

BANKRUPTS NEED NOT APPLY: SOUND HIRING POLICY OR DANGEROUS PROPOSITION?

by

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ABSTRACT

The downturn in the economy has caused an increase in two areas: consumer bankruptcy filing rates and unemployment. It is clear in the literature that unemployment is a cause of consumer bankruptcy. What has become an issue, particularly in light of increased bankruptcy filings and unemployment, is the impact of an individual's status as a debtor or former debtor on their ability to obtain employment in the private sector. More and more private employers are using bankruptcy status as a tool in the hiring decision process. The use of bankruptcy status in the hiring decision process may actually lead to longer periods of unemployment and higher bankruptcy filing rates. This paper explores the legal ramifications of private employers using bankruptcy status as a tool, as well as the reasons the use of bankruptcy status may actually be beneficial in some hiring contexts.

I. INTRODUCTION

Most prudent employers engage in some type of background check or investigation of job applicants. In fact, background checks are a critical part of the hiring process.¹ The benefits are self-evident. The reasons range from the need of employers to weed out applicants that have a history of unlawful or irresponsible behavior which may be an indicator of work performance, to efforts to protect the safety of the workplace, and to minimize negligent hiring claims² in the future.³ For example, if a bank is hiring tellers, a thorough background investigation will help screen out applicants that have been conviction of crimes, such as embezzlement.⁴ Or if a firm is hiring an accountant and a pre-employment investigation would have revealed accounting irregularities in the potential employee's prior positions, then the hiring firm may very well be liable if problems arise in the future.⁵

The scope of the investigation varies a great deal. Some firms conduct limited in-house investigations and others have very extensive investigations with the retention of outside private investigators.⁶ With the Internet the availability of information is much more accessible for virtually all employers. For example, "Googling" prospective employees can provide a vast amount of private information.⁷ In fact, at least one-half of U.S. employers utilize the Internet in the pre-employment screening process.⁸

Pre-employment investigations often wander into thorny areas such criminal checks and examination of the applicant's credit report.⁹ It is generally permissible for criminal convictions to be considered as part of the hiring process¹⁰ when the records are related to and considered a business necessity.¹¹ Likewise, as long as the employer complies with the Fair Credit Report Act,¹² as well as applicable state laws,¹³ examination of the credit report is a permissible practice and offers rich information about the applicant.¹⁴ The credit report can provide information to employers including verification of social security numbers, prior employment, evaluate honesty and accuracy of information in resumes, and other detailed information may be gleaned from the credit report.¹⁵

The credit report or other aspects of a background investigation may reveal a bankruptcy case of a prospective employee. The treatment and weight of this information on the hiring decision varies from employer to employer. Some companies consider a past or present bankruptcy in the hiring process. And some businesses have a company policy in place of not hiring individuals with bankruptcies on their credit report.¹⁶

There is a concern that policies that use bankruptcy as a determinative factor in hiring, although it may advance the interest of the employer, it will have a detrimental impact an individual's fresh start afforded by the Bankruptcy Code.¹⁷ The discharge under the Code¹⁸ is needed to facilitate the fresh start,¹⁹ a primary purpose of the Bankruptcy Code.²⁰ To implement this fundamental goal, the Code provides certain protection from discrimination to individuals who are debtors or were debtors,²¹ particularly in the employment arena. The Code provides different protections in the employment arena depending on whether the actor involved is a governmental agency²² or a private employer.²³ Arguably, the interest of employers conflicts with, if not the statutory language of the Code, the spirit and intent of anti-discrimination provisions applicable to private employers. Certainly the ability to find gainful employment, if cut off due to bankruptcy status or history, would limit a person's fresh start.

