Has the Federal Labour Court Put a Stop to Meritless Discrimination Lawsuits?

Lena Jordan **Cologne, 31.08.2015**

Decision

An insurance company that solicited applications for its trainee program indicated that it was looking for candidates who had recently received or would soon receive a very good university degree and had also had some professional experience acquired through formal training, internships or student employment. Candidates with law degrees were also expected to have concentrated on labor law or have a medical background. The plaintiff in this case, who had passed the second exam required for admission to the German bar in 2001, applied for the position. In his application letter, he mentioned, among other things, that he had managerial experience due to his previous executive position with a legal expenses insurer. He also said that he was attending a course to qualify as a specialist in labor law and had had background experience in medical law since he was handling an extensive case involving medical law due to the death of his father. After the plaintiff's application was rejected, he demanded payment of € 14,000 from the defendant as compensation for damages due to age-based discrimination. The defendant then invited him to a meeting with the company's personnel manager to discuss the issue, but the plaintiff declined to accept the invitation.

The Federal Labour Court was, on the basis of the formulation of the plaintiff's application and conduct, of the opinion that it could be assumed that the plaintiff did not submit his application for the purposes of obtaining employment. According to the court, the application was formulated to ensure that the defendant would not hire the plaintiff as a trainee and that it was in fact to be assumed that the plaintiff had provoked a rejection, which would mean that he did not therefore qualify as an "applicant" within the meaning of § 6(1) sent. 2 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG).

The Federal Labour Court also pointed out that the General Equal Treatment Act was based on the implementation of a European directive, according to which "access to employment" is protected. In that regard, the formulation goes further than the General Equal Treatment Act. The Federal Labour Court decided to request a ruling from the European Court of Justice as to whether the directive was to be understood to mean that an applicant must actually seek employment, i.e., actually want to be employed, or whether mere formal application sufficed to enjoy the protection prescribed by the directive.

Implications for Practice

The Federal Labour Court would obviously like to put an end to the practice of submitting frivolous employment applications for the express purpose of provoking rejection in order to be able to claim damages for discrimination under the General Equal Treatment Act. According to current case law, claims for damages by applicants are already being denied under exceptional circumstances on the grounds that they are abusive of the law. However, employers still bear the burden of evidence and proof in such cases. Employers must provide evidence to the effect that the applications were never meant seriously, and the level of proof is very high.

Even if the anticipated ruling of the European Court of Justice on the preliminary question turns out to be in favor of employers – meaning that applicants enjoy protection under the General Equal Treatment Act only if their applications for employment are seriously meant –

this will not change the fact that employers will still bear the burden of evidence and proof in the future if they suspect that an application is not meant seriously. Rejection of a claim for damages would, however, then have to be justified on other grounds. In the past, claims for damages have been dismissed on the grounds that they were abusive of the law. If the response of the European Court of Justice to the question presented by the Federal Labour Court is positive, this would on the other hand not open the way to application of § 15 of the General Equal Treatment Act. Whether the requirements as regards the level of proof required to conclude that an application is not meant seriously would in the future be lower remains to be seen. The order for reference does not seem to indicate any such tendency. As a result, regardless of the outcome of the proceedings, caution is still recommended when it comes to the formulation of employment ads and the entire recruitment process in terms of possible discrimination.

Note

Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Klingelhöferstraße 5, 10785 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

ESSEN
Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG
Dammtorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH
Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90