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NOTE: The Sign Says "Help Wanted, Inquire Within" — But It May Not Matter If You Have Ever Filed (or Plan to File) For Bankruptcy

Introduction

Unemployment, poor fiscal management, mounting debts, and impatient creditors frequently lead to the path of bankruptcy. [1] Even during periods of economic growth and prosperity, the prospects of bankruptcy linger in the shadows. Fortunately for the debtor, bankruptcy serves as an avenue to begin life anew, a principle generally referred to as the "fresh start." [2]

The Bankruptcy Code [3] (hereinafter the "Bankruptcy Code" or the "Code") addresses the fresh start policy in a number of sections. In certain circumstances, the Code grants the debtor a discharge of some or all of their debt obligations. [4] The Code also prohibits discriminatory conduct against debtors in the public and private sector. [5]

However, with respect to private sector discrimination, the courts have treated discriminatory conduct inconsistently. [6] Some courts have even construed the anti−discrimination provision in a manner that appears, on its face, contrary to the fresh start policy. [7] Consequently, there is a lack of uniform treatment and perhaps a reasonable fear on the debtor's part that they will be discriminated against due to their present or past economic misfortunes.

The purpose of this Note is to provide the general landscape of one type of discrimination that debtors, and those associated with them, may face due to the debtor's bankruptcy status. Part I focuses on the fresh start policy and why its goals are potentially frustrated by acts of discriminatory treatment towards debtors. Part II discusses the history and development of the anti−discrimination provision of the Code, beginning with the case that provided the impetus for the prohibition of discriminatory treatment in the public sector, and ending with case law that limited the scope of that landmark case. Part III examines the enactment of an anti−discrimination provision for the private sector, and reviews the similarities and differences between the public and private sector anti−discrimination sections. Part IV considers the arguments for expansive construction and plain meaning of the private sector anti−discrimination provision, as well as a possible approach the United States Supreme Court may utilize. Finally, this paper concludes that absent specific language indicating Congress' intentions, statutory interpretation and judicial consistency requires that the language of section 525(b) be interpreted to allow private employers discretion when hiring prospective individuals, including the consideration by private employers of an individual's bankruptcy status.

I. Wiping the Slate Clean for a Fresh Start

The Bankruptcy Code attempts to balance the countervailing interests of debtors and creditors in two ways. The Code accomplishes this goal by: (1) providing debtors with a fresh start and (2) providing creditors with equality in distribution. [8] This attempted balance is illustrated by the availability of the discharge provisions, as well as the exceptions to discharge. [9] While the discharge provisions further the debtor's objective of a fresh start, the limitation of discharges under section 523 of the Code protects the creditors and gives them a sense of fairness. [10]

The "[f]resh start is a principal ingredient and goal of modern American bankruptcy law." [11] However, the fresh start is not available to all debtors. It is restricted to the "honest but unfortunate debtor." [12] As the Supreme Court stated in *Local Loan Co. v. Hunt*:

One of the primary purposes of the bankruptcy act is to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to *the honest but unfortunate debtor* who surrenders for distribution the property which he owns *at the time of bankruptcy*, a *new opportunity in life and a clear field for future effort*, unhampered by the pressure and discouragement of preexisting debt. The various provisions of the [B]ankruptcy [A]ct were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. [13]

Restriction of the fresh start policy to the "honest but unfortunate debtor" prevents dishonest debtors from benefiting from their own fraudulent acts. [14] Clearly, dishonest debtors cannot use the fresh start policy as a shield against creditors [15] — to allow it would disrupt the balance of fairness. [16]

The benefits of discharge constitute the "cornerstone" of the fresh start policy. [17] As such, the "honest but unfortunate debtor['s]" primary objective is to attain a discharge and essentially wipe the slate clean. [18] Discharge is a major step towards the debtor's new life and as one bankruptcy judge stated, "[a] denial of discharge is an extremely drastic and harsh sanction; it is the death penalty of bankruptcy." [19] The significance of the discharge is frequently demonstrated by the courts' adherence to reading the discharge exceptions narrowly. [20] But the fresh start policy faced (and still faces) a barrier. In particular, the ideals of a fresh start were potentially frustrated by the prospects of discrimination. [21] Discrimination on the basis of bankruptcy impeded on the essence of the fresh start. Discrimination would negate the concept of a fresh start if the discharged debtor were unable to find the means of supporting him or herself.

II. The Origin of the Anti−Discrimination Provision

- *The Advent of Perez v. Campbell*

Prior to the Bankruptcy Act of 1978, there was no prohibition of discriminatory conduct against bankrupts or debtors. [22] Consequently, many debtors progressed slowly through their so−called "new life" under the fresh start policy, effectively frustrated by their status as a debtor or bankrupt. [23]

Local Loan

formed the stepping−stone for the fresh start policy. Yet notwithstanding *Local Loan*, two cases illustrated the frustrations debtors continued to suffer. In *Reitz v. Mealey*, [24] the Court was presented with a New York statute, which allowed the suspension of a driver's license if there was an unpaid tort judgment resulting from the use of an automobile. [25] The suspension was lifted upon payment or discharge of the judgment but excluded discharges in bankruptcy. [26] The Court disagreed with the debtor's argument that the New York statute violated the due process clause of the Fourteenth Amendment and the Bankruptcy Act. [27] According to the Court, "[a]ny appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process." [28] Permitting the judgment debtor to avoid the consequences of his or her irresponsible driving by availing themselves of the bankruptcy system would frustrate the State's interests in safety. [29] Ultimately, "[s]uch legislation [was] not in derogation of the Bankruptcy Act. Rather it [was] an enforcement of permissible state policy touching highway safety." [30]

The second case, *Kesler v. Department of Public Safety*, [31] occurred nearly twenty years later and involved Utah's Motor Vehicle Safety Responsibility Act. Pursuant to the Utah statute, judgments resulting from automobile accidents had to be satisfied in order for the judgment debtor's suspended license and registration to be reinstated. [32] In *Kesler*, the judgment debtor obtained a voluntary discharge in bankruptcy but the discharge was inconsequential to the statutory mandate for payment. The Utah statute, as did the New York statute in *Reitz*, specifically provided that a discharge in bankruptcy would not pardon the judgment debtor from satisfying judgments related to automobile accidents. [33] As in *Reitz*, the Court disagreed with the argument that the state financial responsibility statute frustrated the fresh start policy of the Bankruptcy Act. [34] The Court deemed the Utah statute necessary to the State's interests against irresponsible driving, and since the goal of the statute was not to aid debt collection, the Court concluded there was no conflict with the Bankruptcy Act. [35]

Not until 1971 did the Court revert back to the principles of *Local Loan* and the fresh start policy. In the landmark case *Perez v. Campbell*, [36] the Supreme Court addressed the frustrations encountered by debtors. *Perez* set forth what would eventually be another means of debtor protection. [37] At issue before the Court was whether the Arizona Motor Vehicle Safety Responsibility Act could validly withhold driving privileges from a debtor who was discharged of his debts under bankruptcy law. [38] The Court referred to the Supreme Court of Arizona case law to decipher the purpose of the Arizona statute. [39] Arizona case law consistently held that the principal purpose was for "the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons." [40] Hence, "[t]he sole emphasis in the [Arizona statute] [was] one of providing leverage for the collection of damages from drivers who either admit[ed] that they [were] at fault or [were] adjudged negligent." [41] This frustrated, and was contrary to, the fresh start principles of the Bankruptcy Act, [42] and as such, the Court struck down the Arizona statute as constitutionally invalid pursuant to the Supremacy Clause. [43]

Although the Arizona statute was held invalid, the Court went further and specifically addressed the rulings in *Kesler* and *Reitz*. [44] The Utah statute in *Kesler* "frustrated Congress' policy of giving discharged debtors a new start" [45] and *Reitz* was guilty of the same. [46] As a result, *Perez* overruled *Kesler* and *Reitz*.

We can no longer adhere to the aberrational doctrine of *Kesler* and *Reitz* that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy −− other than frustration of the federal objective −− that would be tangentially furthered by the proposed state law. In view of the consequences, we certainly would not apply the *Kesler* doctrine in all Supremacy Clause cases. Although it is possible to argue that *Kesler* and *Reitz* are somehow confined to cases involving either bankruptcy or highway safety, analysis discloses no reason why the States should have broader power to nullify federal law in these fields than in others. Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. [47]

B. Codification of Perez v. Campbell into the Bankruptcy Code

Perez seemingly revived the forgotten fresh start policy and *Local Loan* and provided a key role in the statutory protections against discriminatory conduct. [48] In 1973, the Commission on the Bankruptcy Laws of the United States (hereinafter the "Bankruptcy Commission") embraced the *Perez* decision and proposed a broad anti−discrimination provision. [49] Section 4−508, entitled "Protection Against Discriminatory Treatment," provided:

A person shall not be subjected to discriminatory treatment because he, or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act. This action does not preclude consideration, where relevant, of factors other than those specified in the preceding sentence, such as present and prospective financial condition or managerial ability. [50]

The proposed section was "intended to preserve to debtors the full effect of relief granted under [the Bankruptcy Act] and to protect those affiliated with an Act debtor from discriminatory treatment under federal or state law." [51] Moreover, the prohibition would have applied to public and private parties [52] — "essentially [an] unlimited extension of the *Perez* principle." [53] However, Congress did not adopt the all−encompassing scope of protection. [54] Rather, Congress adopted a narrower anti−discrimination section. [55]

Section 525(a) [56] is a codification of the *Perez* case. [57] The provision prohibits a governmental unit [58] from discriminating against (1) a person who is or has been a debtor under the Code (or a bankrupt under the Bankruptcy Act) or (2) a person associated with such debtor or bankrupt. [59] The form of discrimination includes various acts. Specifically, the governmental unit may not:

deny, revoke, suspend or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment . . . solely because such bankrupt or debtor is or has been a debtor under this

title or a bankrupt or a debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act. [60]

The enactment of section 525(a) was an important step towards debtor protection, serving as an "additional debtor protection." [61] Congress acknowledged that section 525(a) was not as expansive as the Bankruptcy Commission's proposed section 4−508. [62] Given this however, Congress stated that section 525(a) was not exhaustive. [63] Forms of discrimination not specified did not necessarily mean those acts were permissible. [64]

Yet, Congress' last words of wisdom on section 525(a) have created some confusion. [65] A reading of the legislative history gives the impression that Congress was not sure what it wanted to bar or allow in terms of discriminatory treatment. [66] Section 525(a) was already noted by Congress to be narrower than proposed section 4−508. [67] "Nevertheless, it is not limiting either, as noted. The courts will continue to mark the contours of the anti−discrimination provision in pursuit of sound bankruptcy policy." [68]

The anti−discrimination provision was used broadly by many courts to encompass a variety of governmental activities. [69] These activities have included: (1) the State's revocation or suspension of driver's licenses; [70] (2) the State's denial of liquor licenses to the debtor; [71] (3) the denial of student loan applications or college transcripts; [72] (4) the denial of certain business licenses or government contracts [73] (5) evictions in public housing; [74] (6) availability of public mortgage financing; [75] (7) insurance options; [76] (8) provision of utility services; [77] (9) the denial of building permits; [78] (10) employment termination; [79] and even (11) agricultural subsidies. [80]

While many courts applied section 525(a) to a vast array of circumstances, the discretion given to the courts "to mark the contours" of section 525(a) did not lead to a parade of decisions extending the anti−discrimination provision to private parties. Some courts were reluctant to expand the coverage of section 525(a) to private parties despite section 525(a)'s legislative history. [81] As one court stated:

Indeed, it may well obtain that a private party, like a governmental unit . . . may not lawfully discriminate simply because one has filed bankruptcy. The legislative history to section 525[a] clearly states that while it pertains to governmental units, "it is not limiting" and the Courts "will continue to mark the contours of the anti−discrimination provisions in pursuit of sound bankruptcy policy." *This view will only be accorded the status here of dictum*. [82]

There were, on the other hand, two bankruptcy courts, *Amidon v. AVCO Financial Services Trust* (*In re Amidon*) [83] and *Barbee v. First Virginia Bank* (*In re Barbee*), [84] that expressed their displeasure with the private employer's actions. [85] Unfortunately for the plaintiffs in both cases, the court's malcontent with the employers did not give cause to extend section 525(a) to the private entity. [86] As displeased as the court was in *In re Barbee*, the court nonetheless "believe[d] that it [did not have] the power to enjoin the firing of an employee by a private entity for the reason that the employee/debtor [had] filed a petition in bankruptcy." [87]

Other courts refused to find a violation of section 525(a) unless the defendant was strictly within the meaning of a governmental unit. [88] For example, in *Wilson v. Harris Trust & Savings Bank*, the Seventh Circuit was presented with a debtor who was discharged by her former private employer for filing a petition under chapter 7. [89] The case was commenced prior to the 1984 Amendments; therefore, the debtor could only base her claims upon section 525(a). As a result, the debtor had to concede that a "literal reading" of section 525(a) did not include private employers within the meaning "governmental unit." [90] The court further explained that:

Congress amended section 525[a] in 1984 to provide that the prohibitions in section 525(a) now apply to private, as well as public, employers. Congress would not have added this provision if it thought private employers were already barred from discriminating against debtors under section 525[a]. [91]

The Seventh Circuit's approach to the anti−discrimination provision was perhaps harsh to debtors, [92] but it was in accord with the majority of courts that did not extend the *Perez* principle or "mark the contours of the anti−discrimination provision." [93]

III. Expansion of the Anti−Discrimination Protections to the Private Sector Pursuant to Section 525(b)

As stated earlier, the prohibition of public sector discrimination was a significant step towards debtor protection. [94] The crossover to the private sector was lacking however. [95] But in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Congress took another step in the name of anti−discrimination. [96] The anti−discrimination provision was renumbered and subsection (b) was added.

