

Traiter un cas de discrimination

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- présentation
 - Initier une action
 - Charge de la preuve
 - Voies de recours et sanctions



I. Initier une action



- Initier une action
 - Est-ce qu'il y a une créance exécutoire?
 - Possibilités:
 - Discrimination directe
 - Discrimination indirecte
 - discrimination par association
 - harcèlement
 - harcèlement sexuel



- **Désavantage – discrimination directe**

- Un désavantage existe lorsque un traitement moins favorable que celui réservé à une autre personne se trouvant dans une situation comparable

- Est subi
- A été subi
- Serait subi

- **Compareteur :**

- Les personnes se trouvant dans une « situation comparable »:
 - en particulier, lorsque les tâches présentent pratiquement les mêmes caractéristiques que celles confiées au compareteur

- Désavantage par rapport à un comparateur hypothétique:
 - Comment l'employeur aurait-il traité un comparateur hypothétique?
 - Comparaison du comportement réel vis-à-vis de la victime et de celui vis-à-vis d'un comparateur hypothétique.



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- **Quel aurait été le comportement de l'employeur?**
 - **Principe de comportement rationnel:**
 - L'employeur agit de manière rationnelle, en fonction de ses intérêts objectifs. En particulier: il a intérêt à ce que ses salariés effectuent leurs tâches de manière efficace, susceptible de maximiser ses bénéfices.
 - **Principe de respect de la loi:**
 - L'employeur respecte la loi, en particulier son obligation de loyauté et d'assistance.



- **Principe de prévisibilité:**

- Le traitement réservé à d'autres salariés permet de déduire la manière dont serait traité un comparateur hypothétique.
- Condition préalable: que la situation soit comparable, au moins dans ses prémisses.
- Le principe de prévisibilité est sous réserve des principes de rationalité et de respect de la loi.



- 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.

- Discrimination by association
 - Someone is discriminated against not because they themselves belong to certain group but because they are close to such a person.

- 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



- **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



- 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.”



Questions

- 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



- 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:
 - Indirect discrimination of
 - women
 - foreigners
 - disabled persons
 - older persons



- 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:
 - No harassment



- 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:
 - Harassment because of age

- 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:
 - This is direct discrimination because of race

- 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:
 - No sexual harassment



- 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:
 - Sexual harassment



- 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



- 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



- 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. Charge de la preuve



- Allemagne – difficultés considérables, car:
 - pas de droit à l'information opposable à l'employeur
 - preuves / le commencement de preuve doit se faire avec les moyens dont dispose le salarié
 - en règle générale, la requérante elle-même ne peut pas être entendue comme témoin
 - l'utilisation d'enregistrements audio et vidéo sans autorisation préalable punissable
 - en pratique, exigences en matière de commencement de preuve très élevées (comparables aux preuves)



- Commencement de preuve limité au lien de causalité (désavantage en raison de ...) Preuve intégrale exigée pour:
 - indices pour le commencement de preuve du lien de causalité entre élément de discrimination et désavantage
- En Allemagne, la pratique n'est pas conforme aux dispositions de l'UE:
 - désavantage
 - commencement de preuve suffisant en matière d'indices
 - article 10 directive 2000/43/CE et article 8 directive 2000/78/CE
 - CJE: arrêt du 10.03.2005-03-10 Nikoloudi, affaire C-196/02



- Récapitulatif des indices possibles
 - Violation du § 12 AGG (également discrimination indirecte)
 - Violation des accords d'entreprises / engagements volontaires d'entreprises
 - Violation de dispositions formelles destinées aussi à protéger contre la discrimination:
 - Dispositions pour garantir la protection des personnes handicapées
 - En Allemagne, jurisprudence du BAG (Cour fédérale du travail): non-respect de dispositions formelles destinées à protéger aussi de la discrimination, p. ex.:



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- SGB(code allemand de la sécurité sociale) IX:
 - » § 81 Abs. 1 SGB IX: vérification et notification des postes de travail aménagés pour les personnes souffrant de handicaps graves
 - » § 95 Abs. 2 SGB IX: consultation des représentants des travailleurs handicapés sur toutes les questions concernant un salarié gravement handicapé
 - » § 84 Abs. 1 SGB IX: absence de stratégie d'insertion dans l'entreprise
 - » § 82 Abs. 1 SGB IX: fonction publique: obligation d'encourager les personnes gravement handicapées à participer aux procédures d'embauche



