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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. OR-11-1191-ClPaJu
	)	
RICHARD DEAN CARTER,	)	Bk. No. 10-30555-tmb7
	)	
Debtor.	)	Adv. No. 10-03136-tmb
<hr/>		
RICHARD DEAN CARTER,	)	
	)	
Appellant,	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
UNITED STATES	)	
DEPARTMENT OF EDUCATION,	)	
	)	
Appellee.	)	
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Argued and Submitted on October 20, 2011  
at Portland, Oregon

Filed - November 8, 2011

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Trish M. Brown, Bankruptcy Judge, Presiding

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Appearances: Donald H. Grim, Esq. of Greene & Markley, P.C.  
argued for Appellant Richard Dean Carter  
Sean E. Martin, Esq., Assistant United States  
Attorney, argued for Appellee United States  
Department of Education

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Before: Clarkson<sup>2</sup>, Pappas and Jury, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Scott C. Clarkson, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal arises from the bankruptcy court's judgment  
2 denying Chapter 7 debtor and appellant Richard Carter's ("Carter"  
3 or "Debtor") request that his student loans, in the current amount  
4 of approximately \$26,000.00, be discharged pursuant to 11 U.S.C.  
5 §523(a)(8).<sup>3</sup>

6 The Debtor has a compelling personal story consisting of  
7 several decades of substance abuse, related crimes and  
8 punishments, the eventual recovery from that dark abyss, and his  
9 reentry as a productive member of mainstream society. For the  
10 past seven years, the Debtor has been steadily employed and  
11 currently holds a position as a service station manager at a gas  
12 station in the Portland, Oregon area.

13 Filing his chapter 7 petition on January 26, 2010, and  
14 thereafter commencing his adversary proceeding, the Debtor  
15 asserted that, based upon his current income and living expenses,  
16 he was unable to pay his student loans and maintain a minimal  
17 standard of living. After trial, and with sympathetic  
18 acknowledgment of the Debtor's destructive past and remarkable  
19 recovery, the bankruptcy court determined that the Debtor had a  
20 current ability to repay his student loans under the government  
21 administered Income Contingent Repayment Plan and at the same time  
22 continue to maintain a minimal standard of living. Thus, the  
23 bankruptcy court concluded that the Debtor's student loans could  
24 not be discharged. For the reasons discussed below, we AFFIRM the  
25 bankruptcy court's judgment.

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28 <sup>3</sup> Absent contrary indication, all section and chapter  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

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**I. FACTS**

**a. Pre-Bankruptcy Events**

Carter is fifty years old and has no dependents. In 1991, Carter graduated from ITT Technical Institute in Portland, Oregon with an Associate of Applied Science, Electronics Engineering Technology Degree, and in 1992, he received his Bachelor of Applied Science Degree in Automated Manufacturing Technology. Between 1989 and 1992, Carter originally financed his education through two student loans. In April 2003, Carter consolidated these student loans (the "Consolidated Loan"), which resulted in a principal amount of \$21,122.19, with an interest rate of 4.5%. Prior to consolidating his student loans, Carter had made no payments on either, and his student loans were in default.

Commencing before his education at ITT, Carter used and became addicted to various illicit substances. This use continued until approximately January, 2004. Carter also engaged in criminal activities associated with his drug addiction, including selling drugs. As a result of those activities Carter was arrested and imprisoned on many occasions.

From August 1992 to March 2003, Carter worked as an electronics technician, and from March 1999 to 2004, Carter obtained a second job as a field service technician. From 1999 to 2004, he was earning between \$10.00 and \$15.00 per hour performing field technical services.

In January 2004, Carter entered into a six month

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1 rehabilitation program,<sup>4</sup> and in June 2004, completed his treatment  
2 and moved into the Oxford House.<sup>5</sup>

3 After completing his treatment, Carter worked part-time at a  
4 furniture manufacturing company and in December 2004, commenced  
5 working for his present employer, WSCO Petroleum. Clean and  
6 sober, Carter advanced from a part-time employee to a full-time  
7 employee, then to an assistant manager and finally became a  
8 service station manager. Carter's commute to work is  
9 approximately twenty miles each way.

