

Remedies and Sanctions

EU Gender Equality Law
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Possible remedies and sanctions

- Criminal sanctions (penal law):
 - are possible
 - But one big disadvantage:
 - Convictions require high legal threshold
 - Therefore: only few convictions can be expected
- Civil Law:
 - Compensation

Material Compensation

- Material Compensation:
 - Material losses have to be fully compensated for
 - Especially:
 - Loss of wages
 - Legal costs
 - Loss of work efficiency

Remedies and sanctions in sex discrimination cases

- **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

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- Need to have the estimate made in accordance with § 287 ZPO (German code of civil procedure)

LAG Hamm, 26 Feb. 2009, Case no.: 17 Sa 923/08, para. 134; von Roetteken, JURIS Kommentar AGG, §15 para. 44; BAG 12 Nov. 1985, 3 AZR 576/83; BGH 06 June 2000, Case no.: VI ZR 172/99; cf. BAG 29 Sep. 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

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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 – in my judgement

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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)

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

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- 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.

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- 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?

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- “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.
- Parallel: Basic data protection regulation (DSGVO)
 - Deterrence in case of infringement of the DSGVO:
 - fine of up to 4% of the worldwide turnover, Art. 83 para. 5 b DSGVO
 - This shows how “deterrence” should be interpreted.

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- Examples for how the EU interprets deterrence:
 - Big companies have been fined the following “deterrent” amounts:
 - €1.5 Bn, Google, 2019
 - € 497 M, Microsoft, 2004
 - € 462 M, Hofmann-La Roche, 2001
 - € 280 M, Microsoft, 2006
 - € 899 M, Microsoft, 2008
 - € 85.8 M, Knauf, 2008

So:

Real deterrence requires „painful“ compensation

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- 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

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- 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.: 0.0001 % of sales
- cf. average earner:
 - Sales revenues (i.e. mean annual income): € 30 000.00
 - Corresponding compensation amount would be:
 - 0.0001 % thereof € 0.03
 - 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?

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- 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 still a new law with unclear interpretations
 - They have to face years of legal battles (for example 3 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?

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- **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?

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- A more exact way to define compensation (proposal):
 - Calculation of the following factors for each discrimination incident:
 - Category I:**
 - Intensity of discrimination (no consequences - extreme consequences):
level 1 – 6
 - Category II:**
 - intensity of fault (no fault – slight fault – gross negligence– intent)
 - and motivation (intent to harm e.g.):
 - level 1 – 6
 - Category III:**
 - decline of health caused by discrimination: level 1 - 6
 - Category IV:**
 - deterrent, based on a comparison of the turnover of the company and the wage per year of the victim: level 1 - 6
 - Average multiplied by two monthly wages**

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- Examples from Germany:
 - Tradition of very low compensations for immaterial damages
 - Before 2006 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/09
 - Discrimination/Bullying: 12 months wages or more:
 - Labour Court Cottbus, 08.07.2009, reference number 7 Ca 1960/08
 - Labour Court Stendal, reference number 3 Ca 1274/07 (decision about legal aid)
 - Labour Court Cologne, reference number 12 Ca 4734/10 (decision about legal aid)
 - Labour Court Leipzig, reference number 9 Ca 3854/11: 53,000 €
 - Proposals of the courts e.g.:
 - 110,000 €, 2014, Labour Court Cologne
 - 110,000 €, 2015, Labour Court Wiesbaden
 - 120,000 €, 2019, Labour Court Aachen

