Recently, the New York Times reported that people who have filed bankruptcy cases have had difficulty getting jobs. A credit check will reveal whether a debtor has filed a bankruptcy case at any time within the past 10 years. Some employers believe that a bankruptcy filing suggests that a prospective employee is unreliable. Even worse, some laws in some states make it difficult to get or maintain a professional license if one has filed a bankruptcy case.

Sections 525 of the Bankruptcy Code was enacted protects debtors from discrimination. As will be seen, the benefits of Section 525 are broad but by no means all-encompassing. Section 525(a) is broader than 525(b) and provides protection regarding licensing, grants, and employment.

Section 525 of the Bankruptcy Code was enacted to codify the result in *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). In *Perez*, the Court held that a state may not suspend the driver's license of a debtor whose tort judgment resulting from an automobile collision was discharged. The Court found that the state financial responsibility statute was in conflict with the "fresh start" policy of the Bankruptcy Act (now the Bankruptcy Code) Id. at 652. The Court recognized that the fresh start offered by Bankruptcy would be frustrated by the discriminatory treatment resulting from the unpaid debt arising from a tort claim.

These provisions prohibit employers from discharging an employee solely because the employee has discharged debts in bankruptcy. However, the code provides additional protection to government employees and potential government employees. In addition, the statute also prohibits governmental units from denying or suspending licenses or grants because of a bankruptcy.

Recently the Northern District of Illinois has analyzed the licensing provisions of §525(a). *In re Slayton,* No. 06 B 2826 (N.D. Ill. 2009). In this case the debtors owned and operated a trucking business. The corporation filed a chapter 11 bankruptcy case and was involuntarily dissolved. Later the debtors, as individuals, filled a chapter 7 case and received a discharge. After the discharge the Illinois Secretary of State cancelled Mr. Slayton's driver's license because of an unpaid check the trucking company issued to the Secretary. The court held that the revoking the license was a violation of §525(a). The Seventh Circuit Court of Appeals has also resolved violations of the antidiscrimination clause of the Bankruptcy code in favor of a debtor with a cancelled license. *Airadigm Communications Inc. v. Federal Communications Commission,* 519 F.3d 640 (7th Cir. 2008). These provisions apply, even if the governmental unit have a legitimate regulatory motive for revoking the license, so long as filing a bankruptcy case is the proximate cause of the state action. *Federal Communications Commission v. Nextwave Personal Communications,* No. 01-653 (D.D.C. 2003)

Both §§525(a) and 525(b) apply to cases involving employment discrimination based discharging a debt in bankruptcy. In order to fully understand the antidiscrimination clause of the Bankruptcy Code, it must be compared to other employment retaliation claims.

A traditional retaliation claim exists to encourage employees to engage in protected activities, such as voting or reporting employer misconduct. The retaliation claim reassures employees that there is recourse if an employer subjects an employee to an adverse employment action because the employee engaged in a protected activity.

The antidiscrimination clause is not intended to encourage an employee to file bankruptcy, but to protect those who have attempted to obtain a fresh start through bankruptcy proceedings. *Majewski v. St. Rose Dominican Hospital,* 310 F. 3d 653 (9th Cir. 2002). At first glance claim under §525 appears to operate as other retaliation claims. However, analyzing the policy behind these claims creates a foundation for the often harsh requirements of §525.

Section 525(a) only applies to government units. Debtors employed in the private sector are limited to claims under §525(b). Section 525(a) prevents a governmental unit from denying employment to, terminating the employment of, or discriminating with respect to employment against a person that has been a debtor under this title solely because of filing a bankruptcy.

Section 525(b) prevents a private employer from terminating the employment of an individual or discriminating with respect to employment of an individual solely because of filing a bankruptcy.

The majority of jurisdictions hold that these provisions only protect individuals who have filed a case. Individuals expressing a desire to file a bankruptcy case in the future are not protected by the majority of jurisdictions. *Kanouse v. Gunster, Yoakley & Stewart,* 168 B.R. 441 (S.D. Fl 1994). There is one exception to this rule. *Tinker v. Sturgeon State Bank,* holds that a would-be debtor can state a claim under §525(b). In this case the court did not want to encourage employers to discharge a would-be debtor before the individual has an opportunity to file. *Id.*

There is also a split in authority regarding whether §525(b) applies to failure to hire claims. Courts consistently hold that §525(a) prohibits a governmental unit from refusing to hire an individual solely because debts have been discharged in bankruptcy. A private sector employee utilizing §525(b) cannot be discharged or subjected to discriminatory practice with respect to employment. But the provision included in §525(a) prohibiting denying employment to a debtor is not included in §525(b). *In re Madison Madison International of Illinois,* 77 B.R. 678 (E.D. Wisc. 1987). There is some authority to support a claim alleging failure to hire for a private sector employee, but the majority of jurisdiction have supported the strict statutory interpretation and excluded such a claim.

[3]
[4] **IN RE: LAURA STOLTZ, DEBTOR.**
LAURA STOLTZ, DEBTOR-APPELLEE,
v.
BRATTLEBORO HOUSING AUTHORITY, CREDITOR-APPELLANT,
UNITED STATES TRUSTEE AND RAYMOND J. OBUCHOWSKI, CHAPTER 7 TRUSTEE,

[5] **Docket No. 01-5048**
[6] **UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT August Term**
[7] **December 20, 2002**

Section 525(a) evolved from Perez v. Campbell, 402 U.S. 637, 91 S. Ct. 1704 (1971), a seminal bankruptcy case in which the Supreme Court struck down a state statute that withheld driving privileges from debtors who failed to satisfy motor-vehicle-related tort judgments against them, even if the judgments were discharged under bankruptcy law. The Supreme Court used the Supremacy Clause to invalidate the state statute, finding that it discriminated against debtors in a manner that frustrated and was contrary to the fresh start principles of the Bankruptcy Act. Id. at 649-52, 1711-13.

[43] Congress thereafter signaled its approval of the Perez holding by enacting section 525(a), which prohibits bankruptcy-based discrimination by governmental units against debtors. Section 525(a) states, in relevant part, that:

[44] [A] governmental 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 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. 11 U.S.C. § 525(a) (2001) (emphasis added).

[45] Notably, the text of Section 525(a) does not limit its scope to the facts presented in Perez. Section 525(a) applies to any governmental unit, not just a State agency or department; it covers not only licenses, but also permits, charters, franchises, and other similar grants; and it applies regardless of whether the governmental unit involved is the creditor whom the debtor failed to pay, or is simply a grantor conditioning a grant on the debtor's satisfaction of a discharged debt owed to a third party.

[46] 2. Case Law Development of Section 525(a)

[47] In the nearly twenty-four years that have passed since its enactment, section 525(a) has been interpreted by the courts to protect debtors from discrimination in a wide variety of contexts, including a debtor's right to operate a motor vehicle, see, e.g., In re Adler, 47 B.R. 554 (Bankr. S.D. Fla. 1985) (holding section 525(a) prohibits enforcement of statute that allows state department of motor vehicles to suspend licenses and registrations of judgment debtors, even if motor-vehicle-related judgments against them were discharged in bankruptcy); ability to engage in a trade or business, see, e.g., In re Walker, 927 F.2d 1138 (10th Cir. 1991)(finding statute, which automatically revokes real estate license of any licensee for whom payment was made from real estate recovery fund, contravenes section 525(a)); and ability to obtain essential goods and

services, In re Heath, 3 Bankr. 351 (N.D. Ill. 1980) (holding state university's refusal to release student-debtor's transcript until he paid prepetition debt in full violated section 525(a)).

