INTEGRATION AND PARTICIPATION OF DISABLED PERSONS IN THE LABOUR MARKET – THE LEGAL INSTRUMENTS IN GERMAN LAW

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UNIVERSITY: CAREER COUNSELLING AND JOB PLACEMENT FOR STUDENTS WITH DISABILITIES. 7.1. The legal situation concerning Higher Education in Germany. 7.2. Access to higher education. 7.3. Assistance during studies. *7.3.1. Information and practical support. 7.3.2. Financial support, especially provided by the BafögG*. 7.4. Job Placement. 8. CONCLUSIONS.

RESUMEN: Esta contribución presenta una visión general sobre los instrumentos jurídicos alemanes –tanto en el derecho laboral como en el derecho social– designados para asegurar la integración y participación de las personas con discapacidad en el mercado laboral. Las autoras tratan la influencia e implementación de normas legales internacionales, como las Directivas Europeas o la Convención sobre los Derechos de las Personas con Discapacidad (CRPD, por sus siglas en inglés). Además, se describe la situación real del mercado laboral en relación al empleo de personas con discapacidad. Finalmente, las autoras dan algunos ejemplos concretos de programas de empleo para titulados jóvenes con discapacidad, dirigidos por la Agencia Estatal de Empleo de Alemania, universidades y organizaciones de servicios para estudiantes.

ABSTRACT: This paper gives an overview on German legal instruments in both labour law and social law designated to insure the integration and participation of persons with disabilities in the labour market. The authors discuss the influence and implementation of international legal rules such as European Directives or the Convention on the Rights of Persons with Disabilities (CRDP). The paper also describes the actual labour market situation with regard to the employment of disabled persons. Finally, the authors give examples of job placement programs for young academics with disabilities, led by the German National Employment Agency, universities, and student services organisations.

PALABRAS CLAVE: participación en el mercado laboral, despido improcedente, Convención sobre los Derechos de las Personas con Discapacidad, ajustes razonables, acceso a la enseñanza superior.

KEYWORDS: participation in the labour market, unlawful dismissal, Convention on the Rights of Persons with Disabilities (CRPD), reasonable accommodation, access to Higher Education.

1. PREFACE

To fully appreciate the following report, we would like to point out some characteristics of the German legal system.

German constitutional law and any other written law has to be interpreted following the rule of "Völkerrechtsfreundlichkeit" (favourable attitude towards international law), which means that respecting the international law has to be enforced if at all possible in the limits set by the wording and the recognizable spirit of the law.[1]

The integration of persons with disabilities in the educational and vocational training system as well as in the labour market are relevant to the fields of labour law and social security law as well as to social assistance and welfare law. This distinction is important because the former is considered part of civil law and primarily follows the regime of contract law, whereas social security law and social assistance and welfare law are specialized fields of public, and here more specifically administrative law. These different premises may cause issues in the application of different acts.

Lastly, the above-mentioned areas of law are at the junction of the division of power within the federal system. Both the competency of legislation as well as the execution thereof can fall under the purview of either the federation or the federal states. This is further complicated in that within one area of law, competency of legislation can lie with the federation while the execution lies with the federal states.

[1] BVerfG, 26/03/1987, file ref. 2 BvR 589/79 ; 14/10/2004, file ref. 2 BvR 1481/04; 23/03/2011, file ref. 2 BvR 882/09; R. GEIGER, *Grundgesetz und Völkerrecht*, 6th ed., Munich, 2013, pp. 163, 170 et seqq.; K.-P. SOMMERMANN, in: Hermann von Mangoldt/Friedrich Klein/Christian Starck (eds.), GG, Vol. 2, 6th ed., Munich, 2010, Art. 20 rec. 254; K.-P. SOMMERMANN, "Völkerrechtlich garantierte Menschenrechte als Maßstab der Verfassungskonkretisierung – Die Menschenrechtsfreundlichkeit des Grundgesetzes", *AöR 114* (1989), p. 391 (418); J. v. BERNSTORFF, "Anmerkungen zur innerstaatlichen Anwendbarkeit ratifizierter Menschenrechtsverträge: Welche Rechtswirkungen erzeugt das Menschenrecht auf inklusive Schulbildung aus der UN-Behindertenrechtskonvention im deutschen Sozial- und Bildungsrecht?", *RdJB 2011*, p. 203 (208).

2. THE DEFINITION OF DISABILITY IN GERMAN LAW

2.1. The general definition of disability

Within German law, a definition of the term "disability" is to be found in § 2 (1) 1 SGB IX (Sozialgesetzbuch IX, Code of Social Law, Book IX). This definition has been adopted verbatim in § 3 Behindertengleichstellungsgesetz (BGG, Equality for the Disabled Act) as well. Furthermore, being considered the most appropriate legal definition, it is adopted into the entirety of the social law as well as other legal contexts.[2] The same definition underlies § 1 Allgemeines Gleichbehandlungsgesetz (AGG, General Equal Treatment Act).[3] The AGG was enacted as a realization of European directives, and with regard to labour law specifically the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[4], which itself, while mentioning the term "disability", does not include an explicit definition. However, even in the context of the European guidelines, the adoption of the term into the AGG is compatible with both European guidelines and German law.[5]

According to § 2 (1) 1 SGB IX a person is disabled, "if his or her physical function, mental ability or psychological health differs from the typical age-appropriate state of being for a period presumed to be more than six months and if this leads to a lack of integration and participation in society."

Following the explanatory statement of the draft for the SGB IX, § 2 (1) 2 SGB IX takes into consideration the international discussion which has lead to the previous adoption of the ICF[6], of which one crucial aim is the turn against a deficit orientated view of disability.[7]

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[2] Cf. F. WELTI, in: Klaus Lachwitz/Walter Schellhorn/Felix Welti (eds.), *HK-SGB IX*, 3rd ed., Cologne, 2010, § 2 rec. 7 et seqq.; F. WELTI, "Das neue SGB IX – Recht der Rehabilitation und Teilhabe behinderter Menschen", *NJW 2001*, p. 2210 (2211).

[3] Cf. explanatory statement of the draft for the AGG, BT-Drucks. 16/1780, p. 31.

[4] OJ no. L 303 of 02/12/2000, p. 16.

[5] P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 81 rec. 34 et seqq., inter alia.

[6] International Classification of Functioning, Disability and Health.

[7] BT-Drucks. 14/5074, p. 98.

The definition of disability is trinomial.[8] It presupposes a functional disorder, which is more than temporary; which sets apart the person from the norm (atypical); and which leads to a lack of integration and participation in society.

2.1.1. Functional disorder

Firstly, a functional disorder of a physical, mental or psychological type has to be proven and thus be objectively assessable.[9] For indicators of what is considered a physical, mental or psychological disorder, § 14 (2) SGB XI and §§ 1 to 3 of the Eingliederungshilfe-Verordnung (EinglH-VO, Integration Assistance Ordinance) can be consulted.[10] On the international level the ICD-10[11], compiled by the World Health Organisation (WHO), can serve as a reference point. The functional disorder must be strongly presumed to exist more than six months. This is meant to differentiate the terms disability and disease in legal terms.[12] The latter has not been defined in written law. However, the federal social court has stated that disease is an untypical physical or mental state, which needs medical treatment and/or leads to (temporary) inability to work.[13]

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[8] V. NEUMANN, in: Olaf Deinert/Volker Neumann (eds.), *Rehabilitation und Teilhabe behinderter Menschen – Handbuch SGB IX*, 2nd ed., Baden-Baden, 2009, § 5 rec. 1 et seqq., § 2 rec.s 6 et seqq.

[9] Cf. BSG, 18/06/1968, file ref. 3 RK 63/66 concerning the irregular physical or mental state in the context of the definition of disease.

[10] This is a federal ordinance based on § 60 SGB XII.

[11] International Statistical Classification of Diseases and Related Health Problems.

[12] V. NEUMANN, in: Deinert/Neumann (fn. 8), § 2 rec. 10.

[13] BSG 28/10/1960, file ref. 3 RK 29/59; 28/04/1967, file ref. 3 RK 12 /65; 30/05/1967, file ref. 3 RK 15/65; 18/06/1968, file ref. 3 RK 63/66; 27/05/1971, file ref. 3 RK 28/68; 20/10/1972, file ref. 3 RK 93/71; 13/02/1975, file ref. 3 RK 68/73; 12/11/1985, file ref. 3 RK 48/83; 08/03/1990, file ref. 3 RK 24/89; 28/02/2008, file ref. B 1 KR 19/07 R; see in the literature I. EBSEN, Krankenversicherung, in: Bernd Baron von Maydell/Franz Ruland/Ulrich Becker (eds.), *Sozialrechtshandbuch*, 5th ed., Baden-Baden, 2012, § 15 rec. 88; G. IGL/F. WELTI, *Sozialrecht*, 8th ed., Neuwied, 2007, § 17 rec. 31 et seqq.; R.WALTERMANN, *Sozialrecht*, 10th ed., Heidelberg, 2012, rec. 171 et seqq.

