SUMMARY

# 2010/45: Employer liable for harassment because of racist graffiti? (GE)

***<p>Can an employer be held liable for discriminatory graffiti on toilet walls? Is a two month time bar for bringing a discrimination claim compatible with Directive 2000/43/EC?</p>***

**Summary**

Can an employer be held liable for discriminatory graffiti on toilet walls? Is a two month time bar for bringing a discrimination claim compatible with Directive 2000/43/EC?

**Facts**

The plaintiffs in this case were four Turkish employees. They were employed as blue collar staff in the defendant's warehouse. Out of a total of approximately 50 warehouse staff about half were of foreign descent. At a certain point in time two out of the five toilets in the warehouse were defiled by all manner of racist text and graffiti. It is not known when this occurred, nor when management was informed. Given that the managers used separate sanitary facilities, they claimed ignorance. Their version was that they did not become aware of the racist graffiti until March 2007. The plaintiffs, on the other hand, alleged that management had been informed as early as September 2006.

On 11 April 2007 the plaintiffs submitted a written discrimination notice pursuant to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* or "AGG"), and in June 2007 they brought an action against their employer, claiming EUR 10,000 each. They argued that the failure by management to act against the racist text in the toilets amounted to harassment, which is a form of discrimination.

The court of first instance and the appellate court dismissed the claim, whereupon the

plaintiffs appealed to the Federal Labour Court (*Bundesarbeitsgericht* or "BAG").

**Judgment**

The main questions before the BAG (Eighth Chamber, *"Achter Senat"*) were whether:

(1) the racist graffiti qualified as harassment of the plaintiffs in view of their ethnic origin;

(2) the plaintiffs had asserted their harassment claim in a timely manner.

Unfortunately, the BAG left the first question largely unanswered, because it confirmed the lower courts' finding that the plaintiffs had failed to assert their claim within the two month deadline prescribed by section 15(4) of the AGG. This section requires claims for damages or compensation based on violation of the AGG to be notified to the employer in writing within two months, in order not to be time-barred. As a rule, this period starts running when the employee becomes aware of the discrimination (in this case, the harassment). In the event the employer fails to respond, or fails to offer adequate compensation, the employee has three months from the date of the written notification to bring legal proceedings.

Given that the plaintiffs argued that the graffiti had been brought to management's attention in September 2006 and that they did not notify their employer of their desire to be compensated until 11 April 2007, their claim had become time-barred. However, they argued that the two month preclusion period is incompatible with Directive 2000/43/EC on racial discrimination.

The BAG pointed out that Article 7(3) of Directive 2000/43/EC allows Member States to adopt "national rules relating to time limits for bringing actions as regards the principle of equality of treatment". The two month preclusion period provided in section 15(4) of the AGG does not deny employees an effective remedy, as that period does not start running until the employee has become aware of the discrimination. Moreover, the period is not shorter than other preclusion periods under German law, so it cannot be said that discrimination claims deriving from EU law are treated less favourably than similar claims under purely domestic law. In fact, German law provides for a preclusion period of no more than three weeks for unfair dismissal claims.

A point of debate was that (a different *Senat* of) the BAG[1] had previously held that a contractual preclusion period of two months for the assertion of claims based on an employment contract is too short and therefore invalid. How does that finding relate to the two month period under section 15(4) of the AGG? The BAG answered that this previous

ruling does not apply to statutory preclusion periods such as the one at issue.

Thus, the plaintiffs lost their case in all three instances. Fortunately, although the BAG declined to rule on whether the plaintiffs had been harassed, it did provide some guidance on what constitutes harassment as provided in the AGG. Article 3(3) of the AGG defines harassment as unwanted conduct related to any of the protected grounds (race, gender, age, etc.) that takes place with the purpose or effect of violating the dignity of a person and of creating an environment characterized by intimidation or humiliation or by hostile, degrading or offensive behaviour. When is an intimidating, hostile (etc.) environment created? The BAG held that all circumstances of the individual case must be taken into account. In principle the term "characterized" indicates that "single actions" as a rule do not create such an environment. The creation of a humiliating, hostile, etc. environment requires the inappropriate behaviour to be of a certain duration and to have a certain connectivity to the employment relationship. The BAG indicated that it doubted whether the mere fact of toilet walls carrying racist text would meet this test, but also held that single actions might create a hostile environment if they were very serious (it remains unclear, what is meant by this). However, it did add that if the employer in this case had been notified of the writing and had chosen publicly not to do anything about it, because it condoned it, the said test could have been met. As already mentioned, the BAG did not address these questions, as it found the plaintiff's claim to be time-barred.

