

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
KANDI MARIE PORTER,)	CASE NO. 03-33552 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
KANDI MARIE PORTER,)	
PLAINTIFF,)	
vs.)	PROC. NO. 03-3115
)	
SALLIE MAE SERVICING CORPORATION)	
and EDUCATIONAL CREDIT MANAGEMENT)	
CORPORATION,)	
DEFENDANTS.)	

Appearances:

John W. VanLaere, Esq., attorney for debtor, Jones Obenchain, LLP, 600 KeyBank Building, P.O. Box 4577, South Bend, Indiana 46634-4577; and

Stacia L. Yoon, Esq., attorney for defendant, Kopko, Genetos & Retson, LLP, 8585 Broadway, Suite 480, Merrillville, Indiana 46410.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 22, 2005.

Before the court is the Complaint to Determine Dischargeability pursuant to 11 U.S.C. § 523(a)(8), filed by the plaintiff Kandi Marie Porter (“debtor”) on August 22, 2003. The defendant Educational Credit Management Corporation (“ECMC”) answered the Complaint on October 9, 2003.¹ There were numerous extensions of time granted; in addition, the court granted in part and denied in part ECMC’s Motion in Limine. The court held a trial on the Complaint on September 8, 2004. It then took the Complaint under advisement.

¹ ECMC filed a Motion to Substitute Party and the court granted the motion, substituting ECMC for Sallie Mae Servicing Corporation. See R. 5, 7.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Kandi Marie Porter filed her voluntary chapter 7 bankruptcy petition on June 23, 2003. In her schedules she listed her government guaranteed educational loans in the amount of \$41,000. Two months later, the debtor filed a Complaint seeking to except her education loan debt from discharge under 11 U.S.C. § 523(a)(8) because it imposed an undue hardship on her and her dependents. ECMC filed an Answer denying all the essential allegations. As the parties prepared for trial, ECMC sought by a Motion in Limine to exclude certain evidence the debtor wanted to introduce at the hearing. After the court granted the Motion in part and denied it in part, the trial went forward on September 8, 2004.

The debtor Kandi Porter was the only witness. Initially she presented her personal history and circumstances. She testified that she is 36 years old and lives in LaPorte, Indiana, with her two children and her 9 year-old nephew. They now are in a house; however, in the past, she and her two daughters lived for a while in a single bedroom with her aunt and later with her mother. She takes care of her nephew, she stated, because her sister, an alcoholic, has disappeared. She is attempting to gain custody of him. However, she does not

anticipate receiving any aid or benefits if she does obtain custody of him. She told the court, as well, that her former husband is not the father of the children and that she receives no child support for them.

Ms. Porter is divorced. Her former husband is a violent man, she testified. He threatened her, stabbed her, ran her off the road, and tried to kill her. He also molested her children, she stated. In 2001, at Christmas, he locked her in their home when she said she wanted to leave him. He then stabbed her, she said, and her child called the police. Although he was arrested and removed from the house, he later broke into the house and sometimes followed her. She was so frightened of him that she did not leave home for four months, she said, except to go to her psychiatrist. She asked the police to check her house whenever she returned home. She could not sleep or eat or work well. She even tried to commit suicide twice. She stated that she knows he lives in the area. Her children are afraid to leave her, afraid to go to school. She herself cannot be around men, she testified, and her aversion to men affects her employment. For example, her employer, a former Marine, is gruff, and a salesman in her office gets too close to her; they both make her nervous, she said.

The debtor told the court of her medical condition. She was diagnosed with bipolar disorder three years ago, but she has suffered with the symptoms of the disease for twelve years. The disorder makes it difficult for her to keep a job. She described severe mood swings and panic attacks that affect her every day. She takes medication, both the samples her former psychiatrist gave her and what she can purchase through Medicaid and the health insurance she has at work. She testified that her medication costs \$300 a month, and she cannot afford it. It does not get rid of her problems, she said. She has been hospitalized twice after suicide attempts. In addition, she needs knee replacement surgery on both knees. She suffers severe pain and cannot walk or climb stairs. She also has back pain and migraines as the result of a car accident: When she has a migraine attack, her vision is blurred and she cannot tolerate noise or light. The accident also left her with back problems, and as a result she cannot sit for any length of time. She goes to a chiropractor for relief.

