

Non-discrimination, direct and indirect discrimination, reasonable accommodation and the burden of proof in disability proceedings in EU law

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Before I begin: the relevance of the CRPD

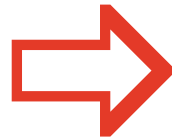


“Demonstration of cripples and idiots”, 1981 “Cripples tribunal in Dortmund”

<http://www.freitag.de/2006/50/06500601.php>

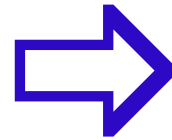
Change in attitude

invisible
embarrassing
locked away



looked
after

care



goal:

diversity
inclusion

special
treatment
segregated

change
systems -
not people,
inclusion
right in the
middle

Human rights approach CRPD

Art. 1(1): Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal employment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect of their inherent dignity.



We had no idea that women would also attend this event. We have no toilets for women.

Quelle: <http://www.flickr.com/photos/homeofhostians/2222201044/>



Under the general transport conditions, we cannot carry more than three homosexuals per flight.

Quelle: <http://www.flickr.com/photos/homeofhostians/2222201044/>



Good news: people from Lower Austria can already use 40% of the trams in Vienna.

Quelle: <http://www.flickr.com/photos/nesteds/27859401/>



Your child has blond hair. Attending a normal school is out of the question.

Quelle: BilderBox.com

Still plays a key role for enforcement.

Council Directive 2000/78/EC

“Framework Directive”

- *direct and indirect discrimination*
- *harassment*
- *instruction to discriminate*
- *victimisation*

Direct discrimination “based on disability”

- treated “less favourably”
in a comparable situation
- association (CJEU Coleman)
- attributed/presumed disability

Test: just on grounds of disability ...

Only justification:

*“genuine and determining
occupational requirement”*

or

“positive action”

INDIRECT DISCRIMINATION

“where an apparently neutral provision, criterion or practice would put persons having ... a particular disability ... at a particular disadvantage ... unless ...”

Justification:

- justified by a legitimate aim
- means of achieving that aim are appropriate and necessary

REASONABLE

ACCOMMODATION

REASONABLE ACCOMMODATION



Quelle: BIZEPS <http://www.bizeps.or.at/woche/index.php?anderes=0839>



Quelle: <http://failblog.org/2010/06/01/epic-fail-photos-access-ramp-fail/>

Obligation of the employer

- take appropriate measures, where needed in a particular case
- objective: have access to, participate in, or advance in employment, or undergo training

Justification: disproportionate burden

(governmental measures/funding taken into consideration)

Recital 20 of Directive 2000/78/EC

effective and practical measures

for example:

- adapting premises
- adapting equipment
- adapting patterns of working time
- adapting the distribution of tasks
- adapting the provision of training or integration measures

disproportionate burden ?

recital
21

- financial and other cost ?
- scale, financial resources, total turnover of the organisation ?
- possibility of obtaining public funding or any other assistance ?

Judgment C-335/11, C-337/11 (HK Danmark)

UNCRPD has already had an impact

• concept of disability:

impairment can also be caused by illness

• reasonable accommodation.

can also be a reduction of working time

• existence of disability does **not** depend on the type of accommodation to be provided

The burden of proof

in general:

Claimant:

has to establish facts from which it may be presumed that there has been discrimination

Respondent:

has to prove that there has been no breach of the principle of equal treatment

Entitlement to information

Judgments Kelly (C-104/10) and Meister (C-415/10)

- An applicant who meets the requirements listed in a job advertisement is **not entitled to have access to information** indicating whether the employer engaged another applicant.
- **Nevertheless**, the refusal to grant access to information **may be taken into account** in the context of establishing facts from which it may be presumed that there has been discrimination.
(Meister)