The Scarlet D: Bankruptcy Filing and Employment Discrimination

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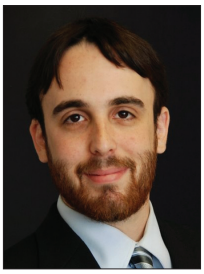
Section 525 of the Bankruptcy Code imbues debtors with certain protections against discriminatory treatment by employers, with paragraph (a) addressing acts by governmental units and paragraph (b) focusing on acts by private entities. However, when read together, both paragraphs contain a very curious dichotomy in phrasing. More particularly, as it pertains to the employment of a debtor, paragraph (a) provides that "a governmental unit may not…deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title,"[1] while paragraph (b) states that, "[n]o private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title."[2]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The notable absence in paragraph (b) of the phrase "deny employment" has seemingly made it easy for courts, in applying the plain meaning of the statute, to decline anti-discrimination protection to job-seeking debtors. While it may be hard to quibble with such straightforward statutory construction, it nonetheless raises the question of whether leaving debtors unprotected from hiring discrimination by private employers fits within the spirit of the Code.

The Majority View

Since it was enacted in 1984, § 525(b) has been the subject of numerous district and bankruptcy court opinions, the results of which have created an overwhelming majority position that § 525(b) provides no protection to debtors and former debtors against hiring discrimination by private employers.[3] Despite the relative profusion of opinions, it was not until this December 2010 that an opinion on § 525(b) as it pertains to job-seeking debtors was rendered at the circuit-court level when the Third Circuit handed down its decision in *Rea v. Federated Investors*.[4] Not surprisingly, the Third Circuit adopted the well-established majority view.

The circumstances in *Rea* are fairly typical of the majority of hiring discrimination cases arising under § 525(b). The plaintiff received his bankruptcy discharge in 2003, and six years later he applied for a job with the defendant. After an interview, the defendant extended an employment offer to the plaintiff, complete with important details such as the start date and salary.[5] The plaintiff accepted the offer with the understanding that it was contingent on background checks into his criminal and credit histories.[6] It was at this juncture that the defendant came to learn of the plaintiff's bankruptcy filing, and prompted by that realization, withdrew the employment offer.[7]

Utilizing a line of reasoning put forth by plaintiffs in several prior cases,[8] the plaintiff in *Rea* urged the Third Circuit to adopt a broad reading of the statute, and in particular, infer that the phrase "no private employer may...discriminate with respect to employment" include a prohibition against private employers refusing to hire on account of a candidate's bankruptcy filing.[9] To this end, courts have conceded that if § 525(b) was read in a vacuum, the phrase "discriminate with respect to employment" would likely encompass a private employer's hiring decisions.[10] However, the Third Circuit, in an exercise of statutory construction performed by many courts in previous opinions, juxtaposed the language of § 525(a) and (b) to determine that, unlike the former paragraph with respect to government entities, the latter paragraph did not create a protection for debtors against discriminatory hiring with respect to private employers. In particular, the court noted that even though the two paragraphs were enacted years apart,[11] it was far from inconsequential that Congress "chose to place the two subsections adjacent to each other,"[12] giving rise to a strong presumption that any difference or omission in language was done deliberately. In this vein, the fact that paragraph (b) lacked the phrase "deny employment" but was otherwise a verbatim mimic of paragraph (a) signaled Congress' intention to permit private employers to deny employment based on a job candidate's bankruptcy filing, unlike government entities.

Along these same lines, other courts have elaborated that to make any broader inferences from § 525(b) would result in a redundancy in § 525 when read as a whole.[13] More specifically, if courts were to extrapolate on the phrase "discriminate with respect to employment against," which appears in both paragraphs (a) and (b), to include hiring decisions, then the explicit prohibition on denying employment in § 525(a) would be superfluous.[14] This rationale is additionally supported by the fact that paragraph (b) includes paragraph (a)'s express prohibition against employment termination, further evidencing Congress' apparent intentions in exclusively omitting the denial of employment language.[15] Instead, at least one court has

