

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Chay Linette Williams,

Debtor

Case No. 10-03620-als7

Chapter 7

**MEMORANDUM OF DECISION
(date entered on docket: July 14 , 2011)**

Chay Linette Williams (“Debtor”) filed a voluntary chapter 7 petition on July 19, 2010. The matter before the Court arises from the United States Trustee’s (“U.S. Trustee”) motion to dismiss this chapter 7 case pursuant to 11 U.S.C. section 707(b)(3) (“Motion”) filed on October 15, 2010. An objection thereto was filed by the Debtor on November 8, 2010. An evidentiary hearing on the pending Motion was conducted on May 12, 2011 and thereafter the matter was placed under advisement. The court has jurisdiction of these matters pursuant to 28 U.S.C. sections 157(b)(1) and 1334. For the reasons set forth herein the Motion to Dismiss is granted.

FACTS

Filed with her bankruptcy petition is Debtor’s Schedule I, Current Income of Individual Debtors (“Schedule I”) which shows combined average monthly income of \$6,947.50. As required, the Debtor’s Schedule I includes income information both for the Debtor and her non-filing spouse (“Mr. Williams”). Schedule J, Current

Expenditures of Individual Debtor(s) (“Schedule J”) shows a negative monthly income of \$1,174.68 after deduction of the itemized expenses contained in that document.

The U.S. Trustee asserts that revisions are necessary to Schedules I and J filed by the Debtor. In support of this position, exhibits were prepared that compare the figures contained in the Debtor’s Schedules I and J with revised numbers the U.S. Trustee believes are more appropriate. The modifications to income figures on Schedule I include the elimination of the Debtor’s voluntary retirement contributions and a vehicle administrative expense related to Mr. Williams’ employment with General Motors. These proposed revisions increase monthly income by \$414.00. At the hearing, these adjustments were not objected to in the Debtor’s case presentation. Consequently, the Court will utilize the figure of \$7,361.00, as proposed by the U.S. Trustee’s revisions to Schedule I, as the average monthly income for the household.

The U.S. Trustee also submitted an exhibit that contained a comparison of Debtor’s Schedule J with the local IRS standards. According to this exhibit, the amounts for charitable contributions, life insurance and child care were allowed in the full amounts claimed by the Debtor. A number of expenditures set forth on Schedule J were completely eliminated by the U.S. Trustee. The basis for these exclusions is the U.S. Trustee’s position that such expenses are included under the local IRS standards. A summary of the adjustments made to the Debtor’s claimed expenses on the exhibit are as follows:

Description	Claimed	Adjusted	Net Change
Housing Ownership (includes insurance)	\$2,237	\$2,237 ¹	\$ 0
Housing Utilities and maintenance	\$1,403	\$ 539	(\$864)
Food, Clothing and other	\$2,555 ²	\$1,371	(1,184)
Medical and Dental	\$ 250	\$ 240	(\$ 10)
Transportation Operating	\$ 375	\$ 420	\$ 45
Transportation Ownership	\$ 138	\$ 992	\$854
Time-share Installment and fees	\$ 218	\$ 0	(\$218)

Utilizing the figures presented by the U.S. Trustee results in a computation of net monthly household income in the amount of \$1,091.

The Debtor testified that the expense amounts shown on her Schedule J were derived from estimates or from actual expenses during the six months prior to her bankruptcy filing. Based upon this information she disputes that there is any amount remaining after deduction of the necessary household expenses and allowing for payment of her husband's separate obligations.

DISCUSSION

A court may dismiss a chapter 7 case filed by an individual debtor with primarily consumer debts if the court finds that granting the debtor relief would be an abuse. See 11 U.S.C. § 707(b)(1) (2010). The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") substantially changed the concept of abuse in two ways. First, BAPCPA implemented the "means test" to initially determine whether a filing is presumed abusive. All consumer debtors are required to complete the Chapter 7 Current Monthly Income and Means-Test Calculation ("Form 22A"), which involves a deduction of specific expense allowances based upon local Internal Revenue standards

¹ Allowed in full in excess of the local IRS standard.

² This figure includes the sum of expenses on Schedule J for food, clothing, laundry and dry cleaning, recreation, education, personal and pet care, student loan payment, and the non-filing spouse's credit card and medical expenses.

from a debtor's current monthly income, as defined by the Bankruptcy Code. Even if a debtor's filing is not presumed abusive upon completion of Form 22A, a filing may still constitute abuse if the statutory requirements of 11 U.S.C. section 707(b)(3) are met. Second, BAPCPA lowered the standard from a finding of "substantial abuse" to abuse. Compare 11 U.S.C. § 707(b) (2010) with 11 U.S.C. § 707(b) (2004).

