

Workplace Bullying and Harassment in Germany*

Martin Wolmerath

Lawyer and Lecturer

University of Applied Sciences Georg Agricola Bochum, and
The Technical University of Ilmenau

Workplace bullying has engaged Germany for 20 years now. The discussion about this phenomenon was primarily initiated by a book written by Heinz Leymann and published in 1993: “Mobbing. Psychoterror am Arbeitsplatz und wie man sich dagegen wehren kann” (Bullying. Psychoterror in the workplace and how you can defend yourself against it). Since the publication of this book a lot has happened in Germany. Nevertheless, the summary is only from meagre to moderate. In many companies bullying is still a word that is not talked about. Other companies, on the other hand, have responded to the challenges and are following the way of best practice. Overall successes are rather anecdotal, all in all, the balance is rather sobering. German legislature has so far failed to confront the bullying problem. Those looking for clear legislation in Germany, won’t find it there.

Harassment is a different case: The Grundgesetz, the German Constitution, the basic law for the Federal Republic of Germany is clear about this. According to Article 2 Section 1 (Art. 2 Abs. 1 Grundgesetz [GG]) it states, that everyone has the right to free development of his personality insofar as he does not infringe on the rights of others and does not violate the constitutional order or the moral law. Further, it says in article 3 section 3 (Art. 3 Abs. 3): No one may be prejudiced or favoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No one may be discriminated because of his disability.

As a result of the implementation of European law provisions into national law on 18.08.2006, the Allgemeines Gleichbehandlungsgesetz (AGG [general equal treatment act])¹ has come into force. This act aims to prevent or remedy discrimination on grounds of race or ethnic origin, gender, religion or philosophy of life, disability, age or sexual identity (paragraph 1 [§ 1] AGG). Paragraph 7 section 1 (§ 7 Abs. 1) AGG states a ban on discrimination: Employees should not be disadvantaged because of a reason referred to in paragraph 1 (§ 1) AGG. Further, paragraph 7 section 3 (§ 7 Abs. 3) AGG clarifies that a discrimination according to paragraph 7 section 1 (§ 7 Abs. 1) AGG, carried out by the employer or an employee or several employees, is a breach of contractual obligations within a contract of employment, which is accessible to sanction. In accordance with paragraph 12 section 3 (§ 12 Abs. 3) AGG, the employer shall take measures necessary to eliminate discrimination appropriate to the individual circumstances (for example warning, repositioning, relocation or dismissal) when employees are in breach of the discrimination

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¹ www.gesetze-im-internet.de/agg

prohibition under paragraph 7 section 1 (§ 7 Abs. 1) AGG. Furthermore, paragraph 15 (§ 15) AGG grants the person discriminated against compensation and damages.

Of particular relevance is paragraph 13 section 1 (§ 13 Abs. 1) AGG, which requires that every employer has to set up a specific complaints body to which those employees can turn, who feel discriminated against by their employer, supervisor, other employee or third parties (for example agency or temporary workers, customers) because of a reason referred to in paragraph 1 (§ 1) AGG (= race, ethnic origin, gender, religion, philosophy of life, disability, age, sexual identity). I will return to the special significance of this body, which is known as “betriebliche Beschwerdestelle” (company complaints board), in item VIII. (Intervention and prevention in companies).

The Allgemeines Gleichbehandlungsgesetz (general equal treatment act) defines in its paragraph 3 section 1 (§ 3 Abs. 1) direct and in paragraph 3 section 2 (§ 3 Abs. 2) indirect discrimination. Further, it tells us the conditions under which a harassment (paragraph 3 section 3 [§ 3 Abs. 3]) or sexual harassment (paragraph 3 section 4 [§ 3 Abs. 4]) represent discrimination in terms of the general equal treatment act. I will have a closer look at the importance of the expression of harassment for addressing the bullying issue in item VII. (Importance of the judiciary).

