IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
CHARLES R. ROGERS,	§	Case No. 01-41855
	§	
Debtor.	§	
	§	
CHARLES R. ROGERS,	§	
	§	
Plaintiff,	§	
	§	
vs.,	§	Adv. No. 04-4115
	§	
EDUCATIONAL CREDIT MANAGEMENT CORPORATION,	§	
	§	
Defendant.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 52 of the Federal Rules of Civil Procedure, as adopted and applied to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, the Court enters the following findings of fact and conclusions of law:

A. Findings of Fact

1. Procedural Background

1. Charles R. Rogers (the "Debtor") filed a petition for relief under Chapter 7 of the Bankruptcy Code on May 11, 2001.

2. The Court entered an order discharging the Debtor on September 20, 2001, and the case was subsequently closed.

3. On March 30, 2004, the Debtor filed a motion to reopen his bankruptcy case, which the Court granted on May 10, 2004.

4. On May 21, 2004, the Debtor filed the instant Complaint seeking a determination that his pre-petition student loans are dischargeable in bankruptcy.

5. The Complaint was tried before this Court on September 15, 2005. The Debtor was the only witness at the trial.

2. Factual Background

6. The Debtor is a 51-year-old man who owes no child support and has no dependants. He has worked for Lockheed Martin as a full time mechanic since May 2003. The Debtor is an aircraft assembler for Lockheed Martin, which is a physical job involving, among other things, drilling and counter-synching.

(a) Educational and Loan History

7. From 1988 through 1990, the Debtor attended the National Education Center, where he obtained an associates degree in electronics.

8. In an effort to qualify for a job in railroad dispatching, the Debtor attended North Texas State University from 1991 through 1999, and he attended Tarrant County Junior College during 2000. However, the Debtor never finished taking all of the courses he needed for a job in railroad dispatching, and he has never worked as a railroad dispatcher. The Debtor testified, credibly, that railroad dispatching is a stressful job that he is now to old to do.

9. The Debtor originally borrowed a total of approximately $6,000. His student loans were consolidated in 1994, and the total amount of the

consolidated debt was $12,809.82 with an interest rate of 9%. The terms for repayment required monthly payments in the amount of $210.

10. When the Debtor filed for bankruptcy protection in 2001, his student loan debt was $16,333. This debt represented 61% of his unsecured debt at that time and was a factor in his decision to file for bankruptcy protection.

11. As of the time of trial, the balance of the Debtor's student loan was $22,431.97. The required monthly payment at the time of trial was $267.

12. Educational Credit Management Corporation's trial exhibits included a forbearance and borrower history on the Debtor's student loan. The loan history reflects that the loan was in forbearance or deferment for portions of 1994, 1995 and 1996 and from February 27, 1999 through April 22, 2004. Additionally, the parties stipulated that the debtor made three payments during 1993, four payments during 1994, six payments during 1997 and five payments during 1998.

13. The parties stipulated at trial that the Debtor has made total payments of $3,679.23 on his student loan.

(b) Employment History

14. Upon graduation from the National Education Center with a degree in electronics in April 1990, the Debtor obtained a job installing intercom systems in hospitals for Intercom Incorporated. He worked for Intercom Incorporated for six months. He was fired one week after falling off a ladder at work and injuring

his knee and back. He received workmen's compensation and unemployment from 1990 through 1993.

15. Between 1993 and 1995, the Debtor worked for Motorola in Austin, Texas, and for Boeing Aerospace in the Dallas area.

16. From 1995 through 1999, the Debtor worked as a driver for Lattimore Material Company and earned approximately $31,000 each year. However, the Debtor sustained a whiplash injury in 1999 and lost his job.

17. After losing his job at Lattimore Material Company, the Debtor worked as a part-time instructor for the American Red Cross, conducting CPR and first aid classes in Denton County and Tarrant County. He worked for different offices of the American Red Cross from October 1999 through November 2001.

18. At the same time, the Debtor obtained temporary employment through various staffing agencies. One of his temporary employers, Triple S. Technologies Services, hired the Debtor as a process mold technician in October 2000. The Debtor made $8 an hour at Triple S. Technologies Services. He was laid off in February 2001.