[48] Despite more than twenty years of judicial consideration, however, the scope of Section 525(a)'s protection in the context of public housing is still unsettled. No circuit court has yet spoken on the issue, and the bankruptcy courts and district courts that have done so have done so inharmoniously. It is undisputed that a public housing authority is a governmental unit within the meaning of 525(a). *fn3 See 11 U.S.C. § 101(27); In re Robinson, 169 B.R. 171, 176 (N.D. Ill. 1994), In re Szymecki, 87 B.R. 14, 16 (Bankr. W.D. Pa. 1988). BHA has conceded as much in this appeal. Instead, the debate over section 525(a) in the public housing context has centered on (1) the precise contours of the "other similar grant[]" at stake, compare Johnson v. Chester Hous. Auth. (In re Johnson), 250 B.R. 521, 530 (Bankr. E.D. Pa. 2000) (determining that the "other similar grant[]" protected by section 525(a) was the public housing tenant's inseparable rights to lease a residence and to be charged rent reductions established for public housing residents), and In re Curry, 148 B.R. 966, 972 (Bankr. S.D. Fla. 1992) (finding eviction would violate section 525(a) because it would revoke the governmental grant of a rent subsidy), with In re Bacon, 212 B.R. 66, 74-75 (Bankr. E.D. Pa. 1997)(finding eviction permissible because section 525(a) protects only debtor-tenant's future right to participate in public housing program), and (2) whether a public housing authority in this situation seeks to evict the public housing tenant "solely because" of the discharge of prepetition defaults, compare Robinson v. Chicago Hous. Auth. (In re Robinson), 169 B.R. 171, 176 (Bankr. N.D. Ill. 1994) (distinguishing between eviction solely because debtor-tenant failed to pay dischargeable debt and eviction because debtor-tenant stopped paying rent), and Hous. Auth. of Pittsburgh v. James (In re James), 198 B.R. 885, 888 (Bankr. W.D. Pa. 1996) (distinguishing between eviction solely because of the failure to pay dischargeable

debt and eviction (1) because the lease is no longer in effect because it was deemed rejected, (2) because of housing authority's duty to taxpayers to ensure that tenants pay rent, and (3) because of housing authority's obligation to other applicants to make housing available to them), with Bacon, 212 B.R. 66, 75 (disagreeing with "[t]he illusory distinction between seeking eviction for not paying a dischargeable debt as opposed to eviction for stopping the payment of rent").

[49] C. The Public Housing Grant Protected Under Section 525(a)

[50] In addition to its concession that it falls within section 525(a)'s definition of a "governmental unit," BHA also concedes that Stoltz's prepetition defaults have been discharged, and that it may not discriminate against Stoltz with regard to a section 525(a) grant because of her prepetition defaults. Nonetheless, BHA argues that the eviction it seeks is not proscribed by section 525(a) because a public housing lease is not an "other similar grant[]" within the meaning of section 525(a). BHA appears to argue that a public housing tenant's future right to participate in the public housing program is the only protected public housing grant under section 525(a). In this scenario, Stoltz's protected public housing grant would not be disturbed by eviction because eviction would not limit her right to participate in the public housing program in the future. If this line of thinking were correct, section 525(a) would prohibit BHA only from denying Stoltz, upon reapplication, a future lease because of her prepetition defaults.

[51] We reject this artificially narrow construction of section 525(a) because the plain language of the provision indicates that eviction would revoke a protected grant, i.e., the lease, in violation of section 525(a). "[W]e begin [statutory interpretation] with the understanding that Congress says in a statute what it means and means in a statute what it says." Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6, 120 S. Ct. 1942, 1947 (2000) (internal

quotation marks and citation omitted). "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." United States v. Ron Pair Enter., 489 U.S. 235, 242, 109 S. Ct. 1026, 1031 (1989) (internal quotation marks and citation omitted).

[52] The text of section 525(a) states that it protects a debtor's interest in a "license, permit, charter, franchise, or other similar grant" provided by a governmental unit. The term "other similar grant" is not defined by the code. *fn4 In common parlance, a grant is "a transfer of property by deed or writing." Merriam Webster's Collegiate Dictionary 507 (10th ed. 2000).

[53] As a legal term, a grant is "[a]n agreement that creates a right of any description other than the one held by the grantor. Examples include leases, easements, charges, patents, franchises, powers, and licenses." Black's Law Dictionary 707 (7th ed. 1999) (emphasis added). Similarly, a lease is "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration." Id. at 898.

[54] Thus, a public housing lease is a grant by which a public housing authority conveys to a public housing tenant the right to use and occupy public housing in exchange for rent. The only question that remains is whether a public housing lease is a grant "similar" to a "license, permit, charter, [or] franchise."

[55] The common qualities of the property interests protected under section 525(a), i.e., "license[s], permit[s], charter[s], franchise[s], and other similar grants," are that these property interests are unobtainable from the private sector and essential to a debtor's fresh start. For instance, a real estate license, state university transcript, or driver's license may only be obtained from a particular governmental unit. A debtor who cannot obtain

her real estate license will be unable to pursue her chosen profession; a debtor who cannot obtain his transcript will be unable to apply for certain jobs or further schooling; a debtor who cannot obtain a driver's license will be unable to commute to many jobs or school.

[56] Public housing leases, too, are property interests unobtainable from the private sector and essential to a debtor's fresh start. Public housing leases are, by definition, obtainable only from governmental entities. *fn5 Furthermore, a public housing lease is essential to a debtor's fresh start. An individual qualifies for public housing because he or she cannot afford housing at prevailing market rates. In light of the notoriously lengthy waiting lists that may exist for public housing, see, e.g., Housing Auth. Of Pittsburgh v. Collins (In re Collins), 199 B.R. 561, 568 n.13 (Bankr. W.D. Pa. 1996), an evicted debtor-tenant, along with any dependants, would quite possibly become homeless - a status not conducive to economic survival. A debtor-tenant's future right to participate in public housing programs - on a space available basis - would therefore be of little or no practical value upon eviction. A debtor-tenant's "entire economic status [therefore] is dependent on" his or her current public housing lease, In re Day, 208 B.R. 358, 367 (Bankr. E.D. Pa. 1997), which is his or her "single most significant material possession," In re Whitsett, 163 B.R. 752, 755 (Bankr. E.D. Pa. 1994). Eviction-induced homelessness would "seriously affect the debtors' livelihood [and] fresh start." H. Rep. No. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6268. Conversely, preventing homelessness promotes the Code's fresh start policy by helping debtors maintain steady employment and self-sufficiency.

[57] BHA urges us to follow, as did the bankruptcy court below, the reasoning of In re Bacon, 212 B.R. 66 (Bankr. E.D. Pa. 2000).

[58] The Bacon analysis bifurcated the public housing authority into separate creditor and grantor roles, finding that a public housing authority is

constrained by section 525(a) only in its role as a grantor of a public benefit, but remains unconstrained in its role as a creditor, "so long as [the debtor-creditor relationship] is not being utilized to deprive the [d]ebtor of a protected grant." Id. at 75-76. The Bacon court then defined the protected grant as "the [future] right to participate in public housing," id. at 75, and it expressly declined to include the public housing lease itself in its definition of the protected grant, id. at 75, n.17. Bacon then concluded that a public housing authority, in its creditor role, may evict a debtor-tenant for nonpayment of discharged, prepetition rent because such eviction would not deprive the debtor of his or her future right to participate in the public housing program, even though it would result in "temporary loss of a public housing unit for the Debtor as she awaits the assignment of a new unit." Id. at 76.

[59] Thus, Bacon's holding results in a strained temporal separation of the public housing grant into a current, unprotected right to participate in public housing and a future, protected right to participate in public housing.

[60] We see two serious errors with this approach. First, the Bacon court's interpretation of section 525(a)'s protected grant in the public housing context is not based on the text of section 525(a). Bacon constructed its interpretation of a protected public housing grant based on its belief that it need not preserve the debtor-tenant's right to fully participate in the government program, but instead need only preserve the debtor-tenant's right to participate in the public housing program to some degree. Bacon, 212 B.R. at 75, n.17. Nothing in section 525(a)'s text or legislative history, however, indicates that the protected grant should be defined as anything less than the grant in its entirety, let alone as the debtor's smallest discernable interest in the benefit at issue.

[61] Second, the text of section 525(a) expressly proscribes revocation and suspension of a protected grant, not just denial of or refusal to renew a grant upon application. Because eviction

results in revocation of the debtor-tenant's current participation in the public housing program, eviction revokes the protected grant in violation of 525(a). Permitting the debtor only to reapply to receive future housing benefits does not ameliorate the discriminatory revocation of the debtor-tenant's protected public housing lease.

[62] Beyond its incompatibility with the text of section 525(a), Bacon's holding is also problematic because it does not comport with the congressional intent underlying section 525. Section 525(a) was enacted to protect debtors from bankruptcy-based discrimination by governmental units that provide essential services. Yet, Bacon's holding would effectively protect the debtor's interest in essential services only where the governmental unit is a non-creditor. Where the governmental unit is a grantor and a creditor - that is, where the governmental unit is even more involved, and private actors are not involved -the debtor would effectively receive no protection from section 525(a) against the governmental unit's bankruptcy-based discrimination. This incongruous result cannot be what Congress intended.

[63] D. Whether Eviction is "[S]olely [B]ecause" of Discharged Prepetition Rent

[64] Alternatively, BHA focuses on section 525(a)'s "solely because" language and argues that it desires to evict Stoltz only because she breached her public housing lease, not because she failed to pay prepetition rent that was discharged in bankruptcy.

[65] This unpersuasive argument is premised on an "illusory distinction" between the breach of the lease and the nonpayment of the discharged prepetition rent. Bacon, 212 B.R. at 75. The breach is not an additional basis for eviction beyond that prohibited by section 525(a); it is the very basis for discrimination prohibited by 525(a). Had Stoltz breached the lease by failing to comply with an enumerated tenant duty other than the duty to pay prepetition rent, BHA might have a permissible basis for eviction under section

525(a). That factual scenario is not before us. Stoltz breached the lease because she failed to pay prepetition rent, which was later discharged in bankruptcy. Therefore, saying that BHA desires to evict Stoltz for breach of the lease is the equivalent of saying BHA desires to evict her "solely because . . . [she] has not paid a debt that was discharged under the Bankruptcy Act." 11 U.S.C. § 525(a) (2001). Evicting Stoltz under these circumstances would constitute discrimination against her in violation of section 525(a).

[66] Because we have discerned from the plain text of section 525(a) that a public housing lease, and therefore the debtor-tenant's current right to participate in the public housing program, is a protected grant, it is unnecessary to delve into section 525(a)'s legislative history. We note briefly, however, that the legislative history fully supports our interpretation of "other similar grants" as inclusive of public housing leases. *fn6

[67] E. Resolving the Conflict Between Sections 525(a) and 365

[68] Because section 525(a) protects debtor-tenants like Stoltz from eviction for nonpayment of discharged prepetition rent, section 525(a) conflicts with section 365. The bankruptcy trustee did not assume the lease under section 365(b)(1); accordingly, Stoltz's public housing lease has been deemed rejected under section 365(d)(1), thus permitting BHA to pursue state law remedies on the ground that Stoltz breached the lease prepetition, see section 365(g). *fn7 Sections 525(a) and 365 therefore cannot simultaneously be given their full effect. If we protect Stoltz from bankruptcy-based discrimination under section 525(a), we cannot allow BHA to evict her. If we do not allow BHA to evict Stoltz, however, then we cannot enforce the executory contract assumption requirements or the implications of rejection under section 365. Thus, we face a conflict between sections 525(a) and 365 of the Bankruptcy Code. Unlike the Zax in the prairie of Prax, however, these important Bankruptcy Code

provisions cannot be left in conflict, unbudged in their tracks.

[69] 1. Specificity Analysis

[70] Many courts have resolved this impasse by concluding that either section 525(a) or section 365 *fn8 is the more specific provision and therefore trumps the other, more general provision. Compare Curry, 148 B.R. at 972 (finding section 525(a) more specific than section 365(b)(1)(A) because section 525(a) addresses a specific type of creditor and creditor behavior), with In re Collins, 199 B.R. 561, 567 (Bankr. W.D. Pa. 1996) (finding section 365 more specific than section 525(a) because section 365 is "about as specific as it can be about what it takes to assume a lease and section 525(a) does not even mention leases"), In re James, 198 B.R. 885, 890 (Bankr. W.D. Pa. 1996) (same), In re Caldwell, 174 B.R. 650, 654 (Bankr. N.D. Ga. 1994) (same). The bankruptcy court in this case, for instance, ruled that "the more specific language of § 365(d)(1) must be read to trump the general provisions of § 525(a)." The district court determined that section 525(a) is more specific, even though "'specificity' is not easily measured, because Congress acted to codify a judicial holding that addressed a specific set of facts and because it fashioned the provision to compel only 'governmental units' to take measures to prevent interference with a debtor's fresh start." Stoltz, 259 B.R. at 260-61.

[71] It is a "basic principle of statutory construction that a specific statute . . . controls over a general provision," HCSC-Laundry v. United States, 450 U.S. 1, 6, 101 S. Ct. 836, 839 (1981). Based on the text alone, without regard to each provision's meaning, section 365's claim to greater specificity, based on the invocation of the more specific word "lease" instead of the more general term "grant," seems no more compelling than section 525(a)'s claim to greater specificity, based on its use of the specific term "governmental unit," as compared to section 365's failure to discuss the public or private status of the grantor. Focusing on the

meaning of sections 525(a) and 365 in the housing context, however, makes plain that section 525(a) is the more specific provision. As discussed above, section 365 indicates that landlords (in general) may evict debtor-tenants for nonpayment of discharged prepetition rent. Section 525(a), on the other hand, specifically prohibits landlords who are also governmental units from evicting debtor-tenants solely because of nonpayment of discharged prepetition rent. Thus, these two sections dictate precisely opposite outcomes - except that section 365 applies to all landlords, whereas section 525(a) applies only to landlords which are also governmental units.

[72] Coupled with the district court's persuasive reasoning, our specificity analysis convinces us that section 525(a) is the more specific provision. *fn9

[73] 2. Sound Bankruptcy Policy

[74] Our determination that section 525(a) should control on the basis of specificity is supported by sound public policy and the overarching goals of the Bankruptcy Code. The Code seeks to give debtors like Stoltz a fresh start. "Congress made it a central purpose of the bankruptcy code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts." In re Bogdanovich, 292 F.3d 104, 107 (2d Cir. 2002). Similarly, section 525(a) was enacted to ensure that governmental units do not deprive debtors of grants that are essential to a debtor's fresh start. "This section permits further development [of the Perez rule] to prohibit actions by governmental or quasi-governmental organizations . . . that can seriously affect the debtors' livelihood or fresh start . . . ." H. Rep. No. 95-595, at 367 (1977), reprinted in 1978 U.S.C.C.A.N.. 5963, 6268. As already discussed, Stoltz's fresh start would be thwarted if we were to permit BHA to evict her on the basis of nonpayment of debts discharged in bankruptcy.

[75] Of course, creditors also receive protection from the Bankruptcy Code. In order to assume an

unexpired lease, the executory contract provision requires the bankruptcy trustee to cure defaults, 11 U.S.C. § 365(b)(1)(A), compensate for losses, 11 U.S.C. § 365(b)(1)(B), and provide adequate assurance, 11 U.S.C. § 365(b)(1)(C), thereby protecting the creditor's pecuniary interests before requiring a creditor to continue a contractual relationship with a debtor. If a debtor or trustee does not assume an unexpired lease under section 365(b)(1), then the lease is deemed rejected under section 365(d)(1). The landlord may then pursue state law remedies for breach, so long as the landlord does not attempt to reaffirm the debt in violation of section 524. *fn10

[76] Giving section 525(a) its full effect, however, will only marginally abbreviate the benefit BHA receives under section 365.

[77] It is undisputed that BHA, as a governmental unit, may not deny Stoltz a future public housing lease on the basis of the discharged prepetition rent. The only benefit BHA seeks, therefore, is eviction. Whether Stoltz remains in her apartment or is evicted and later readmitted to BHA's public housing, she is obligated to pay all post-petition rent. Neither Stoltz's discharge nor section 525(a) diminishes her obligation to pay post-petition rent, and the Code expressly prohibits Stoltz from receiving another discharge under bankruptcy for at least six years. 11 U.S.C. § 727(a)(8). In the interim, Stoltz may be evicted if she breaches her lease by post-petition default.

