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"EQUAL TREATMENT OF PERSONS WITH DISABILITIES IN EMPLOYMENT"

German National Report

Sophie Franz, Vanessa Karich, Clara Marie Weiger, Iris Schwarz

A. Introduction

Germany has established a comprehensive legal framework to ensure the equal treatment of persons with disabilities in employment, in accordance with both national and international obligations. The primary legislation governing this area is the General Act on Equal Treatment (AGG), which transposes Directive 2000/78/EC into German law and explicitly prohibits discrimination based on disability in the workplace. Additionally, the Social Code Book IX (SGB IX) plays a central role in promoting the participation and integration of disabled persons in the labour market, outlining specific employer obligations and protective measures.

Additionally, there is a fundamental distinction in Germany between people with a disability and those with a severe disability. For this reason, we have an own severe disability law.

On the one hand, there is a general prohibition of discrimination against disabled people in the Basic Law (GG) and, more specifically, for employees with disabilities in the General Equal Treatment Act (AGG).

On the other hand, there is the law for severely disabled people, which has existed for much longer than the ban on discrimination against disabled people in the Basic Law. The law for severely disabled people is largely regulated in the Social Code IX (SGB IX) around participation for disabled people who fall under the definition of severe disability.

A special role in reducing discrimination in the working lives of disabled people have the trade unions. In collective bargaining and collective agreements, trade unions work to ensure that collective agreements contain provisions that guarantee the protection and promotion of employees with disabilities. They represent the interests of employees with disabilities vis-à-vis employers and support them in individual cases of discrimination. Furthermore, they offer legal advice and support those affected in labour law proceedings, at no cost to the affected trade union members.

Trade unions are also committed to improving legislation on the political level to protect people with disabilities. They are committed to stronger regulations in the Social Code IX (SGB IX) and the General Equal Treatment Act (AGG). Moreover, they organize further training for works councils, human resources managers and employees to raise awareness of the rights and needs of people with disabilities and to actively combat discrimination in the workplace.

B. Report first part

I. Legal framework on equal treatment for persons with disabilities in employment

Equal treatment and non-discrimination of persons with disabilities in employment are important principles in German law. Over the years, Germany has developed a comprehensive legal framework to protect individuals with disabilities from discrimination and to promote their integration into the labour market. This framework consists of constitutional provisions, national laws, and international agreements that ensure equal opportunities and accessibility in employment.

The distinction between persons with disabilities and those with severe disabilities plays a crucial role in German law, particularly in the Social Code IX (SGB IX), which outlines specific rights and obligations. Additionally, the Basic Law (GG) establishes a fundamental prohibition of discrimination based on disability, which has been reinforced by case law and the European Union's Directive 2000/78/EC. The General Equal Treatment Act (AGG) serves as Germany's primary anti-discrimination law, ensuring protection in various aspects of employment.

Further legal instruments, such as the Disability Equality Act (BGG), the Social Code (SGB), and the UN-CRPD, provide additional guidelines and obligations for employers, particularly in terms of reasonable accommodations and reintegration measures. Over time, the definition of disability in German law has evolved, aligning with international standards and recognizing the role of environmental and social barriers in restricting participation in society.

1. General legal framework on non-discrimination in employment for with disabilities in Germany

First there is the difference between disabled people and people with a severe disability. According to the law for severely disabled people, the Social Code IX (SGB IX), people are disabled if their physical function, mental ability, or mental health is likely to deviate from the condition typical for their age for more than 6 months and therefore their participation in life in society is impaired.

People who are disabled according to this definition are severely disabled if their "degree of impairment" reaches at least 50%. The degree of impairment depends on which illnesses the disabled person suffers from and how severe these illnesses are. This is then calculated to determine the degree of severe disability.

In addition to the regulations on severely disabled people in Social Code IX (SGB IX), there is also the prohibition of discrimination on the grounds of disability in Article 3 of the Basic Law (GG) and in the General Equal Treatment Act (AGG).

a. Basic law

The general legal framework on non-discrimination for persons with disabilities is the Basic Law (GG) In Article 3(3) GG explicitly states: "No person shall be disadvantaged because of disability." This constitutional provision, incorporated into the constitution 30 years ago,[1] establishes the principle of equal treatment and prohibits discrimination against persons with disabilities.

For a long time, however, it was questionable how the prohibition of discrimination on the grounds of disability in Article 3(3) GG would affect employment relationships. In the case law of the labour courts, the theory of the indirect horizontal effect of fundamental rights for the prohibition of discrimination has long been advocated. The indirect horizontal effect (mittelbare Drittwirkung) of fundamental rights is generally understood in German constitutional law to mean that fundamental rights apply in private law via private law's general clauses that require interpretation and their objective value content[2].

However, both the literature and case law now take the view that the theory of the indirect horizontal effect of fundamental rights is not required for the prohibition of discrimination on the grounds of disability.[3] Rather, this fundamental right is an objective value decision by the constitutional legislator to grant special protection to people with disabilities.[4] It follows that the prohibition of discrimination against disabled people as part of the objective value system also flows into the interpretation of civil law. It therefore automatically has an effect when interpreting and applying labour law standards.[5]

b. EU Directive 2000/78/EC

The Directive is a major part of EU labour law which has the goal to combat discrimination on grounds of disability, sexual orientation, religion or belief and age in the workplace.

The EU Directive has to be implemented with the expiry of the transposition period since 2 December 2003, after which it came into force on 2 December 2000. Germany made use of the three-year extension of the transposition deadline for the directive and implemented it on 4 August 2006 with the Act on the Implementation of European Directives Implementing the Principle of Equal Treatment.[6] This Act also served to transpose Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. The most important

[1] *Jarass*, Jarass/Pieroth GG, Art. 3 para. 160.
[2] Bundesverfassungsgericht (BVerfG) (Constitutional Court) January 15, 1958, BVerfGE 7, 198 para. 205.
[3] *Deinert*, in: SWK-BehindertenR Schwerbehindertenrecht arbeitsrechtliches para. 7; Bundesarbeitsgericht (BAG) (Federal Court of Labour Law) August 26, 2008 (1 AZR 354/07); Bundesarbeitsgericht (BAG) (Federal Court of Labour Law) November 10, 1994 (8 AZR 131/93).
[4] Bundesverfassungsgericht (BVerfG) (Constitutional Court) October 8, 1997, BVerfGE 96, 288 para. 304.
[5] Bundesverfassungsgericht (BVerfG) (Constitutional Court) March 24, 2016, Neue Juristische Wochenschrift (NJW) 2016, 3013 para. 11.
[6] Bundesverfassungsgericht (BVerfG) (Constitutional Court) July 6, 2010, BVerfGE 126, 286 para. 292-293.

component of this transposition law is the AGG. The AGG is the primary anti-discrimination law in Germany, it prohibits discrimination in employment, including on the grounds of disability.

But since the Egenberger case, the prohibition of discrimination under Art. 21 of the EU Charter of Fundamental Rights (EU-GrCh) has direct effect in private law relationships. The more recent case law of the Federal Constitutional Court also ruled that decisions must also be reviewed directly against the standard of EU-GrCh in order to ensure effective protection of fundamental rights.[7]

2. Legal sources for the promotion of reintegration of a person with disabilities

The legal sources on non-discrimination on the ground of disability and for the promotion of reintegration of a person with disabilities are the AGG, the Disability Equality Act for the public sector (BGG), the SGB and the UN-CRPD.

a. AGG

As the primary anti-discrimination law in Germany the AGG prohibits discrimination in employment, including on the grounds of disability in §§ 1, 7 and 19. It covers all aspects of employment, such as hiring, promotions, working conditions, and terminations.

