

CONTEMPLATING THE RECOGNITION OF A COMMON LAW TORT FOR WRONGFULLY REFUSING TO HIRE BANKRUPTCY DEBTORS

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INTRODUCTION

Section 525 of the Bankruptcy Code,¹ commonly known as the antidiscrimination provision,² prohibits employers from discriminating against debtors for exercising their right to seek relief from creditors under the Bankruptcy Code.³ Although the provision reflects Congress's intent to protect the bankruptcy debtor's ability to "earn a livelihood,"⁴ its restrictions on the employment practices of public and private entities were not enacted simultaneously,⁵ and the protections those restrictions provide to bankruptcy debtors are not identical.⁶

In particular, the statute Congress originally enacted as section 525 in 1978 only prohibited government entities from discriminating against a bankruptcy debtor based on the debtor's "insolvency, bankruptcy, or nonpayment of a

¹ 11 U.S.C. § 525 (2012). Congress has defined the "Bankruptcy Code" to mean the statutes in title 11 of the United States Code. 12 U.S.C. § 5381(a)(2) (2012); Courts have indicated the term refers to title I of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). *See, e.g., In re Hospitality Ventures/Lavista*, 314 B.R. 843, 857–58 (Bankr. N.D. Ga. 2004); *In re Troy Indus. Catering Serv.*, 2 B.R. 521, 522 (Bankr. E.D. Mich. 1980).

² *See Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 86 n.2 (2d Cir. 2002) ("[C]ourts and commentators generally refer to section 525(a) as the antidiscrimination provision . . ."); *In re Betty Owen Schs., Inc.*, 195 B.R. 23, 29 (Bankr. S.D.N.Y. 1996) ("Section 525 is the anti-discrimination provision of the Bankruptcy Code."); *In re Madison Madison Int'l*, 77 B.R. 678, 678 (Bankr. E.D. Wis. 1987) (stating section 525 is anti-discrimination provision of Bankruptcy Code).

³ *See Brown v. Pa. State Emps. Credit Union (In re Brown)*, 851 F.2d 81, 85 (3d Cir. 1988) (noting section 525 bars only government agencies and employers from discriminating against debtors based on previous bankruptcy filings); *In re Diamond & Gold Connection, Inc.*, 54 B.R. 917, 919 (Bankr. D. Mass. 1985) (same). The antidiscrimination provision actually "prohibits governmental entities from discriminating against an individual in employment *and certain other areas* on the basis of the individual's current or prior bankruptcy status." *Pastore v. Medford Sav. Bank*, 186 B.R. 553, 554 (D. Mass. 1995) (emphasis added). However, the provision "has no application to private . . . entities except in the employment context." *In re Rosemond*, 105 B.R. 8, 9 (Bankr. W.D. Pa. 1989).

⁴ *In re Stinson*, 285 B.R. 239, 247 (Bankr. W.D. Va. 2002); *see In re Elsinore Shores Assocs.*, 66 B.R. 723, 740–41 (Bankr. D. N.J. 1986) ("The purpose of 11 U.S.C. § 525 is to protect a debtor's means of securing a living or pursuing a livelihood.").

⁵ *See Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 56 (M.D. Fla. 2009) ("The statute provides two standards: one for governmental agencies in § 525(a) and one for private employers in § 525(b). The government standard . . . was enacted in 1978 The standard governing private employers . . . was not enacted until 1984[.]"), *aff'd*, 640 F.3d 1278 (11th Cir. 2011).

⁶ *See Mannella v. Comm'r of Internal Revenue*, 631 F.3d 115, 125 n.7 (3d Cir. 2011) (contrasting "the limited protection given to persons in private employment from bankruptcy discrimination" with "the more expansive protection from bankruptcy discrimination given to public employees"); *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1283 (11th Cir. 2011) ("Section 525 of the Bankruptcy Code provides individuals who are or have been in bankruptcy with some protection against discriminatory actions by employers. . . . The acts against which they are protected depend on whether the employer is a 'governmental unit' or a 'private employer . . .'" (quoting 11 U.S.C. § 525(a) & (b))).

dischargeable debt."⁷ The original provision was renumbered as section 525(a) in 1984 when Congress added subsection (b),⁸ which extended the scope of the provision to prohibit private employers from discriminating against employees who invoke the protection of the Bankruptcy Code.⁹

In contrast to section 525(a), which "specifically states that a governmental unit may not 'deny employment to, terminate the employment of, or discriminate with respect to employment against' a person on the basis of his or her bankruptcy status,"¹⁰ section 525(b) only appears to prohibit private employers from discriminating against their existing employees.¹¹ The statute does not expressly prevent private employers from denying employment to job applicants on the basis of their bankruptcy status.¹² Most courts that have considered the issue have concluded that the difference between the two provisions is intentional,¹³ and that unlike public employers, private employers can

⁷ *In re Hopkins*, 66 B.R. 828, 833 (Bankr. W.D. Ark. 1986); see *In re Patterson*, 125 B.R. 40, 52 (Bankr. N.D. Ala. 1990) ("Section 525 . . . was enacted in 1978 to eliminate a wide variety of forms of discrimination against bankruptcy debtors by government agencies and activities."), *aff'd*, 967 F.2d 505 (11th Cir. 1992).

⁸ See *In re Goldrich*, 45 B.R. 514, 519 n.2 (Bankr. E.D.N.Y. 1984), *rev'd on other grounds*, 771 F.2d 28 (2d Cir. 1985); David L. Zeiler, *Section 525(b): Anti-Discrimination Protection for Employees/Debtors in the Private Sector—Is It Illusion or Reality?*, 101 COM. L.J. 152, 159 (1996); Elizabeth A. Bronheim, Comment, *Interpreting Section 525(a) of the Bankruptcy Code*, 7 BANKR. DEV. J. 595, 598 n.21 (1990); Samantha Orovitz, Comment, *The Bankruptcy Shadow: Section 525(b) and the Job Applicant's Sisyphean Struggle for a Fresh Start*, 29 EMORY BANKR. DEV. J. 553, 558 (2013).

⁹ See *Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 86 n.2 (2d Cir. 2002); *In re Potter*, 354 B.R. 301, 309 (Bankr. N.D. Ala. 2006); *In re Callender*, 99 B.R. 378, 380 (Bankr. S.D. Ohio 1989); *In re Wagner*, 87 B.R. 612, 618 (C.D. Cal. 1988); Daniel Keating, *Offensive Uses of the Bankruptcy Stay*, 45 VAND. L. REV. 71, 101 n.147 (1992).

¹⁰ *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 172 (5th Cir. 2011) (quoting 11 U.S.C. § 525(a)); see also *In re Rees*, 61 B.R. 114, 124 (Bankr. D. Utah 1986) (stating section 525(a) "prohibits a governmental unit from denying employment to a debtor, terminating his employment, or discriminating with respect to his employment").

¹¹ See *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 57 (M.D. Fla. 2009) ("[T]he private sector is prohibited only from discriminating against those persons who are already employees."), *aff'd*, 640 F.3d 1278 (11th Cir. 2011); *In re Hardy*, 209 B.R. 371, 378 (Bankr. E.D. Va. 1997) ("[T]he plain meaning of § 525(b) does not extend anti-discrimination protection to non-employees of the defendant.").

¹² See *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1284 (11th Cir. 2011) (noting "§ 525(a) expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, while § 525(b) does not"); *In re Stinson*, 285 B.R. 239, 245 (Bankr. W.D. Va. 2002) ("The plain text of § 525(b) does not explicitly provide that discriminatory hiring is prohibited."); *Fiorani v. CACI*, 192 B.R. 401, 405 (E.D. Va. 1996); Orovitz, *supra* note 8, at 557 ("[U]nlike § 525(a), § 525(b) does not specify that a private employer cannot 'deny employment to' a job applicant because she was *once* a bankrupt debtor.") (emphasis in original).

¹³ See, e.g., *Burnett*, 635 F.3d at 172–73 (using various cannons of statutory interpretation including *in pari materia*, legislative history, Congressional intent, and structural analysis to support intentional differences in application of sections 525(a) and 525(b)); *Myers*, 419 B.R. at 57–58 (using plain

discriminate against bankruptcy debtors during the hiring process without running afoul of the Bankruptcy Code.¹⁴

This interpretation of the antidiscrimination provision has been criticized.¹⁵ Courts and commentators alike have asserted that allowing private employers to discriminate against bankruptcy debtors during the hiring process is inconsistent with the "fresh start"¹⁶ afforded individuals seeking relief under the Bankruptcy Code,¹⁷ which the antidiscrimination provision itself was specifically intended to promote.¹⁸ As one pair of commentators observed: "Although it may advance

meaning approach to exclude private employers from prohibition on discriminatory hiring practices relative to prospective employees in bankruptcy); *In re Martin*, Bankr. No. 06-41010, 2007 WL 2893431, at *2-3 (Bankr. D. Kan. Sept. 28, 2007) (inferring intentionality on Congress's intention to differentiate the two provisions).

¹⁴ See *In re Uplinger*, Bankr. No. 09-13129-BFK, 2012 WL 194621, at *2-3 (Bankr. E.D. Va. Jan. 20, 2012) (refusing to categorize outside contractors to government agencies as 'government employees' within meaning of section 525(a), thus denying applicant protection against discrimination in hiring for status as debtor in bankruptcy under section 525(b)); *In re Stinson*, 285 B.R. 239, 242 (Bankr. W.D. Va. 2002) (holding that legislative history behind section 525(a) could not apply to section 525(b) due to passage of time between enactment of both provisions); Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1752 (2012) ("Applying the *expressio unius est exclusio alterius* canon of statutory interpretation, almost all courts have thus concluded that Congress intended to permit private—but not public—employers to refuse to hire bankruptcy filers.").

¹⁵ See, e.g., Michael R. Herz, *The Scarlet D: Bankruptcy Filing and Employment Discrimination*, 30 AM. BANKR. INST. J., Apr. 2011 at 16, 89 ("[Section] 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."); Jina Kim Yun, Note, *The New Danger of Being Fired: Section 525(b)'s Disproportionate Effect on Older Workers and a Call to Amend*, 7 NW. J. L. & SOC. POL'Y 196, 198 (2012) ("[A]ntidiscrimination provisions of the Bankruptcy Code for private employers, as they stand, are now overly punitive to the debtor job applicant and inconsistent with the 'fresh start' principles that first engendered and underlie bankruptcy law.").

¹⁶ See generally *Dalton v. IRS*, 77 F.3d 1297, 1300 (10th Cir. 1996) ("The purpose of the Bankruptcy Code is to provide the honest, but unfortunate, debtor a fresh start."); *Johnson v. Edinboro State Coll.*, 728 F.2d 163, 164 (3d Cir. 1984) ("The desire to give the debtor a 'fresh start' is a key goal of the Bankruptcy Code . . ."). For illuminating discussions of bankruptcy's fresh start objective, see Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49 (1986), and Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

¹⁷ See, e.g., *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000) (asserting prevailing interpretation of Section 525 "allows [private] employers to discriminate on the initial hiring against those unfortunate economic casualties who are seeking . . . a fresh start from the bankruptcy court"); Shepard, *supra* note 14, at 1750 (asserting that Bankruptcy Code's fresh start policy "is noticeably circumscribed" by fact that private employers "can refuse to hire those who have sought bankruptcy relief"); Yun, *supra* note 15, at 211-12 ("[R]efusing relief to the debtor who is discriminatorily denied employment by a private employer largely because of his past insolvency inherently impairs the debtor's ability to have the 'fresh start' that bankruptcy law seeks to accord him . . .").

¹⁸ See *In re 1900 M Rest. Assocs., Inc.*, 319 B.R. 302, 315 (Bankr. D.D.C. 2005) ("The so-called 'fresh start' is not a specific statutory provision. Instead, certain provisions are viewed as giving the debtor certain 'fresh start' relief, as in the case of the Bankruptcy Code's anti-discrimination provision .

the interests of the employer to use bankruptcy as a determinative factor in hiring, there is some concern that such policies will have a detrimental impact [on] an individual's ability to have a 'fresh start,' which is an aim of the Bankruptcy Code."¹⁹

This Article explores one possible means of rectifying this perceived statutory deficiency²⁰—the judicial recognition of a wrongful refusal to hire tort applicable in cases in which bankruptcy debtors are denied employment in the private sector.²¹ The Article begins with a discussion of Congress's enactment of the antidiscrimination provision,²² and its subsequent amendment of the provision to encompass some aspects of private employment.²³ The author then

. . ."), *aff'd*, 352 B.R. 1 (D.D.C. 2006); *In re Stinson*, 285 B.R. 239, 247 (Bankr. W.D. Va. 2002) ("Clearly, the purpose of § 525(a) is to prevent discriminatory conduct by the government. Such a prohibition is essential to allow the purposes of the Bankruptcy Code to be fulfilled."); *In re Cnty. Sch., Inc.*, 163 B.R. 424, 429 (Bankr. D. Conn. 1994) (explaining that legislative history of section 525(a) indicates it was designed primarily to protect integrity of debtor's discharge and fresh start).

¹⁹ Robert J. Landry & Benjamin Hardy, *Bankrupts Need Not Apply: Sound Hiring Policy or Dangerous Proposition?*, 7 VA. L. & BUS. REV. 47, 50 (2012); *cf. In re Briggs*, 143 B.R. 438, 444 (Bankr. E.D. Mich. 1992) ("Entities who are in a position to fire, or have an opportunity to deny employment to, debtors based solely on the fact of bankruptcy clearly pose a . . . threat to the debtor's livelihood . . .").

²⁰ Not all courts have been "persuaded by the argument that Congress purposefully omitted from § 525(b) the phrase 'deny employment to,' which is contained in § 525(a)[.]" *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010) (discussing *Leary*, 251 B.R. at 658). Even if the omission was intentional, it is certainly unusual. *See Downey v. Comm'r*, 97 T.C. 150, 167 (1991) ("Generally, the Federal employment discrimination statutes were designed to go beyond the 'mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g., refusal to hire contexts.'" (quoting *Rickel v. Comm'r*, 900 F.2d 655, 662 (3d Cir. 1990))).

²¹ Amending the Bankruptcy Code would seem to be the most logical means of addressing the perceived problem. *See Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975) ("Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce."), *vacated on other grounds*, 429 U.S. 1033 (1977); Douglass G. Boshkoff, *Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L.J. 159, 161 n.8 (1987) (assuming Congress has constitutional authority "to prohibit all forms of discrimination by both public and private entities"). However, "Congress appears to have expressly intended to give the Courts the responsibility to refine and define further the scope and limitations of Section 525 as it applies to various discriminatory acts." *In re Marine Elec. Ry. Prods. Div., Inc.*, 17 B.R. 845, 852 (Bankr. E.D.N.Y. 1982) (citing S. Rep. No. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867).

²² For a comprehensive discussion of the antidiscrimination principle's application in the bankruptcy context, see John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 AM. BANKR. L.J. 185 (1986).

²³ For a contemporaneous discussion of this legislative development, see Morman McGill, Comment, *The Prohibition on Discrimination Toward Bankrupt Employees: Congress Extends the Prohibition Into the Private Sector by the Adoption of 11 U.S.C. § 525(b)*, 3 BANKR. DEV. J. 641 (1986).

discusses the conflicting judicial views of the amended provision's impact on the hiring discretion of private employers.²⁴

After briefly summarizing the employment-at-will doctrine and its widely-recognized public policy exception,²⁵ the author explores the potential recognition of a common law wrongful discharge claim premised on the public policy embodied in the Bankruptcy Code's antidiscrimination provision.²⁶ The author then considers the possible expansion of this potential tort to encompass a private employer's discriminatory refusal to hire a bankruptcy debtor.²⁷ Despite legitimate policy arguments for protecting bankruptcy debtors from private sector hiring discrimination,²⁸ the author ultimately concludes that the extent to which debtors are to be protected from employment discrimination is a matter for Congress, rather than the courts, to decide.²⁹

²⁴ For a prior discussion of this issue, see Jeanette M. McPherson, *The Anti-Discrimination Provision Does Not Apply To Private Employers Who Deny Employment Based Upon Bankruptcy Status*, 20 NORTON J. BANKR. L. & PRAC. 843 (2011).

²⁵ For a more comprehensive discussion of these matters, see generally Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

²⁶ See generally *In re Sudler*, 71 B.R. 780, 787 (Bankr. E.D. Pa. 1987) (discussing "the strong public policy of 11 U.S.C. § 525"). The potential recognition of a tort claim of this nature has been described as an "interesting and rarely litigated issue[] on which there is little published law." *Robinette v. WESTconsin Credit Union*, 686 F. Supp.2d 1206, 1207 (W.D. Wis. 2010). There likewise have been only passing references to the issue in the academic literature. See, e.g., Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1991*, 25 IND. L. REV. 981, 993 n.88 (1992) ("[C]ould a state decide that a violation of the rules against bankruptcy based discrimination also created a cause of action under state law?").

²⁷ See John A. Gray, *Workforce Size and Remedies for Discrimination in Employment: Wrongful Discharge and Future Possibilities*, 15 MIDWEST L. REV. 79, 101 (1997) ("[T]here is no principled stopping point to extending the availability of the public policy exception once recognized, thus leading to the recognition of new torts of discriminatory refusal to hire, to promote, and discriminatory discipline . . ."). The most comprehensive scholarly argument for recognizing a common law wrongful refusal to hire claim premised on the public policy exception appears in Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-At-Will Rule*, 24 CONN. L. REV. 97 (1991).

²⁸ See *In re McNeely*, 82 B.R. 628, 632 (Bankr. S.D. Ga. 1987) ("Debtors under the Bankruptcy Code are to be given a fresh start in their financial lives, and private employment practices which circumvent this policy are intolerable."); Zeiler, *supra* note 8, at 162 ("[T]he policy rationale the courts have articulated in 'governmental unit' cases appears even more appropriate and necessary in the private sector. Why should a private employer be allowed to frustrate the federal policy of providing the debtor with a fresh start?").

²⁹ See *Fioriani v. CACI*, 192 B.R. 401, 407 (E.D. Va. 1996) ("If a private employer is to be prohibited from refusing to hire an applicant because that person has filed for bankruptcy, Congress must say so, which it has not yet done."); cf. Yun, *supra* note 15, at 216 ("Section 525(b) should be amended to provide protection for bankruptcy discrimination for debtors in hiring decisions. Such reform has a better chance of being achieved through legislative means rather than through the courts."). But see Rothstein, *supra* note 27, at 137 ("The recognition of a general common law duty . . . is preferable to awaiting the enactment of specific legislation . . .").

I. ORIGIN AND EVOLUTION OF THE BANKRUPTCY CODE'S ANTIDISCRIMINATION PROVISION

A. Pre-1978 Discrimination Against Bankrupt Debtors

Congress enacted the antidiscrimination provision as part of a comprehensive overhaul of federal bankruptcy law known as the Bankruptcy Reform Act of 1978,³⁰ the substantive portions of which make up today's Bankruptcy Code.³¹ Prior to this enactment,³² no federal statute prevented public or private employers from discriminating against bankruptcy debtors.³³ Although the fresh start policy underlying the antidiscrimination provision predated the 1978 reforms,³⁴ the policy traditionally was (and actually continues

³⁰ See *In re Straight*, 248 B.R. 403, 420 (B.A.P. 10th Cir. 2000); *In re Ellis*, 493 B.R. 818, 828 n.25 (Bankr. D. Colo. 2013); *In re Cnty. Schs., Inc.*, 163 B.R. 424, 429 (Bankr. D. Conn. 1994). The Bankruptcy Reform Act effectively repealed and replaced the Bankruptcy Act of 1898, see *In re U.S. Truck Co.*, 71 B.R. 99, 102 (Bankr. E.D. Mich. 1987), which was the "first reasonably permanent American bankruptcy law." *In re Helmuth*, 92 B.R. 494, 496 (Bankr. N.D. Okla. 1988). Prior to the passage of the 1898 Act, Congress provided debtors with "only short-term bankruptcy relief, and in each case the laws were subsequently repealed." *In re Nelson*, 254 B.R. 436, 445 n.14 (Bankr. W.D. Wis. 2000), *rev'd on other grounds*, 258 B.R. 374 (W.D. Wis. 2001), *aff'd*, 301 F.3d 820 (7th Cir. 2002); see also Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 941 n.1 (1979). The evolution of these laws is discussed in Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

³¹ See *In re VistaCare Group, LLC.*, 678 F.3d 218, 225 (3d Cir. 2012); *Bonner Mall P'ship v. U.S. Bankcorp Mortgage Co.* (*In re Bonner Mall P'ship*), 2 F.3d 899, 901 (9th Cir. 1993); see also *supra* note 1.

³² The events leading to the Bankruptcy Code's enactment are recounted in several cases, including *In re Sweetwater*, 40 B.R. 733, 735–39 (Bankr. D. Utah 1984), and *In re Nikron, Inc.*, 27 B.R. 773, 775–76 (Bankr. E.D. Mich. 1983); see also Klee, *supra* note 30, at 942–57. For a substantive examination of the 1978 reforms, see Clive W. Bare, *The Bankruptcy Reform Act of 1978*, 47 TENN. L. REV. 501 (1980).

³³ See *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1367 (D. N.J. 1978) (noting absence of a provision in Bankruptcy Act explicitly preventing discrimination against bankrupts); *In re Goldrich*, 45 B.R. 514, 520–21 (Bankr. E.D.N.Y. 1984), *rev'd on other grounds*, 771 F.2d 28 (2d Cir. 1985) (same); Peter H. Carroll, III, *Discrimination Under Section 525(b) of the Bankruptcy Code*, 54 TEX. B.J. 424, 424 (1991) ("Under the former Bankruptcy Act of 1898, there was no statutory provision shielding a debtor in bankruptcy from discrimination by a private or public entity."); Chobot, *supra* note 22, at 185–86; Robert C. Yan, Note, *The Sign Says "Help Wanted, Inquire Within"—But It May Not Matter If You Have Ever Filed (Or Plan to File) for Bankruptcy*, 10 AM. BANKR. INST. L. REV. 429, 434 (2002).

³⁴ See *Helmuth*, 92 B.R. at 496 (noting "the Act of 1898 . . . effected a policy of granting Debtors 'a fresh start' relieved of disastrous and overwhelming debt") (citation omitted); *Henry v. Heyison*, 4 B.R. 437, 438 n.1 (E.D. Pa. 1980) ("[T]he Bankruptcy Act has been superseded by the Bankruptcy Code. . . . [H]owever, the underlying policy of giving debtors who declare bankruptcy a 'fresh start' is the same under either statute.").

to be)³⁵ reflected primarily in the "discharge" of an individual's debts.³⁶ The policy does not purport to shield debtors from all of the potential consequences of declaring bankruptcy,³⁷ and prior to 1978 no federal statute prohibited any form of discrimination against bankruptcy debtors.³⁸ As a result, it was relatively common—and apparently entirely lawful³⁹—for private employers, in particular,⁴⁰ to base employment decisions on an individual's status as a current or former bankruptcy debtor.⁴¹

³⁵ See *In re Waller*, 394 B.R. 111, 113 (Bankr. D. S.C. 2008) ("The discharge of debt is the foundation for a debtor's fresh start."); *In re Matus*, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) ("The fresh start is primarily accomplished through the discharge of debt."); *In re Speece*, 159 B.R. 314, 322 (Bankr. E.D. Cal. 1993) ("Debtors achieve their so-called 'fresh start' primarily because of the discharge.").

³⁶ See *Girardier v. Webster Coll.*, 563 F.2d 1267, 1275 (8th Cir. 1977) ("Historically, the Congress has rested on the discharge provisions of the Act to effectuate this goal . . ."). Section 524 of the Bankruptcy Code states, in part, that a discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2) (2012). For an academic discussion of this critical aspect of federal bankruptcy law, see Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723 (1980).

³⁷ See *Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1094 (3d Cir. 1989) ("[T]he fresh start policy does not require the State to insulate a debtor from any and all adverse consequences of a bankruptcy filing."); cf. *Girardier*, 563 F.2d at 1276 ("[T]he present Bankruptcy Act does not fully implement a 'fresh start' policy . . ."); see also *In re Montgomery*, 219 B.R. 913, 916 (B.A.P. 10th Cir. 1998) ("Though the 'fresh start' maxim . . . may have been a fundamental consideration in the formation of the Code, we recognize the maxim to be a limited, and no longer a completely unencumbered, guiding principle.").

³⁸ See *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 930 (5th Cir. 1977) ("Congress is only now considering what protection, if any, a bankrupt should have from discriminatory treatment. No statutory protection has been afforded in the past and none presently shelters this unfortunate class."); see also *In re Ellis*, 493 B.R. 818, 828 n.25 (Bankr. D. Colo. 2013) ("Section 525(a) is original to the Bankruptcy Reform Act of 1978, which completely overhauled the Bankruptcy Act of 1898."); *In re Rees*, 61 B.R. 114, 117 (Bankr. D. Utah 1986) ("Section 525 had no predecessor under the former Bankruptcy Act . . .").

³⁹ See, e.g., *Handsome v. Rutgers Univ.*, 445 F. Supp. 1362, 1367 (D. N.J. 1978) ("There being no explicit provision in the Bankruptcy Act making it unlawful to discriminate against a bankrupt, private entities may lawfully refuse to deal with bankrupts."); see also *Girardier*, 563 F.2d at 1272 ("[A] great variety of adverse consequences could be visited upon bankrupts . . . without any violation of the Bankruptcy Act . . .").

⁴⁰ In a case decided several years before Congress enacted the antidiscrimination provision, *Perez v. Campbell*, 402 U.S. 637 (1971), the United States Supreme Court held that "discrimination against bankrupts by a governmental unit can violate the Supremacy Clause of the United States Constitution." *In re IT Corp.*, 573 N.E.2d 136, 142 (Ohio Ct. App. 1989) (citing *Perez*, 402 U.S. at 649–52). However, the constitutional protection announced in *Perez* has no application where "purely private action is involved." *McLellan*, 545 F.2d at 930 n.57; see also *Handsome*, 445 F. Supp. at 1366 n.6 (acknowledging that *Perez* "does not proscribe purely private discrimination against bankrupts").

⁴¹ See, e.g., *Bell v. Sanford-Corbitt-Bruker, Inc.*, No. 86-201, 1987 WL 1380671 at ¶ 17 (S.D. Ga. Sept. 14, 1987) (describing an employer's "policy not to hire anyone who had ever declared bankruptcy"); see also *In re Barbee*, 14 B.R. 733, 734 (Bankr. E.D. Va. 1981) ("Prior to the enactment

In one particularly influential pre-Bankruptcy Reform Act decision,⁴² *McLellan v. Mississippi Power & Light Co.*,⁴³ the Fifth Circuit addressed whether an individual whose employment was terminated because he sought bankruptcy relief could pursue a claim for wrongful termination against his employer.⁴⁴ The court concluded that no such claim existed:

We find no law which restrains [the defendant] from firing an employee because he has filed a petition in voluntary bankruptcy A thorough examination of the Bankruptcy Act and its legislative history discloses no explicit provision or intent to prohibit discriminatory action against an individual on the basis of his declaring bankruptcy. In addition, no such Congressional intent can be reasonably inferred from the statute as it is now enacted.⁴⁵

In a case decided a few months after *McLellan*, the court in *Marshall v. District of Columbia Government*⁴⁶ concluded that employers also were not prohibited from discriminating against bankruptcy debtors during the hiring process.⁴⁷ The plaintiff in *Marshall* brought suit against a municipality after he was denied employment as a police officer because he previously was adjudged bankrupt.⁴⁸ He asserted that he had "a right under the bankruptcy laws to be free

of the 1970 amendments to the Bankruptcy Act of 1898, discrimination by governmental and private entities against the bankrupt for filing a petition in bankruptcy was well documented.").

⁴² See Boshkoff, *supra* note 21, at 171 ("The reluctance to condemn private party discrimination is based [in part] upon . . . the deference some courts have given to the *McLellan* opinion . . .").

⁴³ 545 F.2d 919 (5th Cir. 1977).

⁴⁴ *Id.* at 922. The plaintiff in *McLellan* sought relief under a federal civil rights statute, 42 U.S.C. § 1985(3), that "prohibits private conspiracies to deprive a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." *Miss. Women's Med. Clinic v. McMillan*, 866 F.2d 788, 793 (5th Cir. 1989). Because "it is only when the conspirators seek to achieve their objective by *independently unlawful means* that a section 1985(3) claim can be maintained," the *McLellan* court necessarily addressed whether it was a violation of federal bankruptcy law for an employer to terminate an individual's employment "because he filed in bankruptcy." *McLellan*, 545 F.2d at 929 (emphasis added).

⁴⁵ *McLellan*, 545 F.2d at 929 (footnotes omitted); see also *Girardier v. Webster Coll.*, 563 F.2d 1267, 1275 (8th Cir. 1977) ("The plaintiffs urge that they are entitled to be treated in a nondiscriminatory manner by reason of their bankruptcy, unless the disparity in treatment is rationally supported. This . . . is not the present law.").

⁴⁶ 559 F.2d 726 (D.C. Cir. 1977).

⁴⁷ See *id.* at 729 (rejecting plaintiff's argument that "the bankruptcy statute . . . prohibits defendant from using his bankruptcy against him in any way in the future.").

⁴⁸ *Id.* at 727.

from any negative employment implications resulting from his having gone through bankruptcy."⁴⁹

The court noted that the plaintiff's claim was "not one recognized under a specific provision of the bankruptcy law," but instead was premised on the fresh start policy "assumed to underlie the bankruptcy laws themselves."⁵⁰ Although the court found it unnecessary to reach the merits of the plaintiff's claim,⁵¹ it opined that he was reading the fresh start policy too broadly,⁵² in that the then-applicable bankruptcy statutes merely offered bankruptcy debtors a fresh start through the discharge of pre-existing debt.⁵³ The court noted that those statutes did "not expunge the fact of bankruptcy,"⁵⁴ nor did they prohibit a prospective employer from considering the implications of a job applicant's prior bankruptcy—specifically, the fact that the applicant had been "unable to

⁴⁹ *Id.* at 728. The plaintiff was initially denied employment pursuant to a municipal regulation "barring the hiring of bankrupts." *Id.* at 727. Although the defendant ultimately hired the plaintiff after modifying its regulation, the plaintiff continued to challenge the legality of "the delay in his hiring due to the bankruptcy regulation." *Id.* In particular, he sought "back pay from the date of his original application . . . until the date he was hired[.]" *Id.* at 730 (Kaufman, J., concurring in part and dissenting in part).

⁵⁰ *Id.* at 729; *cf. In re 1900 M Rest. Assocs., Inc.*, 319 B.R. 302, 315 (Bankr. D. D.C. 2005) ("The so-called 'fresh start' is not a specific statutory provision."), *aff'd*, 352 B.R. 1, (D.D.C. 2006).

⁵¹ In a separate opinion, one of the judges in *Marshall* observed that the court in *Rutledge v. City of Shreveport*, 387 F. Supp. 1277, 1279 (W.D. La. 1975) "seemingly accepted as valid the same substantive contentions that [were being] advanced as to the bankruptcy issue" by the plaintiff in *Marshall*. *Marshall*, 559 F.2d at 731 (Kaufman, J., concurring in part and dissenting in part). Citing *Rutledge*, the lower court in *Marshall* indicated that the plaintiff had raised "a significant issue," but concluded that it lacked jurisdiction to resolve the issue. *Marshall v. District of Columbia*, No. 74-990, 1975 WL 219 at *3 (D. D.C. Aug. 6, 1975), *remanded*, 559 F.2d 726 (D.C. Cir. 1977). Because the appellate court in *Marshall* was merely reviewing this jurisdictional ruling, the majority likewise expressed "no opinion on . . . the correctness of the *Rutledge* decision." *Marshall*, 559 F.2d at 728 n.6.

⁵² See *Marshall*, 559 F.2d at 729 (asserting plaintiff's argument read "too much into the Act"); *cf. Toth v. Mich. State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998) (rejecting "an expansive understanding of the 'fresh start' policy to insulate a debtor from all adverse consequences of a bankruptcy filing"); *In re Colfer*, 159 B.R. 602, 609 (Bankr. D. Me. 1993) ("Reliance on idealized notions of 'fresh start,' divorced from the very statute that provides that fresh start, is inappropriate.").

⁵³ See *Marshall*, 559 F.2d at 730 ("All a discharge in bankruptcy does is to discharge 'pre-existing debt.'"); *cf. Girardier v. Webster Coll.*, 563 F.2d 1267, 1272 (8th Cir. 1977) ("[H]istorically the protection afforded the bankrupt has been limited to discharge of liability for past debts."); *In re Feddon*, 2 B.R. 322, 323 (Bankr. M.D. Fla. 1980) ("Congress intended to create a 'fresh start' for the bankrupt by granting a discharge").

⁵⁴ *Marshall*, 559 F.2d at 730; see *In re Dabney*, 3 B.R. 719, 720 (E.D.N.Y. 1980) ("The 'fresh start' to which [a debtor] is entitled extends to relief from the oppressive debts he incurred prior to his petition The doctrine does not relieve him of every conceivable disability incurred as a result of his bankruptcy or inconvenience encountered while starting over."); Lawrence Gebhardt, Note, *Supremacy in the Bankruptcy Act: The New Standard of Perez v. Campbell*, 40 GEO. WASH. L. REV. 764, 771-72 (1972) ("[T]he Bankruptcy Act entitles a debtor to a fresh start, free from the onus of past obligations. . . . The Act, however, does not purport to protect a bankrupt from all possible obstacles which he may encounter because of past failures.").

successfully manage his financial affairs"⁵⁵—when deciding whether his "past record . . . merits his consideration for employment."⁵⁶

B. Congress's Enactment of the Antidiscrimination Provision

Congress adopted the original version of the antidiscrimination provision—what is now section 525(a) of the Bankruptcy Code⁵⁷—in 1978,⁵⁸ the year after *Marshall* and *McLellan* were decided.⁵⁹ However, the provision originated in proposed legislation drafted several years earlier by the Commission on the Bankruptcy Laws of the United States,⁶⁰ a "blue ribbon panel"⁶¹ comprised of

⁵⁵ *Marshall*, 559 F.2d at 729. An applicant's prior bankruptcy "may serve as an indicator—in effect, a proxy—of characteristics that an employer simply may not want in a prospective employee." Landry & Hardy, *supra* note 19, at 57; *see also* Karyn D. Heavenrich, *Are Fair Employment Practices After Bankruptcy A Human Right?*, 32 AM. BANKR. INST. J., Feb. 2013 at 36, 69 ("A declaration of bankruptcy may be a red flag for employers, potentially leading to the discovery of risky spending habits or other character flaws.").

⁵⁶ *Marshall*, 559 F.2d at 729; *cf. In re Tinker*, 99 B.R. 957, 958 (Bankr. W.D. Mo. 1989) (noting under pre-1978 bankruptcy law, "prior bankruptcy was as much a part of a person's credit history as any other factor bearing on the likelihood that they would fulfill their future obligations").

⁵⁷ *See In re Patterson*, 125 B.R. 40, 52 (Bankr. N.D. Ala. 1990); *In re Hopkins*, 66 B.R. 828, 833 (Bankr. W.D. Ark. 1986) ("11 U.S.C. § 525 of the Bankruptcy Reform Act of 1978 contained only the language of what is now 11 U.S.C. § 525(a) which prohibits employment discrimination by a governmental unit solely because of their debtor's insolvency, bankruptcy, or nonpayment of a dischargeable debt.").

⁵⁸ *See Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 86 n.2 (2d Cir. 2002); *In re Brown*, 244 B.R. 62, 66 (Bankr. D. N.J. 2000); *Patterson*, 125 B.R. at 52 ("Section 525 of 11 U.S.C. was enacted in 1978 to eliminate a wide variety of forms of discrimination against bankrupt debtors by government agencies and activities."); *In re Wagner*, 87 B.R. 612, 617 (Bankr. C.D. Cal. 1988).

⁵⁹ *See* R. Stuart Phillips, *Walking the Tightrope: Servicemembers, Bankruptcy and Debtor Protection*, 7 J. BANKR. L. & PRAC. 257, 266 (1998) ("In *Marshall*, the D.C. Circuit Court of Appeals allowed [a] city to discriminate against a police officer on the basis of a bankruptcy filing . . . [T]he reasoning of this case was effectively mooted by the passage of § 525 one year later."). The antidiscrimination provision and most other aspects of the Bankruptcy Reform Act of 1978 did not become effective until October 1, 1979—nearly a year after its enactment. *See* Commonwealth Nat'l Bank v. United States (*In re Ashe*), 712 F.2d 864, 869 n.1 (3d Cir. 1983) (Becker J., concurring in part and dissenting in part); *Henry v. Heyison*, 4 B.R. 437, 441 n.6 (E.D. Pa. 1980); *In re Beck*, 4 B.R. 661, 662 (Bankr. C.D. Ill. 1980) (noting effective date of law was October 1, 1979).

⁶⁰ *See Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 4 (1st Cir. 1996); *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 238 (5th Cir. 1984) (explaining how Commission issued report in 1973 containing findings, recommendations, and draft of bill to implement them); *In re Rees*, 61 B.R. 114, 117 (Bankr. D. Utah 1986). *See also In re Sweetwater*, 40 B.R. 733, 735 (Bankr. D. Utah 1984) ("The Bankruptcy Code evolved from the study and recommendations of the Commission on Bankruptcy Laws of the United States.").

⁶¹ *Allen v. Geneva Steel Co. (In re Geneva Steel Co.)*, 281 F.3d 1173, 1176 (10th Cir. 2002); *see In re Gero Fin. Group*, 482 B.R. 86, 95 (Bankr. S.D.N.Y. 2012) (describing Commission members as "distinguished").

four members of Congress,⁶² two federal district court judges,⁶³ a law professor,⁶⁴ a prominent businessman,⁶⁵ and a highly-regarded practicing lawyer (and former academic) who served as the Commission's Chairman.⁶⁶

⁶² These were Senators Quentin Burdick of North Dakota and Marlow Cook of Kentucky, and Representatives Don Edwards and Charles Wiggins of California. See Frank R. Kennedy, *The Report of the Bankruptcy Commission: The First Five Chapters of the Proposed New Bankruptcy Act*, 49 IND. L.J. 422, 422 n.2 (1974); The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 14 (2007). All were "members of the Judiciary Committees of their respective Houses of Congress through which all bankruptcy legislation must pass." Kennedy, *supra*, at 422 n.2.

⁶³ One of the judges who served on the Commission, Hubert L. Will of the Northern District of Illinois, subsequently lamented, hyperbolically, that "Congress did not adopt many of the Commission's recommendations." *In re Lear Colorprint*, 29 B.R. 438, 440 n.1 (Bankr. N.D. Ill. 1983). But see *In re Dow Corning Corp.*, 237 B.R. 380, 396 (Bankr. E.D. Mich. 1999) ("The Commission's recommendations were largely adopted by Congress when it enacted the Bankruptcy Code in 1978."). The Commission's other judicial representative was Edward Weinfeld of the Southern District of New York. See *In re Lear*, 29 B.R. at 440 n.1; Kennedy, *supra* note 62, at 422 n.2. At the time of their appointment to the Commission, both judges were members of the Committee on Bankruptcy Administration of the Judicial Conference of the United States. See Jeb Barnes, *Bankrupt Bargaining?: Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J.L. & POL. 893, 908 n.87 (1997).

⁶⁴ The law professor was Charles Seligson, who was both a practicing lawyer and a member of the NYU law faculty. See *In re Neihsel*, 32 B.R. 146, 150 (Bankr. D. Utah 1983); Kennedy, *supra* note 62, at 422 n.2 (noting Charles Seligson was member of NYU law faculty and dean of New York bankruptcy bar for many years); Gerald R. Smith & Frank R. Kennedy, *Some Suggestions for the Bankruptcy Review Commission*, 1995 ANN. SURV. BANKR. L. 477, 478 (1995). At the time of his appointment to the Commission, Professor Seligson was Chairman of the National Bankruptcy Conference. See Barnes, *supra* note 63, at 908 n.87; Mund, *supra* note 62, at 14. He was "a recognized authority on the law of bankruptcy and bankruptcy practice." *In re Gross*, 341 A.2d 336, 338 (N.J. 1975); see also Smith & Kennedy, *supra*, at 478 (asserting Seligson "was widely recognized as the leading bankruptcy practitioner in the United States").

⁶⁵ The businessman was J. Wilson Newman, an executive with and former president of Dun & Bradstreet. See Barnes, *supra* note 63, at 908 n.87; Kennedy, *supra* note 62, at 422 n.2. Mr. Newman was a lawyer as well as a successful businessman, and "brought a seasoned economic and business perspective to the Commission." Smith & Kennedy, *supra* note 64, at 478-79. In his autobiography, Mr. Newman subsequently expressed a somewhat jaded view of his government service, which also included a stint as a member of President Nixon's controversial Price Commission in the early 1970s. See J. WILSON NEWMAN, *FOR WHAT DO WE LABOR? A LIFE'S VALUES FROM CHILDHOOD TO CHAIRMAN OF DUN AND BRADSTREET AND BEYOND* 243-54, 258 (Whetstone Ventures, Inc., 1996). Curiously, Newman did not discuss his service on the Bankruptcy Commission, which was merely listed, without comment, in the Appendix of his book. See *id.* at 258.

⁶⁶ The Chairman of the Commission was Harold Marsh, Jr. See *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 585 n.38 (Bankr. D. Utah 1985); *Neihsel*, 32 B.R. at 153; *In re Allard*, 23 B.R. 517, 517 (Bankr. E.D. Mich. 1982). Mr. Marsh was formerly a UCLA law professor, but at the time of his appointment to the Commission he was in private corporate practice in Los Angeles. See Barnes, *supra* note 63, at 908 n.87; Kennedy, *supra* note 62, at 422 n.2; Mund, *supra* note 62, at 14. He has been described as "a respected academic and practicing lawyer, and expert in securities law, Article Nine of the Uniform Commercial Code and corporate reorganizations." Smith & Kennedy, *supra* note 64, at 478.

Congress established the Commission in 1970,⁶⁷ and charged it with responsibility for studying and recommending changes to the existing bankruptcy laws.⁶⁸ After more than two years of intensive work,⁶⁹ the Commission submitted a report to Congress on July 30, 1973.⁷⁰ The published report consisted of two parts.⁷¹ Part I summarized the Commission's history,⁷² and also set forth its findings and recommendations.⁷³ Part II was a draft of a proposed new bankruptcy act designed to implement the Commission's recommendations,⁷⁴ which the Commission referred to as the "Bankruptcy Act of 1973,"⁷⁵ together with accompanying explanatory notes.⁷⁶ A third component of the report, which was not formally published with Parts I and II when the

⁶⁷ See *In re Ridgeway*, 322 B.R. 19, 27 (Bankr. D. Conn. 2005) (citing Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970)); *In re Sweetwater*, 40 B.R. 733, 735-36 (Bankr. D. Utah 1984) (same); Kennedy, *supra* note 62, at 422 n.2.

⁶⁸ See *In re Smith*, 640 F.2d 888, 889 (7th Cir. 1981); *In re Teleservices Group, Inc.*, 444 B.R. 767, 832 n.232 (Bankr. W.D. Mich. 2011); *In re Ridgeway*, 322 B.R. at 27 (noting Congress created Commission after determining Bankruptcy Act likely needed significant overhaul); *In re White Motor Credit Corp.*, 14 B.R. 584, 588 (Bankr. N.D. Ohio 1981); *In re Taff*, 10 B.R. 101, 105 (Bankr. D. Conn. 1981); *In re Ford*, 3 B.R. 559, 567 (Bankr. D. Md. 1980).

⁶⁹ See *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.* (*In re Timbers of Inwood Forest Assocs., Ltd.*), 793 F.2d 1380, 1393 (5th Cir. 1986); *Ridgeway*, 322 B.R. at 27; *In re Melendez*, 224 B.R. 252, 254 (Bankr. D. Mass. 1998); *In re Keckler*, 3 B.R. 155, 159 (Bankr. N.D. Ohio 1980); Kennedy, *supra* note 62, at 422; Klee, *supra* note 30, at 943; Smith & Kennedy, *supra* note 64, at 479.

⁷⁰ See *In re Sweetwater*, 40 B.R. at 736; *In re Nikron, Inc.*, 27 B.R. 773, 775 (Bankr. E.D. Mich. 1983); *In re Morris*, 12 B.R. 321, 344 (Bankr. N.D. Ill. 1981); *In re Hemmen*, 7 B.R. 63, 64 (Bankr. N.D. Ala. 1980).

⁷¹ See *In re Hall*, 15 B.R. 913, 916 (B.A.P. 9th Cir. 1981); *In re Baldwin*, 84 B.R. 394, 397 (Bankr. W.D. Pa. 1988); *In re Nikron*, 27 B.R. at 775; Klee, *supra* note 30, at 943; Tabb, *supra* note 30, at 32.

⁷² See *In re Baldwin*, 84 B.R. at 397; Smith & Kennedy, *supra* note 64, at 480. For another perspective on the Commission's history, see Harry D. Dixon, Jr., *Bankruptcy Commissions: Then and Now*, 15 AM. BANKR. INST. J., Apr. 1996 at 3.

⁷³ See *Grubbs v. Houston First Am. Sav. Ass'n*, 730 F.2d 236, 238 (5th Cir. 1984); *In re Baldwin*, 84 B.R. at 397; *In re Nikron*, 27 B.R. at 775; *In re Hemmen*, 7 B.R. at 64; Tabb, *supra* note 30, at 33.

⁷⁴ See *Grubbs*, 730 F.2d at 238; *In re Smith*, 640 F.2d 888, 889 (7th Cir. 1981); *In re Grayhall Res., Inc.*, 63 B.R. 382, 388 (Bankr. D. Colo. 1986); *In re Mojica*, 30 B.R. 925, 928 (Bankr. E.D.N.Y. 1983) (describing Commission's recommendation that exceptions from discharge in Bankruptcy Act be continued in new legislation); *In re Nikron*, 27 B.R. at 775.

⁷⁵ See *Gehrig v. Shreves* (*In re Gehrig*), 491 F.2d 668, 674 n.7 (8th Cir. 1974); *In re Laflamme* 14 B.R. 21, 23 (B.A.P. 1st Cir. 1981); *In re Teleservices Group, Inc.*, 444 B.R. 767, 832 n.232 (Bankr. W.D. Mich. 2011); *In re White Motor Credit Corp.*, 14 B.R. 584, 588 (Bankr. N.D. Ohio 1981).

⁷⁶ See *Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 456 (2d Cir. 1985); *In re Baldwin*, 84 B.R. at 397; *In re Sweetwater*, 40 B.R. 733, 736 (Bankr. D. Utah 1984) (quoting explanatory note included in Commission's plan); *In re Anderson*, 30 B.R. 995, 1010 (M.D. Tenn. 1983) (quoting explanatory note); *In re Elin*, 20 B.R. 1012, 1016 (D. N.J. 1982), *aff'd*, 702 F.2d 1400 (3d Cir. 1983); Kennedy, *supra* note 62, at 422 n.3; Klee, *supra* note 30, at 943 n.20.

report was submitted to Congress,⁷⁷ contained a collection of studies prepared by and for the Commission's staff.⁷⁸

Among other things,⁷⁹ the Commission found that discrimination against bankruptcy debtors was undermining the fresh start objective of the existing bankruptcy laws.⁸⁰ In an effort to address this problem, the Commission included a provision in its proposed legislation that would have prohibited both private and public entities from discriminating against bankruptcy debtors.⁸¹ As explained in the Commission's report:

The "fresh start" policy of the present Act has been frustrated, in some instances, by provisions of federal and state laws that subject an

⁷⁷ See Klee, *supra* note 30, at 943 n.20 ("Part III of the Commission's report, containing several studies prepared by the Commission's staff, was never published as an official document."); Smith & Kennedy, *supra* note 64, at 480 n.12 ("Part III was not included in the published document."). Members of the public could obtain copies of the Commission's full report from the United States Government Printing Office. See Robert J. Rosenberg, *Beyond Yale Express: Corporate Reorganization and the Secured Creditor's Rights of Reclamation*, 123 U. PA. L. REV. 509, 532 n.81 (1975).

⁷⁸ See John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 978 n.77 (1989) (describing Part III as selection of studies chosen by Commission); Smith & Kennedy, *supra* note 64, at 480. Courts interpreting the Bankruptcy Code have occasionally relied on the Commission's unpublished material. In *In re Durensky*, 377 F. Supp. 798, 802 & n.8 (N.D. Tex. 1974), *appeal dismissed*, 519 F.2d 1024 (5th Cir. 1975), for example, the court relied on a report prepared by William T. Plumb, Jr., a consultant to the Commission and "arguably the most influential bankruptcy tax scholar of the twentieth century." Michelle A. Cecil, *Reinvigorating Chapter 11: The Case for Reinstating the Stock-for-Debt Exemption in Bankruptcy*, 2000 WIS. L. REV. 1001, 1014 (2000); see also Smith & Kennedy, *supra* note 64, at 480.

Part III included two lengthy articles concerning the interplay of tax laws and bankruptcy, which were the pioneering efforts of the indefatigable William T. Plumb, Jr. The value of his contributions in bringing clarity and reason to this highly specialized intersection of two complex areas of the law is hard to overstate.

Id. Plumb expanded his work for the Commission into a series of law review articles published in 1974 and 1975, while Congress was evaluating the Commission's proposals, that "informed every change in the legislative product that developed in the ensuing five years." Cecil, *supra*, at 1014 n.74 (quoting Paul H. Asofsky, *Toward a Bankruptcy Tax Act of 1993*, 51 N.Y.U. INST. ON FED. TAX'N 13-1, 13-5 (1993)).

⁷⁹ See *In re Neiheisel*, 32 B.R. 146, 158 (Bankr. D. Utah 1983) ("Finding the existing bankruptcy law to be inadequate, the Commission recommended changes intended to enhance the fresh start of consumer debtors.").

⁸⁰ See *In re Rees*, 61 B.R. 114, 117 (Bankr. D. Utah 1986); *In re Bryant*, 43 B.R. 189, 196 (Bankr. E.D. Mich. 1984).