The Bankruptcy Code contains anti-discrimination provisions of debtors and former debtors. Many suits have been brought against prospective employers for not hiring the individual based on bankruptcy. Virtually all cases, except for one,

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have found that the hiring decision of private employers is not protected under the Bankruptcy Code.²⁴ The statutory analysis of these Courts is straightforward²⁵ and most do not delve into the public policy that supports such decisions. In fact, there are sound policy reasons for permitting discrimination in this context. To date, little has been written advocating this practice, whereas a great deal has been written arguing for expanding the bankruptcy anti-discrimination provisions to include hiring either through legislation or caselaw. And, recently arguments have been raised that even if such practice is permitted under bankruptcy law, it may violate Title VII.²⁶

This paper fills the gap in the literature and offers strong reasons supporting an employer's decision to base hiring decisions, at least in part, on bankruptcy status or history. This position is less than popular and certainly a politically incorrect position to take, but none the less, there are valid bases for considering bankruptcy status in the hiring process. Following this Introduction we examine the Bankruptcy Code anti-discrimination statutory framework. Section III provides an analysis of potential Title VII claims in using bankruptcy status in the hiring process and Section IV considers relevant state law. The policy rationales and reasons for using bankruptcy status are offered in Section V. Section VI provides the Conclusion and considerations for employers to avoid violating Title VII when using bankruptcy status as a screening tool.

II. BANKRUPTCY CODE FRAMEWORK AND ANALYSIS

Section 525²⁷ of the Bankruptcy Code provides protections to individuals against some discriminatory actions by employers.²⁸ The protections afforded depend on whether the employer is a private or governmental employer.²⁹ Governmental employers are subject to the requirements of § 525(a) which provides as follows:

(a) ... a governmental unit may not ... *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.³⁰

The protections afforded under this section are quite broad. Discrimination is prohibited in hiring, termination and other aspects of employment if the employer is a governmental unit.

Private employers are subject to the requirements of § 525(b) which provides as follows:

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

- (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
- (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
- (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.³¹

Section 525(b) clearly applies to termination, but what absent is any reference to hiring as under § 525(a).³² What is problematic is the statutory phrase "with respect to employment" as this may, under a broad reading, arguably include hiring.³³ However, the broad reading fails when basic tenants of statutory construction are applied to § 525. The Third Circuit Court of Appeals recently analyzed the issue and found:

Section 525(a) provides that the Government may not "*deny employment to, terminate the employment of, or discriminate with respect to employment against*" any person that has been bankrupt. (emphasis added). In § 525(b), on the other hand, Congress omitted the language prohibiting a private employer from "*deny[ing] employment to*" a person that has been bankrupt. As the Supreme Court stated in *Russello*, "[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."³⁴

Recently, both the Fifth Circuit Court of Appeals³⁵ and the Eleventh Circuit Court of Appeals³⁶ joined with the Third Circuit on this issue. In fact, all courts, except for one,³⁷ have found that bankruptcy can be used in the hiring decision process by private employers without violating the Bankruptcy Code.

III. TITLE VII

Although the use of a job applicant's bankruptcy status may not run afoul of the Bankruptcy Code, there may be issues that arise under Title VII. Title VII, of the Civil Rights Act of 1964,³⁸ as enacted, prohibited intentional employment

discrimination based on “race, color, religion, sex or national origin.”³⁹ The 1964 Act did not expressly prohibit unintentional practices that resulted in discrimination.⁴⁰ After 1964 the courts interpreted Title VII broadly so as to include both intentional discrimination, i.e. disparate treatment, as well as practices that resulted in discrimination, i.e. disparate impact.⁴¹ In 1971 the Supreme Court, in *Griggs v. Duke Power Co.*,⁴² interpreted Title VII “to prohibit, in some cases, employers’ facially neutral practices that, in fact, are ‘discriminatory in operation.’”⁴³ The Civil Rights Act of 1991⁴⁴ codified *Griggs* and expressly provides for disparate impact claims.⁴⁵ A plaintiff can show an unlawful employment practice if it is demonstrated that the employer used “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity...”⁴⁶

There is a growing concern that using bankruptcy status as a proxy for employment hiring decisions may give rise to disparate impact claims.⁴⁷ If the employment practice excludes individuals in a protected class, such as blacks or Hispanics, from employment, without any basis for relying on bankruptcy status for the job in question,⁴⁸ a disparate impact claim under Title VII may be viable.