The struggles and confusion of determining whether or not courts should construe section 525(a) to include private entities were addressed by section 525(b). [97] Subsection (b) bridges the fissure left when Congress enacted the initial anti−discrimination provision. [98] In particular, section 525(b) provides:

No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

1. is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
2. has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
3. has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act. [99]

With the addition of section 525(b) there is no dispute that private entities are prohibited from discriminatory conduct.

The question remains, however, as to what types of discriminatory conduct are prohibited. [100] "The statutory interpretation controversy continues because many forms of bankruptcy−based discrimination are not explicitly condemned under the current language." [101] This is due in large part to the language, or rather lack of language, in subsection (b).

A. The Grounds for Discrimination are the Same for Section 525(a) and Section 525(b)

Subsection (b) is not, in all respects, different from subsection (a). Paragraphs (1) through (3) of subsection (b) parallel the grounds for discrimination set forth in subsection (a). This means that a debtor (or a bankrupt under the Bankruptcy Act) may not be discriminated against, by a governmental unit or a private employer, because he or she is or has been a debtor (or a bankrupt under the Bankruptcy Act), or has been insolvent before the commencement of a case under the Code or during the case but before the determination of discharge, or has not paid a dischargeable debt. [102]

B. Section 525(b) Refers to "Private Employers"

One difference between the two subsections concerns the type of defendant. In subsection (b), the prohibition of discriminatory conduct is directed at the "private employer." The definition of "private employer" is not specified in the Code but the courts have fleshed it out somewhat. The "private employer" has typically been confined to the debtor's own employer. [103] Some courts have emphatically stressed the existence of an employee−employer relationship. [104] But the scope has been broadened to encompass credit unions affiliated with the debtor's employer, [105] thereby, "eviscerat[ing] the employee−employer requirement." [106]

Perhaps the greatest guidance comes from *Fiorani v. Caci*. [107] The court was asked to determine whether a temporary employment agency was an "employer" under section 525(b), simply because it provided temporary workers. [108] Recognizing the lack of help in the Code to define the term, the court relied on a multi−factor test [109] established in the Circuit Court of Appeals for the District of Columbia. [110] The primary factor is the right to control the individual's work. This factor, alone, is not dispositive. [111] Other factors deemed relevant include:

1. the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
2. the skill required in the particular occupation;

3. whether the "employer" or the individual in question furnishes the equipment used and the place of work;
4. the length of time during which the individual has worked;
5. the method of payment, whether by time or by the job;
6. the manner in which the work relationship is terminated, i.e., by one or both parties, with to without notice and explanation;
7. whether annual leave is afforded;
8. whether the work is an integral part of the business of the "employer";
9. whether the worker accumulates retirement benefits;
10. whether the "employer" pays social security taxes; and
11. the intention of the parties. [112]

It has also been suggested that a "private employer" means a non−governmental unit. [113] Therefore, entities like banks, radio stations, and insurance companies have been construed non−governmental units. [114]

- *Section 525(b) Refers to "Individuals"*

Another distinction is found in the use of "individual" in subsection (b) rather than "person," as subsection (a) proscribes. Consequently, corporations and partnerships are excluded from the protective boundaries of subsection (b). [115] Illustrative of this is *Madison Madison International of Illinois, P.C. v. Matra, S.A.* (*In re Madison Madison Int'l of Illinois, P.C.*). [116] There the court did not allow the debtor corporation to benefit from section 525(b). It reasoned that the distinction made in the Code between a corporate debtor and the individual debtor would be pointless if the two terms could be used interchangeably. [117]

The issue of whether an individual may benefit from section 525(b) prior to filing for bankruptcy has also been entertained by the courts. [118] The first court to address the question held section 525(b) should be read to include individuals who had not yet filed. [119] It was simply illogical not to include these individuals. By denying application of section 525(b) under these circumstances, there would be a "footrace between a prospective bankrupt and his or her employer." [120] Five years later, the issue arose again. Rather than follow the lead of *In re Tinker*, the court in *In re Kanouse* expressly disagreed with the decision. [121] *In re Kanouse* applied a plain meaning interpretation and held that "will be" debtors are not within the confines of subsection (b). [122]

B. Interpreting the "Solely Because" Standard

Unlike the terms "private employer" and "individual," the phrase "solely because" is present in both subsections. It is the standard proscribed by the two subsections when considering the grounds for discrimination. If discrimination is not "solely because" of any of the grounds for discrimination, then neither subsection is applicable.

The difficulty with this "seemingly obvious" phrase, however, is that no definition or explanation exists in either the Code or the legislative history. [123] This has resulted in a myriad of interpretations by the courts under both subsections. [124] The phrase has been construed to mean or require: (1) "only reason;" [125] (2) "reason independent of;" [126] (3) "other reasons . . . appear to be de minimis;" [127] (4) "primarily," or "predominantly;" [128] (5) "primarily due to;" [129] (6) "primary purpose;" [130] (7) "but for;" [131] (8) "primarily concerned with;" [132] (9) "on the grounds of;" [133] (10) "only because;" [134] (11) "played a significant role;" [135] (12) "except for the fact;" [136] and (13) "exclusive reason." [137]

1. Liberal Reading vs. Restrictive Reading

The multitude of constructions given to "solely because" appears to be dependent upon two views. The first view is expansive and liberal. *In re Metro Transportation Company*, [138] illustrates such a view. In applying section 525(a), the court interpreted "solely because" to mean "played a significant role." [139] According to the court:

It would be quite impossible −− or at least unlikely −− that the governmental unit could be found to have acted adversely on the grounds of a debtor's bankruptcy filing rather than at least partially upon consideration of the financial circumstances of the debtor which led to the bankruptcy filing. It is also unlikely that a

governmental body cognizant of § 525(a) will concede that it acted exclusively on the basis of a bankruptcy filing. Therefore, we believe that adverse governmental actions concerning which a bankruptcy filing appears to have played a significant role are proscribed by § 525(a). [140]

Bell v. Sanford−Corbitt−Bruker, Inc

. also demonstrates a broader perspective of "solely." [141] In *Bell*, "solely" was equivalent to a "but for" analysis. [142] "It would be virtually impossible for a bankrupt to prove that her employer fired her due only to bankruptcy, and without having considered any other factors in reaching the decision. To interpret 'solely' as requiring a bankrupt to prove this scenario would conflict with the policies of the Bankruptcy Act [of providing a fresh start]." [143] By utilizing a "but for" analysis, the court placed the burden on the defendant employers to show non−discriminatory reasons for their conduct once the plaintiff debtor established a prima facie case of discrimination. [144]

The other view is narrower and restrictive. The First Circuit Court of Appeals rejected a liberal approach in reading "solely because." [145] It observed that most courts apply the plain meaning of section 525(b) [146] and "[t]he ordinary meaning of words expresses the underlying legislative purpose of the statute." [147] Therefore, the court was unwilling to look beyond the statutory words and utilized a "sole reason" standard instead of "played a significant role" or "but for." [148] In addition, the court expressly declined to follow the reasoning in *Bell*, stating: "[T]he *Bell* decision rests on tenuous grounds . . . . Contrary to the reasoning in *Bell*, we believe that, in the absence of a clearly expressed legislative intention to the contrary, the plain language of the statute is conclusive." [149] In *Stockhouse v. Hines Motor Supply* (*Wyoming*), *Inc*., [150] the district court did not invoke a liberal reading either. The debtor, who was discharged one month after filing for bankruptcy and telling his employer, was unable to provide direct evidence that the firing was due to discrimination. [151] According to the court, "[a]n employer may dismiss an employee for *any cause* unrelated to the employer's recourse to the bankruptcy laws." [152] Even with the evidence viewed in a light favorable to the debtor, the evidence only supported an inference that the employer was displeased by the debtor's choice to seek bankruptcy, and was thus insufficient for the court for a section 525(b) violation. [153]

2. "Solely Because" is More Concerned with What Can Be Shown as Evidence [154]

The reluctance by some courts to expand "solely" does not always prevent the plaintiff debtor from prevailing under the anti−discrimination provision. This is especially true when the defendant−employer's are unable to provide credible evidence demonstrating the existence of non−prohibited grounds for their actions — i.e., the defendant's alleged discriminatory treatment was not "solely because" of bankruptcy status. [155] In one case, the lack of evidence to justify the debtor's transfer from the teller window to the bookkeeping department satisfied the court that the debtor was discriminated against solely because of her bankruptcy status. [156] In yet another case, the debtor was victorious when the employer was unable to show other reasons for the debtor's termination. [157] In fact, all the evidence in the case suggested to the court that the debtor was a good employee, who behaved, worked well, and was well respected by her friends. [158] In one final example, a debtor was fired the day after he filed for bankruptcy. [159] The employer could not cite any non−prohibitive reasons for discharging the debtor other than show evidence that it hired a former debtor. [160] Not surprisingly, the court found the defendant in violation of section 525(b), even though the court adhered to the "solely because" language.

