

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ROBERT J. CHAMBERLIN

CASE NO. 95-63381

Debtor

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed by Richard Chamberlin ("Debtor") on April 18, 1997, for an order pursuant to § 1328(b) of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), seeking a so-called hardship discharge. Mark W. Swimelar, Esq., the chapter 13 trustee ("Trustee"), filed opposition to the Debtor's motion on May 15, 1997.

The motion was heard at a regular motion term of the Court on May 20, 1997 in Syracuse, New York, and was adjourned to June 3, 1997, to afford the Debtor an opportunity to provide the Court with case law in support of his position. At the Trustee's request, the parties were given additional time to brief their respective positions. The matter was submitted for decision on June

20, 1997.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (2)(A) and (O).

FACTS

On September 21, 1995, the Debtor filed a voluntary petition pursuant to chapter 13 of the Code. On December 13, 1995, the Debtor's chapter 13 Plan was confirmed by Order of this Court. The Plan provided for 36 monthly payments of \$503, beginning October 21, 1995, with an estimated dividend of 40% to unsecured creditors. According to the Debtor's attorney, the Debtor has paid \$7,584.49 in plan payments to the Trustee for an actual dividend of approximately 7.6%. *See* Affidavit of Michelle C. Marans, Esq., sworn to April 10, 1997. Debtor's last payment was made to the Trustee on January 6, 1997. *See* Trustee's Affidavit in Opposition, sworn to May 14, 1997, at ¶3.

On or about October 28, 1996, the Debtor was allegedly notified by his employer that his position had been eliminated. *See* Debtor's Affidavit, sworn to on April 10, 1997, at ¶4. Said notification occurred thirty-one (31) days prior to Debtor's fifty-fifth (55th) birthday. As a result, the Debtor claims that he is ineligible for pension payments until he reaches age sixty-two (62). Debtor indicates that he has 35 years of experience in security and police enforcement and has

been unable to find employment despite numerous attempts since being laid off in October. *See id.* at ¶¶6,7. Debtor's unemployment benefits ceased the end of April 1997. Debtor maintains that until he lost his employment, he had been current with his payments to the Trustee. According to Amended Schedule I and J, Debtor's expenses exceed his monthly income from another pension as a former police officer with the City of Syracuse by \$948.00

ARGUMENTS

Debtor contends that he is entitled to a "hardship discharge" pursuant to Code § 1328(b) because his failure to complete his plan payments is due to circumstances for which he should not justly be held accountable. Debtor asserts that his inability to continue payments to the Trustee is due to his loss of employment and ineligibility for additional pension benefits at this time. The Debtor also claims to be disabled because of his age and experience, which he argues prevent him from obtaining employment.

The Trustee opposes the motion on the grounds that unemployment and Debtor's age do not rise to the level that qualifies the Debtor for a hardship discharge under Code § 1328(b). Further, the Trustee opposes the motion on the grounds that the Debtor's age and experience are not disabilities and do not preclude the Debtor from obtaining gainful employment. The Trustee asserts that a hardship discharge is reserved for something other than the temporary loss of a job.

DISCUSSION

Code § 1328(b) authorizes the Court to grants a discharge to a debtor who is unable to complete payments under a plan only if:

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan or account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under a Chapter 7 of this title [11 U.S.C. §§101 et seq.] on such date; and
- (3) modification of the plan under section 1329 of this title [11 U.S.C. §1329] is not practicable.

11 U.S.C. § 1328(b)

Some bankruptcy courts in interpreting Code § 1328(b)(1) have required that the "circumstances" referred to in the statute be catastrophic in nature, such as death or debilitating illness of a permanent nature.¹ *See In re Nelson*, 135 B.R. 304, 307 (Bankr. N.D.Ill. 1991) (citing

¹The Debtor suggests that since the phrase "undue hardship" does not appear in Code § 1328(b), the Court should apply a lesser standard than it would in considering a motion pursuant to Code § 523(a)(8)(B), which does make specific reference to "undue hardship" with respect to the dischargeability of a student loan. In applying the term "undue hardship" found in Code § 523(a)(8), the Second Circuit has indicated that the evidence must establish "exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time" *See Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). The Court finds no case law to support the Debtor's novel argument. In order for the Court to accept the Debtor's suggestion, the Court would need to conclude that the discharge of a single debt, i.e. a student loan, requires more stringent proof than is necessary for the discharge of all debts in the event that relief is granted pursuant to Code § 1328(b). This does not appear to be a reasonable approach in the view of the Court. However, the Code § 1328 discharge is granted presumably after the Debtor has paid its creditors an amount not less than they would receive in a chapter 7.

In re Dark, 87 B.R. 497 (Bankr. N.D.Ohio 1988)); *In re Graham*, 163 B.R. 95 (Bankr. E.D.Pa. 1986); *In re Bond*, 36 B.R. 49 (Bankr. E.D.N.C. 1984); *In re White*, 126 B.R. 542, 545 (Bankr. N.D.Ill. 1991)). Other Courts have held debtors to a less stringent standard. *See, e.g., In re Edwards*, 207 B.R. 728 (N.D. Florida, 1997) (granting discharge to debtor who, following the post-confirmation failure of his business, suffered from depression which required medication and also experienced the breakup of his marriage.)