Ms. Porter then testified about her education and employment. She graduated from high school in 1986. She began her college career at Purdue North Central University that fall and attended classes, off and

on, from 1986 until she received a bachelor's degree in accounting in 1999. She obtained student loans from Sallie Mae and from Purdue for her university education. After she graduated in 1999, Ms. Porter's first job was in Michigan City; however, the business closed at the end of that year. Her salary started at \$8 an hour and increased to \$13 an hour. By the end of 1999, she was married, she testified, and her husband insisted that she not work. However, once they were separated she again went to work. She has been employed at Kohl's, in the school system as a substitute teacher, and twice at Kroger's. She presently works at Weiss Pre-Stain in the sales and marketing department. She believed that substitute teaching was the best job she had, because she could choose not to work on the days that she did not feel well. It was not a full-time job. However, she was not licensed to be a teacher, she said; her degree was in accounting. She stated that she sends out at least twenty resumes each week, to CPAs and manufacturers, to find an accounting job in this geographic area.

The debtor testified she was tied to this area, in part because her 1991 van is too old to take her and her family far, and in part because here she has her family to help her out with her younger daughter, who has asthma attacks, and her older daughter, who has bipolar syndrome. She stated that the older daughter is violent; she has punched her mother and has choked her younger sister. According to Ms. Porter, the older daughter has never gotten over being molested by her former husband. The debtor testified, however, that her family will not be responsible for her older daughter in Ms. Porter's absence. When her older daughter does not want to go to school, sometimes the debtor must drag her daughter out of the van and into the school. As a result, Ms. Porter occasionally misses days of work. However, her mother sometimes helps by taking the children to school, she said.

Ms. Porter stated that her husband did not allow her to work after she was married in 1999; she did not return to work until he was removed from house at the end of 2001. However, she was always employed except when her husband forbade her to work. She said she had never been fired because of her medical condition, her husband's threats, or her children's problems.

The debtor then presented to the court her present financial circumstances. She stated that her current monthly income is \$1,600 and that she receives government assistance, \$200 a month, in food stamps. She was told that she could get \$600 a month in social security disability benefits; however, she realized that those benefits would cover little more than her rent, \$550. So she works, she testified, to earn more money than social security would bring. Nevertheless, she has missed work often and may lose her job as a result. She testified that she has no bank accounts, no jewelry, and no assets. In addition, her van has no value and all her furniture is used. When she received a \$3,983 tax refund in 2002 and a \$5,430 refund in 2003, she used the refunds to fix her van and to buy a couch, mattresses, table, and chairs. She explained that her former husband had destroyed her furniture, clothes, tax records and documents, leaving her with nothing.

Ms. Porter testified that her monthly expenses include rent (\$550), gas and electricity (\$100), and telephone (\$75). She pays \$90 for car insurance and \$20-\$30 for car repairs. She spends \$50-60 a month on clothes for her children and \$80 for laundry and household expenses. She stated that she needs a cell phone when she is out and that the children need the internet to use for school. She spends about \$75 a week on groceries and \$20 for internet service. She testified that she filed bankruptcy because she could not pay her bills. Her former husband was not putting money in the bank account and therefore her checks to pay those bills, most of which were in her name, bounced. She testified that she had no choice but to file bankruptcy.

At the end of her testimony, the debtor focused on her student loans. She told the court that she had attempted to begin paying off those loans. She paid the minimal amount at Purdue whenever she had a job, she said. When she contacted Sallie Mae, however, she was told that she qualified for a deferment. In addition, she was told that her income was never high enough to move her out of the “deferment” status, and she has been on deferment status since graduation. On cross examination, however, she admitted that she made no actual attempt to pay Sallie Mae. She stated that she only telephoned the loan office, nothing more. She understood that her minimum payment for the student loans is \$74.19 and that her payments could be as low as \$50 if she consolidated the loans. Following closing arguments, the court took the Complaint under advisement.

Discussion

In general, when a chapter 13 debtor completes her bankruptcy plan, her dischargeable debts are discharged. *See* 11 U.S.C. § 1328(a). However, under 11 U.S.C. § 523(a)(8), student loan debts are not dischargeable unless the debtor can show that a required payment of those debts would impose an undue hardship on the debtor and her dependents. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 1912, 158 L.Ed.2d 764 (2004) (“Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.”); *In re Hanson*, 397 F.3d 482, 484 (7th Cir. 2005) (“Student loan debts are presumptively nondischargeable”). Section 523(a)(8) states:

§ 523(a) A discharge . . . does not discharge an individual debtor from any debt —

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor’s dependents.