2.1.2. Difference from age-appropriate condition

The functional disorder must be atypical. This is defined as differing from the assumed age-appropriate state of being. The original intent was to exclude functional disorders that "develop physiologically in old age and are age-appropriate in kind and extent for the respective age and therefore cannot be considered as an abnormal state and consequently cannot be viewed as a disability."[14]

Today, jurisdiction and legal publications refer to the need of medical treatment as the arbitrative criterion in considering an atypical condition. The explanatory statement in the draft version of the SGB IX states accordingly that the atypical state of being for the respective age group is the "loss or disorder of normally existing physical functions, mental abilities or psychological health".[15]

2.1.3. Lack of participation in society

Lastly, in order to be classified as a disability, the atypical functional disorder must lead to a lack of participation in society.

As the SGB IX is conceived to enable persons with disabilities to live their life in an independent way and to enable them to participate in society, the terms "society" and "social" must be understood in a broad sense.[16] In this context, it is understood to include health care benefits aiming at habilitation and rehabilitation, as well as benefits aiming at integration in the labour market and participation in social events. The ICF refers to nine fields of participation: learning and applying knowledge; general tasks and demands; communication; mobility; self-care; domestic life; interpersonal interactions and relationships; significant areas of life; and community, social and civic life.[17] Following the explanatory statement of the SGB IX, "social benefits can only be seen as an offer and as an opportunity that need to be actively utilized by disabled persons to reach the aim of these benefits: integration and participation in society." [18]

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[14] BT-Drucks. 10/5701, p. 9; also Federal Ministry of Labour and Social Affairs (ed.), *Anhaltspunkte für die ärztliche Gutachtertätigkeit im sozialen Entschädigungsrecht und nach dem Schwerbehindertenrecht* (Teil 2 SGB IX) [AHP], Bonn, legal status of 2008, p. 21.

[15] BT-Drucks. 14/5074, p. 98.

[16] BT-Drucks. 14/5074, p. 98.

[17] German Institute of Medical Documentation and Information (DIMDI)/WHO Center for Cooperation for the System of International Classifications (eds.), *International Classification of Functioning, Disability and Health – German-language version*, Cologne, 2005, p. 20.

[18] BT-Drucks. 14/5074, p. 98.

Therefore, the intention is to empower persons with disabilities and to strengthen their ability of independence and self-care.[19]

2.1.4. Further development of § 2 (1) 1 SGB IX influenced by the CRPD[20] and the European legal situation

Comparing the relatively narrow definition of disability in § 2 (1) 1 SGB IX and the CRPD evokes some concerns. The CRPD has been adopted as simple federal law.[21] Even if the CRPD does not include an explicit definition of disability itself (*argumentum e contrario* from Art. 2 CRPD),[22] its spirit and purpose as well as its scope (cf. Art. 1)[23] suggest a broad understanding of the term. Whether or not it is possible a broadening of the term in the context of German law, by favourably considering the international rule[24] in the context of § 2 (1) 1 SGB IX, is in doubt.[25] Alternatively, a modification of the German legal text according to the CRPD would

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[19] BT-Drucks. 14/5074, p. 98.

[20] Detailed M. BANAFSCHE, "Die UN-Behindertenrechtskonvention und das deutsche Sozialrecht – eine Vereinbarkeitsanalyse anhand ausgewählter Beispiele (part I)", *SGb 2012*, p. 373 (374 et seqq.).

[21] BVerfG 26/03/1987, file ref. 2 BvR 589/79; 14/10/2004, file ref. 2 BvR 1481/04; exemplary B. KEMPEN, in: von Mangoldt/Klein/Starck (fn. 1), Art. 59 rec. 92.

[22] T. DEGENER, "Welche legislativen Herausforderungen bestehen in Bezug auf die nationale Implementierung der UN-Behindertenrechtskonvention in Bund und Ländern?", *br 2009*, p. 34 (34).

[23] For a discussion of reasons for not giving a definition of disability see T. DEGENER, „Die UN-Behindertenrechtskonvention als Inklusionsmotor", *RdJB 2009*, p. 200 (204); T. DEGENER, "Die UN-Behindertenrechtskonvention – Grundlage für eine neue inklusive Menschenrechtstheorie", *VN 2010*, p. 57 (57 et seqq.); for a discussion on controversy during the development stages of the CRPD, see T. DEGENER, "Menschenrechtsschutz für behinderte Menschen – Vom Entstehen einer neuen Menschenrechtskonvention der Vereinten Nationen", *VN 2006*, p. 104 (106); J.v. BERNSTORFF, "Menschenrechte und Betroffenenrepräsentation: Entstehung und Inhalt eines UN-Antidiskriminierungsübereinkommens über die Rechte von behinderten Menschen", *ZaöRV 67* (2007), p. 1041 (1047).

[24] Vide supra Preface.

[25] For a discussion on the resolution of conflicts between international law and federal law in applying the 'lex posterior rule', see also: D. RAUSCHING, in: Rudolf Dolzer/Wolfgang Kahl/Christian Waldhoff/Karin Graßhof (eds.), *Bonner Kommentar zum Grundgesetz*, Vol. 8, status: February 2012, Heidelberg, 2012, Art. 59 rec. 141.

be necessary. In this regard, the interpretation of the term "disability" in the context of the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[26] by the CJEU seems very important.[27]

2.2. The term "severe disability" and its equivalence

The majority of labour laws protecting persons with disabilities in the workplace also require a so-called severe disability according to § 2 (2) SGB IX. By law a severe disability is determined by the competent authority[28] by assessing the lack of participation in society on a scale (Grad der Behinderung). The assessment process is indeed governed by schematic examination. The relevant criteria concerning physical, mental or psychological disorders are listed in a legal ordinance (Versorgungsmedizin-Verordnung, VersMedV). A severe disability needs a degree of disability of 50% or higher.

A grade of disability of 30% or higher can be equated by law to a "severe disability" by the employment agency. The legal consequence of the equivalence is the application of most of the benefits for persons with severe disabilities, especially §§ 68 to 160 SGB IX (cf. § 68 (1) and (3) SGB IX). The equivalence takes effect "from the day the claim was made."

3. LABOUR MARKET STATISTICS CONCERNING PERSONS WITH DISABILITIES

There are very little statistical data in Germany pertaining to the situation and integration of persons with disabilities in the labour market in total. Following the Federal Statistic Office, the percentage of persons with disabilities participating in the labour market is relatively low. In 2009 70% of persons with disabilities between the ages of 25 and 44 years were working or looking for employment, whereas the rate was

[26] OJ no. L 303 of 2/12/2000, p.16; vide already supra A.I.1.

[27] Cf. infra Section I, II. and CJEU,11/04/2013, file ref. C-335/11 – Ring/Skouboe Werge.

[28] The competence follows federal state law, usually it is the pension office (§ 69 (1) 1 SGB IX).

88% in the age group of persons without disabilities. The rate of unemployment was 10% of persons with disabilities, but only 7% for those without disabilities.[29]

Most of the statistical data are limited to assessing the employment situation of the above-mentioned severely disabled persons. This is reflected in the latest report of the Federal Government on the situation of persons with disabilities (Disability Report, 2009), which mainly refers to severely disabled persons.[30] The relevant data is collected by a procedure as provided in § 80 (2) SGB IX. It obliges any employer to report those data to the employment agencies, and they are the basis for calculating the percentage of positions to be filled by persons with severe disabilities and for the compensatory levy in case employers do not act in keeping with this percentage. § 71 (1) SGB IX places public and private employers with more than 20 employees under obligation to hire at least 5% persons with severe disabilities.[31]

3.1. Development of the rate of employment of persons with severe disabilities from 2003 to 2010

The following table shows the development of employment rates as reported by public and private employers for the reference period between 2003 and 2012[32] Data for 2013 is not yet available.

[29] Federal Statistic Office (ed.), Pressemitteilung no. 187, 12/5/2011 (https://www.destatis.de/DE/PresseService/Presse/Pressemitteilungen/2011/05/PD11_187_227.html), last access: 29/7/2014); see also Federal Ministry of Labour and Social Affairs (ed.), *Participation Report of 2013*, Bonn, status: August 2013, pp. 128 et seqq., referring to all persons with impairments and not only those with barriers to participation in society.

