

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

IN RE:

NORMA SUE TANNER,  
  
Debtor.

CASE NO. 00-11496-WSS  
  
Chapter 7

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NORMA SUE TANNER,  
  
Plaintiff,

v.

ADV. PROC. NO. 00-1158

KENTUCKY HIGHER EDUCATION  
ASSISTANCE AUTHORITY, EDUCATIONAL  
CREDIT MANAGEMENT CORPORATION,  
  
Defendants.

**ORDER ON DEBTOR'S COMPLAINT TO DETERMINE  
DISCHARGEABILITY OF A DEBT**

Ellen Turner, Attorney for the Debtor  
Mac Halcomb, Attorney for Educational Credit Management Corporation  
Larry Voit, Attorney for Kentucky Higher Education Assistance Authority

This matter came before the Court on the Debtor's complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(8). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The United States of America ("U.S.") was named as a defendant in this action. In its position dated August 31, 2000, the U.S. stated that it had not taken assignment of the debt at issue, and asked to be dismissed as a party. The Court hereby dismisses the U.S. as a party to this action. After due consideration of the pleadings, evidence, testimony and arguments of counsel, the Court makes the following

findings of fact and conclusions of law:

### **FINDINGS OF FACT**

The Debtor, Norma Sue Tanner (“Tanner”), attended Faulkner University from 1992 to 1994 studying business. She did not obtain a degree. From 1995 to 1998, she attended the University of Mobile, and received her bachelor of science in organizational management.<sup>1</sup> Tanner financed her education through grants and educational loans. Educational Credit Management Corporation (“ECMC”) holds six notes for Tanner’s education totaling approximately \$14,500.00. The ECMC debt could be repaid over 10 years at \$162.55 per month at 7% interest or \$117.55 per month for 17 years. Tanner owes Kentucky Higher Education Assistance Authority (“KHEAA”) approximately \$19,907.07 as of August 31, 2000.

Tanner has worked as a computer support technician at the University of South Alabama (“South Alabama”) since July 2000. Her duties involve downloading information from the mainframe computer. It does not involve her organizational management degree. Tanner previously worked at Xante, Inc. from 1996 to 1999 as a computer support technician. In 1998, she earned an annual salary of \$24,413.00 (her highest salary) with Xante. In 1999, she earned \$18,899.00 with Xante. Tanner testified that she was fired from Xante by a manager who had less education and experience. Between 1990 and 1996, she worked at QMS as a technical support engineer. She earned \$1,340.60 per month at QMS. She left QMS due to a work force reduction. Tanner also worked as a clerk in an accounting firm.

Since graduating from the University of Mobile, Tanner has diligently sought a position

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<sup>1</sup>Tanner testified that she has not completed her thesis, which is required for a bachelor of science in organizational management.

in her field of study. She sought employment through the University of Mobile's career placement office. She registered with the State of Alabama's Employment Office. She sent resumes for positions offered in the local newspaper and applied with over 30 companies. Tanner has had five interviews. She has made "cold calls" to several local businesses and has faxed her resume to companies in response to employment announcements. Tanner would like to stay in the Mobile area because she has a daughter who works and attends school in Mobile. Tanner is 48 years old, and she believes her age prevents her from getting a position in management. She also has no experience in the field.

Tanner earns take-home pay of \$658.00 bi-weekly. In addition to the standard federal and state deductions, Tanner has \$15.00 deducted for health insurance, a mandatory retirement deduction, and \$50.00 deducted for savings. She is divorced and has no other income. She has 20-year-old daughter living with her.

Tanner has the following monthly expenses:

Rent for mobile home lot	\$165.00
Electricity/heating	\$139.24
Water/sewer	\$20.00
Telephone	\$58.51
Cable	\$30.00
Food	\$400.00
Clothing	\$50.00
Laundry/Dry cleaning	\$25.00
Medical/Dental	\$20.00
Transportation	\$100.00
Car payment	<u>\$286.57</u>
TOTAL	\$1,294.32

For a time, Tanner paid \$50.00 per month for Direct TV, and \$55.00 per month for a pager. She no longer has these expenses. Tanner has medical and dental expenses which her employer-provided health care does not pay. She stated that her health insurance does not cover pre-

existing illnesses until a specified time period. Tanner takes medication for clinical depression, and has been diagnosed with hypertension. She is not currently on medication for hypertension, although her doctor recommends it, because she cannot afford the medication. Tanner testified that she also needs some major repairs for her mobile home at an estimated cost of \$2,000.00. She has been threatened with eviction if the repairs are not done, but she cannot afford them at this time. The loan on Tanner's Saturn automobile will be completely paid in 2003. However, it is no longer under warranty and has a transmission leak and is in need of repair.

Tanner filed her Chapter 7 case on April 13, 2000. She filed the present adversary proceeding on July 26, 2000.

### **CONCLUSIONS OF LAW**

Section 523(a)(8) of the Bankruptcy Code provides that discharge under the applicable sections of the Code does not discharge a debt:

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

This Court has adopted the test utilized in Brunner v. New York State Higher Education Services Corp, 831 F.2d 395, 396 (2nd Cir. 1987) to define "undue hardship". The factors considered are:

- 1) whether the debtor can maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's dependents if forced to repay the student loans;
- 2) whether additional circumstances exist which indicate that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

3) whether the debtor has made a good faith effort to repay the loan.

