pain, back pain and headaches due in part to this accident. See Exhibit 16. The Debtor was recently diagnosed with arthritis in her knee, for which she is taking Vioxx. See id.

The Debtor has a documented history of mental health problems. In 1993, the Debtor was diagnosed with possible major depressive episode, recurrent; generalized anxiety disorder; family problems; panic attacks; and possible personality disorder. See id. She was prescribed Xanax at that time. See id. Shortly thereafter, she was diagnosed with ADHD and was prescribed Ritalin.

⁵See Exhibit 10.

⁶See Exhibit 13; Exhibit 14.

⁷See Exhibit 12.

See id. During 1993, the Debtor was seen and treated several times for various problems relating to ADHD, anxiety, and general difficulty functioning in day to day life. See id. By 1995, these problems had escalated and included depression and an inability to concentrate; the Debtor reported having suicidal thoughts. See id. Currently the Debtor takes Ritalin to treat ADHD and St. John's Wort to treat her depressive symptoms. See id.

Although the parties stipulated in the Pretrial Statement that the Debtor was diagnosed with ADHD in 1993, the Defendant disputes the accuracy of the diagnosis. At trial, the Defendant offered the testimony of expert witness Eric G. Mart, Ph.D., ABPP, a licensed psychologist of Highland Psychological Services ("Mr. Mart"). Mr. Mart testified that he evaluated the Debtor for purposes of this trial, and as part of his evaluation he tested the Debtor for ADHD and concluded that she does not have ADHD. More specifically, Mr. Mart testified that he administered the D2 test of attention and that the Debtor "did very well," scoring in the ninety-ninth percentile. Based on this score, Mr. Mart ruled out ADHD. Significantly, however, Mr. Mart acknowledged that the Debtor was taking Ritalin at the time the test was administered, and that most people with ADHD become asymptomatic when taking Ritalin.

E. Earning Capacity

At trial, the Debtor offered the testimony of expert witness Christine Spaulding, MA, CRC, of Rehabilitation Service Associates ("Ms. Spaulding"), who testified that the Debtor's current employment situation is appropriate in light of her educational background and medical impairments. More specifically, Ms. Spaulding explained that the Debtor does not have the work or educational background required to obtain more skilled employment, and that the Debtor needs a quiet, isolated work situation with minimal contact with others. Ms. Spaulding further explained that although the Debtor had originally hoped to teach, teaching is not an option because she did

not complete her master's program; the Debtor's bachelor's degree in women's studies does not afford her any specific work skills. While interviewing the Debtor for purposes of evaluation, Ms. Spaulding found the Debtor's thought process to be scattered and hard to keep on track. Ms. Spaulding concluded that the Debtor's current employment situation is appropriate because it allows the Debtor a flexible work schedule and frequent extended breaks with minimal contact with others. Ms. Spaulding opined that it is possible that the Debtor could increase her employability if she sought therapy and job training, but that such an undertaking would be expensive and would result at best in employment that generates about \$19,000 annual gross income.

Mr. Mart's testimony was offered to rebut that of Ms. Spaulding. Mr. Mart evaluated the Debtor to assess her current psychological status, whether the Debtor has ADHD, and if so how it impacts her earning ability. Mr. Mart testified that he found the Debtor to be alert and emotionally appropriate with no effects of pain, medication, or distress. He further testified that the Debtor's tests revealed a moderate elevation of withdrawal, but that it is not at the clinical level, meaning that the Debtor is not socially phobic. In light of the Debtor's ability to perform as a sales person, Mr. Mart speculated that it may be that the Debtor has more difficulty with intimate relationships. After conducting a series of tests on the Debtor, Mr. Mart concluded that the Debtor has no cognitive disabilities that would have a significant effect on her ability to work; he concluded specifically that the Debtor does not have ADHD. Mr. Mart further acknowledged that he did not form an opinion regarding the Debtor's marketable skills based on her work experience, what kinds of jobs she can perform, or her earning ability. Mr. Mart was clear that his report concludes only that there is nothing about the Debtor that would prevent her from obtaining gainful

employment consistent with her education level, that she does not have ADHD which would prevent her from paying back her loans.

When asked about Mr. Mart's report, Ms. Spaulding testified that Mr. Mart's findings did not alter her conclusions regarding the Debtor's employability.

F. Repayment Efforts

In 1996, the Debtor made seven loan payments totaling \$1,576.22. See Exhibit 2. The Debtor testified that she tried to keep up to date with her loan payments. Unable to do so, she sought and obtained a series of deferments, the last of which was on or about December 28, 1998. In April 1999, the Debtor consolidated fourteen Stafford Loans into a single loan. Subsequent to her execution of the consolidated note, the Debtor sought and received four separate forbearance requests during the years 1999, 2000, 2001, and 2002.

III. DISCUSSION

Under section 523(a)(8)⁸ 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 followed 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:

⁸ Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

1. That the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependants 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.

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

A. The First Prong of the Brunner Test

The first prong of the Brunner test requires the Debtor to demonstrate that she cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her daughter if forced to repay the loans. See McClain, 272 B.R. at 47; Grigas, 252 B.R. at 874. The Debtor’s schedules indicate that the Debtor does not have any surplus income as her monthly expenses exceed her income. Although the Defendant challenged the accuracy of the Debtor’s stated income and claimed expenses, the Court finds that the Defendant’s evidence is insufficient.