The AGG has a dual objective, which is stated in § 1. Firstly, discrimination for the reasons stated in the law should be prevented. Secondly, discrimination should be eliminated if it has occurred. The law therefore contains both preventive and remedial provisions. In this way, it does justice to the principle of effet utile.[8]

The objective of preventing discrimination is achieved by prohibiting any discrimination based on one or more of the reasons listed in § 1 (§ 7(1)), prohibiting discriminatory tenders (§ 11), the employer's organizational and protective obligations (§ 12) and the obligations of employers and social partners (§ 17(1)).[9]

The AGG has various means of reacting to the elimination of discrimination that has occurred. The most important instruments for this are the damages and compensation claims (§ 15 (1, 2), § 21(2)), the performance claims (§ 7(1) AGG or § 7 EntgTranspG) and the removal claims provided for in general civil law (§ 21(1)). To give the prohibitions on discrimination a real effect and to restore equality, the regulations on the distribution of the burden of proof (§ 22) are particularly important. To prevent a repetition of discrimination that has already occurred, there is also a requirement for effective

[7] Bundesverfassungsgericht (BVerfG) (Constitutional Court) November 6, 2019, Neue Juristische Wochenschrift (NJW) 2020, 314 para. 44 ff..
[8] *Däubler*, in: Däubler/Beck AGG § 1 para. 1-2.
[9] *v. Roetteken*, in: v. Roetteken AGG § 1 AGG para. 3.

protection of discriminated persons by the employer (§ 12(3, 4)), a right to injunctive relief (§ 21(1) sentence 2) and the right of appeal for victims of discrimination (§ 13).[10]

b. Disability Equality Act for the public sector (BGG)

In Germany, a fundamental distinction is made between employment relationships under private law and those under public law. The AGG only applies to employment relationships under private law; for public-law employment relationships, the law does not apply. For the public-law employment applies therefore the BGG.

Public sector employment relationships employ people who work in public administration, in the courts, in the police force and in schools. However, since Germany is a federal state, a distinction is made in the public service between employees at the federal level and those at the federal states. This is why the BGG only applies to employees at the federal level; the 16 federal states have their own equality laws, which are often similar.

The Disability Equality Act for the public sector (BGG) therefore also implements the EU Directive 2000/78/EC and the UN-CRPD with effect for the federal level of government.

The aim of the law is to eliminate existing disadvantages for people with disabilities and to prevent further disadvantages. To this end, disabled people should be guaranteed equal participation in life in society and be enabled to lead a self-determined life. In § 7(1) refers precisely to the AGG. The "harassment" defined in § 3(3, 4) AGG is transferred to the terminology of the BGG.[11]

c. The SGB

The § 33c SGB I prohibits discrimination on the grounds of race, ethnic origin, or disability for claiming social rights. Social Code IX (SGB IX) governs the rights of persons with disabilities, particularly focusing on their integration into society and the labour market.

It mandates employers to make reasonable accommodations for employees with disabilities and defines specific obligations, such as employment quotas for larger companies.

[10] *v. Roetteken*, in: v. Roetteken AGG § 1 AGG para. 4.
[11] *Ritz*, in: Kossens/von der Heide/Maaß, SGB IX mit BGG § 1 para. 4-6.

d. The UN-CRPD

Germany ratified the UN CRPD in 2008.[12] Since March 2009 the convention is binding law.[13] In Germany, no concrete implementation act is required for the legal obligations of international treaties to take effect. This is governed by Article 59(2) GG at the constitutional level. It is only necessary for domestic validity that the German parlement approve a so-called "approval law" which authorizes the Federal President to ratify the international treaty.[14] This approval law also contains the order to apply the law for the international treaty.[15] The treaty law gives the UN-CRPD the status of a statutory law at the federal level in Germany. This means that it is below the GG in the hierarchy of norms.[16]

Apart from this domestic law the UN-CRPD has also the function aid interpretation for determining the content and scope of fundamental rights especially for the prohibition of disabled people in Article 3(3) GG.[18] [17] In addition to this interpretive aid for the German understanding of disability in Article 3(3) GG, the principle of friendliness under international law must be observed.[18] Accordingly, "the German state organs are obliged to follow the international legal norms that bind the Federal Republic of Germany and, if possible, to refrain from violating them."[19]

The government contact point required under Article 33(1) of the UN CRPD is located at the federal level at the Federal Ministry of Labor and Social Affairs. It assumes responsibility for managing the implementation process and the cross-departmental awareness-raising measures. The committee set up at the Federal Ministry of Labor and Social Affairs is made up of representatives of social, disability and welfare associations, the social partners and academia.[20]

A central point in the application of the Convention in Germany was the Federal Participation Act in 2016. As will be explained in more detail in the next point, this has adapted the definition of disability in Germany to a modern definition.

In the report on the state review of the UN Committee on the Rights of Persons with Disabilities, Germany was criticized for continuing to make too little progress in dismantling the special education system and the workshops in which many people with disabilities go to school and work. There is still too

[12] BGBl. 2008 II S. 1420.
[13] GBl. 2009 II S. 812.
[14] *Jarass*, in: Jarass/Pieroth, GG Art. 59 para. 15.
[15] Bundesverfassungsgericht (BVerfG) (Constitutional Court) May 4, 2011, BVerfGE 128, 326 para. 367.
[16] Bundesverfassungsgericht (BVerfG) (Constitutional Court) Ocotber 13, 2016, BVerfGE 143, 101 para. 114.
[17] Bundesverfassungsgericht (BVerfG) (Constitutional Court) December 16, 2021, Neue Juristische Wochenschrift (NJW) 2022, 380 para. 383.
[18] Bundesverfassungsgericht (BVerfG) (Constitutional Court) October 14, 2004 BVerfGE 111, 307 para. 318.
[19] Bundesverfassungsgericht (BVerfG) (Constitutional Court) December 15, 2015 BVerfGE 141, 1 para. 70.
[20] B*anafsche*, in: SWK Behinderten Behinderung para. 36.

much clinging to the exclusion of disabled people instead of creating the conditions for comprehensive inclusion of disabled people.

II. Definitions of the persons with disabilities

Before the concept of disability was included in the GG as grounds for discrimination, the law on severely disabled persons had already existed for a much longer period. The first law on this issue was passed in 1923 with the aim of guaranteeing the livelihoods of war victims and enabling them to be rehabilitated into the labour market.[21]

A major change came with the amendment of the law in 1974. This meant that, in accordance with the recommendation of ILO Convention no. 99, more people were included in the definition of severe disability. Now, not only war victims and victims of work accidents with a reduction in their ability to work of at least 50% were counted as severely disabled, but all disabled people who have reached a certain degree of disability and are therefore in need of protection.[22]

This has been the last change of the definition before the AGG came into force. Since then, there is not one specific definition of disabled people in German law. Even though the GG and the AGG both use the term of disabled but without an exact definition in the respective laws.[23] For this reason, there has been a development of the definitions for disabled people in German law in the past 30 years. The Constitutional Court gave a definition of the term disabled in 1998. According to this definition people are not disabled by social attitudes but they are disabled generally.

Before Germany accepted the UN-CRPD disability was defined as any functional impairment that is not merely temporary and is based on an irregular physical, mental or psychological condition, the person affected must be impaired in their ability to lead an individual and independent life in the long term.[24] An abnormal condition is a condition that deviates from what is typical for a person's age; a period of more than six months is considered to be not merely temporary. This definition also corresponds to the definition used by the World Health Organisation (WHO) at the time, according to which a disability results from damage, functional impairment, and social disadvantage.[25]

[21] *Deinert*, in: SWK BehindertenR Schwerbehinderung para. 2.
[22] *Deinert*, in: SWK BehindertenR Schwerbehinderung para. 3.
[23] *v. Roetteken*, in: v. Roetteken AGG § 1 AGG para. 505.
[24] *v. Roetteken*, in: v. Roetteken AGG § 1 AGG para. 505.
[25] Oberverwaltungsgericht Lüneburg (OVG Lüneburg) (Higher Administrative Court) July 31, 2012, (5 LB 33/11 – para. 61).

So, this definition of disabled people was referenced by the government when they transposed the EU Directive 2000/78/EC with the AGG.[26] The definition used changed especially after accepting the UN-CRPD with laws to change the definition in 2016.

The definition of disability in SGB IX and the BGG was amended so that the definition of disability in German law meets the requirements of the UN-CRPD.[27] Since 27 July 2016, § 3 BGG reads: "Persons with disabilities within the meaning of this Act are persons who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with attitudinal and environmental barriers, may prevent them from participating in society on an equal basis with others. Long-term is defined as a period that is highly likely to last longer than six months.