The EEOC expressly recommends avoiding pre-employment inquiry into bankruptcy, absent such information being essential to the position. EEOC prohibited practices provides:

Inquiry into an applicant's current or past assets, liabilities, or credit rating, including *bankruptcy* or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question.⁴⁹

To date, there do not appear to be any EEOC cases based on employing bankruptcy status. However, the EEOC has stepped up prosecution of disparate impact cases recently, particularly in the economic status area pertaining to the use of credit history. Bankruptcy status or history is not that far removed. In late 2010 the EEOC filed suit against Kaplan Higher Education for the practice of rejecting job applicants based on credit history.⁵⁰ The policy is argued to not have any justifiable business necessity and result in a discriminatory impact on blacks, and thereby, violate Title VII.⁵¹ The case is in the early phase of litigation. Even so, it is not a very far leap for the EEOC to bring the use of bankruptcy status or history into this type of litigation.

IV. STATE EMPLOYMENT AND OPPORTUNITY LAWS

Even if a prospective employer does not violate the Bankruptcy code or Title VII, caution must be used to ensure that there are no state-level equal employment opportunity laws in place that prohibit using bankruptcy as part of the hiring decision process. For example, three states, Hawaii, Illinois, and Oregon place prohibitions on the use of credit reports and credit histories in their hiring of employees. In Hawaii employers cannot discriminate based on garnishments or bankruptcy.⁵² The Hawaii statute recites such a prohibition “unless the information in the individual’s credit history or credit report directly relates to a bona fide occupational qualification...”⁵³

The Illinois act also provides that the prohibition does not prevent the utilization of one’s credit reporting history if a satisfactory history is a bona fide requirement for a position or for a particular group of one’s employees. The Illinois statute goes on to explain that for a credit history to be a bona fide occupational requirement one of the following must be present: state or federal requirement that the person in the position be bonded; the position involves custody or a lack of supervision with regard to cash or marketable assets of \$2,500 or more; signatory power over assets of \$100 or more per transaction; management position controlling the business; access to personal, confidential and financial information, assets or security information of the state or nation; the state requires a credit history as a bona fide occupational requirement and the applicant’s credit history is required or exempt under state and federal law.⁵⁴

The Oregon law makes it unlawful to use or obtain information in a credit history of an applicant unless the information is substantially job related and the reason for such use is disclosed to the prospective employee or employees in writing. Exceptions are made for the following: employers of federally insured credit unions and banks; if the use of such history is mandated by state or federal law; certain public safety officers; the information is substantially job related and the employers need for such information is disclosed to the employee or prospective employee in writing.⁵⁵

V. RATIONALE FOR CONSIDERING BANKRUPTCY STATUS

Finding the right employee is not always easy.⁵⁶ Hiring the wrong individual is quite costly for employers as they have to go through the hiring process again.⁵⁷ Effective hiring requires finding the best candidates for a particular position.⁵⁸ This requires ensuring that selection criteria match the hard and soft skills needed in the position.⁵⁹ The job description should be carefully written to match skills needed.⁶⁰ The soft skills needed, such as responsibility and honesty, are more difficult to detect in the hiring process. A past bankruptcy may indicate deficiencies in soft skills or in attributes the

employer seeks. A past bankruptcy may serve as an indicator—in effect a proxy—of characteristics that an employer simply may not want in a prospective employee.

