EVALUATION OF THE PROPOSAL TO AMEND THE BANKRUPTCY CODE TO PROHIBIT PRIVATE EMPLOYERS FROM REFUSING TO HIRE APPLICANTS ON THE BASIS OF BANKRUPTCY FILING

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I. INTRODUCTION

A fundamental tension exists within § 525 of the United States Bankruptcy Code. On one hand, there is subsection (a), which applies to governmental units. It prohibits discrimination in licensing and employment—including hiring—if that applicant, or licensed or employed person, has filed for bankruptcy. On the other hand, there is subsection (b), which applies to private employment; it does not extend such protection to applicants, but it does protect currently employed persons. Under both subsections, factors other than bankruptcy may be considered in the employment context. Over twenty years of case law have sustained the interpretation that subsection (b) does not protect applicants for employment in the private sector. However, various parties have recently proposed amending subsection (b) to extend protection to applicants for employment in the private sector who have filed for bankruptcy. Part I of this paper examines the judicial history of subsection (b). Part II examines the practical and ethical considerations of amending subsection (b). Part III concludes the article by suggesting that since there are other protective statutes already in place and applicants' financial histories are not actually being abused employers, there is no reason to amend subsection (b).

II. JUDICIAL HISTORY

In *Perez v. Campbell*,[1] the United States Supreme Court held that a state cannot refuse to renew a bankrupt tortfeasor's driver's license in order to force repayment.[2] This decision was the basis for the anti-discrimination protections in § 525 of the U.S. Bankruptcy Code enacted in 1978, which expressly protects individuals against bankruptcy discrimination by government entities.[3] The legislature codified *Perez* in § 525 to preserve the congressional policy of ensuring a fresh start for debtors.[4] Subsequent court decisions refused to apply § 525 to the private sector. In 1984, § 525 was amended to add protection for private sector employees who had filed for bankruptcy.[5]

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1. 402 U.S. 637 (1971).
2. *Id.* at 643–44.
3. *See* 11 U.S.C. § 525 (1984) ("[A] government unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition 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 debtor under the Bankruptcy Act."); *see also* Wilson v. Harris Trust & Sav. Bank, 777 F.2d 1246, 1248 (7th Cir. 1985) (highlighting the legislative history of § 525).
4. *Id.*
5. *Wilson*, 777 F.2d at 1249.

In 2010, a plaintiff sought to expand the interpretation of § 525. In *Rea v. Federated Investors*,[6] the plaintiff, a prospective employee, claimed that Federated Investors, a private employer, violated § 525 when it refused to hire him because he had filed for bankruptcy.[7] The plaintiff argued that the phrase "discriminate with respect to employment," which is found in both subsections (a) and (b) of § 525, should be read to include the denial of employment.[8] The Third Circuit, however, disagreed. Instead, the court held that § 525(b) "does not create a cause of action against private employers who engage in discriminatory hiring."[9] The court noted that when the language of a statute is plain, a court should construe its language according to its terms.[10] It reasoned that, since Congress used subsection (a) as the basis for subsection (b), any language excluded in subsection (b) was intentional.[11]

This rationale echoed the Supreme Court's decision in *Russello v. United States*,[12] stating that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same [a]ct, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."[13] According to the *Rea* Court, Congress did not intend for the protection to extend to prospective employees in the private sector because the language "deny employment to" provided in subsection (a) (relating to government entities) was absent in subsection (b).[14] The court was also not persuaded that the difference between the two subsections was "a simple mistake in draftsmanship."[15]

The Fifth Circuit also addressed whether § 525(b) provides protection to applicants of private employers.[16] In *Burnett v. Stewart Title, Inc.*, a private sector employer, Stewart Title, made the plaintiff "an offer of employment contingent upon the results of a drug screening and background check."[17] When the background check results showed that the plaintiff had previously filed for bankruptcy, Stewart Title rescinded

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6. 627 F.3d 937 (3d Cir. 2010).
7. *Id.*
8. *Id.* at 939.
9. *Id.* at 938.
10. *Id.* at 940 (citing W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 99, 111 (1991)).
11. *Id.*
12. Rea v. Federated Inv'rs, 627 F.3d 937, 939 (3d Cir. 2010) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).
13. *Id.*
14. *Rea*, 627 F.3d at 941 (citing *Russello*, 464 U.S. at 23).
15. *Id.*; *see* Pastore v. Medford Sav. Bank, 186 B.R. 553, 555 (D. Mass. 1995); *see also* Fiorani v. CACI, 192 B.R. 401, 405 (E.D. Va. 1996).
16. *In re* Burnett, 635 F.3d 169 (5th Cir. 2011).
17. *Id.*

its employment offer.[18] The *Burnett* court followed the same rationale from *Russello;*[19] it reasoned that the phrase "deny employment to," found only in § 525(a), is redundant if "discriminate in respect to employment," found in both subsections, extended not only to private sector employees but also to applicants.[20] The court also reasoned that if Congress intended for § 525(b) to include denial of employment, then it would have included that phrase, as it had in subsection (a).[21]

In *Myers v. TooJay's Management Corp*, the Eleventh Circuit joined the Fifth and Third Circuits by rejecting the argument that bankruptcy discrimination protection extends to private sector applicants.[22] In *Myers*, the plaintiff applied for a management position with the defendant, a private employer.[23] The plaintiff was denied employment after the defendant conducted a background check and discovered the plaintiff's status as a bankruptcy debtor.[24] Like the other circuits, the *Myers* court held that the statement "discriminate with respect to employment against," found in § 525(b), "does not apply to refusals to hire."[25] The court took a plain-meaning approach in interpreting the statute, stating that "[j]udges and courts tempted to bend statutory text to better serve congressional purposes would do well to remember that Congress enacts compromises as much as purposes."[26]

Conversely, the only court to rule that § 525(b) extends protection to prospective employees of a private employer is the Southern District of New York in *Leary v. Warnaco, Inc.*[27] In *Leary*, a private employer refused to hire the plaintiff because her credit report showed she had previously filed for bankruptcy.[28] The plaintiff argued that the defendant's refusal to hire her was a violation of § 525(b).[29] The court agreed with the plaintiff, holding that an employer violates the statute's intent by denying employment to an applicant solely for the applicant's prior bankruptcy filing.[30]

To reach its conclusion, the court took a different approach than the other courts when analyzing the statute. First, the court noted that while § 525(b) does not contain the express language for applicant

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18. *Id.*
19. *Id.* at 172 (citing Russello v. United States, 464 U.S. 16, 23 (1983)).
20. *Id.* at 173.
21. *Id.*
22. 640 F.3d 1278, 1287 (11th Cir. 2011).
23. *Id.* at 1280.
24. *Id.* at 1281–82.
25. *Id.* at 1280, 1287.
26. *Id.* at 1286.
27. Leary v. Warnaco, Inc., 251 B.R. 656, 657 (S.D.N.Y. 2000).
28. *Id.*
29. *Id.*
30. *Id.* at 658–59.

protection that is found in § 525(a), a strict interpretation of the statute does not comport with the legislative *purpose* of § 525(b)—to provide debtors with a "fresh start."[31] The court reasoned that "[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[,]" and that "[a] [c]ourt 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)."[32]

Ironically, the *Leary* court refused to allow the plaintiff to plead for punitive damages stating that "[t]here is no authority for an award of punitive damages or attorneys' fees under § 525(b)."[33] However, the *Leary* court never explained why that portion of the statute should be strictly interpreted while another should be liberally construed.[34]

III. PRACTICAL & ETHICAL CONSIDERATIONS OF AMENDING § 525(B)

A. The Case for Change

First, it is important to note that credit agencies do not provide credit *scores* for employment purposes, so an employer only receives an applicant's financial, or credit, history.[35] This is significant because it means that employers are required to review the applicants' credit histories and cannot simply rely on a number provided by a third-party agency. Moreover, as explained in Part I, virtually all courts that have considered § 525(b) have ruled that it does not provide protection to prospective employees of private employers. However, various commenters have recently proposed that the incongruity between the private and public sector creates an essential unfairness that should be rectified by amending subsection (b) to match subsection (a) with regard to prospective employees.

