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ABSTRACT

This Note explores an increasingly perverse effect of an anti-discriminatory provision of the Bankruptcy Code on numerous Americans who have declared personal bankruptcies after the recent economic recession of 2007. Under § 525(b) of the Bankruptcy Code, a private employer is not prohibited from barring a former debtor from prospective employment based on a past insolvency. This provision has had an immense impact on the large number of former debtors seeking the fresh start that bankruptcy law is meant to provide. With the dramatic increase in the number of personal bankruptcies, this Note argues that such an impact is overly punitive on the current debtor within the context of bankruptcy law policy.

This Note also examines how § 525(b) has a disproportionate effect on older populations since the largest constituent of those who have filed for personal bankruptcy since 2007 have been older workers. This unintended effect directly undermines Congress's recent efforts to protect older workers in the workplace, such as the through the Age Discrimination in Employment Act. This Note proposes a number of solutions to § 525(b)'s adverse effect on debtors through legislative amendment rather than judicial interpretation. The recent increase in the practical importance of bankruptcy protection must be paralleled with the meaningful and consistent application of its policies.

INTRODUCTION

In 2009, Dean Rea interviewed for the position of project manager at Federated Investors through a placement firm.[1] Rea had filed for bankruptcy in 2002, and had received a discharge of his debts in 2003.[2] Following the interview, Rea's placement firm informed Rea that the employer wanted to hire him, his start date would be August 24, 2003, and his salary would be $80,000.[3] Rea accepted the job offer with the understanding that he would first have to pass criminal and credit history checks.[4] Upon

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[1] Rea v. Federated Investors, 431 B.R. 18, 20 (W.D. Pa. 2010).
[2] *Id.*
[3] *Id.*
[4] *Id.*

disclosing his past bankruptcy, the placement firm informed Rea that the employer considered the bankruptcy to be a "deal killer" and that he would not be hired at all.[5]

Rea sued the employer for bankruptcy discrimination under § 525(b) of the U.S. Bankruptcy Code,[6] which prohibits a private employer from terminating the employment of, or discriminating with respect to, employment against an individual who is or has been a debtor under the Bankruptcy Act.[7] However, the district court dismissed the claim and held that § 525(b) does not forbid a private employer from refusing to hire a job applicant solely because the applicant had filed for bankruptcy in the past. The court reasoned that while § 525(b) prevents employers from discriminating against *current* employees based upon a bankruptcy filing, the language of the section does not prohibit bankruptcy discrimination in the hiring process of prospective employees.[8]

The *Rea* court's decision is the prevalent interpretation of § 525(b) today. Currently, anti-discrimination provisions of the Bankruptcy Code do not prohibit private employers from taking into account a job applicant's past financial history or past bankruptcy in denying employment to an applicant as long as it was not "solely because" of the bankruptcy. In practice, this means that as long as the employer can assert *any* alternative reason for denying employment to a former debtor, the employer is not liable for discrimination against the debtor under the statute.[9] The adverse effect of this provision on a debtor's employment opportunities has been exacerbated by the recent economic recession since it is more likely today that a prospective job applicant will have filed for bankruptcy in the past.

The United States entered an economic recession[10] in December 2007.[11] News headlines for the several years since then have overwhelmingly focused on the recent economic recession and its alarming results on unemployment rates, poor fiscal management, mounting debts, and impatient creditors.[12] For example, the unemployment

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[5] *Id.*
[6] 11 U.S.C. § 525(b) (2011).
[7] *Rea*, 431 B.R. at 20.
[8] *Id.* at 21–23.
[9] The practice of employer use of past financial history and credit history checks as a job criterion or investigative tool has become increasingly widespread. *See* Adam T. Klein et al., *Employer Credit-History Checks and Criminal Record Checks of Job Applicants for Hiring Decisions: The Illegality Under Title VII Disparate Impact Doctrine*, OUTTEN & GOLDEN LLP, 1 (May 3, 2007), http://www.outtengolden.com/files/Klein_EEOC_Testimony_final.pdf (citing a 2004 study by the Society of Human Resource Management that found that "[m]ore employers [we]re using credit checks in 2003 (35%) compared to in 1996 (19%)" as a way to "investigate the backgrounds of potential employees").
[10] A recession is a period of time between a peak and a trough in the business cycle. During a recession, which can last a few months or even for more than a year, the rate of economic activity declines significantly across the economy. *See generally* NATIONAL BUREAU OF ECONOMIC RESEARCH, www.nber.org (last visited Oct. 10, 2011).
[11] LESLIE E. LINFIELD, 2009 ANNUAL CONSUMER BANKRUPTCY DEMOGRAPHICS REPORT: AMERICAN DEBTORS IN A RECESSION, INSTITUTE FOR FINANCIAL LITERACY, 1 (June 2010), *available at* http://www.financiallit.org/PDF/2009_Demographics_Report.pdf.
[12] The Business Cycle Dating Committee of the National Bureau of Economic Research determined that "a trough in business activity" which occurred in the U.S. economy in June 2009 marked the end of the recession. The Committee also determined that the recession was the "longest of any recession since World War II." *See* Press Release, Business Cycle Dating Committee (Sept. 20, 2010), *available at* http://www.nber.org/cycles/sept2010.pdf.

rate dramatically increased from 5.0% in January 2008 to 9.1% in September 2011.[13] All of these factors have unsurprisingly translated into a significant increase in the number of personal bankruptcy filings as more debtors find themselves out of a job and unable to pay their creditors.[14]

In August 2010, the Administrative Office of the U.S. Courts reported that bankruptcy filings rose 20% in the twelve-month period ending June 30, 2010,[15] and that a total of 1,572,597 bankruptcy cases were filed in the federal courts during that period.[16] This was an increase from 2009, where approximately 1.4 million bankruptcy petitions were filed by individuals with predominantly non-business debt, a dramatic increase of 32% over the number of filings in 2008.[17] Moreover, studies show that an increasing proportion of those who have filed for personal bankruptcy since the economic recession has ensued have been older workers. This is particularly alarming, as studies show that older workers face more difficulty in finding employment than do younger workers.

With the recession barely at our heels, it is more likely than ever that today's prospective job applicant will have filed for bankruptcy in the past, and that such an applicant is an older worker. This Note argues that anti-discrimination provisions of the Bankruptcy Code for private employers, as they stand, are now overly punitive to the debtor job applicant and inconsistent with the "fresh start" principles that first engendered and underlie bankruptcy law. This Note also examines whether the anti-discrimination provisions for private employers under § 525(b) have a disproportionate impact on older populations, who increasingly constitute a larger number of those filing for bankruptcy. This effect undermines congressional attempts to protect older workers through other legislative provisions, such as the Age Discrimination in Employment Act. Finally, this Note seeks to examine the anti-discrimination statute under § 525(a), which prohibits bankruptcy discrimination by public employers, and then § 525(b), and how its provisions currently affect the debtor who has been denied employment based on insolvency. This discussion will illustrate the policy implications that render a need for reform.

Part I of this Note focuses on the "fresh start" policy of bankruptcy law and the historical development of bankruptcy discrimination protection. Part II examines the current state of bankruptcy discrimination protection and courts' difficulties finding a workable approach to applying § 525(b) for private employers. Part III reviews Congress's recent efforts to protect older workers and argue that § 525(b)'s provisions run counter to these efforts by having an exacerbated effect on older workers. Part IV examines the arguments that seek to justify employer discrimination based on financial

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[13] *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://data.bls.gov/timeseries/LNS14000000 (last visited Oct. 25, 2010).

[14] From 2008 to 2009, the percentage of debtors seeking bankruptcy protection increased more for unemployed individuals than for those who were retired, employed, or self-employed. Therefore, it appears that the higher rate of unemployment during the recession took its toll as more unemployed individuals filed for bankruptcy. LINFIELD, *supra* note 11, at 11.

