

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

JANE DOE,

Bankruptcy No. 00-31234

Debtor,

JANE DOE,

Plaintiff,

Adversary No. 00-1234

vs.

EDUCATIONAL CREDIT MANAGEMENT
CORPORATION and DEPARTMENT OF
HEALTH and HUMAN SERVICES,

PLAINTIFF'S TRIAL MEMORANDUM

Defendants.

THE PARTIES

Plaintiff Jane Doe ("Plaintiff") is a 38-year-old single mother with a ten-year-old daughter named Judy Doe. Plaintiff is currently employed as a laboratory supervisor at Yourtown Community College. On August 30, 2000, Plaintiff received a Chapter 7 discharge. Excepted from Plaintiff's discharge were her student loans, which are held by the above-named defendants in the manner and amounts set forth below.

Defendant Educational Credit Management Corp. ("ECMC") holds a consolidated loan ("ECMC Loan"), which it obtained from Great Lakes Higher Education Corporation, in the amount of Thirty-Five Thousand Three Hundred Twenty-Two and 81/100 Dollars (\$35,322.81). Plaintiff owed ECMC, inclusive of costs, interest and attorneys' fees, Sixty-One Thousand Eight Hundred Sixty-Nine and 83/100 Dollars (\$61,869.83) as of June 4, 2001.

Defendant United States Department of Health and Human Services (“HHS”) (ECMC and HHS will herein be referred to together as the “Defendants”) holds the rights, title and interest to three notes executed by Plaintiff and originally guaranteed by the Health Education Assistance Loan Program (“HEAL Loans”). Plaintiff currently owes HHS Fourteen Thousand Six Hundred Ninety-Seven and 91/100 Dollars (\$14,697.91), including interest as of December 1, 2000.

CHRONOLOGICAL STATEMENT OF FACTS

A. Graduation, Early Work and First Bankruptcy

In 1986, Plaintiff completed chiropractic school at Spinal College of Chiropractic in Theirtown, MN (“Spinal”). Plaintiff paid for her tuition at Spinal through the assistance provided by the ECMC Loan and the HEAL Loans, (together referred to as the “Student Loans”), which Plaintiff used for educational expenses including tuition, books, and living expenses. More than seven years have expired since the first date when repayment of the Student Loans was required, exclusive of any period after such date in which the obligation to pay installments on the loan was suspended.

In 1987, Plaintiff attempted to form a practice with a partner and obtained financing in order to fund the startup of this practice. Plaintiff’s partner abandoned the project. As a result, Plaintiff filed chapter 7 bankruptcy in 1988. Plaintiff then returned to the clinic at which she had previously worked and remained in that practice until approximately 1990.

In 1990, Plaintiff again attempted to start her own practice. This time Plaintiff joined with a friend who was a naturopathic healer to form a joint office in which they shared expenses. Plaintiff was the only chiropractor in the office, and had brought most of her clients with her from her prior job. In 1993, however, Plaintiff began to feel “flu-like” and run down. Although Plaintiff continued to work at her clinic, she began to require breaks during the day and simply

touching her patients began to make her feel uncomfortable. As she became unable to work for ever-increasing periods of time, Plaintiff would cancel appointments and would occasionally miss work altogether. In 1995, Plaintiff had lost the ability to carry on her practice. Because Plaintiff was unable to do so herself, she asked her partner to find another doctor to take over her practice. Plaintiff's partner located someone to take over the remains of Plaintiff's business, so Plaintiff's partner arranged for the transfer of her interest in the practice to a new doctor without compensation. Prior to this, Plaintiff paid on her Student Loans for approximately 10 years.

Plaintiff's condition continued to deteriorate during the period that she was leaving her practice. In 1995, Plaintiff sold her home because she could no longer make payments on her mortgage and continue to pay her other creditors. Around this time Plaintiff requested, and received, a forbearance on her Student Loans from HHS. Plaintiff attempted to live with a friend, but three months after selling her home, Plaintiff moved in with her parents.

Plaintiff's condition had reached such a point that eventually a concerned friend of Plaintiff arranged an appointment with a general practitioner in Yourtown named Dr. John Johnson ("Dr. Johnson"). Dr. Johnson met with Plaintiff frequently at first, and understood that he was unable to adequately treat her condition. Dr. Johnson soon referred Plaintiff to a psychologist, Dr. Pete Peterson ("Dr. Peterson"), who would be better able to properly diagnose Plaintiff and prescribe the appropriate medications. After some time of meeting with Drs. Johnson and Peterson on an almost weekly basis, they referred Plaintiff to a psychiatrist, Dr. Doug Douglas ("Dr. Douglas"). For approximately one year Plaintiff continued to visit Drs. Johnson and Peterson, due to her suicidal tendencies, and met with Dr. Douglas once every four to six weeks.

Due to Plaintiff's array of disabilities, affecting her both mentally and physically, Dr. Douglas filled out a form labeled "Temporary or Permanent Total Disability Certification" ("DIS") in which he certified that he had concluded that Plaintiff was disabled and was therefore unable to pay for her student loans. Plaintiff signed the form, as Dr. Douglas requested, but was unaware of what Dr. Douglas did with the form or what ever became of this petition for relief.

In 1997, Plaintiff's doctors finally found a combination of drugs that allowed her to regain her ability to begin to function again, although she still suffered from slight memory loss, chronic fatigue and decreased analytical ability. Almost immediately, Plaintiff began to seek employment, but it was clear to Plaintiff and her doctors that she would be extremely limited in the type of jobs that she would be able to do. Plaintiff's continued limitations were extremely evident throughout 1997 and much of 1998. Despite the efforts of Plaintiff, with Dr. Johnson's advice, to find employment that might suit Plaintiff's more limited capabilities, she was unable to maintain employment until late in 1998.

Also at this time, Plaintiff and Dr. Johnson determined that she should try to return to school in order to obtain a degree in an area that now more suited her abilities. It was the conclusion of Dr. Johnson that Plaintiff was no longer suited to tasks that require memorization or analytical thinking. Instead, Plaintiff found that she had a growing interest in the area of counseling. Thus, in the Fall of 1998, Plaintiff enrolled at Your State University with the hope of obtaining a two year Human Resources degree because she was unable to use her chiropractic education any longer. Therefore Plaintiff decided to attend school, hoping that she could increase her chances of finding a good paying job.¹ Plaintiff has also continued to look for jobs

¹ Plaintiff also has a unique opportunity to take the classes she is currently taking because she has no rent payment. This allowed Plaintiff to take this step to make the small investment with the hopes that it would result in making her eligible for a higher paying job. Additionally, many of Plaintiff's classes are arranged through independent study, allowing her to avoid attending classes.

that may be better paying or that provide a better opportunity for her to follow interests.

Unfortunately, Plaintiff's hope to better her chances of survival through her new degree may fail.

Plaintiff was scheduled to graduate this spring, but because of her deteriorated analytical processes, Plaintiff has been unable to satisfy the math requirement for graduation.

In 1999, Plaintiff attempted to retire her chiropractic license, so that if she one day fully recovered, she might be able to reinstate her licensure. Unfortunately, when Plaintiff looked into this possibility, Plaintiff was informed that her continuing education credits had lapsed some time before that, and that the state licensing authority had terminated her license before she could retire it. Plaintiff was then advised that in order to regain her license, Plaintiff would have to retake, and again pass, the state board exams.

Today, Plaintiff resides in the basement of her parents' home in Yourtown, Minnesota, along with her daughter, who is now 10. Shut out from the only employment she had ever seriously considered, Plaintiff works as a laboratory manager at Yourtown Community College. Plaintiff's gross income from the year 2000 was Thirteen Thousand Seven Hundred Forty-Six and 98/100 Dollars (\$13,746.98). Thus, Plaintiff's income averaged approximately One Thousand One Hundred Fifty and No/100 Dollars (\$1,150.00) per month. Plaintiff's monthly expenses average roughly that same amount.² Of the \$500.00 that Plaintiff pays to her parents each month, that sum also covers what would otherwise be extra expenses for rent, childcare and food, which Plaintiff's parents provide to her and her daughter.

² Plaintiff's average monthly expenses are as follows: \$500.00 to her parents (this sum covers her car payment and car insurance, along with a minimal cell phone plan); approximately \$200.00 for gas and maintenance of the car she uses; approximately \$100.00 for food, including groceries and meals outside the home; \$50.00 for personal items, toiletries and co-pay on Plaintiff's medications; \$25.00 for health insurance; \$25.00 for union dues; \$100.00 for Plaintiff's daughter's school; \$80.00 for Plaintiff's college tuition and books; and any additional amounts used for clothing and entertainment for Plaintiff and her daughter.