The primary argument to change § 525(b) is that credit histories are a poor proxy for judging an applicant's risk to a potential employer.[36] Lea Shepard is one advocate who sets off the debate by noting that many people have damaged credit histories following the 2008 financial crisis, and that "legislators and policymakers have questioned the logic and ethics" of employers relying on credit reports for hiring purposes.[37]

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31. *Id.* at 658.

32. *Id.*

33. Leary v. Warnaco, Inc., 251 B.R. 656, 659 (S.D.N.Y. 2000).

34. *See id.* at 658–59.

35. *See* Leslie Callaway & Mark Kruhm, *Servicemember Disclosure a Must on All Mortgages*, A.B.A. BANKING J., Oct. 2010, at 64.

36. *See, e.g.* Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C. L. REV. 1695, 1764–65 (2012).

37. *Id.* at 1764–65 (2012); *Id.* at 1697.

Shepard states that employers use credit histories for two purposes: (1) to appraise the prospective employee's likelihood to steal; and (2) to predict a prospective employee's level of responsibility.[38] According to Shepard, some bankruptcy practitioners also argue that § 525(b) should be amended to reflect § 525(a)'s prohibition of bankruptcy considerations when evaluating job applicants.[39]

However, there are flaws in Shepard's argument. First, Shepard concedes employers do not treat all financial problems the same; "[i]n reviewing an applicant's credit history and assessing his or her relative merits, employers . . . scrutinize particular *pieces* of adverse information, including bankruptcy filings and collection actions."[40] While Shepard provides that employers' use of credit histories has grown from 13% in 1996 to 60% in 2010,[41] this statistic loses impact when Shepard subsequently admits that most employers limit the practice to specific types of positions.[42] This is important when considering the fact that employers use credit histories and not credit scores because if a good credit history is relevant to the position, an employer who is made aware of a bankruptcy after reviewing the applicant's credit report can ask the applicant to explain the circumstances that led to the filing. Further, while lenders, insurance companies, landlords, and employers increasingly rely on credit histories to evaluate applicants,[43] several states have enacted laws limiting the use of credit reports by employers to instances where there is a "reasonably clear relationship between the applicant's financial transgression and his or her ability to perform the responsibilities demanded by the position."[44]

Shepard next attacks the two reasons employers provide for using credit reports, focusing first on the argument that credit history can predict an applicant's likelihood of stealing from the employer. Shepard suggests that the use of sensitive job responsibilities related to the employer's financial risk in hiring an employee with a questionable financial history can be a pretext for racial discrimination.[45] However, Shepard's support for this argument relies on the use of credit *scores*

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38. *Id.* at 1697.

39. *Id.* at 1696–98.

40. *See, e.g., id.* at 1706–07 (emphasis added).

41. *Id.* at 1706 (citing SOC'Y FOR HUM. RES. MGMT., BACKGROUND CHECKING: CONDUCTING CREDIT BACKGROUND CHECKS SHRM POLL 3 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundChecking.aspx; EVREN ESEN, Soc'y for HUM. RES. MGMT., WORKPLACE VIOLENCE SURVEY 19 (2004), http://www.shrm.org/Research/SurveyFindings/Documents/Workplace%20Violence%20Survey.pdf).

42. *Id.* at 1707–08.

43. *Id.* at 1696.

44. Shepard, *supra* note 36, at 1697 & n.11.

45. *Id.* at 1713–14.

and not credit histories, and, as mentioned, employers do not receive credit scores with requested credit reports.[46]

Shepard's analysis of the second employer rationale, credit history as a proxy for responsibility, faces the same challenges because it depends on the use of credit scores and not credit histories.[47] It also relies on the statistic that 60% of employers use credit reports but ignores data showing that employers only use them for specific positions.[48] Moreover, this analysis is based on witness reports presented during an Equal Employment Opportunity Commission (EEOC) hearing on the topic;[49] while some witnesses for the hearing were critical of the use of credit reports and indicated that they may lead to discrimination, there were other witnesses in the same hearing who defended the use of credit reports for hiring practices.[50] Shepard also admits that employers use credit reports to confirm other information provided by the applicant and to avoid negligent hiring claims.[51]

