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**UNITED STATES BANKRUPTCY COURT
THE DISTRICT OF ARIZONA**

In Re)
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PAULA K. ANTHONY,)
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 Debtor.)
)
_____)
)
PAULA K. ANTHONY,)
)
 Plaintiff,)
)
v.)
)
AMERICAN EDUCATION SERVICES)
et al,)
)
 Defendants.)
)
_____)

Chapter 7 Proceedings

Case No. 2:09-bk-25857

Adv. No. 2:09-ap-1414

**UNDER ADVISEMENT DECISION
RE DISCHARGEABILITY OF
STUDENT LOANS**

I. Introduction and Background

In 1981, the Debtor enrolled at the University of Pennsylvania Indiana to pursue a degree in transportation management, but two years later transferred to University of Alabama to escape the cold. Faced with the need to support her family financially, Debtor worked full time while taking classes. Her workload ultimately forced her to withdraw from Alabama in 1989, thirteen credits shy of a diploma. The student loans she obtained to attend each university now total \$27,803.38.

Since then, Debtor has used her education pursuing a career focused on the transportation industry. She established several freight brokerage businesses and worked as a truck driver for many years. More recently, the Debtor worked as an administrative assistant but

1 lost her position due to economic conditions in 2008 and has since been unable to find full time
2 work, ultimately filing for bankruptcy in 2009.

3 Debtor now fears that if forced to repay her student loans, her limited income will not
4 suffice to make ends meet. Citing economic conditions in the state of Arizona and difficulty
5 obtaining employment at 59 years of age, Debtor seeks to discharge her debt. Education Credit
6 Management Corporation (“ECMC”) objects to a discharge, contending that an Income Based
7 Repayment (“IBR”) option is available to debtor under the Ford program which will reduce
8 Debtor’s payment to a level she can afford. The Court held a hearing to determine if undue
9 hardship exists and concluded a discharge is unwarranted because, under the IBR program,
10 Debtor’s payments can be as low as \$0.00 which does not present an undue hardship.

11 **II. Facts**

12 The Debtor testified that her financial situation is dire and that she has done all she can
13 to cut her expenses by giving up her car, driving a vehicle her son pays for, subscribing to basic
14 cell phone and internet plans to facilitate job searches, and shopping for essentials at her church
15 store. Though her monthly expenses are only \$1019, no income is left at the end of each month.
16 Further, the duration of Debtor’s unemployment benefits has been reduced from 26 to 15 weeks,
17 and once expired, she will have no income.¹ As a result, Debtor insists she is wholly unable to
18 support even a modest loan payment.

19 Debtor contends that her current financial hardship is likely to continue for some time.
20 She testified that efforts to find a job prove fruitless; she searches for jobs four hours each day
21 and attempts to book freight through her personal business to no avail. Further, Debtor
22 submitted articles from local newspapers and the US Department of Labor, all predicting
23 sustained unemployment in Arizona. Debtor did earn over \$5000 in 2009 through seasonal
24 employment at H&R Block, but will not be asked to return in 2010. Debtor testified she is
25 ineligible for many jobs because she did not complete her degree, and due to a \$2500

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28 ¹ During the hearing the Debtor testified that her benefits had already terminated but that she had applied for a
renewal.

1 outstanding debt, the University of Alabama will not release her transcript so that she may
2 complete her education.²

3 Despite the hardships she faces, Debtor contends that she has made good faith efforts to
4 repay her loans when she has been able. She testifies that over the years she has paid over
5 \$4,000 toward her loans but that now and in the near future, payments will likely be impossible
6 given her unemployment and the economic condition in Arizona.

7 ECMC disputes that the Debtor has cut expenses to a basic level. During cross
8 examination the Debtor admitted that each month she spends of \$97 on a Blackberry, \$57 on
9 satellite television, and \$78 on home phone and internet service for a total monthly expense of
10 \$232.

11 ECMC further challenges Debtor's testimony that she has diligently searched for jobs.
12 Through requests for production Debtor was asked to provide evidence of her current
13 employment search and only produced material that was over six months old.

14 Finally ECMC questions whether the Debtor has attempted to repay the debt. During
15 cross examination, Debtor admitted that in 2007 she earned close to fifty thousand dollars, but
16 repaid only \$591 of her student loans. ECMC also disputes that Debtor has made an effort to
17 participate in the Ford program. ECMC introduced letters sent to Debtor that explain in detail
18 the relief available under the Ford repayment program, specifically that Debtor's payment could
19 be as low as \$0.00.