19. The Debtor began working for Boeing Aerospace in Corinth, Texas, in July 2001. The Debtor was employed as a wiring harness assembler and made less than $10 an hour. He was laid off in January 2002.

20. The Debtor began working for Lockheed Martin in May 2003. As of February 25, 2005, the Debtor was listed as the 277th employee out of 503 employees on Lockheed Martin's seniority list.

(c) Income and Wages

21. In their pretrial order, the parties stipulated that the Debtor's adjusted gross income for 2001 was $20,157. His adjusted gross income during 2002 was $10,486, most of which was unemployment compensation. The Debtor's gross income during 2003 was $24,259, and his gross income during 2004 was $29,124.

22. The increase in the Debtor's wages from 2003 to 2004 was largely due to overtime the Debtor received at Lockheed Martin. His hourly wage also increased during this period. However, Lockheed Martin ceased allowing overtime in late spring 2005.

23. Lockheed Martin has laid off hundreds of workers during the Debtor's employment. In light of what the Debtor described as the "continuous" layoffs by Lockheed Martin, the Debtor testified, credibly, that he had no expectation of a promotion or a higher paying job at Lockheed Martin in the future. He also testified, credibly, that, given his age and health, he could not obtain better employment elsewhere or in another occupation or trade.

24. The Debtor offered testimony regarding his current wages at Lockheed Martin, and he introduced copies of some of his pay stubs into evidence.

25. As of the time of trial, the Debtor's hourly wage at Lockheed Martin was $14.49 an hour. His gross weekly pay (based on a 40-hour work week) was approximately $580, and his net weekly pay (after taxes and medical insurance as well as a pre-tax 401k contribution in the amount of $25) was approximately $432.

Thus, exclusive of overtime, the Debtor's net take-home pay per month was approximately $1,727 at the time of trial. If the pre-tax 401k contribution is added back in, his net monthly salary was approximately $1,806 at the time of trial.

(d) Expenses

26. At the time of trial, the Debtor was living in an efficiency apartment (650 square feet) and his rent was $408 a month. The Debtor spent $254.30 each month repaying the loan used to purchase his only vehicle, a truck, and he spent $300 each month for vehicle maintenance and gas (mostly gas).

27. The Debtor's other monthly expenses included the following:

$18 for water;
$100 for medical expenses;
$300 for food;
$40 for clothing;
$29.95 for internet service;
$54 for satellite/DISH Network;
$50 for entertainment;
$65 for cellular phone service;
$92.50 for electricity;
$155 for truck insurance; and
$79.60 for repayment of a 401k loan.

28. These monthly expenses totaled $1,946.35.

29. The exhibits introduced by the Debtor at trial included copies of some of his monthly bills. These documents reflected that the Debtor was unable to pay all of his bills in full every month and that he sometimes carried a balance forward into the next month.

30. With respect to his $65 cell phone expense, the Debtor does not have a "land line." Rather, he entered into a contract with Cingular Wireless for a

cellular telephone. He is charged a base amount of approximately $65 each month by Cingular Wireless. However, his monthly bill from Cingular Wireless is often more than of $65 due to "surcharges" Cingular Wireless imposes when he exceeds the limits of his contract. For example, the Debtor's exhibits included a bill from Cingular Wireless in the amount of $111.58 for the period from June 6, 2005, through July 5, 2005.

31. With respect to his $54 satellite/DISH Network expense, the Debtor testified that his monthly charge is often higher than $54, depending on whether he added HBO for that particular month.

32. While he was receiving overtime from Lockheed Martin, the Debtor contributed $300 a month into a 401k plan at Lockheed Martin. After Lockheed Martin stopped allowing overtime, the Debtor reduced his monthly contribution to $100 beginning in May 2005.

33. In December 2004, while he was receiving overtime from Lockheed Martin, the Debtor paid $374 for abstract metal art. He spent $80 at Best Buy and $80.71 at Toys "R" Us for Christmas presents for his niece and nephews. In January 2005, he spent $104 at Guitar Center for a bag for his guitar. In February 2005, he spent $50 on candles at DJ's Candles – which is the only time he has ever purchased candles at that store.

