Dealing with a discrimination case

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• Parts of the presentation
  – Bringing a claim
  – Burden of proof
  – Conclusion
I. Bringing a claim
• Bringing a claim
  – Is there an enforceable claim?
  – Possibilities:
    • Direct discrimination
    • Indirect discrimination
    • Discrimination by association („vermittelte Diskriminierung“)
    • Harassment
    • Sexual harassment
• Question:
  – The Müller GmbH publishes a job advertisement: "young men up to 25 years looking for challenging work in construction."
  – How do you judge this ad?
• Answer:
• Direct discrimination: less favourable treatment
  – Less favourable treatment implies that the plaintiff is treated less favourably than another person in a comparable situation
    • is
    • was
    • or would be
  – Comparator:
    • persons in a “comparable situation”:
    • especially if the job is similar in essential ways to that of the person being compared
• Less favourable treatment than a hypothetical comparator:
  – How would the employer have treated the hypothetical comparator?
  – Comparison of actual behaviour towards plaintiff and potential behaviour towards a hypothetical comparator.
• How would the employer have behaved?

  – **Principle of rational behaviour:**
    • An employer behaves rationally, in accordance with objective interests. Especially: interest in the worker working efficiently and hence maximising profit.

  – **Principle of the law-abiding citizen:**
    • An employer abides by the law, which notably includes compliance with his duties of loyalty and care as an employer.
- **Principle of expectable behaviour:**
  - Conclusions can be drawn from the treatment of other workers about how a hypothetical comparator would probably be treated.
  - Prerequisite: the situation must be similar in at least some recognisable ways.
  - The principle of expectable behaviour is conditional on the principles of rational and law-abiding behaviour.
• Question:
  – An employee of Turkish origin and German citizenship with a degree in Business Administration feels he is suffering from discrimination because of his ethnic origin. He files a complaint. There are no direct comparators.
  – Alleged discrimination
    • Superiors have on several occasions promised the plaintiff a salaried position outside the collective pay scale. He has been denied this for many years.
    • On the pay scale established under the collective agreement, he is graded the same as a subordinate who performs much simpler tasks.

  – Is this “less favourable treatment”?
• **Answer:**
  
  – Was the plaintiff treated less favourably than native German employees with the same tasks and qualifications would have been?

  – **Principle of rational behaviour:**
    • Grading workers by objective criteria and keeping promises are rational ways of motivating workers and stimulating performance.

  – **Principle of law-abiding behaviour:**
    • Agreements (here: collective wage agreement and oral commitment) will be observed by a law-abiding employer.
– **Principle of expectable behaviour:**
  
  • The employer has not demonstrated such practice. This would furthermore be unlawful and hence of no significance here.

– **Outcome:**
  
  – a hypothetical comparator would have been treated better
• Indirect discrimination
  – an apparently neutral
    • provision
    • criterion or
    • practice

would cause 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
– provision

  • Any kind of provision, e.g.
    – law
    – any form of legal regulation
    – collective labour agreement
    – Standard business conditions
    – labour-management contract
    – a provision can be part of a contract of labour
    – An order can be a provision
– criterion
  • A criterion is a factor for deciding about employees (e.g. hiring or promoting them)

– practice
  • concrete practices including the appliance of criteria or provisions.
• Question:
  – The Alfons AG issued the following invitation in Germany:
    • "We are looking for employees, who have the following abilities:
      – Ability to run 100 meters in less than 11s
      – Ability to lift 50-pound bags at regular intervals.
      – Ability to participate in a hurdle race.
      – Ability to summarize the book “Wallenstein’s camp” on two pages in their own words and then correctly recite
      – for work in the payroll group of letters A through C.
  – How do you evaluate this ad?
• Answer:
• Question:
  – Mrs. Meier worked for a city administration in the social welfare office responsible for the care of social welfare recipients. Again and again applicants attack Mrs. Meier e.g. by insulting and yelling at her. After two years of this work she is suffering from significant health problems. The specialist treating her informs the employer that Mrs. Meier cannot work there any longer. She should be transferred to a place without direct contact with the applicants in order to maintain her health. Otherwise the employer risks serious damage (possibly life-threatening) to the health of Mrs. Meier. The employer refused to assign Mrs. Meier a new post. Her superior states that else everyone would try to evade unpleasant work.
  – Three months after the request for a transfer Mrs. Meier suffered a stroke. Since then she is severely disabled and can do only limited work.
  – How do you rate this?
• Answer:
  – (indirect) Discrimination because of disability
• Discrimination by association