Just as with credit checks, bankruptcy status should not be a litmus test,⁶¹ but it can provide valuable information. Credit checks can show how a person handles their finances.⁶² For example, large debts from numerous sources can indicate information about judgment or ability of a person to manage their financial affairs.⁶³ This information may be relevant to certain positions involving cash, employer finances or property.⁶⁴

Bankruptcy status or history can indicate many of these same things that credit history does. It may indicate “that the debtor is a poor manager; faces imminent personal or business instability that threatens its ability to fulfill its contracts or to do her job; is subject to financial pressures that will be conducive to blackmail or other financial temptations; or other similar problems.”⁶⁵ However, as others have correctly recognized, these come close to stereotypes which may hold true and untrue in certain situations.⁶⁶ Nevertheless, the information is valuable to employers and it should be within their discretion on how to use the information.

For example, a past bankruptcy may show a person is irresponsible. Some debtors simply live beyond their means and get caught up in the trap of consumer credit. This behavior may indicate a lack of maturity, judgment or irresponsibility. Perhaps, a single prior case may not show this, but what if the applicant has had two, three, four or more cases. At some point reasonable inferences about maturity, judgment and irresponsibility should be able to be drawn by a prospective employer.

A great deal may be revealed with a closer examination of a bankruptcy case. For example, the information in the bankruptcy case may indicate dishonesty. What if on the face of Schedules I & J it shows the applicant’s budget is prima facie implausible? If it does not show dishonesty in the schedules, it certainly shows a lack of maturity, judgment and discipline, that an employer may want in an employee. What if in the prior case there were dischargeability actions based on fraud⁶⁷ and some debts were not discharged? This would be most relevant in jobs in which employees will be entrusted with the employers assets. What if the debtor had a non-dischargeable debt for a willful and malicious injury?⁶⁸ Not all bad behavior will rise to level of criminal conduct. Some may result in civil liabilities and be revealed in an adversary proceeding contesting the dischargeability of a debt.

The type of debt may indicate something. For example, what if most of the debts are gambling debts? Addictive personalities may be attributes that a potential employer would be interested in. What if the debt was largely unpaid income taxes or trust fund taxes? This would be of interest to positions of trust. What if the debt was largely unpaid domestic support obligations? The failure to honor this obligation may indicate certain characteristics that an employer may not want.

Granted the type of employment position at issue will go a long way to indicate whether the information inferred from the bankruptcy is relevant to the hiring inquiry. Consider the bank teller example from the introduction. Assume the criminal component of the background check revealed no criminal history, but the credit report showed a bankruptcy or two and a pattern of delinquent accounts. Certainly that would be relevant in hiring someone, albeit a bank teller, that will be entrusted with valuable assets. Reasonable inferences should be permissibly drawn by the employer to allow them to determine if the bankruptcy history is a factor that is determinative.

VI. CONCLUSION

Under the Bankruptcy Code, private employer screening policies that use bankruptcy as a factor are not illegal. Arguments made under the Bankruptcy Code that such screening policies by private employers are illegal are not supported by the appellate caselaw and run contrary to basic statutory construction arguments.⁶⁹ Even if the anti-discrimination policy that supports a fresh start should outweigh the interests of employers, that is an issue for Congress, not the courts. As the Supreme Court has written in another context: “[a]chieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts.”⁷⁰

Although there is little exposure under the Bankruptcy Code, employers must be cognizant of other potential legal issues. Title VII and state-level EEO concerns are valid and any policy using bankruptcy in the screening process must be clearly linked to the underlying job. Employers must weigh what bankruptcy status may reveal in the screening process with the costs of ensuring a fair application of that screening tool. Ensuring that the screening tool does not have a disparate impact or that there is a valid business reason for the tool is challenging. Employers may want to only employ bankruptcy status after interviews and/or conditional offers. Credit checks are typically conducted at this stage by employers that use them and this will limit the potential adverse impact since applicants are not blindly screened out because of the bankruptcy status.⁷¹ However, the rich information that can be revealed from bankruptcy, bankruptcy status may be a valuable tool in some hiring contexts.

FOOTNOTES

¹ See Denlinger, Rosenthal & Greenberg, a Legal Professional Association, *Should You Run Background Checks?*, 12 No. 9 OHIO EMP. L. LETTER 5 (September 2001).