⁸¹ See *In re Rees*, 61 B.R. at 116 n.5; *In re Barbee*, 14 B.R. 733, 735 (Bank. E.D. Va. 1981); *In re Heath*, 3 B.R. 351, 353 n.1 (Bankr. N.D. Ill. 1980).

individual who obtains a discharge, and [fails] to pay the discharged debt, to discriminatory treatment. . . . The Commission is of the opinion that such discriminatory treatment frustrates a major policy of the Bankruptcy Act and should be prohibited. Therefore, the Commission recommends that no one be subjected to discriminatory treatment because he . . . is or has been a debtor or has failed to pay a debt discharged in a case under the Act[.]⁸²

The Commission's proposed legislation was introduced as a legislative bill in each House of Congress in October 1973, during the 93rd Congress.⁸³ When no significant action was taken on those bills,⁸⁴ the Commission's proposal was reintroduced the following year in the 94th Congress.⁸⁵ The Commission's proposed legislation and a competing proposal drafted by the National

⁸² *In re Bryant*, 43 B.R. at 196 (quoting Report of Commission on Bankruptcy Laws of United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. 177 (1973)). Although the Commission specifically noted that discriminatory "federal and state laws" were frustrating the fresh state policy, *id.*, "actions taken against a bankrupt by private individuals or organizations which do not involve the machinery of the states . . . may deprive the bankrupt entirely of his means of livelihood," and thus also frustrate the fresh start policy. *Girardier v. Webster Coll.*, 563 F.2d 1267, 1273 (8th Cir. 1977) (quoting Gebhardt, *supra* note 54, at 772); *cf.* James A. Timko, Note & Comment, *Section 525(a) of the Bankruptcy Code and Sovereign Immunity: The Supreme Court's Creation of a Super Creditor*, 17 BANKR. DEV. J. 605, 605 (2001) ("One way of ensuring this fresh start is to prevent discriminatory acts by government and private entities against debtors based on a debtor availing himself to the protections of the Bankruptcy Code.").

⁸³ See *In re Nikron, Inc.*, 27 B.R. 773, 775 (Bankr. E.D. Mich. 1983); *In re White Motor Credit Corp.*, 14 B.R. 584, 589 (Bankr. N.D. Ohio 1981) ("The Commission bill was introduced in the House of Representatives on October 9, 1973 . . ."); Mund, *supra* note 62, at 528; Tabb, *supra* note 30, at 33.

⁸⁴ See *In re Law*, 37 B.R. 501, 507 n.7 (Bankr. S.D. Ohio 1984) ("This delay was caused at first by Congressional preoccupation with the possible impeachment of former President Nixon and later continued when the Congress first contemplated the potential constitutional flaws in the then proposed structure of the Bankruptcy Courts."); Klee, *supra* note 30, at 943-44.

The only formal legislative action taken during the 93rd Congress was one day of hearings, held on December 10, 1973, conducted by Congressmen [sic] Edwards' Subcommittee on Civil and Constitutional Rights. This relative inactivity was due to the Judiciary Committee's preoccupation with the possible impeachment proceedings of Richard M. Nixon.

Id.

⁸⁵ See *In re Rees*, 61 B.R. at 117; *In re Sweetwater*, 40 B.R. 733, 736 (Bankr. D. Utah 1984); *In re Nikron*, 27 B.R. at 775; *In re White Motor Credit Corp.*, 14 B.R. at 589.

Conference of Bankruptcy Judges⁸⁶ that differed from the Commission's proposal in several important respects⁸⁷ (but contained an identical antidiscrimination provision)⁸⁸ were ultimately debated at length in a series of hearings held by separate subcommittees of the House and Senate in 1975 and 1976.⁸⁹

There was significant congressional support for the Commission's proposed legislation⁹⁰ (not least from the bills' sponsors, all of whom had been members of the Commission),⁹¹ and Congress eventually incorporated many of the Commission's recommendations into the Bankruptcy Code it ultimately enacted in 1978.⁹² To some extent, the congressional support for the Commission's proposal extended to its proposed antidiscrimination provision.⁹³ However, a number of interested observers lobbied against the adoption of that provision,⁹⁴

⁸⁶ See *In re Law*, 37 B.R. at 506 ("The Commission was not the only group concerned with the nation's bankruptcy laws during the early 1970s. The National Conference of Bankruptcy Judges submitted a proposed bankruptcy code in 1974 . . ."). The bankruptcy judges' proposal, which was formulated in response to the Commission's proposal, was first introduced in the House on September 12, 1974, in the Second Session of the 93rd Congress. See *In re Sweetwater*, 40 B.R. at 736 nn. 7 & 8; *In re Scher*, 12 B.R. 258, 271 n.49 (Bankr. S.D.N.Y. 1981). The judges' bill was reintroduced in the 94th Congress along with the Commission's proposal after no action on the proposals was taken during the 93rd Congress. See *In re White Motor Credit Corp.*, 14 B.R. at 589.

⁸⁷ See *In re Ridgeway*, 322 B.R. 19, 28 (Bankr. D. Conn. 2005) (stating judges' proposal disagreed with major aspects of Commission's proposal); *In re Jeppson*, 66 B.R. 269, 288 (Bankr. D. Utah 1986) (describing judge's proposal as containing "major differences" from Commission's bill).

⁸⁸ See *Girardier v. Webster Coll.*, 563 F.2d 1267, 1275 (8th Cir. 1977); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 930 (5th Cir. 1977) ("Both of the proposed new Bankruptcy Acts—that drafted by the Commission on the Bankruptcy Laws of the United States and that by the National Conference of Bankruptcy Judges—have identical section 4–508's . . ."); *In re Rees*, 61 B.R. at 117.

⁸⁹ See *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.* (*In re Timbers of Inwood Forest Assocs., Ltd.*), 793 F.2d 1380, 1394 (5th Cir. 1986) (noting Congress held extensive hearings regarding drafted legislation); *In re Smith*, 640 F.2d 888, 889 (7th Cir. 1981); *In re Ridgeway*, 322 B.R. at 28; *In re Rees*, 61 B.R. at 117–18; *In re Sweetwater*, 40 B.R. at 737; *In re Nikron*, 27 B.R. at 775; *In re White Motor Credit Corp.*, 14 B.R. at 589; Klee, *supra* note 30, at 944–45; Bronheim, *supra* note 8, at 597 n.17.

⁹⁰ See *In re Neiheisel*, 32 B.R. 146, 150 n.21 (Bankr. D. Utah 1983); *cf. In re Shapiro*, 188 B.R. 140, 147 (Bankr. E.D. Pa. 1995); *In re Hustwaite*, 136 B.R. 853, 854 (Bankr. D. Or. 1991).

⁹¹ See Kenneth B. Davis, Jr., *The Status of Defrauded Securityholders in Corporate Bankruptcy*, 1983 DUKE L.J. 1, 12 n.50 (1983); Mund, *supra* note 62, at 19; Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 75 n.151 (1990).

⁹² See *In re Dow Corning Corp.*, 237 B.R. 380, 396 (Bankr. E.D. Mich. 1999); *In re Brunson*, 87 B.R. 304, 309 (Bankr. D. N.J. 1988).

⁹³ See *In re Olson*, 38 B.R. 515, 519 n.1 (Bankr. N.D. Iowa 1984) ("[T]here was support in Congress that § 525 should be extended to cover private as well as public entities.").

⁹⁴ See, e.g., *In re Rees*, 61 B.R. at 117–18 (noting "credit industry was extremely concerned about the wording of [the antidiscrimination provision], and urged that it be redrafted," and the "Department of Justice agreed that the language . . . providing for the protection of discharged debtors from 'discriminatory treatment' was too broadly worded.").

and Congress, responding to their concerns,⁹⁵ ultimately elected not to provide debtors with the broad protection from discriminatory treatment envisioned by the Commission.⁹⁶

The antidiscrimination statute Congress enacted as part of the Bankruptcy Reform Act of 1978 instead simply regulated the conduct of government entities.⁹⁷ The provision did not place any restrictions on the conduct of private entities,⁹⁸ except to the extent those entities might be deemed to be acting in a quasi-governmental capacity.⁹⁹ As a result, many courts continued to follow *McLellan v. Mississippi Power & Light Co.*¹⁰⁰ and *Marshall v. District of Columbia Government*¹⁰¹ in cases challenging the employment practices of private entities,¹⁰² who remained free to discriminate against bankruptcy debtors without violating the new Bankruptcy Code.¹⁰³

⁹⁵ See *In re Straight*, 248 B.R. 403, 429 (B.A.P. 10th Cir. 2000) (Boulden, J., dissenting) (stating antidiscrimination provision proposed by Bankruptcy Commission was "modified to what is now § 525(a) when Congress received complaints that it was too broad"); *In re Rees*, 61 B.R. at 119 (noting that antidiscrimination provision Congress ultimately enacted "reflects . . . lobbying efforts during the [congressional] hearings").

⁹⁶ See *Exquisito Servs., Inc. v. United States (In re Exquisito Servs. Inc.)*, 823 F.2d 151, 153 (5th Cir. 1987) (recognizing Congress' emphasis of narrow reading of section 525); *In re The Bible Speaks*, 69 B.R. 368, 372 (Bankr. D. Mass. 1987); *In re Rees*, 61 B.R. at 124 ("Congress considered many alternatives to preserve the effectiveness of a debtor's fresh start. During the legislative process, the broadly worded protection against 'discriminatory treatment' originally found in Section 4–508 of the Commission bill gave way to the much narrower enumeration found in Section 525(a).").

⁹⁷ See *Toth v. Mich. State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998); *Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1094 n.3 (3d Cir. 1989); *Exquisito Servs.*, 823 F.2d at 153; *In re Richardson*, 27 B.R. 560, 563 (E.D. Pa. 1982); *In re Wagner*, 87 B.R. 612, 618 (Bankr. C.D. Cal. 1988); *In re Coachlight Dinner Theatre of Nanuet, Inc.*, 8 B.R. 657, 658 (Bankr. S.D.N.Y. 1981).

⁹⁸ See *In re Depoy*, 29 B.R. 466, 470 (Bankr. N.D. Ind. 1983); *In re Rose*, 23 B.R. 662, 666 (Bankr. D. Conn. 1982); *In re Amidon*, 22 B.R. 457, 457 (Bankr. D. Mass. 1982); *In re Douglas*, 18 B.R. 813, 815 (Bankr. W.D. Tenn. 1982); *In re Marine Elec. Ry. Prods. Div., Inc.*, 17 B.R. 845, 850 (Bankr. E.D.N.Y. 1982).

⁹⁹ See *In re Heath*, 3 B.R. 351, 353 (Bankr. N.D. Ill. 1980) ("It is apparent from the legislative history . . . that section 525 extends to action by quasi-governmental units."); *In re Douglas*, 18 B.R. at 815 ("Section 525 . . . only prohibits a governmental or quasi-governmental unit or organization from discriminating against petitioners under the Bankruptcy Code . . .").

¹⁰⁰ 545 F.2d 919, 929 (5th Cir. 1977); see *supra* notes 42–45 and accompanying text.

¹⁰¹ 559 F.2d 726 (D.C. Cir. 1977); see *supra* notes 46–56 and accompanying text.

¹⁰² See, e.g., *Wilson v. Harris Trust & Sav. Bank*, 777 F.2d 1246, 1248–49 (7th Cir. 1985) (citing, *inter alia*, *Marshall* and *McLellan* in observing that "the majority of courts . . . rejected applying § 525 to private entities prior to 1984"); *Bell v. Citizens Fid. Bank & Trust Co.*, 24 Fair Empl. Prac. Cas. (BNA) 790, 791–92 (W.D. Ky. 1979) (finding *McLellan* to be "dispositive" of discrimination claim asserted against private employer), *remanded*, 636 F.2d 1119 (6th Cir. 1980).

¹⁰³ See *Bell v. Citizens Fid. Bank & Trust Co.*, 636 F.2d 1119, 1120 (6th Cir. 1980) (Weick, J., dissenting).

There is no provision in the Bankruptcy Act prohibiting a private employer from discharging an employee for filing a voluntary petition in bankruptcy. In fact,

C. The 1984 Amendment of the Antidiscrimination Provision

Responding to judicial and scholarly criticism of the original antidiscrimination provision,¹⁰⁴ Congress eventually expanded the protection available to bankruptcy debtors by adding subsection (b) to section 525 of the Bankruptcy Code¹⁰⁵ as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").¹⁰⁶ By prohibiting private entities from discriminating against bankruptcy debtors in most aspects of employment,¹⁰⁷ the 1984 amendment eliminated some of the controversy surrounding the original provision.¹⁰⁸

Congress . . . expressly refused to make unlawful employment discrimination against bankrupts by private employers, although providing in Section 525 for such a prohibition applicable only to public employees.

Id.; *In re Stinson*, 285 B.R. 239, 241 n.5 (Bankr. W.D. Va. 2002) ("Prior to 1984, non-governmental employers were not prohibited from firing employees simply because they had received a discharge in bankruptcy.").

¹⁰⁴ See, e.g., *In re Olson*, 38 B.R. 515, 519 (Bankr. N.D. Iowa 1984) ("[R]ecent decisions have strongly suggested that § 525 should be construed to apply to private entities"); Rendleman, *supra* note 36, at 755 ("The statute . . . only prohibit[s] discrimination against bankrupts by governmental units, and Congress should delete that limitation [I]f Congress seeks to protect livelihoods, it should treat public and private employers alike." (footnotes omitted)).

¹⁰⁵ See 11 U.S.C. § 525(b).

¹⁰⁶ See *In re Stinson*, 285 B.R. at 241 ("The Bankruptcy Amendments and Federal Judgeship Act of 1984 amended 11 U.S.C. § 525 by adding subsection (b), which prohibits private employers from discriminating against Title 11 debtors."); *In re Goldrich*, 45 B.R. 514, 519 n.2 (Bankr. E.D.N.Y. 1984) (citing Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.)), *rev'd on other grounds*, 771 F.2d 28 (2d Cir. 1985). For a comprehensive discussion of the 1984 amendments, see Lawrence K. Snider et al., *The Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 MICH. B.J. 775 (1984).

¹⁰⁷ See *In re Stinson*, 285 B.R. at 250 ("Section 525(b) prohibits discrimination with respect to employment, but this prohibition does not include hiring decisions."); *Pastore v. Medford Sav. Bank*, 186 B.R. 553, 554 (Bankr. D. Mass. 1995).

Subsection (a) of § 525 prohibits governmental entities from discriminating against an individual in employment and certain other areas on the basis of the individual's current or prior bankruptcy status Subsection (b) was added in 1984 to extend some of the same antidiscrimination principles to private employers[.]

Id.

¹⁰⁸ See Chobot, *supra* note 22, at 196–97 ("Any divergence of view concerning the applicability of bankruptcy anti-discrimination provisions to private employers has been rendered academic by the enactment of new section 525(b).").

For example, private employers, like their public counterparts,¹⁰⁹ can no longer terminate an employee because the employee is, or once was, a bankruptcy debtor.¹¹⁰ The antidiscrimination provision also now prohibits both public and private employers from discriminating against bankruptcy debtors in "other aspects of employment, such as in promotions, demotions, hours, pay, and so forth."¹¹¹ However, because the amended provision does not purport to prevent private employers from discriminating against bankruptcy debtors during the hiring process,¹¹² courts continue to debate the provision's impact in that situation.¹¹³

II. JUDICIAL INTERPRETATIONS OF SECTION 525(b)

A. The Majority View

*In re Madison Madison International*¹¹⁴ was the first case to address the impact of the amended antidiscrimination provision on a private employer's

¹⁰⁹ See *In re Straight*, 248 B.R. 403, 425 n.5 (B.A.P. 10th Cir. 2000) (Boulden, J., dissenting) (discussing "that portion of § 525(a) proscribing a State's termination of a debtor's employment solely because of a bankruptcy filing"); *In re McKibben*, 233 B.R. 378, 381 (Bankr. E.D. Tex. 1999) ("11 U.S.C. § 525(a) prevents a governmental unit from terminating a person's employment as a result of filing bankruptcy." (emphasis omitted)).

¹¹⁰ See *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1287 (11th Cir. 2011) ("A private employer cannot terminate an employee because he has filed for bankruptcy."); *In re Piazza*, 460 B.R. 322, 326 (Bankr. S.D. Fla. 2011), *aff'd sub nom. Piazza v. Nuetera Healthcare Physical Therapy*, 469 B.R. 388 (S.D. Fla. 2012); *In re Spaulding*, 116 B.R. 567, 572 (Bankr. S.D. Ohio 1990); *Wenners v. Great State Beverages, Inc.*, 663 A.2d 623, 625 (N.H. 1995); see also *Fiorani v. CACI*, 192 B.R. 401, 407 (Bankr. E.D. Va. 1996).

¹¹¹ *Myers*, 640 F.3d at 1286; see also *In re McNeely*, 82 B.R. 628, 633 (Bankr. S.D. Ga. 1987); *In re Hicks*, 65 B.R. 980, 983 (Bankr. W.D. Ark. 1986); *In re Latchaw*, 24 B.R. 457, 460 (Bankr. N.D. Ohio 1982).

¹¹² See *In re Piazza*, 460 B.R. at 326 ("The phrase 'deny employment to' present in § 525(a) is conspicuously absent from § 525(b)."); *In re Stinson*, 285 B.R. at 250 ("Section 525(b) prohibits discrimination with respect to employment, but this prohibition does not include hiring decisions.").

¹¹³ See *In re Stinson*, 285 B.R. at 243 (stating antidiscrimination provision "has led intelligent and reasonable courts to contradictory interpretations"); *In re Briggs*, 143 B.R. 438, 444 n.5 (Bankr. E.D. Mich. 1992) (noting apparent split of authority regarding "whether the refusal to hire a debtor because of bankruptcy is actionable under § 525(b)"); *Orovitz*, *supra* note 8, at 557.

[U]nlike § 525(a), § 525(b) does not specify that a private employer cannot 'deny employment to' a job applicant because she was *once* a bankrupt debtor. The two sections' disparate language has generated a split in the courts as to whether private employers can deny employment to job applicants solely because their credit histories reveal a past bankruptcy.

Id. (footnotes omitted).

¹¹⁴ 77 B.R. 678 (Bankr. E.D. Wis. 1987).

hiring discretion.¹¹⁵ Contrasting the language of newly-enacted section 525(b) with the language of the original provision,¹¹⁶ the court held that private employers are prohibited from discriminating against bankruptcy debtors only when there is "an existing employer-employee relationship between the parties."¹¹⁷ The court offered the following explanation for its holding:

[Section] 525(b) states that no private employer may: (1) terminate the employment of an individual or (2) discriminate with respect to employment against an individual (meaning such things as could affect the debtor's promotion, salary increases or job duties). To this extent, § 525(b) precisely tracks the language of § 525(a). However, § 525(a) also . . . precludes governmental units from denying employment to potential employees. The fact that this particular prohibition was not carried over to § 525(b) cannot be ignored.¹¹⁸

Although *Madison* was decided by a federal bankruptcy court,¹¹⁹ and thus is not binding in subsequent bankruptcy cases,¹²⁰ the court's reasoning has been embraced by a number of other courts.¹²¹ In *Pastore v. Medford Savings Bank*¹²²

¹¹⁵ A bankruptcy court in a case decided a few months before *Madison* noted "[t]he only reported case under the new subsection, deal[t] with a situation in which the debtor was *fired* by her private employer as a result of her bankruptcy filing." *In re Hicks*, 65 B.R. 980, 983 (Bankr. W.D. Ark. 1986) (emphasis added). The *Madison* court itself lamented the "paucity of legal authority" interpreting Section 525(b). *In re Madison*, 77 B.R. at 680; see also *Bell v. Sanford-Corbitt-Bruker, Inc.*, No. CV186-201, 1987 WL 60286 at *3 (S.D. Ga. Sept. 14, 1987) ("Section 525(b) was added by Congress in a 1984 amendment to the Bankruptcy Code. There has been very little case law under the statute.").

¹¹⁶ See generally *Fiorani v. CACI*, 192 B.R. 401, 405 (Bankr. E.D. Va. 1996) ("The language of § 525(b) was added by Congress in 1984. It was antedated by § 525(a), which Congress enacted in 1978. A comparison of the two provisions is instructive . . .").

¹¹⁷ *In re Madison* *Madison Intl.*, 77 B.R. at 680.

¹¹⁸ *Id.* at 682; cf. *Fiorani*, 192 B.R. at 406 ("Congress' inclusion of an explicit reference to hiring in § 525(a), juxtaposed with its deliberate omission in § 525(b) six years later, makes unmistakably clear that subsection (b) does not reach hiring decisions.").

¹¹⁹ The bankruptcy courts occupy "a unique position in the country's judicial structure." *In re Volpert*, 110 F.3d 494, 499 (7th Cir. 1997). In particular, they "act as surrogate trial courts . . . and have a special power to issue final orders on certain bankruptcy issues which then become appealable to the district court." *In re Washington Mfg. Co.*, 133 B.R. 113, 116 n.1 (M.D. Tenn. 1991).

¹²⁰ See *In re Kavolchuck*, 154 B.R. 793, 799 (Bankr. S.D. Fla. 1993); *In re Shubert*, 147 B.R. 618, 619 (Bankr. N.D. Ga. 1992).

¹²¹ See generally *In re Cord*, No. 01-20256, 2004 WL 2923845, at *2 (Bankr. M.D. Fla. Oct. 14, 2004) ("It is well established now by several cases, that Section 525(b) of the Code applies only to

and *Fiorani v. CACI*,¹²³ for example, federal district courts in Massachusetts and Virginia,¹²⁴ respectively, followed *Madison* in holding that section 525(b) does not prevent private employers from discriminating against bankruptcy debtors during the hiring process.¹²⁵ Even more significantly, the only three federal appellate courts that have considered the issue¹²⁶—the Third,¹²⁷ Fifth,¹²⁸ and Eleventh Circuits¹²⁹—agree that section 525(b) does not limit a private employer's right to consider an applicant's prior bankruptcy when making hiring decisions.¹³⁰

B. The Minority View

*Leary v. Warnaco, Inc.*¹³¹ is the only case in which a court has expressly held that section 525(b) prohibits private employers from discriminating against job applicants.¹³² The plaintiff in *Leary* alleged that the defendant violated the

actions taken after . . . an employment relationship has been established and does not cover a situation which might be a discriminatory hiring practice by private employers."); *Landry & Hardy*, *supra* note 19, at 54 ("[A]ll courts except for one have found that bankruptcy can be used in the hiring decision process by private employers without violating the Bankruptcy Code." (footnote omitted)).

¹²² 186 B.R. 553 (D. Mass. 1995).

¹²³ 192 B.R. 401 (E.D. Va. 1996).

¹²⁴ Congress vested the district courts "with appellate jurisdiction over bankruptcy court rulings." *In re Orange Boat Sales*, 239 B.R. 471, 473 (S.D.N.Y. 1999); Nevertheless, "it is not clear whether a bankruptcy court is bound by decisions of the district courts in that district." *In re Shattuc Cable Corp.*, 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992), *disapproved on other grounds in In re Reliable Drug Stores, Inc.*, 70 F.3d 948 (7th Cir. 1995). For a comprehensive discussion of this issue, see Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994).

¹²⁵ See *Fiorani*, 192 B.R. at 406; *cf. Pastore*, 186 B.R. at 553.

¹²⁶ Federal appellate court opinions have precedential force in bankruptcy cases arising in the circuit in which they were issued. See *Montgomery Cnty. Md. v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 489 (S.D.N.Y. 2005); *Shattuc Cable Corp.*, 138 B.R. at 565. Obviously, those opinions also have persuasive force in other circuits. See, e.g., *In re Disney*, 386 B.R. 292, 297 (Bankr. D. Colo. 2008) ("A bankruptcy court in Colorado is not bound by a decision of the Sixth Circuit Court of Appeals, but neither can this Court lightly dismiss such circuit level authority.").

¹²⁷ See *Rea v. Federated Investors*, 627 F.3d 937, 941 (3d Cir. 2010).

¹²⁸ See *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 174 (5th Cir. 2011).

¹²⁹ See *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1283 (11th Cir. 2011).

¹³⁰ See *id.* at 1287 ("Our holding that § 525(b) does not apply to refusals to hire is in accord with the holdings of the only two other circuits that have decided the issue.") (citing *Burnett*, 635 F.3d at 172–173, and *Rea*, 627 F.3d at 940–41); *Orovitz*, *supra* note 8, at 564 ("[A]ll of the circuit courts that have interpreted § 525(b) of the Bankruptcy Code have concluded that the statute does not preclude private employers from engaging in discriminatory hiring.").

¹³¹ 251 B.R. 656, 658 (S.D.N.Y. 2000).

¹³² See *Rea*, 627 F.3d at 940 (discussing *Leary*); *Orovitz*, *supra* note 8, at 568. However, another federal bankruptcy judge, writing before his appointment to the bench, interpreted Section 525(b) to prohibit private employers "from discriminating with respect to a . . . prospective employee," and observed that "[i]n order to maintain a cause of action for discrimination under section 525(b), there

antidiscrimination provision when it refused to hire her because she sought relief under the Bankruptcy Code.¹³³ The bankruptcy court dismissed the plaintiff's complaint,¹³⁴ following the majority view in holding that section 525(b) prohibits private employers from discriminating against bankruptcy debtors only after an employment relationship has been established.¹³⁵

On appeal, the district court reversed the bankruptcy court's ruling,¹³⁶ rejecting the latter court's "narrow construction" of the antidiscrimination provision.¹³⁷ The district court noted that section 525(b) expressly prohibits private employers from discriminating against bankruptcy debtors "with respect to employment,"¹³⁸ and concluded that this language is "broad enough to extend to discriminating with respect to extending an offer of employment."¹³⁹

There is no legislative history explaining Congress's failure to address hiring discrimination in section 525(b),¹⁴⁰ as it had done in the provision that is now section 525(a).¹⁴¹ This situation has led several courts (including, apparently, the

must be an actual or *potential* employer-employee relationship between the parties." Carroll, *supra* note 33, at 426 (emphasis added).

¹³³ See Leary, 251 B.R. at 657.

¹³⁴ See *id.*

¹³⁵ See *id.* at 658.