(“vermittelte Diskriminierung”)

– Someone is discriminated against not because they themselves belong to certain group but because they are close to such a person.
• Question:
  – Jane is married to a black Congolese business man. Her white colleagues tell her she must be crazy to marry a “negro”. Nobody wants to talk to her and her colleagues use to make jokes about black people.
• Answer:
• Harassment:
  – Is a form of discrimination when unwanted conduct is related to any of the protected groups
  – purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment
    • (Art 2 para 3 Framework Directive, 2000/78/EU)
  – This means:
    • Workplace bullying because of race e.g. is discrimination
• Harassment -

– Problem: the victim has to show:

1. attacks
2. purpose or effect: of violating the dignity of a person
3. creation of an intimidating, hostile, degrading, humiliating or offensive environment
4. because of them (seemingly) belonging to a protected group

This is harder than showing a less favourable treatment because they belong to a protected group

But: every single such attack is at the same time (normally) a less favourable treatment: direct discrimination
• Question:
  – Mr. Meyer has worked for ten years at Miller Inc. He enters the office in the morning. His boss tells him to put on her coffee. She says: "Do your best. I know that men usually do not make a decent coffee, but I must now rely on you!".

  – Has the supervisor harassed Mr. Meyer because of his sex?
• Answer:
• Question:
  – Mr. Meyer is working at a software company. The day after his 40th birthday, he finds an advertisement on his desk:
    • "House Quiet Evening – your residence for the autumn of life"
    • The next day he finds a newspaper article with the headline: "Alzheimer's - how to recognize the early signs"
    • On the third day an article about the problems caused by dementia lies on his desk.
    • On the fourth day he finds a letter on his desk with the headline: "Old people, a strain on the economy! Now young workers have to compensate for the inefficiency of the elderly employees by working longer."
    • His colleagues and superiors have observed these occurrences. They have laughed heartily about these "jokes".
  – How do you assess these events?
• Answer:
• Sexual Harassment
  – any form of unwanted
    • verbal or
    • non-verbal or
    • physical conduct
  – of a sexual nature
  – with the purpose or effect of violating the dignity of a person,
    • in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment

Every single such attack is at the same time (normally) a less favourable treatment: direct discrimination
• Question:
  – Mr. Müller invites his colleague Ms. Meier to dinner.
  – Ms. Meier rejects this and complains with their superiors because of sexual harassment. They refuse her any support.

  – How do you judge this?
• Answer:
• Question:
  – A woman is working at a construction company as an architect. Her boss regularly makes ambiguous, suggestive remarks in her presence and asks her regularly for a date. She rejects this strictly and asks for a transfer that the superiors refuse.
  – During a business trip she drinks alcohol on orders of her superiors. Then the male superiors lift her on the counter and order her to dance. She refuses. The supervisors tell her if she will not start dancing it will have bad consequences for her. Finally, she is dancing on the bar. Her male colleagues put bills into her pants and touch her on her thigh and buttocks.
  – How do you evaluate this?
• Answer:
• Instruction to discriminate against persons because they belong to a protected group

• Example:
  – The boss orders his secretary to dismiss any application of women for a position as carpenter
  – This is an instruction to discriminate against women

  – But:
    • normally the victim does not know this and cannot prove it
• Wage discrimination
  – Article 157 TFEU

  • “For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
  
  • Equal pay without discrimination based on sex means:
    (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
    (b) that pay for work at time rates shall be the same for the same job.”
• Question:
  – The Meyer AG pays the employees according to a collective bargaining agreement. Ms. Müller accidentally discovers that several male colleagues doing the same job as she receive their standard pay plus additional allowances and bonuses. According to the information she receives in a random conversation, these men seem to get about 25% more salary than herself. Ms. Müller worked for five years with the company. She earns € 4,000 per month.
  – What can Ms. Müller do?
• Answer:
  – Art. 157 TFEU: compensation for the difference in earnings
II. Burden of proof
• Burden of proof: The Main Problem
  – Victim:
    • Bringing facts/establishing facts (e.g. Dir. 2000/78/EU, art. 10, rec. 31): which does not mean, proving them
      – Bring forth facts that support the likeliness of a direct or indirect discrimination
      – Slightly higher probability is sufficient (50.1 %)
    • consequence: shifting the burden of proof to the employer
      – EuGH 10.03.2005-03-10 Nikoloudi, Rs. C-196/02, para. 68
  – Slightly higher probability is sufficient to shift the burden of proof
    1. Regarding the less favourable treatment of the claimant and
    2. Regarding the reason why the claimant is less favourably treated (less favourable treatment on the grounds of being a part of a protected group)
E.g. Germany – major difficulties because:

- workers and their legal representatives are not entitled to request information from employers
- a prima facie case must be built on whatever resources are available to the worker
- a plaintiff may not normally be heard as a witness
- it is a punishable offence to make voice recordings or take pictures without consent
- in practice, establishing the prima facie evidence is subject to very stringent requirements (similar to standards of proof)
• Possibilities for prima facie evidence
  – a breach of Section 12 Equality Act [AGG] (could be indirect discrimination)
  – Infringement of company agreements/voluntary commitments by companies
  – a breach of formal rules intended to protect against discrimination:
    • rules to protect people with disabilities
• Federal Labour Court [BAG] case-law in Germany: non-compliance with formal rules also designed to protect against discrimination, e.g.:
  – Social Code Book [SGB] IX:
    » Section 81 (1) SGB IX: Inspection and notification of employment suitable for persons with disabilities
    » Section 95 (2) SGB IX: Hearing disability representatives in all matters affecting a person with a disability
    » Section 84 (1) SGB IX: Absence of workplace integration management
    » Section 82 (1) SGB IX: Public service: Duty to invite applicants with disabilities
  – Industrial Relations Act [BetrVG]
    » Section 102 BetrVG: Failure to hear works council before notice of dismissal
    » Section 8 TzBfG: Reduction in working hours has to be granted
    » Section 7 TzBfG: Announcement of vacancies, including part-time
• “Other” evidence:
  – a discriminatory job advert (even if discrimination can take on other forms)
  – interview questions relating to prohibited grounds
    • “Are you pregnant?”
  – comments of a pertinent nature
    • “We wanted to take on a woman.”
  – Less favourable treatment than colleagues who do not share the discrimination characteristic
  – Failure to accommodate disability
  – Instructions that contradict medical advice
– Xenophobic comments by colleagues and superiors, especially if these do not lead to disciplinary measures
– Notice after receiving an application for parental leave that the fixed-term contract will not be renewed
– Failure to comply with health and safety rules
  • e.g. rules about PC screens not applied to wearers of spectacles
  • actually: indirect discrimination
– Not answering a question about the reason for a decision
– Employer claims bad work / lack of performance as reason for his discriminating decisions – if this can be proven wrong e.g. by written reference
• **Question:**
  – Patriarch GmbH employs 500 workers, 400 of them women (80%). Of the 50 managerial posts, 7 are held by women:
  – Antonia applies unsuccessfully for a managerial post. A male colleague is promoted.
  – This is all Antonia knows
  – Are there any facts on which we can establish discrimination?
• Statistics and probability

<table>
<thead>
<tr>
<th>Category</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>All managers:</td>
<td>50</td>
</tr>
<tr>
<td>Women managers:</td>
<td>7</td>
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<tr>
<td>Standard deviation:</td>
<td>-11.67</td>
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<tr>
<td>Probability of discrimination:</td>
<td>100%</td>
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</tbody>
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• Combination of statistics and probability

• Women as a percentage of the workforce 80%
  – Assumption: Percentage of women in the company ought to be reflected in managerial levels
• Use of statistics and probability in Germany:
  – Consequently: Victim must bring even more evidence:
    • How many women are qualified to take a management post?
  – Only then can the court decide whether there is evidence of discrimination.
– But:
  • only the employer can know.
  • the victim may suspect
  • the employer must bring evidence about this
  • principle known in Germany as the graded burden of adduction and proof
– USA: Statistics and probability long since accepted
– prima facie case has been made with standard deviations of 2–3 upwards
Would the plaintiff have to prove for every incident of less favourable treatment that it occurred BECAUSE of a prohibited ground of discrimination, or can the motive behind one incident be used to infer the motive in others?
• **Question:**

  – Incident 1:
    
    • On Monday Alfons X beats up a resident of Turkish origin with a baseball bat, shouting “Foreigners go home!” as he does so.

  – Incident 2:
    
    • On Wednesday Alfons X kicks another resident of Turkish origin with his jackboots without saying a word.