(e) Personal and Medical History

34. The Debtor divorced in 1997.

35. The Debtor testified that he had a "nervous breakdown" in May 2004. At around that time, someone broke into his apartment and stole his television, stereo, guitar and amplifier, among other things.

36. The Debtor "worked a lot of overtime" to replace the stolen items during the latter half of 2004. He testified that playing the guitar is his only hobby and that he pent approximately $1,000 replacing his stolen musical equipment with the same or similar equipment from Guitar Center.

37. In January 2005, the Debtor's only vehicle – a 1997 Mercury Cougar – was totaled in a car accident. He received $4,400 from his insurance company for the car. He used $4,000 as a down payment on a new, approximately $16,000 Dodge truck. He used the remainder of the funds he received from the insurance company to pay off the loan for the 1997 Mercury Cougar.

38. The Debtor testified, credibly, that his new Dodge truck is very basic with no "bells and whistles" such as leather seats.

39. The monthly payment on his 1997 Cougar was $162.

40. When asked why he purchased a new truck rather than a used vehicle, the Debtor explained that he wanted something under warranty because he does not have anyone to count on for help if he has a problem with the vehicle.

41. Due to personal and medical problems, the Debtor exceeded the number of days he was allowed for sick and vacation time at Lockheed Martin during 2004. After Lockheed Martin initiated a "step 1" disciplinary action against him in September 2004, the Debtor applied for (and was allowed) time off

under the Family Medical Leave Act. He received family medical leave from July 18, 2005 through October 18, 2005. At trial, the Debtor testified that he expected to return to work in October or November 2005.

42. In the summer of 2005, the Debtor pawned his television in order to make ends meet. In June 2005, he repaid the pawn loan of $165.00.

43. The Debtor has had medical problems with his back, knees (including surgery on both knees) and neck. At the time of trial, he was on workman's compensation leave due to an injury to his elbows. He had surgery on his right elbow a few weeks prior to trial and, based on his doctor's recommendation, he planned to have surgery on his left elbow a few weeks after trial. At the time of trial, the Debtor was attending physical therapy sessions for his right elbow three times a week.

44. Due to medical restrictions, the Debtor will not be able to immediately return to his position at Lockheed Martin after his workman's compensation leave ends. The Debtor expected that he would be placed in a "coded area" and that he would not qualify for any overtime.

45. Any conclusion of law may also be deemed a finding of fact.

B. Conclusions of Law

1. The Complaint seeks an order from this Court declaring the Debtor's obligations to Educational Credit Management Corporation ("ECMC"), the successor to Southwest Student Services, to be dischargeable pursuant to 11 U.S.C. §523(a)(8).

2. This Court has jurisdiction to consider the Complaint pursuant to 28 U.S.C. §§ 1334 and 157(a). This Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (I), and (O).

3. Section 523(a)(8) of the Bankruptcy Code provides that "a loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit ... unless excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." As the statutory text suggests, a discharge of a student loan is possible if a debtor can demonstrate, by a preponderance of the evidence, that to hold the student loan non-dischargeable would impose an "undue hardship" upon him and his dependents.

4. There is no precise definition of the term "undue hardship." It is not defined in the Bankruptcy Code nor has any particular judicial definition been endorsed by any decision of the United States Supreme Court. *Kettler v. Great Lakes Higher Educ. Serv. Corp. (In re Kettler)*, 256 B.R. 719, 722 (Bankr. S.D. Tex. 2000). However, most courts have endorsed a three-prong test articulated by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2nd Cir. 1987) under which a debtor is required to show that: (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is

likely to persist for a significant portion of the repayment period of the student loan; and (3) the debtor has made good faith efforts to repay the loan. *Id*. at 396.

5. This test was expressly adopted by the Fifth Circuit in *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003). Thus, this Court will review the Debtor's evidentiary presentation in light of the *Brunner* factors in order to determine whether he has met his burden to demonstrate the existence of an undue hardship.

1. First Prong

6. With regard to the first prong of *Brunner*, the Court engages in a two-step process encompassing: (1) the evaluation of the debtor's present standard of living based upon his lifestyle attributes which appear from the record; and (2) whether the forced repayment of the student loan obligation will preclude the debtor from maintaining a minimal standard of living.