¹³⁶ See *id.* at 659.

¹³⁷ See *id.* at 658.

¹³⁸ *Id.* (quoting 11 U.S.C. § 525(b)); see *In re Briggs*, 143 B.R. 438, 444 (Bankr. E.D. Mich. 1992) ("Broadly stated, § 525(b) prohibits private employers from 'discriminat[ing] with respect to [the debtor's] employment.'" (quoting 11 U.S.C. § 525(b))).

¹³⁹ Leary, 251 B.R. at 658; see *In re Stinson*, 285 B.R. 239, 245 (Bankr. W.D. Va. 2002) ("[T]his court cannot unequivocally declare that, standing alone, the words '[n]o private employer . . . may discriminate with respect to employment' do not encompass discriminatory hiring."); *In re Patterson*, 125 B.R. 40, 53 (Bankr. N.D. Ala. 1990) ("[T]he text of Section 525(b) lends itself to an expansive interpretation of its protections. For it forbids private employers to terminate workers or to 'discriminate with respect to employment against' (underlining for emphasis) an individual who has been a debtor under federal bankruptcy laws."). But see *In re Martin*, 06-41010, 2007 WL 2893431, at *4 (Bankr. D. Kan. Sept. 28, 2007) ("Read in a vacuum, this Court agrees that the phrase 'with respect to employment' would likely include hiring decisions. But we do not have a vacuum here. The Court rejects the Leary decision[.]").

¹⁴⁰ See *Fiorani v. CACI*, 192 B.R. 401, 406 n.12 (E.D. Va. 1996); see also *Pastore v. Medford Sav. Bank*, 186 B.R. 553, 555 (D. Mass. 1995); Chobot, *supra* note 22, at 197; Yan, *supra* note 33, at 452. See generally *In re Cardinal Indus., Inc.*, 116 B.R. 964, 978 (Bankr. S.D. Ohio 1990) ("Given the urgency with which BAFJA was passed, its legislative 'history' is comprised solely of statements inserted rather than actually read into the Congressional Record Consequently there is no authoritative legislative history for BAFJA as enacted in 1984. Likewise there is no authoritative legislative history for its component acts as enacted in 1984.") (citations omitted).

¹⁴¹ See *Fiorani*, 192 B.R. at 406 (referring to Congress's "explicit reference to hiring in § 525(a)"); *In re Martin*, No. 2007 WL 2893431 at *3 (Bankr. D. Kan. Sept. 28, 2007) (discussing "the specific reference to discrimination with respect to hiring contained in § 525(a)").

bankruptcy court in *Leary*)¹⁴² to conclude that the antidiscrimination provision must be interpreted as written¹⁴³—that is, to allow private employers to base their hiring decisions on an applicant's bankruptcy status.¹⁴⁴ Rejecting this view,¹⁴⁵ the district court in *Leary* concluded that the difference between the two subsections is likely the result of careless draftsmanship,¹⁴⁶ and interpreted section 525(b) to prohibit hiring discrimination in order to give effect to the Bankruptcy Code's fresh start policy.¹⁴⁷ The court explained that 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."¹⁴⁸

¹⁴² The bankruptcy court's decision in *Leary* is unpublished, but was briefly summarized in the district court's opinion. *See Leary*, 251 B.R. at 658 ("Judge Hardin found that Section 525(b) applies only to actions taken after an employment relationship has been established . . . [¶] This rather narrow construction of a remedial statute has been reached by drawing a negative inference comparing this statute with § 525(a).").

¹⁴³ *See, e.g., Myers v. Toojay's Mgmt. Corp.*, 419 B.R. 51, 59 (M.D. Fla. 2009), *aff'd*, 640 F.3d 1278 (11th Cir. 2011); *In re Sweeney*, 113 B.R. 359, 362 (Bankr. N.D. Ohio 1990) ("Section 525 has been accorded various constructions . . . However, absent ambiguity or a clearly expressed legislative intent to the contrary, the plain language of the statute is conclusive."). *See generally Williams v. Dist. of Columbia*, 916 F. Supp. 1, 9 (D. D.C. 1996) ("Absent compelling legislative history to the contrary, federal courts are obligated to apply statutes as written.").

¹⁴⁴ *See, e.g., Myers*, 419 B.R. at 58 ("[U]nder the plain terms of the statute, it is clear that Congress prohibited discriminatory hiring decisions in § 525(a) and did not prohibit such conduct by private employers under § 525(b)."); *Pastore*, 186 B.R. at 555 ("[T]he absence of support for the [contrary] position in the legislative history of the statute . . . suggest[s] that 11 U.S.C. § 525(b) does not create a cause of action for failure to hire because of an individual's bankruptcy.").

¹⁴⁵ The majority view of section 525 has been characterized as one in which the courts "adhere[] to the plain meaning of subsection (b)." Yan, *supra* note 33, at 453 (discussing *Pastore*); *see also Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21 (1st Cir. 1989) ("In construing § 525(b), most courts have applied the plain meaning of the statute."). However, the *Leary* court also claimed to be applying the "plain meaning of the statute." *Leary*, 251 B.R. at 658; *see Orovitz, supra* note 8, at 566 ("The minority [view] disputes that the plain meaning interpretation of § 525(b) supports the exclusion of hiring discrimination by private employers."). Thus, at least in this context, "plain meaning is not so plain and certainly not the same in every court's eyes." Yan, *supra* note 33, at 456; *see In re Stinson*, 285 B.R. 239, 243 (Bankr. W.D. Va. 2002) (noting that the "two competing interpretations both claim[] to be grounded in the plain meaning of the text").

¹⁴⁶ *See Leary*, 251 B.R. at 658 (declining to interpret Section 525(b) to permit discriminatory hiring decisions "simply because the scrivener was more verbose in writing § 525(a)."). *But see Martin*, 2007 WL 2893431 at *3 ("The Court is unwilling . . . to find that Congress' failure to include a specific reference to hiring in § 525(b), after expressly including it in subsection (a), was merely the result of a less verbose scrivener.").

¹⁴⁷ The court characterized as "absurd" the suggestion that Congress would permit private employers "to discriminate on the initial hiring against those unfortunate economic casualties who are seeking . . . a fresh start from the bankruptcy court, and yet at the same time prohibit[] discrimination against those who have been hired." *Leary*, 251 B.R. at 658.

¹⁴⁸ *Id.*; *see also Yan, supra* note 33, at 457 ("*Leary* endorses an expansive construction of Section 525(b). The premise on which the court relied . . . was the fresh start policy." (footnotes omitted)). *See generally In re Envtl. Source Corp.*, 431 B.R. 315, 322 (Bankr. D. Mass. 2010) ("Those courts

Although no other court has followed the analysis in *Leary*,¹⁴⁹ the *Leary* court's interpretation of the antidiscrimination provision is consistent with dicta in other cases¹⁵⁰ and the views of several commentators.¹⁵¹ These courts and commentators agree that interpreting section 525(b) to prohibit discriminatory hiring practices is more consistent with the Bankruptcy Code's fresh start policy than the contrary majority view.¹⁵²

In *In re Stinson*,¹⁵³ for example, the court observed that "interpreting § 525(b) to cover discriminatory hiring is more consistent with the thrust of § 525 taken as a whole, since it forbids grounding decisions solely on the fact that [an] individual was or is a [bankruptcy] debtor."¹⁵⁴ The *Stinson* court nevertheless adopted the majority view,¹⁵⁵ concluding that the *Leary* court's interpretation of section 525(b) could not be reconciled with the statutory language.¹⁵⁶

supporting the notion that § 525 should be broadly construed focus on the Bankruptcy Code's fresh start policy.").

¹⁴⁹ See, e.g., *Burnett v. Stewart Title, Inc.* (*In re Burnett*), 635 F.3d 169, 173 (5th Cir. 2011) ("We . . . reject the solitary view advanced in *Leary*. . . . The view in *Leary* is contrary to overwhelming authority otherwise"); see also Landry & Hardy, *supra* note 19, at 51 ("[I]n all but one case, courts have found that the hiring decisions of private employers are not protected under the Bankruptcy Code.").

¹⁵⁰ See, e.g., *In re Mayo*, 322 B.R. 712, 718–19 (Bankr. D. Vt. 2005) (assuming discriminatory denial of employment would violate § 525(b), but finding "no evidence that [the defendant] denied the Plaintiff employment because of her bankruptcy"); *In re Bobbitt*, 174 B.R. 548, 552 (Bankr. N.D. Cal. 1993) ("To qualify for protection under § 525(b), a debtor must establish that . . . employment has been terminated or withheld . . . solely on the ground of bankruptcy." (emphasis added)).

¹⁵¹ See, e.g., Herz, *supra* note 15, at 89 (suggesting "courts that have gone against *Leary* . . . 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"); Yan, *supra* note 33, at 458 ("From a policy perspective, *Leary* . . . [is] persuasive. How can the 'honest but unfortunate debtor' receive a fresh start if they are prevented from finding the means of achieving it?").

¹⁵² See *Myers v. Toojay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) (indicating *Leary* court "recast the meaning of § 525(b)'s language in a way that will better achieve one of the broad purposes Congress sought to achieve in the Bankruptcy Code, which is to give debtors who go through bankruptcy a fresh start"); Herz, *supra* note 15, at 90 ("[A] lack of protection against hiring discrimination can impose a serious impediment to a debtor's efforts in . . . 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."); Landry & Hardy, *supra* note 19, 50–51 ("Certainly, the inability to find gainful employment, if cut off by employers due to one's bankruptcy status or history, would limit a person's fresh start.").

¹⁵³ 285 B.R. 239 (Bankr. W.D. Va. 2002).

¹⁵⁴ *Id.* at 247.

¹⁵⁵ See *id.* at 242 ("A majority of courts addressing this issue have held that § 525(b) does not reach discriminatory hiring by private employers.").

¹⁵⁶ See *id.* at 247; cf. *Burnett v. Stewart Title, Inc.*, 431 B.R. 894, 900 (S.D. Tex. 2010) ("While the *Leary* court's desire to uphold the 'fresh start' policy is commendable, the plain language of the statute does not support its interpretation."), *aff'd*, 635 F.3d 169 (5th Cir. 2011); *In re Martin*, No. 06-41010, 2007 WL 2893431, at *4 (Bankr. D. Kan. Sept. 28, 2007) ("[T]he *Leary* decision . . . exalts the admirable policy of giving debtors a fresh start over clear statutory language.").

In fact, Congress appears to have intentionally excluded hiring discrimination from the conduct in which private employers are prohibited from engaging when it amended the antidiscrimination provision to encompass the employment practices of private entities in other important respects.¹⁵⁷ Had Congress intended to prohibit private sector hiring discrimination,¹⁵⁸ it could have done so simply by incorporating all of the prohibitory language of section 525(a) into section 525(b),¹⁵⁹ and yet it elected to incorporate only the language prohibiting the termination of or discrimination against existing employees.¹⁶⁰ The fact that Congress chose not to follow its own model¹⁶¹ in this particular respect suggests it did not intend to limit the hiring discretion of private employers in the same manner as public employers.¹⁶²

In addition, on two occasions after the majority of courts had begun interpreting section 525(b) to permit private sector hiring discrimination,¹⁶³

¹⁵⁷ See *Burnett v. Stewart Title, Inc.* (*In re Burnett*), 635 F.3d 169, 172 (5th Cir. 2011) ("Congress's exclusion of the words 'deny employment to' in subsection (b) was intentional and purposeful."); Orovitz, *supra* note 8, at 567 ("[T]he majority of courts construe Congress's use of the same wording in both subsections of the statute with an absence of 'deny employment to' in subsection (b) as a purposeful omission on the part of Congress.").

¹⁵⁸ See *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30, 34 (D. D.C. 1991) ("Congress has . . . expressed a policy decision that employees and job applicants are to be given unconditional protection against discrimination based upon their conflicting military duties . . . Congress has chosen to extend such protection to job applicants as well as to existing employees . . ."); *McConnell v. Anderson*, 316 F. Supp. 809, 812 (D. Minn. 1970) ("[T]he 1964 Civil Rights Act . . . makes it an unlawful employment practice for any employer, private or public[,] 'to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex or natural [sic] origin.'" (quoting 42 U.S.C. § 2000e-2)), *rev'd on other grounds*, 451 F.2d 193 (8th Cir. 1971).

¹⁵⁹ See *Myers v. Toojay's Mgmt. Corp.*, 640 F.3d 1278, 1285 (11th Cir. 2011) ("Had Congress wanted to cover a private employer's hiring policies and practices in § 525(b), it could have done so the same way it covered a governmental unit's hiring policies and practices in § 525(a).").

¹⁶⁰ See *id.* at 1284–85 n.5 ("Congress had § 525(a) in front of it when it enacted § 525(b). It used the same language for § 525(b) that it had in § 525(a) except it left out 'deny employment to' in § 525(b)."); *cf.* *Shawley v. Bethlehem Steel Corp.*, 784 F. Supp. 1200, 1203 (W.D. Pa. 1992) ("[I]n considering other employment related remedial legislation by Congress, it appears that when discrimination in hiring was sought to be addressed by Congress, language expressly covering hiring is used."), *aff'd*, 989 F.2d 652 (3d Cir. 1993).

¹⁶¹ See *Burnett*, 635 F.3d at 173 ("Although § 525(b) was enacted six years after § 525(a), its language regarding employment discrimination is nearly identical to that used in § 525(a), implying that Congress modeled subsection (b) on subsection (a).").

¹⁶² See *In re Stinson*, 285 B.R. 239, 240 (Bankr. W.D. Va. 2002); *Pastore v. Medford Sav. Bank*, 186 B.R. 553, 554–55 (D. Mass. 1995); See generally *Maney v. Kagenveama* (*In re Kagenveama*), 541 F.3d 868, 874 (9th Cir. 2008) ("When Congress includes language in one part of a statute and excludes it from another part of the same statute, it is presumed that Congress acted purposely in the disparate inclusion or exclusion."), *overruled on other grounds by Flores v. Flores* (*In re Flores*), 735 F.3d 855 (9th Cir. 2013).

¹⁶³ By the mid-1990s, several courts had already "answered in the negative the question of whether [section 525(b)] applies to hiring decisions of private employers." *Pastore*, 186 B.R. at 555.

Congress again amended the antidiscrimination provision.¹⁶⁴ Congress's failure to address the hiring practices of private employers in either of those instances (or, for that matter, at any subsequent time)¹⁶⁵ is a further indication it did not intend to limit the hiring discretion of private employers.¹⁶⁶ As one court explained: "The only rational interpretation of congressional idleness in the face of voluminous precedent that it has the power to set straight is to assume that Congress agrees."¹⁶⁷

III. THE EMPLOYMENT-AT-WILL DOCTRINE AND ITS PUBLIC POLICY EXCEPTION

Even if the language of section 525(b) cannot reasonably be interpreted to prohibit discriminatory hiring practices,¹⁶⁸ courts could give effect to the policy

¹⁶⁴ Congress added subsection (c) to section 525 as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 313, 108 Stat. 4106, 4140-41. See *In re Taylor*, 263 B.R. 139, 144 (N.D. Ala. 2001); *In re Colon*, 212 B.R. 23, 25 (Bankr. D. P.R. 1997). The new subsection expressly prohibits "discrimination against bankrupts in the granting of student loans." *Stoltz v. Brattleboro Hous. Auth.* (*In re Stoltz*), 315 F.3d 80, 96 (2d Cir. 2002). Congress subsequently amended that subsection—but not subsection (a) or (b)—as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1211, 119 Stat. 23, 194. The Bankruptcy Code has not been significantly amended since that time. See *In re Varanasi*, 394 B.R. 430, 434 (Bankr. S.D. Ohio 2008); Jonathan C. Lipson, *Governance in the Breach: Controlling Creditor Opportunism*, 84 S. CAL. L. REV. 1035, 1036 n.1 (2011).

¹⁶⁵ On February 13, 2013, Representative Steve Cohen of Tennessee introduced proposed federal legislation, designated the "Bankruptcy Nondiscrimination Enhancement Act of 2013," which would amend section 525 to prohibit private employers from discriminating against bankruptcy debtors during the hiring process. H.R. 646, 113th Cong. (2013). Representative Cohen's bill, which has no co-sponsors, was referred to a subcommittee of the House Judiciary Committee, where it appears to have received no further substantive attention.

¹⁶⁶ See *Burnett*, 635 F.3d at 173 ("Congress is 'presumed to have knowledge of its previous legislation when making new laws.' . . . Had Congress wished to bar private employers from discriminating against debtors in their hiring decisions, it could have done so by adding the phrase 'deny employment' to subsection (b) when it amended § 525 in 1994 and again in 2005." (quoting *United States v. Zavala-Sustaita*, 214 F.3d 601, 606 n.8 (5th Cir. 2000)); cf. *Yasin v. Equifax Info. Servs., LLC*, No. C-08-1234, 2008 WL 2782704, at *4 (N.D. Cal. July 16, 2008) ("Where Congress amends a statute without modifying a provision that has been the subject of judicial interpretation, a reasonable inference can be drawn that 'Congress accepted the construction' placed on that statute by the courts." (quoting *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951))).

¹⁶⁷ *United States v. Kelly*, 105 F. Supp. 2d 1107, 1115 (S.D. Cal. 2000); see also *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1499 (6th Cir. 1993) ("When Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot."); *In re Adoption of Baby E.Z.*, 266 P.3d 702, 709 (Utah 2011) ("Congress surely is cognizant of the fact that parties rely on judicial interpretations of legislation and, if the interpretation is in error, Congress ordinarily will take steps to either correct the legislation or provide additional guidance to the courts.").

¹⁶⁸ See *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 57 (M.D. Fla. 2009) ("When § 525(a) and (b) are read in *pari materia*, the language in § 525(b) cannot possibly be construed to included denial of

considerations that prompted the *Leary* court to interpret the statute in that manner by extending common law protection to bankruptcy debtors who are denied employment in the private sector.¹⁶⁹ In particular, the courts could recognize a new "wrongful refusal to hire" tort claim applicable in this situation by interpreting the public policy exception to the employment-at-will doctrine to prohibit private employers from discriminating against bankruptcy debtors during the hiring process.¹⁷⁰

The employment-at-will doctrine is a product of the American common law,¹⁷¹ having arisen and flourished in the laissez-faire political and economic climate of the late nineteenth century industrial era.¹⁷² The doctrine holds that an employment relationship of unspecified duration is presumptively terminable at the will of either party.¹⁷³ Although courts applying the doctrine typically focus on the employer's right to terminate the relationship "for good cause, for no cause or even for cause morally wrong, without being guilty of legal wrong,"¹⁷⁴

employment; if that was Congress' intent, Congress would have included the phrase 'deny employment to' in § 525(b)."), *aff'd*, 640 F.3d 1278 (11th Cir. 2011).

¹⁶⁹ See Boshkoff, *supra* note 21, at 174 (alluding to need for "state common law to take proper notice of the demands of bankruptcy policy"); cf. Heavenrich, *supra* note 55, at 37 ("[T]he *Leary* court moved beyond principles of pure statutory construction and considered public policy implications.").

¹⁷⁰ See Landry & Hardy, *supra* note 19, at 59 ("For [private] employers who screen applicants for bankruptcy, there is little legal vulnerability under the Bankruptcy Code itself, but employers must still be cognizant of prohibitions from other areas of law."). Bankruptcy debtors have only occasionally invoked the public policy exception in cases involving employment actions other than discharge. See, e.g., *In re Browning*, 176 B.R. 805, 806 (Bankr. M.D. Tenn. 1995) ("Debtor asserts that [the employer's] demerits policy discriminates against employees who are debtors in bankruptcy in contravention of § 525(b), and violates public policy because it will discourage employees from filing bankruptcy.").

¹⁷¹ See *Woods v. Era Med LLC*, 677 F. Supp.2d 806, 816 (E.D. Pa. 2010); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983). The doctrine has now been codified in some states. See, e.g., *Bakken v. N. Am. Coal. Corp.*, 641 F. Supp. 1015, 1022 (D. N.D. 1986) ("North Dakota has codified its employment at will rule . . .").

¹⁷² See *In re Hotstuf Foods, Inc.*, 95 B.R. 355, 357 (Bankr. E.D. Pa. 1989); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1086 (Wash. 1984). The origin of the doctrine is frequently traced to an "influential treatise on master and servant law [published] in 1877." *Mursch v. Van Dorn Co.*, 851 F.2d 990, 993 n.2 (7th Cir 1988) (referring to H.G. WOOD, LAW OF MASTER & SERVANT § 134 (1877)); see also *Hayes v. Trulock*, 755 P.2d 830, 832 (Wash. Ct. App. 1988) ("The employment-at-will doctrine is a common law doctrine developed from a treatise on master and servant written in the last century.").

¹⁷³ See *In re Pre-Press Graphics Co.*, 310 B.R. 893, 900 (Bankr. N.D. Ill. 2004); see also *In re Port-A-Pit, Inc.*, 138 B.R. 624, 626 (Bankr. M.D. Fla. 1992). Under the "English" rule that prevailed prior to the employment-at-will rule's emergence, "the arrangement between an employer and his employee was considered a status-based relationship, wherein the master was responsible for the servant's health, welfare, and security." See *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 627 (Haw. Sup. Ct. 1982). As a result, "a contract of employment for an indefinite duration was presumptively for a term of one year." See *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 783 (Conn. Sup. Ct. 1984).

¹⁷⁴ See *Hillesland v. Fed. Land Bank Ass'n*, 407 N.W.2d 206, 211 (N.D. Sup. Ct. 1987) (quoting *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds*, *Hutton v.*

the doctrine also permits an employer to refuse to hire a job applicant "for any cause not specifically prohibited by applicable state or federal authorities."¹⁷⁵

Modern commentators have argued that changes in socioeconomic values and conditions have rendered the employment-at-will doctrine obsolete,¹⁷⁶ and the courts in most states have responded by recognizing exceptions to its operation.¹⁷⁷ The most widely accepted of these common law exceptions prohibits employment terminations that violate "a clear mandate of public policy."¹⁷⁸ In jurisdictions that recognize this exception,¹⁷⁹ employers retain the

Watters, 179 S.W. 134 (Tenn. 1915); *see also* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 896 n.2 (3d. Cir. 1983) (describing this characterization of employment-at-will as "[a]n oft quoted statement of [the] doctrine").

¹⁷⁵ Baker v. Campbell Cnty. Bd. of Educ., 180 S.W.3d 479, 483 (Ky. Ct. App. 2005); *see* Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 105 (Colo. Sup. Ct. 1992) ("[T]he at-will employment doctrine implicates . . . an employer's discretion in hiring"); Todd H. Girshon, Comment, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635, 642-43 (1992) ("Under the employment at-will doctrine, employers have the unfettered discretion to hire and fire for good cause or no cause at all.") (emphasis added).

¹⁷⁶ *See* Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509 (N.J. Sup. Ct. 1980) (observing many states have recognized needs in protecting employees from abusive practices by employers); *see also* James E. DeFranco, *Modification of the Employee at Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, 30 ST. LOUIS U. L.J. 65, 68 (1985) (analyzing whether growing disparities of bargaining power between large corporate employers and their employees justify abrogation of at will rule).

¹⁷⁷ *See* Chambers v. Valley Nat'l Bank of Ariz., 721 F. Supp. 1128, 1130 (D. Ariz. 1988); *see also* Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1050-51 (Utah Sup. Ct. 1989) (Zimmerman, J., concurring). In addition, "both the Congress and State legislatures have created statutory exceptions to the employment-at-will rule." Banas v. Matthews Int'l Corp., 502 A.2d 637, 646 (Pa. Super. Ct. 1985). Indeed, section 525 of the Bankruptcy Code is itself such an exception. *See* Krystad v. Lau, 400 P.2d 72, 84 (Wash. Sup. Ct. 1965) (Hill, J., dissenting) ("[A]nti-discrimination statutes have greatly limited the freedom of employers, both private and public, to hire and fire at will."); Ezra S. Greenberg, Note, *Stray Remarks and Mixed-Motive Cases After Desert Palace v. Costa: A Proximity Test for Determining Minimal Causation*, 29 CARDOZO L. REV. 1795, 1795 n.1 (2008) ("Antidiscrimination statutes are an exception to the rule of at-will employment.").

¹⁷⁸ *Martin Marietta Corp.*, 823 P.2d at 107; *see also* Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. Sup. Ct. 1985); Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814, 816 (Ala. Sup. Ct. 1984) (Beatty, J., dissenting) ("The most widely accepted limitation on the rule of at-will employment has been the 'public policy exception,' under which an employee may recover damages from her employer if she is fired for reasons that undermine an important public policy") (quoting *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1931-32 (1983)).

¹⁷⁹ "Almost every state has recognized this public policy exception." Gardner v. Loomis Armored Inc., 913 P.2d 377, 379 (Wash. Sup. Ct. 1996). Another important judicially-recognized exception to the employment-at-will doctrine applies when "[a]n implied-in-fact contract term . . . is inferred from the statements or conduct of the parties." *See* Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1036 (Ariz. Sup. Ct. 1985). A third, less widely recognized exception prohibits employers from discharging employees in violation of a covenant of good faith and fair dealing implicit in the employment relationship. *Id.* at 1031. For the author's consideration of another potential common law

right to discharge their employees "for good cause or for no cause,"¹⁸⁰ but they cannot discharge an employee—or, arguably, refuse to hire an applicant¹⁸¹—"for a cause that violates public policy."¹⁸²

The recognition of a common law wrongful refusal to hire claim applicable in this situation is suggested by legislative history indicating that Congress did not intend to limit the scope of the antidiscrimination provision to the express terms of the statute,¹⁸³ but instead expected the courts to "expand the anti-discrimination coverage to be consistent with bankruptcy public policy."¹⁸⁴ As one state court judge discussing the courts' authority to recognize common law exceptions to the employment-at-will doctrine observed: "Legislative inaction in

exception, see Michael D. Moberly, *Negligent Investigation: Arizona's Fourth Exception to the Employment-at-Will Rule?*, 27 ARIZ. ST. L.J. 993, 997–98 (1995).