- § 102 BetrVG: défaut de consultation du comité d'entreprise avant un licenciement
- § 99 BetrVG: décision personnelle concernant un individu (mutation, embauche, etc.)
- § 8 TzBfG: réduction du temps de travail
- § 7 TzBfG: offres d'emplois également à temps partiel



- Indices « habituels »:
 - Offre d'emploi discriminatoire (même si la discrimination existe sous une autre forme)
 - Questions comportant des éléments de discrimination dans le cadre de l'entretien d'embauche
 - « êtes-vous enceinte? »
 - Déclarations à l'avenant
 - « nous souhaitons embaucher une femme »
 - Traitement défavorable par rapport aux collègues dépourvus de la caractéristique à l'origine de la discrimination
 - Absence de prise en considération du handicap
 - Instruction de travail contraire aux prescriptions médicales



- Propos xénophobes tenus pas les collègues et les supérieurs hiérarchiques, en particulier lorsqu'ils ne font pas objet de sanctions
- Annoncer au salarié qui fait une demande de congé parental que son contrat à durée déterminée ne sera pas prolongé
- Non-respect des règles de protection de la santé des travailleurs
 - p. ex. non-respect pour les porteurs de lunettes des règles de protection concernant le travail sur écran
- En fait: discrimination indirecte

- Statistiques et calculs de probabilité en Allemagne:
 - En principe reconnu (BAG 22.07.2010, Az.: 8 AZR 1012/08)
 - BAG part du principe que les indices doivent être prouvés – à tort. Conséquence:
 - Victime doit fournir des informations supplémentaires:
 - Combien de femmes ont la qualification nécessaire pour exercer des fonctions d'encadrement
 - Ce n'est qu'alors qu'il est possible de constater s'il existe un indice de discrimination



- Toutefois :
 - seul l'employeur possède ces informations
 - la victime en réduite aux spéculations
 - l'employeur a l'obligation de donner des informations
 - en Allemagne, ce que l'on appelle le principe de la charge graduelle de présenter les faits et les preuves
- USA: statistiques et calculs de probabilité reconnus depuis longtemps
- Existence d'une discrimination apparente à partir d'un écart standard de 2 - 3
 - *Teamsters v. United States* 431 U.S. 324, 1977; *Hazelwood School District v. United States*, 433 U.S. 299, 1977; *Castaneda v. Partida*, 430 U.S. 482, 1977



- Dans chaque cas concret, faut-il prouver que le désavantage trouve son origine dans une caractéristique à l'origine de la discrimination ou peut-on déduire d'un cas concret que les mêmes motifs sont à l'œuvre dans d'autres cas?



- La victime en tant que témoin
 - En Allemagne, la requérante ne peut pas être entendue comme témoin
 - Toutefois:
 - Lorsque ne participent à l'entretien que la requérante et le représentant de la défenderesse, le témoignage de la requérante doit être pris en compte, afin de garantir l'égalité des armes
 - CEDHE 27.10.1993, réf.: 37/1992/382/460 sur base de l'article 6, paragraphe 1 de la convention européenne des droits de l'homme
 - Allemagne: audition des parties sans autorisation de la défenderesse, § 448 ZPO

- **Témoin par ouï-dire**
 - Particulièrement crédible lorsqu'il s'agit de faits qui se sont déroulés sur une longue durée, en effet
 - Le témoin par ouï-dire rapporte ce qui lui a été raconté
 - La victime aurait dû tromper le témoin sur une longue période, ce qui paraît peu probable



Questions



- **Question:**

- La SARL Patriarch emploie 500 salariés, dont 400 sont des femmes (80 %). Sur les 50 personnels d'encadrement 7 sont des femmes:
- Antonia pose en vain sa candidature à un poste d'encadrement. C'est un homme qui est promu.
- Antonia ne dispose pas d'autres informations
- Les statistiques permettent-elles de fonder un présomption de discrimination?



