

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re:	:	Case No. 08-60633
	:	
Karen E. Oldham,	:	Chapter 7
	:	
Debtor.	:	Judge Caldwell
	:	

---

Karen E. Oldham,	:	
Plaintiff,	:	
v.	:	<b>Adv. Pro. No. 09-2077</b>
Nelnet,	:	
Defendant.	:	

**MEMORANDUM OPINION**

This is an adversary proceeding to determine the dischargeability of student loan debt. On October 30, 2008, Karen Oldham (“Plaintiff”) filed a petition for relief under Chapter 7 of Title 11 of the United States Code (the “Bankruptcy Code”). The trustee of Plaintiff’s Chapter 7 estate determined that there were no assets to administer, and Plaintiff subsequently received a discharge under section 727 of the Bankruptcy Code.

In her Complaint, Plaintiff seeks an order declaring that the repayment of student loan debt owed to Nelnet would impose an undue hardship upon her such that the debt would be subject to her discharge as provided for in 11 U.S.C. § 523(a)(8). Defendant Educational Credit Management Corporation, on behalf of Nelnet (collectively “Defendant”), denies these claims.

To discharge the obligation, Plaintiff must prove three factors by a preponderance of the evidence. They include: (1) that she cannot maintain a minimal standard of living, (2) that her circumstances indicate that her state of affairs is likely to persist for a significant portion of the repayment period, and (3) that she has made a good faith effort to repay the loan. As will be discussed, Plaintiff has not proved any of these elements.

Plaintiff took out a series of student loans between the years of 1989 and 2004. She began her education at the Ohio State University in 1987 where she obtained a bachelor’s degree in theatre education and English education. In 1996, she entered the Ohio State University’s graduate school. There, she obtained master’s degrees in arts education and in arts policy and administration.

In April 2005, Plaintiff consolidated her loans. The consolidated loan had a beginning balance of \$80,136.00, and an interest rate of 6.25%. As of January 31, 2009, the balance due on the consolidated was \$92,929.00. Since consolidation, Plaintiff has made no payments on the loan. She has never applied for a Total and Permanent Disability discharge, and has not participated in the Income Contingent Repayment Program. Plaintiff estimates that her payment under the Income Contingent Repayment Program would be approximately \$52.83 per month, which she does not believe is affordable.

Since acquiring the loans, Plaintiff has held several jobs. From 1995 through 1997, she worked part-time for the Ohio State University Libraries. From 1997 through 2000, she worked

as a graduate associate in the arts policy and administration program at the Ohio State University.

After leaving the Ohio State University, Plaintiff briefly worked as an education director in Toledo and as a team leader with the Ohio Education Association. In 2001, she obtained employment as an administrative assistant at Lee & Associates in Dublin, Ohio, where she helped non-profit clients apply for grants. After leaving Lee & Associates in 2002, she obtained employment at a Verizon Wireless call center in Dublin, Ohio, where she remained until 2005.

Plaintiff currently holds two jobs. Since 2008, she has worked for the Columbus Metropolitan Library helping students with their homework on a one-on-one basis. She works at the library Monday through Thursday for three hours per day. She earns \$8.08 per hour from the library, or \$420.00 per month before taxes.

Since 2010, Plaintiff has also worked for Partners for Active Living through Socialization. Working from home, she provides telephone support to patients from 10 p.m. through 2 a.m. on two nights per week between the days of Thursday and Sunday. From this job, she earns \$7.40 per hour, or \$256.00 before taxes. In addition to her employment income, she receives \$829.00 per month in Social Security Disability due to depression. In sum, Plaintiff's gross monthly income before taxes is approximately \$1,505.00.

Plaintiff testified to several changes in her expenses since the filing of her underlying bankruptcy case. Based upon the schedules filed in the underlying case, as well as her testimony, Plaintiff's expenses have changed as follows:

<b>Expense</b>	<b>Scheduled</b>	<b>Current</b>
Rent	\$315.00	\$405.00
Electricity and heating fuel	\$100.00	\$70.00
Food	\$93.00	\$250.00

Laundry	\$0.00	\$20.00
Medical and dental expenses	\$40.00	\$50.00
Transportation (not including car payments)	\$75.00	\$150.00
Auto insurance	\$40.00	\$60.00
Auto payment	\$0.00	\$165.00

Plaintiff's average monthly expenses are now approximately \$1,383.00.

Plaintiff testified she suffers from several physical and mental infirmities. These include scoliosis which prevents her from performing work that involves standing or pushing, as well as depression, attention deficit disorder, and post-traumatic stress disorder. She experiences panic attacks if she is away from home for more than four hours, if she must talk to or be around someone for long periods of time, or if she engages in conflict. The result of these attacks is that she cannot think, she thinks someone will hit or humiliate her, and that she must hide. She has attempted suicide three times.