**Commentary**

This BAG judgement confirms that the two month time bar of section 15(4) of the AGG is legal, but it is not the final word on this matter and it also leaves open a number of questions. In the first place, the Labour Court in Hamburg has recently decided to refer the time-bar issue to the ECJ. Secondly, there is the fact that a discrimination claim can be based either on tort (as in section 15 of the AGG which was at issue in this case) or on breach of contract. An employer that discriminates against an employee, for example by condoning harassment by colleagues, can be held liable either on the basis that the employer's breach of the law is a tort or on the basis that the employer committed a breach of contract (section 7 of the AGG).The fact that the statutory two month time bar is lawful according to the BAG need not necessarily imply that a claim for breach of contract would be subject to the same time bar. My personal view is that the two month time bar could also be invoked by employers who are faced with a breach of contract claim. If this were not the case, the BAGÕs ruling in this case would be almost worthless, as the time bar would be easy to circumvent by basing a discrimination claim on breach of contract rather than on tort.

This BAG judgement is also interesting because it sheds some light (admittedly, not much) on

what constitutes harassment. First of all, it makes quite clear that the unwanted conduct needs to have some significance for the employment relationship, which was questionable in the case at hand, since the graffiti were not visible in the area where the employees actually performed their work.

Further, the BAG noted that tacit approval of the graffiti could possibly lead to the creation of a hostile environment by the employer (the facts of this were disputed, but according to the plaintiffs the employer knew about the graffiti and ignored them).

From my perspective the most interesting aspect of this decision (other than the preclusion period) is the acceptance of ignorance regarding offensive behaviour of employees by the employer as a possibly decisive factor for claims for compensation and damages. Until now, there has been no stable case law as to when and how an employer should react if it becomes aware of harassment amongst employees. The BAG seems to incline towards the view that ignorance by the employer of such behaviour amongst employees can create a hostile environment, even if the conduct of the employees themselves is not sufficient to constitute harassment. I believe that this opinion is correct, since the employer himself appears to show animosity towards employees belonging to one of the protected categories just by his ignorance, and that can be understood as a tacit approval.

**Comments from other jurisdictions**

*Austria (Andreas Tinhofer)*: In Austria, the duty of employers to act is triggered if they (or their managers) know or (should know) about the harassment at the workplace. Section 21 of the Equal Treatment Act defines harassment essentially in the same way as under the German Article 3(3) of the AGG, following the text of Article 2(3) of Directive 200/78/EC closely. As in Germany a certain intensity in the harassment is necessary in order to create an "intimidating, hostile, degrading, humiliating or offensive environment" as required under section 21 of the Equal Treatment Act. However, it seems to me that under Austrian law the management would have been obliged to act against the racist text and graffiti on the toilets used by the employees as soon as they became aware of it. If the management were reluctant to protect the employees from such harassment the employees could have sued the employer for "appropriate" immaterial damages. The minimum amount set by the act is EUR 720 (section 26(11) of the Equal Treatment Act). The limitation period for pursuing such a claim is one year (section 29 of the Equal Treatment Act).

*The Netherlands (Peter Vas Nunes)*: The text of the Dutch equivalent of the AGG (*Algemene wet gelijke behandeling*) gives no indication that the creation of a humiliating, hostile (etc.) environment requires the inappropriate behaviour to have (i) a certain duration or (ii) a

certain connectivity to the employment relationship. In my view it prohibits inappropriate conduct (*gedrag*), which includes not acting, regardless whether the conduct consist of a one-off incident, such as the painting of graffiti, or a continuous situation, such as not doing anything about graffiti. See for the distinction the Portuguese case report in this edition. Clearly, the conduct must be attributable to the employer, but this will often not be difficult. Take, as an example, the situation where a group of employees sprays hostile graffiti on the wall of the home of one of their colleagues, this fact becomes publicly known, including to management, and the management fail to take disciplinary action against the malfeasants. In my view such failure could qualify as harassment.

*United Kingdom (Alexandra Mizzi)*: A UK employment tribunal would have approached the question of the employer's liability for acts of harassment quite differently, with far less focus on the employer's state of knowledge. Once it had been established that the graffiti was capable of amounting to an act of harassment and that an employee was responsible for it, the employer would have been vicariously liable unless it could show that it had taken such steps as were reasonably practicable to prevent the employee acting as he or she did (Sex Discrimination Act 1975, section 41(3)). This burden is notoriously difficult to discharge. Case law suggests that simply having an equal opportunities policy in place or taking steps to discipline the perpetrator after the event will not be enough. The employer must show that it has taken proactive steps to create an environment where such conduct is not tolerated.

It is also well established in the UK that time limits for bringing employment tribunal proceedings are relatively strict (although claimants have slightly more leeway in discrimination claims than they do in bringing other statutory claims). Since April 2009, there has no longer been a requirement for employees to raise a grievance with their employer before bringing a claim (although their compensation may be reduced by up to 25% for failure to do so).

**Footnote**

1 BAG (Fifth Chamber) 28 September 2005 - 5 AZR 52/05.

**Subject:** Race/nationality discrimination

**Parties:** not known

**Court:** German Federal Employment Court (*Bundesarbeitsgericht*, abbreviated *BAG*), Eighth

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Chamber (*Achter Senat*)

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