Specifically, the Court rejects the Defendant’s assertion that the Debtor has understated her income. At trial, the Defendant challenged the Debtor’s testimony regarding her net profit per box of meat and other details relating to her income, but the Defendant did not succeed in getting the Debtor to change her testimony. The Defendant introduced evidence in the form of Mr. Benjamin’s e-mail message, but the information provided in the message did not directly contradict the Debtor’s representations regarding her income. Instead, the e-mail message provided information regarding matters such as products purchased by the Debtor from Horizon, and Mr. Benjamin’s “best guess” as to the average net profit per box. This information, while relevant, provides merely indirect or background information and is not helpful in determining the Debtor’s actual income. Ultimately, the Defendant succeeded in raising questions about the Debtor’s income, but

failed to provide sufficient evidence to prove that the Debtor had misrepresented her income on her tax returns and bankruptcy schedules.

Moreover, the Court finds that the Debtor's expenses are legitimate and are not excessive. The Defendant's challenge to the Debtor's food expense of \$560.00 per month did not raise any significant questions. The Debtor testified that her food expenses include \$10.00 a day for her food while on the road, plus food for her family and food purchased as "giveaways," or incentives to customers. Given the inclusion of food as a work-related expense, the Court finds that the amount is not excessive. Furthermore, the discrepancy between the Debtor's testimony at trial that she spends \$10.00 per day for food for herself while working versus her statement during deposition that the amount is \$20.00 is an insignificant discrepancy. Importantly, the Defendant was unable to provide evidence to prove that the Debtor misrepresented her food expenses.

The Defendant's challenge to the Debtor's claimed expense of \$516.00 per month for transportation raised some questions regarding the Debtor's calculation of the costs for the truck lease and operating expenses. However, the Defendant was unable to provide evidence proving that the Debtor had in fact misrepresented or miscalculated her transportation expenses.

Lastly, the Court rejects the Defendant's challenge to the Debtor's claimed car expense of \$283.59 per month for her 1996 Lumina. The Defendant asserted that the car does not actually belong to the Debtor, based on the following evidence: the car loan is in the Debtor's father's name, the payments are made by the Debtor's father, and the payment ledger is in her father's handwriting. The loan company denied the Debtor's request to reaffirm the debt because her name is not on the loan documents. The Defendant further argued that the car is not required for the Debtor's employment because she leases a truck from Horizon, and that the Debtor rarely uses the

car. The Debtor responded by asserting that it is her car, that she does use the car, and that her father's name was on the loan because she had credit problems.

The Court finds that although the Defendant has raised questions regarding the current circumstances regarding use of the car, the Defendant has not proven that the car belongs to the Debtor's father rather than to the Debtor. Further, although the car may not be essential for the Debtor's current employment, it was at the time the car was purchased. Finally, given that the educational loan in question is a single consolidated (i.e., indivisible) loan that requires monthly payments of approximately \$800.00, the Debtor's ownership of the car does not impact the outcome of this case. Even if the Court were to find that the car belongs to the Debtor's father and that therefore the Debtor cannot count the \$283.59 per month car payment as an expense, the evidence nonetheless shows that the Debtor would be unable to maintain a "minimal" standard of living for herself and her daughter if forced to repay her educational loans.

The Court finds, therefore, that the Debtor has shown that she would not be able to maintain a minimal standard of living if she were required to repay her educational loans, and that the Defendant was unable to provide evidence disputing this showing. As such, the Court finds that the Debtor has demonstrated that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her daughter if forced to repay the loans. The Debtor has therefore satisfied the first prong of the test.

B. The Second Prong of the Brunner Test

The second prong of the Brunner test requires 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. See McLain, 272 B.R. at 47; Grigas, 252 B.R. at 874. The evidence in this case

shows that the Debtor's inability to repay her student loans is likely to persist for a significant portion of the repayment period of the student loans.

The Debtor provided a considerable amount of evidence regarding a long history of medical and mental health problems, some of which contributed to the Debtor not completing her master's program. More importantly, the Debtor provided an expert witness who testified that the Debtor's current employment situation is appropriate given the Debtor's work skills and mental health issues. The Defendant's expert witness disputed some of the Debtor's previous diagnoses, but ultimately did not prove that such diagnoses were incorrect. For example, the Defendant's expert testified that his tests indicated that the Debtor does not have ADHD, but then conceded that most people who have ADHD do not demonstrate symptoms of it while taking Ritalin as the Debtor was at the time of testing. More importantly, the Defendant's witness acknowledged that he did not form an opinion regarding the Debtor's marketable skills based on her work experience. The Court therefore finds that the Debtor has demonstrated that additional circumstances exist indicating that the state of affairs is likely to persist for a significant portion of the repayment period of the student loans. The Debtor has satisfied the second prong of the Brunner test.

C. The Third Prong of the Brunner Test

The third prong of the Brunner test requires 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. The Debtor made payments totaling \$1,576.22 during the year after she left Mankato. When she could no longer make the payments, she sought forbearance requests. After receiving four forbearances, the Debtor consolidated her loans. Still unable to make the payments, she sought additional forbearances and eventually filed her Chapter 7 petition. The Court is satisfied that the Debtor has made good faith efforts to repay her loans, and therefore that the third prong of the Brunner test has been met.

IV. CONCLUSION

The Debtor has demonstrated that she is not able to repay her educational loans, that her current situation will persist for a substantial portion of the repayment period, and that she has made a good faith effort towards repayment of the loan in question. Accordingly, the Court finds that the Debtor has met the requirements for discharging educational loans under section 523(a)(8); the Debtor's obligations to the Defendant will 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 8th day of July, 2003, at Manchester, New Hampshire.

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