[78] Therefore, all of BHA's creditor-interests are protected, regardless of whether Stoltz is evicted or not. *fn11 Given the serious harm posed to Stoltz's fresh start, and the minimal benefit BHA would receive, curtailment of BHA's state law remedy of eviction serves the sound public policy of granting debtors a fresh start and does the least mischief to the purposes underlying sections 525(a) and 365 of the Bankruptcy Code. We therefore conclude that, when sections 365(b) and 525(a) come "foot to foot" in the public housing context, section 365(b) must step aside and let

section 525(a) pass.

[79] III. CONCLUSION

[80] For the foregoing reasons, we affirm the district court's reversal of the bankruptcy's court's order to lift the automatic stay. Section 525(a) protects debtor-tenants like Stoltz from eviction on the basis of nonpayment of discharged prepetition rent. To the extent sections 525(a) and 365 of the Bankruptcy Code conflict, the rules of statutory construction and sound bankruptcy policy dictate that section 525(a) must prevail. BHA is therefore permanently enjoined from enforcing its judgment for possession against Stoltz.

285 B.R. 239
In re Daynor A. STINSON, Debtor.
Daynor A. Stinson, Plaintiff,
v.
BB & T Investment Services, Inc., Defendant.
Bankruptcy No. 7-01-02631.
Adversary No. 7-02-00001.
United States Bankruptcy Court, W.D. Virginia, Roanoke Division.
April 26, 2002.

A. Carter Magee, Roanoke, VA, for debtor.

George I. Vogel, Roanoke, VA, trustee.

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DECISION AND ORDER

ROSS W. KRUMM, Bankruptcy Judge.

At Roanoke in said District this 26th day of April, 2002:

The issue before the court is whether 11 U.S.C. § 525(b)(1) prohibits discriminatory hiring by private entities. The complaining party alleges that a bank withheld an offer of employment solely because he had been a debtor under Title 11 of the United States Code. Moving to dismiss for failure to state a claim,[1] the bank contends that discriminatory hiring is not an event proscribed by 11 U.S.C. § 525(b). The court heard the parties in oral argument and considered the pleadings and authorities. For the reasons set forth below, the court will dismiss the complaint.

BACKGROUND

The facts alleged in the complaint are as follows: Daynor A. Stinson (hereinafter Debtor) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on June 11, 2001. The court entered a final decree and discharge order in the Debtor's case on September 11, 2001 and the case was closed.[2] In August and September of 2001, the Debtor interviewed with BB & T Investment Services, Inc. (hereinafter BB & T) for a position as an investment counselor. During the interview process, the Debtor was informed by Roger White, BB & T's regional manager, that BB & T wanted to hire the Debtor to work in the Lexington, Virginia area. Roger White told the Debtor that his hiring was contingent only on the processing of paperwork. At some time subsequent to a second interview, Roger White informed the Debtor that no offer of employment would be extended.[3]

The Debtor alleges that BB & T's refusal to extend an offer of employment was based solely on the fact that he had been a debtor under Title 11. The Debtor contends that BB & T's decision with respect to the Debtor's employment is in violation on 11 U.S.C. § 525(b)(1). The Debtor admits that § 525(b) does not explicitly outlaw discriminatory hiring, but argues that the prohibition in the statute against discriminating "with respect to employment" is broad enough to cover the factual situation set forth in the Debtor's complaint.

BB & T argues that since § 525(b) does not specifically include a refusal to hire in its anti-discrimination provision, there is no legal basis to support the complaint. BB & T further supports its position by juxtaposing subsections (a) and (b) of § 525, pointing out that subsection (a) specifically prohibits a governmental unit from refusing to hire; thus, the failure to specifically forbid discrimination in hiring in subsection (b) evinces Congress' intent to limit the anti-discrimination policy as it applies to hiring by private employers. The Debtor counters with the argument that the two code sections should not be compared because they were enacted at different times and were crafted by different draftsmen.[4]

ANALYSIS

The court's analysis begins with the text of the statute. The Bankruptcy Amendments and Federal Judgeship Act of 1984 amended 11 U.S.C. § 525 by adding subsection (b), which prohibits private employers from discriminating against Title 11 debtors.[5] In pertinent part, § 525(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 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.
>
> 11 U.S.C. § 525(b).

BB & T relies on *Fiorani v. CACI,* 192 B.R. 401 (E.D.Va.1996) for the proposition that § 525(b) does not reach discriminatory hiring. In *Fiorani,* the court stated:

> The statute's explicit reference to discrimination with respect to termination leaves no doubt that terminations are covered. But notably absent from the statute is any explicit reference to discrimination in hiring. This omission would be conclusive were it not for the statute's general reference to discrimination "with respect to employment" against one who has filed for bankruptcy, which reference arguably furnishes a basis for stretching the statute to cover hiring. Yet, this argument seems to stretch the statute too far, for if the reference to discrimination "with respect to employment" is read to cover hiring, it would, for the same reasons, seem that the phrase was also meant to reach termination. But it is quite apparent that this is not so, given that statute's framers found it necessary to make separate, explicit reference to termination. More likely, the phrase discrimination "with respect to employment" refers neither to hiring nor termination, but to other terms and conditions of employment.

Fiorani, 192 B.R. at 404-05. The *Fiorani* court supported its conclusion by comparing § 525(b) to § 525(a).

> A comparison of the two provisions is instructive on the issue at bar. Subsection (a), which applies only to governmental units, states that a governmental unit may not "deny employment to, terminate the employment of, or discriminate with respect to employment against" a debtor or bankrupt. 11 U.S.C. § 525(a) (emphasis added). Thus, this portion of § 525 explicitly includes a prohibition against discrimination in hiring on the basis of an applicant's bankruptcy filing. By contrast, § 525(b), the private-employer provision, omits the prohibition of "denying employment" on the basis of an applicant's bankrupt status. This is compelling evidence

> that § 525(b) does not reach hiring, for it is well established that 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 acted intentionally and purposely in the disparate inclusion or exclusion."
>
> *Fiorani,* 192 B.R. at 405.

The *Fiorani* court also relied on the textual cannon of interpretation *in pari materia,* stating when § 525(b) is read in juxtaposition to § 525(a) the conclusion is persuasive that Congress did not intend to "subject private employers to liability for choosing not to hire an applicant on the basis of his bankruptcy status." *Id.* at 405. The court rejected any reference to the legislative

history of § 525(a) when interpreting § 525(b) because, quite simply, the legislative history pertains to subsection (a) not (b). The court was not satisfied that there was a sufficient nexus to link the legislative history of subsection (a) to subsection (b). The court also dismissed relying on § 525(a)'s legislative history because it implicitly discusses the Supremacy Clause by referring to the *Perez* decision, *supra* note 2, which clause is not relevant to private employers.

A majority of courts addressing this issue have held that § 525(b) does not reach discriminatory hiring by private employers. *See, e.g.,* *Pastore v. Medford Sav. Bank,* 186 B.R. 553 (D.Mass.1995)(holding that § 525(b) does not provide a cause of action of failure to hire); *In re Hardy,* 209 B.R. 371 (Bankr.E.D.Va.1997) (requiring an employment relationship as a prerequisite for the applicability of § 525(b)); *In re Hopkins,* 81 B.R. 491 (Bankr.W.D.Ark.1987) (holding § 525(b) reaches private employers only after an offer of full-time employment has been extended); *In re Madison Madison Intl. of Illinois,* 77 B.R. 678 (Bankr.E.D.Wis.1987) (stating § 525(b) does not apply to hiring decisions).

Despite an apparent consensus to the contrary, the Debtor argues that *Leary v. Warnaco, Inc.,* 251 B.R. 656 (S.D.N.Y.2000) correctly interprets the breadth of § 525(b). In *Leary,* the debtor was offered employment subject only to a credit check. When the employer discovered the debtor's prior bankruptcy, it refused to hire her. The bankruptcy court dismissed the debtor's complaint for discriminatory hiring. On appeal, the district court reversed. The *Leary* court held that the plain meaning of the language "with respect to employment" is "clearly broad enough to extend to discriminating with respect to extending an offer of employment."

