Workplace Bullying/Mobbing in Germany

Legal Analysis Report

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1. Introduction

Aim of the present Legal Analysis Report of Workplace Bullying/Mobbing in Germany is to present a coherent picture of the phenomenon understood in the context of the Decent Workplace project\(^1\) as “the persistent negative social behaviour systematically targeted at some employees, which may include discrimination and unequal treatment and may result in victimisation of the above-mentioned persons.”

Although mobbing does not constitute a phenomenon of modern times, the problem Workplace Bullying/Mobbing has evolved in time mainly due not only to the rapid changes in the social environment but also because of the psychological strains related with the critical situation in the labour market. Constant time pressure, hectic rhythms, increased demands for more performance promote a hostile atmosphere which enables cases of mobbing. Workplace Bullying/Mobbing not only erodes work culture but can also affect the health of the persons being targeted in a way that has consequences for their own life and the economic structures they are embedded with. At the centre of any policy targeting the problem Workplace Bullying/Mobbing should be awareness building and prevention so that eventual workplace conflicts do not escalate to mobbing practices.

1.1 Definition

The phenomenon workplace bullying\(^2\) is described in Germany by the term “mobbing”,\(^3\) a language loan from English,\(^4\) which is derived from the verb “to mob”.\(^5\) Despite the acknowledgment of the fact that the concept as such is not defined by a

\(^1\) The Decent Workplace project is realised in cooperation with the Ministry of Labour and Social Affairs of the Czech Republic, the State Labour Inspection Office of the Czech Republic and the Office of the Ombudsman of the Czech Republic.

\(^2\) Although bullying as a term has also been used in the workplace aggression context and has been a consistent term in the publications for example of the pioneer for her investigations in the field British journalist Andrea Adams, in Germany it is rather used mainly in the school environment setting. S. A. Adams/N. Crawford, Bullying at Work: How to Confront and Overcome it, London 1992.

\(^3\) From now on and due to the linguistic preference of the German speaking world, the phenomenon will be addressed as Workplace Mobbing or simply Mobbing.

\(^4\) The word as such has its etymology rooted in the Latin phrase mobile vulgus: the vacillating crowd. S. https://www.merriam-webster.com/dictionary/mob [accessed 10 July 2018].

consistent theoretical framework,⁶ Heinz Leymann’s description of the phenomenon in the 1990s is still dominating the discussion: “..., in recent years, a work environment problem has been discovered, the existence and extent of which was not known previously. This phenomena [sic] has been called “mobbing,” “ganging up on someone” or psychic terror. It occurs as schisms, where the victim is subjected to a systematic stigmatizing through, inter alia, injustices (encroachment of a person’s rights), which after a few years can mean that the person in question is unable to find employment in his/her specific trade. Those responsible for this tragic destiny can either be workmates or management.”⁷

In Germany the absence of a statutory definition of “mobbing” in any legal discipline has mobilised incentives to steer the legislative body in the direction of passing a relevant law. The Parliament of the Federal Republic of Germany (Deutscher Bundestag)⁸ recently⁹ rejected¹⁰ a legislative proposal brought by the Green Party (Fraktion Bündnis 90/Die Grünen),¹¹ the aim of which had been the definition of mobbing as a legal term as a form of violation of general personal law and the classification of the protection against it under the General Act on Equal Treatment (Allgemeines Gleichbehandlungsgetz, AGG)¹² applied in all private and public employment relationships.

The fact remains that “mobbing” in Germany does not constitute a legal term which can support a basis for a claim. Whatever practice constitutes “mobbing” can be legally interpreted ad hoc according to the facts that accompany it and to the extent that these

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⁸ From now on Bundestag. For more information in English, s.: https://www.bundestag.de/en/ [last accessed 10 July 2018].

⁹ 29 June 2017.

¹⁰ For further documentation in German, s.: https://www.bundestag.de/dokumente/textarchiv/2017/kw26-de-beratungen-ohne-aussprache/511834 [last accessed 10 July 2018].

¹¹ The text of the proposal is available in German at: http://dip21.bundestag.de/dip21/btd/18/120/1812097.pdf [last accessed 10 July 2018].

¹² Act Implementing European Directives Putting into Effect the Principle of Equal Treatment, from now on AGG. Available in English at: https://www.gesetze-im-internet.de/englisch_agg/index.html [last accessed 10 July 2018].
facts fulfil the requirements of the respective legal context,

1.2 Types of Workplace Mobbing

Basically three types of Workplace Mobbing exist:14

1. *mobbing* in a narrow sense, a term used to describe the practice of mobbing among co-workers that are on the same level of hierarchy;

2. *bossing*, referring to situations where the employer or a supervisor harasses a subordinate employee;

3. *staffing*, applied in cases where a subordinate harasses an employer or a supervisor.

Among them, the most common types are *mobbing* (in the narrower sense) and *staffing* whereas *staffing* remains a highly unlikely and exceptional event which is not documented in the German case law.15

1.3 Forms of Workplace Mobbing

The forms of Workplace Mobbing are multiple and variable.16 A basic distinction lies in the harassing acts that are based on the arsenal of management prerogatives, such as unjustified reprimands, denials of promotion, practically unrealistic instructions, as provided in employment law, and those that derive from interpersonal conduct with a wide range starting from social exclusion and insulting practices, to assaults and sometimes even battery.17 In the first category the harasser is the supervisor while in the second coworkers. It is noteworthy to mention that contrary to a colloquial language use of the word mobbing when referring to asocial and unfriendly single acts, not every such practice

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15 Fischinger, 156.


17 Fischinger, 159.
establishes in the legal context a claim based on mobbing.\textsuperscript{18} Such behaviours can result to psychological, physical and technology-based violence and to sexual harassment and harassment.

1.4 Key Workplace Mobbing-Related Agencies in Germany

Core institutions of the Federal Republic of Germany dealing with issues of Workplace Mobbing are the Federal Ministry of Labour and Social Affairs (\textit{Bundesministerium für Arbeit und Soziales}, BMAS),\textsuperscript{19} the Federal Anti-Discrimination Agency (\textit{Antidiskriminierungsstelle des Bundes}, ADS)\textsuperscript{20} and the Federal Institute for Occupational Safety and Health (\textit{Bundesanstalt für Arbeitsschutz und Arbeitsmedizin}, BAuA).\textsuperscript{21} In addition, the Joint German Occupational Safety and Health Strategy (\textit{Gemeinsame Deutsche Arbeitsschutzstrategie}, GDA)\textsuperscript{22} has created a Work Programme “Psyche” with an internet portal\textsuperscript{23} where employers and employees can find all necessary information on the topic of psychological strains at work.