Comparing Tanner's net take-home pay of approximately \$1,400.00 with her expenses of \$1,294.32, she has roughly \$105.68 at the end of each month. While her budget was fairly complete, it did not include funds for hypertension medication, repairs to her mobile home, or major car repairs. According to ECMC's counsel, Tanner would have to pay between \$117.55 and \$162.55 monthly to pay off the \$14,500.00 ECMC debt. Tanner's debt to KHEAA is approximately \$19,907.07, and would therefore require payments of \$167.15 to \$231.14 per month under the same conditions. At a minimum, Tanner would have to pay \$284.70 per month to service the debt to both ECMC and KHEAA. It is obvious Tanner cannot presently make such a payment. Tanner does not have an extravagant lifestyle. She did testify on cross-examination that she had some expenses for Direct TV and a pager, but it appears that these extra expenses have already been eliminated from her budget. She will also finish paying for her car in the near future; however, her car already has mechanical problems that may necessitate buying a new car. While Tanner may have some room in her budget to make adjustments for payment of these debts, the Court finds that she would not be able to maintain a minimal standard of living and pay the debts to ECMC and KHEAA in full.

The Court now must consider whether additional circumstances exist which indicate that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans. After graduation, Tanner made an exhaustive effort to find a job in her field of study. Unfortunately, her effort was not successful in finding a position. Her job at South Alabama is essentially the same type of job that she had prior to getting her degree. The Court agrees with Tanner that her age may be a factor in an employer's reluctance to hire her. Her lack

of experience in management may also be a significant factor. Tanner's age is a circumstance that will not improve with time. She is trapped in a "Catch 22" regarding her lack of experience: she cannot get a job without experience, and she cannot get experience without a job. However, Tanner did testify that she will be eligible for pay increases in her position, although they may not be more than cost of living increases. The Court finds that Tanner's difficulty in finding a position is not likely to improve over the life of the repayment period for the loans.

The final issue is whether Tanner made a good faith effort to repay her student loans. Unfortunately, the Court has no direct evidence on this issue. Tanner lost her job with Xante shortly after graduating from the University of Mobile, and did not get another position until July 2000. Her unemployment may not have allowed her to make any payments on the loan.

After considering Tanner's situation under the Brunner factors, the Court finds that requiring Tanner to repay the debts in full to ECMC and KHEAA would create an undue hardship for Tanner. However, Tanner's circumstances also convince the Court that she would be able to make a partial payment on the debts. Courts interpreting §523(a)(8) have found that the section allows them to modify the student loan agreement in order to give the debtor relief from the harsh results of nondischargeability, or find that the equitable powers under 11 U.S.C. §105(a) give them authority to modify the loan agreement. See Cheeseman v. Tenn. Student Assistance Corp., (In re Cheeseman) 25 F.3d 356, 360-61 (6th Cir. 1994) (Court affirmed the bankruptcy court's decision to postpone a final determination of dischargeability for 18 months under the bankruptcy court's equitable powers under 11 U.S.C. § 105(a)). This Court is in agreement with those cases giving bankruptcy courts authority to grant partial discharges or to amend student loan agreements under §523(a)(8). Tanner is gainfully employed and has no

dependants. There is the likelihood that she at least will get cost of living increases in the future. Accordingly, the Court finds that Tanner should repay the loans from ECMC and KHEAA at the rate of \$75 per month for ten years with no interest accruing. The \$75.00 payment should be divided *pro rata* among ECMC's loans and KHEAA's loans. It is hereby

**ORDERED** that the relief sought in the Debtor's complaint to determine dischargeability of a debt to Educational Credit Management Corporation and Kentucky Higher Education Assistance Authority pursuant to 11 U.S.C. §523(a)(8) is **GRANTED IN PART** and **DENIED IN PART**; and it is further

**ORDERED** that the Debtor shall pay a total monthly payment of \$75.00 which is to be divided *pro rata* between the Defendants, beginning on the 15<sup>th</sup> day of September, 2001 and continuing for ten (10) years from the date of this order. No interest shall accrue on the debts to Educational Credit Management Corporation and Kentucky Higher Education Assistance Authority. A non-dischargeable judgment in the amount of \$9,000.00 shall be entered in favor of Educational Credit Management Corporation and Kentucky Higher Education Assistance Authority and against the Debtor. The balance remaining on the debts to Educational Credit Management Corporation and Kentucky Higher Education Assistance Authority remaining at the end of the 10-year period shall be **DISCHARGED**.

DATED: July \_\_\_\_\_, 2001

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WILLIAM S. SHULMAN  
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
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KENTUCKY HIGHER EDUCATION  
ASSISTANCE AUTHORITY, EDUCATIONAL  
CREDIT MANAGEMENT CORPORATION,

Defendants.

**JUDGMENT**

These proceedings having come on for hearing before the Court and a decision having been duly rendered; it is

**ORDERED AND ADJUDGED** that pursuant to Rule 58 of the Federal Rules of Civil Procedure and Bankruptcy Rule 9021, a **NON-DISCHARGEABLE JUDGMENT** in the amount of NINE THOUSAND AND NO/100 (\$9,000.00) DOLLARS be and it hereby is **ENTERED** in favor of the Defendants, Educational Credit Management Corporation and Kentucky Higher Education Assistance Authority, and against the Plaintiff herein, Norma Sue Tanner.

DATED: July \_\_\_\_, 2001

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WILLIAM S. SHULMAN  
U. S. BANKRUPTCY JUDGE