– Statistiques et calculs de probabilité

total des personnels d'encadrement:	50
femmes parmi les personnels d'encadrement:	7
écart standard:	-11,67
probabilité de discrimination:	100 %

- Combinaison des statistiques et des calculs de probabilité
 - voir Alenfelder, ZAD 1/2010 (Zeitschrift für Arbeits- und Antidiskriminierungsrecht, www.dgadr.org)
- Pourcentage des femmes dans l'ensemble des effectifs 80 %
 - postulat: le pourcentage de femmes dans l'entreprise devrait également se refléter aussi au niveau de l'encadrement



- **Question:**

- Cas 1:
 - Alfons X. attaque un lundi un passant d'origine turque à coups de batte de base-ball en criant: « les étrangers à la porte! »
 - Cas 2:
 - le mercredi suivant, Alfons X. blesse un autre passant d'origine turque à coup de bottes sans mot férir
-
- Est-ce que ce sont des actes de discrimination fondées sur l'origine ethnique?



- Solution :

- Cas 1:

- Discrimination fondée sur l'origine ethnique prouvée par l'exclamation « les étrangers à la porte! »

- Cas 2: litigieux

- Thèse 1: pas de discrimination

- Nécessité d'un lien direct entre indice et chaque préjudice particulier

- Par conséquent: exclamation du lundi (les étrangères à la porte!) est insuffisante, dans la mesure où le préjudice n'est pas le même (il existe une différence entre coups et coups de pied!). Donc: pas de discrimination (voir ArbG Wiesbaden 18.12.2008)



- Thèse 2: discrimination

- Le cas 1 prouve que l'auteur des coups veut de manière générale porter préjudice aux étrangers.
- Les auteurs de tels actes n'expliquent pas toujours leur conduite – ceux qui veulent traiter de manière moins favorable les personnes issues de l'immigration le feront à différentes occasions – **sans donner d'explications**



- 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. →



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- 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 their 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)
 - She can sue the company
 - gender discrimination and retaliation (threat)
 - material and immaterial damages



- 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 formelry 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 its 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.

III. Voies de recours et sanctions



• Dispositions des directives de l'UE

- « Les États membres doivent mettre en place des **sanctions effectives, proportionnelles et dissuasives** applicables en cas de non-respect des obligations découlant de la présente directive. »
 - Considérant 35, 2000/78/CE du 27.11.2000, ou article 17 de la directive, article 15 de la directive 2000/43/UE, article 17 de la directive 2000/78/UE
- Jurisprudence constante de la CJE: les sanctions doivent avoir un **effet vraiment dissuasif sur l'employeur.**
 - CJE, arrêt du 22 avril 1997, affaire C-180/95, Nils Draehmpaehl/Urania Immobilienservice OHG, EzA BGB § 611a Nr. 12

Pourquoi ces sanctions sont-elles nécessaires?

- 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



L'absence de discrimination est efficace

- Amélioration au niveau de l'embauche
- Acquisition de nouveaux marchés et de nouveaux clients
- Amélioration de l'image auprès des clients et des candidats
- Augmentation du potentiel d'innovation
- Amélioration de la qualité des effectifs:
 - **Sélection en fonction de critères de performance plutôt que de préjugés**
 - Exemple:
 - 100 candidats pour un poste d'encadrement
 - Les employeurs qui discriminent refusent p.ex.:
 - » 50 femmes
 - » 10 travailleurs immigrés
 - » 10 personnes handicapées
 - » 15 candidats âgés de plus de 50 ans
 - » **And then they will start applying facts to their decision making**
 - **Chances are they will reject the best applicant**



L'absence de discrimination est efficace:

- Meilleure fidélisation des personnels:
 - Coûts liés à la fluctuation:
 - 125 % du salaire annuel pour un salarié qui n'occupe PAS un poste à responsabilité, discrimination en plus de la perte de savoir
- Moins d'absentéisme
 - Des salariés peu motivés s'absentent 4 jours de plus dans l'année que les salariés dont la motivation est forte
- Performance accrue:
 - Engagement au lieu de grève du zèle
- Coûts globaux de la discrimination et du harcèlement: plus de 100 milliards d'euros par an
- Pas moins de 1,5 million de victimes de harcèlement chaque année
- Les coûts globaux pour la société sont encore beaucoup plus élevés
 - Caisses d'assurance maladie
 - Paiement de retraites
 - Prestations sociales



Même si la discrimination était économiquement rentable:
quel prix attachons-nous à la dignité de la personne?

**La discrimination est contraire à la dignité de la
personne**

Discrimination: immorale et inefficace

La dignité de l'homme est inaliénable.