[30] Federal Ministry of Labour and Social Affairs (ed.*), Disability Report of 2009*, Bonn, status: June 2009, pp. 56 to 58; partially taking into account all persons with disabilities, cf. *Participation Report of 2013* (fn. 29), p. 133.

[31] For further information on the employment quota and compensatory levy vide infra Section III, I.1.a).

[32] Federal Employment Agency (ed.), Statistics of the Federal Employment Agency (http://statistik.arbeitsagentur.de/nn_31958/SiteGlobals/Forms/Rubrikensuche/Rubrikensuche_Suchergebnis_Form.html?view=processForm&resourceId=210358&input_=&pageLocale=de&topicId=17388&region=&year_month=201212&year_month.GROUP=1&search=Suchen), last access: 28/7/2014.

	Relevant jobs		Target (5 %)		Actual state (in %)	
	Private employers	**Public employers**	**Private employers**	**Public employers**	**Private employers**	**Public employers**
2003	14,978,767	4,812,000	722,207	242,025	3.6	5.4
2004	14,680,371	4,815,439	701,668	242,002	3.6	5.6
2005	14,478,097	4,745,478	629,698	238,342	3.7	5.7
2006	14,611,180	4,735,735	699,694	237,738	3.7	5.9
2007	15,175,978	4,712,031	724,700	236,521	3.7	6.0
2008	15,696,407	4,727,327	749,702	237,375	3.7	6.1
2009	15,536,478	4,805,608	741,161	241,115	3.9	6.3
2010	15,695,522	4,817,990	748,591	241,795	4.0	6.4
2011	19,399,555	5,593,779	778,252	242,790	4.0	6.5
2012	19,696,397	5,663,318	789,528	245,312	4.1	6.6

3.2. Consideration

Concerning the data two aspects shall be examined in more detail. Firstly, the development of the rate of employment itself deserves a closer look. Secondly, the development of the rate of employment of persons with severe disabilities regarding the development of unemployment in general will be discussed.[33]

The Disability Report of 2009 only states that the rate of employment has risen by 0.3%, from 4.0% in 2003 to 4.3% in 2006. The Report concludes that the system of employment quota and compensatory levy positively and significantly influences the employment rate of persons with severe disabilities.[34] However, this conclusion does not differentiate between private and public employers –a distinction that is most informative–. A closer look is revealing: focusing only on the reported period from 2003 to 2006, 92% of all employers are located in the private sector, compared to only 8% of employers in the public sector. The number of relevant jobs in the private

[33] Already M. BANAFSCHE, "Die Beschäftigungspflicht der Arbeitgeber nach § 71 et seqq. SGB IX zwischen Anspruch und Wirklichkeit", *NZS 2012*, p. 205 (208 et seqq.).
[34] Disability Report of 2009 (fn. 28), p. 57.

sector decreased by approximately 2.5%, whereas the quota increased from 3.6% to 3.7%. In absolute numbers, this translates into an increase of 11,528 jobs filled with severely disabled persons.[35] In the public sector, the number of relevant jobs decreased by approximately 1.6%, while the quota increased from 5.4% to 5.9%, translating into 18,544 jobs in absolute numbers. While the loss of jobs in both sectors was more or less comparable, the increase in jobs designated for persons with severe disabilities in the public sector outnumbered those in the private sector by almost a third. The postulated positive effect of a quota and compensatory levy therefore could not be seen in the vast majority of the private sector employers although, making up for 92% of employers altogether, they are the main target group of the rules stated in §§ 71 et seqq. SGB IX.

According to the Disability Report of 2009, a reduction of 25,000 in the number of unemployed persons with severe disabilities could be observed in the period between 2005 and 2008.[36] Given a decrease of the unemployment quota as a whole of 33.5% in the reported period, the effects of the employment quota and the compensatory levy must be called into question. Indeed the employment quota of persons with severe disabilities during that period increased from 4.2% to 4.3%. However, taking a closer look at the distribution between private and public sector, in the private sector the quota remained at 3.7% and so it might be assumed that the increase is based solely on changes within the public sector.

4. SECTION I: JOB PLACEMENT POLICIES – LEGAL FRAMEWORK AND CASE LAW

4.1. The influence of international law

The CRPD and its Optional Protocol have been adopted as federal law by a federal act ("Gesetz zu dem Übereinkommen der Vereinten Nationen vom 13.12.2006 über die Rechte von Menschen mit Behinderungen sowie zu dem Fakultativprotokoll vom 13.12.2006 zum Übereinkommen der Vereinten Nationen über die Rechte von Menschen mit Behinderungen"[37]) on 21 December 2008,

[35] See also the Statistics of the Federal Employment Agency (fn. 30).
[36] Disability Report of 2009 (fn. 28), p. 56.
[37] BGBl. II 2008, p. 1419.

according to Art. 59 (2) 1 GG (Grundgesetz, German Constitution). It came into effect on 26 March 2009.[38]

Since then, CRPD has to be taken into account in both word and intention whenever applying German constitutional law or other legal acts. As mentioned above, the latter have to be interpreted favourably in keeping with international law, e.g. the CRPD.[39]

There might be constitutions where rights from the CRPD might be individually enforced. This depends on whether or not the article in question assigns an individual right to the claimant and is self-executing.[40]

Particularly significant are Art. 27[41] and Art. 24 of the CRPD[42], both of which have to be considered and enforced by the legislation and in the application of any law. This obligation is imperative for public bodies at all levels, likewise for the

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[38] Concerning the development and relevance of the CRPD T. DEGENER (fn. 23), *VN 2006*, pp. 104 et seqq.; J. v. BERNSTORFF (fn. 23), *ZaöRV 67* (2007), pp. 1041 et seqq.; V. AICHELE, "Die UN-Behindertenrechtskonvention und ihr Fakultativprotokoll – Ein Beitrag zur Ratifikationsdebatte", *Policy Paper No. 9*, Berlin, 2008; T. DEGENER (fn. 23), *RdJB 2009*, pp. 200 et seqq.; *Degener* (fn. 22), *br 2009*, pp. 34 et seqq.; T. DEGENER (fn. 23), *VN 2010*, pp. 57 et seqq.; V. AICHELE, "Behinderung und Menschenrechte: Die UN-Konvention über die Rechte von Menschen mit Behinderungen", *APuZ 23/2010*, pp. 13 et seqq.; J. v. BERNSTORFF, "Anmerkungen zur innerstaatlichen Anwendbarkeit ratifizierter Menschenrechtsverträge: Welche Rechtswirkungen erzeugt das Menschenrecht auf inklusive Schulbildung aus der UN-Behindertenrechtskonvention im deutschen Sozial- und Bildungsrecht?", *RdJB 2011*, pp. 203 et seqq.; P. MASUCH, „Die UN-Behindertenrechtskonvention anwenden!", in: Christine Hohmann-Dennhardt/Peter Masuch/Mark Villiger (eds.), *Festschrift für Renate Jäger – Grundrechte und Solidarität – Durchsetzung und Verfahren*, Kehl on the Rhein, 2011, pp. 245 et seqq.

[39] Vide supra Preface.

[40] So in the context of Art. 24 CRPD: E. RIEDEL, Zur Wirkung der internationalen Konvention über die Rechte von Menschen mit Behinderung und ihres Fakultativprotokolls auf das deutsche Schulsystem, Mannheim/Geneva, 2010, p. 8; cf. to the attribute of "self-executing" BVerwG, 04/06/1991, file ref. 1 C 42/88 - rec. 14; R. STREINZ, in: Michael Sachs (ed.), Grundgesetz, 6th ed., Munich, 2011, Art. 59 rec. 68.

[41] Detailed on Art. 27 CRPD: P. TRENK-HINTERBERGER, Artikel 27 – Arbeit und Beschäftigung, in: Antje Welke (ed.), *UN-Behindertenrechtskonvention mit rechtlichen Erläuterungen*, Berlin, 2012, pp. 190 et seqq.

