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THE BANKRUPTCY SHADOW: SECTION 525(B) AND THE JOB APPLICANT’S SISYPHEAN STRUGGLE FOR A FRESH START

ABSTRACT

Congress amended § 525 of the Bankruptcy Code in 1984 to expand employment discrimination regulation to private employers. Section 525 prohibits employment discrimination on the basis of bankruptcy status. Section 525(a) prohibits this practice by government employers, and § 525(b) does so with respect to private employers. But there is a key difference between the two sections: only § 525(a), which governs public employers, explicitly prohibits discriminatory *hiring* on the basis of bankruptcy status.

Courts have split over whether a similar prohibition protecting private employees from discriminatory *hiring* should be read into § 525(b). This Comment argues that by narrowly interpreting § 525(b) as omitting such a prohibition, courts are dishonoring an overarching goal of bankruptcy law: to provide debtors with a fresh start. This Comment supports its position in several ways. First, credit reports—the source of information about individuals’ bankruptcy status—are unreliable, unfair, and difficult to remedy. Second, the history of § 525(b) shows that permitting private employers to use bankruptcy status as a hiring criterion leads to unreasonable and unnecessarily punitive results that were outside the goals of the enacting legislators. Third, enacted state statutes and proposed federal legislation identify, address, and attempt to remedy this very problem.

Ultimately, because bankrupt debtors deserve both a fresh start and protection against discriminatory hiring, § 525(b) should be amended to prohibit private employers from hiring discrimination on the basis of bankruptcy status.

INTRODUCTION

One of the pillars of bankruptcy is providing the debtor with “a fresh start in life,”¹ a “new opportunity,”² and “a clear field for future effort.”³

¹ Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

² Stellwagen v. Clum, 245 U.S. 605, 617 (1918).

Problematically, employers who request credit reports as part of the job application process are increasingly disrupting this “fresh start.” When credit reports reveal job applicants’ past bankruptcies, employers often disqualify the applicants without considering what gave rise to the bankruptcies or the applicants’ pertinent credentials. This knee-jerk reaction by employers creates a *bankruptcy shadow*: job applicants who filed for bankruptcy after falling victim to a bad economy or other unfortunate circumstances are categorically prevented from obtaining employment. The bankruptcy shadow makes jobs harder to find for those who need them the most. Thus, the Bankruptcy Code’s fresh start is merely theoretical for a wide swath of debtors. Those looking for their fresh start are forced, like the mythological king Sisyphus, to endure the interminable and repetitive toil of job application after job application with no positive result.

This toil is exemplified by Eric Myers, a North Carolina native, who filed for chapter 7 bankruptcy relief in 2008.⁴ A month after Myers filed for bankruptcy, he moved from North Carolina to Florida in pursuit of a “fresh start.”⁵ In Florida, Myers managed to find work at a Starbucks coffeehouse as a shift supervisor.⁶ The bankruptcy court discharged Myers’ debt.⁷ While working at Starbucks, Myers saw an advertisement for a management position at a nearby TooJay’s restaurant.⁸ Myers met with the regional manager of TooJay’s, and after a two-day on-the-job assessment he was scheduled to begin working at TooJay’s.⁹ Myers gave Starbucks his two weeks’ notice.¹⁰ However, Myers was never informed that a pristine credit history would be a prerequisite to gain full-time employment with TooJay’s.¹¹

A month later, before Myers was scheduled to start work, he received a letter from TooJay’s indicating that his employment offer had been rescinded due to information revealed in his consumer credit report.¹² Myers contacted TooJay’s Human Resources Department to obtain further explanation about

³ *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904).

⁴ *Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278, 1280 (11th Cir. 2011).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1280–81.

¹⁰ *Id.* at 1281.

¹¹ *Id.*

¹² *Id.* at 1282.

why his offer was rescinded.¹³ TooJay's explained that its policy forbids hiring individuals who have filed for bankruptcy.¹⁴ In short, Myers could not get a job at the restaurant because he had filed for bankruptcy relief in 2008.¹⁵ Myers wrote a letter to the CEO requesting that TooJay's reconsider its policy.¹⁶ Myers never received a response to his letter, but instead returned to Starbucks, where he was forced to accept reduced hours.¹⁷ Myers filed suit against TooJay's alleging employment discrimination.¹⁸ Because TooJay's is a private employer and Myers' employment never officially began, the Bankruptcy Code could not provide him with protection or compensation.¹⁹

Myers did not realize that his past bankruptcy would trail him like a shadow. Instead, he put his faith in a promise made by the American consumer bankruptcy system for a "fresh start." The underlying purpose of the fresh start is to encourage recovering and former debtors to participate in the American economy so that they may have a chance at a prosperous financial future.²⁰ The concept of a fresh start is omnipresent in the world of bankruptcy, yet the meaning of the term is not fully understood.²¹ Because "fresh start" has such an elusive meaning, it is often supplemented with the rhetoric of rehabilitation by commentators.²²

Rehabilitation, in its most distilled form, means that the debtor will be "free of financial hardship" after she files for bankruptcy.²³ Professor Margaret Howard explained that within the concept of rehabilitation there is a policy thread of economic rehabilitation.²⁴ However, post-bankruptcy economic rehabilitation may be impossible when private employers use adverse credit reports to disqualify job applicants.²⁵ Adverse credit reports are treated like a

¹³ *Id.*

¹⁴ *Id.* at 1281–82.

¹⁵ *Id.*

¹⁶ *Id.* at 1282.

¹⁷ *Id.*

¹⁸ *Id.* at 1280, 1282.

¹⁹ See 11 U.S.C. § 525(b) (2006).

²⁰ Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68–69 (2006).

²¹ *Id.* at 68.

²² See, e.g., *id.*

²³ *Id.*

²⁴ Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1060–62 (1987).

²⁵ *Id.* Credit reports are not the only way to discover whether a job applicant has filed for bankruptcy, it is just the most prevalent. An employer can also look at the Federal District record system where the job

scarlet letter for those who hoped the bankruptcy system would provide them with a “fresh start.”²⁶ The bankruptcy system gave Myers the impression that, if he qualified for and complied with the chapter 7 provisions of the Bankruptcy Code, he would have a clean slate and the opportunity to better his circumstances.²⁷ Instead, he is burdened by the shadow of his former bankruptcy filing.

In Part I, this Comment examines protective mechanisms in the Bankruptcy Code and the Fair Credit Reporting Act for bankrupt debtors. This Comment demonstrates that these mechanisms do not adequately prevent employment discrimination in the bankruptcy context. In Part II, this Comment examines the majority of courts’ narrow interpretation of 11 U.S.C. § 525(b). In Part II, this Comment also describes an extreme minority of courts that have tried to skirt the plain meaning of the text to harmonize its interpretation with the fresh start theory of bankruptcy. In Part III, this Comment argues that reform is needed because employers’ use of credit checks leads to unfair and unnecessarily punitive results. In Part IV, this Comment explores both proposed and enacted state and federal legislation that aims to remedy employment discrimination in this context. This Comment concludes by arguing that the Bankruptcy Code should be amended to better protect job applicants who have filed for bankruptcy.

I. BACKGROUND

To gain context, it is important to first examine § 525(b) of the Bankruptcy Code and the Fair Credit Reporting Act (FCRA). These two laws attempt to limit employment discrimination against debtors. They are the primary statutes used by courts to determine whether Congress permitted employment discrimination against bankrupt debtors. First, this Comment addresses § 525(b). This Comment reviews the circumstances prompting the enactment of the statute, surveys the discrepancies in the interpretation of § 525(b), and outlines the reasons why the majority interpretation provides inadequate protection. Second, this Comment assesses the FCRA’s deficiency in limiting the abuse of credit reports in the employment context. A critical examination

applicant resides. The record system is called PACER and is available to the public. *See generally* PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <http://www.pacer.gov> (last visited Mar. 28, 2013).

²⁶ Michael R. Herz, *The Scarlet D: Bankruptcy Filing and Employment Discrimination*, 30 AM. BANKR. INST. L.J., Apr. 2011, at 16, 89–90.

²⁷ *See Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278, 1280 (11th Cir. 2011).

of § 525(b) and the FCRA supports the argument that to give *all* debtors a “fresh start,” Congress must amend § 525(b).

A. *Section 525(b) of the Bankruptcy Code*

In contrast to § 525(a), which applies to government employers, § 525(b) is directed at private employers.²⁸ Section 525 of the Bankruptcy Code is the primary statute that protects bankrupt debtors from employment discrimination.²⁹ Subsection (b) prevents private employers from terminating employees based on bankruptcy status.³⁰ However, 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.³¹ The two sections’ disparate language has generated a split in the courts as to whether private employers can deny employment to job applicants solely because their credit histories reveal a past bankruptcy.³² Below, this Comment discusses the history preceding the enactment of § 525(b) to demonstrate that the majority interpretation does not satisfy Congress’s goals.

1. *History of 11 U.S.C. § 525*

In 1978, Congress enacted § 525 of the Bankruptcy Code in reaction to the Supreme Court’s *Perez v. Campbell* decision.³³ In *Perez*, the Court was dissatisfied with the protection afforded to a debtor who filed for bankruptcy.³⁴ Specifically, in its opinion, the Court expressed that it disliked how a third party’s action could interfere with a debtor benefiting from the bankruptcy process.³⁵ In the years following the enactment of § 525, courts filled in the statutory gaps and manipulated the statute,³⁶ but stopped short of applying it to

²⁸ Compare 11 U.S.C. § 525(a) (2006), with *id.* § 525(b).

²⁹ *Id.* § 525(b).

³⁰ *Id.*

³¹ Compare *id.* § 525(a), with *id.* § 525(b).

³² See, e.g., *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011); *Leary v. Wamaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

³³ S. REP. NO. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867 (citing *Perez v. Campbell*, 402 U.S. 637 (1971) (holding that a state would frustrate the congressional policy of a fresh start if it were permitted to refuse to renew a drivers license because the driver did not pay a judgment that was discharged in bankruptcy)); 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, 152 & n.2 (1996).

³⁴ See *Perez*, 402 U.S. at 654.

³⁵ See *id.*

³⁶ See Zeiler, *supra* note 33, at 157 (“Conduct [the courts] deemed to warrant debtor protection includes: withholding college transcripts by public institutions, excluding bankrupt debtors from student loan guarantee programs, refusing participation in the contract bidding process by governmental entities, refusing to grant

debtors who suffer discrimination at the hands of private employers.³⁷ Courts have explained that the language of § 525 prevents them from interpreting the statute in a way that punishes private employers' discriminatory hiring.³⁸ For instance, in one case, the Eleventh Circuit did not condone private entities' discriminatory actions, but explained that it would be improper to replace the court's policy opinions with the legislation passed by Congress.³⁹

Congress responded to the courts' disapproval of the limitations of § 525 by amending the statute in 1984. The original provision states:

[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, conditions such a grant to, discriminate with respect to such a grant against, *deny employment to*, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.⁴⁰

This amendment numbered the original provision from the 1978 Bankruptcy Reform Act as subsection (a) and the new provision as subsection (b). Subsection (b) provides:

No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the

state licensure, evicting a discharged debtor from municipal housing, and participating in governmental home mortgage finance programs.”)

³⁷ *Id.*

³⁸ See *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 173 (5th Cir. 2011); *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 58 (M.D. Fla. 2009), *aff'd*, 640 F.3d 1278 (11th Cir. 2011); *Stinson v. BB&T Inv. Servs., Inc. (In re Stinson)*, 285 B.R. 239, 248 (Bankr. W.D. Va. 2002); see also *Kungys v. United States*, 485 U.S. 759, 778 (1988) (“[T]he cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant.”).

³⁹ 11 U.S.C. § 525(a) (2006); *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011) (quoting *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008)); see, e.g., *Barbee v. First Va. Bank-Colonial (In re Barbee)*, 14 B.R. 733, 736 (Bankr. E.D. Va. 1981).

⁴⁰ 11 U.S.C. § 525(a) (emphasis added).

Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

- (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
- (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
- (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.⁴¹

Section 525(b) essentially prevents private employers from discriminating against debtors who filed for bankruptcy if certain conditions are met.

When Congress enacted § 525(b), legal scholars lauded it as a strengthening of existing bankruptcy policies.⁴² They explained that extending the protection afforded against government employers to private employers would promote rehabilitation and provide a fresh start for debtors.⁴³ While these scholars recognized that interpreting courts would inevitably shape the new law, one bankruptcy attorney confidently wrote in the *American Bankruptcy Law Journal* that § 525(b) “does protect an employee from terminations or other actions, the effect of which would interfere with the ‘fresh start’ policy of the bankruptcy laws.”⁴⁴ This understanding of § 525(b) would turn out to be overly optimistic because courts would interpret this new provision to provide limited protection to the “honest but unfortunate debtor.”⁴⁵

2. *Judicial Interpretation of § 525(b)*

Courts are split on how to interpret § 525(b) in light of § 525(a), which does not allow a government employer to deny employment to an applicant who has filed for bankruptcy.⁴⁶ Most courts that have considered § 525(b) have decided that the statute does not bar a private employer from discriminating against applicants who have filed for bankruptcy, while a minority of courts

⁴¹ *Id.*

⁴² Zeiler, *supra* note 33, at 153; *see also* Douglas G. Boshkoff, *Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L.J. 159 (1987); John C. Chobot, *Anti-Discrimination Under the Bankruptcy Laws*, 60 AM. BANKR. L.J. 185 (1986); Andrew N. Herbach, *Debtor’s Protection from Private Employer’s Discrimination*, WIS. B. BULL., Oct. 1988, at 21.

⁴³ *See, e.g.,* Zeiler, *supra* note 33, at 153; Boshkoff, *supra* note 42; Chobot, *supra* note 42; Herbach, *supra* note 42.

⁴⁴ Chobot, *supra* note 42, at 201.