10 The Trial record is clear that as a service station manager,  
11 Carter receives \$9.00 per hour, periodic bonuses based on  
12 performance of his service station, vacation benefits, health  
13 benefits, and overtime pay. Carter's monthly bonuses are based  
14 upon unit sales of gasoline and cigarettes. However, Carter is  
15 also financially liable for any and all cash shortages, and if  
16 inventory is short, it results in a reduction of his monthly  
17 bonus. Interestingly, any overtime (time in excess of forty hours  
18 per week) that Carter or any of his employees work is deducted  
19 from Carter's monthly bonus. As Carter describes the situation,  
20 he basically pays himself to work overtime.

21 Beginning in 2003, Carter's monthly payment on the  
22 Consolidated Loan was \$78.25 under the Income-Contingent Repayment  
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26 <sup>4</sup> The Volunteers of America Men's Rehabilitation Center is a  
publicly funded drug addiction treatment center.

27 <sup>5</sup> The Oxford House is a publicly funded, non-profit low-cost  
28 housing alternative for recovering alcoholics and drug addicts.  
Carter stayed at the Oxford House until December 2008.

1 Plan ("ICRP") program.<sup>6</sup> Following the consolidation in April  
2 2003, Carter failed to make any payments on the Consolidated Loan  
3 and in September 2004, the Department of Education ("DOE")  
4 declared his loan in default. On December 14, 2005, Carter  
5 submitted to DOE an offer to settle the Consolidated Loan for  
6 \$1,000.00, which was rejected, and on January 6, 2006, Carter  
7 offered to commence paying \$25.00 per month on the Consolidated  
8 Loan. He made a single payment of \$25.00. On July 18, 2006,  
9 Carter renewed his offer to settle the Consolidated Loan for  
10 \$1,000.00, which was also rejected. No further payments on the  
11 Consolidated Loan were made until June 15, 2009, when eight  
12 consecutive monthly payments were made, each in the amount of  
13 \$230.00.<sup>7</sup>

14 **b. Procedural History**

15 On January 26, 2010, Carter filed a voluntary chapter 7  
16 petition, and on May 5, 2010, Carter filed a complaint initiating  
17 an adversary proceeding against DOE to determine the  
18 dischargeability of the Consolidated Loan under § 523(a)(8) (the  
19 "Complaint"). Carter alleged that excepting the student loans  
20 from discharge would impose an undue hardship on him.

21 \_\_\_\_\_  
22 <sup>6</sup> The Income Contingent Repayment (ICRP) Plan is designed to  
23 make repaying education loans easier for students who intend to  
24 pursue jobs with lower salaries, such as careers in public  
25 service. It does this by pegging the monthly payments to the  
26 borrower's income, family size, and total amount borrowed. The  
27 monthly payment amount is adjusted annually, based on changes in  
28 annual income and family size. Income-contingent repayment is  
currently available only from the U.S. Department of Education.

<sup>7</sup> While the parties' stipulation (ER p. 13) states that  
seven payments were made, a review of the record demonstrates that  
eight payments were actually made. Carter made monthly payments  
in the amount of \$230.00 from June 15, 2009 to January 1, 2010.

1           On June 9, 2010, DOE filed its answer (the "Answer") which  
2 further contained a counterclaim against Carter, alleging that  
3 Carter is indebted on the Consolidated Loan in the principal  
4 amount of \$20,866.12, plus interest of \$4,915.80, for a total of  
5 \$25,781.92 and interest continues to accrue at a daily rate of  
6 \$2.57, and that the DOE had received \$1,865.00 in payments on the  
7 loan. DOE's counterclaim further alleged that the Consolidated  
8 Loan was not dischargeable and non-discharge of Carter's student  
9 loan would not create an undue hardship on Plaintiff.

