



European network of legal experts in gender equality and non-discrimination

FLASH REPORT

Country:	Germany
Title:	Discrimination by statute
Date:	25 November 2019
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<u>Context</u>	
Issue at stake:	Discrimination on the ground of religion (Islamic Headscarf)
Grounds of discrimination:	Religion or belief
Field of application:	Employment
Source:	National court decision
Applicable law:	Sec. 15.2 Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz)

Content

Case/law/policy development: The Regional Administrative Court of North Rhine-Westphalia decided two cases that concern the possibility of claiming damages according to Sec. 15.2 Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz) based on a violation of the prohibition of discrimination, Sec. 7 Equal Treatment Act *by a statute*. The school law of North Rhine-Westphalia provided for a prohibition for teachers of wearing any visible symbols displaying – among others – religious beliefs that put the neutrality of the state into question. This statutory prohibition continued to be in force until the Federal German Constitutional Court (1 BvR- 471/10, 27 January 2015) had clarified that a general ban on Islamic headscarves worn by teachers violated the guarantee of freedom of religion. It was then abrogated. The claimants, wearing Islamic headscarves at work, applied for employment in the public service in schools and were not employed at all or were not employed as civil servants but only on a contractual basis, before the prohibition was abrogated.

Decision of the court: The Regional Administrative Court of North Rhine-Westphalia (6 A 2170/16, 7 October 2019) decided that in this case there were no indications of the claimant being not employed because of wearing religious symbols as this was not known to the employer at the time of application. The legal question it posed is whether discrimination by statute in this case might give rise to claims of damages. It rejects these claims both on the ground of Sec. 15.2 Equal Treatment Act and of state liability due to a violation of European Union law. The legal prohibition as such is not sufficient to give rise to claims based on Sec. 15.2 Equal Treatment Act. Damages on this legal ground presuppose that the prohibition is concretely applied to the claimant, which was not the case. She was not employed because of other grounds than her wearing an Islamic headscarf. The legislator did not violate grossly EU law, either. Only after the decision of the German Federal Constitutional Court (1 BvR- 471/10, 27 January 2015) the legislator was under a duty to adapt existing law to these legal findings. Before that, the legislator could reasonably conclude that the School Law did neither violate the Basic Law nor EU law. The legislator in North Rhine-Westphalia adapted its law without undue delay after the clarification by the Federal German Constitutional Court.

The Regional Administrative Court of North Rhine-Westphalia (6 A 2628, 7 October 2019) decided a similar case on the grounds outlined. It added that in this case employment not as a civil servant but on a contractual basis does not constitute immaterial damage because of a violation of personality rights by degrading treatment. Employment on a contractual basis, the court argued, has no such degrading effects, which are the precondition for assuming immaterial damage.

Key points of analysis: The decisions provide insights in the limits of claims that exist, in the view of this higher instance court, based on violation of the prohibition of discrimination *by statute*. They are also important because they outline the legal responsibility of a legislator as regards its duty not to violate anti-discrimination directives of the EU.

Internet link source:

https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/6_A_2170_16_Urteil_20191007.html;
https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/6_A_2628_16_Urteil_20191007.html.