CONTEMPLATING THE RECOGNITION OF A COMMON LAW TORT FOR WRONGFULLY REFUSING TO HIRE BANKRUPTCY DEBTORS

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INTRODUCTION

Section 525 of the Bankruptcy Code, commonly known as the antidiscrimination provision, prohibits employers from discriminating against debtors for exercising their right to seek relief from creditors under the Bankruptcy Code. Although the provision reflects Congress's intent to protect the bankruptcy debtor's ability to "earn a livelihood," its restrictions on the employment practices of public and private entities were not enacted simultaneously, and the protections those restrictions provide to bankruptcy debtors are not identical.

In particular, the statute Congress originally enacted as section 525 in 1978 only prohibited government entities from discriminating against a bankruptcy debtor based on the debtor's "insolvency, bankruptcy, or nonpayment of a

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5 See Myers v. TooJay's Mgmt. Corp., 419 B.R. 51, 56 (M.D. Fla. 2009) ("The statute provides two standards: one for governmental agencies in § 525(a) and one for private employers in § 525(b). The government standard . . . was enacted in 1978 . . . . The standard governing private employers . . . was not enacted until 1984.["]"); aff'd, 640 F.3d 1278 (11th Cir. 2011).

6 See Mannella v. Comm'r of Internal Revenue, 631 F.3d 115, 125 n.7 (3d Cir. 2011) (contrasting "the limited protection given to persons in private employment from bankruptcy discrimination" with "the more expansive protection from bankruptcy discrimination given to public employees"); Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278, 1283 (11th Cir. 2011) ("Section 525 of the Bankruptcy Code provides individuals who are or have been in bankruptcy with some protection against discriminatory actions by employers. . . . The acts against which they are protected depend on whether the employer is a 'governmental unit' or a 'private employer . . . '" (quoting 11 U.S.C. § 525(a) & (b))).
dischargeable debt. The original provision was renumbered as section 525(a) in 1984 when Congress added subsection (b), which extended the scope of the provision to prohibit private employers from discriminating against employees who invoke the protection of the Bankruptcy Code.

In contrast to section 525(a), which "specifically states that a governmental unit may not 'deny employment to, terminate the employment of, or discriminate with respect to employment against' a person on the basis of his or her bankruptcy status," section 525(b) only appears to prohibit private employers from discriminating against their existing employees. The statute does not expressly prevent private employers from denying employment to job applicants on the basis of their bankruptcy status. Most courts that have considered the issue have concluded that the difference between the two provisions is intentional, and that unlike public employers, private employers can

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7 In re Hopkins, 66 B.R. 828, 833 (Bankr. W.D. Ark. 1986); see In re Patterson, 125 B.R. 40, 52 (Bankr. N.D. Ala. 1990) ("Section 525 . . . was enacted in 1978 to eliminate a wide variety of forms of discrimination against bankruptcy debtors by government agencies and activities."); aff'd, 967 F.2d 505 (11th Cir. 1992).

8 See In re Goldrich, 45 B.R. 514, 519 n.2 (Bankr. E.D.N.Y. 1984), rev'd on other grounds, 771 F.2d 28 (2d Cir. 1985); 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, 159 (1996); Elizabeth A. Bronheim, Comment, Interpreting Section 525(a) of the Bankruptcy Code, 7 BANKR. DEV. J. 595, 598 n.21 (1990); Samantha Orovitz, Comment, The Bankruptcy Shadow: Section 525(b) and the Job Applicant's Sisyphean Struggle for a Fresh Start, 29 EMORY BANKR. DEV. J. 553, 558 (2013).


10 Burnett v. Stewart Title, Inc. (In re Burnett), 635 F.3d 169, 172 (5th Cir. 2011) (quoting 11 U.S.C. § 525(a)); see also In re Rees, 61 B.R. 114, 124 (Bankr. D. Utah 1986) (stating section 525(a) "prohibits a governmental unit from denying employment to a debtor, terminating his employment, or discriminating with respect to his employment").

11 See Myers v. TooJay's Mgmt. Corp., 419 B.R. 51, 57 (M.D. Fla. 2009) ("[T]he private sector is prohibited only from discriminating against those persons who are already employees."); aff'd, 640 F.3d 1278 (11th Cir. 2011); In re Hardy, 209 B.R. 371, 378 (Bankr. E.D. Va. 1997) ("[T]he plain meaning of § 525(b) does not extend anti-discrimination protection to non-employees of the defendant.").

12 See Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278, 1284 (11th Cir. 2011) (noting "§ 525(a) expressly prohibits a government employer from refusing to hire someone based on a bankruptcy filing, while § 525(b) does not"); In re Stinson, 285 B.R. 239, 245 (Bankr. W.D. Va. 2002) ("The plain text of § 525(b) does not explicitly provide that discriminatory hiring is prohibited."); Fiorani v. CACI, 192 B.R. 401, 405 (E.D. Va. 1996); Orovitz, supra note 8, at 557 ("Unlike § 525(a), § 525(b) does not specify that a private employer cannot 'deny employment to' a job applicant because she was once a bankrupt debtor.") (emphasis in original).

13 See, e.g., Burnett, 635 F.3d at 172–73 (using various cannons of statutory interpretation including in pari materia, legislative history, Congressional intent, and structural analysis to support intentional differences in application of sections 525(a) and 525(b)); Myers, 419 B.R. at 57–58 (using plain
discriminate against bankruptcy debtors during the hiring process without running afoul of the Bankruptcy Code.\textsuperscript{14} This interpretation of the antidiscrimination provision has been criticized.\textsuperscript{15} Courts and commentators alike have asserted that allowing private employers to discriminate against bankruptcy debtors during the hiring process is inconsistent with the "fresh start"\textsuperscript{16} afforded individuals seeking relief under the Bankruptcy Code,\textsuperscript{17} which the antidiscrimination provision itself was specifically intended to promote.\textsuperscript{18} As one pair of commentators observed: "Although it may advance
the interests of the employer to use bankruptcy as a determinative factor in hiring, there is some concern that such policies will have a detrimental impact on an individual's ability to have a 'fresh start,' which is an aim of the Bankruptcy Code."

This Article explores one possible means of rectifying this perceived statutory deficiency—the judicial recognition of a wrongful refusal to hire tort applicable in cases in which bankruptcy debtors are denied employment in the private sector. The Article begins with a discussion of Congress's enactment of the antidiscrimination provision, and its subsequent amendment of the provision to encompass some aspects of private employment. The author then

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19 Robert J. Landry & Benjamin Hardy, *Bankruptcy Need Not Apply: Sound Hiring Policy or Dangerous Proposition?*, 7 Va. L. & Bus. Rev. 47, 50 (2012); cf. *In re Briggs*, 143 B.R. 438, 444 (Bankr. E.D. Mich. 1992) ("Entities who are in a position to fire, or have an opportunity to deny employment to, debtors based solely on the fact of bankruptcy clearly pose a . . . threat to the debtor's livelihood . . . .").

20 Not all courts have been 'persuaded by the argument that Congress purposefully omitted from § 525(b) the phrase 'deny employment to,' which is contained in § 525(a)[.]' *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010) (discussing *Leary*, 251 B.R. at 658). Even if the omission was intentional, it is certainly unusual. *See Downey v. Comm'r*, 97 T.C. 150, 167 (1991) ("Generally, the Federal employment discrimination statutes were designed to go beyond the 'mere employer-employee context, protecting individuals from various forms of discrimination even if they are not yet in a contractual relationship, e.g., refusal to hire contexts.'" (quoting *Rickel v. Comm'r*, 900 F.2d 655, 662 (3d Cir. 1990))).

21 Amending the Bankruptcy Code would seem to be the most logical means of addressing the perceived problem. *See Comm'nrs Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024, 1031 (2d Cir. 1975) ("Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce."); *vacated on other grounds*, 429 U.S. 1033 (1977); *Douglass G. Boshkoff, Private Parties and Bankruptcy-Based Discrimination*, 62 Ind. L.J. 159, 161 n.8 (1987) (assuming Congress has constitutional authority "to prohibit all forms of discrimination by both public and private entities"). However, "Congress appears to have expressly intended to give the Courts the responsibility to refine and define further the scope and limitations of Section 525 as it applies to various discriminatory acts." *In re Marine Elec. Ry. Prods. Div.*, Inc., 17 B.R. 845, 852 (Bankr. E.D.N.Y. 1982) (citing S. Rep. No. 95-989, at 81 (1978), *reprinted in 1978 U.S.C.C.A.N. 5787, 5867*).


discusses the conflicting judicial views of the amended provision's impact on the hiring discretion of private employers.\footnote{24}

After briefly summarizing the employment-at-will doctrine and its widely-recognized public policy exception,\footnote{25} the author explores the potential recognition of a common law wrongful discharge claim premised on the public policy embodied in the Bankruptcy Code's antidiscrimination provision.\footnote{26} The author then considers the possible expansion of this potential tort to encompass a private employer's discriminatory refusal to hire a bankruptcy debtor.\footnote{27} Despite legitimate policy arguments for protecting bankruptcy debtors from private sector hiring discrimination,\footnote{28} the author ultimately concludes that the extent to which debtors are to be protected from employment discrimination is a matter for Congress, rather than the courts, to decide.\footnote{29}
I. ORIGIN AND EVOLUTION OF THE BANKRUPTCY CODE'S ANTIDISCRIMINATION PROVISION

A. Pre-1978 Discrimination Against Bankrupt Debtors

Congress enacted the antidiscrimination provision as part of a comprehensive overhaul of federal bankruptcy law known as the Bankruptcy Reform Act of 1978, the substantive portions of which make up today's Bankruptcy Code. Prior to this enactment, no federal statute prevented public or private employers from discriminating against bankruptcy debtors. Although the fresh start policy underlying the antidiscrimination provision predated the 1978 reforms, the policy traditionally was (and actually continues...
to be) reflected primarily in the "discharge" of an individual's debts. The policy does not purport to shield debtors from all of the potential consequences of declaring bankruptcy, and prior to 1978 no federal statute prohibited any form of discrimination against bankruptcy debtors. As a result, it was relatively common—and apparently entirely lawful—for private employers, in particular, to base employment decisions on an individual's status as a current or former bankruptcy debtor.

35 See In re Waller, 394 B.R. 111, 113 (Bankr. D. S.C. 2008) ("The discharge of debt is the foundation for a debtor's fresh start."); In re Matus, 303 B.R. 660, 670 (Bankr. N.D. Ga. 2004) ("The fresh start is primarily accomplished through the discharge of debt."); In re Speece, 159 B.R. 314, 322 (Bankr. E.D. Cal. 1993) ("Debtors achieve their so-called 'fresh start' primarily because of the discharge.").

36 See Girardier v. Webster Coll., 563 F.2d 1267, 1275 (8th Cir. 1977) ("Historically, the Congress has rested on the discharge provisions of the Act to effectuate this goal . . . "). Section 524 of the Bankruptcy Code states, in part, that a discharge in bankruptcy "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2) (2012). For an academic discussion of this critical aspect of federal bankruptcy law, see Doug Rendleman, The Bankruptcy Discharge: Toward a Fresher Start, 58 N.C. L. Rev. 723 (1980).

37 See Watts v. Pa. Hous. Fin. Co., 876 F.2d 1090, 1094 (3d Cir. 1989) ("[T]he fresh start policy does not require the State to insulate a debtor from any and all adverse consequences of a bankruptcy filing."); cf. Girardier, 563 F.2d at 1276 ("[T]he present Bankruptcy Act does not fully implement a 'fresh start' policy . . . "); see also In re Montgomery, 219 B.R. 913, 916 (B.A.P. 10th Cir. 1998) ("Though the 'fresh start' maxim . . . may have been a fundamental consideration in the formation of the Code, we recognize the maxim to be a limited, and no longer a completely unencumbered, guiding principle.").

38 See McLellan v. Miss. Power & Light Co., 545 F.2d 919, 930 (5th Cir. 1977) ("Congress is only now considering what protection, if any, a bankrupt should have from discriminatory treatment. No statutory protection has been afforded in the past and none presently shelters this unfortunate class."); see also In re Ellis, 493 B.R. 818, 828 n.25 (Bankr. D. Colo. 2013) ("Section 525(a) is original to the Bankruptcy Reform Act of 1978, which completely overhauled the Bankruptcy Act of 1898."); In re Rees, 61 B.R. 114, 117 (Bankr. D. Utah 1986) ("Section 525 had no predecessor under the former Bankruptcy Act . . . ").

39 See, e.g., Handsome v. Rutgers Univ., 445 F. Supp. 1362, 1367 (D. N.J. 1978) ("There being no explicit provision in the Bankruptcy Act making it unlawful to discriminate against a bankrupt, private entities may lawfully refuse to deal with bankrupts."); see also Girardier, 563 F.2d at 1272 ("[A] great variety of adverse consequences could be visited upon bankrupts . . . without any violation of the Bankruptcy Act . . . ").

40 In a case decided several years before Congress enacted the antidiscrimination provision, Perez v. Campbell, 402 U.S. 637 (1971), the United States Supreme Court held that "discrimination against bankrupts by a governmental unit can violate the Supremacy Clause of the United States Constitution." In re IT Corp., 573 N.E.2d 136, 142 (Ohio Ct. App. 1989) (citing Perez, 402 U.S. at 649–52). However, the constitutional protection announced in Perez has no application where "purely private action is involved." McLellan, 545 F.2d at 930 n.57; see also Handsome, 445 F. Supp. at 1366 n.6 (acknowledging that Perez "does not proscribe purely private discrimination against bankrupts").

In one particularly influential pre-Bankruptcy Reform Act decision,\textsuperscript{42} McLellan \textit{v. Mississippi Power & Light Co.},\textsuperscript{43} the Fifth Circuit addressed whether an individual whose employment was terminated because he sought bankruptcy relief could pursue a claim for wrongful termination against his employer.\textsuperscript{44} The court concluded that no such claim existed:

\begin{quote}
We find no law which restrains [the defendant] from firing an employee because he has filed a petition in voluntary bankruptcy . . . . A thorough examination of the Bankruptcy Act and its legislative history discloses no explicit provision or intent to prohibit discriminatory action against an individual on the basis of his declaring bankruptcy. In addition, no such Congressional intent can be reasonably inferred from the statute as it is now enacted.\textsuperscript{45}
\end{quote}

In a case decided a few months after McLellan, the court in \textit{Marshall v. District of Columbia Government}\textsuperscript{46} concluded that employers also were not prohibited from discriminating against bankruptcy debtors during the hiring process.\textsuperscript{47} The plaintiff in \textit{Marshall} brought suit against a municipality after he was denied employment as a police officer because he previously was adjudged bankrupt.\textsuperscript{48} He asserted that he had "a right under the bankruptcy laws to be free of the 1970 amendments to the Bankruptcy Act of 1898, discrimination by governmental and private entities against the bankrupt for filing a petition in bankruptcy was well documented.”\textsuperscript{49}

\textsuperscript{42} See Boshkoff, \textit{supra} note 21, at 171 ("The reluctance to condemn private party discrimination is based [in part] upon . . . the deference some courts have given to the McLellan opinion . . . ”).

\textsuperscript{43} 545 F.2d 919 (5th Cir. 1977).

\textsuperscript{44} \textit{Id.} at 922. The plaintiff in \textit{McLellan} sought relief under a federal civil rights statute, 42 U.S.C. § 1985(3), that "prohibits private conspiracies to deprive a person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws." Miss. Women's Med. Clinic \textit{v. McMillan}, 866 F.2d 788, 793 (5th Cir. 1989). Because "it is only when the conspirators seek to achieve their objective by \textit{independently unlawful means} that a section 1985(3) claim can be maintained," the \textit{McLellan} court necessarily addressed whether it was a violation of federal bankruptcy law for an employer to terminate an individual's employment "because he filed in bankruptcy." \textit{McLellan}, 545 F.2d at 929 (emphasis added).

\textsuperscript{45} \textit{McLellan}, 545 F.2d at 929 (footnotes omitted); see also Girardier \textit{v. Webster Coll.}, 563 F.2d 1267, 1275 (8th Cir. 1977) ("The plaintiffs urge that they are entitled to be treated in a nondiscriminatory manner by reason of their bankruptcy, unless the disparity in treatment is rationally supported. This . . . is not the present law.”).

\textsuperscript{46} 559 F.2d 726 (D.C. Cir. 1977).

\textsuperscript{47} See \textit{id.} at 729 (rejecting plaintiff's argument that "the bankruptcy statute . . . prohibits defendant from using his bankruptcy against him in any way in the future.”).

\textsuperscript{48} \textit{Id.} at 727.
from any negative employment implications resulting from his having gone through bankruptcy."\(^{49}\)

The court noted that the plaintiff's claim was "not one recognized under a specific provision of the bankruptcy law," but instead was premised on the fresh start policy "assumed to underlie the bankruptcy laws themselves."\(^{50}\) Although the court found it unnecessary to reach the merits of the plaintiff's claim,\(^{51}\) it opined that he was reading the fresh start policy too broadly,\(^{52}\) in that the then-applicable bankruptcy statutes merely offered bankruptcy debtors a fresh start through the discharge of pre-existing debt.\(^{53}\) The court noted that those statutes did "not expunge the fact of bankruptcy,"\(^{54}\) nor did they prohibit a prospective employer from considering the implications of a job applicant's prior bankruptcy—specifically, the fact that the applicant had been "unable to

\(^{49}\) Id. at 728. The plaintiff was initially denied employment pursuant to a municipal regulation "barring the hiring of bankrupts." Id. at 727. Although the defendant ultimately hired the plaintiff after modifying its regulation, the plaintiff continued to challenge the legality of "the delay in his hiring due to the bankruptcy regulation." Id. In particular, he sought "back pay from the date of his original application . . . until the date he was hired[]" Id. at 730 (Kaufman, J., concurring in part and dissenting in part).


