U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
GLENDA K. EFFINGER,	§	CASE NO. 02-35969-SAF-7
D E B T O R.	§	
	§	
STATE OF OKLAHOMA,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 02-3429
	§	
GLENDA K. EFFINGER,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

On July 15, 2002, Glenda K. Effinger, the debtor, filed a petition for relief under Chapter 7 of the Bankruptcy Code. On October 11, 2002, the Oklahoma Employment Security Commission (OESC) filed this adversary proceeding requesting that the court declare that the debtor's indebtedness of $5,497.40 to OESC constitutes a nondischargeable debt under 11 U.S.C. § 523(a)(2)(A). Effinger denies that she made false representations or committed fraud with respect to the unemployment benefits she received from OESC. The court conducted a trial on August 1, 2003.

The determination of the discharge of a debt raises a core matter over which this court has jurisdiction to enter a final order or judgment. 28 U.S.C. §§ 157 (b)(2)(I) and 1334. This

memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rule 7052.

FACTS

Rose State College employed Effinger for the week ending December 18, 1999, through the week ending May 13, 2000, as an adjunct professor, except for the week ending January 1, 2000, when RemedyTemp Inc. employed Effinger. Pl.'s Exs. 5 & 6. While working for Rose State College and RemedyTemp Inc., Effinger also applied for and collected unemployment benefits from OESC. In order to receive these benefits, Effinger certified that an OESC claims taker explained the Benefits Rights Information to her and showed her the Benefits Rights Video presentation. Pl.'s Ex. 2. By signing the Benefits Rights Information form, Effinger demonstrated that she understood the instructions for reporting earnings, including those received for part-time work and that failure to do so would result in fraud on her part. According to "Information for Workers who are Unemployed" issued by the Oklahoma State Employment Service:

> [The worker] may draw some benefits for a work week if you work less than full time. Full time work is considered 32 or more hours per week ... **You must report ALL earnings**. You must continue to look for and be able to work full time. You must report your gross wages (wages before deductions) and not just 'take home pay.'

Pl.'s Ex. 1 at 8 (emphasis original). The exhibit further reads: "[y]ou must report **all** earnings even those less than $100. Fail-

ure to report all earnings will result in an overpayment and may result in a fraud disqualification." Pl.'s Ex. 1 at 8 (emphasis original).

Effinger also signed the Telephone Filing Authorization, which allowed her to file her weekly claims for unemployment insurance telephonically after setting up her own login to the system based on her own social security and pin number. Pl.'s Ex. 3 & 4.

During the weeks ending December 18, 1999, through May 13, 2000, Effinger worked nine part-time hours per reported week at Rose State College, save for two weeks (weeks ending March 11, 2000, and May 13, 2000) in which she worked four hours and fifty minutes per week. Pl.'s Ex. 5. On February 10, 2000, Effinger signed the "Unemployment Insurance Eligibility Review" certifying that she neither worked full nor part-time during the weeks she had claimed for benefits. Pl.'s Ex. 9. Those weeks included the weeks ending December 18, 1999, through February 5, 2000, for which Effinger did earn wages. Effinger submitted telephonic claim requests each week, stating that she did not perform work.

On July 15, 2000, OESC informed Effinger in an "Overpayment Inquiry/Maintenance" that during the weeks ending December 18, 1999; January 1, 2000; January 22, 2000, through March 11, 2000, and April 1, 2000, through May 13, 2000, she had withheld information regarding her employment and actual earnings,

resulting in a total fraud balance of $4,620. Pl.'s Ex. 10. With interest at the time of the bankruptcy petition, the claim totaled $5,497.80.

DISCUSSION

Section 523 of the Code sets forth the following exceptions to discharge:

> a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A). OESC must establish its claim of nondischargeability by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286 (1991); AT&T Universal Card Servs. v. Mercer (In re Mercer), 211 F.3d 214, 216-17 (5th Cir. 2000); Universal Bank, N.A. v. Kuntz (In re Kuntz), 249 B.R. 699, 703 (Bankr. N.D. Tex. 2000).

To establish false pretenses or a false representation, OESC must prove that Effinger: (1) made a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that was relied upon by the creditor; (4) who thereby suffered a loss. Mercer, 211 F.3d at 216-17; Kuntz, 249 B.R. at 703. To recover for actual fraud, OESC must establish that: (1) the debtor made representations; (2) at the time they were made the debtor knew

they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations. Kuntz at 703-04 (citing RecoverEdge, L.P. v. Pentecost, 44 F.3d 1284, 1292 (5th Cir. 1995)). The creditor must establish that it justifiably relied on the debtor's representations. Field v. Mans, 516 U.S. 59, 69-70 (1995); Mercer, 211 F.3d at 216-17.

At trial, Trish Baer, senior fraud investigator for the OESC/State of Oklahoma, testified that Effinger was told to report all of her earnings while drawing unemployment benefits and that non-compliance would constitute fraud. Baer testified that the "Information for Workers who are Unemployed" booklet and accompanying video was shown to Effinger. In addition, the phone system was explained to Effinger. The "Information for Workers who are Unemployed" booklet gives examples of fraud as "failure to properly report a job separation or earnings." It further explains penalties for fraud to include some or all of the following: "denial of unemployment benefits; repayment of the amount of benefits received as a direct result of fraud plus a penalty; criminal prosecution under federal or state law; and jail sentence." Pl.'s Ex. 1 at 11-12.