Perhaps the most novel argument made by Shepard with regard to the use of credit reports is that persons with poor credit histories actually have no control over their financial situation. Therefore, Shepard maintains that this should be regarded as "analogous to traditional immutable characteristics."[52] The argument seems to be that poor management of credit might be an immutable characteristic like gender, race, nationality, and age, and therefore, ought not to be considered when evaluating applicants for employment.[53] Based on this analysis, Shepard asserts that § 525(b) should be amended to add protection for applicants.[54]

A 2012 article from the *Northwestern Journal of Law and Policy* somewhat parallels Shephard's arguments.[55] This article also proposes that § 525(b) should protect applicants either by judicial interpretation or amendment.[56] The article's author takes a different approach by explaining that, due to the increase in older Americans filing for bankruptcy, the lack of a bar to consideration of bankruptcy by private

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46. *Id.*; *see also supra* note 35 and accompanying text.

47. *Id.* at 1715–16.

48. *Id.* at 1706, 1714.

49. *Id.* at 1716–1717.

50. U.S. EQUAL EMP. OPPORTUNITY COMM., EMPLOYER USE OF CREDIT HISTORY AS A SCREENING TOOL, STATEMENTS OF MANEESHA MITHALL & PAMELA QUIQLY DEVATA (Oct. 20, 2010), https://www.eeoc.gov/eeoc/meetings/10-20-10/transcript.cfm; *see* discussion *infra* Part II.B.i.

51. Shephard, *supra* note 36, at 1718–20.

52. *Id.* at 1718, n. 136.

53. *Id.*

54. *Id.*

55. *See generally* Jina Kim Yun, Note, *The New 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 (2012).

56. *Id.* at 216.

sector employers amounts to *de facto* age discrimination.[57] Both authors rely on an increase in bankruptcy filings and high unemployment rates to establish urgency for their proposals.

Finally, a 2013 article in the *Emory Bankruptcy Development Journal* argues that "by narrow[ly] interpreting § 525(b) . . . courts are dishonoring an overarching goal of bankruptcy law."[58] While the article argues that effective remedies for inaccurate credit reporting are lacking and claims rampant discrimination due to negative credit reports, bankruptcy is a well-documented incident in public records and easier to establish than other credit issues.

Further, most employers are subject to federal and state anti-discrimination statutes that prohibit use of such information for discriminatory purposes. However, it seems Congress has not found a reason to reconcile the language differences between subsections (a) and (b). In the 113th session of Congress, the Bankruptcy Nondiscrimination Enhancement Act of 2013 was introduced by Representative Steve Cohen,[59] and it would have simply amended § 525(b) to add the language from subsection (a) that protects applicants.[60] Nonetheless, the bill had no co-sponsors and quietly died in the GOP-controlled Congress.[61]

B. The Case Against Changing § 525(b)

This section of the paper will examine the arguments for keeping § 525(b) as it is, without the language regarding protection of applicants to private sector employers that is found in § 525(a).

1. Knowledge of an Applicant's Financial History Is Not Abused by Employers

In October 2010, a representative from the Society of Human Resource Management testified before the EEOC about the results of a survey it conducted on credit background checks.[62] Some of the survey's findings that were presented to the EEOC included: (1) the use of credit background checks did not change over the six-year period; (2) most organizations do not conduct credit background checks on all applicants; (3) credit background checks are conducted for positions where they are most relevant; (4) credit background checks are not as

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57. *Id.* at 214.

58. Samantha Orovitz, *The Bankruptcy Shadow: Section 525(b) and the Sisyphean Struggle for a Fresh Start*, 29 EMORY BANKR. DEV. J. 553, 553 (2013).

