



Employment Law News Alert

Informing clients and friends of the firm about legal trends, news or items of interest.

Private Employers Can Deny Employment to Applicants who Have Filed For Bankruptcy



The Eleventh Circuit Court of Appeals ruled last week that the Bankruptcy Code does not prohibit a private employer from denying employment to an individual on the basis that the individual is or has been in bankruptcy. In *Myers v. TooJay's Mgmt. Corp.*, No. 10-10774 (11th Cir. May 17, 2011), the Court acknowledged that the Code prohibits both private and government employers from terminating an employee because the employee has filed for bankruptcy. However, while the Code also prohibits government employers from denying employment based on the job applicant's bankruptcy, the *TooJay's* Court found that the same proscription does not apply to private employers.

In the *TooJay's* case, the prospective employer asked the applicant to take part in a two-day on-the-job evaluation ("OJE"), during which he was asked to sign a release for a background check, including a credit history review. At the end of the OJE, the applicant was scheduled to begin work. There was disputed testimony over whether the applicant had been told that hiring was contingent on the background check. The offer was rescinded after the background check revealed that the applicant had previously filed for bankruptcy because it was "*TooJay's* policy not to hire people who had done that."

The applicant filed suit, alleging that *TooJay's* had violated 11 U.S.C. § 525(b) by refusing to hire him or, alternatively, terminating him because of his prior bankruptcy. The district court granted summary judgment in favor of *TooJay's* on the refusal to hire claim, but let the wrongful termination claim go to the jury, which found no employment relationship between the applicant and *TooJay's*.

On appeal, the Court found that the applicant's "contrary evidence" was sufficient to support the jury's finding that no employment relationship was formed. As to the refusal to hire claim, the court compared § 525(a), which applies to government employers, to § 525(b), which applies to private employers. The Court agreed with the trial court that:

A comparison of the words used in subsections (a) and (b) demonstrates that subsection (a) prohibits government employers from "deny[ing] employment to" a person because of his or [her] bankrupt status, whereas subsection (b) does not contain such a prohibition for private employers. Rather, the private sector is prohibited only from discriminating against those persons who are already employees.

The Court reasoned that if "*TooJay's* were a governmental unit, [the applicant] would have a refusal to hire claim; because it is not, he does not." Accordingly, the Court affirmed the judgment below. The take away is that a private employer may refuse to offer employment to an individual on the basis that the individual is or has been in bankruptcy. It is still the law that an employer may not fire an employee because the employee filed for bankruptcy.

The Schwarzberg & Associates Employment Law Compliance and Defense Practice Group is here to help you defend unemployment claims, develop policies, procedures, and proactive responsive measures to these and other employment related issues. We also provide our clients with our employment law “hotline” which allows our clients, for a flat fee, to ask our employment attorneys general questions to assist in their compliance efforts. Please do not hesitate to contact a member of the Schwarzberg & Associates Employment Law Group: Steve Schwarzberg, Carrie Cherveney, Kristin Ahr, Kerry Raleigh, or Grace Murillo at 561-659-3300 to obtain more information about our firm and its various employment law compliance and defense services.



Named a “Go-To Law Firm” for Employment Law
by *Corporate Counsel* magazine, 2007 - 2010.

Esperanté Building • 222 Lakeview Avenue - Suite 210 • West Palm Beach, FL 33401

Phone: (561) 659-3300 • Fax: (561) 659-1911

www.schwarzberglaw.com