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Discrimination Beyond Categories? "Associated Discrimination" in European and German Labour Law

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1. *Introduction*

The term "associated discrimination" or "discrimination by association" refers to unfavourable treatment of a person who has or is assumed to have a close relationship to a person with a protected characteristic (race or ethnic origin, gender, religion or belief, disability, age or sexual orientation). Surprisingly, this form of discrimination received little attention in scientific literature and has rarely been litigated in courts. Nevertheless, it is probably widespread, for example when parents of young children are discriminated against in job applications.

Although EU law comprises a broad range of directives to implement the principle of equal treatment, it does not explicitly mention the concept of associated discrimination. The ECJ recognised this form of discrimination as unlawful as early as 2008 in its "Coleman" judgement. The German Federal Labour Court, however, did obviously not take note of this decision.

While directive 2019/1158/EU on the "Work-life balance for parents and carers" intended to promote the participation of parents in the workforce, the debate on its implementation in German labour law provides a new opportunity to take a closer look at discrimination by association.

Part II. of this paper will give an overview on EU equality law and the jurisprudence of the ECJ. In part III. we will discuss unfavourable treatment of parents and caregivers as a problem in German labour law, while in Part IV. we will identify further implications resulting from the work-life balance directive. In concluding (Part V.), we will reflect on the need for legislative changes.

2. *Protection against discrimination by association in EU Law*

Directive 2000/43/EC[1] establishes a framework for combating discrimination on the grounds of racial or ethnic origin in labour law and civil law, whereas directive 2000/78/EC[2] covers the categories religion and belief, disability, age and sexual orientation and refers to employment and occupation. Gender equality is covered by directive 2006/54/EC[3] for employment law, and directive 2004/113/EC[4] for civil law.

2.1. *Protected characteristics and concepts of discrimination*

Age and gender are of particular importance for the discrimination of parents or caregivers. The notion "age" often evokes the image of elderly or very old people, but it includes young age likewise. As originally understood, "gender" included the biological assignment to the female or male sex only. It is meanwhile recognized that it also covers persons who do not identify with any gender; the term therefore encompasses every kind of gender identity.

[1] Dir. 2000/43 CE of 29 june 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, p. 22.

[2] Dir. 2000/78 CE of 27 november 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, p. 16.

[3] Dir. 2006/54 CE of 5 july 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204, p. 23.

[4] Dir. 2004/113 CE of 13 december 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, p. 37.

All EU equal treatment directives distinguish between direct and indirect discrimination. Moreover, they address multiple discrimination, i.e. unfavourable treatment based on several characteristics, which particularly often affects women, cf. recital 14 dir. 2000/43/EC and recital 3 dir. 2000/78/EC. Intersectional discrimination is not explicitly mentioned in EU secondary law. As with multiple discrimination, intersectional discrimination is linked to different categories but has a greater negative impact than the sum of its individual instances or – as for example in the case of headscarf bans[5] – creates discrimination as a result of their combined effect[6]. However, according to the case law of the ECJ, the concept of discrimination presupposes that unfavourable treatment must constitute discrimination on each of the individual grounds in itself. Therefore, the discriminatory effect resulting from the mere combination of two or more overlapping criteria shall not be relevant in EU discrimination law[7].

2.2. *Congruence of protected characteristic and disadvantaged person?*

As for the wording of the anti-discrimination directives, it is not obvious whether they protect persons from unfavourable treatment on grounds which they do not fulfil in their own person. However, the "grounds" or "characteristics" mentioned in EU secondary legislation do not describe "properties" that would be unalterably attached to a person. Rather, equal treatment law aims to prevent and sanction discriminatory attributions[8]. It therefore focusses on the mindset and attitudes of those persons who do not respect the equal treatment principle.

This is reflected in recital 6 dir. 2000/43/EC for the category "race", according to which the EU rejects theories "which attempt to determine the existence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories". This clearly shows that "equal treatment irrespective of a person's racial origin" is in-

[5] See WEINBERG, *Ansätze zur Dogmatik der intersektionalen Benachteiligung*, in *EuZA*, 2020, p. 64; KAHLO, STEIN, *Intersektionale Diskriminierungen und das AGG*, in *NJW*, 2022, p. 2797.

[6] In detail WEINBERG, *cit.*; KAHLO, STEIN, *cit.*; HOLZLEITHNER, *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 13.

[7] ECJ, 24. November 2016, C-443/15 (Parris), ECLI:EU:C:2016:897, para. 81 on discrimination based on a combination of age and sexual orientation.

[8] MANGOLD, PAYANDEH in *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 1; para. 81 ss.

tended to protect them against racist attributions[9]. The fact that this concern is not reflected in the wording of the directive has been criticised for a long time[10].

