**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

**CIARA VESEY,** **Case No. 16-02268-als7**

Debtor(s)

**CIARA VESEY,** **Adv. Pro. 16-30131-als**

Plaintiff(s)

v.

**FEDLOAN SERVICING, et al.,**

Defendant(s)

**MEMORANDUM OF DECISION**

**(date entered on docket: October 19, 2017)**

Before the Court in this adversary proceeding plaintiff, Ciara Vesey ("Vesey"), seeks to discharge her student loan debt owed to the defendant, U.S. Department of Education (DOE). The Court has jurisdiction in this core proceeding under 28 U.S.C. §§ 1334 and 157(b)(1). For the reasons set forth below Vesey has not met her burden of proof to establish an undue hardship.

## DISCUSSION

Vesey attended Drake University and obtained her undergraduate degree in 2007. Later she returned to Drake and earned a Law Degree and a Masters Degree in Public Administration in 2012. Her education was financed through student loans obtained through the government and private lenders.[1] At the time of trial she owed $251,779.70 to the DOE.

[1] Pursuant to a stipulation by the parties, Defendants Iowa Student Loan Liquidity Corporation and Aspire Servicing Center were dismissed from this matter on September 11, 2017. A Motion for entry of default judgments against Drake University and Educational Computer Systems was denied. Only the DOE was involved in the trial of this adversary proceeding.

Student loans are only subject to discharge in bankruptcy under specific circumstances where repayment would constitute an "undue hardship on the debtor [or] the debtor's dependents." 11 U.S.C. § 523(a)(8). It is the plaintiff's burden to establish an undue hardship by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 289-91 (1991). The concept of "undue hardship" is not defined by the Bankruptcy Code. The Eighth Circuit applies a totality of the circumstances test to determine whether repayment of student loans would constitute an undue hardship. *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549, 553 (8th Cir. 2003). The analysis involves three areas of inquiry: "(1) a debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and [any] dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *Long*, 322 F.3d at 554. This broad test affords the flexibility to evaluate specific circumstances that are relevant to determining undue hardship. *Shadwick v. U.S. Dep't of Educ. (In re Shadwick)*, 341 B.R. 6, 11 (Bankr. E.D. Mo. 2006).

1. Past, Present and Future Financial Resources

After obtaining her undergraduate degree Vesey was employed in Des Moines as a paraglegal with GuideOne Insurance. When she did not pass the bar exam she moved to her parents' home in Davenport where she still resides. In July 2012 Vesey began working part-time for American Eagle Airlines out of Moline, IL where her schedule varied between 20 and 40 hours a week. Vesey passed the bar exam in May 2013 and since that time she has engaged in the solo practice of law. Until October 2016 she also continued to work at the airline.

Vesey argues that she has earned only minimal amounts the last few years and submitted 6 years of income tax returns to demonstrate this fact. A review of her returns show she received wages and reported gross receipts from the operation of a business. These returns also reflect that Vesey received substantial tax refunds in each year under both her federal and state returns. At the time of trial Vesey was doing independent reviews for the State of Iowa Health Facilities Division and some work referred by the Rock Island Arsenal for the Department of Defense. She stated her income from her practice was trending upward which is reflected by the amount of her gross receipts. Her bankruptcy Schedule A/B lists $19,375.64 in outstanding invoices.

Vesey urges a conclusion that her income will not increase over time based solely upon her lack of income to date. She explains that she now realizes that she was not always financially responsible and has no roadmap for repaying the amount of debt she owes. It is Vesey's argument that she will never have sufficient resources to meet her obligations, and any attempts to repay are therefore hopeless.

