

**Ninth Meeting of European Labour Court Judges
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GERMANY

SEXUAL HARASSMENT

Questionnaire

General Reporter: Professor Alan Neal

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1. CONCEPT: THE SUBSTANTIVE NOTION OF ASEXUAL HARASSEMENT®

1.1 In your country is there a recognised concept of Asexual harassment®? **Yes**

1.2 If so, since when has this existed?

In Germany there is a legal expressed duty to protect against sexual harassment at the work-place since 1994: Act on the Protection of Employees from Sexual Harassment at the Work-place (Employees Protection Act) from Juni 24, 1994. This Act is due to a recommendation of the Commission for the protection of the dignity of women and men at the work-place (92/131/EWG B November 27, 1991)

Before that Act the duty could be found in the jurisdiction on general rules in the Civil Code.

1.3 Is there in your country a legal definition for the notion of Asexual harassment®? **Yes**

1.4 If so, is that definition provided by statute, and/or through case-law development, and/or by reference to a relevant definition existing elsewhere (e.g. in a European Union or other international instrument)?

By statute.

1.5 Please state what is that definition:

*The Act defines sexual harassment in Section 2 paragraph 2 as
Any deliberate, sexual determined behavior, which affronts the dignity of employees at the place of work. This includes*

- 1) sexual actions and ways of behavior, which are punishable according to the regulations of criminal law and
- 2) other sexual actions and demands to the same, sexually determined physical contact,

comments of a sexual nature, as well as the showing of and visible displaying pornographic representations, which are clearly disapproved of the person affected.@

- 1.5 In your country is there any supplementary/complementary guidance as to what constitutes Asexual harassment (e.g. A Code of Practice or other guidance on dignity at work)?

No

- 1.7 If so, what is the nature of that supplementary/complementary guidance? -----

- 1.6 Are there any circumstances where Asexual harassment@ is (or could be) regarded as a matter falling within the regulation of health and safety at work in your country?

It is a matter of health and safety at work.

2. CAUSE OF ACTION AND PROCEEDINGS IN RESPECT OF ASEXUAL HARASSMENT@

- 1.7 In your country is it possible to bring proceedings before a court (a labour court or any other judicial instance) in respect of alleged employment-related Asexual harassment@?

Yes

- 1.8 Do proceedings in respect of Asexual harassment@ stand as a cause of action in its own right, or do such proceedings fall within a broader category of dispute (e.g. in the guise of Asex discrimination@)?

Proceedings in respect of Asexual harassment@ may be actions in its own right with the aim of getting damages, compensation, dismissing the harasser or omitting the sexual harassment.

Proceedings can also fall within a broader category of dispute, especially in the guise of actions against unfair dismissal or something like that.

- 1.9 Does there exist in your country any Aparallel@ or comparable form of action (e.g. a cause of action in respect of Aracial harassment@)?

There are no special proceedings, but the situation is similar: There can be actions with the aim of omitting Aracial harassment@, damages, compensation or dismissing the harasser.

1.10 Is there any significant difference in respect of the relevant cause of action or the procedures involved if the alleged harasser is a *Apublic@* body, as opposed to a private individual or body@:

No

2.5 If so, what will be the applicable situation in relation to each of those? -----

2.6 Against whom can an action be taken in relation to alleged employment-related *Asexual harassment@*?

a) against the harasser

b) against the employer

1.11 If action can be taken against the employer of an alleged harasser, please indicate in what circumstances that will be possible?

It is possible to make sure that there will be no sexual harassment in future. For example to oblige the employer to implement measures against sexual harassment or to dismiss the harasser.

2.8 Who is formally entitled to bring such an action?

The victim of the sexual harassment.

1.12 If a body other than an alleged victim of alleged employment-related *Asexual harassment@* (e.g. an *Aequality commission@*, an *Aombudsman@*, or similar) is entitled to bring such an action, please indicate in what circumstances this will be permitted:

In Germany there is no body, ombudsman, commission or similar to do so.

2.10 Is public legal aid, advice, or other assistance available to a party who wishes to bring an action in relation to alleged employment-related *Asexual harassment@*?