Debtor makes an appealing argument that his loss of employment and his inability to collect a second pension until age 62 due to the timing of his termination constitute circumstances for which he should not justly be held accountable. In support of his position, the Debtor cites to and attempts to distinguish *White* and *Nelson*. In both of those cases, hardship discharges were denied to the debtors who knew about the circumstances for which they asserted they should not be held accountable prior to filing their petitions. The Debtor claims he had no reason to believe that his job was not secure, nor that he would be laid-off and be ineligible to immediately receive pension benefits at the time he filed his petition. Whether or not the Debtor knew at the time of filing his petition that circumstances impacting on his ability to pay were likely to change post-petition, begs the issue presently before the Court and is more appropriately addressed on a post confirmation motion to modify a chapter 13 plan. The question is whether the circumstances for which the Debtor argues he should not justly be held accountable warrant granting him a discharge despite the fact that he has not completed the payments provided in the Plan.

This Court has previously had occasion to address whether the loss of employment constitutes a basis for granting a debtor a hardship discharge pursuant to Code § 1328(b). *See*

In re Scott, Case No. 88-00057 and *In re Guernsey*, Case No. 88-01096 (Bankr. N.D.N.Y. June 29, 1992). The Court considered therein two contested matters which implicated a single question of law and concluded that “[t]o allow a hardship discharge under Code § 1328(b) based upon . . . temporary loss of employment in difficult economic times, would open a door to a result that Congress neither intended nor this Court can condone.” *See id.* at 9-10. In both cases the debtors were unemployed, and there was no allegation that any of the debtors were physically incapable of holding a job. *See id.* at 8-9.

The Debtor contends that the loss of his job and having to wait until age 62 for additional pension benefits are not the only circumstances that should be considered by the Court. The Debtor asserts that the Court should also consider the Debtor’s age and the fact that he is overqualified for many jobs because of his years of experience in the area of law enforcement and security as constituting disabilities which prevent him from obtaining gainful employment.

Nowhere in the Code is the term “disability” defined. It is, therefore, necessary for the Court to look elsewhere for assistance in its analysis. Section 72m(7) of the Internal Revenue Code addresses whether an individual is “disabled” and entitled to be excepted from an additional 10% tax penalty on early retirement distributions. *See* 26 U.S.C. § 72(m)(7). The statute provides

. . . an individual shall be considered to be disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long, continued, and indefinite duration. . . .

See id. In *In re Black*, 702 B.R. 701 (Bankr. W.D.Tex. 1996), the debtor sought a refund of the 10% tax penalty, asserting that he had taken early retirement due to certain health problems, including chronic bronchitis and high blood pressure. The debtor was 57 years old and had

worked as a commercial airline pilot for 29 years when he voluntarily took early retirement. *See id.* In determining whether the debtor was disabled for purposes of the statute, the focus of the court's analysis was on whether the debtor had met his burden of establishing that he had a medical condition that precluded him from gainful employment as an airline pilot. *See id.* at 704.

In *Minnesota Mutual Life Insur. v. Wright*, 312 F.2d 655 (8th Cir. 1963), which was a disability case rather than a tax case, an airline pilot sought to recover under an insurance policy.

The lower court's instructions to the jury asked them to determine

whether plaintiff is physically able to engage in any occupation similar or comparable to that in which he was engaged before his disability, or one for which he may be capable of fitting himself within a reasonable time, and from which occupation plaintiff can earn a reasonably substantial income rising to the dignity of a livelihood in any such occupation even though the income be not as much as he earned before the disability.

See id. at 657. In *Wright* the plaintiff was a 53 year old man with one year of college and no training or experience in any other field than flying planes. He had lost his license as a result of his hypertension and had been unable to secure other employment because he was told he was either too old to train or was not physically fit for the particular position. *See id.* at 658. The jury found that the plaintiff was disabled under the terms of the policy.

There are factual similarities between the plaintiff in *Wright* and the Debtor herein. Debtor has worked in the field of law enforcement or security for most of his adult life. Debtor contends that he has been unable to obtain other employment because he is either overqualified or too old. The important distinction to be drawn between the *Wright* and *Black* decisions and the matter *sub judice* is that the primary consideration in both reported cases in determining if the individuals were disabled was whether there was some sort of physical or mental impairment which prevented them from engaging in any "substantial gainful activity." In this case, there has

been no assertion by the Debtor that he suffers from any physical or mental impairment that prevents his employment. He simply argues that he is too old or overqualified to obtain employment. This, in and of itself, is not sufficient for the Court to find that the Debtor is disabled.

Code § 1328(b) gives the Court discretion to grant a discharge to a debtor under the appropriate circumstances. Based on the facts before the Court, it concludes that the Debtor has failed to establish that the circumstances for which the Debtor should not be justly held accountable, namely the loss of employment, delay in receiving additional pension benefits and the inability to find other employment warrant granting a hardship discharge.

Based on the foregoing, it is hereby

ORDERED that the Debtor's motion seeking a discharge pursuant to Code § 1328(b) is denied.

Dated at Utica, New York

this 22nd day of September 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge