

Multiple discrimination

Lynn Roseberry, J.D., LL.M., Ph.D.
Associate Professor, Copenhagen Business School

Outline

1. What is “multiple discrimination”?
 - ▶ Scholarship
 - ▶ International law
2. Multiple discrimination in EU law
 - ▶ EU legislation
 - ▶ ECJ case law
3. Litigating multiple discrimination claims: challenges and solutions
4. Conclusions

What is multiple discrimination?

- ▶ Discrimination based on any combination of grounds.
 - ▶ Sex
 - ▶ Racial or ethnic origin
 - ▶ Religion or belief
 - ▶ Disability
 - ▶ Age
 - ▶ Sexual orientation
 - ▶ Nationality

▶ 3

Lynn Roseberry 2013

Early scholarship on multiple discrimination

- ▶ Elizabeth Spelman, *Inessential Woman* (1988)

- ▶ Kimberlé Crenshaw, “Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and anti-racial politics”, *University of Chicago Legal Forum* (1989) 139-67.

▶ 4

Lynn Roseberry 2013

Different understandings of multiple discrimination

- ▶ Additive discrimination
 - ▶ Simultaneous discrimination on different grounds can be analyzed ground by ground.
 - ▶ Equality Tribunal, Ireland, 18 December 2001, DEC-S2001-020, *Maughan v. The Glimmer Man*
- ▶ Intersectionality
 - ▶ The combined effects of discriminatory practices based on more than one characteristic. Different combinations produce different effects.
- ▶ Compound discrimination
 - ▶ Discrimination on different grounds at different times.

▶ 5

Lynn Roseberry 2013

Beijing Declaration and Platform for Action (1995)

- ▶ We are determined to:...
 - ▶ 32. Intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people...

▶ 6

Lynn Roseberry 2013

UN Treaty bodies

- ▶ CERD Committee
 - ▶ General Recommendation No. 25, Gender related dimensions of racial discrimination (2000).
 - ▶ General Recommendation No. 34, regarding situation of women of African descent (2011).
- ▶ CEDAW Committee
 - ▶ Concluding comment on Czech Republic's periodic report (2010):
 - ▶ "...discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health status, age, class, caste, and sexual orientation and gender identity" (para 35)
 - ▶ *Alyne da Silva Pimentel Teixeira vs. Brazil* (2011)
- ▶ CESCR Committee
 - ▶ General Comment no. 20 (2009)

▶ 7

Lynn Roseberry 2013

UN Convention on the Rights of Persons with Disabilities (2006)

- ▶ First international agreement to explicitly recognize multiple discrimination.
- ▶ Aims to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities..."

▶ 8

Lynn Roseberry 2013

Multiple discrimination in the EU

Legislation

Case law

9

Lynn Roseberry 2013

EU Directives 2000/43 and 2000/78

- ▶ “women are often the victims of multiple discrimination”
 - ▶ Preamble, Recital 14, 2000/43 (racial and ethnic origin)
 - ▶ Preamble, Recital 3, 2000/78 (framework directive)
- ▶ “Sex equality” directives
 - ▶ No mention of multiple discrimination

▶ 10

Lynn Roseberry 2013

Soft law

- ▶ Council Decision of 27 November 2000, 2000/750, OJ L 303, 2/12/2000
 - ▶ “equality of women and men requires action on multiple discrimination”
 - ▶ “new practices and policies to combat discrimination should include multiple discrimination”
- ▶ Community action programme to combat discrimination, “Non-discrimination and equal opportunities: a renewed commitment”, COM(2008)420 final, p. 9
 - ▶ Announcing use of “new governance mechanisms to address the issue of multiple discrimination” through, inter alia, “providing funding for smaller networks of NGOs representing intersectional groups”.
- ▶ Decision 771/2006 establishing the “European Year of Equal Opportunities for All (2007) – Towards a Just Society”
 - ▶ Preamble, recital 14: The European Year “will also seek to address issues of multiple discrimination, that is discrimination on two or more of the grounds listed in Article 13 EC”.

▶ 11

Lynn Roseberry 2013

Proposal for new directive

- ▶ Council Directive on implementing the principle of equal treatment between persons irrespective of religion and belief, disability, age or sexual orientation other than in the field of employment and occupation. COM(2008)426
 - ▶ No mention of multiple discrimination in the text
 - ▶ Obligations to report
- ▶ European Parliament proposal
 - ▶ Article 1(2): Multiple discrimination occurs when discrimination is based
 - ▶ (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or
 - ▶ (b) on any one or more of the grounds set out in paragraph 1 (religion and belief, disability, age or sexual orientation) and also on the ground of any one or more of
 - (i) sex...
 - (ii) racial or ethnic origin
 - (iii) nationality

▶ 12

Lynn Roseberry 2013

Multiple discrimination and the Equal Treatment paradigm

- ▶ Coleman, Case -303/06 (2008)
 - ▶ Mother of disabled child claimed disability discrimination.
 - ▶ Comparison: mothers of children without disabilities.
 - ▶ Indirect sex discrimination?
 - ▶ not considered.

▶ 13

Lynn Roseberry 2013

Case law of the CJEU: recognizes more than 1 ground

- ▶ Lindorfer, Case C-227/04P (2007)
 - ▶ Female EU staff; claimed age and sex discrimination in connection with calculation of years of pensionable service following transfer to EU scheme
- ▶ Kamberaj, Case C-571/10 (2012)
 - ▶ Albanian national residing in Italy denied housing benefit; 3rd country nationals excluded from Directive 2000/43
- ▶ Kleist, Case C-356/09 (2010)
 - ▶ Pension company relying on national law allowing pensions for women at 60 and men at age 65 forces female physician to retire.
- ▶ Meister, Case C-415/10 (2012)
 - ▶ Russian woman living in Germany; claimed discrimination on grounds of sex, age and ethnic origin.

▶ 14

Lynn Roseberry 2013

Litigating multiple discrimination claims

Challenges and practical solutions

15

Lynn Roseberry 2013

Proving multiple discrimination claims

▶ *Despite the common sense notion that the more "different" a worker is, the more likely she will encounter bias, empirical evidence shows that multiple claims—which may account for more than 50 per cent of federal court discrimination actions—have even less chance of success than single claims. ... the more complex the claimant's identity, the wider must be cast the evidentiary net to find relevant comparative, statistical, and anecdotal evidence.*

▶ Minna J. Kotkin (2009)

▶ 16

Lynn Roseberry 2013

Challenges

- ▶ Equal treatment traditionally requires a comparator
 - ▶ Choice of relevant comparator in cases of indirect discrimination.
- ▶ Differences in personal and material scope of protection against discrimination on different grounds.
- ▶ Differences in enforcement mechanisms.
- ▶ Differences in exceptions, justifications.

▶ 17

Lynn Roseberry 2013

National approaches - EU Agency for Fundamental Rights (2013)

- ▶ National law appears to cover “multiple discrimination” in 7 countries.
 - ▶ Austria: explicit legislation
 - ▶ Bulgaria: no explicit legislation
 - ▶ Germany: General Non-Discrimination Act of 2006
 - ▶ In cases of multiple discrimination the justification must meet the requirements of the strictest exception clause applicable to the case at hand.
 - ▶ Greece: no explicit legislation
 - ▶ Italy: explicit legislation, but only sex plus another ground
 - ▶ Romania: no explicit legislation
 - ▶ Sweden: case law

▶ 18

Lynn Roseberry 2013

European Court of Human Rights: Rasmussen v. Denmark, 28 November 1984

- ▶ For the purposes of Article 14, the Court...finds that there was a difference of treatment as between Mr. Rasmussen and his former wife as regards the possibility of instituting proceedings to contest the former's paternity. There is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive.

Thank you for your attention

References

- ▶ European Union Agency for Fundamental Rights, “Inequalities and multiple discrimination in access to and quality of healthcare” (2013).
- ▶ Sarah Hannett, “Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination” (2003) 23 *Oxford Journal of Legal Studies* 68.
- ▶ Minna J. Kotkin, “Diversity and discrimination: A look at complex bias”, in *William and Mary Law Review* (2009), Vol. 50, No. 5, pp. 1439-1500.
- ▶ Lynn Roseberry, “Multiple Discrimination” in Malcolm Sargeant (editor), *Age Discrimination and Diversity: Multiple Discrimination from an Age Perspective*, 2011, Cambridge University Press, pages 16-40.
- ▶ Dagmar Schiek, Lisa Waddington, Mark Bell, *Cases, Materials and Text on National, supranational and International Non-Discrimination Law*, 2007, Oxford and Portland Oregon: Hart Publishing.