¹⁸⁰ See *Broomfield v. Lundell*, 767 P.2d 697, 702 (Ariz. Ct. App. 1988). As a practical matter, discharges for "no cause" are rare. *Carl v. Children's Hosp.*, 702 A.2d 159, 189 (D.C. App. Ct. 1997) (Mack, J., concurring) ("When an employer decides to discharge an employee, there is always a reason for that discharge."); *D'Angelo v. Gardner*, 819 P.2d 206, 225 (Nev. Sup. Ct. 1991) (Steffen, J., dissenting) ("It should hardly be surprising that most at-will terminations will occur for some articulable cause."). Nevertheless, employers occasionally may terminate an employee "for no other reason than to show that they maintain the freedom to do so"—that is, to avoid any implication that they have agreed to terminate only for cause. *Hartbarger v. Frank Paxton Co.*, 857 P.2d 776, 785 (N.M. Sup. Ct. 1993).

¹⁸¹ See Gray, *supra* note 27, at 99 ("[A]n employer has the freedom and right to refuse to hire whomever it wishes as long as its motivation does not contravene a clear mandate of public policy"); Steven H. Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 INDUS. REL. L.J. 386, 391 (1992) ("[A]pply[ing] the [public policy] exception to a refusal-to-hire situation . . . appears logical.").

¹⁸² See *Broomfield*, 767 P.2d at 702–03; see also Kelly Gallagher, Note, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1603 (2006) ("The common law at-will employment regime in the United States permits employers to refuse to hire or fire employees for any reason, or no reason at all, as long as they do not violate specific statutes or public policies prohibiting discrimination based on certain characteristics.").

¹⁸³ See *In re Berkelhammer*, 279 B.R. 660, 670 (Bankr. S.D.N.Y. 2002) ("The enumeration of various forms of discrimination in section 525 is not exhaustive" (citing S. Rep. No. 95-989, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867)); *In re Watts*, 93 B.R. 350, 354 (E.D. Pa. 1988) ("[C]ongressional reports accompanying § 525 . . . contained language indicating that Congress sought to attack a broader range of discriminatory practices than those specifically enumerated in the statute."), *rev'd sub nom. Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090 (3d Cir. 1989); *In re Howren*, 10 B.R. 303, 304 (Bankr. D. Kan. 1980) ("Although certain acts of discrimination are expressly prohibited in § 525, the enumeration is not exclusive.") (citing H.R. Rep. No. 95-595, at 366–67 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6322–23).

¹⁸⁴ *In re Hardy*, 209 B.R. 371, 378 (Bankr. E.D. Va. 1997); see *In re Envtl. Source Corp.*, 431 B.R. 315, 322 (Bankr. D. Mass. 2010); *In re Cleasby*, 139 B.R. 897, 900 (W.D. Wis. 1992) ("Congress left to the courts the task of defining the scope of § 525 consistent with 'sound bankruptcy policy.'" (quoting H.R. Rep. No. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323)); *Bell v. Sanford-Corbitt-Bruker, Inc.*, No. CV186-201, 1987 WL 60286, at *3 n.1 (S.D. Ga. Sept. 14, 1987).

one or more particular areas does not necessarily signify a legislature's endorsement of the status quo."¹⁸⁵

IV. WRONGFUL DISCHARGE IN VIOLATION OF BANKRUPTCY POLICY

A. The Propriety of Looking to Federal Law as a Source of Public Policy

The clear mandate of public policy necessary to support a tort claim based upon the public policy exception to the employment-at-will doctrine is typically found in a state statute.¹⁸⁶ Indeed, there is some authority suggesting that state statutes (and presumably state constitutional provisions)¹⁸⁷ are the only legitimate sources of public policy for purposes of applying the exception.¹⁸⁸ However, a number of courts have held that common law wrongful discharge

¹⁸⁵ *Carl v. Children's Hosp.*, 702 A.2d 159, 171 (D.C. C.A. 1997) (Ferren, J., concurring); *cf.* *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033, 1043 (Utah Sup. Ct. 1989) ("Judicial decisions can . . . enunciate substantial principles of public policy in areas which the legislature has not treated."); Marc A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-At-Will Rule*, 24 CONN. L. REV. 97, 137 (1991) ("The creation of a common law action for wrongful refusal to hire . . . is not inconsistent with the enactment of future legislation regulating additional aspects of the hiring process.").

¹⁸⁶ *See, e.g., Williamson v. Va. First Sav. Bank*, 26 F. Supp. 2d 798, 801 (E.D. Va. 1998) ("[A]n at-will employee may bring a tortious wrongful discharge claim if the employee's termination is based on a violation of Virginia public policy as expressed in a state statute."); *see also* *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 389 (Conn. Sup. Ct. 1980) ("We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. Certainly when there is a relevant state statute we should not ignore the statement of public policy that it represents.").

¹⁸⁷ *See, e.g., Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283 (Iowa Sup. Ct. 2000) ("In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, we have primarily looked to our statutes but have also indicated our Constitution to be an additional source."); *Painter v. Graley*, 639 N.E.2d 51, 56 (Ohio Sup. Ct. 1994) ("Provisions found in the Ohio Constitution are necessarily statements of Ohio public policy, if not the most definitive statements of Ohio public policy."); *Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 587 (W. Va. Ct. App. 1998) ("[A]n at-will or otherwise employed private sector employee may sustain, on proper proof, a cause of action for wrongful discharge based upon a violation of public policy emanating from a specific provision of the state constitution.").

¹⁸⁸ *See, e.g., Childress v. City of Richmond*, 907 F. Supp. 934, 941 (E.D. Va. 1995) ("Virginia strongly adheres to the at-will employment doctrine, with a narrow exception for violations of public policy The exception is limited to policy as embodied by state statutes, not federal ones."), *aff'd*, 134 F.3d 1205 (4th Cir. 1998); *Leach v. Northern Telecom, Inc.*, 141 F.R.D. 420, 426 (E.D. N.C. 1991) ("[N]o North Carolina case has ever held that a wrongful discharge claim can be grounded on a violation of federal public policy."); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 842 (Wis. Sup. Ct. 1983) ("This court intends only a recognition of stated public policy as reflected in the constitution and statutes of Wisconsin.").

claims also can be premised on public policies reflected in federal statutes¹⁸⁹ (and under some circumstances, the federal constitution).¹⁹⁰ In jurisdictions that adhere to the latter view,¹⁹¹ the Bankruptcy Code's antidiscrimination provision would seem to be as logical a source of public policy as any other federal antidiscrimination statute.¹⁹²

B. The Common Law Claim Is Not Preempted By Federal Law

*Wenners v. Great State Beverages, Inc.*¹⁹³ was the first case to address the public policy exception's application in the bankruptcy discrimination context.¹⁹⁴ The plaintiff in *Wenners* asserted a state law wrongful discharge

¹⁸⁹ See *Grant-Burton v. Covenant Care, Inc.*, 122 Cal. Rptr.2d 204, 214 (Ct. App. 2002); *Faulkner v. United Techs. Corp.*, 693 A.2d 293, 297 (Conn. Sup. Ct. 1997); *Peterson v. Browning*, 832 P.2d 1280, 1283 (Utah Sup. Ct. 1992).

¹⁹⁰ See, e.g., *Painter*, 639 N.E.2d at 56 ("Clear public policy' sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed . . . in the form of statutory enactments. . . . [S]uch a public policy may be . . . based on sources such as the Constitutions of Ohio and the United States . . ."); see also *Phillips v. St. Mary's Reg'l Med. Ctr.*, 116 Cal. Rptr.2d 770, 782 (Ct. App. 2002) ("[I]n the absence of a conflict between state and federal policies, federal statutory and constitutional law may provide the policy basis for a wrongful termination claim.").

¹⁹¹ The issue of whether "the public policy to support the tort of wrongful discharge . . . can be derived from a federal statute" raises "a host of considerations, including potential federal preemption issues." *Fitzgerald*, 613 N.W.2d at 285 n.4. Nevertheless, "of those states that have addressed whether a wrongful discharge claim can be based on public policy as evinced in federal law, the vast majority have answered in the affirmative." *Sedlacek v. Hillis*, 36 P.3d 1014, 1022 (Wash. 2001) (Sanders, J., dissenting). For an academic discussion of this issue, see Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623 (2006).

¹⁹² See, e.g., *Cipolla v. HMS Host Corp.*, No. Civ. 04-2646, 2005 WL 2679779, at *1 (D. N.J. Oct. 20, 2005) ("Plaintiff alleges employment discrimination due to his filing for bankruptcy, in violation of . . . New Jersey common law prohibiting employment termination that is contrary to a clear mandate of public policy (in this case, that of § 525)."); *Pratt v. Phx. Home Life Mut. Ins. Co.*, 285 B.R. 3, 8 (D. Or. 2001) ("Plaintiff asserts any termination of employment that violates public policy can give rise to a wrongful discharge claim. Plaintiff contends § 525(b) of the Bankruptcy Act is evidence of a public policy against discrimination based on bankrupt status."); *In re Hutchins*, 211 B.R. 325, 328 n.5 (Bankr. E.D. Ark. 1997) ("Of course, an employer is not permitted to terminate a debtor solely due to the filing of a petition in bankruptcy, 11 U.S.C. § 525, or otherwise violate the 'well-established public policy of the state.'" (quoting *St. Edward Mercy Med. Ctr. v. Ellison*, 946 S.W.2d 726, 728 (Ark. Ct. App. 1997)).

¹⁹³ 663 A.2d 623 (N.H. Sup. Ct. 1995). New Hampshire is among the states in which a common law wrongful discharge claim can be "premised upon a public policy created solely by [a] federal statute." *Bliss v. Stow Mills, Inc.*, 786 A.2d 815, 817 (N.H. Sup. Ct. 2001); see also *Slater v. Verizon Commc'ns, Inc.*, No. Civ.04-303, 2005 WL 488676, at *3 (D. N.H. Mar. 3, 2005) (noting public policy that is necessary to support common law wrongful discharge claims in New Hampshire "apparently can arise from federal as well as state statutory provisions").

¹⁹⁴ See *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 429 (1st Cir. 1996) ("In *Wenners* . . . the plaintiff relied on a section of the Bankruptcy Code to establish a public policy against the termination of his employment."). In an earlier case, *West v. First National Bank of Atlanta*, the Georgia Court of

claim against his former employer,¹⁹⁵ alleging that the employer violated public policy when it terminated his employment because he filed bankruptcy.¹⁹⁶ The employer argued that the plaintiff's claim was preempted by federal law¹⁹⁷—an argument frequently made by employers (albeit with mixed success)¹⁹⁸ in cases in which a terminated employee has invoked the public policy embodied in a federal statute.¹⁹⁹

The New Hampshire Supreme Court rejected the employer's argument,²⁰⁰ even though the recognition of a common law tort premised on a public policy contained in the Bankruptcy Code may undermine the uniformity Congress

Appeals held that an employer's termination of an at-will employee "for filing a bankruptcy petition" did not give rise to a "cause of action for wrongful discharge." 245 S.E.2d 46, 47 (Ga. Ct. App. 1978). The plaintiff in *West* did not invoke the public policy exception, presumably because the exception had not been recognized by the Georgia courts. See *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029, 1031 (5th Cir. 1981) (noting Georgia courts have been reluctant to adopt public policy exception). Nevertheless, *West* has been characterized as a case in which the court refused to recognize an exception to the employment-at-will doctrine where the "employee alleged she was fired for declaring bankruptcy." *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1056 (5th Cir. 1981).

¹⁹⁵ New Hampshire first recognized the public policy exception in *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551–52 (N.H. Sup. Ct. 1974), one of the nation's "most influential cases in wrongful discharge litigation." Michael J. Higgins, Comment, *California Wrongful Discharge Law and the Public Employee*, 23 U.C. DAVIS L. REV. 117, 135 (1989); see also Kathleen C. McGowan, Note, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 148 (1998) ("United States courts followed the employment at-will philosophy almost without exception until the 1974 seminal New Hampshire case of *Monge v. Beebe Rubber Co.* . . .").

¹⁹⁶ See *Wenners*, 663 A.2d at 625.

¹⁹⁷ See *id.*; cf. *In re Hollins*, 150 B.R. 53, 54 (Bankr. D. Or. 1993) ("The U.S. Constitution itself specifies that Congress may enact 'uniform' laws of bankruptcy. If the Bankruptcy Code did not preempt contrary state law, uniformity would be impossible.").

¹⁹⁸ Compare *Phillips v. St. Mary's Reg'l Med. Ctr.*, 116 Cal. Rptr. 2d 770, 784 (Ct. App. 2002) ("The remedies afforded under Title VII do not preempt a state law claim for wrongful termination in violation of public policy.") with *Ferragamo v. Signet Bank/Maryland, Civ. A. No. WN-88-3333*, 1992 WL 219826, at *3 (D. Md. Mar. 17, 1992) ("A tort claim for wrongful discharge is . . . preempted by Title VII when the violation of public policy alleged is one embodied in Title VII."); see also *Peatros v. Bank of Am. NT & SA*, 990 P.2d 539, 559 n.2 (Cal. Sup. Ct. 2000) (Brown, J., dissenting) ("Courts are . . . in disarray as to whether federal law preempts state causes of action for wrongful termination in violation of public policy.").

¹⁹⁹ See, e.g., *Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 565 (W.D. Mo. 1990) ("Defendant argues that plaintiff's state law claim for wrongful discharge is preempted by the FLSA and that plaintiff has not stated a claim within the public policy exception."); *Jie v. Liang Tai Knitwear*, 107 Cal. Rptr. 2d 682, 686 (Ct. App. 2001) ("Defendants contend that California law, to the extent it allows an action for wrongful termination in violation of public policy to be based on . . . the federal Immigration and Naturalization Act . . . as amended by IRCA, is preempted by IRCA.") (footnote omitted). For the author's perspective on one variation of this argument, see Michael D. Moberly, *Fair Labor Standards Act Preemption of "Public Policy" Wrongful Discharge Claims*, 42 DRAKE L. REV. 525 (1993).

²⁰⁰ See *Wenners*, 663 A.2d at 625–26; see also *Mason v. Smith*, 672 A.2d 705, 707 (N.H. Sup. Ct. 1996) ("In *Wenners* . . . we held that the plaintiff's common law cause of action for wrongful termination was not preempted by section 525(b) of the Bankruptcy Code . . .").

sought to achieve when enacting the Code,²⁰¹ as the employer had argued.²⁰² Applying traditional federal preemption analysis,²⁰³ the court noted that section 525(b) contains no express preemption language.²⁰⁴ The court also found no "clear and manifest" congressional intent to preempt a state law wrongful discharge claim.²⁰⁵ Finally, the court concluded that there would be no actual (and therefore preemptive)²⁰⁶ conflict between section 525(b) and the recognition of a state common law remedy for violations of that provision:

The prohibition in section 525(b) and a State law cause of action for wrongful termination based on the public policy set forth in that section are

²⁰¹ See *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, 125 (D. Md. 1995) ("Allowing state tort actions . . . ultimately would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme [S]uch a result . . . would threaten the uniformity of federal bankruptcy law"); *Pauletto v. Reliance Ins., Co.*, 75 Cal. Rptr. 2d 334, 340 (Ct. App. 1998) (asserting that "state-law tort claims . . . threaten the uniformity of federal bankruptcy law"); *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) ("The uniformity of bankruptcy law is a matter textually committed to Congress by the federal constitution The insertion of state tort standards into the bankruptcy process poses significant interference with federal regulation in that area" (citation omitted)).

²⁰² See *Wenners*, 663 A.2d at 624; *cf. In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp.2d 1145, 1198 n.33 (C.D. Cal 2010) ("[S]ome negative effect on uniformity' is not sufficient to trigger preemption" (quoting *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 784 (3d Cir. 1992))); *Kolbeck v. Gen. Motors Corp.*, 702 F. Supp. 532, 540 (E.D. Pa. 1988) (observing that an "interest in national uniformity . . . standing alone may not provide an adequate basis to overcome the presumption against finding preemption.").

²⁰³ The New Hampshire Supreme Court has stated that "[s]tate law is preempted . . . where (1) Congress expresses an intent to displace state law; (2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or (3) state and federal law actually conflict." *Disabilities Rights Ctr., Inc. v. Comm'r., N.H. Dept. of Corrs.*, 732 A.2d 1021, 1022 (N.H. Sup. Ct. 1999).

²⁰⁴ See *Wenners*, 663 A.2d at 626; *cf. Sturm v. Providian Nat'l Bank*, 242 B.R. 599, 602 (S.D. W. Va. 1999) ("Congress did not employ preemptive language in the Bankruptcy Code"); *Douglass G. Boshkoff, Bankruptcy-Based Discrimination*, 66 AM. BANKR. L.J. 387, 398 (1992) (noting that "there is no preemption clause in the Bankruptcy Code").

²⁰⁵ *Wenners*, 663 A.2d at 626 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *cf. Penn Terra Ltd. v. Dep't Env'tl. Res.*, 733 F.2d 267, 272 (3d Cir. 1984).

While Congress, under its Bankruptcy power, certainly has the constitutional prerogative to pre-empt the States, even in their exercise of police power, the usual rule is that congressional intent to pre-empt will not be inferred lightly. Pre-emption must either be explicit, or compelled due to an unavoidable conflict between the state law and the federal law.

Id.

²⁰⁶ See *Wenners*, 663 A.2d at 625 ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law." (quoting *English v. General Electric Co.*, 496 U.S. 72, 79 (1990))).

not incompatible; in fact, they are complimentary. A wrongful termination claim relying on section 525(b) would further the goals of Congress to protect debtors from discrimination[.]²⁰⁷

C. The Claim May Be Precluded By the Existence of a Statutory Remedy

The court in *Robinette v. WESTconsin Credit Union*²⁰⁸ reached a result different from that in *Wenners*.²⁰⁹ The plaintiff in *Robinette* asserted a common law wrongful discharge claim against her former employer when her employment was terminated after the employer learned of her intent to file bankruptcy.²¹⁰ The court dismissed the claim,²¹¹ noting that the plaintiff had stated a claim for relief under section 525(b),²¹² and that as in many other states,²¹³ the public policy exception applies in Wisconsin only when a terminated employee "has no other recourse" for the alleged violation of public policy.²¹⁴ The court explained:

²⁰⁷ *Id.* at 626. *See also* Boshkoff, *supra* note 21, at 398 (asserting "a more rigorous state wrongful discharge rule would not impose conflicting obligations on the actions [sic] or otherwise interfere with the federal regulation").

²⁰⁸ 686 F. Supp. 2d 1206 (W.D. Wis. 2010).

²⁰⁹ *See id.* at 1208 ("[P]laintiff has no state law claim for wrongful termination so long as § 525(b) provides her a federal statutory remedy. This conclusion makes it unnecessary to decide whether to . . . expand Wisconsin's public policy exception to the employment at-will doctrine.").

²¹⁰ *See id.* at 1207–08.

²¹¹ *See id.* at 1208, 1213.

²¹² *See id.* at 1207–08, 1212.

²¹³ *See, e.g.,* Bruffett v. Warner Commc'ns, Inc., 692 F.2d 910, 919 (3d Cir. 1982) ("[T]he only Pennsylvania cases applying the public policy exception have done so where no statutory remedies were available."); Shaffer v. ACS Gov't Servs., Inc., 454 F. Supp. 2d 330, 337–38 (D. Md. 2006) ("Maryland courts provide an exception to [the employment-at-will] rule for otherwise unremedied violations of public policy. However, where a statute provides a remedy to redress the employee's injury, the public policy exception to the employment at-will doctrine is not available to the employee.") (citations omitted); Robinson v. Wal-Mart Stores, Inc., 341 F. Supp. 2d 759, 764 (W.D. Mich. 2004) ("Under Michigan law, . . . an express statutory prohibition and remedy are exclusive and preclude a common law public policy claim."); Miles v. Martin Marietta Corp., 861 F. Supp. 73, 74 (D. Colo. 1994) ("Colorado law is clear that a separate public policy wrongful discharge claim is not available where the statute at issue provides a wrongful discharge remedy.").

²¹⁴ *Robinette v. WESTconsin Credit Union*, 686 F. Supp. 2d 1206, 1212 (W.D. Wis. 2010) (citing *Repetti v. Sysco Corp.*, 2007 WI App 49, 730 N.W.2d 189 (Wis. Ct. App. 2007)); *see also* *Shanahan v. WITI-TV, Inc.*, 565 F. Supp. 219, 224 (E.D. Wis. 1982) ("[A] Wisconsin court would only apply the public policy exception to the at-will employment rule when there was no other adequate remedy to vindicate such policy."); *McCluney v. Jos. Schlitz Brewing Co.*, 489 F. Supp. 24, 26 (E.D. Wis. 1980) ("The rationale for . . . the 'public policy' exception to the traditional rule governing 'at will' employment relations[] is that a private remedy should be implied for employment discharges violative of public policy, when there is no other adequate remedy to vindicate such policy.").

Because plaintiff may bring a claim under § 525(b) and seek appropriate remedies, she may not bring a state law claim for wrongful termination. Where the legislature has created a federal remedy for wrongful discharge, as here, that remedy is exclusive and does not warrant expansion of Wisconsin's public policy exception.²¹⁵

To the extent the *Wenners* court addressed this "adequate alternative remedy" issue,²¹⁶ which is occasionally referred to as preclusion²¹⁷ (and also, somewhat misleadingly,²¹⁸ as another form of preemption),²¹⁹ the court concluded that the plaintiff's common law claim was not barred because section

²¹⁵ *Robinette*, 686 F. Supp. 2d at 1213.

²¹⁶ In *Smith v. F.W. Morse & Co.*, 76 F.3d 413 (1st Cir. 1996), the First Circuit observed that the *Wenners* court held that "a wrongful discharge action could proceed if the relevant statutory provision did not provide a private cause of action for its violation." *Id.* at 429 (citing *Wenners v. Great State Beverages, Inc.*, 663 A.2d 623, 625 (N.H. Sup. Ct. 1995)). However, there appears to be no reported New Hampshire Supreme Court decision "in which a plaintiff's common law wrongful discharge claim has been dismissed due to the existence of 'an adequate statutory remedy.'" *Slater v. Verizon Commcn's, Inc.*, No. Civ.04-303, 2005 WL 488676, at *3 (D. N.H. March 3, 2005) (internal quotation marks omitted). See generally *Collins v. Rizkana*, 652 N.E.2d 653, 660 (Ohio Sup. Ct. 1995) (observing that "the courts are split" on the issue of "whether the public policy tort should be rejected where the statute expressing the public policy already provides adequate remedies to protect the public interest").

²¹⁷ See *Flenker v. Willamette Indus., Inc.*, 967 P.2d 295, 299 (Kan. 1998) ("The alternative remedies doctrine . . . referenced sometimes as preclusion, is a substitution of law concept. Under the alternative remedies doctrine, a state or federal statute would be substituted for a state retaliation claim if the substituted statute provides an adequate alternative remedy."); cf. *Parker v. MVM, Inc.*, No. 05-CV-380, 2006 WL 1724359, at *3 (D. N.H. June 20, 2006) ("[T]he First Circuit has interpreted New Hampshire common law to preclude a cause of action for wrongful termination when the aggrieved employee has a statutory cause of action arising out of the same conduct." (discussing *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 429 (1996))).

²¹⁸ See *Schmauch v. Honda of Am. Mfg., Inc.*, 311 F. Supp. 2d 631, 636 (S.D. Ohio 2003) ("[T]he issues of preemption and whether a statute provides adequate remedies to protect public policy are generally not the same."); *EEOC v. Int'l Paper Co.*, Civ. A. No. 91-2017-L, 1992 WL 370850, at *6 (D. Kan. Oct. 28, 1992) ("The adequate alternative remedies doctrine is significantly different from preemption. Essentially the doctrine holds that a court should not recognize a common law cause of action when there is an adequate statutory remedy available.").

²¹⁹ See, e.g., *Price v. Multnomah Cnty.*, 132 F. Supp. 2d 1290, 1295 n.6 (D. Or. 2001) ("Under Oregon law, the availability of a common law remedy is conditioned upon the absence of an adequate statutory remedy Thus, an adequate statutory remedy will preempt an otherwise sufficient claim for common law wrongful discharge." (citations omitted)). For an academic discussion of the adequate alternative remedy doctrine and its relationship to preemption, see Paul J. Zech, *Federal Pre-Emption and State Exclusive Remedy Issues in Employment Litigation*, 72 N.D. L. REV. 325 (1996).