Plaintiff also suffers from various mental and physical disabilities³, limiting the nature and amount of work of which Plaintiff is capable. The general symptoms that Plaintiff currently exhibits include chronic fatigue and a persistent ache and soreness. Plaintiff also struggles with memory problems. Plaintiff still regularly visits with both Drs. Johnson and Peterson, though less frequently and, in order to treat her conditions, takes the following medications: Welbutrin, Serzone, Prozac and Glucophage. Plaintiff also sleeps in excess of twelve (12) hours per day.⁴

**STATEMENT OF THE LAW
AND ARGUMENT**

Plaintiff has the burden of proving that there is a basis for granting discharge in this case. Student Loans are generally not dischargeable in bankruptcy except under special circumstances of hardship. The extent to which a debtor must show hardship varies depending upon the type of student loan involved. The dischargeability of student loans, such as those held by ECMC, is governed by 11 U.S.C. §523(a)(8), which requires that repayment is an “undue hardship” on the debtor. In the context of HEAL guaranteed loans, such as those held by HHS, the standard is set at “unconscionable” by 42 U.S.C. §292f(g). Because the Student Loans involved in this case are of both types, and the standard for each is so markedly different, each should be considered in turn. However, Plaintiff’s circumstances are such that discharge is appropriate in either case in order to avoid an unconscionable situation. If Plaintiff is required to repay her Student Loans in her present condition, that would in effect require her parents to subsidize Plaintiff’s repayment

³ Plaintiff has been diagnosed with such conditions as manic depression, chronic fatigue syndrome, obsessive compulsive disorder, fibromyalgia and possibly bi-polar disorder.

⁴ On an average day, Plaintiff gets up at about six a.m. and gets her daughter ready for school. Plaintiff then travels from her parents’ home to work. Plaintiff works from eight o’clock to approximately one or two. During the day she has a lab assistant that helps her to perform her job duties, and Plaintiff occasionally rests during the work day. Plaintiff then returns home and requires a nap from three-thirty or four to six o’clock, p.m. in order to recover from the day. Plaintiff then gets up in order to feed and do homework with her daughter, then Plaintiff goes to bed at approximately eight or eight-thirty, p.m.

of the Student Loans. Without Plaintiff's parents, she would be fundamentally unable to maintain a minimal standard of living for herself and for her daughter.

A. ECMC Loans:

The standard for determining the dischargeability of a student loan in bankruptcy is as follows:

A discharge under section 727 . . . of [Title 11] does not discharge an individual debtor from any debt . . . 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.

11 U.S.C. §523(a)(8).

The phrase "undue hardship" is not defined anywhere in the Code; thus it is a factual determination to be made by the Court, which involves a great deal of discretion. In re Cline, 245 B.R. 617, 620 (Bkrcty. W.D. Mo. 2000). In the Eight Circuit, courts look to the "totality of the circumstances" to determine whether discharge is appropriate in a particular case. Id., In re Andrews, 661 F.2d 702, 704 (8th Cir. 1981). This standard is applied according to three principles: (i) the current and future financial resources of the debtor and the debtor's dependents; (ii) the debtor's reasonable living expenses; and (iii) any other facts that apply uniquely to the particular case. In re Cline, 248 B.R. 347 (B.A.P. 8th Cir. 2000) (citing Andrews).

Plaintiff's financial resources, now and in the foreseeable future, are quite minimal. Plaintiff currently works for a community college setting up labs for science classes. Plaintiff is limited to 32 hours per week, but she would be completely unable to function at a job that required anything more out of her, as is clear from her daily routine, discussed above. In Cline,

the debtor had an advanced degree as Plaintiff does, and during the period in question the Cline debtor made approximately \$25,000.00 per year, a sum far exceeding what Plaintiff has made in the past several years. Meanwhile, the amount due on the loans in Cline was not even as great as what Plaintiff owes in this case; yet the District Court granted Cline a discharge of her student loan debt, Cline, 245 B.R. at 621, and the Eighth Circuit Bankruptcy Appellate Panel affirmed. Cline, 248 B.R. at 351.

Additionally, due to the nature of Plaintiff's condition, it is highly unlikely that she will suddenly and completely achieve the kind of medical recovery that would allow her to make much more than this amount within the foreseeable future.

