

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

WILLIAM BARRY WEST,

CASE NO. 96-14232

Debtor.

ADV. NO. 97-1046

ORDER

This matter came on for hearing on the complaint of AT&T Universal Card Services Corporation (hereinafter "AT&T") to determine dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2)(A). Appearances were as noted in the record. 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 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting the relief requested in the complaint.

The Debtor, William Barry West (hereinafter "West"), responded to an offer for a credit card with AT&T Universal Card Services Corporation (hereinafter "AT&T") in 1991. On the application, West listed his annual income as \$20,000.00. He testified that the \$20,000.00 figure included money he received from his roommates for rent and utilities, and funds he received from student loans. On his federal income tax returns, West reported total wages of \$13,246.11 in 1994 and \$14,525.06 in 1995. West testified that he had earned as much as \$24,000.00 in 1993 and 1994 while working at Lane Bryant. After his employment ended at Lane Bryant, West worked at Gayfers and at a bar as a bouncer.

West's initial credit limit was \$3,000.00. At some point in time after the opening of the account, the credit limit was increased to \$4,500.00. West's account with AT&T provided

“convenience checks”, which could be written and charged to the client’s account up to the client’s credit limit. He could also receive cash advances up to the amount of his credit limit. West testified that he used the account like a checking account, because his actual checking account “was so messed up.” He also testified that his financial troubles began when he was lost his second job as a bouncer, his roommates moved out, and he was denied student loans in 1996.

The activity for West’s account from November 10, 1995 to June 9, 1996 is summarized below:

<u>DATE</u>	<u>BALANCE</u>	<u>PAYMENTS</u>	<u>PAYMENTS RETURNED</u>
11-10-95 to 12-09-95	\$4,917.89 (\$417.89) ¹	\$300.00	N/A
12-10-95 to 1-09-96	\$5,036.25 (\$536.25)	\$300.00 \$400.00	\$300.00
1-10-96 to 2-09-96	\$5,115.16 (\$615.16)	0	N/A
2-10-96 to 3-09-96	\$4,551.87 (\$51.87)	\$650.00	N/A
3-10-96 to 4-09-96	\$5,784.73 (\$3,184.73)	\$2,000.00 \$2,622.65	\$2,622.65 ²
4-10-96 to 5-09-96	\$5,887.95	0	N/A

¹The figures in parentheses represent the amount which West was over his credit limit of \$4,500.00.

²West stopped payment on his check for \$2,622.65.

5-10-96 to
6-09-96 \$6,007.74 0 N/A

AT&T presented the transactions log for West's account at trial.³ The log documented the transactions of West's account as well as the substance of telephone contact between West and AT&T representatives. Beginning in September 1995, the log revealed that West submitted a series of convenience checks which were returned by AT&T because West did not have sufficient credit to cover the checks. The checks were:

<u>DATE</u>	<u>CHECK NUMBER</u>	<u>AMOUNT</u>
9-14-95	1019	\$138.05
9-26-95	1023	\$79.02
9-28-95	1025	\$150.00
11-03-95	1031	\$246.45
11-13-95	1033	\$700.00
11-29-95	1036	\$500.00
11-30-95	1034	\$250.00
12-07-95	1037	\$500.00
2-21-96	1040	\$500.00
2-27-96	1039	\$128.42
3-07-96	1045	\$400.00
3-11-96	1044	\$51.26

³AT&T identified the transaction log as Plaintiff's exhibit 3, consisting of nineteen pages. The log was arranged in reverse chronological order with the latest transaction on top. The exhibit was admitted without objection.

3-14-96	1046	\$64.11
3-19-96	1047	\$77.64
4-1-96	1043	\$21.00
7-18-96	1052	\$200.00
TOTAL		\$4,005.95

The transaction log also revealed that West requested an increase of his credit limit on February 19, 1996; however, the increase was denied due to a derogatory payment history. On March 29, 1996, AT&T reduced West's credit limit to \$2,600.00. According to the transaction log, West was advised of the reduction on the same day, and indicated that he wanted stop payment on the "last check he sent." Also on March 29, 1996, the AT&T representative recorded that West requested that his last payment be returned to him or that his previous credit limit be restored. AT&T informed West that the payment could not be returned and that his credit limit could not be restored. West then asked for the amount needed to pay off the account in full, and the AT&T representative gave him the figure of \$2,622.65. He testified at trial that he wanted to pay off the account to bolster his credit rating and to have the available credit limit.

On April 1, 1996, AT&T received a check from West for \$2,622.65. West wrote the following convenience checks on April 2, 1996: Check 1041 - \$100.00; Check 1050 - \$105.68; Check 1042 - \$150.00; Check 1051 - \$200.00; Check 1049 - \$500.00. West also took a cash advance of \$2,000.00 on April 2, 1996. On April 4, 1996, West stopped payment on his \$2,622.65 check to AT&T. West testified that he stopped payment on the check because his mother was supposed to make him a loan to cover the check and was not able to make the loan. The \$2,622.65 check was the last payment on the account before West filed his bankruptcy

petition on November 13, 1996. He contacted Consumer Credit Counselors of Mobile in September 1996 before filing his bankruptcy petition.

West testified that he thought his credit limit was \$4,500.00 when he took the \$2,000.00 cash advance on April 2, 1997. However, he also stated that he learned that AT&T had lowered his credit limit when he called to get the payoff amount for his account, which occurred on March 29, 1996 according to AT&T's transaction log. West also testified that he intended to pay the account in full. He expected to get a better job after he completed his education. West received his undergraduate degree in art history in 1989 and went back to school in 1994 to get a masters degree in organizational communications. West owed \$26,964.00 in student loans and had several other credit cards in addition to the card issued by AT&T.

