

Legal and methodical issues in situation testing in Germany

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Situation testing in Germany

- Until the **Equal Treatment Act**(Allgemeines Gleichbehandlungsgesetzes, AGG) 2006:
 - Situation testing was almost unknown and barely used to fight discrimination
- In recent years
 - Anti-discrimination offices have been using situation tests, especially in the leisure sector (night clubs)
 - Research studies are being carried out in the fields of housing and labour
- Jurisprudence
 - First judgments of lower courts
 - No rulings by federal courts

Sector 1: Leisure



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Sector 1: Night Clubs

- **Anti-discrimination Office Saxony (2011)**
 - Face-to-face testing in night clubs in Leipzig
 - 6 complaints concerning racial admission control
 - 500 € damages
- **Anti-discrimination advisory center “basis & woge” in Hamburg (2012)**
 - Face-to-face testing in 8 night clubs around the Hamburger Reeperbahn
 - Test subjects with African and Arab origin are denied access, in some clubs they are already rejected in the queue

Sector 2: Housing



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Sector 2: Housing

- **Kilic: Discrimination against migrants in housing (2008)**
 - Test subjects with / without Turkish background
 - First Level: Written request via Internet (200 / 200)
 - Second Level: arrange an appointment by phone (11/19)
 - Third Level: apartment tour (4/9)
 - Fourth Level: contract offer (1/4)
- **Planerladen e.V.: Unequal treatment of immigrants in the housing market**
 - Phone (2009): 19% of the agents treated the “Turkish” test person worse than the “German” (n=482)
 - Writing via Internet (2007): 42% of the agents only answered the “German” and not the “Turkish” test person (n=151)

Sector 3: Employment

Stellenmarkt - Stellenmarkt

Wie suchen wir sofort eine Stelle?
 Fast alle in diesem Bild sind Arbeitsstellen, die sofort besetzt werden müssen. Sie haben bereits Erfahrungen im Verkauf oder in anderen Berufen gesammelt und möchten in einem neuen Unternehmen arbeiten. Die anderen sind zum Teil noch in Ausbildung und suchen nach dem Abschluss eine erste Arbeitsstelle. (Quelle: ZDF, 2012)

Das Beispiel: Tagelöhner sucht Kunden
 Die Tagelöhner suchen Kunden für ihre neuen Dienstleistungen. (Quelle: ZDF, 2012)

Handwerkliche / Fachliche und Willenszüge
 sind in der Bewerbung für den Arbeitgeber wichtig. (Quelle: ZDF, 2012)

Wie suchen wir nicht nur eine Stelle?
 In der heutigen Zeit gibt es viele Möglichkeiten, um eine Stelle zu finden. Neben der traditionellen Methode über Zeitschriften und Jobportale gibt es auch Online-Portale und soziale Medien. (Quelle: ZDF, 2012)

Wie werden berufliche Entscheidungen getroffen?
 Die Entscheidung über eine berufliche Entscheidung wird von verschiedenen Faktoren beeinflusst. (Quelle: ZDF, 2012)

Faktoren für einen erfolgreichen Bewerber
 sind die Fähigkeiten und das Auftreten. (Quelle: ZDF, 2012)

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Sector 3: Employment

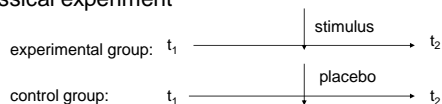
- Kaas/Manger: Ethnic Discrimination in Germany's Labour Market: A Field Experiment
 - Written (2010)
 - n = 528 tested companies
 - Test person with / without a Turkish background (name)
 - Applying for an internship as part of management studies
 - 40% of the "German" but only 35% of the "Turkish" identities received positive feedback

Proposal for a typology

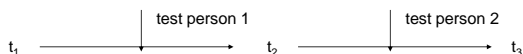
- Purpose
 - Individual case-related: enforcement of anti-discrimination law in a particular case
 - Research studies: measuring the extent of discriminatory practices in a society
- Reason
 - Proactive: discrimination should be exposed and brought to justice
 - Reactive: evidence should be obtained in known cases of discrimination
- Methodology
 - Paired: checking whether individuals who differ only in the tested characteristic are treated differently
 - Non-paired: repeat discriminatory conduct in the presence of witnesses

Methodological Requirements

classical experiment



paired testing



Legal requirements

- **Criminal law**
 - Falsification of documents: forgery of application documents (eg CV, diploma)?
 - Fraud: impersonation with intent to deceive
- **Civil law**
 - Compensation for lost profits and wasted working time?
- **Further legal requirements**
 - **competition law**: interference in the operation of the tested company?
 - **labour law**: illegal surveillance of employees?
 - **data protection law**: testings carried out by public authorities

Testing and burden of proof

22 Allgemeines Gleichbehandlungsgesetz - Beweislast

Wenn im Streitfall die eine Partei **Indizien beweist**, die eine Benachteiligung wegen eines in § 1 genannten Grundes **vermuten lassen**, trägt die andere Partei die Beweislast dafür, dass kein Verstoß gegen die Bestimmungen zum Schutz vor Benachteiligung vorgelegen hat.

Sec. 22 General Act on Equal Treatment - Burden of Proof

Where, in case of conflict, one of the parties is able to **establish facts** from which it **may be presumed** that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.

Testing and burden of proof

- Lower standard of proof in two ways
 - Instead of main facts (eg causality) only circumstantial facts must be proven.
 - It is sufficient if the court considers the weight of circumstantial evidence counts as proof for the main facts.
- Legal consequence: shifted burden of proof
 - The "other party" has the opportunity to prove to the full satisfaction of the court that the provisions for the protection against discrimination have not been violated.

Testing procedures as evidence

Night club



Housing



Employment



➤ **Is it highly probable, the different characteristic was the ground for the unequal treatment of the subjects?**

- Similarity of the individuals (apart from the tested characteristic)
- Relevance of the individual circumstances for the particular contract
- Presence of other evidence (eg, discovery of a token argument)

Testing procedures as evidence

written



oral



fact-to-face



- Creation of test identities which differ only in the most relevant characteristic
- Recruitment of test subjects in terms of "external" and "internal" characteristics
- Rehearsal of the relevant information for the application, the conversation and reactions to possible requests
- Documentation of the testing process through logs, reports and supervision

Conclusion

- In Germany situation testing is still an untapped opportunity to ease the burden of proof for people who are victims of discrimination.
- There are methodological standards for the performance of testing procedures.
- Testings that meet these standards are consistent with criminal law, competition law and labour law and can serve as evidence for the existence of discrimination in accordance with sec. 22 AGG.

Remaining questions

- Dealing with non-binary attributes (eg, age)?
- Ethical concerns? Deception? Public perception?
- (Re) Construction of difference?
- Implementation of situation testing by state (anti-discrimination) agencies
- Humiliation of the test persons
- Assessment of the amount of the claim for compensation