Article 1 Grundgesetz, article 1 de la Charte des droits fondamentaux de l'UE



Voies de recours et sanctions

- Sanctions pénales:
 - Sont possibles
 - Présentent toutefois un inconvénient de taille:
 - condamnations: exigences beaucoup plus strictes en ce qui concerne la charge de la preuve
 - Conséquence: il ne faut pas s'attendre à un nombre important de condamnations
- Droit civil:
 - Dommages-intérêts



Réparation du préjudice matériel

- Réparation du préjudice matériel:
 - Les préjudices matériels doivent faire l'objet d'une réparation intégrale
 - En particulier:
 - La perte de salaire
 - Les frais de la procédure judiciaire
 - La perte du potentiel de gains



- **Material Compensation:**
 - No time limit for loss of wages – differential hypothesis
 - Germany: LAG Berlin, 26 Nov. 2008, case no.: 15 Sa 517/08
 - Victim can sue for lost earnings each year or every month until pension age minus his earnings elsewhere or
 - Estimate of the losses and one-off payment
 - Reasonable solution: Estimate and one-off payment instead of 20 years in court
 - In *Vento v. Chief Constable of West Yorkshire* (2003) IRLR 102 the judges estimated the probability of working until pension age was 75 percent. They awarded 75 percent of the wages until pension age (165,829 GBP) - Short report on the case: www.cre.gov.uk/legal/remedies/case_015vento3.html



- Évaluation doit se faire conformément au § 287 ZPO (code de procédure civile)
 - LAG Hamm, 26.02.2009, Az.: 17 Sa 923/08, Rn. 134; von Roetteken, JURIS Kommentar AGG, § 15 Rn. 44; BAG 12.11.1985, 3 AZR 576/83; BGH 06.06.2000, Az.: VI ZR 172/99; vgl. BAG 29.09.1994, 8 AZR 570/93; Alenfelder ZfAD 2/2007; Alenfelder, European Employment Cases, 12/2011, p. 17
 - In Germany the Kattenstein Formula is a means to estimate losses:
 - Based on 14 million data sets
 - Considering for example normal labour turn-over rate, deduction of accrued interest, lost promotions
- See: ZfAD, Alenfelder, 2/2007, www.dgadr.org

Material Compensation:

– Legal costs:

- Under German law there is no compensation for legal costs in the first instance in Labour Courts
- this is a violation of the EU directives , since these provisions stipulate the complete replacement of ALL losses.



– Special financial damages:

- This means material losses like
 - Reduced productivity
 - Loss of abilities
- These damages are to be expected in cases of intensive and degrading bullying (so-called mobbing and straining)
- The losses can be permanent or for a long time.
- Therefore: financial losses may be higher than the lost wages
- The damage can be defined by an expertise in a way similar to bullying („mobbing“)
 - See „La valutazione peritale del danno da Mobbing“, Verlag Giuffrè, Mailand, 2002 by Prof. Dr. Ege, Bologna, acknowledged in judgements of Italian Labour Courts: Agrigent (01.02.2005), La Spezia (04.07.2005), Sondrio (31.03.2006), Sondrio (22.07.2006), Bergamo (08.08.2006), Bergamo (14.06.2007)



- Estimated loss of earnings (Kattenstein Formula): around € 240,000
- But:
 - this sum equals only around four year's wages. The permanent loss of abilities is not taken into account.
- The employee „sells“ his abilities and efficiency in his job. If these „goods“ are damaged he loses economic value. This means: no salary, lower salary or a lower increase in salary.
- This material loss has to be compensated in full.
- These special financial damages can be estimated by an expertise similar to damages caused by bullying („mobbing“ and „straining“)

Metodo Ege 2002, „La valutazione peritale del danno da Mobbing“, Milan, 2002



Compensation for immaterial damages



- **Immaterial damages**

- distinction needs to be made between

- Compensation of immaterial damages:

- Purpose: compensation for the injustice done, focusing on the victim and his or her sufferings

- punitive damages:

- Purpose: securing a preventive effect of an award for damages, on the defendant and on potential future perpetrators of discrimination.

- Therefore:

- 1.: compensation for the suffering of the victim
 - 2.: an additional sum which is enough to guarantee a deterrent effect

– Germany:

- German judges avoid qualifying the awards in question as being "punitive".
- Rather, the courts refer to compensation for immaterial damage and awards aimed at prevention jointly as "compensation".
- But: This lack of precise terminology needs to be redressed. Only when the different elements of an award are identified can the award be determined in accordance with the European rules.



