IN BRIEF: NEW JUDGMENTS ON DISCRIMINATION

HEADNOTE On 19 August 2010, the Federal Labor Court provided a more precise description of what constitutes discrimination in violation of the General Equal Treatment Act in a series of judgments. As the court of third instance, the Federal Labor Court has increasingly found itself confronted with appeals in connection with disputes involving violations of anti-discrimination law since the entry into effect of the law in 2006. These judgments tend to show that the existence of illegal discrimination should not be hastily assumed. In fact, the Federal Labor Court carefully examines the background to such legal disputes, among other reasons, to preclude abusive litigation. As was already foreseen four years ago, it has once again become obvious that actions are as a rule brought by rejected candidates for employment but not by those who are already employed.

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CASE 1 A church was looking for a person who had a university degree (social science/social pedagogy) and was a member of the Protestant Church for a temporary position in connection with a project involving the integration of immigrants. A person who met these requirements was also ultimately hired. One applicant, a practicing Muslim of Turkish descent who had been trained as a travel agent, i.e., who had no relevant university background, filed an action with the Labor Court seeking compensation. The Federal Labor Court dismissed the action in the final instance, finding that the issue of discrimination need not even be addressed since the candidates were not comparable in the first place. This is, however, an essential prerequisite for payment of any compensation. The Court stated that the qualifications specified by an employer provide the basis for choosing a candidate for employment. As a result, the claimant was not comparable with the successful candidate because of her education.

CASE 2 The dismissal of an action brought by a person with a severe disability who had applied for a position after it was filled did not come as a surprise. The company had solicited applications from candidates for an engineering position through the Internet and filled the position in mid-December 2007. The employer then forgot to withdraw the advertisement. The plaintiff then submitted his application on 29 December 2007. Since his application was submitted too late, it was not considered. He claimed that the employer had violated the provisions of the Social Code (Sozialgesetzbuch) that promote employment of the disabled and sought compensation. The Federal Labor Court ruled that the application had to have been submitted as of the time the hiring decision was made.

CASE 3 Finally, the action of a lawyer who was born in 1958 was successful. He had applied to an advertisement for a "young" lawyer to fill a temporary position. A 33-year-old lawyer was ultimately hired. The court awarded the claimant compensation in the amount of one month's salary. The Court found that the advertisement did provide grounds for concluding that the claimant was not hired exclusively because of his age. However, the Federal Labor Court dismissed the claim for damages in the amount of a year's salary since the claimant was not able to provide sufficient proof to the effect that he would actually have been hired in the absence of any discriminatory intent.