In reaching this conclusion, the *Leary* court rejected the analysis of courts, like *Fiorani,* which exclude discriminatory hiring from the scope of § 525(b).

This rather narrow construction of a remedial statute has been reached by drawing a negative inference comparing this statute with § 525(a). Section 525(a) states that the government may not "deny employment to, terminate the employment of or discriminate with respect to employment against" a person who has been a bankruptcy debtor. Section 525(b), while similar in language, does not contain the phrase "deny employment to." 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.

Id. at 658. The *Leary* court declared that an application of the plain meaning of the statute to include discriminatory hiring is consistent with the purpose of § 525. "The 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." *Id.* "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)." *Id.*

This court is faced with two competing interpretations both claiming to be grounded in the plain meaning of the text. The court therefore must endeavor to interpret this statute that has led intelligent and reasonable courts to contradictory interpretations.

As an initial premise, "[w]here ... the statute's language is plain, the sole function of the court is to enforce it according to its terms." *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 99, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (internal quotation marks omitted). The court's "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, `that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) (discussing plain meaning rule). "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns, Inc.,* 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

At times a proposed interpretation of a statute that fulfills the purpose for which it was enacted cannot properly be given by a court because doing so arguably runs afoul of the constitutional limitations on a court's power. The Supreme Court case discussed below illustrates the tension between interpreting the words of a statute to give effect to the intent of a legislative body and respecting the constitutionally proscribed limitations of the judiciary's role.

In *West Virginia University Hospitals, Inc. v. Casey,* Justice Scalia stated "[t]he question before us, then, is — with regard to both testimonial and nontestimonial expert fees-whether the term `attorney's fee' in [42 U.S.C.] § 1988 provides the `explicit statutory authority' required by *Crawford Fitting* [*Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987)]."[6] The Court held that 42 U.S.C. § 1988, which permits the award of a "reasonable attorney's fee" in civil rights cases, does not concomitantly authorize an award of fees for expert services. Based on the record of statutory usage, Justice Scalia showed that attorney's fees and expert fees are separate elements in litigation costs. He relied on various federal statutes to make this point. For example, § 1988 refers only to attorney's fees whereas 15 U.S.C. § 2618(d) allows recovery of "the cost of suit and reasonable fees for attorneys and expert witnesses." *Casey,* 499 U.S. at 88, 111 S.Ct. 1138.

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Justice Scalia stated that allowing "attorney's fees" to include "expert fees" would cause "dozens of statutes referring to the two separately [to] become an inexplicable exercise in redundancy." *Id.* at 92, 111 S.Ct. 1138. Justice Scalia rejected the imaginative reconstruction of congressional intent which posits that Congress would have included attorney's fees had it thought about it. Justice Scalia declared that it is not a court's "function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently." *Id.* at 101, 111 S.Ct. 1138. Rejecting the argument that congressional purpose should prevail over the ordinary meaning of the statute, Justice Scalia stated

[t]he facile attribution of congressional "forgetfulness" cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the better disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States: "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin v. United States,* 270 U.S. 245, 250-251, 46 S.Ct. 248, 70 L.Ed. 566 (1926).

Casey, 499 U.S. at 101, 111 S.Ct. 1138.

Justice Stevens dissented based upon his view that the legislative history indicated a congressional desire that prevailing plaintiffs be made whole. Justice Stevens criticized the majority decision as anti-democratic, stating that the Court disserves democratic norms when it "puts on its thick grammarian spectacles and ignore[s] the available evidence of congressional purpose and the teachings of prior cases construing the statute." He opined that the Court does "country a disservice when [it] needlessly ignore[s] persuasive evidence of Congress' actual purpose and require[s] it ... to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error." *Casey,* 499 U.S. at 115, 111 S.Ct. 1138 (Stevens, J., dissenting).[7]

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In the instant statute, the task of interpreting a statute to give effect to the will of Congress without overstepping the court's limited powers is not a facile undertaking. The plain text of §

525(b) does not explicitly provide that discriminatory hiring is prohibited. Admittedly, this court cannot unequivocally declare that, standing alone, the words "[n]o private employer ... may discriminate with respect to employment" do not encompass discriminatory hiring.[8] Indeed, a reasoned opinion holds that the plain meaning of § 525(b) does, in fact, prohibit hiring based on individual's participation in Title 11.[9] *See Leary, supra.* *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir.1990).[10]

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On the surface, the *Leary* court's construction of the statute closely serves the purpose for which § 525 was enacted. An interpretation that 525(b) prohibits discriminatory hiring is, arguably, supported by the history of § 525. Section 525(a) was enacted to codify and expand the *Perez* ruling. In relevant part § 525(a) states:

[A] governmental 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 or a debtor under the Bankruptcy Act, ... solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act ....

The enumerations in § 525(a) are not intended to be an exhaustive list, rather the section was drafted to permit further development of prohibited discriminatory treatment. *See* Collier on Bankruptcy ¶ 525.01. When read as a starting point, and not a exclusive and circumscribed list, the enumerations in § 525(a) can be viewed as examples of prohibited discriminatory treatment and not the only instances thereof. The significance of omitted terms is minimized under this approach.

The legislative history to § 525(a) corroborates the above understanding and evinces a congressional concern that governmental entities be prohibited from interfering with a debtor's discharge and fresh start. As stated in Colliers, "[o]ne of the key purposes of section 525 is to protect the debtor's means of earning a livelihood." Collier ¶ 525.02[4]. The House and Senate Reports describe the effect and purpose of § 525(a), stating:

This section is additional debtor protection. It codifies the result of *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971), which held that a State would frustrate the Congressional policy of a fresh start for a debtor if it were permitted to refuse to renew a drivers license because a tort judgment resulting from an automobile accident had been unpaid as a result of a discharge in bankruptcy.

The prohibition extends only to discrimination or other action based solely on the basis of the bankruptcy, on the basis of insolvency before or during bankruptcy prior to a determination of discharge, or on the basis of nonpayment of a debt discharged in the bankruptcy case (the *Perez* situation). It does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily.

In addition, the section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination. The courts have been developing the *Perez* rule. This section permits further development to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start, such as exclusion from a union on

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the basis of discharge of a debt to the union's credit union.

The effect of the section, and of further interpretations of the *Perez* rule, is to strengthen the anti-reaffirmation policy found in section 524(b). Discrimination based solely on nonpayment could encourage reaffirmations contrary to the expressed policy.

H. Rep. No. 95-595, 95th Cong., 1st Sess. 366-67 (1977), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5963, 6322-6323; S.Rep. No. 989, 95th Cong., 2d Sess. 81 (1978), *reprinted in* 1978 U.S.Code Cong. & Admin. News 5787, 5867. The Senate Report further states that courts "will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy." *Id.*"In short, a governmental unit may not discriminate against a person in ways that will frustrate the fresh start policies of the Code." Colliers on Bankruptcy ¶ 525.02.

Clearly, the purpose of § 525(a) is to prevent discriminatory conduct by the government. Such a prohibition is essential to allow the purposes of the Bankruptcy Code to be fulfilled. *See Perez,* 402 U.S. at 648, 91 S.Ct. 1704 ("This Court on numerous occasions has stated that `one of the primary purposes of the bankruptcy act' is to give debtors `a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'").

Subsection (b) was amended into § 525 to further the policy embodied in § 525(a); namely, to protect the debtor's ability to earn a livelihood. *See* Collier ¶ 525.02[4]. In light of the clear and obvious purpose of § 525, the argument rejecting a broad interpretation of § 525(b) based on the fact that there is no apparent nexus between the legislative history of § 525(a) and § 525(b) appears unwarranted. *See Fiorani,* 192 B.R. at 406. Instead of asking how a court can link subsection (b) to (a) based on the legislative history, perhaps the more salient question is whether there is any reasonable basis for believing that subsection (b) was purposefully enacted to achieve a more limited goal than subsection (a).

