

OKLAND

THE BURDEN OF PROOF IN SEX DISCRIMINATION CASES

ERA - TRIER

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Introduction

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Legislative history

The shifted burden of proof is about **access to justice** in discrimination cases

- ❑ Directive 97/80, (2003/73 recital) and 2006/54 recital 30, directive 2004/113 recital 22
- ❑ See also directives 2000/78/EC recital 31 and 32, and 2000/43/EC recital 21 and 22
- ❑ Based on the principle of **effectiveness**: on the practical fact that it is normally impossible for the claimant to prove the actual factual basis or criteria applied in reaching the contested decision in discrimination cases

The shifting of the burden of proof

- ❑ Normally (tort law): the task of proving the facts upon which a claim is based rests upon the claimant. The defendant does not need to prove anything
- ❑ C-109/88 Danfoss and C-127/92 Enderby: developing a shifting of the burden of proof from the claimant to the defendant (employer) once the complainant established the facts that there was a disproportionate impact on one sex. The employer must prove that the reason was unrelated to sex.

Council Directive 97/80/EC on the burden of proof:

Art 4(1).

“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, **when persons who consider themselves wronged** because the principle of equal treatment has not been applied to them **establish**, before a court or other competent authority, **facts from which it may be presumed that there has been direct or indirect discrimination**, it shall be for the **respondent to prove** that there has been no breach of the principle of equal treatment”.

- Case C-196/02 *Vasiliki Nikoloudi*: *when facts are established, the burden of proof shifts to the respondent*

LEGAL FRAMEWORK

	2006/54	2004/113	2010/41	2000/78	2000/43	(92/85) + (2010/18)
Burden of proof	Article 19	Article 9	-	Article 10	Article 8	Art 19(4)a of 2006/54, see C-531/15 for 92/85

Note: not inquisitorial processes

- ❑ The shifting of the burden of proof need not apply to proceedings in which it is for the court or competent body to investigate the facts to the case itself, that is, to proceedings that are inquisitorial rather than adversarial, as well as criminal cases
- Directive 2006/54 art 19(3) and (5)

Test for shifting the burden of proof

1. The complainant must prove the primary facts to establish a *prima facie* case.
2. The court must evaluate the fact and be satisfied that they are of sufficient significance to raise a presumption of discrimination.
3. If the complainant succeeds at 1 and 2, the burden of proof shifts to the respondent.
4. The respondent must provide an adequate explanation to discharge the burden of proving that a prohibited ground was not any part of the reason(s) for the treatment in question.
5. If the respondent fails to discharge the burden of proof, the court must make a finding of unlawful discrimination.

The two-stage test:

- 1) The **claimant** must show “facts from which it may be presumed that there has been direct or indirect discrimination”

- 2) If no 1 is fulfilled, then the **respondent** must prove on a balance of probabilities and despite the *prima facie* case made out by the claimant, that the reason for the treatment complained of is NOT caused by any discrimination whatsoever.

The first stage: what kind of facts/ evidence?

- Facts vs Evidence
- The burden of proof does not shift simply on proof that there has been a difference in treatment and a difference in sex (or race or age or disability etc).
- A statement is not enough, nor is pregnancy
- There must be additional facts not *proving* that discrimination has occurred, but supporting the likeliness of a direct or indirect discrimination occurring – the *probability*
- A slightly higher probability (50,1%) is sufficient to shift the burden of proof regarding
 1. the less favorable treatment of the claimant
 2. the reason why the claimant is less favorably treated (on the grounds of being part of a protected group)

Prima facie evidence of discrimination:

- Did the alleged treatment occur?
 - If so, when, by whom? Who was affected?
 - Is there an actual or hypothetical comparator who was/ could have been treated differently?
 - Were proper procedures followed?
 - Is there evidence of prejudice, segregation or past discrimination?
 - Was the treatment on the alleged grounds?
- The court needs to consider all the evidence relevant to the complaint of discrimination, including evidence adduced by the respondent disputing the claimant's evidence.

Establishing facts

- Not always easy because a prima facie case must be built on whatever resources are available to the worker (is a worker entitled to request information from the employer re: the qualifications of other candidates? ECJ: "no", C-104/10 *Kelly*. C-415/10 *Meister* on access to information)
- In many countries making voice recordings or taking pictures/ filming is not allowed, even a punishable offence
- Impertinent comments are difficult to prove. An oral statement is not accepted as evidence if not witnessed or admitted to.
 - (Are you pregnant? Given your religion, will you be able to perform this task?)

