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United States Bankruptcy Court,
E.D. Wisconsin.
In re Martha Ann MERRIWETHER, Debtor
Martha Ann MERRIWETHER, Plaintiff,
v.
EDUCATIONAL CREDIT MANAGEMENT CORP., Defendant.
No. 03-32060-SVK, ADV. 02-2424.

Nov. 5, 2003.

Steven R. McDonald, Milwaukee, WI, for Debtor.

[Michael S. Winter](#), Milwaukee, WI, for Plaintiff.

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER DISMISSING COMPLAINT

[KELLEY](#), Bankruptcy J.

*1 Trial in this student loan hardship discharge matter was held on October 3, 2003. Based upon the testimony of the Debtor, Martha Ann Merriwether, and her mother Bessie Rideout, and the exhibits admitted into evidence, the Court finds the following facts:

1. The Debtor is a 52 year old single mother of four children. She has been married and divorced three times, and has received minimal child support for only one of her children.
2. The Debtor earned a bachelors degree from Alverno College in Milwaukee, Wisconsin, and a masters degree in counseling and psychological services from St. Mary's College in Minneapolis, Minnesota. Although she finished her course work for her masters degree in 1995, she did not write and defend her masters thesis until 1999. She has not obtained a therapist's license, she testified, because the cost is prohibitive.
3. The Debtor had various student loans which she consolidated in 1997. Since the consolidation, she has only made five payments. She testified that she simply could not afford to make more than the payments that she made. The balance on the Debtor's student loans, as of February 21, 2003, is \$102,620.19, which includes interest at 9%.
4. The Debtor currently works as a counselor in the Minneapolis area earning \$34,000 a year. Recent tax returns indicate the Debtor has earned between \$32,000 and \$40,000 over the past five years at her previous jobs.
5. The Debtor worked part-time as a stocker at Target to supplement her income, but had to quit because of a problem with her feet that she developed after standing so much at that job.
6. The Debtor worked at the Milwaukee Bureau of Child Welfare from September 2001, to July 2002. After being promoted to case manager, the Debtor was making upwards of \$38,000. However, the job was very stressful and "not a good fit." The Debtor soon sought, and found, other employment as an in-home counselor paying \$30 an hour, but soon left that job because she was not paid regularly.
7. The Debtor currently lives in Minnesota with her youngest daughter, age twenty-two. The daughter works part-time at a gas station, but the Debtor continues to support her daughter and to pay the bulk of her daughter's living expenses. The daughter does not contribute to the rent and pays little towards her own living expenses.
8. The Debtor and her daughter live in a two-bedroom apartment owned by the Debtor's son. Rent is \$1,166 a month, including heat, which the Debtor pays to her son. The Debtor previously assisted her son financially, but she testified that her son now makes over \$30,000 a year more than the Debtor makes. The Debtor's expenses include \$356 per month for a 2002 Chrysler Concorde.
9. The Debtor has received financial support from her mother, starting in 1997 and continuing to the present, for food, rent, gas, and car repairs. The Debtor's mother gave the Debtor the money to file this bankruptcy case, which is the Debtor's second. The first was filed in Minnesota in 1997.

*2 The Court makes the following conclusions of law:

1. The Seventh Circuit Court of Appeals established in *In re Roberson*, a three-part test for "undue hardship" discharge of student loans:

- (A) 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 loans;
- (B) 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
- (C) the debtor has made good-faith efforts to repay the loans.

[999 F.2d 1132, 1135 \(7th Cir.1993\)](#).

2. In *O'Hearn v. Educational Credit Management Corp. (In re O'Hearn)*, 339 F.3d 559 (7th Cir.2003), the Seventh Circuit Court of Appeals applied the *Roberson* factors in a case in which a 50-year old debtor earned \$43,000 per year plus benefits. The debtor's expenses included \$1,402 in mortgage expense, although he could have rented property in Portland for less than \$1,000 per month. The IRS housing and utility allowance for a family of two in Portland was \$837 per month. The debtor testified that he had contacted over 500 employers before landing his present job, and the bankruptcy court concluded he had found the best-paying job he could in his field. With respect to the third prong, the debtor in *O'Hearn* actually had made all of his student loan payments to an accountant, who embezzled them. The Bankruptcy Court and the District Court on appeal had little trouble finding that to require the Debtor to pay twice would be an undue hardship. Nevertheless, the Seventh Circuit reversed the lower courts' grant of an undue hardship discharge. The Court of Appeals stated that more than "garden variety" hardship must be shown, and the court noted that the debtor's income was over \$1,500 per month higher than the IRS housing guidelines for a family of two in his area. The Court cited *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)* 144 F.3d 433, 438 (6th Cir.1998) and *Pennsylvania Higher Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3rd Cir.1995), for the proposition that debtors who earn incomes above the poverty guideline can rarely satisfy the first prong of the undue hardship test. Moreover, the Court of Appeals stated that the debtor had not satisfied the second prong of the test, by demonstrating that he did not have job skills that would be transferable to higher-paying occupations. The Court noted: "It is not uncommon for individuals to take jobs not to their liking in order to pay off their student loans, or for that matter to meet all sorts of other financial obligations." *O'Hearn*, 339 F.3d at 567.

3. Applying the very stringent tests established in *Roberson* and *O'Hearn*, this Court concludes that the Debtor does not qualify for an undue hardship discharge of her student loans. The Debtor is healthy and articulate. She is living in a two-bedroom property that she rents from her son, at a rent which is higher than the IRS guideline for a family of two in Hennepin County. She testified that while she had supported and assisted her son financially, and he now earns over \$30,000 per year more than she does, she continues to pay him a monthly rent that she considers market rate or slightly less. She supports a 22-year old daughter. She pays more for a vehicle than the IRS guidelines allow for the Minneapolis area. She testified that she left a higher paying job in Milwaukee because it was not a good fit and stressful. The IRS guidelines show that it is considerably cheaper to live in Milwaukee than Minneapolis. If the debtor in *O'Hearn* could not satisfy the second prong of the test by showing that he had contacted 500 employers before he landed his present job, the Debtor in the instant case certainly has not met her burden of proof by showing that she left a higher paying job for a lower paying job in a more expensive area of the country. Moreover, the Debtor has not demonstrated a good faith effort to repay the student loans, as required by the third prong of the test. She is not a crime victim as was the debtor in *O'Hearn*; she simply did not earn enough money to support four children and make payments on her student loans. As stated in *Roberson*: "If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow." *Roberson*, 999 F.2d at 1137.

*3 4. The Debtor asked the Court to discharge a portion of the student loan debt, but the language of [Bankruptcy Code § 523\(a\)\(8\)](#) does not provide that the Court can discharge a student loan "to the extent that" it creates an undue hardship. As the statute is plain on its face and does not permit a partial discharge, and since the Court of Appeals has expressed such an incredibly stringent application of the undue hardship standards, the Court will not grant the Debtor's request absent compelling and persuasive authority.

It is therefore,

ORDERED: that the Debtor's request for an undue hardship discharge of her student loans is denied, and the Complaint is dismissed with each party to pay her and its own costs.

2003 WL 22722036 (Bankr.E.D.Wis.)
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