Since 1 January 2018, § 2(1) SGB IX reads: "Persons with disabilities within the meaning of this Act are persons who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with attitudinal and environmental barriers, are very likely to prevent them from participating in society on an equal basis with others for more than six months. An impairment according to sentence 1 exists if the physical and health condition deviates from the typical condition for the person's age." [28]

Both laws now each contain their own definition of disability instead of the previous uniform definition in order to emphasise the different legislative purpose. For protection against discrimination and accessibility under the BGG, the reference to age should not be relevant, but for social benefits and severely disabled status under SGB IX, it may be relevant.[29]

According to recent case law of the Federal Constitutional Court, the decisive factor for the assumption of a person's disability is whether he/she is impaired in the longer term in his/her ability to lead an individual and independent life.[30] Regarding to this, the concept of disability does not cover minor impairments, but longer-term restrictions of significance, whereby the reason for the disability should not be relevant.[31] This includes people with a mental illness if the impairment is long-term and of such a nature that it may prevent the person concerned from participating fully, effectively and equally in society.[32]

[26] BT/Drs. 16/80 S. 31; 15/4538 S. 28.
[27] BT-Drs. 18/7824, 21; 18/9522, 227.
[28] BT-Drs. 18/9522, 1.
[29] *Welti*, in: SWK BehindertenR Behinderung para. 14.
[30] Bundesverfassungsgericht (BVerfG) (Constitutional Court) January 29, 2019 Neue Juristische Wochenschrift (NJW) 2019, 1201 para. 1205; Bundesverfassungsgericht (BVerfG) (Constitutional Court) Neue Juristische Wochenschrift (NJW) 2022, 380 para. 383.
[31] *v. Roetteken*, in: v. Roetteken AGG § 1 AGG para. 505a.
[32] Bundesverfassungsgericht (BVerfG) (Constitutional Court) January 29, 2019, Neue Juristische Wochenschrift (NJW) 2019, 1201 para. 1205.

The result of this development is that § 3 BGG in the same way as Art. 1 sentence 2 UN-CRPD does not stipulate any requirements regarding the weight of the impairment but is based on the criterion of the long-term nature of the impairment.[33]

C. Report second part

I. Overview

1. General principle of equal treatment

The general principle of equal treatment under Art. 3 GG is recognized in employment law by established case law and is also indirectly mentioned in Section 16 (1) sentence 4 BetrAVG. Although Art. 3 GG primarily applies in the relationship between citizens and the state (so-called direct third- party effect), it can also have an indirect effect in private law in certain cases. The Federal Constitutional Court clarified that fundamental rights can also have an indirect effect between private parties if one side has a superior position. In employment law, such an indirect third-party effect is often affirmed, as the employment relationship is characterized by a structural imbalance between employer and employee.[34] Through its authority to issue instructions, the employer assumes a regulatory role that is comparable to that of the state. Therefore, the general principle of equal treatment can also be applied to private employment relationships under certain conditions. For this principle to be violated, three further conditions must be met:

1. Existence of unequal treatment: An employee or a group of employees is disadvantaged compared to other comparable employees.[35]

2. Reference to collective measures: The unequal treatment must general company regulations or repeated decisions, not to one-off individual measures.[36]

3. No objective reason: Unequal treatment is only impermissible if there is no objectively comprehensible objective reason.[37]

It is important to note that this general principle of equal treatment does not apply to the establishment of an employment relationship. External persons who merely apply for a job cannot therefore invoke it. However, they are protected by the General Equal Treatment Act (AGG).[38]

[33] v. *Roetteken*, in: v. Roetteken AGG § 1 AGG para. 505a.
[34] Martin Becker, in Däubler/Hjort/Schubert/Wolmerath (Eds.), *Arbeitsrecht*, 5th ed. (2022), para. 45-57; BVerfG, judgement of 15 January 1958, 7, 198.
[35] Bundesarbeitsgericht (Federal Labour Court, BAG), judgment of May 26, 1993, case 5 AZR 171/92.
[36] Bundesarbeitsgericht (Federal Labour Court, BAG), judgment of June 21, 2000, case 5 AZR 822/98.
[37] Bundesarbeitsgericht (Federal Labour Court, BAG), judgment of September 14, 2011, case 10 AZR 526/10.
[38] BAG, judgment of December 16, 2008, case 9 AZR 985/07; BAG, judgment of March 18, 2010, case 8 AZR 77/09.

2. AGG

The General Equal Treatment Act (AGG) protects employees and applicants from discrimination in all phases of the employment relationship.[39] The examination of a violation of the prohibition of discrimination in accordance with Section 7 (1) AGG begins with the question of whether the personal and material scope of application is open. According to Section 6 (1) AGG, protection applies not only to employees but also to applicants in order to ensure non-discriminatory access to employment. Discrimination exists if a person is treated less favourably on the basis of a characteristic listed in Section 1 AGG, such as a disability. The principle then applies that any unequal treatment on the basis of a discriminatory characteristic, including a "frowned upon characteristic" constitutes unequal treatment without objective grounds and therefore always a violation of the general principle of equal treatment. It is also possible that several characteristics of § 1 AGG may be present. Such a case is explained/mentioned in the final section of the report.

Direct discrimination exists if the unequal treatment is directly attributable to the characteristic(§ 3 (1) AGG). Indirect discrimination occurs when seemingly neutral regulations or criteria actually discriminate against people with disabilities(§ 3 (2) AGG).

A central element of the AGG is the burden of proof regulation according to § 22 AGG. As soon as the disadvantaged person presents evidence of discrimination, the employer must prove that there is no unlawful discrimination or that there is a permissible justification in accordance with § 8 to § 10 AGG.

Irrespective of the grounds for justification in the AGG, the employer can invoke the objection of abuse of rights under Section 242 BGB (principle of good faith). This objection applies if action or claim is asserted improperly, although the actual purpose of the AGG (protection against discrimination) is not affected. Example: An applicant who demonstrably only applies in order to claim compensation. Justification of discrimination in accordance with §§ 8-10 AGG is only possible in certain cases. Direct discrimination based on a characteristic listed in Section 1 AGG, in particular a disability, cannot be justified if it is based solely on this characteristic.[40]

3. Degree of disability

The degree of disability (GdB) is a measure for determining a person's physical, mental or psychological impairment and is used to assess whether and to what extent a disability exists. The basis for the assessment are the health impairments derived from the medical criteria standardized there (see § 152 SGB IX). A person is considered severely disabled starting from a GdB of 50% (§ 2 (2) SGB IX). The GdB results from a certain number of points derived from the personal clinical picture. In this context, a

[39] Thüsing, in *Münchener Kommentar* zum BGB (10th ed., 2035), § 2 AGG paras. 1,2.
[40] BAG, judgment of January 26, 2017, case 8 AZR 848/13.

(severely) disabled person's pass can be issued in Germany(§ 152 (5) SGB IX. If the GdB is between 30 and 49, an application for equal status can be made (§ 2 (3) SGB IX). However, this equality is not automatically granted, but by an administrative act of the Federal Employment Agency (§ 151 (2) SGB IX). The advantage of equal status is that those affected receive almost the same protection as severely disabled people, although there are certain exceptions that must be considered separately. People with a GdB of less than 30 cannot be treated equally. Protection for severely disabled persons is generally provided by law, regardless of whether the employer is aware of it. For those with equal status, protection only comes into effect with the official decision on equal status. Case law has repeatedly clarified that the determination of GdB must be based solely on medical criteria and may not be influenced by social or economic aspects.[41] A retroactive determination of the GdB is generally possible if corresponding medical evidence is available.[42]

II. Equal treatment in the recruitment phase

1. Invitation

According to § 165 sentence 3 SGB IX, public employers are obligated to offer severely disabled applicants (GdB ≥ 50) a job interview, provided they are not obviously unsuitable. Equally qualified applicants (GdB 30-49 with a notice of equal treatment in accordance with Section 2 (3) SGB IX) are not entitled to an invitation, as Section 165 sentence 3 SGB IX only applies to severely disabled people. However, they are subject to the general prohibition of discrimination under Section 7 AGG and may not be discriminated against when filling vacancies.[43]

Persons with a GdB of less than 30 are not subject to the special provisions of SGB IX, but to the general prohibition of discrimination under Section 7 AGG. A breach of the obligation to invite severely disabled persons is an indication of discrimination, meaning that the employer must prove that the rejection was not due to the disability (Section 22 AGG)[44]. The BAG has ruled that subsequent invitation does not reverse discrimination that has already occurred.[45] Private employers are not subject to this obligation, but must observe the prohibition of discrimination pursuant to Section 7 AGG.