- Punitive damages

- 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

- Problem:

What sum is actually a deterrent?



- “dissuasive”:
 - deterring from action
- What does “to deter” mean?
 - Synonyms are: warn, frighten, intimidate
 - For example: “Deterrence theory”:
 - Deterrence is a strategy by which countries threaten an immense retaliation if attacked. Mutually Assured Destruction (MAD) is a form of this strategy.



- Examples for how the EU interprets deterrence:
 - Big companies have been fined the following “deterrent” amounts:
 - € 462 M, Hofmann-La Roche, 2001
www.spiegel.de/wirtschaft/0,1518,292146,00.html
 - € 497 M, Microsoft, 2004
www.sueddeutsche.de/wirtschaft/774/341617/text/
 - € 280 M, Microsoft, 2006
www.spiegel.de/wirtschaft/0,1518,426368,00.html
 - € 899 M, Microsoft, 2008
www.taz.de/1/zukunft/wirtschaft/artikel/1/900-millionen-euro-straefe-fuer-microsoft/?src=SZ&cHash=073fab7d36
 - € 85.8 M, Knauf, 2008
www.eu-info.de/eugh/knauf/

So:

Real deterrence requires „painful“ compensation



- Another problem:
 - Without 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?



- How to calculate the immaterial damages:
 - First step: looking at the victim (immaterial damages of the victim)
 - Criteria:
 - Severity of incidents
 - Psychological and medical consequences
 - Large increase of compensation due to degrading treatment like bullying („mobbing“ and „straining“)
 - Estimate of financial consequences by expertise
 - see Prof Harald Ege, „La valutazione peritale del danno da Mobbing“, Mailand, 2002
 - Second step: looking at the perpetrator (deterrence: punitive damages)
 - Which sum is necessary to guarantee real deterrence?
 - Both sums have to be awarded to the victim



- 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.: 0.01 % of sales
 - cf. average earner:
 - Sales revenues (i.e. mean annual income): **€ 30 000.00**
 - Corresponding compensation amount would be: **€ 0.15**
 - 0.01 % 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?



- **Further problem:**

- Quite apart from high compensation – why should the victim take legal action?
- It appears that there have been very few lawsuits to date.
- Situation from the victim's point of view:
 - Risk: legal questions not yet settled
 - Protracted fight
 - Burden of proof
 - The victim is often abused in the papers filed with the court and called names like liar, paranoid or money-grabber
 - Several of my clients have had to take sedatives before reading the written submissions from the other side
 - Job jeopardised
 - Difficulty in finding new employment
 - poor references
 - warning
- And at the end of all the tribulations: no more than petty cash to show for it
So, why should anyone let themselves in for that?



- **Deterrent compensation:**

- 1-2 percent of the annual business volume: deterrent but could lead to extremely high sums
- Suggestion:
 - For each act of discrimination one year's wages should be awarded or at least one year's average income (in Germany: € 30,000)
 - each act of discrimination can be sued separately, so for every single case a separate sum has to be awarded
 - The minimum is necessary to ensure effective protection of low income earners
 - Several members of German Parliament suggested this sum in 2006
 - ECJ decided in 1997:
 - Three month's wages are insufficient as „deterrent compensation“ (Draempaehl v. Urania Immobilienservice OHG 22. April 1997, C-180/95, Re. 26)
- Question:
 - is such a level of compensation really a deterrent, especially when applied to big enterprises?



- Examples from Germany:

- Tradition of very low compensations for immaterial damages
- In the past the German courts awarded sums around 1.5 months wages for discrimination
- This is insufficient. Now the courts are slowly increasing the amounts.
- Development
 - Several courts awarded 6 months wages
 - e.g. Higher Labour Court Hamm, 26.02.2009, reference number 17 Sa 923/08; Labour Court Neumünster 09.12.2009, reference number 3 Ca 1055 b /2009
 - bullying: 12 months wages: Labour Court Cottbus 08.07.2009, reference number 7 Ca 1960/08