\(^{51}\) In a separate opinion, one of the judges in Marshall observed that the court in Rutledge v. City of Shreveport, 387 F. Supp. 1277, 1279 (W.D. La. 1975) "seemingly accepted as valid the same substantive contentions that [were being] advanced as to the bankruptcy issue" by the plaintiff in Marshall. Marshall, 559 F.2d at 731 (Kaufman, J., concurring in part and dissenting in part). Citing Rutledge, the lower court in Marshall indicated that the plaintiff had raised "a significant issue," but concluded that it lacked jurisdiction to resolve the issue. Marshall v. District of Columbia, No. 74-990, 1975 WL 219 at *3 (D. D.C. Aug. 6, 1975), remanded, 559 F.2d 726 (D.C. Cir. 1977). Because the appellate court in Marshall was merely reviewing this jurisdictional ruling, the majority likewise expressed "no opinion on . . . the correctness of the Rutledge decision." Marshall, 559 F.2d at 728 n.6.

\(^{52}\) See Marshall, 559 F.2d at 729 (asserting plaintiff's argument read "too much into the Act"); cf. Toth v. Mich. State Hous. Dev. Auth., 136 F.3d 477, 480 (6th Cir. 1998) (rejecting "an expansive understanding of the 'fresh start' policy to insulate a debtor from all adverse consequences of a bankruptcy filing"); In re Colfer, 159 B.R. 602, 609 (Bankr. D. Me. 1993) ("Reliance on idealized notions of 'fresh start,' divorced from the very statute that provides that fresh start, is inappropriate.").

\(^{53}\) See Marshall, 559 F.2d. at 730 ("All a discharge in bankruptcy does is to discharge 'pre-existing debt.'"); cf. Girardier v. Webster Coll., 563 F.2d 1267, 1272 (8th Cir. 1977) ("[H]istorically the protection afforded the bankrupt has been limited to discharge of liability for past debts."); In re Feddon, 2 B.R. 322, 323 (Bankr. M.D. Fla. 1980) ("Congress intended to create a 'fresh start' for the bankrupt by granting a discharge").

\(^{54}\) Marshall, 559 F.2d at 730; see In re Dabney, 3 B.R. 719, 720 (E.D.N.Y. 1980) ("The 'fresh start' to which [a debtor] is entitled extends to relief from the oppressive debts he incurred prior to his petition . . . . The doctrine does not relieve him of every conceivable disability incurred as a result of his bankruptcy or inconvenience encountered while starting over."); Lawrence Gebhardt, Note, Supremacy in the Bankruptcy Act: The New Standard of Perez v. Campbell, 40 GEO. WASH. L. REV. 764, 771–72 (1972) ("[T]he Bankruptcy Act entitles a debtor to a fresh start, free from the onus of past obligations. . . . The Act, however, does not purport to protect a bankrupt from all possible obstacles which he may encounter because of past failures.").
successfully manage his financial affairs)—when deciding whether his "past record . . . merits his consideration for employment."

B. Congress's Enactment of the Antidiscrimination Provision

Congress adopted the original version of the antidiscrimination provision—what is now section 525(a) of the Bankruptcy Code—in 1978, the year after Marshall and McElheny were decided. However, the provision originated in proposed legislation drafted several years earlier by the Commission on the Bankruptcy Laws of the United States, a "blue ribbon panel" comprised of

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55 Marshall, 559 F.2d at 729. An applicant's prior bankruptcy "may serve as an indicator—in effect, a proxy—of characteristics that an employer simply may not want in a prospective employee." Landry & Hardy, supra note 19, at 57; see also Karyn D. Heavenrich, Are Fair Employment Practices After Bankruptcy A Human Right?, 52 AM. BANKR. INST. J., Feb. 2013 at 36, 69 ("A declaration of bankruptcy may be a red flag for employers, potentially leading to the discovery of risky spending habits or other character flaws.").

56 Marshall, 559 F.2d at 729; cf. In re Tinker, 99 B.R. 957, 958 (Bankr. W.D. Mo. 1989) (noting under pre-1978 bankruptcy law, "prior bankruptcy was as much a part of a person's credit history as any other factor bearing on the likelihood that they would fulfill their future obligations").


58 See Stoltz v. Brattleboro Hous. Auth. (In re Stoltz), 315 F.3d 80, 86 n.2 (2d Cir. 2002); In re Brown, 244 B.R. 62, 66 (Bankr. D. N.J. 2000); Patterson, 125 B.R. at 52 ("Section 525 of 11 U.S.C. was enacted in 1978 to eliminate a wide variety of forms of discrimination against bankrupt debtors by government agencies and activities."); In re Wagner, 87 B.R. 612, 617 (Bankr. C.D. Cal. 1988).

59 See R. Stuart Phillips, Walking the Tightrope: Servicemembers, Bankruptcy and Debtor Protection, 7 J. BANKR. L. & PRACT. 257, 266 (1998) ("In Marshall, the D.C. Circuit Court of Appeals allowed [a] city to discriminate against a police officer on the basis of a bankruptcy filing . . . . [T]he reasoning of this case was effectively mooted by the passage of § 525 one year later."). The antidiscrimination provision and most other aspects of the Bankruptcy Reform Act of 1978 did not become effective until October 1, 1979—nearly a year after its enactment. See Commonwealth Nat'l Bank v. United States (In re Ashe), 712 F.2d 864, 869 n.1 (3d Cir. 1983) (Becker, J., concurring in part and dissenting in part); Henry v. Heyison, 4 B.R. 437, 441 n.6 (E.D. Pa. 1980); In re Beck, 4 B.R. 661, 662 (Bankr. C.D. Ill. 1980) (noting effective date of law was October 1, 1979).

60 See Lomas Mortg., Inc. v. Louis, 82 F.3d 1, 4 (1st Cir. 1996); Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 238 (5th Cir. 1984) (explaining how Commission issued report in 1973 containing findings, recommendations, and draft of bill to implement them); In re Rees, 61 B.R. 114, 117 (Bankr. D. Utah 1986). See also In re Sweetwater, 40 B.R. 733, 735 (Bankr. D. Utah 1984) ("The Bankruptcy Code evolved from the study and recommendations of the Commission on Bankruptcy Laws of the United States.").

61 Allen v. Geneva Steel Co. (In re Geneva Steel Co.), 281 F.3d 1173, 1176 (10th Cir. 2002); see In re Gerova Fin. Group, 482 B.R. 86, 95 (Bankr. S.D.N.Y. 2012) (describing Commission members as "distinguished").
four members of Congress,62 two federal district court judges,63 a law professor,64 a prominent businessman,65 and a highly-regarded practicing lawyer (and former academic) who served as the Commission’s Chairman.66

62 These were Senators Quentin Burdick of North Dakota and Marlow Cook of Kentucky, and Representatives Don Edwards and Charles Wiggins of California. See Frank R. Kennedy, The Report
of the Bankruptcy Commission: The First Five Chapters of the Proposed New Bankruptcy Act, 49 IND.
L.J. 422, 422 n.2 (1974); The Honorable Geraldine Mund, Appointed or Anointed: Judges, Congress
and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In, 81 AM. BANKR. L.J. 1,
14 (2007). All were “members of the Judiciary Committees of their respective Houses of Congress
through which all bankruptcy legislation must pass.” Kennedy, supra, at 422 n.2.

63 One of the judges who served on the Commission, Hubert L. Will of the Northern District of
Illinois, subsequently lamented, hyperbolically, that “Congress did not adopt many of the
recommendations were largely adopted by Congress when it enacted the Bankruptcy Code in 1978.”).
The Commission’s other judicial representative was Edward Weinfeld of the Southern District of New
York. See In re Lear, 29 B.R. at 440 n.1; Kennedy, supra note 62, at 422 n.2. At the time of their
appointment to the Commission, both judges were members of the Committee on Bankruptcy
Administration of the Judicial Conference of the United States. See Jeb Barnes, Bankruptcy
Bargaining?: Bankruptcy Reform and the Politics of Adversarial Legalism, 13 J.L. & Pol. 893, 908
n.87 (1997).

64 The law professor was Charles Seligson, who was both a practicing lawyer and a member of the
NYU law faculty. See In re Neiheisel, 32 B.R. 146, 150 (Bankr. D. Utah 1983); Kennedy, supra note
62, at 422 n.2 (noting Charles Seligson was member of NYU law faculty and dean of New York
bankruptcy bar for many years); Gerald R. Smith & Frank R. Kennedy, Some Suggestions for the
appointment to the Commission, Professor Seligson was Chairman of the National Bankruptcy
Conference. See Barnes, supra note 63, at 908 n.87; Mund, supra note 62, at 14. He was “a recognized
authority on the law of bankruptcy and bankruptcy practice.” In re Gross, 341 A.2d 336, 338 (N.J.
1975); see also Smith & Kennedy, supra, at 478 (asserting Seligson "was widely recognized as the
leading bankruptcy practitioner in the United States").

65 The businessman was J. Wilson Newman, an executive with and former president of Dun &
Bradstreet. See Barnes, supra note 63, at 908 n.87; Kennedy, supra note 62, at 422 n.2. Mr. Newman
was a lawyer as well as a successful businessman, and "brought a seasoned economic and business
perspective to the Commission." Smith & Kennedy, supra note 64, at 478–79. In his autobiography,
Mr. Newman subsequently expressed a somewhat jaded view of his government service, which also
included a stint as a member of President Nixon's controversial Price Commission in the early 1970s.
See J. WILSON NEWMAN, FOR WHAT DO WE LABOR? A LIFE'S VALUES FROM CHILDHOOD TO CHAIRMAN
Newman did not discuss his service on the Bankruptcy Commission, which was merely listed, without
comment, in the Appendix of his book. See id. at 258.

66 The Chairman of the Commission was Harold Marsh, Jr. See In re Jensen-Farley Pictures, Inc., 47
(Bankr. E.D. Mich. 1982). Mr. Marsh was formerly a UCLA law professor, but at the time of his
appointment to the Commission he was in private corporate practice in Los Angeles. See Barnes,
supra note 63, at 908 n.87; Kennedy, supra note 62, at 422 n.2; Mund, supra note 62, at 14. He has
been described as "a respected academic and practicing lawyer, and expert in securities law, Article
Nine of the Uniform Commercial Code and corporate reorganizations." Smith & Kennedy, supra note
64, at 478.
Congress established the Commission in 1970, and charged it with responsibility for studying and recommending changes to the existing bankruptcy laws. After more than two years of intensive work, the Commission submitted a report to Congress on July 30, 1973. The published report consisted of two parts. Part I summarized the Commission’s history, and also set forth its findings and recommendations. Part II was a draft of a proposed new bankruptcy act designed to implement the Commission’s recommendations, which the Commission referred to as the "Bankruptcy Act of 1973," together with accompanying explanatory notes. A third component of the report, which was not formally published with Parts I and II when the

69 See United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 793 F.2d 1380, 1393 (5th Cir. 1986); Ridgeway, 322 B.R. at 27; In re Melendez, 224 B.R. 252, 254 (Bankr. D. Mass. 1998); In re Keckler, 3 B.R. 155, 159 (Bankr. N.D. Ohio 1980); Kennedy, supra note 62, at 422; Klee, supra note 30, at 943; Smith & Kennedy, supra note 64, at 479.
71 See In re Hall, 15 B.R. 913, 916 (B.A.P. 9th Cir. 1981); In re Baldwin, 84 B.R. 394, 397 (Bankr. W.D. Pa. 1988); In re Nikron, 27 B.R. at 775; Klee, supra note 30, at 943; Tabb, supra note 30, at 32.
72 See In re Baldwin, 84 B.R. at 397; Smith & Kennedy, supra note 64, at 480. For another perspective on the Commission's history, see Harry D. Dixon, Jr., Bankruptcy Commissions: Then and Now, 15 AM. BANKR. INST. J., Apr. 1996 at 3.
73 See Grubbs v. Houston First Am. Sav. Ass'n, 730 F.2d 236, 238 (5th Cir. 1984); In re Baldwin, 84 B.R. at 397; In re Nikron, 27 B.R. at 775; In re Hemmen, 7 B.R. at 64; Tabb, supra note 30, at 33.
74 See Grubbs, 730 F.2d at 238; In re Smith, 640 F.2d 888, 889 (7th Cir. 1981); In re Grayshall Res., Inc., 63 B.R. 382, 388 (Bankr. D. Colo. 1986); In re Mojica, 30 B.R. 925, 928 (Bankr. E.D.N.Y. 1983) (describing Commission's recommendation that exceptions from discharge in Bankruptcy Act be continued in new legislation); In re Nikron, 27 B.R. at 775.
report was submitted to Congress,\(^{77}\) contained a collection of studies prepared by and for the Commission's staff.\(^{78}\)

Among other things,\(^{79}\) the Commission found that discrimination against bankruptcy debtors was undermining the fresh start objective of the existing bankruptcy laws.\(^{80}\) In an effort to address this problem, the Commission included a provision in its proposed legislation that would have prohibited both private and public entities from discriminating against bankruptcy debtors.\(^{81}\) As explained in the Commission's report:

The "fresh start" policy of the present Act has been frustrated, in some instances, by provisions of federal and state laws that subject an

\(^{77}\) See Klee, supra note 30, at 943 n.20 ("Part III of the Commission's report, containing several studies prepared by the Commission's staff, was never published as an official document."); Smith & Kennedy, supra note 64, at 480 n.12 ("Part III was not included in the published document."). Members of the public could obtain copies of the Commission's full report from the United States Government Printing Office. See Robert J. Rosenberg, Beyond Yale Express: Corporate Reorganization and the Secured Creditor's Rights of Reclamation, 123 U. PA. L. REV. 509, 532 n.81 (1975).

\(^{78}\) See John D. Ayer, Rethinking Absolute Priority After Ahlers, 87 MICH. L. REV. 963, 978 n.77 (1989) (describing Part III as selection of studies chosen by Commission); Smith & Kennedy, supra note 64, at 480. Courts interpreting the Bankruptcy Code have occasionally relied on the Commission's unpublished material. In In re Durensky, 377 F. Supp. 798, 802 & n.8 (N.D. Tex. 1974), appeal dismissed, 519 F.2d 1024 (5th Cir. 1975), for example, the court relied on a report prepared by William T. Plumb, Jr., a consultant to the Commission and "arguably the most influential bankruptcy tax scholar of the twentieth century." Michelle A. Cecil, Reinvigorating Chapter 11: The Case for Reinstating the Stock-for-Debt Exemption in Bankruptcy, 2000 Wis. L. REV. 1001, 1014 (2000); see also Smith & Kennedy, supra note 64, at 480.

Part III included two lengthy articles concerning the interplay of tax laws and bankruptcy, which were the pioneering efforts of the indefatigable William T. Plumb, Jr. The value of his contributions in bringing clarity and reason to this highly specialized intersection of two complex areas of the law is hard to overstate.

\(^{79}\) See In re Neiheisel, 32 B.R. 146, 158 (Bankr. D. Utah 1983) ("Finding the existing bankruptcy law to be inadequate, the Commission recommended changes intended to enhance the fresh start of consumer debtors.").


individual who obtains a discharge, and [fails] to pay the discharged debt, to discriminatory treatment. . . . The Commission is of the opinion that such discriminatory treatment frustrates a major policy of the Bankruptcy Act and should be prohibited. Therefore, the Commission recommends that no one be subjected to discriminatory treatment because he . . . is or has been a debtor or has failed to pay a debt discharged in a case under the Act[.]82

The Commission's proposed legislation was introduced as a legislative bill in each House of Congress in October 1973, during the 93rd Congress.83 When no significant action was taken on those bills,84 the Commission's proposal was reintroduced the following year in the 94th Congress.85 The Commission's proposed legislation and a competing proposal drafted by the National

82 In re Bryant, 43 B.R. at 196 (quoting Report of Commission on Bankruptcy Laws of United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. 177 (1973)). Although the Commission specifically noted that discriminatory "federal and state laws" were frustrating the fresh state policy, id., "actions taken against a bankrupt by private individuals or organizations which do not involve the machinery of the states . . . may deprive the bankrupt entirely of his means of livelihood," and thus also frustrate the fresh start policy. Girardier v. Webster Coll., 563 F.2d 1267, 1273 (8th Cir. 1977) (quoting Gebhardt, supra note 54, at 772); cf. James A. Timko, Note & Comment, Section 525(a) of the Bankruptcy Code and Sovereign Immunity: The Supreme Court's Creation of a Super Creditor, 17 BANKR. DEV. J. 605, 605 (2001) ("One way of ensuring this fresh start is to prevent discriminatory acts by government and private entities against debtors based on a debtor availing himself to the protections of the Bankruptcy Code.").


84 See In re Law, 37 B.R. 501, 507 n.7 (Bankr. S.D. Ohio 1984) ("This delay was caused at first by Congressional preoccupation with the possible impeachment of former President Nixon and later continued when the Congress first contemplated the potential constitutional flaws in the then proposed structure of the Bankruptcy Courts."); Klee, supra note 30, at 943–44.

The only formal legislative action taken during the 93rd Congress was one day of hearings, held on December 10, 1973, conducted by Congressmen [sic] Edwards' Subcommittee on Civil and Constitutional Rights. This relative inactivity was due to the Judiciary Committee's preoccupation with the possible impeachment proceedings of Richard M. Nixon.

Id.

85 See In re Rees, 61 B.R. at 117; In re Sweetwater, 40 B.R. 733, 736 (Bankr. D. Utah 1984); In re Nikron, 27 B.R. at 775; In re White Motor Credit Corp., 14 B.R. at 589.
Conference of Bankruptcy Judges that differed from the Commission's proposal in several important respects (but contained an identical antidiscrimination provision) were ultimately debated at length in a series of hearings held by separate subcommittees of the House and Senate in 1975 and 1976.

There was significant congressional support for the Commission's proposed legislation (not least from the bills' sponsors, all of whom had been members of the Commission), and Congress eventually incorporated many of the Commission's recommendations into the Bankruptcy Code it ultimately enacted in 1978. To some extent, the congressional support for the Commission's proposal extended to its proposed antidiscrimination provision. However, a number of interested observers lobbied against the adoption of that provision.

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86 See In re Law, 37 B.R. at 506 ("The Commission was not the only group concerned with the nation's bankruptcy laws during the early 1970s. The National Conference of Bankruptcy Judges submitted a proposed bankruptcy code in 1974 . . . "). The bankruptcy judges' proposal, which was formulated in response to the Commission's proposal, was first introduced in the House on September 12, 1974, in the Second Session of the 93rd Congress. See In re Sweetwater, 40 B.R. at 736 nn. 7 & 8; In re Scher, 12 B.R. 258, 271 n.49 (Bankr. S.D.N.Y. 1981). The judges' bill was reintroduced in the 94th Congress along with the Commission's proposal after no action on the proposals was taken during the 93rd Congress. See In re White Motor Credit Corp., 14 B.R. at 589.