No

There is only legal aid in the same way as in other cases, especially for parties, who are financially not very strong..

2.11 If so, what is the nature of that legal aid, advice, or other assistance, and in what circumstances will it be available? Lower income.-----
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3. DISPUTE RESOLUTION FORUM AND STRUCTURES

- 1.13 In what forum can an action be brought in your country relating to alleged employment-related Asexual harassment@?

If the Asexual harassment@ is related to the employment: the labour courts

- 1.14 Where relevant, in what forum can an action be brought in your country relating to alleged non-employment-related Asexual harassment@?

Civil and Criminal Courts.

- 3.3 Who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@?

- Professional Judge(s): Labour Court: *one* B Regional Labour Court: *one* B Federal Labour Court: *three*.

With what background? *Legal training.*

- Lay judges (e. g. trade union members, members of employer's associations): Labour Court: *two* B Regional Labour Court: *two* B Federal Labour Court: *two*

With what background? *No special training.*

- ASpecialist Aassessor (s)@: **No** B in cases where needed: experts with medical or psychological background

Other: **No**

- 1.15 Is any particular experience or qualification required of those who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@? **No**

- 3.5 If so, what is the nature of that requisite experience or qualification? -----

- 3.6 Is any special training provided for those who will adjudicate on a complaint relating to alleged employment-related Asexual harassment@? **No**

- 3.7 If so, what is the nature of that training? -----

4. PROCEDURE IN RELATION TO EVIDENCE AND THE ADJUDICATION OF COMPLAINTS OF EMPLOYMENT-RELATED ASEXUAL HARASSEMENT@

- 1.16 In relation to the procedures which are adopted during the course of adjudicating upon a complaint of alleged employment related Asexual harassment@, are there in your country any special rules relating to:

- 4.1.1 Anonymity of any or all of the Parties? **No**

If so, what rules apply here? *There are no special rules.*

- 4.1.2 Hearing some or all of the evidence in camera? **No**

If so, what rules apply here? -----

- 4.1.3 Placing restrictions upon the freedom of the Press to report such proceedings? **No**

If so, what rules apply here? -----

- 1.16.1 The manner in which cross-examination (or questioning in general) of an alleged victim can take place (e.g. reflecting criminal procedure rules for sexual offences)? **No**

If so, what rules apply here? -----

- 4.2 In terms of making out a case, what elements does a party who complains of employment-related sexual harassment in your country have to establish?

- a) a sexual determined behaviour
- b) the behaviour has to be deliberate
- c) relation to employment

- 4.3 What is the standard of proof required in such cases (e.g. shown on a balance of probabilities, etc.)?

Full proof.

- 4.4 What are the rules in your country concerning the burden of proof in such cases?

The victim has to prove, that it was sexual harassed.

- 4.5 Is this consistent with the normal rules in your country concerning the burden of proof in civil cases? **Yes**

If not, in what way (s) do the rules differ here? -----

- 4.6 Is there any right in your country for a witness or a party to refuse to answer a question during the course of proceedings relating to alleged employment-related sexual harassment on the ground that the answer given might be self-incriminating in respect of a criminal offence? **Yes**

If so, what is the basis of that right to refuse an answer? *Nobody is obliged to give evidence, when he is making himself guilty.*

- 1.17 Do witnesses in proceedings relating to alleged employment related sexual harassment give evidence under oath?

It may be the case like in other proceedings in the labour courts.

- 4.8 Is this consistent with the normal situation for witnesses giving evidence in civil proceedings in your country? **Yes**

- 4.9 Will any aspect of evidence be excluded in proceedings relating to alleged employment-related

Asexual harassment@ (e.g. the sexual history of the alleged Avictim@, or instances of previous allegations made against the alleged harasser)? No

4.10 If so, what rules apply here? *The victim has to bring full proof.*-----

4.11 If there has been a criminal (e.g. by the police) or other investigation into the circumstances under adjudication in proceedings relating to alleged employment-related Asexual harassment@, will statements or other evidence obtained in the course of that investigation be admissible in relation to the alleged employment-related Asexual harassment@ proceedings? No