Important social partners are the Confederations of German Trade Unions (\textit{Deutscher Gewerkschaftsbund}, DGB)\textsuperscript{24} and the Confederation of German Employers’ Associations (\textit{Bundesvereinigung der Deutschen Arbeitgeberverbände}, BDA).\textsuperscript{25}

\textsuperscript{18} Ibid.: “Rather the bullying acts must have occurred over a longer period of time, attained a certain degree of gravity, and appear to be, as links in a chain, parts of a systematic harassment.”

\textsuperscript{19} From now on BMAS. For more information in English, s.: http://www.bmas.de/EN/Home/home.html [last accessed 20 July 2018].

\textsuperscript{20} From now on ADS. For more information in English, s.: http://www.antidiskriminierungsstelle.de/EN/AboutUs/aboutUs_node.html [last accessed 10 July 2018].

\textsuperscript{21} From now on BAuA. For more information in English, s.: https://www.baufa.de/EN/Home/Home_node.html [last accessed 10 July 2018].

\textsuperscript{22} From now on GDA. For more information in English, s.: http://www.gda-portal.de/EN/Home/Home_node.html [last accessed 10 July 2018].

\textsuperscript{23} www.gda-psyche.de. For more information in English, s.: http://www.gda-psyche.de/DE/Service/English/english_node.html;jsessionid=1BFA8C59D6A35101F8B7D94E3B3714EA [last accessed 10 July 2018].

\textsuperscript{24} From now on DGB. For more information in English, s.: http://en.dgb.de [last accessed 10 July 2018].

\textsuperscript{25} From now on BDA. For more information in English, s. https://www.arbeitgeber.de/www/arbeitgeber.nsf/id/en_home [last accessed 10 July 2018].
2. Legal framework

2.1 International law and Co-operation

The German occupation safety and health law’s foundations are rooted in international and European legal standards. Core legal guidelines provides the International Labour Organization\textsuperscript{26} C111 Discrimination (Employment and Occupation) Convention, 1958 (Convention concerning Discrimination in Respect of Employment and Occupation, No. 111)\textsuperscript{27} which has been ratified by Germany in 1961 and is still in force and the ILO C187 Promotional Framework for Occupational Safety and Health Convention, 2006 (Convention concerning the promotional framework of occupational safety and health, No. 187),\textsuperscript{28} which has also been ratified by Germany in 2010 and is still in force.

The BMAS in Germany works closely with international organisations such as the ILO, the Organization for Security and Co-operation in Europe (OSCE),\textsuperscript{29} the Organisation for Economic Co-operation and Developemnt (OECD),\textsuperscript{30} and the United Nations (UN)\textsuperscript{31} on the development of an International Social and Employment Policy, focusing particularly on the promotion of international labour standards.

\textsuperscript{26} From now on ILO.

\textsuperscript{27} S. especially Art. 1 C111: According to Art. 1: “(1) For the purpose of this Convention the term \textbf{discrimination} includes- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinctions, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers’ and workers’ organisations, where such exist, and with other appropriate bodies.” Available in English at: \url{https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111} [last accessed 10 July 2018].

\textsuperscript{28} S. Art. 3 para. 1, Art. 4 para. 1, Art. 5 para. 1 C187. Art. 3 para. 1: “ Each Member shall promote a safe and healthy working environment by formulating a national policy.” Art. 4 para. 1: “Each Member shall establish, maintain, progressively develop and periodically review a national system for occupational safety and health, in consultation with the most representative organizations of employers and workers.” Art. 5 para. 1: “Each Member shall formulate, implement, monitor, evaluate and periodically review a national programme on occupational safety and health in consultation with the most representative organizations of employers and workers.” Available in English at: \url{http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187} [last accessed 10 July 2018].

\textsuperscript{29} From now on OSCE. S. https://www.osce.org [last accessed 10 July 2018].

\textsuperscript{30} From now on OECD. S. http://www.oecd.org [last accessed 10 July 2018].

2.2 European law and Co-operation

The Treaty on the Functioning of the European Union\textsuperscript{32} requires Member States to promote the improvement of the working environment to protect worker’s health and safety.\textsuperscript{33} Within the context of this objective, the European Council issues directives which set minimum standards in the field of occupational safety and health in the workplace that are meant to be transposed into national law. Key directives in this context are the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers (89/391/EEC),\textsuperscript{34} the so-called European Framework Directive on Safety and Health at Work, and the Council Directive of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (91/383/EEC),\textsuperscript{35} in Germany transposed into German law with the Safety and Health at Work Act\textsuperscript{36} and the relevant regulations that have been issued on the basis of the law.

In addition and dealing with discrimination the AGG in Germany incorporates the four EU Anti-Discrimination Directives into German law, the ones relevant for workplace discrimination being the following: Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC),\textsuperscript{37} Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation


\textsuperscript{33} Art. 151: “The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.” Art. 153: “1. With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers’ health and safety;”

\textsuperscript{34} Available in English at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN [last accessed 10 July 2018].

\textsuperscript{35} Available in English at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991L0383&from=EN [last accessed 10 July 2018].

\textsuperscript{36} S. extended information at 2.3.2.3.

\textsuperscript{37} Available in English at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML [last accessed 10 July 2018].
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Furthermore, the European Agency for Safety and Health at Work (OSHA), supported by multiple participating states (all European Union Member States are members of this network) and organisations, has built a global network of know-how and expertise in the occupational safety and health field. An important agency in the field is also the Employment, Social Policy, Health and Consumer Affairs Council of the European Union (EPSCO), which brings together all the national ministers responsible for the above policy fields and which convenes four times a year. Main aim of the EPSCO Council is the improvement of the living standard of quality of life of the citizens of the EU by means of guaranteeing quality jobs and high social, health and consumer-protection standards.