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1 11 U.S.C. § 525(a).
2 11 U.S.C. § 525(b).
3 For a survey of district and bankruptcy court opinions, *see Burnett v. Stewart Title Inc.*, 431 B.R. 894 (S.D. Tex. 2010); *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51 (M.D. Fla. 2009); *Martin v. American Family Mutual Ins. Co.*, 2007 Bankr. LEXIS 3278 (Bankr. D. Kan. 2007); *In re Stinson*, 285 B.R. 239 (Bankr. W.D. Va. 2002); *Fiorani v. Caci*, 192 B.R. 401 (E.D. Va. 1996).
4 *Rea v. Federated Investors*, 2010 U.S. App. LEXIS 25501 (3d Cir. 2010).
5 For more detailed case background, *see* the district court's opinion, *Rea v. Federated Investors*, 431 B.R. 18, 19 (W.D. Pa. 2010).
6 *Id.*
7 *Id.*
8 *See* cases referenced *supra* in n.3.
9 *Rea* at *5-6.
10 *See Martin* at *11; *In re Stinson* at 245.
11 Section 525(a) was enacted in 1978.
12 *Rea* at *8.
13 *See Myers* at 58; *Martin* at *8; *In re Stinson* at 249.
14 *Id.*
15 In a further example of how narrowly the language of § 525(b) has been interpreted, at least one court has opined that it is permissible for an employee to have his or her employment terminated simply due to an intent to file, finding that § 525(b) only protects an individual upon filing. *See Majewski v. St. Rose Dominican Hosp. (In re Majewski)*, 310 F.3d 653 (9th Cir. 2002).

continued on page 89

from page 16

observed that § 525(b)'s bar on discrimination "with respect to employment" likely refers to other conditions of employment, such as "transfers, demotions or modifications to employment terms."[16]

The Extreme Minority View

While federal courts throughout the nation have heretofore almost universally adopted the position exhibited by the Third Circuit in *Rea*, one court has assumed the opposite tact, much to the criticism of the majority.[17] In *Leary v. Warnaco Inc.*,[18] the Southern District of New York held that § 525(b) does give rise to a cause of action against private employers that discriminate in hiring on account of an applicant's bankruptcy filing.

The circumstances in *Leary* are of the familiar variety in that a former debtor received a job offer from a private employer subject to the results of a credit report, but then had the offer withdrawn when the credit report revealed the bankruptcy.[19] Of added note in *Leary* is the fact that the employer did not mince words, explicitly informing the plaintiff that she would not be hired due to her credit report.[20]

Like the many other courts that have addressed § 525(b), the *Leary* court applied what it believed to be the plain meaning of the statute. However, in stark contrast to the majority view, the court adopted a much broader interpretation of the statute, criticizing the majority position as too narrowly interpreting the law by "drawing a negative inference in comparing" it to § 525(a).[21] Rather, the foundation of the court's opinion lies in its greater emphasis on the policy aims of the Bankruptcy Code, and notably the notion that § 525(b) is one of the Code's remedial provisions enacted to facilitate "fresh starts" for consumer debtors.[22] To that end, it was seemingly incongruous to the court that the law would prohibit discrimination in firing by a debtor's current employer, but would permit discrimination in hiring against job-seeking debtors. To the court, allowing a private employer to discriminate in hiring based solely on a bankruptcy filing was a direct impediment toward the attainment of a "fresh start."

Although the court acknowledged the clear disparity in language between § 525(a) and (b), it believed that the Code's overarching fresh start policy superseded the disjoint in language. Instead, the court gave an expansive reading to § 525(b)'s "with respect to employment" phrase, finding that its plain meaning implicated "all aspects of employment including hiring, firing, and material changes in job conditions."[23] In addition, the court attributed the inconsistency in language between the two provisions to a mere difference in verbosity by the scrivener, having drafted the respective provisions years apart.[24]

The Scarlet D

Nearly a century ago, the Supreme Court observed of a forbearer of today's Bankruptcy Code, the Bankruptcy Act, that its purpose was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh."[25] While U.S. bankruptcy law has gone through much evolution in the past century, the notion that the law is meant to facilitate a fresh start for those maligned by debt remains a core tenet, one that at least the court felt was too important to ignore in *Leary*. While it is difficult to argue with the sound principles of straightforward statutory construction employed by the many courts that have gone against *Leary*, one persuaded by the logic in *Leary* might argue that it is those courts that have read § 525(a) and (b) in a vacuum, producing an end result that is contradictory to the greater aims of the Bankruptcy Code, and frustrating a debtor's fresh start prospects in particular.

Employment issues are often a key reason driving a consumer debtor toward a bankruptcy filing, as well as a critical component of consumer debtors' efforts to jumpstart their lives after bankruptcy and achieve financial viability. Consequently, a lack of protection against hiring discrimination can impose a serious impediment to a debtor's efforts in making professional advancements, or even just finding gainful employment, thus placing a burden and potential stagnation on a debtor that the rest of the job-seeking public does not face. This would seem to be a result incompatible with the Code's overarching aims.