10           On March 31, 2011, the bankruptcy court conducted trial,  
11 taking testimony from Carter regarding, *inter alia*, his income and  
12 expenses. Carter testified that (1) his transportation costs had  
13 increased, (2) his utilities had increased, (3) he has forgone  
14 certain medical procedures because he does not have the available  
15 funds, (4) his car insurance premium was \$148.00 per month, (5) he  
16 estimated that a reasonably reliable car would cost approximately  
17 \$346.00 per month, and (6) he anticipated a decrease in earnings  
18 of approximately \$100.00 to \$200.00 per month because of slower  
19 business at the station. Also, Carter testified that he is in  
20 line for a promotion to work at another store which is closer to  
21 his home in The Dalles.

22           Carter testified regarding his current health condition that  
23 he suffers from right foot tremor disorder, Hepatitis C, and  
24 chronic fatigue syndrome.

25           The bankruptcy court also took testimony from Carter's  
26 witness, Clariner Boston. Ms. Boston testified that, considering  
27 Carter's background, legal history, previous drug abuse, and  
28 education, it would be "highly improbable" within a short amount

1 of time for him to obtain an alternative better and more lucrative  
2 position. Ms. Boston testified that "given everything that we  
3 know about his background, that considering his own disposition,  
4 and given the competitiveness out there of people looking for  
5 jobs, I think it's great that he's doing everything that he can to  
6 hold onto his position because if he lost it, he even in The  
7 Dalles would have to stand in line, and I don't know if he could  
8 get something that would be as lucrative as this has been for him,  
9 and that's even in a limited way."

10 The bankruptcy court further took testimony from DOE's  
11 witness, Sheryl Davis, who testified that based on Carter's  
12 Adjusted Gross Income of \$35,500.00, his monthly payment on the  
13 Consolidated Loan under the ICRP would be \$203.98 per month.

14 The bankruptcy court, instructed by the Ninth Circuit case  
15 United Aid Funds v. Pena (In re Pena), 155 F.3d 1108, 110 (9th  
16 Cir. 1998), identified and applied the three factors set forth  
17 under the Brunner test to determine "undue hardship" under  
18 § 523(a)(8). Brunner v. N.Y. State Higher Educ. Services, Corp.  
19 (In re Brunner), 831 F.2d 396 (2d Cir. 1987). The bankruptcy  
20 court made the following findings with respect to the first prong  
21 of the Brunner test:

22 So I - so I'm going to find that [Carter] can make  
23 payments under the income-contingent repayment plans,  
24 so he doesn't meet the first criteria under the Brunner  
25 test...I think he does have an ability to - a current  
26 ability to pay under the ICRP, so I'm finding against  
the debtor on the first prong of the Brunner test. I  
know it's tight, but I mean the budget that he filed  
with the Bankruptcy Court showed that he could make  
\$230 a month payments.

27 Transcript, 31 March 2011, pages 98-99.

28 With respect to the second prong of the Brunner test, the

1 bankruptcy court found, "And I don't find that in the future - I  
2 mean, if he has that ability to for the next 15 years, he has the  
3 ability to pay, so I don't think - I understand it's going to be  
4 difficult, and I understand what I'm telling you." Id. at 99-100.

5 As to the third prong of the Brunner test, the bankruptcy  
6 court found, "With respect to good faith, though, I think he  
7 probably did make good faith efforts to pay once he started making  
8 payments. I can't find that he didn't, so I can't find with  
9 respect to the third prong of the Brunner test." Id. at 100.

