

GERMAN LABOR AND EMPLOYMENT NEWS

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DIVERSITY IN THE WORKPLACE IN GERMANY: IS IT COMING? . . . OR MAYBE IT'S ALREADY HERE

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Diversity gained a foothold in the United States in the 1960s, becoming increasingly common by the 1980s. What is diversity? Let's start with what diversity is not. It is not a form of affirmative action (or, as it is called in the European Union, "positive action"), as is often believed to be the case in Germany. For example, it is not uncommon to hear from German HR personnel or executives that Germany already subscribes to the concept of diversity, since there are various statutes and regulations that provide support to groups that have traditionally been disadvantaged in the workplace, e.g., women and the disabled.

■ DIVERSITY AS A MARKETING INSTRUMENT

Diversity is a strategy by which companies seek to have a broad base of employees with various backgrounds and characteristics (in terms of age, national origin, race, sexual orientation, disability, religion, etc.) because these companies have realized that their customers share these backgrounds and characteristics. The



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more a company has in common with its customers and potential customers, the greater its success in the market will be.

Nobody is naïve enough to believe that companies initially became more diverse to facilitate their entry into new markets or to win new customers. Instead, diversity got its start, at least in the United States, as a direct response to the fear of employment-discrimination lawsuits. Companies learned that they were less apt to be the target of a discrimination action if they had a diverse employee population; or, if an employee did file a discrimination suit, the court would look more favorably upon the company if it had a diverse staff.

■ BENEFITS OF DIVERSITY

Companies eventually discovered that diversity could actually be a win-win situation. Employees with different

characteristics introduced “new” ideas in the workplace, and at times, this resulted in the creation of a new customer base and markets for the employer (especially with the change in demographics as Asians, African Americans, and Hispanics became a greater influence on the U.S. economy). Simultaneously, diversity created opportunities for employees who had had employment opportunities closed to them in the past, often as a result of their “distinguishing” characteristics.

Though there were – and still are – naysayers, it is safe to say that every *Fortune* 500 company in the United States now has some sort of employee-diversity policy in place – the vast majority of these policies are “active” policies. To further support the concept of diversity, the federal and local governments in the United States will often not award government contracts to a company unless that company is

sufficiently diverse. Even law firms in the United States have been bitten by the diversity bug. Law firms have learned that larger corporate clients often take a law firm's diversity into consideration when deciding which firm to engage, as these companies also want to reap the benefits of being diverse in terms of selecting diverse service providers.

■ DIVERSITY IN GERMANY

Though diversity has not garnered nearly the same attention in Germany as in the United States, it is becoming more of an issue. This is due, in large part, to the increased attention given to discrimination in the workplace; undoubtedly, the enactment of the General Equal Treatment Act, and the discussions and debates leading up to this statute, played a vital role. In fact, earlier this year, one of Germany's primary weekly business magazines had as its cover article, "Homosexual – And What Does That Have to Do With Business? A Lot." The point of the article was that a diverse staff can lead to greater profitability.

To the extent diversity plays a role in Germany, the driving force continues to be the German subsidiaries of American companies. Until now, whenever companies asked their legal advisors in Germany what impact diversity plays in Germany, they would (depending on the advisors' experience) usually get a quizzical look, as the concept of diversity was still unknown, or a flat-out response that diversity does not play a role in Germany, as "it is not needed." Times, however, are changing. According to a 2005 study that included Germany's largest companies, plus the German subsidiaries of the 50 largest U.S. companies, "only" 43 percent of the respondents said that they had not heard of diversity. (To be frank, it would not have been surprising if this number had been significantly higher.)

■ SUPPORTING DIVERSITY IN THE WORKPLACE

When executives are first confronted with diversity, they are often skeptical. They see diversity as unnecessary, just another layer of bureaucracy, or possibly just another public relations gimmick that costs money and is destined to fail. Regardless, companies such as Ford, Deutsche Bank, Bertelsmann, and Volvo have diversity policies in place in Germany. These diversity policies include the following:

Though, as in the United States, there will probably not be any laws that require a diverse employee population, it's a good bet that federal and local governments in Germany will eventually support diversity by preferring companies with a diverse staff when awarding government contracts.

- Concluding works agreements to strive for more diverse employees;
- Supporting employee resource groups (e.g., a women's engineering panel);
- Introducing and maintaining a mentoring program to support younger employees with different backgrounds to facilitate their integration into the workplace; and
- Providing management training to employees with different backgrounds or characteristics to improve the chances that these employees will eventually join the ranks of management (the intended benefit is twofold: to gain greater acceptance among customers with similar backgrounds or characteristics and to decrease turnover of employees with different backgrounds or characteristics, as they will better be able to relate to their managers).

