A TEST OF FAITH?
Cultural Diversity and Law in Association with RELIGARE
Series editor: Prakash Shah, Queen Mary, University of London, UK

RELIGARE is a project on Religious Diversity and Secular Models in Europe funded by the European Commission under the 7th Framework programme. The project brings together an interdisciplinary team of high profile researchers and 13 academic institutions to collaborate on examining how existing policy and practice is suited to the demands of religious diversity within Europe and what legal models can be recommended to accommodate such diversity in future. More details on the project can be seen at its website: http://www.religareproject.eu/. ‘Cultural Diversity and Law in Association with RELIGARE’ provides an outlet for the results of specific research undertaken within the RELIGARE project.
A Test of Faith?
Religious Diversity and Accommodation in the European Workplace

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# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notes on Contributors</td>
<td>ix</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>xiii</td>
</tr>
<tr>
<td>List of Abbreviations</td>
<td>xv</td>
</tr>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink</td>
<td>13</td>
</tr>
<tr>
<td>PART I: EUROPEAN COMPONENTS OF THE RELIGION AND WORKPLACE DEBATE</td>
<td>17</td>
</tr>
<tr>
<td>Religious Interests in the European Workplace: Different Perspectives</td>
<td>20</td>
</tr>
<tr>
<td>Lucy Vickers</td>
<td>22</td>
</tr>
<tr>
<td>Religious Accommodation in the Workplace: Improving the Legal Reasoning of the European Court of Human Rights</td>
<td>27</td>
</tr>
<tr>
<td>Saïla Ouald Chaib</td>
<td>29</td>
</tr>
<tr>
<td>A Critical Appraisal of the Margin of Appreciation Left to States Pertaining to “Church–State Relations” under the Jurisprudence of the European Court of Human Rights</td>
<td>31</td>
</tr>
<tr>
<td>Kristin Henrard</td>
<td>34</td>
</tr>
<tr>
<td>Beyond Lautsi: An Alternative Approach to Limiting the Government’s Ability to Display Religious Symbols in the Public Workplace</td>
<td>36</td>
</tr>
<tr>
<td>Hans-Martien ten Napel</td>
<td>38</td>
</tr>
</tbody>
</table>
### Part II: Identity, Neutrality, Secularism: Case Studies and Comparative Perspectives

#### Section I: Country Studies: Turkey, France and Belgium

1. **Religion in the Public and Private Turkish Workplace:**
   - Mine Yıldırım
   - 23

2. **The Practice of Religion in the French Public and Private Workplace: In Search of an Elusive Balance**
   - Rim-Sarah Alouane
   - 26

3. **Jewish Women in the Belgian Workplace: An Anthropological Perspective**
   - Efrat Tzadik
   - 30

#### Section II: Comparative Perspectives in the Public and Private Workplace

4. **Muslim Women Made Redundant: Unintended Signals in Belgian and Dutch Case Law on Religious Dress in Private Sector**
   - Katayoun Alidadi
   - 38

5. **Employment and Unemployment**
   - 40

6. **A Test of Faith?**
   - Titia Loenen
   - 7

7. **Silence is Golden? Charting the Intersections of Speech and Direct Discrimination under EU Law with a Special Focus on Racial and Religious Discrimination in Recruitment**
   - Jogchum Vrielink
   - 10

8. **Religious-Ethos Employers and Other Expressive Employers under European and Belgian Employment Law**
   - Yves Stox
   - 13

9. **Accentuation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice**
   - Titia Loenen
   - 103

10. **Accommodation of Religion and Equality in the Workplace**
    - Jogchum Vrielink
    - 7

11. **Racial and Religious Discrimination in Recruitment**
    - Jogchum Vrielink
    - 10

12. **Religious-Ethos Employers and Other Expressive Employers under European and Belgian Employment Law**
    - Yves Stox
    - 13

13. **Religion in the Public and Private Turkish Workplace: The Approach of the Turkish Judiciary**
    - Mine Yıldırım
    - 183

    - Rim-Sarah Alouane
    - 205

15. **Jewish Women in the Belgian Workplace: An Anthropological Perspective**
    - Efrat Tzadik
    - 225

16. **Muslim Women Made Redundant: Unintended Signals in Belgian and Dutch Case Law on Religious Dress in Private Sector**
    - Katayoun Alidadi
    - 245
Contents

1  12  Reasonable Accommodation as a Tool to Manage Religious Diversity in the Workplace: What about the “Transposability” of an American Concept into the French Secular Context? 283

2  4  Gabrielle Caceres


4  9  Amandine Barb

5  8  Religion, Diversity and the Workplace: What Role for the Law? 335

6  11  Julie Ringelheim

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44

Index 359
Introduction

Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink

In today’s Europe, religion is increasingly discussed in a problematic tone and context. Indeed, “[t]he growing presence of other faith communities in general, and of the Muslim population in particular, is challenging some deeply held European assumptions.” In recent years, the issue of religious diversity in the various domains of social life has gained prominence amongst politicians, in academic circles and with the public at large in Europe. School administrators in the Netherlands, for example, are caught between requests from a growing Muslim student body for practical accommodations and eye-raising moves and pressures from right-wing politicians. Debates on the wearing of burqas and other full-face covering veils in the public sphere are raging in parliamentary assemblies across Europe, and have already resulted in a number of local and country-wide “burqa bans.” These developments, signs of the contemporary European zeitgeist, cannot be overlooked when considering the topic of religious identity and diversity as it relates to the workplace, a crucial test case for policies of substantive or genuine equality in Europe.

As a potentially powerful element of personal identity, religion has already made its way into the amalgam of contemporary European workplaces, and with employees often belonging to minority religions or denominations, issues of accommodation of religious beliefs and practices have been raised before domestic courts and the European Court of Human Rights. Whether it be Muslim workers requesting time off to observe the Islamic Sugar Feast, pious Catholics seeking to wear visible crucifixes with their uniforms, or job seekers requesting state unemployment benefits after losing or leaving positions that contradict with their religious duties, issues of religious diversity and accommodation are receiving ample attention in the public arena. These examples—and the debates

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2 See, e.g.: X., “Vragen PVV aan minister over islamitische wasruimte op Hogeschool” [Questions of PVV (i.e. Partij voor de Vrijheid, Geert Wilders) to minister regarding Islamic washing cot at Institute for Higher Education], De Telegraaf 4 February 2011, available at www.telegraaf.nl.
3 M. Evans, “From Cartoons to Crucifixes: Current Controversies Concerning the Freedom of Religion and the Freedom of Expression before the European Court of Human Rights,” 26 J.L. & Religion 345 (2011), 364–65. At the time of writing, burqa bans have entered into effect in France and Belgium, and similar proposals are being considered in the Dutch and Italian Parliaments, amongst others.
they spark—illustrate that the role and position of religion and religious identity in both the non-religious and the religious workplace is often controversial, contentious and constantly evolving. With one of its objectives being an attempt to better grasp what is currently going on in Europe, this edited collection brings together chapters by legal scholars and social scientists on the many challenges created by (increasing) religious diversity in the European workplace.

Together, the chapters provide a wealth of information on the legal responses across Europe to the situation of employees as well as employers who, to various degrees, face conflicts between professional and religious obligations. Divergent judicial decisions have been reached across Europe, with case law challenging the public perception of religion and religious conflicts in the context of labor relations. Because religious claims potentially conflict with other rights and interests in the workplace, a delicate balance must be struck between a multitude of interests, factors, perspectives and values. The case law of the European Court of Human Rights, the European Court of Justice, domestic experiences and comparative analyses can indicate trends, pinpoint “hard cases,” and reveal established and innovative approaches alike. The chapters in this book aim to contribute to the debate concerning the proper scope of religious liberty and protection against religious discrimination in the workplace by addressing such divergent questions as:

- how has the stance of the European Court of Human Rights on religious freedom in the workplace evolved?
- how should we assess the hands-off approach by the European Court in this area, exemplified by the broad margin of appreciation for states?
- what about the right of employees not to be confronted with religious manifestation by co-workers, employers or the state in the workplace?
- how do various European states compare when it comes to the right of public school teachers to wear their religious dress?
- should the high rates of unemployment amongst religious minorities be taken into account when debating the proper level of de facto or de jure accommodation in the workplace and, if so, how?
- what is the effect of a perceived proliferation and diversification of (Christian and non-Christian) faith-based companies across the European Union (EU)? Is their “privileged” exemption from aspects of discrimination law justified?

The papers were delivered at an international symposium on “Religious Diversity and the European Workplace,” Leuven, Belgium on 13 January 2011. This symposium was organized under the umbrella of the EU-funded FP7 RELIGARE project (Religious Diversity and Secular Models in Europe—Innovative Approaches to Law and Policy), and hosted at the Law Faculty of the Catholic University of Leuven.

While the emphasis in this volume is mainly on Western Europe, specifically Belgium, France, and the Netherlands, it also includes a chapter on Turkey and—for comparative purposes—two chapters on the American experience.
Introduction

To what extent does the American experience, with more pro-active and affirmative approaches to diversity in the multi-religious workplace, offer perspectives for the European work landscape?

Within the broad field of labor relations and (religious) diversity, this volume brings together a number of European perspectives, comparative accounts and national case studies. The volume approaches the issue of religious identity and diversity in the workplace from various perspectives, and it is our hope that it will be relevant for legal practitioners, researchers, lecturers and students interested in or working on human rights law, discrimination law, labor law and, generally, the intersection of law and religion. It should also spark the interest of national and EU-level policy-makers who venture into this thorny area of law and policy.

To a large extent, the chapter by Lucy Vickers can be read as an alternative introduction to the theme of this volume. Addressing an important factor that makes debates in this field so intricate, namely the various legal backgrounds of lawyers working in this field, Vickers identifies a range of perspectives from which the issues can be viewed, such as an equality perspective, a human rights perspective and the perspective of Church–State relations in this intersecting area of law. Each of these perspectives (or at least the dominant strands inside these, as an internal diversity cannot be denied) comes with its particular ground rules, presuppositions and internal dynamic. Vickers illustrates how these different perspectives can lead to differing legal approaches to the central issues relating to religious diversity at work.

European components of the religion and workplace debate

The first part of this volume contains a number of chapters dealing with the case law of the European Court of Human Rights (ECtHR) on religious freedom in general, and as it applies to the workplace setting in particular, as well as on the current and prospective role of European Union law and the European Court of Justice (ECJ), specifically with regard to religious discrimination in employment.

The chapter by Saïla Ouald Chaib, ambitiously seeking to improve the legal reasoning of the European Court of Human Rights, provides a wide analysis and critique of the ECtHR’s case law under Article 9 of the European Convention on Human Rights (ECHR) as applied to the rights of employees wishing to express their religious beliefs and practices in the workplace. She first explores the approach taken by the ECtHR in a number of cases where employees sought to reconcile their religious obligations with work schedules. The “freedom to resign”

6 A number of chapters offer both European and domestic perspectives, but have been placed in the respective parts of the volume based on their predominant focus.

7 Moreover, there is an important degree of overlap or concurrence, in practice, between each of the (ideal typical) perspectives.
argument, which under the jurisprudence figures prominently as the “ultimate guarantee of religious freedom,” leads to these claims being considered—in the relevant terminology—manifestly ill-founded and thus inadmissible. A second set of analysed cases revolve around the wearing of religious attire, such as the headscarf, in the workplace. Here, the ECHR has found interference with Article 9 of the Convention, but in the subsequent proportionality assessment gives limited weight to the employee’s right to manifest religious identity. Ouald Chaib contrasts this to more generous approaches taken by the ECtHR in recent cases on family rights and the rights of prisoners, arguing that good practices derived from its own case law should help the Court move towards a more accommodating stance.

Kristin Henrard critically assesses the “margin of appreciation” doctrine of the ECtHR, and the ensuing broad state discretion in Church–State matters allowed under the ECHR, in the light of their compatibility with the existence of an international supervisory structure and general principles of legitimate limitations to human rights. Particular Church–State relations have an impact on the workplace as they can determine issues such as the choice of official holidays and the willingness towards accepting de facto reasonable accommodations. Henrard questions the hands-off approach taken by the ECtHR as being insufficiently in line with religion as a suspect class of differentiation, since this should trigger heightened scrutiny and a restricted margin of appreciation.