2.3 German Law

As already mentioned, not every hostile behaviour targeting an employee constitutes Workplace Mobbing and fulfils the requirements of a successful claim based on mobbing. Scholarship and German case law describe the following characteristics as preconditions for such a claim:

1. The mobbing behaviour under examination should be a combination of single events, meaning that key characteristic of the behaviour is that this is extended over a longer

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40 From now on OSHA. For more information in English s.: https://osha.europa.eu [last accessed 10 July 2018].

41 From now on EU.

42 For the list of the current 28 members of the EU, s.: https://europa.eu/european-union/about-eu/countries_en [last accessed 2018].

43 From now on EPSCO. For more information in English, s.: http://www.consilium.europa.eu/en/configurations/epsco/ [last accessed 10 July 2018].

44 Fischinger, 156.
period of time and the single events are connected by means of the main goal of the offender to harass the victim.\textsuperscript{45}

2. The behaviour in question must bear the potential of violation of the victim’s rights or legal interests.\textsuperscript{46}

3. The mobbing behaviour should be practiced unilaterally in the sense that in the case for example of mutual and reciprocal insults such actions fall out of the scope of workplace mobbing.\textsuperscript{47}

2.3.1 The Legal Situation in Germany: A Preview

Before one proceeds to a detailed analysis of the legal situation in Germany, a summary of the key issues seems necessary in terms of a preliminary orientation.

Employees in Germany have at their disposal a number of legal opportunities to defend themselves against workplace mobbing:

- they have the right to file a complaint by the responsible officials within the working environment;
- they have the right to demand that mobbing co-workers, whether superiors or fellow employees, cease and desist the mobbing behaviour targeted against them;
- they can assert compensation for damages for pain and suffering based on the mobbing behaviour they have suffered;
- they can invoke the AGG in cases the harassing behaviour consists discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity.

It is noteworthy to mention that the ADS in Germany supports institutionally the fight against discrimination and therefore any victim of sexual harassment or harassment at the workplace linked with the discrimination characteristics as described above can address the Office seeking for advice and further help.

\textsuperscript{45} Fischinger, 157. BAG 16.05.2007 - 8 AZR 709/06.

\textsuperscript{46} Fischinger, 157.

\textsuperscript{47} Fischinger, 158. This is perhaps a rather problematic characteristic since eventual questionable previous behaviour of the victim might lead to a de facto “justification” of harassing actions against him. Ibid.
2.3.2 Constitutional Law

From the perspective of the German Constitutional Law, the practice of “mobbing” constitutes a violation of Articles 1 (Human dignity - Human rights - Legally binding force of basic rights), 2 (Personal Freedoms) and 3 (Equality before the law) of the Basic Law for the Federal Republic of Germany (Grundgesetz, GG). According to Art. 1 GG, the human dignity not only is inviolable but all state authority has the duty to respect and protect it. The right to free development of one’s personality is explicitly provided for in Art. 2 para. 1 GG. Each person has according to Art. 2 para. 1 GG the so-called right of personality, that is the right of each person to develop freely his personality and to enjoy respect as a unique human being. This right can be violated in case of a workplace mobbing practice that takes the form of insults or social exclusion. The evaluation of the facts that might lead to such a verdict depends on the available evidence that eventually prove that such behaviour consists systematic attacks against the victim’s personality and that it is not to be interpreted as an undesirable contemptible behaviour which might occur within an open - and in times malfunctioning - society. Art. 3 para. 3 GG establishes prohibition of discrimination on the grounds of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions and disability.

Fundamental rights are directly applicable in public law, including public service law. Fundamental rights have an indirect horizontal effect in private law relations, including labour law. This is in particular relevant for interpreting norms of private law.


49 Art. 1 GG: “(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

50 Art. 2 GG: (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights or offend against the constitutional order or the moral law.

51 Fischinger, 158.

52 Art. 3 para. 3 GG: “No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.”
### 2.3.3 Civil Law

#### 2.3.3.1 Workplace Mobbing as Harassment and Sexual Harassment of the AGG

The descriptions of the phenomenon of mobbing vary in the German Labour Case Law. The German Federal Labour Court (*Bundesarbeitsgericht*, BAG)\(^{53}\) for example has described mobbing as “systematic targeting, harassing or discriminating of employees either by colleagues or supervisors”.\(^{54}\) Since AGG, which applies both in the private as well as in the public sector, came into force, Sec. 3 para. 3 AGG with its definition of harassment as a form of discrimination has defined the discussion of workplace mobbing when mobbing practices are motivated by a prohibited ground of discrimination.\(^{55}\)

Sec. 3 para. 3 AGG states: “Harassment shall be deemed to be discrimination when an unwanted conduct in connection with any of the grounds referred to under Section 1 takes place with the purpose or effect of violating the dignity of the person concerned and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” Harassment as described in Sec. 3 para. 3 AGG\(^ {56}\) has been classified in German scholarship and case law as mobbing and that only under the precondition that is connected with the discrimination grounds of Sec. 1 AGG, race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.\(^{57}\) The “environment” of Sec. 3 para. 3 AGG can be in general terms only established by a behaviour with a certain continuity and severity, preconditions required by relevant German jurisprudence.\(^ {58}\)

Sexual harassment constitutes discrimination and is described in Sec. 3 para. 4 AGG as “an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images” taking place

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\(^{53}\) From now on BAG.

\(^{54}\) BAG, 15.01.1997 - 7 ABR 14/96.

\(^{55}\) Workplace mobbing can be derived by other motivations as well.

\(^{56}\) Direct discrimination of Sec. 3 para. 1 AGG and indirect discrimination of Sec. 3 para. 2 AGG as such do not constitute mobbing. S. for example BAG 15.09.2016 - 8 AZR 351/15. W. Däubler/M. Bertzbach. *AGG* Handkommentar, Baden-Baden 2018, AGG § 3 [Schrader/Schubert RNr. 15], 278.

\(^{57}\) Ibid. There also the reference to BAG 25.10.2007 - 8 AZR 593/06. S. also Däubler/Bertzbach. *AGG* Handkommentar, AGG § 3 [Schrader/Schubert RNr. 91], 302.

\(^{58}\) M. Mahlmann, Country Report Non-discrimination: Germany, Brussels 2017, 52. S. for example BAG 24.04.2008 - 8 AZR 347/07, where the case of an unjustified dismissal was not considered to be connected to a creation of a hostile environment. Ibid.
“with the purpose or effect of violating the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.”