The evil prohibited by § 525 is discrimination based upon a person's participation in Title 11, all other things being equal. The prohibition against discrimination is designed to prevent the frustration of the fresh start by the government, private employers, or educational lending institutions. In this respect, interpreting § 525(b) to cover discriminatory hiring is more consistent with the thrust of § 525 taken as a whole, since it forbids grounding decisions solely on the fact that individual was or is a Title 11 debtor.

However, the fact that the result reached by the Debtor's interpretation more fully advances the apparent goals of § 525 does not necessarily mean that the court should interpret the statute to reach that goal. In the final analysis, the words in the statute do not permit the court to interpret the statute to prohibit discriminatory hiring, however laudable that result may appear. The court believes that to interpret the statute as the Debtor requests would require this court to step beyond its constitutionally proscribed function. When the statute is read as a whole, meaning a reading that does not confine itself to a portion of one subsection, the Debtor's interpretation is not tenable because it does harm to other provisions in § 525. *United States v. Penn,* 17 F.3d 70 (4th Cir.1994) ("[I]t is fundamental rule of statutory construction that all parts of a statute must be read together.").

"When interpreting a statute, 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." *Kokoszka v. Belford,* 417 U.S. 642, 650, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974). *See* 2A Sutherland, Statutes and Statutory Construction § 47.02, at 139 (5th ed., Norman Singer ed.) (endorsing the whole act rule). Under this approach, the court must heed "the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States,* 485 U.S. 759, 778, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (plurality opinion by Scalia, J.).

If the phrase "with respect to employment" covers hiring decisions, then provisions in § 525(a) and (b) become an exercise in redundancy. *See Casey,* 499 U.S. at 101, 111 S.Ct. 1138. The court cannot ascribe a substantive meaning to the terms "deny employment to" in § 525(a) if "discriminate with respect to employment" is read to encompasses discriminatory hiring. The explicit inclusion of the phrase "deny employment to" in § 525(a), preceding the phrase "discriminate with respect to employment," leads this court to concluded that Congress believed the phrases offered different protections to a Title 11 debtor. To interpret "discriminate with respect to employment" in § 525(b) to mean that a private employer may not deny employment to a Title 11 debtor would create unwarranted superfluousness in subsection (a).

Similarly, the *Fiorani* court rejected a reading that would harm provisions in subsection (b). If, in subsection (b), "discriminate with respect to employment" covers hiring decisions, then there is no cogent argument why it would not also cover decisions regarding terminations as well. *See Fiorani,* 192 B.R. at 404-05. The Debtor's interpretation would cause the anti-termination provision in subsection (b) to be unnecessarily redundant.

The court believes that the result reached by the *Fiorani* court is proper. Analyzing the subsections *in pari materia* also supports an interpretation that "discrimination with respect to employment" does not cover hiring decisions.[11] The Debtor cites *United States v. Mitchell,* 39 F.3d 465 (4th Cir.1994) as an example of the Fourth Circuit's reluctance to rely on disparate inclusions or exclusions of language in a statute.

The issue before the *Mitchell* court was whether the term "law" in 18 U.S.C. § 545 encompassed legislative acts and administrative regulations. The appellant in*Mitchell* argued that "contrary to law" should be limited to legislation passed by Congress and should not include agency regulations. The Fourth Circuit held that 18 U.S.C. § 545 reaches conduct contrary to Fish and Wildlife Service regulations

that have the force and effect of law. In doing so, the court noticed that "law" was not defined in the statute; thus, the court gave the term its ordinary meaning, which commonly includes administrative regulations. The *Mitchell* court recognized the well-settled principle announced *Chrysler Corp. v. Brown,* 441 U.S. 281, 295-96, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979): "It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the `force and effect of law.'" According to the *Mitchell* court, it would take a clear showing of contrary legislative intent before the phrase "contrary to law" could be held to encompass a narrower ambit than the ordinary and traditional understanding. *Id.* at 468.

The *Mitchell* court rejected the appellant's reliance on various provisions in the 1922 and 1930 Tariff Acts that refer to "law and regulations." The *Mitchell* court discussed the Supreme Court's pronouncement *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) that when "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 purposely in the disparate inclusion or exclusion." First the court noted that the presumption loses force when the sections in issue are scattered within a lengthy and complex act.*Mitchell,* 39 F.3d at 470. More importantly, the court pointed out that the terms "law and regulations," which were apparently enacted after the terms in § 545, were not used in the context of conduct "contrary to law" and that the legislative history to the new sections did not indicate to the court that Congress intended to limit the meaning of "contrary to law" *Id.* The court also recognized the presumption that Congress adopts judicial interpretations when it re-enacts a statute without modifications. Thus, without clear evidence of Congress' intent to the contrary, the Fourth Circuit was unwilling to ascribe an untraditionally narrow definition to the terms "contrary to law." *Id.*

Although the *Mitchell* decision is well-reasoned and sound, the court is not convinced that the principles announced therein advance the Debtor's position. The Debtor's exegesis of *Mitchell* is too narrow: the reasons why the *Mitchell* court did not find an omitted phrase significant are not present here. The Debtor did not show that his proposed interpretation is the traditional and understood meaning of the terms in question. In fact, most courts have not interpreted the language as the Debtor does. Also, the phrases here are used in the same context (prohibited discriminatory conduct) and in the same section; thus, the presumption

announced in *Russello*appears more applicable than in *Mitchell.* In *Mitchell* the phrases analyzed when applying the *Russello* presumption were apparently scattered throughout the statute and were not used in the same context. For that reason, and in light of the traditional meaning of "law" previously announced in judicial decisions, the *Mitchell* court was not persuaded that Congress intended to narrowly use the term. The court finds that the *Mitchell* case is distinguishable from the matter *sub judice.*

Reading § 525(b) to except discriminatory hiring maintains internal congruity and avoids needless redundancies when § 525 is read in its entirety. It is not necessarily an anomaly to find that § 525(b) offers less protections than § 525(a). A respected treatise recognizes that § 525(b) is more narrow in scope than § 525(a).*See* Norton Bankruptcy Law and Practice § 50:2 ("The prohibition [in § 525(b)] is limited to discrimination in employment and is not, therefore, as broad as the ban on governmental

discrimination in Code § 525(a)"). Code § 525(a) extends protections to hiring, termination, and discrimination in employment while Code § 525(b) makes no reference to hiring. Also, while § 525(a) protects a "person" (which under 11 U.S.C. § 101, includes individuals, partnerships, and corporations), Code § 525(b) protects only "individuals." Furthermore, the analysis of *Fiorani* and the presumption discussed in *Russello* tip the scales in favor of this court's interpretation of Code § 525(b). Even if the Debtor's reading of § 525(b) is more palatable and better serves the fresh start policies of the Bankruptcy Code, the court cannot give the statute a meaning that harms the text enacted by Congress and signed by the President.

CONCLUSION

Section 525(b) prohibits discrimination with respect to employment, but this prohibition does not include hiring decisions. When § 525 is read as a whole, the court cannot interpret "with respect to employment" without causing redundancies and surplusage. Although the result reached by the Debtor's interpretation may be desirable, the task of achieving that end is better left to Congress, not this court. Accordingly, it is

ORDERED:

That the Motion to Dismiss is GRANTED.

A copy of this order is directed to be sent to W. Calvin Smith, Esquire, Counsel for the Debtor, P.O. Box 404, Roanoke, Virginia 24003-0404; to Kevin Oddo, Esquire, Counsel for BB & T, 1800 First Union Tower, P.O. Drawer 1200, Roanoke, Virginia 24006; and to Edward Katze, Esquire, Counsel for BB & T, 230 Peachtree Street, N.W., Suite 2400, Atlanta, Georgia 30303-1557.

Notes:

1. Federal Rule of Civil Procedure 12(b)(6) ("failure to state a claim upon which relief can be granted") is made applicable to adversary proceedings by Rule 7012 of the Federal Rule of Bankruptcy Procedure.