The next chapter, by Hans-Martien ten Napel, looks at the burning hot question, ignited by the Lautsi v. Italy case, of the government’s ability to display religious symbols in a public (work)place, particularly crosses in public school classrooms. This case involves the negative aspect of religious freedom, namely the right not to believe or have a religion. Ten Napel offers an in-depth analysis and assessment of the ECtHR’s opposite Lautsi rulings—on 3 November 2009 while on 18 March 2011 the Grand Chamber came to the opposite conclusion—in the light of the argument that the debate on the limits of the government’s ability to display religious symbols in the public sphere is closely related to the issue of manifestations by citizens of religious symbols in public institutions.

Religious diversity issues can be addressed through freedom of religion and human rights as well as through an anti-discrimination perspective. In 2000, European Union law entered as a new player in the field of religion and the workplace with the Employment Equality Directive (2000/78/EC) prohibiting direct and indirect discrimination, the instruction to discriminate, harassment and victimization inter alia on the basis of religion or belief. However, in the 11 years since, the ECJ has not yet been offered the chance to render judgments to mediate between the widely divergent approaches in European countries to the accommodation of religious practices in the workplace related to religious discrimination. In her chapter, Titia Loenen notes that it is only a matter of time before the ECJ is called upon to decide on the sensitive issue of accommodation of religious practices in the workplace, such as the wish to wear a headscarf or a face-covering veil, or the refusal to shake hands with colleagues or clients of
Introduction

1 the opposite sex, and thus decide where EU law stands in this respect. Loenen
2 continues by offering a fascinating account of dilemmas this diversity may create
3 for the ECJ if, and when, it is called upon to decide how the various equality
4 directives have to be interpreted and applied to such issues. She argues that the
5 legal framing of the issues—e.g. as discrimination on grounds of religion, race/
6 ethnic origin and/or gender—will, to a large extent, determine the ECJ’s decision.
7 Another intersection, this time of discrimination and speech, is examined in
8 the chapter by Jogchum Vrielink. In charting the intersections of speech and direct
9 discrimination in the context of recruitment and hiring procedures in particular,
10 Vrielink argues that even though discrimination is first and foremost thought of as a
11 particular form of conduct, it is not exceptional for speech to either itself constitute,
12 or provide evidence of the existence of, (direct) religious or racial discrimination.
13 He identifies a number of categories of such speech, carefully attempting to
14 delineate these from types of speech that should receive free speech protection.
15 Turning to an issue usually addressed from a Church–State perspective, Yves
16 Stox takes on the topic of the complicated legal status of faith-based organizations,
17 which he refers to as “expressive employers.” While many employers may seek
18 to realize a specific identity such as plurality or neutrality, the EU Employment
19 Equality Directive only provides an exemption for employers whose ethos is based
20 on religion or belief. Behind this provision lies a difficult political decision-making
21 process that has led to the anything but straightforward and clear formulation
22 of this exemption in the Directive. He illustrates how the formulations of this
23 exemption under the Belgian Anti-discrimination Acts of 2003 and 2007 were also
24 the result of political compromise that left the courts without clear guidelines,
25 something which has been complicated even further by the case law of the Belgian
26 Constitutional Court.
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28 Identity, neutrality, secularism: Case studies and comparative perspectives
29
30 The focus in the second part of this volume is on particular case studies and
31 comparative analyses. As far as the case studies are concerned, there is a general
32 emphasis on working through legal sources and events, paying close attention to
33 what actually happens in the application of the law while recognizing the need to
34 locate particular developments in their broader context(s); for example, existing
35 bans on headscarves for public servants in Turkey and the underlying concept of
36 secularism.
37 Mine Yıldırım offers an internal perspective of the Turkish situation regarding
38 religious dress in the public and private workplace. It is known that headscarves
39 and other types of religious attire are prohibited for all Turkish public servants;
40 however, the situation in the private workplace is far less clear. Yıldırım starts
41 by offering the reader some background on the Turkish understanding of the
42 constitutionally enshrined principle of secularism and its interpretation by the
43 Turkish Constitutional Court. She argues that the application of this principle and
44
1 its ensuing elaboration by the Turkish judiciary reflect a hierarchy between norms 1
2 protecting secularism and norms protecting the freedom to manifest one’s religion 2
3 or belief, rather than a balanced and harmonized interpretation which she favors. 3
4 Turning to France, where the principle of laïcité forms the backbone of many 4
5 debates on religion and secularism in the public space, Rim-Sarah Alouane 5
6 evaluates the approach taken in France to religious symbols and practices in the 6
7 workplace. The idea that religion is a private matter that has to be confined to the 7
8 private sphere conflicts with the (new) French social reality where Muslims form 8
9 an important and visible minority that assert their religious rights and interests. 9
10 Through an examination of the case law and legal scholarship related to religion 10
11 in the workplace, Alouane compares the situation in the public and private 11
12 workplace. Interestingly, and in contrast to Yıldırım’s analysis with regard to the 12
13 Turkish judiciary, Alouane argues that French judges are becoming the voice of 13
14 the religious pluralism that characterizes France on the ground. 14
15 An anthropological perspective is introduced into the debate by Efrat Tzadik 15
16 who, on the basis of fieldwork and in-depth interviews with Jewish women in 16
17 Brussels, offers us a privileged look into a largely inaccessible sphere. Through 17
18 the personal accounts of Jewish and Israeli women, she highlights the interplay 18
19 between Jewish identity and the workplace, with an emphasis on aspects of 19
20 gender. In particular, she highlights a number of obstacles that Jewish women, 20
21 and in particular orthodox Jewish women, experience in the Belgian workplace. 21
22 For a number of women these barriers (or their prospects) have proven to be 22
23 complete blockages, deterring or preventing them from participation in outside 23
24 work while rendering the mother role even more appealing. In contrast, for other 24
25 Jewish women these barriers have been triggers to finding “coping mechanisms” 25
26 that allow them to function in workplaces even if they nonetheless often feel they 26
27 are regarded as “the other.” 27
28 While understanding local particularities and histories is crucial, a great deal is 28
29 to be learned from comparisons of religious accommodation and management of 29
30 diversity both inside Europe as well as beyond. Muslim women’s dress continues 30
31 to receive a large amount of public attention across Europe in various settings such 31
32 as schools, public spaces and workplaces. Katayoun Alidadi’s chapter addresses 32
33 this topic, which lies at the intersection of gender, ethnicity and religion. Since 33
34 religious dress is sometimes regarded as “unconventional” or “unprofessional,” its 34
35 presence in the workplace can challenge the policies of employers and companies 35
36 that seek the services of “neutral-looking” staff. After discussing recent case law 36
37 from the E CtHR and the situation under the EU Employment Equality Directive, 37
38 the focus is on domestic case law from Belgium and the Netherlands. Noting 38
39 marked differences between these two neighboring countries when it comes to 39
40 the accommodation of Muslim dress in the workplace, the chapter draws attention 40
41 to the fact that non-accommodation in the workplace entails consequences, 41
42 in particular through the unemployment benefits system. Juxtaposing and 42
43 comparing the approaches taken by domestic courts in workplace conflicts and in 43
44 unemployment benefits proceedings has the potential to illuminate which signals 44
Introduction

and incentives are being sent out about what the acceptable and desirable position 1 of Muslim women in society is. One danger that is not unimaginable is that the 2 case law combined sends out unintended messages making Muslim women, and 3 others with “unconventional dress” out of place or “redundant” when it comes to 4 mainstream employment.

In many ways the American experience offers a strong contrast to Europe, 5 and two chapters examine that experience in the light of the challenges faced in 6 the European workplace. As such, the contributions by Gabrielle Caceres and 7 Amandine Barb turn to perspectives from across the Atlantic and introduce a 8 number of possible future routes for Europe, while reminding us that the current 9 debate in Europe, which largely *problematizes* religion in the context of modernity 10 and the mainstream workplace, should not be taken for granted. In particular, 11 Caceres asks whether the concept of “reasonable accommodation” (the duty for 12 private and public US employers under Title VII of the federal Civil Rights Act of 13 1964 to accommodate the religious observances and practices of their employees 14 unless it results in undue hardship) could be “transposed” in Europe, particularly in 15 the French secular context. She argues that considering the diverse constituencies 16 in the US, it is understandable that the issue of religious diversity was more 17 quickly tackled there. By contrast, the French model, with its secularist tradition 18 of republican integration, as also addressed by Alouane, seems evidently more 19 resistant to denominational pluralism. While Caceres illustrates that the wearing 20 of signs or clothes expressing a religious affiliation or the ability to request time 21 off for religious observance, in public services or private firms, are particularly 22 sensitive in France, she notes “an embryonic right” to religious accommodations 23 in the workplace, thanks to efforts by the former French equality body HALDE 24 (*Haute Autorité de lutte contre les discriminations et pour l’égalité*, replaced in 25 May 2011 by the *Défenseur de droits*) and French courts. However, she argues 26 that much more needs to happen in order for “reasonable accommodations” to be 27 accepted in the French employment context.

In contrast to the situation in France, a number of structural and societal 28 preconditions and developments paved the way early on in the US for more 29 proactive and engaging methods of handling religious diversity in the workplace. 30 Barb analyses the emergence of the so-called “faith at work” movement since 31 the 1990s in the US, under which managers have adopted such approaches. In 32 the context of a steady rise in religious discrimination complaints, the main 33 objective of this movement is to go beyond mere “reasonable accommodations” 34 (as is addressed by Caceres) and to actively reassert the place and value of faith 35 in American companies through the positive engagement with employees’ diverse 36 religious identities. The creation of Bible-study and other (inter)faith groups, the 37 official acknowledgment of various holy days, the hiring of “corporate chaplains,” 38 a greater freedom of religious speech and a general emphasis on “spiritual well- 39 being” are all signs of a move from more reactive attention to their employees’ 40 beliefs, with anti-discriminatory or accommodationist policies, to a more 41 *affirmative* recognition of religious diversity. The debate again has to come down 42
to the role of *context*. The high religiosity in the US contrasted with the continuing 1 2 secularization amongst Europe’s majority population forms one factor explaining 3 why the “faith at work” movement is not as appealing and will most likely 4 remain a marginal phenomenon in Europe, Barb argues. While a spontaneous 5 transplantation of this new management model is unlikely, European managers can 6 learn a number of things from this efficiency-driven and self-interested approach. 7 In the final chapter, Julie Ringelheim questions to what extent European law 8 should play a role in (re)designing ways to approach or manage religious and 9 other diversity as it is found in the workplace. While this closing chapter looks at 10 a number of common themes and offers important future-oriented reflections on 11 diversity, religion and labor relations, we want to conclude this introduction by 12 addressing a few overarching concerns of our own.