Indirect discrimination pursuant to Section 3 (2) AGG exists if an apparently neutral regulation effectively discriminates against a certain group without this being objectively justified. An employer can only justify a non-invitation if the applicant is obviously unsuitable or the selection is based on non-discriminatory, legitimate criteria.[46] Computer-aided procedures that negatively assess interruptions in

[41] BSG, judgment of October 30, 2014, case B 9 SB 2/13 R; BAG, judgment of July 7, 2011, case 8 AZR 580/10.
[42] BSG, judgment of April 24, 2008, case B 9/9a SB 10/06 R.
[43] BAG, judgment of January 26, 2017, case 8 AZR 736/15.
[44] BAG, judgment of January 26, 2017, case 8 AZR 736/15.
[45] BAG, judgment of August 22, 2013, case 8 AZR 563/12.
[46] BAG, judgment of June 26, 2014, case 8 AZR 547/13.

employment or longer periods of study, for example, are particularly problematic. If severely disabled or equivalent applicants are structurally disadvantaged as a result, this may constitute indirect discrimination. In cases of doubt, the burden of proof is reversed in accordance with Section 22 AGG: the employer must prove that there was no discrimination.

2. Right to ask questions and duty of disclosure

Persons with a severe disability or equal status may not be asked about their disability during the application process. Such a question violates the prohibition of discrimination in § 7 Para. 1 in conjunction with § 1 AGG, as it has no legal basis if the disability does not affect work performance.[47]

The only exception is if the employer specifically wants to promote severely disabled people. In this case, the question is permissible, but the answer remains voluntary. If an applicant refuses to answer the question about an inadmissible severe disability, this must not be to his or her disadvantage and a rescission of the employment contract would be excluded in accordance with Section 123 BGB.[48] Even in the case of persons with a degree of disability below 30 who are not considered severely disabled and do not enjoy special protection against dismissal in accordance with SGB IX, such a question is generally inadmissible. The only exception is if the disability relates to a significant occupational requirement. For example, a significant physical limitation in jobs that require a high level of physical exertion may justify a permissible question about health-related suitability.

In principle, an applicant is not obliged to disclose a disability or severe disability. There is only an obligation to disclose if the disability significantly impairs the performance of the advertised job. If there is a health restriction that is decisive for suitability, a deliberate deception about one's own ability to work may result in a rescission of the employment contract in accordance with Section 123 of the German Civil Code (BGB) or, subsequently, termination. However, if there is no significant impairment, an inadmissible question may be answered untruthfully without this having any legal consequences.

III. Equal treatment regarding employment conditions

1. General information

In accordance with Section 164 (4) SGB IX, employers are obliged to design the workplace in such a way that people with disabilities can carry out their work under reasonable conditions. This obligation includes the provision of technical aids, ergonomic adjustments to the workplace and accessibility measures. Employers are therefore not only passively obliged to protect against discrimination, but

[47] BAG, judgment of February 16, 2012, case 8 AZR 697/10; BAG, judgment of December 19, 2013, case 8 AZR 838/12.
[48] BAG, judgment of July 7, 2011, case 2 AZR 396/10.

must also take active measures to ensure the professional participation of people with disabilities [49]. An important aspect of this obligation is the necessity and reasonableness of the measures. Employers are not employers are not obliged to make every desired adjustment, but only those that actually enable work to be carried out and are economically justifiable. The Federal Labor Court has clarified that employers must take "reasonable measures" provided that these do not involve disproportionate effort. In practice, however, the question of reasonableness can lead to legal disputes, especially if employers invoke economic or organizational reasons to refuse certain adjustments.[50]

2. Differences for severely disabled persons, equivalent persons

While the obligation to organize the workplace applies to all employees with disabilities, there are significant differences between severely disabled persons (GdB≥ 50), persons with equivalent status (GdB 30-49 with recognition in accordance with Section 151 SGB IX) and other disabled employees (GdB < 30). Severely disabled employees enjoy special protection under employment law as a result of several provisions of SGB IX. These include, in particular, the right to a reduction in working hours in accordance with Section 164 (5) SGB IX, which is only available to severely disabled and equivalent employees. A severely disabled employee can therefore request that their working hours be reduced if this is necessary due to their disability. Employees with equivalent status cannot invoke this provision directly, but may have to reach an individual agreement with the employer or refer to general employment law to adjust their working hours .[51]

There is a further difference in the exemption from overtime. According to Section 207 SGB IX, severely disabled employees may not be asked to work overtime against their will. This regulation is intended to prevent overwork, which can be particularly problematic due to the health restrictions of severely disabled people. However, employees of equal status are exempt from this provision, although their impairments often have comparable effects in practice. This could constitute indirect discrimination within the meaning of Section 3 (2) AGG, as the workload may exist regardless of the formally recognized GdB.[52]

The differentiation is even more serious in the case of additional leave in accordance with Section 208 SGB IX. Severely disabled employees receive five additional days of leave per year if they are employed in a regular work a five-day week. Employees of equal status are excluded from this, although they may suffer similar stresses in their day-to-day work. This raises the question of whether a constitutionally

[49] Rolfs, in *Erfurter Kommentar zum Arbeitsrecht (*25th ed. 2025) Section 164 SGB IX para. 13.
[50] BAG, judgment of December 19, 2013, case 6 AZR 190/12.
[51] Greiner, in Neumann/Pahlen/Greiner/Winkler/Westphal/Krohne, SGB IX (15th ed., 2024), Section 164 paras. 68-72.
[52] Rolfs, in *Erfurter Kommentar zum Arbeitsrecht* (25th ed., 2025), § 207 SGB IX, para. 1.

permissible differentiation exists or there is unequal treatment within the group of people with disabilities.

3. Case law Unequal treatment

The differentiation between employees with severe disabilities, employees with equivalent status and other employees with disabilities has been critically questioned several times in employment law practice and case law. The Federal Constitutional Court has generally recognized that a graduated system of protection in social law is permissible, provided that it is based on a factual differentiation. This could, for example, result from a higher need for protection of severely disabled people. However, the court also emphasized that any unequal treatment must be proportionate and objectively justified.[53]

The Federal Labor Court clarified that insufficient consideration of the needs of disabled employees can constitute indirect discrimination if it is not objectively justified. This could apply in particular to cases in which employees of equal status are excluded from regulations, even though they have comparable restrictions to severely disabled employees.[54]

4. Duty of disclosure in the employment relationship

Another problematic aspect is the regulation on the disclosure of disabilities. In principle, employees are not obliged to disclose their disability. However, the BAG ruled that employees who do not disclose their disability cannot later assert claims for adjustment measures or compensation due to discrimination.[55] This means that employees are effectively forced to disclose their disability if they wish to claim their protection rights. This creates a tension between the right to privacy and the need to maintain protective measures.[56]

5. Support measures for employers

There are various financial incentives for employers to hire people with disabilities. According to Section 185 (3) SGB IX, wage subsidies can amount to up to 70% of the salary and can be granted for a maximum of 24 months. These subsidies apply to both severely disabled employees and employees of equal status. However, it is problematic that some other support measures are only available to severely disabled employees, which could tempt employers to give preference to severely disabled employees when hiring new staff.[57]

IV. Equal treatment during the termination phase

[53] BVerfG, judgement of October 11, 2005, case 1 BvR 1335/03.
[54] BAG, judgment of January 22, 2009, case 8 AZR 906/07.
[55] BAG, judgment of February 16, 2012, case 6 AZR 553/10.
[56] BAG, judgment of February 16, 2012, case 8 AZR 697/10.
[57] BAG, judgment of December 19, 2013, case 8 AZR 838/12.

Severely disabled persons enjoy special protection against dismissal in accordance with §§ 168 et seq. of the German Social Code IX. Ordinary dismissal is only possible with the prior consent of the Integration Office. The integration office checks whether the dismissal can be based on operational, personal or behavioural reasons and whether continued employment is possible through reasonable accommodations or other measures.

This special protection supplements the provisions of the General Equal Treatment Act (AGG). A dismissal that is based on a disability is generally considered discrimination in accordance with Section 3 (1) AGG and can therefore be invalid. Persons of equal status who cannot find or keep a suitable job due to their disability without equal status also benefit from special protection against dismissal. Employees with a degree of disability below 30 are not subject to the special protection against dismissal under SGB IX, but can derive protection from the AGG if they are discriminated against due to their disability.

Employers are obliged to take reasonable precautions to prevent discrimination. This includes measures such as redesigning the workplace, technical and organizational adjustments, retraining and the implementation of occupational integration management (BEM). If no reasonable adjustment is possible, dismissal may justify under certain circumstances. However, the employer must prove that it has taken all possible measures to enable continued employment. A dismissal that is essentially based on disability constitutes direct discrimination in accordance with Section 3 (1) AGG and is invalid if there is no justification in accordance with Section 8 (1) AGG. If a dismissal is intended, special regulations apply: The approval of the Integration Office is required, the works council must be consulted and, in the case of collective bargaining or contractual non-terminability, a special examination of reasonableness is carried out. The employer is also obliged to consider alternative employment.