[42] On Art. 24 CRPD: M. KRAJEWSKI/T. BERNHARD, Artikel 24 – Bildung, in: Antje Welke (ed.), *UN-Behindertenrechtskonvention mit rechtlichen Erläuterungen*, Berlin, 2012, pp. 164 et seqq.

national state (Bund), the federal states (Bundesländer) and the municipalities (Gemeinden) (cf. Art. 4 (5) CRPD).[43] The legal instruments in German labour and social law regarding disabled persons that are treated below[44] are considered to be measures of reasonable accommodation according to Art. 2 (4) CRPD when applied in individual cases.[45]

4.2. The influence of European law

In the context of European law and the protection against discrimination for persons with disabilities the AGG deserves special mention. The AGG was issued based on the following directives[46]: the "Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation"[47]; the "Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin"[48]; and the 'Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'[49]. Revisions were made based on the "Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002" [50] and the law was amended based on the "Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)"[51]. The law aims at preventing or removing discrimination based on, among other factors, disability (§ 1). The presuppositions of the AGG as a realisation of European directives have to be

[43] Cf. AICHELE (fn. 38), *Policy Paper No. 9*, p. 8; AICHELE (fn. 38), *APuZ 23/2010*, p. 13 (17).
[44] Vide infra Section IV.
[45] Cf. P. TRENK-HINTERBERGER in: Marcus Kreutz/Klaus Lachwitz/Peter Trenk-Hinterberger, *Die UN-Behindertenrechtskonvention in der Praxis – Erläuterungen der Regelung und Anwendungsgebiete*, Cologne 2013, Art. 27 Rn. 24.
[46] See the overview at G. MEINEL/J. HEYN/S. HERMS, *Allgemeines Gleichbehandlungsgesetz*, 2nd ed., Munich, 2010, Introduction Rec. 1.
[47] OJ no. L 303 of 2/12/2000, p.16; vides already supra A.I.1.
[48] OJ no. L 180 of 19/7/2000, p. 22.
[49] OJ no. L 39 of 14/2/1976, p. 40.
[50] OJ no. L 269 of 5/10/2002, p.15.
[51] OJ no. L 204 of 26/7/2006, p.23.

interpreted in conformance with European law [cf. Art. 288 (3) Treaty on the Functioning of the European Union (TFEU) in conjunction with Art. 4 (3) of the Treaty on European Union (TEU)].[52] According to jurisdiction of the European Court of Law, these norms fall within the scope of European law.[53] They have to be applied by courts in conformance with European law.[54] Therefore, the benchmark is not just the directives upon which the AGG is based, but also primary law.[55] When applied in individual cases, the legal instruments provided in labour and social law regarding disabled persons that are treated below[56] are considered to be measures of reasonable accommodation according to Art. 5 of the Council Directive 2000/78/EC.[57]

In this context, Art. 21 of the European Union Charter of Fundamental Rights (Charter) stands out. Among other things, it prohibits any discrimination based on disability and other features. Additionally, Art. 26 Charter has to be considered which states that "the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community" has to be recognised and respected.[58]

4.3. German constitutional law in the Grundgesetz (GG)

In 1994, Art. 3 (3) 2 GG was added to the GG (the German constitution), prohibiting any disadvantageous treatment based on disability. This is a special rule of equality.[59] The main intention was to prevent social and legal exclusion of disabled persons.[60] Discrimination can only be justified constitutionally by compelling and

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[52] See M. SCHWEITZER, *Staatsrecht III – Staatsrecht, Völkerrecht, Europarecht*, 10th ed., Heidelberg, 2010, rec. 352d, inter alia.

[53] CJEU, 19/01/2010,file ref. C-555/07 – Kücükdeveci.

[54] CJEU, 19/01/2010, file ref. C-555/07 – Kücükdeveci.

[55] CJEU, 22/11/2005, file ref. C-144/04 – Mangold.

[56] Vide infra Section I – IV.

[57] BAG, 19/12/2013, file ref. 6 AZR 190/12, referring to CJEU 11/04/2013, file ref. C-335/11 – Ring/Skouboe Werge.

[58] The definition of disability corresponds to the definition of § 2 (1) 1 SGB IX. Cf. H. JARASS, *Charta der Grundrechte der Europäischen Union*, 2nd ed., Munich, 2013, Art. 26 rec. 7.

[59] BGBl. 1994 I, p. 3146.

[60] BT-Drucks. 12/8165, p. 28.

urgent reasons.[61] The discrimination must be unavoidable to meet the concerns of special interests caused by disability. The principle of proportionality has to be considered to the utmost degree.[62] Consequently, the legislative powers are very restricted in this field.[63]

Concerning a constitutional legal understanding of the term of disability, the Federal Constitutional Court (Bundesverfassungericht, BVerfG) still refers to the now abandoned rule of § 3 (1) 1 Schwerbehindertengesetz (SchwbG; Severely Disabled Persons Act), that defined disability as "a consequence of a more than transitory functional disorder that is caused by an atypical physical, mental or psychological condition." [64]

In contrast to Art. 3 (1) 1 GG, which prohibits favouritism and discrimination, Art. 3 (3) 2 GG does not prohibit any and all discrimination, but it focuses only on disadvantages based on disability. This means that positive measures to the benefit of disabled persons are permitted, but they are not compulsory under constitutional law.[65] This is to imply that there is no direct constitutional claim to compensatory positive measures.[66]

4.4. Federal law

As there is no appropriate codification, many different acts of law are relevant in the field of integration of disabled persons into the labour market. This means not only the above-mentioned AGG[67], but also different acts of social law, such as different books of the Code of Social Law, i.e. Sozialgesetzbuch II (SGB II: Grundsicherung für Arbeitssuchende; Basic Social Security for Unemployed),

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[61] BVerfG,19/01/1999, file ref. 1 BvR 2161/94; H. JARASS, in: Hans Jarass/Bodo Pieroth, *Grundgesetz*, 13th ed., Munich, 2014, Art. 3 rec. 149.

[62] L. OSTERLOH, in: Michael Sachs (ed.), *Grundgesetz*, 6th ed., Munich, 2011, Art. 3 rec. 314.

[63] B. PIEROTH/B. SCHLINK, *Grundrechte – Staatsrecht II*, 28th ed., Heidelberg, 2012, § 11 rec. 481, 488.

[64] BVerfG,08/10/1997, file ref. 1 BvR 9/97; V. NEUMANN, in: Deinert/Neumann (fn. 8), § 2 rec. 6 et seqq..

[65] BVerfG,08/10/1997, file ref. BvR 9/97.

[66] C. STARCK, in: Hermann von Mangoldt/Friedrich Klein/Christian Starck (eds.), *Grundgesetz*, Vol. 1, 6th ed., Munich, 2010, Art. 3 rec. 419.

[67] Vide supra Preface, I.1.

Sozialgesetzbuch III (SGB III: Arbeitsförderung, Employment Promotion); the above mentioned SGB IX, the Bundesausbildungsförderungsgesetz (BAföG; Federal Education and Training Assistance Act); and finally the Kündigungsschutzgesetz (KSchG; Protection Against Dismissal Act). Many of the instruments provided, e.g. in §§ 81 and 84 SGB IX, are understood as measures of reasonable accommodation according to Art. 2 (4) and 27 CRPD[68] and Art. 5 of the Council Directive 2000/78/EC[69]. The Federal Labour Court (Bundesarbeitsgericht, BAG) recently clarified that these European and International rules have to be taken into account when applying and interpreting the German legal rules.[70] To date, the federal government considered that no legislative activity was necessary to fulfil the demands of the CRPD in the field of employment politics.[71]

4.4.1. SGB IX – Rehabilitation and participation of persons with disabilities

The SGB IX was conceived to adopt the constitutional prohibition of disadvantages based on disability in the field of social politics.[72] It aims to promote a life based on independence and participation and inclusion in society, as well as to prevent disadvantages (cf. § 10 SGB I and § 1 (1) SGB IX).

The SGB IX itself is not primarily a source of inalienable rights, but is meant to classify the inalienable and individual rights and benefits provided in other acts of social law.[73] In its first part, it also defines the important legal terms and provides some special administrative procedures in favour of persons with disabilities. It provides a basis to standardise the content, the scope of benefits and their execution. In its second part, the SGB IX contains important rules (of labour law and social law) to promote the employment of severely disabled persons.[74]

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[68] Vide supra Section I – I.

[69] Vide supra Section I – II.

[70] BAG, 19/12/2013, file ref. 6 AZR 190/12.

[71] Bundesministerium für Arbeit und Soziales, Nationaler Aktionsplan der Bundesregierung zur Umsetzung der UN-Behindertenrechtskonvention – Unser Weg in eine inklusive Gesellschaft, Berlin 2011, pp. 39 et seqq.

[72] BT-Drucks. 14/5074, p. 92.

[73] F. WELTI, in: Lachwitz/Schellhorn/Welti (fn. 2), § 7 rec. 5.

[74] Cf. F. WELTI, in: Lachwitz/Schellhorn/Welti (fn. 2), § 7 rec. 1, 4a; BT-Drucks. 14/5074, p. 100.

Important institutions providing social assistance for the participation and integration into the labour market, such as enumerated in §§ 33 to 54 SGB IX, are the Federal Employment Agency and –subsidiarily– the Integration Offices.