According to the Debtor's Form 22A, the presumption of abuse does not arise based upon the information contained in that document. This result has not been disputed. The Motion to Dismiss is based solely upon 11 U.S.C. sections 707(b)(3)(A) and (B) which provide in relevant part:

(1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

The U.S. Trustee bears the burden of proof, by a preponderance of the evidence, in showing that there is a presumption of abuse under this statute.

The plain language of the Code separately identifies bad faith and totality of the circumstances for purposes of determining whether abuse exists related to a chapter 7 filing. Although these bases have some overlapping characteristics, the language of the Code is in the disjunctive. Therefore, the U.S. Trustee must satisfy only one of the

identified factors, either bad faith or the totality of the circumstances, for the Court to dismiss the case.

“While bad faith under § 707(b)(3)(A) *may* involve a dishonest or nefarious act on the part of the debtor, such motivation or intent is not necessary.” In re Webb, 447 B.R. 821, 824 (Bankr. N.D. Ohio 2010) (emphasis added). The Sixth Circuit has identified bad faith as being demonstrated by “concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish life-style, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.” In re Zick, 931 F.2d 1124, 1129 (6th Cir. 1991).

The Eighth Circuit has established that the ability to pay, standing alone, constitutes abuse under the totality of the circumstances. See United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1994) (citations omitted). Although this holding pre-dates the enactment of BAPCPA, the fundamental concept of “ability to pay” remains unchanged. See In re Honkomp, 416 B.R. 647, 649 (Bankr. N.D. Iowa 2009) (citing In re Booker, 399 B.R. 662, 667 (Bankr. W.D. Mo. 2009)) (“When considering the § 707(b)(3)(B) totality of the circumstances, ‘the Court should consider primarily, if not exclusively, the Debtors’ ability to pay.’”); In re Boatright, 414 B.R. 526, 530 (Bankr. W.D. Mo. 2009) (explaining that the totality of the circumstances allows a departure from a rigid mathematical formula, but is predominately based upon an ability to pay).

In summary, bad faith rests upon a debtor’s conduct as of the date of filing, and the totality of the circumstances rests upon a debtor’s ability to pay that is not restricted by the filing date and may take into account post-petition developments. See In re

Boyce, 446 B.R. 447, 450 (D. Or. 2011); In re Maiorino, 435 B.R. 806, 809-10 (Bankr. D. Mass. 2010).

11 U.S.C. section 707(b)(3)(A)

Debtor's counsel argues that the household expenses on Schedule J are correct based upon historical figures, for the six months prior to filing and are therefore the most predictable measure of future expenses. Debtor provides no legal authority that such an approach is correct. I disagree with Debtor's conclusion for two reasons.

First, Schedule J is clearly labeled "*Current* Expenditures of Individual Debtor(s)." (emphasis added). The directions for completing this document state: "[c]omplete this schedule by estimating the average or *projected* monthly expenses of the debtor and debtor's family *at time case filed*." (emphasis added). This form also requests that anticipated increases or decreases in monthly expenses be identified. Schedule J does not instruct debtors to provide historical information for the prior six months.

Second, the Debtor's argument fails to account for a reduction in expenses that are a direct consequence of a bankruptcy filing. This fallacy in the Debtor's position is illustrated by a close examination of the entry for Electrical and Heating Fuel on Schedule J. Debtor states at entry 2(a) that she pays \$756 per month for these utilities. However, based upon the testimony and exhibits presented it is clear that this monthly amount includes a large past due obligation that would be subject to discharge in the bankruptcy proceeding. According to average annual usage, as provided by MidAmerican Energy and contained in the Debtor's exhibit, the monthly amount incurred is \$365. This figure is less than one-half the amount entered on Schedule J as a current, anticipated expense. Similar examples are contained in the testimony regarding

monthly home maintenance and medical expenses. Discrepancies of this nature raise a suspicion that the expenses set forth on Schedule J may be inflated. See In re Shores, No. 1:09-bk-08905MDF, 2010 WL 5125328, at *5 (Bankr. M.D. Penn. Dec. 9, 2010). This suspicion is confirmed based upon a comparison of Schedule J to other filings made in the Debtor's case.