**Turning the tide?**

While to a large extent the workplace produces and enforces rules of conduct of 17 its own, there is room for the law to play a compass function towards creating 18 a more tolerant society through impulses directed in the workplace. Within the 19 EU, this process has already commenced with the adoption of the Employment 20 Equality Directive in combating discrimination on grounds of religion or belief. 21 However, both religious or belief-based discrimination as well as the freedom of 22 thought, conscience and religion include open and necessarily vague notions that 23 have arguably not entirely slipped into the European awareness just yet. So which 24 factors are to be taken into account to effect social change, not only in case law but 25 also on the “shop floor of social life”? Since it is this setting that affects workers 26 in their everyday work life, our concern should be for the use and impact of rules 27 in that context. Turning the tide of societal pressures and misconceptions is the 28 biggest challenge for the law.⁸

The idea that religion is first and foremost an issue of personal conscience 31 explains part of the viewpoint that members of religious minorities are faced with in 32 today’s Europe. The religion–secular divide, which, to a large extent corresponds to 33 the public–private divide, perseveres across Europe. Europe seems an exceptional 34 place in this regard, as it is one of the few places where secularization is actually 35

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⁹ This is all the more challenging in this context as it appears that the position of 40 the labor unions is divided on this issue. The typically individualized nature of religious 41 accommodations often conflicts with the traditionally collective aspect of labor law. The 42 laws of collective bargaining can appear of little use to the individual religious practitioner 43 working in a factory or office subject to dominant norms and standards.
on the rise, at least amongst its majority population.\textsuperscript{10} In many other parts of the world, religion does not have the problem status it has in twentieth-century Europe. The fact that religious practices are increasingly being brought to the attention of the judiciary, in the apparent absence of counterbalancing services to society, can confirm and strengthen this perspective. With the background being that “the Christian tradition has had an irreversible effect on the shaping of time and space in this part of the world,”\textsuperscript{11} increasing diversity of religions and other convictions is transforming Europe into a new type of entity.\textsuperscript{12} While several chapters in this volume provide perspectives on how to start turning the tide by identifying ways forward in responding to this challenge, a word of warning is appropriate: the approaches and perspectives offered throughout these chapters are mostly not miracle solutions, ready to be poured into legal or policy form. And even if some are ready to use, it is likely too optimistic to take for granted the capacities of the law to effect real social change in the short term, especially in the context of the workplace, where straying from social norms is often feared to lead to diminished competitiveness and profits. A recent controversy that took place in Belgium offers a striking illustration of the way in which societal norms and practices tend to be tenacious, and even self-perpetuating. It concerned a case in which the employment contract of a female Muslim employee was not renewed by a large Dutch general store chain in the Belgian town of Genk, after the woman refused to take off the headscarf that she had started to wear on the job.\textsuperscript{13} The striking thing about this case was that the same chain store is known in the Netherlands for its inclusive policy regarding the headscarf, e.g. even providing a headscarf as part of the company uniform to those who wish to wear it. In Belgium, however, it opted for prohibition. Following a media storm in which human rights NGOs and the Belgian equality body expressed their outrage over this case, the store responded with a statement that

\begin{footnotesize}
\begin{enumerate}
\item Ibid., 24.
\item The Framework which made the symposium and this present volume possible, the EU Seventh Framework Program, also funds RELIGARE, “Religious Diversity and Secular Models in Europe: Innovative Approaches to Law and Policy” (2010–2013) which addresses the challenges of religious pluralism in contemporary Europe in the areas of the workplace, family law, the public space and financing of churches, and explains the forward-looking way of addressing the policy implications of the research. However, while the scholars were engaged in this exercise, the research itself was conducted largely without this concern in mind. For more information on RELIGARE, see www.religareproject.eu.
\item X., “Hema ‘schikt zich naar gewoonten van het land’” [Hema is ‘conforming itself to the customs of the country’]. \textit{De Standaard} 8 March 2011, available at www.standaard.be.
\item In March 2012, the Belgian Centre for Equal Opportunities and Opposition to Racism announced that negotiation and mediation attempts had failed and it was pursuing the case in court, suing HEMA for discrimination on the basis of religion, see Y. Delepeleire, “Hema voor rechter na ontslag voor hoofddoek” [HEMA before the court after dismissal because of headscarf], \textit{De Standaard} 6 March 2012.
\end{enumerate}
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it had only opted for the prohibition in response to a series of “negative customer
comments,” and that—more generally—it was “merely conforming to the customs
of the country.” Indeed, it is a little-noticed fact that one hardly ever encounters
employees wearing headscarves in Belgian stores, especially in comparison with
some surrounding countries. As it seems unlikely that this situation would be due
to voluntary choices made by Muslim women, the main difference between most
stores operating on the Belgian market and the Dutch one in Genk was that the
latter was naïve enough to make explicit that which most others do as well, albeit
in a more covert or concealed fashion.

Of course, the fact that the religious freedom of employees is not a priority for
employers is not a problem as such, as employers certainly have other priorities
starting with staying in business. The issue becomes critical, however, if in a
society (certain) religious practices become automatically equated with trouble
and elicit resentment, and when—as a consequence—this negative perspective is
(unquestioningly) copied into the norms and practices that govern the workplace.

In such situations, most employers will seek to repress or avoid (conspicuous) expressions of religion at any cost, thereby “merely” following the trail of
dominant customs with regard to religion’s place in society. The challenge that we face is, as such, one for society as a whole, and not only for the national or
European legislator. With an issue so complex, the means to turn the tide cannot
be one-sided, let alone be limited to top-down (legal) approaches. Appropriate
responses should benefit from a thorough understanding of the issues, contexts
and interests at stake. This volume aims to contribute just that. What emerges from
it—almost unanimously—is a call for a common and positive language to develop
thoughtful, contextual and innovative ways to deal with the tensions that can arise
with respect to religion at work.

Leuven
Chapter 6

Silence is Golden? Charting the Intersections of Speech and Direct Discrimination under EU Law with a Special Focus on Racial and Religious Discrimination in Recruitment

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Introduction

Discrimination inter alia on the grounds of race and religion is prohibited in the European workplace. Speech, be it of a religious or any other nature, is considered to be free unless specific restrictions apply. Individuals have a fundamental right to speak, even if the messages they convey are unpopular, insulting or misleading.

So what happens when speech and discrimination collide or intersect in the context of the workplace?

Cases abound of such collisions, involving the entire cast of workplace actors.

Even though discrimination is most often thought of as a form of conduct, it is not exceptional for it to in fact be realized or evidenced by means of speech, as much human activity and decision-making in particular takes place by means of speech.

In many cases these situations will not raise significant free speech concerns, since

* This work was supported by the RELIGARE project, which received funding under the European Commission’s Seventh Framework Programme (Socio-economic Sciences and Humanities) under grant agreement number 44635. The author thanks Christian Bayart, Marie-Claire Foblets and Stefan Sottiaux for their insightful suggestions.

As in many other, non-European, contexts, of course. However, the European workplace constitutes the focus of this chapter, in the light of the focus of the symposium that gave rise to it, and due to the—more or less—uniform (minimum) norms that exist throughout the whole of the EU region, in enactment of the relevant directives (infra §1).

2 Speech, for the purposes of this chapter, is understood as anything a person says, writes or does that is intended to convey a message that could reasonably be expected to be understood by others. The emphasis, however, is on verbal and written utterances.

3 Or, as the mantra of the European Court of Human Rights (ECtHR) would have it, “freedom of expression … is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population” (ECtHR 7 December 1976, Handyside v. United Kingdom, App. No. 5493/72, par. 49).
often such “communicative efforts do not seriously implicate the values that lie behind freedom of speech.” The employer that tells a candidate that he or she will not be hired or promoted because of his or her sex, ethnicity, religion or belief, sexual orientation, age or handicap may technically be engaging in speech, but he or she will thereby (generally) be discriminating as well. It is doubtful that even the most hardened free speech absolutists would deny this. Likewise, so-called smoking gun statements—expressing outward discriminatory animus, and followed by a negative decision regarding the applicant—are commonly accepted as evidence in discrimination cases.

The situation can also be less clear-cut however, with the conflation or evidentiary bond between discrimination and speech being more ambiguous. What if, for instance, an employer publicly engages in discriminatory—e.g. racist or anti-religious—speech or even announces his intention to discriminate, but there are no other signs that a discriminatory act took place? And to what extent does discrimination law also restrict the types of questions that an employer can ask or more generally the things he can say during a job interview? More controversial still is the issue of “discriminatory” workplace harassment: can jokes, posters, or even playing certain types of music amount to a hostile work environment violating someone’s dignity, and therefore amount to discrimination? In these and many other cases in which speech and discrimination law collide, it must be decided whether the expression deserves free speech protection, or whether it really amounts to (evidence of) a prohibited form of discrimination.

At present, such situations remain fundamentally under-analyzed, which, especially in the light of their frequent occurrence, can be deemed problematic, since it is liable to pave the way for arbitrary decisions both within and across EU Member States. So far, the only aspect of this issue that has received systematic attention in the literature is the tension between the prohibition of harassment and free speech principles. While the latter issue has been debated vigorously, the manifestation of discrimination (infra §1).


5 EU discrimination law defines harassment based on protected grounds as a manifestation of discrimination (infra §1).

extent to which other manifestations of discrimination that fall within the scope of EU discrimination law—such as direct discrimination, indirect discrimination, and the instruction to discriminate—can also be realized or evidenced by means of speech, and if so what criteria the content and context of that speech has to meet without unduly restricting the freedom of speech, has been a neglected area. A general treatment of this vast and complicated topic exceeds the reach and ambitions of the current chapter. Instead, I will focus on one single category of overlap or tension between speech and discrimination: that of direct discrimination by means of (or evidenced by) speech in the context of hiring procedures in private employment, with a special focus on racial and religious discrimination.

The chapter starts with a brief overview of some of the key aspects of EU legislation prohibiting direct discrimination in employment and the workplace, which are relevant for the current purposes (§1). Subsequently, the chapter goes on to examine the extent to which direct discrimination in the context of hiring procedures, on the basis of race and/or religion in particular, can be realized or evidenced by means of speech (§2). I will conclude with a review of my main points, and with some closing thoughts (§3).

This can be explained firstly due to the fact that the tension between harassment and free speech is prima facie most apparent. An additional reason for this one-sided attention arguably has to do with the “default” focus in both discrimination law and labor law analyses, which tends to be respectively on the victims and employees, and on their rights and freedoms, and much less so on those of the decision-makers in this context. This also explains why harassment is the only manifestation of discrimination that has regularly been analyzed from a (free) speech angle, since employees can engage in harassment vis-à-vis each other, while they—generally speaking—cannot (or are far less liable to) commit any of the other manifestations of discrimination.

The reasons for focusing on direct (rather than indirect) discrimination are related to the fact that—after intimidation—most cases in which speech is dealt with under discrimination law concern direct discrimination. An analysis of these types of cases would therefore seem to be the most relevant from a practical point of view. At the same time, this focus facilitates drawing on a significant number of non-fictitious illustrations.

The exclusive focus on hiring for private employment is due to the specific nature of speech restrictions and responsibilities that hold regarding (hiring for) the civil service. However, one could see Hans-Martien ten Napel’s chapter in this volume as dealing with a particular aspect of this issue, i.e. that of symbolic religious speech by public employers.
1. EU framework concerning direct racial and religious discrimination in employment

The EU legal framework concerning the prohibition of discrimination on the grounds of race and religion in the area of employment is founded on Article 13 of the Treaty establishing the European Community (“EC Treaty”), which authorizes the Council to adopt measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In 2000, two directives were adopted pursuant to Article 13 of the EC Treaty: the so-called Race Equality Directive (RED) and the Employment Equality Directive (EED). The EED introduced minimal standards of non-discrimination on the grounds of religion or belief, disability, age and sexual orientation in all aspects of employment, including (decisions about) hiring, promoting, compensating and firing employees. The RED—offering protection only to discrimination on the basis of race and ethnic origin—covers employment as well, while also extending to other areas of public life, such as social protection, health care, education and access to goods and services.

In doing so, the directives aim at ensuring access to important opportunities for the full participation of all persons in society—inter alia in the workplace—irrespective of their protected grounds, in order that they might realize their potential. The Council believes furthermore that discrimination based on the protected grounds “may undermine the achievement of the objectives of the EC Treaty,” and in particular “the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.”

Both the EED and the RED prohibit a number of manifestations of discrimination, i.e. direct discrimination, indirect discrimination, harassment and harassment and repercussions.

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10 Article 13 reads as follows: “1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. 2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.”


