

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION**

**In re: Mark A. Carey and
Jana D. Carey**

Debtors.

Bankruptcy Case No. 02 B 75502

Chapter 13

**MEMORANDUM OPINION GRANTING THE TRUSTEE'S
MOTION TO MODIFY PLAN, IN PART**

This matter comes before the Court on the Motion to Modify Plan brought by the standing chapter 13 trustee, Lydia Meyer (the "Trustee"). The debtors, Mark and Jana Carey (the "Debtors"), are represented by William L. Balsley.

NATURE OF CASE

The Debtor's filed their chapter 13 bankruptcy petition, schedules and plan on November 27, 2002. The Trustee filed a motion to dismiss combined with an objection to confirmation on January 23, 2003. The Debtors filed Amended Schedules I and J on March 19, 2003. At the confirmation hearing, conducted on June 2, 2003, Mr. Carey presented testimony in support of the Debtors' proposed Chapter 13 Plan. Mr. Carey testified that although he received some compensation attributable to overtime, he had no indication that overtime work would be available. In addition, some compensation he received was attributable to reimbursement for training, which he did not expect to receive in the future. Further, he received a \$450 bonus, which he did not receive the previous year and did not expect to receive in that year. Therefore, the Debtors included only the amount of compensation earned during a regular 40 hour work week on Schedule I. This Court found that the compensation received for reimbursements due to training did not constitute disposable income. In addition, this Court found that

the overtime and bonus were not anticipated. Debtors are required to project their income in good faith and with their best efforts. Because the Debtors had done so, this Court found that the Debtors' proposed plan complied with § 1325(b). Therefore, an Order was entered confirming the plan over the Trustee's objection on June 13, 2003.¹

The Confirmation Order required the Debtors to file a copy of their tax returns with the Trustee on or before May 15th of each year. (Docket #21.)² The Debtors tendered a copy of their tax returns in compliance with the Confirmation Order to the Trustee. The Trustee filed this motion to modify plan on May 11, 2004.

This Court held an evidentiary hearing on August 27, 2004 at which time Mr. Carey testified as to the Debtors' income and expenses. He testified that his income had increased, and the Debtors submitted proposed amended Schedules I & J which indicate total monthly income of \$3,868.00 and total expenses of \$3,168.00. Mr. Carey further testified that although his wife had maintained the same part-time employment since confirmation, she was going to look for new employment due to a gradual decrease of assigned work hours. Two paycheck stubs dated July 23, 2004, and July 30, 2004, indicate that Mrs. Carey earned \$43.38 and \$39.81, respectively. (Debtors' Exhibits 1 and 2.) Thus, the current proposed amended schedules do not include any income derived from Mrs. Carey's employment. The only other significant post-confirmation change is an additional expense of \$78 for preschool. This expense was to commence in September, a few days after the confirmation hearing and was

¹The docket entry and order indicates that the Trustee withdrew her motion to dismiss and objection to confirmation. A corrective order will be issued if it is determined that the docket is incorrect.

²The Confirmation Order was originally docketed as number 11; due to the change from NIBS to CM/ECF the current docket number is 21.

thus not included on the proposed amended Schedule J.

DISCUSSION

Some courts have required a showing of a change in financial circumstances, some requiring that the change be both unanticipated and substantial, in order to modify a plan. *In re Witkowski*, 16 F.3d 739, 743 (7th Cir. 1994)(citing cases). However, the Seventh Circuit established in *Witkowski* that the clear and unambiguous language of section 1329 “negates any threshold change in circumstances requirement and clearly demonstrates that the doctrine of res judicata does not apply,” although courts are free to consider a change in circumstances in determining whether to modify a plan. *Id.* at 746. In *Witkowski*, the chapter 13 trustee sought to modify the plan in order to increase the percentage paid to unsecured creditors based upon the failure of some creditors to file proofs of claims. The Court further noted that “by the express terms of the statute, modifications are only allowed in three limited circumstances . . .” and only if §§ 1322(a), 1322(b), 1325(a) and 1323(c) are met. *Id.* at 745.

Section 1329 provides:

- (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –
- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
 - (2) extend or reduce the time for such payments; or
 - (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329. The Trustee can seek to modify the plan in this case only if doing so

would increase the amount of payments on claims of a particular class provided for by the plan, i.e. unsecured creditors. The Debtors' confirmed plan provides for 0% distribution to unsecured creditors. An increase in plan payments of \$360³ per month would most likely generate some distribution to unsecured creditors. This Court will assume that such is the case since the Debtors have not objected to the Trustee's motion upon that basis. The Trustee also apparently relies on language contained in the confirmation order which provides: "the confirmation herein shall not bar the trustee from seeking a modification of the plan if it appears that additional disposable income is available to fund this Chapter 13 Plan."⁴ Therefore, this Court finds that the Trustee is entitled to seek to modify the plan pursuant to § 1329(a)(1).