Debtor filed reaffirmation agreements for her vehicle and a time-share property. In support of her requests for approval of the reaffirmation agreements, a monthly budget for the time period of September 1, 2010 through September 30, 2010 ("September Budget") was filed to demonstrate the ability to pay and to overcome an undue hardship inquiry. She testified that the amounts shown on the September Budget represented actual expense figures that were derived from an accounting program that she had used for the past ten years to track her household income and expenses. The September Budget³ shows a positive cash flow of \$340 before payment of the reaffirmed vehicle obligation in the amount of \$138. The September Budget shows net monthly income of \$378 prior to payment of the time share obligation in the amount of \$218. Upon reviewing the September Budget it is clear that actual monthly expenses are substantially lower than the amounts set forth on Schedule J in several categories including: Electrical and Heating Fuel, House Cleaning/Repairs, Food, Medical Expenses, Personal and Pet Care, and Tithes.⁴

³ Filed with docket numbers 22 and 32.

⁴ Although the U.S. Trustee did not revise the figure for charitable contributions on its comparison, and the Court is unaware whether support of the entry was provided by the Debtor, the entry on the September Budget includes both Tithes and Other Cash Withdrawals. On the September Budget, a charitable contribution is shown in the amount of \$60. It is unclear whether the remaining amount of \$280.00 is related to charitable giving or is cash utilized in payment of monthly household expenses. "Debtors are allowed to deduct . . . charitable contributions to qualified religious or charitable entities or organizations. . . [T]hat charitable impulse must have been evidenced by at least some contributions prior to the filing of

During her testimony, the Debtor agreed with her attorney's statement that the budget included in support of the reaffirmation agreement is "aspirational rather than accurate." This response is in direct contradiction to the testimony that the September Budget was based on actual income and household expenses. Given all of the evidence, I must conclude that the expenses utilized by the Debtor on Schedule J are inflated in excess of the current and actual monthly household expenditures which is indicative of bad faith. In re Webb, 447 B.R. 821, 826 (Bankr. N.D. Ohio 2010) (estimates which appear to be inflated beyond actual expenses can be construed as bad faith under 11 U.S.C. section 707(b)(3)(A)).

11 U.S.C. section 707(b)(3)(B)

A number of factors may be utilized in evaluating the totality of a debtor's circumstances.

[W]hether the bankruptcy filing was precipitated by an unforeseen catastrophic event, such as a sudden illness or unemployment; whether the debtor is eligible for relief under another chapter; whether there are non-bankruptcy remedies available to the debtor; whether the debtor can obtain relief through private negotiations; whether the debtor's proposed budget is excessive or unreasonable; whether the debtor has a stable source of future income; whether the debtor could provide a meaningful distribution in a chapter 13 case; and whether the debtors' expenses could be reduced significantly without depriving them and their dependents of necessities.

In re Honkomp, 416 B.R. at 649-50 (citations omitted). These identified factors may be used as a guide in making a determination of whether abuse exists under the totality of a particular debtor's circumstances. The Court acknowledges that the Debtor was unemployed for a period of time during 2008. However, at the time of filing she had

the bankruptcy case, and debtors may need to provide some evidence of such gifts." 6-707 Collier on Bankruptcy ¶ 707.04 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

obtained employment and there is no indication that she will not continue in her current job. In this case, the reasonableness of the debtor's monthly expenditures is the primary issue.

The U.S. Trustee argues that the IRS standards are to be utilized in determining whether an ability to pay exists under the totality of the circumstances. In making adjustments to a debtor's budget for purposes of a motion to dismiss, the U.S. Trustee is not permitted to "cherry pick" only those expenses that decrease. See In re McKay, No. 09-41491, 2010 WL 6519012, at *7 (Bankr. S.D. Ga. Nov. 30, 2010). The U.S. Trustee appropriately included both increases and decreases to the Debtor's household expenses based upon the local IRS standards. In her objection to the Motion to Dismiss the Debtor asserts that she is willing to accept all increases to household expenses based upon the revisions made by the U.S. Trustee, but disputes any decrease in expenses listed on her original Schedule J filed with the court. The same restrictions on "cherry picking" must apply to the Debtor.

