

CLIENT ALERT

Circuit Court Rules No Cause of Action for Discrimination Against Debtors

May 24, 2011

The U.S. Court of Appeals for the Eleventh Circuit has joined the Third and Fifth Circuits in holding that the Bankruptcy Code, 11 U.S.C. § 525, *does not* prohibit a private-sector employer from discriminating in hiring based on an applicant's having filed a bankruptcy petition. See *Myers v. TooJay's Mgmt. Corp.*, No. 10-10774 (11th Cir. May 17, 2011).

Plaintiff Eric Myers filed for Chapter 7 bankruptcy in 2008, and he received a discharge of his debts. Shortly thereafter, Myers applied for employment as a manager at TooJay's Restaurant. Myers interviewed for the position and completed a two-day on-the-job evaluation. He then resigned from his then-current employment with Starbucks, only to be informed by TooJay's that he would not be offered employment because TooJay's had discovered that he had filed for bankruptcy.

Myers sued TooJay's, contending that he had been hired for the position and then unlawfully terminated from employment because of his bankruptcy filing. He also claimed that TooJay's was prohibited from refusing to hire him based solely upon bankruptcy.

In a technical application of statutory construction of the Bankruptcy Code, the Eleventh Circuit held that Congress intended that *government employers* could not discriminate on the basis of a bankruptcy against employees, or against candidates for employment, but that the prohibition on discrimination in hiring did not apply to *private employers*. The court confirmed that private-sector employers are prohibited from discriminating against current employees as a result of a bankruptcy. The Eleventh Circuit, however, upheld the jury's finding that TooJay's had not yet hired Myers.

While there are currently no federal Courts of Appeals that have issued decisions contrary to the Eleventh Circuit's holding, there is no certainty that it will be applied elsewhere. Also, the court's decision makes no mention of, and presumably would not affect, state laws on the subject. Lastly, employers should be wary of adopting a policy of disqualifying candidates for having filed for bankruptcy, because such a policy would create the potential for a disparate impact claim, particularly in light of the EEOC's recent focus on potential sources of systemic discrimination.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies

Partner – Washington, D.C.
Phone: +1.202.624.2690
Email: tgies@crowell.com

Glenn D. Grant

Senior Counsel – Washington, D.C.
Phone: +1.202.624.2852
Email: ggrant@crowell.com