[15] *Bankruptcy Statistics, Filings,* ADMIN. OFF. OF THE U.S. COURTS (2010), http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2010/0610_f2.pdf.

[16] *Id.*

[17] ADMIN. OFF. OF THE U.S. COURTS, 2009 REPORT OF STATISTICS REQUIRED BY THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 1, 5 (2009) *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2009/2009BAPCPA.pdf.

history and argue that these are unsupported by evidence. Lastly, Part V proposes a legislative amendment to § 525(b)'s anti-discrimination provision to prohibit private employers from considering an individual's bankruptcy status when hiring prospective individuals, consistent with the anti-discrimination statute under § 525(a), which specifically prohibits a government employer from denying employment based on a past bankruptcy.[18]

I. BANKRUPTCY LAW AND HISTORY OF BANKRUPTCY DISCRIMINATION PROTECTION

A. "Fresh Start" Policy

Bankruptcy law in the United States has seen many developments since bankruptcy legislation was first enacted in 1898. The National Bankruptcy Act of 1898 (Bankruptcy Act) was "based upon the liquidation of a debtor's non-exempt assets to pay creditors."[19] The Bankruptcy Act governed bankruptcy in the United States until Congress passed the Bankruptcy Reform Act of 1978 (Bankruptcy Code).[20] Although the Bankruptcy Code embodied much of the Bankruptcy Act's substance, "it modified its provisions to provide a single, uniform procedure for business reorganizations and expanded the availability of financial rehabilitation rather than liquidation of assets for individual debtors."[21] The bankruptcy system,[22] as codified today, primarily seeks to deal with the payment of creditors and to provide a shelter and a "fresh start" to debtors.[23] The "fresh start" policy is the touchstone and "a principal ingredient and goal of modern American bankruptcy law."[24]

The principal case providing bankruptcy law's relief to the "honest but unfortunate debtor" is *Local Loan Co. v. Hunt*.[25] In that case, the Supreme Court stated that 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 all the obligations and responsibilities consequent upon business misfortunes."[26] The Court explained that the purpose of the Bankruptcy Act is 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 clear field for future effort,

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[18] 11 U.S.C. § 525(a) (2011).
[19] J. Michael Deasy, *History of Bankruptcy Law in the United States*, 1 (May 2004), www.rarolc.net/programs/download.php?fcid=2&fid=136.
[20] *Id.* at 2.
[21] *Id.* Additionally, the Bankruptcy Code instituted a separate system of bankruptcy courts, judges, and proceedings. These courts are now part of the federal district court system. *Id.*
[22] Bankruptcy laws can be explained in reference to socioeconomic policy and social utility. This explanation is founded on the notion that insolvent debtors' entrepreneurial skills and economic participation must be restored by appropriate relief measures which deal effectively with creditors' repayment expectations. *See* Charles G. Hallinan, *The 'Fresh Start' Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive History*, 21 U. RICH. L. REV. 49, 57 (1986).
[23] *Id.* at 50.
[24] Robert C. Yan, Note, *The Signs Says "Help Wanted, Inquire Within"—But It May Not Matter if You Have Ever Filed (or Plan to File) for Bankruptcy*, 10 AM. BANKR. INST. L. REV. 429, 432 (2002); *see also* LINFIELD, *supra* note 11.
[25] 292 U.S. 234, 244 (1934).
[26] *Id.* (quoting Williams v. U.S. Fidelity & Guar. Co., 236 U.S. 549, 554–55 (1915)).

unhampered by pressure and discouragement of preexisting debt."[27] The Court reasoned that the various provisions of the Bankruptcy Act "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."[28]

According to *Local Loan*, the "fresh start" policy recognizes that the "'honest but unfortunate debtor['s]' primary objective is to attain a discharge and essentially wipe the slate clean"[29] in order to have a new beginning.[30] This fresh-start policy logically proscribes against discrimination based on one's past bankruptcy since such discrimination would impede on the very essence of the fresh start itself. Employment discrimination would necessarily negate the concept of a fresh start if the discharged debtor were unable to find means of supporting himself after filing for bankruptcy.[31] Thus, as the court in *Local Loan* and congressional intent in drafting the Bankruptcy Act show, courts and Congress saw the need early on to protect the discharged debtor as he sought to move on from his financial past and start a new life.

B. Pre-Section 525 Court Protection of Discrimination Against the Bankrupt Debtor

Although bankruptcy law allowed debtors to discharge their debts, specific protection against bankruptcy discrimination only began with the Supreme Court's seminal case: *Perez v. Campbell*.[32] There the Court reviewed the validity of the Arizona Vehicle Safety Responsibility Act. Specifically, the Court considered whether or not the state statute could rescind the driving privileges of a debtor who had been discharged of his debts through bankruptcy law.[33] Referring to the Arizona Supreme Court, the majority found that the statute's primary objective had been to protect the driving public from the risk of costly, uncompensated accidents with such individuals.[34] The Court determined that this intent impeded, and was contrary to, the Bankruptcy Act's fresh start tenets.[35] The Court, then, relying on the Supremacy Clause, struck down the Arizona statute as "constitutionally invalid."[36]

Perez was significant because for the first time, the Court applied bankruptcy law far more expansively to protect the debtor from harmful activities by non-creditors.[37] Before *Perez*, the bankruptcy statute which existed at the time had only placed limits on creditors' activities.[38] According to Congress, *Perez* recognized that non-creditors and

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[27] *Id.*
[28] *Id.*
[29] *See* Yan, *supra* note 24, at 433–34. It is important to note that the "fresh start" policy is not available to all debtors, such as perpetrators of fraud. Courts and Congress have made clear that the "fresh start" is limited to honest debtors and that such a limitation prevents dishonest debtors from taking advantage of bankruptcy protection to avoid consequences of their own fraudulent acts. *Id.* at 432–33.
[30] *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1393 (1985) (stating that a debtor's primary advantage of bankruptcy relates to discharge).
[31] *See* Yan, *supra* note 24, at 434.
[32] 402 U.S. 637 (1971).
[33] *Id.* at 638.
[34] *Id.* at 639–41.
[35] *Id.* at 648–49.
[36] *Id.* at 656.
[37] Douglass G. Boshkoff, *Bankruptcy-Based Discrimination*, 66 AM. BANKR. L. J. 387, 387 (1992).
[38] Pub. L. 91-467, 91st Congress., 2d Sess. (1970) included § 14(4) which provided that "[a]n order of discharge shall–(b) enjoin all creditors whose debts are discharged from thereafter instituting or continuing

those who were not involved in the bankruptcy should nevertheless participate in forgiving the debtor's past bankruptcy in order to facilitate complete rehabilitation of the debtor.[39] The Supreme Court's opinion in *Perez* suggested that discriminatory activity which adversely affects debtors is illegal.[40]

Post-*Perez* court decisions drew the outer limits of available debtor discrimination protection. Some debtors received increased anti-discrimination protection. For example, in *In re Patterson*, the Eleventh Circuit found that a credit union's freezing an account holder's accounts upon receiving a notice that he had filed for bankruptcy was unlawful discrimination and prohibited under § 525(b).[41] However, courts nevertheless largely excluded private entities from judicial construction of the outer contours of actionable discriminatory purposes. In *McLellan v. Mississippi Power & Light Co*., the Fifth Circuit found that a private utility employer that discharged an employee who filed a voluntary bankruptcy petition was not liable for discriminatory discharge.[42] The court distinguished the case from *Perez* and reasoned that the employee's discharge did not violate Mississippi state law because the employee was asserting a purely private action.[43] The court stated that although at the time of the ruling, Congress had proposed legislation prohibiting discrimination based on bankruptcy, there was no statutory protection that presently protected the employee from such discrimination.[44]

C. Legislative Response to Perez

Congress quickly responded to the Court's holding in *Perez*.[45] Legislative history informs us that 11 U.S.C. § 525 "codifies the result of *Perez v. Campbell*."[46] By doing so, Congress indicated its approval of its non-discrimination rule.[47] Nothing in the legislative history suggests otherwise.[48]

The stated purpose of § 525 further indicates congressional support of the *Perez* holding: § 525 "is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws."[49] Shortly after *Perez*, the Commission

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any action or employing any process to collect such debts as personal liabilities of the bankrupt." *See* Boshkoff, *supra* note 37, at 388.