As far as the scope of the liability in case of harassment is concerned, Sec. 7 para. 3 AGG establishes contractual liability since the violation of the prohibition of discrimination constitutes itself violation of the contractual duty of the offender. Furthermore, in case of harassment perpetrated by an employee, both the offender employee and the employer are liable. Based on Sec. 12 para. 1 AGG, the employer has the organisational duty to provide for appropriate measures of protection against and prevention of discrimination. Training of the employees on the principles of non-discrimination is a core duty of the employer as well, according to Sec. 12 para. 2 AGG. The employer has also the duty according to Sec. 12 para. 3 AGG to act against discrimination perpetrated by his/her employees through appropriate measures, one of which could even be the dismissal of the perpetrator. In addition, Sec. 12 para. 4 AGG refers to the duty of the employer to protect his/her employees against discrimination by third parties. Finally according to Sec. 12 para. 5 AGG the employer is under a duty to introduce the AGG to the enterprise or public authority by various means such as putting up relevant notices or information leaflets.

59 Sec. 7 para. 3 AGG. “Any discrimination within the meaning of Subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations.” Also Mahlmann, 52.

60 Ibid.

61 Ibid.

62 Sec. 12 para. 1 AGG: “The employer has the duty to take measures necessary to ensure protection against discrimination on any of the grounds referred to under Section 1. This protection shall also cover preventive measures.”

63 Sec. 12 para. 2 AGG: “The employer shall draw attention to the inadmissibility of such discrimination in a suitable manner, in particular within the context of training and further training, and shall use his or her influence to ensure that such discrimination does not occur.”

64 Sec. 12 para. 3: “Where employees violate the prohibition of discrimination under Section 7(1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to put a stop to the discrimination; this may include cautioning, moving, relocating or dismissing the employee in question.”

65 Sec. 12 para. 4: “Where employees are discriminated against in the pursuance of their profession by third persons within the meaning of Section 7(1), the employer shall take suitable, necessary and appropriate measures, chosen in a given case, to protect the employee in question.”

66 In the concrete case of workplace mobbing, the sphere of influence of the employer point would be a decisive rule. Liability of the employer of a wider scale does not derive from the AGG: Mahlmann, 52.

67 Sec. 12 para. 5 AGG: “This Act and Section 61b of the Labour Courts Act (Arbeitsgerichtsgesetz), as well as information concerning the departments competent to handle complaints pursuant to Section 13 shall be made known in the enterprise or public authority. This may be done by putting up a notice or displaying information leaflets in a suitable place or by using the information and communication channels normally used in the enterprise or authority.”
The liability of the employer\textsuperscript{68} for material damages caused by violation of the prohibition of discrimination is defined in 15 para. 1 AGG\textsuperscript{69} while 15 para. 2 AGG\textsuperscript{70} regulates liability for non-material damages. Intent or gross negligence is required in cases where the discrimination under examination occurs while applying collective agreements according to Sec. 15 para. 3 AGG.\textsuperscript{71}

Finally, the right to refuse performance (\textit{Leistungsverweigerungsgrund}) of Sec. 14 AGG\textsuperscript{72} exists only for harassment and sexual harassment as described in Sec. 3 para. 3 and 4 AGG respectively. Critical remains the overall examination of the discriminating practice: a systematic attack against the personality rights of the victim is required for the assessment of the prohibited (sexual) harassment as eventual workplace mobbing behaviour.\textsuperscript{73}

A decisive provision of the AGG concerning workplace mobbing constitutes Sec. 16 AGG\textsuperscript{74} which prohibits the victimisation not only of the employees who assert their relevant rights but also of those who support them or testify as witnesses, thus promoting a culture of a civilised and healthy working environment.

\textsuperscript{68} While the AGG does not contain a specific provision concerning the liability of legal persons, the rule of Sec. 31 German Civil Code (\textit{Bürgerliches Gesetzbuch}, BGB) which acknowledges liability of legal persons for damage caused by executive employees applies as well: “The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which it or he is entrusted, where the act gives rise to a liability in damages.” S. Mahlmann, 52-53.

\textsuperscript{69} Sec. 15 para. 1 AGG: “In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.”

\textsuperscript{70} Sec. 15 para. 2 AGG: “Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.”

\textsuperscript{71} Sec. 15 para. 3 AGG: “The employer shall only be under the obligation to pay compensation where collective bargaining agreements have been entered into when he or she acted with intent or with gross negligence.”

\textsuperscript{72} Sec. 14 AGG: “Where the employer takes no or takes obviously unsuitable measures to stop the harassment or sexual harassment in the workplace, the affected employees shall have the right to refuse performance without loss of pay insofar as this is necessary for their protection. Section 273 of the German Civil Code (\textit{Bürgerliches Gesetzbuch}) shall remain unaffected.”

\textsuperscript{73} Düähler/Bertzbauck, AGG Handkommentar, AGG § 3 [Buschmann RNr. 6], 661. S. Also BAG 16.05.2007 - 8 AZR 709/06.

\textsuperscript{74} S. especially Sec. 16 para. 1 AGG: “The employer shall not be permitted to discriminate against employees who assert their rights under Part 2 or on account of their refusal to carry out instructions that constitute a violation of the provisions of Part 2. The same shall apply to persons who support the employee in this or who testify as a witness.”
2.3.3.2 Works Constitution Act

The Works Constitution Act (Betriebsverfassungsgesetz, BetrVG)\textsuperscript{75} regulates co-operation among employees and employers, aiming to fight workplace xenophobia and racism and promoting the representation of women.

According to Sec. 75 (Principles for the treatment of persons employed in the establishment) BetrVG:
“(1) The employer and the Works Council shall ensure that all persons working in the establishment and treated in accordance with the principles of law and equity, in particular that no one is subject to discrimination on grounds of race, ethnic origin, descent or other origin, nationality, religion or belief, disability, age, political or trade union activities or convictions or on the grounds of gender or sexual identity.
(2) The employer and the Works Council shall safeguard and promote the untrammelled development of the personality of the employees of the establishment. They shall promote the independence and personal initiative of the employees and working groups.”

