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Bankruptcy can carry consequences for job-seekers

Commentary by Cheryl Wilke


Wilke

Two years ago, I was contacted by a longstanding client, who told me their restaurant had been sued for bankruptcy discrimination. Having never heard of such a cause of action in 20 years of practice in employment matters, I asked to see the complaint to formulate a strategy.

Much to my surprise, there was a cause of action for employees under the Bankruptcy Code, specifically 11 U.S.C § 525.

Section 525 prohibits an employer from terminating an existing employee because the employee has filed bankruptcy. The concept is that an employee attempting to earn a living should not be fired as a result of exercising his or her rights for bankruptcy protection. The remedies afforded to employees who do suffer such discrimination are the same as for those who file a Title VII claim: past wages, future wages, compensatory damages and — in egregious circumstances — punitive damages.

For practitioners and attorneys, claims made under this provision are not maintained through the U.S. Department of Labor or the U.S. Equal Employment Opportunity Commission. They are instead original jurisdiction claims venued in federal court.

In our case, plaintiff, Mr. Myers, was working as an assistant manager at Starbucks and applied for a job as a manager at Toojay's Restaurant. Toojay's managers serve all parts of the restaurant, and as in most restaurant positions, work long hours. As part of his application process, he participated in a two-day, on-the-job evaluation. He was paid $100 for each day. The evaluation gave him the chance to see, firsthand, the demands of the restaurant manager position. During the evaluation, it was the position of Toojay's that Mr. Myers had not been formally hired.

After the evaluation, his background check was reviewed and it was determined he had a discharged bankruptcy within 90 days of his application and, after the filing, continued to have late payments. Toojay's decided not to hire him, and Mr. Myers sued.

This case was complicated by a split in the U.S. circuit courts of appeals. In all circuits other than the 2nd, an employer has the option not to hire a prospective applicant based solely on the results of a credit background check, including findings of bankruptcy, assuming the proper release is first obtained

from the applicant. The 2nd Circuit holds that the bankruptcy filing cannot be the sole reason for not hiring an applicant, although it can be considered.

As our case was one of first impression in the 11th Circuit, the arguments set forth by Mr. Myers included that the 2nd Circuit should control over the conflicting circuits, and, further, that by paying Mr. Myers for the two-day job evaluation, he was an employee and therefore, could not be fired because of the bankruptcy. After a jury trial in the Middle District of Florida, Toojay's prevailed and the bankruptcy discrimination claim was denied.

In a 21-page opinion, the 11th Circuit agreed with the Toojay's position. First, Mr. Myers was not an employee during the on-the-job evaluation. Second, the 11th Circuit adopted the holdings of the 3rd and 7th Circuits that the plain meaning of Section 525(a) applies to private employers in the hiring process. The court thus concluded that employers do have the right and option not to hire a job applicant and can use the employee's bankruptcy filings as the sole basis for that decision.

For employers, this ruling does provide some much-needed direction as to the factors that can be legally considered when hiring employees. Experience shows that in times when there is high unemployment and employers have options as to whom to hire, they will hire the applicant they feel is the most trustworthy and credible. It is acceptable to consider any applicant's credit and bankruptcy history in the hiring process. The ruling also confirms the obligation of all employers not to impose adverse employment actions against an existing employee based on a filed bankruptcy claim.

For those in the work force who are contemplating bankruptcy in these difficult economic times, it is important to know your rights. If you are currently employed, your employer cannot legally terminate your employment based on your bankruptcy filing. However, it is important to also understand that filing bankruptcy could have significant ramifications if you intend to change jobs or quit your current employment. Bankruptcy is an available right, but exercising it can have consequences beyond the direct financial impact.

Cheryl Wilke, partner in charge of the Fort Lauderdale office of Hinshaw & Culbertson, focuses on representing employers in labor and employment matters.

BUSINESS OF **LAW**

Spring bonuses for associates seem unlikely at this point


Orrick Herrington & Sutcliffe managing partner Ralph Baxter said there was "no rational foundation" to give spring bonuses last year.

by Claire Zillman
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By this time last year, Am Law 100 and Second Hundred firms were about halfway through what proved to be a spring bonus bonanza.

Twenty-one firms had doled out extra cash payments to their associates ranging from $2,500 to about $20,000. Twenty-six firms would follow suit over the next six weeks.

In 2012, as Above The Law has been quick to note, things are different. Tuesday officially marked the start of spring, and so far not a single Am Law 100 or Second Hundred firm had announced supplemental bonuses.

In fact, the leaders of the 21 firms that handed out bonuses by this time last year were contacted about whether the extra payments would be coming this year. All 21 either did not reply or declined to comment for attribution about their plans.

Sullivan & Cromwell, which kicked off last spring's bonus wave by announcing in January 2011 that it would award class-based extra payments ranging from $2,500 to $20,000, appeared poised for a repeat performance, saying in a memo last Dec. 8 that it expected to award spring bonuses again in 2012.

Sullivan & Cromwell, which kicked off last spring's bonus wave by announcing class-based extra payments ranging from $2,500 to $20,000, has been silent on the issue so far this year.

Since then, however, the firm has been silent on the subject. Chairman Joseph Shenker did not reply to phone calls and emails seeking comment on bonus plans, and a Sullivan & Cromwell spokeswoman said the firm would have no comment on the matter.

Four Am Law 100 managing partners whose firms awarded extra payments last spring agreed to address the topic, but only on the condition of anonymity. All four said spring bonuses are unlikely this year.

One of the four said he will only consider awarding bonuses this year if another firm does so first.

"We have not had any discussions about the subject," said a second, adding he doubts spring bonuses will be paid this year. "I'm not sure if firms are going to feel confident enough to pay them out again."

The two managing partners cited the shaky state of both the legal industry and the overall economy as key reasons for their reluctance.

The results of a Citi Private Bank Law Firm Group survey at the end of 2011, which predicted dropping demand for legal services late last year would be followed by a similar slowdown at the start of this year, lends credence to their qualms.

And while a subsequent Citi survey released last week classified law firm leaders as increasingly confident about their prospects this year, it nonetheless described the confidence level as modest.

'NO RATIONAL FOUNDATION'

Partners at several top New York firms said a lackluster second half of 2011 helped explain why their slight gains in revenue and profits failed to match the increases they enjoyed in 2010.

Another Am Law 100 managing partner said a third factor figured into the lack of spring bonuses this year: skepticism about whether doling out the extra payments last year was

SEE BONUSES, PAGE A7