The Dismissal Protection Act (KSchG) applies in undertakings with more than ten employees at least six months' service (§§ 1, 23 KSchG). Dismissal is then only permissible for operational, personal or behavioural reasons. The AGG supplements the KSchG by ensuring that a dismissal is not discriminatory. According to Section 22 AGG, employers must prove that the dismissal is not based on the disability. Dismissals of people with disabilities can a form of discrimination, especially if they are made solely on the basis of disability, do not take into account reasonable precautions for continued employment have been taken or the Integration Office has not given its approval. Nevertheless, dismissal may be justified in certain cases, for example if continued employment is objectively impossible, if the employee is no longer able to fulfil their essential contractual obligations on a permanent basis or if there have been serious breaches of duty.

Affected employees can take action against a discriminatory dismissal and claim damages or compensation in accordance with § 15 AGG. Case law shows that dismissal on the grounds of disability can

constitute direct discrimination and that employers are obliged to seriously consider alternative employment opportunities.

D. Report third part

I. Obligations of employers

1. Reasonable accommodations

a. Implementation of Directive 2000/78

Germany passed the Gesetz zur Umsetzung europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung on August 4th, 2006, implementing not only Directive 2000/78, but also several other Directives concerning equal treatment.[58] The central part of this implementation law was the creation of the General Act on Equal Treatment (AGG). It further included a few changes to the Social Code, designed to bring them into accordance with and clarify the newly passed law, particularly the ninth Book (SGB IX) dealing with persons with disabilities. While the SGB IX is lex specialis as regards the treatment of persons with severe disabilities in the workplace, the AGG offers a specific basis of claim for damages due to discrimination in §15 AGG.

b. Definition §7(2) BGG; 164(4) SGB IX

Reasonable accommodations are defined in §7(2) of the the Act on Equal Opportunities for Persons with Disabilities (BGG) as measures that are in individual cases both suitable and necessary to ensure a disabled person's ability to enjoy the same rights as a non-disabled person. Not establishing reasonable accommodations is prohibited discrimination according to §7(2) BGG. While the BGG only obligates public employers, the definition remains relevant for private employers as well. In contrast to the regulation in the SGB IX however, §7 BGG is applicable to all disabled, not exclusively the severely disabled. According to §164(4) s.1 nr. 4 SGB IX, which somewhat clarifies the obligations of employers in case of severe disability, all equipment needs to be suitable for the disabled person; the organization of the workplace and the structure of the work itself, including working hours need to be suitable for the disabled person as well. §164(4) SGB IX also requires employers to offer opportunities to use their abilities and expertise to the fullest (S.1 no. 1), opportunities for special trainings (S.1 no. 2, no. 3) and to offer all necessary technical tools (no. 5).

Despite the AGG being the central law governing discrimination directly created to implement the EU directives on discrimination, it contains no definition for reasonable accommodation. This was sharply criticized by the scathing report of the CRPD from 2015.[59] A proposal for such a definition was made by

[58] These include 2000/43; 2002/73; 2004/113.

[59] Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Germany, from 13 May, 2015, https://digitallibrary.un.org/record/811105?v=pdf (last visited March 12th 2025).

prof. Eichenhofer in his report for the Federal Anti-Discrimination Agency from 2018[60] but has not yet been implemented.

c. Collective agreement provisions / bylaws

Because of the federalist character of Germany, there is no central collection of bylaws concerning protection of workers with disabilities. While the Tarifverträge der Länder –collective agreement provisions for public servants – are largely homogenous across Germany, they contain few to no provisions dealing with disability, beyond the question of wages. State-specific provisions regarding concrete requirements of reasonable accommodation are scattered across state laws, bylaws and administrative regulations and can be difficult to find.[61] They only apply to civil servants, not the private sector.

d. Consequences of unreasonable accommodation / Remedies

There are not really any mechanisms by which the state can compel companies to comply with regulation regarding reasonable accommodation in the stages of hiring and employment. Rather, in most cases the best remedy is the individual disabled persons right to sue due to discrimination. This is frequently used for violations in the stage of hiring but has so far been litigated rarely concerning specific violations on rules of reasonable accommodation during employment.[62] The result of successful litigation is usually a monetary compensation. According to the federal labour court, the termination of a disabled worker is invalid, unless employers are unable to remove the obstacles to employment through the implementation of reasonable accommodations.[63] §16 BGG establishes an arbitration board for disabled employees of public employers.

2. Inclusion Agreements §166 SGB IX

One important instrument to specify measures of reasonable accommodation within a company are inclusion agreements, special contracts that are made between the company and the representative body for the severely disabled, as well as the institutions mentioned in §176 SGB IX, often with assistance of integration offices. These agreements are tools to anticipate and pre-empt challenges of integrating disabled workers and establish rules on how specific situations are to be handled. They can include all conceivable aspects of reasonable accommodation including the organization of the

[60] Angemessene Vorkehrungen als Diskriminierungsdimension im Recht, 6.3; https://www.antidiskriminierungsstelle.de/SharedDocs/downloads/DE/publikationen/Rechtsgutachten/rechtsgutachten_angemessene_vorkehrungen.pdf?__blob=publicationFile&v=4 (last visited March 12th 2025).

[61] For example, Berlin has a collection under https://www.berlin.de/hvp/wichtiges-fuer-die-sbv/vorschriften/#headline_1_0 (last visited March 12th 2025) aimed at the representative bodies for the severely disabled.

[62] Knickrehm/Roßbach/Waltermann/Kohte SGB IX §§ 164, 165, which includes examples of case law.

[63] BAG 19.12.2013 – 6 AZR 190/12, NZA 2014, 372.

workspace, the hiring and dismissal phases, special training measures, agreements on the organization of the work processes and the possibility of part-time work among many others.[64]

While they have proven to be largely successful in integrating disabled employees into the workforce when agreed, there is unfortunately no mechanism to compel a company to agree on such a contract. Companies are required by §166(1) SGB IX to negotiate, but those negotiations need not be successful, so in reality many employers have failed to finalize inclusion agreements.[65]

3. Problems with the implementation of Directive 2000/78

As mentioned before, almost all specific and legally recoverable rights and benefits for persons with disability only apply to those with a disability of over 50% (making them unable to perform at least 50% of jobs on the job market). §167(2) SGB IX does ensure rights of all persons with disability – not just severe disability – to engage an integration management under certain circumstances; this is a reasonable accommodation but does not fully satisfy the requirements of the directive.[66] Furthermore, there are no guarantees for access to employment as mandated by the directive.[67] EU compliant interpretation of §§3,7 and 12 AGG in combination with §241(2) BGB does offer some requirements to make reasonable accommodations,[68] however it does not usually constitute a specific basis of claim for disabled workers to sue for.[69]

II. Positive action measures

1. Authorization for positive action measures

§5 AGG is the central general derogatory provision authorising unilateral implementation of positive action measures. It allows employers to discriminate based on race or ethnicity, gender, religion or political views, disability, age or sexual identity, if the specific measures are necessary and suitable to reduce or eliminate existing disadvantages in society. In general employers are permitted to advantage any group of their choosing so long as that group is demonstrably disadvantaged across the work force, however §205 SGB IX makes clear that no other obligations – and so certainly no voluntary measures – towards disadvantaged groups can release an employer from their obligation to employ severely disabled persons.

2. Quotas in employment

a. §154 SGB IX – quota for severely disabled employees

[64] Knickrehm/Roßbach/Waltermann/Kohte SGB IX § 166 Rn. 7-13a.
[65] Knickrehm/Roßbach/Waltermann/Kohte SGB IX § 166 Rn. 5.
[66] Deinert/Welti/Luik/Brockmann, StichwortKommentar Behindertenrecht, Angemessene Vorkehrungen Rn 15.
[67] Deinert/Welti/Luik/Brockmann, StichwortKommentar Behindertenrecht, Angemessene Vorkehrungen Rn 14.
[68] BAG 19.12.2013 – 6 AZR 190/12, NZA 2014, 372.
[69] Deinert/Welti/Luik/Brockmann, StichwortKommentar Behindertenrecht, Angemessene Vorkehrungen Rn 20.