It is almost certain that diversity will play an ever-increasing role in Germany. Germany's population is becoming more diverse (e.g., immigrants from Eastern Europe). Though, as in the United States, there will probably not be any laws that require a diverse employee population, it's a good bet that federal and local governments in Germany will eventually support diversity by preferring companies with a diverse staff when awarding government contracts. Finally, assuming that the General Equal Treatment Act truly becomes a factor in German employment law, a diverse staff will serve the company well in terms of minimizing discrimination lawsuits.



Companies will now need to consider what changes they must introduce as the result of having a more diversified workforce, in terms of age or in terms of employment relationship.

THE IMPACT OF DEMOGRAPHIC CHANGES ON COMPANIES' HR STRATEGIES AND THEIR COMPANY PENSION PLANS

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As of late, discussions on demographic changes, including the impact on the Social Security system, have caused people to become generally more aware of the phenomenon of an “aging society.” The focus many companies place on seeking young talent, which for a long time was believed to lead to greater innovation, agility, flexibility in the workplace and, to a greater extent, performance, is increasingly subject to question. Many companies have since shifted their focus. The focus on young employees has been replaced by the acknowledgment that a company is better positioned if it has a “healthy” balance between younger and older employees. As a consequence, companies will need to create an environment that provides the same opportunities to older as to younger employees.

■ OLDER EMPLOYEES ARE BACK IN THE WORKFORCE

Companies are exploring opportunities to attract those employees who, in the past, discontinued their careers

due to family commitments. This new trend was triggered by a summit of the European Council several years ago, when Europe's leaders declared their political goal was to increase the ratio of older employees in active employment. This shift was necessary not only to cope with the future economic challenges for Europe's Social Security and welfare systems resulting from an “aging society,” but also to respond to a foreseen shortage of qualified employees in various labor markets in Western Europe. Germany's increasing of its mandatory retirement age was just one logical consequence.

■ RESPONSE TO AN OLDER AND “NONTRADITIONAL” WORKFORCE

Companies will now need to consider what changes they must introduce as the result of having a more diversified workforce, in terms of age or in terms of employment relationship. This requires a higher awareness of the needs of the different stakeholder groups and the competence to resolve potential conflicts through innovative solutions. In addition, companies need to consider the requirements imposed by nontraditional employment relationships. Nontraditional employment relationships are those that deviate from common practice (e.g., careers with fluctuating part-time schedules, lateral careers, employees joining the company later in their careers, phased-in retirement concepts, and contracts with interim project managers).

As a first step, companies should review their HR strategies in light of the changed framework in terms of demographics, longer life expectancies, new working-time rules, Germany's General Equal Treatment Act, etc., and adapt those strategies to the extent necessary. Subsequently, individual HR programs (e.g., mandatory retirement at the age of 65, personnel development) should be revised to be in line with revised HR strategies. In this context, the potential effects of the increase of retirement ages on the Social Security system should be considered. Despite long transition periods, this topic needs to be discussed in a timely manner to give employees sufficient time to prepare themselves for the upcoming changes and to assist them, to the extent requested, with their planning.

■ EXTENDED CAREERS

Companies that see their opportunities in diversifying their workforce will offer an extended career in accordance with the new retirement ages. This will enable them to better cope with a high demand for qualified personnel, which may not be satisfied in the future solely by relying on the domestic labor market. Often the employment relationship during the two additional years prior to retirement will be structured differently from the rest of the earlier career. It is quite likely that employees may wish to begin with a phased-in retirement, such as part-time or project-based employment.

For other companies (e.g., production, but also certain field service activities), an extended career may not be an option for either the company or the employee. Solutions should be explored that allow the employees to retire, from a financial perspective, at the current retirement age despite the decrease in pensions as a result of the “early” retirement. Employers also need to keep in mind that such employees will no longer be able to reap the benefits of being statutory senior part-time employees.

■ OLDER EMPLOYEES AND COMPANY PENSION PLANS

Special attention should be given to the retirement age as defined in the company pension plan. The retirement age determines not only the date as of which a pension is paid, but also the amount of the pension, meaning company pensions can be used as a strategic HR tool to influence an employee's retirement behavior.

Of course, age is an important element that can significantly impact pension costs and risks. As a consequence, many company pension plans exclude certain employee groups based on age-related criteria. This may now conflict with the new HR strategy that is designed for a more diversified workforce, including more senior employees.