13 Preamble §12 RED; Preamble §9 EED.

14 Preamble §9 RED; Preamble §11 EED.
the instruction to discriminate.\textsuperscript{15} Direct discrimination “shall be taken to occur
where one person is treated less favourably than another is, has been or would
be treated in a comparable situation,” and such “on the grounds of” one of the
protected characteristics.\textsuperscript{16} As such, four elements need to be present in order for
direct discrimination to be established: a less favorable treatment (1), of a person
(2), than another person is, has been or would be treated in a comparable situation
(3) and such on the grounds of inter alia race, religion or belief (4).\textsuperscript{17} Crucial in
direct discrimination is that the unfavorable treatment is directly predicated on the
protected ground, in the sense of it being the \textit{cause} or the \textit{motive} (although this
should be distinguished from intent, which is not required).\textsuperscript{18}

Although not the topic of this text, the definition of indirect discrimination
will nonetheless be relevant in the remainder of this chapter as well.\textsuperscript{19} Indirect
discrimination under both the EED and the RED occurs “where an apparently
neutral provision, criterion or practice would put persons” of a certain racial or
ethnic origin or of a particular religion or belief “at a particular disadvantage
compared with other persons unless that provision, criterion or practice is
objectively justified by a legitimate aim and the means of achieving that aim are
appropriate and necessary.”\textsuperscript{20} Like direct discrimination, indirect discrimination
therefore also requires the presence of four elements: there needs to be an

\begin{itemize}
\item[(1)] The EED also includes an obligation to make reasonable accommodations for
persons with a handicap (Art. 5 EED), but does not, strictly speaking, define the refusal to
make such accommodations as a manifestation of discrimination (see L. Waddington and A.
Hendriks, “The Expanding Concept of Employment Discrimination in Europe: From Direct
and Indirect Discrimination to Reasonable Accommodation Discrimination,” 18 \textit{International
Journal of Comparative Labour Law and Industrial Relations} 403 (2002). Some Member
States do, however, in their implementation legislation of the Directive, explicitly include
the refusal to make reasonable accommodations in the concept of discrimination.

\item[(16)] Article 2 (2a) EED and RED.

\item[(17)] See extensively M. J. Busstra, \textit{The Implications of the Racial Equality Directive
for Minority Protection Within the European Union} (Eleven International Publishing 2010),
and Minority Protection} (Eleven International Publishing 2010), 24–25.

\item[(18)] R. A. Sedler, “The Role of ‘Intent’ in Discrimination Analysis,” in \textit{Non-Discrimination
Law: Comparative Perspectives} (T. Loenen and P. Rodrigues, eds, Kluwer 1999); M. J.
Busstra, \textit{The Implications of the Racial Equality Directive for Minority Protection Within the
European Union} (Eleven International Publishing 2010), 146; M. Ambrus, M. J. Busstra and
K. Henrad, “The Racial Equality Directive and Effective Protection Against Discrimination:
Mismatches Between the Substantive Law and Its Application,” 3 \textit{Erasmus Law Review}
165 (2010), 171; C. Bayart and C. Deiteren, “Direct en indirect onderscheid,” in \textit{De Nieuwe
Federale Antidiscriminatiewetten} (C. Bayart, S. Sotiaux and S. Van Droogenbroeck, eds,
die Keure 2008), 195; E. Ellis, \textit{EU Anti-Discrimination Law} (Oxford University Press 2005),
Protection} (Eleven International Publishing 2010), 24–25.

\item[(19)] Mainly in distinguishing and delineating it from direct discrimination.

\item[(20)] Article 2 (2b) EED and RED.
apparently neutral provision, criterion or practice (1); that would put persons with
the protected characteristics at a particular disadvantage (2); compared to other
persons (3); unless that provision (etc.) is objectively justified by a legitimate aim
and the means of achieving that aim are appropriate and necessary (4).21
In order for discrimination to be established under the directives, a two-phased
model applies.22 The applicant first needs to make (at least) a prima facie case
of discrimination (§1.1). If successful, the burden of proof will shift so that it is
subsequently for the respondent to demonstrate that no discrimination has taken
place (§1.2).

1.1. First phase: prima facie case of discrimination

As mentioned, the applicant needs first to establish facts from which it may be
presumed that discrimination took place. Both directives provide that the burden
of proof—more specifically the burden of persuasion23—in (most)24 discrimination
cases will shift when complainants “establish, before a court or other competent
authority, facts from which it may be presumed that there has been direct or
indirect discrimination.”25
As such, a presumption of discrimination is made on the basis of the facts, but
the facts do not themselves constitute the presumption: the presumption results
from drawing inferences from the facts.26 Furthermore, the facts that are to be

for Minority Protection Within the European Union (Eleven International Publishing 2010),
203–231.
22 See extensively M. Ambrus, Enforcement Mechanisms of the Racial Equality
23 In general evidence law two forms of the burden of proof tend to be distinguished:
first an evidential or subjective burden of proof (burden of production), and secondly a legal
or objective burden of proof (burden of persuasion). The burden of production concerns
the duty upon parties in a legal proceeding to introduce sufficient evidence, or counter-
evidence, relating to assertions of fact to have an issue be considered by the fact-finder
rather than it being summarily dismissed or decided. The burden of persuasion concerns the
duty upon a party to persuade the fact-finder to decide for that party on an assertion of fact.
While the former burden tends to shift back and forth in (most) legal procedures, the latter
is usually allocated at the beginning of a procedure, the onus remaining on the same party
throughout the process. See extensively J. Kokott, The Burden of Proof in Comparative
and International Human Rights Law: Civil and Common Law Approaches with Special
24 Both directives exclude criminal procedures from this measure (Art. 8 (3) RED;
Art. 10 (3) EED), and Member States are also not required to apply Art. 8 (1) RED or Art.
10 (1) EED to proceedings in which it is for the court or competent body to investigate the
facts of the case (Art. 8 (5) RED; Art. 10 (5) EED).
25 Article 10 (1) EED; Article 8 (1) RED.
26 C. Tobler, Indirect Discrimination. A Case Study into the Development of the
Legal Concept of Indirect Discrimination under EC Law (Intersentia 2005), 43; H. Collins,
established do not, by themselves, have to lead to the conclusion that there was an act of unlawful discrimination, i.e. that an unjustified less favorable treatment on the protected grounds did in fact take place. The directives do not provide further information on either the nature of the (initial) burden on the complainant, or on the facts that can or will be regarded as relevant. However, it does seem clear that this burden was intended to be rather minimal.  

1.2. Second phase: refutation of discrimination  

Once an applicant has established facts from which the presumption of (direct or indirect) discrimination can be inferred, the burden of proof shifts to the respondent, who will then have “to prove that there has been no breach of the principle of equal treatment.” This can be done, either by negating causality (§1.2.1) or by claiming that the prima facie discrimination falls under a legally permissible exception and/or that it is justified (§1.2.2).

1.2.1. Negation of causality  

In order to discharge his burden of proof, the respondent can first attempt to negate the causal link between the harm that the “less favourable treatment” resulted in and the protected ground. In direct discrimination the causality of the harm is based on the adverse treatment being predicated on the protected ground (supra §1). As such, a respondent—in order not to be found guilty of direct discrimination—can attempt to demonstrate, on the balance of probabilities, that the treatment was not predicated on the prohibited ground(s). He can, in other words, attempt to negate the prima facie causality that appeared to emerge from the facts established by the applicant, by challenging the link between the protected ground and the harm. If the respondent does not succeed in doing so, the court—or other competent authority—will find that the respondent unlawfully discriminated, unless the respondent is able to justify the unequal treatment and/or if it falls under an exception included in the directives (infra §1.2.2).

1.2.2. Exceptions and justifications  

When a respondent is unable to prove a lack of causality, the exceptions and justifications available under the RED and EED may still be invoked to demonstrate why an adverse treatment, based on a protected ground, should not in
a given case be regarded as (prohibited) discrimination. Under both directives, the concept of direct discrimination—as opposed to that of indirect discrimination—does not allow for justifications or exceptions of a general nature, but only offers specific, and limited, justification clauses. Under the RED, and in the context of employment, these are limited to the genuine and determining occupational requirement and positive action. The EED, like the RED, also allows for these justifications, and additionally provides several “ground-specific” justifications. As far as religion is concerned, the EED contains (the option of) an additional, specific type of occupational requirement for churches and other public and private organizations based on a religious ethos.

1.2.2.1. Positive action Both directives offer the possibility of positive action, as an exception or justification for unequal treatment of a direct (or indirect) nature, “with a view to ensuring full equality in practice.” The relevant provisions stipulate that “the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to” any of the discrimination grounds.

The case law of the European Court of Justice of the European Communities on this issue—having been developed in cases of sex discrimination—is on a side note: the directives offer neither any exceptions to the prohibition of harassment, nor opportunities to “justify” it. As far as the instruction to discriminate is concerned, it remains somewhat unclear to what extent it can be justified. The directives offer no explicit guidance on this issue, but most commentators assume that in this context the systems of justification for the other manifestations of discrimination should be applied

mutatis mutandis, depending on the type of discrimination the instruction to which was given. Implementation of Article 4 (2) EED is optional, and several Member States have not included it in their legislation, at least not expressly (CEJI and ENAR, “Religious Discrimination and Legal Protection in the European Union,” Fact Sheet (2007), 19).

Regarding positive action on the basis of religion, the EED contains an additional, specific provision for Northern Ireland, excluding the recruitment into the police service (including its support staff) and that of teachers from the strict prohibitions of (religious) discrimination that the Directive entails, as long as the relevant recruitment programmes “are expressly authorised by national legislation” (Article 15 EED).

One can argue over whether positive action should properly be regarded as an exception to the prohibition of discrimination, or rather as a justification for unequal treatment (or even as a necessary component of equal treatment), depending on whether one attaches greater weight, respectively, to a formal or to a substantive ideal of equality and non-discrimination. The ECJ by and large sees it as an exception to the principle of equal treatment.

Article 7 (1) EED; Article 5 RED.

Although it is not entirely certain that these principles will also be applied to positive action involving other grounds than sex, commentators by and large agree that there do not, at present, appear to be indications that this will not be the case. First, the explanatory memorandum to the EED expressly indicates that the principles of the existing case law of the ECJ are to be employed to assess the permissibility of every form of positive
1 quite restrictive, and by and large entails the following criteria.\textsuperscript{36} First, positive
2 action is only admissible as long as groups really are in a significantly under-
3 represented position.\textsuperscript{37} Secondly, rules that guarantee the disadvantaged group an
4 absolute and unconditional preference or priority for appointment or promotion
5 overstep the limits of permissible positive action, and are disproportional to
6 any given aim.\textsuperscript{38} Thirdly, all applications should be subjected to an objective
7 and transparent assessment, taking into account the individual situation of all
8 candidates.\textsuperscript{39} And finally, preference may only be granted provided that a candidate
9 from a disadvantaged group at least possesses (substantially) equivalent merits.\textsuperscript{40}
10 All of this excludes far-reaching measures such as so-called hard quota.

11 action, even if it is not based on sex, but on grounds such as religion, handicap, age or sexual
12 orientation (see, for example, A. Haquet, “L’action positive, instrument de l’égalité des
13 chances entre hommes et femmes,” 37 Revue trimestrielle de droit Européen 305 (2001),
14 307–308). An analogous line of reasoning can be followed with regard to the RED (see, for
15 example, T. Jones, “The Race Directive: Redefining Protection from Discrimination in EU
16 Law,” 5 EHLR 515 (2003), 522–524). Secondly, the EED itself—as mentioned in footnote
17 32—including a specific provision for positive action on the basis of religion in Northern
18 Ireland, limited to the recruitment of teaching personnel and the police service: arguably
19 (the need for) this express “exception to the rule” would indicate \textit{a contrario} that more
20 generally (in other Member States and/or domains) the restrictive rules for positive action
21 are to remain in force, at least for the criteria included in the EED. Compare: D. De Prins,

23 \textsuperscript{36} See more extensively on positive action in EU law, for example: D. Caruso,
25 Equality Directives,” 44 Harvard International Law Journal 331 (2003); D. Schiek,
26 “Positive Action in Community Law,” 25 Industrial Law Journal 239 (1996); C. Tobler,
28 les femmes et les hommes et la vie professionnelle–le point sur les développements actuels
29 en Europe} (Association Française des Femmes Juristes and European Women Lawyers
31 l’Union européenne,” in \textit{Les droits de l’homme au seuil du troisième millénaire, Mélanges
32 en hommage à Pierre Lambert} (Bruylant 2000), 37–49; O. De Schutter and B. Renauld,
33 “Égalité de traitement. L’action affirmative devant la Cour de justice de Communautés