[39] Boshkoff, *supra* note 37, at 388.

[40] *Id.* at 390.

[41] 967 F.2d 505, 514 (11th Cir. 1992).

[42] 545 F.2d 919, 929 (5th Cir. 1977) (en banc).

[43] *Id.* at 930.

[44] *Id.*

[45] By the time Congress had codified *Perez* with the enactment of § 525 of the Bankruptcy Code, few courts had had the opportunity to discuss *Perez*. Boshkoff, *supra* note 37, at 388. Before its codification, only two courts had considered whether employment discrimination based on bankruptcy was legal. In *Rutledge v. Shreveport*, the court held that a police officer who was terminated for filing a voluntary bankruptcy was not prohibited under employer regulations which authorized a termination. 387 F.Supp. 1277 (W.D. La. 1975). Similarly, in *In re Loftin*, the Louisiana Court of Appeals found that a fireman's dismissal for commencing voluntary bankruptcy was also not prohibited. 327 So. 2d 543 (La. Ct. App. 1976). Boshkoff, *supra* note 37, at 393.

[46] S. REP. NO. 95-989, 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.

[47] *Id.*

[48] Boshkoff, *supra* note 37, at 392.

[49] H.R. REP. NO. 95-595, at 165 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6126.

on the Bankruptcy Laws of the United States[50] had embraced the *Perez* decision and proposed provisions providing anti-discrimination protection.[51] The Commission proposed liberal reform to federal bankruptcy law and other sweeping protections for the debtor. Section 4-508 of the Commission Report, entitled "Protection Against Discriminatory Treatment," proposed:

> A person shall not be subject 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 precedent sentence, such as present and prospective financial condition or managerial ability.[52]

The Commission's 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 and state law."[53] Furthermore, the prohibition would have applied to both public and private parties as "an essentially unlimited extension of the *Perez* principle."[54]

That is not to say that Congress intended § 525 to be without limits. Congress did not adopt the all-encompassing scope of protection as proposed by the Commission.[55] This may partly be explained by the opposition that a number of groups, including the credit industry, agricultural groups, and the Department of Justice, had against the

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[50] The National Bankruptcy Review Commission was created when President Clinton signed the Bankruptcy Reform Act of 1994. *The Commission: Its History and Process*, NAT'L BANKR. REVIEW COMM. ARCHIVES, http://govinfo.library.unt.edu/nbrc/report/04commis.html#3 (last visited Sept. 28, 2011). "The Commission was created as an independent commission to investigate and study issues relating to the Bankruptcy Code, fulfill its duties as specified by the Act, and to prepare a report to be submitted to the President, Congress and the Chief Justice not later than two years after the date of its first meeting, which took place on October 20, 1995." *Id.*

The 1994 Bankruptcy Reform Act specified Commission's duties:

(1) to investigate and study uses and problems relation to title 11, United States Code (commonly known as the "Bankruptcy Code");
(2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
(3) to prepare and submit to the Congress, the Chief Justice, and the President a report in accordance with section 608; and
(4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

Pub. L. No. 103-394, § 603, 108 Stat. 4107, 4147 (1994).

[51] "In 1997 the Commission submitted a detailed report with more than 170 recommendations for improving the bankruptcy process." Deasy, *supra* note 19, at 2. Many of these recommendations have been controversial and as of 2004, the proposed reform bill was still pending in Congress. *Id.*

[52] REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R.DOC. NO. 93-137, pt. II, at 143–44 (1973).

[53] *Id.*

[54] Jackson, *supra* note 30, at 1429.

[55] "In enacting § 525, Congress expressly acknowledged that it was not intended to be as broad as the proposed Section 4-508." Elizabeth A. Bronheim, *Interpreting Section 525(a) of the Bankruptcy Code*, 7 BANKR. DEV. J. 595, 598 (1990).

Commission's proposed section.[56] For example, a spokesman for the National Consumer Finance Association expressed the credit industry's fear that § 4-508, as drafted by the Commission, "could be susceptible to misinterpretation in its application in the field of credit granting."[57] The United Fresh Fruit and Vegetable Association and the National Cattlemen's Association also expressed their own concern that § 525 would negatively impact the Perishable Agricultural Commodities Act and the Packers and Stockyards Act.[58] For example, the Perishable Agricultural and Commodities Act permits termination of a license upon being discharged in bankruptcy unless the Secretary of Agriculture "finds upon examination of the circumstances of [the] bankruptcy . . . that such circumstances do not warrant such termination."[59] Likewise, § 204 of the Packers and Stockyards Act allows the Secretary to suspend, after notice, the permit of a registrant who is found to be insolvent.[60] These industries expressed concern that an expansive § 525 would negatively impact these provisions. The Department of Justice also explained that the language was "too broadly worded," and expressed concern that § 4-508 would "give rise to a flood of discrimination suits brought to harass those who sell, lend and contract."[61]

In response to this opposition, Congress adopted a narrower anti-discrimination section in § 525 than was originally proposed by the Commission in § 4-508.[62] Nevertheless, the Commission Report's language in § 4-508 remains important legislative history in understanding the purposes and aims of § 525(b). In fact, some bankruptcy courts have relied on the language to justify an expansive reading of the protections granted in § 525(b).[63]

The range in judicial application of bankruptcy discrimination protection is substantial. The original enactment of § 525 had afforded the bankrupt debtor protection against discrimination by governmental and public entities. Section 525(a)'s protection of debtors against discrimination includes various acts.[64] 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, discrimination 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

[56] *Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Right of the H. Comm. on the Judiciary*, 94th Cong. 1 (1975) (hereinafter *Subcommittee Hearings*).
[57] Douglass Boshkoff, *Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L. J. 159, 165 n.23 (1987).
[58] *Subcommittee Hearings*, *supra* note 56.
[59] 7 U.S.C. § 499(d) (1988).
[60] 7 U.S.C. § 204 (1988).
[61] *Subcommittee Hearings*, *supra* note 56.
[62] *See* Boshkoff, *supra* note 57, 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.").
[63] *See, e.g.*, *In re* Tinker, 99 B.R. 957, 960 (W.D. Mo. 1989).
[64] 11 U.S.C. § 525(a) (1994).

> that is dischargeable in the case under this title or that was discharged under the Bankrupt Act.[65]

Simply put, § 525(a) prohibited public employers from discriminating against a debtor solely because of his or her past bankruptcy status. It is important to note that courts interpreting the original § 525 had generally stopped short of extending relief to debtors suffering from discriminatory conduct by private employers.[66]

As a result of courts' unwillingness to extend bankruptcy discrimination protection to private employers under the original § 525 for public employers, in 1984, Congress extended statutory protection to prohibit discriminatory conduct by private employers as well.[67] In doing so, Congress responded to federal courts' decisions, which held that they lacked the power to redress private employer discrimination against bankrupt debtors under the original § 525.