The ninth book of the code of social law in §154(1) SGB IX requires all employers – public and private – with at least 20 employees to hire severely disabled persons for at least 5% of their work force. §156 SGB IX clarifies which positions are relevant to determine the number of workers in a company. Notably excluded are all positions that are either limited to less than 8 weeks or less than 18 hours per week of employment, as well as all positions where the benefit to the employee is not meant to be primarily financial. This includes job creation schemes by employment offices aimed at reintegrating those who have been unemployed long-term into the job market.

b. §163 SGB IX – Obligations of disclosure and notification

Employers must keep records of the number of positions and the number of severely disabled employees they have and are required to transmit them on request to the relevant integration offices as well as federal employment offices. They are further required once a year to compile and send all information necessary to calculate to what extent they fulfilled their obligations under §154(1) SGB IX during the preceding year.

c. §160 SGB IX – Compensatory levy in case of non-compliance

There are no mechanisms by which employers can be compelled to comply with §154(1) SGB IX. However, employers who do not hire the mandated number of severely disabled persons are required to pay a compensatory levy to the integration offices. This fine is calculated per position based on the percentage of such positions unlawfully filled with non-disabled workers. It starts at 140€ per month and position in cases of slight underrepresentation and caps out at 720€ per month and incorrectly filled position if the company employs no severely disabled persons. A company employing 1000 workers would need to employ 50 severely disabled persons. If they employ zero, they will pay a fine of 36000 € per month (720 € per unfilled position). If they employ a single severely disabled worker, their fine will reduce to 17640 € (360 € for each of the 49 unfilled positions), while if they employ 30 severely disabled persons, they will now pay 2800€ per month (140€ for each of the 20 positions).

III. Resources for employers

1. By the state

a. Equalization fund

There is an equalization fund with the Federal Ministry of Labor and Social Affairs to pay for special measures of integration (§161 SGB IX). It is used for certain national and supra-regional projects aimed at integrating severely disabled persons into the job market.

b. Integration offices and employment agencies

Integration offices can partially or fully subsidize an employer's costs for reasonable accommodations, special trainings for severely disabled workers (§§185(3) SGB IX; 46(2) SGB III). §46(1) SGB III enables employers to get compensated for three months long probationary periods for new employees with severe disability. Up to 70% of the salary of severely disabled persons for up to 24 months can be compensated to the employer (§90 SGB III) as an integration grant by local employment agencies.

2. By non-governmental actors

Integrationsfachdienste (IFD) are 3rd party services, financed by the state, that provide support for inclusion of people with disabilities into the job market based on §192 SGB IX. They are meant to be independent advisors and intermediaries between the state, the employer and employees. While the focus is on direct support to employees with disabilities, they also provide services to employers. They give advice on accessibility of the workplace, provide legal advice and help with documents.

The EAA (Einheitliche Ansprechstellen für Arbeitgeber) offers a single point of contact to employers seeking help with providing an inclusive workplace. The program is state-sponsored and provides contacts to local 3rd party services. The chambers of commerce provide their members with special support and advisory services regarding inclusion.[70]

The "Aktion Mensch" is a social organization financed by a lottery. They provide funding to projects that try to improve access to employment for people with severe disabilities. They also provide initial funding for inclusion companies during the first 5 years. Only non-profit organizations can receive funding.[71] Rehadat is an information platform created by the "german economic institute cologne".[72]

[70] https://www.bih.de/integrationsaemter/aufgaben-und-leistungen/einheitliche-ansprechstellen/ (last visited March 12th 2025).
[71] https://www.aktion-mensch.de/foerderung/foerderprogramme/lebensbereich-arbeit (last visited March 12th 2025).
[72] https://www.rehadat.de.

IV. Workshops for the disabled § 219 SGB IX

1. Legal Framework for sheltered workshops

Sheltered workshops for the disabled are mostly regulated in §§219-229 SGB IX, with the Werkstätten-Mitwirkungsverordnung (regulation on participation in workshops) dealing with representation of the disabled workers in the workshop system.

According to §219(1) SGB IX, one of the primary tasks of sheltered workshops is the integration of disabled persons to the regular job market. §219(2) SGB IX requires at least a minimal ability to produce value through work from participants to be eligible to work in sheltered workshops. Participants in sheltered workshops are not usually workers as defined in §611a BGB (German Civil Code), making them ineligible for minimum wage. They can be regular workers, if the value of their work manifestly outweighs the cost of their supervision,[73] which is rarely the case.

2. Sheltered workshops in Germany in numbers

The current system of sheltered workshops in Germany emerged in the 1960s and has remained largely unchanged since its formal definition by the Bundestag in 1974. At present, it provides services to around 270000 people with disabilities and employs 70000 people. In 2022, the state spent an average of 18970 € per case (5 billion € in total) to support the sheltered workshop system.[74] Sheltered workshops make between 20-30 % of their revenue through the sale of goods and services made by them, raising the total economic impact of the sector from 5 to over 6 billion €.[75] Only around 7% of participants have a physical disability, while 72% have a cognitive disability and 21% have psychological disability.[76] Workers with physical disabilities are typically relatively easy to integrate into the job market, explaining why they do not enter the sheltered workshops in high numbers. While the law defines providing transition to the general labour market as a key goal of sheltered workshops, there is no mechanism to compel service providers to deliver on that goal. Transitions from sheltered workshops to the general labour market have remained extremely low. A study from 2008 found that only 0,1% of participants made a transition to the general labour market.[77] A study from 2023 found similar numbers of around 0,2%-0,3%.[78] Of those cases around 15% end up returning to the sheltered workshop system.

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[73] BeckOK SozR/Jabben, 75. Ed. 1.9.2020, SGB IX § 221 Rn. 4.

[74] BAGüS-Kennzahlenvergleich Eingliederungshilfe 2024 Berichtsjahr 2022, https://www.lwl.org/spur-download/bag/Bericht_2024_final.pdf (last visited March 12th 2025).

[75] Bundesweite SROI-Studie der BAG WfbM 2013/2014.

[76] Entwicklung der Zugangszahlen zu Werkstätten für behinderte Menschen, https://bagues.de/spur-download/sht/91_08an.pdf (last visited March 12th 2025).

[77] https://www.bar-frankfurt.de/fileadmin/dateiliste/f626-entgeltsystem-wfbm.pdf (last visited March 12th 2025).

[78] Concluding observations on the initial report of Germany : Committee on the Rights of Persons with Disabilities, https://digitallibrary.un.org/record/811105?ln=en&v=pdf (last visited March 12th 2025).

As participants in sheltered workshops are not considered workers, they receive far less than minimum wage, often making less than 2 € per hour in addition to the government support they already get. However, they do get preferential treatment when it comes to the pension system. Working at a sheltered workshop for 20 years guarantees a pension set at 80% of the average German worker salary (fictitious income of 2500 €), regardless of age. This is usually far better than what other minimum wage workers would receive and is in many cases a strong incentive not to transition from a sheltered workplace to the regular job market.

3. Criticism of sheltered workshops in Germany

The UN report from 2015 by the Committee of the Rights of Persons with Disabilities found Germany to be in violation of article 27 and recommended: "Phasing out sheltered workshops through immediately enforceable exit strategies and timelines and incentives for public and private employment in the mainstream labour market".[79] Critics point to the isolating and segregating effects of sheltered workshops as well as the large costs associated with them. There are currently no federal quality standards or monitoring mechanisms, since mechanisms for quality control are negotiated at the state level according to §131(1) SGB IV. While §128 SGB IV allows for the monitoring and evaluation of sheltered workshops in cases of concrete suspicions of operational failures, in practice quality control is left to the sheltered workshops. This is done through subjective and standardized questions that measure client satisfaction (e.g. POS: personal outcome scales)[80]. On their website, the BAG WfbM, an organization representing 93% of the sheltered workshops in Germany says their focus is on wellbeing and person growth of their clients, not inclusion into the job market. They point out the complete lack of governmental quotas regarding transitions to the labour market. In fact, there isn't even a system to collect data in place. According to the BAG WfbM:

"The German model is unique as regards the group of people using its services: Here, people with severe disabilities participate in working life in sheltered workshops. In other European countries, this group of people is usually cared for in day care centres, occupational services or living facilities."[81]

4. Recent developments and future plans

While the CDU lead government initially disregarded criticism of sheltered workshops by the UN in 2016 as immaterial, subsequent governments have tried to overhaul Germanys social system and to

[79] Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Germany, from 13 May, 2015, https://digitallibrary.un.org/record/811105?v=pdf (last visited March 12th 2025).
[80] BAGüS Übergänge in den allgemeinen Arbeitsmarkt, https://www.lwl.org/spur-download/bag/Langfassung-Papier-Uebergaenge.pdf (last visited March 12th 2025).
[81] AG WfbM: The system and services of sheltered workshops in Germany, https://www.bagwfbm.de/file/1321 (last visited March 12th 2025).

introduce a paradigm shift in the way people with disabilities are treated, in order to be more in line with the UN. It expanded subsidies to companies to help them integrate disabled workers who are not yet able to be fully productive. The Bundesteilhabegesetz taking effect in 2023 strengthened the powers of elected representatives inside sheltered workshops and introduced new measures for quality control. It remains to be seen if the attempts to make the job market more inclusive have a meaningful impact and if the CDU will try to continue down the path to a more inclusive job market.