  – Are these acts of discrimination because of ethnic origin?
• Solution:
  – Incident 1:
    • Discrimination on the grounds of ethnic origin is evident from the utterance “Foreigners go home!”
  – Incident 2: disputable
    • Position 1: It is not discrimination
      – a direct link must be established in each case between the fact adduced as evidence and the less favourable treatment
      – Hence: utterance on Monday (“Foreigners go home!”) is not enough, as the less favourable treatment was different (hitting with a bat is not the same as kicking!) Hence there is no discrimination (cf. ArbG Wiesbaden 18/12/2008)
– Position 2: It is discrimination

• Incident 1 shows that the defendant is in principle inclined to treat foreigners less favourably.

• Defendants do not constantly explain their motives – anyone who wants to treat people with immigrant backgrounds less favourably will do so on different occasions – **without explaining why**.
• The victim as a witness
  – In Germany a plaintiff must not be heard as a witness
  – But:
    • If only the plaintiff and the counsel for the defence participate in
      an exchange, the plaintiff’s statement must be heard in order to
      restore equality of arms
      – ECtHR 27/10/1993, ref.: 37/1992/382/460 based on Art. 6
        (1) ECHR
    – Germany: Hearing the parties without the defendants’
      consent, Section 448 Code of Civil Procedure [ZPO]
• Hearsay witness
  – Particularly credible when the incidents described are protracted, as the hearsay witness recounts what he was told - a victim would have to deceive the witness over a long period, which is unlikely
• Question:
  – Mr. Severin worked as a manager in a big company. For three years he endures enormous pressure and harassment by his superiors. He has repeatedly complained to the manager and asked for help. This was unsuccessful. He described all that happened to his wife in the evenings after work. He also wrote a detailed diary of the incidents.
  – Finally, he cannot stand it any longer and wants to sue his employer.
  – Does he have evidence of the harassment?
• Answer:
  – diary
  – witness by hearsay
  – plaintiff as a witness
• **Question**

  – Ms. Meier and Mr. Müller work for the Gemini AG. She is head of human resources in Hamburg and he is head of human resources in Nuremberg. The CEO decides to set up for the first time a human resources director as superior for the whole Gemini AG to coordinate personnel tasks in a better way. Without advertising this position the Gemini AG promotes Mr. Müller. Mrs. Meier had told her superiors several times that she was interested in a more responsible position.

  – She complains with the Gemini AG. The lawyers of the company then explain in a letter, that Mrs. Meier works only part time (38.5 hours instead of 40 h). Therefore it was impossible to entrust with her the higher and more strenuous position.

  – The lawyers advise her to proceed carefully. The company might issue a transfer from Hamburg to Nuremberg if she pursued the matter further.
Mrs Meier learns from a colleague, that the CEO of Gemini AG had stated in a meeting, Mrs. Meier had recently gotten married and he expects her to become pregnant in the near future. Under these circumstances he will not put her or any other woman in an important position in his company.

The CEO himself said to Mrs. Meier: You have a nice position in this company. Since you just got married, you should care more for your family as my wife did after our marriage.

Two-thirds of employees are women. Of the 50 executives only two are female.

How do you assess the situation and how can Mrs. Meier proceed?
• **Answer:**
  – **Evidence:**
    • Statistics
    • Comments of the CEO
    • Comment of the lawyer about part time (obviously absurd)
    • Threat of transfer
  – **She can sue the company**
    • gender discrimination and retaliation (threat)
    • material and immaterial damages
    • Retaliation: threat
Question:

– Mr. Miller is 62 years old. For three decades he worked in a large company in the sales department. There he achieved great success on a regular basis. After the 60th birthday, his boss asked him several times if he had thought about trying to slow down and go into early retirement. He refused categorically, because he loves his work.

– In the coming months, the employer withdrew most of his authorizations. He cannot any longer visit customers. This was until then the core of his regular activities. His expense account is deleted. Therefore he cannot invite his customers as he formerly did.
– He loses his large single office, and is eventually placed in an open-plan office right beside the trainees.

– Finally, he sues his employer for age discrimination.

– In the process the employer claimed, only the poor performance of Mr. Miller was the reason for the withdrawal of competences. Mr. Miller can demonstrate through the certificates of the same employer that he was very successful, and his performance has been assessed accordingly.