- Labour law, total financial value (cases involving the presenter):
 - € 500,000: gender and age discrimination, employer's offer of a settlement, 2009
 - € 270,000: gender and ethnic origin, settlement, 2011
 - € 250,000: gender discrimination, employer's offer of a settlement, 2011
 - € 230,000: gender discrimination, 2012
 - € 200,000: gender discrimination, settlement, 2011
 - € 200,000: age discrimination, settlement, 2008
 - € 135,000: age discrimination, settlement, 2010
 - € 100,000: disability discrimination, settlement, 2012
 - € 100,000: age discrimination, settlement, 2009
 - € 100,000: age and gender discrimination, settlement, 2005
 - € 100,000: age and disability discrimination, settlement 2011
 - € 80,000: age and gender discrimination, settlement, 2010, discrimination during employment
 - € 75,000: gender discrimination, settlement, 2011
 - € 70,000: gender discrimination, proposal of the judge, 2010
 - € 50,000: gender discrimination, settlement, 2009
 - € 50,000: discrimination of disabled people, settlement, 2008
 - € 35,000: race discrimination, settlement, 2012
 - € 33,000: discrimination on grounds of belief, settlement, 2008
 - € 30,000: because of bullying, judgement, 2009
 - € 23,000: gender discrimination (14.5 month's wages), settlement, 2009
 - Around 12 month's wages: gender discrimination, Labour Court Neumünster, reference number 3 Ca 1055 b/09, 2009



- Further Remedies and Sanctions:

- Non commercial compensations:

- the wrongdoer can be required to do something or to refrain from doing something

- A very effective measure would be blacklisting discriminating companies and barring them from applying for public sector tenders and subsidies

- In the USA such a blacklist exists:

- Office of Federal Contract Compliance Programs (OFCCP), US Department of Labor



- Question

- Why should we spend tax money on discriminating companies by awarding them public tenders or subsidies?
- At the very least the government should keep up the idea of a society free from discrimination.
- This would be hypocritical:
 - On the one hand passing legislation against discrimination whilst on the other hand doing business with discriminating companies.



- **Conclusion**

- Discrimination

- is immoral – a direct attack on human dignity;
 - and, at the same time, economically harmful.

- Low levels of compensation are pointless.

- They encourage perpetrators of discrimination;
 - They discourage victims.

- Only the complete compensation for all pecuniary damage and genuinely dissuasive forms of compensation put an end to discrimination.

- Genuine deterrence needs “compensation” that hurts.

Only high levels of compensation guarantee an end to discrimination



- Fundamental problem: effective protection of human dignity
 - human dignity is attacked by:
 - discrimination
 - Workplace bullying (so called „mobbing“ and/or „bossing“)
 - any other violations of the rights of the individual
 - 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



Questions



- Question:

- Mr. Oskahana is from Nigeria and is a German citizen. He works for an international industrial company in manufacturing. He performs his duties for five years. From the beginning, he was occasionally mocked because of his skin color. The situation comes to a head when a new manager takes over the work group. He explains that he wanted to lead an all-German working group and everybody else should get out.



- Mr. Oskahana is now reviled by the superiors and colleagues as negro, black gazelle, roofing felt, stupid, Kunta Kinte, chocolate cake and chocolate Santa Claus.

The supervisor explains in front of the other employees that if he wins the lottery, he would buy four of of Mr. Oskahana's kind and should they not work properly, then he would whip them. He further explained that Mr. Oskahana can still go and visit his family at the zoo, the baboons.

- When Mr. Oskahana reported that he had been to his native country over Christmas, the superior said, Mr. Osakhan must have been transported there in a cage, as it should be.



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- A few days later the supervisor walked by and spat in front of Mr. Oskahan's feet.
 - Some more days later, a colleague of Mr. Oskahana told him, all the blacks are lazy and unreliable anyway. Mr. Oskahana being no exception. Mr. Oskahana replied, if the colleague said such things he were a Nazi. The colleague then tried to hit him with his fist. But he missed and smashed a pane of glass, which shattered. The shards of glass flew into the eye of Mr. Oskahana who had to be treated in hospital. Permanent damages did not occur.



- A few days later the employer admonished Mr. Oskahana because of the incident. The colleague who perpetrated the incident was not punished.
- Mr. Oskahana is unable to work since this happened because of severe depression and suicidal tendencies.
- What can he do?

- Answer:
 - Sue for compensation: race discrimination
 - Loss of income
 - Costs of medical treatment and rehabilitation
 - Special financial damages: expertise
 - Immaterial damages
 - Punitive damages



- Question:
 - Mr. Meyer is applying for a job. He is 50 years old. The company issued a denied him the job and stated that he does not fit into the young team. The job is remunerated with € 5,000 per month. Mr. Meyer receives the following year unemployment benefit to the amount of € 1,000 per month. Then he finds a new job which pays € 4,000 monthly
 - What damage can he assert?