The Trustee seeks modification of the Debtors' plan both retrospectively and prospectively. The Trustee relies on the 2003 tax returns submitted by the Debtors, which indicate the Debtors' disposable income is greater than the amount indicated on Schedule I. Similarly, the current paycheck stub indicates increased income. The Debtors agree that their plan payments should be increased by \$300 to \$400 per month retroactively to when the Trustee filed her motion to modify plan, but not retroactively to the date of confirmation.

This Court will first address whether a retroactive modification is appropriate.

³The Debtors and the Trustee agree that since May of 2004 the plan payments should increase by \$438 per month, but that beginning in September 2004, \$78 of pre-school expenses should be deducted.

⁴While the issue is not before the Court at this time, this Court is not prepared to find that such language would override the requirement to establish grounds to modify a plan pursuant to § 1329. See *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 358 (9th Cir. 1994)(the Court found that a "Best Efforts Certification" implemented by the chapter 13 trustee could not "extinguish the [debtors'] statutory right to ask the bankruptcy court to disapprove a modification of the plan proposed by the Trustee.")

Section 1329(b)(1) provides that modification pursuant to § 1329(a) requires compliance with sections 1322(a), 1322(b), 1323(c) and 1325(a). This Court previously held that § 1329(a) modifications must also comply with § 1325(b), which includes the disposable income test. Section 1325(b)(1)(B) requires chapter 13 plans to provide for the payment of all “projected disposable income.” In the case of *In re Bass*, 267 B.R. 812, 819 (Bankr. S.D. Ohio 2001), the Court determined that the disposable income test “does not require debtors to commit all actual disposable income to obtain confirmation over a timely objection.” The Court explained that “on a case-by-case basis, the party objecting under § 1325(b) must at least provide some evidentiary support for the contention that a particular source of income can be projected at the time of confirmation.” *Id.* at 818-19 (citations omitted). Likewise, this Court finds that the language of § 1325(b)(1)(B) clearly requires debtors to devote all “projected disposable income,” not actual income.

As previously recognized by this Court and others, the efficient administration of chapter 13 cases requires debtors to be forthcoming and to cooperate with the chapter 13 trustee. 11 U.S.C. §§ 521(3) and (4). Part of a debtor’s duties includes accurately reflecting all projected disposable income on Schedule I, whether obtained as regular compensation or overtime. In addition, when debtors are required to submit income tax documents to the Trustee’s office, compliance is imperative. Such compliance includes tendering the documents in a timely fashion. This Court previously held that the Trustee could modify a plan pursuant to § 1329(a) retroactively to the date the motion to modify plan was filed. In that case, the debtors failed to submit tax returns in a timely fashion as required by the confirmation order and, in fact, failed to tender them until after the

Trustee filed her motion.

Conversely, the Debtors in this matter have performed their duties as required. They included their regular monthly income on their amended schedules. That income was found to comply with § 1325(b)(1)(B), and their plan was confirmed over the Trustee's objection. The Debtors subsequently tendered their tax returns in a timely fashion. The fact that the tax returns establish that the Debtors' average monthly income for the year 2003 exceeds the amount indicated on Schedule I does not necessitate a retroactive modification. Allowing such a modification based upon hindsight would alter the requirement of § 1325 that all "projected" disposable income be devoted to the plan. Just as the Ninth Circuit held in *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 358 (9th Cir. 1994), a requirement to devote actual disposable income at the time of confirmation would impose a more burdensome standard than § 1325 requires. Similarly, allowing a retroactive modification to require debtors to devote all actual disposable income would undo the original confirmed plan and would nullify the requirement to devote projected disposable income. Consequently, this Court finds that, absent a showing of a debtor's failure to report a significant increase in income or a change of employment, a plan may only be modified prospectively from the date of the hearing on the motion.

While the parties seem to agree to the amount of the increase of current monthly income, the Debtors argued at the hearing that only regular monthly income must be included on Schedule I. Because the Trustee's objection to confirmation was based upon overtime compensation disclosed on Mr. Carey's pay stubs and because this issue regularly comes before this Court, the necessity to include compensation derived

from overtime on Schedule I should be addressed at this time.

The Trustee asserts that the Debtors have not included all of their disposable income based upon their 2003 tax return and year-to-date income information contained on Mr. Carey's pay stub. Mr. Carey's check stubs, both at the time of confirmation and at the time of the hearing on the Trustee's motion to modify plan, contain some income derived from overtime. At the original confirmation hearing, Mr. Carey testified that a portion of the payments labeled as "overtime" on his pay stub included reimbursement for travel and food incurred during training. In addition, he also indicated that he had no indication how much overtime he would receive in the future.

The parties have not cited authority regarding the need to include overtime income, although the Debtors do argue that their schedules need only include regular, monthly income, which they define as 40 hours per week. This Court has found little authority addressing the issue of income derived from overtime. The Fifth Circuit Court in *In re Killough* found that "the potential for [the debtor] to work overtime in the future was not definite enough to follow [the cases where overtime was included as projected income]." 900 F.2d 61, 65 (5th Cir. 1990). The Court found that it was not clearly erroneous for the Bankruptcy Court to accept the debtor's testimony that overtime might not always be available to her, despite testimony concerning the regular availability of overtime, and that the overtime would "perhaps jeopardize her health." *Id.* at 65. Similarly, in an unpublished opinion, Judge Ninfo held that a chapter 7 debtor's overtime income would not be considered when determining whether the debtor had the ability to pay pursuant to § 523(a)(15). *In re Gallagher*, 1999 WL 33542930 (Bankr. W.D.N.Y. Sept. 13, 1999). The Court found that the debtor's projected income, which did not

include any overtime compensation, and a letter from his employer which stated that the debtor “was not scheduled to work overtime in the foreseeable future” established that the debtor’s current income did not include overtime compensation. *Id.* at *3.

However, the Court in *In re Smith*, 222 B.R. 846 (Bankr. N.D. Ind. 1998), held that overtime income could be reasonably expected based upon the debtor’s past earnings. The debtors included some overtime compensation on Schedule I, but the creditor objected based upon greater overtime compensation received in the past. In weighing the evidence, the Court found that the debtor’s testimony as to the variations in overtime income was credible. Thus, the Court confirmed the plan based upon the amount of overtime compensation the debtors listed on Schedule I.

This Court finds that overtime income must be included in Schedule I when it can be reasonably expected. Such a determination is a fact intensive one and must be undertaken on a case-by-case basis. While overtime income is typically neither guaranteed nor projected by employers, it can still constitute reasonably expected “projected disposable income.” Therefore, this Court finds that income derived from overtime is not *per se* excluded from “projected disposable income.”

It appears that the income figures utilized by both the Trustee and the Debtors were derived from the check stub submitted by the Trustee. (Exhibit E.) That exhibit includes compensation earned from overtime and also from “taxable non-cash award.” As previously noted, the Trustee and the Debtors seems to agree that the plan payments should increase by \$300 to \$400 per month, with the only uncertainty being the preschool expense. Therefore, this Court finds that the check stub presented at the hearing accurately reflects Mr. Carey’s projected monthly income. The motion to modify

the plan is granted as to future plan payments.

The Trustee also seeks to modify the plan to increase the base amount by \$4,024.00, the total amount the Debtors' received as an income tax refund. The Debtors agree that \$2,024.00 should be added to the base. Mr. Carey testified that the Debtors had financial difficulties and utilized the entire tax refund to cure a post-petition mortgage arrearage. The docket does indicate that a motion to modify stay was filed on February 6, 2004, and subsequently withdrawn on February 27, 2004. Currently, the Trustee's office generally allows debtors to retain \$1800 - \$2000 of any income tax refund. This Court has conducted numerous pre-trial conferences and entertained numerous arguments concerning the issue of whether income tax refunds are disposable income. The Trustee's policy aids her in administering the ever-increasing number of new and pending chapter 13 petitions. Just as the requirement to include all actual disposable income would necessitate periodic reporting and result in what Judge Lundin terms "an administrative nightmare," so would monitoring every debtor's tax return and refund, if received. 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 164.1 (3d ed. 2000 & Supp. 2004).

Other possible remedies may exist. For example, confirmation orders may provide that any tax refund received in excess of \$2,000.00 must be tendered to the Trustee. Such a requirement would shift the burden to the debtors to demonstrate any refund in excess of \$2,000.00 does not constitute disposable income. This Court, however, does not wish to alter the policy of the Trustee's office at this time. Therefore, this Court will split the proverbial baby and find that the amount of the tax refund in excess of \$1,900.00 constitutes disposable income. Thus, the plan must be modified to

add \$2,124.00 to the base of the plan.

Finally, Mr. Carey testified on the record that his wife intended to seek alternate employment shortly after the hearing. Any increase in Mrs. Carey's income should be included in any modification of the plan at this time. Because sufficient time has passed since the time of the hearing this Court will set this matter for hearing, at which time the Debtors must report any change in Mrs. Carey's income and employment status. At the hearing, the Debtors can also present and file amended schedules, which should include both Mrs. Carey's income, the preschool expense and additional expenses, if any, due to a change in Mrs. Carey's employment. At that time, the Court will enter an Order approving modification of the plan consistent with this Memorandum Opinion.

CONCLUSION

The Trustee may modify a plan prospectively from the date of the hearing on the motion, but may not retroactively modify a plan based upon actual income received. In addition, the Trustee may modify a plan to increase plan payments based upon income derived from overtime compensation and income tax refunds if those funds are determined to constitute disposable income. Because Mr. Carey's testimony indicated an imminent change in Mrs. Carey's income, this matter will be set for hearing to determine the appropriate amount by which the plan should be modified.

The foregoing constitutes findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 7052. A separate judgment will be entered

giving effect to the determinations reached herein.

Dated:

MANUEL BARBOSA
United States Bankruptcy Judge