Of added concern is the reality that debtors are seemingly encumbered by a metaphorical Scarlet A, or perhaps more appropriately, a Scarlet D, at least for the term that a bankruptcy remains on a credit report for prospective employers to see. While likening the challenges that a debtor faces to the trials and travails of Hester Prynne may seem like an exercise in hyperbole, a certain negative stigma can nonetheless attach to debtors and cloud how others view debtors. This can be especially true for prospective employers, who, perhaps guided by misconceptions of the bankruptcy process, may deem a bankruptcy filing, even if years removed, as invalidating all other qualifications that a job-seeking debtor might otherwise possess for the job. Consequently, § 525(b), as seemingly written and subsequently interpreted by the majority view, in effect permits a bankruptcy filing to loom over a debtor and prejudice his/her employment prospects for years.

Inconsistent Treatment

In addition to the employment and fresh-start obstacles that § 525(b) engenders as interpreted by the majority view, there is an additional concern that this interpretation produces inconsistent results between two very similarly situated groups of people. As observed in *Leary*, "the evil being legislated against is no different when an employer fires a debtor simply for seeking refuge in bankruptcy, as contrasted with refusing to hire a person who does so. The 'fresh start' policy is impaired in either case."[26] More specifically, it is clear under § 525(b) that a debtor or former debtor cannot have his or her current employment terminated on account of a bankruptcy filing. Thus, if an individual accepts an offer of employment, commences work and then files for bankruptcy minutes later, § 525(b) would protect that person from being fired on account of the bankruptcy filing. In this scenario, a private employer that may have had serious misgivings about the debtor's bankruptcy filing had it occurred

16 *Martin* at *9.
17 For a sampling of criticisms, *see Rea* at *8; *Burnett* at 900; *Myers* at 58; *Martin* at *13.
18 *Leary v. Warnaco Inc.*, 251 B.R. 656 (S.D.N.Y. 2000).
19 *Id.* at 657. In a slight difference from the circumstances in *Rea*, the plaintiff in *Leary* was only days removed from her bankruptcy rather than years.
20 *Id.*
21 *Id.* at 658.
22 *Id.*
23 *Id.* at 659.
24 *Id.*
25 *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915).
26 *Leary* at 658.

continued on page 90

prior to employment is impotent from acting on that concern once employment is in place.

However, in the case of an individual who is years removed from his or her bankruptcy filing and proves to be otherwise fully qualified for the job, such as the plaintiff in *Rea*,[27] § 525(b), as applied under the majority view, would not protect him or her from being discriminated against in hiring, even after receiving a contingent offer of employment. Consequently, § 525(b), as applied by the majority view, would appear to spawn undesirable results for all parties in that job-seeking debtors can be frustrated in their attempts to achieve a fresh start, while private employers are prevented from acting on concerns stemming from an employee's bankruptcy filing that they would not have been barred from had the filing occurred prior to hiring.

[I]t is the courts' role to interpret statutory language as written, and thus it is difficult to fault the many courts that have narrowly applied § 525(b) based on the language as clearly written, especially when aligned with the preceding paragraph.

Conclusion

At least one court in the majority position has observed a potentially instructive statement of Congress' intentions, at least when drafting § 525(a), in that the relevant Senate Report states that courts "will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy."[28] While this statement was made in reference only to § 525(a), it nonetheless revealed that Congress was cognizant of a greater bankruptcy policy beyond the specific language in the provision and was reliant on the courts to further that policy.

Nevertheless, it is the courts' role to interpret statutory language as written, and thus it is difficult to fault the many courts that have narrowly applied § 525(b) based on the language as clearly written, especially when aligned with the preceding paragraph. However, with the ultimate result of such strict construction not only seemingly in discord with a fundamental goal of the Bankruptcy Code, but also erecting a potential major impediment toward advancing that goal, it may be time that the scrivener revisit § 525(b) and craft language that serves to better promote the Code's intrinsic fresh-start ideals. ■

[27] For another detailed example of how a seemingly fully qualified individual can be denied employment on account of a bankruptcy filing, *see Myers v. TooJay's Mgmt. Corp.* The plaintiff, a former debtor, received a job offer after both an interview and a two-day trial period during which he shadowed employees of the defendant and performed various job tasks, and also completed several forms typical for new hires, but ultimately had the offer rescinded when a bankruptcy filing appeared on a background check. *Myers*, at 53-56.

[28] *In re Stinson*, at 247 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin.).