Third Circuit Holds That Private Employers Are Not Prohibited By The Bankruptcy Code From Denying E

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KEY POINTS:

- A private employer is not prohibited under §525(b) of the Bankruptcy Code from refusing to hire an individual simply because he or she previously filed for bankruptcy.
- Public entity employers, however, are prohibited by §525(a) of the Bankruptcy Code from denying employment to an individual because he or she previously filed for bankruptcy.
- Public entity employers should not make inquiry as part of a prospective employee's application or interview process of whether he or she previously filed for bankruptcy, as even making the inquiry may be considered discriminatory and in violation of §525(a) of the Bankruptcy Code.

In *Rea v. Federated Investors*, 627 F.3d 937 (3rd Cir. 2010), the United States Court of Appeals for the Third Circuit considered whether an individual can maintain a cause of action against a private employer who refused to hire him because he had previously declared bankruptcy. Rea filed for bankruptcy in 2002, and his debts were discharged in 2003. In 2009, Rea applied for employment with Federated Investors through an independent placement firm. After Rea interviewed for the position, the placement firm informed Rea that Federated Investors had refused to hire him because of his prior bankruptcy.

Rea brought suit in federal district court against Federated Investors under §525 of the Bankruptcy Code, which prohibits discrimination against an individual solely because he or she is or has been a debtor or bankrupt. Section 525(b) in pertinent part provides that no private employer may terminate the employment of, or discriminate with respect to the employment against, an individual who is or has been a debtor or bankrupt under the Bankruptcy Code, solely because the individual: (1) is or has been a debtor under the Bankruptcy Code; (2) has been insolvent before the commencement of a case under the Bankruptcy Code; or (3) has not paid a debt that is dischargeable in a case under the Bankruptcy Code.

Federated Investors moved to dismiss Rea's action, arguing that §525(b) does not prohibit a private employer from refusing to hire an individual because that individual has claimed bankruptcy. Rea, in response, argued the court was required to read §525(b) broadly to effect its remedial purpose, and under this expansive reading of the statute, Rea contended that §525(b) does in fact include such a prohibition. In considering Federated Investor's motion, the district court examined and compared the language of §525(b) to the language of §525(a), which applies to public entity employers only and which specifically prohibits a public entity employer from denying employment to an individual who has been a debtor or bankrupt. The district court granted Federated Investor's motion, reasoning that in light of the plain language of §525(b), Congress "clearly opted" to exclude the prohibition against denying employment found in §525(a) as it applies to public entity employers.

On appeal, the Third Circuit affirmed, reasoning that the language in §525(b) was plain and that the "sole function of the court is to enforce it according to its terms." The Third Circuit noted that although §525(b) was enacted years after §525(a), its language regarding employment discrimination is nearly identical to that used in §525(a) and that Congress chose to place the two subsections adjacent to each other in the Bankruptcy Code. The Third Circuit reasoned, "It is abundantly clear that Congress modeled §525(b) off of §525(a) and that any differences between the two are a result of Congress acting intentionally and purposefully." The Third Circuit pointed out that in §525(b), Congress omitted the language prohibiting a private employer from "deny[ing] employment to" a person who has been bankrupt and noted that it viewed the difference in language between the two subsections as purposeful, and not a "simple mistake in draftsmanship." Thus, the Third Circuit concluded the district court properly denied Rea's request to read the phrase "discrimination with respect to employment" in §525(b) as broad enough to encompass discrimination in denying employment.

Rea is significant for both public entity and private employers, as well as to attorneys who represent clients in employment practices liability matters. While the Third Circuit made clear that private employers are not prohibited under §525(b) of the Bankruptcy Code from refusing to hire an individual who previously filed for bankruptcy simply because that person filed for bankruptcy, the court also reaffirmed that public entity employers, on the other hand, cannot deny employment on that basis alone. Thus, when counseling a client on its employment practices, it is important to be mindful of the provisions of both §525(a) and §525(b) of the Bankruptcy Code and to be cognizant that based upon the status of that particular employer, whether public or private entity, the employer must consider carefully before declining to hire an individual to a position of employment simply because he or she previously filed for bankruptcy.

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