2.2.1. The CHEZ case

These considerations also apply to the notion of "ethnic origin". Insofar, the ECJ refers to the case law of the ECtHR on Art. 14 ECHR[11]. The court defines "ethnic origin" as belonging to societal groups that are marked, among others, by a common nationality, religion, language, cultural and traditional origins and backgrounds. However, the elements of this definition are difficult to distinguish and difficult to prove. Consequently, the ECJ decided that it is not a prerequisite that disadvantaged persons themselves are a member of a particular ethnic group.

In the CHEZ case[12], a female entrepreneur ran a shop in a district that was mainly inhabited by persons of Roma origin. The energy supplier did not – as usual – install the electricity meters on the consumers' properties at a height of 1.7 meters, but on the concrete pylons of the overall electricity supply network at a height of six to eight meters. Obviously, the energy supplier intended to prevent electricity theft which he assumed were predominantly committed by consumers of Roma origin, however without expressly mentioning this. The claimant held that she was suffering direct discrimination on grounds of ethnic origin, even though she was herself of Bulgarian origin.

The ECJ followed her reasoning by referring to the wording and the objective of art. 2(1) dir. 2000/43/EC that defines the principle of equal treatment as comprising "direct or indirect discrimination based on racial or ethnic origin", but not "based on *his or her* ethnic origin". According to the court, the scope of the directive shall not be interpreted restrictively. It

[9] Lasserre, *"Rasse"-Begriff der Grundrechtecharta*, in *NZA,* 2022, p. 302. The German legislator distances from race theories as well, cf. BT-Drucksache 16/1780 of 08 June 2006, p. 30.

[10] Unabhängige Beauftragte der Bundesregierung für Antidiskriminierung, *Grundsatzpapier zur Reform des Allgemeinen Gleichbehandlungsgesetzes*, 2023, p. 3; Ludyga, *Rasse als Rechtsbegriff?*, in *NJW*, 2021, p. 914 with numerous references.

[11] ECtHR, n. 43577/98 and 43579/98 (Nachova and Others v. Bulgaria); ECtHR, n. 27996/06 and 34836/06 (Sejdi and Finci v. Bosnia and Herzegovina), para. 43 to 45 and 50.

[12] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480.

refers to the characteristics mentioned in art. 1 dir. 2000/43/EC (racial or ethnic origin) – not to a certain category of persons, but to "all persons", cf. recital 16 dir. 2000/43/EC. Hence, the equal treatment principle shall "benefit also persons who, although not themselves a member of the race or ethnic group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds"[13].

Even if the term "associated discrimination" was not mentioned in the decision, the ECJ has placed this very form of discrimination under the protection of the directive and sanctioned stigmatisation that goes beyond the categorical classification of the disadvantaged person[14]. Yet, the court did not limit its reasoning to direct discrimination, but also considered an indirect discrimination, because the placement of the electric meters could be regarded as an "apparently neutral practise" that disproportionally affected persons of Roma origin[15]. This argument has been criticised as a misguided interpretation of the criterion "neutrality" and due to the lack of a relevant comparison group in the case[16]. Moreover, criticism referred to the circumstance that the ECJ implied that discrimination required "malicious intent" and thus rendering it difficult for claimants to prove[17].

Another aspect of the CHEZ ruling is that it specified the nature of the disadvantage that the discriminated person has to suffer: Even though art. 2(2)(b) dir. 2000/43/EC seems to presuppose a "particular disadvantage", this does not necessarily have to refer to a certain right, but may include any disadvantageous circumstances. Hence, "particular" refers to a group of persons particularly affected and not to the "quality" of the disadvantage, nor does it require a certain seriousness of the disadvantage[18]. This would lead, according to criticism in academic literature, to a situation in which there is

[13] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480, para. 56.

[14] Hartmann, *Diskriminierung durch Antidiskriminierungsrecht?*, in *EuZA* 2019, p. 42.

[15] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480, para. 93 ff.

[16] In detail Atrey, *Redefining Frontiers of EU Discrimination Law*, in *Public Law* 2017, p. 189; cf. Connolly, *The myth of associative discrimination*, in *NILQ*, 2021, 72, p. 534 ff. In contrast, Suk, *New Directions for European Race Equality Law*, in *Fordham Int. Law J*, 2017, 40, p. 1219 ff. agrees with the EJC's reasoning.

[17] Connolly, *The myth of associative discrimination*, cit., p. 524.

[18] Suk, *cit.*, p. 1217 ff. and p. 1222; Fredman, *The Reason why: Unravelling Indirect Discrimination*, in *Ind. Law J*, 2016, 45, p. 237.

less damage to be compensated than behaviour, for the ECJ implied that discrimination would require not more than "conduct of a discriminatory nature and a victim"[19].

2.2.2 The Coleman case

Even before the CHEZ case, in the Coleman case in 2008, the ECJ had to decide on associated discrimination in labour law[20]. An employee was pressured by her employer into "voluntary dismissal" after giving birth to a severely disabled child who required specialised and particular care. She repeatedly missed work due to her care obligations and was confronted with hostile and humiliating comments from her employer and colleagues. The claimant asserted that this constituted an unfavourable treatment on grounds of the disability (art. 1 dir. 2000/78/EC) of her child.

In his opinion, the Advocate General stated that "*directly targeting a person who has a particular characteristic is* not the only way of discriminating against him or her; there are also other, more subtle and less obvious ways of doing so. One way of undermining the dignity and autonomy of people who belong to a certain group is to target not them, but third persons who are closely associated with them and do not themselves belong to the group. A robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications"[21].

The ECJ followed this reasoning and endorsed for a broad understanding of the notion of "discrimination". Neither the wording nor the objective of directive 2000/78/EC presupposed that the principle of equal treatment is limited to persons who themselves have a disability. Rather, it shall "combat all forms of discrimination on grounds of disability"[22]. Thus, the ECJ essentially argued with the *effet utile* of EU law and affirmed that the claimant was discriminated against because of her son's disability.

Moreover, associated discrimination is also recognized in the case law of the ECtHR on equal treatment under art. 14 ECHR, which expressly

[19] Connolly, *The myth of associative discrimination*, cit., p. 516.

[20] ECJ, 17 July 2008, C-303/06 (Coleman), ECLI:EU:C:2008:415.

[21] Opinion of AG M. Poiares Maduro, 31 January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 12.

[22] ECJ, 17 July 2008, C-303/06 (Coleman), ECLI:EU:C:2008:415, para. 38.

refers to the ECJ decision in the Coleman case[23]: *it thus follows, in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics. The Court therefore finds that the alleged discriminatory treatment of the applicant on account of the disability of his child, with whom he has close personal links and for whom he provides care, is a form of disability-based discrimination covered by Article 14 of the Convention*[24].

3. *Discrimination against parents in German labour law*

3.1. *Basic principles of German equality law*

The EU equal treatment directives have been implemented in German national law with the General Act on Equal Treatment (AGG) in 2006. It covers direct and indirect discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age – including young age[25] – or sexual orientation (sec. 1 AGG). Besides, it addresses multiple discrimination (sec. 4 AGG), and there is a broad consensus that its scope comprises intersectional discrimination, even though this is not explicitly mentioned in its wording.

Moreover, sec. 7(1) AGG states that unfavourable treatment also occurs where the person committing the act of discrimination only assumes the existence of any of the grounds referred to in sec. 1 AGG. This is referred to as *Putativdiskriminierung*, i.e. discrimination by perception. Despite the wording and the systematic position of the provision in the act's subdivision "Protection of employees against discrimination", the concept of discrimination by perception is not limited to labour law but constitutes a general principle in German equality law[26].

Hence, it is not a precondition that persons facing unfavourable treatment fulfil any of the protected characteristics. This was clearly demonstrated in the so-called "Ossi case". The colloquial word "Ossi" refers to persons

[23] ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 41.

[24] ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 78 ss. for tax discrimination against the father of a disabled child.

[25] BT-Drucksache 16/1780 of 08 June 2006, p. 31.

[26] *Commentary on sec. 1*, in ERMAN/Armbrüster, *AGG Commentary*, 17th ed. 2023, para. 15.

who were born and grew up in the former GDR. A woman applying for a vacancy in West Germany was rejected because of her East German origin, which she regarded as unfavourable treatment on grounds of her ethnic origin. The Stuttgart Labour Court[27] held that she could not invoke her ethnic origin. Although the term "Ossi" may refer to persons living in a common area, East Germans lacked a common language and a sufficiently long shared history and culture. These considerations may be correct. However, the court did not consider the pejorative characterisation of the plaintiff because of her East German origin and the negative attributions associated with it. Much like "race", ethnic origin often is an "ideological construct" that is based on a "myth of belonging"[28]. If courts were required to verify a person's ethnicity in discrimination cases, this would put judges in the position of having to conduct "dubious ancestry studies"[29]. Therefore, the scientific community advocates for a post-categorical approach that sanctions negative attributions, without presupposing the disadvantaged person's affiliation to a particular group[30]: "a person who thinks evil[31] does not deserve protection, while at the same time those who are exposed to discriminatory and stereotypical mindsets do"[32].

The protected characteristics mentioned in sec. 1 AGG undoubtedly provide guidance and legal certainty. However, they may have an arbitrary effect and can perpetuate and reinforce unequal treatment, as persons are labelled as "different" in this way and "sorted" into categories that need to be overcome[33].

3.2. *Case law of the Federal Labour Court*

This reasoning will have to guide the legal implications of discrimina-

[27] Stuttgart Labour Court, 15 April 2010, 17 Ca 8907/09.

[28] SCHIECK, *Diskriminierung wegen "Rasse" oder "ethnischer Herkunft"*, in *AuR*, 2003, 51, p. 46.

[29] SCHIECK, *cit.*, p. 46; cf. GREINER, *Putativ-Diskriminierung wegen Ethnie oder Rasse*, in *Der Betrieb* 2010, p. 1941; HARTMANN, *cit.*, p. 28.

[30] HARTMANN, *cit.*, p. 31; KAHLO, STEIN, *cit.*, p. 2796 ff.; in detail BAER, *Handbuch Antidiskriminierungsrecht,* Mohr Siebeck, 2022, para. 5.

[31] Cf. MCCRUDDEN, *The New Architecture of EU Equality Law after CHEZ*, in *Eur. Equality Law Rev.*, 2016, 1, p. 8 ff.: "stigma, offence and humiliation".

[32] *Commentary on sec. 7*, in BeckOK/*Horcher*, *AGG* Commentary, 2023, para. 9.

[33] HARTMANN, *cit.*, p. 26.

tion against parents in the labour market, for they are based on stereotypes related to both young children and to women. Despite all the societal developments in recent years, women are still underrepresented in the German labour market, mainly because they are regarded as solely responsible for informal care tasks[34].

Art. 1 dir. 2006/54/EC as well as sec. 1 AGG provide for equal treatment of women in employment. Recital 23 dir. 2006/54/EC underlines that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of gender. Therefore, it shall be expressly covered by the directive. However, the term "motherhood" is interpreted rather narrow. According to the German Federal Labour Court (*Bundesarbeitsgericht*, BAG), "maternity" refers to the protection of a woman in respect of imminent or recent childbirth[35]. Hence, the term includes only pregnant women, breastfeeding mothers and women who have recently given birth, but not mothers as such.

The concept of associated discrimination is obviously not recognised in German jurisprudence. Even though the Coleman case has been broadly discussed in scientific literature, the BAG ignored it in a similar case. A woman applying for a position had been rejected; her application documents were returned to her with the handwritten note "one child, 7 years old!". The BAG denied discrimination on grounds of gender, for due to the age of the child there was no immediate link to pregnancy, birth or breastfeeding. Furthermore, the court did not see evidence for discrimination in the fact that the employer obviously assumed that the claimant, as a mother, was "responsible" for taking care of the child. It held that this only constituted gender-related discrimination if the reconciliation of work and family was an obstacle to recruitment for women alone. The employer's reference to the age of the child could be "neutral if it were made to all applying parents, regardless of their gender"[36].

This decision raises the question of how likely it would be that a young

[34] BMFSFJ, Zweiter Gleichstellungsbericht der Bundesregierung, BT-Drucksache 18/12840, p. 11 identifies a gender care gap of 52.4% to the detriment of women, based on data from 2012 and 2013. BMFSFJ, Dritter Gleichstellungsbericht der Bundesregierung, BT-Drucksache 19/30750, p. 29 is based on the gender care share, i.e. the proportion of informal care work performed by women in couple relationships; this amounted to 66% in 2017.

[35] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 26.

[36] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 31.

father, like a young mother, would be reduced to his caring duties. Besides, the court does not discuss in the slightest whether the result of its decision is acceptable: Is it reasonable that young parents remain excluded from the labour market as long as mothers and fathers are equally affected? In its decision, the BAG did not mention associated discrimination on grounds of the age of the child, although it pointed out that in her application, the plaintiff had not specified the age of the child, so that the employer had been forced to "painstakingly … calculate it himself"[37]. Six years after the ECJ's decision in the Coleman case, there was an obvious lack of awareness of the different manifestations of discrimination! Age discrimination was ignored. The stereotype of childcare decreases as the child gets older – one would certainly never have to expect a remark like "one child, 17 years old!".

The decision of the lower instance court likewise revealed a blind spot in this respect. The Higher Labour Court stated that the remark "one child, 7 years old!" constituted a neutral criterion[38]. In its reasoning it also referred to the age of the child and addressed the "compatibility of work and caring for a minor child of *primary school age* [author's note]"[39], but implicitly attributed these tasks to the everyday reality of women and analysed the case exclusively from the perspective of gender discrimination.

3.3. *Associated discrimination vs. prohibition of victimisation*

The German Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*, ADS) points out that discrimination of parents is often considered in the light of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) only. Sec. 612a BGB states that an employer may not discriminate against an employee in an agreement or a measure because that employee exercises their rights in a permissible way ("prohibition of chicanery" or "prohibition of victimisation"). The ADS refers to a case in which a young father asked for parental leave after the birth of his child. The employer threatened him with dismissal and argued that child care could be taken over by his wife; he then assigned him inappropriate work tasks[40].

[37] Federal Labour Court, 18 September 2014, 8 AZR 753/13, para. 32.
[38] Higher Labour Court Hamm, 6 June 2013, 11 Sa 335/13, para. 31.
[39] Higher Labour Court Hamm, 6 June 2013, 11 Sa 335/13, para. 36.
[40] Unabhängige Bundesbeauftragte für Antidiskriminierung, Jahresreport 2022, p. 12.

Distinguishing associated discrimination due to the age of the child and violations of the prohibition of victimisation is challenging. It is important, however, as both entail different legal consequences. An infringement of sec. 612a BGB results in the invalidity of the legal act in question, for example a dismissal. However, liability for damages is only due in case of negligent conduct[41]. In the Maïstrellis case[42], the ECJ recognised direct discrimination on grounds of gender if fathers are allowed to take parental leave under strict conditions only. However, the decision referred to a statutory provision that would have prevented the employer from granting parental leave to a father if his spouse is not gainfully employed. It therefore depends on whether a person – according to sec. 612a BGB – is facing disadvantages in an individual case, or whether this occurs in (hypothetical) comparison to another person – according to the approach of antidiscrimination law[43].

The prohibition of victimisation applies in existing employment relationships only and presupposes that an employee "exercises their rights in a permissible way". It does not aim at the prevention of unequal treatment, but rather protects the freedom of employees to decide whether to exercise their rights. The case described above was less a matter of the employee's fatherhood, but rather the fact that he intended to take parental leave. Unfavourable treatment was therefore not related to the assumed burden of caring for a small child, but to a traditional, outdated role model of the employer, who lacked understanding for the employee's temporary absence during parental leave. If, on the other hand, parenthood becomes less important in the employment context as the child gets older, this indicates associated discrimination. It is unlawful in the pre-employment relationship already, as well as in existing employment contracts, independent of the gender of the parent and does not refer to parenthood as such. The age of the child does not have to be addressed explicitly, but can also be an implicit factor.

3.4. *Unresolved issues of associated discrimination*

Associated discrimination is an integral part of discrimination law. Yet, some details still require clarification.

[41] See only BENECKE, *Umfang und Grenzen des Maßregelungsverbots und des Verbots der "Viktimisierung"*, in *NZA*, 2011, p. 482.

[42] ECJ, 16 July 2015, C-117/99, para. C-222/14 (Maïstrellis), ECLI:EU:C:2015:473.

[43] BENECKE, *cit.*, p. 483.

3.4.1. The Coleman case vs. other protected categories

So far, case law has only dealt with associated discrimination on grounds of disability or age. The concept can, however be applied to any protected characteristics, for example in case of unfavourable treatment of a person based on religion or belief, sexual identity[44], race or ethnic origin of another person.

The German language version of the equal treatment directives seems to suggest the opposite. In the Coleman case, the ECJ has clarified that dir. 2000/78/EC covers "all persons" and "on grounds of" all categories mentioned in the directive. With regard to gender, it appears that art. 2(1) lit. a) dir. 2006/54/EC in the German version does not cover associated discrimination, as it sanctions discrimination against a person "*aufgrund ihres Geschlechts*" ("on grounds of their sex"). The same applies to art. 2(2) lit. a) dir. 2000/43/EC for racial or ethnic discrimination. Here, too, the German wording of the directive refers to unfavourable treatment of a person "*aufgrund ihrer Rasse oder ethnischen Herkunft*" (on grounds of "their" racial or ethnic origin). This distinction is also made in case of sexual harassment: art. 2(1) lit. c) dir. 2006/54/EC refers to unwanted conduct related to "*das Geschlecht einer Person*" (the sex of a person) which has the purpose or effect to offend the dignity of "*der betreffenden Person*" ("the person concerned"). The BAG therefore denies associated discrimination due to the sex of another person[45]. As for racist harassment, art. 2(3) dir. 2000/43/EC refers to unwanted conduct ... related to "*Rasse oder der ethnischen Herkunft einer Person*" ("racial or ethnic origin of a person").

However, this distinction is not reflected in other language versions of the equal treatment directives. Moreover, their objective requires a broad interpretation that aims at the *effet utile* of the equal treatment principle[46]. Even

[44] In the Maruko case, the ECJ decided that an/the unfavourable treatment of a person living in a homosexual partnership constituted a direct discrimination on grounds of sexual orientation rather than an associated discrimination of a person on grounds of another person's sex, ECJ, 1 April 2008, C-267/06 (Maruko).

[45] German Federal Labour Court, 22.04.2010, 6 AZR 966/08, para. 17.

[46] Benedí Lahuerta, *Ethnic discrimination, discrimination by association and the Roma community*, in *CMLR*, 2016, 53, 3, p. 817; Eriksson, *Broadening the scope of European nondiscrimination law*, in *Int. J. Const. Law*, 2009, 7, p. 751; Connolly, *The myth of associative discrimination*, in *NILQ*, 2021, 72, 3, p. 514; Waddington, *Case 303/06, S. Coleman v. Attridge Law*, in *CMLR*, 2009, 46, p. 672; Lindner, *Die Ausweitung des Diskriminierungsschutzes durch den EuGH*, in *NJW*, 2008, p.

though discrimination law follows a categorical and piecemeal approach[47], it does not suggest a different level of protection for different categories. It would be incomprehensible if the mother of a Black child were less protected from discrimination than the mother of a child with a disability[48]. This conclusion is supported by primary law: Both art. 13 TEC and art. 19 TFEU oblige EU institutions take appropriate action to combat discrimination "*based on* sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation", without specifying that the disadvantaged person must belong to one of the categories mentioned[49].

3.4.2. Immediate victim vs. disadvantaged person

If parents experience unfavourable treatment in their working life because of their young children, may claim compensation according to sec. 15 AGG. This could be doubted, referring to the reasoning of the Advocate General in the Coleman case[50]: "indeed, the dignity of the person with a suspect characteristic is affected as much by being directly discriminated against as it is by seeing someone else suffer discrimination merely by virtue of being associated with him. In this way, the person who is the immediate victim of discrimination not only suffers a wrong himself, but also becomes the means through which the dignity of the person belonging to a suspect classification is undermined"[51].

This wording might indicate a difference between an "immediate victim of discrimination" and another person. Most probably the Advocate General merely intended to distinguish between direct and indirect discrimination, for in his conclusions he affirms the discrimination of both the other person and the "immediate victim". Hence, this reasoning does not have any effect on the claimant's status.

The ECJ did not even discuss this question in his judgement. Further-

2752; LEDER, *Diskriminierung auch bei Benachteiligung eines Arbeitnehmers*, in *EWiR,* 2008, p. 604; PRASAD, MUCKENFUSS, FOITZIK, *Recht vor Gnade*, Beltz Juventa, 2020, p. 112; SACKSOFSKY, in *Handbuch Antidiskriminierungsrecht*, Mohr Siebeck, 2022, para. 14 and para. 80.

[47] SUTSCHET, *Assoziierte Diskriminierung*, in *EuZA*, 2009, p. 250.

[48] SUTSCHET, *cit.*, p. 251.

[49] *Ibid*.

[50] For more details see SUTSCHET, *cit.*, p. 248.

[51] Opinion of AG M. POIARES MADURO, 31. January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 13.

more, it remains ambiguous whether the third party / the "immediate victim" must actually belong to the protected group. This would limit the scope of application of associated discrimination as it would imply that it would not cover discrimination by perception[52].

3.4.3. The need for a "qualified relationship"

Finally, the question arises whether a "qualified relationship" between the disadvantaged person and the "immediate victim" is required. In his opinion in the Coleman case, the Advocate General explicitly referred to "third persons who are closely associated [author's note] with them and do not themselves belong to the group"[53]. Some authors argue in favour of such a "close relationship", which shall obviously be identical with the nuclear family[54]. Others, however, plead for including non-family ties[55], any "family ties" or "concrete" personal or social bonds[56] or even just "some" connection[57].

The *effet utile* requires a broad understanding of the concept of associated discrimination as shown in the CHEZ[58] case, where mere local proximity was sufficient[59]. Consequently, associated discrimination does not require any form of personal relationship[60]; it is only relevant that the person causing the unfavourable treatment assumes – whether rightly or not – that such a connection exists[61]. It is essential that both members and non-mem-

[52] Connolly, *The "associative" discrimination fiction*, in *NILQ*, 2021, 72, 1, p. 33; in contrast Benedí Lahuerta, *cit.*, p. 810 ff.

[53] Opinion of AG M. Poiares Maduro, 31. January 2008, C-303/06 (Coleman), ECLI:EU:C:2008:61, para. 12.

[54] Bayreuther, *Drittbezogene und hypothetische Diskriminierungen*, in *NZA,* 2008, p. 987 and Eriksson, *cit.*, p. 751 mention child, spouse, partner, sibling, parent.