II. CONGRESSIONAL DRAFTING AND SUBSEQUENT JUDICIAL INTERPRETATION OF § 525

Significantly, post 1984 expansion of § 525, a debtor claiming discrimination by a private employer has generally been unable to receive the protections of § 525(b) in a manner consistent with the same broad interpretive application given § 525(a) covering governmental entities. Before examining the reasons behind this, it is important to first examine the language of § 525(b) and the protections its language provides. 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

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[65] *Id.*

[66] *See* 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, 157 (1996). In *Wilson v. Harris Trust & Savings Bank*, the Seventh Circuit rejected the plaintiff's § 525 claim against her former private employer for alleged discriminatory conduct. 777 F.2d 1246 (7th Cir. 1985). The court refused to go beyond the express language of the statute and reasoned that Congress had specifically considered and then "purposefully rejected" discriminatory conduct by private entities as being an "overly broad" interpretation of § 525. *Id.* at 1249. The court held that § 525 must be limited to actions by public entities and cannot extend to an action against private employers. *Id.* The court reasoned that prior to 1984 when the section was amended, the provision neither expressly nor implicitly permitted the judiciary to protect a debtor from discharge for filing a voluntary petition. *Id.* at 1249.

[67] This took place in the 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.). This renumbered the anti-discrimination provision and added subsection (b).

> (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.[68]

Upon enacting § 525, Congress expressly stated that § 525(b) was not intended to be as broad as the Commission proposed in § 4-508.[69] However, both houses significantly emphasized that § 525 was not intended to be too narrow, either.[70]

This intent is revealed in Congress's statement that "the section is not exhaustive[, as t]he enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination."[71] However, Congress decided that it is the responsibility of the courts to "mark the contours of the anti-discrimination provision in pursuit of a sound bankruptcy policy."[72] Some observers have contended that Congress' provision for judicial interpretation supports an expansive reading of the statute.[73] Subsequent confusion as to this legislative intent has caused courts to struggle to find a workable approach in applying the language of the anti-discrimination statute of § 525 while maintaining the fresh start policy underlying bankruptcy law.[74] This uneasy situation has persisted since § 525(b) was first enacted and strongly recommends reform of the statute.

A. Statutory Distinctions Between § 525(a) and § 525(b)

Most of the provisions in § 525(a) and § 525(b) are parallel. Specifically, the cited reasons for the prohibition of discrimination by private employers against a debtor are applicable to cases involving "governmental units."[75] Furthermore, § 525(b) parallels the original § 525 in its prohibition against discrimination with respect to *termination* of employment. Despite these similarities, courts have relied on the distinctions between the two sections to reach different rulings under both subsections.[76]

The key difference between the two subsections concerns the *type* of defendant that the debtor is facing. Under subsection (b), the "private employer" is the target of the prohibition of discriminatory conduct.[77] Congress did not specifically define "private employer" within the Bankruptcy Code. Generally, courts have limited the term as the debtor's own employer.[78]

The varying aspects of the employer-employee relationship covered by both sections also differ. Section 525(a) prohibits a public employer or governmental entity from denying employment to, terminating the employment of, or discriminating with

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[68] 11 U.S.C. § 525(b) (1994).
[69] H.R. REP. NO. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6322–23.
[70] Bronheim, *supra* note 55, at 598.
[71] H.R. REP. NO. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6322–23.
[72] *Id.*
[73] *See* Bronheim, *supra* note 55, at 598.
[74] *See* Bronheim, *supra* note 55, at 599 (stating "[g]iven the conflicting statements found in the legislative history of Section 525, it is not surprising that courts would reach diverse holdings when deciding discrimination cases.").
[75] 11 U.S.C. § 525(a)(1)–(3).
[76] Zeiler, *supra* note 66, at 159.
[77] Yan, *supra,* note 24 at 445. "The scope [of § 525(b)] has been broadened to encompass credit unions that are affiliated with the debtor's employer." *Id.*
[78] *Id.* at 444.

respect to employment against a "person" covered by the statute. However, in § 525(b), a private employer is *not* prohibited from denying employment to an "individual" who has been a bankrupt debtor.[79] Unsurprisingly, the omission of this particular protection in § 525(b) has presented significant problems for the bankrupt debtor bringing a claim under § 525 who has been refused employment based on his past bankruptcy. Federal courts have generally resorted to the well-known rule of statutory construction[80] to conclude that the omission was not inadvertent.[81]

Courts have largely dismissed arguments asserting otherwise. For example, in *Pastore v. Medford Savings Bank*,[82] the plaintiff alleged under § 525(b) that the defendant discriminated against her due to her prior bankruptcy status.[83] The plaintiff had interviewed with the defendant for the positions of bank teller and customer service representative two years after the plaintiff voluntarily filed for bankruptcy.[84] The plaintiff was informed that due to her credit report, the defendant would not hire her.[85]

The plaintiff argued that Congress omitted the phrase "deny employment to" in § 525(b) to "streamline" the language of the statute.[86] The plaintiff also contended that the language "discriminate with respect to employment against" can reasonably be interpreted to encompass hiring decisions.[87] The court rejected both arguments and held that the lack of reference to discrimination in hiring in the provision regulating the conduct of private employers in subsection (b) "strongly suggests that Congress *intentionally* omitted the reference to discrimination in hiring from the provision regulating the conduct of private employers."[88] The court held that "[w]here Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded."[89] Many courts followed suit and refused to go beyond the exact words of § 525(b).[90] However, other courts have disagreed with *Pastore*'s textual approach.[91]

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[79] There is no evidence explaining Congress's omission of this specific protection from the private employer anti-discrimination statute. Zeiler, *supra* note 66, at 160.

[80] This rule of statutory construction is illustrated by the Sixth Circuit's reasoning in *Lynch v. Johns-Manville Sales Corp*, 710 F.2d 1194 (6th Cir. 1983). The court there held that if Congress includes certain language in one section of a statute but then omits that same language in another section of the same statute, there is a presumption that the omission was intentional. *Id.* at 1197–98.

[81] *See also* Madison Madison International of Illinois, P.C. v. Matra, S.A. (*In re* Madison Madison International of Illinois, P.C.), 77 B.R. 678, 681 (Bankr. E.D. Wis. 1987) (showing that the court did not refer to policy and refused to go beyond the exact words of the statute since the plain language could not result in an "absurd result").

[82] 186 B.R. 553 (D. Mass. 1995).

[83] *Id.*

[84] *Id.* at 554.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 555 (emphasis added).

[89] *Id.* (quoting J. Ray McDermott & Co., Inc. v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir. 1972)).

[90] "An inquiry into statutory scope which is restricted to an examination of the text of § 525 will produce a narrower view of what is prohibited than an interpretative approach which also considers legislative intent and purposes." Boshkoff, *supra* note 37, at 395.

[91] One court that has boldly veered away from this textual approach is the Southern District of New York in *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658–59 (S.D.N.Y. 2000) (holding the language of § 525(b) prohibiting employer from discrimination "with respect to employment" can be broadly construed to include discriminating with respect to extending offer of employment). The district court reversed the

The widely different application of the two subsections has been created by judicial interpretation of the courts, rather than by the language of the statute itself.[92] Both § 525(a) and § 525(b) include an identical requirement that the actor's alleged prohibited discriminatory actions result "solely because" of the debtor's bankruptcy situation. However, in practice, courts have given the requirement in § 525(a) a more expansive reading than its counterpart in § 525(b).[93]

On the one hand, courts have interpreted the "solely because of" language in § 525(a) quite liberally. In applying § 525(a), courts generally balance "the need to allow a governmental unit or public employer the freedom to operate in the best interest of the citizenry against protecting the federal policy of providing the debtor with a 'fresh-start'" given by bankruptcy law.[94] To do so, courts have justified a more liberal interpretation of the "solely because of" language.[95] What this means in practice is that for the debtor to

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bankruptcy court's conclusion that § 525(b) only applied to actions taken after an employment relationship was formed and disagreed with *Pastore*. *Id.* at 659. The court reasoned:

> 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.