88 See Girardier v. Webster Coll., 545 F.2d 1267, 1275 (8th Cir. 1977); McLellan v. Miss. Power & Light Co., 545 F.2d 919, 930 (5th Cir. 1977) ("Both of the proposed new Bankruptcy Acts—that drafted by the Commission on the Bankruptcy Laws of the United States and that by the National Conference of Bankruptcy Judges—have identical section 4–508's . . . "); In re Rees, 61 B.R. at 117.

89 See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.), 793 F.2d 1380, 1394 (5th Cir. 1986) (noting Congress held extensive hearings regarding drafted legislation); In re Smith, 640 F.2d 888, 889 (7th Cir. 1981); In re Ridgeway, 322 B.R. at 28; In re Rees, 61 B.R. at 117–18; In re Sweetwater, 40 B.R. at 737; In re Nikron, 27 B.R. at 775; In re White Motor Credit Corp, 14 B.R. at 589; Klee, supra note 30, at 944–45; Bronheim, supra note 8, at 597 n.17.


93 See In re Olson, 38 B.R. 515, 519 n.1 (Bankr. N.D. Iowa 1984) ("[T]here was support in Congress that § 525 should be extended to cover private as well as public entities.").

94 See, e.g., In re Rees, 61 B.R. at 117–18 (noting "credit industry was extremely concerned about the wording of the antidiscrimination provision", and urged that it be redrafted, and the "Department of Justice agreed that the language . . . providing for the protection of discharged debtors from 'discriminatory treatment' was too broadly worded.").
and Congress, responding to their concerns, ultimately elected not to provide debtors with the broad protection from discriminatory treatment envisioned by the Commission.

The antidiscrimination statute Congress enacted as part of the Bankruptcy Reform Act of 1978 instead simply regulated the conduct of government entities. The provision did not place any restrictions on the conduct of private entities, except to the extent those entities might be deemed to be acting in a quasi-governmental capacity. As a result, many courts continued to follow *McLellan v. Mississippi Power & Light Co.* and *Marshall v. District of Columbia Government* in cases challenging the employment practices of private entities, who remained free to discriminate against bankruptcy debtors without violating the new Bankruptcy Code.

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95 See *In re Straight*, 248 B.R. 403, 429 (B.A.P. 10th Cir. 2000) (Boulden, J., dissenting) (stating antidiscrimination provision proposed by Bankruptcy Commission was "modified to what is now § 525(a) when Congress received complaints that it was too broad"); *In re Rees*, 61 B.R. at 119 (noting that antidiscrimination provision Congress ultimately enacted "reflects . . . lobbying efforts during the [congressional] hearings").

96 See *Exquisito Servs.*, Inc. v. United States (*In re Exquisito Servs. Inc.*), 823 F.2d 151, 153 (5th Cir. 1987) (recognizing Congress' emphasis of narrow reading of section 525); *In re The Bible Speaks*, 69 B.R. 368, 372 (Bankr. D. Mass. 1987); *In re Rees*, 61 B.R. at 124 ("Congress considered many alternatives to preserve the effectiveness of a debtor's fresh start. During the legislative process, the broadly worded protection against 'discriminatory treatment' originally found in Section 4–508 of the Commission bill gave way to the much narrower enumeration found in Section 525(a).")


99 See *In re Heath*, 3 B.R. 351, 353 (Bankr. N.D. Ill. 1980) ("It is apparent from the legislative history . . . that section 525 extends to action by quasi-governmental units."); *In re Douglas*, 18 B.R. at 815 ("Section 525 . . . only prohibits a governmental or quasi-governmental unit or organization from discriminating against petitioners under the Bankruptcy Code . . . ").

100 545 F.2d 919, 929 (5th Cir. 1977); see * supra* notes 42–45 and accompanying text.

101 559 F.2d 726 (D.C. Cir. 1977); see * supra* notes 46–56 and accompanying text.


There is no provision in the Bankruptcy Act prohibiting a private employer from discharging an employee for filing a voluntary petition in bankruptcy. In fact,
C. The 1984 Amendment of the Antidiscrimination Provision

Responding to judicial and scholarly criticism of the original antidiscrimination provision,\(^\text{104}\) Congress eventually expanded the protection available to bankruptcy debtors by adding subsection (b) to section 525 of the Bankruptcy Code\(^\text{105}\) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA").\(^\text{106}\) By prohibiting private entities from discriminating against bankruptcy debtors in most aspects of employment,\(^\text{107}\) the 1984 amendment eliminated some of the controversy surrounding the original provision.\(^\text{108}\)

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Congress . . . expressly refused to make unlawful employment discrimination against bankrupts by private employers, although providing in Section 525 for such a prohibition applicable only to public employees.

\(^{104}\) See, e.g., In re Olson, 38 B.R. 515, 519 (Bankr. N.D. Iowa 1984) ("[R]ecent decisions have strongly suggested that § 525 should be construed to apply to private entities"); Rendleman, supra note 36, at 755 ("The statute . . . only prohibit[s] discrimination against bankrupts by governmental units, and Congress should delete that limitation . . . . [I]f Congress seeks to protect livelihoods, it should treat public and private employers alike." (footnotes omitted)).

\(^{105}\) See 11 U.S.C. § 525(b).


\(^{107}\) See In re Stinson, 285 B.R. at 250 ("Section 525(b) prohibits discrimination with respect to employment, but this prohibition does not include hiring decisions."); Pastore v. Medford Sav. Bank, 186 B.R. 553, 554 (Bankr. D. Mass. 1995).

Subsection (a) of § 525 prohibits governmental entities from discriminating against an individual in employment and certain other areas on the basis of the individual's current or prior bankruptcy status . . . . Subsection (b) was added in 1984 to extend some of the same antidiscrimination principles to private employers.]

\(^{108}\) See Chobot, supra note 22, at 196–97 ("Any divergence of view concerning the applicability of bankruptcy anti-discrimination provisions to private employers has been rendered academic by the enactment of new section 525(b).")
For example, private employers, like their public counterparts, can no longer terminate an employee because the employee is, or once was, a bankruptcy debtor. The antidiscrimination provision also now prohibits both public and private employers from discriminating against bankruptcy debtors in "other aspects of employment, such as in promotions, demotions, hours, pay, and so forth." However, because the amended provision does not purport to prevent private employers from discriminating against bankruptcy debtors during the hiring process, courts continue to debate the provision's impact in that situation.

II. JUDICIAL INTERPRETATIONS OF SECTION 525(b)

A. The Majority View

In re Madison Madison International was the first case to address the impact of the amended antidiscrimination provision on a private employer's
hiring discretion.\textsuperscript{115} Contrasting the language of newly-enacted section 525(b) with the language of the original provision,\textsuperscript{116} the court held that private employers are prohibited from discriminating against bankruptcy debtors only when there is "an existing employer-employee relationship between the parties."\textsuperscript{117} The court offered the following explanation for its holding:

[Section 525(b) states that no private employer may: (1) terminate the employment of an individual or (2) discriminate with respect to employment against an individual (meaning such things as could affect the debtor's promotion, salary increases or job duties). To this extent, § 525(b) precisely tracks the language of § 525(a). However, § 525(a) also . . . precludes governmental units from denying employment to potential employees. The fact that this particular prohibition was not carried over to § 525(b) cannot be ignored.\textsuperscript{118}

Although Madison was decided by a federal bankruptcy court,\textsuperscript{119} and thus is not binding in subsequent bankruptcy cases,\textsuperscript{120} the court's reasoning has been embraced by a number of other courts.\textsuperscript{121} In Pastore v. Medford Savings Bank\textsuperscript{122}
and \textit{Fiorani v. CACI},\textsuperscript{123} for example, federal district courts in Massachusetts and Virginia,\textsuperscript{124} respectively, followed \textit{Madison} in holding that section 525(b) does not prevent private employers from discriminating against bankruptcy debtors during the hiring process.\textsuperscript{125} Even more significantly, the only three federal appellate courts that have considered the issue—\textit{Third},\textsuperscript{127} \textit{Fifth},\textsuperscript{128} and \textit{Eleventh Circuits}\textsuperscript{129}—agree that section 525(b) does not limit a private employer's right to consider an applicant's prior bankruptcy when making hiring decisions.\textsuperscript{130}

\textbf{B. The Minority View}

\textit{Leary v. Warnaco, Inc.}\textsuperscript{131} is the only case in which a court has expressly held that section 525(b) prohibits private employers from discriminating against job applicants.\textsuperscript{132} The plaintiff in \textit{Leary} alleged that the defendant violated the actions taken after . . . an employment relationship has been established and does not cover a situation which might be a discriminatory hiring practice by private employers."); \textit{Landry & Hardy, supra note 19}, at 54 ("[A]ll courts except for one have found that bankruptcy can be used in the hiring decision process by private employers without violating the Bankruptcy Code." (footnote omitted)).


\textsuperscript{123} See 192 B.R. 401 (E.D. Va. 1996).

\textsuperscript{124} Congress vested the district courts "with appellate jurisdiction over bankruptcy court rulings." \textit{In re Orange Boat Sales}, 239 B.R. 471, 473 (S.D.N.Y. 1999); Nevertheless, "it is not clear whether a bankruptcy court is bound by decisions of the district courts in that district." \textit{In re Shattuc Cable Corp.}, 138 B.R. 557, 565 (Bankr. N.D. Ill. 1992), \textit{disapproved on other grounds in In re Reliable Drug Stores, Inc.}, 70 F.3d 948 (7th Cir. 1995). For a comprehensive discussion of this issue, see Daniel J. Bussel, \textit{Power, Authority, and Precedent in Interpreting the Bankruptcy Code}, 41 UCLA L. REV. 1063 (1994).

\textsuperscript{125} See 251 B.R. 656, 658 (S.D.N.Y. 2000).

\textsuperscript{126} See 127 See Rea v. Federated Investors, 627 F.3d 937, 941 (3d Cir. 2010).

\textsuperscript{127} See 128 See Burnett v. Stewart Title, Inc. (\textit{In re Burnett}), 635 F.3d 169, 174 (5th Cir. 2011).

\textsuperscript{128} See 129 See Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278, 1283 (11th Cir. 2011).

\textsuperscript{129} See 130 See id. at 1287 ("Our holding that § 525(b) does not apply to refusals to hire is in accord with the holdings of the only two other circuits that have decided the issue.") (citing \textit{Burnett}, 635 F.3d at 172–173, and \textit{Rea}, 627 F.3d at 940–41); \textit{Orovitz, supra note 8}, at 564 ("[A]ll of the circuit courts that have interpreted § 525(b) of the Bankruptcy Code have concluded that the statute does not preclude private employers from engaging in discriminatory hiring.").

\textsuperscript{130} See 131 See \textit{Leary}, 627 F.3d at 940 (discussing \textit{Leary}); \textit{Orovitz, supra note 8}, at 568. However, another federal bankruptcy judge, writing before his appointment to the bench, interpreted Section 525(b) to prohibit private employers "from discriminating with respect to a . . . prospective employee," and observed that "[i]n order to maintain a cause of action for discrimination under section 525(b), there
antidiscrimination provision when it refused to hire her because she sought relief under the Bankruptcy Code. Following the majority view in holding that section 525(b) prohibits private employers from discriminating against bankruptcy debtors only after an employment relationship has been established.

On appeal, the district court reversed the bankruptcy court's ruling, rejecting the latter court's "narrow construction" of the antidiscrimination provision. The district court noted that section 525(b) expressly prohibits private employers from discriminating against bankruptcy debtors "with respect to employment," and concluded that this language is "broad enough to extend to discriminating with respect to extending an offer of employment."

There is no legislative history explaining Congress's failure to address hiring discrimination in section 525(b), as it had done in the provision that is now section 525(a). This situation has led several courts (including, apparently, the
bankruptcy court in *Leary*)\(^{142}\) to conclude that the antidiscrimination provision must be interpreted as written\(^{143}\)—that is, to allow private employers to base their hiring decisions on an applicant's bankruptcy status.\(^{144}\) Rejecting this view,\(^{145}\) the district court in *Leary* concluded that the difference between the two subsections is likely the result of careless draftsmanship,\(^{146}\) and interpreted section 525(b) to prohibit hiring discrimination in order to give effect to the Bankruptcy Code's fresh start policy.\(^{147}\) The court explained that 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."\(^{148}\)

\(^{142}\) The bankruptcy court's decision in *Leary* is unpublished, but was briefly summarized in the district court's opinion. See *Leary*, 251 B.R. at 658 ("Judge Hardin found that Section 525(b) applies only to actions taken after an employment relationship has been established...[¶] This rather narrow construction of a remedial statute has been reached by drawing a negative inference comparing this statute with § 525(a)."

\(^{143}\) See, e.g., *Myers v. Toojay's Mgmt. Corp.*, 419 B.R. 51, 59 (M.D. Fla. 2009), aff'd, 640 F.3d 1278 (11th Cir. 2011); *In re Sweeney*, 113 B.R. 359, 362 (Bankr. N.D. Ohio 1990) ("Section 525 has been accorded various constructions...However, absent ambiguity or a clearly expressed legislative intent to the contrary, the plain language of the statute is conclusive."). See generally *Williams v. Dist. of Columbia*, 916 F. Supp. 1, 9 (D. D.C. 1996) ("Absent compelling legislative history to the contrary, federal courts are obligated to apply statutes as written.").

\(^{144}\) See, e.g., *Myers*, 419 B.R. at 58 ("[U]nder the plain terms of the statute, it is clear that Congress prohibited discriminatory hiring decisions in § 525(a) and did not prohibit such conduct by private employers under § 525(b)."; *Pastore*, 186 B.R. at 555 ("[T]he absence of support for the [contrary] position in the legislative history of the statute...suggest[s] that 11 U.S.C. § 525(b) does not create a cause of action for failure to hire because of an individual's bankruptcy.").

\(^{145}\) The majority view of section 525 has been characterized as one in which the courts "adhere[ ] to the plain meaning of subsection (b)." *Yan*, supra note 33, at 453 (discussing *Pastore*); see also *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21 (1st Cir. 1989) ("In construing § 525(b), most courts have applied the plain meaning of the statute."). However, the *Leary* court also claimed to be applying the "plain meaning of the statute." *Leary*, 251 B.R. at 658; see *Orovitz*, supra note 8, at 566 ("The minority [view] disputes that the plain meaning interpretation of § 525(b) supports the exclusion of hiring discrimination by private employers."). Thus, at least in this context, "plain meaning is not so plain and certainly not the same in every court's eyes." *Yan*, supra note 33, at 456; see *In re Stinson*, 285 B.R. 239, 243 (Bankr. W.D. Va. 2002) (noting that the "two competing interpretations both claim[] to be grounded in the plain meaning of the text").

\(^{146}\) See *Leary*, 251 B.R. at 658 (declining to interpret Section 525(b) to permit discriminatory hiring decisions "simply because the scrivener was more verbose in writing § 525(a).""). But see *Martin*, 2007 WL 2893431 at *3 ("The Court is unwilling...to find that Congress' failure to include a specific reference to hiring in § 525(b), after expressly including it in subsection (a), was merely the result of a less verbose scrivener.").

\(^{147}\) The court characterized as "absurd" the suggestion that Congress would permit private employers "to discriminate on the initial hiring against those unfortunate economic casualties who are seeking...a fresh start from the bankruptcy court, and yet at the same time prohibit[,] discrimination against those who have been hired." *Leary*, 251 B.R. at 658.

\(^{148}\) Id.; see also *Yan*, supra note 33, at 457 ("*Leary* endorses an expansive construction of Section 525(b). The premise on which the court relied...was the fresh start policy." (footnotes omitted)). See generally *In re Envtl. Source Corp.*, 431 B.R. 315, 322 (Bankr. D. Mass. 2010) ("Those courts
Although no other court has followed the analysis in *Leary*, the *Leary* court's interpretation of the antidiscrimination provision is consistent with dicta in other cases and the views of several commentators. These courts and commentators agree that interpreting section 525(b) to prohibit discriminatory hiring practices is more consistent with the Bankruptcy Code's fresh start policy than the contrary majority view.

In *In re Stinson*, for example, the court observed that "interpreting § 525(b) to cover discriminatory hiring is more consistent with the thrust of § 525 taken as a whole, since it forbids grounding decisions solely on the fact that [an] individual was or is a [bankruptcy] debtor." The *Stinson* court nevertheless adopted the majority view, concluding that the *Leary* court's interpretation of section 525(b) could not be reconciled with the statutory language.

supporting the notion that § 525 should be broadly construed focus on the Bankruptcy Code's fresh start policy.

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149 See, e.g., *Burnett v. Stewart Title, Inc.* (In re *Burnett*), 635 F.3d 169, 173 (5th Cir. 2011) ("We . . . reject the solitary view advanced in *Leary*. . . . The view in *Leary* is contrary to overwhelming authority otherwise . . . ."); see also *Landry & Hardy, supra* note 19, at 51 ("[I]n all but one case, courts have found that the hiring decisions of private employers are not protected under the Bankruptcy Code.").

150 See, e.g., *In re Mayo*, 322 B.R. 712, 718–19 (Bankr. D. Vt. 2005) (assuming discriminatory denial of employment would violate § 525(b), but finding "no evidence that [the defendant] denied the Plaintiff employment because of her bankruptcy"); *In re Bobbitt*, 174 B.R. 548, 552 (Bankr. N.D. Cal. 1993) ("To qualify for protection under § 525(b), a debtor must establish that . . . employment has been terminated or withheld . . . solely on the ground of bankruptcy." (emphasis added)).

151 See, e.g., *Herz, supra* note 15, at 89 (suggesting "courts that have gone against *Leary* . . . have read § 525(a) and (b) in a vacuum, producing an end result that is contradictory to the greater aims of the Bankruptcy Code, and frustrating a debtor's fresh start prospects in particular"); Yan, *supra* note 33, at 458 ("From a policy perspective, *Leary* . . . [is] persuasive. How can the 'honest but unfortunate debtor' receive a fresh start if they are prevented from finding the means of achieving it?").