Pension costs and risks may be controlled other than merely by excluding specific employees from a pension plan based on their age. For instance, benefit risks could be transferred to an insurance company. The benefit formula could be revised by reflecting the higher costs resulting from longer survivor pensions for young spouses or by using other methods of benefit payments, e.g., lump-sum capital instead of an annuity.

■ THE GENERAL EQUAL TREATMENT ACT AND COMPANY PENSION PLANS

According to the current prevailing opinion, the General Equal Treatment Act applies also to company pension plans. Thus, pension design options will need to comply with the new legal framework. This means an entirely new way of thinking, as equal treatment issues in the past were primarily questions of discrimination based on sex. In Germany, different treatment based on age has been discussed only within the context of sex discrimination (with respect to vesting requirements, as it was argued that this will adversely affect women more so than men).

Company pension plans in particular may be impacted by such changes, as they usually apply to an employee's entire career and are financed by the company. Thus, the key question is how the employees' and company's trust is protected under the new law. Regarding company pension plans, the General Equal Treatment Act does not regulate to what extent this new law applies to past services and promises made prior to the enactment of the General Equal Treatment Act. Also, clarification is needed as to what extent preservation of rights must be considered when amendments to company pension plans are made.

The Federal Labor Court provides some guidance as to its current stance on how to resolve such issues. Past experience within the context of the harmonization of retirement ages of men and women has demonstrated the complexity of company pension plan issues. However, it has also been shown that companies that have adapted their benefit plans in a timely manner in response to the new legal picture could successfully avoid additional costs.

The increase of the retirement ages in the German Social Security system and the General Equal Treatment Act should be seen as an opportunity to adapt the regulations of the existing HR programs (including company pension plans) to the requirements deriving from a revised HR strategy and the new legal regulations.

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THE GENERAL EQUAL TREATMENT ACT AND THE PROHIBITION ON DISCRIMINATION AGAINST DISABLED PERSONS

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The disabled constitute one of the protected classes under Germany's General Equal Treatment Act. This article will discuss some of the crucial issues that need to be considered when confronted with the prohibition against discrimination based on disability.

■ PROHIBITION AGAINST DISCRIMINATION BASED ON DISABILITY – OLD AND NEW

The prohibition on discriminating against disabled persons is not new to Germany. Such a prohibition has been codified in Germany's "Social Book" since 2001. This particular provision prohibits discrimination against employees with a "disability degree" of at least 50. In Germany, a disabled person may apply for his level of disability with the responsible authorities (more specifically, the Integration Office). A disability degree of above 50 constitutes a "severe disability." Though this provision is actually now redundant as a result of the enactment of the General Equal Treatment Act, it remains on the books.

The term "disability" as used in the General Equal Treatment Act has a different basis than does the term "severely disabled" as used in the Social Book. The former means a physical, mental, or psychological state that is atypical for a person of that age, lasts longer than six months, and impairs the person's ability to participate "normally" in society. The term "severely disabled" means, very simply, if the degree of disability is above 50. The General Equal Treatment Act uses this broader term so that it is in line with the EU Equal Treatment Directive that Germany was required to harmonize into its national law.

The term "severely disabled" is distinguishable from the term "disabled." Germany's Federal Labor Court, however, recently eliminated this apparent contradiction, as the court held that a person with a disability degree of under 50 is also protected by the prohibition on discrimination in the Social Book, *i.e.*, even if that employee is not "severely disabled." The court ruled in this manner, as otherwise the Social Book would be in violation of the above-referenced EU Equal Treatment Directive. This means that employees who are not "severely disabled" and were victims of discrimination prior to the enactment of the General Equal Treatment Act may seek compensatory damages for discrimination under the Social Book.



Since 2001 employers have generally not been permitted to inquire about a disability, as it would open the door to discrimination prohibited by the Social Book. The General Equal Treatment Act does not change this.

■ **WATCH OUT WHAT QUESTIONS YOU, AS THE EMPLOYER, ASK DURING AN INTERVIEW**

If a job applicant lies in response to a question posed by a potential employer during an interview, and the question was permissible, the employer may subsequently rescind the employment once the truth comes out. If an employer exercises this right, it is deemed that the employment relationship had never commenced.

Prior to 2001, German courts had consistently held that employers were permitted to ask applicants about a disability; this was largely because employers were required to accommodate disabled employees and an employer had to know what type of accommodations it would need to make if the disabled individual was hired. If, during an interview, a potential employer asked an applicant about a disability that did not constitute a “severe disability,” the applicant was required to answer this question truthfully only if the disability somehow restricted the applicant’s ability to perform the work without any accommodations.