Id. at 658 (emphasis added). Interestingly, the district court argued for the plain meaning analysis that the court in *Pastore* employed, but came out on the other side. *Leary* also construed the language of § 525(b) to enforce the fresh start policy:

> 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 respects of employment including hiring*, firing and material changes in job conditions.

Id. at 658–59 (emphasis added)(citation omitted).

[92] *See* Bronheim, *supra* note 55, at 599 (stating "[m]uch of the conflict regarding the proper interpretation of Section 525 stems from the phrase 'solely because,' which is used to qualify the situations when discrimination will be barred.").

[93] The difficulty with this language is that "no definition or explanation exists in either the Code or the legislative history." *See* Yan, *supra* note 24, at 447. Therefore courts' interpretations of the phrase have been varied. *Id.* "Solely because" of has been:

> construed to mean or require (1) 'only reason;' (2) 'reason independent of;' (3) 'other reasons . . . appear to be de minimis;' (4) 'primarily,' or 'predominantly;' (5) 'primarily due to;' (6) 'primary purpose;' (7) 'but for;' (8) 'primarily concerned with;' (9) 'on the grounds of;' (10) 'only because;' (11) 'played a significant role;' (12) 'except for the fact;' and (13) 'exclusive reason.'

Id.

[94] Zeiler, *supra* note 66, at 161.

[95] *See* Bell v. Sanford-Corbitt-Bruker, Inc., 1987 WL 60286 (S.D. Ga. 1987).

succeed in his claim under § 525(a) against a public entity, he or she must prove that at least one of the reasons for a governmental unit's alleged discrimination against the debtor was his or her past bankruptcy.[96] If the debtor meets this burden of proof, then courts will evaluate the other reasons that the government unit offers to justify its actions.

Conversely, the "solely because of" language in § 525(b) is accorded a much narrower interpretation by the courts than is applied under § 525(a).[97] Courts have employed a much more rigid adherence to the plain meaning of "solely because of" than they have under § 525(a).[98] This difference in judicial interpretation is undoubtedly significant in practice. Bankruptcy discrimination protection is likely to be more broadly extended when the "solely because of" language is more narrowly interpreted. In fact, a broader interpretation of this language under § 525(b) has been criticized as "strip[ping] § 525(b) of any substantive teeth to deal with discriminatory conduct in the private sector."[99] This distinction also distances itself from other discrimination laws that require only that the protected classification be a "motivating factor" for the negative employment action.[100]

Practically, this narrower interpretation means that private entities are not absolutely precluded from *considering* a person's insolvency of bankruptcy status as a debtor against him in the future.[101] Thus, to prevail in a § 525(b) claim against his employer, a debtor must prove that his insolvency was the sole reason for the adverse employment action. Otherwise, as long as that employer can demonstrate that there exist *other* legitimate and compelling reasons, which, together with insolvency or bankruptcy status, justify the adverse action taken against the debtor, the employer is deemed to have not violated any law.

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[96] Zeiler, *supra* note 66, at 161.

[97] These courts include the First and Ninth Circuit, as well as federal district courts within the Seventh Circuit. *See* Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9th Cir. 1990) (alternative holding); Laracuente v. Chase Manhattan Bank, 891 F.2d 17 (1st Cir. 1989); United States v. Professional Sales Corp. (*In re* Professional Sales Corp.), 56 B.R. 753 (N.D. Ill. 1985).

[98] *See* Boshkoff, *supra* note 37, at 408 ("A few courts, concerned that a literal application of 'solely' will preclude recovery in most discrimination lawsuits, have adopted a less demanding causation requirement that permits recovery when bankruptcy plays a significant role in the adverse decision.").

[99] Zeiler, *supra* note 66, at 162.

[100] The Supreme Court introduced the "motivating factor" causation standard in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII gender discrimination case. The "motivating factor" causation standard is employed with respect to Title VII and the ADEA.

[101] It is important to note that employers also legally use credit checks in employment decisions. In a survey released earlier this year by the Society for Human Resources Management, 13% of employers said they used credit checks on all job applications, while 47% said they used credit checks for certain applicants. The applicable statutory framework is 15 U.S.C. § 1681. The Federal Credit Reporting Act (FCRA) allows procurement of credit reports for employment purposes. Section 1681 merely mandates that employers comply with all federal and state equal employment laws in the use of credit information. Employers must "clearly and accurately" notify job applicants when they request a credit report from an agency and an employee must give his or her approval. However, many contend that this provision does not protect employees who are unlikely to withhold their approval for fear that it will prevent them from getting employment. Furthermore, under this section, employers must notify applicants if their credit report is then used to make an adverse employment decision. Generally, employers can use credit checks, but not credit scores, during the employment process as long as they obtain written permission from the potential employee. *See* Sharon Goott Nissim, Stopping a Vicious Cycle: The Problems with Credit Checks in Employment and Strategies to Limit Their Use (Aug. 2010) (unpublished Northwestern University School of Law course paper).

This is particularly unfair to the debtor because it is unlikely that the debtor will have sufficient evidence to show that the *sole reason* for the adverse employment was his bankruptcy status.[102] Contrast this to the employer's ability to easily conjure up another reason for its adverse action against the debtor.[103] Under this interpretation an employer is not liable under § 525(b) even where an adverse action is predominantly based upon a debtor's insolvency or bankruptcy.

This difference in judicial interpretation is unjustifiable. The policy rationales that courts have articulated in cases with public employers appear ever more appropriate and necessary in the private employer context. Debtors in the private employment context should surely be granted the same sort of "fresh start" that is duly accorded with their bankruptcy as would be granted to them in the government employment context. Prohibiting a governmental employer from forcing a debtor to reaffirm discharged obligations in order to maintain his or her employment seems identical to otherwise prohibiting a private employer from doing so. Finally, there is "no practical difference . . . between government entities and the private sector to justify creating a situation in which the debtor cannot satisfy future obligations" because the debtor's employment is terminated.[104]

Nonetheless, these distinctions in interpretation have created real and harmful effects on past debtors seeking a fresh start that bankruptcy law is supposed to provide.

B. Inconsistent Judicial Application of § 525(b)

Due to the differences between the two subsections, courts continue to struggle with a workable approach to § 525(b). Most federal courts have followed the strict language of the statute in interpreting its effect on the hiring decisions of private employers.

Courts that have narrowly construed § 525 have done so by relying on congressional statements which seem to restrict the section's applicability, as discussed in the beginning of Part II.[105] In *Fiorani v. CACA*,[106] a federal district court reviewed the scope of § 525(b) and declined "to expand the statute beyond its explicit terms merely to give effect to an abstract statement of purpose."[107] The court reasoned that § 525(b)'s

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[102] "[M]ost job applicants screened out of jobs for unlawful reasons *never know why*; an applicant rejected for having an insufficiently positive credit record typically will not know that a never-disclosed employer-credit-history check is the reason." Klein et al., *supra* note 9, at 4 (emphasis in the original).

[103] Theoretically, a reason for the adverse action that is highly tangential to the bankruptcy would suffice.

[104] Zeiler, *supra* note 66, at 162.

[105] *See* Bronheim, *supra* note 55, at 607.

[106] 192 B.R. 401 (E.D. Va. 1996). In this case, the court granted the defendants' motion to dismiss each of the plaintiff's counts alleging that he was not hired because of his prior bankruptcy filing.