7. The test requires "more than a showing of tight finances, and is not met 'merely because repayment of the borrowed funds would require some major personal and financial sacrifices.'" *Elmore v. Mass. Higher Educ. Assistance Corp. (In re Elmore)*, 230 B.R. 22, 26 (Bankr. D. Conn. 1999). However, the test does not require a debtor to demonstrate that repayment of the loan would cause him and his family to live at or below poverty level. *See, e.g., Lebovitz v. Chase Manhattan Bank (In re Lebovitz)*, 223 B.R. 265, 271 (Bankr. E.D.N.Y. 1998).

8. Here, unlike the debtor in *Gerhardt*, the Debtor is not choosing to obtain a low-paying job. Relatively low-paying jobs are all that the Debtor has

been able to obtain. Further, his current monthly expenses (of $1,946.35) exceed his monthly net income (of $1,727.00). Where a debtor's monthly expenses exceed his monthly income, the present ability to maintain a minimal standard of living has been proven. *Gerhardt*, 348 F.3d at 92.

9. None of the Debtor's projected expenses are unreasonably high. In fact, they appear to be too low. His monthly apartment rent is low compared to those this Court regularly sees for similarly situated debtors. The Debtor's expenses for food, clothing, laundry and recreation are also low when compared to the expenses of other similarly situated debtors. With regard to the Debtor's decision to purchase a new, rather than a used vehicle, it is not enough to simply compare monthly payments (as ECMC did at trial). A new vehicle is less likely to require the same upkeep and maintenance costs as a used vehicle, for example.

10. However, the Debtor's monthly expenses do include several items that other courts have found to be unreasonable for purposes of determining whether a debtor can maintain a minimal standard of living under the first element of the *Brunner* test – namely, satellite and internet services for a total monthly amount of at least $83.95.[1] The Debtor testified that he often paid double or nearly double the base amount of his satellite bill so that he could watch paid

[1] *See, e.g., In re Buchanan*, 276 B.R. 744, 751-52 (Bankr. N.D. W. Va. 2002) (finding expenses for home internet service and movie rentals unreasonable in the context of § 523(a)(8)); *In re East*, 270 B.R. 485, 494 (Bankr. E.D. Cal.2001) (observing that basic cable television was not necessary to maintain a minimal standard of living); *Commonwealth of Virginia State Education Assistance Authority v. Dillon*, 189 B.R. 382 (Bankr. W.D. Va. 1995) (finding that debtors failed to meet the first prong of the *Brunner* test where their budget included expenses such as $35.00 per month for cable television); *In re Wardlow*, 167 B.R. 148 (Bankr. W.D. Mo. 1993) (finding that plaintiffs were maintaining more than a minimal standard of living where their budget included expenses for cable television, recreation and miscellaneous expenses).

movie channels such as HBO. Additionally, the Debtor's monthly expenses include approximately $100 for 401(k) contributions, which generally are not regarded as reasonably necessary for the support or maintenance of a debtor.[2]

11. If all of these questionable items are removed from the Debtor's monthly expenses or added to his income, as appropriate, the Debtor's net monthly income (of approximately $1,806) would still be less than his current monthly expenses (of $1,862.40). Further, the Debtor's current monthly expenses, excluding his satellite and internet bills as well as any "surcharges" from Cingular Wireless, are reasonable and necessary to maintain a minimal standard of living.

12. The Debtor is unlikely to receive overtime from Lockheed Martin in the immediate future. Even if overtime were more likely to be available, the possibility of the Debtor receiving overtime would not be definite enough for the Court to include in the Debtor's monthly income. *See In re Killough*, 900 F.2d 61, 65 (5th Cir. 1990) (holding that the finding that income from overtime should not be included in a Chapter 13 plan was not clearly erroneous--even where overtime had been earned in the past and would likely be available in the future--because the possibility of getting such overtime was not "definite enough").

13. The Court, therefore, finds and concludes that the Debtor has established the first prong of *Brunner*.

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[2] *See, e.g., In re Speer*, 272 B.R. 186 (Bankr. W.D. Tex. 2001) (holding debtor was entitled to discharge of student loans based on undue hardship under §523(a)(8) but adding debtor's retirement plan contributions back into his income for purposes of analysis and noting that "paying the government back would certainly take priority over saving for retirement under a standard of 'undue hardship' ").