⁴⁵ *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

⁴⁶ Herz, *supra* note 26, at 18.

have decided that the statute should be interpreted to protect private job applicants.⁴⁷ Because § 525(b)'s language does not explicitly prevent a private employer from denying employment to an individual who has filed for bankruptcy, courts must speculate as to whether subsection (b) protects job applicants.⁴⁸ Courts are left to deduce whether § 525(b)'s omission of "deny employment to" was a scrivener's error or evidence that Congress intended for private employers to be subjected to less stringent standards than government employers.⁴⁹ Unfortunately, the legislative history is vague and confusing.⁵⁰

B. *Fair Credit Reporting Act*

The FCRA is another law that ineffectively limits employment discrimination. Congress enacted the FCRA to curtail abusive practices by credit-reporting agencies and those who subscribe to these the reports.⁵¹ The primary function of these agencies is to produce consumer credit reports for third-party lenders that reflect individuals' creditworthiness.⁵² There are three main credit-reporting agencies in the United States: Experian, Equifax, and TransUnion.⁵³ These credit-reporting agencies must comply with the FCRA. The FCRA has been criticized for not shielding consumers from employers who use these reports to punish job applicants who have filed for bankruptcy.⁵⁴ Credit reports are widely used by employers because they believe that job applicants with fewer payment delinquencies and better credit scores are less likely to steal and more likely to be valuable workers.⁵⁵ Below, this Comment

⁴⁷ See *infra* Part II.

⁴⁸ *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000) ("We are asked to infer from this omission not only that it was purposeful to achieve a disparate result where the Government is the employer, but that § 525(b) accordingly allows employers to discriminate on the initial hiring against those unfortunate economic casualties who are seeking or have obtained a fresh start from the bankruptcy court, and yet at the same time prohibits discrimination against those who have been hired.").

⁴⁹ See *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010) (discussing the *Leary* court's opinion that § 525(b) contains a scrivener's error and ultimately rejecting this interpretation), *cert. denied*, 132 S. Ct. 116 (2011).

⁵⁰ See generally H.R. REP. NO. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6322-23.

⁵¹ Kelly Gallagher, Comment, *Rethinking the Fair Credit Reporting Act: When Requesting Credit Reports for "Employment Purposes" Goes Too Far*, 91 IOWA L. REV. 1593, 1595 (2006).

⁵² Experian (formerly TRW), Equifax, and TransUnion dominate the multibillion-dollar credit industry where they have reports on almost every single adult American and add over 24 billion pieces of information to their reports each year. ELIZABETH WARREN & JAY L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 13 (6th ed. 2009).

⁵³ *Id.*

⁵⁴ Gallagher, *supra* note 51, at 1595.

⁵⁵ *Id.*

will explore the effect of the FCRA on credit reporting agencies and employers.

1. *Credit Reporting Agency Abuse of Credit Reports*

A credit score is designed to be a snapshot of an individual's current financial health.⁵⁶ The FCRA defines consumer credit reports as

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for – (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title.⁵⁷

Simply put, a credit report is any type of statement created by a consumer-reporting agency that has been used to determine a consumer's eligibility for credit, insurance, or a job. The FCRA mandates that credit reporting agencies use "reasonable procedures" to guarantee the accuracy of the information found within a credit report. The majority of courts subscribe to the "maximum possible accuracy" standard, which holds credit reporting agencies liable for "reports containing factually incorrect information that . . . mislead their readers."⁵⁸ But, there are many courts that only require that credit reports be "technically accurate."⁵⁹ This less stringent standard allows for credit reporting agencies to report information that may be misleading or deficient.⁶⁰ For example, if a father files for bankruptcy after co-signing a car lease with his daughter, it is "technically accurate" to include the bankruptcy on her credit report.⁶¹ This is misleading because the daughter's credit report will indicate that she filed for bankruptcy when, in actuality, it was her father who filed for bankruptcy.

⁵⁶ The score range used by the three main credit-reporting agencies is from a bad score of 300 to a perfect score of 850, and it reflects the types of credit in use, payment history, amount owed, length of credit history, and new credit. FAIR ISAAC CORP., UNDERSTANDING YOUR FICO SCORE 3 (2011), http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf.

⁵⁷ 15 U.S.C. § 1681a(d)(1) (2006).

⁵⁸ *Neal v. CSC Credit Servs., Inc.*, No. 8:02CV378, 2004 WL 628214, at *3 (D. Neb. Mar. 30, 2004).

⁵⁹ *Henson v. CSC Credit Servs.*, 29 F.3d 280, 283 (7th Cir. 1994); *Neal*, 2004 WL 628214, at *3; *Todd v. Associated Credit Bureau Servs., Inc.* 451 F. Supp. 447, 448 (E.D. Pa.1977).

⁶⁰ *Neal*, 2004 WL 628214, at *3.

⁶¹ *See, e.g., id.* at *3–4.

Despite most courts' expectations that credit reporting agencies maintain "maximum possible accuracy," a 2004 study by the Public Interest Research Group found that seventy-nine percent of credit reports contained errors.⁶² This statistic raises the question of whether credit reports should be used as a barometer of job success and whether the FCRA is effective in protecting consumers. Moreover, the statistic also demonstrates job applicants' vulnerability, as the broad language of the FCRA allows for nearly unrestricted use of consumer credit reports for "employment purposes."⁶³ Employers are unrestricted in their use of inaccurate credit reports to deny individuals employment.⁶⁴ This unfettered power is inherently unfair because it not only denies bankrupt debtors a "fresh start," but it also punishes applicants who are not bankrupt debtors but who are listed as such on their credit reports.

2. *Employer Abuse of Credit Reports*

Employers that wish to obtain a job applicant's credit report must procure written authorization from the applicant.⁶⁵ If an employer takes adverse action against an applicant because of information in her credit report, the FCRA requires two additional transparency measures.⁶⁶ First, the employer must furnish the applicant with a copy of her credit report.⁶⁷ Second, the employer must inform the applicant that information found in her credit report was detrimental to her application.⁶⁸ This second measure is important because, in theory, it gives an individual the information she needs to be proactive in remedying any inaccuracies in her credit report. This Comment will address why this unfortunately does not work in practice.⁶⁹

The credit report that an employer receives includes bankruptcy records.⁷⁰ This information may be a factor in employers' decisions to employ the applicant. Employers feel justified to use credit reports as an evaluative tool

⁶² WARREN & WESTBROOK, *supra* note 52, at 13.

⁶³ See 15 U.S.C. § 1681b(a)(3)(B) (2006).

⁶⁴ See EEOC v. Kaplan Higher Educ. Corp., 790 F. Supp. 2d 619, 624 (N.D. Ohio 2011).

⁶⁵ 15 U.S.C. § 1681b(b)(2)(A)(ii).

⁶⁶ *Id.* § 1681b(b)(3)(A)(i)-(ii).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *infra* Part III.A.1.b.

⁷⁰ *Credit Reports and Credit Scores*, FEDERALRESERVE.GOV (Feb. 15, 2011), <http://www.federalreserve.gov/creditreports/default.htm>.

because they believe credit reflects a potential job candidate's qualifications.⁷¹ Sixty percent of employers use credit checks in pre-employment screenings for at least some job applicants.⁷² Yet, there are no studies supporting a correlation between a person's credit and her job performance.⁷³ In fact, a TransUnion Credit Bureau official stated under oath that there is no "research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."⁷⁴ If credit reporting agencies cannot provide empirical support to justify employer reliance on their product, employers should be prohibited from using them to make hiring decisions.

In Part II, this Comment will address how courts have interpreted § 525(b).

II. STATUTORY INTERPRETATION OF § 525(B)

Courts are currently split on how to interpret § 525(b) in light of § 525(a). According to a majority of courts, a plain reading of § 525(b) reveals Congress's purposeful omission of the expansive protection afforded to private job applicants under § 525(a).⁷⁵ These courts hold that subsection (b) should be interpreted as not affording private job applicants the same anti-discriminatory rights as individuals who are applying for government jobs.⁷⁶ For example, under the majority interpretation, an individual who filed for chapter 7 bankruptcy five years prior to applying for a job cannot be discriminated against solely for that reason if he is applying for a position with the post office, but he can be discriminated against if he is applying for a job with FedEx or UPS.⁷⁷

A minority of courts takes the position that the language of § 525(b) is broad enough to extend protections to discriminatory hiring by private employers.⁷⁸ These courts believe that they "should not go out of [their] way to place such an absurd gloss on a remedial statute, simply because the scrivener

⁷¹ See *Background Checking: Conducting Credit Background Checks SHRM Poll*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Jan. 22, 2010), <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx>.

⁷² *Id.*

⁷³ See Andrew Martin, *As a Hiring Filter Credit Checks Draw Questions*, N.Y. TIMES, Apr. 9, 2010 (quoting Eric Rosenberg of TransUnion Credit Bureau).

⁷⁴ See *id.*

⁷⁵ See, e.g., *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011).

⁷⁶ See *id.* at 940–41.

⁷⁷ See 11 U.S.C. § 525(a)–(b) (2006).

⁷⁸ See *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

was more verbose in writing § 525(a).”⁷⁹ Instead, the minority view claims that subsection (a)’s inclusion of “discriminate with respect to employment against an individual who . . . has been a debtor” is broad enough to encompass employment discrimination in the private employer context.⁸⁰ The majority of courts maintain that this language is not explicit enough to have such a broad meaning.⁸¹ In response, the minority view claims that the evil being legislated against is the same whether an individual is being discriminated against during her employment with a private entity or discriminated against during the hiring process.⁸² For example, an individual who works for FedEx or UPS cannot be fired because his employer discovers that he filed for bankruptcy, but he can be removed from the applicant pool because of this filing.⁸³ Such arbitrary distinctions make little sense and will be discussed below. This Comment will look to how courts of appeals have decided § 525(b) cases, and then address a minority court that has interpreted the statute differently.

A. Majority View and the Courts of Appeals’ Consensus

In 2010, the Third Circuit adopted the majority’s position in *Rea v. Federated Investors*.⁸⁴ In 2011, the Fifth and Eleventh Circuits followed suit.⁸⁵ These are the only courts of appeals that have addressed the scope of § 525(b). Thus, all 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.⁸⁶ There are two main reasons why this conclusion is appealing: (1) it purports to discern the plain meaning of the statute; and (2) when the two subsections of the statute are read *in pari materia*, through a direct comparison, a court’s more narrow interpretation is easily defensible. Each of these points will be explained in turn.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 11 U.S.C. § 525(b).

⁸² *Leary*, 251 B.R. at 658.

⁸³ *See generally* 11 U.S.C. § 525(b).

⁸⁴ *Rea v. Federated Investors*, 627 F.3d 937, 938 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011).

⁸⁵ *See Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278 (11th Cir. 2011); *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169 (5th Cir. 2011).

⁸⁶ *See, e.g., Myers*, 640 F.3d at 1278; *In re Burnett*, 635 F.3d at 169; *Rea*, 627 F.3d at 937; *Stinson v. BB&T Inv. Servs., Inc. (In re Stinson)*, 285 B.R. 239 (Bankr. W.D. Va. 2002); *Fiorani v. CACI*, 192 B.R. 401 (E.D. Va. 1996); *Pastore v. Medford Sav. Bank*, 186 B.R. 553 (D. Mass. 1995); *Madison Madison Int’l of Ill., P.C. v. Matra, S.A. (In re Madison Int’l of Ill., P.C.)*, 77 B.R. 678 (Bankr. E.D. Wis. 1987). *Contra In re Hopkins*, 81 B.R. 491 (Bankr. W.D. Ark. 1987).

1. “Plain Meaning” Interpretation

The Supreme Court frequently endorses a “plain meaning” interpretation of a statute because the words used in a particular statute are the most persuasive evidence of the legislature’s intent.⁸⁷ The Third Circuit’s opinion in *Rea v. Federated Investors* is illustrative of the majority’s plain meaning interpretation of § 525(b). The Third Circuit held that the phrase “discrimination with respect to employment” should not be read broadly to encompass hiring.⁸⁸ The facts in *Rea* are typical of hiring discrimination cases arising under § 525(b). In *Rea*, Dean Rea filed for bankruptcy and his debts were discharged.⁸⁹ Six years later, he applied for a project manager job with Federated Investors, but the offer was contingent on a check of his credit history.⁹⁰ Rea authorized the checks, and it revealed his past bankruptcy.⁹¹ The bankruptcy was a “deal killer”; the job offer was withdrawn.⁹²

Rea then sued, claiming that the employer had engaged in unlawful employment discrimination when the firm refused to hire him because of his past bankruptcy.⁹³ The employer moved to dismiss Rea’s action and argued that § 525(b) is not applicable to situations in which private employers refuse to hire an individual because that individual has filed for bankruptcy.⁹⁴ The employer claimed that the plain meaning of § 525(b) did not specifically include “hiring” in its list of actions that should be considered employment discrimination against a bankrupt debtor.⁹⁵

However, the text of § 525(b) does not explicitly *exclude* “hiring.”⁹⁶ Arguably, Congress meant for the phrase “[n]o private employer . . . may

⁸⁷ United States v. Am. Trucking Ass’ns, Inc., 310 U.S. 534, 543 (1940).

⁸⁸ 11 U.S.C. § 525(b) (2006); *Rea*, 627 F.3d at 940–41. Lower courts have similarly held that the phrase “discriminate with respect to employment” should not be a catchall phrase calculated to encompass all particulars of employment. *Burnett v. Stewart Title, Inc. (In re Burnett)*, 431 B.R. 894, 899–900 (S.D. Tex. 2010), *aff’d*, 635 F.3d 169 (5th Cir. 2011).

⁸⁹ *Rea*, 627 F.3d at 938.

⁹⁰ *Rea v. Federated Investors*, 431 B.R. 18, 20 (W.D. Pa. 2010), *aff’d*, 627 F.3d 937 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011).