2. On the Debtor's motion the case was reopened on February 12, 2002.

3. Consistent with the application of Fed.R.Civ.P. 12(b)(6), these facts are assumed true for the purpose of ruling on the motion.

4. Apart from the obvious fact that subsection (a) was enacted in 1978 and subsection (b) was enacted in 1984, the court did not see any authority for the "different scrivener" prong of this argument.

5. Prior to 1984, non-governmental employers were not prohibited from firing employees simply because they had received a discharge in bankruptcy. For example, *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir.1977), the court held that a company's termination of an employee who received a discharge in bankruptcy was not prohibited under the Supreme Courts

holding *Perez v. Campbell,* 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). In *Perez,* the Court held that a state may not refuse to renew a debtor's driver's license because the debtor was discharged of a tort judgment resulting from an automobile accident. Invoking the Supremacy Clause, the court stuck down state laws that impeded the application of the Bankruptcy Code. The Court recognized that the fresh start policies of the Bankruptcy Code would be frustrated by the discriminatory treatment resulting from an unpaid debt.

6. In *Crawford Fitting,* the Court held that 28 U.S.C. § 1821(b) and § 1920(3) completely define a federal court's authority to shift litigation costs, absent clear congressional authority to go beyond those provisions. *Crawford Fitting,* 482 U.S. at 439, 107 S.Ct. 2494. The *Crawford Fitting* Court specifically announced its reluctance to find an implied repeal of sections 1821 and 1920 through Fed.R.Civ.P. 54(d) or other provisions not clearly addressing witness fees. *Id.* at 445, 107 S.Ct. 2494.

7. Approximately, 3 months later, the Court declined to follow Scalia's interpretation of a statutory term. In the case styled *Chisom v. Roemer,* 501 U.S. 380, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991), Justice Scalia was in the dissent. In this case, the issue before the court was whether the "results test" of the Voting Rights Act protects the right to vote in state judicial elections. *Id.* at 383, 111 S.Ct. 2354.

A class of African Americans brought a suit arguing that Louisiana's use of multimember districts diluted the voting strength of the minority community in violation of § 2 of the Voting Rights Act, as amended in 1982. Section 2 as amended removed the intent to discriminate requirement and adopted a results test. In pertinent part § 2 provides "... [a] violation ... is established if ... it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice." 42 U.S.C. § 1973(b) (emphasis added).

Writing for the Court, Justice Stevens, rejected the contentions that the use of the term "representative" evidences a congressional intent to except from the statute vote dilution claims concerning judicial elections. Justice Stevens stated that if Congress had such an intent, it would have made it explicit in the statute, or at least mentioned it in the legislative history. Justice Stevens described "representatives" as winners of representative, popular elections and stated that if executive officers could be considered "representatives" merely because they are voted in by popular election, then the same logic brings elected judges into the scope of § 2. *Chisom,* 501 U.S. at 399, 111 S.Ct. 2354.

Dissenting, Justice Scalia stated that the Court erred in interpreting the statute because it did not "first, find the ordinary meaning of the language in its textual context; and second, us[e] established canons of construction, ask[ing] whether there is any clear indication that some permissible meaning other than the ordinary one applies." *Id.* at 404, 111 S.Ct. 2354. According to Justice Scalia, elected judges are not included in the ordinary meaning of "representative" and there is no good indication that the ordinary meaning of representatives should not apply. *Id.* at 414, 111 S.Ct. 2354. Justice Scalia rejected the Court's interpretation of § 2 based on what he describes as the "Court's conception of what Congress had in mind." *Id.* at 417, 111 S.Ct. 2354.

8. Transfers, demotions, or modifications to the employment terms of a debtor are, perhaps, illustrative of the most natural reading of "discrimination with respect to employment." *See, e.g., In re McNeely,*82 B.R. 628 (Bankr.S.D.Ga.1987) (finding discriminatory treatment where the employer the debtor's reduced logging quotas).

9. There is a colorable argument, however, that the statute's use of the term "employment" precludes its application to discriminatory hiring. The term is used in the statute as a noun. Some of the synonyms associated with the noun "employment" include appointment, business, career, commission, job, labor, lifework, livelihood, means of livelihood, occupation, post, profession, task, trade, vocation, and work. William C. Burton, LEGAL THESAURUS 198 (Deluxe ed.1980). Used as a noun, the term does not appear to connote the time where an individual is attempting to secure a job. In other words, the term "employment" does not naturally include decisions and activities occurring before the time that the individual can be said to be in possession of a "career," "job," "labor," "occupation," "profession," or "trade." Had the statute used the verb employ, the case for discriminatory hiring would be much stronger than it now stands.

10. Addressing the plaintiff's § 525(b) claim that the defendant failed to hire him solely because of his status as a Title 11 debtor, the Ninth Circuit stated thusly:

> In the instant case, *even if* B & W had made its final employment decision after it learned of the bankruptcy, B & W told Comeaux *before* it knew of the Chapter 13 filing that it would not hire him because of his credit history. n6 Thus, knowledge of the bankruptcy was clearly not the sole factor influencing B & W. Therefore, summary judgment for B & W was proper on this claim.

It is not clear whether the court is implicitly recognizing that § 525(b) covers hiring decisions or whether they merely restated the plaintiff's position when deciding the case.

Footnote 6 contained the following:

> Comeaux did not allege in his complaint or appellate briefs that B & W had violated section 525(b)(3), that is, that B & W failed to hire him because he had not paid certain debts "dischargeable" under the bankruptcy statute. Absent more information, it is not possible for us to discern whether the debts listed on the credit report that led B & W to change its mind about hiring Comeaux were "dischargeable" or "discharged" under the Act.

11. The court recognizes, however, that there is a response to every canon employed to reach a certain interpretation. Karl Llwellyn illustrated in *Remarks on the Theory of Appellate Decision and the Rules of Canons about how Statutes are to be Construed,* 3 Vand. L.Rev. 395, 401-06 (1950) a number of parries to asserted canons of interpretation. For example, the canon that a statute cannot be applied beyond its text is cast against the principle that to effect its purpose a statute may be implemented beyond its text. The canon that statutes *in pari materia* must be construed together is subject to the exception that statutes are not *in pari materia* if the scope and aim are distinct or where the design to depart from the general purpose or policy of the previous statute is apparent. The canon that if language is plain and unambiguous it must be given effect is countered by the desire to avoid literal interpretations if doing so leads to absurd results or thwarts the manifest purpose of the statute.

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121 L.R.R.M. (BNA) 2241, Bankr. L. Rep. P 70,868,
1 Indiv.Empl.Rts.Cas. 1759

Olita D. WILSON, Plaintiff-Appellant,
v.
HARRIS TRUST & SAVINGS BANK, Defendant-Appellee.

No. 85-1352.

United States Court of Appeals, Seventh Circuit.

Submitted Oct. 24, 1985.[*]
Decided Nov. 26, 1985.

Russel V. Sutton, Sutton & Gunn, Chicago, Ill., for plaintiff-appellant.

Bruce R. Alper, Vedder, Price, Kaufman & Kammholz, Chicago, Ill., for defendant-appellee.

Before CUMMINGS, Chief Circuit Judge, and WOOD and CUDAHY, Circuit Judges.

PER CURIAM.

1

Plaintiff-appellant, Olita Wilson, brought this action against her former employer, Harris Trust and Savings Bank, seeking an injunction, back pay, and reinstatement in connection with the termination of her employment allegedly in violation of Sec. 525 of the Bankruptcy Code, 11 U.S.C. Sec. 525. The district court, affirming the bankruptcy court's decision, held that Sec. 525 did not apply to the defendant, a private employer. Wilson appeals. We affirm.

I.

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In December 1981, Wilson filed a voluntary petition under Chapter 7 of the Bankruptcy Code, 11 U.S.C. Sec. 701, et seq. At the time of the petition, Wilson was employed by the defendant, Harris Trust and Savings Bank ("The Bank"). Wilson was also indebted to the Bank in the amount of $2,707.23.