Since 2001 employers have generally not been permitted to inquire about a disability, as it would open the door to discrimination prohibited by the Social Book. The General Equal Treatment Act does not change this. The only time an employer may ask about a disability is if such a disability would disqualify an individual for the available position; e.g., the driver of an ambulance cannot be blind.

Though not that significant, the General Equal Treatment Act will cause a couple of practical changes to be introduced with respect to inquiring about a disability during an interview. Not only may an employer not ask about a “severe disability,” the employer may not ask about *any* “disability.” An exception exists if the employer is seeking



to hire a disabled employee in response to a call for “positive action” under the General Equal Treatment Act (comparable to affirmative action in the United States); in such an instance, the employer may ask about a disability. An employer may also ask about a disability if the employer is seeking to improve the integration of disabled persons or to increase the company’s number of disabled employees. Regardless, as can be imagined, asking about a disability is risky, as it may open the door to a claim of discrimination.

■ **ILLNESS DOES NOT CONSTITUTE A DISABILITY**

A person who is “ill” generally may not file a claim for discrimination under the General Equal Treatment Act, as an “illness” does not constitute a “disability.” The difference relates primarily to duration – an illness is generally temporary, while a disability is generally permanent. Only if an employee has been ill for at least six months, and is the victim of discrimination, can the illness constitute a disability and thus enable that person to file a claim under the General Equal Treatment Act.

■ HAS THE DISMISSAL OF DISABLED EMPLOYEES BECOME MORE COMPLICATED?

Germany's General Equal Treatment Act succinctly states that Germany's termination protection laws, rather than the General Equal Treatment Act, will exclusively apply to the termination of employees. From a practical perspective, this means that the General Equal Treatment Act does not play a role with respect to terminations. But not so fast . . . this may soon change.

The European Court of Justice decided last year that the EU Equal Treatment Directive, on which Germany's General Equal Treatment Act is based, does not permit the termination of an employee as the result of a disability if the employee is not able to perform his work duties only because the employer failed to provide the statutory reasonable accommodations. This means that an employer may terminate a disabled employee as a result of the disability only if the employee is unable to perform his work obligations despite the employer having provided the requisite reasonable accommodations.

This principle is currently reflected in the Social Book only with respect to "severely disabled" persons. Only for such employees is an employer required to provide reasonable accommodations. Under the EU Directive, however, an employer is required to make such accommodations for *all* disabled employees, without regard to their degree of disability. As a result, German law is not yet in line with EU standards. If bringing German law in line with EU law is accomplished by amending the General Equal Treatment Act – which is quite possible – then this will indeed complicate the termination of disabled employees.

PRINCIPLES OF AGE DISCRIMINATION

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One of the explicit purposes of the General Equal Treatment Act is to reduce or eliminate discrimination based on age. Though the General Equal Treatment Act was enacted only about eight months ago, it is predicted that age discrimination will be the most significant factor in practice in the employment arena (followed by sex discrimination).

Various statutory employment provisions, as well as collective bargaining agreement provisions or agreements with works councils, will not pass muster under the General Equal Treatment Act. For example, under German employment law, statutory termination notice periods are based on the employee's years of service; however, Germany's Civil Code sets forth that the employment period prior to the employee reaching the age of 25 will not be considered when calculating years of service. It is doubtful that this complies with the General Equal Treatment Act.

The following discusses what factors, in terms of age, must be taken into consideration when applying the General Equal Treatment Act:

■ PROTECTION OF EMPLOYEES – REGARDLESS OF AGE

Unlike the Age Discrimination in Employment Act of the United States (ADEA), under which only employees 40 years old and over are protected, the General Equal Treatment Act applies to all employees, regardless of age. This means that if an employee is the subject of discrimination because of his youth, he may also file a claim under the Act. The General Equal Treatment Act does not set forth a minimum or maximum age.

The General Equal Treatment Act protects against direct as well as indirect discrimination. An indirect form of discrimination may be based on factors other than merely the employees' ages, though the criteria that the employer uses have some connection to the employees' ages. For example, if an aspect of the employment relationship is based on years of service and this impacts a disproportionate number of younger or older employees, then this could constitute a violation of the General Equal Treatment Act. So as not to run afoul of the Act, any unequal treatment based on age must be due to an acceptable objective reason, or a permissible reason particular to the employee or group of employees at issue.

