

**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**

**Western Division**

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RICHARD KEITH McNAUGHTON and  
TERESA JEAN McNAUGHTON

Bankruptcy No. 93-50743XS

*Debtors.*

Chapter 7

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TERESA JEAN McNAUGHTON

Adversary No. 93-5177XS

*Plaintiff*

vs.

IOWA COLLEGE STUDENT AID  
COMMISSION and  
LOAN SERVICING CENTER

*Defendants.*

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**ORDER RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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The matter before the court is the motion for summary judgment filed by defendant Iowa College Student Aid Commission (COMMISSION). Telephonic hearing on the motion was held May 27, 1994. Donald Molstad appeared for plaintiff Teresa McNaughton, and James Wisby appeared for the Commission.

Debtor's complaint seeks discharge of a student loan on the ground that excepting the loan from discharge would cause her undue hardship. 11 U.S.C. § 523(a)(8)(B). Commission denied the allegation of undue hardship and counterclaimed seeking judgment for the balance due on the student loan. In her reply, debtor admitted the Commission's allegations of jurisdiction, venue and ownership of the claim. The balance of the counterclaim's allegations were denied.

Commission moved for summary judgment on April 7, 1994. By its attorney's affidavit, Commission shows that on November 24, 1993, it served a "Request for Admission of Facts and Genuineness of Documents" (hereafter "request") on debtor's counsel (Affidavit, docket no. 12). No response was served on defendant. There were 11 requests for admissions. Most dealt with the execution of promissory notes, their status as student loans, Commission's ownership of the claim and the balance due. Commission asked also that debtor admit the following statement:

Excepting the notes from discharge under 11 U.S.C. Section 523(a)(8) will not impose an undue hardship on the plaintiff Teresa Jean McNaughton and the plaintiff's dependents.

Request, Statement No. 9 (docket no. 12).

In its motion, Commission contends that because all of the matters which were the subject of its request were deemed admitted, all facts necessary to its recovery are conclusively established and debtor cannot succeed on her complaint seeking a hardship discharge of the debt. Debtor resisted the motion for summary judgment on May 6 (docket no. 18). She has filed an affidavit stating that she filled out her response to the request and placed it in a drawer, forgetting to mail it back to her attorney. She says that at that time she was suffering from depression and for unknown reasons, did not mail back the document. Also, she states that a medical condition limits her ability to work, and that, therefore, repayment of the loan would impose an undue hardship. Affidavit attached to Memorandum, docket no. 19.

In a memorandum filed on May 6, 1994, debtor's attorney states that plaintiff filed a (late) response to the request in which request number 9 was denied. He also states that debtor has filed an Application with the court to permit the late filing as timely. No such filings have been made, although it may be that late responses were served on counsel for the Commission.

A matter of which an admission is requested is deemed admitted unless an answer or objection is filed within 30 days after service of the request. Fed.R.Civ.P. 36(a). Debtor failed to file a timely answer or objection to Commission's request, and as yet, debtor has failed to file a formal request that the court allow as timely the untimely response that has now allegedly been "filed."

Although little has been properly done to correct debtor's failure to timely serve a response to Commission's request, an excuse has been offered for the original late response--debtor's depression. Although there is no evidence to indicate debtor's counsel was unable to assure his clients' timely response, the court considers the debtor's excuse as well as other factors in determining not to grant the motion for summary judgment.

The particular request at issue (number 9) goes to the heart of the case. It is more than fact which is merely relevant to the ultimate issue at trial. It is the ultimate issue--whether there would be undue hardship to the debtor if the debt is not excepted from discharge. Plaintiff alleged undue hardship as the basis of her complaint. To determine that there is no such hardship because of the failure to deny the request is the same as defaulting the plaintiff after she has already pled her claim for relief. Since plaintiff obviously believed there was undue hardship when she filed her complaint, it should be no surprise to defendant that this issue is disputed. Two functions of Rule 36 are to narrow the issues and to facilitate proof of the issues. Advisory Committee Note to 1970 Amendment to Rule 36. Commission's request does not do either. It asks plaintiff either to admit or to deny the ultimate issue which debtor places before the court. Admission would not facilitate proof, it would end the plaintiff's case; denial would not narrow the issues or facilitate proof. Moreover, Commission is not prejudiced by permitting late denial. Trial has not been set. Commission may still conduct discovery. The burden of proof on the issue of undue hardship is on the debtor. Permitting late denial does nothing more than preserve the merits of the debtor's case.

The motion for summary judgment will not be granted. The court will take up plaintiff's motion to permit late filing of her response when it is appropriately filed. It may be that upon consideration of that motion, the court will not permit late filing of responses to other of the requests. To the extent that debtor fails to file a motion to permit late filing, the Commission may refile its Motion for Summary Judgment.

## **ORDER**

IT IS ORDERED that the motion for summary judgment filed by the Iowa College Student Aid Commission is DENIED.

SO ORDERED ON THIS 1<sup>st</sup> DAY OF JUNE, 1994.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order by U. S. mail to: Donald Molstad, James Wisby and U. S. Trustee.