- Answer:
 - Age discrimination: „**young** team“
 - Loss of earnings:
 - One year: € 60,000
 - Afterwards: € 1,000 per month /€ 12,000 per year

- Question:
 - Tony is fired on reaching his 45th birthday because he is „too old“. He wanted to retire at 65.
 - His annual wage was € 60,000.
 - What are his material damages for the loss of earnings?

- Answer:
 - Maximum material loss:
 - 20 years = € 1,200,000
 - Problem: what if Tony finds another job? The money he earns there has to be taken into account
 - Tony can sue for € 60,000 each year or € 5,000 every month for the next 20 years minus his earnings elsewhere or
 - Estimate of the losses and one-off payment

Example:

Estimate by using the
Kattenstein Formula:

Monthly wage (€):	5,000
Age:	45
Retirement age:	65
Interest rate p.a.:	2.50 %
Estimated salary increase p.a.:	3.60 %
Lost pension claims p.a.:	0.27 %
Raise of salary due to promotion p.a.:	0.47 %
Probability of keeping the job p.a.:	86 %
duration of employment (months)	240
volume of employment:	100 %
Reduction for unemployment pay I:	59.80 %
Reduction for unemployment pay II (€):	800
Claim for damages:	€ 233,960.48

In the case of Tony:
almost four year's wages



Question:

- Tony is 45 years of age and works as a mid level manager (salary: € 60,000).
- He has been bullied by his superiors and colleagues for 5 years because of his religion. He is the only roman catholic in the company.
- Finally he collapses and his doctor advises him to leave the company.
- He suffers from depression, he feels insecure and avoids meeting people. His doctor expects these handicaps to be permanent.



- He loses the ability to lead work groups and his working efficiency is permanently down to 50 percent.
- Four years later, he finds a new job.
- There he is paid an annual salary of € 60,000
- But: he is no longer in a managerial position. He has lost any chance of:
 - further promotion
 - bonus payments

- What are his material damages?

- Answer:
 - Special financial damages
 - expertise similar to damages caused by bullying („mobbing“ and „straining“)
 - Loss of earnings for four years



- Question:

- Mr. Omer has worked for ten years as a sales manager in a company. He is of Turkish origin and a German citizen. In several applications, he feels left out. He is treated worse than German-born colleagues on the same hierarchical level. Again and again he is also rebuked in public. Several complaints were unsuccessful.
- He suffers from heart disease. Through the processes at work the condition got considerably worse. Eventually he is unable to work at age 45. He now receives € 1,500 disability pension instead of € 5,500 a month.



-
- Specialists reckon that after appropriate therapy in about five years time he can again hold a job. Then, however, a re-training of two years is required. The retraining is expected to cost € 40,000. The medical treatment and the rehabilitation will cost around € 300,000. The doctors expect a loss of working efficiency of at least 20% to the end of his life. Mr. Omer wants to sue his employer.

 - What are his damages?

- Answer:
 - Loss of income (for five years)
 - Loss of pension
 - lower pension because he cannot work for five years
 - Costs of medical treatment and rehabilitation
 - Special financial damages: expertise
 - Immaterial damages
 - Punitive damages



- Question

- Ms. Meier is passed for two applications in favor of male candidates. Here the manager has declared that men are more reliable than women because they cannot get pregnant. In addition, men are more loyal to the company.
- Despite doing the same job, she receives € 500 per month less than their male colleagues, as she incidentally learns.
- She has fulfilled her duties conscientiously and correctly. Nonetheless the company claims she has made major mistakes. For these alleged failures her superior exhorts her in public.



- Later, she can prove that the allegations are untrue. The superior refuses to acknowledge this publicly. He says that would undermine his authority. Nothing similar has ever happened to a male colleague in the company.
- She earns an annual salary of € 60,000.
- What can she do?

- Answer:
 - She can sue her employer for gender discrimination
 - Loss of earning (Art. 157 TFEU)
 - Loss of earnings by denying her a promotion
 - Immaterial damages / punitive damages
 - Four discriminating acts:
 - Denying promotion: 2
 - Wage discrimination
 - Public dispraise