152 See *Myers v. Toojay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) (indicating *Leary* court "recast the meaning of § 525(b)'s language in a way that will better achieve one of the broad purposes Congress sought to achieve in the Bankruptcy Code, which is to give debtors who go through bankruptcy a fresh start"); *Herz, supra* note 15, at 90 ("[A] lack of protection against hiring discrimination can impose a serious impediment to a debtor's efforts in . . . finding gainful employment, thus placing a burden and potential stagnation on a debtor that the rest of the job-seeking public does not face. This would seem to be a result incompatible with the Code's overarching aims."); *Landry & Hardy, supra* note 19, 50–51("Certainly, the inability to find gainful employment, if cut off by employers due to one's bankruptcy status or history, would limit a person's fresh start.").


154 Id. at 247.

155 See id. at 242 ("A majority of courts addressing this issue have held that § 525(b) does not reach discriminatory hiring by private employers.").

156 See id. at 247; cf. *Burnett v. Stewart Title, Inc.*, 431 B.R. 894, 900 (S.D. Tex. 2010) ("While the *Leary* court's desire to uphold the 'fresh start' policy is commendable, the plain language of the statute does not support its interpretation."); *aff'd*, 635 F.3d 169 (5th Cir. 2011); *In re Martin*, No. 06-41010, 2007 WL 2893431, at *4 (Bankr. D. Kan. Sept. 28, 2007) ("[T]he *Leary* decision . . . exalts the admirable policy of giving debtors a fresh start over clear statutory language.").
In fact, Congress appears to have intentionally excluded hiring discrimination from the conduct in which private employers are prohibited from engaging when it amended the antidiscrimination provision to encompass the employment practices of private entities in other important respects.\textsuperscript{157} Had Congress intended to prohibit private sector hiring discrimination,\textsuperscript{158} it could have done so simply by incorporating all of the prohibitory language of section 525(a) into section 525(b),\textsuperscript{159} and yet it elected to incorporate only the language prohibiting the termination of or discrimination against existing employees.\textsuperscript{160} The fact that Congress chose not to follow its own model\textsuperscript{161} in this particular respect suggests it did not intend to limit the hiring discretion of private employers in the same manner as public employers.\textsuperscript{162}

In addition, on two occasions after the majority of courts had begun interpreting section 525(b) to permit private sector hiring discrimination,\textsuperscript{163}

\begin{itemize}
  \item \textsuperscript{157}See Burnett v. Stewart Title, Inc. (\textit{In re Burnett}), 635 F.3d 169, 172 (5th Cir. 2011) ("Congress's exclusion of the words 'deny employment to' in subsection (b) was intentional and purposeful."); Orozitz, \textit{supra} note 8, at 567 ("[T]he majority of courts construe Congress's use of the same wording in both subsections of the statute with an absence of 'deny employment to' in subsection (b) as a purposeful omission on the part of Congress.").
  \item \textsuperscript{158} See Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30, 34 (D. D.C. 1991) ("Congress has . . . expressed a policy decision that employees and job applicants are to be given unconditional protection against discrimination based upon their conflicting military duties . . . . Congress has chosen to extend such protection to job applicants as well as to existing employees . . . ."); McConnell v. Anderson, 316 F. Supp. 809, 812 (D. Minn. 1970) ("[T]he 1964 Civil Rights Act . . . makes it an unlawful employment practice for any employer, private or public[, ] 'to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex or natural [sic] origin.'" (quoting 42 U.S.C. § 2000e-2)), rev'd on other grounds, 451 F.2d 193 (8th Cir. 1971).
  \item \textsuperscript{159} See Myers v. Toojay's Mgmt. Corp., 640 F.3d 1278, 1285 (11th Cir. 2011) ("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).").
  \item \textsuperscript{160} See \textit{id}. at 1284–85 n.5 ("Congress had § 525(a) in front of it when it enacted § 525(b). It used the same language for § 525(b) that it had in § 525(a) except it left out 'deny employment to' in § 525(b).:"; cf. Shawley v. Bethlehem Steel Corp., 784 F. Supp. 1200, 1203 (W.D. Pa. 1992) ("[I]n considering other employment related remedial legislation by Congress, it appears that when discrimination in hiring was sought to be addressed by Congress, language expressly covering hiring is used."), aff'd, 989 F.2d 652 (3d Cir. 1993).
  \item \textsuperscript{161} See \textit{Burnett}, 635 F.3d at 173 ("Although § 525(b) was enacted six years after § 525(a), its language regarding employment discrimination is nearly identical to that used in § 525(a), implying that Congress modeled subsection (b) on subsection (a).")
  \item \textsuperscript{162} See \textit{In re Stinson}, 285 B.R. 239, 240 (Bankr. W.D. Va. 2002); Pastore v. Medford Sav. Bank, 186 B.R. 553, 554–55 (D. Mass. 1995); \textit{See generally} Maney v. Kagenveama (\textit{In re Kagenveama}), 541 F.3d 868, 874 (9th Cir. 2008) ("When Congress includes language in one part of a statute and excludes it from another part of the same statute, it is presumed that Congress acted purposely in the disparate inclusion or exclusion."); \textit{overruled on other grounds by} Flores v. Flores (\textit{In re Flores}), 735 F.3d 855 (9th Cir. 2013).
  \item \textsuperscript{163} By the mid-1990s, several courts had already "answered in the negative the question of whether [section 525(b)] applies to hiring decisions of private employers." \textit{Pastore}, 186 B.R. at 555.
\end{itemize}
Congress again amended the antidiscrimination provision.\textsuperscript{164} Congress's failure to address the hiring practices of private employers in either of those instances (or, for that matter, at any subsequent time)\textsuperscript{165} is a further indication it did not intend to limit the hiring discretion of private employers.\textsuperscript{166} As one court explained: "The only rational interpretation of congressional idleness in the face of voluminous precedent that it has the power to set straight is to assume that Congress agrees."\textsuperscript{167}

III. THE EMPLOYMENT-AT-WILL DOCTRINE AND ITS PUBLIC POLICY EXCEPTION

Even if the language of section 525(b) cannot reasonably be interpreted to prohibit discriminatory hiring practices,\textsuperscript{168} courts could give effect to the policy


\textsuperscript{165} On February 13, 2013, Representative Steve Cohen of Tennessee introduced proposed federal legislation, designated the "Bankruptcy Nondiscrimination Enhancement Act of 2013," which would amend section 525 to prohibit private employers from discriminating against bankruptcy debtors during the hiring process. H.R. 646, 113th Cong. (2013). Representative Cohen’s bill, which has no co-sponsors, was referred to a subcommittee of the House Judiciary Committee, where it appears to have received no further substantive attention.

\textsuperscript{166} \textit{See Burnett}, 635 F.3d at 173 ("Congress is 'presumed to have knowledge of its previous legislation when making new laws.' . . . Had Congress wished to bar private employers from discriminating against debtors in their hiring decisions, it could have done so by adding the phrase 'deny employment' to subsection (b) when it amended \S 525 in 1994 and again in 2005."). (quoting \textit{United States v. Zavala-Sustaita}, 214 F.3d 601, 606 n.8 (5th Cir. 2000)); \textit{cf. Yasin v. Equifax Info. Servs., LLC}, No. C-08-1234, 2008 WL 2782704, at *4 (N.D. Cal. July 16, 2008) ("Where Congress amends a statute without modifying a provision that has been the subject of judicial interpretation, a reasonable inference can be drawn that 'Congress accepted the construction' placed on that statute by the courts."). (quoting NLRB. v. Gullett Gin Co., 340 U.S. 361, 366 (1951)).

\textsuperscript{167} \textit{United States v. Kelly}, 105 F. Supp. 2d 1107, 1115 (S.D. Cal. 2000); \textit{see also Plaut v. Spendthrift Farm, Inc.}, 1 F.3d 1487, 1499 (6th Cir. 1993) ("When Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot."); \textit{In re Adoption of Baby E.Z.}, 266 P.3d 702, 709 (Utah 2011) ("Congress surely is cognizant of the fact that parties rely on judicial interpretations of legislation and, if the interpretation is in error, Congress ordinarily will take steps to either correct the legislation or provide additional guidance to the courts.").

\textsuperscript{168} \textit{See Myers v. TooJay's Mgmt. Corp.}, 419 B.R. 51, 57 (M.D. Fla. 2009) ("When \S 525(a) and (b) are read in \textit{pari materia}, the language in \S 525(b) cannot possibly be construed to includedenial of
considerations that prompted the Leary court to interpret the statute in that manner by extending common law protection to bankruptcy debtors who are denied employment in the private sector. In particular, the courts could recognize a new "wrongful refusal to hire" tort claim applicable in this situation by interpreting the public policy exception to the employment-at-will doctrine to prohibit private employers from discriminating against bankruptcy debtors during the hiring process.

The employment-at-will doctrine is a product of the American common law, having arisen and flourished in the laissez-faire political and economic climate of the late nineteenth century industrial era. The doctrine holds that an employment relationship of unspecified duration is presumptively terminable at the will of either party. Although courts applying the doctrine typically focus on the employer's right to terminate the relationship "for good cause, for no cause or even for cause morally wrong, without being guilty of legal wrong."
the doctrine also permits an employer to refuse to hire a job applicant "for any cause not specifically prohibited by applicable state or federal authorities."\(^1\)

Modern commentators have argued that changes in socioeconomic values and conditions have rendered the employment-at-will doctrine obsolete, and the courts in most states have responded by recognizing exceptions to its operation.\(^2\) The most widely accepted of these common law exceptions prohibits employment terminations that violate "a clear mandate of public policy."\(^3\) In jurisdictions that recognize this exception,\(^4\) employers retain the

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\(^2\) See Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 509 (N.J. Sup. Ct. 1980) (observing many states have recognized needs in protecting employees from abusive practices by employers); see also James E. DeFranco, Modification of the Employee at Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy, 30 ST. LOUIS U. L.J. 65, 68 (1985) (analyzing whether growing disparities of bargaining power between large corporate employers and their employees justify abrogation of at will rule).


\(^4\) See Martin Marietta Corp., 823 P.2d at 107; see also Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. Sup. Ct. 1985); Meeks v. Opp Cotton Mills, Inc., 459 So. 2d 814, 816 (Ala. Sup. Ct. 1984) (Beatty, J., dissenting) ("The most widely accepted limitation on the rule of at-will employment has been the 'public policy exception,' under which an employee may recover damages from her employer if she is fired for reasons that undermine an important public policy") (quoting Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931, 1931–32 (1983)).

\(^5\) See also Novosel v. Nationwide Ins. Co., 721 F.2d 894, 896 n.2 (3d. Cir. 1983) (describing this characterization of employment-at-will as "an oft quoted statement of the doctrine").
right to discharge their employees "for good cause or for no cause,"180 but they cannot discharge an employee—or, arguably, refuse to hire an applicant181—"for a cause that violates public policy."182

The recognition of a common law wrongful refusal to hire claim applicable in this situation is suggested by legislative history indicating that Congress did not intend to limit the scope of the antidiscrimination provision to the express terms of the statute,183 but instead expected the courts to "expand the anti-discrimination coverage to be consistent with bankruptcy public policy."184 As one state court judge discussing the courts’ authority to recognize common law exceptions to the employment-at-will doctrine observed: "Legislative inaction in


180 See Broomfield v. Lundell, 767 P.2d 697, 702 (Ariz. Ct. App. 1988). As a practical matter, discharges for "no cause" are rare. Carl v. Children’s Hosp., 702 A.2d 159, 189 (D.C. App. Ct. 1997) (Mack, J., concurring) ("When an employer decides to discharge an employee, there is always a reason for that discharge."); D’Angelo v. Gardner, 819 P.2d 206, 225 (Nev. Sup. Ct. 1991) (Steffen, J., dissenting) ("It should hardly be surprising that most at-will terminations will occur for some articulable cause."). Nevertheless, employers occasionally may terminate an employee "for no other reason than to show that they maintain the freedom to do so"—that is, to avoid any implication that they have agreed to terminate only for cause. Hartbarger v. Frank Paxton Co., 857 P.2d 776, 785 (N.M. Sup. Ct. 1993).

181 See Gray, supra note 27, at 99 ("[A]n employer has the freedom and right to refuse to hire whomever it wishes as long as its motivation does not contravene a clear mandate of public policy"); Steven H. Winterbauer, Wrongful Discharge in Violation of Public Policy: A Brief Overview of an Evolving Claim, 13 INDUS. REL. L.J. 386, 391 (1992) ([A]pplying the [public policy] exception to a refusal-to-hire situation . . . appears logical.").

182 See Broomfield, 767 P.2d at 702–03; see also Kelly Gallagher, Note, Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for “Employment Purposes” Goes Too Far, 91 IOWA L. REV. 1593, 1603 (2006) ("The common law at-will employment regime in the United States permits employers to refuse to hire or fire employees for any reason, or no reason at all, as long as they do not violate specific statutes or public policies prohibiting discrimination based on certain characteristics.").


one or more particular areas does not necessarily signify a legislature's endorsement of the status quo.\textsuperscript{185}

IV. WROngFUL DISCHARGE IN VIOLATION OF BANKRUPTCY POLICY

A. The Propriety of Looking to Federal Law as a Source of Public Policy

The clear mandate of public policy necessary to support a tort claim based upon the public policy exception to the employment-at-will doctrine is typically found in a state statute.\textsuperscript{186} Indeed, there is some authority suggesting that state statutes (and presumably state constitutional provisions)\textsuperscript{187} are the only legitimate sources of public policy for purposes of applying the exception.\textsuperscript{188} However, a number of courts have held that common law wrongful discharge


\textsuperscript{186} See, e.g., Williamson v. Va. First Sav. Bank, 26 F. Supp. 2d 798, 801 (E.D. Va. 1998) ("[A]n at-will employee may bring a tortious wrongful discharge claim if the employee's termination is based on a violation of Virginia public policy as expressed in a state statute."); see also Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 389 (Conn. Sup. Ct. 1980) ("We need not decide whether violation of a state statute is invariably a prerequisite to the conclusion that a challenged discharge violates public policy. Certainly when there is a relevant state statute we should not ignore the statement of public policy that it represents.").

\textsuperscript{187} See, e.g., Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 283 (Iowa Sup. Ct. 2000) ("In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, we have primarily looked to our statutes but have also indicated our Constitution to be an additional source."); Painter v. Graley, 639 N.E.2d 51, 56 (Ohio Sup. Ct. 1994) ("Provisions found in the Ohio Constitution are necessarily statements of Ohio public policy, if not the most definitive statements of Ohio public policy."); Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 587 (W. Va. Ct. App. 1998) ("[A]n at-will or otherwise employed private sector employee may sustain, on proper proof, a cause of action for wrongful discharge based upon a violation of public policy emanating from a specific provision of the state constitution.").

\textsuperscript{188} See, e.g., Childress v. City of Richmond, 907 F. Supp. 934, 941 (E.D. Va. 1995) ("Virginia strongly adheres to the at-will employment doctrine, with a narrow exception for violations of public policy . . . . The exception is limited to policy as embodied by state statutes, not federal ones."); aff'd, 134 F.3d 1205 (4th Cir. 1998); Leach v. Northern Telecom, Inc., 141 F.R.D. 420, 426 (E.D. N.C. 1991) ("[N]o North Carolina case has ever held that a wrongful discharge claim can be grounded on a violation of federal public policy."); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 842 (Wis. Sup. Ct. 1983) ("This court intends only a recognition of stated public policy as reflected in the constitution and statutes of Wisconsin.").
claims also can be premised on public policies reflected in federal statutes189 (and under some circumstances, the federal constitution).190 In jurisdictions that adhere to the latter view,191 the Bankruptcy Code's antidiscrimination provision would seem to be as logical a source of public policy as any other federal antidiscrimination statute.192

B. The Common Law Claim Is Not Preempted By Federal Law

Wenners v. Great State Beverages, Inc.193 was the first case to address the public policy exception's application in the bankruptcy discrimination context.194 The plaintiff in Wenners asserted a state law wrongful discharge

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190 See, e.g., Painter, 639 N.E.2d at 56 ("Clear public policy' sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed . . . in the form of statutory enactments. . . .[S]uch a public policy may be . . . based on sources such as the Constitutions of Ohio and the United States . . ."); see also Phillips v. St. Mary's Reg'l Med. Ctr., 116 Cal. Rptr.2d 770, 782 (Ct. App. 2002) ("[I]n the absence of a conflict between state and federal policies, federal statutory and constitutional law may provide the policy basis for a wrongful termination claim.").

191 The issue of whether "the public policy to support the tort of wrongful discharge . . . can be derived from a federal statute" raises "a host of considerations, including potential federal preemption issues." Fitzgerald, 613 N.W.2d at 285 n.4. Nevertheless, "of those states that have addressed whether a wrongful discharge claim can be based on public policy as evinced in federal law, the vast majority have answered in the affirmative." Sedlacek v. Hillis, 36 P.3d 1014, 1022 (Wash. 2001) (Sanders, J., dissenting). For an academic discussion of this issue, see Nancy Modesitt, Wrongful Discharge: The Use of Federal Law as a Source of Public Policy, 8 U. PA. J. LAB. & EMP. L. 623 (2006).


194 See Smith v. F.W. Morse & Co., 76 F.3d 413, 429 (1st Cir. 1996) ("In Wenners . . . the plaintiff relied on a section of the Bankruptcy Code to establish a public policy against the termination of his employment."). In an earlier case, West v. First National Bank of Atlanta, the Georgia Court of
claim against his former employer, alleging that the employer violated public policy when it terminated his employment because he filed bankruptcy. The employer argued that the plaintiff's claim was preempted by federal law—an argument frequently made by employers (albeit with mixed success) in cases in which a terminated employee has invoked the public policy embodied in a federal statute.

The New Hampshire Supreme Court rejected the employer's argument, even though the recognition of a common law tort premised on a public policy contained in the Bankruptcy Code may undermine the uniformity Congress

Appeals held that an employer's termination of an at-will employee "for filing a bankruptcy petition" did not give rise to a "cause of action for wrongful discharge." 245 S.E.2d 46, 47 (Ga. Ct. App. 1978). The plaintiff in West did not invoke the public policy exception, presumably because the exception had not been recognized by the Georgia courts. See Taylor v. Foremost-McKesson, Inc., 656 F.2d 1029, 1031 (5th Cir. 1981) (noting Georgia courts have been reluctant to adopt public policy exception). Nevertheless, West has been characterized as a case in which the court refused to recognize an exception to the employment-at-will doctrine where the "employee alleged she was fired for declaring bankruptcy." Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1056 (5th Cir. 1981).