Plaintiff testified to receiving several forms of treatment for these illnesses, including her taking up to 12 pills per day. She sees a counselor every week, and a psychiatrist every other month. Plaintiff testified that she had previously been committed, and that she received electroconvulsive therapy sometime in 2005 and 2006. The treatments resulted in long term and short term memory loss, including an inability to recall the years 2003 through 2006.

When asked why she cannot work more, Plaintiff testified that her condition requires her to spend a good deal of time getting ready to leave the house before work, and that she can only be gone for a few hours at a time. Her personal belief is that her current financial and physical conditions will not improve, and that she will not be able to pay back her student loans.

Under the Bankruptcy Code, the Court cannot declare a student loan dischargeable "unless excepting such debt from discharge... would impose an undue hardship on the

debtor....” 11 U.S.C. § 523(a)(8). “Undue hardship” is a term of art not otherwise defined by the Bankruptcy Code. The Sixth Circuit has adopted the three part test enunciated in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2nd Cir. 1987) for determining what constitutes an undue hardship. See *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 359 (6th Cir. 2007). Under the *Brunner* test, a debtor must establish by a preponderance of the evidence:

1. that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living... 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.

*Barrett*, 487 F.3d at 359. As discussed below, Plaintiff has failed to meet her burden with respect to each element of the *Brunner* test.

Under the first prong of the *Brunner* test, Plaintiff must demonstrate that she cannot maintain, based upon her current income and expenses, a minimal standard of living if forced to repay her student loan debt. *Id.* The relevant date for determining whether Plaintiff has met this prong of the *Brunner* test is the date of trial. As recently discussed in this District, a “minimal standard of living” includes adequate food; shelter; heating and cooling; basic utilities; personal hygiene products, clothing, and footwear; functioning transportation to go to and from work, stores, and doctors; the ability to pay for medical bills and save for final expenses, and the ability to pay for some form of diversion or recreation. See *Wallace v. Educ. Credit Mgmt. Corp. (In re Wallace)*, 443 B.R. 781, 787–88 (Bankr. S.D. Ohio 2010). The term “minimal” does not mean “comfortable,” but also does not mean “reduced to poverty.” See, e.g., *Educ. Credit Mgmt.*

*Corp. v. Stanley*, 300 B.R. 813, 818 (N.D. Fla. 2003); *Campton v. U.S. Dep't of Educ. (In re Campton)*, 405 B.R. 887, 891 (Bankr. N.D. Ohio 2009). To establish this prong of the *Brunner* test, Plaintiff must demonstrate that she has taken steps to maximize her income and minimize her expenses. *See Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 438 (6th Cir. 1998).

Plaintiff has not shown by a preponderance of the evidence that she cannot maintain, based on current income and expenses, a minimal standard of living. Her average monthly income before taxes is approximately \$1,505.00. Her average monthly expenses are approximately \$1,383.00. This leaves a monthly net income of \$122.00. Even after taxes, this amount is more than enough to make Plaintiff's estimated Income Contingent Repayment Program payment.

It does appear that Plaintiff is minimizing her expenses. The budget discussed above certainly demonstrates a minimal lifestyle as envisioned by the factors described in *Ivory*. In fact, there may be expenses, such as life and health insurance, that Plaintiff has failed to account for which this Court may yet consider. *See Wallace*, 443 B.R. at 788. However, even if this Court were to consider additional expenses to make up for the \$122.00 of disposable income, Plaintiff still does not meet the income portion of the "minimal standard of living" prong.

Plaintiff has not shown that, based upon her circumstances, she is maximizing her income for the benefit of her creditors. Plaintiff currently works two part time jobs. She works twelve hours per week at the library, and works four hours per week with the support line. In total, Plaintiff works approximately 16 hours per week. Though Plaintiff's description of her anxiety may justify not working more hours at the library, it does not demonstrate an inability to work more hours from home. If Plaintiff were to work more hours per week from home, the additional

income would more than compensate for any additional expenses she may have failed to disclose as well as provide enough money for repayment of her student loan debt. Plaintiff is required to demonstrate not only an attempt to minimize expenses, but that she sought work that would allow for repayment of her student loan debts. *See, e.g., Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005). She has failed to do so.

Under the *Brunner* test's second prong, Plaintiff must demonstrate that additional circumstances exist which indicate that her state of affairs is likely to persist for a significant portion of the repayment period. *Barrett*, 487 F.3d at 359. These include, but are not limited to, "illness, disability, a lack of useable job skills, or the existence of a large number of dependents." *Id.* The Sixth Circuit has described these circumstances as "indicating a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *Id.* Here, Plaintiff claims her psychological condition prevents her from retaining employment such that repaying her student loans would be an undue hardship upon her. The Court disagrees.

As a general rule, "psychological impairment must be an impairment to work -- that is to say, an impairment to do any kind of work, even work outside of the debtor's chosen field." *United Student Aid Funds v. Paolini (In re Paolini)*, 124 F.3d 199, [published in full-text format at 1997 U.S. App. LEXIS 22454, \*\*5] (6th Cir. 1997). The Court's focus "should not be on the fact that a debtor has a physical or mental impairment," but "the effect that impairment has upon a debtor's ability to obtain and sustain adequate financial resources in the future." *Id.* Applying these precepts to the evidence adduced, Plaintiff has failed to meet her burden with respect to the second prong of the *Brunner* test for two reasons.