59. H.R. 646, 113th Cong. (2013) (sponsored by Representative Steve Cohen).

60. *See id.*

61. *Id.*

62. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER USE OF CREDIT HISTORY AS A SCREENING TOOL, SHRM RESEARCH SPOTLIGHT: CREDIT BACKGROUND CHECKS (2010).

critical as other job-related factors in evaluating applicants; and (5) these checks are not used to screen out large numbers of applicants.[63] It is also useful to note that while bankruptcy will certainly be a negative entry on a credit report, only a small percentage of Americans file for bankruptcy each year.[64]

Michael Eastman, Executive Director of Labor Law Policy for the U.S. Chamber of Commerce, echoed these findings during his testimony at the EEOC hearings. First, Mr. Eastman testified that although a number of large employers reserve the right to use credit histories for applicant screening, most have chosen not to do so.[65] He also stated that, of the employers that do use credit histories, none use them for all applicants, and most use them for only a small percentage of positions unless legally required to do so.[66] When credit history information was used, he pointed out, it was only to screen for positions with access to employer funds, client funds, or sensitive information.[67] He concluded his testimony by stating that he "found no employer that considers credits scores."[68] He also commented that credit histories serve as a reason to do further investigation, not to block applicants simply based on an adverse credit history.[69] Such an investigation affords the applicant with an opportunity to explain the circumstances involved.[70]

2. Urgency is Fading

Part of the rationale for changing § 525(b) is the difficulty that job applicants—particularly those with a bankruptcy on their record—face when seeking employment.[71] Since current conditions indicate that the job market is near full employment, this argument is highly suspect. In response to the peak of bankruptcy filings in 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[72] Following its enactment, 2011 marked the post-BAPCPA

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63. *Id.*

64. *Bankruptcy Filings Fall 0.7% – Smallest 12-Month Decline Since 2010*, U.S. COURTS NEWS (Jan. 24, 2018), https://www.uscourts.gov/news/2018/01/24/bankruptcy-filings-fall-07-smallest-12-month-decline-2010.

65. U.S. EQUAL EMP. OPPORTUNITY COMM., EMPLOYER USE OF CREDIT HISTORY AS A SCREENING TOOL, STATEMENT OF MICHAEL EASTMAN, EXECUTIVE DIRECTOR, LABOR LAW POLICY, U.S. CHAMBER OF COMMERCE (Oct. 20, 2010), http://www.eeoc.gov/eeoc/meetings/10-20-10/eastman.cfm (Last visited Jan. 18, 2018).

66. *Id.*

67. *Id.*

68. *Id.* Director Eastman did, however, mention that some federal agencies, including the Department of Homeland Security, do require credit history reports. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g.*, Shepard, *supra* note 36, at 1750–53, 1757, 1764–65.

72. *See Richard* E. Flint, *Consumer Bankruptcy Policy: Ability to Pay and Catholic Social Teaching*, 43 St. Mary's L. J. 333, 388–91 (2012).

peak in bankruptcy filings.[73] Filings dropped in 2012, and as of March of 2015, fillings were 12% below the amount for the same period in the previous year.[74] Furthermore, 789,020 debtors filed for bankruptcy in 2017, representing a decline of more than 50% compared to filings in 2011.[75]

Shepard and other scholars claim that consideration of bankruptcy might unfairly prejudice racial minorities. It can be argued, however, that the data proves otherwise. Comparing the racial percentages filing bankruptcy in 2010 against the racial makeup of the American population in the 2010 U.S. Census, the results show the following population percentages against bankruptcy filings: White—75.1% of the population vs. 71.63% of filings; Black—12.3% of the population vs. 11.30% of the filings; Hispanic—12.5% of the population vs. 8.68% of the filings; and Asian—4.2% of the population vs. 4.50% of the filings.[76] Therefore, whites are disproportionately represented in bankruptcy filings, which is the opposite of what advocates for a change to § 525(b) would seem to argue.

While unemployment rates in excess of 9% were referenced by various advocates, the official unemployment rate was 4.1% as of December of 2017.[77] So, there has been a significant drop in the unemployment rate.[78] If a 9% unemployment rate was a reason to amend § 525(b), that is not the case today.[79]

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73. *See Bankruptcy Filings Down 14 Percent for March 2013*, U.S. COURTS NEWS (Apr. 29, 2013), http://news.uscourts.gov/bankruptcy-filings-down-14-percent-march-2013; *March 2015 Bankruptcy Filings Down 12 Percent*, U.S. COURTS NEWS (Apr. 27, 2015), http://www.uscourts.gov/news/2015/04/27/march-2015-bankruptcy-filings-down-12-percent.