⁹¹ *Id.*

⁹² *Id.*

⁹³ See 11 U.S.C. § 525(b); Linda Coady, *Private Employer May Refuse to Hire Bankrupt Applicant*, THOMPSON REUTERS NEWS & INSIGHT (Jan. 23, 2013, 4:55 PM), http://newsandinsight.thomsonreuters.com/Bankruptcy/Insight/2011/01_-_January/Private_employer_may_refuse_to_hire_bankrupt_applicant/.

⁹⁴ *Rea*, 627 F.3d at 939 (emphasis added).

⁹⁵ *Id.*

⁹⁶ See 11 U.S.C. § 525(b).

discriminate with respect to employment” to include discriminatory hiring.⁹⁷ This, too, would be a reasonable plain meaning interpretation of the statute’s text. The minority disputes that the plain meaning interpretation of § 525(b) supports the exclusion of hiring discrimination by private employers.⁹⁸

The minority argues that the language “with respect to employment” is broad enough to encompass discrimination in hiring.⁹⁹ In *Leary v. Warnaco*, the Southern District Court of New York reasoned that discrimination “with respect to employment” embraces, through its plain meaning, all facets of employment including “hiring, firing and material changes in job conditions.”¹⁰⁰ Commentators posit that any interpretation of a statute that strictly looks at its plain meaning risks generating a “law without mind.”¹⁰¹ Instead, some courts, as discussed below, try to read a statute in within the context of similar statutes to move beyond a purely plain meaning approach.

2. *In Pari Materia*

The majority counters that interpreting the phrase “with respect to employment” to include hiring would make the provisions in § 525(a) and (b) redundant and much of the specific language in subsection (a) superfluous.¹⁰² The majority reasons that disparate inclusions and exclusions within two subsections should be read *in pari materia* if the scope and aim of the subsections are the same.¹⁰³ *In pari materia* is a statutory canon driving the legal fiction that where “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”¹⁰⁴ In short, without evidence to the contrary, judges are to assume that Congress was aware of all other relevant statutes when it was drafting a new statute. When interpreting a statute,

⁹⁷ *Id.*; see also *Stinson v. BB&T Inv. Servs., Inc. (In re Stinson)*, 285 B.R. 239, 245 (Bankr. W.D. Va. 2002).

⁹⁸ *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

⁹⁹ See, e.g., 11 U.S.C. § 525(b); *Leary*, 251 B.R. at 658.

¹⁰⁰ 11 U.S.C. § 525(b); *Leary*, 251 B.R. at 659.

¹⁰¹ See generally Steven Smith, *Law Without Mind*, 88 MICH. L. REV. 104 (1989).

¹⁰² 11 U.S.C. § 525(a)–(b); *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 172–73 (5th Cir. 2011); *Myers v. TooJay’s Mgmt. Corp.*, 419 B.R. 51, 58 (M.D. Fla. 2009); *Stinson*, 285 B.R. at 248; see *Kungys v. United States*, 485 U.S. 759, 777–78 (1988) (noting that “the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant”).

¹⁰³ See *United States v. Mitchell*, 39 F.3d 465, 468 (4th Cir. 1994).

¹⁰⁴ WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 292 (2d ed. 2006) (citing *Lorillard v. Pons*, 433 U.S. 907 (1977)).

the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.¹⁰⁵

Simply put, if there is more than one subsection within a statute, then the two will be read side-by-side to fully understand Congress's intent. If § 525(a) and (b) are read *in pari materia*, the 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.¹⁰⁶

The employer argued in *Rea* for a narrow reading of § 525(b), noting "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."¹⁰⁷ The majority emphasized that Congress made the language in subsection (b) nearly identical to subsection (a) and put the two subsections adjacent to each other.¹⁰⁸ The Third Circuit concluded that Congress must have modeled subsection (b) after subsection (a), and so exclusion of language in subsection (b) dealing with hiring was *ipso facto* deliberate.¹⁰⁹ The majority also conceded that, if § 525(b) existed in isolation, the implicit inclusion of hiring in its list of discriminatory acts would be meritorious.¹¹⁰

The majority's position emphasizes that the plain meaning interpretation of § 525(b) does not prohibit discriminating hiring based on bankruptcy.¹¹¹ The Third, Fifth, and Eleventh Circuits have held that § 525(b) should be read *in pari materia*.¹¹² Using this statutory canon, the majority argues that Congress meant to exempt private hiring from § 525's protections from actions that are considered discriminatory.¹¹³ The minority, on the other hand, argues that it is

¹⁰⁵ Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

¹⁰⁶ Myers v. TooJay's Mgmt. Corp., 419 B.R. 51, 57 (M.D. Fla. 2009).

¹⁰⁷ Rea v. Federated Investors, 627 F.3d 937, 939 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011) (quoting Russell v. United States, 464 U.S. 16, 23 (1983)).

¹⁰⁸ *Id.* at 940.

¹⁰⁹ *Id.*

¹¹⁰ Burnett v. Stewart Title, Inc. (*In re Burnett*), 635 F.3d 169, 172 (5th Cir. 2011).

¹¹¹ See, e.g., Myers, 640 F.3d at 1283–84; *In re Burnett*, 635 F.3d at 172–73; *Rea*, 627 F.3d at 938.

¹¹² See, e.g., Myers, 640 F.3d at 1283–84; *In re Burnett*, 635 F.3d at 172–73; *Rea*, 627 F.3d at 938.

¹¹³ See, e.g., Myers, 640 F.3d at 1283–84; *In re Burnett*, 635 F.3d at 172–73; *Rea*, 627 F.3d at 938.

employment discrimination under § 525(b) to deny employment to an individual because of a past bankruptcy.¹¹⁴

B. Minority View as Exemplified in the Leary Case

The scope and aims of subsections (a) and (b) are alike: both provisions protect bankrupt debtors from employment discrimination. It is possible that the Bankruptcy Code is purposefully extending less protection to individuals applying for private jobs than government positions. But, the minority argues that this interpretation does not pass muster when the underlying tenets of bankruptcy's fresh start policy are kept in mind.¹¹⁵ Interpreting a statute with the goal of honoring this policy would make the plain meaning just one factor in determining the legislative intent behind § 525(b).¹¹⁶

Section 525(b) does not exist in isolation. It makes sense to consider all relevant material when interpreting its provisions. The majority, taking its plain meaning stance, comments that Congress's intentions are instructive for interpreting § 525(b).¹¹⁷ In the applicable Senate Report, Congress instructed that courts "will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy."¹¹⁸ There is no such legislative history for § 525(b), but using the majority's logic that Congress paints with a wide brush, this intention should imbue subsection (b) as well. When drafting § 525, Congress was mindful of the tenets of bankruptcy.¹¹⁹ Perhaps courts should adopt this frame of reference of rehabilitation and a fresh start when interpreting statutes from the Bankruptcy Code.

The bankruptcy court case of *Leary v. Warnaco, Inc.*¹²⁰ is the sole case representing the minority's position. Marlene Leary filed and received a voluntary discharge under chapter 7 of the Bankruptcy Code.¹²¹ About five months later Leary interviewed for an executive assistant position.¹²² The employer offered Leary the job subject to a credit check.¹²³ When Leary's

¹¹⁴ *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

¹¹⁵ *Id.*

¹¹⁶ Eskridge and his coauthors warn that "if the rule of law requires interpreters to apply statutes to the letter, then sometimes the cost of 'lawfulness' will be too great." ESKRIDGE ET AL., *supra* note 104, at 233.

¹¹⁷ *Stinson v. BB&T Inv. Servs., Inc. (In re Stinson)*, 285 B.R. 239, 247 (Bankr. W.D. Va. 2002).

¹¹⁸ S. REP. NO. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867.

¹¹⁹ *Id.*

¹²⁰ 251 B.R. 656 (S.D.N.Y. 2000).

¹²¹ *Id.* at 657.

¹²² *Id.*

¹²³ *Id.*

credit report revealed her past bankruptcy, the company told her it would not hire her due to information found within the report.¹²⁴ Leary filed a complaint alleging that by refusing to hire her because of her past bankruptcy, the employer violated § 525(b).¹²⁵ Leary argued for a broader interpretation of § 525(b) that takes into account the fresh start theory and avoids the absurd result that would follow from a narrow reading of the statute.¹²⁶ Here, an intertextual argument was applied in the *Leary* case. An intratextual argument supports the majority's position. Each will be explained in turn.

1. Intertextual Argument

In general, it is assumed that Congress uses terms in a consistent manner and with a design that each provision contributes to the overall statutory scheme. Congress wishes to avoid the situation where a provision is to be applied in ways that weaken other provisions.¹²⁷ The theory employed by all federal and state courts is called the “whole act rule” and the premise is that Congress enacts legislation as if it did not have a variety of authors, but one author throughout Congress's entire lifespan.¹²⁸ There are two opposing, yet related, arguments for how to interpret a statute holistically—the intertextual argument and the intratextual argument. The two arguments are formed under the one mind, omniscient author premise.

Under the *intratextual* argument, “the preferred meaning of a provision is the one consistent with the rest of the statute and statutory scheme.”¹²⁹ Akin to an *in pari materia* argument,¹³⁰ the majority uses an intratextual argument to support its position that unaccounted for verbiage should not be injected into § 525(b).¹³¹ On the other hand, the *intertextual* argument presupposes that “the

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 658–59.

¹²⁷ ESKRIDGE ET AL., *supra* note 104, at 271. “The assumption of a single-minded and omniscient legislature is strongly at odds with actual legislative practice, where terms are inserted willy-nilly into the law, duplication occurs for reasons of emphasis or even just oversight, and compromises may yield provisions that are in tension with one another.” *Id.* at 271–72.

¹²⁸ *Id.* at 271. Professor William Buzbee calls this assumption the “one-Congress fiction” where “questionable logic illuminates the weak normative and empirical underpinnings of some broader claims about textualist modes of interpretation.” William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 242 (2000).

¹²⁹ ESKRIDGE ET AL., *supra* note 104, at 272.

¹³⁰ *See supra* Part II.A.2.

¹³¹ *Myers v. TooJay's Mgmt. Corp.*, 419 B.R. 51, 57 (M.D. Fla. 2009), *aff'd*, 640 F.3d 1278 (11th Cir. 2011).

preferred meaning of a provision is the one consistent with the rest of the code.”¹³² The minority position provides that § 525(b) should be interpreted even more broadly than the majority suggests.¹³³ Instead of merely juxtaposing the two subsections of § 525, the statute should be read with the attainment of a fresh start in mind. This broader interpretation echoes the familiar rule that “a thing may be within the letter of the statute, and yet not within the statute, because [it is] not within its spirit nor within the intention of its makers.”¹³⁴ Determining how broadly to interpret a statute from the Bankruptcy Code is unambiguous according to this interpretation because rehabilitation and a fresh start are always the goal.¹³⁵

Interpreting § 525(b) with an emphasis on the policy aims of the Bankruptcy Code, in lieu of the plain text enacted by Congress, may be a usurpation of Congress’s legislative role.¹³⁶ The Fifth Circuit likened this broader interpretation to looking at a statute with a blurry eye in an attempt to find a hidden meaning.¹³⁷ This comparison is less than apt. Examining a statute without consideration of the Bankruptcy Code as a whole is like looking at a statute with tunnel vision. It is easier to have a clear view of a statute’s subsection when the rest of the Code is used as a frame of reference. Otherwise, reading § 525(b) in a vacuum ignores the evils that the Bankruptcy Code is trying to resolve. As argued by the minority, a myopic interpretation of the Bankruptcy Code may result in an absurd judgment.¹³⁸

2. *Absurd Result and Scrivener’s Error*

The absurd result canon assumes that Congress does not intend to make illogical or unclear instructions for courts to interpret.¹³⁹ Courts should not have to rewrite a statute to avoid an absurd result.¹⁴⁰ An absurd result may be due to a blunder on the part of the legislature that enacted the statute. The Supreme Court has called this type of blunder a scrivener’s error.¹⁴¹ If an

¹³² ESKRIDGE ET AL., *supra* note 104, at 272.

¹³³ The *Leary* court criticizes the majority position for interpreting § 525(b) too narrowly and “drawing a negative inference in” by comparing it to subsection (a). *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

¹³⁴ *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

¹³⁵ *See* S. REP. NO. 95-989, at 81 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5867.

¹³⁶ *Burnett v. Stewart Title, Inc.*, 431 B.R. 894, 900 (S.D. Tex 2010), *aff’d*, 635 F.3d 169 (5th Cir. 2011).

¹³⁷ *See Myers v. TooJay’s Mgmt. Corp.*, 640 F.3d 1278, 1286 (11th Cir. 2011).

¹³⁸ *Leary*, 251 B.R. at 658.

¹³⁹ ESKRIDGE ET AL., *supra* note 104, at 267.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 269.

absurd result is deemed to be a scrivener's error, then the canon as frequently applied requires the judiciary to remedy the mistake.¹⁴² To detect a scrivener's error it is imperative that a statute be interpreted so as to not only look at the plain meaning of the text, but also to take into account the legislative deliberation and practical consequences of interpreting the words as they are written.¹⁴³

In *Leary*, the court explained, “[t]he evil being legislated against is no different when an employer fires a debtor simply for seeking refuge in bankruptcy, as contrasted with refusing to hire a person who does so. The ‘fresh start’ policy is impaired in either case.”¹⁴⁴ Further, “[a] Court should not go out of its way to place such an absurd gloss on a remedial statute, simply because the scrivener was more verbose in writing § 525(a).”¹⁴⁵ The *Leary* court reasoned that it is nonsensical to draw an arbitrary line between public and private employers where a discriminatory action by one is acceptable but not the other.¹⁴⁶ The *Leary* court explained the absence of certain phrases that were included in § 525(a) by saying that the scrivener for § 525(b) was simply less verbose.¹⁴⁷

The Fifth Circuit addressed this inconsistency and dismissed it as a policy argument best delegated to Congress.¹⁴⁸ The majority uses the rationale that ascribing the difference in the language to a mistake in draftsmanship is contrary to overwhelming authority.¹⁴⁹ The Third Circuit rejected the argument that the varying language in the two subsections is a scrivener's error.¹⁵⁰ In *Myers v. TooJay's Management Corporation*, the Eleventh Circuit argued that just because subsection (b) was enacted by Congress seven years after subsection (a) does not mean that any omissions are errors.¹⁵¹ The Eleventh Circuit reasoned that Congress's use of the same language in subsection (b) as in subsection (a) is evidence that Congress modeled the former on the latter

¹⁴² *Id.*

¹⁴³ *Id.* at 233.