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- Decision Labour Court Dortmund, 23.01.2020, File No.: 6 Ca 3796/19:
- 60,000 € (an expected annual salary) only compensation for age discrimination in job applications.
- "According to the case law of the Federal Labour Court ... the amount of compensation to be fixed must take into account that it must be reasonable according to § 15 (2) AGG. It must guarantee de facto and effective legal protection of the rights derived from Union law ... The severity of the penalties must be commensurate with the seriousness of the infringement, in particular by ensuring a genuine deterrent effect, while at the same time respecting the general principle of proportionality ...
- All the circumstances of the individual case - such as the nature and seriousness of the disadvantage, its duration and consequences, the reason and motive for the action - and the purpose of the sanction in the compensation rule must be taken into account ...
- The Chamber has no objection to fixing compensation at the level of one year's earnings as genuinely deterrent but still appropriate in the present individual case because the defendant has not commented on the reasons for its selection decision and has not presented any circumstances which would argue for a lower assessment.
- (Labour Court Dortmund 23.01.2020, file no.: 6 Ca 3796/19, p. 5 f.)
- LAG Hamm dismissed appeal (file no.: 6 Sa 427/20, 16.09.2020), decision legally binding

Remedies and sanctions in sex discrimination cases

Labour law, total financial value (cases involving the presenter):

- 1) 1 year's wages: gender discrimination, Labour Court Neumünster, ref. no. 3 Ca 1055 b/09, 2009
- 2) € 22,500: age discrimination of an applicant, settlement, 2018
- 3) € 23,000: gender discrimination of an applicant (14.5 month's wages), settlement, 2009
- 4) € 26,000: age and ethnic origin, discrimination of an applicant, settlement 2013
- 5) € 27,500: age discrimination, 2014
- 6) € 30,000: because of bullying, judgement, 2009
- 7) € 30,000: disability discrimination, settlement 2017
- 8) € 33,000: discrimination on grounds of belief, settlement, 2008
- 9) € 35,000: race discrimination, settlement, 2012
- 10) € 42,000: age discrimination, 2016
- 11) € 50,000: discrimination of disabled people, settlement, 2008
- 12) € 50,000: gender discrimination, settlement, 2009
- 13) € 64,000: sexual harassment, 2016
- 14) € 70,000: gender discrimination, proposal of the judge, 2010
- 15) € 75,000: gender discrimination, settlement, 2011
- 16) € 75,000: racial discrimination, settlement, 2013
- 17) € 77,000: discrimination because of homosexuality, 2016
- 18) € 80,000: age and gender discrimination, settlement, 2010, discrimination during employment
- 19) € 90,000: discrimination on grounds of belief (head of workers' council) and sex, settlement, 2015
- 20) € 90,000: disability discrimination, settlement 2015
- 21) € 95,000: discrimination on grounds of belief, settlement, 2017

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Labour law, total financial value (cases involving the presenter):

- 22) € 100,000: disability discrimination, settlement, 2012
- 23) € 100,000: age discrimination, settlement, 2009
- 24) € 100,000: age and gender discrimination, settlement, 2005
- 25) € 100,000: age and disability discrimination, settlement 2011
- 26) € 100,000: discrimination on grounds of belief, settlement, 2017
- 27) € 110,000: disability discrimination, 2015
- 28) € 132,000: age discrimination, settlement, 2019
- 29) € 135,000: age discrimination, settlement, 2010
- 30) € 200,000: age and gender discrimination, proposal of the judge, 2015
- 31) € 200,000: age discrimination, settlement, 2008
- 32) € 200,000: gender discrimination, settlement, 2011
- 33) € 200,000: discrimination on grounds of belief, settlement, 2017
- 34) € 230,000: gender discrimination, 2012
- 35) € 250,000: disability discrimination, employer's offer of a settlement, 2012
- 36) € 250,000: gender discrimination, employer's offer of a settlement, 2011
- 37) € 270,000: gender and ethnic origin, settlement, 2011
- 38) € 300,000: race discrimination, , employer's offer of a settlement, 2017
- 39) € 300,000: disability discrimination, employer's offer of a settlement, 2013
- 40) € 320,000: age discrimination, settlement, 2013
- 41) € 500,000: gender and age discrimination, employer's offer of a settlement, 2009
- 42) € 541,000: disability discrimination, settlement, 2013

Remedies and sanctions in sex discrimination cases

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
 - Abfrage der Unternehmen:
https://www.sam.gov/portal/SAM/?portal:componentId=9615a076-c195-44d7-9bf4-ff1d3d101e6c&interactionstate=JBPNS_rO0ABXc0ABBfanNmQnJpZGdlVmlld0kAAAAAQATL2pzzI9uYXpZ2F0aW9uLmpzcAAHX19FT0ZlXw**&portal:type=action#1

Remedies and sanctions in sex discrimination cases

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.