37 \textsuperscript{37} See, for example, Case C-450/93, \textit{Kalanke v. Freie Hansestadt Bremen} [1995],
38 ECR I-3051; Case C-158/97, \textit{Georg Badeck and others} [2000], ECR I-1875.
39 \textsuperscript{38} See, for example, Case C-450/93, \textit{Kalanke v. Freie Hansestadt Bremen} [1995],
41 \textsuperscript{39} See, for example, Case C-158/97, \textit{Georg Badeck and others} [2000], ECR I-1875;
42 Case C-407/98, \textit{Abrahamsson and Anderson v. Fogelqvist} [2000], ECR I-5539.
43 \textsuperscript{40} See, for example, Case C-407/98, \textit{Abrahamsson and Anderson v. Fogelqvist}
44 [2000], ECR I-5539.
1.2.2.2. Occupational requirements

As for the occupational requirements, both the EED and the RED allow Member States “to provide that a difference of treatment, which is based on a characteristic related to” one of the protected grounds “shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement.”\[41\] Such an occupational requirement, in order to be legitimate, needs to be justified by a legitimate aim (i.e. not being itself discriminatory or otherwise illegal), and be proportionate in the light of that aim. However, the preambles of both directives indicate that this justification applies only “very limited circumstances,”\[42\] which is commonly interpreted as indicating that a high level of scrutiny must be applied.\[43\]

In addition to this general provision on occupational requirements, the EED also includes a more specific one concerning professional activities of “churches and other public or private organisations the ethos of which is based on religion or belief.” Member States may allow that “in the case of occupational activities within such organizations a difference of treatment based on a person’s religion or belief shall not constitute discrimination where … a person’s religion or belief constitute an occupational requirement,” in order to be legitimate and justified occupational requirement, having regard to the organisation’s ethos, again taking into account either “the nature of these activities” or “the context in which they are carried out.”\[44\] As such—and contrary to the general provision regarding occupational requirements—the requirement referred to in Article 4 (2) EED need not be determining, though it must be genuine, legitimate and justified, and have regard to an organization’s ethos. The provision goes on to state that it “should not justify discrimination on another ground,” thereby (again) emphasizing that it potentially only warrants a difference in treatment on the basis of religion or belief, and not on other grounds, such as sexual orientation.

The concluding section of Article 4 (2) EED states that the directive “shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief … to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”\[45\]

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41 Article 4 (1) EED; Article 4 RED.
42 Preamble §18 RED; Preamble §23 EED. Adding, moreover, that “[s]uch circumstances should be included in the information provided by the Member States to the Commission.”
44 Article 4 (2) EED.
45 See also Preamble §24 EED: “The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the
Debate rages in the literature as to a number of issues with regard to Article 4 (2) EED, such as the types of organizations that are entitled to invoke it; the types of occupational activities within those organizations that it can legitimately be invoked for; the extent of the differential treatment it may justify; and the problem of how exactly to interpret the formal restriction that the provision cannot justify discrimination on other grounds than religion or belief. The answers to most of these questions remain relatively uncertain, in the absence of case law of the ECJ to settle them.46

2. Direct discrimination or the presumption thereof through speech in the context of hiring47

What do these general rules imply as far as speech is concerned? In regulating direct discrimination the directives at no point explicitly prohibit speech. However, as with many (or even most) prohibitions of conduct,48 regulating direct discrimination also has an indirect or incidental impact on certain types of speech.49 That is the case, first since speech can realize (or can be used to realize) many actions, including discrimination as defined in the directives. As such, some speech can by itself amount to direct discrimination (§2.1). Secondly, speech that is de facto relevant does not conceptually have to constitute unlawful direct discrimination in and by itself: under the directives it would suffice when the speech leads to a presumption thereof (supra §1.1) in order for the burden of proof to shift (§2.2).

Amsterdam Treaty, has explicitly recognized that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations. With this in view, Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements which might be required for carrying out an occupational activity.”

46 On these and other issues see the chapters by Yves Stox and Amandine Barb in this volume.

47 This paper is conceptual in nature. Examples from case law that are provided in this section are used mainly to elucidate the analytical distinctions that are being made. They are predominantly derived from Dutch and Belgian case law.

48 Innumerable legal restrictions of conduct also impair people’s ability to express themselves the way they want. For a general and thoughtful treatment of this topic (albeit limited to criminal infractions), see K. Greenawalt, Speech, Crime, and the Uses of Language (Oxford University Press 1989).

49 Arguably this would seem to be the case with discrimination law even more so than with many other forms of conduct regulations, since discrimination tends to be highly “expressive” conduct—see, for example, E. Chemerinsky and C. Fisk, “The Expressive Interest of Associations,” 9 William & Mary Bill of Rights Journal 595 (2001).
In employing this conceptual distinction, it should be kept in mind that from a procedural or practical point of view—in the light of the two-phased model of establishing discrimination (supra)—all an applicant has to do, and perhaps more importantly all he can (initially) do, is to create a presumption of discrimination. The directives do not provide for something as a “complete” proof of discrimination, which would preclude attempts by the respondent to dispute the factual evidence brought forward, or to negate or justify the alleged discrimination. In that regard the distinction between speech that may itself constitute direct discrimination, and speech that may (only) lead to a presumption thereof, will, in practice, be one of degree rather than of kind. Nonetheless, the distinction seems relevant both conceptually and practically as it points to an important difference in what one aims to establish (and conversely what the respondent has to discharge or disprove): in the former case this concerns whether the speech itself took place, whereas in the latter situation one not only has to demonstrate the likelihood of the speech having taken place, but also that it is sufficiently indicative of an underlying act of discrimination not coinciding with the speech itself.

2.1. Speech that can amount to direct discrimination

In order for speech to amount to direct discrimination under EU discrimination law, it must itself constitute a form of less favorable treatment on the grounds of race or religion (without there being any exception or justification available). In the following it will be argued that at least three such, partially overlapping, categories of speech can be identified. The first category is speech that directly and unmediatedly excludes or disadvantages persons from opportunities on a discriminatory basis (§2.1.1). Secondly, direct discrimination can arguably also be realized by speech that is (highly) likely to deter applicants from continuing to pursue opportunities on a discriminatory basis. Finally, and closely related to the latter, speech can also amount to direct discrimination when it is (highly) likely to mislead applicants from continuing to pursue opportunities on a discriminatory basis (§2.1.2).

2.1.1. Speech that (directly and unmediatedly) excludes or disadvantages persons from opportunities on a discriminatory basis

Both in the EED and the RED the prohibition of direct discrimination in the context of employment is mainly aimed at (discriminatory) decisions or other conduct of employers and others with the power to control access to important opportunities. Regulated actions include decisions about hiring, promoting, compensating and firing employees. Many of these acts are or may be taken by means of speech, either verbal or written; this is the case particularly in the phase of hiring. As such, one of the most obvious ways in which speech can constitute direct discrimination in the context of hiring is when it itself amounts to a decision or an act that directly and unmediatedly excludes one or more persons from important workplace opportunities, on the basis of discriminatory considerations.
Silence is Golden?

1 This in effect concerns transactional speech that carries out an “ordinary” direct
discrimination by means of communicating, unequivocally committing the listener
or the speaker or both to action.

4 Examples of this include the situation mentioned in the introduction, in which
someone is told during a job interview that he will not be hired because he is of

6 foreign origin or because he is a Muslim. Other types of example could involve

7 letters or other written forms of communication that expressly exclude someone

8 from a hiring procedure due to being an atheist or on the basis of his ethnicity or

9 skin color, as in a striking Belgian case in which a black applicant was rejected
	with the (written) remark “My dog does not tolerate this person: risk of dog bites

to the applicant’s skin color.”

10 Examples in relation to other discrimination grounds are plentiful as well. To

13 provide but one illustration: in a case from the Netherlands, a contractor said the

14 following while rejecting a (male) candidate: “Do you have a male partner, as

15 your e-mail address seems to indicate? Then we really cannot work together. This

16 conflicts too much with my principles.”

17 This first category of speech that amounts to direct discrimination is generally

18 accepted—or rather taken for granted—both in case law as well as in literature.

19 The fact that such manifestations of discrimination in fact also concern “speech”

20 is rarely even explicitly addressed, either in the literature or in case law, precisely

21 because it is considered so self-evident.

22 This is unproblematic from a free speech point of view, as long as the conflation

23 or coincidence between direct discrimination and speech is sufficiently complete

24 and unmediated. In those cases, the mere fact that a discriminatory exclusion

25 is realized by means of speech indeed does not imply that it enjoys heightened

26 protection on the basis of free speech: there are no exemptions from legal conduct

27 regulations in general—or from discrimination law specifically—for people who

28 manage to violate it by means of verbal or written communication, i.e. speech

29 in the technical sense of the word. This is the case even in criminal law, where

30 carrying out an ordinary criminal purpose by communicating is no less punishable

31 than doing it by any other means. The fact, for instance, that a homicide is carried

32 out “by telling a blind companion on a mountain path that he can safely step to

33 the right, while wanting to cause his death and knowing that a 2000-foot drop lies

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35 All translations are my own, unless otherwise indicated.

37 Tribunal of Arnhem, 23 September 2010, LJN: BN8113. It concerned a criminal

38 case and the defendant argued that his freedom of speech and especially his freedom of

39 religion precluded his statements from being regarded as discrimination. The judge ruled

40 that the defendant was free to lead his life and to conduct his business in accordance with

41 his beliefs, but that this freedom reached its limits in the discriminatory exclusion of

42 individuals that the statements entailed. Cf. infra §2.2.2 for the (hypothetical) situation

43 in which the contractor had only posed his initial query concerning sexual orientation or

44 another protected characteristic (followed by a negative decision), without explicitly stating

45 that a particular answer to the question would lead to exclusion.
to the right,’” does not result in this communication being protected under free speech principles. In the case of direct discrimination of course it need not even be proved or demonstrated that a person wanted to discriminate by means of his statements, since intent is not required. What is required for this particular type of (unprotected) speech to occur without raising free speech issues is that the speech meets at least three conditions. First, it should originate from persons who are in fact in a position to discriminate, being decision-makers in hiring procedures. Generally this would concern either the employer or the head of human resources, or other authorized parties. If this is not the case, the speech cannot itself amount to a direct discrimination of this category, although it might still give rise to a presumption of discrimination (infra §2.2.1). Secondly, there should be a direct connection between the speech and a concrete hiring procedure, and finally the speech should unequivocally exclude or disadvantage one or more specific and identifiable persons in relation to the hiring procedure on the basis of their protected characteristics. If speech corresponds with these conditions, and assuming it can be proven, it will generally come down to direct discrimination, since very few exceptions or justifications will hold. To begin with, negating the discrimination will in any case be practically impossible, save by disputing the available proof. What will be possible in some cases—just as in other cases of adverse treatment directly based on a protected ground—is to claim a justification or exception. Justifications for this type of speech will generally be limited to occupational requirements, and will as such be quite rare in the context of race and religion. In exceptional cases positive merit categorical exclusions or disadvantages of the sort that are at issue here.

2.1.2. Speech that is likely to deter or mislead applicants from continuing to pursue important opportunities on a discriminatory basis

The second and third categories of speech that can amount to direct discrimination in the context of hiring will be dealt with together, since they are closely related. It concerns speech that has the effect of either (significantly) deterring or misleading applicants from continuing to pursue opportunities, on a discriminatory basis. Both categories of speech would include certain statements, advertisements, announcements, signs or other expressions containing a (discriminatory) preference or dispreference by decision-makers for applicants of a certain race, religion or belief. Here, the “less favourable treatment” that results from such speech—and as such the reason for qualifying it as a direct discrimination—is not quite as unmediated as in the first category of speech that was discussed. In that sense it would not seem correct—as is often done in cases such as these—to approach them in the same manner, for instance by arguing that a sign “saying that ‘Turks cannot

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enter’ involves a direct causal link, because there is no intermediary circumstance necessary to ascertain that there is a connection between being Turkish and the disadvantage of not being able to enter.” In reality there are intermediate circumstances in such cases: a sign that says “Turks cannot enter” does not in fact impair someone’s very ability to enter. It does however render it highly likely that someone of Turkish origin or nationality would not enter, since the sign gives them reasonable cause, at the very least, to believe they are not welcome, and will subsequently be excluded (or worse) anyway.