See Wenners, 663 A.2d at 625.

See id.; cf. In re Hollins, 150 B.R. 53, 54 (Bankr. D. Or. 1993) ("The U.S. Constitution itself specifies that Congress may enact 'uniform' laws of bankruptcy. If the Bankruptcy Code did not preempt contrary state law, uniformity would be impossible.").


See, e.g., Prewitt v. Factory Motor Parts, Inc., 747 F. Supp. 560, 565 (W.D. Mo. 1990) ("Defendant argues that plaintiff's state law claim for wrongful discharge is preempted by the FLSA and that plaintiff has not stated a claim within the public policy exception."); Jie v. Liang Tai Knitwear, 107 Cal. Rptr. 2d 682, 686 (Ct. App. 2001) (Defendants contend that California law, to the extent it allows an action for wrongful termination in violation of public policy to be based on . . . the federal Immigration and Naturalization Act . . . as amended by IRA, is preempted by IRA"). (footnote omitted). For the author's perspective on one variation of this argument, see Michael D. Moberly, Fair Labor Standards Act Preemption of "Public Policy" Wrongful Discharge Claims, 42 DRAKE L. REV. 525 (1993).

See Wenners, 663 A.2d at 625–26; see also Mason v. Smith, 672 A.2d 705, 707 (N.H. Sup. Ct. 1996) ("In Wenners . . . we held that the plaintiff's common law cause of action for wrongful termination was not preempted by section 525(b) of the Bankruptcy Code . . . ").
sought to achieve when enacting the Code, as the employer had argued. Applying traditional federal preemption analysis, the court noted that section 525(b) contains no express preemption language. The court also found no "clear and manifest" congressional intent to preempt a state law wrongful discharge claim. Finally, the court concluded that there would be no actual (and therefore preemptive) conflict between section 525(b) and the recognition of a state common law remedy for violations of that provision:

The prohibition in section 525(b) and a State law cause of action for wrongful termination based on the public policy set forth in that section are

201 See Koffman v. Osteoimplant Tech., Inc., 182 B.R. 115, 125 (D. Md. 1995) ("Allowing state tort actions . . . ultimately would have the effect of permitting state law standards to modify the incentive structure of the Bankruptcy Code and its remedial scheme . . . . [S]uch a result . . . would threaten the uniformity of federal bankruptcy law . . . ."); Pauletto v. Reliance Ins., Co., 75 Cal. Rptr. 2d 334, 340 (Ct. App. 1998) (asserting that "state-law tort claims . . . threaten the uniformity of federal bankruptcy law"); Shiner v. Moriarty, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) ("The uniformity of bankruptcy law is a matter textually committed to Congress by the federal constitution . . . . The insertion of state tort standards into the bankruptcy process poses significant interference with federal regulation in that area" (citation omitted)).


203 The New Hampshire Supreme Court has stated that "[s]tate law is preempted . . . where (1) Congress expresses an intent to displace state law; (2) Congress implicitly supplants state law by granting exclusive regulatory power in a particular field to the federal government; or (3) state and federal law actually conflict." Disabilities Rights Ctr., Inc. v. Comm'r., N.H. Dept. of Corrs., 732 A.2d 1021, 1022 (N.H. Sup. Ct. 1999).


While Congress, under its Bankruptcy power, certainly has the constitutional prerogative to pre-empt the States, even in their exercise of police power, the usual rule is that congressional intent to pre-empt will not be inferred lightly. Pre-emption must either be explicit, or compelled due to an unavoidable conflict between the state law and the federal law.

206 Id. See Wenners, 663 A.2d at 625 ("[S]tate law is pre-empted to the extent that it actually conflicts with federal law." (quoting English v. General Electric Co., 496 U.S. 72, 79 (1990))).
not incompatible; in fact, they are complimentary. A wrongful termination claim relying on section 525(b) would further the goals of Congress to protect debtors from discrimination.

C. The Claim May Be Precluded By the Existence of a Statutory Remedy

The court in Robinette v. WESTconsin Credit Union reached a result different from that in Wenners. The plaintiff in Robinette asserted a common law wrongful discharge claim against her former employer when her employment was terminated after the employer learned of her intent to file bankruptcy. The court dismissed the claim, noting that the plaintiff had stated a claim for relief under section 525(b), and that as in many other states, the public policy exception applies in Wisconsin only when a terminated employee "has no other recourse" for the alleged violation of public policy. The court explained:

207 Id. at 626. See also Boshkoff, supra note 21, at 398 (asserting "a more rigorous state wrongful discharge rule would not impose conflicting obligations on the actions [sic] or otherwise interfere with the federal regulation").
208 686 F. Supp. 2d 1206 (W.D. Wis. 2010).
209 See id. at 1208 ("[P]laintiff has no state law claim for wrongful termination so long as § 525(b) provides her a federal statutory remedy. This conclusion makes it unnecessary to decide whether to . . . expand Wisconsin's public policy exception to the employment at-will doctrine.").
210 See id. at 1207–08.
211 See id. at 1208, 1213.
212 See id. at 1207–08, 1212.
213 See, e.g., Bruffett v. Warner Commc'ns, Inc., 692 F.2d 910, 919 (3d Cir. 1982) ("[T]he only Pennsylvania cases applying the public policy exception have done so where no statutory remedies were available."); Shaffer v. ACS Gov't Servs., Inc., 454 F. Supp. 2d 330, 337–38 (D. Md. 2006) ("Maryland courts provide an exception to [the employment-at-will] rule for otherwise unremedied violations of public policy. However, where a statute provides a remedy to redress the employee's injury, the public policy exception to the employment at-will doctrine is not available to the employee.") (citations omitted); Robinson v. Wal-Mart Stores, Inc., 341 F. Supp. 2d 759, 764 (W.D. Mich. 2004) ("Under Michigan law, . . . an express statutory prohibition and remedy are exclusive and preclude a common law public policy claim."); Miles v. Martin Marietta Corp., 861 F. Supp. 73, 74 (D. Colo. 1994) ("Colorado law is clear that a separate public policy wrongful discharge claim is not available where the statute at issue provides a wrongful discharge remedy.").
214 Robinette v. WESTconsin Credit Union, 686 F. Supp. 2d 1206, 1212 (W.D. Wis. 2010) (citing Repetti v. Sysco Corp., 2007 W1 App 49, 730 N.W.2d 189 (Wis. Ct. App. 2007)); see also Shanahan v. WITI-TV, Inc., 565 F. Supp. 219, 224 (E.D. Wis. 1982) ("[A] Wisconsin court would only apply the public policy exception to the at-will employment rule when there was no other adequate remedy to vindicate such policy."); McCluney v. Jos. Schlitz Brewing Co., 489 F. Supp. 24, 26 (E.D. Wis. 1980) ("The rationale for . . . the 'public policy' exception to the traditional rule governing 'at will' employment relations[.] is that a private remedy should be implied for employment discharges violative of public policy, when there is no other adequate remedy to vindicate such policy.").
Because plaintiff may bring a claim under § 525(b) and seek appropriate remedies, she may not bring a state law claim for wrongful termination. Where the legislature has created a federal remedy for wrongful discharge, as here, that remedy is exclusive and does not warrant expansion of Wisconsin's public policy exception.\textsuperscript{215}

To the extent the Wenners court addressed this "adequate alternative remedy" issue,\textsuperscript{216} which is occasionally referred to as preclusion\textsuperscript{217} (and also, somewhat misleadingly,\textsuperscript{218} as another form of preemption),\textsuperscript{219} the court concluded that the plaintiff's common law claim was not barred because section

\textsuperscript{215} Robinette, 686 F. Supp. 2d at 1213.
\textsuperscript{216} In Smith v. F.W. Morse & Co., 76 F.3d 413 (1st Cir. 1996), the First Circuit observed that the Wenners court held that "a wrongful discharge action could proceed if the relevant statutory provision did not provide a private cause of action for its violation." Id. at 429 (citing Wenners v. Great State Beverages, Inc., 663 A.2d 623, 625 (N.H. Sup. Ct. 1995)). However, there appears to be no reported New Hampshire Supreme Court decision "in which a plaintiff's common law wrongful discharge claim has been dismissed due to the existence of 'an adequate statutory remedy.'" Slater v. Verizon Commc'n's, Inc., No. Civ.04-303, 2005 WL 488676, at *3 (D. N.H. March 3, 2005) (internal quotation marks omitted). See generally Collins v. Rizkana, 652 N.E.2d 653, 660 (Ohio Sup. Ct. 1995) (observing that "the courts are split" on the issue of "whether the public policy tort should be rejected where the statute expressing the public policy already provides adequate remedies to protect the public interest").

\textsuperscript{217} See Flenker v. Willamette Indus., Inc., 967 P.2d 295, 299 (Kan. 1998) ("The alternative remedies doctrine, . . . referenced sometimes as preclusion, is a substitution of law concept. Under the alternative remedies doctrine, a state or federal statute would be substituted for a state retaliation claim if the substituted statute provides an adequate alternative remedy."); cf. Parker v. MVM, Inc., No. 05-CV-380, 2006 WL 1724359, at *3 (D. N.H. June 20, 2006) ("[T]he First Circuit has interpreted New Hampshire common law to preclude a cause of action for wrongful termination when the aggrieved employee has a statutory cause of action arising out of the same conduct." (discussing Smith v. F.W. Morse & Co., 76 F.3d 413, 429 (1996))).


\textsuperscript{219} See, e.g., Price v. Multnomah Cnty., 132 F. Supp. 2d 1290, 1295 n.6 (D. Or. 2001) ("Under Oregon law, the availability of a common law remedy is conditioned upon the absence of an adequate statutory remedy . . . . Thus, an adequate statutory remedy will preempt an otherwise sufficient claim for common law wrongful discharge." (citations omitted)). For an academic discussion of the adequate alternative remedy doctrine and its relationship to preemption, see Paul J. Zech, Federal Pre-Emption and State Exclusive Remedy Issues in Employment Litigation, 72 N.D. L. REV. 325 (1996).
525 provides no remedy for employment terminations that are prohibited by the Bankruptcy Code. While section 525 provides no specific remedy for the bankruptcy-based discrimination that it prohibits, section 105(a) of the Bankruptcy Code authorizes courts to enforce other provisions of the Code, as the Robinette court recognized. Several courts have invoked this authority to fashion remedies for violations of the antidiscrimination provision.

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220 See Wenners v. Great State Beverages, Inc., 663 A.2d 623, 625 (N.H. 1995) (“While a plaintiff may not pursue a common law remedy where the legislature intended to replace it with a statutory cause of action . . . here, there has been no clear statutory intent to supplant the common law cause of action . . . Section 525(b) itself provides no remedy for violation by a private employer.”) (quoting In re Hicks, 65 B.R. 980, 984 (Bankr. W.D. Ark. 1986)); see also Weeden v. Sears, Roebuck & Co., No. 98-435, 1999 WL 1209494, at *3 n. 2 (D. N.H May. 25 1999) (“The Wenners court found dispositive the fact that although a federal prohibition of employment termination existed, federal law provided no remedy for violations of the prohibition and no procedures for pursuing a violation.”).

221 The Wenners court’s rejection of the employer’s preemption argument reflects the “strong presumption against preemption of state law by federal statute or regulation.” Dillon v. Chi. Southshore & S. Bend R.R. Co., 670 N.E.2d 902, 910 (Ind. Ct. App. 1996) (citing California v. ARC Am. Corp., 490 U.S. 93, 101 (1989)). This presumption “is just as strong in bankruptcy as in the other areas of federal legislative power,” even though “bankruptcy is one of only two federal legislative provisions in Article I, Section 8 of the Constitution in which the power to make ‘uniform’ laws is made explicit.” Pac. Gas & Elec. Co. v. California, 350 F.3d 932, 943 (9th Cir. 2003); see also In re Fed.-Mogul Global Inc., 684 F.3d 355, 365 (3d Cir. 2012) (“This ‘strong presumption against inferring Congressional preemption’ also applies ‘in the bankruptcy context.’”) (quoting Integrated Solutions, Inc. v. Serv. Support Specialties, Inc., 124 F.3d 487, 493 (3d Cir. 1997)).

222 See In re Saunders 105 B.R. 781, 784 (Bankr. E.D. Pa. 1989) (“[C]ourts have concluded that Congress intended to establish a comprehensive enforcement mechanism for . . . discrimination against debtors within the bankruptcy code itself. As a result, they hold that no additional cause of action exists . . . ”).


224 Section 105(a) provides, in pertinent part, that “[t]he court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). For an interesting academic discussion of this Bankruptcy Code provision, see Steve H. Nickles & David G. Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code, 3 CHAP. L. REV. 7 (2000).

225 See Robinette v. WESTconsin Credit Union, 686 F. Supp. 2d 1206, 1213 (W.D. Wis. 2010) (“Plaintiff . . . argues that § 525(b) contains absolutely no remedy provisions. This is technically correct, but courts have looked to 11 U.S.C. § 105(a) to fashion a remedy . . . . Section 105(a) grants courts the power to enforce provisions of the bankruptcy code. (citations omitted)).

226 See In re Sweeney, 113 B.R. 359, 363 (Bankr. N.D. Ohio 1990) (“Section 525 contains no appropriate relief for violation thereof. Section 105(a) of the Code empowers the Court to carry out Title 11 provisions, and is generally recognized as the authority to fashion relief.”); In re McNeely, 82 B.R. 628, 633 (Bankr. S.D. Ga. 1987) (“Section 525(b) does not specify what remedies are available to an aggrieved debtor who . . . has been discriminated against with respect to employment. Evidently, a court’s power to fashion remedies is derived from Section 105(a) which grants the bankruptcy court
The remedies awarded in these cases have included reinstatement\(^{227}\) (or front pay)\(^{228}\) and other forms of equitable or injunctive relief,\(^{229}\) as well as monetary relief in the form of back pay,\(^{230}\) compensatory damages,\(^{231}\) and punitive damages.\(^{232}\) These are the same types of relief typically awarded to successful plaintiffs in common law wrongful discharge cases.\(^{233}\) Thus, debtors terminated from employment for seeking relief under the Bankruptcy Code appear to have an adequate "statutory cause of action for redress of power to enforce provisions of the Bankruptcy Code."); \textit{In re} The Bible Speaks, 69 B.R. 368, 376 (Bankr. D. Mass. 1987) ("Section 525(a) is enough to invoke Section 105(a) in this situation.").\(^{227}\) \textit{See In re Simms-Wilson}, 434 B.R. at 468 n.16 ("Reinstatement is a potential remedy for a § 525(b) violation."); \textit{Sweeney}, 113 B.R. at 364 ("Reinstatement of employment is an equitable remedy in federal job discrimination cases. It has also been applied to bankruptcy discrimination."); Boshkoff, \textit{supra} note 20, at 414 ("When employment discrimination is alleged, reinstatement, the remedy of choice in other wrongful discharge situations, is also appropriate for illegal action induced by bankruptcy." (footnote omitted)).\(^{228}\) \textit{See}, e.g., \textit{In re Wakefield}, 293 B.R. 372, 378 (N.D. Tex. 2003) (suggesting "recovery for front pay under § 525(b)" is "permissible"). Front pay is a monetary award designed to compensate a terminated employee for a "future loss of earnings." \textit{James v. Sears, Roebuck & Co.}, 21 F.3d 989, 997 (10th Cir. 1994). It is a disfavored equitable remedy ordinarily awarded only when the preferred remedy of reinstatement "is not feasible." \textit{Hadley v. VAM P T S}, 44 F.3d 372, 376 (5th Cir. 1995); \textit{see also Hopkins}, 81 B.R. at 494 (citing cases holding that front pay can be awarded under Section 525 "if reinstatement would cause severe disruption.").\(^{229}\) \textit{See In re Latchaw}, 24 B.R. 457, 462 (Bankr. N.D. Ohio 1982) ("Section 105(a) authorizes a bankruptcy court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.'Surely an order enjoining an employer from suspending, discharging, or taking other disciplinary measures against its employees is necessary or appropriate . . . ." (quoting 11 U.S.C. § 105(a))).\(^{230}\) \textit{See Wakefield}, 293 B.R. at 384 ("The court has located no case that addresses the standard of review for a back pay award under § 525(b), although cases have held that back pay is recoverable."); \textit{Sweeney}, 113 B.R. at 363 ("An award of back pay is presumptively favored in federal job discrimination cases . . . . Awards are appropriate under Section 105(a)." (citation omitted)).\(^{231}\) \textit{See In re Taylor}, 252 B.R. 201, 208 (Bankr. N.D. Ala. 2000) ("Most of the cases discussing section 525(b) awarded actual damages in circumstances such as loss of employment and injunctive relief."); \textit{rev'd on other grounds}, 263 B.R. 139 (N.D. Ala. 2001); \textit{see also In re McNeely}, 82 B.R. at 633 ("Courts have given debtors making a case under Section 525(b) a variety of types of relief, including injunctive relief and compensatory damages.").\(^{232}\) There is relatively little case law addressing the recoverability of punitive damages under Section 525. \textit{See, e.g., In re Simms-Wilson}, 434 B.R. at 470 n. 20 ("The Court does not decide whether punitive damages are available under § 525(b)."); \textit{see also Robinette v. WESTconsin Credit Union}, 686 F. Supp.2d 1206, 1213 (W.D. Wis. 2010) ("Although other courts have fashioned various remedies for violations of the statute, none appear to have given specific attention to the availability of punitive damages."). However, the Eleventh Circuit has stated that "the plain meaning of § 105(a) encompasses \textit{any} type of order, whether injunctive, compensatory, or punitive, as long as it is necessary or appropriate to carry out the provisions of the Bankruptcy Code." \textit{Jove Eng'g, Inc. v. IRS}, 92 F.3d 1539, 1554 (11th Cir. 1996) (quoting 11 U.S.C. § 105(a)).\(^{233}\) \textit{See Neal v. Honeywell, Inc.}, 191 F.3d 827, 832 (7th Cir. 1999) (describing "reinstatement and back pay" as "the usual remedies in wrongful-discharge cases"); \textit{see also United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.}, 950 F.2d 1340, 1345 (7th Cir. 1991) ("Reinstatement and back pay awards are common remedies in wrongful discharge cases.").
discrimination in violation of section 525\textsuperscript{234} that may constitute the exclusive remedy for such a violation,\textsuperscript{235} even though the remedy is not explicitly set forth in Section 525 itself.\textsuperscript{236}

This conclusion is supported by the analysis in \textit{In re Begley}.\textsuperscript{237} The plaintiffs in \textit{Begley} asserted claims under section 525 and the federal civil rights statute commonly known as "section 1983,"\textsuperscript{238} which provides a private cause of action to individuals deprived of their federal statutory rights by an individual or entity acting under color of state law.\textsuperscript{239} Although section 1983 is occasionally invoked to redress discriminatory employment actions,\textsuperscript{240} the Supreme Court has held that no section 1983 claim exists when the federal statute establishing the underlying substantive right alleged to have been violated contains "an adequate and comprehensive internal enforcement mechanism."\textsuperscript{241}

Applying this variation of the "adequate alternative remedy" principle,\textsuperscript{242} the

\textsuperscript{234} Stephens v. Bd. of Regents of Univ. of Minn., 614 N.W.2d 764, 771 (Minn. Ct. App. 2000); see also \textit{In re Hopkins}, 81 B.R. 491, 494 (Bankr. W.D. Ark. 1987) ("Clearly, this Court has the power to fashion a remedy for the . . . violation of section 525(b). In seeking guidance for an appropriate remedy for job discrimination by a private employer, the Court has looked to the general principles of federal job discrimination law . . . .").

\textsuperscript{235} See \textit{In re Coats}, 168 B.R. 159, 167 (Bankr. S.D. Tex. 1993) ("A review of 11 U.S.C. §§ 362 and 525 reveals Congress' intent to establish a comprehensive enforcement mechanism for violations of the automatic stay and governmental discrimination, respectively. Therefore, . . . it does not appear that additional derivative causes of action exist . . . .").

\textsuperscript{236} See, e.g., \textit{In re Saunders}, 105 B.R. 781, 788 (Bankr. E.D. Pa. 1989) ("Under two . . . antidiscrimination provisions of the Code, 11 U.S.C. §§ 366(a) and 525(b), damages have been awarded against those who violate their terms, even though no such statutory remedy was expressed.").

\textsuperscript{237} 41 B.R. 402 (E.D. Pa. 1984), aff'd, 760 F.2d 46 (3d Cir. 1985).


\textsuperscript{242} See Periera v. Chapman, 92 B.R. 903, 906 (C.D. Cal. 1988) ("[I]n cases involving the enforcement of federal statutory rights, access to a section 1983 remedy should be denied if . . . the language of the statute indicates a congressional intent to preclude section 1983 enforcement by
Begley court concluded that the Bankruptcy Code provides "a completely comprehensive enforcement scheme for violations of Section 525" that negates any need for the recognition of a separate claim under section 1983. The same analysis presumably would apply to bar common law wrongful discharge claims, at least in those jurisdictions holding that the availability of an adequate federal statutory remedy precludes the judicial recognition of a common law remedy based on the public policy exception.

V. WRONGFUL REFUSAL TO HIRE IN VIOLATION OF BANKRUPTCY POLICY

A. No Statutory Remedy Precludes Recognition of the Claim

In considering whether the public policy embodied in the Bankruptcy Code would support the recognition of a common law "wrongful refusal to hire" claim, it is useful to begin by comparing the preclusion analysis in Robinette making alternative remedies available") (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 51 (1981) (White, J., dissenting)).

243 See Begley, 41 B.R. at 408. The court explained that "[a]pplication of section 1983 would simply duplicate the substantive claim [under section 525]". Id.; see also In re Lesniewski, 246 B.R. 202, 215 (Bankr. E.D. Pa. 2000) ("Since a private right of action is available under § 525(a) for injunctive and declaratory relief, § 1983 is not inconsistent with any remedy granted thereunder. It is, however, duplicative.").

244 Cf. Nichols v. Am. Nat'l Ins. Co., 945 F. Supp. 1242, 1246 (E.D. Mo. 1996) ("[B]ecause the statute upon which Plaintiff relies, i.e., Title VII, contains a comprehensive remedial provision, the Court concludes that allowing Plaintiff's claim for wrongful discharge based on a violation of public policy evidenced by such statute would be duplicative and unwarranted."); see also Burnham v. Karl & Gelb, P.C., 717 A.2d 811, 816 (Conn. App. Ct. 1998) (holding "the existence of a statutory remedy under OSHA precludes the plaintiff's public policy wrongful discharge claim").

245 See Robinette v. WESTconson Credit Union, 686 F. Supp. 2d 1206, 1213 (W.D. Wis. 2010) (holding "a federal [statutory] remedy for wrongful discharge . . . is exclusive and does not warrant expansion of Wisconsin's public policy exception"); see also, Clinton v. Okla. ex rel. Logan Cnty. Election Bd. 29 P.3d 543, 546 (Okla. 2001) ("[T]he existence of a federal statutory remedy that is sufficient to protect Oklahoma public policy precludes the creation of an independent common law claim based on a public policy exception to the employment-at-will doctrine."), overruled by Kruchowski v. Weyerhauser Co. 202 P.3d 144, 152 (Okla. 2008); see also Dockins v. Ingles Markets, Inc., 413 S.E.2d 18, 19 (S.C. 1992) ("When a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to the statutory remedy. We hold this applies when the right is created by federal law as well as state law." (citing Campbell v. Bi-Lo, Inc. 392 S.E.2d 477, 480–81 (S.C.App. 1990))).

246 See Stevenson v. Superior Ct., 941 P.2d 1157, 1170 (Cal. 1997) ("[T]he conclusion that a prohibition of one form of employment discrimination will support a common law . . . claim does not necessarily mean that a prohibition on a different form of employment discrimination will do likewise."); see also King v. Driscoll, 638 N.E.2d 488, 493 (Mass. 1994) ("Even a public policy, evidenced in a particular statute, which protects employees in some instances might not protect employees in all instances.").
v. WESTconsin Credit Union\textsuperscript{247} and In re Begley\textsuperscript{248} with that of the court in Runyan v. River Rock Entertainment Authority.\textsuperscript{249} The plaintiff in Runyan asserted a common law tort claim premised on the public policy embodied in section 525,\textsuperscript{250} alleging that he was "constructively discharged"\textsuperscript{251} when his employer learned of his intent to file bankruptcy.\textsuperscript{252} The court noted that while section 525 "outlaws discrimination by employers" and "creates a private right of action for its violation,"\textsuperscript{253} the statute only protects "individuals who are or have been bankruptcy debtors,"\textsuperscript{254} and thus provides no remedy for individuals who "are merely prospective bankruptcy debtors."\textsuperscript{255}

Relying on this statutory nuance,\textsuperscript{256} the Runyan court concluded that the plaintiff was free to argue that the employer's constructive termination of his employment "due to his status as a prospective filer is . . . a violation of public policy, there being no federal remedy for such a 'violation'" to preclude the recognition of a state common law claim.\textsuperscript{257} There likewise being no federal

\textsuperscript{247} 686 F. Supp. 2d 1206 (W.D. Wis. 2010); see supra notes 208–15 and accompanying text.

\textsuperscript{248} 41 B.R. 402 (E.D. Pa. 1984), aff'd, 760 F.2d 46 (3d Cir. 1985); see supra notes 237–43 and accompanying text.

\textsuperscript{249} No. C 08-1924, 2008 WL 3382783, at *7 (N.D. Cal. Aug. 8, 2008).

\textsuperscript{250} See id. at *7 ("[P]laintiff cites 11 U.S.C. § 525 as grounds for his argument that defendants' stated grounds for terminating him, his 'prospective petition for bankruptcy,' . . . were a violation of public policy.").

\textsuperscript{251} See id. at *2 (discussing plaintiff's claim for "wrongful, constructive termination in violation of public policy"). In California, where Runyan arose, a constructive discharge occurs when an employer "effectively forces an employee to resign." Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1025 (Cal. 1994). In this situation, the employee's resignation "is legally regarded as a firing rather than a resignation." Id. For an academic discussion of this principle, see Cathy Shuck, Comment, That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine, 23 BERKELEY J. EMP. & LAB. L. 401 (2002).

\textsuperscript{252} See Runyan, 2008 WL 3382783, at *1, *2, *7. In particular, the plaintiff alleged that the employer "forced [him] to resign his employment under threat of immediate termination" when it became aware of "his prospective petition for bankruptcy." Id. at *1 (internal quotation marks omitted); cf. EEOC v. Univ. of Chi. Hosps., 276 F.3d 326, 332 (7th Cir. 2002) ("When an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the employer's conduct may amount to a constructive discharge.").

\textsuperscript{253} Runyan, 2008 WL 3382783, at *7.

\textsuperscript{254} Id. at *2.

\textsuperscript{255} Id. at *7; see also In re Kanouse, 168 B.R. 441, 447 (S.D. Fla. 1994) ("[O]ne 'who is or has been a debtor' is afforded protection under 11 U.S.C. § 525(b). The statute does not allow a remedy to 'will be' debtors.") (emphasis omitted), aff'd, 53 F.3d 1286 (11th Cir. 1995).

\textsuperscript{256} The court based its interpretation of section 525 on the analysis in In re Majewski, where the Ninth Circuit held that the statute does not prohibit an employer from terminating the employment of an individual who "was not, and had not been, a debtor in bankruptcy." In re Majewski, 310 F.3d 653, 656 (9th Cir. 2002). Other courts have found Judge Reinhardt's dissent in Majewski to be more persuasive than the majority's analysis of this issue. See, e.g., Robinette v. WESTconsin Credit Union, 686 F. Supp.2d 1206, 1210 (W.D. Wis. 2010); In re Mayo, 322 B.R. 712, 717 (Bankr. D. Vt. 2005).

\textsuperscript{257} Runyan, 2008 WL 3382783, at *7. Under California law, "[a]n actual or constructive discharge in violation of a fundamental public policy gives rise to a tort action in favor of the terminated
statutory remedy for a private employer’s refusal to hire a bankruptcy debtor, an individual denied employment in the private sector due to a prior or prospective bankruptcy also may not be precluded from asserting a common law tort claim premised on the public policy contained in the Bankruptcy Code.

B. The Public Policy Exception Is Rarely Applied in Hiring Cases

The fact that a common law tort claim premised on the public policy exception would not be precluded (or preempted) by an existing federal statutory remedy does not mandate the judicial recognition of such a claim. The absence of preemption merely leaves resolution of the question to the various state courts (or occasionally to a federal court forced to predict how a employee.” Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1030 (Cal. 1994) (emphasis added). Not all courts follow California’s lead in this regard. See, e.g., Gallimore v. Newman Mach. Co., 301 F. Supp.2d 431, 454 (M.D. N.C. 2004) (“[T]he North Carolina courts have declined to recognize a public policy exception to the employment-at-will doctrine for constructive (as opposed to actual) discharge[s]”); Dixon v. Denny’s Inc., 957 F. Supp. 792, 799 (E.D. Va. 1996) (concluding “a federal court should not interpret Virginia’s public policy exception to the employment at will doctrine to encompass constructive as well as actual discharge unless and until Virginia’s courts have unequivocally done so.”). The Runyan court remanded the case to state court for lack of a substantial federal question, leaving the ultimate viability of the plaintiff’s public policy claim for the state court’s determination. See Runyan, 2008 WL 3382783, at *7, *9; cf. Tiengkham v. Elec. Data Sys. Corp., 551 F. Supp.2d 861, 868 (S.D. Iowa 2008) (“[I]t is particularly important that a state court decide the parameters of the state public policy exception to the at-will employment doctrine.”).

See In re Rea 431 B.R. 18, 23 (W.D. Pa.) (concluding bankruptcy debtor “lacks a statutorily cognizable cause of action under 11 U.S.C. § 525(b) against . . . a private employer[] for denying [the debtor] employment” (emphasis added)), aff’d, 627 F.3d 937 (3d Cir. 2010).


See generally Hysten v. Burlington N. Santa Fe Ry. Co., 108 P.3d 437, 441 (Kan. 2004) (“Preemption or the alternative remedies doctrine may prevent an aggrieved employee from pursuing a state cause of action for wrongful discharge.”); Zech, supra note 219, at 325 (observing that “concepts of pre-emption and exclusive remedy” are “similar in some respects”).

See, e.g., City of Moorpark v. Superior Ct., 959 P.2d 752, 761 (Cal. 1998) (“[O]ur conclusion that [the statute articulating the relevant public policy] does not provide an exclusive remedy is only half the analysis. We must also decide whether [the type of] discrimination [being alleged] can form the basis of a common law action of this type.”); see also Andre D. Bouffard, Emerging Protection Against Retaliatory Discharge: A Public Policy Exception to the Employment At-Will Doctrine in Maine, 38 Me. L. Rev. 67, 108 n.145 (1986) (“[T]he preemption issue . . . is analytically distinct from . . . whether federal statutes may be used to support a state public policy exception claim.”).

See Ramos v. Docomo Pac., Inc., 2012 Guam 20, ¶ 20 (2012) (“If federal law does not preempt the wrongful discharge claim, the court should . . . consider whether a particular federal law articulates the state’s public policy by determining whether the state has an interest in promoting greater enforcement of that area of the law.”); cf. In re Sugar Antitrust Litig., 588 F.2d 1270, 1273 (9th Cir.
Although a few courts have indicated that a wrongful refusal to hire tort may be recognized under appropriate circumstances, cases challenging discriminatory hiring practices are almost invariably brought directly under federal or state antidiscrimination statutes, which ordinarily prohibit both public and private employers from discriminating during the hiring process.

The public policy exception to the employment-at-will doctrine, by contrast, "arose in the context of termination," and its application has been limited...
almost exclusively to that situation.\textsuperscript{268} The courts have been hesitant to extend the exception to protect individuals from employment actions other than discharge,\textsuperscript{269} and they have been particularly reluctant to apply it in cases challenging an employer's hiring practices.\textsuperscript{270}

\textit{Bass v. City of Wilson}\textsuperscript{271} is a rare exception.\textsuperscript{272} The court in that case recognized a cause of action for wrongful refusal to hire in violation of the public policy against age discrimination embodied in North Carolina's Equal Employment Practices Act.\textsuperscript{273} The court provided the following explanation for

\textsuperscript{268} See Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731, 744 n.19 (Conn. 2002) ("[T]he tort of wrongful discharge in contravention of public policy applies uniquely to terminations, and not to . . . other discriminatory practices"); Francis J. Moatz III, \textit{The Sounds of Silence: Waiting for Courts to Acknowledge that Public Policy Justifies Awarding Damages to Third-Party Claimants When Liability Insurers Deal With Them in Bad Faith}, 2 NEV. L.J. 443, 481 (2002) ("[C]ases . . . restrict the cause of action to employees who have been discharged (actually or constructively), and deny relief to employees who allege that they have been demoted or otherwise treated unfairly for reasons that violate public policy."). For the author's prior consideration of this phenomenon, see Michael D. Moberly & Carolann E. Doran, \textit{The Nose of the Camel: Extending The Public Policy Exception Beyond The Wrongful Discharge Context}, 13 LAB. LAW. 371 (1997).

\textsuperscript{269} See, e.g., Woods v. Miamisburg City Schs., 254 F. Supp. 2d 868, 877 (S.D. Ohio 2003) ("[A]lthough Ohio recognizes claims for discharge in violation of public policy, Ohio courts have repeatedly rejected attempts to expand that claim beyond the discharge of an at-will employee." (citations omitted)); Gallo v. Eaton Corp., 122 F. Supp. 2d 293, 307 (D. Conn. 2000) ("[T]he court concludes that the Connecticut Supreme Court would not recognize the tort of wrongful demotion in violation of public policy."). The judicial reluctance "to recognize a claim for [wrongful] disciplinary action in violation of public policy" reflects a concern that extending the application of the public policy exception beyond the discharge context "would result in excessive judicial interference in the workplace." Hurst v. IHC Health Servs., Inc., 817 F. Supp. 2d 1202, 1207 (D. Idaho 2011); see also White v. Washington, 929 P.2d 396, 408 (Wash 1997) ("[B]y recognizing a cause of action for employer actions short of an actual discharge, the court would be opening a floodgate to frivolous litigation and substantially interfering with an employer's discretion to make personnel decision.").

\textsuperscript{270} See Berrington v. Wal-Mart Stores, Inc., 696 F.3d 604, 609 (6th Cir. 2012) ("The common denominator in all the recognized public policy exceptions to at-will employment is the existence of an employment relationship. An employee's right to be hired or rehired by an employer, on the other hand, has never been recognized as actionable, under common law on public policy grounds."); Runski v. Nu-Car Carrier Inc., 47 Pa. D. & C. 3d 192, 199–200 (Pa. Ct. Com. P. 1980) ("The protections afforded presently employed persons . . . and the strong policy reason[s] therefore have not, as yet, been held to apply to mere applicants for employment"); Elaine W. Shoben, \textit{Test Defamation in the Workplace: False Positive Results in Attempting to Detect Lies, AIDS or Drug Use}, 1988 U. CHI. LEGAL F. 181, 204 ("There is no common law action for wrongful refusal to hire.").

\textsuperscript{271} 835 F. Supp. 255 (E.D. N.C. 1993).

\textsuperscript{272} See McGuinness, \textit{supra} note 267, at 229 ("There is some authority suggesting that adverse action other than termination is also recognized under the public policy doctrine. For example, in Bass v. City of Wilson, the Eastern District of North Carolina held that the failure to hire could constitute a violation of public policy.").

interpreting the public policy exception to prohibit discriminatory hiring decisions:

Allowing a cause of action for wrongfully refusing to hire an individual based on age discrimination will further . . . public policy at both the hiring and employment stages, and will contribute toward alleviating the concerns referred to in the statute. If it violates public policy for an employer to discriminate against an individual during employment or as a basis for termination, then it is equally abusive to discriminate against an individual seeking employment.274

One commentator writing shortly after Bass was decided observed that widespread judicial acceptance of the analysis in that case would transform the "once narrow" public policy exception "into a doctrine that goes beyond the wrongful discharge context and reaches into the hiring process."275 Although rejected job applicants have invoked the exception in subsequent cases,276 and there are persuasive policy arguments for extending the exception's application to the hiring context,277 the Bass court's reasoning generally has not been


embraced by other courts. Indeed, courts in several states, including Arizona, Kentucky, Nevada, New Jersey, Ohio, Oklahoma, and Washington, have either specifically held, or strongly implied, that a common law claim for wrongful refusal to hire cannot be premised on the public policy exception to the employment-at-will doctrine.

278 See, e.g., Berrington v. Wal-Mart Stores, Inc., 799 F. Supp. 2d 772, 777 (W.D. Mich. 2011) ("Neither the Michigan Supreme Court nor the Michigan Court of Appeals have indicated any willingness to expand the wrongful termination public policy exception to the employment-at-will presumption to the hiring or rehiring context."); aff’d, 696 F.3d 604 (6th Cir. 2012); see also Cohen, supra note 275, at 67 ("Perhaps the most surprising development in the public policy tort area was the approval of a claim for ". . . violation of public policy’ brought by a rejected job applicant in Bass v. City of Wilson.").

279 See Burris v. City of Phx., 875 P.2d 1340, 1348 (Ariz. Ct. App. 1993) ("[W]e have found no state or federal court that has recognized the tort of wrongful failure to hire even though federal law and the laws of many states prohibit discrimination in hiring on the basis of such factors as race, national origin, sex or handicap."); John Alan Doran, It Takes Three to Tango: Arizona’s Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting, 35 Ariz. St. L.J. 477, 505 (2003) (asserting that "Arizona law does not recognize claims for wrongful refusal to hire").


282 See Ebner v. STS Tire & Auto Ctr., No. 10-2241, 2011 WL 4020937, at *7 (D. N.J. Sept. 9, 2011) (asserting "a common law action for failure to hire . . . [is] not recognized by New Jersey courts").

283 See Noble v. Genco I, Inc., No. 2:10-CV-648, 2010 WL 5541046, at *5 (S.D. Ohio Dec. 30, 2010) ("Ohio courts have essentially limited the public policy doctrine to claims for wrongful discharge or discipline of an employee at will. For instance, courts have refused to extend the doctrine to a claim for failure to hire . . . ."); Fontaine v. Clairmont Cnty, Bd. of Comm’rs, 633 F. Supp. 2d 530, 540 (S.D. Ohio 2007) ("[T]here is no cause of action under Ohio law . . . for wrongful failure to hire in violation of public policy.").

284 See Williams v. Dub Ross Co., 895 P.2d 1344, 1347 (Okla. Ct. App. 1995) ("[T]here presently is no tort cause of action for wrongful failure to hire, and . . . we decline to recognize such a claim as a new cause of action").


[T]he statutory law against discrimination is significantly broader than the tort of wrongful discharge. Under this statute an employee may obtain actual damages sustained as a result of discriminatory refusal to hire . . . as well as discriminatory discharge. However, the tort of wrongful discharge in violation of public policy clearly applies only in a situation where an employee has been discharged.

Id. (citations omitted).

286 See, e.g., Gaj v. U.S. Postal Serv., 800 F.2d 64, 66 (3d Cir. 1986) ("Pennsylvania does not recognize the tort of failing to hire based on a handicap"); see also Marley S. Weiss, Commentary:
C. Statutory Violation as a Prerequisite to the Exception's Application

Several courts have held that the protection provided by the public policy exception "cannot be broader than the . . . statute on which it depends," and thus that no claim premised on the exception can be maintained unless the underlying statute has been violated. Because the Bankruptcy Code's antidiscrimination provision does not prohibit private employers from refusing to hire bankruptcy debtors, courts adhering to this view are particularly unlikely to recognize a wrongful refusal to hire claim premised on the public policy contained in that provision. In other words, despite the importance of bankruptcy's fresh start policy in other respects, the Bankruptcy Code may

Maryland recognizes only a common law cause of action for wrongful termination in violation of public policy. The state courts are highly unlikely to recognize a tort claim for wrongful failure to hire . . . in violation of that same public policy against employment discrimination, even though the dignitary insult may be equally as great.

Id.

287 City of Moorpark v. Superior Ct., 959 P.2d 752, 762 (Cal. 1998); see also Kaplan v. Dr. Reddy's Labs., Inc., No. CV 10-00675-R, 2010 WL 3894232, at *1 (C.D. Cal. Sept. 30, 2010) ("Claims for wrongful termination in violation of public policy do not grant employees rights beyond those provided by the statute upon which the claim is based."); Stevenson v. Superior Ct., 941 P.2d 1157, 1174 (Cal. 1997) ("As compared to a statutory . . . cause of action, a common law wrongful discharge claim does not broaden the scope of prohibited conduct").


289 See Burnett v. Stewart Title, Inc. (In re Burnett), 635 F.3d 169, 173 (5th Cir. 2011) (stating "Congress did not prohibit private employers from denying employment to applicants based on their bankruptcy status"); Myers v. TooJay's Mgmt. Corp., 419 B.R. 51, 58 (M.D. Fla. 2009) ("[I]t is clear that Congress prohibited discriminatory hiring decisions in § 525(a) and did not prohibit such conduct by private employers under § 525(b).", aff'd, 640 F.3d 1278 (11th Cir. 2011).

290 See, e.g., Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1249 (7th Cir. 1985) ("We cannot find a cause of action under § 525 when Congress has expressly declined to provide one."); see also Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731, 747 (Conn. 2002) (concluding that a legislative decision to exempt certain employers from a statutory prohibition of employment discrimination is "fully applicable to common-law claims based on the public policy exception to the at-will employment doctrine"); Fitzgerald v. Salsbury Chem., Inc., 613 N.W.2d 275, 285 (Iowa 2000) ("We are reluctant to infer a broad public policy from a statute which is limited in its scope to specific discriminatory practices.").

291 See, e.g., In re Gibson, 157 B.R. 366, 369 (Bankr. S.D. Ohio 1993) ("One of the major public policies underlying the Bankruptcy Code is to provide a debtor with a 'fresh start' by discharging a
not contain a sufficiently comprehensive antidiscrimination provision to support the recognition of a common law wrongful refusal to hire tort.292

An analogous issue arose in Warnek v. ABB Combustion Engineering Services, Inc.293 In that case, the Washington Supreme Court addressed whether the common law wrongful discharge claim it recognized in Wilmot v. Kaiser Aluminum & Chemical Corp.,294 which provided a remedy to individuals terminated "for having filed or expressed an intent to file a workers' compensation claim,"295 also applies when an employer refuses to rehire an individual for the same reason.296

In concluding that Wilmot does not insulate workers' compensation claimants from discriminatory hiring decisions,297 the Warnek court noted that the statute establishing the public policy at issue only protects individuals

\[\text{Plaintiff maintains that a public policy exception should emanate from . . . the bankruptcy code . . . . Unless the plaintiff can point to some portion of the bankruptcy code which specifically allows . . . employees . . . more rights than allowed by the at-will employment doctrine, the plaintiff has no cause of action.}\]

\[\text{id. (emphasis added); In re Ellwanger, 140 B.R. 891, 902 (W.D. Wash. 1992) ("There is nothing in the Bankruptcy Code to warrant . . . reading into it a public policy exception not clearly contemplated by Congress"); cf. Orovitz, supra note 8, at 591 ("The court system is not the appropriate arena to fix the problem of employment discrimination against individuals who have filed for bankruptcy. The protections provided by § 525(b) . . . are too narrow to allow courts to restrict private employer[\text{s}].")}\]

\[\text{293 972 P.2d 453 (Wash. 1999).}\]

\[\text{294 821 P.2d 18 (Wash 1991).}\]

\[\text{295 Id. at 21. The claim recognized in Wilmot was premised on the Washington Supreme Court's earlier recognition in Thompson v. St. Regis Paper Co. of "a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy." 685 P.2d 1081, 1089 (Wash. 1984). One commentator has asserted that "[t]he most common public policy exceptions to the employment-at-will doctrine are those recognizing a cause of action for employees terminated in retaliation for pursuing a workers' compensation claim." Tom Werner, The Common Law Employment-At-Will Doctrine: Current Exceptions for Iowa Employees, 43 Drake L. Rev. 291, 315 (1994).}\]

\[\text{296 See Warnek, 972 P.2d at 455. The question addressed in Warnek had been certified to the Washington Supreme Court by a federal district court. See id. at 453–55. The Washington Supreme Court is statutorily authorized to answer unsettled questions of Washington law certified to it by other courts. See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 72 P.3d 151, 156 (Wash. 2003); Wilmot, 821 P.2d at 33 (discussing WASH. REV. CODE § 2.60.020 (2010)).}\]

\[\text{297 See Warnek, 972 P.2d at 455 ("A former employee not rehired because the employee filed a workers' compensation grievance during the course of previous employment with the employer may not initiate a lawsuit for employment discrimination based upon . . . the wrongful discharge cause of action articulated in Wilmot").}\]
"during the course of their employment." Declining to contravene the legislative intent implicit in this statutory language, the Warnek court held that individuals who have been denied employment because they previously filed a workers' compensation claim cannot state a cognizable common law claim under Wilmot.

The court in Weaver v. Harpster offered a persuasive rationale for the result in Warneck and other cases in which courts have refused to provide victims of employment discrimination with broader protection under the public policy exception than is available under the statute from which the public policy at issue is drawn. Noting that the articulation of public policy is primarily a legislative function, the Weaver court stated:

[I]f we permitted a common law cause of action . . . where the employer is expressly not covered by the statute that created the public policy, we would create the concern that other statutes that explicitly exempt certain employers from compliance actually express a general public policy and apply even to those the legislature chose to exclude. If the legislature chooses to expand statutes to cover more employers, it is clearly within its

298 Id. at 456 (discussing WASH. REV. CODE § 51.48.025 (2010)).
300 See id. at 560 ("[T]he courts have never utilized a wrongful termination statute . . . to recognize a public policy exception to the at-will employment doctrine beyond the protections afforded by that statute.").
301 See id. at 569 ("Extending protections afforded by a statute beyond its explicit limitations would require the courts to act as a super-legislature."); cf. Kennebec Utah Copper Corp. v. Becker, 195 F.3d 1201, 1207 (10th Cir. 1999) ("Determining public policy is a uniquely legislative endeavor, one not well suited to judicial resolution"); Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1329 (Fla. Dist. Ct. App. 1985) ("The determination of what constitutes public policy . . . is a function of the legislature.").
authority to do so. Our role, however, does not include expanding statutes beyond their terms.\textsuperscript{304}

The \textit{Weaver} court was addressing the scope of a public policy contained in a state statute.\textsuperscript{305} However, the same analysis applies in cases involving federal statutes,\textsuperscript{306} and specifically those in which the public policy at issue is embodied in the Bankruptcy Code.\textsuperscript{307} The judicial recognition of a tort claim for wrongful refusal to hire in violation of public policy in some jurisdictions,\textsuperscript{308} but presumably not in others,\textsuperscript{309} based on a statutory prohibition of bankruptcy-

\textsuperscript{304} \textit{Weaver}, 975 A.2d at 570; \textit{cf.} Thibodeau v. Design Grp. One Architects, LLC, 802 A.2d 731, 747 (Conn. 2002) ("The legislature may wish to revisit its policy judgment . . . . [Courts], however, are not free to ignore the clear expression of public policy embodied in [a] statutory exemption . . . . afforded [certain types of employers . . . . "). \textit{See generally} Brian Hersey, \textit{Note, Roberts v. Dudley: An Unnecessary Broadening of the Public Policy Exception to the Employment-at-Will Doctrine in Washington}, 76 WASH. L. REV. 179, 207 (2001) (asserting court "raises serious separation-of-powers issues by using the public policy exception to fill a gap deliberately left in the statute by the Legislature").

\textsuperscript{305} \textit{Weaver} involved the Pennsylvania Human Relations Act ("PHRA"), 43 PA. CONS. STAT. §§ 951–63, and specifically "whether an employer with fewer than four employees, although not subject to the PHRA's prohibition against sexual discrimination, nevertheless is prohibited from discriminating against an employee on the basis of sex" under the common law. \textit{Weaver}, 975 A.2d at 556; \textit{cf.} Chavez v. Sievers, 43 P.3d 1022, 1026 (Nev. 2002) ("[T]he legislature sets the public policy of this state regarding racial discrimination in employment. Since the legislature determined that small businesses should not be subject to racial discrimination suits, we decline to create an exception to the at-will doctrine for racial discrimination in these businesses."); Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 994 P.2d 1261, 1266 (Utah 2000) ("We have found no cases . . . recognizing a public policy against age discrimination by small employers in a statute . . . which expressly exempts small employers.").

\textsuperscript{306} \textit{See, e.g.}, Hill v. Mr. Money Fin. Co., 309 F. App'x 950, 963–64 (6th Cir. 2009) ("Similar reasoning applies to the clear public policy as expressed in the Federal Whistleblower Statutes. If [the plaintiff's] claim under . . . those statutes fails, then his public policy claim based thereupon must also fail."); Basile v. Missionary Sisters of Sacred Heart of Jesus-Stella Maris Province, No. 11-cv-01827-REB-KMT, 2011 WL 5984752, at *2 (D. Colo. November 30, 2011) ("[B]ecause employers with fewer than twenty employees are not subject to the ADEA, the anti-discrimination policies embodied in that statutory scheme implicitly do not extend to those employers.").

\textsuperscript{307} \textit{See, e.g.}, Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1269 (9th Cir. 1990) (holding individual's claim "that his termination violated public policy because it offended the policies underlying the Bankruptcy Code" was precluded because the employer "did not violate the Bankruptcy Code").

\textsuperscript{308} \textit{See, e.g.}, Hamovitz v. Santa Barbara Applied Research, Inc., No. 2:07-cv-0154, 2010 WL 4117270, at *3 (W.D. Pa. October 19, 2010) (rejecting contention "that Pennsylvania does not recognize a common law tort for failure to hire"); \textit{see also} Roe v. TeleTech Customer Case Mgmt. (Colo.) LLC, 257 P.3d 586, 595 (Wash. 2011) ("A statute may provide a public policy mandate . . . even where the employer's conduct is beyond the reach of the statute's remedies.").

\textsuperscript{309} \textit{See, e.g.}, Murdock v. Village of Ottawa Hills, 731 N.E.2d 284, 289 (Ohio Ct. App. 1999) (Sherck, J., concurring) ("[E]ven were we to accept appellant's assertion that [the statute] represents some broader public policy, to apply this to a hiring situation goes far beyond the exception to Ohio's employee-at-will doctrine that has been established for terminations."). There are still a few states in
based discrimination that is not binding on private employers would not provide those employers with sufficient notice of the conduct that might subject them to liability, and thus would foster the very uncertainty to which the Weaver court alluded.

In short, only through strict judicial adherence to legislative pronouncements of public policy will employers receive clear notice of the employment practices in which they may not engage. The fact that section 525 prohibits hiring discrimination by public employers is not sufficient to apprise private employers of the fact that they too may be prohibited from engaging in such discrimination. As another state court explained:

A statute’s exclusion of certain employers from its requirements precludes a finding that a fundamental policy supported by that statute would extend to the excluded employers. To make such a finding would unreasonably require employers to realize they must comply with a which the public policy exception to the employment-at-will doctrine has not been recognized. See, e.g., Bruley v. Village Green Mgmt. Co., 592 F. Supp. 2d 1381, 1385 (M.D. Fla. 2008), aff’d, 333 F. App’x 491 (11th Cir. 2009); Lobosco v. N.Y. Tel. Co./NYNEX, 751 N.E.2d 462, 464 (N.Y. 2001). The courts in these states are particularly unlikely to apply the exception in a refusal to hire case. See, e.g., Bruffet v. Warner Commc’ns, Inc., 692 F.2d 910, 920 (3d Cir. 1982) (“[I]f Pennsylvania would not recognize a common law action for [wrongful] discharge [in violation of public policy], it is less likely to recognize an action for failure to hire on the same basis.”).

See Gelini v. Tishgart, 91 Cal. Rptr. 2d 447, 452 (Ct. App. 1999) (“[O]ur Supreme Court has taken care to restrict claims for . . . violation of public policy to those in which ‘employers have adequate notice of the conduct that will subject them to tort liability’” (quoting Stevenson v. Superior Ct., 941 P.2d 1157, 1161 (Cal. 1997))).

See Weaver v. Harpster, 975 A.2d 555, 569 (Pa. 2009) (asserting that courts “cannot enforce the public policy articulated in [a statute] while simultaneously ignoring . . . the specific conduct characterized as unlawful”); cf. Jennings v. Marralle, 876 P.2d 1074, 1083 (Cal. 1994) (“It would be unreasonable to expect employers who are expressly exempted from [a statutory] ban on . . . discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.”).

See Carl v. Children’s Hosp., 702 A.2d 159, 197 (D.C. 1997) (“[P]ublic policy exceptions fashioned by the legislature have the benefit of providing clear notice to employers and employees prior to the accrual of a cause of action . . . . In contrast, public policy exceptions formulated by courts are derived and applied post hoc, and provide no clear guidance to employers . . . .”); cf. Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 524 (Colo. 1996) (“[A]n expansive definition of public policy would be . . . unpredictable leaving employers and employees alike without direction as to the contours of the public policy exception.”).

See Griffin v. Mullinex, 947 P.2d 177, 179 (Okla. 1997) (“[A]n Act which . . . applies to public employers only is not an adequate basis upon which to premise the private tort action of a private employee.”); Tiernan v. Charleston Area Med. Ctr., 506 S.E.2d 578, 591 (W. Va. 1998) (“In the absence of a statute expressly imposing public policy . . . upon private sector employers, an employee does not have a cause of action against a private sector employer.”).
Congress has not been indifferent to the impact bankruptcy-based employment discrimination can have on a debtor's right to a fresh start under the Bankruptcy Code. In an effort to address this problem, Congress has expanded the antidiscrimination protection available to bankruptcy debtors on three separate occasions—once when it originally enacted section 525, and then again when it subsequently added subsection (b) and ultimately subsection (c) to the statute.