– How do you judge the situation?
• Answer:
  – Age discrimination
  – Evidence:
    • Wrong statements about the reasons for the demotion
    • No objective reasons for demotions apart from age
    • Question from his superior: why not go into early retirement before the demotions began
• Questions:
  – Mr. Miller and Ms. Meier are both 40 years old and have been working for ten years in the company. Both applied for a higher position. Mr. Miller was promoted.
  – Ms. Meier is considering whether she was discriminated against as a woman. Give ten possible indicators for a sex discrimination.
• Answer:

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III. Conclusion
• Requirements of the EU Directives

  – Aim: a Europe free from discrimination

  • Hence in the workplace:

    – Employees MUST BE hired, paid and promoted based on facts only - and not based on bias
Eliminating discrimination is efficient:

– Better employees: hiring by merit instead by bias
– Better employee loyalty:
  • Fluctuation costs:
    – 125% of the annual salary of an employee WITHOUT top managerial responsibilities: discrimination plus loss of knowledge
– Lower costs of illnesses
  • Poorly motivated employees are absent for four more days per year than well motivated ones.
– Higher labour efficiency:
  • Dedication rather than working according to the rulebook
– Extremely high costs of discrimination and bullying for the companies
  • Estimates for Germany alone: more than € 100 billion per year (e.g. Focus magazine)
  • Every year, there are 1.5 million victims of workplace bullying in Germany.
– The costs to society as a whole are very considerably higher still
  • Health-insurance programs
  • Pension payments
  • Social benefits
Even if discrimination were to make economic sense, what value do we attach to human dignity?

Discrimination is degrading

Discrimination: immoral and inefficient

**Human dignity is inviolable.**

Art. 1 German Basic Law, Art. 1 EU Charter of Fundamental Rights
• Therefore:
  – Victims must be enabled to win their cases AND
  – Perpetrators must be deterred, so the compensation needs to have a **real deterrent effect** on the employer
    • Aims are
      – dissuading the perpetrator from further acts of discrimination
        » Special prevention
      – dissuading other employers from discriminating against their employees
        » General prevention
    • More details: lecture tomorrow
• Dissuasive effect against discrimination:
  • Relationship between revenues and expenditures

• Example:
  – The respondent’s sales revenues: € 10,000,000,000.00
  – Court awards as compensation: € 10,000.00
    i.e.: 0.0001 % of sales
  – cf. average earner:
    • Sales revenues (i.e. mean annual income): € 30,000.00
    • Corresponding compensation amount would be: € 0.03
      • 0.0001 % thereof
      • cf. parking fine: € 30.00

Adapted slightly from Wiesbaden Labour Court, 18 Dec. 2008, Case no.: 5 Ca 46/08

Can this sum be a deterrent?
Dealing with a discrimination case - ERA Seminar

• Another problem:
  – Without a good perspective to win the case (burden of proof) and high compensations – why should a victim care to make a claim?
  – In Germany there have been just a few hundred cases up to now
  – Let us consider the position of the victim:
    • It is a new law with unclear interpretations
    • They have to face years of legal battles (for example three instances and 5 years)
    • They have to prove things only they themselves have seen and heard
    • In many cases they will be denounced as liars, as being paranoid, as being greedy
      – Some of my clients have to take calming medication before reading letters from their former employers and their lawyers
    • They lose their jobs: for example because things will get rather unpleasant in the work place
    • And they have a hard time finding a new job because their references are damaged
    • And if they win, they are awarded just a token € 2,000

Why make the effort?
• Discrimination
  – is immoral – a direct attack on human dignity;
  – and, at the same time, economically harmful.

• Fundamental problem: effective protection of human dignity
  – High threshold of proof and low levels of compensation are pointless:
    • They encourage perpetrators of discrimination
    • They discourage victims
  – The law would afford adequate protection of human dignity, provided compensation were to be of a dissuasively high amount.

It is in the hands of the courts!
Whom do they want to deter: the perpetrator or the victim?
• Further details:
  – Detailed contributions are to be found in the periodical “Zeitschrift für Arbeits- and Antidiskriminierungsrecht” (in German) on subjects including
    • Establishing a prima facie case with statistics and calculation of probability, 1/2010
    • Level of compensation, 1/2010
    • Compensation for pecuniary damage (Kattenstein formula) 2/2007
    • Ineffectiveness of the time limits in §15 (4) of the German general law on equal treatment AGG, 4/2007

  Available free-of-charge at: www.dgadr.org

  – About remedies and sanctions (in English): „Greedy“ plaintiffs and punitive damages, European Employment Law Cases, 12/2011, p. 17