¹⁴⁴ *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169, 173 (5th Cir. 2011).

¹⁴⁹ *Id.*

¹⁵⁰ *Rea v. Federated Investors*, 627 F.3d 937, 941 (3d Cir. 2010), *cert. denied*, 132 S. Ct. 116 (2011) (“[W]e refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

¹⁵¹ *See Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1284 n.5 (11th Cir. 2011).

and, thus, omission of the phrase “deny employment to” from subsection (b) was purposeful.¹⁵²

Here, the majority argues that Congress’s silence on the issue speaks loud and clear.¹⁵³ It is hard to fault the majority for its unwillingness to interpret § 525(b) beyond what it sees as the plain meaning of the text. Since this view is pervasive and courts are loath to overstep their constitutional role, it is necessary for Congress to revisit § 525(b) of the Bankruptcy Code and amend its language to better advance bankruptcy’s fresh start policy.

III. CREDIT CHECKS AS AN EMPLOYMENT PRACTICE LEAD TO UNREASONABLE AND PUNITIVE RESULTS

In this Part, this Comment argues that private employers should not use credit report information to screen applicants because doing so leads to unreasonable results that are unnecessarily punitive. In particular, there are five reasons why the use of credit reports is unreasonable and punitive. First, credit reports are ineffective evaluative tools due to their inaccuracies. Credit reports are not only unreliable, but their unreliability is difficult to remedy. Second, credit reports ignore external factors that lead to bankruptcies. Because of issues such as job problems, illness, and family break-up, otherwise-qualified job applicants are treated adversely for reasons outside their control when employers discriminate against them based on credit history. Third, financial responsibility, the ostensible reason for using credit reports in employment, is irrelevant to most low-level positions. Fourth, the use of credit reports is unreasonable because it may violate the Title VII disparate impact doctrine. Lastly, screening out job applicants who file for bankruptcy is unnecessarily punitive because it punishes individuals who have already been penalized for incurring too much debt. Each of these reasons for why credit reports provide little to no value in the employment context is discussed below.

A. *Discrete Yet Harmful Measure*¹⁵⁴

It is far too easy to obtain a consumer credit report. Consumer credit reporting agencies disclose an individual’s bankruptcy records to an employer

¹⁵² *Id.* at 1284–85.

¹⁵³ *Id.* at 1285.

¹⁵⁴ In this subpart, I define a “discrete yet harmful measure” as a criterion that bears no connection to what it is used to prove.

if the employer follows the necessary steps to obtain this report.¹⁵⁵ While employers justify using credit reports because they think it is necessary, many employers use this information regardless of its inherent value because it is an easy tool to truncate the applicant pool.¹⁵⁶ The President of Consumer Education at Credit.com explained this best when he said “The recession has made this a buyer’s market when it comes to hiring, which may be leading more companies to use credit reports as screening criteria.”¹⁵⁷

Other employers truly believe gathering this information is a germane practice for gaining insight into an employee’s value, likelihood to steal, or money managing skills.¹⁵⁸ In testimony to the Equal Employment Opportunity Commission (EEOC), an executive member of the National Employment Lawyers Association, debunked one of the main reasons for using credit reports as an evaluative tool: “There’s no evidence, no science to suggest that one’s credit has anything at all to do with propensity to steal.”¹⁵⁹ Nonetheless, the Society of Human Resource Management found that 35% of employers use credit checks to look into the backgrounds of job applicants.¹⁶⁰ This is a growing practice amongst employers.¹⁶¹

Despite employers’ increased reliance on credit reports, in reality, this practice is a discrete and harmful measure for four reasons. First, credit records are laden with inaccuracies that are onerous to correct.¹⁶² The information they impart may not even depict an individual’s actual credit history, let alone her value as an employee. Second, this practice obfuscates the reasons outside of

¹⁵⁵ See 15 U.S.C. § 1681b(a), (b)(3) (2006).

¹⁵⁶ See Ruth Desmond, Comment, *Consumer Credit Reports and Privacy in the Employment Context: The Fair Credit Reporting Act and the Equal Employment for All Act*, 44 U.S.F.L. REV. 907, 907–08 (2010).

¹⁵⁷ Pamela Yip, *Employers Increasingly Use Applicants’ Credit Histories In Determining Job Future*, DALLAS MORNING NEWS, Sept. 21 2009, available at Newspaper Source Accession No. 2W6253277812.

¹⁵⁸ Adam T. Klein, ReNika Moore & Scott A. Moss, *Employer Credit-History Checks and Criminal Record Checks of Job Applicants for Hiring Decisions: The Illegality Under the Title VII Disparate Impact Doctrine*, at The 13th Annual Corporate Counsel Institute, in GEORGETOWN UNIVERSITY LAW CENTER CONTINUING LEGAL EDUCATION, 2009 WL 2432291, at *5 (Mar. 12–13, 2009).

¹⁵⁹ Adam T. Klein, Outten & Golden LLP, Transcript of Testimony at the U.S. Equal Emp’t Opportunity Comm’n, Employment Testing and Screening Meeting (May 16, 2007), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-1516-07/transcript.html>.

¹⁶⁰ EVREN ESEN, SOC’Y FOR HUMAN RES. MGMT., SHRM WORKPLACE VIOLENCE SURVEY (2004), available at <http://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf>. This number is up from the 19% of employers who admitted to using credit checks in 1996. *Id.*

¹⁶¹ See RICHARD C. HOLLINGER & JASON L. DAVIS, UNIVERSITY OF FLORIDA SECURITY RESEARCH PROJECT, 2002 NATIONAL RETAIL SECURITY SURVEY FINAL REPORT 13 (2003), available at http://www.pitnet.com/nrss_2002.pdf. In 2002, an academic study found that about 41% of retail employers use credit history as a screening measure for new employee hiring. *Id.*

¹⁶² See Gallagher, *supra* note 51, at 1603.

an individual's control that may have led to her filing for bankruptcy.¹⁶³ Third, the practice does not take into account that there is no correlation between an individual's ability to manage her finances and the quality of her work in low-level positions.¹⁶⁴ Fourth, the practice has a disparate impact on minorities that may run afoul of Title VII of the Civil Rights Act.¹⁶⁵ Fifth, the practice is unnecessarily punitive because it punishes individuals who have already been penalized for incurring too much debt.

1. *Credit Reports Are Ineffective Evaluative Tools Due to Inaccuracies*

A consumer credit report is a vehicle that enables lenders to “pierce the fog of uncertainty” presented by an unknown consumer.¹⁶⁶ Some employers use these reports in the hiring process and believe that a credit report provides evidence that is reflective of employment practices. Without examining whether an individual's debt or bankruptcy record actually reveals information about her competency and integrity, which will be explored later, it is worth examining the reliability of credit reports.

a. *Credit Reports Are Unreliable*

Studies of the three major credit reporting agencies by the Consumer Federation of America found discrepancies among what each of these agencies reported on the same individuals.¹⁶⁷ Distressing statistics reveal an overwhelming number of credit reporting inaccuracies that call into question the validity of using credit reports.¹⁶⁸ When comparing the information from

¹⁶³ ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* 81, fig. 4.1 (2003).

¹⁶⁴ Robert J. Nobile & Brian Murphy, *Rethinking the Use of Credit Histories in the Hiring Process*, 17 NO. 2 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE ART 7, Mar.–Apr. 2011.

¹⁶⁵ See Klein, Moore & Moss, *supra* note 158, at *2.

¹⁶⁶ Elizabeth Doyle O'Brien, *Minimizing the Risk of the Undeserved Scarlet Letter: An Urgent Call to Amend § 1681e(b) of the Fair Credit Reporting Act*, 57 CATH. U. L. REV. 1217, 1221 (2008).

¹⁶⁷ See CONSUMER FED'N OF AM., NAT'L CREDIT REPORTING ASS'N, CREDIT SCORE ACCURACY AND IMPLICATIONS FOR CONSUMERS 16, 33 (2002), available at http://www.consumerfed.org/pdfs/121702CFA_NCRA_Credit_Score_Report_Final.pdf. Currently, the FTC is conducting an eleven-year study mandated by the Fair and Accurate Credit Transactions Act of 2003 to evaluate the accuracy and completeness of consumer reports. Congress will report the study in 2014. FED. TRADE. COMM'N, REPORT TO CONGRESS UNDER §§ 318 AND 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003, at 2 (2004), available at <http://www.ftc.gov/reports/facta/041209factarpt.pdf> (quoting Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-59, 117 Stat 1952, 1999).

¹⁶⁸ See Gallagher, *supra* note 51, at 1595. A founder and former CEO of an employment screening company admitted, “[t]his is an industry that has delivered historically a very low quality product.” Desmond, *supra* note 156, at 913 (quoting Tal Moise, a provider of background screenings).

the three major credit reporting agencies, on average only 24% of the information yielded on a single consumer is reconcilable among the credit reports.¹⁶⁹ Moreover, 25% of errors found among the credit reports were significant enough to change a person's credit score.¹⁷⁰ This is not surprising considering that credit reports are supplemented with four billion pieces of information every month.¹⁷¹

While it is easy to blame inaccuracies on the overwhelming amount of new information, many of the inconsistencies in credit reporting are due to the credit reporting agencies' carelessness.¹⁷² For example, a credit bureau routinely collects data from courthouse public records, and it may in its course of work find that a potential employee named Alex Lopez from Miami, Florida has filed for bankruptcy. However, the credit bureau is careless in that it does not adequately verify which of the many people living in Miami named Alex Lopez filed for bankruptcy before putting this negative information in his credit report.¹⁷³ If an Alex Lopez who is not bankrupt wants to fix his credit report, he can contact the credit bureau directly. However, because of the "technical accuracy" defense, reporting agencies may not be culpable for errors that cost Alex Lopez a job, good credit, and future employment.¹⁷⁴

Under the "technical accuracy" standard, a credit reporting agency must not "merely promise that its reports contain factually correct information" for the technical accuracy standard to be met, but rather the reports must actually contain factually correct information.¹⁷⁵ Courts applying the technical accuracy standard justify the application of this lesser standard by explaining that it promotes cost effective credit reporting.¹⁷⁶ But the technical accuracy standard cannot be justified when the legislature's intent is taken into consideration. Senator Proxmire, who introduced the Fair Credit Reporting Bill on January

¹⁶⁹ CONSUMER FED'N OF AM., *supra* note 167, at 25.

¹⁷⁰ WARREN & WESTBROOK, *supra* note 52, at 13.

¹⁷¹ FED. TRADE COMM'N & BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON THE FAIR CREDIT REPORTING ACT DISPUTE PROCESS 3 (2006), available at <http://www.ftc.gov/os/comments/fcradispute/P044808fcradisputeprocessreporttocongress.pdf>.

¹⁷² See NATIONAL ASSOCIATION OF STATE PIRGS, MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS 7 (2004), available at <http://georgiapirg.org/sites/pirg/files/reports/MistakesDoHappen2004-1.pdf>.

¹⁷³ *Id.*

¹⁷⁴ See Gallagher, *supra* note 51, at 1603.

¹⁷⁵ Cahlin v. Gen. Motors Acceptance Corp., 936 F.2d 1151, 1157 (11th Cir. 1991). Other courts have argued that the legislative history mandates procedures that assure "maximum accuracy." Koropoulos v. Credit Bureau, Inc., 734 F.2d 37, 40 (D.C. Cir. 1984).

¹⁷⁶ Heupel v. Trans Union LLC, 193 F. Supp. 2d 1234, 1240 (N.D. Ala. 2002).

31, 1969, stated that “[p]erhaps the most serious problem in the credit reporting industry is the problem of inaccurate or misleading information.”¹⁷⁷ A technical accuracy standard hardly accomplishes what Senator Proxmire intended when he introduced his bill.

Theoretically, if there is any false information in a consumer’s credit report, the consumer is in the best position to remedy the error- the consumer is likely to be the most knowledgeable person when it comes to activities that may affect that individual’s credit report. Under § 1681 of the FCRA, if a consumer contacts a credit reporting agency about any inaccuracies or incompleteness found within the credit report, the agency must investigate the disputed information free of charge or delete the controversial item.¹⁷⁸ According to the Eleventh Circuit, proving that a credit reporting agency has not followed reasonable procedures in repairing inaccuracies requires a plaintiff to establish that: (1) the plaintiff’s credit report contains an inaccuracy; (2) this inaccuracy is due to the credit reporting agency’s “failure to follow reasonable procedures to assure maximum possible accuracy”; (3) the plaintiff was injured by this failure; and (4) the plaintiff’s injury was caused by the credit reporting agency’s inclusion of the inaccuracy.¹⁷⁹ The Consumer Credit Reporting Reform Act and the Fair and Accurate Credit Transactions Act amended the FCRA in 1996 and 2003 to improve reporting “maximum possible accuracy.”¹⁸⁰

The 1996 and 2003 amendments, while a step in the right direction, have done little to protect vulnerable job applicants. In *Neal v. CSC Credit Services, Inc.*, Neal, a consumer, sued CSC, a credit reporting agency, for an entry on her credit report that stated that she was “included in bankruptcy.”¹⁸¹ She discovered this misinformation after she was denied a position.¹⁸² The issue in this case was whether CSC Credit Services violated the FCRA by including this information.¹⁸³ Neal claimed that CSC did not maintain reasonable

¹⁷⁷ Jill Riepenhoff & Robert Wagner, *Credit-reporting Agencies’ Failure to Address Damaging Errors Plaguing Thousands of Americans Prompts Call for Swift Action*, THE DISPATCH (MAY 6 2010), <http://www.dispatch.com/content/stories/local/2012/05/06/credit-scars.html>.