The "necessary reasonable living expenses for the [Plaintiff] and the [Plaintiff's] dependents" are also not excessive. Id. The Eighth Circuit Bankruptcy Appellate Panel, in upholding the ruling of the lower court, found that the debtor in Cline had as much as a \$328.00 surplus each month, even while paying modest rent on a townhome. Id. Plaintiff pays no rent and, despite the food, childcare and other value that her parents provide to her, still has scarcely enough money to pay for minimal expenses each month, often foregoing entertainment and clothing expenses out of necessity.

It should be noted that Plaintiff does currently pay for her own and her daughter's educations, but this sum is relatively small considering the amount of expenses that Plaintiff does not otherwise incur, and that Plaintiff's education expenses were made with the hope that Plaintiff might qualify herself for a higher paying job. Unfortunately, Plaintiff may be unable to complete her degree from Metropolitan State because she has lost her analytical skills, preventing her from passing the required math course. Additionally, the Cline court noted that

“going over Cline’s expenses dollar for dollar in order to find every possible way to boost a surplus is not reasonable given that the overall total remains fairly minimal.” 248 B.R. at 351.

The third factor under the totality of the circumstances test includes anything unique to the case that would make the discharge more equitable. Cline, 248 B.R. at 349. In Cline, the debtor only made two payments over the course of 10 years after she completed school. Plaintiff, conversely, made payments for almost 10 years totaling more than the principal amount of her Student Loans.

Defendants may attempt to bring out that there are income-contingent payment plans available to Plaintiff which would allow her to make “reasonable” payments. Those payments would account for 20% of Plaintiff’s income to the extent that it exceeds \$11,000.00.⁵ This sum might appear innocuous when Plaintiff’s income is only \$14,000.00 and she is paying \$40-\$50 per month, but if she were to make even \$25,000.00 per year, as Cline did, Plaintiff would be expected to pay approximately \$230.00 per month. Again, this sum does not appear excessive, except that Plaintiff would be making those payments for twenty-five years. The debtor in Cline refused to accept a payment plan that could stretch out for thirty-five years, and the court agreed with her decision. Cline, 245 B.R. at 621. That decision was then affirmed by the Eighth Circuit Bankruptcy Appellate Panel. Cline, 248 B.R. at 351. Plaintiff’s decision to eschew such a burden should not be a barrier to a discharge of her Student Loans.

Again, the assistance that Plaintiff currently receives from her parents highlights another reason that discharge is appropriate when it is considered that Cline, who obtained a discharge, rented cheaply from her father, thus keeping her expenses to a reasonable level. In finding Cline’s \$465.00 per month rent reasonable, the District Court held that “[Cline’s] father, who is a

⁵ The amount to be paid under the plan is the debtor’s net income minus the poverty level (approximately \$11,000.00), times 20%.

retired autoworker, should not be expected to provide [Cline's] housing rent-free." Plaintiff lives with her parents, who are also retired, yet does live with them essentially rent-free. The fact that Plaintiff might have any money left over after her other expenses cannot be counted upon to serve as money available for repayment of her Student Loans. Plaintiff's parents will not be able to help her forever.

Other factors, considered in the light of Cline, which buttress Plaintiff's argument for discharge include the fact that: Cline had no disability, Plaintiff does; Cline was 35, Plaintiff just turned 39; Cline reasonably declined a payment plan extending her payments out for 35 years, Plaintiff does not wish to find herself with no hope of financial recovery for 25 years; Cline obtained higher paying jobs but requested transfers because she couldn't handle the new responsibilities and stress, Plaintiff has sought higher paying jobs that she can handle but has been held back due to her disabilities.

The key phrase used by the District Court, upheld by the Eighth Circuit, is that "[l]ike some debtors, Ms. Cline obtained an education that was not worthwhile to her financially. To require her to pay for that decision for the rest of her working life would indeed impose an undue hardship on her." This is particularly true in Plaintiff's case, when the loss of her education investment was not due to her own actions, and the principal amount of that indebtedness has been repaid.

B. HEAL Loans:

Student loans that have been guaranteed by a government agency are entitled to a higher standard of review than other student loans.