Remedies and sanctions in sex discrimination cases

Questions

Remedies and sanctions in sex discrimination cases

- **Question:**

- Mrs. Mayer works for an international industrial company as an engineer. She performs her duties for two years. From the beginning, she was occasionally mocked because of her sex. The situation comes to a head when a new manager takes over the division. He explains that he wants no female engineers. Women should stay at home or work as secretaries.

Remedies and sanctions in sex discrimination cases

- Mrs. Mayer is now reviled by the superior. He calls her incompetent, orders her to stop working on important and high prestige projects. Instead she has to serve coffee at meetings. Younger and less qualified male colleagues take over these projects.
- The colleagues start to avoid Mrs Mayer.
- A colleague tells her, women are lazy and unreliable.
- Finally the superior screams at her because of invented mistakes during a meeting of the division. Mrs Mayer starts to weep and leaves the meeting.
- She is unable to work since this happened because of severe depression and suicidal tendencies.
- What can she do?

Remedies and sanctions in sex discrimination cases

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

Remedies and sanctions in sex discrimination cases

- **Question:**
 - Mrs. Meyer is applying for a job. The company denied her the job and stated that he does not fit into the all male team. The job is remunerated with € 5,000 per month. Mrs. Meyer receives the following year unemployment benefit to the amount of € 1,000 per month. Then she finds a new job which pays € 4,000 monthly.
 - What damage can she assert?

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- **Answer:**

- Sex discrimination: all male team
- Loss of earnings:
 - One year: € 60,000
 - Afterwards: € 1,000 per month /€ 12,000 per year
- Immaterial damages

Remedies and sanctions in sex discrimination cases

- **Question:**

- Lisa is a leading secretary. Her married boss, 62 years, wants to start a relationship with her. She firmly declines.
- Next day he fires her. She is 47 years. She wanted to retire at 67.
- His annual wage was € 60,000.
- What are his material damages for the loss of earnings?

Remedies and sanctions in sex discrimination cases

- **Answer:**

- Maximum material loss:

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

Remedies and sanctions in sex discrimination cases

Example

Estimate by using the
Kattenstein Formula:

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

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

Remedies and sanctions in sex discrimination cases

Question:

- Lisa is 45 years of age and works as a mid level manager (salary: € 60,000).
- She has been sexually harrassed by her superior and colleagues for 5 years.
- Finally she collapses and her doctor advises her to leave the company.
- She suffers from depression, she feels insecure and avoids meeting people. Her doctor expects these handicaps to be permanent.

Remedies and sanctions in sex discrimination cases

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

Remedies and sanctions in sex discrimination cases

- **Answer:**

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

Remedies and sanctions in sex discrimination cases

- **Question:**

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

Remedies and sanctions in sex discrimination cases

- Specialists reckon that after appropriate therapy in about five years time she 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 her life. Mrs. Müller wants to sue her employer.
- What are her damages?

Remedies and sanctions in sex discrimination cases

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

Remedies and sanctions in sex discrimination cases

• 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 her 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.

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- 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?

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- **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

Remedies and sanctions in sex discrimination cases

Why are these sanctions necessary?