In this adversary proceeding, the debtor asserts that her student loan debts to the defendant should be discharged under § 523(a)(8) because they create an undue hardship on her and her children. The term “undue hardship” is not defined in the Bankruptcy Code. The Seventh Circuit Court of Appeals, adopting the Second Circuit’s three-part test, requires a debtor to demonstrate “undue hardship” by showing:

- (1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for [herself] and [her] dependents if forced to repay the loans;
- (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) that the debtor has made good faith efforts to repay the loans.

In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (quoting *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curiam)); *see O’Hearn v. ECMC (In re O’Hearn)*, 339 F.3d 559, 563-64 (7th Cir. 2003) (explaining and using *Roberson* test in § 523(a)(8) analysis). The appellate court places the burden on the debtor to establish all three of the *Roberson* elements. *See O’Hearn*, 339 F.3d at 564.

The first element requires an examination of “the debtor’s current financial condition to see if payment of the loans would cause his standard of living to fall below that minimally necessary.” *Roberson*, 999 F.2d at 1135. The debtor contended that she successfully demonstrated that her present standard of living was minimal and that she would not be able to maintain even that standard for herself and her children if she was required to repay the loans. ECMC, however, asserted that the debtor had a monthly gross income of more than \$1,900 a month, which is \$600 more than her expenditures. In addition, the debtor received \$200 a month in food stamps and large annual tax refunds – \$5,400 last year. By ECMC’s calculation, the debtor’s gross monthly income is around \$2,500. In addition, ECMC pointed out, the debtor could reduce her expenses: Her cell phone, dining-out expenses, internet and cable television are luxuries, it contended. Moreover, it pointed out, the debtor’s care of her nephew, while commendable, is a voluntary obligation that should not be considered in a repayment plan. Because she discharged other debts in her chapter 7 bankruptcy, ECMC insisted that the debtor could make the minimum payments for her student loan debt.

The court examined the record before it to determine the debtor’s standard of living, based upon her actual living expenses and her income. It found that the debtor’s total combined monthly income was listed on Schedule I as \$818.97.² At trial, however, the debtor testified that her monthly income was about \$1,600 (specifically, that she was paid \$883.39 every two weeks), and that she also received \$200 a month in food stamps. The record reflected different expenditure amounts, as well. On Schedule J, the debtor listed total monthly expenses of \$880.00. At trial, however, she listed approximately \$1,305.00 in expenses.³

² The debtor reported, on Schedule I, gross monthly wages of \$1,213.33 and a net monthly take-home income of \$670.97. The debtor also reported receiving \$11.00 for AFDC and \$137.00 in food stamps. Her total monthly take-home income was \$818.97.

³ The court compared the expense figures listed on Schedule J and those given by the debtor at trial:

<u>Expenditure</u>	<u>Sched. J</u>	<u>Testimony</u>
Rent or mortgage	\$ 250.00	\$ 550.00
Food	250.00	300.00
Clothing	60.00	60.00

(continued...)

The court found a considerable disparity between the figures presented in Schedules I and J and those presented by the debtor at trial, fourteen months after the schedules were filed. However, the undue hardship determination is to be made based on the consideration of the debtor's standard of living and her financial circumstances at the time of trial. *See Pollard v. Superior Cmty. Credit Union & ECMC (In re Pollard)*, 306 B.R. 637, 652 (Bankr. D. Minn. 2004); *cf. O'Hearn*, 339 F.3d at 565 (evaluating debtor's financial circumstances on the basis of his income and expenses at the time of the hearing); *Ekenasi v. Education Resources Inst. (In re Ekenasi)*, 325 F.3d 541, 544 (4th Cir. 2003) (comparing the debtor's income at the bankruptcy filing and at trial in determining whether a discharge of student loan debts was warranted). The evidence at the hearing suggested that the debtor had obtained her job with Weiss Pre-Stain after filing her bankruptcy schedules and now earned a better salary. Moreover, after observing the debtor's demeanor and hearing her testimony, the court found her to be sincere and credible.