4.4.2. SGB III – Occupational integration

The law of occupational integration is contained in the SGB III[75], which aims to counteract unemployment, to shorten the period of unemployment, and to adjust supply and demand in the labour market. It also especially aims to prevent long-term unemployment by improving the individual employability. The latter is of special interest for disabled persons, because they are particularly affected by long-term unemployment, defined as a period of unemployment lasting one year or longer (cf. § 18 (1) SGB III).

The unemployment insurance ordinarily covers a 12-month period at most, according to § 137 (1) SGB III. Subsequently, in case that legal conditions for benefits of the unemployment insurance are not fulfilled, persons are entitled to benefits according to the SGB II. This form of social aid is aimed particularly at job seekers, only covering the minimum means of subsistence.

Benefits aiming at the integration of disabled persons into the labour market are included in §§ 112 to 129 of the SGB III, and are understood to be part of the active work support.

§ 19 (1) SGB III establishes a domain-specific rule concerning benefits for the disabled. In the context of the law, it defines as disabled those persons "whose expectations to participate in working life or to continue participating in working life are considerably diminished due to the type and the gravity of their disability and who consequently need special assistance in order to be part of the work force."

4.4.3. SGB II – Basic support for job seekers

Following the SGB III, work support falls under the purview of unemployment insurance, which is financed by employers and those employees contributing to the insurance (cf. §§ 340, 346 SGB III). In contrast, basic benefits for job seekers is a tax-based system, funded by the national state and municipalities § 46 SGB II.[76] For this

[75] Gesetz zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz – AFRG) of 24/03/1997, BGBl. I 1997, p. 594.

[76] Vgl.: G. IGL/F. WELTI (fn. 13), § 53 rec. 3; R.WALTERMANN (fn. 13), rec. 453c.

reason, public interest in terminating the period of unemployment is considered particularly important.[77]

According to § 16 (2) 3 SGB II, the rules of §§ 112 et seqq. SGB III are applicable for disabled persons entitled to the benefits for job seekers.[78] Contrary to the decreasing number of persons entitled to the benefits for job seekers (18.5 %), the number of disabled persons entitled to benefits under the SGB II has increased by 3%.[79]

4.4.4. BAföG – Federal Education and Training Assistance Act

The BAföG is considered a special part of the social code according to § 68 No.1 SGB I. The BAföG aims to promote vocational training and higher education and to realise equal chances in these fields.[80] The BAföG contains only a few norms concerning disabled persons.[81]

4.4.5. Protection against unlawful dismissal

Next to the rules of social benefits, the rules for the protection against unlawful dismissal are particularly relevant for disabled persons in terms of labour politics. The AGG does not contain provisions pertaining to this subject but refers to the common rules of unlawful dismissal (cf. § 2 (4) AGG). These rules are posed by the civil code, as far as the form and the delays are concerned. Rules about reasons and legal protection can be found in the KSchG.

These rules are supplemented by the special protection against unlawful dismissal for severely disabled persons[82] in §§ 85 et seqq. SGB IX.[83] The number of different acts and the interference of the numerous rules prove to be a major challenge when it comes to their application in industrial relations.

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[77] Cf. the explanatory statement to "Entwurf eines Vierten Gesetzes für moderne Dienstleistungen am Arbeitsmarkt", BT-Drucks. 15/1516, p. 53; ferner: S. RIXEN, in: Wolfgang Eicher/Wolfgang Spellbrink (eds.), *SGB II*, 2nd ed., Munich, 2008, § 10 rec. 11.

[78] Cf. S. THIE, in: Eicher/Spellbrink (fn. 68), § 16 rec. 13.

[79] Disability Report 2009 (fn. 28), p. 56.

[80] U. RAMSAUER/M. STALLBAUM/S. STERNAL, *BAföG,* 4th ed., Munich, 2005, § 1 rec. 4.

[81] Vide infra Section IV, III.2.

[82] P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 85 rec. 1, 45.

[83] Vide infra Section III, I.1.c).

4.5. Collective agreements

According to the basic rule of Art. 9 (3) GG, the regulation of industrial relations is conferred to the social partners. They do have to respect mandatory legal rules that provide minimum protective guarantees. In regard to disabled and severely disabled persons, these legal guarantees are particularly numerous, as this group is considered vulnerable in the labour market. This may be the reason for not including rules on employment and protection of disabled employees in collective labour agreements. However, the mandatory legal rules can be extended in collective agreements.

If operating agreements are reached between the employer and the works council, the special interests of severely disabled persons always have to be considered according to § 93 SGB IX.[84] Furthermore, § 83 SGB IX provides the so-called integration agreement as a special instrument to benefit severely disabled persons. The integration agreement is decided upon at a company level between the employer and the representative body of disabled employees[85] or the works council respectively.

5. SECTION II: CASE LAW

In a comparative perspective we should also examine case law. Thus, within the German legal system, case law in a strict sense has little significance, as it is based on written law. This also applies to the fields discussed here. Of course there is jurisprudence concerning the application of legal rules, which is discussed in context.[86] However, one issue has not been ruled on precisely by the law and, as of yet, is unresolved by jurisprudence. It concerns the employer's right to question an applicant or an employee about the existence of a severe disability.

Employers have a legally recognized interest to employ only those persons who are generally able to fulfil the tasks stipulated in the employment agreement.[87] Nevertheless, this may not lead to discrimination of persons with disabilities. For their

[84] In the public sector, this is addressed in the BPersVG (Federal Personnel Representation Act) and the Personal Representation Acts of the federal states.

[85] Vide infra Section III, I.1.a).

[86] Vide infra and vide supra.

[87] K. LEUBE, in: Norbert Kollmer/Thomas Klindt, *Arbeitsschutzgesetz*, 2nd ed., Munich, 2011, § 11 rec. 14 considers this as an « objectively legitimate interest »; cf. BAG, 7/06/1984, file ref. 2 AZR 270/83BAG, 13/02/1964, file ref. 2 AZR 286/63.

protection, the acceptable request of information by employers is narrowly defined through anti-discrimination rules. This is stipulated in the AGG and extends both to employees and applicants, following § 6 (1) 1 and 2 AGG.[88] It can be argued that since the AGG took effect, the employer's request for information concerning the (severe) disability of an applicant is prohibited.[89] The employer has a legally recognized interest in knowing about the severe disability of an (potential) employee, because employing a severely disabled person might count toward the quota or lower or remove the compensatory levy (§ 77 SGB IX).[90] However, following § 81 (2) SGB IX in combination with the AGG, it can be purported that the personality rights and protection against discrimination of the severely disabled person takes precedence over the interests of the employer.

The employer's legally protected interest, and consequently the right to question the applicant, is limited to the fact whether or not the applicant –in addition to being qualified– is physically, mentally and psychological able to fulfil the contracted duties.[91] Only this question may be asked by the employer and only this question may also be clarified by a pre-employment examination.

While having an employee under contract, the employer has a right to information with regard to severe disability, if all the rules of protection against unlawful dismissal apply, namely after a period of six months. In any case, there must be a legitimate interest of the employer, such as during the preparation of a dismissal.[92]

Physical aptitude is a *sine qua non* requirement for the appointment as civil servant. It is considered especially with regard to the risk of early retirement due to illness. In case of severely disabled applicants, the requirements are eased.[93]

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[88] It is illegal to inquire whether or not an applicant is pregnant following § 7 (1) i.V.m. § 1 AGG, because this is considered to be a discrimination based on gender. If the question is posed nonetheless, the female applicant is permitted to lie.

[89] Not decided by BAG 07/07/ 2011, file ref. 2 AZR 396/10, *NZA 2012*, 34et seqq.

[90] Cf. BAG 16/02/2012, file ref. 6 AZR 553/10, NZA 2012, 555 et seqq.

[91] U. KELLER, „Die ärztliche Untersuchung des Arbeitnehmers im Rahmen des Arbeitsverhältnisses", *NZA 1988*, p. 561 (562), inter alia.

[92] Cf. BAG 16/02/2012, file ref. 6 AZR 553/10, NJW 2012, 2058 et seqq.

[93] OVG Lüneburg, 31/07/2012, file ref. 5 LC 226/11 (juris).

6. SECTION III: EMPLOYMENT POLICIES AND JOB PLACEMENT FOR PERSONS WITH DISABILITIES

6.1. Instruments of job placement

6.1.1. Labour law

a) Employers obligation to hire severely disabled persons according to §§ 71 et seqq. and § 81 (1) SGB IX.

