



ERA EU gender equality law

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"The (procedural) proof of discrimination".

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Proof of discrimination: overview

- Classification of the problem situation
- Focus of consideration
- Basics of consideration
- Locating the problem situation
- The European legal situation
- The case law of the CJEU
- The conclusion of the consideration
- The bottom line

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Proof of discrimination: classification of the problem

From the point of view of legal practitioners, the question of proving discrimination is a very central problem in the field of law.

A considerable number of claims fail precisely because of this hurdle, since claimants have to obtain and present information from the other party.

The fundamental burden of proof in civil law on every claimant therefore often prevents the effective enforcement of claims of discrimination.

A solution to this problem is often only offered by the so-called reversal of the burden of proof. In this case, it is sufficient to present circumstantial evidence that gives rise to a presumption of discrimination. It is then the duty of the other party to rebut this presumption.

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Proof of discrimination: classification of the problem

If the reversal of the burden of proof is applied correctly, the procedural obligations can be distributed according to the respective responsibilities and possibilities.

A reversal of the burden of proof therefore not only corresponds in many cases to the elementary procedural principle of procedural equality of opportunity, but is also absolutely necessary for the effective enforcement of statutory prohibitions of discrimination.

While the reversal of the burden of proof is now largely clarified in law and case law, access to the reversal of the burden of proof (circumstantial evidence) continues to pose major problems and represents the actual legal problem, the question remains as to when a reversal of the burden of proof is triggered ...

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Proof of discrimination: locating the problem

Suspicion of discrimination



→ Indication of discrimination



→ Reversal of the burden of proof



→ Counterevidence

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Proof of discrimination: EU law

Article 157 TFEU
EU's basic treaty

Directive 2000/78/EC
Framework Directive Professional Life

Directive 2006/54/EC
Equality Directive Work

• Non-discrimination: Art. 2

• Non-discrimination remuneration: Art. 4

• Legal protection requirement: Art. 9

• Legal protection requirement: Art. 17

• Burden of proof reversal: Art. 19

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• Reason for consideration 15: Circumstantial evidence

• Reason for consideration 30:
Circumstantial evidence

No circumstantial rule!
No right to information!

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Reservation of national legislation and case law

But:

Legislative objectives must be effectively achievable (CJEU)

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Proof of discrimination: case law of the CJEU

EU primary law (TFEU) must also be observed in private law (e.g. C-262/88)

Citizens can invoke EU primary law, courts must respect it (e.g. C-43/75)

General rule on burden of proof at EU level (e.g. C-127/92, C-400/93, C-381/99)

No general right to information at EU level (e.g. C-104/10, C-415/10)

Approach for shifting the burden of proof (circumstantial evidence) must be provided by claimant (e.g. C-104/10, C-415/10, C-427/11)

Evidence problems and lack of information must not prevent legislative objectives from being achieved (C-104/10, C-415/10)

State authorities (including courts) must ensure the realisation of the objectives of the law (e.g. C-555/07), interpret national laws in conformity with European law, and leave unapplied if that is not possible (e.g. C-414/16)

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Proof of discrimination: case law of the CJEU

Conclusion of CJEU case law:

General rule of burden of proof + shifting of burden of proof in case of circumstantial evidence of discrimination

Assessment of whether there is circumstantial evidence is a matter for the national court under national law.

National courts must take account of statutory objectives when interpreting the law

Examples from case law for indicative effect

Refusal to provide information may trigger reversal of burden of proof (e.g. C-415/10)

Non-transparent remuneration system may trigger reversal of burden of proof (e.g. C-381/99)

Public statements by the employer (e.g. C-54/07, C-81/12)

General statistics can shift the burden of proof if concrete information is not accessible (C-274/18)

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Proof of discrimination: the conclusion of the consideration

The final point of the problem analysis under European law will be a German court decision, since it is a very recent implementation of the European legal basis presented at national level, and probably also the most far-reaching court decision on the concrete problem of shifting the burden of proof in discrimination law (at least in the area of salary discrimination).

The judgment takes up where the CJEU leaves off and shows how the principle of subsidiarity established by the European law can be completed nationally.

The highest German labor court, the Federal Labor Court, in case number **8 AZR 488/19**, delivered on 21.01.2021 a landmark ruling that is suitable to serve as a leitmotif for dealing with the question of the reversal of the burden of proof.

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Proof of discrimination: the conclusion of the consideration

The gist of the ruling is:

"If a woman sues for equal pay for the same work or work of equal value, the fact that her pay is lower than the comparative pay (median) of the male comparator notified by the employer (in accordance with the information provision of) § 10 EntgTranspG regularly justifies the presumption - which can be rebutted by the employer - that the disadvantage in pay occurred because of gender."

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Proof of discrimination: the conclusion of the consideration

The legal bases of the judgment

EU:

Article 157(1) TFEU
Directive 2006/54/EC
Case law CJEU

National German Law:

Sections 7, 15, 22 General Anti-Discrimination Act
§§ 3,7,10 Remuneration Transparency Act

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Proof of discrimination: the conclusion of the consideration

Significance of the judgment

Linking of a (national) right to information with a circumstantial effect

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Proof of discrimination: conclusion of the analysis

For effective, predictable and thus plannable legal protection, national regulations on information claims, their enforcement and evaluation are necessary.

These can make a significant contribution to achieving equality (in pay matters):

→ See: Remuneration Transparency Act (D) + BAG 8 AZR 488/19

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**Thanks a lot
for your attention**



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