First, Plaintiff has not established that her circumstances prevent her from obtaining and sustaining financial resources sufficient to service her student loan debt. Courts generally require

substantial credible evidence of debilitating illness. *Swinney v. Academic Financial Services (In re Swinney)*, 266 B.R. 800, 804 (Bankr. N.D. Ohio 2001). Though expert testimony is not necessary, such evidence must consist of more than bare allegations. *Id.* Such testimony could consist of medical bills, letters from a treating physician, surgeries a debtor has undergone, prescription medications, and a debtor's physical demeanor. *Barrett*, 487 F.3d at 361.

Plaintiff has not met her burden to show by a preponderance of the evidence that her condition meets these standards. Almost all of the evidence before the Court consists of the testimony of Plaintiff. Plaintiff offered no supporting exhibits or testimony to corroborate her medical condition. As noted above, the Court may yet consider factors such as her employment history, her eligibility for social security disability, and her physical demeanor. These factors, combined with Plaintiff's testimony at trial, do demonstrate that she has some form of impairment. The evidence does not support, however, the conclusion that Plaintiff is unable to obtain and hold employment sufficient to maintain a minimum standard of living while servicing her student loan debt. At most it shows that Plaintiff is limited in the type of work she can perform. Assuming Plaintiff's claims that she cannot leave home for more than four hours at a time are true, Plaintiff provided no explanation as to why her condition would prevent her from simply working more hours from home.

Second, Plaintiff has also failed to establish that her current circumstances will persist for the life of the loan. Plaintiff testified that she does not believe that she will be able to obtain more income in the years to come. However, Plaintiff provided no corroborating evidence of prognosis. Plaintiff did testify that her condition improved a few years ago, and has remained relatively the same since then. However, there is no evidence before the Court to establish that

her condition will not improve over time, even if that condition currently limits how much income she can receive.

Ultimately, Plaintiff has not demonstrated the “certainty of hopelessness” contemplated by the *Brunner* test and the Sixth Circuit. The record before the Court fails to establish that Plaintiff’s circumstances make her unable to obtain and maintain sufficient financial resources now or in the future with which to service her student loan debt.

The final prong of the *Brunner* test requires Plaintiff to demonstrate that she has made a good faith effort to repay her loan. “[A] primary consideration for the third prong of the *Brunner* test is axiomatic: the extent to which any voluntary payments were made toward the student-loan obligation.” *Roberts v. U.S. Dep't of Educ. (In re Roberts)*, 442 B.R. 116, 120 (Bankr. N.D. Ohio 2010). A failure to make payments is not necessarily evidence of bad faith. *See, e.g., Lebovits v. Chase Manhattan Bank, (In re Lebovits)*, 223 B.R. 265, 274 (Bankr. E.D.N.Y. 1998) (failure to make payments does not preclude a finding of good faith where the debtor lacks the financial resources to do so); *Speer v. Educ. Credit Mgmt. Corp. (In re Speer)*, 272 B.R. 186, 197 (Bankr. W.D. Tex. 2001) (court considered debtor’s seeking of deferments and forbearance in finding good faith despite lack of payment). Although “probative of [an] intent to repay [the] loans,” a debtor's decision to forgo participation in contingent repayment programs “is not a per se indication of a lack of good faith....” *Barrett*, 487 F.3d at 364.

Here, the parties have stipulated that after 2005 Plaintiff made no payments on the loan. Plaintiff testified that she thought she made payments prior to that, but offered no additional evidence to show that payments had ever been made. A review of Plaintiff’s employment history shows that she has had income from several jobs since obtaining her degree. However, Plaintiff has offered no evidence which would suggest she lacked the financial resources to make

payments during the times she held employment. Ultimately Plaintiff has not met her burden with respect to the third prong of *Brunner*. The evidence before this Court is insufficient to support a finding that Plaintiff has made a good faith effort to repay any portion of her student loan debt.

Plaintiff has failed to meet her burden with respect to each prong of the *Brunner* test. The Court concludes that the exception of Plaintiff's student loan debt from discharge does not constitute an undue hardship for purposes of 11 U.S.C. § 523(a)(8). Therefore, such debt is not discharged. Further, the Sixth Circuit has held that the Court may use its equitable powers under 11 U.S.C. § 105(a) to fashion a remedy short of a complete discharge, such as a partial discharge of student loan debt, if the facts so warrant. *See Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 624 (6th Cir. 2004). In this case, the Court concludes that Plaintiff has not presented evidence that would warrant such equitable relief.

A final judgment will be entered by separate order.

**Copies to:**

Matthew J. Thompson, Esq. (electronic service)  
William M. Harter, Esq. (electronic service)