When several explanations are presented, one of which is barred by the anti−discrimination provision, the court will consider the other reasons and decipher whether the non−tainted reasons are credible in light of the circumstances. [161] An example can be seen in *Laracuente v. Chase Manhattan Bank*. [162] The plaintiff was employed as a consumer credit department coordinator for the defendant bank when she and her husband filed for bankruptcy. Eighteen months later the plaintiff was fired. The defendant prevailed since it proved there were other "legitimate business reasons" for the plaintiff's termination, namely plaintiff's participation in loans to her family and her husband's employees under false pretenses. [163]

A. Types/Forms of Discrimination Differ Between Section 525(a) and Section 525(b)

Regarding the types or forms of discrimination prohibited by the two subsections, there is one glaring difference. Under subsection (a) the governmental unit may not (1) deny employment to, (2) terminate the employment of, or (3) discriminate with respect to employment. [164] Significantly, the current language of section 525(b) only bars a private employer from terminating the employment of or discriminating with respect to employment *but does not* prohibit a private employer from denying employment to an individual who is or has been a debtor/bankrupt. [165]

1. "Deny Employment to"

There is no legislative history to explain why "deny employment to" has been left out of subsection (b). [166] Hence, the courts have been left to mull over the statutory interpretation required by the absence. [167] It is quite possible, however, that "the omission indicates a legislative intention to narrow the scope of prohibited discrimination." [168] Instructive in these circumstances is *Lynch v. Johns−Manville Sales Corporation*. [169] In *Lynch*, the Sixth Circuit Court of Appeals held that in instances where Congress includes certain language in one section but does not include the same in another section, the presumption is that Congress acted intentionally and the exclusion was not inadvertent. [170] With the *Lynch* rationale in mind, section 525(b) suggests employers will not violate it when hiring individuals as opposed to firing individuals or changing the scope of one's employment.

a. Court's Application of Section 525(b)

The three missing words have already caused problems for some debtors, for the courts have generally adhered to the plain meaning of subsection (b). [171] For example, in *Pastore v. Medford Savings Bank*, the plaintiff alleged the defendant discriminated against her due to her prior bankruptcy status. [172] In 1992, the plaintiff voluntarily filed for bankruptcy. Approximately two years later, the plaintiff interviewed with the defendant for a position at the bank. Subsequently, she was informed that due to her credit report, the defendant was not going to hire her. [173] Arguing that section 525(b) did not apply, the defendant made reference to the absent phrase "deny employment to." [174] The plaintiff countered that Congress omitted the language in order to "streamline" the statute. She further argued that the language — "discriminate with respect to employment" — encompassed hiring. [175] Both contentions by the plaintiff proved unsuccessful to the court. The critical fact remained. Subsection (b) clearly made no reference to prohibiting the denial of employment. [176] As such, "[t]his strongly suggest[ed] that Congress intentionally omitted the reference to discrimination in hiring from the provision regulating the conduct of private employers." [177] Moreover, "'[w]here Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded.'" [178]

Other cases have considered whether section 525(b) applies to the hiring decisions of private employers as well. No violation was found in *In re Madison Madison International of Illinois, P.C.*, when the defendant ceased employment negotiations with the plaintiff once the plaintiff filed for bankruptcy. [179] In *In re Hopkins*, the court held that section 525(b) should be read broadly so that employers would be precluded from "refusing to hire, or promote as the case may be, the debtor solely because of . . . bankruptcy, *once an offer for full−time employment has been extended and accepted*." [180]

At first glance, *In re Madison Madison International of Illinois, P.C.* and *In re Hopkins* appear to be at odds with one another. But *Fiorani* distinguished the two cases and observed that *In re Madison Madison International of Illinois, P.C.* involved ongoing negotiations, and so no contract was created, whereas, *In re Hopkins* had an employment contract in place. [181] Flowing from the same reasoning as *In re Madison Madison International of Illinois, P.C.*, and comparing the subsections (a) and (b), the *Fiorani* court concluded that the omission of "denying employment" was "compelling evidence that section 525(b) does not reach hiring." [182] The presence of certain words in one section but absent in another was sufficient to presume that Congress wanted such a result. [183]

[There] is compelling evidence that section 525(b) does not reach hiring, for it is well established that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion." Indeed, some courts have held that such a rule is particularly appropriate when construing the Bankruptcy Act, "a detailed and calculated statutory scheme." This rule of construction, applied here, points persuasively to the conclusion that section 525(b) was not intended to subject private employers to liability for choosing not to hire an applicant on the basis of

his bankruptcy status. [184]

One court has taken a bold path, opting to veer away from the flock of cases applying a textual approach to section 525(b). [185] In *Leary v. Warnaco, Inc.*, the plaintiff was a former debtor [186] who interviewed with the defendant for an executive assistant position. [187] Subsequently, the defendant informed the plaintiff that it would not be hiring her "in whole or in part" because of her credit report, which revealed her earlier bankruptcy. [188] In response, the plaintiff alleged violations of sections 525(b)(1) and (3). [189] The judge in the bankruptcy court, however, concluded that section 525(b) only applied to actions taken after an employment relationship was formed and thus dismissed the plaintiff's complaint. [190] On appeal, the district court reversed the dismissal and remanded the case to determine if discrimination did in fact occur. [191] As for the reasoning behind the reversal, the district court first reviewed the case law pertaining to section 525(b) and hiring decisions. The case law revealed that section 525(b) did not apply to hiring decisions prior to the extension and acceptance of an offer. [192] The district court emphatically and thoroughly disagreed with the construction of the language given in *Pastore, In re Hopkins* and *Fiorani*:

This *rather narrow construction* of a remedial statute has been reached by drawing a negative inference comparing this statute with section 525(a). . . . We are asked to infer from this omission not only that it was purposeful to achieve a disparate result where the Government is the employer, but that section 525(b) accordingly allows employers to discriminate on the initial hiring against those unfortunate economic casualties who are seeking or have obtained a fresh start from the bankruptcy court, and yet at the same time prohibits discrimination against those who have been hired. [193]

Ironically, the district court argued for the same plain meaning analysis, albeit different outcome, that *Pastore* and *Fiorani* called for. [194]

The *plain meaning of the statute does not support such a gloss*. Section 525(b) prohibits an employer from discriminating "with respect to employment." Such language is clearly broad enough to extend to discriminating with respect to extending an offer of employment. Such an application of the plain meaning of the statute makes sense. 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. A Court should not go out of its way to place such an absurd gloss on a remedial statute, simply because the scrivener was more verbose in writing section 525(a).

"*Where, as here, the statute's language is plain*, 'the sole function of the court is to enforce it according to its terms'."

. . .

Plaintiff's claim is for discrimination with respect to employment. This includes by its plain meaning *all* aspects of employment including hiring, firing and material changes in job conditions. [195]

From the above passage it becomes obvious that plain meaning is not so plain and certainly not the same in every court's eyes.

1. "Discriminate with Respect to Employment"

Leary suggests that "with respect to employment" covers the extension of an offer to work. [196] *Leary*, in effect, argues more for a policy/plain meaning view. Rather than read the words literally, the *Leary* court chose to squeeze the words as best it could into the fresh start policy. "With respect to employment" would act as the catch−all phrase under *Leary*'s reasoning. [197] But the court did not address the argument made in *Fiorani* regarding the use of "with respect to employment" to entail hiring.

The statute's explicit reference to discrimination with respect to termination leaves no doubt that terminations are covered. But notably absent from the statute is any explicit reference to discrimination in hiring. This omission would be conclusive were it not for the statute's general reference to discrimination "with respect to employment" against one who has filed for bankruptcy, which reference arguably furnishes a basis for stretching the statute to cover hiring. Yet,

this argument seems to stretch the statute too far, for if the reference to discrimination "with respect to employment" is read to cover hiring, it would, for the same reasons, seem that the phrase was also meant to reach termination. But it is quite apparent that this is not so, given that statute's framers found it necessary to make separate, explicit reference to termination. More likely, the phrase discrimination "with respect to employment" refers neither to hiring nor termination, but to other terms and conditions of employment. [198]

Fiorani

is not the only case to restrict the "with respect to" language. [199] The plaintiff in *Pastore* argued, to no avail, that the language could "reasonably be interpreted to encompass a private employer's decision not to hire." [200] As in *Fiorani*, the presence of "terminate the employment of" in section 525(b) dismissed any suggestion that "with respect to" included hiring decisions. [201]

IV. Expansive Construction vs. Plain Meaning of Section 525(b)

It is obvious that *Leary* endorses an expansive construction of section 525(b). [202] The premise on which the court relied upon was the fresh start policy. [203] "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." [204] In addition, the court called the narrow construction given by other courts an "absurd gloss" of section 525(b). [205]

On the other end of *Leary* are cases that did not consider policy. For example, in *In re Madison Madison International of Illinois, P.C.*, the court did not refer to policy and refused to go beyond the words of the statute since the plain language did not result in an "absurd result." [206] The plaintiff's argument that the case was "a terribly ripe case to continue the Congressional intent to defer to the courts to continue to mark the contours of the anti−discrimination provision in pursuit of a sound bankruptcy policy" was unpersuasive. [207] In response to the plaintiff's contention, the court stated:

Any attempt to liberalize this statute, in the face of its plain meaning, is inappropriate. Had Congress intended an expansive interpretation to section 525(b), it could have so stated. Where Congress wants to permit an action, it is capable of making that intention clear. [208]

Professor Boshkoff claims the approach in *In re Madison Madison International of Illinois, P.C.* is "a strictly textual approach [that] is unacceptable because it converts the affirmative act of codification into a negative act, a barrier standing in the way of further elaboration of the *Perez* decision." [209]

Fiorani addressed Professor Boshkoff's comments and stated it would not follow Professor Boshkoff's "text does not matter" reasoning. [210]

[A] statute's text and structure do matter; they are central to the interpretative task. It would be wholly inappropriate for a court to embark instead on a wide−ranging attempt to expand the statute beyond its explicit terms merely to give effect to an abstract statement of purpose. [211]

The court remarked further by noting that Professor Boshkoff's reliance on the legislative history is incorrect. Specific reference to hiring in section 525(a) and the omission of the same in section 525(b) clearly shows that section 525(b) is more restrictive in scope. [212] Reference to *Perez* in the legislative history does not help or apply to section 525(b) since private employers cannot violate the Supremacy Clause. [213] "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 as not yet done." [214]

From a policy perspective, *Leary* and Professor Boshkoff are persuasive. How can the "honest but unfortunate debtor" receive a fresh start if they are prevented from finding the means of achieving it? On the other hand, *Fiorani* is consistent with other courts applying plain meaning. [215] Perhaps *In re Madison Madison International of Illinois, P.C.* states it the best: "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." [216]

A. How Would the Supreme Court Construe Section 525(b)?

Although the Supreme Court has never been presented with a case involving the interpretation of section 525(b), the Court has had the occasion to consider another section in the Bankruptcy Code, namely section 506. In *Dewsnup v. Timm*, [217] the construction of the term "allowed secured claim" had a significant impact for the opposing parties. The petitioner debtor argued that sections 506(a) and 506(d) were "complementary and to be read together" while the respondent creditors asserted for a more liberal reading of section 506(d) — i.e., "506(d) need not be read as an indivisible term of art defined by reference to section 506(a), which by its terms is not a definitional provision. . . . Rather, the words should be read term−by−term . . . ." [218] In support of their position, the respondent creditors argued that the pre−Code bankruptcy laws preserved liens similar to respondent creditors' lien on petitioner debtor's real property. [219] The Court favored the respondent creditors' construction despite Justice Scalia's strong dissent. [220] According to the Court: "Were we writing on a clean slate, we might be inclined to agree with petitioner that the words 'allowed secured claim' must take the same meaning in section 506(d) as in section 506(a). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre−Code rule that liens pass through bankruptcy unaffected." [221]

Applying the Court's rationale in *Dewsnup* to section 525(b), it might be possible to place far greater prohibitions on private employers in terms of hiring practices. The fresh start policy, which existed before the Bankruptcy Code, emphasizes a new beginning for debtors. [222] Analogizing the fresh start to the Court's treatment of pre−Code rule for liens, sections 525(b) and 525(a) would not be read together and a "term−by−term" method would be used instead. If the sections were read together then discriminatory hiring would occur and conflict with the fresh start policy, since section 525(b) does not state "deny employment to." [223] A "term−by−term" approach to section 525(b) could support the rationale in *Leary*. The language of section 525(b) could be isolated into two components: 1) "terminate the employment" and 2) "with respect to employment." In isolation, "with respect to employment" could include hiring practices as *Leary* points out. [224]

Justice Scalia took exception to the Court's ruling and rationale in *Dewsnup*. [225] Justice Scalia saw no ambiguity in section 506(d). [226] He observed that the Court frequently used the "'normal rule of statutory construction that 'identical words used in different parts of the same act are intended to have the same meaning.'" [227] Presumably, "[t]hat rule must surely apply, *a fortiori*, to use of identical words *in the same section of the same enactment*." [228] The Court's interpretation of section 506(d) rendered some of the section's language redundant, and as Justice Scalia commented, "[a]n unnatural meaning should be disfavored at any time, but particularly when it produces a *redundancy*." [229] He also remarked that pre−Code rules should have no bearing on statutory interpretation because "the text means precisely what it says." [230]

Whereas the majority decision in *Dewsnup* supports *Leary*'s rationale, the dissenting opinion supports the rationale of *Fiorani*. There is no doubt the language of sections 525(b) and 525(a) differ. [231] If Justice Scalia's dissent is of any guidance, then there would be no question as to section 525(b)'s scope. As was stated in *Fiorani*, "with respect to" cannot include within its meaning hiring, because to do so would also mean termination fell within "with respect to." [232] This would create the redundancy that Justice Scalia was against. [233] In addition, unlike *Leary*, the court in *Fiorani* disregarded the fresh start policy in its construction of section 525(b) — practically heeding Justice Scalia's remarks on the influence of pre−Code rules. [234]

Even though *Dewsnup* strengthens the reasoning in *Leary*, it would seem more probable that *Fiorani* would prevail as the appropriate stance towards construing section 525(b). Supporting this is the Court's reasoning in *Patterson v. Shumate*. [235] *Shumate* clarified the meaning of "applicable nonbankruptcy law" for purposes of section 541(c)(2). [236] To the dismay of the petitioner, who argued the "applicable nonbankruptcy law" only meant state law, the Court could find no restrictions on the use of the term and so, "applicable nonbankruptcy law" covered both federal and state law. [237] In particular, "[t]he Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency." [238] If Congress meant to say it, then Congress would say it. This would be in accord with the *Fiorani* court's analysis regarding section 525(b)'s omission of "deny employment to." [239] Simply put, if Congress wanted to prohibit private employers from discriminatory hiring then

Congress would have included "deny employment to" in section 525(b) as section 525(a) does.

