IN BRIEF: NEW JUDGMENTS ON DISCRIMINATION

HEADNOTE As in past issues of our Newsletter, we would also like to review judgments in this issue which involve anti-discrimination legislation that illustrate the existence of a thin line between what constitutes discrimination and permissible conduct.

FIRST SET OF FACTS 1. If an employer requires that an employee who is not a native speaker of German take German lessons, this does not constitute harassment within the meaning of section 3(3) of the General Equal Treatment Act (Allgemeines Gleichstellungsgesetz – AGG). This is the case even if an employer urges an employee to take language lessons with "considerable insistence". According to the court, such an employer is acting only in respect of the language skills of the employee, which the General Equal Treatment Act does not prohibit. Discrimination on the basis of ethnicity, which is one of the forms of discriminatory actions covered by the General Equal Treatment Act, is not involved here (Schleswig-Holstein Higher Labor Court, judgment of 23 December 2009 - 6 Sa 158/09).

SECOND SET OF FACTS 2. According to a judgment of the Hamburg Labor Court, an employer who institutes a formal hiring procedure that calls for initial contact with candidates for employment by telephone may be guilty of discrimination on the basis of ethnic origin in the case of applicants whose native language is not German. The court ruled that this will regularly be the case when an employer does not invite individuals to an interview who cannot express themselves in clear, understandable and accent-free German. According to the court, this is not a case in which language skills are used as a criterion for the selection of candidates, which is permissible. Instead, the court reasoned that such an employer is indirectly making his decision on the basis of ethnicity, which the General Equal Treatment Act prohibits, since members of other ethnic groups often speak German with a noticeable accent. The Hamburg Labor Court did, however, make it clear that a command of German may be included as a qualification for employment in an employment advertisement if knowledge of the language is required to ensure efficient operation of a business and permit appropriate communication between the employee and the employer as well as with customers. The ability to speak accent-free German is on the other hand not necessary to ensure proper communication with customers and may therefore not be used as a criterion for selection (Hamburg Labor Court, judgment of 26 Janurary.2010, 25 Ca 282/09).

UNDER-THE-TABLE PAYMENTS NO BASIS FOR A "NET PAY AGREEMENT"

FACTS In the last issue of our Newsletter, we mentioned the fact that section 14 of Social Code IV presumes the de facto existence of a "net pay agreement" in the case of "illegal" employment within the meaning of social-security law, which will regularly result in claims for unpaid social-security contributions. In a recent judgment, the Federal Labor Court made it clear that the presumption of the existence of a net pay agreement applies only in the context of legislation governing the social security system and has no implications at the level of rights and obligations under employment agreements. In a concrete case, an employee filed an action to recover compensation for lost wages and paid leave on the basis of a de facto net pay agreement within the meaning of section 14 of Social Code IV. She had been employed under a marginal employment program and received Đ 400.00 per month, which was exempt from the payment of social-security contributions. In actual fact, however, she was working full time and received a significant share of her remuneration, i.e., € 900.00, "under the table" in addition to the Đ 400.00. The Federal Labor Court dismissed the employee's action for payment in the final instance. The court reasoned that the only reason for presuming the existence of a net pay agreement is to discourage payment "under the table" through social-security legislation and thereby protect the community of insureds, adding that another purpose of the legislation was to make it easier to determine the amount of the social-security contributions in arrears. The court pointed out that the legislation was not on the other hand intended to enable employees who receive wages "under the table" to benefit from the legal fiction. As a result, net payment agreements are presumed to exist only for the purposes of enforcement of social-security legislation and not to support claims of employees under employment law (Federal Labor Court, judgment of 17 March 2010, 5 AZR 301/09).