11th Circuit: Private Employment May Be Denied Based on Applicant's Bankruptcy Filing

5/27/2011 By Michael G. McClory

The Bankruptcy Code does not make it unlawful for a private employer to deny employment to an individual on the grounds that the individual is or has been in bankruptcy, according to the 11th U.S. Circuit Court of Appeals.

In February 2008, Eric Myers moved to Florida from North Carolina looking for a fresh start. The month before, he had filed a Chapter 7 bankruptcy petition with a bankruptcy court in North Carolina, and that court ultimately discharged Myers' debts in May 2008. In Florida, Myers quickly found employment as a shift supervisor at a coffeehouse. While still employed there, he responded to a job posting and applied for a managerial position at a local TooJay's Gourmet Deli restaurant.

Myers interviewed at TooJay's in mid-July 2008. The interview went well, and a compensated two-day on-the-job evaluation of Myers was scheduled for July 31 and Aug. 1, 2008. (Compensation was less than half of the pay associated with the position.) During the on-the-job evaluation, Myers observed the operation of the deli, did some kitchen work and signed various personnel forms. The forms included a "personnel action form" on which the options "new hire" and "rehire" were left blank while the option "other (explain)" was marked with the explanation "OJE" (on-the-job evaluation). Myers also authorized TooJay's to conduct a background check, including a review of his credit history and reports. At the conclusion of the on-the-job evaluation, TooJay's scheduled Myers to begin work on Aug. 18, 2008; he was not told that his employment would be conditioned on a clean credit history. After Myers quit his job at the coffeehouse, he received a letter from TooJay's informing him he was not hired because of "a financial matter." Myers contacted the HR department and was told that his bankruptcy filing was the only reason he was not hired and that it was company policy not to hire people who had filed for bankruptcy.

In September 2008, Myers filed a lawsuit in federal court asserting, among other things, that TooJay's had discriminated against him in violation of 11 U.S.C. §525(b) by refusing to hire him because of his bankruptcy filing and, alternatively, by terminating his employment because of his bankruptcy filing. The district court granted summary judgment to TooJay's on the refusal to hire claim on the grounds that Section 525(b) does not prohibit a private employer from refusing to hire someone because of a bankruptcy filing. Although the court allowed the termination claim to proceed to trial, the jury found that TooJay's had not hired Myers and, therefore, did not terminate him.

Myers appealed both decisions, and the 11th Circuit affirmed the district court decisions. With respect to the refusal to hire claim, the appellate court said that discrimination protection under 11 U.S.C. §525 depends on whether the employer is a "governmental unit" (subject to Section 525(a)) or a "private employer" (subject to Section 525(b)). The earlier-enacted Section 525(a) provides that a governmental unit "may not … deny employment to, terminate the employment of, or discriminate" against a person based on that person's bankruptcy filings. In contrast, the later-enacted Section 525(b) provides

that a private employer may not "terminate the employment of, or discriminate" against a person based on that person's bankruptcy filings; this section says nothing about denying employment because of bankruptcy.

The 11th Circuit found that Myers had no claim because TooJay's was a private employer. It stated: "Had Congress wanted to cover a private employer's hiring policies and practices in §525(b), it could have done so the same way it covered a governmental unit's hiring policies and practices in §525(a)." Moreover, because the phrase "discriminate with respect to employment" is in both subsections, it necessarily "means something other than discrimination in hiring," which is only in Section 525(a) (applicable to governmental units and not private employers).

With respect to Myers' termination claim, the appellate court stated that "the factual basis he asserts for the claim—that he was hired and then fired because of his bankruptcy filing—was rejected by the jury." It held that the district court had properly denied Myers' motions for judgment as a matter of law and for a new trial.

Myers v. TooJay's Mgmt. Corp., 11th Cir., No. 10-10774 (May 17, 2011).

Professional Pointer: There are three important lessons in this decision. First, while a private employer may lawfully adopt a rule that it will not hire applicants who have prior bankruptcy filings, a private employer should not apply that rule to an existing employee; the statute expressly bars termination from employment because of a bankruptcy filing. Second, any private employer should uniformly follow any rule that it adopts against hiring applicants with bankruptcy filing histories; failing to apply the rule uniformly may lead to pretext claims (e.g., an applicant may cite non-uniform application in support of a claim that race or gender, not bankruptcy, was the reason for non-hire). Third, the employer in this case came very close to hiring Myers; it is important for employers to separate pre-employment activities from post-employment activities.

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Editor's Note: This article should not be construed as legal advice.

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