Conclusion

Over the last twenty−plus years, considerable steps have been taken to promote and preserve the debtor's fresh start. But there is still much to do. The absence of "deny employment to" has caused a negative effect for debtors. In essence, debtors have become subject to the same types of frustration to the fresh start that prompted the Supreme Court, in 1971, to hold invalid a state financial responsibility statute that impinged upon a debtor's new start, and also prompted Congress to enact an anti−discrimination provision. How can the "honest but unfortunate debtor" receive their fresh start if they are unable to find the means of achieving it? Questions that Congress supposedly clarified in the 1984 Amendments have only raised new ones.

Moreover, Congress' permission to the courts to "mark the contours of the anti−discrimination provision in pursuit of sound bankruptcy policy" has been relatively unsuccessful, creating more confusion than anything else. The courts have generally steered clear of "marking" anything, all for the name of plain meaning. *Leary* takes a bold leap and certainly raises a valid argument from a policy standpoint. But I would contend that plain meaning, as exhibited in *Fiorani*, is the better approach. This does not necessarily mean that I endorse the hindrance of the fresh start goals, but judicial consistency is just as important.

Oddly enough, a hard−lined construction may be the only way of getting some clarity for section 525(b). After all, section 525(a) was presumably enacted in response to the failure of the courts to protect the debtor's fresh start after *Perez.* And section 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, or at least give some enlightenment on the current anti−discrimination provision that would subject private employers to the same restrictions as governmental units? In that case, *Leary* would be a pioneer as much as *Perez* was. Of course, it is uncertain whether this scenario would ever transpire but one can never tell with Congress.

Ultimately, Congress is the only one that can clarify the issue and tell the debtor if he or she needs to worry when inquiring about the help−wanted sign hanging on the door.

Robert C. Yan

FOOTNOTES:

[1] See Consumer Bankruptcy: A Roundtable Discussion, 2 Am. Bankr. Inst. L. Rev. 5, 6 (1994) (statement by Judge Geraldine Mund) (discussing reasons some pro se filers have for filing, including necessity of relief from "heavy debt load," to halt evictions and simply listening to others); A. Mechele Dickerson, America's Uneasy Relationship with the Working Poor, 51 Hastings L.J. 17, 69 (1999) (stating debtors file for number of reasons); Tahira K. Hira & Kyle L. Kostelecky, Pilot Study of Consumer Debtors Provides New Insights −− What Influences Debtors' Attitudes?, 17 Am. Bankr. Inst. J. 1, 1 (April 1995) (analyzing decision process of debtors prior to filing and finding majority of debtors point to "creditors' debt collection actions" which led them to file). Other factors found in the study included: 1) marital problems; 2) overspending; and 3) unemployment. See id; see also Steven W. Rhodes, An Empirical Study of Consumer Bankruptcy Papers, 73 Am. Bankr. L.J. 653, 670 (1999) (asserting many times debtors put themselves into bankruptcy by consistently borrowing to carry on lifestyle which exceeds their economic conditions). Back To Text

[2] Local Loan Co. v. Hunt has been recognized as the foundation for the fresh start policy. 292 U.S. 234 (1934); see also Douglass G. Boshkoff, Fresh Start, False Start, or Head Start?, 70 Ind. L.J. 549, 564 (1995) [hereinafter Boshkoff, Fresh Start] (stating "[t]he foundation for this protective doctrine was established by the U.S. Supreme Court in 1934."). See infra Part I (noting bankruptcy rules try to give debtor fresh start and clean slate to recover from). Back To Text

[3] Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101−1330) amended by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98−353, 98 Stat. 333 (codified as

amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99−554, 100 Stat. 3088 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100−334, 102 Stat. 610 (codified as amended in scattered sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101−508, 104 Stat. 1388 (codified as amended in scattered sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101−581, 104 Stat. 2865 (codified as amended in scattered sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101−647, 104 Stat. 4789 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101−650, 104 Stat. 5089 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.); Treasury, Postal Service and General Government Appropriations Act of 1991, Pub. L. No. 101−509, 104 Stat. 1389 (codified as amended in scattered sections of 28 U.S.C.); Department of Commerce, Justice, and State, the Judiciary, and Related Agency Appropriations Act of 1994, Pub. L. No. 103−121, 107 Stat. 1153 (codified as amended in scattered sections of 28 U.S.C.); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103−322, § 320934, 108 Stat. 1796, 2135; and Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.). Back To Text

[4] See 11 U.S.C. § 524 (1994) (asserting effect of discharge under Bankruptcy Code); id. § 727 (providing discharge of debtor under chapter 7 liquidation); id. § 944 (providing discharge of debtor under chapter 9 plan); id. § 1141 (providing discharge of debtor under chapter 11 plan); id. § 1328 (providing discharge of debtor under chapter 13 plan). But see 11 U.S.C. § 523 (restricting scope of discharge). Back To Text

[5] See 11 U.S.C. § 525 (1994); see also Ann Haberfelde, Note, A Reexamination of the Non−Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcies, 43 Hastings L.J. 1517, 1536 (1992) (noting § 525 "reflect[s] a policy that bankruptcy should not stigmatize debtors in the employment arena, because to do so would subvert the fresh start policy by inhibiting debtors' return to full economic productivity."). Back To Text

[6] Compare Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 679−82 (Bankr. E.D. Wis. 1987) (utilizing narrow interpretation of § 525(b) and finding plain language clear and controlling), with McNeely v. Hutchison Fin. Corp. of Augusta (In re McNeely), 82 B.R. 628, 632 (Bankr. S.D. Ga. 1987) (construing § 525(b) broadly to include state law classification of independent contractor). See generally Douglass G. Boshkoff, Bankruptcy−Based Discrimination, 66 Am. Bankr. L.J. 387, 393−97 (1992) [hereinafter Boshkoff, Bankruptcy−Based] (observing lack of uniformity by courts in interpreting § 525(b)). Back To Text

[7] Compare Fiorani v. Caci, 192 B.R. 401, 404−07 (E.D. Va. 1996) (construing § 525(b) narrowly to exclude hiring decisions), with Leary v. Warnaco, Inc., 251 B.R. 656, 658 (S.D.N.Y. 2000) (construing § 525(b) expansively to include hiring decisions so it is in accordance with fresh start policy). See generally Boshkoff, Bankruptcy−Based, supra note 6, at 395−97 (arguing strict plain language approach hinders purposes of § 525's enactment); Douglass G. Boshkoff, Private Parties and Bankruptcy−Based Discrimination, 62 Ind. L.J. 159, 161, 164 (1987) [hereinafter Boshkoff, Private Parties] (advocating prohibition of discriminatory conduct, whether § 525 specifies such conduct or not). Back To Text

[8] See Boone v. I.S.S.C. (In re Boone), 215 B.R. 386, 390 (Bankr. S.D. Ill. 1997) (recognizing fresh start to be fundamental goal of bankruptcy). The court specifically stated:

While the Court agrees that providing debtors with a fresh start is one of the fundamental goals of bankruptcy, it is not the only interest that is entitled to protection. A debtor's fresh start must be balanced against the creditors' right to fair treatment. While such a rule may lead to harsh results, it is the only conclusion supported by the Code.

Id. (emphasis added). See generally Michelle M. Arnopol, Including Retirement Benefits in a Debtor's Bankruptcy Estate: A Proposal for Harmonizing ERISA and the Bankruptcy Code, 56 Mo. L. Rev. 491, 501 (1991) (stating goals of federal bankruptcy system are to provide honest debtor with fresh start and to ensure equitable distribution of assets to creditors); Richard Lieb, Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisdictional Approach, 7 Am. Bankr. Inst. L. Rev. 269, 276 (1999) (noting "[t]here are two basic goals of the bankruptcy law:

equality of distribution for creditors, and a 'fresh start' for the debtor."); Tamara Ogier & Jack F. Williams, Bankruptcy Crimes and Bankruptcy Practice, 6 Am. Bankr. Inst. L. Rev. 317, 329 (1998) (observing debtor relief and equitable distribution as two goals of bankruptcy law). Back To Text

[9] See Seth J. Gerson, Note, Separate Classification of Student Loans in Chapter 13, 73 Wash. U. L.Q. 269, 273 (1995) (asserting "Congress' attempt to balance these two opposing interests is manifested in the discharge and automatic stay provisions of the Bankruptcy Code"). Back To Text

[10] Id. (stating discharge provisions "reflect" fresh start goals and exceptions to discharge "reflect a desire to protect certain creditors' interests"). See Cohen v. De la Cruz, 523 U.S. 213, 222 (1998) (deciding court in considering § 523(a), determined Congress intended "the creditors' interest in recovering full payment of debts [within § 523(a)] outweigh[ed] the debtors' interest in a complete fresh start"); In re Boone, 215 B.R. at 390 (noting fairness dictates creditors' rights must be considered along with fresh start policy despite potentially harsh rulings). Back To Text

[11] Michael G. Hillinger, How Fresh a Start?: What Are "Household Goods" for Purposes of Section 522(f)(1)(B)(i) Lien Avoidance?, 15 Bankr. Dev. J. 1, 5−6 (1998); see also Wetmore v. Markoe, 196 U.S. 68, 77 (1904) (stating "[s]ystems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start."). Back To Text

[12] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). This phrase has been utilized so frequently in bankruptcy cases that it has been referred to as a "touchstone" of bankruptcy. See Richard E. Coulson, Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge, 62 Alb. L. Rev. 467, 516−19 (1998) (asserting "honest but unfortunate debtor" is cited so frequently by courts, it has become, for all practical reasons, philosophy adopted by lower courts). Back To Text

[13] Local Loan, 292 U.S. at 244−45 (citations omitted) (first and third emphasis added). Back To Text

[14] See Cohen, 523 U.S. at 217 (stating "[t]he Bankruptcy Code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.'"); Grogan v. Garner, 498 U.S. 279, 286−87 (1991) (noting "in the same breath that we have invoked this 'fresh start' policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the 'honest but unfortunate debtor.'"); see also 11 U.S.C. § 523(a)(2)(A) (1994) (excepting fraudulent conduct from discharge). The Fifth Circuit observed this limitation of the fresh start, stating that "[b]y enacting § 523(a)(2)(A), Congress made clear its intent to limit the 'fresh start' to honest, but unfortunate, debtors, not perpetrators of fraud." See AT&T Universal Card Servs. v. Mercer (In re Mercer), 246 F.3d 391, 407 n.17 (5th Cir. 2001). Back To Text

[15] See Molitor v. Eidson (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996) (explaining court is "mindful that the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts") (citing Graven v. Fink (In re Graven), 936 F.2d 378, 385 (8th Cir. 1991)); St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 680 (11th Cir. 1993) (stating "the malefic debtor may not hoist the Bankruptcy Code as protection from the full consequences of fraudulent conduct."). See generally Susan Jensen−Conklin, Nondischargeable Debts in Chapter 13: "Fresh Start" or "Haven for Criminals"?, 7 Bankr. Dev. J. 517, 520 (1990) (stating one of Code's objectives is to prevent dishonest debtors from using "[Code's] protections to shield wrongdoing at the expense of the debtor's creditors"). Back To Text