Section 523(a)(2)(A) of Title 11 does not allow a debtor to discharge a debt for money or property which was obtained by "false pretenses, a false misrepresentation, or actual fraud, . . .". To prevail under § 523(a)(2)(A), a creditor must show that: 1) the debtor made a false representation with the purpose and intention of deceiving the creditor; 2) the creditor relied on the representations; and 3) the creditor sustained a loss as a result of the representation. In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986). In addition, the creditor must prove that its reliance was justifiable. Field v. Mans, 116 S.Ct. 437 (1995); In re Vann, 67 F.3d 277 (11th Cir. 1995). The standard of proof for such a claim is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991).

Essentially, "the use of a credit card is a representation concerning the user's intent to perform an act in the future. That representation is fraudulent only when made without the present intention to perform." Matter of McKinnon, 192 B.R. 768, 775 (Bankr. N.D. Ala. 1996),

citing In re Murphy, 190 B.R. 327 (Bankr. N.D. Ill. 1995). Because a debtor will rarely confess to an intent not to pay the debt at the time it was incurred, such intent must be gleaned from the surrounding facts and circumstances. Id.

Prior to March 29, 1997, West carried a balance on his AT&T credit card and wrote some convenience checks which were returned for insufficient funds. From November 1995 to March 9, 1996, he had charges that exceeded his credit limit by various amounts. However, he was making substantial payments of \$300.00 and \$400.00 on his account. After receiving his monthly statement for January 10, 1996 to February 9, 1996, West made a payment of \$650.00, which brought him within \$51.87 of his credit limit. From West's actions, it appeared that he intended to pay the debt he owed to AT&T at that time. The Court finds no indication of actual fraud or false misrepresentations related to the charges made on West's account prior to March 29, 1996.

West's actions after March 29, 1996 are a different story. AT&T's transactions log shows that West learned that his credit limit was lowered to \$2,600.00 on March 29, 1996 despite his testimony to the contrary at trial. Upon learning that his credit limit had been lowered, West told the representative that he would stop payment on the last check he sent to AT&T, presumably the check for \$2,000.00, which AT&T had received and posted on March 27, 1996. Again, on March 29, 1996, West contacted AT&T and requested that the \$2,000.00 be returned to him or that his credit limit be restored to \$4,500.00. After being told that AT&T would not return the check or restore his credit limit to \$4,500.00, West called back later the same day and asked the AT&T representative for the payoff figure for his account, and was given the figure of \$2,622.25. On April 1, 1996, AT&T posted a payment from West for

\$2,622.25, which would have paid off his account and left a zero balance. On April 2, 1996, West wrote five checks totalling \$1,055.68 and took one cash advance of \$2,000.00. According to AT&T, West then issued a stop payment order on the check for \$2,622.25 on April 4, 1996.

When West was questioned at trial as to why he stopped payment on the \$2,622.25 check, West testified that he was not able to get the money from his mother, who was going to make him a loan. This statement is contradicted by an April 11, 1996 entry in the AT&T transaction log, which indicates that West stated that he stopped payment on the check because he had already made a payment on the account for that month. Further, there is no mention in the AT&T transaction log of a loan from West's mother until July 19, 1996, approximately three months after West stopped payment on the \$2,622.25 check.

Considering all of the evidence, the Court finds that West had no intention of repaying the charges he made on his AT&T account after March 29, 1996. The first indication of his lack of intent is the numerous charges he made on the account in one day. On April 2, 1996, West made a total of \$3,055.68 charges on his account with knowledge that his credit limit was only \$2,600.00. This was an unusual amount for West to charge in one day. His typical charges for the previous months were between \$30.00 to \$400.00. Then, with knowledge of his lower credit limit, West stopped payment on the \$2,622.25 check which would have paid off his account and given him some available credit. His testimony that he stopped payment on the check because his mother was not able to make him a loan was not credible in light of other evidence. Finally, West made no further payments on his account after the charges incurred on April 2, 1997. West's actions indicate an intent to deceive AT&T into extending more credit to him in the belief that he had paid off his account. AT&T justifiably relied on West's representations

because his actions led them to believe that he had paid off his account in full. Relying on West's payments, AT&T extended West credit for the convenience checks and the \$2,000.00 cash advance. When West stopped payment on his check and made no further payments on his account, AT&T clearly suffered a loss as a result.

Based on the foregoing, AT&T's complaint to determine dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2)(A) is due to be granted, and a debt in the amount of \$3,055.68 is due to be held nondischargeable. Therefore, it is hereby

ORDERED that complaint of AT&T to determine dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2)(A) is **GRANTED**; and it is further

ORDERED that that the judgment owed to AT&T in the amount of \$3,055.68 by the debtor be, and it hereby is, **NONDISCHARGEABLE** in this bankruptcy proceeding.

DATED: JULY _____, 1997

WILLIAM S. SHULMAN
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

WILLIAM BARRY WEST,

CASE NO. 96-14232

Debtor.

ADV. NO. 97-1046

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 **NONDISCHARGEABLE JUDGMENT** in the amount of **THREE THOUSAND FIFTY-FIVE AND 68/100** (\$3,055.68) be and it hereby is **ENTERED** in favor of the Plaintiff, AT&T and against the Defendant herein, William Barry West.

DATED: JULY _____, 1997.

WILLIAM S. SHULMAN
U. S. BANKRUPTCY JUDGE