74. *See March 2015 Bankruptcy Filings Down 12 Percent*, U.S. COURTS NEWS (APR. 27, 2015), http://www.uscourts.gov/news/2015/04/27/march-2015-bankruptcy-filings-down-12-percent.

75. *Compare Bankruptcy Filings Fall 0.7% – Smallest 12-Month Decline Since 2010*, U.S. COURTS NEWS (Jan. 24, 2018), http://www.uscourts.gov/news/2018/01/24/bankruptcy-filings-fall-07-smallest-12-month-decline-2010, *with Bankruptcy Filings Down 14 Percent for March 2013*, U.S. COURTS NEWS (Apr. 29, 2013), http://news.uscourts.gov/bankruptcy-filings-down-14-percent-march-2013.

76. *See* LESLIE E. LINFIELD, INST. FOR FIN. LITERACY, 2010 ANNUAL CONSUMER BANKRUPTCY DEMOGRAPHICS REPORT: A FIVE YEAR PERSPECTIVE OF THE AMERICAN DEBTOR (Sept. 2011), http://centerforconsumerfinancialresearch.org/wordpress/wp-content/uploads/2013/06/2010-Annual-Consumer-Bankruptcy-Demographics-Report.pdf; *see also Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045217. (last visited Jan. 18, 2020).

77. *National Employment Monthly Update*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 2, 2019), http://www.ncsl.org/research/labor-and-employment/national-employment-monthly-update.aspx.

78. *Id.*

79. *See id.*

3. Other Protective Statutes

It can also be argued that commenters advocating for changes to § 525(b) often overlook the protection already available at both the federal and state levels.[80] One allegation that has been made against the use of credit reports, and by implication, the reference to bankruptcy that might be found in such reports, is that there are errors in consumer credit reports.[81] However, the Fair Credit Reporting Act (FCRA)—and the Act's amendments included in the Fair and Accurate Credit Transactions Act of 2003 (FACT)—provide significant protection for applicants who find they are subject to adverse employment action due to errors in their credit report.[82] These Acts also afford these applicants the opportunity to fix any errors.[83] The amended Civil Rights Act of 1964,[84] the amended Age Discrimination in Employment Act,[85] the amended Civil Rights Act of 1866,[86] and the Americans with Disabilities Act,[87] and many other federal and state statutes prohibiting discrimination, also provide substantial protection for applicants who feel that they have been exposed to either disparate treatment or disparate impact due to employers' use of bankruptcy filings contained in credit reports.

The EEOC has also announced increased review of credit report use by employers due to a perceived disparate impact on minorities.[88] In 2010, for example, the EEOC sued Kaplan Higher Education claiming discrimination when it used credit checks to evaluate applicants.[89] The case was resolved in a heavily covered outcome when the District Court for the Northern District of Ohio granted summary judgment to the employer on January 28, 2013.[90] The court found that the EEOC failed to show that the use of credit reports resulted in a statistically significant disparate impact for black applicants.[91]

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80. *See generally* Shepard, *supra* note 36.

81. *Id.* at 1704.

82. *See* Pub. L. No. 90-321, 91-508, 84 Stat. 1129 (1970) (codified at 15 U.S.C. §§ 1681a–1681x); *see also* Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended in scattered sections of 15 U.S.C. §§ 1681a–1681x).

83. David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the Financial Crisis May be Contributing to Improving Accuracy in Credit Reporting*, 24 LOY. CONSUMER L. REV. 329, 333 (2012).

84. 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 116–39).

85. 29 U.S.C.A. § 621 (Westlaw through Pub. L. No. 116–39).

86. 42 U.S.C.A. § 1981 (Westlaw through Pub. L. No. 116–39).

87. 42 U.S.C.A. § 12101 (Westlaw through Pub. L. No. 116–39).

88. Orovitz, *supra* note 58, at 574, 589.

89. *EEOC Files Nationwide Hiring Discrimination Lawsuit*, GLOBAL H.R. RES. (Dec. 21, 2010), http://www.ghrr.com/eeoc-files-nationwide-hiring-discrimination-lawsuit/.

