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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re)	Case No. 05-31918-A-7
ANGELA ZYGAREWICZ,)	
)	
Debtor.)	
_____)	
ANGELA ZYGAREWICZ,)	Adv. No. 08-2723
)	
Plaintiff,)	
)	
vs.)	
)	
EDUCATIONAL CREDIT MANAGEMENT)	
CORPORATION,)	
)	
Defendant.)	
_____)	

MEMORANDUM

Angela Zygarewicz, a chapter 7 debtor and the plaintiff in this adversary proceeding, borrowed 16 government-guaranteed student loans totaling \$81,429. The loans have been assigned to

1 Educational Credit Management Corporation ("ECMC"). By September
2 2009, the accrual of interest on these student loans had caused
3 the debt to balloon to more than \$146,000. The debtor asks the
4 court to declare that these student loans were discharged in
5 bankruptcy.

6 The Bankruptcy Code provides financially distressed debtors
7 with a fresh start by discharging most of their pre-petition
8 debts. See Grogan v. Garner, 498 U.S. 279, 286-87 (1991).
9 However, under 11 U.S.C. § 523(a)(8), there is a presumption that
10 educational loans extended by or with the aid of a governmental
11 unit or nonprofit institution are nondischargeable unless the
12 debtor can demonstrate that their repayment would be an undue
13 hardship. See United States v. Wood, 925 F.2d 1580, 1583 (7th
14 Cir. 1991). This exception to a bankruptcy discharge ensures
15 that student loans, which are typically extended solely on the
16 basis of the student's future earnings potential, cannot be
17 discharged by recent graduates who then pocket all of the future
18 benefits derived from their education. See Andrews Univ. v.
19 Merchant (In re Merchant), 958 F.2d 738, 740 (6th Cir. 1992).

20 The debtor bears the burden of proving by a preponderance of
21 the evidence that she is entitled to a discharge of the student
22 loan. See Garner, 498 U.S. at 291; Rifino v. United States (In
23 re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001). That is, the
24 debtor must prove that repayment of student loans will cause an
25 undue hardship.

26 The Bankruptcy Code does not define "undue hardship."
27 Courts interpreting section 523(a)(8), however, have concluded
28 that undue hardship is something more than "garden-variety

1 hardship." United Student Aid Funds, Inc. v. Pena (In re Pena),
2 155 F.3d 1108, 1111 (9th Cir. 1998). Only cases involving "real
3 and substantial" hardship merit discharges. See Cota v. U.S.
4 Dept. of Educ. (In re Cota), 298 B.R. 408, 423 (Bankr. D. Ariz.
5 2003).

6 The Ninth Circuit has adopted a three-part test to guide
7 courts in their attempts to determine whether a debtor will
8 suffer an undue hardship is required to repay a student loan:

9 First, the debtor must establish "that she cannot
10 maintain, based on current income and expenses, a
11 'minimal' standard of living for herself and her
dependents if forced to repay the loans." . . .

12 Second, the debtor must show "that additional
13 circumstances exist indicating that this state of affairs
is likely to persist for a significant portion of the
repayment period of the student loans." . . .

14 The third prong requires "that the debtor has made good
15 faith efforts to repay the loans. . . ."

16 Pena, 155 F.3d at 1111 (citing Brunner v. N.Y. State Higher Educ.
17 Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987 (internal
18 citations omitted)).

19 Debtor must satisfy all three parts of the Brunner test
20 before her student loans can be discharged. See United Student
21 Aid Funds, Inc. v. Nascimento (In re Nascimento), 241 B.R. 440,
22 444 (9th Cir. BAP 1999); see also Strauss v. Student Loan Office-
23 Mercer Univ. (In re Strauss), 216 B.R. 638, 641 (Bankr. N.D. Cal.
24 1998). Failure to prove any of the three prongs will defeat a
25 debtor's case.

26 When this bankruptcy case was filed in September 2005, the
27 debtor was a single woman and had no dependents. She is 39 years
28 old.

1 Schedule I reported that the debtor was unemployed. The
2 debtor's responses to the Statement of Financial Affairs revealed
3 that she had received \$5,500 in income during 2005 prior to the
4 filing of the petition. Evidence at trial indicated that after
5 the petition was filed, the debtor found work and earned a total
6 of \$9,424 in 2005. In 2004 and 2003, she earned \$13,994 and
7 \$17,339, respectively.

8 Despite this modest income, the debtor did not immediately
9 file an adversary proceeding to determine the dischargeability of
10 her student loans. It was almost three years after the entry of
11 her chapter 7 discharge on January 3, 2006 that the debtor
12 reopened her chapter 7 case in order to pursue this adversary
13 proceeding.

14 In her complaint, the debtor admits that after she received
15 a discharge, she found part-time work with a church and later
16 took a full-time job as a speech therapist. During 2006, the
17 debtor earned \$20,009 and in 2007 she earned \$37,314. Hence,
18 while it is clear the debtor's income was very modest in the time
19 period immediately prior to her bankruptcy petition, her
20 financial situation improved during her bankruptcy case.

21 The court cannot conclude based on the evidence of the
22 debtor's financial circumstances up to the date of the discharge,
23 that she was unable to maintain a minimal standard of living if
24 she was required to repay her students loans.

25 However, in January 2007, the debtor was injured in an
26 automobile accident. Her injuries eventually halted the
27 financial progress she had been making and eventually prevented
28 her from working. She now subsists on social security disability

1 payments.

2 The circumstance creating the debtor's hardship, the
3 automobile accident, occurred after her chapter 7 petition was
4 filed, indeed, approximately one year after her discharge was
5 entered. The debtor is maintaining that this post-petition,
6 post-discharge circumstance warrants a declaration that her
7 student loans were discharged effective from the petition date.