As such, a more accurate argument for qualifying such speech in itself as “a less favourable treatment” consists in the fact that it is highly likely to de facto screen or skew the population that will apply for (or further pursue) an available position, in a discriminatory manner. When people have good grounds to think that they will not stand a chance if they apply for or continue to pursue a particular (job) opportunity, they cannot reasonably be expected to do so. As such, they will be either deterred from applying or further pursuing (job) opportunities, or, if the effect was unintentional, they will at the very least be misled into doing this.

2.1.2.1. The Feryn case

The most prominent illustration from case law in which this type of speech is being grappled with, and that by and large offers the above line of reasoning, comes from the case law of the CJ, and concerns the case of Centrum voor Gelijkheid van Kansen v. Firma Feryn (hereafter “Feryn”).

Analyzing this case in some detail can serve to identify criteria, including those of a contextual nature, for the second and third categories of directly discriminatory speech.


54 Or conversely: it makes it very unlikely that someone of Turkish origin or nationality would enter.

55 Though it does fall within the scope of this chapter, one should note that certain statements, advertisements, signs, etc. can also be indirectly discriminatory, following the same line of reasoning. Some case law also explicitly does this, an interesting example being provided by a ruling of the tribunal of Huy (Belgium) in which it had to rule on a restaurant that put up a sign at its entrance prohibiting any form of head covering (Court of First Instance of Huy, 26 May 2010, nr. 09/928/B). A woman wearing a headscarf for medical reasons (due to hair loss as a result of chemotherapy) entered the restaurant, but was subsequently confronted with the headgear policy. An employee asked her to remove her headscarf. When the woman explained her situation she was told the policy applied regardless of circumstances. The woman subsequently left the restaurant but did file a complaint for (indirect) discrimination on the basis of “state of health” (a protected characteristic under Belgian discrimination law). The judge not only accepted her claim of indirect discrimination on the basis of state of health, but also found the sign to be indirectly discriminatory on the basis of religion, arguing that the sign (likely) deters women wearing a headscarf from entering the restaurant, thereby having an indirectly discriminatory effect.

56 Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism) v. Firma Feryn NV [2008], ECR I-5187.
The *Feryn* case concerned a private employer (a producer and installer of sectional doors), who had, amongst other things, made public statements in the press—after putting up a conspicuous job vacancy notice—that he did not and would not hire persons of Moroccan origin, since allegedly his customers were unwilling to accept them. The case was brought as an injunction procedure by the Belgian equality body, the Centre for Equal Opportunities and Opposition to Racism (CEOOR). The Brussels Labor Tribunal ruled that such speech did not itself constitute discrimination. It acknowledged that discrimination legislation could imply de facto restrictions on speech, but that such requires “that the claimant demonstrates that the reproached ‘hiring policy,’ that is only substantiated with public statements to the press, also constitutes an act, namely is based on acts.”

In *casu* it is neither demonstrated nor is the presumption established that so much as one single candidate mechanic of foreign origin has applied, and that he or she was not hired on account of his or her ethnic origins. A press article can neither supply this proof, nor the presumption thereof.

The Tribunal did accept that the speech could lead to a presumption of (potential) direct discrimination vis-à-vis subsequent hiring decisions, but it believed this presumption to be sufficiently negated or redressed by the fact that the defendant had distanced himself from his former statements in later press releases and statements in the media:

> Since the discriminatory behaviour was established by means of the media, subsequent press statements also constitute a sufficient redress. No discrimination … can either be established or feared any longer.

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57 On 28 April 2005, newspapers published interviews with Mr. Pascal Feryn, one of the firm’s directors, in which he was quoted to have said that his firm did not and would not recruit persons of Moroccan origin for the available position: “Apart from Moroccans, no one else has responded to our notice in two weeks … but we aren’t looking for Moroccans. Our customers don’t want them. They have to install … doors in private homes, often villas, and those customers don’t want them coming into their homes … I must comply with my customers’ requirements. If you say ‘I want that particular product or I want it like this and like that’, and I say ‘I’m not doing it, I’ll send those people,’ then you will 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!”


60 Ibid.
Silence is Golden?

The Labor Court of Appeals subsequently asked the ECJ for a preliminary ruling regarding a number of issues. The ECJ had to decide first whether speech—in the form of public statements made by an employer during a selection procedure—could itself constitute direct discrimination, without particular complainants having come forward contending that they had been victims of discrimination.\(^{61}\) A number of other questions concerned the character of facts from which it may be presumed that there has been direct or indirect discrimination, including whether the aforementioned statements were sufficient to presume the existence of a (continued) directly discriminatory recruitment policy.\(^{62}\)

In relation to the first question the ECJ ruled that

The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment … such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.\(^{63}\)

\(^{61}\) The relevant question being: “(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states: ‘I must comply with my customers’ requirements. If you say ‘I want that particular product or I want it like this and like that,’ and I say ‘I’m not doing it, I’ll send those 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 UK and Irish government intervened in the case, arguing that there could be no direct discrimination where an employer had not demonstrably acted on his discriminatory statements. Additionally, the governments argued that, in the absence of one or more identifiable victims, a public equality body (like the CEOOR) should not be allowed to bring a claim before the courts.

\(^{62}\) The relevant questions being: “(4) What is to be understood by ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination? (a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of [Directive 2000/43]? (b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy?”

\(^{63}\) Case C-54/07, Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism) v. Firma Feryn NV [2008], ECR I-5187, §28 (emphasis in original).
Regarding the second (cluster of) questions, the ECJ accepted that such public
statements are sufficient for a presumption of the existence of a recruitment policy which is
directly discriminatory.64

The Court went on to state that “[c]onsequently, given such presumption, the
employer concerned will have to prove that there was no breach of the principle
of equal treatment and non-discrimination, for example by showing that the
employer’s actual recruitment practice does not correspond to those statements.”65

The latter passage has given rise to some puzzlement and criticism in the
literature. Several commentators have interpreted it as entailing a tension or
even a contradiction with the acceptance of dissuasive or deterrent speech as a
form of direct discrimination: on the one hand the ECJ accepts public statements
announcing a discriminatory hiring practice as constituting discrimination in
itself, while on the other hand it considers such speech as a mere presumption
of discrimination, allowing the defendant the possibility to demonstrate that his
recruitment policy in fact does not correspond to his statements.66

This alleged contradiction can be explained away, however, by looking at
the distinct questions that the ECJ sought to answer in the respective passages,
combined with the facts in the national case that gave rise to it: whereas the former
passage in the ruling concerns the situation in which an employer makes certain
public statements in an ongoing hiring procedure, the latter passage arguably

64 Ibid., §34.

65 Ibid., §34.

66 See, for example, Ambrus, Busstra and Henrard: “The ECJ … increased the
confusion [about how a finding of discrimination is related to the establishment of a
presumption of discrimination] by qualifying a public statement revealing a discriminatory
recruitment policy both as a presumption of discrimination and as prohibited discrimination
in itself without explicitly applying the review model and without explaining the respective
qualifications in this context. In paragraph 28 of its judgment, the ECJ explicitly states
that ‘the fact that an employer states publicly that it will not recruit employees of a certain
racial or ethnic origin constitutes direct discrimination in respect of recruitment within
the meaning of Article 2(2)(a) of Directive 2000/43’ … The Court subsequently stipulates
in paragraph 31 that the statements concerned ‘may constitute facts of such a nature as
to give rise to a presumption of a discriminatory recruitment policy’ … Hence, what a
few paragraphs earlier is said to constitute direct discrimination, is now possibly merely
a presumption of discrimination” (M. Ambrus, M. J. Busstra and K. Henrard, “The Racial
Equality Directive and Effective Protection Against Discrimination: Mismatches Between
the Substantive Law and Its Application,” 3 Erasmus Law Review 165 (2010), 175). See
also M. J. Busstra, The Implications of the Racial Equality Directive for Minority Protection
Within the European Union (Eleven International Publishing 2010), 150–151 (concluding
that the Court “clearly hinged on two thoughts, and that it remains to be seen whether it
will in the future unambiguously include statements in its interpretation of ‘treatment’”).
is concerned only with the question of whether such (previous) speech can still be taken into account (as amounting to a presumption of discrimination) when it concerns subsequent or future procedures. Specific in the Feryn case was the fact that the CEOOR did not immediately go to court following Feryn’s public statements. Rather, the CEOOR had initially opted for mediation, and trying to get the firm to adopt diversity measures. This extra-legal approach was abandoned, however, because Feryn failed to respect promises made concerning the implementation of diversity training and plans. By that time, the vacancy that had given rise to the issue was no longer available, but other vacancies were. In order for the aforementioned injunction procedure to still offer adequate redress, the court had to ascertain to what extent such ongoing and future facts were implicated by the previous speech of the defendant as well, i.e. by (still) being demonstrative or presumptive of an ongoing directly discriminatory recruitment policy.

In this reading the ECJ offers relatively clear, consistent and workable criteria for when dissuasive, deterrent or misleading speech can be said to itself constitute discrimination (§2.1.2.2), and when such speech merely amounts to a presumption of discrimination (infra §2.2.1).

19.2.1.2.2. Criteria, negation and exceptions/justifications Based in large part on the Feryn ruling, one can conclude that a number of requirements should be fulfilled in order for this type of speech to occur, and be accepted as direct discrimination, without unduly infringing upon the freedom of speech. First, the speech must originate from and be directly attributable to a decision-maker in recruitment procedures. Secondly, the relevant speech must also be temporally related to a concrete and ongoing hiring procedure. If this is not the case, such speech might still be said to have a certain dissuasive effect on future hiring procedures, but it cannot conceptually be deemed actionable discrimination—i.e. actual adverse treatment, which necessarily should relate to specific (job) opportunities—in itself, at the time when the statements are made. Naturally such statements by an employer outside an ongoing hiring procedure can nevertheless constitute a reason to pay close attention to future hiring procedures, and they might also amount to

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67 Due to its future-oriented nature, the injunction procedure is particularly relevant where it concerns ongoing and future facts.

68 This reading of the ECJ’s preliminary ruling in Feryn is also followed consistently in the ruling by the Brussels Labor Court of Appeal, which first unequivocally accepts that “the aforementioned public statements made by Feryn constitute direct discrimination in respect of recruitment on the grounds of race or ethnic origin,” and secondly goes on to consider whether said statements and the events, additionally, “afterwards constitute a presumption of continued discrimination in the recruitment policy of Feryn” (emphasis added), accepting that only in relation to the latter can Feryn “adduce evidence, among other things, that the actual recruitment practice of the undertaking does not correspond to those statements” (Labor Court of Appeals Brussels, 1 September 2009).
facts from which a presumption of discrimination can be inferred in future such cases (infra §2.2.1).69

These first two criteria invalidate overly broad interpretations that the Feryn ruling has given rise to concerning the equation of certain types of speech with discrimination, such as the general claim that “saying that one will discriminate, is discrimination” without having (explicit) regard to the transactional context of the speech and the identity of the speaker,70 or even by extending the reasoning of the ECJ to situations in which politicians “merely” propose exclusionary policy measures aimed at minorities.71 The latter readings clearly ignore the specificities of the Feryn case, and the required (contextual) characteristics of this category of directly discriminatory speech more generally.

A final requirement, closely related to the second one, that this category of speech must fulfill in order to be regarded as a form of direct discrimination, is that it should significantly or unequivocally deter or mislead applicants, i.e. doing so to an extent that the latter would reasonably believe the further pursuit of the opportunity to be pointless or unwise. In assessing this it should be the ordinary listener’s or reader’s perception of a message—rather than the decision-maker’s intent or the subjective reading by the plaintiff—that is taken as dispositive in determining this.72 If the deterring or misleading effect is insufficiently clear or strong by such a reading, one cannot regard the speech by itself as a form of direct discrimination, since qualifying it as a form of adverse treatment would then be excessively hypothetical. Again, this would not preclude such speech from being used as facts from which a presumption of discrimination may be inferred (infra §2.2.1).