In support of her position Vesey points to *In re Fern* to establish that her past income and lack of current financial resources should be sufficient to satisfy the income factor under the totality of the circumstances test. *See* 563 B.R. 1, 5 (B.A.P. 8th Cir. 2017). Her reliance on this case is misplaced. Fern borrowed money to participate in online accounting courses, which she never completed, and to attend Capri College to become an esthetician. *Fern v. FedLoan Servicing (In re Fern),* 553 B.R. 362, 365 (Bankr. N.D. Iowa 2016). She had been working for the same employer for 6 years earning less than $25,000 annually. *Id.* Ms. Fern's prospects for increasing her income were minimal due to her education, skills and need for flexibility to care for her three children. By comparison, Vesey has obtained not only an undergraduate degree but two graduate degrees and is in the early state of her career. Her potential earning capacity is a relevant and important factor in evaluating her future financial resources. *In re Shadwick,* 341 B.R. at 12 (a law degree is "extremely lucrative and offer[s] . . . .a wide range of employment opportunities."). Under these circumstances it is premature to conclude that she will not have any future ability or opportunity to earn a higher income. *See Educ. Credit Mgmt. Corp. v. Jesperson (In re Jesperson),* 571 F.3d 775, 780 (8th Cir. 2009).

2. Reasonable and Necessary Living Expenses

"To be reasonable and necessary, an expense must be 'modest and commensurate with the debtor's resources.'" *In re Jesperson*, 571 F.3d at 780, citing *In re DeBrower*, 387 B.R. 587, 590 (Bankr. N.D. Iowa 2008). A debtor is entitled to "sufficient financial resources to satisfy needs for food, shelter, clothing and medical treatment" and to maintain a minimal standard of living. *Nielsen v. ACS, Inc. (In re Nielsen),* 473 B.R. 755, 760 (B.A.P. 8th Cir. 2012) citing *Brown v. Am. Educ. Servs., Inc.*, 378 B.R. 623, 626 (Bankr. W.D. Mo. 2007). The DOE raised no argument related to Vesey's current expenses and the Court finds the amounts on Schedule J to be reasonable.

During her testimony and in her brief, Vesey states her future expenses should be considered in evaluating her standard of living and inability to make student loan payments. No evidence, opinion, or estimate of the amount of any such anticipated future living expenses were supplied at trial. "A court may not engage in speculation when determining net income and reasonable and necessary living expenses." *In re Jesperson*, 571 F.3d at 780; *see Walker v. Sallie Mae Serv. Corp.*, 650 F.3d 1227, 1233 (8th Cir. 2011). Vesey bears the burden of proving she has "no excess funds with which to make the student loan payment." *See Hurst v. Southern Arkansas University (In re Hurst)*, 553 B.R. 133, 138 (B.A.P. 8th Cir. 2016). No evidence has been submitted to establish the net monthly funds reflected on Vesey's Schedules are not available to make payments on the student loan obligation and the Court cannot infer otherwise.

3. Any other Relevant Facts and Circumstances

This final inquiry allows the Court to consider any other relevant information that would be persuasive to overcome the analysis of undue hardship under the first two factors of the totality of the circumstances test. *In re Fern*, 563 B.R. at 4. A variety of issues may be considered, including:

> (1) total present and future incapacity to pay debts for reasons not within the control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the student loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of the study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; and (9) the ratio of student loan debt to total indebtedness.

*In re Brown*, 378 B.R. at 626-27, (citing *VerMaas v. Student Loans of N.D. (In re VerMaas)*, 302 B.R. 650, 656-57 (Bankr. D. Neb. 2003); *Morris v. Univ. of Ark.*, 277 B.R. 910, 914 (Bankr. W.D. Ark. 2002)).

Situations resulting from self-imposed restrictions or actions are relevant to a determination of undue hardship. *In re Jesperson*, 571 F.3d 775, 782 (8th Cir. 2009) *citing In re Loftus*, 371 B.R. 402, 410-11 (Bankr. N.D. Iowa 2007). Vesey's recent work history reveals that she has not

focused entirely on her law practice. After passing the bar exam in 2013 and opening her law practice she continued to work part-time for the airline for three more years. The record indicates that she engaged in both of these vocations on less than a full time basis.