Based on her testimony, the court finds that the debtor at the time of the trial brought home approximately \$1,800 and spent less than \$1,400 each month. The court recognizes that the debtor has led a difficult life, that she owns virtually no property of any value, and that she needs knee replacement surgery and medication for her migraine headaches and back pain. It also finds no evidence of an extravagant lifestyle. Although ECMC listed some of her expenditures as luxuries, the court believes that a cell phone and internet access may no longer be considered excessive expenses in a household with school-age children. It does not believe that her monthly expenses are unreasonable. Nevertheless, the court determines that, if she is required

³(...continued)

Laundry, cleaning	60.00	80.00
Medical expenses	45.00	not given
Recreation, etc.	25.00	
Auto insurance	95.00	90.00
Auto repair	95.00	30.00
Gas, electricity		100.00
Internet hook-up		20.00
Telephone		75.00
Cell phone		<u>not given</u>
TOTALS:	<u>\$880.00</u>	\$1,305.00

to repay the student loan debt in modest, affordable increments, she still will be able to maintain at least a minimal standard of living for herself and her dependents, based on her current income and expenses. In fact, under the new federal options set forth under the William D. Ford Federal Direct Loan Program, a debtor can consolidate her loans and establish a repayment plan based on her income. See 34 C.F.R. § 685.200 ff.; *Archibald v. United Student Aid Funds*, 280 B.R. 222, 228-29 (Bankr. S.D. Ind. 2002). According to ECMC, this debtor would qualify for such a program and would pay about \$50 a month. The court determines, therefore, that the debtor failed to establish that payment of the student loans would cause her standard of living to fall below a level minimally necessary.

The court does not need to address the second or third elements of the undue hardship test once it finds that the debtor was unsuccessful in proving the first factor. See *O'Hearn*, 339 F.3d at 564 (concluding that, when a debtor fails on any one element, “the test has not been met and the court need not continue with the inquiry”) (quoting *Goulet v. ECMC*, 284 F.3d 773, 777 (7th Cir. 2002)). It is important, nevertheless, that the court make a critical finding of fact concerning the final prong of the test, the debtor’s repayment record. The debtor testified that she has made no payments to reduce her student loan debts. She telephoned the loan office and was placed on deferment status; she did not indicate that she ever considered any of the repayment options available. Accordingly, the court determines that she has not made a good faith effort to repay the loans and thus has not met her burden of establishing the third element of the *Roberson* test.

Because the debtor focused on her continuing medical difficulties, and in particular bipolar syndrome, in explaining her undue hardship, the court will address the second prong briefly as well. That element of the *Roberson* inquiry “centers on whether circumstances indicate that [the debtor’s] financial situation is likely to persist for a significant portion of the repayment period.” *O'Hearn*, 339 F.3d at 566. The debtor claimed that her present circumstances, coping with bipolar disorder and numerous other medical complications, would continue without change and therefore would limit her ability to work to repay the loans. She relied on *Green v. Sallie Mae Servicing Corp. (In re Green)*, 238 B.R. 727 (Bankr. N.D. Ohio 1999), in which the student loan

debt of a debtor diagnosed with bipolar disorder was found dischargeable. ECMC objected to that characterization of the debtor's present and future state of affairs. It commented that the debtor was an exceptional woman, one who kept her jobs, despite her ex-husband's abuse and the medical conditions from which she suffered. It noted that her jobs have gotten progressively better and that, according to her testimony, she never lost a job as a result of her medical difficulties. In addition, it pointed out, she took on more responsibility with her care of her nephew. ECMC concluded that there are no exceptional circumstances to hinder her repayment of the debt and that her student loans should not be discharged in her bankruptcy.

After hearing the debtor's testimony at trial, the court was of the opinion that she was remarkably successful in spite of the difficulties of her circumstances. It notes that, in her first job after graduation from college, she moved from \$8 to \$13 an hour in a short time. In her present job, she is earning almost \$23,000 (\$883.39 every two weeks) and her income is greater than her expenses. The court now finds that the debtor has failed to demonstrate the "certainty of hopelessness" required by the Seventh Circuit in *Goulet*, 284 F.3d at 778, and *Roberson*, 999 F.2d at 1136. Rather than presenting a picture of hopelessness, she has shown strength and accomplishment: Despite the adversities of bipolar disorder, migraines, and back and knee pain; despite the threats from her violent former husband; and despite the care she has needed to give her children (one with asthma, one with bipolar disorder), she has maintained her employment and has improved her standard of living.⁴ See *Pobiner v. ECMC (In re Pobiner)*, 309 B.R. 405, 414-45 (Bankr. E.D.N.Y. 2004) (finding that a debtor suffering from attention deficit hyperactivity disorder, having graduated from law school, demonstrated a continued ability to function and to improve his income and failed to demonstrate an inability to work and to earn money). In many cases of debtors who suffer from mental disorders such as bipolar or manic-depressive disorder, when the courts find the debtors unable to earn any meaningful amount of income, they have granted