[107] This case was also significant in providing guidance as to the employee-employer requirement of § 525(b). *See* Yan, *supra* note 24, at 445–46. The court dealt with the issue of whether a temporary employment agency that provided temporary workers was an "employer" under § 525(b). *Fiorani*, 192 B.R. at 408. There was nothing in the Bankruptcy Code that helped the court to define the term. Therefore, the court employed a multi-factor test first used by the Circuit Court of Appeals for the District Court of Columbia. *Spirides v. Reinhardt*, 613 F.2d 826, 831–32 (D.C. Cir. 1979). The court held that although the right to control the individual's work is the primary factor, it is not dispositive. Yan, *supra* note 24, at 445 (citing *Fiorani*, 192 B.R. at 409). Other relevant factors 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;

explicit reference to discrimination with respect to termination leaves to no doubt that terminations are covered.[108] However, an explicit reference to discrimination in hiring is notably absent from the statute.[109] The court refused to interpret the statute's general reference to discrimination "with respect to employment" as a "basis for stretching the statute to cover hiring."[110] The court reasoned that this would "stretch the statute too far"[111] and instead referred to how "the statute's framers found it necessary to make separate, explicit reference to termination."[112]

Other courts continue to struggle in developing a broader application of § 525(b). Many courts pursue the Bankruptcy Code's "fresh start" goal and interpret § 525 to apply to a wide spectrum of discriminatory actions.[113] These more liberal courts evaluate the discriminatory action in terms of whether the legislation authorizing the action is generally aligned with the Bankruptcy Code's rehabilitative policy.[114] In *Leary v. Warnaco, Inc.*, one court did precisely that.[115] The *Leary* court concluded that a private employer could not refuse to hire an applicant solely because he had filed for bankruptcy.[116] In reversing the bankruptcy court's dismissal of the plaintiff's complaint, the court acknowledged that previous cases, such as *Fiorani*,[117] held that § 525(b) does not apply to private hiring decisions.[118] However, in this court's view, these decisions adopted an improperly narrow reading on the applicable language.[119]

The court reasoned that such a reading would mean that § 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."[120] The

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(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 or 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.

Fiorani, 192 B.R. at 409 (quoting *Spirides*, 613 F.2d at 832) (listing all relevant factors to be applied in multi-factor test). Courts have also suggested that "private employer" is defined as a "non-governmental unit." *See* Yan, *supra* note 24, at 445–46.

[108] *Fiorani*, 192 B.R. at 404.
[109] *Id.* at 404–05.
[110] *Id.* at 405.
[111] *Id.*
[112] *Id.*
[113] Bronheim, *supra* note 55, at 600.
[114] *Id.* at 600–01.
[115] 251 B.R. 656 (S.D.N.Y. 2000).
[116] *Id.*
[117] *Fiorani*, 192 B.R. 401 (E.D. Va. 1996).
[118] *Leary*, 251 B.R. at 658.
[119] *Id.*
[120] *Id.*

court was convinced that § 525(b)'s provision that an employer is prohibited from discrimination "with respect to employment" was "clearly broad enough to extend to discriminating with respect to extending an offer of employment."[121] The court reasoned that "[t]he 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."[122] "The 'fresh start' policy is impaired in either case."[123] The court noted that it "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 § 525(a)."[124]

Instead of adopting what it viewed as a limited approach, the court decided to look at Congress's intent to provide a fresh start to debtors, and determined that Congress could not have meant to exclude hiring decisions from the coverage of § 525(b).[125] The court found that the plaintiff's claim for discrimination with respect to employment included "by its plain meaning *all* aspects of employment including hiring, firing and material changes in job conditions."[126]

The differing interpretations courts have given to § 525 make it apparent that the proper interpretation of § 525 and its permissible application is far from concrete. Courts disagree as to whether § 525(b) should be applied according to its exact language, especially in relation to § 525(a), or whether it should be applied liberally in light of its legislative history and the policy of granting relief to the debtor.

This confusion in judicial interpretation has led to inconsistent findings that impose real costs on debtors and hinders fair adjudication of discriminatory claims under § 525. These results also greatly hinder the "fresh start" that bankruptcy law seeks to provide debtors. With the economic recession barely at our tails, it is imperative to amend § 525(b)'s language to prevent the exacerbated effects these different interpretations are likely to have on the large number of debtors applying for employment today.

C. What § 525(b) Means for the Unemployed Debtor

The inequity in applying § 525(b) narrowly is likely exacerbated by the high number of unemployed debtors in the market today. In 2009, a study by the Institute for Financial Literacy[127] showed that 16.2% of those who filed bankruptcies identified themselves as "[u]nemployed," an increase of 3.2% from the year before.[128] The study noted a connection between unemployment rates and bankruptcy filings and concluded that the higher rate of unemployment in the past few years has taken its toll as more jobless individuals sought bankruptcy protection.[129] With more job applicants in the market who have filed for bankruptcy in the past, refusing relief to the debtor who is discriminatorily denied employment by a private employer largely because of his past

[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 659.
[127] The Institute for Financial Literacy is a nonprofit financial literacy organization with the mission to make effective financial literacy education more available. *See* THE INSTITUTE FOR FINANCIAL LITERACY, www.financiallit.org (last visited Oct. 2, 2011).
[128] LINFIELD, *supra* note 11, at 11.
[129] *Id.*

insolvency inherently impairs the debtor's ability to have the "fresh start" that bankruptcy law seeks to accord him through discharge.

Courts' refusals to extend anti-discrimination protection under § 525(b) are overly punitive to today's debtor. Due to the subprime mortgage crisis,[130] a debtor may have filed for a past bankruptcy for reasons far beyond personal control or decision, or even those reasons that were foreseen when Congress first enacted § 525(b).[131] In 2009, among the American debtors who filed for bankruptcy from January through December, the demographics that had increases in reported percentages were Americans with bachelors' or graduate degrees, and Americans earning $60,000 or more per year.[132] These statistics show that the past recession has "noticeably shift[ed] more 'middle class' Americans into bankruptcy."[133]

It is likely that this economic recession has produced more "honest and unfortunate" debtors than legislators of the Bankruptcy Code could foresee when the Code was enacted in 1984. In such dire economic circumstances, the "fresh start" accorded to the debtor by bankruptcy laws is particularly critical and must be applied to ensure the fair adjudication of claims of illegal bankruptcy discrimination. With the unemployment rate at 9.0% in September 2010, there are increasing numbers of unemployed Americans who have filed for bankruptcy.[134] Debtors must be ensured adequate anti-discrimination protection in their search for employment, to pay off their creditors, and to have a "fresh start." A narrow reading of § 525(b) undermines this protection.

III. SECTION 525(b)'S INTERFERENCE WITH CONGRESSIONAL EFFORTS TO PROTECT OLDER WORKERS

This Part highlights the disparate effect the harms generated by a strict interpretation of § 525(b) impress upon the older population. Many studies show that a growing proportion of those who have filed for bankruptcy since the economic recession have been older workers.[135] Refusing to extend protection to a debtor under § 525(b) for a

[130] The subprime mortgage crisis was largely due to a sudden rise of home foreclosures in 2006 and 2007. Lenders made loans to borrowers who could not afford the homes they purchased. These delinquencies on the mortgage market and falling U.S. housing prices set off a national and global financial crisis. For more information regarding the subprime mortgage crisis, see KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN (2008), *available at* http://business.cch.com/bankingfinance/focus/news/Subprime_WP_rev.pdf.

[131] *See* Klein et al., *supra* note 9, at 7 (noting that, according to *The Consumer Bankruptcy Project*, "the most significant study of how and why bankruptcy filings occur, 85% of bankruptcy filings reportedly occur following 'income loss, medical problems, or family breakup'—problems that do not trace to simply irresponsible 'Over-Consumption' or any other trait that could be 'job-related,' much less a matter of 'business necessity.'").

[132] LINFIELD, *supra* note 11, at 1.

[133] *Id.*

[134] For more information on the past employment rates of the civilian noninstitutional population from 1940 to date, see *Household Data Annual Averages, Employment Status of the Civilian Noninstitutional Population, 1940 to Date*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/cps/cpsaat1.pdf (last visited Oct. 4, 2011).