[55] Lindner, *cit.*, p. 2752; Rosendahl, *cit.*, p. 7 mentions, for example, a bond based on voluntary work; Prasad, Muckenfuss, Foitzik*, Recht vor Gnade*, Beltz Juventa 2020, p. 112 mention family, partners and friends.

[56] Büro für Recht und Wissenschaft, *Evaluation des Allgemeinen Gleichbehandlungsgesetzes*, Nomos, 2016, p. 18; see also ECtHR, 22 March 2016, n. 23682/13 (Guberina v. Croatia), para. 78.

[57] *Commentary on sec. 3*, in Schleusener, Suckow, Plum/plum., *AGG Commentary*, 6th ed. 2022, para. 183; Leder, *cit.*, p. 604.

[58] ECJ, 16 July 2015, C-83/14 (CHEZ Razpredelenie Bulgaria AD), ECLI:EU:C:2015:480.

[59] Atrey, *cit.*, p. 187.

[60] Connolly, *The myth of associative discrimination*, cit., pp. 511 and 517.

[61] Sutschet, *cit.*, p. 252; see also ECtHR, 31. May 2007, n. 40116/02 (Šečič v. Croatia),

bers of the protected group "suffer together"[62] or experience "associated harm"[63]. This does not lead to sanctioning unintended, merely accidental inconvenience[64], but is rooted in the fact that a person disapproves of another person's equal status. If the disadvantaged person does not have any or just a very loose relationship to a person with the protected characteristic, it may however have an effect on the burden of proof[65], especially regarding the causality of discrimination[66]. Furthermore, this could be considered when assessing the amount of the compensation[67].

4. *Further Implications: the work-life-balance-directive*

The fact that caring responsibilities are not fairly divided between the women and men and that women still face structural disadvantages in the labour market, were the main reasons for the adoption of the Work-Life Balance Directive, cf. recitals 6 and 10 dir. 2019/1158/EU[68]. The more likely men are to take up such informal work, the more disadvantages they will face on the labour market. Access to employment or the promotion of their career will be more difficult if they ask for flexible working hours or if they are unavailable to work at short notice due to urgent care responsibilities. Such disadvantages do not result from gender, but from taking on responsibility for a third person – a young child or a person in need of care.

Associated discrimination reacts to stereotypes, which are a result of outdated role models. Yet, discrimination law does not oblige member states to consider new rules in labour law in order to enforce working conditions

para. 66 and ECtHR, 28. March 2017, n. 25536/14 (Škorjanec v. Croatia), para. 56 for a racist hate crime.

[62] SUK, *cit.*, p. 1216.

[63] CONNOLLY, *The myth of associative discrimination*, cit., p. 518. Nonetheless, the author criticises the vagueness of the association criterion, CONNOLLY, *The "associative" discrimination fiction*, cit., p. 40.

[64] HARTMANN, *cit.*, p. 42 f. and CONNOLLY, *The myth of associative discrimination*, cit., p. 536, refers to this as a mere "collateral damage".

[65] BAYREUTHER, *cit.*, p. 987.

[66] SUTSCHET, *cit.*, p. 253.

[67] BAYREUTHER, *cit.*, p. 987.

[68] Dir. 2019/1158 EU of 20 june 2019 on work-life balance for parents and carers, OJ L 188, p. 79.

that enable parents to carry out their care obligations by suspending their work duties[69]. This is the objective of the Work-Life Balance Directive. According to art. 11 dir. 2019/1158/EU, Member States shall take the necessary measures to prohibit less favourable treatment of workers on the ground that they have applied for or taken parental leave or leave for caring for relatives and family members, time off work due to urgent family reasons or flexible working time arrangements. According to art. 14 dir. 2019/1158/EU Member States shall introduce the necessary measures to protect employees from any adverse treatment by the employer or other negative consequences resulting from a complaint for the purpose of enforcing compliance with the directive. Both provisions presuppose an existing employment relation and are similar to the prohibition of victimisation according to sec. 612a BGB. Hence, the question arises of whether effective protection of parents and caregivers is actually achieved.

In Germany, only rudimentary changes in labour law have been introduced[70], such as an obligation of the employer to give reasons for refusing flexible working time arrangements, care leave or family care leave. Furthermore, it is possible to lodge a complaint with the Federal Anti-Discrimination Agency. However, the risk of discrimination of parents in employment and occupation cannot be entirely banned[71].

5. *Need for changes in Equal Treatment Law?*

Associated discrimination is not a new, previously unregulated form of discrimination, but lies within the scope of "traditional" anti-discrimination rules. It does not necessarily lead to a shift from protecting the victim of discrimination to sanction conduct[72], for it presupposes a violation of the dis-

[69] Bayreuther, *cit.*, p. 987.