⁴ The court notes that the debtor testified that her bipolar disorder causes severe mood swings, from happy to sad, angry, or suicidal. However, her earlier testimony referred to two attempted suicides after her husband had locked her in the house and was arrested; she did not relate them to her medical condition. See Transcript of Proceedings at 10. In addition, she described the effect of her mood swings on her children and on people in general, *see id.* at 18-19, but did not emphasize the impact of bipolar disorder on her ability to work.

an undue hardship discharge of their student loan debts. *See, e.g., In re Green*, 238 B.R. at 736; *Doherty v. United Student Aid Funds, Inc. (In re Doherty)*, 219 B.R. 665, 671 (Bankr. W.D.N.Y. 1998). In Ms. Porter's case, however, the debtor has managed, in spite of her medical difficulties, to earn a college degree and to put to use marketable job skills. *See Stupka v. Great Lakes Ed. (In re Stupka)*, 302 B.R. 236, 245 (Bankr. N.D. Ohio 2003) (finding that the debtor obtained a financial benefit from her student loans, despite her bipolar disorder; denying discharge because there was not a good faith effort to repay). Even though she has not found employment as an accountant, she has been successful in jobs in other areas of expertise. *See ECMC v. Stanley*, 300 B.R. 813, 820 (N.D. Fla. 2003) (finding that the debtor, with an abusive former husband and post-traumatic stress disorder, could make the required student loan payments while maintaining at least a minimal standard of living; reversing bankruptcy court's discharge of her debt).

In the view of this court, the debtor has obtained substantial benefits from an education funded by taxpayer dollars. She now "must accept the consequences of the decision to borrow," *see Roberson*, 999 F.2d at 1137, and must not dismiss her obligation to repay her student loans now "merely because repayment of the borrowed funds would require some major personal and financial sacrifices." *In re O'Hearn*, 339 F. 3d at 564 (quoting *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 305-06 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996)). "This is, at bottom, a financial issue, and [this debtor], like many other students to whom Congress has denied a discharge, can pay this debt while maintaining at least a minimal standard of living." *Stanley*, 300 B.R. at 820. The debtor has demonstrated that her bipolar disorder and other medical problems have not impaired her ability to work and, although her financial situation is hardly encouraging, it is not dire. *See id.* at 819. The court finds that the debtor's fulfillment of her financial commitment to repay her student loan debt, if modest payments are established through an appropriate repayment plan, would not create an undue hardship on her and her dependents. *See, e.g., O'Hearn*, 339 F.3d at 566 (noting that "it is not uncommon for individuals to take jobs not to their liking in order to pay off their student loans"); *see also In re Oyler*, 397 F.3d 382, 386 (6th Cir. 2005) (concluding that the "Bankruptcy Court erred by not considering that [the debtor's]

decision not to maximize his earnings, though commendable, was voluntarily made after he also voluntarily incurred the debt that he now wishes to discharge”); *Stanley*, 300 B.R. at 818-19 (discussing the Income Contingent Repayment Plan in light of the debtor’s circumstances).

The court concludes that the debtor was unsuccessful in demonstrating each of the three prongs of the *Roberson/Brunner* undue hardship test under § 523(a)(8). She therefore failed to demonstrate that the repayment of her student loans would create an undue hardship on herself and her dependents. For that reason, the court denies the debtor’s Complaint seeking a discharge of her student loan debt pursuant to § 523(a)(8).

Conclusion

For the reasons set forth above, the court denies the Complaint to Determine Dischargeability pursuant to 11 U.S.C. § 523(a)(8), filed by the plaintiff debtor Kandi Marie Porter against the defendant Educational Credit Management Corporation.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT