

Court Report

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Employment May Be Denied Based on Applicant's Bankruptcy Filing

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

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

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

Myers interviewed at TooJay's in mid-July 2008.

The interview went well, and a compensated two-day on-the-job evaluation of Myers was scheduled for July 31 and Aug. 1, 2008. During the on-the-job evaluation, Myers observed the operation of the deli, did some kitchen work and signed various personnel forms, including a "personnel action form." On that form, the options "new hire" and "rehire" were left blank while the option "other (explain)" was marked with the explanation "OJE" (on-the-job evaluation). Myers also authorized TooJay's to conduct a background check.

At the conclusion of the on-the-job

evaluation, TooJay's scheduled Myers to begin work on Aug. 18, 2008; he was not told that his employment would be conditioned on a clean credit history. After Myers quit his job at the coffeehouse, he received a letter from TooJay's informing him he was not hired because of "a financial matter." Myers contacted the HR department and was told that his bankruptcy filing was the only reason he was not hired.

In September 2008, Myers filed a lawsuit in federal court asserting, among other things, that TooJay's had discriminated against him in violation of 11

U.S.C. §525(b) by refusing to hire him because of his bankruptcy filing and, alternatively, by terminating his employment because of his bankruptcy filing. The district court granted

summary judgment to TooJay's on the refusal-to-hire claim on the grounds that Section 525(b) does not prohibit a private employer from refusing to hire someone because of a bankruptcy filing. Although the court allowed the termination claim to proceed to trial, the jury found that TooJay's had not hired Myers and, therefore, did not terminate him.

Myers appealed, and the 11th Circuit affirmed. With respect to the refusal-to-hire claim, the appellate court said that discrimination protection under 11 U.S.C. §525 depends on whether the employer is a "governmental unit"

subject to Section 525(a) or a "private employer" subject to Section 525(b). The earlier-enacted Section 525(a) provides that a governmental unit "may not ... deny employment to, terminate the employment of or discriminate" against a person based on that person's bankruptcy filings. In contrast, the later-enacted Section 525(b) provides that a private employer may not "terminate the employment of or discriminate" against a person based on that person's bankruptcy filings; this section says nothing about denying employment because of bankruptcy.

The 11th Circuit found that Myers had no claim because TooJay's was a private employer. It stated, "Had Congress wanted to cover a private employer's hiring policies and practices in §525(b), it could have done so the same way it covered a governmental unit's hiring policies and practices in §525(a)." Moreover, because the phrase "discriminate with respect to employment" is in both subsections, it necessarily "means something other than discrimination in hiring," which is only mentioned in Section 525(a).

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

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Professional Pointer

Private employers should uniformly follow any rules that they adopt against hiring applicants with bankruptcy filing histories; failing to apply the rules uniformly may lead to pretext claims.