2.3.3.3 Safety and Health at Work Act

The Act on the Implementation of Measures of Occupational Safety and Health to Encourage Improvements in the Safety and Health Protection of Workers at Work, known as Safety and Health at Work Act, (Arbeitsschutzgesetz, ArbSchG),\textsuperscript{76} provides measures of occupational safety and health with the aim to safeguard and improve the safety and health protection of workers at work through measures of occupational safety and health.\textsuperscript{77} “Workers” in the sense of the law are basically employees, also the ones employed for the

\textsuperscript{75} From now on BetrVG. Available in English at: http://www.gesetze-im-internet.de/englisch_betrvg/ [last accessed 10 July 2018].

\textsuperscript{76} From now ArbSchG. Available in English at: https://www.gesetze-im-internet.de/englisch_arbschg/index.html [last accessed 10 July 2018].

\textsuperscript{77} S. Sec. 1 (Objective and scope) para. 1 ArbSchG: “This Act serves to safeguard and improve the safety and health protection of workers at work through measures of occupational safety and health. It applies to all sectors of activity and is also applicable in the exclusive economic area within the framework of the requirements set by the United Nations Convention on the Law of the Sea of 10 December 1982 (Federal Law Gazette 1994 II p. 1799).”
purpose of their vocational training, civil servants, judges, soldiers.\textsuperscript{78} The ArbSchG describes explicitly the obligations of the employers within the scope of the law in Sec. 3 (Basic obligations on employers) ArbSchG, which states the following:

“(1) The employer has a duty to take the necessary measures of occupational safety and health, taking account of the circumstances, to influence the safety and health of workers at work. He shall examine the effectiveness of those measures and, where necessary, adapt them to changing circumstances. His aim in doing so shall be to improve the safety and health protection of the workers.

(2) When planning and implementing the measures referred to in subsection (1), the employer shall, in the light of the nature of the activities and the number of workers,

1. guarantee an appropriate organisation and provide the necessary means, and
2. take precautions so that the measures are, if required, observed when performing all activities and incorporated into the management structures, and workers are able to meet their duties to cooperate.”

2.3.3.4 German Civil Code

The German Civil Code (\textit{Bürgerliches Gesetzbuch}, BGB)\textsuperscript{79} contains several provisions that might apply at a workplace mobbing situation based on the particular facts of the occasion under examination. Core provisions\textsuperscript{80} relevant for the discussion of workplace mobbing in Germany are Sec. 241 BGB (Duties arising from an obligation),\textsuperscript{81} Sec. 280 para. 1 BGB (Damages for breach of duty),\textsuperscript{82} Sec. 823 para. 1 BGB (Liability in Damages).\textsuperscript{83} Section 826 BGB serving the principles of maintenance of public policy which

\textsuperscript{78} Sec. 2 (Definitions) para. 2 ArbSchG: “For the purposes of this Act, ‘workers’ shall be: 1. Employees, 2. Those employed for the purpose of their vocational training, 3. Persons comparable to employees within the meaning of Sec. 5 (1) of the Labour Courts Act (\textit{Arbeitsgerichtsgesetz}, ArbGG), excluding domestic workers and those equal in law to domestic workers, 4. Civil servants, 5. Judges, 6. Soldiers, 7. Those employed in workshops for the disabled.”

\textsuperscript{79} From now on BGB. Available in English at: https://www.gesetze-im-internet.de/englisch_bgb/index.html [last accessed 10 July 2018].

\textsuperscript{80} An extensive elaboration on the relevance of BGB for workplace mobbing cases in Germany will follow.

\textsuperscript{81} Sec. 241 BGB: “(1) By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance. (2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.”

\textsuperscript{82} Sec. 280 para. 1 BGB: “If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby.”

\textsuperscript{83} Sec. 823 para. 1 BGB: “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.”
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is endangered in cases of workplace mobbing states explicitly: “A person who, in manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.”

2.3.3.5 Exclusively for the Public Sector

2.3.3.5.1 Federal Act on Gender Equality

The Act on Equality between Women and Men in the Federal Administration and in Federal Enterprises and Courts, known as the Federal Act on Gender Equality, (Bundesgleichstellungsgesetz, BGleiG), primary aims to achieve gender equality and to eliminate existing discrimination on the basis of gender, in particular discrimination in the future. Suggestive of the commitment of Germany in assessing the achievements in the field of gender equality and in contemplating existing cases of gender discrimination is Sec. 39 BGleiG regarding the production of a relevant report of the Federal Government of Germany to be presented to the Bundestag:

“(1) The Federal Government shall every four years submit a report to the German Bundestag on the situation of women and men in the agencies under section 3 no. 5 (Report on the Federal Act on Gender Equality). The report shall be based on the data collected in accordance with section 38 (1) and (2). The top-level federal authorities shall provide the requisite information.

(2) The report shall set out to what extent the aims of this Act have been achieved and the Act has been applied. It shall make reference to exemplary gender equality measures implemented in individual agencies. The report shall not contain any personal data.

(3) The Interministerial Working Group of the Equal Opportunities Officers of the Highest Federal Authorities shall be involved in preparing the report.”

2.3.3.5.2 Federal Civil Service Act

The Federal Civil Service Act (Bundesbeamtengesetz, BBG) specifically addresses the employment conditions of civil servants in Germany. Sec. 78 BBG and Sec. 45 Civil

84 From now on BGleiG. Available in English at: https://www.gesetze-im-internet.de/englisch_bgleig/index.html [last accessed 10 July 2018].

85 Sec. 1 para. 1, 1 and 2. BGleiG.

86 From now on BBG. Available in German at: https://www.gesetze-im-internet.de/bbg_2009/ [last accessed 10 July 2018].
Service Status Act (Beamtenstatusgesetz, BeamtStG)\(^{87}\)\(^{88}\) in particular describe one of the German civil service principles, namely the duty of care (Fürsorgepflicht) of the employer, more precisely, to care for the welfare of the civil servants.

Furthermore, civil servants have the right according to Sec. 125 para. 1 BBG to file a complaint following the rules of the existing hierarchy, an option with a certain significance in cases of workplace mobbing since the right can be exercised not only by the direct victim of the eventual workplace mobbing behaviour but also by someone who observes and condemns it.