¹⁷⁸ 15 U.S.C. § 1681i(a)(1)(A) (2006).

¹⁷⁹ *Cahlin*, 936 F.2d at 1156.

¹⁸⁰ Consumer Credit Reporting Reform Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003).

¹⁸¹ *Neal v. CSC Credit Servs., Inc.*, No.8:02CV378, 2004 WL 628214, at *2 (D. Neb. 2004).

¹⁸² *Id.* at *1.

¹⁸³ *Id.*

procedures to avoid reporting prohibited information.¹⁸⁴ However, the court held that the information included in Neal's credit report was "technically accurate" and did not violate the FCRA.¹⁸⁵

Neal's father was the debtor who filed for bankruptcy, but because her father's name was on her car lease, her father's bankruptcy filing was included on her credit report.¹⁸⁶ After the court was notified that the credit report accurately reflected that a bankruptcy was the cause of the late car payments, a point won by using the technical accuracy standard, Neal had the additional burden of establishing that CSC had not taken reasonable steps to assure an accurate reflection of who filed for bankruptcy.¹⁸⁷ For someone who is trying to find employment, it is a drain on valuable time and resources to pursue a credit reporting agency over the three words of "included in bankruptcy" on a piece of paper. But the combination of the prevalence of private employers using credit reports to screen job applicants and the majority's narrow interpretation of § 525(b) breathe life into these three words. Without these words, Neal and countless others like her will have their employment prospects damaged for many years. In short, "if it is true that [a] poor credit history is the 'Scarlet Letter' of [twentieth] century America, then no American consumer should have to wear that letter undeservedly" when applying for a job.¹⁸⁸ The American bankruptcy system is meant to protect against that sort of endless stigma.

b. Credit Reports Are Difficult to Remedy

Even if an individual learns of an error on her credit report, this discovery is in vain because credit reports are currently too difficult to remedy. We care about remedying the reports because an adverse report can interfere with gaining employment and there is nothing prohibiting private employers' use of the reports. There are no federal statutes directly or indirectly on point enjoining employment discrimination on the basis of an individual's credit score or her refusal to consent to the procurement of her credit report for a potential employer.¹⁸⁹ For instance, an employer can reject a job applicant

¹⁸⁴ *Id.* at *2.

¹⁸⁵ *Id.* at *4.

¹⁸⁶ *Id.* at *1–2.

¹⁸⁷ *See id.* at *4.

¹⁸⁸ O'Brien, *supra* note 166, at 1244.

¹⁸⁹ *See* Gallagher, *supra* note 51, at 1603.

simply for refusing to authorize the distribution of her credit report.¹⁹⁰ The only mechanism that provides uniform protection to consumers is the FCRA and it does not sufficiently protect consumers from inaccurate credit reporting in the employment context.

Despite this glaring deficiency, the FCRA is meant to protect consumers from abusive practices and infringements on their privacy.¹⁹¹ The FCRA requires an employer to secure an individual's authorization prior to obtaining a copy of her credit report.¹⁹² The FCRA also requires employers to inform job applicants if their credit report results in denial.¹⁹³ This urges creditors to combat inaccuracies in their credit reports.¹⁹⁴ But the FCRA has proven ineffectual in both protecting consumers who have filed for bankruptcy and in empowering them to fix inaccuracies in their credit reports.¹⁹⁵ A consumer who learns of an inaccuracy in her credit report should take this error very seriously because an adverse credit report can have an extremely harmful impact on future employment.¹⁹⁶ For example, in *Neal*,¹⁹⁷ the inaccurate inclusion of Neal's father's bankruptcy on her credit report led to her being denied employment as a teller with financial institutions like the American National Bank, First National Bank, and Strategic Air Command Federal Credit Union.¹⁹⁸

¹⁹⁰ See generally *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 437 (M.D. Pa. 2004), *aff'd*, 135 F. App'x 499, 502 (3d Cir. 2005) (holding that an employer has the right to terminate an employee upon her refusal to authorize a credit check).

¹⁹¹ See 15 U.S.C. § 1681b(a) (2006); *Adams v. Berger Chevrolet, Inc.*, 2001 WL 533811, at *3 (W.D. Mich. 2001).

¹⁹² 15 U.S.C. § 1681b(b)(2)(A).

¹⁹³ *Id.*

¹⁹⁴ See Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 38–41 (1994).

¹⁹⁵ None of the cases that address a consumer making an effort to overcome his credit mention the individual's attempt to employ FCRA mechanisms. See, e.g., *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278 (11th Cir. 2011); *Burnett v. Stewart Title, Inc. (In re Burnett)*, 635 F.3d 169 (5th Cir. 2011); *Rea v. Federated Investors*, 627 F.3d 937 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 116 (2011); *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000); *Fiorani v. CACI*, 192 B.R. 401 (E.D. Va. 1996); *Pastore v. Medford Sav. Bank*, 186 B.R. 553 (D. Mass. 1995); *Stinson v. BB&T Inv. Servs. (In re Stinson)*, 285 B.R. 239 (Bankr. W.D. Va. 2002); *Madison Madison Int'l of Ill., P.C. v. Matra S.A. (In re Madison Int'l of Ill., P.C.)*, 77 B.R. 678 (Bankr. E.D. Wis. 1987).

¹⁹⁶ Michael R. Guerrero, *Disputing the Dispute Process: Questioning the Fairness of § 1681s-2(a)8 and § 1681j(a)(1)(A) of the Fair and Accurate Credit Reporting Act*, 47 CAL. W. L. REV. 437, 437–38 (2011).

¹⁹⁷ See *supra* Part III.A.1.a.

¹⁹⁸ See *Neal v. CSC Credit Servs., Inc.*, No.8:02CV378, 2004 WL 628214, at *2 (D. Neb. 2004).

The FCRA does provide some protection to consumers applying for jobs.¹⁹⁹ Employers must furnish a rejected job applicant with a copy of his or her credit report, including a written description of the specific information that was detrimental to the job application.²⁰⁰ This is cold comfort when the hurdles for correcting inaccuracies are prohibitively high.²⁰¹ Credit reporting agencies do not take inaccuracy claims seriously; they outsource credit report disputes to foreign countries that spend too little time evaluating individual claims.²⁰² In a severe illustration of how taxing the process for remedying a credit report inaccuracy can be, one man fruitlessly disputed the accuracy of his credit report for over a year.²⁰³ The process exacerbated his depression, and he ultimately committed suicide.²⁰⁴ In his suicide note, he commented on his struggle with the credit reporting agencies.²⁰⁵

This is an extreme example, but it demonstrates how frustrating it is that the FCRA lacks both adequate protection for job applicants and the means to correct credit report inaccuracies. Taking the steps to obtain job applicants' consent and providing incentives to rejected applicants to diligently pursue greater accuracy is not a remedy for the fundamental problem with the FCRA. The fundamental problem is that the FCRA was not created with the aim of regulating the employment industry, nor does it successfully do so.²⁰⁶ With this in mind the important question becomes: should employers rely on unreliable credit reports for measuring job applicants' financial responsibility? This Comment posits that they should not for two reasons: (1) the FCRA was not created to regulate the employment industry; and (2) credit reports have a dubious connection to job proficiency.

¹⁹⁹ See, e.g., 15 U.S.C. §1681b(a) (2006); Gallagher, *supra* note 51, at 1602.

¹⁹⁹ 15 U.S.C. § 1681b(a).

²⁰⁰ *Id.* § 1681b(b)(3).

²⁰¹ See Guerrero, *supra* note 196, at 438–39. It can also be expensive to remedy credit report inaccuracies, since a consumer can only view his credit report free-of-charge once a year.

²⁰² Credit reporting agencies outsource credit report disputes to third-party contractors in countries like Costa Rica and the Philippines. *Id.* at 438. This is supported by the facts that credit reporting agencies process a minimum of twenty-two claims per hour and it costs agencies about fifty cents per dispute to process. *Id.*

²⁰³ Chi Chi Wu, *Automated Injustice: How a Mechanized Dispute System Frustrates Consumers Seeking to Fix Errors in Their Credit Reports*, 14 N.C. BANKING INST. 139, 140 (2010).

²⁰⁴ *Id.* at 141.

²⁰⁵ *Id.* Captain John Harrison's testimony before the Senate Committee on Banking, housing, and Urban Affairs provides an additional account of how trying to fix a credit report error destroyed a man's life. *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the Senate S. Comm. On Banking, Housing, and Urban Affairs*, 108th Cong. 157–59 (2003) (statement of Capt. John Harrison, U.S. Army (Ret.)).

²⁰⁶ See 15 U.S.C. § 1681b(b)(2)(A) (2006) (indicating that the FCRA is void of any requirement adapting consumer information to the employment context).

2. *Credit Reports Ignore External Factors*

Another reason why credit reports are an unreliable mechanism for measuring an individual's financial responsibility is that the reports do not take into account forces outside of the consumer's control that affect her decision to file for bankruptcy. Therefore, credit reports can be misleading. They give the illusion of providing insight into a job candidate's spending habits and level of responsibility when, in reality, credit reports merely impart the "brute facts . . . without the reasons" and do not reflect the true causes of bankruptcy.²⁰⁷ The three main causes of bankruptcy that account for 87% of filings are job loss, medical problems, and family break-up (divorce and separation).²⁰⁸ None of these causes are reflected on an individual's credit report. Moreover, there is nothing inherently indicative of the "big three" causes suggesting an individual's irresponsibility or a propensity to steal.²⁰⁹ But instead of actually learning more about a job candidate, potential employers only see numbers and vague words on a credit report that incorrectly suggest that an individual is financially irresponsible.²¹⁰ An examination of the "big three" causes of bankruptcy will further call into question employer reliance on credit reports to measure a job applicant's value.²¹¹ This examination will also strengthen the claim that § 525(b) should be amended.

a. *Job Problems*

Job problems are the most prevalent cause of bankruptcy.²¹² Sixty-one percent of households report that their financial difficulties were due to problems with unsteady and inadequate incomes before they ever filed for

²⁰⁷ Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1425 (2001).

²⁰⁸ WARREN & TYAGI, *supra* note 163, at 81, fig. 4.1. Other reasons include bad investments, credit card overspending, and natural disasters. *Id.*

²⁰⁹ Desmond, *supra* note 156, at 911–12.

²¹⁰ *Id.* at 912.

²¹¹ The reason why the "big three" have not done more to transform the political debate is because these findings "ha[ve] been largely eclipsed by the credit industry's effort to convince Congress and the American people that frivolous overconsumption and moral decline are the causes of the increased use of bankruptcy." Jean Braucher, *The Two-Income Trap: Why Middle-Class Mothers & Fathers Are Going Broke*, 21 EMORY BANKR. DEV. J. 193, 196 (2004) (reviewing WARREN & TYAGI, *supra* note 163).

²¹² TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 105 (2000).

bankruptcy.²¹³ Not surprisingly, the stability of the job market is a crucial factor affecting an individual's financial health.²¹⁴ There has been an increase in layoffs since the December 2007 downturn in the economy.²¹⁵ According to the *Wall Street Journal*, as of 2011, unemployment and underemployment was at 16.7%.²¹⁶ A two-income family is two and a half times more likely to experience layoffs than a single-income family from a generation ago.²¹⁷

Consequently, increases in bankruptcy filings are not only to be expected, but also unavoidable even with the most prudent financial planning.²¹⁸ Ironically, families that think they are wise to send both parents into the workforce in order to "buffer them[selves] against the terrible wrenches of a changing economy," according to researchers, "have just made themselves more vulnerable to those very wrenches."²¹⁹ This is because a growing number of mothers in the workplace means that the family has lost the security of having mothers enter the workplace only when the family is experiencing financial difficulties.²²⁰ Moreover, having both parents in the workplace doubles the likelihood that one or both of the breadwinner's employment may be terminated.²²¹

Because a recession is an outside force that does not reflect an individual's value as an employee, penalizing individuals for not anticipating an unstable economy is senseless. Further, it is a social injustice for employers to use this lack of foresight as an indication of financial impropriety. Part of bankruptcy's framework was founded on the principle that "economic failures [were] produced by economic forces no more controllable or predictable than that visitation by a tornado."²²² Discriminating against job applicant Dorothy

²¹³ See Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 99–100 (2006).

²¹⁴ See *id.*

²¹⁵ The Administrative Office of the U.S. Courts reported that over a twelve-month period bankruptcy filings rose about 20%. *Bankruptcy Statistics, Filings*, ADMIN. OFF. OF THE U.S. COURTS tbl. F (2010). Since the recession began in December 2007, 4.4 million people have lost their jobs. Peter S. Goodman & Jack Healy, *Job Losses Hint at Vast Remaking of Economy*, N.Y. TIMES, Mar. 6, 2005, http://www.nytimes.com/2009/03/07/business/economy/07jobs.html?pagewanted=all&_r=0.

²¹⁶ Dave Kansas, *A World of Worries: Markets Fall, New Recession Feared*, WALL ST. J., Aug. 7, 2011.

²¹⁷ WARREN & TYAGI, *supra* note 163, at 83.

²¹⁸ See Porter & Thorne, *supra* note 213, at 99–100.

²¹⁹ WARREN & TYAGI, *supra* note 163, at 84 (quoting ROSALIND C. BARNETT & CARYL RIVERS, SHE WORKS/HE WORKS: HOW TWO-INCOME FAMILIES ARE HAPPIER, HEALTHIER, AND BETTER-OFF 2, 5 (1996)).

²²⁰ *Id.* at 81–82.