E. Report fourth part

I. Introduction

The dual system of co-determination in Germany comprises various bodies that deal with the interests of employees. Particularly relevant for the integration of people with disabilities in companies are the representatives of severely disabled employees and the works councils, which play an important role in social dialogue. This raises the question of whether inclusion agreements are actually binding or whether they are more of an orientation aid without enforceable consequences.

A look at supranational regulations shows that German courts implement their requirements differently. It is crucial to analyse how these standards are integrated into national law and applied in practice by companies.

II. The role of employee representatives and social dialogue

The participation of the representative body for severely disabled employees (SBV) in internal decision-making processes is required by law.[82] According to § 178 (1) SGB IX, the SBV must already be involved in the recruitment process. It acts as a representative body for severely disabled employees and is determined in a democratic election process in accordance with § 177 SGB IX. All severely disabled employees at the respective office are eligible to vote. The term of office is four years, with one representative and one deputy being elected.

In addition to the SBV, trade unions are also campaigning for the rights of people with disabilities. One notable example is IG Metall, which has been officially recognised as an association for people with disabilities by the Federal Ministry of Labour since 2016. This enables it to use additional instruments to assert the interests of its members.[83] As a member of the union's executive board emphasised, this recognition is a tribute to the work done to date and strengthens the position of works councils and

[82] *Neumann/Pahlen/Greiner/Winkler/Westphal/Krohne/Pahlen*, 15. Aufl. 2024, SGB IX § 178 Rn. 2a.
[83] IG Metall, Teilhabepraxis aktuell, Nr. 09 5/2016 S. 2.

representatives of severely disabled employees in companies. This effort has already been successful, even if only under individual law.[84]

III. Collective and statutory regulations on inclusion

The legal framework for the integration of people with disabilities is primarily regulated in the German SGB IX (§§ 151-178). In addition, there are state-specific regulations, such as the Severely Disabled Persons Directive of the state of Brandenburg. The collective bargaining regulations TV ATZ BW in the public sector include specific provisions on partial retirement. In particular, employees can reduce their working hours to 50% while retaining 83% of their previous net salary. This option is available from the age of 55 on a voluntary basis and becomes a legal entitlement at the age of 60.[85]

IV. Legal remedies, procedures and sanctions in the event of discrimination

First of all, a distinction must be made between individual and collective legal proceedings before labour courts.

1. Individual legal proceedings

a. Discrimination action pursuant to §§ 15, 21 AGG

If a person is discriminated against in connection with the workplace, the person concerned can bring an action for damages or compensation against the employer in accordance with § 15 AGG. Compensation for damages is aimed at a financial loss that has occurred, while compensation is usually claimed if a person has been disadvantaged in the application process for discriminatory reasons. In this case, there is an upper limit of three months' salary for the job that the discriminated person applied for.

§ 21 AGG is the legal basis for bringing an action for the elimination of discrimination in an existing employment relationship pursuant to para. 1 sentence 1 and for injunctive relief pursuant to para. 1 sentence 2. Here too, the person affected can file a lawsuit against the employer. This claim exists in addition to § 15 AGG. It is also important to mention here that there is a reversal of the burden of proof in accordance with § 22, i.e. the employer must prove that there was no discrimination.

The Social Code IX (SGB IX) contains provisions on the rehabilitation and participation of people with disabilities in Germany. Here, too, there are basic principles that are enforceable under individual law.[86]

[84] LAG Düsseldorf Urt. v. 12.3.2024.

[85] dbb, Altersteilzeit für Schwerbehinderte bis Ende 2025 verlängert, 04. September 2020, abrufbar unter: https://www.dbb.de/artikel/altersteilzeit-tarifvertrag-fuer-schwerbehinderte-bis-ende-2025-verlaengert.html (letzter Zugriff 12.03.2025).

[86] Further information Aktion Mensch, Verbandsklagen: Gemeinsam gegen Goliath, abrufbar unter: https://www.aktionmensch.de/inklusion/recht/reformansaetze/verbandsklage.

b. Action for protection against dismissal § 168 SGB IX

The prior consent of the Integration Office is required for the dismissal of a severely disabled person or a disabled person with equivalent status. If this approval is not granted, the person concerned can take legal action against the employer.

Integration offices are authorities at the state level, i.e. they act as an interface between severely disabled people and the economy.

c. Legal consequence of non-compliance with the quota from § 154 para. 1 SGB IX

In Germany, both private and public employers are subject to a quota for the employment of severely disabled persons or persons with equivalent disabilities. Employers with an annual average of at least 20 jobs per month must achieve a quota of 5% employment of severely disabled persons. For smaller companies, including employers with an annual average of less than 40 jobs per month, one severely disabled person must be employed per month. For companies with an annual average of less than 60 jobs per month, two severely disabled people must be employed each month.

If the statutory quotas for the employment of severely disabled people are breached, employers must pay a compensatory levy (Section 160 SGB IX).

d. Legal basis from the SGB IX pursuant to § 164 para. 4

The regulations establish a right of the severely disabled employee against the employer to ensure that workplaces, including all operational facilities, are designed and maintained in an accessible manner.[87]

In detail, severely disabled persons are entitled vis-à-vis their employers to

a. Employment in which they can utilise and develop their skills and knowledge as fully as possible,

b. preferential consideration for in-house vocational training measures to promote their professional advancement,

c. Facilitating participation in external vocational training measures to a reasonable extent,

d. the disability-friendly design and maintenance of workplaces, including plant, machinery and equipment, as well as the design of workplaces, the working environment, work organisation and working hours, with particular attention to the risk of accidents,

e. Equipping their workplace with the necessary technical work aids

(letzter Zugriff 10.03.2025) oder auch hier DBSV, Verbandsklagen im Behindertenrecht -Chancen und Herausforderungen auf dem Weg zu mehr Barrierefreiheit, 2023.

[87] *Kossens/von der Heide/Maaß/Kossens*, 5.Aufl. 2023, SGB IX § 164.

2. Collective action proceedings

There is no general collective action in German labour law.[88] However, there are a few special cases in which a collective can take legal action.

a. Trade union complaint

Trade unions can take legal action in the event of breaches of the collective agreement and unauthorised works agreements.[89] This is legally linked to § 823 of the German Civil Code (BGB). Trade unions can also act as authorised representatives before the labour courts, provided that their representatives are qualified to hold judicial office (§ 11 para. 4 ArbGG).[90]

b. Complaint by the representative body for severely disabled persons

The Representative Body for Severely Disabled Employees (SBV) is the elected representative body for severely disabled employees in companies with at least five severely disabled employees (§ 177 para. 1 SGB IX). Its tasks include promoting participation, securing employment and accessibility (§ 178 para. 1 SGB IX). The employer must involve them in dismissals and important decisions (§ 178 para. 2 SGB IX) and provide them with appropriate support § 179 para. 8 SGB IX. The election takes place in accordance with the Severely Disabled Persons Election Ordinance (SchwbVWO) for a term of office of four years (§ 177 para. 6 SGB IX).

The representative body for severely disabled employees has a right to be consulted in accordance with § 178 para. 2 SGB IX if matters affect an individual severely disabled person or the severely disabled as a group. This results in the enforceability of this participation, but then in its own rights as a legal entity and not - for - the rights of the affected group or the affected person.

c. Complaints by the works council § 23 Para. 3 BetrVG

The works council is a body elected by the employees to represent their interests in the company and to exercise their rights and co-determination vis-à-vis the employer § 1 BetrVG. Paragraph 3 stipulates that the works council or a trade union represented in the company can apply to the labour court to order the employer to refrain from an action, to tolerate the performance of an action or to perform an action in the event of gross violations by the employer of its obligations under this Act.[91]

d. Right to sue associations under the BGG

[88] *Ponti, Sarah/ Tuchtfeld Erik* in ZRP 2018, 139.
[89] BAG, Urt. v. 18. 4. 2012 – 4 AZR 371/10.
[90] For details, see Schnabel (2014), p. 141.
[91] Willing, Ernst (ifb), Prozessvertretung abrufbar unter: https://www.betriebsrat.de/betriebsratslexikon/br/prozessvertretung, 2023 (letzter Zugriff: 11.03.2025).