4.12 If so, under what conditions will such evidence be admitted? -----

4.13 Will a failure by the employer of an alleged harasser to observe any Aguidance@ or ACode of Practice@ provisions on dignity at work be taken into account during the course of adjudicating in proceedings relating to alleged employment-related Asexual harassment@? Yes

4.14 If so, in what way will this come about, and what might be the consequences of such non-observance? *To bring full proof may be easier.*

5. ADJUDICATION, REMEDIES AND CONSEQUENTIAL MATTERS

5.1 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related Asexual harassment@ be given with a full statement of the reasons underlying the outcome of those proceedings? Yes

5.2 Is this consistent with the normal situation for judgments/decisions in civil proceedings in your country? Yes

5.3 In your country will the judgement/decision in relation to proceedings concerning alleged employment-related Asexual harassment@ be made public? Yes

Like in other cases.

5.4 If so, will the whole of the judgment/decision be made public, or may portions of it not be made available (e.g. the names of parties)?

In Germany judgements/decisions are made public without the names of the parties (alike in the European Court of Justice).

5.5 What remedies are available to a successful party who has complained of employment-related Asexual harassment@?

A succesfull party needes no remedy. But it is a problem of execution.

5.6 In addition to Adirect@ remedies for a successful party in such proceedings, is it possible for the adjudicating body to make Arecommendations@ or similar (e.g. to bring about an investigation into, or monitoring of, an employer-s practices)? No

5.7 If so, what is the potential scope of any such Arecommendations@ (or the like)? -----

- 5.8 Is there a recognized cause of action in your country for Avictimization@ in relation to a person who has brought a complaint concerning, assisted a person who has made a complaint, or been involved with proceedings concerning alleged employment-related Asexual harassment@? **Yes**

In Section 4 paragraph 3 of the Act we have a prohibition of victimization of employees.

- 5.9 If so, what conditions must be satisfied in order to succeed in a claim alleging such Avictimization@?

The victim has to proof that he is victimased because he has defended himself against sexual harassment.

- 5.10 What remedies are available to a successful party who has complained of Avictimization@ relating to alleged employment-related Asexual harassment@?

Damages and compensation.

- 5.11 Is it possible in your country to appeal against a judgment/decision in proceedings relating to alleged employment-related Asexual harassment@ or alleged Avictimization@ arising out of any such allegation? **Yes**

- 5.12 If so, to whom does any such appeal lie, and on what grounds can such an appeal be made?

Who has lost the case.

- 5.13 Is it possible in your country for a party who has brought proceedings relating to alleged employment-related Asexual harassment@ or alleged Avictimization@ to be open to litigation in respect of (e.g.) defamation, perjury, or the like? **Yes**

- 5.14 If so, in what circumstances might this arise?

Wrong oath or evidence.

6. SUPPLEMENTARY

- 6.1 Please indicate your (personal) impression of the extent to which the notion of Asexual harassment@ in your country depends upon the subjective response of the alleged Avictim@ and to what extent it has proved possible in your country to develop objective criteria for identifying action or circumstances which can be said to amount to Asexual harassment@

In my opinion the protection against sexual harassment is sufficient; but we have only a few cases in the labour courts.

- 6.2 Please provide any available data relating to statistics for cases involving allegations of employment-related Asexual harassment@ in your country.

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- 6.3 Please furnish a copy of any legislative provisions in your country which deal specifically with the phenomenon of Asexual harassment@.

- 6.4 Please furnish a copy of any Aguidance@ or ACode of Practice@ in relation to dignity at work which

touch upon the phenomenon of Asexual harassment@.

- 6.5 Is there in your country any experience in the use of Aalternative dispute resolution@ mechanisms in relation to circumstance in which allegations of employment-related Asexual harassment@ have been made? **No**
- 6.6 If so, please indicate the nature of the Aalternative dispute resolution@ mechanism(s) and give a brief description of its (their) operation:-----
- 6.7 Have there been developments in your country in the direction of applying any of the provisions dealt with in this questionnaire to alleged Asame sex@ harassment? **No**
- 6.8 If so, please indicate how these developments have progressed to date: -----