■ GENERAL PERMISSIBLE REASON FOR UNEQUAL TREATMENT

A general permissible criterion concerning different treatment based on age may be due to specific job requirements. An obvious example that is often cited in legal treatises involves an actor for the role of "young lover"; this role cannot be filled by a 60-year-old. Such unequal treatment may also be permissible for jobs that involve arduous physical tasks or quick reflexes, e.g., a fireman, air traffic



An employer may treat employees differently based on age pursuant to the German Equal Treatment Act only if this is for an objective reason, is reasonable, and is legitimately justified.

controller, or pilot. (For a discussion regarding pilots, see the article “May Pilots Be Prohibited From Flying Based on Age? The First Court Rulings Regarding the General Equal Treatment Act” in this issue of *German Labor and Employment News*.)

■ PARTICULAR JUSTIFICATION FOR UNEQUAL TREATMENT

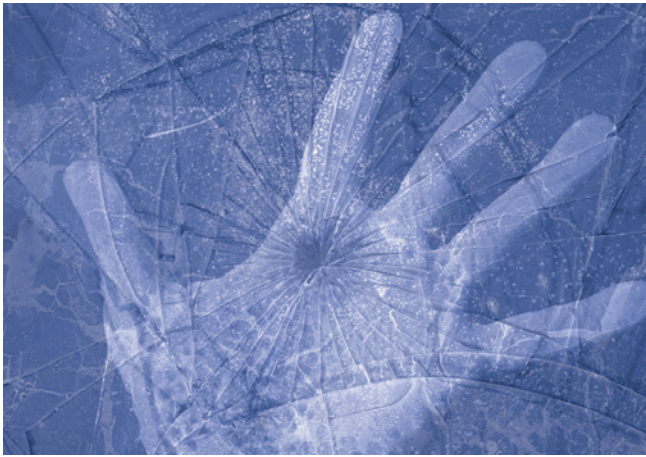
An employer may treat employees differently based on age pursuant to the German Equal Treatment Act only if this is for an objective reason, is reasonable, and is legitimately justified. The General Equal Treatment Act includes a non-exhaustive list as to why an employer may treat an employee unequally based on age. The list includes the following:

- Offering higher levels of compensation to employees who have greater job experience, as long as this is not related solely to age, is probably acceptable. Conversely, compensation levels in collective bargaining agreements that are tied strictly to an employee's age will presumably be subject to review within the context of the German Equal Treatment Act and not pass muster.
- Minimum requirements for an age group may be permissible, as they are usually tied to job experience. Also, under certain circumstances an employer may set a maximum age when seeking to hire an employee, particularly if it will take a long time for the employee to com-

plete his on-the-job training and it does not make sense, from a financial perspective, to hire an older employee.

- It is probably permissible to set a minimum age to be eligible for pension payments.
- To have a statutory retirement age setting forth when an individual is eligible for a pension is permissible. This means that an employment relationship can automatically end upon reaching that age without requiring the employer to issue a notice of termination.
- The General Equal Treatment Act permits unequal treatment based on age for severance payments to employees under a Social Plan. (Social Plans set forth the level of compensation to be paid to employees who lose their jobs as part of a mass layoff.)

As indicated above, the preceding list is not exhaustive. As a result, employers may treat employees unequally based on age for reasons other than those set forth above. The burden on employers, however, is high, to ensure that they do not run afoul of the General Equal Treatment Act.



Considering that employers are entrepreneurs, and further considering that entrepreneurs are interested in buying goods and services at the most favorable price, why should an employer be prevented from obtaining a woman's work at a lower price than a man's if both are hired at the same time and market conditions permit the employer to offer the woman less money for the same work?

DISCRIMINATION AGAINST WOMEN IN THE WORKPLACE

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Discrimination based on gender is prohibited – at least, that's what Germany's new General Equal Treatment Act says. The reality, however, is a bit different. According to recent surveys, the average hourly wage or annual salary of women in Germany is significantly below that of their respective male colleagues. Based on statistical data from the European Union, women in Germany earn 22 percent less than their male counterparts, compared to an EU average of 15 percent. In this respect, Germany is among the worst EU member states; only Estonia, Slovakia, and Cyprus, with income gaps reaching up to 25 percent, are worse. Women face a disadvantage even in the best EU country – Malta, where the difference is 4 percent. Thus, while gender discrimination may be a European problem, Germany is more affected by it than most other states, a discrepancy German women are unlikely to tolerate for long. The enactment of the General Equal Treatment Act is merely the first step – and an important one – in a growing movement to correct this imbalance, and this article is an effort to predict the next steps and recommend appropriate action.

■ WHAT EQUAL TREATMENT IS ABOUT

Treating two employees differently in a comparable situation constitutes discrimination *only if there is no justification for doing so*. The General Equal Treatment Act actually permits unequal treatment on the basis of professional qualifications, religious practices, or age if the situation warrants

it. However, there are no such provisions for the unequal treatment of women. This may be owing to the fact that legislators could hardly imagine a broad-based reason for gender discrimination. But this also raises the question of where to draw the line between discrimination and justified unequal treatment – and where the employer's freedom to act ends.