As for possibilities of demonstrating that this type of discrimination did not take place, it would again seem unlikely that it could be negated, save by disputing the available proof. In any case, if the employer’s public statements announcing or advertising a discriminatory recruitment policy are done during an ongoing hiring procedure, this cannot be negated by claiming the actual hiring criteria did not correspond with the speech (cf. supra §2.1.2.1), since the discrimination consists of the (likely) deterrent or misleading effect that the speech gave rise to.

69 That can be rebutted, for instance by demonstrating that subsequent recruitment practices do not (any longer) correspond to those statements (cf. supra §2.1.2.1 and infra §2.2.1).


72 Compare H. Norton, “You Can’t Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech,” 11 William & Mary Bill of Rights Journal 727 (2003), 729. Based on US case law, Norton describes the ordinary reader as “neither the most suspicious nor the most insensitive of our citizenry.”
1 However, with the conclusion of whether this type of speech amounts to 2 discrimination being significantly dependent on the likelihood of the effect, 3 negation could hypothetically consist of showing that the speech was insufficiently 4 likely to dissuade, deter or mislead; for instance by arguing or showing that the 5 message was ambiguous in its potential effects, or perhaps even by demonstrating 6 that despite the allegedly dissuading or deterrent speech, large numbers of 7 applicants from the allegedly disadvantaged groups did apply.\textsuperscript{73} 8 Regarding exceptions and justifications, occupational requirements, of either a 9 general or a religious nature (cf. supra §1.2.2), could of course be successfully 10 invoked, if the job legitimately requires it. As such, stating a preference for a 11 Christian or for someone of a certain skin color is lawful when the nature of the 12 particular occupational activities or the context in which they are carried out 13 necessitates this, with the requirement being justified by a legitimate aim, and it 14 being proportionate in the light of that aim.\textsuperscript{74} 15 The same goes for speech that announces positive action, under the condition 16 that the criteria for that exception are respected (cf. supra §1.2.2.1). One should 17 note, however, that this implies that speech announcing measures such as hard quota 18 with regard to a certain hiring procedure, would in principle also amount to this 19 form of direct discrimination, just as the actual practice of such measures does.\textsuperscript{74} 20 When the criteria for positive action are clearly transgressed in public statements 21 or announcements, there would, after all, seem to be no legally relevant difference 22 between the effects of such speech, and other speech that deters potential applicants 23 from opportunities on a discriminatory basis.\textsuperscript{75} In order for this effect to occur and 24 for the announcement of illegitimate “positive action” to actually itself constitute 25 direct discrimination, it does require, however, that the criteria be quite flagrantly 26 transgressed. If this is not the case, the misleading or deterrent effect will not be 27 sufficiently likely to occur in order to qualify the announcement itself as direct 28 discrimination.\textsuperscript{76} To give an example: in a Dutch case, an employer had mentioned 29 in a job advertisement that he would give preference to a homosexual candidate 30 “in case of equal qualifications.”\textsuperscript{77} The actual practice of such positive action is 31 clearly not allowed by Dutch discrimination law, which only offers the possibility 32 of 33 34

\textsuperscript{73} And, moreover, were not discriminated against in the subsequent procedure. 35 \textsuperscript{74} Cf. supra §1.2.2.1 on the requirements and criteria that positive action has to fulfill 36 under EU discrimination law in order to be considered lawful. 37 \textsuperscript{75} That which is allowed will strongly depend on the local implementation of rules 38 concerning positive action, which vary significantly from Member State to Member State 39 (in accordance with the leeway provided on this point by the Directives that allow for but 40 do not oblige positive action). 41 \textsuperscript{76} Although it might still amount to a presumption thereof: infra §2.2.1. 42 \textsuperscript{77} The relevant part of the advertisement read as follows: “[X] is a professional 43 organization that strives to attain diversity. Both men and women are invited to apply, in 44 case of equal qualifications we will give preference to a homo[sexual].”
of positive action for women, ethnic minorities and persons with a disability.\textsuperscript{78} However, the announcement would itself seem insufficient to fulfill the definition of direct discrimination, since the way in which the (legally illegitimate) preference is formulated seems unlikely to significantly dissuade other applicants. In order for this to occur, the employer’s preference, as expressed in the announcement, arguably would have had to be of a “higher degree,” for instance by stating that heterosexuals need not apply or that their applications would only be taken into account if and when no homosexual candidates were minimally qualified.

2.2. Speech that creates a presumption of direct discrimination

The previous section dealt with speech that conceptually amounts to direct discrimination. The current section concerns speech that does not fulfill the definition of direct discrimination, but that nonetheless contributes or amounts to facts from which the presumption of direct discrimination can be established. As mentioned, neither the directives nor EU law in general provide much clarity on the kinds of facts that are liable to give rise to such a presumption. One can, as such, only (re)turn to the concept of direct discrimination itself—entailing a causal link between a harm and a protected ground—in order to identify potentially relevant indicators for a presumption of discrimination,\textsuperscript{79} while bearing in mind that the initial burden for the complainant to establish such a presumption was intended to be minimal (cf. supra §1.1).

In the following, two main categories of speech from which a presumption of discrimination may be inferred will be discussed. The first is speech that indicates that the disadvantaging or the exclusion of persons from important opportunities on a discriminatory basis likely took place (§2.2.1). The second category concerns speech that is liable to facilitate discriminatory decision-making (§2.2.2).

2.2.1. Speech that indicates the occurrence of direct discrimination

The first category of speech from which a presumption of discrimination might be inferred in hiring procedures is all speech that reliably indicates that the disadvantaging or the exclusion of persons from important opportunities on a discriminatory basis took place, or might have taken place; combined of course with a particular adverse decision or treatment vis-à-vis a claimant. In practice, this can concern a wide variety of speech, and the following examples should not be regarded as being exhaustive.

\textsuperscript{78} Art. 2.3 Equal Treatment Act (Algemene Wet Gelijke Behandeling) and Art. 3.1c Disability or Chronic Disease Equal Treatment Act (Wet Gelijke Behandeling op grond van Handicap of Chronische ziekte). See also: Equal Treatment Commission, opinion 2006/61.

Silence is Golden?

To begin with, one could think of all speech from which a pattern of adverse treatment might be inferred; as was the case for the statements made in the Feryn case, regarding future or subsequent hiring procedures (cf. supra §2.1.2.1). An employer will then subsequently have to show that his current hiring practices do not in fact correspond with the presumption that was established on the basis of said speech, or argue that the general exceptions and justifications apply.

Often this type of speech will also come in the form of overheard, accidentally forwarded, intercepted or leaked communications showing that discrimination took place. An interesting example of this occurred in Belgium some time ago.

A man of Turkish origin had applied for a sales function at a security company. Soon afterwards he received a standard message through email, saying that he would not be selected. Attached to that email however was an internal mail from the responsible HR manager saying: “Could you please get rid of this person? A foreigner selling security: now that’s something I haven’t seen before.” This type of speech could clearly lead to shifting the burden of proof, as in fact it did in this case, resulting in a conviction, since the security company representatives were unable to show that the decision to exclude the Turkish applicant was taken on non-discriminatory grounds.

Likewise, in a Dutch case a large supermarket chain urgently required additional personnel for their branches in several cities. Those in charge had included, in writing and via an email exchange, in the internal recruitment requirements (that were subsequently leaked) that persons of Moroccan origin were not to be considered as candidates: “No Moroccans!” Again, it seems that such speech should be construed as, among other things, amounting to a presumption of direct discrimination.

Furthermore, one could think of so-called “smoking gun statements,” i.e. expressions of outward discriminatory animus. When such statements are accompanied or followed by a negative decision regarding the applicant, they will normally give rise to a presumption of discrimination. An example of this would be the case in which a Muslim employer states his opinion, during a job interview

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80 Labor Court Ghent, 26 March 2007. In a comparable—albeit slightly more veiled—case from the Netherlands, a job seeker received an email refusing him for a job; attached to the message was an additional mail saying that the employer was (only) looking for “a Jansen or a Smith” (typically Dutch names) (Equal Treatment Commission, opinion 2010-93 of 17 June 2010).

81 As it concerned a criminal case the burden of proof could not be shifted on the basis of these statements, but the recruitment requirement combined with the fact that all Moroccan applicants were rejected did lead to a conviction for criminal discrimination (Court of The Hague, 11 October 2010).

82 Aside from this, one might note that this type of speech—at least in the examples that were provided here—also arguably by itself concerns a manifestation of discrimination, namely that of an instruction to discriminate (cf. supra §1).
with a woman wearing an Islamic headscarf, that Muslim women do not belong in the workplace, followed by a decision not to hire the applicant. Likewise, the use of discriminatory slurs, terms or code words by decision-makers can provide a presumption that an employment decision was motivated by race or religion, since such speech could be regarded as prima facie proof of discriminatory intent. Albeit outside the context of hiring, an example of this occurred in Belgium, where an employer offered the following “justification” for firing a black employee in a dismissal letter: “Cannot adjust himself to the country; should be sent back to the bush-bush where people attack each other.”

Finally, as mentioned previously, announcements of certain forms of illegitimate positive action may also amount to a presumption of discrimination of this type. In order for this to be the case, the relevant announcement should be sufficiently likely to deter or mislead applicants from applying (as such speech would itself constitute direct discrimination—cf. supra §2.1.2.2), but it must nonetheless go further than is legally allowed. If, in those circumstances, an applicant from the group that was announced to receive preferential treatment is selected for the job, the announcement arguably could amount to a presumption of direct discrimination.

2.2.1.1. Transformative or revelatory speech indicating the occurrence of direct discrimination It is worth noting that this particular category of speech is also liable to change the prima facie nature of the presumed discrimination, as it may for instance show that an apparent (potential) indirect distinction was in fact intended and set up as a covert direct discrimination, due to its express discriminatory purpose. Although discriminatory intent is not required for there to be direct discrimination, the presence of such intent nonetheless conceptually leads to the qualification of (a presumption of) direct discrimination, despite other formal reasons being provided by the alleged perpetrator for his contested practice.

83 Again, of course, such speech can also concern other grounds than race and religion: see Equal Treatment Commission opinion 2010-137 of 16 September 2010, in which a man was (allegedly) told: “One can simply see that you’re gay, it’s not excessive, but you can clearly see it nonetheless and some people here have great difficulty with that.” Confronted with the claim that this had been said, and that it amounted to discrimination, the firm declared that the man had indeed been told that he came across as “being very gay,” but that his rejection was nonetheless due to other reasons. Since the firm was unable to adequately substantiate the latter claim, however, the ETC found that the man’s sexual orientation had played a role in rejecting him, and that the decision had therefore been directly discriminatory.

or provision.\textsuperscript{85} After all, in such cases there arguably turns out to be a direct causal link to the protected characteristic, with people as such being treated “less favourably on the grounds” involved (direct discrimination), rather than being “an apparently neutral provision, criterion or practice” with a disparate impact (indirect discrimination).

Often such a discriminatory intent will be evidenced by speech. As such, in cases in which speech can demonstrate that an ostensible indirect distinction was in fact intentionally “based on the grounds” of religion or race, a presumption of direct discrimination might be inferred from such speech, thereby transforming the initially supposed nature of the discrimination involved. This transformative or rather revelatory capacity of speech liable to create a presumption of direct discrimination is relevant in the light of the possibilities of negation and justification that a respondent has, more specifically excluding the possibility of an objective and reasonable justification (\textit{supra} §1.2).