[16] See Clark & Gregory, Inc. v. Hanson (In re Hanson), No. 99−CV−55, 1999 U.S. Dist. LEXIS 8442, at *24 (W.D. Mich. June 1, 1999) (finding it "manifestly unjust" to allow debtor to avoid consequences of his actions by using Code, which is meant to protect "honest debtor"). See generally Steven H. Resnicoff, Barring Bankruptcy Banditry: Revision of Section 523(a)(2)(C), 7 Bankr. Dev. J. 427, 431 (1990) (commenting if fraudulently incurred debts were discharged then "creditors victimized by the fraud could suffer significant and unredressed financial injury"). Back To Text

[17] Schultz v. Shapiro (In re Shapiro), 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986). Back To Text

[18] See Thomas H. Jackson, The Fresh−Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393, 1393 (1985) (stating primary advantage of bankruptcy to debtor relates to discharge); see also Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1352 (8th Cir. 1990) (observing discharge gives "honest debtor" chance to "reinstate himself," thereby comporting with Code's policies) (citing In re May, 12 B.R. 618, 621 (Bankr. N.D. Fla. 1980)); Dickerson, supra note 1, at 43−44 (noting debtors who are unable to repay should receive discharge because it is moral and "society should give the financially burdened a second chance"). Back To Text

[19] Levine v. Raymonda (In re Raymonda), Ch. 7 Case No. 99−13523, Adv. No. 99−91199, slip op. at 4 (Bankr. N.D.N.Y. Feb. 16, 2001). Back To Text

[20] See In re Mercer, 246 F.3d at 407 n.17 (finding card−use as representation of intent to pay, court stated that it "[did] not ignore the principle that exceptions to discharge are narrowly construed. . . . That principle seeks to further the goal of providing the debtor a 'fresh start.'"); Miller v. J.D. Abrams, Inc. (In re Miller), 156 F.3d 598, 602 (5th Cir. 1998) (narrowly construing exceptions to discharge in favor of debtor so goal of Code's fresh start is not neglected). Back To Text

[21] See Boshkoff, Fresh Start, supra note 2, at 563 (noting debtor's fresh start would be "undercut" if Code did not prohibit various discriminatory acts). Back To Text

[22] See McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 929 (5th Cir. 1977) (en banc) (noting examination of Bankruptcy Act and its legislative history shows "no explicit provision or intent to prohibit discriminatory action against an individual on the basis of his declaring bankruptcy"); see also John C. Chobot, Anti−Discrimination under the Bankruptcy Laws, 60 Am. Bankr. L.J. 185, 186 (1986) (noting lack of protection from discriminatory acts under former Bankruptcy Act); 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, 154 (1996) (pointing out private and public sectors were not barred from discriminating against debtors or bankrupts). Back To Text

[23] See Perez v. Campbell, 402 U.S. 637, 651−52 (1971) (unwilling to adhere to state laws that frustrate federal law, namely Code and it's goals of fresh start). See generally Larry A. D'Orazio et al., Recent Development in Bankruptcy Law: Creditors and Claims, 1 Bankr. Dev. J. 257, 279 (1984) (asserting absent protection from discriminatory conduct fresh start would be hindered and would instead "prolong[ ] the economic hardships of those who have been debtors under the [Bankruptcy] Code or the prior [Bankruptcy] Act"). Back To Text

[24] 314 U.S. 33 (1941), overruled by Perez v. Campbell, 402 U.S. 637 (1971). Back To Text

[25] Id. at 34−35. Back To Text

[26] See id. at 35. Back To Text

[27] See id; see also supra note 22 and accompanying text (observing absence of any anti−discrimination provisions prior to 1978). Back To Text

[28] Reitz v. Mealey, 314 U.S. 33, 36 (1941). Back To Text

[29] See id. at 37 (explaining rationale for upholding statute). Back To Text

[30] Id. Back To Text

[31] 369 U.S. 153 (1962), overruled by Perez v. Campbell, 402 U.S. 637 (1971). Back To Text

[32] See id. at 155. Back To Text

[33] See id. Back To Text

[34] See id. at 173−74. Although the Court held the Utah statute valid, the Court did acknowledge the burden that debtors faced despite a discharge:

The Utah Safety Responsibility Act leaves the bankrupt to some extent burdened by the discharged debt. Certainly some inroad is made on the consequences of bankruptcy if the creditor can exert pressure to recoup a discharged debt, or part of it, through the leverage of the State's licensing and registration power. But the exercise of this power is deemed vital to the State's well−being, and, from the point of view of its interests, is wholly unrelated to the considerations which propelled Congress to enact a national bankruptcy law. There are here overlapping interests which cannot be uncritically resolved by exclusive regard to the money consequences of enforcing a widely adopted measure for safeguarding life and safety.

Id. at 171. Back To Text

[35] See Kesler, 369 U.S. at 171. The frustration of the fresh start was not lost on some of the justices. As Justice Black, with whom Justice Douglas concurred, stated:

The Bankruptcy Act serves a highly important purpose in American life. Without the privileges it bestows on helplessly insolvent debtors to make a new start in life, many individuals would find themselves permanently crushed by the weight of obligations from which they could never hope to remove themselves and the country might, therefore, be deprived of the value of the endeavors of many otherwise useful citizens who simply would have lost their incentive for constructive work. I cannot agree with a decision which leaves the States free – subject only to this Court's veto power – to impair such an important and historic policy of this Nation as is embodied in its bankruptcy laws. I therefore respectfully dissent.

Id. at 184−85 (Black, J., dissenting). Back To Text

[36] 402 U.S. 637 (1971). Back To Text

[37] See infra Part II (B) (discussing codification of Perez into Code). The Fifth Circuit did not embrace the broad ruling in Perez. In McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 929 (5th Cir. 1977) (en banc), a private employer's policy of discharging employees who filed for bankruptcy was upheld. Back To Text

[38] Perez, 402 U.S. at 643. Specifically, the Court narrowed the issue to:

the power of a State to include as part of this comprehensive enactment designed to secure compensation for automobile accident victims a section providing that a discharge in bankruptcy of the automobile accident tort judgment shall have no effect on the judgment debtor's obligation to repay the judgment creditor, at least insofar as such repayment may be enforced by the withholding of driving privileges by the State.

Id. Back To Text

[39] See id. at 644. Back To Text

[40] Id. (quoting Schecter v. Killingsworth, P.2d 136, 140 (Ariz. 1963)). Back To Text

[41] Id. at 646−47. Back To Text

[42] Id. at 648 (citing Local Loan Co. v. Hunt, 292 U.S. 234 (1934)). Back To Text

[43] Perez v. Campbell, 402 U.S. 637, 651−52 (1971). Back To Text

[44] See id. at 650. Back To Text

[45] Id. Back To Text

[46] See id. at 650−51. Back To Text

[47] Id. at 651−52. Back To Text

[48] Citing the Perez decision, the Commission on the Bankruptcy Laws of the United States stated:

The "fresh start" policy of the present Act has been frustrated, in some instances, by provisions of federal and state laws that subject an individual who obtains a discharge, and fails to pay the discharged debt, to discriminatory treatment. This is but another example of the erosion of the "fresh start" which has been countenanced in the past. 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, or any person with whom he is or has been associated, is or has been a debtor or has failed to pay a debt discharged in a case under the Act. This does not mean, however, that present and prospective financial condition or managerial ability cannot be taken into consideration. But it does mean that laws which, e.g., suspend a contractor's license until he obtains a release of discharged claims, are suspended.

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93−137, pt. I, at 177 (1973) (footnotes omitted). Back To Text

[49] See Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93−137, pt. II, 143−44 (1973). The Bankruptcy Commission clearly indicated the significance of Perez v. Campbell when it stated in a note following section 4−508 that, "[t]he section codifies the principle in Perez v. Campbell, which, reversing prior decisions, voided application of a state motorists' responsibility law under the supremacy clause of the Constitution because it impaired the 'fresh start' provided by the Bankruptcy Act." Id. at 144 (emphasis added). Back To Text

[50] Id. at 143−44. Back To Text

[51] Id. at 144. Back To Text

[52] See Barbee v. First Virginia Bank (In re Barbee), 14 B.R. 733, 735 (Bankr. E.D. Va. 1981) (arguing section 4−508 would have applied to private as well as governmental discrimination against debtor); Chobot, supra note 22, at 188 (stating Commission on Bankruptcy Laws of United States version would have applied to private as well as to public sector). Back To Text

[53] Jackson, supra note 18, at 1429. Back To Text

[54] See Zeiler, supra note 22, at 156 (stating Congress did not adopt broad protective policy urged in Commission's recommendation in its eventual enactment of § 525(a)). Back To Text

[55] See 11 U.S.C. § 525 (1978) [hereinafter referred to as section 525(a)] (presenting narrower anti−discrimination section); see also Boshkoff, Private Parties, supra note 7, at 164 (stating "Congress did not adopt the Commission's recommendation but chose the less ambitious policy statement embodied in the original version of section 525.").

Section 525 was later renumbered into subsections (a) to (c). Subsection (b) relates to private sector discriminatory conduct and its discussed infra Part III. Subsection (c) deals with discriminatory acts as related to student loans and grants. For purposes of this Note, subsection (c) will not be discussed in detail. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98−353, 98 Stat. 333 (codified as amended at 11 U.S.C. § 525); Bankruptcy Reform Act of 1994, Pub. L. No. 103−394, 108 Stat. 3146 (codified as amended at 11 U.S.C. § 525). Back To Text

[56] See 11 U.S.C. § 525(a) (1994) (protecting debtors from discriminatory conduct in public sector). Back To Text

[57] The Senate and House Report both state:

It codifies the result of Perez v. Campbell, 402 U.S. 637 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 95−595, at 366 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6322. Back To Text

[58] "Governmental unit" is defined in 11 U.S.C. § 101(27) (1994). The term includes:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. Back To Text

[59] See 11 U.S.C. § 525(a) (1994). Back To Text

[60] Id. Back To Text

[61] S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 95−595, at 366 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6322. Back To Text

[62] See S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867 (stating § 525(a) was not as broad as § 4−508, which would have expanded prohibition of discriminatory acts to any discriminatory acts, including those done by private party); H.R. Rep. No. 95−595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (stating same). Back To Text

[63] See S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 95−595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323. Back To Text

[64] See S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 95−595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (explaining "[t]he enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination."). Back To Text

[65] See Boshkoff, Private Parties, supra note 7, at 165 (referring to language in statute as "maddeningly ambiguous"). Back To Text

[66] See Joseph A. Guzinski, Policy Problems and "Plain Meaning": An Examination of Some Recent Decision under 11 U.S.C. § 525(a), 15 Am. Bankr. Inst. J., 10, 20 (Feb. 1996) (noting apparent contradiction between Congress' intent and statutory language). Perhaps it would be better to say that the legislative history shows Congress' intent to be ambiguous. Back To Text

[67] See supra note 62 and accompanying text. Back To Text

[68] S. Rep. No. 95−598, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867; H.R. Rep. No. 95−595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323. Back To Text

[69] See Chobot, supra note 22, at 190 (noting section 525(a) has been applied to range of activities); see also Zeiler, supra note 22, at 157 (stating same); Elizabeth A. Bronheim, Comment, Interpreting Section 525(a) of the Bankruptcy Code, 7 Bankr. Dev. J. 595, 600 (1990) (stating same). Back To Text

[70] See, e.g., In re Taylor, 27 B.R. 83, 84 (Bankr. S.D. Fla. 1983) (finding violation for suspension of debtor's driver's license due to unpaid judgment for damages resulting from automobile accident, even after debtor was discharged);