Let's start with a provocative question: Considering that employers are entrepreneurs, and further considering that entrepreneurs are interested in buying goods and services at the most favorable price, why should an employer be prevented from obtaining a woman's work at a lower price than a man's if both are hired at the same time and market conditions permit the employer to offer the woman less money for the same work? And why should the employer be prevented from defending himself against allegations of discrimination by arguing that the woman was willing to be hired at the lower rate?

■ FREEDOM OF CONTRACT AND DISCRIMINATION

The aforementioned questions strike at the core of the discrimination issue. First and foremost, German law is governed by the concept of freedom of contract. This principle allows parties to decide *whether they want to enter a contractual relationship* and what the *content* of that contractual relationship will be. The General Equal Treatment Act was not intended to abolish freedom of contract, but if this principle were to be applied in its purest form, the new act would be seriously weakened. German courts must not allow this to happen. The European Court of Justice requires EU member states to transpose EU directives

The reason for this is the burden-of-proof rule under the General Equal Treatment Act, which provides that as a first step, *employees have to present signs indicating possible discrimination*.

into national law in an “effective way” (*effet utile*), and the General Equal Treatment Act is based on several EU directives. The case law that resulted from the need to weigh an employer’s right to terminate an employment agreement against the principles of social protection suggests the European Court of Justice will sacrifice freedom of contract before protection against discrimination.

Accordingly, freedom of contract is limited in such a way that an employer is not permitted to reject a female applicant merely for gender reasons. An early court decision that seems capable of being generalized holds that if the employer discriminates by rejecting an employee but then decides not to hire anyone at all, there is no basis for a discrimination claim. In rare cases, giving up the intention to hire may be the last resort for an employer who does not want to hire a woman but finds no other reason to reject her. In all other situations, however, nondiscrimination will prevail over freedom of contract.

If it was left to an employer to hire a woman at less favorable conditions than a male employee simply because the job market seems to allow this, it may appear at first glance that the employer does not discriminate directly. After all, the employer is not responsible for the lower remuneration of women on the overall job market. However, the General Equal Treatment Act prohibits not only direct discrimination but indirect as well. The latter is deemed to exist if provisions, criteria, or practices that appear to be neutral in fact discriminate under one of the prohibited categories, e.g., gender, age, or disability. All this indicates that the courts would not accept market conditions as justification for less favorable remuneration for women. Offering unequal compensation on the basis of prevailing market trends could become an established practice, and the courts are thus likely to view it as a form of indirect discrimination.

■ THE BURDEN OF PROOF

At risk are not only those employers who actually discriminate, but even those who – when the need arises – are not in a position to prove that they don’t. The reason for this is

the burden-of-proof rule under the General Equal Treatment Act, which provides that as a first step, *employees have to present signs indicating possible discrimination*. Thereafter, it is the *employer’s obligation to present proof that there was in fact no discrimination*. One might think that German employers are thus relatively safe against allegations of remuneration discrimination, since remuneration is traditionally treated in a confidential way. And indeed, a woman who believes herself to be the victim of discrimination might well have difficulty supplying the necessary signs. However, it is entirely possible that case law will develop in a different way, with the courts reducing the burden of proof for women as well as other groups of potentially disadvantaged employees.

A parallel may be drawn with the Termination Protection Act. This act states that the employee bears the burden of proof with respect to allegations of unjustified termination, but in practice, employers have usually had to show that the terminations were socially justified. The language of the General Equal Treatment Act is even more employee-friendly, imposing the burden of proof upon the employer, so a very employee-friendly interpretation of the General Equal Treatment Act by the courts is entirely possible. In addition, the employee position is often strengthened by the fact that the works council has a right to review wage and salary lists.

■ RECOMMENDED ACTIONS

In practice, an employer may well have legitimate reasons for paying different salaries, but these may not be apparent to an observer. Therefore, as is recommended for other cases of unequal treatment, employers should write down the reasons for any salary differences and establish a documentation routine. This will provide a paper trail, especially if the documents are prepared prior to a potential lawsuit. Another recommendation is to establish an ombudsman or another type of complaint procedure. For an employee, it simply would not look good in court to have waived the opportunity to complain before bringing a lawsuit. Further, employers might consider making use of “positive action” – steps which might appear discriminatory but which in fact are justified since they are intended to abolish earlier discrimination. Of course, the most important recommendation of all is to know the prohibitions of the General Equal Treatment Act and avoid them.