According to § 71 (1) 1 SGB IX, private and public employers are obliged to fill at least 5% of their positions with severely disabled persons. This obligation applies to employers with a yearly average of at least 20 jobs.[94] The law provides additional alleviations for small enterprises, cf. §§ 71 (1) 3 and 77 (1) 1 SGB IX. In case of non-fulfilment of the quota, employers have to pay a compensatory levy as set in § 77 (1) 1 SGB IX for every unfilled job.

The term "position" in this context is defined by § 73 (1) SGB IX as any position where employees, public agents, judges and apprentices or other trainees are employed. Therefore, the number of positions generally corresponds to the number of employees.[95] § 74 SGB IX provides details on how to calculate the quota of jobs having to be filled by severely disabled persons. This system can only be described as complex. We refer to the legal text for further information.

A compensatory levy provided in § 73 (1) 1 SGB IX has to be paid by the employer as long as the above-mentioned quota is not fulfilled.[96] The payment of the compensatory levy does not suspend the employer's obligation to fill the quota, as the employer cannot choose to pay the quota rather than hiring a severely disabled employee (§ 77 (1) 2 SGB IX).[97] The compensatory levy is meant to be both an incentive for the employer as well as help finance assistance and benefits to employers

[94] In this context BT-Drucks. 15/124, p. 5.

[95] Bayerischer VGH, 26/11/2008, file ref. 12 BV 07.2529; P. TRENK-HINTERBERGER, in: Lachwitz/Schellhorn/Welti (fn. 2), § 73 rec. 7.

[96] Concerning the constitutional aspects BVerfG26/05/1981, file ref. 1 BvL 56/78; BVerfG,01/10/2004, file ref. 1 BvR 2221/03; BVerfG, 10/11/2004, file ref. 1 BvR 1785/01.

[97] M. KOSSENS, in: Michael Kossens/Dirk von der Heide/Michael Maaß (eds.), *SGB IX*, 3rd ed., Munich, 2009, § 77 rec. 5.

that fulfil the quota.[98] The levy's amount is ruled in § 77 SGB IX and graded depending on the percentage of jobs filled with severely disabled persons. It varies from 115 to 290 € per every unfilled job position. The rule also provides exceptions for small businesses according to § 77 (2) 2 SGB IX.

Irrespective of the obligation to hire a certain number of severely disabled persons or the actual number already employed, § 81 (1) SGB IX puts the employer under the obligation to attempt hiring severely disabled persons whenever possible. In addition, public employers are obliged to invite any severely disabled person applying for a job to an interview.

b) Additional obligations for employers

Numerous legal rules are meant to protect existing employment of severely disabled persons and thus guarantee the sustained inclusion of disabled persons in the labour market. The employer's obligation to especially support severely disabled persons in career advancement provided in § 81 (4) SGB IX is to be understood in this sense. Inter alia, severely disabled persons have to be considered first for in-house or externally provided advanced training offers. This is also true for providing adequate and disability-friendly workplaces.

Furthermore, the employer has different legal duties to prevent the occurrence of severe disability and job loss due to a loss of physical capacity. Important instruments are the obligation of prevention provided in § 81 (1) SGB IX and the internal re-integration management (Betriebliches Eingliederungsmanagement, BEM), provided in § 84 (2) SGB IX.

Since 2004, employers are obliged to provide an "internal re-integration management" (BEM) for all employees who are unable to work due to illness for more than six weeks (consecutively or intermittently) within a given year. The program aims to overcome or prevent an inability to work in the future and to help maintain the employment.[99] This concerns not only severely disabled persons but any employee.[100] Others can be included in the BEM, namely (medical) experts, providers of social benefits and state integration agencies.[101] As part of a "cooperative search process"[102],

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[98] Vgl.: BVerfG, 26/05/1981, file ref. 1 BvL 56/78; M. KOSSENS, in: Kossens/von der Heide/Maaß (fn. 86), § 77 rec. 2.

[99] For further information on the legal conditions see M. SCHILS, *Das betriebliche Eingliederungsmanagement im Sinne des § 84 Abs. 2 SGB IX*, Frankfurt a.M., 2009, pp. 61 et seqq.

[100] BAG, 12/07/2007, file ref. 2 AZR 716/06.

[101] BAG, 10/12/2009, file ref. 2 AZR 198/09.

all existing and legally provided options, as well as social benefits should be considered, in order to design a work place as health-friendly as possible and to maintain employment. In practice, the BEM is most promising when it is part of a larger strategy within a business to promote health and a culture of integration[103], [104].

c) Protection against unlawful dismissal

Concerning the protection against unlawful dismissal of employees with disabilities, the AGG refers to the 'general' rules, i.e., the KSchG and §§ 85 et seqq. SGB IX.

The KSchG is applicable to any labour contract after a period of 6 month according to § 1 (1) KSchG. Material to this is the legal existence of the contract. Small and very small businesses are excluded from the rule. The KSchG differentiates three types of reasons that may legally justify dismissal: personal reasons, behavioural reasons and economic reasons. In the context of (severe) disabilities the latter is particularly important. Also, as a special case of personal reasons, dismissal due to illness is particularly relevant.

§ 1 (3) 1 KSchG stipulates four conclusive social criteria for an employer in selecting a person who has to be dismissed for economic reasons ("social selection"). Next to length of employment, age, and spousal or child support obligation, severe disability is explicitly mentioned. Severely disabled persons can only be considered for termination in social selection if the proper integration offices are in agreement (cf. § 85 SGB IX).

Employees have special protection against being terminated (§§ 85 seqq. SGB IX) if at the time of receiving a dismissal they were objectively severely disabled according to § 2 (2) SGB IX. Generally, this has to be proven by a formal authentication by the pension office. If this is not authenticated at the time of dismissal, complications can arise that are exacerbated rather than solved by the

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[102] BAG, 10/12/2009, file ref. 2 AZR 198/09.

[103] M. NIEHAUS/B., MARFELS/G. E. VATER/J. MARGIN/E. WERKSTETTER, Betriebliches Eingliederungsmanagement. Studie zur Umsetzung des Betrieblichen Eingliederungsmanagements nach § 84 Abs. 2 SGB IX, Cologne, 2008, p. 62.

[104] For a discussion of problems and challenges in application, see J. BROCKMANN, "Schwerbehindertenrecht, Arbeitsmarkt und Rehabilitation", in: Klaus-Dieter Thomann/Eberhard Losch/Petra Nieder, *Begutachtung im Schwerbehindertenrecht*, Frankfurt a.M., 2012, p. 1999 and G. NASSIBI, "Die Durchsetzung der Ansprüche auf Schaffung behinderungsgerechter Arbeitsbedingungen – Betriebliches Eingliederungsmanagement und Beteiligung der Interessenvertretung", *NZA 2012*, p. 720.

ambiguous rule in § 90 (2a) SGB IX. A dismissal cannot be based on the disability itself. Therefore, the approval of the respective government office has to be obtained. A dismissal based on illness is not considered discriminatory, if its specific requirements are met, even if the severe disability is the cause of the illness-related inability to work.

Recently, the Federal Labour Court (Bundesarbeitsgericht) stated that there is a legal protection against discriminatory dismissal under the AGG for disabled persons if the "general rules" do not apply.[105]

d) Representative body of severely disabled employees

All representatives of employees, such as the works council, are obligated to promote the rights and interests of severely disabled persons and control the employer in this regard according to § 93 SGB IX.

Additionally, a representative body of severely disabled employees shall be elected according to § 94 (1) 1 SGB IX. Members of the committee are the representative of severely disabled employees and his or her substitute. This pertains only to businesses (in the private and public sector)[106] that continuously employ at least five severely disabled persons. The representatives have a status and protection comparable to the members of the work council, § 96 SGB IX. The main tasks and competences of the representatives for severely disabled persons enumerated in § 95 SGB IX are the following: individual guidance and assistance to severely disabled persons; representation of collective interests towards and in cooperation with the employer and the work council. In addition, the representative body is a party of the integration agreement provided in § 83 SGB IX.

If no representative body of severely disabled persons exists, its tasks and rights are conferred to the work council or personnel board.

6.1.2. Social law

a) Participation and integration in working life of persons with disabilities, §§ 112 et seqq. SGB III.

As part of employment promotion, §§ 112 to 129 SGB III regulate the participation of persons with disability in working life. The goals of these benefits are regulated in § 4 (1) No. 3 und § 33 (1) SGB IX and include the maintenance,

[105] BAG, 19/12/2013, file ref. 6 AZR 190/12.

[106] Subsequently, the discussion of the legal situation is limited to the private sector.

improvement, instatement or re-instatement of gainful employment of disabled persons or those threatened by disability according to their abilities.

