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EU's highest court rules that speech constitutes prohibited discrimination even without proof of tangible injury to any actual or prospective employees.

EU's Highest Court Rules Speech Constitutes Employment Discrimination

By Eric A. Savage and Michael A. Gregg

In a ruling issued on July 10, 2008, the Court of Justice of the European Communities, the court charged with ensuring uniform application of EU legislation among member states, ruled that an employer's statements regarding recruitment of immigrants constituted discrimination, even without evidence that any immigrants were denied employment. This decision expands EU anti-discrimination law further than United States court rulings. In today's global environment, this case has far-reaching implications for employers, as even well-intended statements may now constitute discrimination in and of themselves, at least in the EU.

The action was brought by a Belgian civil rights group, Centre for Equal Opportunities and Opposition to Racism ("CGKR"), in the Brussels Labour Court against a garage door installation company, Firma Feryn NV. The claim concerned public remarks made by one of Feryn's directors, who was explaining why his company did not wish to recruit immigrants, particularly Moroccans.

The legislation at issue, Council Directive 2000/43/EC ("Directive"), prohibits "direct or indirect discrimination based on racial or ethnic origin," and provides that direct discrimination occurs "where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin." Indirect discrimination, which was not an issue in the case, occurs where a neutral provision, criterion or practice disadvantages persons of a racial or ethnic origin, unless the neutral practice is justified by a legitimate reason.

The remarks that led to the claim were made on a Belgian television station by one of the company's directors. In an interview, he explained his company's hiring practices as follows: "[W]e have many of our representatives visiting customers … Everyone is installing alarm systems and these days everyone is obviously very scared. It is not just immigrants who break in. I won't say that, I'm not a racist. Belgians break into people's houses just as much. But people are obviously scared. So people often say: 'no immigrants'. … I must comply with my customers' requirements. If you say 'I want a particular product or I want it like this and like that', and I say 'I'm not doing it, I'll send these people', then you say 'I don't need that door.' Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? I must do it the way the customer wants it done!"

The initial proceedings were dismissed by the Brussels Labour Court on the ground that the statements did not constitute discrimination. Instead, as the court explained, they were simply evidence of potential discrimination, because CGKR had neither claimed nor demonstrated that the company had ever turned down a job applicant on the basis of ethnic origin. CGKR appealed the dismissal, and the matter was referred to the Court of Justice for a preliminary ruling. The rulings and legal interpretations of the Court of Justice are binding on the national court to which the ruling is addressed, as well as on national courts in other member states.

The Court of Justice ruled that the remarks by themselves, without proof of tangible injury to any actual or prospective employees, constituted direct discrimination with respect to recruitment within the meaning of the Directive. In doing so, the Court of Justice noted that the goal of the Directive is to "foster conditions for a socially inclusive labour market," which include selection criteria and recruitment conditions. The Court of Justice further explained that the goal of fostering conditions for a socially inclusive labor market would be hard to achieve if the Directive were limited to an identifiable victim of discrimination. It ruled that the statements at issue strongly dissuade certain candidates from applying for employment and, accordingly, hinder their access to the labor market. While the Court of Justice noted that the company, in its defense, could produce evidence that its actual recruitment practices were not discriminatory, particularly in the absence of any identifiable complainant, such a showing would likely be difficult to meet or would probably require a massive assembling and presentation of evidence. With regard to remedy, the Court of Justice explained that according to the Directive, each member state had the responsibility for determining the appropriate sanctions as provided in its national legal system. It noted that such sanctions could include a public pronouncement of discrimination, prohibitory injunction, fines or money damages, and that the sanctions imposed must be "effective, proportionate and dissuasive."

A ruling of this sort, which did not turn on any identifiable injury to a specific person or even a class of people, would be extraordinary in an American court. Of course, a plaintiff in the United States could cite to similar statements as evidence of discrimination or as revealing a discriminatory intent behind an ostensibly neutral action, but the statements would not constitute discrimination by themselves. Under American jurisprudence, a plaintiff is generally required to prove that he or she was subjected to some type of adverse action. By contrast, the EU Court of Justice found that the words themselves were the legal equivalent of the prohibited deed.

This ruling increases the potential liability that companies doing business in EU member states face for statements made by their employees or agents. The increased risk clearly attaches to statements made in the EU, but it is unclear if the rule would apply to statements made outside the EU to a media outlet in Europe or otherwise broadcast into the EU. To avoid possible liability, and particularly until the full ramifications of the ruling become clear, employers active in the EU would be best served by instituting specific rules and procedures regarding who can speak on their behalf, and under what circumstances, and ensuring that any such statements, however well-intentioned, do not condone or adopt any discriminatory intent in employment.

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