90. EEOC v. Kaplan Higher Learning Educ., 2013 U.S. Dist. LEXIS 11722, at *2 (N.D. Ohio 2013).

91. *Id.* at *12–13.

At the time of this article's publication, ten states have passed laws restricting the use of credit reports when evaluating applicants. In order of enactment date, the first seven states are Washington, Hawaii, Illinois, Oregon, California, Connecticut, and Maryland.[92] In 2012, Vermont and Colorado joined the list,[93] followed by Nevada in 2013,[94] and Delaware in 2014.[95] As of 2015, thirty-one bills in seventeen states were pending that related to the use of credit information in employment decisions.[96] It is beyond the scope of this article to discuss the specific features of each state law, but each of them restricts the use of credit reports by employers. Obviously, reports of filing for bankruptcy are included in credit reports.

Various states and localities may have regulations and ordinances that provide employment discrimination protection, which may take a restrictive view of an employer's use of the information contained in credit reports. Note also that employers of certain types of certified and licensed workers are also required to conduct thorough background checks, which include in some cases, credit checks for teachers, home healthcare workers, and daycare workers.[97]

4. Paying Bills & Good Employees

There are many who argue for sympathy for persons who have filed for bankruptcy and this is certainly not to be ignored. At the same time, there is a big difference between someone who does not pay their bills chronically and someone who is forced into bankruptcy due to job loss or a major illness. In analyzing the positive attributes of paying one's bills, a 2012 article by law professor Richard Flint analyzes BAPCPA with reference to means testing and the ability to pay.[98] Professor Flint suggests that even in bankruptcy, it is the moral thing to pay what can be paid by the party seeking the assistance of the bankruptcy courts.[99] Likewise, employers generally expect that potential employees will pay their bills, absent some compelling reason, and see this as an indication of ethical behavior that will be practiced at work.

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92. Trevor Hughes, *Shaky Credit Reports Could Hurt some Job Applicants; Seven State Legislatures Act to Limit Hiring Requirement*, USA TODAY, 2B (Mar. 6, 2012).

93. *See* VT. STAT. ANN. tit. 21, § 495i (West 2012); *see also* COLO. REV. STAT. ANN. § 8-2-126 (West 2017).

94. NEV. REV. STAT. ANN. §§ 613.520–.600 (West 2013).

95. Heather Morton, *Use of Credit Information in Employment 2015 Legislation*, NAT. CONF. OF STAT. LEGIS. (Jun. 2, 2015), http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2015-legislation.aspx.

96. *Id.*

97. Shepard, *supra* note 36, at 1708–10.

98. Flint, *supra* note 72; *see supra* notes 75–78 and accompanying text.

99. *Id.*

III. CONCLUSION

The push reflected by the various authors cited above to amend § 525(b) to protect applicants in the private sector who have filed for bankruptcy was driven by the 2008–09 economic downturn. However, before joining the "bandwagon" to abandon this useful tool, it is worthwhile to examine the way it is used by employers. Evidence from various employer groups indicate that employers do not receive credit scores, but, instead, receive credit reports, where problems like bankruptcy are subject to review. In such cases, most employers give a candidate the opportunity to explain problems and generally do not use the reports as an absolute decision point for whether they will hire a candidate.

While news reports have noted that there are many incorrect credit reports, federal laws provide significant protection for applicants who are refused employment due to incorrect information in their credit reports. Certainly, if an applicant's credit report contains reference to a bankruptcy that was not filed by the applicant, it is expected that this could be fixed expeditiously. It is also rarely discussed that a strong ethical orientation includes prompt payment of just debts and avoiding actions like bankruptcy.

Further, continuation of economic recovery requires employment opportunities to sustain its growth. Regulations tending to restrict employers, while meant to extend employment opportunities for many, including the poor and disadvantaged, may instead lead to decreased domestic employment activity and increased offshoring of positions. Therefore, this author finds that there is no compelling reason to amend § 525(b), but good reasons to keep it as it is now.