MAY PILOTS BE PROHIBITED FROM FLYING BASED ON AGE? THE FIRST COURT RULINGS REGARDING THE GENERAL EQUAL TREATMENT ACT

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Germany enacted the General Equal Treatment Act more than six months ago, but the feared onslaught of discrimination lawsuits has not occurred. Nor have there been many cases of “Equal Treatment Act hopping,” where persons actively look for employment ads that are not in line with the new law solely for the purpose of collecting damages from that company, with no real intent to work for that company. The fact that neither came to fruition is the direct result of employers having for the most part quickly adapted themselves to the requirements of the General Equal Treatment Act.

One case that did gain a fair amount of publicity was a decision rendered by the Frankfurt Labor Court on March 15, 2007.

■ LUFTHANSA PILOTS FILE A DISCRIMINATION LAWSUIT

Three pilots at Germany's national airline, Lufthansa, filed an action arguing that the provision of the collective bargaining agreement prohibiting pilots from flying once they turn 60 was illegal, as this was age discrimination. The Frankfurt Labor Court dismissed the pilots' action. The court ruled that the provision in the collective bargaining agreement was reasonable. According to the court, the age limit of 60 was established for a legitimate purpose, *i.e.*, to ensure that pilots could withstand the rigors of flying commercial planes; this could no longer be guaranteed once a pilot turned 60. Though the complete court opinion has not yet been published, there has been plenty of discussion as to whether the court's holding was correct.

■ CRITICAL VIEWS

The General Equal Treatment Act does permit different treatment of employees, but only as long as such different treatment is the result of reasonable job requirements and the means to reach the end are reasonable. The General Equal Treatment Act specifically sets forth when different treatment based on age is permissible: first, if such different treatment is reasonable from an objective point of view and,

The Lufthansa pilots have already announced that they plan to appeal the case. Using the above analysis, it would seem that the pilots have a reasonably good chance of winning on appeal.

second, the end to be achieved is justified. As discussed in the article “Principles of Age Discrimination” in this issue of *German Labor and Employment News*, the statute includes a nonexhaustive list of situations that could satisfy these requirements.

The classic example is an actor’s role – a child’s part cannot be played by a 70-year-old. As evidenced by the Lufthansa case, most cases are, unfortunately, not that clear.

To analyze the Lufthansa decision, it is necessary to determine whether a pilot’s age alone is an appropriate criterion for determining whether someone is qualified to be a pilot. To answer this in the affirmative would mean that no other criteria would be appropriate or that there are no other means to reach the goal of ensuring safety in the air.

The Lufthansa pilots have already announced that they plan to appeal the case. Using the above analysis, it would seem that the pilots have a reasonably good chance of winning on appeal. Why is this so? Very simply, it is not accurate to say that a pilot automatically loses his ability to fly safely once he turns 60. There are 65-year-old pilots who can fly extremely well and safely and satisfy all of the other rigors of being a commercial pilot, just as there are 55-year-old pilots who can no longer ensure the necessary level of safety. Whether a pilot is still qualified to fly a commercial plane needs to be determined on a case-by-case basis. Age alone is not an appropriate test.

Under the General Equal Treatment Act, only objective criteria – which are not based purely on age – may be considered to determine whether a pilot may be required to retire. For example, requiring pilots to undergo regular physical and mental tests serves as a suitable basis for determining whether a pilot is still qualified to fly.

Not only does the collective bargaining agreement clause seem to be in violation of the General Equal Treatment Act, but it is also overreaching in that it does not permit any exceptions. A pilot does not have the opportunity to rebut the “presumption” that he is no longer qualified to fly. It would be preferable for the collective bargaining agreement to include a provision that would permit a pilot to demonstrate that he is, in fact, still qualified to fly despite having turned 60. Another alternative would be to require senior pilots to undergo physical and mental tests at shorter intervals than their younger counterparts, to ensure that they still have the requisite skills and stamina to fly a commercial airline safely.

RISKS ASSOCIATED WITH ASKING CERTAIN QUESTIONS DURING INTERVIEWS

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As should be surmised, the General Equal Treatment Act applies not only to existing employment relationships, but also to those at the application stage. While many employees who already have a job may turn a blind eye to less egregious forms of discrimination in the workplace so as not to jeopardize an otherwise good working environment, applicants for a job may not be so “generous.”

Germany’s Civil Code stated in the past that if a person suffers discrimination on the basis of sex, the damages would be up to three months of pay. A comparable provision is included in the General Equal Treatment Act, though it applies not only to sex discrimination, but to the seven other types of discrimination set forth in the General Equal Treatment Act. It is important to point out that the applicant

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may receive up to three months of compensation even if the applicant would not have gotten the job despite the discrimination. If the applicant would have received a job offer had there been no discrimination, the money damages are not limited to the three months' pay.