The approval of benefits for the participation in working life generally falls under the discretion of the funding agency. For benefits of active employment promotion, under which the benefits for participation of persons with disability fall, this follows § 3 (2) SGB III. However, according to § 3 (3) No. 8 SGB III, special benefits for participation in the workforce (§§ 117 to 129 SGB III) are excluded, since they are distinct from general benefits for the participation in working life.

The general benefits for participation in working life are regulated in §§ 115 und 116 SGB III. § 115 SGB III names the individual benefits of active promotion of employment, that can be granted to all persons entitled to benefits according to SGB III, irrespective of an existing disability.[107] The special benefits for participation in working life for persons with disabilities are regulated in §§ 117 to 129 SGB III and are designed in the sense of standard benefits. Insofar as general benefits suffice to ensure a participation in working life, there is no claim to special benefit.[108] 'Insofar' implies that general and special benefits should not preclude each other, but can also be combined.[109]

According to § 112 (2) SGB III, in choosing benefits, "aptitude, interest, previous employment, as well as current state and developments in the job market have to be considered. If necessary, the professional qualification is to be clarified or a trial work period as to be agreed upon."

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[107] Vgl.: K. LAUTERBACH, in: Alexander Gagel (Begr.), *SGB II/SGB III*, Band 1, 45th complement, status 1/04/2012, Munich, 2012 § 98 SGB III rec. 3; W. KELLER, in: Bernd Mutschler/Ralf Bartz/Reimund Schmidt-De Caluwe (eds.), *SGB III*, 3th ed., Baden-Baden, 2008, § 98 rec. 5; S. LUIK, in: Wolfgang Eicher/Rainer Schlegel (eds.), *SGB III*, Vol. 1, 109th complement, status: May 2012, Cologne, 2012, § 98 rec. 17; R. GROSSMANN, in: Karl Hauck/Wolfgang Noftz (eds.), *SGB III*, Vol. 1, 2nd ed., Berlin, 2012, § 113 rec. 31; C. KARMANSKI, in: Klaus Niesel/Jürgen Brand (eds.), *SGB III*, 6th ed., Munich, 2012, § 98 rec. 4; B. GÖTZE, in: *Friedrich Ambs et al.*, *GK-SGB III*, 176th Complement, status: July 2012, Cologne, 2012, § 98 rec. 3.

[108] The explanatory statement to the "Entwurf eines Gesetzes zur Reform der Arbeitsförderung (Arbeitsförderungs-Reformgesetz – AFRG)", BT-Drucks. 13/4941, p. 173; cf. BSG, 25/03/2003, file ref. B 7 AL 8/02 R, rec. 17 (juris) considers general and special benefits are graded.

[109] cf.: U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 98 rec. 9; *Luik*, in: Eicher/Schlegel (fn. 95), § 98 rec. 18; R. GROSSMANN, in: Hauck/Noftz (fn. 98) , § 113 rec. 52; ferner: K. LAUTERBACH, in: Gagel (fn. 98), § 98 SGB III rec. 4.

b) Trial work and work support for persons with disabilities, § 46 SGB III.

Trial work and work support for persons with disability are considered benefits for the employers according to § 34 (1) 1 No. 3 and 4 SGB IX. Following § 46 (1) SGB III "the costs for a limited trial work period of disabled, severely disabled persons or persons legally equated to them according to § 2 SGB IX for up to three months can be reimbursed, if thereby the possibility of participating in working life is improved or a complete and continuous participation in working life can be achieved." The benefits are at the discretion of the employment agencies. The rule is meant to be an incentive for employers to –possibly permanently– hire disabled persons after a positive trial work period.[110]

According to instructions by the Federal Employment Agency for the promotion of participation in working life, "benefits for trial work periods of severely disabled persons and those legally equated to them (§ 2 (2) and (3) SGB IX) […] can be granted even if they are not entitled to benefits for participation in working life according to SGB IX."[111] If this is interpreted to mean that employers are entitled to corresponding benefits for the trial work of severely disabled persons and those legally equated to them regardless of actual limitations of participation caused by disability, § 19 (1) SGB III with its reference to § 2 (1) SGB IX would mean the specific conditions are stated only for persons with mild disabilities. This, in turn, would be a misconstruction of the term "disability" which, according to § 2 (1) 1 SGB IX includes both severely disabled and persons legally equated to them.

The legal conditions for the approval of trial work are fulfilled when a prognosis predicts an improved possibility of participation in working life.[112]

§ 46 (2) SGB III[113] allows the responsible employment agency at their discretion to grant subsidies to employers for the adaptation of the work environment or working conditions of employees with disabilities to their special needs, if this is necessary to achieve or to assure a continuous participation and inclusion into working life.

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[110] U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 238 rec. 3; R. BRANDTS, in: Niesel/Brand (fn. 95), § 238 rec. 1.

[111] Bundesagentur für Arbeit, Geschäftsanweisungen zur Durchführung der §§ 88 – 92 und 131 SGB III as of March 2013.

[112] U. KELLER in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 238 rec. 12; R. BRANDTS, in: Niesel/Brand (fn. 98), § 238 rec. 3.

[113] BT-Drucks. 17/6277, p. 94.

To ascertain the necessity of the grant, all relevant circumstances have to be considered individually, following the same procedure of a personal prognosis described above.[114]

6.2. Labour market situation and economic crisis; effects of labour market politics

The German labour market seems to have fared rather well during the last economic crisis. One of the explanations is the various measures taken during the so-called "Hartz legislation" beginning in 2003. The legislation permits an increased flexibility in hiring personnel; in terminating contracts; and exceptions for compulsory social security for certain types of contracts. At the same time, the period of benefits of unemployment insurance in one branch of social security provided in SGB III has been reduced. The Hartz legislation is completed by the basic provision for jobseekers now regulated in the SGB II, which reduces the amount of benefits in case of unemployment. Furthermore, the system of job placement by the employment agency has become a lot stricter. Some consider the German system has changed from welfare to workfare, and that it has become rather "unattractive" for unemployed persons.

6.3. Multidimensional or intersectional discrimination

Current research in social sciences suggests that multidimensional and intersectional discrimination respectively, are a relevant societal phenomenon in Germany.[115] This insight has not (yet) translated into the legal discussion and the application of the non-discrimination rules.[116] Indeed, § 4 AGG prohibits multiple discriminations. The problem of intersectional discrimination is discussed in this context; however, the wording of § 4 AGG seems to be limited to additive discrimination. Furthermore, disability as discriminatory factor has played a marginal role in the discussion about intersectional discrimination. In the jurisprudence to date,

[114] U. KELLER, in: Mutschler/Bartz/Schmidt-De Caluwe (fn. 98), § 237 rec. 10.

[115] M. PEUCKER, Diskriminierung aufgrund der islamischen Religionszugehörigkeit im Kontext Arbeitsleben – Erkenntnisse, Fragen und Handlungsempfehlungen, Berlin, 2010, p. 53 et seqq.

[116] Instructive J. ZINSMEISTER, *Mehrdimensionale Diskriminierung*, Baden-Baden, 2007.

only very little cases dealing with multiple or intersectional discrimination can be found, none of them concerning disabled persons.[117]

7. SECTION IV. UNIVERSITY: CAREER COUNSELLING AND JOB PLACEMENT FOR STUDENTS WITH DISABILITIES

The present study aims inter alia to compare the situation of students with disabilities when leaving university to enter the labour market. We focus on the legal framework provided by German legislation and its application by the competent bodies.

7.1. The legal situation concerning Higher Education in Germany

In general, the federal states are responsible for Higher Education matters. The field of Higher Education is subjected to their legislative and administrative competence. The federal rules are limited to the Framework Act on Higher Education (Hochschulrahmengesetz, HRG[118]). Following § 2 (4) 2, any institution of higher education is assigned to prevent disadvantageous treatment of students with disabilities and to facilitate their access to any program or offer of the university without further need of assistance. Since it falls under the federal states' purview, the legal situation of students with disabilities differs in every federal state. This is all the more true, as public universities and local student services organisations have the status of public entities with legislative competence concerning their own affairs.

In general, federal legislation provides that special interests of applicants and students with disabilities must be taken into account in particular. For example, § 3 (6) of the Hamburgian Higher Education Act (Hamburgisches Hochschulgesetz, HmbHG) determinates that institutions within the higher education system have to promote the inclusion of students with disabilities. They are also put under the

[117] Cf. S. BAER/M. BITTNER/A. L. GÖTTSCHE, *Mehrdimensionale Diskriminierung – Begriffe, Theorien und juristische Analyse*, Berlin, 2010; one of the rare cases is OLG Stuttgart, 12/12/2011, file ref. 10 U 106/11 on discrimination because of racial origin and sex (black male demanding access to a night club).