[135] *See* John Golmant & Tom Ulrich, *Aging and Bankruptcy: The Baby Boomers Meet Up at Bankruptcy Court*, AM. BANKR. INST. J., May 2007, at 26.

private employer's hiring practices further undermines Congress' recent efforts to protect older workers.

Congress has sought to increase protections for older workers in the past and keep older employees in the workplace, particularly through the Age Discrimination in Employment Act (ADEA).[136] In enacting the ADEA in 1967, Congress sought to help solve problems that arise from an aging workforce and enact legislation that would promote the employment of older workers based on ability rather than age and prevent unwanted discrimination.

Specifically, Congress provided that "[i]n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs."[137] Therefore, the purpose of the ADEA was "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[138]

In passing the ADEA, Congress was largely responding to what it saw as a "national disgrace" and an increasingly apparent problem: ageism.[139] Congress had realized early on "that older Americans as a group were growing faster than younger Americans, and that this would tax the economy and the federal government."[140] When it amended the ADEA in 1986, Congress further "recognized that the older population exceeded eleven percent of the total population; and by the year 2030, twenty percent of the population would be over 65."[141]

These ageist problems have been exacerbated by the recent economic recession. A growing proportion of those who have lost their jobs and filed for bankruptcy have undoubtedly been older workers.[142] According to a study by the Institute for Financial Literacy, it is clear that nearly 56% of bankruptcy debtors are between the ages of thirty-five and fifty-four.[143] Moreover, in the year between January 2009 and December 2009, the study[144] showed an emerging trend that the fifty-five through sixty-four and the over-

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[136] 29 U.S.C. § 621 (2006).
[137] 29 U.S.C. § 621(a)(1).
[138] 29 U.S.C. § 621(b).
[139] *See* Niall A. Paul, *Reduction in Force Early Retirement Incentives and the Age Discrimination in Employment Act*, 1989 DET. C.L. REV. 987, 990 n.14 (1989) (stating that "[a]geism is a subtle form of discrimination" and that although American society has reacted to the stereotypes placed on the races and on the sexes, the American public has not yet fully accepted that "older" Americans suffer from stereotypes in much the same way).
[140] *Id.* at 994.
[141] *Id.*
[142] *Id.*
[143] LESLIE E. LINFIELD, THE AMERICAN DEBTOR IN THE GREAT RECESSION, 2009 ANNUAL CONSUMER BANKRUPTCY DEMOGRAPHICS REPORT: AMERICAN DEBTORS IN A RECESSION, INSTITUTE FOR FINANCIAL LITERACY, 7 (June 2010), *available at* http://www.financiallit.org/PDF/2009_Demographics_Report.pdf.
[144] The study evaluated the bankruptcy filings according to a number of categories: gender, age, ethnicity, education, income, employment, marital status, and causes of financial distress. *See id.* at 5. The study concluded that in 2009, "as in years past, the average American in financial distress and seeking credit counseling and financial education is a 35- to 54-year-old married Caucasian with a high school degree or some college who is employed and earning less than $30,000 per year." *Id.* at 1.

sixty-four age cohorts appeared to be experiencing an increased deterioration in their financial conditions and filing bankruptcy at greater rates.[145]

The Institute for Financial Literacy has also identified the "bell curve present[] in the age data of bankruptcy debtors as a whole as compared to the U.S. population,"[146] which suggests that older populations "may be emerging from bankruptcy within twenty-five years or less from retirement with no assets set aside."[147] This is supported by research showing that 96% of all Chapter 7 bankruptcies filed are "no asset" cases.[148] These figures are alarming and have serious implications: the "potential societal costs could be immense as this population may only have Social Security and Public Assistance programs to rely upon."[149]

Hiring policies and transfer policies are already largely affected by ageist stereotypes. With older workers becoming an increasingly larger proportion of those who file for bankruptcy, they are more in danger of being impacted by the current anti-discrimination provisions under § 525(b). With generally fewer prospects than a younger debtor may have, a debtor over the age of fifty-five already facing ageist hiring policies may be in need of additional protection for any other improper discriminatory motive based on their past insolvency and financial history.

Surely Congress, in enacting the Bankruptcy Code, did not intend the "fresh start" to apply less to the older worker population, especially in light of other legislative efforts that seek to protect them. With a debtor over the age of fifty-five, the "fresh start" accorded by discharge is all the more critical. However, § 525(b)'s failure to provide protection against bankruptcy discrimination in hiring decisions impacts the older debtor even more than the younger debtor. These considerations render it imperative that § 525(b) be amended.

IV. JUSTIFICATIONS FOR DENYING EMPLOYMENT BASED ON PAST FINANCIAL HISTORY AND BANKRUPTCY

This Note has discussed the harms that result from denying protection against bankruptcy discrimination in hiring decisions and the lack of legislative history as to why Congress failed to include the language "deny employment to" in § 525(b) as one of the prohibited acts by private employers. Nonetheless, courts and private industries insist that such omission is not inadvertent and is well-justified.

Courts that refused to extend bankruptcy discrimination protection for prospective employees have suggested that Congress has allowed room for private employers to consider past bankruptcy to determine future financial responsibility. For example, in *In re Goldrich,*[150] the court considered Congress's statement regarding permissible analysis

[145] *Id.* at 7.
[146] *Id.*
[147] *Id.* at 8.
[148] "Over 70% of the bankruptcy cases filed each year are filed in Chapter 7. Chapter 7, also known as 'straight bankruptcy' or 'liquidation,' allows the debtor to keep only certain exempt assets." *Id.* "Retirement Accounts are exempt assets in bankruptcy, but often times debtors have cashed out these accounts prior to filing in an attempt to stave off bankruptcy." *Id.* at 7, n.15.
[149] *Id.*
[150] *In re* Goldrich, 45 Bankr. 514 (Bankr. E.D.N.Y. 1984), *rev'd*, 771 F.2d 28 (2d Cir. 1985).

of future financial responsibility in determining whether to deal with a debtor.[151] The court reasoned that by permitting the consideration of future financial responsibility, Congress "acknowledged the possibility that a prior bankruptcy could be considered in evaluating financial responsibility."[152] However, such a consideration must be "done in a nondiscriminatory fashion" and "as long as the purpose of that examination is not to coerce the debtor into paying or reaffirming a discharged debt."[153]

Although the decision at issue in *Goldrich* concerned a post-discharge application for credit,[154] its reasoning is important in demonstrating many courts' finding that to consider "the examination of a prior bankruptcy for the purpose of evaluating future responsibility is logical where the debtor's future activities are likely to create circumstances similar to those which previously necessitated the debtor's resort to bankruptcy."[155]

Employers have also argued that policy justifications exist for the use of job applicants' past financial information in employment decisions. For example, employers often argue that employees with good financial history are more responsible employees.[156] This has particularly been the case in retail sectors. Retailers claim that employees with good financial history will be less likely to steal from the employer and less likely to commit crimes in general.[157]

Eric Rosenberg of TransUnion Credit Bureau cites statistics that retailers lose $30 billion a year from employee theft, employers lose $55 million a year in lost wages from workplace violence, and a third of employees put false information on their resumes.[158] Large credit bureaus also suggest that credit checks serve as an important general security measure for companies.

