

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BEVERLY JOAN WENNER
a/k/a Beverly J. Wenne

Case No. 93-10916 K

Debtor

This Court is persuaded by the decision rendered by Bankruptcy Judge Yacos, in *In re Keniston*, 85 B.R. 202 (Bankr. D.N.H. 1988), that a Chapter 7 Debtor's ability to repay her debts without significant hardship does not, without more, sustain dismissal of the case under 11 U.S.C. § 707(b) for "substantial abuse" of the provisions of Chapter 7. "More" is required.

This Court is aware of the criticism of the *Keniston* decision contained in *In re Herbst*, 95 B.R. 98 (W.D. Wis. 1988). However, *Herbst* does not stand for a contrary proposition. Rather, *Herbst* states that the ability of the debtor to repay is "the principal factor" to be considered under 11 U.S.C. § 707(b), and that the Court "must also consider all the facts and circumstances which may tend to aggravate or mitigate the abusiveness of the filing." *Id.* at 101. Ultimately, according to that Court, ability to repay may alone sustain a finding of abuse, but does not command it.

Unlike the lower court in the *Herbst* case, the present court did conduct a full evidentiary hearing upon the U.S. Trustee's § 707(b) motion. This Court finds nothing, other than an ability to repay, that even hints of an abusive filing.

Ms. Wenner has worked in a GM factory for 21 years and continues to work there. She is divorced. She rents, does not own, her home. She has no non-exempt assets. She has no non-dischargeable debts. Consequently, the only possible motivation she might have to file a Chapter 13 petition rather than a Chapter 7 petition would be a desire to repay her debts in whole or in part.

Her debts are consumer-type debts, incurred (for the most part) as a result of the loss of her furniture, appliances and clothing in a fire. Her monthly expenses are reasonable, including:

Rent	\$ 650/mo.
Utilities	225/mo. during the winter
Food for herself	200/mo.
Food and other support for her high-school aged daughter who is estranged from her but whom she assists "	200-250/mo.
Car insurance for daughter's car	79/mo.
Her own transportation	80/mo.

In sum, Ms. Wenner's own average monthly expenses, including taxes, are \$1725 and she also assists her daughter to the extent of \$100-\$300 per month.

Not counting overtime, her average monthly gross income is \$2055. But she also receives \$80/week child support, and during 1991 and 1992 earned substantial overtime pay. In 1992 alone,

gross overtime pay was \$11,000, or approximately \$600/mo. after taxes.

Thus, during periods of high overtime earnings, the Debtor has as much as \$900 per month excess over her own expenses that she could devote to repaying her creditors as well as supporting her daughter. (That is what led to the U.S. Trustee's motion.)

There is no indication that the Debtor sought relief here in bad faith. She has regularly made payments on her debts until now. There is no precipitating event. Her rocky relationship with her daughter is a source of stress, as was the fire and the dissolution of her marriage.

GM-UAW workers here have a prepaid legal services plan; hence, consultation with an attorney about one's legal and financial problems is not necessarily a landmark event for GM workers, and GM-UAW Legal Services places many of their clients in bankruptcy and does not counsel those with ability to repay to file under Chapter 13 if there is no other reason for them to file under 13 rather than 7.

Thus, the circumstances of Mrs. Wenner's filing and of her selection of Chapter 7 do not bespeak any ill motive or lack of good faith. Rather, it is a natural process among GM-UAW Legal Services' clients. If this case constitutes substantial abuse, it is only because she could pay her debts at least in part in a Chapter 13, and if she continues to work overtime she could repay

them in full in Chapter 13, and do so without significant hardship.

It is not necessary for this Court to determine whether that alone is sufficient to support a finding of substantive abuse. This Court concludes that showing is not sufficient to compel a finding of substantial abuse, and that being so held, the Court finds an insufficient showing to sustain the 11 U.S.C. § 707(b) motion. This motion is denied.

SO ORDERED.

Dated: Buffalo, New York
February 3, 1994



U.S.B.J.