20 At the hearing, the Court requested specific information from ECMC's counsel as to the
21 availability and specifics of the Ford repayment program. ECMC's counsel represented that in
22 her professional opinion: (1) the Debtor will qualify for the program; (2) the payment
23 deferments and forbearances in the program can last up to four years; (3) the Debtor could
24 chose the repayment option that best suited her, and could switch programs in the future; (4)
25 without the program Debtor's monthly payment would be \$158.22; (5) under the IBR plan her

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27 ²The University's refusal to provide a transcript based on the Debtor's failure to pay a dischargeable debt is likely
28 illegal; the Debtor is urged to investigate further. See 11 U.S.C. § 362(a); *In re Kuehn*, 562 F.3d 289 (7th Cir. 2009)
('The University's refusal to honor [her right to receive a transcript] until Kuehn paid her back tuition was an act to
collect a debt and thereby violated the automatic stay and discharge injunction.')

1 payment could be as low as \$0.00; (6) if unemployment were included in Debtor's income
2 calculation, her payment would be \$46.10; and (7) ECMC's counsel has never had a deferment
3 or forbearance denied.

4 5 **III. Analysis**

6 *A. Will enforcement of the Debt create an Undue Hardship?*

7 Under 11 U.S.C. § 523(a)(8) a student loan debt is not dischargeable unless it would
8 create an undue hardship on the Debtor. To establish undue hardship the Debtor must show: "1)
9 [she] cannot maintain, based on current income and expenses, a minimal standard of living for
10 herself and her dependents if forced to repay loans; (2) additional circumstances exist indicating
11 that [her] state of affairs is likely to persist for significant portion of repayment period of
12 student loans; and (3) [she] has made good faith efforts to repay loans." *In re Pena*, 155 F.3d
13 1108, (9th Cir. 1998) (adopting *Brunner v. New York State Higher Education Services Corp.*,
14 831 F.2d 395 (2nd Cir. 1987)). Further, the Debtor has the burden of proof with regard to a
15 showing of good faith. *In re Birrane*, 287 B.R. 490, 495 (9th Cir. BAP 2002). As discussed
16 below, the Court concludes that the Debtor has not met her burden of proof to establish undue
17 hardship, and will not discharge the debt.

18 19 *1. Will the Debtor be unable to maintain a minimum standard of living if the Debt is not* 20 *discharged?*

21 If the debtor will be unable to maintain a minimum standard of living, courts consider
22 whether it would be "unconscionable to require the debtor to take steps to earn more income or
23 reduce her expenses." *Birrane* at 495. Defining a minimal standard of living is within the
24 Court's discretion, and "courts may decline to discharge student loan debt where the debtor's
25 budget contains certain items such as cable television, a new car, or private schooling." *In Re*
26 *Rinfro*, 245 F.3d, 1087 (9th Cir. 2001).

27 The Court is unconvinced the Debtor will be unable to maintain a minimal standard of
28 living of the debt is not discharged. The IBR option will fluctuate with the rise and fall of the

1 Debtor's income, ensuring payments are always affordable no matter what the Debtor earns. At
2 the present time, this could be as low as \$0. Even though the Debtor is currently at or below the
3 poverty line,³ the reality is that the IBR program will not dip any further below that line.
4

5 2. Are the Debtor's circumstances likely to persist for a significant portion of the
6 repayment period?

7 The second prong of the *Brunner* test requires the Court to consider the future financial
8 situation of the Debtor to determine if hardship will continue for an extended period. The
9 Debtor must prove that "insurmountable barriers" exist such that the debtor will not be able to
10 financially recover if the debt is not discharged. *In re Nys*, 446 F.3d 938 (9th Cir. 2006). All
11 debt creates some financial hardship, thus a debtor must demonstrate "exceptional
12 circumstances *strongly suggestive* of continuing inability to repay over an extended period of
13 time." *In re Carnduff*, 367 B.R. 120 (9th Cir. BAP, 2007) (emphasis in original). The Debtor's
14 circumstance need not be as exceptional as a serious illness or disability, but must demonstrate
15 more than a present inability to pay. *Id.* However, because forecasting a financial condition is
16 problematic, certainty as to future hardship is not required, rather a debtor need only rebut the
17 presumption that their income will increase by preponderance of the evidence. *Id.*

18 The Debtor's circumstance does not strongly suggest an extended inability to pay. Even
19 if the Debtor's financial condition remains the same, the available repayment programs
20 discussed at the hearing allow for a \$0.00 monthly payment. The only barrier between relief and
21 on going hardship is an application to the Ford program.