[118] Hochschulrahmengesetz in as issued on 19/01/1999, BGBl. I p. 18 and amended by the law of 12/04/2007, BGBl. I p. 506.

obligation to provide special compensation in the examination systems.[119] The German Rectors Conference adopted a negotiated agreement with an action plan in 2009 in favour of students with disabilities, aiming to reduce barriers. Recent evaluation shows an increasing number of offers for students with disabilities, but also that barriers persist, not least for financial reasons.[120]

Furthermore, students with disabilities may profit from the social law legislation concerning the participation and integration in working life, i.e., special integration benefits for disabled students following SGB IX and SGB XII and the above-mentioned BAföG.

Following the Social Survey, 7% of the students in higher education consider themselves disabled in the sense that they experience barriers in studying due to physical or psychological health problems.[121]

7.2. Access to higher education

The admission of students is subjected to Higher Education Acts of the federal states and internal rules of the universities. Both are bound by the GG and the HRG, and therefore must not discriminate applicants or students with disabilities. On the contrary, most rules provide advantages and preferentially enroll students with disabilities. This is explicitly demanded e.g. by § 10 of the Hamburgian Students Admission Act (Hamburgisches Hochschulzulassungsgesetz, HmbHZG).[122] These principles are implemented in the internal rules of the universities, such as by § 5 (6) and § 6 (2) of the Statutes on the Admission of Students for the University of

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[119] This is followed by the obligation in § 60 (2) No.15 HmbHG to provide these compensations in the institution's statutes.

[120] Hochschulrektorenkonferenz (ed.), "*Eine Hochschule für Alle", Empfehlung der 6. Mitgliederversammlung der HRK am 21. April 2009 zum Studium mit Behinderung/chronischer Krankheit. Ergebnisse der Evaluation*, Bonn, 2013; Autorengruppe Bildungsberichterstattung, *Bildung in Deutschland 2014. Ein indikatorengestützter Bericht mit einer Analyse zur Bildung von Menschen mit Behinderungen,* Bielefeld, 2014, p. 173-174.

[121] E. MIDDENDORFF/B. APOLINARSKI/J. POSKOWSKY/M. KANDULLA/N. NETZ, *Die wirtschaftliche und soziale Lage der Studierenden in Deutschland 2012*, 2013, pp. 452 et seqq.

[122] Gesetz über die Zulassung zum Hochschulstudium in Hamburg dated of 28/12/2004, HmbGVBl. 2004, p. 515.

Hamburg (Satzung der Universität Hamburg über die Zulassung zum Studium, Universitäts-Zulassungssatzung – UniZS).[123]

7.3. Assistance during studies

7.3.1. Information and practical support

The above-mentioned student services organisations give particular support to students with disabilities. Their function is to support students in social affairs. They provide, among other things, barrier-free student housing and adapted housing for students with disabilities, and information on special grants by foundations favouring disabled students.

Following § 54 SGB XII, assistance and integration benefits can be granted to students with disabilities. The rules are implemented by internal administrative guidelines of the federal states. For example, the relevant guideline concerning benefits for persons with disabilities in institutions of higher education in Hamburg (Fachanweisung zu § 54 Abs. 1 Nr. 2 SGB XII in Verbindung mit § 13 Abs. 1 Nr. 5 der EinglHVO) provides numerous benefits for students with disabilities. There are both general benefits as well as special benefits that can be claimed, depending on special needs of different types of disabilities such as visual impairment, hearing impairment or restricted mobility.

Most federal states provide for the creation or election of a body for the special interests of students with disabilities (e.g. § 88 HmbHG). This body has to be involved on every institutional level if a decision is likely to particularly touch special interests of students with disabilities.

7.3.2. Financial support, especially provided by the BAföG

As mentioned before, the BAföG contains some rules in favour of disabled students, apprentices and other trainees. Disability is one reason to extend the funding and benefits according to the BAföG in excess of the age limit of 30 years in the beginning of the training or study phase in question (cf. § 10 (3) 1 BAföG). Funding is granted to cover all needs related to means of subsistence and costs related to educational matters. However, the needs covered are limited to those "typical" for subsistence and educational matters. An increased need due to disability can be

[123] Issued on 1/10/2008 and as amended on 29/09/2009.

covered by social aid according to § 30 (4) and (5) SGB XII. This additional provision, however, is limited to those with a 'relevant' disability according to § 30 (4) and § 53 (1) SGB XII in conjunction with the relevant ordinance. Insofar as this is not the case, disability-based additional needs related to the vocational training or higher education might lead to disadvantages.

However, a hardship regulation in § 25 (6) 2 BAföG provides that income of parents or partners are no reason to reduce grants, as it is the case in general.[124]

Disability also justifies an extension of the maximum period for the grant. This period usually corresponds to the prescribed common period of study (cf. § 15a (1) BAföG). Furthermore, in these cases, the funding is not granted as a bank loan but as a non-repayable grant.[125]

ERASMUS programs and the German Academic Exchange Service (Deutscher Akademischer Auslandsdienst, DAAD) offer special grants for students with disabilities to promote their international mobility.

7.4. Job Placement

Disabled students and graduates benefit from all available measures for job placement by the employment agencies to prepare their entering the labour market and working life. The employment agencies have specialised services for academics with disabilities to promote job placement, also on an international level.[126] It offers support not only to disabled persons but also to employers willing to hire a disabled person.

Additionally, a lot of specialized web pages can be found, offering information, special services or special job offers such as http://www.talentplus.de/ or http://www.projekt-probas.de/, to mention just two examples.

Usually, additional counsel and assistance is provided by student services organisations, occasionally in cooperation with the employment agency. Most universities also provide counselling at special career service centres, also targeting

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[124] RAMSAUER/SALLBAUM/STERNAL (fn. 72), § 25 rec. 29 consider that there is no descretion – contrary to the wording of § 25 (6) BAföG.

[125] RAMSAUER/STALLBAUM/STERNAL (fn. 72), § 17 rec. 9.

[126] Cf. HEGA 07/09 - 01 - *Vermittlung besonders betroffener schwerbehinderter Akademiker durch die ZAV* and http://www.arbeitsagentur.de/web/content/DE/service/Ueberuns/WeitereDienststellen/ZentraleAuslandsund Fachvermittlung/Ueberuns/SchwerbehinderteAkademiker/index.htm.

students with disabilities. The action plan adopted by the German Rectors Conference[127] does not focus on job placement. However, evaluation shows that in most universities the body for special interests of students with disabilities provides individual counselling on labour market integration and cooperates with the Employment Agencies.[128] As mentioned above, there is no national standard, so the offers vary on the federal state level and from university to university. Nevertheless, the German Association of Student Services Organisations published an information booklet designed to support students with disabilities at all stages: on their way from school to university, during their studies and with regard to finding employment.[129] This is well worth to be taken as an example for other countries in providing information. As an example, the University of Hamburg also maintains a Career Centre that offers individual coaching and classes dealing with a wide range of questions concerning job search and application processes to all students, including those with disabilities.

8. CONCLUSIONS

To briefly conclude our appreciation of the German legal situation, we would like to draw the reader's attention to several critical points. We consider the differentiation in the terminology and the legal treatment between severely disabled and "simply" disabled persons introduced by different German legal rules problematic. This is especially true in regard to applicable European and International law. Furthermore, this leads to different protection levels in the appreciation of unlawful dismissals, and influences the chances and instruments in job placement as well. We expect reforms in this respect, knowing that it will be particularly difficult to guarantee an individually high level of protection to job seekers and employees with disabilities on the one hand, and to create rules that are sufficiently easy to apply by employers and courts on the other hand.

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[127] Vide supra Section IV – I.

[128] Hochschulrektorenkonferenz (ed.), *"Eine Hochschule für Alle", Empfehlung der 6. Mitgliederversammlung der HRK am 21. April 2009 zum Studium mit Behinderung/chronischer Krankheit. Ergebnisse der Evaluation*, Bonn, 2013, pp. 19 and 21.

[129] Deutsches Studentenwerk (DSW)/Informations- und Beratungsstelle Studium und Behinderung (IBS) (ed.), *Studium und Behinderung – Informationen für Studierende und Studieninteressierte mit Behinderungen und chronischen Krankheiten*, 7. ed. Berlin 2013; available at: www.studentenwerke.de/behinderung.

Also, the multitude of competent public bodies and actors in the field of job placement and integration and participation in the labour market increases the risk of a diffusion of responsibility. Finally, the compensatory levy seems to reduce the effects of the employer's legal obligation to hire severely disabled personnel. However, the funds raised allow financing a broad range of measures in order to promote the inclusion of disabled persons.

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