Henry v. Heyison, 4 B.R. 437, 442 (Bankr. E.D. Pa. 1980) (holding § 525(a) prohibited State statute from requiring drivers to prove financial responsibility if they had not paid outstanding judgment against them). But see Duffey v. Dollison, 734 F.2d 265, 272 (6th Cir. 1984) (reasoning discharge of debt did not relieve debtor of proving their financial responsibility). Back To Text

[71] See, e.g., Anderson v. Mississippi State Tax Comm'n (In re Anderson), 15 B.R. 399, 400 (Bankr. S.D. Miss. 1981) (holding § 525(a) was violated when State refused to renew debtor's liquor permit); In re Maley, 9 B.R. 832, 834 (Bankr. W.D.N.Y. 1981) (requiring liquor authority to issue debtor liquor license). Back To Text

[72] See, e.g., Goldrich v. New York State Higher Educ. Servs. Corp. (In re Goldrich), 45 B.R. 514, 521−22 (Bankr. E.D.N.Y. 1984) (holding § 525(a) was violated where statute made persons who defaulted on repayment of guaranteed student loans ineligible for future loans); Richardson v. Pennsylvania Higher Educ. Assistance Agency (In re Richardson), 15 B.R. 925, 928−29 (Bankr. E.D. Pa. 1981) (finding denial of guaranteed student loan application for failure to repay previously discharged student loans constituted discriminatory treatment) vacated in part 27 B.R. 560 (E.D. Pa. 1982); Bd. of Trustees of the Univ. of Ala. v. Howren (In re Howren), 10 B.R. 303, 305 (Bankr. D. Kan. 1980) (finding violation when state university refused to release transcript to debtor); In re Heath, 3 B.R. 351, 353 (Bankr. N.D. Ill. 1980) (finding university's withholding of debtor's transcript violated § 525(a)). Back To Text

[73] See, e.g., In re Son−Shine Grading, Inc., 27 B.R. 693, 695−96 (Bankr. E.D.N.C. 1983) (disqualifying debtor from contract bidding awarded by State violated § 525(a)); Lambillotte v. Charlotte County (In re Lambillotte), 25 B.R. 392, 393−94 (Bankr. M.D. Fla. 1982) (stating county violated § 525(a) when it denied renewal of debtor's contractor's license); Marine Elec. Ry. Prods. Div., Inc. v. New York City Transit Auth. (In re Marine Elec. Ry. Prods. Div., Inc.), 17 B.R. 845, 852−53 (Bankr. E.D.N.Y. 1982) (rejecting debtor's bid on basis of debtor's chapter 11 status is subject to § 525(a)); Coleman Am. Moving Servs., Inc. v. J.L. Tullos (In re Coleman Am. Moving Servs., Inc.), 8 B.R. 379, 383 (Bankr. D. Kan. 1980) (noting Air Force contracting officer violated anti−discrimination provision through denial of moving and storage contract). Back To Text

[74] See, e.g., In re Gibbs, 9 B.R. 758, 763−64 (Bankr. D. Conn. 1981) (holding city housing authority violated § 525(a) when it sought to evict debtor for not paying discharged debt). Back To Text

[75] See, e.g., In re Rose, 23 B.R. 662, 667 (Bankr. D. Conn. 1982) (holding mortgage financing by state housing agency is within § 525(a)'s coverage). Back To Text

[76] See, e.g., In re Rath Packing Co., 35 B.R. 615, 618−20 (Bankr. N.D. Iowa 1983) (violating anti−discrimination provision when State Insurance Commissioner revoked debtor's self−insurance exemption solely because of chapter 11 filing). Back To Text

[77] See, e.g., Begley v. Philadelphia Elec. Co. (In re Begley), 46 B.R. 707, 715−16 (E.D. Pa. 1984) (noting no violation when utility Commission declined to enforce utility's obligation to negotiate reasonable payment agreements with chapter 7 debtors before terminating service due to arrearages). Back To Text

[78] See, e.g., Island Club Marina, Ltd. v. Lee County (In re Club Marina, Ltd.), 38 B.R. 847, 854 (Bankr. N.D. Ill. 1984) (noting licensing agency prohibited from denying permit on sole basis of debtor's filing). Back To Text

[79] See, e.g., In re Latchaw, 24 B.R. 457, 461−62 (Bankr. N.D. Ohio 1982) (holding transit authority deemed governmental unit and would thus be enjoined from discharging debtor employees). Back To Text

[80] See, e.g., In re Haffner, 25 B.R. 882, 887−88 (Bankr. N.D. Ind. 1982) (deciding Department of Agriculture's refusal to enter into grain subsidy transaction with debtors unless allowed to setoff pre−petition unsecured debt was violation of § 525(a)). Back To Text

[81] See Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1249 (7th Cir. 1985) (stating "Congress carefully considered extending the anti−discrimination section to private entities and purposefully rejected it as being overbroad."); Barbee v. First Virginia Bank (In re Barbee), 14 B.R. 733, 735 (Bankr. E.D. Va. 1981) (deciding

Congress' rejection of § 4−508 and adoption of narrower provision indicated private entities were not within scope of § 525(a)). But see Olson v. McFarland Clinic, P.C. (In re Olson), 38 B.R. 515, 519 (Bankr. N.D. Iowa 1984) (stating "[h]owever, relying on Congress' invitation . . ., recent decisions have strongly suggested that § 525 should be construed to apply to private entities.") (emphasis added); Green v. Yang (In re Green), 29 B.R. 682, 686 (Bankr. S.D. Ohio 1983) (noting § 525(a) was violated when private entity acted as "vicarious agent" of state); In re Parkman, 27 B.R. 460, 462 (Bankr. N.D. Ill. 1983) (explaining if actions of private entity are tools to collect discharged debt then debtors cannot attain fresh start policy). Back To Text

[82] In re Long, 3 B.R. 656, 656−57 (Bankr. E.D. Va. 1980) (emphasis added) (citations omitted). Back To Text

[83] 22 B.R. 457 (Bankr. D. Mass. 1982). Back To Text

[84] 14 B.R. 733 (Bankr. E.D. Va. 1981). Back To Text

[85] See In re Amidon, 22 B.R. at 457−58 (calling employer's actions "reprehensible" and "repugnant"); In re Barbee, 14 B.R. at 736 (stating "this Court does not condone the action of the Bank in firing the Debtor, and, in fact, takes a dim view of the action . . . ."). Back To Text

[86] See In re Amidon, 22 B.R. at 457−58 (explaining there was nothing court could do since employer's actions were not actionable under §§ 525(a) or 362(a)); In re Barbee, 14 B.R. at 736 (finding lack of authority to enjoin private entities actions). Back To Text

[87] Id. Back To Text

[88] See Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1249 (7th Cir. 1985) (commenting § 525(a) specifically refers to governmental units only); In re Amidon, 22 B.R. at 457 (finding § 525(a) did not apply to management company); In re Douglas, 18 B.R. 813, 814−15 (Bankr. W.D. Tenn. 1982) (holding insurance company not governmental unit); In re Barbee, 14 B.R. at 736 (stating "[f]or this Court to enjoin a private entity based upon § 525[a] would be judicial legislation in an area which Congress has specifically considered and defined."); In re Coachlight Dinner Theatre of Nanuet, Inc., 8 B.R. 657, 658 (Bankr. S.D.N.Y. 1981) (finding private radio station did not fall within scope of § 525(a)); N. Energy Prods., Inc. v. Better Bus. Bureau of Minn., Inc. (In re Northern Energy Prods.), 7 B.R. 473, 474 (Bankr. D. Minn. 1980) (opining Better Business Bureau was private corporation not governmental unit). Back To Text

[89] 777 F.2d at 1247. Back To Text

[90] See id. at 1248. Back To Text

[91] Id. at 1249. This retroactive explanation has been met with criticism by at least one commentator. See Boshkoff, Private Parties, supra note 7, at 168 (arguing court's "statutory reasoning is quite unsatisfactory"). Back To Text

[92] See id. at 167−70 (criticizing Wilson, calling it "[t]he most egregious example of unwillingness to move beyond the precise words of [§ 525(a)]"); see also Zeiler, supra note 22, at 157 (commenting that Wilson depicts judicial reluctance "to stray beyond the exact, express words found in Section 525[a]"). Back To Text

[93] See Wilson, 777 F.2d at 1249 (agreeing with majority's approach to § 525(a)). Back To Text

[94] See supra note 61 and accompanying text. Back To Text

[95] See supra notes 81−88 and accompanying text; see also Wagner v. Piper Indus., Inc. (In re Wagner), 87 B.R. 612, 618 (Bankr. C.D. Cal. 1988) (recognizing many courts have limited § 525(a)'s application and finding cases cited by debtor in support of extending § 525(a) to private parties unpersuasive). Back To Text

[96] Pub. L. No. 98−353, 98 Stat. 333 [hereinafter "1984 Amendments"] (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.). Back To Text

[97] See Chobot, supra note 22, at 196−97 (stating any confusion over prohibition of discriminatory conduct by private employers is "rendered academic by the enactment of . . . [subsection (b)]"). Back To Text

[98] In McNeely v. Hutchinson Financial Corporation. of Augusta (In re McNeely), the court stated:

Congress attempted to remove a perceived impediment to the fresh start given debtors availing themselves of bankruptcy law's protections….Congress' purpose in doing this is abundantly clear: Detors [sic] 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.

82 B.R. 628, 632 (Bankr. S.D. Ga. 1987). See Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 679−82 (Bankr. E.D. Wis. 1987) (noting section 525(b)'s enactment was extension of anti−discrimination protections to private sector); In re Wagner, 87 B.R. at 618 (commenting that section 525(b) was later enacted due to "more general concern"); see also 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, 651 (1986) (commenting that subsection (b) was enacted to "extend the principles and objectives" of subsection (a) to private sector). Back To Text

[99] 11 U.S.C. § 525(b) (1994). Back To Text

[100] See Douglass G. Boshkoff, Debtor Protection at the Close of the Twentieth Century, 23 Cap. U. L. Rev. 379, 392 (1994) [hereinafter Boshkoff, Debtor Protection] (commenting § 525(b) leaves open issue as to types of discrimination that are barred). Back To Text

[101] Id. Back To Text

[102] See 11 U.S.C. § 525(a), (b)(1)−(3) (1994). Back To Text

[103] See In re Merriweather, 185 B.R. 235, 237 (Bankr. S.D. Tex. 1995) (remarking § 525(b) is generally applied to instances where "discrimination relates to the debtor's employment with the entity taking the action."); see also In re Briggs, 143 B.R. 438, 444−45 (Bankr. E.D. Mich. 1992) (concluding violation of § 525(b) could only arise if debtor was employee of defendant). Back To Text

[104] See In re Hardy, 209 B.R. 371, 374 (Bankr. E.D. Va. 1997) (asserting key element for section 525(b) is presence of employee−employer relationship); Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 680 (Bankr. E.D. Wis. 1987) (explaining "[i]t is therefore implicit that there be an existing employee−employer relationship between the parties."). The Madison court also clarified that the possibility of a contract between parties is not sufficient for employee−employer purposes. Id. Back To Text

[105] See In re Hardy, 209 B.R. at 375 (commenting on employee−employer relationship). Back To Text

[106] Id. See Patterson v. B.F. Goodrich Employees Fed. Credit Union (In re Patterson), 125 B.R. 40, 53 (Bankr. N.D. Ala. 1990) (embracing Congress' intent to read statutory language broadly to include discrimination in range of benefits offered by or affiliated with employer, analogizing it to intentions behind public sector prohibitions); In re Callender, 99 B.R. 378, 380 (Bankr. S.D. Ohio 1989) (extending definition of "employer" to include credit union). Back To Text

[107] 192 B.R. 401 (Bankr. E.D. Va. 1996). Back To Text

[108] See id. at 408. Back To Text

[109] See id. at 408−09 (examining other courts have applied multi−factor test in discrimination contexts). Back To Text

[110] Spirides v. Reinhardt, 613 F.2d 826, 831−32 (D.C. Cir. 1979). Back To Text

[111] See Fiorani, 192 B.R. at 409 (stating "the right to control the individual's work remains the most important factor, but is alone not dispositive."); see also Spirides, 613 F.2d at 831 (describing application of multi−factor test in that "[c]onsideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative."). Back To Text

[112] Fiorani, 192 B.R. at 409 (listing all relevant factors to be applied in multi−factor test) (quoting Spirides, 613 F.2d at 832). Back To Text

[113] See McGill, supra note 98, at 651−52 (opining that "private employer" must "by necessity" mean non−governmental unit); see also S. Rep. No. 95−989, at 24 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5810 (indicating governmental unit does not include those entities owing their existence to State action); see also H.R. Rep. No. 95−595, at 311 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6268 (stating same). Back To Text

[114] See supra note 88 and accompanying text. Back To Text

[115] 11 U.S.C. § 101(41) (1994) defines a "person" to include:

individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

A. acquires an asset from a person—
   i. as a result of the operation of a loan guarantee agreement; or
   ii. as a receiver or liquidating agent of a person;
B. is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or
C. is the legal or beneficial owner of an asset of—
   i. an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or
   ii. an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit[.]