² This tort is gaining in acceptance, particularly “when a reasonable inquiry. . . would have revealed a serious deficiency. . . [and] when a special relationship imposes on the employer the duty to take care in hiring. . .” Andrew J. Ruzicho & Louis A. Jacobs, *Personal History or Background Investigation- -Controlling Law*, 1 EMPLOYMENT PRACTICES MANUAL § 4:13 (March 2010).

³ See, e.g., Katherine Parker and Daniel Saperstien, *The Tide Turns Against Background Checks: How Employers Should Approach the Screening of Applicants and Employees*, 16 NO. 4 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE 2 (JULY/AUGUST 2010).

⁴ Denliger, *et al.*, *supra* note 1.

⁵ See Robert Seiden, *Pre-Employment Screenings are Critical For Law Firms*, 26 NO. 2 LEGAL MGMT. 38 (March/April, 2007).

⁶ *Id.*

⁷ See Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW 19, 19-20 (Summer, 2007).

⁸ *Id.* at 20.

⁹ Some estimate that over thirty-percent of retail industry companies use pre-employment credit check. 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. SAN. L. REV. 907, 907-908 (2010)(citation omitted).

¹⁰ A distinction is made between convictions and arrest records. Criminal convictions are permitted to be used in the hiring process, whereas some states do not permit consideration of arrest records that do not result in a conviction. See Sprague, *supra* note 7, at 28 (citations omitted).

¹¹ See Emily J. Carson, Note, *Off the Record: Why the EEOC Should Change its Guidelines Regarding Employers’ Consideration of Employees’ Criminal Records During the Hiring Process*, 36 J. CORP. L 221, 226 (Fall 2010).

¹² 15 U.S.C. § 1681 *et seq.*

¹³ Four states-Washington, Hawaii, Oregon and Illinois-regulate the use of credit checks in the employment hiring process. See Devata, *infra* note 61.

¹⁴ See Parker and Saperstin, *supra* note 3. The Fair Credit Report Act requires written notification to the prospective employee if a report is obtained, as well as notifying the prospective employee if the report is used to make an adverse decision in the hiring process. See Sprague, *supra* note 7, at 30 (citations omitted).

¹⁵ See Desmond, *supra* note 9, at 910.

¹⁶ For example, TooJay’s Management Corporation has such a policy that is applicable to managerial applicants. See Meyers v. TooJay’s Management Corp., 419 B.R. 51, 55-56 (M.D. Fla. 2009)(Based on this policy a job applicant with a prior bankruptcy was denied employment.).

¹⁷ One commentator characterized the concern as expressed by one court as follows: “[A]lloing a private employer to discriminate in hiring based solely on a bankruptcy filing was a direct impediment toward the attainment of a ‘fresh start’.” Michael R. Herz, *The Scarlet D: Bankruptcy Filing and Employment Discrimination*, 30 Am. Bankr. Inst. J. 16 (2011).

¹⁸ See 11 U.S.C. §§ 727, 1141, 1228, & 1328.

¹⁹ See Kristin L. Ballobin, *Line Drawing and the Bankruptcy Discharge: Why Prepetition Stipulations are Enforceable but Prepetition Waivers are Not*, 59 U. KAN. L. REV. 369 (2001)(recognizing that the discharge is central to the debtor’s fresh start).

²⁰ *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). See also Ballobin, *supra* note 19, at 372 (“[T]he underlying purpose of the Code is to give the honest debtor a fresh start. . .”).

²¹ See 11 U.S.C. §§ 525(a),(b) & (c)(2006). The Code provides protection from discrimination in the employment arena, as well student loans that are guaranteed or insured by the government.

²² 11 U.S.C. § 525(a)(1979).

²³ 11 U.S.C. § 525(b)(1984).

