Third Circuit Rules that Private Employers May Discriminate Against Applicants on Basis of Prior Bankruptcy

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Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Uniformed Services Employment and Reemployment Rights Act, and the Age Discrimination in Employment Act are widely known as the primary federal laws governing employment discrimination. Many employers are surprised to learn that the U.S. Bankruptcy Code also contains employment discrimination provisions. Section of 525 of the Code prohibits certain types of employment discrimination against individuals who have claimed bankruptcy. However, this obscure provision is rarely the subject of lawsuits and, consequently, there is little guidance from federal courts as to its meaning. In *Rea v. Federated Investors*, the U.S. Court of Appeals for the Third Circuit considered the fundamental question of whether Section 525 prohibits a private sector employer from discriminating against a job applicant in the hiring process on the basis of his prior bankruptcy.

Mr. Rea applied for employment with Federated Investors in 2009 through a placement firm and, after a successful interview, was informed that he would not be hired due to a 2002 bankruptcy. Rea filed suit in federal court claiming that Federated discriminated against him in violation of Section 525 of the Bankruptcy Code.

Section 525(a) of the Code states that it is unlawful for any "governmental unit…[to]…deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under [the Code]" solely because the individual has been a debtor under the Code, has been insolvent or has not paid a debt that is dischargeable under the Code. Clearly, a government employer could not have refused Mr. Rea employment solely on the basis of his prior bankruptcy without violating Section 525(a). However, as a private sector employer, Federated was governed by Section 525(b) of the Code.

Section 525(b) of the Code, unlike subsection (a), makes no mention of "denying employment to" an individual who has declared bankruptcy. Section 525(b) reads: "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 [the Code]" solely because the individual has been a debtor under the Code, has been insolvent or has not paid a debt that is dischargeable under the Code.

The issue presented in the Rea case was whether 525(b) could be interpreted to prohibit private employers from discriminating against job applicants on the basis of prior bankruptcies.

Mr. Rea argued that Section 525(b)'s prohibition against "discriminat[ion] with respect to employment against" individuals who have filed for bankruptcy should be interpreted to protect job applicants. However, the Third Circuit noted 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 acts intentionally and purposely…" Since Section 525(a) specifically includes "denying employment to" individuals as unlawful discrimination – and 525(b) does not - the Court concluded that private sector employers are not prohibited from discriminating against applicants on the basis of prior bankruptcies.

This recent decision may come as particularly welcome news for employers in the financial services industries who may be reluctant to employ individuals with multiple prior bankruptcies. Although the Rea decision certainly gives private sector employers greater flexibility in the hiring process, it is important to remember that terminating or discriminating against a current employee solely on the basis of a prior bankruptcy remains unlawful.