The aforementioned would imply, for instance, that if preceding or following the introduction of a general dress code, including a prohibition on head gear, one or more of the decision-makers would indicate by means of verbal or written speech that the prohibition was specifically introduced to exclude Islamic headscarves or to exclude Sikh turbans, such speech could arguably “transform” the initial presumption of indirect discrimination, based on the apparent nature of the provision or practice, into a presumption of direct discrimination.\textsuperscript{86}

An interesting example of such “transformative speech”—albeit outside of the realm of employment and hiring, and concerning goods and services—occurred in Belgium in the summer of 2007. A local town council issued a demand for everyone in the pools and recreation domains in their district to wear classical bathing trunks (i.e. “Speedos”), officially for reasons of hygiene. However, a number of the officials responsible for the decision, the mayor and the alderman of sports for example, were quoted as saying that a main reason for introducing the rule was in fact to keep out “trouble makers,” more specifically: youths of Moroccan origin. The officials explained that research had shown that said youths were, due to their culture and religion, highly reluctant or even unable to wear sports for example, were quoted as saying that a main reason for introducing the rule was in fact to keep out “trouble makers,” more specifically: youths of Moroccan origin. The officials explained that research had shown that said youths were, due to their culture and religion, highly reluctant or even unable to wear


\textsuperscript{86} See also the chapter by Titia Loenen in this volume (arguing that a “neutral” employer dress policy should be approached as direct discrimination if it was used to hide an intent to exclude headscarves or \textit{burqas}). See also M. J. Busstra, \textit{The Implications of the Racial Equality Directive for Minority Protection Within the European Union} (Eleven International Publishing 2010), 226.
the required bathing suits (wearing Bermudas instead).\textsuperscript{87} If the officials had not been quoted in this sense, the case would have, at most, amounted to indirect discrimination, subject to the relevant general justification possibilities (\textit{supra} §1). Arguably, however, the officials’ speech amounted to a presumption of direct discrimination instead, on account of its prima facie revealing the measure’s non-neutral and even discriminatory aims.\textsuperscript{88}

2.2.2. \textit{Speech that is liable to facilitate discriminatory decision-making}

Secondly, direct discrimination in the context of hiring might also be presumed on the basis of speech that is liable to facilitate discriminatory decision-making. This will mostly concern inquiries by prospective employers—either on the job application, in a testing process or during the interview—regarding issues that are not (directly) related to the job for which an individual is applying. Discrimination law will often not be the only means by which such speech can be tackled; many countries have specific legislation or (self-) regulation concerning the questions a prospective employer can ask.\textsuperscript{89} For the current purposes, however, such queries are relevant only to the extent that they amount to a presumption of direct discrimination. In order for this to be the case, an employer’s questions in order for this to be the case, an employer’s questions

\begin{itemize}
\item \textsuperscript{87} The alderman of sports was more specifically quoted as follows: “The Town Council decided to introduce that rule, because we know on the basis of research that youths of foreign origin do not feel comfortable wearing regular swimming trunks.”
\item \textsuperscript{88} Strikingly, following the controversy, the CEOOR organized a meeting with the council, during which it was concluded that the measure was neither directly nor indirectly discriminatory. In a subsequent press release the CEOOR accepted the council’s claim that the aim and intent of the measure were not discriminatory: “the new regulations for visitors of the swimming pool are intended for reasons of hygiene only and not to exclude certain groups of people.” The mayor, the alderman and others involved having been quoted in the opposite sense was attributed to “unfortunate communication,” “confusion” and “misunderstandings.” The press release did not discuss the (potential) disparate impact of the measure (CEOOR, “Iedereen blijft welkom in Huizingen” [Everyone Remains Welcome in Huizingen], \textit{Press release}, 26 June 2007).
\item \textsuperscript{89} The focus on inquiries by employers, or more generally decision-makers, implies that applicants themselves are of course free to provide any personal information they wish on a voluntary basis, without this, in principle, subsequently being able to lead to a presumption of discrimination (save in cases in which the decision-maker responded to this information in a manner that raises reasonable suspicion that he would act upon such information in a discriminatory way). Cf. H. Norton, “You Can’t Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech,” \textit{11 William & Mary Bill of Rights Journal} 727 (2003), 770.
\item \textsuperscript{90} The harm of such inquiries is not limited to the (possibility of) its resultant information being used for discriminatory purposes, but also consists in the extracted information often being “deeply private even if never used against the applicant”: “[t]he individual is injured in part simply because someone else (moreover someone in a position of power) now possesses what would otherwise be closely held personal information” (ibid., 740).
\end{itemize}
must be directly related to an individual’s protected characteristics. Examples concerning religion most obviously include asking what religion someone practices, what holy days he or she observes, or finally—depending on the context of the question—whether an applicant is prepared to take off visible expressions of a religious conviction, such as the Islamic headscarf, the Jewish kippa or the Sikh turban. Concerning race or ethnic origin one can think likewise of questions about those characteristics, such as asking about the ethnic background from which an applicant comes.

If such questions are followed by a negative decision in a recruitment procedure, they could generally lead to a presumption of direct discrimination, since it raises the reasonable suspicion that the questions led to or fueled a discriminatory decision. The solicited pre-employment information about protected characteristics in that case suggests that those characteristics might have been used as a basis for making unlawful discriminatory selection decisions. The (incidental) limitation on speech by decision-makers in hiring procedures that the potential use of this speech implies would again not seem problematic, since the information gathered with such questions is valueless, as it may not be used to support choices in hiring, and must therefore be considered irrelevant, except for illegal purposes.

Moreover, to the extent that such questions are benignly posed by well-intentioned employers, the latter will still be able to demonstrate that the acquired information was not actually used as a basis for discriminatory decision-making, but that there were other, non-discriminatory, reasons for not hiring the applicant. Finally, if and when the decisions indeed were based on the solicited information, it will still be possible in certain cases for the queries to have been legitimately posed due to them being justified. That will be the case, first, if the characteristic that was inquired about—be it race, religion or another protected characteristic—constitutes an occupational requirement. Secondly, employers may legitimately secondly, employers may legitimately

91 Concerning a presumption of indirect discrimination one could—regarding race and ethnicity—think of questions concerning citizenship, native tongue, familiarity with native culture, etc., while questions having indirectly to do with religion could concern the type of clubs or social organizations that a person belongs to, etc.

92 The latter type of query could amount to either a presumption of direct or indirect religious discrimination, depending on whether the decision-maker’s question is aimed specifically at preventing the expression of religion or a particular religion (presumption of direct discrimination), or whether he is asking this for reasons unrelated to religion, for instance because there is a general prohibition of head gear in place on the work floor (presumption of indirect discrimination).

93 As mentioned (cf. supra footnote 51), these situations should be distinguished from cases in which such a query is followed by a clear and unequivocal announcement of a causal relationship between a particular answer by the applicant and his exclusion or disadvantaging (as in the example of the contractor in §2.1.1).
require—and as such inquire about—information about potential employees’ or applicants’ race or religion for positive action purposes.\footnote{Regarding disability, moreover, it would also seem legitimate for employers to ask if candidates have disabilities so that reasonable adjustments can be made that enable them to attend interviews.}

\textbf{Conclusion: Direct discrimination, protected speech and line-drawing difficulties}

In this chapter it was argued that certain categories of speech and communication are relevant for assessing whether direct discrimination in recruitment took place, either because they amount to direct discrimination themselves, or because they can reasonably be taken to establish a presumption of direct discrimination. Regarding the former, three partially overlapping categories of speech were identified: speech that directly and unmediatedly excludes or disadvantages persons from opportunities on a discriminatory basis (1); speech that is (highly) likely to deter applicants from pursuing or continuing to pursue opportunities on a discriminatory basis (2); and speech that is (highly) likely to mislead applicants from pursuing or continuing to pursue opportunities on a discriminatory basis (3).

As for speech that can serve to establish a presumption of direct discrimination, two main categories were identified and analyzed: types of speech that indicate that the disadvantaging or the exclusion of persons from important opportunities on a discriminatory basis (likely) took place (1), and speech that facilitates discriminatory decision-making (2). The criteria that were provided for identifying these categories of speech leave significant room for interpretation. Due to the complex nature of human communicative interaction and the rights and interests involved in it, such line-drawing difficulties are not only unavoidable, but also necessary. The assessment of whether a particular instance of speech concerns one of these categories should not take place in the abstract by creating clear-cut criteria which disallow any flexibility. Rather, this should entail a case-by-case consideration that permits the examination of the specific context in which a communicative act occurs, on the basis of which it can be concluded what standards ought to be applied.

on the one hand, the fact that, technically speaking, speech is involved in a discrimination case, does not necessarily result in heightened scrutiny or protection, since—as mentioned before—not all of such speech “seriously implicates the values and principles that lie behind freedom of speech.”\footnote{K. Greenawalt, \textit{Speech, Crime, and the Uses of Language} (Oxford University Press 1989), 3.} On the other hand, however, one should carefully weigh the concrete interests and contextual factors at hand, since freedom of speech and other rights and interests could easily get restricted if...
the categories of speech that are regarded as amounting to discrimination or as establishing a presumption thereof become over-inclusive. By way of conclusion, it may therefore be useful to highlight a number of central and cautionary points that may assist in finding the right balance. First, it is essential that virtually all actionable speech categories that were identified concern speech in the context of decision-making regarding recruitment and speakers as decision-makers. This implies that discrimination law—at least in prohibiting direct discrimination—should not limit alternative avenues for individuals to engage in political, religious or other expressions, outside their role as decision-makers and outside the process of decision-making. One should always determine whether, for instance, an employer is in fact speaking as a decision-maker, communicating about job opportunities, or whether he is speaking as a player in a societal or policy debate. Speech, for instance, by a company decision-maker that criticizes discrimination law should generally be regarded neither as discrimination nor as being able to establish a presumption thereof, as long as it is not done in a context or in a manner that would serve to deter potential employees from applying for future vacancies at the speaker’s company. It is anyone’s right to share their views on the morality or wisdom of discrimination laws, for instance, and to argue and call for their abolition. Furthermore, to the extent that slurs and discriminatory speech—or, more generally, hate speech—might amount to a presumption of direct discrimination or even to direct discrimination itself, it is important to keep the rationale for this in mind to avoid over-broad applications. This rationale does not (and may not) consist of the offense that such speech causes. Under the EU non-discrimination directives, the purpose of the prohibition of direct discrimination does not include alleviating this type of harm. As such, the prohibition of direct discrimination does not imply a blanket prohibition against the use of racially or religiously discriminatory language in the workplace: it may not be used as alternative hate speech legislation. Discriminatory comments or slurs become relevant in the context of direct discrimination only if an employer takes an adverse action against a member of the racial group that was the target of the comment or slur, or if such

97 Cf. ibid., 774.
98 The hate speech legislation that the EU seeks to have its members enact—through the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law—comes closer to serving this aim. However, the criteria that the Framework Decision encompasses regarding the speech that Member States must prohibit are quite strict, as a result of considerations of free speech being far more relevant when speech restrictions are intrinsic rather than incidental to legislative action.
speech is sufficiently exclusionary or deterring to itself constitute such an adverse action (cf. supra). As such, it is not (the content of) the speech as such that is being targeted, just what it could imply in the highly specific transactional context in which it is uttered. Someone making such statements outside the context of a hiring procedure is something else entirely than an employer or other decision-maker doing so when communicating with potential applicants about available opportunities. Moreover, “[t]he decision maker can easily conduct an employment transaction without airing his political views,” so that it is hard to regard the incidental speech restriction that this de facto results in as disproportionate.

Finally, religious speech by employers would seem to take up an even more exceptional place. Whereas racist speech (like sexist or homophobic speech) may not always be actionable under discrimination law, it is generally regarded as undesirable and immoral. The same cannot be said of religious speech and expression, which, at least in the eyes of many, has a “societally recognized and constitutionally enunciated value.” Even though eliminating religious discrimination in employment is an important goal in European discrimination law, “that goal must be achieved in a manner that is cognizant of the explicit, affirmative value that religious speech and expression are generally and legally accepted to have for employers as well as employees.” Therefore, in the absence of additional indications that such speech aimed or served to deprive an applicant of employment opportunities on the basis of religious status or other characteristics, it should—even within the context of the workplace and hiring procedures—generally not be seen as amounting to a presumption of direct discrimination, let alone as constituting direct discrimination in itself.


100 Ibid., 750.

101 At least not under its prohibition of direct discrimination. The use of such speech can, however, sometimes give rise to a claim for harassment, if it is sufficiently severe or pervasive to be said to take “place with the purpose or effect of violating the dignity of a person,” and when it moreover creates “an intimidating, hostile, degrading, humiliating or offensive environment.” On this issue, in the context of the European Directives and concerning religion, see, for example, L. Vickers, “Is All Harassment Equal? The Case of Religious Harassment,” 65 Cambridge Law Journal 579 (2006).


103 Ibid.