²⁴ *Meyers v. TooJay’s Management Corp.*, 419 B.R. at 57 (“Except for one decision, all of the courts confronting this issue have held that § 525(b) does not encompass hiring decisions of private employers.”)(citations omitted). See also, HON. W. HOMER DRAKE, JR., BANKR. PRAC. FOR GEN. PRACTITIONER § 6.26 (WEST 2010)(“Most courts have concluded that discriminatory hiring is not prohibited by section 525(b).”)(citations omitted). See *Rea v. Federated Investors*, 2010 WL 370334 (W.D. Pa. 2010); *Burnett v. Stewart Title, Inc.* 2010 WL 1340609 (S.D. Tex. 2010); *In re Martin*, 2007 WL 2893431 (Bankr. D. Kan. Sept. 28, 2007); *Cord v. Skinner Nurseries, Inc.*, 2004 WL 2923845 (Bankr. M.D. Fla. 2004); *In re Stinson*, 285 B.R. 239 (Bankr. W.D. Va. 2002); *Fiorani v. CACI*, 192 B.R. 401 (.E.D.Va.1996); *In re Hardy*, 209 B.R. 371 (Bankr. E.D. Va. 1997); *Pastore v. Medford Savings Bank*, 186 B.R. 553 (D. Mass. 1995); *In re Briggs*, 143 B.R. 438 (Bankr. E.D. Mich. 1992); *In re Hopkins*, 81 B.R. 491 (Bankr. W.D. Ark. 1987); *In re Madison Madison Intern. of Illinois*, 77 B.R. 678 (Bankr. E.D. Wis. 1987). *Contra Leary v. Warnaco, Inc.*, 251 B.R. 656 (S.D.N.Y. 2000).

²⁵ A court recently characterized its analysis concluding that the private employer is not prohibited from denying employment based on bankruptcy status in terms of “[e]lementary principles of statutory construction and common sense.” *Meyers v. TooJay’s Management Corporation* __ F.3d __, 2011 WL 1843295 (11th Cir. 2011).

