

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 7, 2001

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Assistant U.S. Trustee
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Subject: *In re Pamyla Hefner*
Chapter 7; Bankr. No. 00-40944

Dear Messrs. Gering and Hoffman:

The matter before the Court is the United States Trustee's Motion for Judgment on the Pleadings with respect to her Motion to Dismiss for Substantial Abuse. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the United States Trustee's motion must be denied.

Summary. On November 6, 2000, Pamyla Hefner ("Debtor") filed for relief under chapter 7 of the bankruptcy code. Debtor's schedules, which she filed with her petition, revealed that she had unsecured debt totaling \$53,711.69, monthly income of \$1,617.20, and monthly expenses totaling \$1,613.00.

On January 22, 2001, the United States Trustee filed a Motion to Dismiss for Substantial Abuse. In her motion, the United States Trustee alleged that were the Court to disallow Debtor's contribution to her 401K plan and her repayment of a loan against her 401K plan, Debtor would then have \$604.20 available each month with which to repay her unsecured creditors. This would enable Debtor to repay \$21,751.12 of her unsecured debt over a period of three years or \$36,252.00 of her unsecured debt over a period of five years.

On February 14, 2001, Debtor filed a Resistance to Motion to Dismiss. In her resistance, Debtor alleged that she was required by the terms of her loan agreement to repay her 401K loan through

payroll deduction. Debtor indicated that this indebtedness was secured by a security interest in her future wages and needed to be listed on her Schedule D.¹ Debtor further alleged that she had incurred an additional debt post-petition in connection with her 30-day stay at Keystone Treatment Center in Canton, South Dakota. Finally, Debtor noted that the United States Trustee had not cited any authority in support of her claim that Debtor's voluntary contribution to her 401K plan was inappropriate.

On March 19, 2001, the United States Trustee filed a Motion for Judgment on the Pleadings. In her motion, the United States Trustee pointed out that in her response, Debtor did not deny that Debtor's Schedules I and J showed "disposable" income of \$4.20 or that Debtor was making voluntary payments of \$291.00 per month to her 401K retirement account and that Debtor must therefore be deemed to have admitted these allegations.² Thus, according to the United States Trustee, Debtor has at least \$295.20 available each month with which to repay her unsecured creditors.

On April 20, 2001, Debtor filed a Response to the U.S. Trustee's Motion for Judgment on the Pleadings. In her response, Debtor disclosed that on March 30, 2001 her employer eliminated her supervisor position. Debtor refused a lesser-paying position and is currently unemployed.³ However, she has apparently reconsidered the wisdom of refusing the lesser-paying position and has written her former employer to determine whether that position might still be available.

Discussion. The controlling case law in this Circuit is clear. The Court should grant a motion to dismiss for substantial abuse if the debtor has the ability to repay a substantial portion of her unsecured debt. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997) (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)).

On the face of the pleadings, the United States Trustee has demonstrated that Debtor has at least \$295.20 available each month

¹ Debtor has not served and filed an Amended Schedule D.

² Pursuant to LBR 9014-2(a), "[a]n objection or other response to a motion . . . shall comply substantially with F.Rs.Civ.P. 8 and 10." Pursuant to F.R.Civ.P. 8(d), "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading."

³ Debtor has not served and filed an Amended Schedule I.

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Total notices mailed: 4

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