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In January 1982, Wilson filed a complaint alleging that as a direct result of her filing for bankruptcy the defendant laid her off without pay and threatened to terminate her. She was subsequently terminated (the record does not disclose when). Wilson claimed that the defendant's actions were in violation of 11 U.S.C. Sec. 362(a)(3) and (a)(6). She argued that

the termination was an attempt to force her out of bankruptcy so the Bank could collect the debts owed it by Wilson. She also asserted a claim under 11 U.S.C. Sec. 525.

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The defendant moved to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted. The bankruptcy judge granted the motion and dismissed the case without prejudice. On appeal, the district court affirmed in part and reversed in part, holding that Wilson did have a cause of action under 11 U.S.C. Sec. 362(a), but did not have a cause of action under 11 U.S.C. Sec. 525. The case was remanded to the bankruptcy court.

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Wilson then withdrew her claim with respect to 11 U.S.C. Sec. 362(a). The issue we must decide is whether Wilson has stated a cause of action under 11 U.S.C. Sec. 525.

II.

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Since this is an appeal from a dismissal for failure to state a claim under Fed.R.Civ.P. 12(b)(6) and Rule 712 of the Bankruptcy Rules, we treat all of Wilson's allegations in the complaint as true. United Independent Flight Officers v. United Air Lines, 756 F.2d 1262, 1264 (7th Cir.1985). We also view all allegations in the light most favorable to Wilson. Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 385 (7th Cir.1984), aff'd, --- U.S. ----, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985).

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Section 525(a) provides, in relevant part, as follows:A governmental unit[1] may not ... terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title ... solely because such bankrupt or debtor is or has been a debtor under this title, or a bankrupt or debtor under the Bankruptcy Act, ... or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

The legislative history accompanying Sec. 525 indicates that, as enacted, the section codifies the result in Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). In Perez, the Court held that a state may not suspend the driver's license of a debtor whose tort judgment resulting from an automobile collision was discharged. The Court found that the state financial responsibility statute was in conflict with the "fresh start" policy of the Bankruptcy Act. Id. at 652, 91 S.Ct. at 1712.

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Wilson concedes that a literal reading of 11 U.S.C. Sec. 525 "[a] governmental unit may not ..." indicates that Congress did not intend it to apply to private employers. She argues,

however, that Congress gave the courts discretion to extend Sec. 525 to private employers. Wilson relies on legislative history accompanying Sec. 525 which states that "[t]he section is not so broad as a comparable section proposed by the Bankruptcy Commission ... which would have extended the prohibition to any discrimination, even by private parties. Nevertheless, it is not limited either ... the courts will continue to mark the contours of the anti-discrimination provision in pursuit of sound bankruptcy policy." H.R.Rep. No. 595, 95th Cong., 1st Sess. 366-7 (1977), reprinted in 1978 U.S.Code Cong. & Ad.News 5963, 6323; S.Rep. No. 989, 95th Cong.2d Sess. 81 (1978), reprinted in 1978 U.S.Code Cong. & Ad.News 5787, 5867.

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Wilson relies on In re Heath, 3 B.R. 351, 353 n. 1 (Bkrtcy.N.D.Ill.1980), where the court acknowledged that section 525 could be extended to include private employers. The statement in Heath, however, was dictum: the case involved the application of Sec. 525 to a state university. Wilson also cites In re Terry, 7 B.R. 880 (Bkrtcy.E.D.Va.1980), where the court noted that courts generally take a dim view of a private employer firing an employee simply because he or she has filed a petition in bankruptcy. The court further stated that the jurisdiction to enjoin this is widely accepted.

But Terry did not mention Sec. 525 and ultimately concluded that the employee was discharged for reasons other than filing for bankruptcy. Thus, the cases Wilson relies upon did not apply Sec. 525 to a private entity.

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A few recent cases have suggested that Sec. 525 should be construed to apply to private entities. In re Olson, 38 B.R. 515, 519 (Bkrtcy.N.D.Iowa 1984) (basing decision on Secs. 362(a) and 524(a)); Matter of Green, 29 B.R. 682, 686 (Bkrtcy.S.D.Ohio 1983) (private entity acting as "vicarious agent" of state; Sec. 525 violated); In re Parkman, 27 B.R. 460, 462 (Bkrtcy.N.D.Ill.1983) (where actions of private institution are really tools to collect a discharged debt, debtor is denied the fresh start contemplated by Congress; Secs. 362(a) and 525); Bell v. Citizens Fidelity Bank & Trust Co.,636 F.2d 1119 (6th Cir.1980) (summary judgment improper where issues of material fact existed as to whether employer discharged the plaintiff employee for filing a petition in bankruptcy and whether the policy of discharging employees who have filed petitions in bankruptcy had a discriminatory impact on blacks; citing no statutory authority.) But see id. at 1120 (Weick, J., dissenting).

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Nevertheless, the majority of courts have rejected applying Sec. 525 to private entities prior to 1984. See In re Amidon, 22 B.R. 457 (Bkrtcy.D.Mass.1982) (Sec. 525 does not apply to employer management company); In re Barbee, 14 B.R. 733, 736 (Bkrtcy.E.D.Va.1981) (Sec. 525 does not apply to employer bank); In re Coachlight Dinner Theatre of Nanuet, Inc., 8 B.R. 657, 658 (Bkrtcy.S.D.N.Y.1981) (Sec. 525 inapplicable to a private radio station); In re Northern Energy Products, 7 B.R. 473, 474 (Bkrtcy.C.D.Minn.1980) (Better Business Bureau is

not a governmental unit under Sec. 525); In re Douglas, 18 B.R. 813, 815 (Bkrtcy.W.D.Tenn.1982) (Sec. 525 inapplicable to an insurance company). See also Matter of Jackson, 424 F.2d 1220, 1222 (7th Cir.), cert. denied 400 U.S. 911, 91 S.Ct. 145, 27 L.Ed.2d 150 (1970) (pre-dating Bankruptcy Reform Act but finding no authority to issue an injunction continuing a debtor's employment against his private employer's will); McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 929-30 (5th Cir.1977) (en banc) (pre-dating the Bankruptcy Reform Act but finding no law prohibiting a private employer from firing an employee because he had filed a petition in bankruptcy and refusing to extend Perez); Marshall v. District of Columbia Government, 559 F.2d 726, 729 (D.C.Cir.1977) (pre-dating the Bankruptcy Reform Act but determining that bankruptcy statute does not "prohibit employers from using the fact of bankruptcy in considering whether the past record of a job applicant merits his consideration for employment"; fitness for job in a police department can depend on applicant's prior bankruptcy, pursuant to District of Columbia regulation).

We agree with the majority's interpretation of the statute. Congress carefully considered extending the anti-discrimination section to private entities and purposefully rejected it as being overbroad. Where the terms of the statute are unambiguous, reliance on legislative history is inappropriate, absent rare and exceptional circumstances. Pullman-Standard v. I.C.C., 705 F.2d 875, 879 (7th Cir.1983). Section 525 is specifically worded to apply to governmental units. The Bank is clearly not a governmental unit. We cannot find a cause of action under Sec. 525 when Congress has expressly declined to provide one.

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Moreover, Congress amended Sec. 525 in 1984 to provide that the prohibitions in Sec. 525(a) now apply to private, as well as public, employers. See 11 U.S.C. Sec. 525(b).[2] Congress would not have added this provision if it thought private employers were already barred from discriminating against debtors under Sec. 525.

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Wilson also asks this court to apply Sec. 525(b) retroactively to her 1982 suit. We decline to do so. Congress expressly stated that subsection (b) was to be applied only to cases filed ninety days after enactment. Subsection (b) was enacted on July 10, 1984, long after this case had been in litigation.

The decision of the district court is

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AFFIRMED.

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After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might

file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed.R.App.P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record

[1]

"Governmental unit" is defined in Sec. 101(21) of the Code as follows: " 'Governmental unit' means United States; State, Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. Sec. 101(21)

[2]

Section 525(b) now provides: "[n]o 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