The DOE's evidence contains banking information reflecting Vesey's extensive domestic and international travel costing more than $15,000 from November 2015 through January 2017. Vesey explains that she received discounted travel rates through her job at the airline and that it was a perk of her job. She additionally argues that the DOE's information is not entirely accurate and should not be considered in a determination of undue hardship because she was repaid by friends and relatives for their travel. No evidence of any repayment was presented. She also takes the position that the amount spent on travel is inconsequential compared to her student loan balances and is therefore irrelevant.

Early in her practice Vesey registered for court appointed work in criminal cases in several counties. She explained that she decided to remove herself from the list due to the stress of receiving 2-3 cases a week while working for the airline. Although she left the airline job, she states that she may not continue doing criminal work because it is not good for her well-being. Vesey describes her passion as providing legal assistance to underserved populations which is a laudable endeavor. Passion aside, Vesey does not articulate how she plans to pursue this goal and appears to conclude that any work she does perform will be uncompensated.

These facts weigh in favor of a conclusion that Vesey bears some responsibility for her financial condition due to self-imposed limitations.

The availability of a repayment plan is another singular factor to be considered when evaluating whether undue hardship exists. *Lee v. Regions Bank Student Loans (In re Lee)*, 352 B.R. 91, 95 (B.A.P. 8th Cir. 2006). "[A] student loan should not be discharged when the debtor has 'the ability to earn sufficient income to make student loan payments under the various special opportunities made available through the Student Loan Program.'" *In re Jesperson*, 571 F.3d. at 781 (citations omitted). In 2015 Vesey applied to consolidate all of her government student loans which totaled $220,025.54 at 7.375% interest. As a result of this consolidation she qualified to participate in the Income Based Repayment program ("IBR"), which adjusts payments according to income. Vesey has taken advantage of the IBR and at her current level of income her monthly payment is $0.00. Additionally her loans are not identified as being in default despite her lack of payments. Her monthly payment amount would only be adjusted upward in the event Vesey's

income increases in the future. Interest, however, does continue to accrue on the outstanding balance. Despite her zero dollar payments Vesey argues that she will still suffer an undue hardship because in twenty-five years there will be a tax consequence for forgiveness of her debt. The Court is not persuaded by this as the "mere possibility of tax consequences at the expiration of the 25-year repayment period" is not dispositive of undue hardship. *In re Nielsen*, 473 B.R. at 762.

The evidence includes numerous job applications which Vesey contends establish undue hardship because her efforts have not resulted in employment in her field of study. The Court does not find this argument persuasive. The timing and focus of these applications appear to coincide with legal proceedings and do not reflect a deliberative process[2]. At various intervals applications were submitted online without much reflection as to whether it was employment that Vesey could obtain or would be suitable to her credentials and skill set.

The Court also looks to whether the dominant purpose of her bankruptcy filing was to discharge her student loans. The schedules filed with Vesey's voluntary petition included unsecured obligations in the total amount of $253,710.00 of which $251,577.00 were described as student loans. Vesey refers to *In re Brown* where a 64-year-old debtor on a fixed income acted in good faith despite seeking to discharge her student loans within a year of receiving her Master's degree when she was unaware that discharging those obligations was an option at the time of filing her bankruptcy proceeding. *See* 378 B.R. 623 (Bankr. W.D. Mo. 2007). By comparison, Vesey testified that the "predominant purpose" of her filing bankruptcy was to discharge her student loans. This intent is corroborated by the fact that Vesey's student loan debt represents over 99% of her total unsecured debt.

For the reasons stated Vesey's student loans are not subject to discharge based upon undue hardship.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

[2] Vesey attempted to claim unemployment benefits after leaving her job at the airline. The administrative law judge handling her case stated that her job search was not believable or credible.

Parties receiving this Memorandum of Decision from the Clerk of Court:
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