2.3.4 Criminal Law

Each case which stands under examination for an eventual classification of workplace mobbing might constitute from a criminal law point criminal offences such as bodily harm regulated in Sec. 223 German Criminal Code (Strafgesetzbuch, StGB)\(^{89}\)\(^{90}\) insult as described in Sec. 185 StGB,\(^{91}\) defamation in the sense of Sec. 186 StGB,\(^{92}\) use of

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\(^{87}\) From now on BeamtStG.

\(^{88}\) Available in German at: https://www.gesetze-im-internet.de/beamstg/ [last accessed 10 July 2018].

\(^{89}\) From now on StGB. Available in English at: https://www.gesetze-im-internet.de/englisch_stgb/index.html [last accessed 10 July 2018].

\(^{90}\) Section 223 StGB (Causing bodily harm): “(1) Whosoever physically assaults or damages the health of another person, shall be liable to imprisonment not exceeding five years of fine. (2) The attempt shall be punishable.”

\(^{91}\) Sec. 185 StGB (Insult): “An insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years of fine.”

\(^{92}\) Sec. 186 StGB (Defamation): “Whosoever asserts or disseminates a fact related to another person which may defame him or negatively affect public opinion about him, shall, unless this fact can be proven to be true, be liable to imprisonment not exceeding one year or a fine and, if the offence was committed publicly or through the dissemination of written materials (section 11(3)), to imprisonment not exceeding two years or a fine.”
threats or force to cause a person to do, suffer or omit an act of Sec. 240 StGB, and of course sexual harassment incorporated recently in the StGB in Sec. 184i StGB.

2.3.5 Legal Paths

As already mentioned, due to the lack of specific statutory provisions dealing with workplace mobbing, the victim’s protection is basically limited to the general employment and civil law protections. The basic legal paths being the following:

2.3.5.1 Injunctive Relief

German law provides the possibility for an injunctive relief against both the employer and the offender employee.

As far as the possibility of injunctive relief against the employer is concerned, Sec. 241 para. 2 BGB and Sec. 611 (Typical contractual duties in a service contract) para. 1
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BGB\(^8\) grant the victim the right to an injunctive relief against the employer and compel him so that the mobbing practices cease to exist. Sec. 75 BetrVG allows for action against mobbing by the employer and the Works Council. It is controversial, whether Sec. 75 BetrVG is a protective clause in the sense of 823 para. 2 BGB establishing tort claims. BAG\(^9\) has provided an even wider interpretation of Sec. 241 para. 2 BGB, by suggesting that the employer is obliged to “(actively) protect the employee against the behavior of supervisors, co-workers and third persons on which he exercises influence” and to “[o]rganize his company in a way that reduces the possibility of such violations.”\(^10\) The victim is therefore entitled to demand that the employer takes action in form of reprimands, warnings, transfers, terminations of employment.\(^11\) The wide range of available possible protective actions\(^12\) of the employer suggest that the victim has the right to “demand a specific action only if this sanction is actually the only one that would adequately protect him and is at the same time lawful and reconcilable with the employer’s own interests.”\(^13\)

In case that the offender is a supervisor or a coworker, the victim of the mobbing behaviour due to the absence of a contractual relationship between them would have no contract claims against him but the right to sue for injunctive relief based on Sec. 1004 para. 1 BGB\(^14\) if the mobbing behaviour violates the victim’s right to health, personality or property.\(^15\) Furthermore and when the mobbing behaviour consists of libel or false statements, the victim is also granted according to Sec. 1004 para. 1 BGB the right to demand a public withdrawal of these comments.\(^16\)

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\(^8\) S. Sec. 611 para. 1 BGB: “By means of a service contract, a person who promises service is obliged to perform the services promised, and the other party is obliged to grant the agreed remuneration.”

\(^9\) BAG 16.05.2007 - 8 AZR 709/06.

\(^10\) Fischinger, 160.

\(^11\) Ibid.

\(^12\) Fischinger acknowledges the practical impossibility that the employer does “organize a company in a way that entirely precludes the possibility of workplace bullying”. Ibid.

\(^13\) Ibid.

\(^14\) Sec. 1004 (Claim for removal and injunction) para. 1 BGB: “If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.” For an analogous application of Sec. 1004 para. 1 BGB which refers to property on absolute rights such as health or the right of personality, Fischinger, 161.

\(^15\) Fischinger, 161.

\(^16\) Fischinger, 161. S. also the in ibid. quoted judgment of the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), from now on BVerfG: BVerfG 27.02.2003 - 1 BvR 1120/02.
2.3.5.2 Damage Claims

The German law distinguishes between contractual and tort damage claims against the employer and contractual and tort damage claims against co-workers or supervisors:

2.3.5.2.1 Contractual and Tort Damage Claims against the Employer

A duty to pay damages in the case a contracting party intentionally or negligently breaches a contractual duty derives from Sec. 280 BGB\(^{107}\). In the case that the employer himself/herself is “mobbing” the employer, which constitutes the so-called “bossing” behaviour, the employer is by nature liable for the legal consequences based on Sec. 31\(^{108}\) and 89 para. 1\(^{109}\) BGB. Mobbing behaviour on the other hand performed by supervisors and co-workers may only be attributed to the employer in the case of applicability of Sec. 278 BGB\(^{110}\), which requires “a pertinent relationship between the mobbing behaviour on the one hand and the tasks given to the supervisor or co-worker by the employer within their existing relationship on the other”\(^{111}\). BAG has ruled that this is the case when the harassing actions under examination do affect the legal employment status of the employer.\(^{112}\) Even in the cases that the mobbing behaviour of co-workers or supervisors does not affect the victim’s employment status, the employer may still be held liable for violation of his/her duty to actively protect the employee against such behaviour according to Sec. 241 para. 2 BGB\(^{113}\). Not only has the employer the duty to organise his/her company

\(^{107}\) S. Especially Sec. 280 (Damages for breach of duty) para. 1 BGB: “If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.”

\(^{108}\) Sec. 31 (Liability of an association for organs): “The association is liable for the damage to a third party that the board, a member of the board or another constitutionally appointed representative causes through an act committed by it or him in carrying out the business with which it or he is entrusted, where the act gives rise to a liability in damages.”

\(^{109}\) Sec. 89 (Liability for organs) para. 1 BGB: “The provision of section 31 applies with the necessary modifications to the treasury and to corporations, foundations and institutions under public law.”