²²¹ *Id.*

²²² Charles G. Hallinan, *The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 56 (1986).

because her farmhouse in Kansas was blown away by a tornado, resulting in a chain of events that ruined her credit, is illogical. So, too, would it be unreasonable to discriminate against her bankrupt Auntie Em, who is now seeking employment in Oz because a seven-year drought caused her crops to turn to dust and resulted in her livestock starving to death.

b. Illness

Illness is another factor that contributes significantly to bankruptcy filings. Illness precipitates about 30% of bankruptcy filings.²²³ President Barack Obama addressed this issue in his 2009 State of the Union Address when he said, “We must . . . address the crushing cost of health care. This is a cost that now causes a bankruptcy in America every [thirty] seconds.”²²⁴ Two million Americans who become ill each year must simultaneously file for bankruptcy.²²⁵ These Americans are predominantly middle-class homeowners who went to college and had stable jobs before they were diagnosed with the illnesses that triggered their bankruptcies.²²⁶

Individuals who fall victim to the double disasters of illness and bankruptcy are not reckless people who are more likely to be irresponsible employees.²²⁷ In fact, three-quarters of debtors who became bankrupt due to medical issues had some form of health insurance and thought, like many Americans, that they were responsibly planning for unforeseen illness.²²⁸ The reality is that even those with premier health insurance can suffer staggering out-of-pocket expenses.²²⁹ Predictably, individuals fare worse if they cannot afford durable coverage or their employers do not provide high-quality health insurance.²³⁰ For example, many non-premier healthcare insurance plans only pay for visits to primary care doctors, and will not pay for specialists or emergency hospital visits.²³¹

²²³ A Harvard study of 1,771 Americans in bankruptcy courts nationwide revealed that medical bills cause fifty percent of bankruptcies. Elizabeth Warren, Op-Ed., *Sick and Broke*, WASH. POST, Feb. 9, 2005, at A23.

²²⁴ President Barack Obama, State of the Union Address, Address Before a Joint Session of Congress, 2009 DAILY COMP. PRES. DOC. 5 (Feb. 24, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress>.

²²⁵ Warren, *supra* note 223.

²²⁶ *Id.*

²²⁷ *See id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *See id.* Health and Human Service Secretary Mike Levitt pioneered a healthcare program called the Utah Medicaid Program that provides only bare bones coverage. *Id.*

When an individual is faced with a serious illness, she may be too ill to continue working and lose her job. Losing a job is not just financially devastating but it often means losing health coverage.²³² Medically bankrupt individuals usually qualify for the right to continue their health coverage under the Comprehensive Omnibus Budget Reconciliation Act of 1985 (COBRA), a form of short-term medical coverage triggered by termination.²³³ But the \$1,000 monthly premium for qualifying individuals is often not feasible for someone who has just lost her primary source of income.²³⁴

A fairly typical case demonstrates how a diagnosis of a serious illness can devastate a family's finances and send them straight into bankruptcy. Carl Sorabella, an accountant, contacted his employer to see if he could modify his work schedule after his wife was diagnosed with stage-four lung cancer.²³⁵ Sorabella had worked for his employer for fourteen years, but now wanted a more flexible schedule so that he could increase his availability to take his wife to chemotherapy and accompany her during medical testing.²³⁶ When Sorabella first made his rescheduling request, his employer said that she would have to fire him.²³⁷ In response, Sorabella promised to work nights and make up any missed hours.²³⁸ His employer told him the following work week that his employment would be terminated.²³⁹

Because his company employed fewer than fifty people, the company was exempt from related federal laws and thus acted legally.²⁴⁰ As this case demonstrates, Sorabella was not inherently a bad employee because his wife developed cancer. In fact, Sorabella received a raise months before his position was terminated.²⁴¹ Due to the employer's termination decision, Sorabella and his wife were forced to live off of his unemployment and disability insurance while they both struggled to find employment.²⁴² This case demonstrates that

²³² See *id.*

²³³ MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW 491–92 (7th ed. 2011).

²³⁴ See Warren, *supra* note 223.

²³⁵ Susanna Kim, *Massachusetts Man Fired After Telling Employer His Wife Has Cancer*, ABC NEWS (July 15, 2011), <http://abcnews.go.com/Business/massachusetts-man-fired-revealing-wife-cancer/story?id=13845661>.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* The Family and Medical Leave Act mandates twelve weeks of unpaid leave when an individual or immediate family member is diagnosed with a serious health condition. 29 U.S.C. § 2612(a)(1) (2006).

²⁴¹ *Id.*

²⁴² *Id.*

good employees can be labeled as irresponsible due to unfortunate, extenuating circumstances. Professor Deborah Thorne observes, “from the point of the employer, it simply isn’t a wise business practice—many smart and qualified folks are going to be overlooked just because of the economic downturn or someone in their family had the misfortune of getting ill.”²⁴³

c. Family Break-up

Ninety percent of the individuals who file for bankruptcy not only are educated, but also qualify as middle class.²⁴⁴ Further, most of these individuals are part of a family in which both parents have entered into the workforce.²⁴⁵ Compared to single-income families a generation ago, these modern two-income families are twice as likely to file for divorce.²⁴⁶ The sociological reasons behind this phenomenon is beyond the scope of this Comment, but exploring how divorce and separation lead to bankruptcy further demonstrates that a bankruptcy history is not a relevant criterion for making hiring decisions.

It is conventional wisdom that members of a two-income family tend to share expenses and other responsibilities of managing a household. When a married couple separates, at least one of the adults often moves out of the marital home and finds a new place to live while the remaining spouse is left to shoulder the residual financial burden under the lease or mortgage the couple co-signed.²⁴⁷ Single parents may find it impossible to pay for separate homes with one income when they anticipated paying for one home with their joint incomes. The family break-up and additional expenses leave the single parents vulnerable to debt and bankruptcy.²⁴⁸ Simply because a couple decides it is in their family’s best interest to get a divorce, a decision that may lead to a

²⁴³ Debb Thorne, *Does a Tarnished Credit Report Equal an Untrustworthy Employee?* CREDITSLIPS.ORG (Aug. 14, 2009, 11:39 AM), <http://www.creditslips.org/creditslips/2009/08/last-week-the-nyt-ran-a-piece-describing-how-common-it-has-become-for-employers-to-run-credit-checks-on-folks-applying-for-j.html>.

²⁴⁴ WARREN & TYAGI, *supra* note 163, at 7. Elizabeth Warren and her daughter, Amelia Warren Tyagi, wrote a book that explores, among other topics, how and why divorce and separation is a leading cause of bankruptcy. *The Two Income-Trap: Why Middle-Class Mothers and Fathers are Going Broke* dispels the myth that it is predominantly lower-class spenders who are filing for bankruptcy. *See generally id.*

²⁴⁵ *Id.* at 7.

²⁴⁶ *Id.* at 86.

²⁴⁷ Evan Bedard, *Mortgage Options While Goring Through a Divorce*, LOANSafe (July 20, 2010), <http://www.loansafe.org/mortgage-options-while-going-through-a-divorce>.

²⁴⁸ F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 201–02, 205–06 (1998).

bankruptcy, does not mean that this information is relevant in evaluating a job application.²⁴⁹

3. *Financial Responsibility is Irrelevant to Most Low-Level Positions*

To justify an employer's consideration of a credit report as a part of the hiring process, there should be a nexus between the applicant's personal finances and the job for which the applicant is applying. This nexus requirement would apply when an employer is considering an applicant's bankruptcy history. The job candidates who are most likely to be discriminated against because of a bankruptcy are individuals applying for low-level positions.²⁵⁰ It is these positions where credit history is unlikely to reveal any relevant information.²⁵¹ Wisconsin State Representative Kim Hixton explained that an applicant's credit report is irrelevant to the hiring of a "truck driver, librarian or gym employee," and thus, considering an applicant's credit report for these types of jobs "should be illegal."²⁵² If a job does not entail the handling of cash or expensive assets, employers cannot justify using credit reports as a hiring criterion.

This is demonstrated in a case reported by *The New York Times*. Kevin Palmer had been living in a homeless shelter in Santa Ana, California after filing for bankruptcy.²⁵³ He was granted an interview for a clerk job at a property management company.²⁵⁴ The job entailed transcribing homeowner's complaints.²⁵⁵ The interview went well and Palmer was shown an available desk and the people with whom he would be working.²⁵⁶ Palmer explained that the job would earn him enough income to get himself back on his feet.²⁵⁷ Unfortunately, the company's interest in hiring Palmer disappeared after it checked his credit history.²⁵⁸ Because the connection between Palmer's personal finances and his ability to record telephone complaints is too tenuous

²⁴⁹ See Thorne, *supra* note 243.

²⁵⁰ Nobile & Murphy, *supra* note 164.

²⁵¹ *Id.*

²⁵² Christine Lagorio, *States Propose Limiting Credit Checks by Employers*, INC. (Mar. 1, 2010), <http://www.inc.com/news/articles/2010/03/credit-check-legislation.html>.

²⁵³ Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 6, 2009.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

to merit an extensive credit check, legislation is needed to curb this employment practice.

Representative Jon Switalski, a Democrat who proposed anti-discrimination legislation in Michigan, called cases such as Kevin Palmer's case discrimination. Switalski emphasized that "if you miss a few payments or you have medical debt, your skills as a pipe fitter or an electrician don't diminish."²⁵⁹ There are various factors such as job problems and illness where there is not a causal connection between a job applicant's bankruptcy history and the job for which the applicant is applying.²⁶⁰ Continuing to treat negative credit history caused by extraneous factors as a determinative appraisal of a job applicant is misguided and injurious.

4. *Screening Out Bankrupt Debtors: A Title VII Disparate Impact Issue*

One of the primary reasons the use of bankruptcy history is injurious in the employment context is because it may have a disparate impact on minorities.²⁶¹ The disparate impact doctrine applies when an employment criterion is "facially neutral" yet has the effect of disadvantaging certain minorities.²⁶² There is reason to believe that private employers' use of credit reports as a way of screening out bankrupt debtors may have a disparate impact on protected classes of minorities.²⁶³ Empirically, there is a correlation between adverse credit information and an individual's minority status.²⁶⁴

In general, certain classes of minorities are more likely to file for bankruptcy.²⁶⁵ For example, African Americans are overrepresented in the general population of individuals who file for bankruptcy.²⁶⁶ Hispanic homeowners are nearly three times more likely to file for bankruptcy than similarly situated white homeowners.²⁶⁷ A study in Missouri supported this correlation "even after controlling for income, educational attainment, marital status, urban residence, the unemployment rate, and other socioeconomic

²⁵⁹ *Id.*

²⁶⁰ WARREN & TYAGI, *supra* note 163, at 84.

²⁶¹ *See, e.g.,* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993).

²⁶² *Id.*

²⁶³ *See* Klein, Moore & Moss, *supra* note 158, at *2.

²⁶⁴ *See* Neal v. CSC Credit Services, Inc., No. 8:02CV378, 2004 WL 628214, at *2 (D. Neb. 2004); *see also* Klein, Moore & Moss, *supra* note 158, at *2.

²⁶⁵ *See* Klein, Moore & Moss, *supra* note 158, at *2.

²⁶⁶ BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK 494, 508 tbl. B (1994).

²⁶⁷ WARREN & TYAGI, *supra* note 163, at 159.

factors.”²⁶⁸ In short, a private employer who uses a credit report as an evaluative tool is not only discriminating against a job applicant because of her bankruptcy status, but may also be violating Title VII of the Civil Rights Act.²⁶⁹

In the landmark case of *Griggs v. Duke Power Co.*, the Supreme Court explained that an employment practice with a disparate impact is lawful if and only if it is based on “business necessity.”²⁷⁰ The Court further clarified that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”²⁷¹ The Court looked to congressional intent²⁷² and held that an assessment is forbidden if it measures a person in the abstract instead of measuring the person for a particular job.²⁷³ The Court strongly considered Title VII of the Civil Rights Act, which is meant to protect racial minorities from employment assessments that have a disparate impact on different groups.²⁷⁴ One such employment assessment is a credit report.²⁷⁵

There are no studies to support the contention that individuals with adverse credit reports are more likely to be irresponsible or dishonest employees. In fact, one study found the connection between credit scores and job performance is non-existent.²⁷⁶ Because no empirical evidence exists to substantiate employers’ argument that adverse credit reports are indicative of

²⁶⁸ BRENT KABLER, STATE OF MO. DEP’T OF INS., INSURANCE-BASED CREDIT SCORES: IMPACT ON MINORITY AND LOW INCOME POPULATIONS IN MISSOURI 11 (2004).

²⁶⁹ See Gallagher, *supra* note 51, at 1610.

²⁷⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

²⁷¹ *Id.* at 432.

²⁷² The *Griggs* Court explained:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory employment practices.

Id. at 429–30.

²⁷³ *Id.* at 436.

²⁷⁴ *Id.*; see also 42 U.S.C. § 2000e-2(k)(1)(A) (2006) (detailing the practices that create a disparate impact).

²⁷⁵ See *Employment Tests and Selection Procedures*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (Sept. 23, 2010), http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

²⁷⁶ See Martha C. White, *Employee with Bad Credit Scores Aren’t Less Ethical*, TIME, Nov. 15, 2011, <http://business.time.com/2011/11/15/workers-with-bad-credit-arent-less-ethical/>.

poor job performance, the practice of using credit reports as an evaluative tool raises red flags as to whether this practice runs afoul of Title VII. One credit reporting agency, Equifax, has even discontinued furnishing credit reports to employers seeking to use this information for employment purposes.²⁷⁷ Studies and credit reporting agency behavior indicate that the presence or absence of “filed for bankruptcy” on a credit report is not an appropriate criterion for hiring decisions.²⁷⁸

The disparate impact of using credit reports as a screening tool is similar to the impact of using criminal convictions as a screening tool.²⁷⁹ The Eighth Circuit held that an employer’s refusal to hire individuals with any type of criminal record had an adverse impact on minorities and thus violated Title VII.²⁸⁰ This absolute bar shifts to the employer the burden of proving that the applicant pool is not artificially restricted and that the policy is justifiable via the “business necessity” exception.²⁸¹ Employers have not been able to meet that burden. Employers who use criminal records have been sued for negligent hiring and the settlement figures average \$1.6 million.²⁸² Thus, a policy of avoiding criteria that are unduly restrictive can be beneficial to the litigation-adverse employer and job applicant alike.