10 The bankruptcy court found that Carter could not satisfy all  
11 three prongs of the Brunner test. Apparently addressing DOE's  
12 counsel, the bankruptcy court said, "[Y]ou win on the first two,  
13 and (apparently addressing Carter's counsel) you have to win on  
14 all three in order to - Mr. Greene would have had to win on all  
15 three." Id. at 100. Accordingly, on April 12, 2011, the  
16 bankruptcy court entered a judgment in favor of DOE (the  
17 "Judgment"). At the same time, the bankruptcy court reinstated  
18 Carter's loan to a non default status and re-enrolled Carter into  
19 the ICRP program.<sup>8</sup>

20 Carter timely filed this appeal asserting that the bankruptcy  
21 court erred in (1) holding that the Consolidated Loan did not  
22 impose an undue hardship, and (2) not performing "an

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24 <sup>8</sup> The final Judgment provides that (1) pursuant to 11 U.S.C.  
25 § 523(a)(8) the student loan owed by Carter to the DOE was not  
26 discharged; (2) as of March 31, 2011, Carter's loan balance was  
27 \$20,866.12 in principal, plus \$5,742.22 in interest; (3) the DOE  
28 shall deem Carter not to be in default, recall his loan, and re-  
enroll him in the ICRP program; (4) If Carter's loan remains in  
good standing, including deferrals and forbearances all debt  
remaining when Carter turns 65 years of age shall be considered  
discharged in this bankruptcy proceeding pursuant to Title 11; and  
(5) the parties shall bear their own costs and fees. ER p. 261.



1 individualized analysis" to determine Carter's necessary expenses,  
2 but instead applying a mechanical test relying on the National  
3 Poverty Guidelines and DOE's ICRP.

4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334  
6 and § 157(b)(1) and (b)(2)(I), and we do so under 28 U.S.C.  
7 § 158(c).

8 **III. ISSUES**

9 Whether the bankruptcy court erred in:

- 10 1. its findings regarding undue hardship; and  
11 2. in relying on the National Poverty Guidelines and the  
12 IRCP under the first prong of the Brunner test.

13 **IV. STANDARDS OF REVIEW**

14 We review the bankruptcy court's finding of fact for clear  
15 error. In re Pena, 155 F.3d at 1110. "Where there are two  
16 permissible views of evidence, the factfinder's choice between  
17 them cannot be clearly erroneous." Anderson v. City of Bessemer  
18 City, N.C., 470 U.S. 564 (1985). We review de novo the bankruptcy  
19 court's application of the legal standard to decide whether a  
20 student loan debt is dischargeable as an undue hardship. Pa.  
21 Higher Educ. Assistance Agency v. Birrane (In re Birrane),  
22 287 B.R. 490 (9th Cir. BAP 2002).

23 **V. DISCUSSION**

24 **a. Carter's Request for Judicial Notice**

25 Carter requests that we take judicial notice of the IRS  
26 National Standards for a single person living in Hood River,  
27 Oregon. DOE objects to Carter's request for judicial notice  
28 because this evidence was not brought before the bankruptcy court.

1 Save in unusual circumstances, an appellate court can only  
2 consider the record on appeal. See Barilla v. Ervin, 886 F.2d  
3 1514, 1521 n.7 (9th Cir. 1989). There are exceptions to the  
4 general rule. For instance, we may correct inadvertent omissions  
5 from the record (See Fed. R. App P. 10(e)(2)(C)), and we may take  
6 judicial notice (See Fed. R. Evid. 201(f); EEOC v. Ratliff,  
7 906 F.2d 1314, 1318 n.6 (9th Cir. 1990)).

8 We must first determine why Carter requests that we take  
9 judicial notice of the IRS National Standards for a single person  
10 living in Hood River, Oregon. It appears that Carter wants us to  
11 notice that his living expenses are lower than the IRS National  
12 Standards. From this observation, Carter wants us to determine  
13 that the bankruptcy court inappropriately analyzed his income and  
14 expense. He would ask that we find that his living expenses are  
15 reasonable (that they are approximately \$66.00 a month less than  
16 the local National Standards, not including his medical expenses  
17 and telephone and internet access cost) and that his living  
18 expenses are simply more than his income. Therefore, he argues  
19 that the bankruptcy court incorrectly determined that he could  
20 maintain a minimal standard of living and repay the student loans.