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314 Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 897–98 (Ct. App. 2004) (citation omitted); see, e.g., Basile v. Missionary Sisters of Sacred Heart of Jesus-Stella Maria Province, 11-cv-01827-REB-KMT, 2011 WL 5984752, at #2 (D. Colo. Nov. 30, 2011) (“Because the Colorado legislature has exempted religious organizations from the reach of state anti-discrimination law, it perforce cannot be the public policy of the State of Colorado to prohibit discrimination in employment by such organizations.”). See generally Thibodeau v. Design Group One Architects, LLC, 802 A.2d 731, 742 (Conn. 2002) (“[F]ailure to recognize the public policy reflected in the exemption of [certain] employers would expose them to liability for employment discrimination claims notwithstanding a clearly expressed legislative preference to the contrary.”).

315 See McLellan v. Miss. Power & Light Co., 545 F.2d 919, 930 (5th Cir. 1977) (rejecting suggestion “that Congress and others have been unmindful of discrimination practiced against bankrupts”); In re Brown, 95 B.R. 35, 36 (Bankr. E.D. Va. 1989) (discussing Congress’s awareness “of the need to protect sound bankruptcy policy by prohibiting discrimination.”).

316 See generally In re Rees, 61 B.R. 114, 124 (Bankr. D. Utah 1986) (“Congress considered many alternatives to preserve the effectiveness of a debtor’s fresh start.”).

317 As discussed earlier, see supra note 40, the initial federal prohibition of bankruptcy-based discrimination is properly traced to the Supreme Court’s decision in Perez v. Campbell, 402 U.S. 637 (1971), rather than to an act of Congress. See Boshkoff, supra note 21, at 162 (“Section 525 of the Bankruptcy Code, as originally enacted, is unusual because it is the product of Congress’ decision to codify a judicially developed doctrine of debtor protection.”).

318 Congress’s enactment of Section 525 was in part a delayed codification of the antidiscrimination principle announced in Perez. See In re Potter, 354 B.R. 301, 308 (Bankr. N.D. Ala. 2006); In re Borowski, 216 B.R. 922, 924 (Bankr. E.D. Mich. 1998). However, to the extent Section 525 prohibits “acting against a person solely for filing for bankruptcy, or for being insolvent before filing for bankruptcy,” and not merely for refusing to pay a debt that was discharged in bankruptcy, the protection afforded under the statute “extended well beyond Perez.” In re Straight, 248 B.R. 403, 420 (B.A.P. 10th Cir. 2000).


Although courts and commentators generally refer to section 525(a) as the antidiscrimination provision, section 525 contains two additional antidiscrimination provisions, which were added after the 1978 enactment of section 525(a). Section 525(b), enacted in 1984, prohibits discrimination against debtors by private employers. Section 525(c), enacted in 1994, prohibits
This type of incremental legislative attack on a perceived discrimination problem is not unusual. In this instance, it reflects the fact that both the enactment and the subsequent amendment of the Bankruptcy Code’s antidiscrimination provision were the result of political compromises. Indeed, the enactment—or amendment—of any antidiscrimination statute (or any other form of legislation) invariably involves a balancing of competing political and economic interests. This legislative balancing often results in varying (and thus arguably less than optimal) levels of statutory protection.

discrimination against debtor-borrowers on the basis of discharged, unrepaid loans by governmental units operating a student loan or grant program.

Id. (citations omitted).

See United States v. Lewitzke, 176 F.3d 1022, 1027 (7th Cir. 1999) (“Congress is free to ‘take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.’” (quoting Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955))); Globe Fur Dyeing Corp. v. United States, 467 F. Supp. 177, 180 (D.D.C. 1978) (“Congress may choose to take one step at a time or attack only one aspect of a problem.”), aff’d, 612 F.2d 586 (D.C. Cir. 1980); cf. Griffin v. Eller, 922 P.2d 788, 791 (Wash. 1996) (noting that a state legislature may choose to “approach the problem of employment discrimination one step at a time”).

See In re Tinker, 99 B.R. 957, 958 (Bankr. W.D. Mo. 1989) (noting “§ 525 was a compromise”); In re Neiheisel, 32 B.R. 146, 161 (Bankr. D. Utah 1983) (“In the political give and take surrounding the Bankruptcy Reform Act, many proposals to enhance the fresh start were lost to compromise, including proposals to . . . extend by statute the prohibition of post-discharge discrimination to private parties.”).


[N]ot all forms of discrimination are prohibited under federal law. In our system of government, . . . it is the responsibility of Congress to enact legislation protecting those who are unjustly victimized. Such decisions are based on a range of political considerations, including . . . the level of constituent support (often based on economic or religious considerations), and the like.
The Bankruptcy Code’s antidiscrimination provision is merely a discrete example of this phenomenon.\textsuperscript{327}

When viewed in this manner, there is nothing irrational—or even particularly unusual\textsuperscript{328}—in Congress’s decision to exempt private employers (at least for now)\textsuperscript{329} from the Bankruptcy Code’s prohibition of hiring discrimination.\textsuperscript{330} The decision presumably reflects the fact that those entities

\textit{Id.} See, e.g., Wheatley Heights Neighborhood Coal. v. Jenna Resales Co., 429 F. Supp. 486, 491 (E.D.N.Y. 1977) (“The Fair Housing Act was ‘the result of a political compromise, a product more of the desire for passage than the desire for a rational scheme for uprooting discrimination.’” (quoting Note, Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834, 835 (1969)); Austin v. HealthTrust, Inc.—The Hosp. Co., 967 S.W.2d 400, 403 (Tex. 1998) (“In enacting statutes that prohibit certain conduct in the employment area, the Legislature has carefully balanced competing interests and policies. This has resulted in statutes not only with diverse protections, but also with widely divergent remedies, and varying procedural requirements.”).

\textsuperscript{327} See \textit{In re Goldrich}, 45 B.R. 514, 520 (Bankr. E.D.N.Y. 1984) (“[T]he legislative history of Section 525 indicates that the statute does not necessarily embrace all the varieties of discrimination against debtors which conflict with the bankruptcy laws.”), rev’d on other grounds, 771 F.2d 28 (2d Cir. 1985); cf. Boshkoff, supra note 21, at 176 (“The determination of whether private party discrimination unduly interferes with the bankruptcy process requires a weighing of interests.”).

\textsuperscript{328} See Joseph Lipps, \textit{State Lifestyle Statutes and the Blogosphere: Autonomy for Private Employees in the Internet Age}, 72 Ohio St. L.J. 645, 678 (2011)

\textit{[T]reating termination and hiring differently is consistent with how our society views these two aspects of the employment relationship. Termination has been dubbed ‘capital punishment’ in the employment context, and has a severe effect on employees. Conversely, during the hiring and application process, the employer has a strong incentive to be selective and is entitled to more deference to avoid offering employment to an undesirable employee.}

\textit{Id.} (footnote omitted).

\textsuperscript{329} See Herz, supra note 15, at 90 (“[I]t may be time that [Congress] revisis[t] § 525(b) and craft language that serves to better promote the Code’s intrinsic fresh-start ideals.”); Orovitz, supra note 8, at 558 (“Section 525(b) should be amended so that individuals applying for private sector positions are treated the same as those applying for government jobs.”); Yun, supra note 15, at 216 (“Congress should amend the language of § 525(b) to extend prohibition of all types of bankruptcy discrimination, including private employers’ hiring choices.”).

\textsuperscript{330} See Myers v. Toojay’s Mgmt. Corp., 419 B.R. 51, 58 n.8 (M.D. Fla. 2009), aff’d, 640 F.3d 1278 (11th Cir. 2011).

While section 525 as a whole manifests a Congressional intent—a Congressional policy—to extend a measure of job security to debtors in both the public and private sectors, it is nevertheless a rational, secondary policy choice to distinguish between public and private employers where no dependent relationship has been formed. Being denied a job does not change the status quo; losing a job does.

have "more effective, and well funded, lobbyists to advocate against potential new causes of action against them than do discrete governmental agencies." Despite occasional arguments to the contrary, such a purely "political" reason for differentiating between public and private employers (and by extension, the bankruptcy debtors who seek employment with them) is not inherently objectionable in a democratic system of government.

Indeed, Congress often treats public and private entities differently when regulating aspects of the employment relationship, as it did when it originally

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331 In re Martin, No. 06-41010, 2007 WL 2893431, at *2 n.10 (Bankr. D. Kan. 2007); see also Roger Roots, The Student Loan Debt Crisis: A Lesson in Unintended Consequences, 29 Sw. U.L. Rev. 501, 517 n.110 (2000) ("The Bankruptcy Code in general has been described as a series of political 'horse-trades' driven by legislative commitments to various interest groups." (quoting MICHAEL HERBERT, UNDERSTANDING BANKRUPTCY 2 (1995))); see generally Carl v. Children's Hosp., 702 A.2d 159, 171 (D.C. 1997) (Ferren, J., concurring) ("Legislation typically is the result of initiative and advocacy by groups interested in particular issues.").

332 See, e.g., Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1043 (Utah 1989) ("Limiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection but have limited access to the political process."); Timothy Sandefur, Is Economic Exclusion a Legitimate State Interest?: Four Recent Cases Test the Boundaries, 14 WM. & MARY BILL RTS. J. 1023, 1028 (2006) ("[L]egislative power . . . often becomes a prize in the political contest—a contest won, not by the most deserving, but by those who . . . invest the most resources in the contest.").

333 See Martin, 2007 WL 2893431, at *4 (concluding that Congress elected "to provide greater protection to persons seeking employment with the government . . . than it provides to individuals who are seeking employment in the private sector"); Orovitz, supra note 8, at 568 ("It is possible that the Bankruptcy Code is purposely extending less protection to individuals applying for private jobs than government positions.").

334 See In re Barbee, 14 B.R. 733, 736 n.3 (Bankr. E.D. Va. 1981) ("[R]espect should be paid to the limits to which Congress was prepared to go to enact a particular policy, especially when the boundaries of a statute were drawn in compromise from countervailing pressures of other policies." (quoting Girardier v. Webster Coll., 563 F.2d 1267, 1275 (8th Cir. 1977))); cf. Braunstein v. Trotter, 635 P.2d 1379, 1383 (Or. Ct. App. 1981) ("There are, of course, advantages in the legislative forum, where different interest groups may be heard and where compromises and trade-offs may be effected."). See generally Comm. Educ. Equal. v. Missouri, 294 S.W.3d 477, 498 (Mo. 2009) (Wolff, J., concurring in part and dissenting in part) ("The legislative process by its nature creates winners and losers, relatively speaking. The legislature has wide latitude to make these choices.").

enacted the Bankruptcy Code's antidiscrimination provision.\textsuperscript{336} State legislatures also occasionally differentiate between public and private employment.\textsuperscript{337} There is nothing inappropriate in these legislative distinctions.\textsuperscript{338}

Given the political considerations underlying the enactment of the Bankruptcy Code,\textsuperscript{339} courts should resist the urge to "improve" upon the existing statutory scheme,\textsuperscript{340} no matter how tempting that prospect may be.\textsuperscript{341} The fact that a court unencumbered by the same political constraints as Congress might have enacted a more comprehensive antidiscrimination statute if charged with that responsibility provides no basis for the judicial recognition of a common

\textsuperscript{336} See Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1249 (7th Cir. 1985) ("Congress carefully considered extending the anti-discrimination section to private entities and purposefully rejected it as being overbroad . . . . Section 525 [was] specifically worded to apply to governmental units."); In re Marine Elec. Ry. Prods. Div., Inc., 17 B.R. 845, 850 (Bankr. E.D.N.Y. 1982) ("Section 525 only prohibits discrimination by public entities and . . . . is inapplicable to discrimination stemming from private sources.").

\textsuperscript{337} For example, a Kansas state statute that mirrors to some extent the Bankruptcy Code's original antidiscrimination provision provides only that "no public employee shall be discharged from employment by reason of the fact that he or she has availed himself or herself of . . . a proceeding in bankruptcy . . . . or any other similar proceeding instituted because of such employee's insolvency." Kan. Stat. Ann. § 75-4316(b) (emphasis added); see also Brooklyn Union Gas Co. v. N.Y. State Human Rights Appeal Bd., 359 N.E.2d 393, 400 (N.Y. 1976) (Breitel, C.J., dissenting) ("[P]ublic and private employment are different in many respects, and the legislature is entitled to recognize those differences. It has done so.").

\textsuperscript{338} See FLRA v. U.S. Dep't of Navy, 966 F.2d 747, 773 (3d Cir. 1992) (Rosen, J., dissenting) ("[T]here are numerous . . . . important respects in which public employment is treated differently than private employment under federal law."); Bowers v. City of San Buenaventura, 142 Cal. Rptr. 35, 39 (Ct. App. 1979) ("[T]he state can reasonably treat public and private employers differently.").


\textsuperscript{340} See generally Myers v. TooJay's Mgmt. Corp., 640 F.3d 1278, 1286 (11th Cir. 2011) ("[C]ourts tempted to bend statutory text to better serve congressional purposes would do well to remember that Congress enacts compromises as much as purposes."); Phila. Newspapers, 418 B.R. at 573 ("What may appear to be latent ambiguity, when removed in time and viewed from afar, is likely the result of legislative judgments intended to compromise competing interests or appease particular constituencies. These political judgments should not be disturbed lightly.").

\textsuperscript{341} See United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1007 (2d Cir. 1991) (stating that courts lack "the prerogative of rewriting [bankruptcy law] to maximize bankruptcy objectives that Congress might not have fully achieved"); In re Madison Madison Int'l, 77 B.R. 678, 681 (Bankr. E.D. Wis. 1987) ("Courts must not engage in judicial legislation. They are not empowered to tinker with Congress's statutory schemes, even if they believe they can improve upon them."); In re Brown, 43 B.R. 613, 614 (Bankr. M.D. Tenn. 1984) ("It is not so unusual for a court to find itself interpreting a statute which the judge would word differently was such within the province of the court.").
law "public policy" tort untethered to the language of the statute Congress actually enacted.\textsuperscript{342}

Congress is the institution responsible for formulating national bankruptcy policy,\textsuperscript{343} and the one best suited to balance the competing interests at stake in this situation.\textsuperscript{344} It obviously has the ability to protect bankruptcy debtors from private sector hiring discrimination if it wishes to do so.\textsuperscript{345} The fact that Congress has twice amended section 525 without providing debtors with such protection provides a particularly compelling reason for the courts to defer to its judgment on this issue.\textsuperscript{346} Under the circumstances, any further expansion of the protection afforded bankruptcy debtors should come from Congress,\textsuperscript{347} and not from the state or federal courts.\textsuperscript{348}

\textsuperscript{342} See Kennecott Utah Copper Corp. v. Becker, 195 F.3d 1201, 1207 (10th Cir. 1989) ("We must be cautious of substituting our preferences . . . under the guise of enforcement of public policy."); Myers v. TooJay's Mgmt. Corp., 419 B.R. 51, 58 (M.D. Fla. 2009) ([F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." (quoting United States v. Rutherford, 442 U.S. 544, 555 (1979))), aff'd, 640 F.3d 1278 (11th Cir. 2011); Am. States Ins. Co., v. Symes of Silverdale, Inc., 78 P.3d 1266, 1269 (Wash. 2003) ("[S]tate courts have no authority to depart from federal bankruptcy law based on a disagreement as to appropriate public policy.").

\textsuperscript{343} See Burgess v. Sikes (\textit{In re Burgess}), 438 F.3d 493, 508 (5th Cir. 2006) ("It is Congress who is charged with articulating bankruptcy policy through the Bankruptcy Code."); \textit{In re Brown}, 43 B.R. at 614 ("[N]ational bankruptcy policy is made by the Congress of the United States not by the bankruptcy courts).

\textsuperscript{344} Whether to protect "job applicants as well as . . . existing employees" from a particular form of employment discrimination is ultimately "a policy decision." Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30, 34 (D.D.C. 1991). Such "policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code." United States v. Whizco, Inc., 841 F.2d 147, 151 n.5 (6th Cir. 1988); see also Henry P. Ting, Note, \textit{Who's the Boss?: Personal Liability Under Title VII and the ADEA}, 5 CORNELL J.L. & PUB. POL'Y 515, 550 (1996) ("In the end, it is Congress' job to weigh the competing policies in fashioning the best method for eliminating illegal employment discrimination.").

\textsuperscript{345} See Yan, supra note 33, at 461 ("[S]ection 525(b) was presumably enacted in response to the frustrations of not being able to apply section 525(a) to private employers. Would it not follow then that Congress might actually amend the current section or enact a new section . . . that would subject private employers to the same restrictions as governmental units?").

\textsuperscript{346} See \textit{In re Totina}, 198 B.R. 673, 681 (Bankr. E.D. La. 1996) ("Congress . . . can always amend the Bankruptcy Code. Congress has shown no reluctance to do so in the past."); cf. Stevenson v. Superior Ct., 941 P.2d 1157, 1180 (Cal. 1997) (Brown, J., dissenting) ("Judicial interference with legislative prerogatives is particularly unwarranted where . . . the Legislature continues to develop the statutory scheme in response to changing needs of employees, employers, and the public.").

\textsuperscript{347} See \textit{In re Stinson}, 285 B.R. 239, 250 (Bankr. W.D. Va. 2002) (concluding any prohibition of discriminatory hiring by private employers "is better left to Congress, not this court"); Landry & Hardy, supra note 19, at 59 ("[T]he question of whether the anti-discrimination policy of bankruptcy law which supports a fresh start should outweigh the interests of employers is an issue for Congress, not the courts."); cf. \textit{In re Engles}, 384 B.R. 593, 598 (Bankr. N.D. Okla. 2008) ("[I]t is the prerogative of Congress to change the Bankruptcy Code, not the courts.").

\textsuperscript{348} See \textit{In re Bennett}, 237 B.R. 918, 923 (Bankr. N.D. Tex. 1999) ("[C]ourts are not permitted to establish bankruptcy policy, that is the special province of Congress."); Fiorani v. CACI, 192 B.R. 401, 406 (E.D. Va. 1996) ("It would be wholly inappropriate for a court to . . . attempt to expand the
In re Blue Diamond Coal Co., 147 B.R. 720, 732 (Bankr. E.D. Tenn. 1992) ("[T]his court will not read something into a statutory scheme that Congress may or may not have mistakenly left out. That would be tantamount to rewriting provisions of the Bankruptcy Code, a task properly left to Congress."). aff'd, 160 B.R. 547 (E.D. Tenn. 1993).