\(^{110}\) Sec. 278 (Responsibility for the obligor for third parties) BGB: “The obligor is responsible for fault on the part of his legal representative, and of persons whom he uses to perform his obligation, to the same extent as for fault on his own part.”

\(^{111}\) Fischinger, 162.

\(^{112}\) BAG 16.05.2006 - 8 AZR 709/06.

\(^{113}\) Fischinger, 163.
in such a way that the eventuality of mobbing is reduced but also he has the duty to take appropriate measures against any form of workplace mobbing.\textsuperscript{114}

The damages which the employer must pay the victim can be material damages, such as costs for medical treatment, psychiatric therapy potentially being an essential part of it, when the victim suffered harm to his/her health.\textsuperscript{115} In cases of violations of the victim’s right of personality, the employer may also have the obligation to pay material damages arising out of the circulation of insulting and humiliating remarks when they have lead for example to the victim’s inability to find a new job for reasons of his/her due to such remarks harmed reputation.\textsuperscript{116} When the victim is forced to leave the company and terminate therefore his/her employment contract with or without notice, Sec. 628 para. 2 BGB\textsuperscript{117} might be applicable for damages due to the loss of his/her job and eventual costs of applying for new ones.\textsuperscript{118} In addition the victim has the right to sue the employer on the bases of contractual damages for pain and suffering\textsuperscript{119} according to Sec. 253 para. 2 BGB\textsuperscript{120} in the cases that his/her health or sexual self-determination was harmed.\textsuperscript{121} Decisive criterion for the entitlement to material damages and damages for pain and suffering is the causation between the mobbing behaviour and the existing damages. When such a necessary causation is disputed by the employer, the victim then has the burden of proof to display it.\textsuperscript{122}

According to Sec. 823 para. 1 BGB, the employee has a tort damage claim against the employer in case the latter intentionally or negligently, unlawfully injures the life, health, or right of the privacy of the employee. Sec. 826 (Intentional damage contrary to public policy) BGB applies also. Furthermore, an employer is also tortiously liable for acts

\textsuperscript{114} Fischinger, 163-164.

\textsuperscript{115} Fischinger, 164.

\textsuperscript{116} Ibid.

\textsuperscript{117} Sec. 628 (Partial remuneraparation and damages in case of termination without notice) para. 2: “If notice of termination is prompted by the conduct of the other party in breach of contract, then the other party is obliged to compensate the damage arising from the dissolution of the service relationship.”

\textsuperscript{118} Fischinger, 164-165.

\textsuperscript{119} Although the assessment of the quantification for pain and suffering is in practice highly problematic. Fischinger, 165.

\textsuperscript{120} Sec. 253 (Intangible damage) para. 2: “If damages are to be paid for an injury to body, health, freedom or sexual self-determination, reasonable compensation in money may also be demanded for any damage that is not pecuniary loss.”

\textsuperscript{121} Fischinger, 165.

\textsuperscript{122} Ibid.
of his/her employees according to Sec. 831 para. 2 BGB,¹²³ which may apply only in the case of supervisors and not co-workers since the damage caused by the offender can be caused only by actions that affect the employment status of the victim.¹²⁴ The employer has to prove that he has exercised care while selecting and monitoring the supervisor in order to exculpate himself from his/her liability.¹²⁵ No such possibility exists in the public sector, where the employer is tortiously liable according to Sec. 839 BGB¹²⁶ and Sec. 34 GG¹²⁷.¹²⁸

2.3.5.2.2 No Contractual but Tort Damage Claims against Co-workers or Supervisors

Since no contractual relationship exists between the victim and the offender co-worker or supervisor, Sec. 280 BGB is not applicable.¹²⁹ Tort damage claims against the mobbing co-workers or supervisors who intentionally or negligently and unlawfully injure the life, health, property, the right of personality of an employee establish a tort liability for the offenders identical as the one of the employer based on Sec. 823 para. 1.¹³⁰

Like the liable employer, the offender co-worker or supervisor has to pay material damages such as medical treatment. Furthermore in cases where a violation of the victim’s right of personality occurred, the offender has to correct or withdraw any insulting or

¹²³ Sec. 831 (Liability for vicarious agents) para. 2 BGB: “A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.”

¹²⁴ Fischinger, 166.

¹²⁵ Ibid.

¹²⁶ S. especially Sec. 839 (Liability in case of breach of official duty) para. 1 BGB: “If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way.”

¹²⁷ Sec. 34 (Liability for violation of official duty) GG: “If any person, in the exercise of a public office entrusted to him, violates his official duty to a third party, liability shall rest principally with the state or public body that employs him. In the event of intentional wrongdoing or gross negligence, the right of recourse against the individual officer shall be preserved. The ordinary courts shall not be closed to claims for compensation or indemnity.”

¹²⁸ Fischinger, 166.

¹²⁹ Fischinger, 168.

¹³⁰ Fischinger, 168.
humiliating statements. Where the victim’s reputation has also suffered by the mobbing behaviour of the offender, such withdrawal or correction should presuppose that other people have the opportunity to become aware of it. Same provisions apply for damages for pain and suffering of the victim when the offender violated the victim’s right to health and self-determination, or right of personality. Noteworthy is the observation that the victim’s claims against the mobbing co-workers or supervisors might be higher than the ones granted in cases of liability of the employer to meet his/her duty to organize his/her company in a way that reduces the risk of mobbing, due to the degree of the offender’s fault.

2.3.5.2.3 Miscellaneous

Other possibilities for the victims of workplace mobbing are:

1. Right of Retention according to Sec. 273 para. 1 BGB

The victim of workplace mobbing is entitled to the right of retention of Sec. 273 para. 1 BGB when a) the mobbing behaviour is serious, b) despite the knowledge of the occurring workplace mobbing, the employer does not take any action and c) exercising the right is necessary and appropriate to eliminate the mobbing behaviour. Since the victim has to prove the existence of all above preconditions, it turns out to be a risky choice of the employer because by exercising his/her right unjustifiably he will have violated his/her contractual duties himself.

