

VORTRAGSREIHE

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Same but Different – Similarities and Differences between US and German Anti-Discrimination Laws

Referenten:

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CONTENT

- Concepts and structure of substantive anti discrimination laws
- „Disparate treatment“ and „unmittelbare Benachteiligung“
- “Disparate impact” and “mittelbare Benachteiligung”
- The role of statistics
- Remedies and procedures
- Affirmative Action
- The future of anti-discrimination law in Germany

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CONCEPTS AND STRUCTURE

United States

Germany

Federal Law	State Law	European Law	National Law
<ul style="list-style-type: none"> Title VII of the Civil Rights Act of 1964 42 U.S.C. §§ 1981, 1983 and 1985 Equal Pay Act Age Discrimination in Employment Act Americans with Disabilities Act (ADA) 	<ul style="list-style-type: none"> Various State laws <u>No</u> state anti-discrimination legislation in a handful of U.S. states, though even there such laws may exist at county or municipal levels. State/local laws usually are parallel to federal laws, but may add protected classifications (e.g. gender identity). 	<ul style="list-style-type: none"> Directive 2000/43/EC („anti-racism directive“) Directive 2000/78/EC (“Equal treatment in employment framework“) Directive 2006/54/EC (“Gender-directive“) Directive 2004/113/EC 	<ul style="list-style-type: none"> General Equal Treatment Act [<i>Allgemeines Gleichbehandlungsgesetz</i>] (AGG) Pay Transparency Act [<i>Entgelttransparenzgesetz</i>] No anti-discrimination laws on the state level.

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CONCEPTS AND STRUCTURE

Protected Classes/Categories

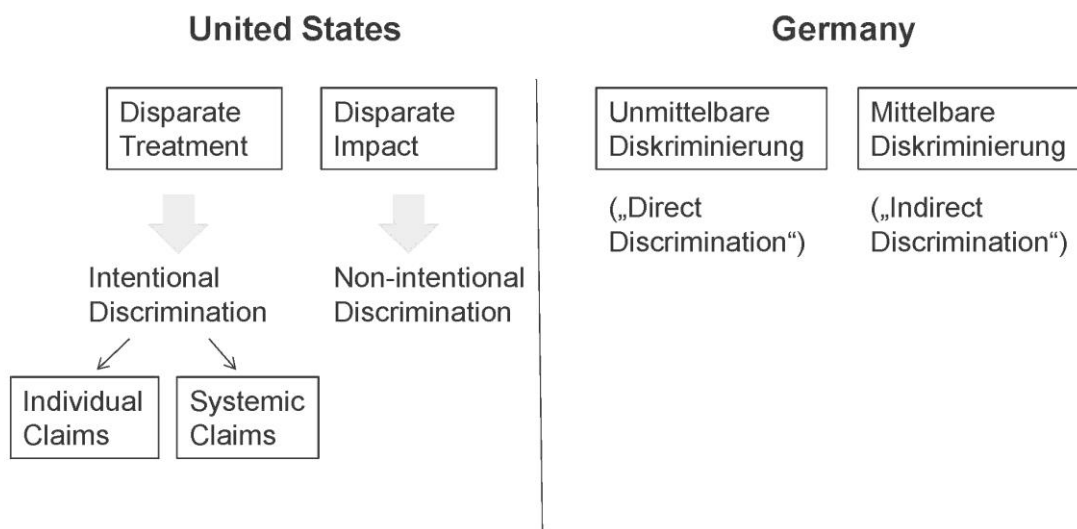
United States	Germany
<ul style="list-style-type: none"> • Race, color (Civil Rights Act of 1964) • Religion (Civil Rights Act of 1964) • National Origin (Civil Rights Act of 1964) • Age (Age Discrimination in Employment Act of 1967) • Sex/Gender (Equal Pay Act of 1963, Civil Rights Act of 1964) • Pregnancy (Pregnancy Discrimination Act) • Disability (Americans with Disabilities Act of 1990) • Gender identity, sexual orientation, other categories protected by some state/local laws. 	<ul style="list-style-type: none"> • Race • Religion / Conviction • Ethnic Origin • Age • Sex/Gender/Pregnancy • Disability • Sexual Identity <p>(all provided by General Equal Treatment Act of 2006)</p>

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CONCEPTS AND STRUCTURE

Kinds of Discrimination



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„DISPARATE TREATMENT“ AND „UNMITTELBARE BENACHTEILIGUNG“

Definition

United States	Germany
<p>Disparate Treatment</p> <p>= Facially disparate / unequal treatment of an applicant or employee that is motivated by the individual's membership in the protected category.</p>	<p>Unmittelbare Benachteiligung („direct discrimination“)</p> <p>= An applicant or employee receives a less favorable treatment by the employer than a different person in a comparable situation because of the individual's membership in the protected category (§ 3 I AGG).</p>

„DISPARATE IMPACT“ AND „MITTELBARE BENACHTEILIGUNG“

Definition

United States	Germany
<p>Disparate Impact</p> <p>=</p> <ul style="list-style-type: none">• Facially neutral criteria that• Produce a disparate exclusionary impact upon a protected group; and• Are not related to job performance or supported by business necessity;• Irrespective of the employer's lack of discriminatory intent.	<p>Mittelbare Benachteiligung („indirect discrimination“) =</p> <ul style="list-style-type: none">• Facially neutral policies, criteria of procedures that• Can disadvantage individuals compared with other individuals in a special way,• Unless those policies, criteria or procedures are justified by a legitimate goal and are necessary to reach that goal and are appropriate (3 II AGG).