525 provides no remedy for employment terminations that are prohibited by the Bankruptcy Code.²²⁰ In contrast to its analysis of the federal preemption issue,²²¹ this aspect of the *Wenners* court's opinion is unpersuasive.²²² While section 525 provides no specific remedy for the bankruptcy-based discrimination that it prohibits,²²³ section 105(a) of the Bankruptcy Code authorizes courts to enforce other provisions of the Code,²²⁴ as the *Robinette* court recognized.²²⁵ Several courts have invoked this authority to fashion remedies for violations of the antidiscrimination provision.²²⁶

²²⁰ See *Wenners v. Great State Beverages, Inc.*, 663 A.2d 623, 625 (N.H. 1995) ("While a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action . . . here, there has been no clear statutory intent to supplant the common law cause of action . . . 'Section 525(b) itself provides no remedy for violation by a private employer.'" (quoting *In re Hicks*, 65 B.R. 980, 984 (Bankr. W.D. Ark. 1986))); see also *Weeden v. Sears, Roebuck & Co.*, No. 98-435, 1999 WL 1209494, at *3 n. 2 (D. N.H. May, 25 1999) ("[T]he *Wenners* court found dispositive the fact that although a federal prohibition of employment termination existed, federal law provided no remedy for violations of the prohibition and no procedures for pursuing a violation.").

²²¹ The *Wenners* court's rejection of the employer's preemption argument reflects the "strong presumption against preemption of state law by federal statute or regulation." *Dillon v. Chi. Southshore & S. Bend R.R. Co.*, 670 N.E.2d 902, 910 (Ind. Ct. App. 1996) (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)). This presumption "is just as strong in bankruptcy as in the other areas of federal legislative power," even though "bankruptcy is one of only two federal legislative provisions in Article I, Section 8 of the Constitution in which the power to make 'uniform' laws is made explicit." *Pac. Gas & Elec. Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003); see also *In re Fed.-Mogul Global Inc.*, 684 F.3d 355, 365 (3d Cir. 2012) ("This 'strong presumption against inferring Congressional preemption' also applies 'in the bankruptcy context.'" (quoting *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997))).

²²² See *In re Saunders* 105 B.R. 781, 784 (Bankr. E.D. Pa. 1989) ("[C]ourts have concluded that Congress intended to establish a comprehensive enforcement mechanism for . . . discrimination against debtors within the bankruptcy code itself. As a result, they hold that no additional cause of action exists . . .").

²²³ See *In re Simms-Wilson*, 434 B.R. 452, 468 (Bankr. S.D. Tex. 2010); *In re Porter*, 354 B.R. 301, 310 (N.D. Ala. 2006); *In re Hopkins*, 81 B.R. 491, 493 (Bankr. W.D. Ark. 1987); *In re Hicks*, 65 B.R. 980, 984 (Bankr. W.D. Ark. 1986).

²²⁴ Section 105(a) provides, in pertinent part, that "[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). For an interesting academic discussion of this Bankruptcy Code provision, see Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7 (2000).

²²⁵ See *Robinette v. WESTconsin Credit Union*, 686 F. Supp. 2d 1206, 1213 (W.D. Wis. 2010) ("Plaintiff . . . argu[es] that § 525(b) 'contains absolutely no remedy provisions.' This is technically correct, but courts have looked to 11 U.S.C. § 105(a) to fashion a remedy Section 105(a) grants courts the power to enforce provisions of the bankruptcy code. (citations omitted)).

²²⁶ See *In re Sweeney*, 113 B.R. 359, 363 (Bankr. N.D. Ohio 1990) ("Section 525 contains no appropriate relief for violation thereof. Section 105(a) of the Code empowers the Court to carry out Title 11 provisions, and is generally recognized as the authority to fashion relief."); *In re McNeely*, 82 B.R. 628, 633 (Bankr. S.D. Ga. 1987) ("Section 525(b) does not specify what remedies are available to an aggrieved debtor who . . . has been discriminated against with respect to employment. Evidently, a court's power to fashion remedies is derived from Section 105(a) which grants the bankruptcy court

The remedies awarded in these cases have included reinstatement²²⁷ (or front pay)²²⁸ and other forms of equitable or injunctive relief,²²⁹ as well as monetary relief in the form of back pay,²³⁰ compensatory damages,²³¹ and punitive damages.²³² These are the same types of relief typically awarded to successful plaintiffs in common law wrongful discharge cases.²³³ Thus, debtors terminated from employment for seeking relief under the Bankruptcy Code appear to have an adequate "statutory cause of action for redress of

power to enforce provisions of the Bankruptcy Code."); *In re The Bible Speaks*, 69 B.R. 368, 376 (Bankr. D. Mass. 1987) ("Section 525(a) is enough to invoke Section 105(a) in this situation.").

²²⁷ See *In re Simms-Wilson*, 434 B.R. at 468 n.16 ("Reinstatement is a potential remedy for a § 525(b) violation."); *Sweeney*, 113 B.R. at 364 ("Reinstatement of employment is an equitable remedy in federal job discrimination cases. It has also been applied to bankruptcy discrimination."); Boshkoff, *supra* note 20, at 414 ("When employment discrimination is alleged, reinstatement, the remedy of choice in other wrongful discharge situations, is also appropriate for illegal action induced by bankruptcy." (footnote omitted)).

²²⁸ See, e.g., *In re Wakefield*, 293 B.R. 372, 378 (N.D. Tex. 2003) (suggesting "recovery for front pay under § 525(b)" is "permissible"). Front pay is a monetary award designed to compensate a terminated employee for a "future loss of earnings." *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir. 1994). It is a disfavored equitable remedy ordinarily awarded only when the preferred remedy of reinstatement "is not feasible." *Hadley v. VAM P T S*, 44 F.3d 372, 376 (5th Cir. 1995); see also *Hopkins*, 81 B.R. at 494 (citing cases holding that front pay can be awarded under Section 525 "if reinstatement would cause severe disruption").

²²⁹ See *In re Latchaw*, 24 B.R. 457, 462 (Bankr. N.D. Ohio 1982) ("Section 105(a) authorizes a bankruptcy court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.' Surely an order enjoining an employer from suspending, discharging, or taking other disciplinary measures against its employees is necessary or appropriate . . ." (quoting 11 U.S.C. § 105(a))).

²³⁰ See *Wakefield*, 293 B.R. at 384 ("The court has located no case that addresses the standard of review for a back pay award under § 525(b), although cases have held that back pay is recoverable."); *Sweeney*, 113 B.R. at 363 ("An award of back pay is presumptively favored in federal job discrimination cases . . . Awards are appropriate under Section 105(a)." (citation omitted)).

²³¹ See *In re Taylor*, 252 B.R. 201, 208 (Bankr. N.D. Ala. 2000) ("Most of the cases discussing section 525(b) awarded actual damages in circumstances such as loss of employment and injunctive relief."), *rev'd on other grounds*, 263 B.R. 139 (N.D. Ala. 2001); see also *In re McNeely*, 82 B.R. at 633 ("Courts have given debtors making a case under Section 525(b) a variety of types of relief, including injunctive relief and compensatory damages.").

²³² There is relatively little case law addressing the recoverability of punitive damages under Section 525. See, e.g., *In re Simms-Wilson*, 434 B.R. at 470 n. 20 ("The Court does not decide whether punitive damages are available under § 525(b)."); see also *Robinette v. WESTconsin Credit Union*, 686 F. Supp.2d 1206, 1213 (W.D. Wis. 2010) ("Although other courts have fashioned various remedies for violations of the statute, none appear to have given specific attention to the availability of punitive damages."). However, the Eleventh Circuit has stated that "the plain meaning of § 105(a) encompasses any type of order, whether injunctive, compensative, or punitive, as long as it is 'necessary or appropriate to carry out the provisions of' the Bankruptcy Code." *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996) (quoting 11 U.S.C. § 105(a)).

²³³ See *Neal v. Honeywell, Inc.*, 191 F.3d 827, 832 (7th Cir. 1999) (describing "reinstatement and back pay" as "the usual remedies in wrongful-discharge cases"); see also *United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340, 1345 (7th Cir. 1991) ("Reinstatement and back pay awards are common remedies in wrongful discharge cases.").

discrimination in violation of section 525²³⁴ that may constitute the exclusive remedy for such a violation,²³⁵ even though the remedy is not explicitly set forth in Section 525 itself.²³⁶

This conclusion is supported by the analysis in *In re Begley*.²³⁷ The plaintiffs in *Begley* asserted claims under section 525 and the federal civil rights statute commonly known as "section 1983,"²³⁸ which provides a private cause of action to individuals deprived of their federal statutory rights by an individual or entity acting under color of state law.²³⁹ Although section 1983 is occasionally invoked to redress discriminatory employment actions,²⁴⁰ the Supreme Court has held that no section 1983 claim exists when the federal statute establishing the underlying substantive right alleged to have been violated contains "an adequate and comprehensive internal enforcement mechanism."²⁴¹

Applying this variation of the "adequate alternative remedy" principle,²⁴² the

²³⁴ *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 771 (Minn. Ct. App. 2000); *see also In re Hopkins*, 81 B.R. 491, 494 (Bankr. W.D. Ark. 1987) ("Clearly, this Court has the power to fashion a remedy for the . . . violation of section 525(b). In seeking guidance for an appropriate remedy for job discrimination by a private employer, the Court has looked to the general principles of federal job discrimination law . . .").

²³⁵ *See In re Coats*, 168 B.R. 159, 167 (Bankr. S.D. Tex. 1993) ("A review of 11 U.S.C. §§ 362 and 525 reveals Congress' intent to establish a comprehensive enforcement mechanism for violations of the automatic stay and governmental discrimination, respectively. Therefore, . . . it does not appear that additional derivative causes of action exist . . .").

²³⁶ *See, e.g., In re Saunders*, 105 B.R. 781, 788 (Bankr. E.D. Pa. 1989) ("Under two . . . anti-discrimination provisions of the Code, 11 U.S.C. §§ 366(a) and 525(b), damages have been awarded against those who violate their terms, even though no such statutory remedy was expressed.").

²³⁷ 41 B.R. 402 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985).

²³⁸ *See Davis v. Dekalb Cnty. Sch. Dist.*, 996 F. Supp. 1478, 1481 (N.D. Ga. 1998) (discussing 42 U.S.C. § 1983), *aff'd*, 233 F.3d 1367 (11th Cir. 2000); *see also Christenson v. Ramaeker*, 366 N.W.2d 905, 907 (Iowa 1985) (same). Section 1983 is one of the post-Civil War statutes enacted as part of the Civil Rights Act of 1871, 17 Stat. 13, "in response to the widespread deprivations of civil rights in the Southern States and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers." *Felder v. Casey*, 487 U.S. 131, 147 (1988).

²³⁹ *See Begley*, 41 B.R. at 408 (citing *Maine v. Thiboutot*, 448 U.S. 1, 1 (1980)). For a fuller discussion of the Section 1983 cause of action, *see* Comment, *Compensatory Damage Awards in Section 1983 Actions Based on Federal Statutory Violations*, 34 Wayne L. Rev. 1373 (1988) (discussing new issues regarding section 1983 causes of action).

²⁴⁰ *See, e.g., Allen v. City of Yonkers*, 803 F. Supp. 679, 700 (S.D.N.Y. 1992) (stating that section 1983 "may be invoked to seek remedies for racial discrimination in employment" (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 202-03 (1989))); *see also Armstrong v. Chi. Park Dist.*, 693 F. Supp. 675, 678 (N.D. Ill. 1988) ("Intentional sex-based discrimination in promotion decisions ('disparate treatment') is actionable under . . . Section 1983."), *aff'd*, 886 F.2d 332 (7th Cir. 1989).

²⁴¹ *See Begley*, 41 B.R. at 408; *see also Myron D. Rumeld, Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 Colum. L. Rev. 1183, 1189 (1982).

²⁴² *See Periera v. Chapman*, 92 B.R. 903, 906 (C.D. Cal. 1988) ("[I]n cases involving the enforcement of federal statutory rights, access to a section 1983 remedy should be denied if . . . the language of the statute indicates a congressional intent to preclude section 1983 enforcement by

Begley court concluded that the Bankruptcy Code provides "a completely comprehensive enforcement scheme for violations of Section 525" that negates any need for the recognition of a separate claim under section 1983.²⁴³ The same analysis presumably would apply to bar common law wrongful discharge claims,²⁴⁴ at least in those jurisdictions holding that the availability of an adequate federal statutory remedy precludes the judicial recognition of a common law remedy based on the public policy exception.²⁴⁵

V. WRONGFUL REFUSAL TO HIRE IN VIOLATION OF BANKRUPTCY POLICY

A. No Statutory Remedy Precludes Recognition of the Claim

In considering whether the public policy embodied in the Bankruptcy Code would support the recognition of a common law "wrongful refusal to hire" claim,²⁴⁶ it is useful to begin by comparing the preclusion analysis in *Robinette*

making alternative remedies available") (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 51 (1981) (White, J., dissenting)).

²⁴³ See *Begley*, 41 B.R. at 408. The court explained that "[a]pplication of section 1983 would simply duplicate the substantive claim [under section 525]". *Id.*; see also *In re Lesniewski*, 246 B.R. 202, 215 (Bankr. E.D. Pa. 2000) ("Since a private right of action is available under § 525(a) for injunctive and declaratory relief, § 1983 is not inconsistent with any remedy granted thereunder. It is, however, duplicative.").

²⁴⁴ Cf. *Nichols v. Am. Nat'l Ins. Co.*, 945 F. Supp. 1242, 1246 (E.D. Mo. 1996) ("[B]ecause the statute upon which Plaintiff relies, i.e., Title VII, contains a comprehensive remedial provision, the Court concludes that allowing Plaintiff's claim for wrongful discharge based on a violation of public policy evidenced by such statute would be duplicative and unwarranted."); see also *Burnham v. Karl & Gelb, P.C.*, 717 A.2d 811, 816 (Conn. App. Ct. 1998) (holding "the existence of a statutory remedy under OSHA precludes the plaintiff's public policy wrongful discharge claim").

²⁴⁵ See *Robinette v. WESTconson Credit Union*, 686 F. Supp. 2d 1206, 1213 (W.D. Wis. 2010) (holding "a federal [statutory] remedy for wrongful discharge . . . is exclusive and does not warrant expansion of Wisconsin's public policy exception"); see also, *Clinton v. Okla. ex rel. Logan Cnty. Election Bd.* 29 P.3d 543, 546 (Okla. 2001) ("[T]he existence of a federal statutory remedy that is sufficient to protect Oklahoma public policy precludes the creation of an independent common law claim based on a public policy exception to the employment-at-will doctrine."), *overruled by Kruchowski v. Weyerhaeuser Co.* 202 P.3d 144, 152 (Okla. 2008); see also *Dockins v. Ingles Markets, Inc.*, 413 S.E.2d 18, 19 (S.C. 1992) ("When a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to the statutory remedy. We hold this applies when the right is created by federal law as well as state law." (citing *Campbell v. Bi-Lo, Inc.* 392 S.E.2d 477, 480–81 (S.C.App. 1990))).

²⁴⁶ See *Stevenson v. Superior Ct.*, 941 P.2d 1157, 1170 (Cal. 1997) ("[T]he conclusion that a prohibition of one form of employment discrimination will support a common law . . . claim does not necessarily mean that a prohibition on a different form of employment discrimination will do likewise."); see also *King v. Driscoll*, 638 N.E.2d 488, 493 (Mass. 1994) ("Even a public policy, evidenced in a particular statute, which protects employees in some instances might not protect employees in all instances.").

*v. WESTconsin Credit Union*²⁴⁷ and *In re Begley*²⁴⁸ with that of the court in *Runyan v. River Rock Entertainment Authority*.²⁴⁹ The plaintiff in *Runyan* asserted a common law tort claim premised on the public policy embodied in section 525,²⁵⁰ alleging that he was "constructively discharged"²⁵¹ when his employer learned of his intent to file bankruptcy.²⁵² The court noted that while section 525 "outlaws discrimination by employers" and "creates a private right of action for its violation,"²⁵³ the statute only protects "individuals who are or have been bankruptcy debtors,"²⁵⁴ and thus provides no remedy for individuals who "are merely prospective bankruptcy debtors."²⁵⁵

Relying on this statutory nuance,²⁵⁶ the *Runyan* court concluded that the plaintiff was free to argue that the employer's constructive termination of his employment "due to his status as a prospective filer is . . . a violation of public policy, there being no federal remedy for such a 'violation'" to preclude the recognition of a state common law claim.²⁵⁷ There likewise being no federal

²⁴⁷ 686 F. Supp. 2d 1206 (W.D. Wis. 2010); see *supra* notes 208–15 and accompanying text.

²⁴⁸ 41 B.R. 402 (E.D. Pa. 1984), *aff'd*, 760 F.2d 46 (3d Cir. 1985); see *supra* notes 237–43 and accompanying text.

²⁴⁹ No. C 08-1924, 2008 WL 3382783, at *7 (N.D. Cal. Aug. 8, 2008).

²⁵⁰ See *id.* at *7 ("[Plaintiff] cites 11 U.S.C. § 525 as grounds for his argument that defendants' stated grounds for terminating him, his 'prospective petition for bankruptcy,' . . . were a violation of public policy.").

²⁵¹ See *id.* at *2 (discussing plaintiff's claim for "wrongful, constructive termination in violation of public policy"). In California, where *Runyan* arose, a constructive discharge occurs when an employer "effectively forces an employee to resign." *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1025 (Cal. 1994). In this situation, the employee's resignation "is legally regarded as a firing rather than a resignation." *Id.* For an academic discussion of this principle, see Cathy Shuck, Comment, *That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine*, 23 BERKELEY J. EMP. & LAB. L. 401 (2002).

²⁵² See *Runyan*, 2008 WL 3382783, at *1, *2, *7. In particular, the plaintiff alleged that the employer "forced [him] to resign his employment under threat of immediate termination" when it became aware of "his prospective petition for bankruptcy." *Id.* at *1 (internal quotation marks omitted); cf. *EEOC v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002) ("When an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to a constructive discharge.").

²⁵³ *Runyan*, 2008 WL 3382783, at *7.

²⁵⁴ *Id.* at *2.

²⁵⁵ *Id.* at *7; see also *In re Kanouse*, 168 B.R. 441, 447 (S.D. Fla. 1994) ("[O]ne 'who is or has been a debtor' is afforded protection under 11 U.S.C. § 525(b). The statute does not allow a remedy to 'will be' debtors.") (emphasis omitted), *aff'd*, 53 F.3d 1286 (11th Cir. 1995).

²⁵⁶ The court based its interpretation of section 525 on the analysis in *In re Majewski*, where the Ninth Circuit held that the statute does not prohibit an employer from terminating the employment of an individual who "was not, and had not been, a debtor in bankruptcy." *In re Majewski*, 310 F.3d 653, 656 (9th Cir. 2002). Other courts have found Judge Reinhardt's dissent in *Majewski* to be more persuasive than the majority's analysis of this issue. See, e.g., *Robinette v. WESTconsin Credit Union*, 686 F. Supp.2d 1206, 1210 (W.D. Wis. 2010); *In re Mayo*, 322 B.R. 712, 717 (Bankr. D. Vt. 2005).

²⁵⁷ *Runyan*, 2008 WL 3382783, at *7. Under California law, "[a]n actual or constructive discharge in violation of a fundamental public policy gives rise to a tort action in favor of the terminated

statutory remedy for a private employer's refusal to hire a bankruptcy debtor,²⁵⁸ an individual denied employment in the private sector due to a prior or prospective bankruptcy also may not be precluded from asserting a common law tort claim premised on the public policy contained in the Bankruptcy Code.²⁵⁹

B. The Public Policy Exception Is Rarely Applied in Hiring Cases

The fact that a common law tort claim premised on the public policy exception would not be precluded (or preempted)²⁶⁰ by an existing federal statutory remedy does not mandate the judicial recognition of such a claim.²⁶¹ The absence of preemption merely leaves resolution of the question to the various state courts²⁶² (or occasionally to a federal court forced to predict how a

employee." *Turner v. Anheuser-Busch, Inc.*, 876 P.2d 1022, 1030 (Cal. 1994) (emphasis added). Not all courts follow California's lead in this regard. *See, e.g.*, *Gallimore v. Newman Mach. Co.*, 301 F. Supp.2d 431, 454 (M.D. N.C. 2004) ("[T]he North Carolina courts have declined to recognize a public policy exception to the employment-at-will doctrine for constructive (as opposed to actual) discharge[s]"); *Dixon v. Denny's Inc.*, 957 F. Supp. 792, 799 (E.D. Va. 1996) (concluding "a federal court should not interpret Virginia's public policy exception to the employment at will doctrine to encompass constructive as well as actual discharge unless and until Virginia's courts have unequivocally done so."). The *Runyan* court remanded the case to state court for lack of a substantial federal question, leaving the ultimate viability of the plaintiff's public policy claim for the state court's determination. *See Runyan*, 2008 WL 3382783, at *7, *9; *cf. Tiengkham v. Elec. Data Sys. Corp.*, 551 F. Supp.2d 861, 868 (S.D. Iowa 2008) ("[I]t is particularly important that a state court decide the parameters of the state public policy exception to the at-will employment doctrine.").

²⁵⁸ *See In re Rea* 431 B.R. 18, 23 (W.D. Pa.) (concluding bankruptcy debtor "lacks a *statutorily cognizable* cause of action under 11 U.S.C. § 525(b) against . . . a private employer[] for denying [the debtor] employment" (emphasis added)), *aff'd*, 627 F.3d 937 (3d Cir. 2010).

²⁵⁹ *See Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir. 1988) (discussing the strong "presumption against preemption . . . of state remedies, like tort recoveries, when no federal remedy exists"); *Cox v. NAP Constr. Co.*, 891 N.E.2d 271, 277 (N.Y. 2008) ("[W]here no federal remedy is provided, state remedies are not preempted.").

²⁶⁰ *See generally Hysten v. Burlington N. Santa Fe Ry. Co.*, 108 P.3d 437, 441 (Kan. 2004) ("[P]reemption or the alternative remedies doctrine may prevent an aggrieved employee from pursuing a state cause of action for wrongful discharge."); *Zech, supra* note 219, at 325 (observing that "concepts of pre-emption and exclusive remedy" are "similar in some respects").

²⁶¹ *See, e.g., City of Moorpark v. Superior Ct.*, 959 P.2d 752, 761 (Cal. 1998) ("[O]ur conclusion that [the statute articulating the relevant public policy] does not provide an exclusive remedy is only half the analysis. We must also decide whether [the type of] discrimination [being alleged] can form the basis of a common law action of this type."); *see also Andre D. Bouffard, Emerging Protection Against Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine*, 38 ME. L. REV. 67, 108 n.145 (1986) ("[T]he preemption issue . . . is analytically distinct from . . . whether federal statutes may be used to support a state public policy exception claim.").

²⁶² *See Ramos v. Docomo Pac., Inc.*, 2012 Guam 20, ¶ 20 (2012) ("If federal law does not preempt the wrongful discharge claim, the court should . . . consider whether a particular federal law articulates the state's public policy by determining whether the state has an interest in promoting greater enforcement of that area of the law."); *cf. In re Sugar Antitrust Litig.*, 588 F.2d 1270, 1273 (9th Cir.

state court would decide the issue).²⁶³ Although a few courts have indicated that a wrongful refusal to hire tort may be recognized under appropriate circumstances,²⁶⁴ cases challenging discriminatory hiring practices are almost invariably brought directly under federal or state antidiscrimination statutes,²⁶⁵ which ordinarily prohibit both public and private employers from discriminating during the hiring process.²⁶⁶

The public policy exception to the employment-at-will doctrine, by contrast, "arose in the context of termination,"²⁶⁷ and its application has been limited

1978) (observing that "however state law might be construed, the state should be free to settle the question" when "there is no congressional preemption.").

²⁶³ See, e.g., *Laws v. Aetna Fin. Co.*, 667 F. Supp. 342, 346 (N.D. Miss. 1987) ("The court is of the opinion that the Mississippi Supreme Court would view the case *sub judice* . . . as an appropriate situation in which to create a narrow public policy exception to the [employment] at will rule."); see also *Reighley v. Int'l Playtex, Inc.*, 604 F. Supp. 1078, 1081 (D. Colo. 1985) ("[W]here no controlling Colorado law has either been found or presented, it is the duty of the federal court to attempt to construe the law of the state of Colorado in the manner in which the state's Supreme Court would, if faced with the same facts and issue.").

²⁶⁴ See, e.g., *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 610 n.3 (6th Cir. 2012) ("At least one federal court has found it 'likely' that a claim for wrongful failure to rehire would be recognized as a state public policy action." (discussing *Simonson v. Trinity Reg'l Health Sys.*, 221 F. Supp.2d 982, 997 (N.D. Iowa 2002)); *Hamovitz v. Santa Barbara Applied Research, Inc.*, 189 L.R.R.M. (BNA) 2623, 2628 (W.D. Pa. 2010) ("[T]he Court finds and rules that the Pennsylvania Supreme Court would recognize a refusal to hire claim in violation of public policy"); *Runski v. Nu-Car Carrier Inc.*, 47 Pa. D. & C. 3d 192, 200 (Pa. Ct. Com. Pl. 1987) ("[T]he public policy against retaliatory discharge of employees might well apply with equal force to a 'retaliatory' refusal to hire.").

²⁶⁵ See *Williams v. Dub Ross Co.*, 895 P.2d 1344, 1347 (Okla. Ct. App. 1995); see also *Wilson McLeod, Rekindling Labor Law Successorship in an Era of Decline*, 11 HOFSTRA LAB. L.J. 271, 325 n.228 (1994) ("[E]mployer freedom in hiring is still almost total, except of course for [statutory] prohibitions on invidious discrimination.").