21 We may not take Carter's request to take judicial notice for  
22 purposes of reviewing the bankruptcy court's factual findings for  
23 clear error, especially since this information was not before the  
24 bankruptcy court. It is inappropriate to use judicial notice to  
25 cure failure to present relevant evidence to trial courts. Yagman  
26 v. Republic Ins. Co., 987 F.2d 622, 626 fn. 3 (9th Cir. 1993).  
27 Therefore, Carter's request for judicial notice is DENIED.

28

1           **b. Dischargeability of student loans under § 523(a)(8)**

2           A debtor may not discharge government-funded or guaranteed  
3 student loans "unless excepting such debt from discharge . . .  
4 will impose an undue hardship on the debtor and the debtor's  
5 dependents[,]" § 523(a)(8), which is further explained in

6           In re Nys:

7                         Congress' main purpose in enacting the bankruptcy  
8 code was to ensure insolvent debtors a fresh start by  
9 discharging prepetition debts. However, under  
10 § 523(a)(8), there is a presumption that educational  
11 loans extended by or with the aid of a governmental  
12 unit or nonprofit institution are nondischargeable in  
13 bankruptcy in the absence of undue hardship to the  
14 debtor or the debtor's dependents. This law furthers  
15 congressional policy to ensure that such loans,  
16 extended solely on the basis of the student's future  
17 earnings potential, cannot be discharged by recent  
18 graduates who then pocket all of the future benefits  
19 derived from their education.

20                         The Debtor bears the burden to prove by a  
21 preponderance of the evidence that he or she is  
22 entitled to a discharge of the student loan.

23                         Neither the code nor the legislative history for  
24 § 523(a)(8) defines "undue hardship," but case law has  
25 held that it is something more than "garden-variety  
26 hardship" Pena, 155 F.3d at 111. Cases involving "real  
27 and sustained" hardship may merit discharge.

28                         Nys v. Educ. Credit Mgmt. Corp. (In re Nys), 308 B.R. 436 (9th  
Cir. BAP 2004) (some citations omitted).

29           **The Brunner Test**

30           The Ninth Circuit has adopted a three-part test to determine  
31 "undue hardship":

32                         First, the debtor must establish "that she  
33 cannot maintain, based on current income and  
34 expenses, a 'minimal' standard of living for  
35 herself and her dependants if forced to repay  
36 the loans. . . ."

37                         Second, the debtor must show "that  
38 additional circumstances exist indicating that  
this state of affairs is likely to persist for a

1 significant portion of the repayment period of  
2 the student loans. . . ."

3 The third prong requires "that the debtor  
4 has made a good faith effort to repay the loan  
5 . . . ." Pena, 155 F.3d at 1111 (quoting  
6 Brunner, 831 F.2d at 396).

7 Debtor must satisfy all three parts of the  
8 Brunner test before her student loans can be  
9 discharged. See Saxman v. Educ. Credit Mgmt.  
10 Corp. (In re Saxman), 325 F.3d 1168, 1173 (9th  
11 Cir. 2003). Failure to prove any of the three  
12 prongs will defeat a debtor's case.

13 In re Nys, 308 B.R. at 441-42.

14 i. Minimal Standard of Living

15 The first prong of the Brunner test requires a debtor to  
16 prove "that the debtor cannot maintain, based on current income  
17 and expenses, a 'minimal' standard of living for herself and her  
18 dependants if forced to repay the loans." In re Brunner, 831 F.2d  
19 at 396.

20 To meet this requirement, the debtor must demonstrate  
21 more than simply tight finances. In re Nascimento,  
22 241 B.R. 440, 445 (9th Cir. BAP 1999). "In defining  
23 undue hardship, courts require more than temporary  
24 financial adversity, but typically stop short of utter  
25 hopelessness." Id.

