UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

PATRICK JOHN PIERI, No. 03-11360

Debtor(s).
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PATRICK JOHN PIERI,

Plaintiff(s),

v. A.P. No. 03-1153

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,

Defendant(s).
_____/

Memorandum of Decision After Trial

Chapter 7 debtor and plaintiff Patrick Pieri is a healthy, intelligent, educated 42-year-old man with no dependents. In this adversary proceeding, he seeks to discharge his student loans - alleged to be about $58,000.00 by defendant Educational Credit Management Corporation - on the grounds of undue hardship pursuant to § 523(a)(8) of the Bankruptcy Code. Finding no hard ship at all, the court will not grant his request.

In deciding this case, the court must struggle to apply a very vague and ambiguous definition of "undue hardship": the *Brunner* test made applicable to courts in this circuit by *In re Pena*, 155 F.3d

1108, 1111 (9th Cir. 1998). Under that test, "undue hardship" exists if the debtor makes a three-pronged showing: that the debtor cannot maintain a minimal standard of living if forced to repay the loans, that additional circumstances make this state of affairs likely to persist for a significant portion of the repayment period, and that the debtor has made a good faith effort to repay the loans.

Unfortunately, the *Brunner* test affords a trial court little real guidance. Application of the first two prongs of the test has led to results ranging from the liberal (*In re Cheesman*, 25 F.3d 356 (6th Cir. 1994); *In re Patterson*, 251 B.R. 866 (Bankr.N.D.Cal. 2000)) to the compassionate (*In re Pena*, supra) to the strict (*In re Nascimento*, 241 B.R. 440 (9th Cir. BAP 1999)) to the draconian (*In re Brightful*, 267 F.3d 324 (3rd Cir. 2001)); they justify an argument that mere inability to pay constitutes hardship as well as an argument that extreme hardship is not enough.[1] Worse, the third "good faith" prong of the test is a piece of bad judicial legislation created out of whole cloth which requires the court, under the rubric of hardship, to listen to testimony which is entirely unrelated to hardship and can best be described as settlement negotiations.

Not surprisingly, Pieri urges the court to take the extreme liberal interpretation of the *Brunner* test: that inability to pay the debt now or in the foreseeable future is *ipso facto* undue hardship without showing anything else. This argument fails because mere inability to pay is not undue hardship and because Pieri can afford to pay his student loans even under the reading of *Brunner* he urges.

Pieri attempts to make himself eligible for student loan discharge by writing the two words "additional circumstances" out of the second prong of the test. In his interpretation of the law, undue hardship exists any time the debtor cannot afford to pay the loans now or in the foreseeable future. This is not a proper interpretation of the law. In addition to mere inability to pay, there must be some additional circumstance, such as serious illness, psychiatric problems, disability of a dependant, or *something* which makes the debtor's circumstances more compelling than those of an ordinary person in

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[1]Most recent cases, including several unpublished appellate decisions in this circuit, apply the Brunner test harshly to justify denial of discharge, even though the Ninth Circuit used it in *Pena* to justify discharge under less compelling circumstances.

debt. *In re Burrane*, 287 B.R. 490, 497 (9th Cir. BAP 2002); *In re Nascimento*, 241 B.R. at 445 (In *Pena*, for example, one of the debtors had a serious, ongoing mental disability). A debtor who is intelligent, healthy, possesses useful skills, and has no extraordinary expenses cannot establish undue hardship merely by showing inability to pay. *In re Brightful*, 267 F.3d 324, 330 (3rd Cir. 2001).

The evidence in this case established that Pieri, who earned a university degree and has had positions of responsibility in the business world. While he has had periods of unemployment or lesser employment - he is now a retail clerk making $350.00 per week - there is no reason why he could not land a good career job tomorrow. He has made up to $38,000.00 per year in the past, and the chances are good he will earn more than that in the foreseeable future. He has not demonstrated any hardship at all, let alone undue hardship. All he has shown is that he can't afford to pay too much on his student loans right now. Under any test, including the one this court would adopt if it were free to make up its own, Pieri will suffer no undue hardship if he has to pay his student loans.[2]

Pieri has asked the court for a determination of the amount he now owes - he has convinced himself that this is only a few thousand dollars - but the court sees no reason to get into this dispute. Since the court finds no undue hardship, whatever Pieri owes is nondischargeable. Accordingly, the court will abstain from adjudicating the exact amount owed.

Pieri also argues, citing *Appling V. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769 (9th Cir. 2003), that this court is bound by principles of issue preclusion to adopt the same reading of the Brunner test that it did in *In re Patterson*, supra. However, more recent appellate cases have convinced the court that its decision in that case was too lenient; the court's proper role is to apply the law as it currently understands it, not as it once held in another case.

The court is also not swayed by Pieri's argument that defendant lost on the issue now before the

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[2]For what it is worth, the court believes that the test for undue hardship should be that some compelling circumstances not common to debtors in general will not permit the debtor to maintain a minimal standard of living if forced to repay the loans, and that this state of affairs is likely to persist for the foreseeable future. See *In re Patterson*, 251 B.R. at 868.

court in *Educational Credit Management Corp. v. Polleys*, --- F.3d ----, 2004 WL 206322 (10th Cir. 2004), and is therefore estopped from arguing differently here. The debtor in that case established psychological problems; dicta that such findings were not necessary to a determination of undue hardship does not mean that every trial court across the country must now discharge student loans by showing nothing more than inability to pay.

For the foregoing reasons, the court will enter a judgment that Pieri's student loans are not dischargeable. Defendant shall recover its costs of suit.

This memorandum constitutes the court's findings and conclusions pursuant to FRCP 52(a) and FRBP 7052. Counsel for defendant shall submit an appropriate form of judgment forthwith, which shall reflect that the court abstains from a determination of the amount Pieri owes.

Dated: February 24, 2004

Alan Jaroslovsky
U.S. Bankruptcy Judge