8 When must the circumstances creating a debtor's hardship
9 arise: before the bankruptcy case is filed; after the case is
10 filed but prior to the entry of a discharge; or at anytime,
11 including after the entry of a discharge?

12 The court concludes that the circumstances causing a chapter
13 7 debtor's financial hardship must arise prior to the entry of
14 the discharge. If the circumstances causing a debtor's hardship
15 arise after the entry of a discharge, those circumstances cannot
16 form the basis of a determination that repayment of a student
17 loan will be an undue hardship.

18 The Ninth Circuit's recent decision in Educ. Credit Mgmt.
19 Corp. v. Coleman (In re Coleman), 560 F.3d 1000 (9th Cir. 2009),
20 is not to the contrary. The debtor in Coleman had filed a
21 chapter 13 petition. Even though a chapter 13 discharge is not
22 entered until the completion of plan payments, typically three to
23 five years after the filing of the petition, the debtor filed a
24 dischargeability action approximately one year after filing the
25 petition. The student lender maintained that the action was
26 premature; any action should be filed and prosecuted after
27 completion of plan payments when it was certain the debtor would
28 receive a discharge.

1 The Ninth Circuit disagreed with the student lender and held
2 that a chapter 13 debtor could “choose the ‘snapshot date’ for
3 determining undue hardship. . . .” Id. 560 F.3d at 1010
4 (internal quotation marks and citations omitted).

5 Indeed, there is nothing in the Bankruptcy Code requiring
6 that a complaint under section 523(a)(8) be filed at any
7 particular point in a bankruptcy case, whether it is filed under
8 chapter 7 or 13. Fed. R. Bankr. P. 4007(b) permits such
9 dischargeability complaints to be brought at any time, including
10 after the entry of a discharge and the closing of the bankruptcy
11 case.

12 This is in contrast with the requirement imposed on a
13 creditor filing a complaint under 11 U.S.C. § 523(a)(2), (a)(4),
14 or (a)(6). Such a complaint must be filed no later than 60 days
15 after the initial meeting of creditors. See 11 U.S.C. § 523(c);
16 Fed. R. Bankr. P. 4007(c).¹

17 While a debtor’s decision to file an action to determine the
18 dischargeability of a student loan is not temporally constrained,
19 this does not mean that a debtor’s financial hardship may arise
20 after a discharge has been entered.

21 Coleman deals with the ripeness of a dispute concerning the
22 dischargeability of a student loan. It is ripe for adjudication
23 at any point during the case. The Ninth Circuit did not
24

25 ¹In a chapter 13 case, the deadline for a creditor to file
26 an action under section 523(a)(6), to the extent incorporated by
27 11 U.S.C. § 1328(a)(4), is different than in a chapter 7. The
28 deadline must be set by the court and creditors must be given at
least 30 days’ notice of the deadline. See Fed. R. Bankr. P.
4007(d).

1 conclude, however, that a debtor could rely upon post-discharge
2 circumstances to establish undue hardship. In fact, the court in
3 Coleman made clear that the debtor could take a snapshot of the
4 hardship warranting a discharge of a student loan any time prior
5 to discharge.

6 Here, the debtor was injured in an automobile accident on
7 January 17, 2007, almost exactly one year after her January 3,
8 2006 chapter 7 discharge. Because the accident had no causal
9 link to the misfortune prompting the debtor to seek bankruptcy
10 relief in the first instance, the accident cannot be relied on to
11 justify the discharge of the student loans because repayment
12 would be an undue hardship.

13 To hold otherwise would mean that a bankruptcy discharge is
14 a perpetual license to discharge student loans based on events
15 that occur years after the bankruptcy discharge is granted.² If
16 a discharged debtor suffers later financial misfortune, that
17 debtor must consider seeking another discharge subject to the
18 limitations imposed by 11 U.S.C. §§ 727(a)(8) and 1328(f).³ In
19

20 ²This is more than a theoretical possibility. The
21 dischargeability of a student loan may be determined at any time
22 and in any court. Such a complaint is not subject to the
23 deadline set in Rule 4007(c) and section 523(c) does not require
24 the complaint to be filed in the bankruptcy court. As a result,
25 a chapter 7 debtor could receive a discharge, not pay on a
student loan after the conclusion of the bankruptcy case, be sued
in a nonbankruptcy forum anytime within the applicable statute of
limitations, and then ask the nonbankruptcy court to apply
section 523(a)(8).

26 ³In this instance, the debtor is now eligible for a
27 discharge in a chapter 13 case. Her chapter 7 petition was filed
28 on September 19, 2005. Section 1328(f)(1) bars a chapter 13
discharge when the debtor has received a chapter 7 discharge in a
case commenced in the prior four years. She would not be

1 the context of a second case, the debtor could then ask that the
2 student loan be declared dischargeable under section 523(a)(8).

3 This is not to say that post-discharge events are
4 irrelevant. The second and third prongs of the Pena test require
5 the court to consider whether the circumstances preventing a
6 debtor from repaying a student loan are likely to persist, and
7 whether the debtor has made good faith efforts to repay the
8 student loan. Post-discharge events are relevant to these
9 determinations because they require the court to look into the
10 debtor's financial future.

11 Unfortunately for the debtor, it is unnecessary to consider
12 the second and third prongs because she cannot satisfy the first
13 prong.

14 Counsel for the defendant shall lodge a judgment consistent
15 with this Memorandum.

16 Dated:

By the Court

17 S/
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Michael S. McManus, Judge
20 United States Bankruptcy Court
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28 _____
eligible for a chapter 7 discharge until September 19, 2013.