22 Though the Debtor has provided the court with statistical data surrounding the current
23 slump in the Arizona economy, it is general in nature and fails to demonstrate any exceptional
24 circumstance *unique* to the Debtor. The Debtor has no health conditions, dependants, or
25 permanent obligations that prevent her from working. Though Debtor's age and lack of degree
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28 ³The Debtor's 2009 tax return lists her Taxable income as \$10,496. (Defendant Exhibit E, p. 19). Poverty guidelines provided by Defendant's counsel list the 2009 poverty line for single individual as \$10,830.(Defendant's Exhibit C).

1 do create increased difficulty in obtaining employment, they are not insurmountable barriers;
2 only two years ago Debtor was employed full time and earned close to fifty thousand dollars.
3 Further, the Debtor is within a semester of finishing her degree and may increase her
4 employment opportunities by returning to school. Absent a showing of a hardship unique to the
5 Debtor, her arguments are unpersuasive.

6
7 3. Has Debtor shown good faith efforts to repay the loan?

8 To demonstrate good faith, a Debtor must make attempts to maximize income through
9 employment and minimize expenses. *In re Birrane*, 287 B.R. at 499. Though “the fact debtor
10 has made no payments or has made some payments on the loan is not in and of itself
11 dispositive” lack of payment where possible weighs against finding good faith. *Id.* at 499.
12 Further, a Debtor’s effort to participate in repayment plans to minimize expenses is “an
13 important indicator of good faith.” *Id.* Failure to participate in a repayment program is not
14 alone evidence of a lack of good faith, especially where the program does not provide effective
15 relief. *See In re Greenwood*, 349 B.R. 795, 804 (Bankr.D.Ariz. 2006) (holding that where the
16 repayment program suggested by ECMC was beyond the Debtor’s ability to pay, failure to
17 participate was not a lack of good faith).

18 The Court finds the Debtor made good faith efforts to maximize her income. She
19 testified to searching for jobs, maintained seasonal employment when available, and
20 enterprisingly operated her own business. These efforts weigh in favor of Debtor’s good faith
21 effort to maximize her income.

22 However, the Court is unconvinced of the Debtor’s good faith effort to minimize
23 expenses. Here the Debtor has failed to participate in the Ford program despite receiving
24 detailed information surrounding the relief it provides. Though the Debtor did apply, her
25 application was rejected due to bankruptcy proceedings before this court. Nonetheless, a
26 “debtor’s obligation to make ‘good faith’ efforts to repay [her] education loans is not
27 extinguished with the filing of an adversary proceeding.” *In re Birrane*, 287 B.R. at 500.

28 Under the Ford program the Debtor will have nearly four years of deferments and

1 forbearances; in the meantime her economic situation is likely to improve. Even if it does not,
2 the IBR program allows for a payment as low as \$0.00 depending upon the Debtor's income.
3 Though failure to participate in the Ford payment alone is not evidence of a lack of good faith,
4 the Court fails to see how a reduction in payment to \$0.00 does not provide effective relief.
5 Debtor argues that because the repayment program takes into account two years of income, her
6 current payment may be inflated by past earnings.⁴ However, Debtor would still be protected
7 from payment through available forbearances and deferments, and would pay nothing if her
8 future income fell below the poverty level. Further, even if such payment was currently
9 required, the Debtor could make up the entirety of the payment by simply forgoing satellite
10 television. Thus, because the Debtor has not participated in a program that provides effective
11 relief, she has failed to meet the burden of proof as to good faith.

12
13 *B. Dismissal with Prejudice*

14 Normally a judgment under 11 U.S.C. § 523 has claim preclusive value in subsequent
15 bankruptcy cases. *In re Arneson*, 282 B.R. 883, at 891 (9th Cir. BAP, 2002). However, §
16 523(b) holds:

17 “Notwithstanding subsection (a) of this section, a debt that was excepted from
18 discharge under subsection. . . (a)(8). . . in a prior case concerning the debtor
19 under this title, or under the Bankruptcy Act, is dischargeable in a case under this
20 title unless, by the terms of subsection (a) of this section, such debt is not
dischargeable in the case under this title.”