Establishing facts

- ❑ The evidence accepted by national courts are key to the prospects of the claimants case
- ❑ CJEU Case C-531/15 *Otero Ramos*, para 73: “evidence capable of showing that the risk assessment did not include a specific assessment... of her individual situation...”
- ❑ CJEU Case C-104/10 *Kelly*, para 35:
 - ❑ “Member states may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and therefore deprive it of its effectiveness”
 - ❑ However, Kelly did *not* get access to the facts that might shift the burden of proof, see para 38+39

CJEU - C-415/10 Meister

- ❑ A right to information on the basis of Directives 2000/43, 2000/78 and 2006/54? **No** (para 46)
- ❑ If so, what are the consequences of a refusal of disclosure by Speech Design? Refusal to grant access may be a factor into “establishing facts...”

CJEU - C-54/07 *Firma Feryn*

The facts: a Belgian employer had in 2005 publicly stated a policy of not employing certain ethnic minorities (Moroccans).

- Was this policy capable of being a **fact** which would place the burden upon the employer to disprove the discriminatory nature of its recruitment policy at a later time?
- How strict must the national court be in assessing evidence in rebuttal of the presumption?

What evidence is required to shift the burden of proof?

- Discriminatory comments: C-54/07 *Firma Feryn*, C-81/12 *Accept*, C-83/14 *Chez*
- The fact of less favourable treatment and difference in status? Probably not: *Chez*
- Comparability: C-381/99 *Brunnhofer*, C-415/10 *Meister*
- Failure to disclose relevant information: *Meister*
- Employers inadequate explanation: *Chez*
- Pregnant workers directive: different matrix: C-531/15 *Otero Ramos?*
Upcoming case C-41/17

The second stage: the respondent

- ❑ The burden of proof shifts to the respondent (employer) once a *prima facie* case is established, to prove no breach of the principle of equal treatment.
- ❑ The court must uphold the complaint unless the respondent provides a cogent explanation which is sufficient to prove, on a balance of probabilities, that there has been no discrimination whatsoever.
- ❑ The court may go directly to the “second stage” focusing on the respondent’s reason for the treatment.

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The second stage: the respondent



- ❑ The weight of the burden of proof imposed at the second stage will depend on the strength of the *prima facie* at the first stage
- ❑ The respondent must prove that there is a reason for the decision which is not discriminatory, and that the non-discriminatory reason is the only reason for the decision. The “innocent” explanation.
- ❑ The employer must either provide an explanation that in no sense at all is connected to the protected status of the employee, or provide an explanation in which it is accepted that what occurred is related to the protected status of the employee, but that the exceptions to direct/ indirect discrimination are invoked

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What evidence may be used to refute a discrimination claim?

CJEU: Case C-81/12 ACCEPT:

“a body of consistent evidence”

“might include, for example, a reaction by the defendant concerned clearly distancing itself from public statements on which the appearance of discrimination is based, and the existence of express provisions concerning its recruitment policy aimed at ensuring compliance with the principle of equal treatment within the meaning of Directive 2000/78.”

The importance of inferences

- Trying to establish a causative link between the primary facts/ treatment and the alleged discrimination
- An inference is a link between the discriminatory ground and a fact in the case; the process of inference drawing is a consideration of what conclusions might be drawn from evidence not specifically or indirectly tainted with discrimination
- Adverse inferences: when an employer does not provide key witnesses involved in the event etc
- Where there is a difference in treatment and a difference in characteristic and no acceptable explanation is given by the employer, an inference of discrimination may follow

Indirect discrimination – justification

- ❑ If the claimant establishes a prima facie case that a provision, criterion or practice of the respondent puts/would put old/disabled etc at a particular disadvantage compared with others without that particular characteristic
- ❑ If the respondent is not able to provide an adequate explanation to rebut the claimant's facts and to prove that any disadvantage is unrelated to the protected ground, the court must make a finding of indirect discrimination
- ❑ *UNLESS* the respondent can justify that the provision, criterion or practice as appropriate and necessary means of achieving a legitimate aim – and thus not discriminatory...

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What evidence may be considered at each stage?

- ❑ Situation testing? Depending on national legislation if admitted as evidence
- ❑ Statistics – increasingly used in relation to indirect discrimination, such as the
 - ❑ ECHR case D.H and other vs Czech Republic of 13. November 2007 (app 57325/00) Grand Chamber – % Roma pupils in special schools
 - ❑ Opuz vs Turkey (app 33401/02) Statistics concerning female victims of domestic violence

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Conclusion - no guidelines

- ❑ Aim: effective enforcement, but material from the CJEU to guide the interpretation of the burden of proof is still sparse and lacks clear guidance and standard setting
- ❑ National courts decide on the cases before them. Equal practice in all member states?
- ❑ What facts must be established by the claimant? Public statement enough?
- ❑ Duty to provide information to the claimant to build the case? Access to information the stumbling block
- ❑ Other discrimination grounds than sex: Different standards for different grounds and cases?