Baer testified that Effinger understood the OESC's reporting requirements and the resulting penalties for non-compliance. Effinger signed the "Benefits Rights Information" form; the "Telephone Filing Authorization" form; and the "Unemployment Insurance Eligibility Review" form. Pl.'s Exs. 2, 4 & 9. Baer testified that to use the phone system, Effinger would input her social security number and pin number. Giving those numbers to another person to use the system would constitute fraud. In addition, Baer stated that civil fraud could still exist despite the lack of a criminal referral by the fraud detection office.

Effinger did not present any evidence to the contrary. Effinger did not testify. Effinger's arguments to the court do not constitute evidence.[1] The court gave Effinger the opportunity to testify and she declined.

Effinger argued to the court (1) that OESC presented no evidence showing that she submitted false "IVR Answer Inquiry" claim requests through the OESC phone system and (2) that she did not commit fraud because OESC did not criminally prosecute her.

With respect to Effinger's first argument, the only person

[1] Effinger argued that she made less than $100 per week. If correct, she still made false statements. But, that argument is not even correct. Effinger asserted that she was paid $31.32 per hour and that this payment equaled less than $100 per week while she was working nine hours per week. Nine hours per week multiplied by a pay rate of $31.32 per hour equals payment of $281.88 per week, an amount above the allowed rate of $100 per week for part-time work.

who could have used OESC's phone system would have had possession of Effinger's pin number and/or social security number to obtain the pin number. If Effinger placed the telephonic claims, they were all false. She reported not working when she actually worked for Rose State College and Remedy Temp Inc. If Effinger had given someone else permission to use her pin number, that would have resulted in fraud as described by Baer's testimony. Effinger did not present any evidence demonstrating that someone else used her pin number to file claims without her consent. Moreover, Effinger signed the "Unemployment Insurance Eligibility Review" affirming that she was not working during the weeks she claimed benefits. Effinger knew that was false. The evidence OESC presented at trial establishes that Effinger did receive benefits during the weeks she certified she was not working, thus making her representations to OESC in the review form false. See Pl.'s Ex. 9.

Accordingly, OESC has proved that Effinger acted under false pretenses or made false representations. First, on the "Unemployment Insurance Eligibility Review" form Effinger made a knowing and fraudulent falsehood by circling "no" to questions regarding her work for Rose State College and RemedyTemp Inc. Each telephonic claim request for the subject weeks contained a knowing and fraudulent false statement. Second, those falsehoods

were describing past or current facts regarding Effinger's claims for benefits and her part-time work during the weeks she received benefits. Third, OESC, the creditor, relied upon those falsehoods in order to extend weekly unemployment insurance benefits to Effinger. Fourth, OESC suffered a loss as a result because it paid more unemployment benefits to Effinger than required.

Furthermore, for actual fraud, OESC has proved that Effinger made representations through her signature on several OESC documents and by showing her understanding of OESC requirements to claims takers. Second, as shown by exhibit 9, OESC has proved that at the time Effinger made the representations she knew they were false. On February 10, 2000, two months after Effinger had already been receiving benefits, she signed a form certifying that she was not working, knowing this was untrue--she had been receiving weekly employment wages from Rose State College or RemedyTemp Inc. Third, Effinger made these representations with the intent and purpose to deceive OESC in order to continue receiving claim benefits. Fourth, OESC relied on these representations in order to process Effinger's claims and pay her claim benefits. Lastly, OESC sustained a loss as a result of these representations because it paid Effinger more than the requisite amount of unemployment benefits.

Effinger's second argument that she did not commit fraud against OESC because it did not criminally prosecute her has no bearing on the court's instant decision. The State of Oklahoma has the discretion not to criminally prosecute unemployment insurance recipients for fraud. The "Information for Workers who are Unemployed" booklet reads: "[p]enalties for fraud include some or all of the following." Pl.'s Ex. 1 at 12. The subsequent listing of penalties, which includes criminal prosecution or jail sentence, does not require that OESC or the State of Oklahoma criminally prosecute a perpetrator of fraud in every instance, especially when the fraudulent amount totals approximately $5,000. Thus, the court rejects this argument.

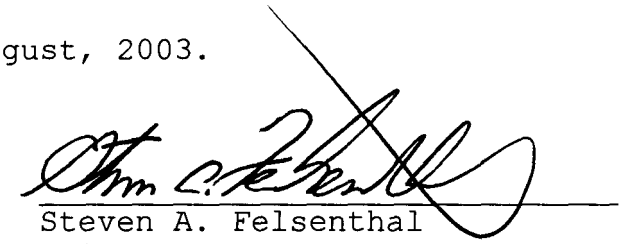
By unopposed evidence, OESC has proved that Effinger made false representations and committed actual fraud by providing false information to obtain benefits. OESC's claim of $5,497 is not discharged pursuant to 11 U.S.C. § 523(a)(2)(A).

OESC requests its attorney's fees. The Bankruptcy Code does not provide for an award of attorney's fees to a creditor for successfully prosecuting a § 523 complaint. OESC has not established that Oklahoma law includes attorney's fees in OESC's claim. Accordingly, the request for attorney's fees is denied.

Based on the foregoing,

IT IS ORDERED that under 11 U.S.C. § 523 (a)(2)(A) the debt of $5,497.80 to OESC is not discharged. OESC shall submit a proposed final judgment consistent with this order.

Signed this 14th day of August, 2003.



Steven A. Felsenthal
United States Bankruptcy Judge