Id. Back To Text

[116] 77 B.R. 678 (Bankr. E.D. Wis. 1987). Back To Text

[117] Id. at 680 (stating "Congress clearly did not intend the term 'corporate debtor' to be used interchangeably with the term 'individual debtor,' as such a construction would render meaningless employment by Congress of the term 'individual'.") (quoting Yamaha Motor Corp. v. Shadko, Inc., 762 F.2d 668, 670 (8th Cir. 1985)). Back To Text

[118] See Leonard v. St. Rose Dominican Hosp. (In re Majewski), 258 B.R. 459, 461 (D. Nev. 2001) (refusing to apply section 525(b) to individuals who had not yet filed bankruptcy when alleged discrimination occurred); see also Kanouse v. Gunster, Yoakley & Stewart, P.A. (In re Kanouse), 168 B.R. 441, 447 (S.D. Fla. 1994) (holding same), aff'd, 53 F.3d 1286 (11th Cir.), cert. denied, 516 U.S. 930 (1995). Contra Tinker v. Sturgeon State Bank (In re Tinker), 99 B.R. 957, 960 (Bankr. W.D. Mo. 1989) (concluding "will be" debtors can benefit from § 525(b)). Back To Text

[119] See In re Tinker, 99 B.R. at 960 (stating § 525(b) applies to future debtors). Back To Text

[120] Id. Nevertheless, the court denied the relief sought because it concluded from the evidence that the plaintiff would have been fired regardless of her filing. Id. at 960−61. Back To Text

[121] See In re Kanouse, 168 B.R. at 447 (disagreeing with Tinker court's use of "questionable legislative history" rather than "unambiguous language of § 525(b)."") (citing Kanouse v. Gunster, Yoakley & Stewart, P.A. (In re Kanouse), 153 B.R. 81, 83 (Bankr. S.D. Fla. 1993)). Back To Text

[122] See id. (noting "one 'who is or has been a debtor' is afforded protection under 11 U.S.C. § 525(b)" but remedy does not exist in statute for "'will be' debtors."); In re Majewski, 258 B.R. at 460 (interpreting subsection (b) liberally to include "will be" debtors would negate plain meaning). Back To Text

[123] In re Rath Packing Co., 35 B.R. 615, 619 (Bankr. N.D. Iowa 1983); see also Bell v. Sanford−Corbitt−Bruker, Inc., No. CV186−201, 1987 WL 60286, at *3 (S.D. Ga. Sept. 14, 1987) (opining word "solely" as used is ambiguous). The use of "solely" has drawn criticism, for it "raises the possibility that discriminatory acts will be justified by related factors outside the specific terms of the subsections." 3 Norton Bankruptcy Law and Practice 2d § 50:2, at 50−6 (William L. Norton, Jr., et al. eds. 1998). Back To Text

[124] See Sweeney v. Ameritrust Co., N.A. (In re Sweeney), 113 B.R. 359, 362 (Bankr. N.D. Ohio 1990) (noting § 525's "solely because" has been given range of constructions); In re Rath Packing Co., 35 B.R. at 619 (stating same). But see Martin v. Boyce, No. 1:99CV01072, 2000 WL 1264148, at *8 (M.D.N.C. July 20, 2000) (stating "[t]hat provision means what it says"); Everett v. Lake Martin Area United Way, 46 F. Supp. 2d 1233, 1237 (M.D. Ala. 1999) (finding "the term 'solely' as used in the statute means what it says"). Back To Text

[125] Shade v. Fasse (In re Fasse), 40 B.R. 198, 201 (Bankr. D. Colo. 1984) (stating "if the only reason for suspension or revocation of the license is a debt discharged in bankruptcy, such action would be in direct contravention of section 525."); Gibbs v. Hous. Auth. (In re Gibbs), 9 B.R. 758, 763−64 (Bankr. D. Conn. 1981) (finding where "[housing authority] expressly admits that the only reason it is seeking to evict [the debtor] is the nonpayment of $74.00" discharged in bankruptcy "an obvious example of discrimination is presented"). Some courts have used "sole reason" in lieu of "solely because." See Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1269 (9th Cir. 1990) (stating "[i]n order to maintain a cause of action under § 525(b), a plaintiff must show that one of the reasons for discharge enumerated in § 525(b) provided the sole reason for termination."); Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 23 (1st Cir. 1989) (affirming "a fundamental element of a § 525(b) claim is that the insolvency, the filing of bankruptcy, or the discharge of a debt is the sole reason for discriminatory treatment by an employer."); Thomas v. Dennis Real Estate, Inc., Civ. A. No. 89−1888, 1989 WL 114165, at *1 (E.D. Pa. Sept. 29, 1989) (stating same); In re Sweeney, 113 B.R. at 362−63 (stating same); Stockhouse v. Hines Motor Supply (Wyoming), Inc., 75 B.R. 83, 85 (Bankr. D. Wyo 1987) (finding "plaintiff's claim is defeated by a showing that his bankruptcy status was not the sole reason for his termination."). Back To Text

[126] In re Richardson, 27 B.R. 560, 565 (Bankr. E.D. Pa. 1982) (holding state loan agency "had reason independent of [debtor's] bankruptcy or the discharge of a previous loan to warrant investigation" of his future financial responsibility). Back To Text

[127] In re Maley, 9 B.R. 832, 833 (Bankr. W.D.N.Y. 1981) (finding liquor authority's primary reason for refusing debtor his license was earlier bankruptcy and current chapter 11 status and "other reasons advanced by the [authority] for refusing to issue the license appear to be de minimis."). Back To Text

[128] Rose v. Connecticut Hous. Fin. Auth. (In re Rose), 23 B.R. 662, 668 n.8 (Bankr. D. Conn. 1982) (noting, but refusing to adopt, debtor's broad construction of "solely" to mean "primarily" or "predominately"). Back To Text

[129] Anderson v. Mississippi State Tax Comm'n (In re Anderson), 15 B.R. 399, 400 (Bankr. S.D. Miss. 1981) (finding debtor's permit would not be renewed "[p]rimarily due to [their] indebtedness" and fact they were currently under chapter 11). "Solely due to" has also been utilized by the courts. See Whittaker v. Philadelphia Elec. Co. (In re Whittaker), 882 F.2d 791, 793 n.1 (3d Cir. 1989) (noting debtor could maintain suit as class action on behalf of those "who have had utility service terminated solely due to nonpayment of pre−petition bills…"); Smith v. St. Louis Hous.

Auth. (In re Smith), 259 B.R. 901, 904 n.5 (B.A.P. 8th Cir. 2001) (stating "the bankruptcy court necessarily and implicitly determined that the termination was not due solely to nonpayment of the debt."). Back To Text

[130] William Tell II, Inc. v. Illinois Liquor Control Comm'n (In re William Tell II, Inc.), 38 B.R. 327, 331 (N.D. Ill. 1983) (affirming bankruptcy court holding "that the Commission discriminated against [debtor] because the primary purpose for revoking and not renewing [his] license was [his] failure to pay certain taxes."). Back To Text

[131] In re Hopkins, 81 B.R. 491, 493 (Bankr. W.D. Ark. 1987) (stating "the evidence is clear that but for the filing of bankruptcy" debtor would have been hired in capacity sought). Back To Text

[132] Lambillotte v. Charlotte County (In re Lambillotte), 25 B.R. 392, 394 (Bankr. M.D. Fla. 1982) (finding "no doubt that the [commissioners] were primarily concerned with the status of the Debtor's prior obligations."). Back To Text

[133] In re Bobbitt, 174 B.R. 548, 552 (Bankr. N.D. Cal. 1993) (implementing "solely on the ground of" in its reasoning); In re Brown, 95 B.R. 35, 37 (Bankr. E.D. Va. 1989) (stating Credit Union may not discriminate against debtor based solely on ground of bankruptcy); In re Lambillotte, 25 B.R. at 393−94 (holding Charlotte County Building Board's denial of debtor's attempt to renew his building contractor's license was based on debtor's previous insolvency and inability to pay prior debts and therefore resulted in unlawful discrimination). Back To Text

[134] Hinders v. Miami Valley Reg'l Transit Auth. (In re Hinders), 22 B.R. 810, 812 (Bankr. S.D. Ohio 1982) (explaining "[a] state cannot revoke or refuse to renew a driver's license only because of a judgment for damages discharged in bankruptcy."). Back To Text

[135] Pennsylvania Pub. Util. Comm'n v. Metro Transp. Co. (In re Metro Transp. Co.), 64 B.R. 968, 975 (Bankr. E.D. Pa. 1986) (explaining because it is unlikely governmental body aware of § 525(a) will concede it acted solely on basis of bankruptcy filing, such actions by a governmental body are governed by § 525(a)). Back To Text

[136] In re Son−Shine Grading, Inc., 27 B.R. 693, 695 (Bankr. E.D.N.C. 1983) (remarking "if a contractor can meet all biding requirements of other contractors except for the fact that it has a bankruptcy petition pending, then it becomes very apparent that the [state] is arbitrarily assuming that a bankrupt debtor cannot meet its reasonable requirements for bidding on state highway projects."). Back To Text

[137] Martin v. Boyce, No. 1:99CV01072, 2000 WL 1264148, at *8 (M.D.N.C. July 20, 2000):

[Section 525(b)] only applies to discrimination that takes place "solely because" of the debtor's or bankrupt's status. That provision means what it says: a plaintiff attempting to proceed under section 525(b) must allege, and ultimately prove, that his status was the sole and exclusive reason that he was terminated or otherwise mistreated.