However, these justifications are largely undermined by the fact that there is simply no evidence or study to support the proposition that an employee's financial history has any correlation with job performance.[159] Despite assertions to the contrary, the fact is that such reports and articles fail to establish *why* employers should look at financial history, or look for past bankruptcy filings, or perform credit checks.[160] The lack of any empirical

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[151] *Goldrich*, 771 F.2d at 31.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] Bronheim, *supra* note 55, at 609–10.
[156] *See* Kelly Gallagher, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1599 (2006).
[157] *See id.*; *see also* Andrew Martin, *As a Hiring Filter, Credit Checks Draw Questions*, N.Y. TIMES, Apr. 9, 2010, http://www.nytimes.com/2010/04/10/business/10credit.html.
[158] *See* Martin, *supra* note 157.
[159] *See* Gallagher, *supra* note 156, at 1595 (stating that in her research of academic business, legal and social science journals, she failed to find any articles assessing whether or not credit scores "accurately and reliably" predicted job performance or the likelihood of an employee stealing, and stated that articles claiming an "obvious reason" to perform credit checks on employees did not reference any data that actually showed a correlation between credit score and job performance, or likelihood of stealing from an employer.); *see also* Martin, *supra* note 157 (noting that Rosenberg of TransUnion Credit Bureau admitted in his testimony before the Connecticut state legislature that "[a]t this point we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud.").
[160] *See* Gallagher, *supra* note 156, at 1620 (arguing that articles "fail to articulate why employers should perform credit checks and claim no empirical support for this screening technique").

support suggests that such justifications are without any substantive merit. Employers have failed to present any credible reason to believe that past financial history reliably predicts job performance, propensity to refrain from violence in the workplace, and likelihood of and stealing from an employer.[161]

With no evidence to suggest the contrary, private employers should be prohibited from denying employment to a job applicant primarily for his or her past insolvency or bankruptcy status.[162] With the unemployment rate nearing 10% of the population and more personal bankruptcies filed than ever, the need for protection against illegal bankruptcy discrimination is ever pressing to ensure a "fresh start" for past debtors. Past debtors should receive anti-discrimination protections under § 525 that adequately enables them to find employment—to have a new start post-discharge.

V. PROPOSALS FOR LEGISLATIVE REFORM

Section 525(b) should be amended to provide protection for bankruptcy discrimination for debtors in hiring decisions. Such reform has a better chance of being achieved through legislative means rather than through the courts. As discussed in Parts II and III, courts' inconsistent interpretation and application of § 525(b) demonstrate the need for legislative action.

Reform through judicial interpretation has largely failed. Congress' permission to the courts to "mark the contours of the anti-discrimination provision in the pursuit of sound bankruptcy policy"[163] has been relatively unsuccessful.[164] As discussed in this Note, courts have struggled in applying § 525(b)'s explicit language while employing bankruptcy law's greater policy of protecting the debtor from undue discrimination and granting that debtor a "fresh start" post-discharge. The result has been confusion in varying interpretations and inconsistencies in judicial outcomes. In light of the courts' failure to do so, legislative reform is the best avenue of effective and comprehensive change.

Congress may reform § 525(b) in a number of effective ways. First, Congress should amend the language of § 525(b) to extend prohibition of *all* types of bankruptcy discrimination, including private employers' hiring choices.[165] This is most easily done by including "deny employment to" in the list of prohibited actions by private employers under § 525(b) to match the language of § 525(a).

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[161] *See* Martin, *supra* note 157 (stating how "Jerry K. Palmer, a psychology professor at Eastern Kentucky University, said his studies, though relatively small, found no correlation between the quality of an employee's credit report and that worker's job performance or likelihood to quit. He said he was not aware of any studies that showed a correlation between poor credit and employee fraud or violence.").

[162] *See* Klein et al., *supra* note 9, at 6 (stating that "[t]here is a complete absence of evidence that employee credit checks are job-related at all, much less consistent with business necessity, for *any* job—and there is substantial evidence that the credit records that employers check are based on factors substantially *un*related to any aspect of the performance of any job." (emphasis in original)).

[163] H.R. REP. NO. 95-595, at 367 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6322–23.

[164] These arguments are discussed in Part II of this Note.

[165] The *Leary* court provides persuasive reasoning in this case. *See* Leary v. Warnaco, Inc., 251 B.R. 656, 658–59 (S.D.N.Y. 2000).

If Congress decides not to amend the language of this statute directly, then Congress should respond to the problems that have occurred with § 525(b) and should legislate *how* these claims are litigated in two ways.

First, Congress should change the test for bankruptcy discrimination from the "sole cause" of termination to the "motivating factor," consistent with other protected classifications of anti-discrimination statutes.[166] This would also necessarily clarify the differing interpretations of the "solely because" of standards of § 525(a) and § 525(b).

Second, Congress can also change the damages that individuals are able to receive as victims of bankruptcy discrimination. Currently, individuals who have been the victims of bankruptcy discrimination may receive back pay, including fringe benefits and reinstatement. These individuals can also recover damages for emotional distress.[167] These damages are awarded "in addition to, or as a substitute for, equitable relief."[168] However, the law does not specify what these remedies are.[169]

Since there are no specified remedial provisions, courts have been free to create their own remedies.[170] In certain situations, remedial possibilities are unusual.[171] In so doing, courts have mostly relied on those remedies, which are applied in other employment discrimination suits.[172]

Remedial issues are significant[173] and are undoubtedly an important consideration to the debtor bringing a discrimination suit. Currently, a "successful plaintiff is entitled to equitable relief."[174] However, unlike other discrimination laws, they cannot recover attorneys' fees or other costs, i.e. punitive damages. This can be a significant deterrence to the debtor to pursue the claim.[175]

Furthermore, the award of attorney fees under other code sections could also worsen the situation.[176] One court noted the absence of an explicit authorization in § 525 in refusing to grant attorneys' fees.[177] The court reasoned, "If Congress had desired to sanction or encourage fee awards in cases under Section 525, it could easily have granted courts discretion to make such awards. It did not do so."[178] It is necessary for Congress to statutorily authorize attorneys' fees because, in general, American law does not sanction the award of attorneys' fees unless a state expressly allows it to do so.[179]

The increase in the practical importance and application of bankruptcy policies and their functions must be matched by parallel improvements in consistent application of

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[166] *See* Bronheim, *supra* note 55, at 606.
[167] *See* Bell v. Sanford-Corbitt-Bruker, Inc., No. CV186–201, 1987 WL 60286, at *5 (S.D. Ga. Sept. 14, 1987).
[168] Boshkoff, *supra* note 37, at 416.
[169] Scott A. Holt, *Exercise Caution with Bankrupt Employees,* DEL. EMP. L. LETTER , Apr. 2003, at 2.
[170] *Id.*
[171] For example, a "refusal to deal" might be this kind of situation. *See* Boshkoff, *supra* note 37, at 415.
[172] Holt, *supra* note 169.
[173] *See* Boshkoff, *supra* note 37, at 413.
[174] Boshkoff, *supra* note 37, at 414.
[175] *See* Boshkoff, *supra* note 37, at 414–15.
[176] *Id.* at 416.
[177] Hicks v. First Nat'l Bank (*In re* Hicks), 65 B.R. 980, 984 (Bankr. W.D. Ark. 1986).
[178] *Id.* at 984–85.
[179] Boshkoff, *supra* note 37, at 417.

those policies.[180] The reforms outlined in this Part provide a number of ways Congress may effectively amend § 525(b).

CONCLUSION

Much has been done through bankruptcy law to promote and preserve the debtor's "fresh start." However, the absence of "deny employment to" in § 525(b) has caused a negative effect for debtors. This has been exacerbated by the recent economic recession, where personal bankruptcies are higher than they have ever been. Furthermore, § 525(b) appears to be in danger of having an exacerbated effect on older workers, who already face ageist stereotypes in hiring and transfer policies. It is time for Congress to respond to these effects, to provide the "honest but unfortunate debtor" the relief that was always intended to be accorded him.

[180] *See* Hallinan, *supra* note 22, at 52 (stating that the "increase in the practical importance of bankruptcy policies has, regrettably, not been matched by improvements in the consistency or clarity of the articulation and application of those policies.").