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- ²⁶ See e.g., Paula Burkes, *Q&A with Adam Childers Background Checks Monitored to Prevent Discrimination*, OKLAHOMAN, 4B, September 10, 2010 (recognizing that bankruptcy as a screening tool may lead to a disparate impact that violates Title VII of the Civil Rights Act of 1964).
- ²⁷ 11 U.S.C. § 525(a)-(b)(2006).
- ²⁸ Myers v. TooJay's Management Corporation, 2011 WL 1843295, at *4.
- ²⁹ *Id.*
- ³⁰ 11 U.S.C. § 525(a)(1979).
- ³¹ 11 U.S.C. § 525(b)(1984).
- ³² Fiorani v. CACI, 192 B.R. 401, 404-405 (E.D. Va. 1996). See also Myers v. TooJay's Management Corporation 2011 WL 1843295, at *5 ("The conspicuous difference between the two subsections is that § 525(a), the one applying to government employers, explicitly forbids them from either denying or terminating employment because of a bankruptcy, while § 525(b), the one applying to private employers, forbids them from terminating employment because of bankruptcy but says nothing about denying employment because of it.").
- ³³ Fiorani v. CACI, 192 B.R. at 405.
- ³⁴ Rea v. Federated Investors, 627 F.3d 937, 940-941 (3rd Cir. 2010) (quoting 464 U.S. at 23, 104 S.Ct. 296).
- ³⁵ See *In re Burnett*, ___ F.3d ___, 2011 WL 754152, at *2 (5th Cir. Mar. 4, 2011).
- ³⁶ See Myers v. TooJay's Management Corporation 2011 WL 1843295, at *5.
- ³⁷ Leary v. Warnaco, Inc., 251 B.R. 656 (S.D.N.Y. 2000).
- ³⁸ 42 U.S.C. § 2000e et seq.
- ³⁹ Ricci v. DeStefano, 129 S.Ct. 2658, 2672 (2009).
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L. Ed. 2d 158 (1971).
- ⁴³ Ricco v. DeStefano, 129 S. Ct. at 2672-2673 (citations omitted).
- ⁴⁴ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).
- ⁴⁵ Lewis v. City of Chicago, Ill., 130 S.Ct. 2191, 2197 (2010).
- ⁴⁶ *Id.* (citation omitted)
- ⁴⁷ See e.g., Sam Hananel, *Job-Screening Tactics Draw Critics*, BOSTON GLOBE, August 12, 2010, available at http://www.boston.com/jobs/news/articles/2010/08/12/job_screening_tactics_draw_critics/?rss_id=Boston+Globe++Today%27s+paper+A+to+Z.
- ⁴⁸ Title VII provides a business-necessity defense that employers can raise. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).
- ⁴⁹ EEOC Website, Prohibited Practices, available at http://www.eeoc.gov/laws/practices/inquiries_credit.cfm
- ⁵⁰ Maureen Downey, *EEOC Sues Kaplan Higher Ed for Unlawful Discrimination*, AJC GET SCHOOLED BLOG, December 22, 2010, available at <http://blogs.ajc.com/get-schooled-blog/2010/12/22/eeoc-sues-kaplan-higher-ed-for-unlawful-discrimination/>.
- ⁵¹ *Id.*
- ⁵² MERRICK T. ROSSEIN, J.D., CHAPTER 15. STATE AND LOCAL EEO AND OTHER WORKPLACE LAWS, 1 EMP. L. DESKBOOK HUM. RESOURCES PROF. § 15:14 (NOVEMBER 2010).
- ⁵³ Fair Employment Practices Act, Title 21, Chapter 378, EMPL. PRAC. GUIDE (CCH) P12-20, 025. 02.
- ⁵⁴ Employee Audit Privacy Act, P.A. 96-1425 (H. 4658), L, 2009, EMPL. PRAC. GUIDE (CCH) P 14-20, 036.03.
- ⁵⁵ Bureau of Labor Rules of Administrative Procedure, Chapter 839- Division 5. EMPL. PRAC. GUIDE (CCH) P 38-20, 127.60, sec. 839-005-0060.
- ⁵⁶ Max Messmer, *Learning to Spot Hiring Red Flags*, 113(1) BUSINESS CREDIT 16 (Jan/Feb 2011).
- ⁵⁷ See Jose Luis Romero, *Hiring Right: Tips for Finding Excellent Employees*, 20 No. 1 HEALTHCARE REGISTRATION 8 (October, 2010).
- ⁵⁸ *Id.*
- ⁵⁹ *Id.*
- ⁶⁰ See e.g., Camille Eber, *Making Good Hiring Decisions*, 49(10) AUTOMOTIVE BODY REPAIR NEWS 10 (October 2010)(recognizing the importance of the job description).
- ⁶¹ See e.g., Pamela Quigley Devata, Statement of Pamela Quigley Devata, Esq., Meeting of October 20, 1010 – Employer Use of Credit History as a Screening Tool (recognizing that credit checks should not be used as litmus test for hiring), available at <http://www.eeoc.gov/eeoc/meetings/10-20-10/devata.cfm#fn19>.
- ⁶² *Id.*
- ⁶³ *Id.*
- ⁶⁴ *Id.*
- ⁶⁵ Karen Cordry, *Section 525: Policy Thoughts about Discrimination Against Debtors*, 2010 ANN. SURV. OF BANKR. LAW 4, §II.a.ii. (2010).
- ⁶⁶ See e.g., *Id.*

⁶⁷ See 11 U.S.C. §§ 523(a)(2) & (4) (2006).

⁶⁸ See 11 U.S.C. §§ 523(a)(6) (2006).

⁶⁹ See *Myers v. TooJay's Management Corporation* 2011 WL 1843295 , at *5-8.

⁷⁰ *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 13-14, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

⁷¹ See *Devata*, *supra* note 61 (recognizing that 87% of employers use credit check after interviews and/or making offers and this practice greatly limits the opportunity for an adverse impact).