Id. (emphasis added). Back To Text

[138] 64 B.R. 968, 969−70 (Bankr. E.D. Pa. 1986) (involving public utility company's denial of self insurance to debtor). Back To Text

[139] See id. at 975. Back To Text

[140] Id. Back To Text

[141] No. CV186−201, 1987 WL 60286, at *2−4 (S.D. Ga. Sept. 14, 1987) (involving § 525(b) case where debtor was discharged by employer/creditor three days after debtor filed for chapter 13). Back To Text

[142] Id. at *4 (finding "'significant role' to be consistent with a 'but for' analysis."); see also Tinker v. Sturgeon State Bank (In re Tinker), 99 B.R. 957, 960 (Bankr. W.D. Mo. 1989) (considering in detail "but for" analysis set out in Bell v. Sanford−Corbitt−Bruker, Inc.). Back To Text

[143] Bell, 1987 WL 60286, at *3. Back To Text

[144] See id. at *4. The court actually analogized the burden of proof in § 525(b) cases to discriminatory cases involving race, color, religion, sex or national origin. Id. Back To Text

[145] See Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 23 (1st Cir. 1989). Back To Text

[146] Id. at 21. The court declined to follow Bell's reasoning. Id. at 23. The Bell court stated that "in the absence of authority in the context of § 525(b),…the burden of proof allocations for proving a discriminatory discharge due to bankruptcy should be framed by analogy to race, color, religion, sex, or national origin cases." Bell, 1987 WL 60286, at *4. Back To Text

[147] Laracuente, 891 F.2d at 23 (citing Irons v. F.B.I., 880 F.2d 1446, 1449 (1st Cir. 1989) (en banc)). Back To Text

[148] Id. at 23 (describing standard applied by court). Back To Text

[149] Id. Back To Text

[150] 75 B.R. 83 (D. Wyo. 1987). Back To Text

[151] See id. at 85 (listing complaints in regards to debtors work performance). Back To Text

[152] Id. (emphasis added). Back To Text

[153] See id. (stating plaintiff must prove he was fired solely because he filed bankruptcy). Back To Text

[154] See Daniel L. Keating, Bankruptcy and Employment Law § 6.2.6, at 361 (1995) (stating "[t]he relevant inquiry is not what the defendant concedes, it is what the evidence shows."). Back To Text

[155] See id. See generally Everett v. Lake Martin Area United Way, 46 F. Supp. 2d 1233, 1237 (M.D. Ala. 1999) (stating employer's employment decisions lacking supporting evidence infers reasons given were merely "pretext for unlawful activity"). Back To Text

[156] See Hicks v. First Nat'l Bank of Harrison (In re Hicks), 65 B.R. 980, 983 (Bankr. W.D. Ark. 1986) (determining plaintiff presented sufficient evidence to support finding of discrimination based on bankruptcy status). Back To Text

[157] See In re Hopkins, 66 B.R. 828, 833 (Bankr. W.D. Ark. 1986) (recognizing at least satisfactory job performance on part of debtor and finding no suggestion of any misappropriation of money or other employee misconduct). Back To Text

[158] See id. at 832−33 (characterizing debtor as honest and well−respected individual and employee). Back To Text

[159] See Sweeney v. Ameritrust Co., N.A. (In re Sweeney), 113 B.R. 359, 361 (Bankr. N.D. Ohio 1990) (establishing disclosure of debtor's bankruptcy filing during meeting held on December 3rd and termination of debtor's employment occurred following day). Back To Text

[160] See id. at 363 (determining sole reason for debtor's termination of employment was his financial condition). Back To Text

[161] See In re Rath Packing Co., 35 B.R. 615, 619 (Bankr. N.D. Iowa 1983) (concluding alternative reasons offered by employer lacked credibility when weighed against entire pool of evidence); Keating, supra note 154, § 6.2.6, at 361; Bronheim, supra note 69, at 606 (recognizing some courts require close examination of facts to discover and overcome pretextual defenses proffered by employer). Back To Text

[162] 891 F.2d 17, 23 (1st Cir. 1989) (analyzing § 525(b) under plain meaning and broad construction approach). Back To Text

[163] Id. at 24 (finding undisputed evidence presented by employer clearly showed bankruptcy status was not sole reason for termination of debtor's employment). Back To Text

[164] See 11 U.S.C. § 525(a) (1994). Back To Text

[165] See 11 U.S.C. § 525(b) (1994). Back To Text

[166] See Chobot, supra note 22, at 197 (remarking there is scant legislative history); Zeiler, supra note 22, at 160 (stating no legislative history to help). Back To Text

[167] See Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 682 (Bankr. E.D. Wis. 1987) (noting omission of this language "cannot be ignored"). Back To Text

[168] Chobot, supra note 22, at 197. Back To Text

[169] 710 F.2d 1194, 1197−98 (6th Cir. 1983) (refusing to grant chapter 11 debtors' co−defendants automatic stay under 11 U.S.C. § 362). Back To Text

[170] See id. at 1197−98 (comparing chapter 13's automatic stay provision with that of chapter 11, and concluding because chapter 13 grants automatic stays to debtors' co−defendants while chapter 11 is silent, Congress's intent must have been to deny automatic stays to co−defendants of chapter 11 debtors). Back To Text

[171] See Zeiler, supra note 22, at 160 (stating omissions cause problems for debtors). Back To Text

[172] 186 B.R. 553, 553 (D. Mass. 1995) (noting plaintiff sued defendant for discrimination and for intentional infliction of emotional distress caused by its refusal to hire her because of prior bankruptcy). Back To Text

[173] See id. at 554. Back To Text

[174] See id. (stating defendant argued because "deny employment to" is omitted from 11 U.S.C. § 525(b), statute does not apply to hiring decisions by private employers). Back To Text

[175] Id. (noting plaintiff cited no authority in support of her argument). Back To Text

[176] See id. at 554−55 (opining plaintiff's position would be stronger if subsection (b) referred solely to "discrimination with respect to employment," but mentioning discrimination in terminating employment, without mentioning employment's inception, suggests intentional omission). Back To Text

[177] Id. at 555. Back To Text

[178] Pastore v. Medford Sav. Bank, 186 B.R. 553, 555 (D. Mass. 1995) (quoting J. Ray McDermott & Co., Inc. v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir. 1972)). Back To Text

[179] See Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 680 (Bankr. E.D. Wis. 1987) (holding § 525(b) did not apply because in its prohibition against discrimination by private employers is implicit requirement of existing employer−employee relationship, and because plaintiff is corporation, and § 525(b) can only be invoked by individuals). Back To Text

[180] In re Hopkins, 81 B.R. 491, 494 (Bankr. W.D. Ark. 1987) (emphasis added). Back To Text

[181] Fiorani v. Caci, 192 B.R. 401, 405−06 (Bankr. E.D. Va. 1996). Back To Text

[182] Id. at 405. Back To Text

[183] See id. (citing Russello v. United States, 464 U.S. 16, 23 (1983)). Back To Text

[184] Id. (citations omitted). Back To Text

[185] See Leary v. Warnaco, Inc., 251 B.R. 656, 658−59 (S.D.N.Y. 2000) (holding language of § 525(b) prohibiting employer from discriminating "with respect to employment" is broad enough to include discriminating with respect to extending offer of employment). Back To Text

[186] The plaintiff filed her voluntary petition under chapter 7 of the Bankruptcy Code on December 17, 1998 and received her discharge on April 20, 1999. Id. at 657. Back To Text

[187] See id. (explaining plaintiff interviewed defendant and participated in second interview on June 23, 1999 at which defendant's president of intimate apparel offered plaintiff position, which was to start on July 26, 1999, subject to results of credit report). Back To Text

[188] Id. (indicating plaintiff was informed of rejection by letter on August 4, 1999. Credit report revealed bankruptcy without mention of plaintiff's conduct or character). Back To Text

[189] See id. (asserting in addition claim for intentional infliction of emotional distress under New York law. Plaintiff moved to amend complaint, but motion was denied). Back To Text

[190] Leary v. Warnaco, Inc., 251 B.R. 656, 658 (S.D.N.Y. 2000) (explaining it is for this reason plaintiff sought to amend complaint to assert employment offer was unconditional rather than "subject to"). Back To Text

[191] See id. at 659 (explaining mere ordering of credit report followed by denial of applicant does not compel inference of discrimination). Back To Text

[192] See id. at 658. For a discussion of the cases reviewed by the district court see supra notes 172−84 and accompanying text. Back To Text

[193] Leary, 251 B.R. at 658 (emphasis added). Back To Text

[194] See supra notes 172−84 and accompanying text. Back To Text

[195] Leary, 251 B.R. at 658−59 (first and second emphasis added) (citations omitted). Back To Text

[196] See id. Back To Text

[197] See Leary, 251 B.R. at 658. See generally Chobot, supra note 22, at 198 (stating if argument is made based lack of "deny employment to" language then potential counter−argument might be "discriminate with respect to employment"). But see Zeiler, supra note 22, at 160 (commenting such argument has done little to persuade courts). Back To Text

[198] Fiorani v. Caci, 192 B.R. 401, 404−05 (E.D. Va. 1996). Back To Text

[199] In re Briggs acknowledged that "[g]iven the text of the statute, the quoted language could plausibly be interpreted as referring only to employment (past, present or prospective) with the party taking the discriminatory action . . . ." 143 B.R. 438, 444 (Bankr. E.D. Mich. 1992). "Prospective," as used in In re Briggs, suggests that section 525(b) would include hiring decisions. The court's statement, "[e]ntities who . . . have an opportunity to deny employment to . . . debtors based solely on the fact of bankruptcy," also furthers such a notion. Although the court did not explicitly mention the implications of hiring under section 525(b), the court restricts the scope of "with respect to" only where there is an employee−employer relationship present. Id. (concluding section 525(b) is violated "only if it relates to the

debtor's employment with the entity taking the action."). Back To Text

[200] Pastore v. Medford Sav. Bank, 186 B.R. 553, 554 (D. Mass. 1995). Back To Text

[201] See id. at 554−55. Back To Text

[202] At least one commentator has expressed an emphasis for a liberal construction of section 525(b) as well. See Boshkoff, Bankruptcy−Based, supra note 6, at 395−97. Back To Text

[203] See Leary v. Warnaco, 251 B.R. 656, 658 (S.D.N.Y. 2000) (couching its discrimination rationale in furtherance of section 525(b)'s fresh start goals). Back To Text

[204] Id. Back To Text

[205] Id. Back To Text

[206] Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 681 (Bankr. E.D. Wis. 1987). Back To Text

[207] Id. Back To Text

[208] Id. Back To Text

[209] Boshkoff, Bankruptcy−Based, supra note 6, at 395−96. Back To Text

[210] Fiorani v. Caci, 192 B.R. 401, 406 (Bankr. E.D. Va. 1996). Back To Text

[211] See id. Back To Text

[212] See id. Back To Text

[213] Fiorani, 192 B.R. at 407. Back To Text

[214] Id. Back To Text

[215] See Pastore v. Medford Sav. Bank, 186 B.R. 553, 554−55 (D. Mass. 1995); Madison Madison Int'l of Illinois, P.C. v. Matra, S.A. (In re Madison Madison Int'l of Illinois, P.C.), 77 B.R. 678, 682 (Bankr. E.D. Wis. 1987) (noting omission of this language "cannot be ignored"); In re Hopkins, 81 B.R. 491, 494 (Bankr. W.D. Ark. 1987) (precluding employer "from refusing to hire, or promote as the case may be, the debtor solely because of her bankruptcy, once an offer for full−time employment has been extended and accepted.") (emphasis added). Back To Text

[216] In re Madison Madison Int'l of Illinois, P.C., 77 B.R. at 681. Back To Text

[217] 502 U.S. 410, 417−18 (1992). Back To Text

[218] Id. at 414−15. Justice Scalia referred to the "term−by−term" approach a "one−subsection−at−a−time approach to statutory exegesis." Id. at 423 (Scalia, J., dissenting). Back To Text

[219] See id. at 416 (arguing "that pre−Code bankruptcy law preserved liens like respondents' and that there is nothing in the Code's legislative history that reflects any intent to alter that law."). Back To Text

[220] See id. at 417. Under the "term−by−term" method, the Court would construe any claim, first as allowed and then as secured. See id. at 415. Back To Text

[221] Id. at 417. Back To Text

[222] See supra Part I (discussing fresh start policy). Back To Text

[223] See Leary v. Warnaco, Inc., 251 B.R. 656, 658 (S.D.N.Y. 2000) (discussing two component parts of § 525(b)). Back To Text

[224] See id. at 658−59 (concluding "with respect to employment," "includes by its plain meaning all aspects of employment including hiring, firing and material changes in job conditions."). Back To Text

[225] Dewsnup v. Timm, 502 U.S. 410, 420 (1992) (noting Justice Souter joined in dissent). Back To Text

[226] See id. at 420−21 (Scalia, J., dissenting) (stating "[w]hen section 506(d) refers to an 'allowed secured claim,' it can only be referring to that allowed 'secured claim' so carefully described two brief subsections earlier."). Back To Text

[227] Id. at 422 (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)). Back To Text

[228] Id. Back To Text

[229] Id. at 425−26 (emphasis added). Back To Text

[230] Id. at 434. Back To Text

[231] See supra Part III. Back To Text

[232] See Fiorani v. Caci, 192 B.R. 401, 404−05 (Bankr. E.D. Va. 1996). Back To Text

[233] See supra note 229 and accompanying text. Back To Text

[234] See supra note 230 and accompanying text. Back To Text

[235] 504 U.S. 753 (1992). Back To Text

[236] See id. at 756−59. Back To Text

[237] See id. at 758. Back To Text

[238] Id. Back To Text

[239] See Fiorani v. Caci, 192 B.R. 401, 405 (E.D. Va. 1996) (stating "it is well established that where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.'"). Back To Text