■ WHAT QUESTIONS MAY BE ASKED?

Even after the enactment of the General Equal Treatment Act, employers are still permitted to pose any number of questions during interviews. For example, employers may ask applicants about their job-related qualifications, past work experience, and foreign-language capabilities (as long as these relate to the job). Employers may also ask for references. As can be imagined, employers are able to glean a good amount of information – including information that was not specifically requested – from the applicant's answers to these questions.

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■ RÉSUMÉS AND LETTERS OF REFERENCE

A résumé in Germany will often include the applicant's date of birth. If this information is not included, the employer should not request it, as this may potentially lead to a claim of age discrimination. Nevertheless, it is quite easy to gauge an applicant's age by reviewing his letters of reference and, as is often still the case in Germany, by looking at the picture that is included with the résumé.

It has quickly become clear in Germany, however, that to insist upon receiving the applicant's picture is a no-no. Not only may this lead to a claim of age discrimination, but the applicant's race will also be revealed. Though the practice is still very common in Germany, postings for positions available should not explicitly request that applicants include a picture of themselves. In any case, assuming a personal interview takes place, the employer will learn of the applicant's age, race, often whether the applicant is disabled, etc., during the interview.

■ “ARE YOU MARRIED? DO YOU HAVE CHILDREN?”

Asking whether the applicant is married or single should also not be part of the application process, as this may be seen as a way of trying to determine the applicant's

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sexual orientation. Employers should also not ask an applicant about children. Related thereto, posing questions about children to female applicants is problematic, as this may lead to a claim of indirect discrimination in that a female applicant with children may fear that she is being discriminated against because the employer will probably think she will be less devoted to her job than to her children. If an employer asks about the flexibility of an applicant, that applicant could also claim that the employer is engaging in sex discrimination, as women with children will tend to be less flexible due to their family commitments.

■ HOW RELEVANT IS A DISABILITY?

The General Equal Treatment Act prohibits any form of discrimination based on disability. In the past, employers could ask applicants whether they were severely disabled. This is no longer the case. An employer should avoid asking such a question during the application process. Also, if such a question is posed, the applicant does not need to respond truthfully. If it subsequently turns out that the employee is disabled despite having said that this was not the case during the application process, the employer may not take any action against the employee for not disclosing this during the application process.

If the position requires certain qualifications – for example, physical qualifications – the employer may want to ask whether the applicant feels that he can fill the position without needing any special accommodations. The employer may state that the person who is hired will often be required to travel by plane. If the applicant states that this is no problem



and later reveals that, due to a disability, he is unable to fly, the employer has a good chance of being able to nullify the employment relationship because the employee misrepresented the facts during the application process.

■ RELIGION AND BELIEFS

Questions relating to an applicant's religion are generally taboo. Less clear are questions pertaining to an applicant's "beliefs." The General Equal Treatment Act also prohibits discrimination based on "beliefs." For example, Scientology has often been a point of discussion within Germany. Though Germany's Federal Labor Court does not recognize Scientology as a religion nor as a form of belief, this holding should not be the end of the discussion. As stated before, the General Equal Treatment Act is based on an EU Directive, and it is possible that the European Court of Justice, if ever confronted with this issue, will conclude differently.

A person's beliefs may also be tied to whether the person is a member of a particular political party. As a result, asking any questions about an applicant's political affiliations must be avoided – especially if the applicant is affiliated with a political party outside the mainstream. There is one proviso to the above – an employer may ask whether an applicant is affiliated with a political party or organization that is prohibited by law.

Finally, employers should avoid asking whether an applicant served in the military or, alternatively, provided social services (men of draft age in Germany may avoid being drafted into the military by electing to provide social services instead, e.g., working in a home for senior citizens).

■ ALWAYS PROCEED WITH CAUTION

Because court decisions interpreting the General Equal Treatment Act are still quite limited, employers should proceed with caution during the application process. Based on Germany's experience with sex discrimination, which has been prohibited in Germany since 1980, courts have tended to have an open ear for discrimination claims. As a result, employers should ensure when preparing a job posting that they are properly informed as to what may lead to a claim of discrimination. As an extreme, in the past applicants from India in the English-speaking world have "tested" employers by submitting two applications – one using an Indian name and one using an English-sounding name; other than the names, the information regarding these "two" applicants was nearly identical. If only the applicant with the English-sounding name was invited in for an interview, the employer "failed" the test and might have opened itself up to a claim of discrimination.

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