The local IRS standards provide a benchmark from which a court can evaluate the reasonableness of a debtor's expenses. In re Gonzalez, 378 B.R. 168, 175 (Bankr. N.D. Ohio 2007). However, an individual debtor's actual expenses may fluctuate higher or lower than the standards. "Congress clearly intended that a debtor might spend more than the IRS standard for one category (e.g. rent) and less for another (e.g. food)" which permits a debtor to have some flexibility in choosing certain expenditures and still remain within a common range of total monthly expenses. See 6-707 Collier on Bankruptcy ¶ 707.04[3][b] 707-44 (Alan N. Resnick & Henry J. Sommer eds., 16th ed 2010). Rather than attempting to minimize her expenses, the Debtor appears to be undertaking an effort

to maximize the household estimates under all categories. See In re Booker, 399 B.R. at 771 (Debtor attempted to maximize rather than minimize expenses).

A debtor's reported expenses are not accepted without question, they must be reasonable in light of a debtor's financial circumstances. Debtors must be prepared to do some financial belt tightening and may be required to forgo amenities to which they had become accustomed. However, debtors are not expected to live in poverty to pass scrutiny in an action brought to dismiss under § 707(b)(3).

In re Shores, 2010 WL 5125328, at *3 (citations omitted). The time-share payment included on Debtor's Schedule J is an example of an adjustment that could be made to Debtor's lifestyle. The court agrees with the U.S. Trustee that this amount should be removed from Debtor's monthly expenses. See In re Brenneman, 397 B.R. 866, 873 (Bankr. N.D. Ohio 2008) (court did not look favorably upon the debtor's attempt to reaffirm a timeshare); In re Lapke, No. BK07-81140-TJM, 2008 WL 901846, at *4 (Bankr. D. Neb. Mar. 31, 2008) (the debtor's time-share property one indication of failure to reduce expenses). Under cross examination by the U.S. Trustee the Debtor stated that she has not made adjustments to her lifestyle since filing bankruptcy. Discretionary expenses contained in the September Budget support her statement.

Treatment of the non-filing spouse's financial obligations in the household budget must also be considered. The U.S. Trustee reduced Mr. Williams' individual expenses to zero in its comparison under the local IRS standards. The Court disagrees that all of the non-filing spouse's expenses should be automatically removed from Schedule J based upon the local IRS standards. In this case, reliance on the actual amounts expended by

the household, which include the non-filing spouse's obligations, provides a more accurate measure of whether there is disposable income.

The Debtor's filings reveal discrepancies in the non-filing spouse's expenses. Schedule J indicates that credit card payments and medical expenses for the non-filing spouse total \$675. The information submitted in support of this entry is again based upon historical data. The actual data supplied in the September Budget includes all household expenses and reports that the actual amount paid on credit card debt was \$283. According to the exhibit submitted by the Debtor related to student loans, there was a consolidation of her loans and those of her husband in 2006. Although Schedule J and the Debtor's testimony indicate that the student loans are paid in the monthly amount of \$500, this information is inconsistent with the actual monthly payment of \$150 which is reflected in the September Budget. The differences in these amounts are not explained.

The summary of schedules sets forth unsecured non-priority claims in the amount of \$157,030.⁵ Schedule F indicates that some of the credit cards were opened a number of years ago. This information does not clarify when, or why, charges may have been incurred. Although credit may have been utilized during the Debtor's period of unemployment, it can just as easily be inferred that the accounts always had a substantial balance. There are medical bills that appear to have recently been incurred, but there is no evidence that clarifies whether these expenses will be ongoing.

The fundamental purpose of dismissal under section 707(b)(3) is to prevent individuals that have an ability to repay a portion of their obligations to avoid payment by virtue of a chapter 7 discharge. In this case, after considering all of the information presented it is clear that the Debtor's total, actual, household expenses are less than the

⁵ Included in this amount is a \$93,318 student loan obligation.

amount stated on Schedule J. Adjusting only a few entries to reflect the Debtor's actual monthly household expenses⁶ results in reducing the total projected monthly expenses on Schedule J to \$6,569. Applying the monthly household income figure of \$7,361 against the revised projected monthly expenses results in monthly disposable income of \$792. Whether utilizing the Debtor's actual household expenses, local IRS standards or a combination of these figures, there is an ability to pay unsecured creditors from disposable income.

It is hereby Ordered:

1. The Debtor's Objection is overruled and the Motion is granted.
2. The Debtor shall have fourteen (14) days from the date of this Order to convert her case to a chapter 13 or the case will be dismissed without further notice and hearing.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Chapter Case

⁶ Student loan (reducing Schedule J amount by \$350), credit card payments for the non-filing spouse (reducing Schedule J amount by \$392), gas and electric (reducing Schedule J amount by \$468); food (reduced by \$125); and elimination of the time-share payments (reducing Schedule J amount by \$218).