[70] Act on the further implementation of Dir. 2019/1158/EU of the European Parliament and of the Council of June 20, 2019, on work-life balance for parents and family carers of 19 December 2022, Federal Law Gazette I, p. 2510.

[71] Nebe, Gröhl, Thoma, *Der Diskriminierungsschutz von Sorgeleistenden*, in *ZESAR*, 2021, pp. 157 and 210 criticise this gap.

[72] Connolly, *The "associative" discrimination fiction*, cit., p. 35. The author also criticises that the concept of associated discrimination does not offer any remedy to the third person, *op. cit.*, p. 36. This, however, is not a question of the concept as such but rather of is legal consequences.

advantaged person's dignity due to their – real or perceived – relation to a third person.

Nevertheless, parents are not sufficiently protected from discrimination, especially if they have small children. Due to their caring responsibilities, they are suspected of not being able to perform to their full potential at work. Many parents and caregivers do perceive difficulties on the labour market, but also on the housing market and even in their leisure time[73]. However, they are apparently not aware that they may be discriminated against or even able to claim compensation.

The German Federal Anti-Discrimination Agency has demanded legislative changes, such as the clarification of the category "age" as comprising young as well as old age. Furthermore, it also advocates for including of "parenthood" or "caring responsibilities" as a protected characteristic[74]. In contrast to those categories traditionally protected in EU discrimination law, parenthood is not an unalterable characteristic, but freely chosen. However, like religion or belief, it is based on a highly personal decision and therefore deserves comparable protection[75].

Moreover, it should be clarified that associated discrimination falls within the application area of equality law and that all disadvantaged persons may claim for compensation. These proposals could be promoted by the ECJ, which will soon have the opportunity to clarify its jurisprudence: In January 2024, the Italian *Corte di Cassazione* has asked the ECJ whether associated discrimination can also be applied in case of indirect discrimination of a caregiver and whether the caregiver is, like the disabled person, entitled to reasonable compensation[76]. The decision will be awaited with interest, for it remains controversial whether applying discrimination by association in cases of indirect unfavourable treatment would overstretch this concept, especially for cases of intersectional discrimination[77].

In order to ensure effective protection and to overcome its "conceptual

[73] In detail JANDA, WAGNER, *Diskriminierung von und wegen Kindern*, Nomos, 2022, p. 71 ff.

[74] Unabhängige Bundesbeauftragte für Antidiskriminierung, *Grundlagenpapier zur Reform des Allgemeinen Gleichbehandlungsgesetzes*, Nomos, 2023, p. 3.

[75] JANDA, WAGNER, *cit.*, p. 121; ERNST & YOUNG LAW GMBH, *Rechtsexpertise zum Bedarf einer Präzisierung und Erweiterung der im Allgemeinen Gleichbehandlungsgesetz genannten Merkmale*, Nomos, 2019, p. 95.

[76] Cass., Sez. IV, 17 January 2024, n. 1788/2024.

[77] ATREY, *cit.*, p. 192; cf. ERIKSSON, *cit.*, p. 752; MCCRUDDEN, *cit.*, p. 7 ff.

shortcomings"[78], equal treatment should no longer be thought of in terms of characteristics, but of circumstances[79]. The latter refer to both the attitudes and behaviour of the perpetrator who denies equality and human dignity of their counterparts, and its impact on the victim[80].

6. *Conclusion*

Associated discrimination allows for protection beyond traditional role models. Although the gender-specific discussion of caring responsibilities in case law reflects their statistical distribution in society, it perpetuates traditional role attributions. This suggests that the discrimination of young parents is not problematic if only men and women are equally affected. However, equal access to employment is an essential prerequisite for securing a decent livelihood. Beyond the legal framework, there is a need for greater awareness of associated discrimination – both among potentially disadvantaged persons and legal advisors, in case law and among employers.

[78] HARTMANN, *cit.*, p. 43.

[79] LINDNER, *cit.*, p. 2751 favours a "trans-individual" approach.

[80] *Commentary on sec. 3*, in ERMAN/ARMBRÜSTER, *AGG Commentary*, 17th ed. 2023, para. 9a; HARTMANN, *cit.*, p. 39; ATREY, *cit.*, p. 194.

Abstract

Based on the ECJ's Colman and CHEZ decisions, the authors explain how the wording of European law allows for the assumption of associated discrimination. In this context, the article addresses criticism of the vagueness of the criteria laid down therein and the danger of proliferation and manipulation. Furthermore, the authors establish a link between associated discrimination and the discriminatory characteristics of age and parenthood. German law in particular lacks awareness of the need to understand discrimination on the basis of care work as associated discrimination, from which both practitioners and those affected could benefit.

Keywords

Associative discrimination/discrimination by association, Unfavourable treatment of parents and caregivers, Labour law.