The EEOC has taken the stance that an employer’s use of a consumer credit report violates Title VII’s disparate impact provisions if the employer does not

²⁷⁷ John Ulzheimer, *Equifax No Longer Selling Credit Reports for Employment Screening*, CREDIT.COM, Sept. 22, 2009, http://creditbuildersalliance.org/files/equifax_not_sell_reports_to_employers.pdf.

²⁷⁸ See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 192 (1983).

²⁷⁹ See Gallagher, *supra* note 51, at 1599.

²⁸⁰ *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1198 (8th Cir. 1975). The Eighth Circuit wrote:

We cannot conceive of any business necessity that would automatically place every individual convicted of an offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirement is an unnecessarily harsh and unjust burden.

Id.

²⁸¹ See *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, EEOC.GOV, <http://www.eeoc.gov/policy/docs/convict2.html> (last visited Feb. 26, 2012). See generally *El v. Se. Penn. Transp. Auth.*, 479 F.3d 232 (3d Cir. 2007).

²⁸² See *EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, EEOC.GOV, <http://www.eeoc.gov/policy/docs/convict2.html> (last visited Feb. 26, 2012).

have a legitimate reason for relying on such a report.²⁸³ Acting chairman of the EEOC Stuart J. Ishimaru has openly questioned whether credit reports are a good screening device.²⁸⁴ In *EEOC v. Kaplan Higher Education*, the EEOC asserted that an employer's use of credit histories violates Title VII when it has a disparate impact on certain protected classes.²⁸⁵ The EEOC reasoned that racial minorities are more disadvantaged than their white counterparts because racial minorities are more susceptible to predatory lending, foreclosures, unemployment, and health care-related bankruptcies that negatively impact credit history.²⁸⁶

The EEOC further alleges that credit history is “neither job-related nor consistent with business necessity because there are more appropriate, less discriminatory alternative selection procedures.”²⁸⁷ It is worth noting that although the EEOC indicates in its decisions that credit checks by private employers are troubling,²⁸⁸ its policies are not always given great deference by courts.²⁸⁹ Of course, if the EEOC's position stands up in court, Congress will have to react accordingly. It is arguable whether there is a disparate impact claim, but the adverse impact on minorities should prompt congressional reform in this field.

B. Screening Out Job Applicants Who File for Bankruptcy is Unnecessarily Punitive

Bankruptcy reform is needed to protect the sanctity of American bankruptcy's fresh start because it is unnecessarily punitive to condemn people for their credit histories and prevent them from obtaining employment to revitalize their credit.²⁹⁰ Bankruptcy reform advocates argue that a major problem with the current system is that filing for bankruptcy no longer elicits shame, a sort of psychological punishment spurred by societal judgment.²⁹¹

²⁸³ Claims brought by the EEOC have been rejected by courts because of the statute of limitations imposed on claims that are found to be discrete acts and not inherent of a hostile work environment. *See, e.g.*, *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 625 (N.D. Ohio 2011).

²⁸⁴ *See Glater, supra* note 253.

²⁸⁵ *Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d at 621.

²⁸⁶ *Nobile & Murphy, supra* note 164.

²⁸⁷ *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *1 (D. Md. Apr. 27, 2010).

²⁸⁸ EEOC Decision No. 72-1176, 45 Fair. Empl. Prac. Cas. (BNA) 960 (1972); EEOC Decision No. 74-2, 6 Fair Empl. Prac. Cas. (BNA) 830 (1973).

²⁸⁹ *See El v. Se. Penn. Transp. Auth.*, 479 F.3d 232, 244–45 (3d Cir. 2007) (finding the EEOC's guidelines unqualified for deference and instead adopting a different standard).

²⁹⁰ *Nobile & Murphy, supra* note 164, at 1.

²⁹¹ Julie Kosterlitz, *Over the Edge*, 29 NAT'L J. 870, 871 (1997).

Senator Chris Dodd has stated that the social stigma of bankruptcy has vanished.²⁹² Reform advocates further argue that because people no longer feel ashamed when they file for bankruptcy, bankruptcy filings have increased over the last decade.²⁹³ It cannot be argued that the social stigma of bankruptcy is gone when employers use internal hiring policies that discriminate against individuals who have filed for bankruptcy. Not only does it appear that the stigma is alive and well, but job seekers are tormented by their bankruptcy shadow warding any opportunity for a “fresh start.”²⁹⁴

Allowing employers to use credit report information as an evaluative tool punishes bankrupt debtors who are just trying to get back on their feet. As previously discussed, the “big three” reasons why people file for bankruptcy are employment termination, serious illness, and family breakup.²⁹⁵ Punishing individuals who have already fallen on hard times because of external factors is unnecessarily punitive and morally repugnant. Moreover, this punishment runs counter to the objective of debtor rehabilitation as envisioned by the fresh start policy. Part of rehabilitation is discharging debt in the name of “renewed economic vigor.”²⁹⁶ It is nonsensical that an individual discharging her debilitating debt is doomed to acquire the debilitating bankruptcy shadow in its place. A solution is necessary to stop the cycle of joblessness. The best way to accomplish this is to limit employers’ access to bankruptcy information, which is not only damaging to a job candidate’s application, but also does not provide any legitimate insight into the candidate’s qualifications.²⁹⁷ To determine the best means of doing so, it is essential to examine how state and federal legislators are handling this issue.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ See Ziad Raymond Azar, *Bankruptcy Policy: A Review and Critique of Bankruptcy Statutes and Practices in Fifty Countries Worldwide*, 16 *CARDOZO J. INT’L & COMP. L.* 279, 289 (2008) (explaining that bankruptcy practices around the world show signs of an enduring, international stigma of bankruptcy).

²⁹⁵ See *supra* Part III.A.2.a–c.

²⁹⁶ Howard, *supra* note 24, at 1088.

²⁹⁷ Nobile & Murphy, *supra* note 164, at 2; Thorne, *supra* note 243.

IV. STATE AND FEDERAL LEGISLATION IS BEING PROPOSED AND ENACTED TO PREVENT THE DISCRIMINATORY PRACTICE OF USING CREDIT HISTORIES IN EMPLOYMENT

A. *State Legislation*

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) and the FCRA are too narrow to allow courts to restrict private employer access to adverse credit reports. However, the political response has been more successful in protecting job applicants from employment discrimination.²⁹⁸ In recent years, state legislators have been reacting to their unemployed constituents who have been discriminated against because of their adverse credit reports.²⁹⁹ For example, Hawaii State Representative Marcus Oshiro explained that the interplay between adverse credit and unemployment is “almost like being forever sentenced to debtors’ prison.”³⁰⁰

Currently, seven states have enacted anti-credit-check legislation that either bans or limits employers’ access to job applicants’ consumer credit reports.³⁰¹ In the 2011 legislative session, twenty-eight states and the District of Columbia either introduced or had pending anti-credit-check bills.³⁰² An examination of some of the enacted and pending legislation signals not only the gravity of the situation, but also the need for uniform reform. To date, California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington have enacted legislation either banning or limiting private employers’ use of credit report information in hiring.³⁰³ Washington was the first state to pass its legislation into law on April 18, 2007.³⁰⁴ It was amended in 2011 to limit employer access to credit reports unless the job applicant seeks to fill a position that is associated with credit.³⁰⁵

²⁹⁸ Lagorio, *supra* note 252.

²⁹⁹ *Id.*

³⁰⁰ Thomas Frank, *Job Credit Checks Called Unfair*, USA TODAY, Feb. 13, 2009, at 1A.

³⁰¹ *Use of Credit Information in Employment 2011 Legislation*, NCSL.ORG (Dec. 19, 2011), <http://www.ncsl.org/issues-research/banking/use-of-credit-information-in-employment-2011-legis.aspx>.

³⁰² *Id.*

³⁰³ CONN. GEN. STAT. ANN. § 31-51tt(b) (West 2012); HAW. REV. STAT. § 378-2.7(a)(8) (2012); 820 ILL. COMP. STAT. 70/10(a)(1) (2012); OR. REV. STAT. § 659A.320 (2012); WASH. REV. CODE § 19.182.020(2) (2012); *see also* NCSL.ORG, *supra* note 301.

³⁰⁴ S.B. 5827.

³⁰⁵ H.B. 1733, 62nd Leg., Reg. Sess. (Wash. 2011).

In this Subpart, this Comment will primarily analyze the Illinois bill, as this legislation shows the strengths and weaknesses of state credit check statutes. This Comment will examine Illinois' Employee Credit Privacy Act (Illinois Act) because it has been lauded as a nearly "ideal [credit check] legislation" and its provisions have been used as a model for several states.³⁰⁶

The Illinois Act forbids employers from denying employment to an individual because of his or her credit report.³⁰⁷ If a job applicant feels she has been discriminated against because of her credit report, she can bring a civil action to obtain damages, injunctive relief, or both.³⁰⁸ In addition, the Act explicitly awards attorneys' fees and reasonable costs to prevailing plaintiffs.³⁰⁹ Under the statute, a credit check is lawful only if it is an "established bona fide occupational requirement of a particular position or a particular group of employees."³¹⁰ A practice is a "bona fide occupational requirement" under the Illinois Act if one of the seven listed exceptions is met.³¹¹ For the most part, these exceptions are narrow and leave little latitude for varying interpretations.³¹² For example, the Illinois Act gives employers the right to use credit reports when an individual applies for a position that entails unsupervised access to cash or assets valued at \$2,500 or more, access to "financial information" or "trade secrets," or "signatory power" over \$100 or more worth of assets per transaction.³¹³

The exceptions listed in the Illinois Act are reasonable for political and policy reasons. Without these exceptions, it is unlikely a bill of this nature would ever get passed. Further, there are some jobs where an individual's credit may be a useful tool for determining her ability to perform a particular task, such as when an employee has access to a substantial amount of business assets or cash. Some commentators suggest that individuals with adverse credit should not have access to sensitive information because they can trade this information for money, but this reasoning is unsupported and is a "slippery

³⁰⁶ Employee Credit Privacy Act, H.B. 4658, 96th Gen. Assemb., Reg. Sess. (Ill. 2010); *see also* Sharon Goott Nissim, *Stopping a Vicious Cycle: The Problems with Credit Checks in Employment and Strategies to Limit Their Use*, 18 GEO. J. POVERTY LAW & POL'Y 45, 73 (2010).

³⁰⁷ Employee Credit Privacy Act, H.B. 4658, 96th Gen. Assemb., Reg. Sess. (Ill. 2010).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

slope.”³¹⁴ Under this rationale, individuals who have filed for bankruptcy cannot be trusted around any business asset of monetary value, such as FedEx parcels. There is no evidence that an employee who has filed for bankruptcy is more likely to engage in theft than an employee who has never filed for bankruptcy.³¹⁵

The Illinois Act effectively avoids loopholes by listing specific circumstances that must be met before an employer can access a job applicant’s credit report. If the Act merely stated that an employer needs “an established bona fide occupational requirement” without the listed circumstances, there would be too much latitude for interpretation.³¹⁶ Further, in specifying a minimum dollar or value amount when a credit report is acceptable, the bill establishes a clear standard.³¹⁷ Also, the fifth exception applies to any position where a job applicant has access to confidential or financial information.³¹⁸ This exception addresses one of the most prominent employer arguments for using credit reports as a hiring criterion. Such an exception imbues banks with the authority to deny individuals employment who have filed for bankruptcy or who somehow indicate financial irresponsibility.

One of the most troubling aspects of the bill is found in the fourth exception: a satisfactory credit history is a bona fide occupational requirement if “the position is a managerial position which involves setting the discretion or control of the business.”³¹⁹ This exception has the potential to be a virtually unchecked loophole and could leave many job applicants vulnerable if courts do not interpret it strictly. California’s bill also includes an exception for “a managerial position.”³²⁰ Another problem with the Illinois Act is that it does not include banks or financial institutions in its definition of employers.³²¹ Banks and financial institutions are wholly exempt from discrimination regulations against job applicants who at some juncture filed for bankruptcy. This type of broad exception undercuts the purpose of the Act by permitting entire industries to freely engage in employment discrimination.

³¹⁴ Nissim, *supra* note 306, at 71.

³¹⁵ See *supra* Part I.B.2.

³¹⁶ H.B. 4658.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ A.B. 22, 2011 Leg., Reg. Sess. (Cal. 2011).

³²¹ H.B. 4658.

The Washington and Hawaii bills also allow companies to freely engage in employment discrimination.³²² For example, the Washington bill gives employers enormous latitude to conduct credit checks if they demonstrate that doing so is “substantially job related.”³²³ This vague direction provides too much leeway for judicial interpretation.

California’s bill is broader than the Illinois bill and has fewer exceptions.³²⁴ The only class of employer exempted from it is “certain financial institutions.”³²⁵ The California bill does not exempt positions including signatory power over business assets.³²⁶ The California bill was vetoed three times by Governor Arnold Schwarzenegger before it was passed.³²⁷ Governor Schwarzenegger stated, “This measure would . . . significantly increase the exposure for potential litigation over the use of credit checks.”³²⁸ A substantially similar bill was approved by a vote of five to one on June 22, 2011.³²⁹

Currently, fifty-eight bills have either been proposed or are currently pending in the 2011 legislative session to restrict a practice that is “discriminatory and unnecessary.”³³⁰ Federal action is an alternative means to solve the employment discrimination problem. It is preferable to state legislation given that the different states will inevitably provide varying standards. Therefore, compliance for national companies, for instance, would be exceedingly difficult. Below, this Comment will argue that since bankruptcy is a federal issue it requires a federal solution.