2. Second Prong

14. The second prong of the *Brunner* analysis considers the likelihood that the debtor's financial situation will improve sufficiently in the future to permit him to resume the payment of his educational loans, *United States Dept. of Education v. Wallace (In re Wallace)*, 259 B.R. 170, 181 (C.D. Cal. 2000), and is "intended to effect the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt." *United Student Aid Funds, Inc. v. Nascimento (In re Nascimento)*, 241 B.R. 440, 445 (9th Cir. B.A.P. 1999). This factor "more reliably guarantees that the hardship presented is 'undue.'" *In re Elmore*, 230 B.R. at 27 (citing *Brunner*).

15. The existence of a debilitating medical condition is not a prerequisite to establishing the existence of "undue hardship" under § 523(a)(8). *See, e.g.*, *McGinnis v. PHEA (In re McGinnis)*, 289 B.R. 254, 256 (Bankr. M.D.Ga. 2002). Rather, as long as a debtor can demonstrate that some condition will, in all likelihood, inhibit his long-term ability to pay the student-loan debt, the second prong of the *Brunner* test has been satisfied. Nonmedical factors to consider in this regard are (1) whether the debtor failed to derive any economic value from his educational debts, (2) the debtor's overall lack of education and/or training, (3) the number and health of the debtor's dependents, (4) whether the debtor lacks marketable skills, and (5) the debtor's age. *Turretto v. U.S. (In re Turretto)*, 255 B.R. 884, 889 (Bankr. N.D. Cal. 2000).

16. Here, given the Debtor's age, history of injuries, his lack of any supervisory experience, the prevalence of layoffs by his current and past employers, the reduction in allowed overtime at Lockheed Martin, and the physical nature of his present and past jobs, the Court finds it extremely unlikely that the debtor's financial condition will improve in the foreseeable future. Notably, the Debtor is not using his electronics degree in his current job, and it does not appear that the Debtor will be able to use his education to build a better career in the future.

17. The Court, therefore, finds and concludes that the second prong of the *Brunner* test has been met.

3. Third Prong

18. Finally, the third inquiry under the *Brunner* test is whether the debtor has made a good faith effort to repay his student loan. This aspect recognizes that undue hardship "encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control.'" *Stein v. Bank of New England (In re Stein)*, 218 B.R. 281, 288 (Bankr. D. Conn. 1998). "Factors to be considered include the number of payments the debtor made, attempts to negotiate with the lender, proportion of loans to total debt, and possible abuse of the bankruptcy system." *In re Wallace*, 259 B.R. at 185.

19. Here, the Debtor obtained numerous forbearances on his student loan payments. When the loan was not in forbearance, he made payments to

ECMC totaling $3,679.23 -- which is more than half of the original principal amount of the student loan.

20. The fact that the Debtor used some of income he earned post-petition from overtime to replace items stolen from his apartment does and to buy gifts does not lead this Court to conclude, as a matter of law, that he failed to engage in a good faith effort to repay his loan. The Debtor testified that he acted in good faith, and the Court finds his testimony to be credible.

21. The Court, therefore, finds and concludes that the Debtor has acted in good faith and that the third prong of the *Brunner* test is met.

22. Any finding of fact may also be deemed a conclusion of law.

CONCLUSION

For the foregoing reasons, the Court concludes that the Debtor has demonstrated, by a preponderance of the evidence, that to hold his student loan non-dischargeable would impose an "undue hardship" upon him.[3] The Court will enter a separate judgment consistent with these findings and conclusions.

Signed on 4/18/2006

Brenda T. Rhoades MD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE

[3] Although some courts have endorsed the policy of granting partial discharges of student loans, *see Barron v. Texas Guaranteed Student Loan Corp. (In re Barron)*, 264 B.R. 833, 843-46 (Bankr. E.D. Tex. 2001), the financial evidence admitted in this case would have precluded even the most nominal of payments by the Debtor to ECMC due to the size of the outstanding debt and his financial restrictions.