²⁶⁶ See, e.g., *Smith v. BellSouth Telecommc'ns, Inc.*, 273 F.3d 1303, 1313 (11th Cir. 2001) ("Title VII declares that 'to fail or refuse to hire' for impermissible reasons is an unlawful employment practice" (quoting 42 U.S.C. § 2000e-2(a)(1))); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1077 (11th Cir. 1996) ("[T]he ADA protects against more than termination. It prohibits discrimination 'in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.'" (quoting 42 U.S.C. § 12112(a))); *Bass v. City of Wilson*, 835 F. Supp. 255, 258 (E.D. N.C. 1993) ("Like Title VII, the ADEA explicitly encompasses discriminatory hiring practices, as well as wrongful termination."); see also *Powell-Ross v. All Star Radio, Inc.*, 68 Fair Empl. Prac. Cas. (BNA) 1148, 1152 (E.D. Pa. 1995) ("Numerous federal statutes . . . prohibit discriminatory hiring practices based upon race, religion, sex, age and marital status." (quoting 3A NORMA J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.08 (5th ed. 1992))).

²⁶⁷ J. Michael McGuinness, *North Carolina's Developing Public Policy Wrongful Discharge Doctrine in the New Millennium: Basic Principles, Causation & Proof of Improper Motive*, 23 CAMPBELL L. REV. 203, 229 (2001); see also *McLeod*, *supra* note 265, at 325 n.228 ("[E]xceptions [to the employment-at-will rule] have all been developed in the context of wrongful firings, not wrongful refusals to hire").

almost exclusively to that situation.²⁶⁸ The courts have been hesitant to extend the exception to protect individuals from employment actions other than discharge,²⁶⁹ and they have been particularly reluctant to apply it in cases challenging an employer's hiring practices.²⁷⁰

*Bass v. City of Wilson*²⁷¹ is a rare exception.²⁷² The court in that case recognized a cause of action for wrongful refusal to hire in violation of the public policy against age discrimination embodied in North Carolina's Equal Employment Practices Act.²⁷³ The court provided the following explanation for

²⁶⁸ See *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731, 744 n.19 (Conn. 2002) ("[T]he tort of wrongful discharge in contravention of public policy applies uniquely to terminations, and not to . . . other discriminatory practices"); Francis J. Moatz III, *The Sounds of Silence: Waiting for Courts to Acknowledge that Public Policy Justifies Awarding Damages to Third-Party Claimants When Liability Insurers Deal With Them in Bad Faith*, 2 NEV. L.J. 443, 481 (2002) ("[C]ases . . . restrict the cause of action to employees who have been discharged (actually or constructively), and den[y] relief to employees who allege that they have been demoted or otherwise treated unfairly for reasons that violate public policy."). For the author's prior consideration of this phenomenon, see Michael D. Moberly & Carolann E. Doran, *The Nose of the Camel: Extending The Public Policy Exception Beyond The Wrongful Discharge Context*, 13 LAB. LAW. 371 (1997).

²⁶⁹ See, e.g., *Woods v. Miamisburg City Schs.*, 254 F. Supp. 2d 868, 877 (S.D. Ohio 2003) ("[A]lthough Ohio recognizes claims for discharge in violation of public policy, Ohio courts have repeatedly rejected attempts to expand that claim beyond the discharge of an at-will employee." (citations omitted)); *Gallo v. Eaton Corp.*, 122 F. Supp. 2d 293, 307 (D. Conn. 2000) ("[T]he court concludes that the Connecticut Supreme Court would not recognize the tort of wrongful demotion in violation of public policy."). The judicial reluctance "to recognize a claim for [wrongful] disciplinary action in violation of public policy" reflects a concern that extending the application of the public policy exception beyond the discharge context "would result in excessive judicial interference in the workplace." *Hurst v. IHC Health Servs., Inc.*, 817 F. Supp. 2d 1202, 1207 (D. Idaho 2011); see also *White v. Washington*, 929 P.2d 396, 408 (Wash 1997) ("[B]y recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decision.").

²⁷⁰ See *Berrington v. Wal-Mart Stores, Inc.*, 696 F.3d 604, 609 (6th Cir. 2012) ("The common denominator in all the recognized public policy exceptions to at-will employment is the existence of an employment relationship. An employee's right to be hired or rehired by an employer, on the other hand, has never been recognized as actionable, under common law on public policy grounds."); *Runski v. Nu-Car Carrier Inc.*, 47 Pa. D. & C. 3d 192, 199–200 (Pa. Ct. Com. P. 1980) ("The protections afforded presently employed persons . . . and the strong policy reason[s] therefore have not, as yet, been held to apply to mere applicants for employment"); Elaine W. Shoben, *Test Defamation in the Workplace: False Positive Results in Attempting to Detect Lies, AIDS or Drug Use*, 1988 U. CHI. LEGAL F. 181, 204 ("There is no common law action for wrongful refusal to hire.").

²⁷¹ 835 F. Supp. 255 (E.D. N.C. 1993).

²⁷² See *McGuinness*, *supra* note 267, at 229 ("There is some authority suggesting that adverse action other than termination is also recognized under the public policy doctrine. For example, in *Bass v. City of Wilson*, the Eastern District of North Carolina held that the failure to hire could constitute a violation of public policy.").

²⁷³ See *Bass* 835 F. Supp. at 258 (discussing N.C. GEN. STAT. §§ 143-422.1 to -422.3); cf. *Hill v. Belk Stores Servs., Inc.*, No. 3:06-CV-398, 2009 WL 2426314, at *5 (W.D. N.C. Aug. 5, 2009) ("The North Carolina Equal Employment Practices Act prohibits discrimination based on age as against public policy.").

interpreting the public policy exception to prohibit discriminatory hiring decisions:

Allowing a cause of action for wrongfully refusing to hire an individual based on age discrimination will further . . . public policy at both the hiring and employment stages, and will contribute toward alleviating the concerns referred to in the statute. If it violates public policy for an employer to discriminate against an individual during employment or as a basis for termination, then it is equally abusive to discriminate against an individual seeking employment.²⁷⁴

One commentator writing shortly after *Bass* was decided observed that widespread judicial acceptance of the analysis in that case would transform the "once narrow" public policy exception "into a doctrine that goes beyond the wrongful discharge context and reaches into the hiring process."²⁷⁵ Although rejected job applicants have invoked the exception in subsequent cases,²⁷⁶ and there are persuasive policy arguments for extending the exception's application to the hiring context,²⁷⁷ the *Bass* court's reasoning generally has not been

²⁷⁴ *Bass*, 835 F. Supp. at 258; see also *Carter Coal Co. v. Human Rights Comm'n*, 633 N.E.2d 202, 211 (Ill. App. Ct. 1994) ("A policy that is undermined when an employer discharges a current employee is also undermined when [an] employer refuses to hire the same person."); Steven H. Winterbauer, *Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim*, 13 INDUS. REL. L. J. 386, 391 (1992) ("An impermissible refusal to hire contravenes public policy to the same degree as a discharge.").

²⁷⁵ Andrew B. Cohen, *Wrongful Discharge and the North Carolina Equal Employment Practices Act: The Localization of Federal Discrimination Law*, 21 N.C. CENT. L.J. 54, 67 (1995); see Rothstein, *supra* note 27, at 136 ("The narrow public policy exception for wrongful refusal to hire would constitute a relatively minor incursion on employer prerogatives, especially in relation to existing statutory constraints.").

²⁷⁶ See, e.g., *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 746 (D.C. Cir. 1995); *Wordekemper v. W. Iowa Homes & Equip., Inc.*, 262 F. Supp. 2d 973, 987 (N.D. Iowa 2003); *Murdock v. Village of Ottawa Hills*, 731 N.E.2d 284, 288 (Ohio Ct. App. 1999) (Sherck, J., concurring).

²⁷⁷ See *Bools v. Gen. Elec. Co.*, 70 F. Supp. 2d 829, 831 (S.D. Ohio 1999) (acknowledging that a "public policy against . . . discrimination and retaliation would be furthered by a claim in tort for wrongful hiring decisions"); Rothstein, *supra* note 27, at 130 ("Recognizing a separate tort action for wrongful refusal to hire . . . would go a long way toward eliminating abusive hiring practices within the bounds of a narrow and self-contained tort."); *City of Phila. v. Pa. Human Relations Comm'n*, 300 A.2d 97, 101 (Pa. Commw. Ct. 1973) ("Discrimination in hiring for any reason is evil and should be vigorously attacked").

embraced by other courts.²⁷⁸ Indeed, courts in several states, including Arizona,²⁷⁹ Kentucky,²⁸⁰ Nevada,²⁸¹ New Jersey,²⁸² Ohio,²⁸³ Oklahoma,²⁸⁴ and Washington,²⁸⁵ have either specifically held, or strongly implied, that a common law claim for wrongful refusal to hire *cannot* be premised on the public policy exception to the employment-at-will doctrine.²⁸⁶

²⁷⁸ See, e.g., *Berrington v. Wal-Mart Stores, Inc.*, 799 F. Supp. 2d 772, 777 (W.D. Mich. 2011) ("Neither the Michigan Supreme Court nor the Michigan Court of Appeals have indicated any willingness to expand the wrongful termination public policy exception to the employment-at-will presumption to the hiring or rehiring context."), *aff'd*, 696 F.3d 604 (6th Cir. 2012); see also Cohen, *supra* note 275, at 67 ("Perhaps the most surprising development in the public policy tort area was the approval of a claim for ' . . . violation of public policy' brought by a rejected job applicant in *Bass v. City of Wilson*.").

²⁷⁹ See *Burris v. City of Phx.*, 875 P.2d 1340, 1348 (Ariz. Ct. App. 1993) ("[W]e have found no state or federal court that has recognized the tort of wrongful failure to hire even though federal law and the laws of many states prohibit discrimination in hiring on the basis of such factors as race, national origin, sex or handicap."); John Alan Doran, *It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting*, 35 ARIZ. ST. L.J. 477, 505 (2003) (asserting that "Arizona law does not recognize claims for wrongful refusal to hire").

²⁸⁰ See *Baker v. Campbell Cnty. Bd. of Educ.*, 180 S.W.3d 479, 484 (Ky. Ct. App. 2005) ("[W]e hold . . . that no cause of action exists for retaliatory failure to hire under the public policy of Kentucky.").

²⁸¹ See *McNamee v. Freeman Decorating Servs., Inc.*, No. 2:10-CV-01294, 2012 WL 1142710, at *2 (D. Nev. April 4, 2012) (holding "a retaliatory refusal to hire, is not a recognized cause of action in Nevada.").

²⁸² See *Ebner v. STS Tire & Auto Ctr.*, No. 10-2241, 2011 WL 4020937, at *7 (D. N.J. Sept. 9, 2011) (asserting "a common law action for failure to hire . . . [is] not recognized by New Jersey courts").

²⁸³ See *Noble v. Genco I, Inc.*, No. 2:10-CV-648, 2010 WL 5541046, at *5 (S.D. Ohio Dec. 30, 2010) ("Ohio courts have essentially limited the public policy doctrine to claims for wrongful discharge or discipline of an employee at will. For instance, courts have refused to extend the doctrine to a claim for failure to hire"); *Fontaine v. Clairmont Cnty. Bd. of Comm'rs*, 633 F. Supp. 2d 530, 540 (S.D. Ohio 2007) ("[T]here is no cause of action under Ohio law . . . for wrongful failure to hire in violation of public policy.").

²⁸⁴ See *Williams v. Dub Ross Co.*, 895 P.2d 1344, 1347 (Okla. Ct. App. 1995) ("[T]here presently is no tort cause of action for wrongful failure to hire, and . . . we decline to recognize such a claim as a new cause of action").

²⁸⁵ See *Roberts v. Dudley*, 993 P.2d 901, 911 (Wash. 2000).

[T]he [statutory] law against discrimination is significantly broader than the tort of wrongful discharge. Under this statute an employee may obtain actual damages sustained as a result of discriminatory refusal to hire . . . as well as discriminatory discharge. However, the tort of wrongful discharge in violation of public policy clearly applies only in a situation where an employee has been discharged.

Id. (citations omitted).

²⁸⁶ See, e.g., *Gaj v. U.S. Postal Serv.*, 800 F.2d 64, 66 (3d Cir. 1986) ("Pennsylvania does not recognize the tort of failing to hire based on a handicap"); see also Marley S. Weiss, *Commentary*:

C. Statutory Violation as a Prerequisite to the Exception's Application

Several courts have held that the protection provided by the public policy exception "cannot be broader than the . . . statute on which it depends,"²⁸⁷ and thus that no claim premised on the exception can be maintained unless the underlying statute has been violated.²⁸⁸ Because the Bankruptcy Code's antidiscrimination provision does not prohibit private employers from refusing to hire bankruptcy debtors,²⁸⁹ courts adhering to this view are particularly unlikely to recognize a wrongful refusal to hire claim premised on the public policy contained in that provision.²⁹⁰ In other words, despite the importance of bankruptcy's fresh start policy in other respects,²⁹¹ the Bankruptcy Code may

Women's Employment Rights in the Maryland Workplace of 2007 and 2027, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 63, 77 (2009).

Maryland recognizes only a common law cause of action for wrongful termination in violation of public policy. The state courts are highly unlikely to recognize a tort claim for wrongful failure to hire . . . in violation of that same public policy against employment discrimination, even though the dignitary insult may be equally as great.

Id.

²⁸⁷ *City of Moorpark v. Superior Ct.*, 959 P.2d 752, 762 (Cal. 1998); *see also* *Kaplan v. Dr. Reddy's Labs., Inc.*, No. CV 10-00675-R, 2010 WL 3894232, at *1 (C.D. Cal. Sept. 30, 2010) ("Claims for wrongful termination in violation of public policy do not grant employees rights beyond those provided by the statute upon which the claim is based."); *Stevenson v. Superior Ct.*, 941 P.2d 1157, 1174 (Cal. 1997) ("As compared to a statutory . . . cause of action, a common law wrongful discharge claim does not broaden the scope of prohibited conduct").

²⁸⁸ *See, e.g.,* *Godfredson v. Hess & Clark, Inc.*, 996 F. Supp. 730, 739 (N.D. Ohio 1998) ("Since [the defendant] is entitled to summary judgment on plaintiff's ADEA claim, he cannot prove a public policy tort. The public policy against age discrimination is not at issue unless age discrimination occurs."); *see also* *Hausler v. Gen. Elec. Co.*, 134 F. App'x 890, 895 (6th Cir. 2005) ("Public policy claims necessarily fail where the underlying statutory claim fails.").

²⁸⁹ *See* *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 173 (5th Cir. 2011) (stating "Congress did not prohibit private employers from denying employment to applicants based on their bankruptcy status"); *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 58 (M.D. Fla. 2009) ("[I]t is clear that Congress prohibited discriminatory hiring decisions in § 525(a) and did not prohibit such conduct by private employers under § 525(b)."), *aff'd*, 640 F.3d 1278 (11th Cir. 2011).

²⁹⁰ *See, e.g.,* *Wilson v. Harris Trust & Sav. Bank*, 777 F.2d 1246, 1249 (7th Cir. 1985) ("We cannot find a cause of action under § 525 when Congress has expressly declined to provide one."); *see also* *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731, 747 (Conn. 2002) (concluding that a legislative decision to exempt certain employers from a statutory prohibition of employment discrimination is "fully applicable to common-law claims based on the public policy exception to the at-will employment doctrine"); *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 285 (Iowa 2000) ("We are reluctant to infer a broad public policy from a statute which is limited in its scope to specific discriminatory practices.").

²⁹¹ *See, e.g.,* *In re Gibson*, 157 B.R. 366, 369 (Bankr. S.D. Ohio 1993) ("One of the major public policies underlying the Bankruptcy Code is to provide a debtor with a 'fresh start' by discharging a

not contain a sufficiently comprehensive antidiscrimination provision to support the recognition of a common law wrongful refusal to hire tort.²⁹²

An analogous issue arose in *Warnek v. ABB Combustion Engineering Services, Inc.*²⁹³ In that case, the Washington Supreme Court addressed whether the common law wrongful discharge claim it recognized in *Wilmot v. Kaiser Aluminum & Chemical Corp.*,²⁹⁴ which provided a remedy to individuals terminated "for having filed or expressed an intent to file a workers' compensation claim,"²⁹⁵ also applies when an employer refuses to rehire an individual for the same reason.²⁹⁶

In concluding that *Wilmot* does not insulate workers' compensation claimants from discriminatory hiring decisions,²⁹⁷ the *Warnek* court noted that the statute establishing the public policy at issue only protects individuals

debtor's previously incurred debts."); see also *In re Rosteck*, 99 B.R. 400, 401 (N.D. Ill. 1989) ("[B]ankruptcy public policy . . . holds in high regard the debtor's right to a 'fresh start' . . ."), *aff'd*, 899 F.2d 694 (7th Cir. 1990).

²⁹² See *In re El San Juan Hotel Corp.*, 149 B.R. 263, 274 (D. P.R. 1992), *aff'd*, 7 F.3d 218 (1st Cir. 1993).

Plaintiff maintains that a public policy exception should emanate from . . . the bankruptcy code . . . Unless the plaintiff can point to some portion of the bankruptcy code which specifically allows . . . employees . . . more rights than allowed by the at-will employment doctrine, the plaintiff has no cause of action.

Id. (emphasis added); *In re Ellwanger*, 140 B.R. 891, 902 (W.D. Wash. 1992) ("There is nothing in the Bankruptcy Code to warrant . . . reading into it a public policy exception not clearly contemplated by Congress"); cf. Orovitz, *supra* note 8, at 591 ("The court system is not the appropriate arena to fix the problem of employment discrimination against individuals who have filed for bankruptcy. The protections provided by § 525(b) . . . are too narrow to allow courts to restrict private employer[s]").

²⁹³ 972 P.2d 453 (Wash. 1999).

²⁹⁴ 821 P.2d 18 (Wash 1991).

²⁹⁵ *Id.* at 21. The claim recognized in *Wilmot* was premised on the Washington Supreme Court's earlier recognition in *Thompson v. St. Regis Paper Co.* of "a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy." 685 P.2d 1081, 1089 (Wash. 1984). One commentator has asserted that "[t]he most common public policy exceptions to the employment-at-will doctrine are those recognizing a cause of action for employees terminated in retaliation for pursuing a workers' compensation claim." Tom Werner, *The Common Law Employment-At-Will Doctrine: Current Exceptions for Iowa Employees*, 43 DRAKE L. REV. 291, 315 (1994).

²⁹⁶ See *Warnek*, 972 P.2d at 455. The question addressed in *Warnek* had been certified to the Washington Supreme Court by a federal district court. See *id.* at 453–55. The Washington Supreme Court is statutorily authorized to answer unsettled questions of Washington law certified to it by other courts. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 156 (Wash. 2003); *Wilmot*, 821 P.2d at 33 (discussing WASH. REV. CODE § 2.60.020 (2010)).

²⁹⁷ See *Warnek*, 972 P.2d at 455 ("A former employee not rehired because the employee filed a workers' compensation grievance during the course of previous employment with the employer may not initiate a lawsuit for employment discrimination based upon . . . the wrongful discharge cause of action articulated in *Wilmot*").

"during the course of their employment."²⁹⁸ Declining to contravene the legislative intent implicit in this statutory language,²⁹⁹ the *Warnek* court held that individuals who have been *denied* employment because they previously filed a workers' compensation claim cannot state a cognizable common law claim under *Wilmot*.³⁰⁰

The court in *Weaver v. Harpster*³⁰¹ offered a persuasive rationale for the result in *Warneck* and other cases in which courts have refused to provide victims of employment discrimination with broader protection under the public policy exception than is available under the statute from which the public policy at issue is drawn.³⁰² Noting that the articulation of public policy is primarily a legislative function,³⁰³ the *Weaver* court stated:

[I]f we permitted a common law cause of action . . . where the employer is expressly not covered by the statute that created the public policy, we would create the concern that other statutes that explicitly exempt certain employers from compliance actually express a general public policy and apply even to those the legislature chose to exclude. If the legislature chooses to expand statutes to cover more employers, it is clearly within its

²⁹⁸ *Id.* at 456 (discussing WASH. REV. CODE § 51.48.025 (2010)).

²⁹⁹ *See id.* (asserting statutory language "evidences a legislative intent not to provide protection under the statute to former employees who have not been rehired because they filed for workers' compensation benefits in the past" (emphasis omitted)); *cf. Ariz. Prop. & Cas. Ins. Guar. Fund v. Ueki*, 724 P.2d 70, 75 (Ariz. Ct. App. 1986) ("The best indication of legislatively enacted public policy and legislative intent is the language of the enactment itself."), *disapproved on other grounds in Ariz. Prop. & Cas. Ins. Guar. Fund v. Herder*, 751 P.2d 519, 525 (Ariz. 1988); *Wandry v. Bull's Eye Credit Union*, 384 N.W.2d 325, 331 (Wis. 1986) (Steinmetz, J., dissenting) ("Public policy reflects the conduct required by a statute. The public policy of a statute therefore is equivalent to the legislature's intent when enacting it.").

³⁰⁰ *See Warnek*, 972 P.2d at 456; *Bruner v. GC-GW, Inc.*, 880 So.2d 1244, 1252 (Fla. Dist. Ct. App. 2004) (Kahn, J., dissenting) ("Florida apparently does not recognize a civil cause of action against a subsequent employer who refuses to hire a job applicant for having filed a workers' compensation claim against a previous employer Although refusal to hire would certainly violate the same public policy [as discharge], it would not subject an employer to a civil cause of action.").

³⁰¹ 975 A.2d 555 (Pa. 2009)

³⁰² *See id.* at 560 ("[T]he courts have never utilized a wrongful termination statute . . . to recognize a public policy exception to the at-will employment doctrine beyond the protections afforded by that statute.").

³⁰³ *See id.* at 569 ("Extending protections afforded by a statute beyond its explicit limitations would require the courts to act as a super-legislature."); *cf. Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1207 (10th Cir. 1989) ("[D]etermining public policy is a uniquely legislative endeavor, one not well suited to judicial resolution"); *Hartley v. Ocean Reef Club, Inc.*, 476 So.2d 1327, 1329 (Fla. Dist. Ct. App. 1985) ("The determination of what constitutes public policy . . . is a function of the legislature.").

authority to do so. Our role, however, does not include expanding statutes beyond their terms.³⁰⁴

The *Weaver* court was addressing the scope of a public policy contained in a state statute.³⁰⁵ However, the same analysis applies in cases involving federal statutes,³⁰⁶ and specifically those in which the public policy at issue is embodied in the Bankruptcy Code.³⁰⁷ The judicial recognition of a tort claim for wrongful refusal to hire in violation of public policy in some jurisdictions,³⁰⁸ but presumably not in others,³⁰⁹ based on a statutory prohibition of bankruptcy-

³⁰⁴ *Weaver*, 975 A.2d at 570; cf. *Thibodeau v. Design Grp. One Architects, LLC*, 802 A.2d 731, 747 (Conn. 2002) ("The legislature may wish to revisit its policy judgment . . . [Courts], however, are not free to ignore the clear expression of public policy embodied in [a] statutory exemption . . . afforded [certain types of] employers . . ."). See generally Brian Hersey, Note, *Roberts v. Dudley: An Unnecessary Broadening of the Public Policy Exception to the Employment-at-Will Doctrine in Washington*, 76 WASH. L. REV. 179, 207 (2001) (asserting court "raises serious separation-of-powers issues by using the public policy exception to fill a gap deliberately left in the statute by the Legislature").

³⁰⁵ *Weaver* involved the Pennsylvania Human Relations Act ("PHRA"), 43 PA. CONS. STAT. §§ 951–63, and specifically "whether an employer with fewer than four employees, although not subject to the PHRA's prohibition against sexual discrimination, nevertheless is prohibited from discriminating against an employee on the basis of sex" under the common law. *Weaver*, 975 A.2d at 556; cf. *Chavez v. Sievers*, 43 P.3d 1022, 1026 (Nev. 2002) ("[T]he legislature sets the public policy of this state regarding racial discrimination in employment. Since the legislature determined that small businesses should not be subject to racial discrimination suits, we decline to create an exception to the at-will doctrine for racial discrimination in these businesses."); *Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc.*, 994 P.2d 1261, 1266 (Utah 2000) ("We have found no cases . . . recognizing a public policy against age discrimination by small employers in a statute . . . which expressly exempts small employers.").

³⁰⁶ See, e.g., *Hill v. Mr. Money Fin. Co.*, 309 F. App'x 950, 963–64 (6th Cir. 2009) ("Similar reasoning applies to the clear public policy as expressed in the Federal Whistleblower Statutes. If [the plaintiff's] claim under . . . those statutes fails, then his public policy claim based thereupon must also fail."); *Basile v. Missionary Sisters of Sacred Heart of Jesus-Stella Maris Province*, No. 11-cv-01827-REB-KMT, 2011 WL 5984752, at *2 (D. Colo. November 30, 2011) ("[B]ecause employers with fewer than twenty employees are not subject to the ADEA, the anti-discrimination policies embodied in that statutory scheme implicitly do not extend to those employers.").

³⁰⁷ See, e.g., *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1269 (9th Cir. 1990) (holding individual's claim "that his termination violated public policy because it offended the policies underlying the Bankruptcy Code" was precluded because the employer "did not violate the Bankruptcy Code").

³⁰⁸ See, e.g., *Hamovitz v. Santa Barbara Applied Research, Inc.*, No. 2:07-cv-0154, 2010 WL 4117270, at *3 (W.D. Pa. October 19, 2010) (rejecting contention "that Pennsylvania does not recognize a common law tort for failure to hire"); see also *Roe v. TeleTech Customer Case Mgmt. (Colo.) LLC*, 257 P.3d 586, 595 (Wash. 2011) ("A statute may provide a public policy mandate . . . even where the employer's conduct is beyond the reach of the statute's remedies.").