B. Proposed Federal Action: Equal Employment for All Act

The benefit of federal legislation is that certain states would never pass state legislation prohibiting employment discrimination by private employers. While employment decisions are usually local, regulation of credit checks in the bankruptcy context should be federalized because bankruptcies are dealt

³²² H.B. 31 25th Leg., Reg. Sess. (Haw. 2009); S.B. 5827, 60th Leg., Reg. Sess. (Wash. 2007).

³²³ S.B. 5827.

³²⁴ Nissim, *supra* note 306, at 74.

³²⁵ A.B. 22.

³²⁶ *Id.*

³²⁷ A.B. 482, 2010 Leg., Reg. Sess. (Cal. 2010); A.B. 943, 2009 Leg., Reg. Sess. (Cal. 2009); A.B. 2918, 2008 Leg., Reg. Sess. (Cal. 2008).

³²⁸ California Governor Veto Message, Bill A.B. 943 (2009).

³²⁹ A.B. 22.

³³⁰ NCSL.ORG, *supra* note 306; Lagorio, *supra* note 252. The fifty-eight bills have been proposed by twenty-eight states and the District of Columbia.

with under federal law. Employment discrimination against debtors is already a federal issue pursuant to the Bankruptcy Code.³³¹ Arguably, private employers' rights would be limited by more expansive federal bankruptcy legislation, but consumer expectations and overall economic health are overriding factors that must be considered. In this Subpart, this Comment will examine proposed federal legislation that mirrors the Illinois Act. This Comment will discuss the merits of the proposed legislations. Lastly, this Comment will appraise whether this legislation is likely to pass and what initiatives are necessary to protect debtors from employment discrimination.

Proposed federal legislation is similar to state laws in states like Illinois and California.³³² The Equal Employment for All Act (EEA Act) restricts when an employer can use credit reports as a hiring tool.³³³ A private employer may use a credit report when evaluating a job applicant if the job entails a "supervisory, managerial, professional or executive position at a financial institution" or if the job requires national security or FDIC clearance.³³⁴ Commentators praise the exceptions in EEA Act for "striking an ideal balance between reducing harmful effects of the credit check and maintaining financial security of institutions."³³⁵ This bill avoids overly broad assumptions about individuals who have filed for bankruptcy while allowing certain employers to use this information when appropriate.

The EEA Act strives to prevent employment discrimination by limiting employers' right to request job applicants' consumer credit reports.³³⁶ The impetus to pass the EEA Act came from the negative effect the economic crisis has had on job applicants.³³⁷ These victims of the economic crisis are already

³³¹ See 11 U.S.C. § 525 (2006).

³³² See Equal Employment for All Act, H.R. 321, 112th Cong. (2011); A.B. 22; Employee Credit Privacy Act, H.B. 4658, 96th Gen. Assemb., Reg. Sess. (Ill. 2010).

³³³ H.R. 321.

³³⁴ *Id.*

³³⁵ Nissim, *supra* note 306, at 75. In July 2009 Representatives Steve Cohen and Luis Gutierrez co-sponsored the EEA Act to address failings in the FCRA. Equal Employment for All Act, H.R. 3149, 111th Cong. (2009).

³³⁶ Stephen Broderick, *Congressmen Cohen and Gutierrez File Bill to Remove Financial Barriers to Employment*, WEBSITE OF CONGRESSMAN STEVE COHEN: 9TH DIST. TENN. (July 31, 2009), <http://cohen.house.gov/index.php?option=content&task=view&id=914&Itemid=25>.

³³⁷ *Id.* The EEA Act has garnered support from thirty-seven members of Congress. *H.R. 321: Equal Employment for All Act*, GOVTRACK.US (Feb. 4, 2012), <http://www.govtrack.us/congress/bill.xpd?bill=h112-321>. In addition, advocacy groups like the National Consumer Law Center, the U.S. Public Interest Research Group, the NAACP, the Asian American Justice Center, and the National Employment Lawyers Association are in favor of the EEA Act. Broderick, *supra* note 336. Advocacy groups are pushing for the EEA Act's passage because it would be integrated into the FCRA as a way to unambiguously protect job applicants. One

feeling the hardships of financial instability. Having a bankruptcy shadow trail them as they attempt to get back on their feet only compounds the problem. While the bill was not passed into law during the 2009 to 2010 congressional session, Representative Steve Cohen reintroduced the bill on January 19, 2011 in Congress's current session.³³⁸ As of March 23, 2011, the EEA Act was under the review of the Subcommittee on Financial Institutions and Consumer Credit.³³⁹ Because the EEA Act must pass through the House and Senate, it will face scrutiny, which may weaken the bill if it is eventually passed.

The EEA Act states in pertinent part: "a prospective employer . . . may not use a consumer report . . . or cause a consumer report . . . to be procured with respect to any consumer where any information contained in the report bears on the consumer's creditworthiness, credit standing, or credit capacity for employment purposes."³⁴⁰ If the EEA Act becomes law, this limitation on employers cannot be waived by a job applicant's authorizing the procurement of her consumer credit report.³⁴¹ The EEA Act lists certain exceptions where an employer can use a consumer report if an individual is applying for a high-level position at a financial institution or is seeking employment with certain government agencies.³⁴² An excepted employer must still conform to other sections of the FCRA mandating disclosure and notification when adverse action is taken because of the information found within the report.³⁴³

Some commentators have criticized the EEA Act for including overly narrow exceptions.³⁴⁴ Critics suggest that non-financial firms whose employees manage money should be included in the list of exempt employers.³⁴⁵ This would include retail stores or call centers where credit card information is given over the telephone. Small businesses are major opponents of the EEA Act. Small businesses claim that they are especially vulnerable to employee

commentator has argued that the EEA Act will also benefit society as a whole because disbursement of data that misrepresents individuals is a social injustice. Desmond, *supra* note 156, at 924.

³³⁸ *H.R. 3149: Equal Employment for All Act*, GOVTRACK.US (Feb. 4, 2012), <http://www.govtrack.us/congress/bill.xpd?bill=H111-3149>.

³³⁹ *H.R. 321: Equal Employment for All Act*, THOMAS.LOC.GOV, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:/temp/~bdYQKF> (last visited Feb. 4, 2012).

³⁴⁰ *Equal Employment for All Act*, H.R. 321, 112th Cong. (2011).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ Liz Wolgemuth, *Should Your Credit Report Cost You a Job?*, U.S. NEWS & WORLD REP., July 29, 2009.

³⁴⁵ *Id.*

fraud.³⁴⁶ By not allowing adverse credit history as a bar to employment, small businesses argue that they become more vulnerable to employee theft.³⁴⁷ Not only small businesses, but also private employers, find the EEA Act, at least in its proposed form, problematic. Employers also argue that there is a correlation between how an individual manages her own finances and her ability to manage the finances of her employer, and thus the potential employer should have access to such information.³⁴⁸ This Comment has shown this argument is unsupported.³⁴⁹

To pass the EEA Act, pioneers of this reform will have to overcome misconceptions about the causes of bankruptcy and the relevance of a bankruptcy filing to job qualifications. Public awareness is paramount to triumph over the bankruptcy shadow. The vicious cycle of bankruptcy can only be stopped when credit reports are used in a way that reflects the value of the information they provide. As it stands, credit reports have been used, and continued to be used, by private employers for an unintended purpose. It is time to pierce the veil of the credit report's perceived, yet unsubstantiated, value to private employers and amend § 525(b).

CONCLUSION

In Greek mythology, Sisyphus is punished for eternity to carry a boulder to the top of a mountain only to watch it roll back down and start this task again.³⁵⁰ The Gods chose this fate for Sisyphus because “they had thought with some reason that there is no more dreadful punishment than futile and hopeless labor.”³⁵¹ Job seekers who have gone through bankruptcy are punished similarly. They struggle to apply for jobs with the promise of a “fresh start,” but like Sisyphus, they realize their efforts are futile and have no choice but to repeat this struggle.

Private employers, who are increasingly using credit reports to disqualify job applicants who have filed for bankruptcy, precipitate a problem that must be addressed. While passage of the EEA Act would ensure that individuals

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *See supra* Part III.A.2.a–c.

³⁵⁰ ALBERT CAMUS, *THE MYTH OF SISYPHUS* (1942), *reprinted in* *THE MYTH OF SISYPHUS AND OTHER ESSAYS BY ALBERT CAMUS* 119 (Justin O'Brien trans. 1969).

³⁵¹ *Id.*

filing for bankruptcy are not victims of employment discrimination,³⁵² the EEA Act was buried during the last congressional session, and it is likely that Congress will continue doing so in perpetuity. Individual state laws are a temporary solution, but most of the states' enacted laws provide too much latitude for interpretation. This leaves the jobless in the same precarious situation they were in before the state law was passed. The jobless are repeatedly punished and must continue to fruitlessly apply themselves when there is only a slight chance of succeeding.

Reforming § 525(b) of the Bankruptcy Code, as one commentator has proposed, is the most practical means of protecting job seekers who have filed for bankruptcy.³⁵³ Section 525(b) should be amended so that individuals applying for private sector positions are treated the same as those applying for government jobs. This would require adding a mere three words to 11 U.S.C. § 525(b).³⁵⁴ The revised subsection should read:

No private employer may terminate the employment of, *deny employment to*, or discriminate with respect to employment against an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt

This reform will undoubtedly lead to treatment of debtors that upholds the fresh start theory. If bankrupt debtors are better protected by the language of the Bankruptcy Code, employers will demand that the credit reporting agencies furnish "clean" bankruptcy reports. Credit reporting agencies will have to redact bankruptcy information from credit reports to prevent employers from being tarred with bankruptcy litigation claims. Employers and credit reporting agencies working together to comply with the amended § 525(b) is a natural cycle of responses that will hopefully ameliorate the fresh start problem.

Resolution of this issue is crucial for another reason. Employers' use of credit histories as an evaluative tool has caused a spike in litigation and arbitration.³⁵⁵ This is because of the fact that as employees are becoming increasingly vulnerable, disgruntled job seekers have nothing to lose by suing

³⁵² Equal Employment for All Act, H.R. 3149, 111th Cong. (2009).

³⁵³ See Jina Kim Yun, *The Danger of Being Fired: Section 525(b)'s Disproportionate Effect on Older Workers and a Call to Amend*, 7 NW. J. L. & SOC. POL'Y 196, 216–17 (2012).

³⁵⁴ See 11 U.S.C. § 525(b) (2006).

³⁵⁵ Rod Fliegel & Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT (Oct. 13, 2011), <http://www.shrm.org/LegalIssues/StateandLocalResources/Pages/CaliforniaJoinsStatesRestricting.aspx>.

employers who they feel have treated them unfairly. While this area of law is in flux, employers should be cautious and take steps to avoid liability. If an employer feels that obtaining a credit report is necessary to evaluate a particular job applicant, she should be certain that she can demonstrate a strong correlation between the applicant's credit history and the job.³⁵⁶ Employers that are financial institutions or that are trying to fill positions that entail access to large amounts of cash have stood up in court.³⁵⁷ The EEOC suggests that private employers avoid using credit history as a hiring criteria altogether, as this practice exposes the employer to liability under the disparate impact doctrine.³⁵⁸ This is especially true if an employer is denying an applicant based *solely* on her bankruptcy status.³⁵⁹

One commentator suggests an alternative solution to the three-word addition to § 525(b) of “deny employment to.”³⁶⁰ She proposes that Congress change the bankruptcy discrimination test from one that relies on the “sole cause” to a “motivating factor” test.³⁶¹ This proposal does not go far enough. The main reason to amend § 525(b) is to prevent employment discrimination against bankrupt debtors and provide a fresh start to debtors applying for private sector jobs. This would mirror the protection provided to bankrupt debtors applying for public sector jobs. The “motivating factor” test does not safeguard job applicants applying for private sector jobs. Instead, it offers another vague test that requires further case law to clarify what falls within the definition of a “motivating factor.” Moreover, augmenting the bankruptcy discrimination test entails not only an examination of § 525(b), but also an understanding of § 525(a). It is a significantly more complicated initiative to amend the entire statute, rather than supplement subsection (b) with three words. Further, the recommended remedial provisions are merely a Band-Aid for a problem that is comparable to a festering wound. The only solution for the bankrupt debtor is for Congress to amend § 525(b) to mirror § 525(a).

Although public awareness and support from influential administrative agencies like the EEOC are critical to reform § 525(b), the most powerful

³⁵⁶ Nobile & Murphy, *supra* note 164.

³⁵⁷ *Id.*

³⁵⁸ FAIR EML. PRAC. MANUAL, EEOC, GUIDE TO PRE-EMPLOYMENT INQUIRIES 8A (1992).

³⁵⁹ Myers v. TooJay's Mgmt. Corp., 419 B.R. 51 (Bankr. M.D. Fla. 2009), *aff'd*, 640 F.3d 1278 (11th Cir. 2011); *see also* Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1269 (9th Cir. 1990) (holding that because knowledge of the bankruptcy was not the sole factor influencing B & W, the summary judgment for B & W was proper).

³⁶⁰ *See* Yun, *supra* note 353, at 217.

³⁶¹ *See id.*

influence for preventing employment discrimination against bankrupt debtors is the courts. Looking at the history of how § 525 came into being and how Congress showed a willingness to codify *Perez*, we can see that the courts have the power to influence change through their opinions.³⁶² While it is understandable for a judge to want to adhere to the letter of the law, it is also admirable for the judge to issue an opinion that addresses the harmful effects of § 525(b). Hopefully, the culmination of supportive judicial opinions, along with public and administrative pressure, may be enough to vanquish the bankruptcy shadow.

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³⁶² See S. REP. NO. 95-989, at 81 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5867.

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