26 Rifino v. United States (In re Rifino), 245 F.3d 1083 (9th Cir.  
27 2001).

28 The "minimal standard of living" must be determined "in light  
of the particular facts of each case." Cota v. U.S. Dep't of  
Educ. (In re Cota), 298 B.R. 408, 415 (Bankr. D. Ariz. 2003)  
(quoting In re Afflitto, 273 B.R. 162, 170 (Bankr. W.D. Tenn.  
2001)). We have held that the IRS standards for living may be  
considered as evidence in evaluating the first prong of the  
Brunner test, but it should not be the sole measure of what is

1 necessary to maintain a minimal standard of living. Educ. Credit  
2 Mgmt. Corp. v. Howe (In re Howe), 319 B.R. 886, 892 (9th Cir. BAP  
3 2004). "The method for calculating a debtor's average monthly  
4 expenses is a matter properly left to the discretion of the  
5 bankruptcy court." In re Pena, 155 F.3d at 1112.

6 Carter argues that the bankruptcy court committed error  
7 because it did not perform an individualized analysis of his  
8 income with a mechanical application of the Poverty Guidelines and  
9 the ICRP. Specifically Carter argues the bankruptcy court erred  
10 in finding that because his income was above the National Poverty  
11 Guidelines he qualified for the ICRP, and because he qualified for  
12 the ICRP, he did not meet the first prong under the Brunner test.<sup>9</sup>  
13 However, a review of the record indicates that the bankruptcy  
14 court was given significant evidence to consider and evaluate the  
15 first prong of the Brunner test.

16 Further, Carter argues that the bankruptcy court failed to  
17 perform an individualized analysis of his necessary expenses.  
18 However, the record reflects that the bankruptcy court received  
19 considerable evidence from Carter regarding his income and  
20 expenses. Prior to trial, Carter and DOE stipulated that Carter's  
21 average monthly net income on his Bankruptcy Schedule I, after  
22 payroll deductions, was approximately \$2,357.00, and his necessary  
23 expenses, as listed on Schedule J, were \$2,361.00 per month.  
24 (Carter's Schedule J included a \$230 monthly payment on the

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25  
26 <sup>9</sup> Carter argues that the bankruptcy court held that because  
27 Carter's income was above the National Poverty Guidelines and he  
28 qualified for reduced payments under the ICRP, he may not  
discharge his student loan. However, Carter's argument is not  
supported by the record.

1 Consolidated Loan.) Prior to trial, the parties also stipulated  
2 that there had been no significant changes in Carter's financial  
3 situation since the bankruptcy petition date.

4 At trial, the bankruptcy court took evidence consisting of  
5 (1) Carter's Schedules I and J, (2) Carter's post petition changes  
6 to his income and expenses, (3) the testimony of Ms. Boston  
7 regarding Carter's ability to find other employment, and (4) the  
8 testimony of Ms. Davis regarding Carter's payment on the  
9 Consolidated Loan under the ICRP. The bankruptcy court's ruling  
10 with respect to the first prong references Carter's schedules  
11 filed in connection with his bankruptcy: ". . . the budget that  
12 [Carter] filed with the Bankruptcy Court showed that he could make  
13 \$230 a month payments." Transcript, 31 March 2011, page 99. Thus  
14 the record reflects that the bankruptcy court did not mechanically  
15 apply the Poverty Guidelines and the ICRP, but conducted an  
16 individualized analysis of Carter's income and expenses.

17 We conclude, therefore, that the bankruptcy court did not  
18 commit clear error in finding that Carter failed to meet the first  
19 prong of the Brunner test.<sup>10</sup>

20 ii. Persistent Additional Circumstances

21 The second prong of the Brunner test requires a debtor to  
22 prove "that additional circumstances exist indicating that this  
23 state of affairs is likely to persist for a significant portion of  
24 the repayment period of the student loans." In re Brunner,

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26 <sup>10</sup> The bankruptcy court was not technically required to  
27 examine the second or third prongs of the Brunner test. See  
28 In re Birrane, 287 B.R. 490, 496 (9th Cir. BAP 2002) (citing  
In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (Only if the  
Debtor meets the first prong of the Brunner test should a court  
examine the other two Brunner requirements.).

1 831 F.2d at 396. The debtor must provide evidence that he or she  
2 will be unable to repay for several years, because of psychiatric  
3 problems, lack of useable job skills, severely limited education,  
4 physical problems, or any other circumstances which will  
5 persistently interfere with the debtor's ability to repay."  
6 In re Birrane, 287 B.R. at 497. See, also, In re Nys, 308 B.R. at  
7 444-45.