Notwithstanding any other provision of Federal or State law, a debt that is a loan insured under the authority of this subpart may be released by: a discharge in bankruptcy under any chapter of Title 11 only if such discharge is granted – (1) after the expiration of the seven-year period beginning on the first date when

repayment of such loan is required, exclusive of any period after such date in which the obligation to pay installments on the loan is suspended; (2) upon a finding by the Bankruptcy Court that the nondischarge of such debt would be unconscionable; and (3) upon the condition that the Secretary shall not have waived the Secretary's rights to apply subsection (f) of this section to the borrower and the discharged debt.

42 U.S.C.A. §292f(g). The parties have stipulated to the first of the three above elements and, if the Secretary has waived the rights described above, HHS has not brought it to the attention of the other parties. Thus, Plaintiff must prove the second prong, that failing to discharge the HEAL Loans would be unconscionable.

Unconscionable is another term that is not defined in the statutes, In re Cothran, 226 B.R. 460, 463 (Bkrcty. E.D. Okla. 1998), but it has been interpreted as meaning “‘shockingly unfair, harsh or unjust,’ ‘excessive,’ ‘unreasonable,’ or ‘outrageous.’” Id. (quoting In re Barrows, 182 B.R. 640, 650 (Bkrcty. D.N.H. 1994)). There are eight factors weighed by courts in making this determination: (1) income, (2) earning ability, (3) health, (4) educational background, (5) dependents, (6) age, (7) accumulated wealth and (8) professional degree. Cothran, 226 B.R. at 463.

Plaintiff's income, discussed above, is less than \$14,000.00 per year, averaging approximately \$1,150.00 per month, and she is not likely to be able to earn more. Plaintiff has consistently sought jobs in recent weeks and has not found any job that could pay her as much as she makes now.

Plaintiff's health has also been discussed quite fully above. Plaintiff suffers from numerous conditions which make it difficult for her to think clearly, to recall facts, to focus or to perform tasks that require manual labor. Plaintiff currently takes four medications to try to manage her condition, but her symptoms are constantly in flux and she still has continuing problems that vary in their nature and degree.

Plaintiff's educational background does consist of chiropractic school, but Plaintiff's condition has rendered her unable to benefit from that education since approximately 1995. Further, even if Plaintiff were to recover her mental faculties, she would be unable to practice because her license has been terminated by the state licensing authority, and it is Plaintiff's understanding that, in order to regain her license, she would have to retake and pass all of her board exams again.

Plaintiff has one dependent; her daughter Judy Doe.

Plaintiff's age and accumulated wealth should weigh in favor of dischargeability, as well, because she is 39, and she does not have any remaining assets of any significance.

Finally, the professional degree which Plaintiff worked to obtain, and for which she used her student loans, has been stripped from her and she does not anticipate ever being able to reinstate that degree.

A final issue arises regarding the extent of dischargeability of the HHS loans. It has been determined in the Eighth Circuit that individual loans may not be broken down, or separated for purposes of granting a partial discharge on any particular loan. However, it has been held that if there are a group of loans that have not been consolidated, then each one may be considered for discharge in turn. Therefore, even if a portion of HHS's debt claimed from the Plaintiff is not discharged, the entire amount may be broken down into the three separate notes, of which any one or all may be discharged as a single "loan." Therefore, Plaintiff contends in the alternative to a complete discharge of the HHS loans, that one or more of the three loans is discharged because forcing Plaintiff to attempt to repay her Student Loans is unconscionable.

CONCLUSION

Based upon the foregoing, Plaintiff is entitled to discharge of her Student Loans because failure to do so would be both an undue hardship and unconscionable. Plaintiff paid on her Student Loans for almost 10 years and fully repaid at least the principal amount. Plaintiff did not cease payment at any time through any fault of her own, but was the victim of an unfortunate twist of fate. Plaintiff had envisioned herself as a chiropractor her entire life, had survived a dishonest business dealing and was finally building her own practice into a successful venture. After all of this Plaintiff was inexplicably, and possibly irretrievably, rendered unable to perform the job that she had so long loved to do. Plaintiff's now finds herself living with her daughter in her parents' basement, scarcely working full time for wages that leave her just over the threshold of the poverty line, and still being exhausted by the effort. Plaintiff satisfies just about every element of the test to determine unconscionability. It would be unconscionable to require Plaintiff to continue to endure her current situation by forcing her to continue to pay on her Student Loans.

RESPECTFULLY SUBMITTED:

LAW FIRM

Dated: _____, 2001.

By _____

Joe Lawyer (Reg. No. 87654)

Address

ATTORNEY FOR PLAINTIFF JANE
DOE