The right of associations to take legal action in accordance with § 12 BGG enables recognised associations of people with disabilities to take legal action against violations of the Disability Equality Act (BGG) by public bodies. This action serves to collectively enforce the rights of people with disabilities, in particular with regard to accessibility, protection against discrimination and reasonable accommodation. “Leben in Deutschland e. V. (ISL)" and "Deutscher Blinden- und Sehbehindertenverband (DBSV)" are examples for such recognised associations.

V. External support for people with disabilities

In addition to internal mechanisms, there are also external organisations that support people with disabilities. These organisations offer advice, representation of interests and, in some cases, legal support for those affected.

The Federal Anti-Discrimination Agency supports individuals affected by discrimination in asserting their rights. This includes providing information on potential claims and legal options, facilitating access to advisory services, and promoting out-of-court settlements between the parties.

To resolve a dispute, the agency may request statements from the parties involved, provided that the affected person has given consent. If the opposing party is a federal authority (Bundesbehörde) or another public body at the federal level (sonstige öffentliche Stelle im Bereich des Bundes), it is obligated to cooperate and provide the necessary information, unless data protection regulations prevent disclosure.[92]

VI. Options for out-of-court dispute resolution

In addition to legal proceedings, it is also possible to report discrimination to internal complaints office in accordance with § 13 AGG. Furthermore, out-of-court settlements, for example through arbitration proceedings or compensation payments in accordance with § 15 para. 4 AGG, can be an alternative to court proceedings.[93]

However, there are certain procedural hurdles. For example, the filing of an action under labour law is subject to strict deadlines. In addition, the Integration Office must be involved in the proceedings when severely disabled people are dismissed § 168 et seq. SGB IX), which can make the legal process more complex. However, conciliation mechanisms can represent a hurdle in the enforcement of rights, where those affected by discrimination - such as in North Rhine-Westphalia (NRW) - are legally obliged

[92] *Kramme,* Comparative Perspectives on the Enforcement and Effectivness of Antidescriminiation Law p. 272.
[93] Further Egenberger, Vera/Nguyen, Huy, „Wie müsste eine ausgelagerte (externe) AGG Beschwedestelle gestaltet werden, um AGG konform zu sein?“, 2023. Oder auch hier DGB, Gegen Diskriminierung – für Respekt und Gleichberechtigung, abrufbar unter: https://www.dgb.de/gerechtigkeit/antidiskriminierung/ (letzter Zugriff 12.03.2025).

to take part in conciliation proceedings,[94] However, Alternative Dispute Resolution currently has little place in anti-discrimination law.[95]

F. Conclusion

In the following, we will attempt a final critical examination and will once again take a closer look at various further issues.

I. A critical view of the first and second labour markets in Germany

Despite the requirements for each company to employ severely disabled persons for 5% of their workforce, they only make up about 2.5% of German workers. With 6% of working age people in Germany being officially severely disabled – skewing very heavily towards being older – it was always an ambitious goal. Regardless of the discussed shortcomings, in recent years through the existing laws and other measures there has been reasonably successful integration into the regular job market for the purely physically disabled. Unfortunately, the situation is much more dire for persons with mental disabilities, particularly those with mental illnesses like schizophrenia who are deemed dangerous or unpredictable. They are often shunted into the dead-end system of sheltered workshops, which over the past decades has become an entirely parallel system of work for mostly mentally disabled persons. These workshops are very convenient for the people running them, the larger society that avoids dealing with mentally disabled persons and even the workers employed by them. As such there are few incentives to bring positive change towards a more inclusive society, despite many of the people entering them initially expressing strong interest in being integrated into the regular job market, before being discouraged by claims of less vacation, harsh conditions or high levels of insecurity. It remains to be seen if the reform process started in 2023 will be successfully implemented by the new government, especially in light of fiscal priorities shifting towards defence.

II. Intersectional discrimination and its impact on the working conditions of people facing multiple discrimination

Intersectional discrimination refers to the overlapping of various disadvantages that result from several grounds of discrimination. In the legal context of the General Equal Treatment Act (AGG), this aspect is regarded as multiple discrimination. The AGG prohibits discrimination based on certain characteristics

[94] Beigang/Boll/Egenberger/Hahn/Leidinger/ Tischbirek/Tuner in: Möglichkeiten der Rechtsdurchsetzung des Diskriminierungsschutzes bei der Begründung, Durchführung und Beendigung zivilrechtlicher Schuldverhältnisse, 2021. Kurzfassung abrufbar unter: https://www.antidiskriminierungsstelle.de/SharedDocs/forschungsprojekte/DE/Studie_Rechtsdurchsetzg_b_Zugang_z_Guetern_und_DL.html (letzter Zugriff 12.03.2025) Abschnitt "Aussergerichtliche Schlichtung".

[95] *Kramme,* Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law p. 263.

such as gender and disability but does not recognize intersectional discrimination as an independent form of discrimination.[96] Women with disabilities are particularly affected by intersectional discrimination in employment law, as they experience both gender-specific and disability-related disadvantages. Studies show that they experience discrimination on the labor market significantly more often than men with disabilities or women without disabilities. A study by the Federal Anti-Discrimination Agency (2021) emphasizes that intersectional discrimination in the education sector and in working life reinforces structural disadvantages and is often insufficiently addressed.[97] Similarly, a study by the Sinus Institute for Aktion Mensch (2021) shows that women with disabilities earn on average 667 euros net less per month than men with disabilities and are less frequently represented in management positions.[98]

Another problem is the inadequate consideration of intersectional discrimination in protective measures under employment law. Women with disabilities are more frequently affected by unlawful dismissals, have poorer chances of promotion and often do not receive reasonable accommodations in the workplace, although they are entitled to so-called reasonable accommodation under Section 164 SGB IX.[99] The lack of explicit recognition of intersectional discrimination in the AGG makes it difficult to effectively enforce legal claims, as discrimination claims can often only be based on one characteristic.[100]

In summary, it can be seen that women with disabilities are disadvantaged on the labor market in several ways. The intersection of gender and disability leads to specific experiences of discrimination that are inadequately addressed by current employment law. Findings from intersectional research show that women with disabilities in particular are restricted in their professional development due to social norms.[101] To counteract this, the AGG should be expanded to explicitly take intersectional discrimination into account. In addition, targeted labor law measures are needed to remove barriers in the application process, in career advancement and in protection against dismissal. Companies and institutions should be sensitized to intersectional perspectives and obliged to develop appropriate anti-discrimination strategies. Only through such a holistic approach can equal opportunities in the labor market for women with disabilities be guaranteed in the long term.[102]

[96] Bauer/Arnold,2022, p.145.
[97] Federal Anti-Discrimination Agency, 2021, p. 98.
[98] Sinus Institute, 2021, p. 45.
[99] BAG, judgement of 22.06.2021 - 9 AZR 571/20.
[100] Schiek, 2018, p. 215.
[101] Siebert, 2020, p. 132.
[102] Article: “Intersectional discrimination in employment law: challenges and solutions”.

III. The necessity of a right of action for organisations in labour law

German labour law is based on the principle of individual legal enforcement, whereby employees must assert their claims themselves. However, from a trade union perspective, a right of class action, as exists in environmental or disability equality law (§ 12 BGG), could significantly improve the enforcement of protective labour laws. There is much to be said for extending the existing regulation for public service to the private sector. Only one in ten employees works in the public sector. The gap in the private sector should be closed to protect employees and improve working conditions. Many employees refrain from individual legal action for fear of reprisals or financial risks. In particular, in cases of discrimination (15 AGG), minimum wage violations or disregard for collective agreements, a class action lawsuit by trade unions or professional associations could enable more effective enforcement of rights. Employers are increasingly circumventing labour law by avoiding collective agreements, using a series of short-term contracts or employing bogus self-employed. Due to the economic dependency of employees, many violations go unpunished. Class actions could address systematic abuses without the affected employees having to expose themselves. A right of class action would enable trade unions to collectively enforce collective agreement violations and ensure uniform application of collective agreement provisions. France, Spain and Sweden already have class actions brought by trade unions to collectively challenge labour law infringements. In view of the EU anti-discrimination directives and the European Social Charter, introducing them in Germany would be a logical step.

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