Remedies and sanctions in sex discrimination cases

- Targets set in the European Union directives
 - “Member States should provide for effective, proportionate and **dissuasive sanctions** in case of breaches of the obligations under this directive.”
 - Recital 35, Directive 2000/78/EC of 27 Nov. 2000, cf. Article 17 of the directive, Art. 15 Directive 2000/43/EU, Art. 17 of Directive 2000/78/EU
 - Settled case-law of the CJEU: the sanctions must have a “**genuinely dissuasive effect**” on employers.
 - CJEU on 22 April 1997, case C-180/95, Nils Draehmpaehl/Urania Immobilienservice OHG, EzA BGB §611a No. 12

Remedies and sanctions in sex discrimination cases

- Germany:
 - Courts stress importance of a „really deterrent effect“
 - Federal Labour Court (FLC – Bundesarbeitsgericht) 11.08.2016, reference number: 8 AZR 406/14, para 53
 - FLC 22.05.2014, reference number: 8 AZR 662/13, para 44
 - FLC 23.01.2014, reference number: 8 AZR 118/13, para 24
 - FLC 21.06.2012, reference number: 8 AZR 364/11, para 57
 - FLC 15.03.2012, reference number: 8 AZR 160/11, para 39
 - Higher Labour Court (HLC - Landesarbeitsgericht) Baden-Württemberg 03.11.2014, reference number: 1 Sa 13/14, para 72
 - HLC Schleswig-Holstein 30.09.2014, reference number: 1 Sa 107/14, para 40
 - HLC Rheinland-Pfalz 14.08.2014, reference number: 5 Sa 509/13, para 32
 - Labour Court Berlin 25.04.2014, reference number: 28 Ca 17463/13, para 71
 - HLC Düsseldorf 12.03.2013, reference number: 11 Ca 7393/11, para 142
 - Labour Court Aachen 23.12.2012, reference number: 2 Ca 4226/11, para 71
 - HLC Sachsen 27.07.2012, reference number: 3 Sa 129/12, para 49
 - Appellate Court Karlsruhe 13.09.2011, reference number: 17 U 99/10, para 43
 - HLC Bremen 29.06.2010, reference number: 1 Sa 29/10, para 76

Remedies and sanctions in sex discrimination cases

- 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

Remedies and sanctions in sex discrimination cases

Eliminating discrimination is efficient:

- Improved recruitment of employees
- Access to new markets and new customers
- Improved image in the eyes of customers and job applicants
- Enhanced innovative capacity
- Higher qualification of employees:
 - **Selection based on performance instead of prejudice**
 - **Example:**
 - 100 applications for a management position
 - discriminating employers may reject:
 - » 50 women
 - » 10 migrants
 - » 10 disabled people
 - » 15 applicants with an age above 50
 - » And then they will start applying facts to their decision making
 - Chances are they will reject the best applicant

Remedies and sanctions in sex discrimination cases

Eliminating discrimination is efficient:

- Better employee loyalty:
 - Fluctuation costs:
 - 125% of the annual salary of an employee WITHOUT top managerial responsibilities: discrimination plus loss of knowledge
- Lower costs of illnesses
 - Poorly motivated employees are absent for four more days per year than well motivated ones.
- Higher labour efficiency:
 - Dedication rather than working according to the rulebook
- Total costs of discrimination and bullying (in Germany so-called mobbing): more than € 100 billion per year
- Every year, there are 1.5 million victims of mobbing alone.
- The costs to society as a whole are very considerably higher still
 - Health-insurance schemes
 - Pension payments
 - Social benefits

Remedies and sanctions in sex discrimination cases

Even if discrimination were to make economic sense, what value do we attach to human dignity?

Discrimination is degrading

Discrimination: immoral and inefficient

Human dignity is inviolable.

Art. 1 German Basic Law, Art. 1 EU Charter of Fundamental Rights

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- Discrimination
 - is immoral – a direct attack on human dignity;
 - and, at the same time, economically harmful.
- Fundamental problem: effective protection of human dignity
 - High threshold of proof and low levels of compensation are pointless:
 - They encourage perpetrators of discrimination
 - They discourage victims
 - 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?