³⁰⁹ See, e.g., *Murdock v. Village of Ottawa Hills*, 731 N.E.2d 284, 289 (Ohio Ct. App. 1999) (Sherck, J., concurring) ("[E]ven were we to accept appellant's assertion that [the statute] represents some broader public policy, to apply this to a hiring situation goes far beyond the exception to Ohio's employee-at-will doctrine that has been established for terminations."). There are still a few states in

based discrimination that is not binding on private employers would not provide those employers with sufficient notice of the conduct that might subject them to liability,³¹⁰ and thus would foster the very uncertainty to which the *Weaver* court alluded.³¹¹

In short, only through strict judicial adherence to legislative pronouncements of public policy will employers receive clear notice of the employment practices in which they may not engage.³¹² The fact that section 525 prohibits hiring discrimination by public employers is not sufficient to apprise private employers of the fact that they too may be prohibited from engaging in such discrimination.³¹³ As another state court explained:

A statute's exclusion of certain employers from its requirements precludes a finding that a fundamental policy supported by that statute would extend to the excluded employers. To make such a finding would unreasonably require employers to realize they must comply with a

which the public policy exception to the employment-at-will doctrine has not been recognized. *See, e.g.,* Bruley v. Village Green Mgmt. Co., 592 F. Supp.2d 1381, 1385 (M.D. Fla. 2008), *aff'd*, 333 F. App'x 491 (11th Cir. 2009); Lobosco v. N.Y. Tel. Co./NYNEX, 751 N.E.2d 462, 464 (N.Y. 2001). The courts in these states are particularly unlikely to apply the exception in a refusal to hire case. *See, e.g.,* Bruffet v. Warner Commc'ns, Inc., 692 F.2d 910, 920 (3d Cir. 1982) ("[I]f Pennsylvania would not recognize a common law action for [wrongful] discharge [in violation of public policy], it is less likely to recognize an action for failure to hire on the same basis.").

³¹⁰ *See* Geline v. Tishgart, 91 Cal. Rptr. 2d 447, 452 (Ct. App. 1999) ("[O]ur Supreme Court has taken care to restrict claims for . . . violation of public policy to those in which 'employers have adequate notice of the conduct that will subject them to tort liability'" (quoting *Stevenson v. Superior Ct.*, 941 P.2d 1157, 1161 (Cal. 1997))).

³¹¹ *See* *Weaver v. Harpster*, 975 A.2d 555, 569 (Pa. 2009) (asserting that courts "cannot enforce the public policy articulated in [a statute] while simultaneously ignoring . . . the specific conduct characterized as unlawful"); *cf. Jennings v. Marralle*, 876 P.2d 1074, 1083 (Cal. 1994) ("It would be unreasonable to expect employers who are expressly exempted from [a statutory] ban on . . . discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.").

³¹² *See* *Carl v. Children's Hosp.*, 702 A.2d 159, 197 (D.C. 1997) ("[P]ublic policy exceptions fashioned by the legislature have the benefit of providing clear notice to employers and employees prior to the accrual of a cause of action In contrast, public policy exceptions formulated by courts are derived and applied *post hoc*, and provide no clear guidance to employers"); *cf. Rocky Mountain Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 524 (Colo. 1996) ("[A]n expansive definition of public policy would be . . . unpredictable leaving employers and employees alike without direction as to the contours of the public policy exception.").

³¹³ *See* *Griffin v. Mullinex*, 947 P.2d 177, 179 (Okla. 1997) ("[A]n Act which . . . applies to public employers only is not an adequate basis upon which to premise the private tort action of a private employee."); *Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 591 (W. Va. 1998) ("In the absence of a statute expressly imposing public policy . . . upon private sector employers, an employee does not have a cause of action against a private sector employer").

law from which they are exempted or suffer the possibility of tort liability.³¹⁴

SUMMARY AND CONCLUSION

Congress has not been indifferent to the impact bankruptcy-based employment discrimination can have on a debtor's right to a fresh start under the Bankruptcy Code.³¹⁵ In an effort to address this problem,³¹⁶ Congress has expanded the antidiscrimination protection available to bankruptcy debtors on three separate occasions³¹⁷—once when it originally enacted section 525,³¹⁸ and then again when it subsequently added subsection (b) and ultimately subsection (c) to the statute.³¹⁹

³¹⁴ *Grinzi v. San Diego Hospice Corp.*, 14 Cal. Rptr. 3d 893, 897–98 (Ct. App. 2004) (citation omitted); *see, e.g.*, *Basile v. Missionary Sisters of Sacred Heart of Jesus-Stella Maria Province*, 11-cv-01827-REB-KMT, 2011 WL 5984752, at *2 (D. Colo. Nov. 30, 2011) ("Because the Colorado legislature has exempted religious organizations from the reach of state anti-discrimination law, it perforce cannot be the public policy of the State of Colorado to prohibit discrimination in employment by such organizations."). *See generally* *Thibodeau v. Design Group One Architects, LLC*, 802 A.2d 731, 742 (Conn. 2002) ("[F]ailure to recognize the public policy reflected in the exemption of [certain] employers would expose them to liability for employment discrimination claims notwithstanding a clearly expressed legislative preference to the contrary.").

³¹⁵ *See* *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 930 (5th Cir. 1977) (rejecting suggestion "that Congress and others have been unmindful of discrimination practiced against bankrupts"); *In re Brown*, 95 B.R. 35, 36 (Bankr. E.D. Va. 1989) (discussing Congress's awareness "of the need to protect sound bankruptcy policy by prohibiting discrimination.").

³¹⁶ *See generally* *In re Rees*, 61 B.R. 114, 124 (Bankr. D. Utah 1986) ("Congress considered many alternatives to preserve the effectiveness of a debtor's fresh start.").

³¹⁷ As discussed earlier, *see supra* note 40, the initial federal prohibition of bankruptcy-based discrimination is properly traced to the Supreme Court's decision in *Perez v. Campbell*, 402 U.S. 637 (1971), rather than to an act of Congress. *See* Boshkoff, *supra* note 21, at 162 ("Section 525 of the Bankruptcy Code, as originally enacted, is unusual because it is the product of Congress' decision to codify a judicially developed doctrine of debtor protection.").

³¹⁸ Congress's enactment of Section 525 was in part a delayed codification of the antidiscrimination principle announced in *Perez*. *See In re Potter*, 354 B.R. 301, 308 (Bankr. N.D. Ala. 2006); *In re Borowski*, 216 B.R. 922, 924 (Bankr. E.D. Mich. 1998). However, to the extent Section 525 prohibits "acting against a person solely for filing for bankruptcy, or for being insolvent before filing for bankruptcy," and not merely for refusing to pay a debt that was discharged in bankruptcy, the protection afforded under the statute "extended well beyond *Perez*." *In re Straight*, 248 B.R. 403, 420 (B.A.P. 10th Cir. 2000).

³¹⁹ *See* *Stoltz v. Brattleboro Hous. Auth. (In re Stoltz)*, 315 F.3d 80, 86 n.2 (2d Cir. 2002)

Although courts and commentators generally refer to section 525(a) as the antidiscrimination provision, section 525 contains two additional antidiscrimination provisions, which were added after the 1978 enactment of section 525(a). Section 525(b), enacted in 1984, prohibits discrimination against debtors by private employers. Section 525(c), enacted in 1994, prohibits

This type of incremental legislative attack on a perceived discrimination problem is not unusual.³²⁰ In this instance, it reflects the fact that both the enactment and the subsequent amendment of the Bankruptcy Code's antidiscrimination provision were the result of political compromises.³²¹ Indeed, the enactment—or amendment³²²—of any antidiscrimination statute (or any other form of legislation)³²³ invariably involves a balancing of competing political and economic interests.³²⁴ This legislative balancing often results in varying (and thus arguably less than optimal)³²⁵ levels of statutory protection.³²⁶

discrimination against debtor-borrowers on the basis of discharged, unrepaid loans by governmental units operating a student loan or grant program.

Id. (citations omitted).

³²⁰ See *United States v. Lewitzke*, 176 F.3d 1022, 1027 (7th Cir. 1999) ("Congress is free to 'take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955))); *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177, 180 (D.D.C. 1978) ("Congress may choose to take one step at a time or attack only one aspect of a problem."), *aff'd*, 612 F.2d 586 (D.C. Cir. 1980); *cf.* *Griffin v. Eller*, 922 P.2d 788, 791 (Wash. 1996) (noting that a state legislature may choose to "approach the problem of employment discrimination one step at a time").

³²¹ See *In re Tinker*, 99 B.R. 957, 958 (Bankr. W.D. Mo. 1989) (noting "§ 525 was a compromise"); *In re Neiheisel*, 32 B.R. 146, 161 (Bankr. D. Utah 1983) ("In the political give and take surrounding the Bankruptcy Reform Act, many proposals to enhance the fresh start were lost to compromise, including proposals to . . . extend by statute the prohibition of post-discharge discrimination to private parties.").

³²² See, e.g., *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 245 F.R.D. 393, 398 (S.D. Iowa 2007) ("Congress, in amending Title VII to extend its reach to educational institutions, . . . weighed the competing interests"); *cf.* *Nagel v. Thomas*, 666 F. Supp. 1002, 1007 (W.D. Mich. 1987) (discussing statute Congress "repeatedly amended . . . for the purpose of reconciling various competing interests").

³²³ See *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1227 (11th Cir. 2009) ("The provisions of legislation reflect compromises cobbled together by competing political forces"); *Hudson v. Soft Sheen Prods., Inc.*, 873 F. Supp. 132, 135 (N.D. Ill. 1995) ("All legislation is the product of political compromise."); *New York v. Ohrenstein*, 565 N.E.2d 493, 497 (N.Y. 1990) ("[A]ll legislation is the product of political activity both inside and outside the Legislature.").

³²⁴ See, e.g., *Silberstein v. Advance Magazine Publishers, Inc.*, 988 F. Supp. 391, 392–93 (S.D.N.Y. 1997) ("[T]he New York State Human Rights Law is a statute dealing comprehensively with the subject of employment discrimination. It creates remedies that are products of legislative balancing of the respective interests of employers and employees." (footnote omitted)); see also *Crews v. Memorex Corp.*, 588 F. Supp. 27, 29 (D. Mass. 1984) ("An antidiscrimination statute . . . reflects the legislature's balancing of competing interests.").

³²⁵ See Stephen B. Thomas & Valerie Riedthaler, *Gender Identity Disorder, Colleges, and Federal Employment Law*, 212 WEST'S EDUC. L. REP. 575, 596 (Nov. 2, 2006)

[N]ot all forms of discrimination are prohibited under federal law. In our system of government, . . . it is the responsibility of Congress to enact legislation protecting those who are unjustly victimized. Such decisions are based on a range of political considerations, including . . . the level of constituent support (often based on economic or religious considerations), and the like.

The Bankruptcy Code's antidiscrimination provision is merely a discrete example of this phenomenon.³²⁷

When viewed in this manner, there is nothing irrational—or even particularly unusual³²⁸—in Congress's decision to exempt private employers (at least for now)³²⁹ from the Bankruptcy Code's prohibition of hiring discrimination.³³⁰ The decision presumably reflects the fact that those entities

Id.

³²⁶ See, e.g., *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 429 F. Supp. 486, 491 (E.D.N.Y. 1977) ("The Fair Housing Act was 'the result of a political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination.'" (quoting Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 835 (1969))); *Austin v. HealthTrust, Inc.—The Hosp. Co.*, 967 S.W.2d 400, 403 (Tex. 1998) ("In enacting statutes that prohibit certain conduct in the employment area, the Legislature has carefully balanced competing interests and policies. This has resulted in statutes not only with diverse protections, but also with widely divergent remedies, and varying procedural requirements.").

³²⁷ See *In re Goldrich*, 45 B.R. 514, 520 (Bankr. E.D.N.Y. 1984) ("[T]he legislative history of Section 525 indicates that the statute does not necessarily embrace all the varieties of discrimination against debtors which conflict with the bankruptcy laws."), *rev'd on other grounds*, 771 F.2d 28 (2d Cir. 1985); cf. *Boshkoff*, *supra* note 21, at 176 ("The determination of whether private party discrimination unduly interferes with the bankruptcy process requires a weighing of interests.").

³²⁸ See Joseph Lipps, *State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 678 (2011)

[T]reating termination and hiring differently is consistent with how our society views these two aspects of the employment relationship. Termination has been dubbed 'capital punishment' in the employment context, and has a severe effect on employees. Conversely, during the hiring and application process, the employer has a strong incentive to be selective and is entitled to more deference to avoid offering employment to an undesirable employee.

Id. (footnote omitted).

³²⁹ See Herz, *supra* note 15, at 90 ("[I]t may be time that [Congress] revisit[s] § 525(b) and craft language that serves to better promote the Code's intrinsic fresh-start ideals."); Orovitz, *supra* note 8, at 558 ("Section 525(b) should be amended so that individuals applying for private sector positions are treated the same as those applying for government jobs."); Yun, *supra* note 15, at 216 ("Congress should amend the language of § 525(b) to extend prohibition of *all* types of bankruptcy discrimination, including private employers' hiring choices.").

³³⁰ See *Myers v. Toojay's Mgmt. Corp.*, 419 B.R. 51, 58 n.8 (M.D. Fla. 2009), *aff'd*, 640 F.3d 1278 (11th Cir. 2011).

While section 525 as a whole manifests a Congressional intent—a Congressional policy—to extend a measure of job security to debtors in both the public and private sectors, it is nevertheless a rational, secondary policy choice to distinguish between public and private employers where no dependent relationship has been formed. Being denied a job does not change the *status quo*; losing a job does.

Myers, 419 B.R. at 58 n.8; cf. *Baker v. Campbell Cnty. Bd. of Educ.*, 180 S.W.3d 479, 484 (Ky. Ct. App. 2005) ("[T]he existence of an established relationship between an employer and an employee

have "more effective, and well funded, lobbyists to advocate against potential new causes of action against them than do discrete governmental agencies."³³¹ Despite occasional arguments to the contrary,³³² such a purely "political" reason for differentiating between public and private employers (and by extension, the bankruptcy debtors who seek employment with them)³³³ is not inherently objectionable in a democratic system of government.³³⁴

Indeed, Congress often treats public and private entities differently when regulating aspects of the employment relationship,³³⁵ as it did when it originally

creates certain expectations of conduct and trust that simply do not exist between an employer and a job applicant."); Landry & Hardy, *supra* note 19, at 51 ("In fact, there are sound reasons for permitting employment discrimination based on an applicant's bankruptcy status.").

³³¹ *In re Martin*, No. 06-41010, 2007 WL 2893431, at *2 n.10 (Bankr. D. Kan. 2007); *see also* Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U.L. REV. 501, 517 n.110 (2000) ("The Bankruptcy Code in general has been described as a series of political 'horse-trades' driven by legislative commitments to various interest groups." (quoting MICHAEL HERBERT, UNDERSTANDING BANKRUPTCY 2 (1995))); *see generally* Carl v. Children's Hosp., 702 A.2d 159, 171 (D.C. 1997) (Ferren, J., concurring) ("Legislation typically is the result of initiative and advocacy by groups interested in particular issues.").

³³² *See, e.g.,* Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1043 (Utah 1989) ("Limiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection but have limited access to the political process."); Timothy Sandefur, *Is Economic Exclusion a Legitimate State Interest?: Four Recent Cases Test the Boundaries*, 14 WM. & MARY BILL RTS. J. 1023, 1028 (2006) ("[L]egislative power . . . often becomes a prize in the political contest—a contest won, not by the most deserving, but by those who . . . invest the most resources in the contest.").

³³³ *See Martin*, 2007 WL 2893431, at *4 (concluding that Congress elected "to provide greater protection to persons seeking employment with the government . . . than it provides to individuals who are seeking employment in the private sector"); Orovitz, *supra* note 8, at 568 ("It is possible that the Bankruptcy Code is purposely extending less protection to individuals applying for private jobs than government positions.").

³³⁴ *See In re Barbee*, 14 B.R. 733, 736 n.3 (Bankr. E.D. Va. 1981) ("[R]espect should be paid to the limits to which Congress was prepared to go to enact a particular policy, especially when the boundaries of a statute were drawn in compromise from countervailing pressures of other policies." (quoting Girardier v. Webster Coll., 563 F.2d 1267, 1275 (8th Cir. 1977))); *cf.* Braunstein v. Trottier, 635 P.2d 1379, 1383 (Or. Ct. App. 1981) ("There are, of course, advantages in the legislative forum, where different interest groups may be heard and where compromises and trade-offs may be effected."). *See generally* Comm. Educ. Equal. v. Missouri, 294 S.W.3d 477, 498 (Mo. 2009) (Wolff, J., concurring in part and dissenting in part) ("The legislative process by its nature creates winners and losers, relatively speaking. The legislature has wide latitude to make these choices.").

³³⁵ *See, e.g.,* Forman v. Small, 271 F.3d 285, 296 (D.C. Cir. 2001) ("Unlike [29 U.S.C.] § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees."); *Caldman v. California*, 852 F. Supp. 898, 902 (E.D. Cal. 1994) (noting "private employers and public employers are treated differently in several sections of the FLSA"); *see also* Cross v. N.Y.C. Transit Auth., 417 F.3d 241, 256–57 (2d Cir. 2005) ("In other contexts, Congress has expressed its intent to distinguish public from private employers in creating remedies for employment discrimination." (citing 42 U.S.C. § 1981a(b)(1))).

enacted the Bankruptcy Code's antidiscrimination provision.³³⁶ State legislatures also occasionally differentiate between public and private employment.³³⁷ There is nothing inappropriate in these legislative distinctions.³³⁸

Given the political considerations underlying the enactment of the Bankruptcy Code,³³⁹ courts should resist the urge to "improve" upon the existing statutory scheme,³⁴⁰ no matter how tempting that prospect may be.³⁴¹ The fact that a court unencumbered by the same political constraints as Congress might have enacted a more comprehensive antidiscrimination statute if charged with that responsibility provides no basis for the judicial recognition of a common

³³⁶ See *Wilson v. Harris Trust & Sav. Bank*, 777 F.2d 1246, 1249 (7th Cir. 1985) ("Congress carefully considered extending the anti-discrimination section to private entities and purposefully rejected it as being overbroad Section 525 [was] specifically worded to apply to governmental units."); *In re Marine Elec. Ry. Prods. Div., Inc.*, 17 B.R. 845, 850 (Bankr. E.D.N.Y. 1982) ("Section 525 only prohibits discrimination by public entities and . . . is inapplicable to discrimination stemming from private sources.").

³³⁷ For example, a Kansas state statute that mirrors to some extent the Bankruptcy Code's original antidiscrimination provision provides only that "no *public employee* shall be discharged from employment by reason of the fact that he or she has availed himself or herself of . . . a proceeding in bankruptcy . . . or any other similar proceeding instituted because of such employee's insolvency." KAN. STAT. ANN. § 75-4316(b) (emphasis added); see also *Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd.*, 359 N.E.2d 393, 400 (N.Y. 1976) (Breitel, C.J., dissenting) ("[P]ublic and private employment are different in many respects, and the legislature is entitled to recognize those differences. It has done so.").

³³⁸ See *FLRA v. U.S. Dep't of Navy*, 966 F.2d 747, 773 (3d Cir. 1992) (Rosenn, J., dissenting) ("[T]here are numerous . . . important respects in which public employment is treated differently than private employment under federal law."); *Bowers v. City of San Buenaventura*, 142 Cal. Rptr. 35, 39 (Ct. App. 1979) ("[T]he state can reasonably treat public and private employers differently.").

³³⁹ See *HSBC Bank USA v. Branch (In re Bank of New Eng. Corp.)*, 364 F.3d 355, 364 (1st Cir. 2004) ("Formulation of the bankruptcy law requires Congress carefully to balance competing considerations."); *In re Phila. Newspapers*, 418 B.R. 548, 573 (E.D. Pa. 2009) ("The Bankruptcy Code . . . is not an ALI restatement of the law of bankruptcy or a model code, resulting from serene reflection and academic dialogue. Rather the Code is the child of the 'give and take' of the political process, perhaps not entirely pretty in its making."), *aff'd*, 599 F.3d 298 (3d Cir. 2010).

³⁴⁰ See generally *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) ("[C]ourts tempted to bend statutory text to better serve congressional purposes would do well to remember that Congress enacts compromises as much as purposes."); *Phila. Newspapers*, 418 B.R. at 573 ("What may appear to be latent ambiguity, when removed in time and viewed from afar, is likely the result of legislative judgments intended to compromise competing interests or appease particular constituencies. These political judgments should not be disturbed lightly.").

³⁴¹ See *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1007 (2d Cir. 1991) (stating that courts lack "the prerogative of rewriting [bankruptcy law] to maximize bankruptcy objectives that Congress might not have fully achieved"); *In re Madison Madison Int'l*, 77 B.R. 678, 681 (Bankr. E.D. Wis. 1987) ("Courts must not engage in judicial legislation. They are not empowered to tinker with Congress's statutory schemes, even if they believe they can improve upon them."); *In re Brown*, 43 B.R. 613, 614 (Bankr. M.D. Tenn. 1984) ("It is not so unusual for a court to find itself interpreting a statute which the judge would word differently was such within the province of the court.").

law "public policy" tort untethered to the language of the statute Congress actually enacted.³⁴²

Congress is the institution responsible for formulating national bankruptcy policy,³⁴³ and the one best suited to balance the competing interests at stake in this situation.³⁴⁴ It obviously has the ability to protect bankruptcy debtors from private sector hiring discrimination if it wishes to do so.³⁴⁵ The fact that Congress has twice amended section 525 without providing debtors with such protection provides a particularly compelling reason for the courts to defer to its judgment on this issue.³⁴⁶ Under the circumstances, any further expansion of the protection afforded bankruptcy debtors should come from Congress,³⁴⁷ and not from the state or federal courts.³⁴⁸

³⁴² See *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1207 (10th Cir. 1999) ("We must be cautious of substituting our preferences . . . under the guise of enforcement of public policy."); *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 58 (M.D. Fla. 2009) ("[F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." (quoting *United States v. Rutherford*, 442 U.S. 544, 555 (1979))), *aff'd*, 640 F.3d 1278 (11th Cir. 2011); *Am. States Ins. Co., v. Symes of Silverdale, Inc.*, 78 P.3d 1266, 1269 (Wash. 2003) ("[S]tate courts have no authority to depart from federal bankruptcy law based on a disagreement as to appropriate public policy.").

³⁴³ See *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493, 508 (5th Cir. 2006) ("It is Congress who is charged with articulating bankruptcy policy through the Bankruptcy Code."); *In re Brown*, 43 B.R. at 614 ("[N]ational bankruptcy policy is made by the Congress of the United States not by the bankruptcy courts").

³⁴⁴ Whether to protect "job applicants as well as . . . existing employees" from a particular form of employment discrimination is ultimately "a policy decision." *Beattie v. Trump Shuttle, Inc.*, 758 F. Supp. 30, 34 (D.D.C. 1991). Such "policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code." *United States v. Whizco, Inc.*, 841 F.2d 147, 151 n.5 (6th Cir. 1988); see also Henry P. Ting, Note, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 550 (1996) ("In the end, it is Congress' job to weigh the competing policies in fashioning the best method for eliminating illegal employment discrimination.").

³⁴⁵ See Yan, *supra* note 33, at 461 ("[S]ection 525(b) was presumably enacted in response to the frustrations of not being able to apply section 525(a) to private employers. Would it not follow then that Congress might actually amend the current section or enact a new section . . . that would subject private employers to the same restrictions as governmental units?").

³⁴⁶ See *In re Totina*, 198 B.R. 673, 681 (Bankr. E.D. La. 1996) ("Congress . . . can always amend the Bankruptcy Code. Congress has shown no reluctance to do so in the past."); cf. *Stevenson v. Superior Ct.*, 941 P.2d 1157, 1180 (Cal. 1997) (Brown, J., dissenting) ("Judicial interference with legislative prerogatives is particularly unwarranted where . . . the Legislature continues to develop the statutory scheme in response to changing needs of employees, employers, and the public.").

³⁴⁷ See *In re Stinson*, 285 B.R. 239, 250 (Bankr. W.D. Va. 2002) (concluding any prohibition of discriminatory hiring by private employers "is better left to Congress, not this court"); Landry & Hardy, *supra* note 19, at 59 ("[T]he question of whether the anti-discrimination policy of bankruptcy law which supports a fresh start should outweigh the interests of employers is an issue for Congress, not the courts."); cf. *In re Engles*, 384 B.R. 593, 598 (Bankr. N.D. Okla. 2008) ("[I]t is the prerogative of Congress to change the Bankruptcy Code, not the courts.").

³⁴⁸ See *In re Bennett*, 237 B.R. 918, 923 (Bankr. N.D. Tex. 1999) ("[C]ourts are not permitted to establish bankruptcy policy, that is the special province of Congress."); *Fiorani v. CACI*, 192 B.R. 401, 406 (E.D. Va. 1996) ("It would be wholly inappropriate for a court to . . . attempt to expand the

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statute beyond its explicit terms merely to give effect to an abstract statement of purpose."); *In re Blue Diamond Coal Co.*, 147 B.R. 720, 732 (Bankr. E.D. Tenn. 1992) ("[T]his court will not read something into a statutory scheme that Congress may or may not have mistakenly left out. That would be tantamount to rewriting provisions of the Bankruptcy Code, a task properly left to Congress."), *aff'd*, 160 B.R. 547 (E.D. Tenn. 1993).