21 11 U.S.C. § 523(b) (2010). Thus, courts have determined that an exception under (a)(8) does
22 not have claim preclusive value in a subsequent bankruptcy case. *In re Carnduff*, 367 B.R.
23 120, at n.4 (9th Cir. BAP, 2007). Nonetheless, many courts have dismissed debtors' discharge
24 requests *with prejudice*.⁵ Some courts have held dismissal with prejudice to have a preclusive

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26 ⁴At the hearing a question was left open as to Debtor's receipt of unemployment income, and whether it would result
27 in an increased payment. If included, Debtor's payment would be \$46.10 per month.(Defendant's Exhibit H, p. 38).

28 ⁵See *In re Fabrizio*, 369 B.R. 238 (Bankr. W.D.Pa., 2007) (dismissing a discharge complaint with prejudice where
debtor met none of the three elements of *Brunner*); *ECMC v. Buchanan*, 276 B.R. 744 (Bankr. N.D.W.Va., 2002)

1 effect on debtors merely seeking reconsideration of their litigated (a)(8) claim. *In re Woodcock*,
2 326 B.R. 441 (8th Cir. BAP, 2005). To avoid a scenario where a debtor could continually
3 challenge the finality of a bankruptcy ruling given any change in circumstance, “to receive a
4 discharge of the types of debts described in § 523(b), a debtor must again file for bankruptcy
5 relief and thereby submit all of his or her property to the bankruptcy estate.” *In re Kapsin*, 265
6 B.R. 778 (Bankr. N.D.Ohio, 2001). Conversely, courts have discretion to dismiss a discharge
7 request *without prejudice*, leaving open the possibility of a change in dischargeability based on
8 future circumstance. *Woodcock*, 326 B.R. at 447; *See also Brunner*, 831 F.2d 395 (2nd Cir.
9 1987) (decision without prejudice to facilitate future changes). Courts may dismiss without
10 prejudice to allow reconsideration of the financial position of a debtor. *See In Re Fuller*, 296
11 B.R. 813, at 819 (decision explicitly without prejudice because of possibility of future changes
12 in circumstances). Thus, it is within the discretion of the court to determine, based on the facts,
13 when dismissal with prejudice is or is not warranted.

14 Here, the Court relies extensively on the information provided by ECMC’s counsel
15 regarding the Ford repayment program and its decision is contingent upon the effectiveness of
16 the program. Dismissal with prejudice would bar the Debtor from reconsideration of the Court’s
17 ruling even if a future change made relief under the Ford Program ineffective. Thus, dismissal
18 with prejudice is inappropriate in this case.

19 **IV. Conclusion**


20 The IBR option of the Ford program provides immediate, effective and ongoing relief to
21 the Debtor by reducing her payments to an affordable level contingent on her income. Her

22
23 (dismissing a discharge complaint with prejudice for failure to demonstrate first *Brunner* element, where a debtor had
24 satellite tv, internet, movie rental, and telephone service); *In re Clark*, 273 B.R. 207 (Bankr. N.D.Iowa, 2002) (dismissing
25 a discharge complaint with prejudice where a debtor had enough income to afford a \$550 car payment and \$225 cigarette
26 habit); *In re Gettle*, 257 B.R. 583 (Bankr. D.Mont., 2000) (dismissing a discharge complaint with prejudice where a
27 debtor held a job paying only \$968 a month, because the condition was likely temporary); *In re Hatfield*, 257 B.R. 575
28 (Bankr. D.Mont., 2000) (dismissing a discharge complaint with prejudice where a debtor’s permanent health condition
was treatable.); *In re Marsh*, 257 B.R. 569 (Bankr. D.Mont., 2000) (dismissing a discharge complaint with prejudice
despite good faith efforts to repay, because debtor had excess monthly income of \$120, and her circumstances were
likely to improve).

1 failure to participate in the program even after being informed of its benefits is evidence of a
2 lack of good faith. Accordingly, her request for discharge pursuant to 523(a)(8) is denied.
3 This court has relied heavily on ECMC's representation of the details of the Ford program and
4 its availability to the Debtor. Should the Debtor's completed application be denied, the Court
5 will reconsider its ruling.

6
7 So ordered.

8
9 **DATED:** July 9, 2010

10 
11 CHARLES G. CASE II
12 UNITED STATES BANKRUPTCY JUDGE

13
14 Copy of the foregoing sent via facsimile and/or mailed to:

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