„DISPARATE TREATMENT“ AND „UNMITTELBARE BENACHTEILIGUNG“

Proving Disparate Treatment / Unmittelbare Benachteiligung

United States

- Direct evidence („smoking gun“) or
- Circumstantial evidence
 - Shifting of burden of production [*Darlegungslast*]
 - Ultimate burden of persuasion [*Beweislast*] remains with plaintiff

Germany

- Direct evidence [*Vollbeweis*] („smoking gun“) or
- Evidence of unequal treatment + circumstantial evidence as to motivation
 - Shifting of burden of persuasion [*Beweislast*] for non-discriminatory motivation to employer (§ 22 AGG).

„DISPARATE TREATMENT“ AND „UNMITTELBARE BENACHTEILIGUNG“

Circumstantial Evidence (1)

United States

- Plaintiff must establish a *prima facie* case by establishing that
 - (1) P. is member of protected category
 - (2) P. was qualified for the job
 - (3) Adverse employment action (e.g., application was rejected, or employee was discharged)
 - (4) Under circumstances that give rise to inference of unlawful discrimination

Note: Many courts see (4) indicated if (1) - (3) is given.

Germany

- Plaintiff must establish that
 - (1) P. is member of protected category
 - (2) Applied and was qualified for the job
 - (3) Application was rejected
 - (4) Under Circumstances that give rise to inference of unlawful discrimination

Note: (4) is not indicated if (1) – (3) is given.

„DISPARATE TREATMENT“ AND „UNMITTELBARE BENACHTEILIGUNG“

Circumstantial Evidence (2)

United States

- Shifted burden of production for employer:
 - Producing evidence of legitimate non-discriminatory explanation for the decision not to hire/promote, or to fire/demote
- Plaintiff must persuade fact finder (jury/judge) that explanation was pretext by
 - (1) Offering direct evidence or
 - (2) Establishing that defense is not believable

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Germany

- Shifted burden of production for employer:
 - Producing direct evidence [*Vollbeweis*] that there were only non-discriminatory reasons for the employer's decision
- “Mixed Motives” defense not sufficient (see BAG 8 AZR 470/14).

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„DISPARATE TREATMENT“ AND „UNMITTELBARE BENACHTEILIGUNG“

Special Defenses/ Exemptions

United States

- The “BFOQ” Defense for sex discrimination (not race or other classifications) (Title VII of the Civil Rights Act 1964)
- The Religious Discrimination Exemption for religious institutions
- “Undue hardship” for disability (moderate burden) or religion (light burden)

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- The “Occupational Requirement” Defense (§ 8 I AGG)
- The “Religious Institutions” Defenses (§ 9 AGG)
- The “Legitimate Goal” Defense re. Age (§ 10 AGG)

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THE ROLE OF STATISTICS

Statistical Evidence re. Disparate Treatment / unmittelbare Benachteiligung

United States

- Statistical evidence is often used to prove Systemic Intentional Discrimination (a “pattern or practice” of intentional discrimination).
- Statistical evidence can prove a *prima facie* case if
 - the observed composition of employer’s workforce differs from
 - the expected composition of employer’s workforce.

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- Statistical evidence can indicate unequal treatment because of a protected criteria.
- But: even statistical “striking disparity” might not be sufficient without further circumstances (BAG 8 AZR 1012/08).

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THE ROLE OF STATISTICS

Statistical Evidence re. Disparate Impact / mittelbare Benachteiligung

United States

- Statistical evidence is used to prove Disparate Impact.
- P must identify a particular employment criterion that causes the impact.
- Compare the employer’s actual workforce to:
 - (1) qualified applicants, (2) workforce in relevant geographical area.
- Expert testimony often crucial.

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- Statistical evidence can be used to prove a special disadvantageous impact.
- How significant must the impact be?
- No statistical evidence necessary if policy /criteria can disfavor a protected category disproportionately by its very nature.

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REMEDIES & PROCEDURES

Remedies

United States

- Equitable relief
 - Reinstatement, hiring, promoting (extremely rare)
 - Back (front) Pay. In federal law, capped by size of employer.
 - Attorney's Fees
- Legal Relief
 - Compensatory damages (pecuniary and non-pecuniary losses)
 - Punitive Damages (rare)

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Germany

- No Equitable relief
 - No reinstatement, hiring, promoting
 - No attorney's fees at trial court stage
- Only Legal Relief
 - Compensatory damages (pecuniary and non-pecuniary losses)
 - No punitive damages
 - Statute of limitations 2 months

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REMEDIES & PROCEDURES

Procedures

United States

- Suits by individuals
- Suits by the EEOC
- Class actions
- Jury trial / bench trial
- Pre-trial discovery
- Mandatory arbitration (by which employers may avoid class actions).

Germany

- Individual suits
- No suits by governmental agencies
- No class actions
- No jury trial / only bench trial including lay judges
- No mandatory arbitration

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AFFIRMATIVE ACTION

Definition

United States

Affirmative Action
= Preferential treatment for race or sex to eliminate manifest imbalances in traditionally segregated job categories or to avoid or remedy an unintentional disparate impact.

Rare. Er must show systemic past discrimination. That showing risks suits from minorities; aff action risks suits from majority.

Germany

Positive Maßnahmen („positive action“)
= Differential treatment to prevent or remedy existing disadvantages resulting from criteria protected under sec. 1 of the Equal Treatment Act (§ 5 AGG).

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THE FUTURE OF ANTI-DISCRIMINATION LAWS IN GERMANY?

- Will it ever be like in the United States?
- Will there ever be class actions?
- Will there ever be jury trials?
- Will there ever be pre-trial discovery?
- Will there ever be punitive damages / “painful” awards?

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