8 We have held, based upon prior case law, that "additional  
9 circumstances" may include the following nonexhaustive list of  
10 factors: (1) serious mental or physical disability of the debtor  
11 or the debtor's dependents which prevents employment or  
12 advancement; (2) the debtor's obligations to care for dependents;  
13 (3) lack of, or severely limited, education; (4) poor quality of  
14 education; (5) lack of usable or marketable job skills;  
15 (6) underemployment; (7) maximized income potential in the chosen  
16 education field, and no other more lucrative job skills;  
17 (8) limited number of years remaining in work life to allow  
18 payment of the loan; (9) age or other factors that prevent  
19 retraining or relocation as a means for repayment of the loan;  
20 (10) lack of assets, whether or not exempt, which could be used to  
21 pay the loan; (11) potentially increasing expenses that outweigh  
22 any potential appreciation in the value of the debtor's assets  
23 and/or likely increases in the debtor's income; and (12) lack of  
24 better financial options. In re Nys, 308 B.R. at 446.

25 Both Carter and DOE argue that they prevailed on the second  
26 prong of the Brunner test. Carter's view that he prevailed  
27 resulted in his failure to specifically address the second prong  
28 in his appeal brief. However, a careful review of the record is

1 consistant with DOE's view that the bankruptcy court found against  
2 Carter on the second prong.

3       The hearing transcript clearly indicates that the bankruptcy  
4 court found against Carter as to the second prong. The bankruptcy  
5 court stated, ". . . I mean if he has that ability to pay for the  
6 next 15 years, he has the ability to pay, so I don't think. . . ."  
7 Transcript, 31 March 2011, page 99. Here, the bankruptcy court  
8 found that Carter had the ability to pay his student loans for the  
9 next 15 years and thus found against Carter under the second prong  
10 of the Brunner test.

11       The bankruptcy court took evidence regarding (1) Carter's age  
12 and education, (2) his previous drug and legal issues,  
13 (3) Carter's previous and current employment, (4) his growth and  
14 responsibilities at his current job, (5) his current physical  
15 condition, and (6) his prospects of finding another job near the  
16 Portland area. Carter did not provide any evidence that his  
17 current economic situation would change in the next several years  
18 which would prevent him from repaying his student loans. On the  
19 contrary, Carter presented evidence that he was next in line for a  
20 promotion which would result in some pay increase and a potential  
21 decrease in transportation expenses. Thus, the record indicates  
22 that Carter's current state of financial affairs (current ability  
23 to repay his student loan while maintaining a minimal standard of  
24 living) would persist for a significant portion of the repayment  
25 period. We conclude that the bankruptcy court did not commit  
26 clear error in finding that Carter did not meet the second prong  
27 of the Brunner test.

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iii. Good Faith Effort to Repay

The final prong of the Brunner test requires a debtor to prove "that the debtor has made a good faith effort to repay the loans." In re Brunner, 831 F.2d 396. Two common factors are considered in evaluating good faith. In re Birrane, 287 B.R. at 499-500. Those are the debtor's efforts (1) to obtain employment, maximize income, and minimize expenses, and (2) to negotiate a repayment plan. Id. The bankruptcy court found that Carter met his burden of the third prong of the Brunner test, and because Carter does not dispute the bankruptcy court's findings in his favor regarding good faith, we will not disturb them.

**VI. CONCLUSION**

The bankruptcy court's decision is amply supported by the record. Applying the Brunner test, the bankruptcy court did not commit clear error in finding that (1) Carter could maintain a minimal standard of living and repay the consolidated loan, and (2) Carter's financial situation was likely to continue for a substantial portion of the repayment period. Carter was unable to establish "undue hardship" within the meaning of § 523(a)(8) and was not entitled to a bankruptcy discharge of the Consolidated Loan.

For the reasons set forth above, we AFFIRM.