2. Complaint a: to the Employer according to Sec. 84 BetrVG

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131 Fischinger, 171.
132 Ibid.
133 Fischinger, 171.
134 Sec. 273 Right of Retention BGB: “If the obligor has a claim that is due against the obligee under the same legal relationship as that on which the obligation is based, he may, unless the obligation leads to a different conclusion, refuse the performance owed by him, until the performance owed to him is rendered (right of retention).”
135 Fischinger, 173.
136 Ibid.
137 Sec. 84 (Right to make complaints) para. 1 BetrVG: “Every employee shall be entitled to make a complaint to the competent bodies in the establishment if he feels that he has been discriminated against or treated unfairly or otherwise put at a disadvantage by the employer or by other employees of the establishment. He may call on a member of the works council for assistance or mediation.”
The victim of the mobbing behaviour has a right to file a complaint to the employer for which he shall not be discriminated against.\textsuperscript{138}

b: to the Works Council, according to Sec. 85 BetrVG\textsuperscript{139}

3. Right to demand the transfer or dismissal of the offender according to Sec. 241 para. 2 BGB\textsuperscript{140}. In practice the employee can demand the transfer or dismissal of the offender only under exceptional circumstances since the employer has in principle a wide range of possible actions at his/her discretion.\textsuperscript{141}

2.3.6 Procedural Issues: Burden of Proof

A core problematic issue in dealing with the practice of workplace mobbing is the one regarding proof, the burden of which is carried by the victim: firstly that the harassing acts did take place and that harm occurred and secondly that these acts were causally linked to the harm.\textsuperscript{142} BAG has already declined to establish any workplace mobbing-related rules alleviating the burden of proof of a mobbing victim.\textsuperscript{143}

Additionally, according to Sec. 447 Code of Civil Procedure (Zivilprozessordnung, ZPO),\textsuperscript{144} the victim may request to be interrogated himself about the facts.\textsuperscript{145} It is therefore recommended that the employee keep a “mobbing diary” where all essential for the proof

\textsuperscript{138} S. Sec. 84 para. 3 BetrVG: “The employee shall not suffer any prejudice as a result of having made a complaint.”

\textsuperscript{139} Sec. 85 para. 1 BetrVG: “The works council shall hear employees’ grievances and, if they appear justified, induce the employer to remedy them.”

\textsuperscript{140} Sec. 241 (Duties arising from an obligation) para. 2 BGB: “An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.”

\textsuperscript{141} S. Also Fischinger, 175.

\textsuperscript{142} S. also Fischinger, 180.

\textsuperscript{143} BAG 16.05.2007, 8 AZR 709/06.

\textsuperscript{144} From now on ZPO. Available in English at: https://www.gesetze-im-internet.de/englisch_zpo/index.html [last accessed 10 July 2018].

\textsuperscript{145} Sec. 447 ZPO (Examination, upon corresponding application being made, of the party upon whom it is incumbent to provide evidence): “The court may also examine the party upon whom it is incumbent to provide evidence regarding the facts and circumstances at issue where one party petitions that this be done and the other consents.”
of his/her claim incidents are documented.\textsuperscript{146} The victim may also request that the employer is examined for the same purposes according to Sec. 445 ZPO.\textsuperscript{147}

The AGG on the other hand establishes in Sec. 22 a reversal of the burden of proof: “Where in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.”

3. Conclusions

German civil and employment law provides variable rights and remedies for workplace mobbing victims. German Workplace Anti-Mobbing policy promotes the preconditions for a decent workplace setting, based on international labour standards. The necessity of the creation of a special statutory law is not widely accepted since the existing legal arsenal offers enough options for the protection of the victims.\textsuperscript{148} Building social awareness of the phenomenon and strengthening the faith in the importance and the merits of a decent work culture should continue to be addressed as the main preventive incentives.\textsuperscript{149}

4. International Perspectives through a German Lens

The Governing Body of the ILO has already decided at its 325th Session (October-November 2015) to place “Violence against women and men in the world of work” on the agenda of the 107th Session (June 2018) of the International Labour Conference (ILC)\textsuperscript{150}. A preliminary report together with a questionnaire, prepared by ILO, was then transmitted to Member States who were invited to submit their views on the issue after consultation

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\begin{footnotes}
\item[146] Fischinger, 181.
\item[147] Sec. 445 para. 1 (Examination of the opponent; offer to provide evidence) ZPO: “Any party that has not fully provided evidence by way of complying with its obligation to provide evidence, or that has failed to so submit other evidence, may offer to provide evidence by filing the petition that the opponent be examined regarding the facts and circumstances to be proven.”
\item[148] S. Fischinger 182: “Against this background it seems unnecessary to pass a law changing the \textit{substantive law} in force and creating a special statutory law dealing with workplace bullying, as it is hard to imagine what other remedies such a law could provide.”
\item[149] S. Fischinger 184: “In the end the “battle against workplace bullying” will have to be fought (and won) mainly at the workplace itself and not in court rooms.”
\item[150] From now on ILC. For more information in English, s. http://www.ilo.org/ilc/AbouttheILC/lang--en/index.htm [last accessed 10 July 2018].
\end{footnotes}
with the most representative organizations of employers and workers. ILO prepared a preliminary report together with a questionnaire which was then transmitted to Member States in May 2017. This report,\textsuperscript{151} which includes comments by the Member States and ILO and finally proposed conclusions provides important information regarding the standing point of Germany on Workplace Mobbing-Related issues, summarised as following:

Regarding the question whether the ILC should adopt an instrument or instruments concerning violence and harassment in the world of work, Germany postulated that “given the existing ILO and UN legal framework, the problem of violence and harassment is not a lack of legislation but the implementation of existing instruments”.\textsuperscript{152}

Germany underlined its policy imperative of maintaining political and public policy coherence by proposing that in the Preamble of the future instrument/instruments “[	extit{t}]here should be a reference to UN Conventions on human rights and discrimination to maintain political and public policy coherence”.\textsuperscript{153}

Germany insisted that for the purposes of the future instrument/instruments violence and harassment in the world of work should only cover situations within the employer’s influence.\textsuperscript{154}

Finally in the relevant provision of the future instrument/instruments regarding the appropriate measures that each Member State should take to ensure the monitoring and enforcement of national laws and regulations regarding violence and harassment in the world of work, Germany commented that concerning “appropriate measures”, “different existing supervision mechanisms in different member States should be respected”.\textsuperscript{155}


\textsuperscript{152} ILC.107/V2, 5.

\textsuperscript{153} ILC.107/V2, 19.

\textsuperscript{154} ILC.107/V2, 26.

\textsuperscript{155} ILC.107/V2, 46.
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