I. Definition and demarcation of other expressions

There is no single definition of what exactly is meant by workplace bullying in Germany. Also, there is no statutory legal definition.

Workplace bullying can roughly be described as “workplace psychological terror” because with this description much is expressed by what constitutes the workplace bullying: a steadily over a long period of time developing process with many diverse activities, which can make those affected sick and can cost them their professional and private life. And because it is precisely these aspects that make up the bullying phenomenon, they are inevitably included in the various definitions. For this reason alone I would like to confine myself to the notion of a definition that includes both academic and occupational aspects of labour law, while ensuring that it is distinguished from other concepts.

Definition of Esser and Wolmerath²

Bullying is a process happening in the working environment, where destructive actions of various kinds against individuals are made repeatedly and over a longer period and are perceived by the aggrieved party as an infringement and violation of their person and

where the unbridled course for those concerned basically leads to the fact that their psychological state and health are increasingly impaired, their isolation and exclusion in the workplace increase, however, the opportunities to a satisfactory solution dwindle and frequently end in the loss of their work sphere.

The bullying phenomenon is merely a manifestation of psychosocial pressure in the workplace, even if the associated risks for those affected can still be so grave. Psychosocial pressures are those, which arise from the social interactions of people in their workplace

² Esser/Wolmerath, *Mobbing und psychische Gewalt. Der Ratgeber für Betroffene und ihre Interessenvertretung*, 8. Auflage (eighth edition), Frankfurt am Main 2011, page 25.

and have an adverse effect on the mental well-being of those working there. Therefore, you could also call it psychological harassment in the workplace. As further manifestations especially the (sexual) harassment and discrimination are mentioned.

In generalised form harassment has been defined in paragraph 3 section 3 (§ 3 Abs. 3) AGG. Accordingly, somebody harasses someone when unwanted intentional or unintentional conduct violates the dignity of the other person and an offensive environment that is marked by intimidation, hostilities, degradation and humiliation is created.

Similarly, according to paragraph 3 section 4 (§ 3 Abs. 4) AGG, sexual harassment exists if unwanted sexually defined behaviour, including unwanted sexual acts such as certain sexual physical contact, comments of a sexual nature and unwanted showing and visible exhibition of pornographic images where the purpose or effect is the violation of a person's dignity, especially when an offensive environment that is marked by intimidation, hostilities, degradation and humiliation is created.

For the definition of discrimination we can fall back on paragraph 75 section 1 Betriebsverfassungsgesetz (works council act [§ 75 Abs. 1 BetrVG]), even if the provision made therein refers to the commitment of the employer and the works council. Accordingly, those discriminate, who treat another contrary to the principles of law and equity, particularly those based on race or ethnic origin, ancestry or other origin, nationality, religion or philosophy of life, disability, age, political or trade union activities or views, or because of gender or sexual identity.

Another manifestation of psychosocial stress is *Nachstellung* (stalking), pursuant to paragraph 238 of the penal code (§ 238 StGB [Strafgesetzbuch]), which provides for the imposition of a penalty of imprisonment or a fine. Even though this criminal regulation does not focus on the working world, it has its application there, if the stalking takes place in the work place. In August 2012 a 43 year old worker made the German media headlines when a former work colleague made his life a proverbial hell with, among other things, text messages, phone calls, a death threat and a fake death notice in a widespread newspaper. The stalker was perhaps caught so quickly because he had given his personal details when he placed the obituary in the paper.

All forms of psychosocial stress at work are interwoven by a circumstance, have one thing in common. They can occur as a single act, only carried out once or as a dependent part of the bullying act. Therefore, it does not come as a surprise that up to 5 % of all bullying cases in Germany are attributed to the area of sexual harassment.³

II. Current situation

In describing the current situation in Germany, I will limit myself to the problem of workplace bullying, which is not necessarily easy. This is partly due to the fact that there are only a few significant studies. Moreover, the present findings are often quite old now. Therefore, they do not necessarily reflect the current situation in the German working world at the beginning of 2013.

1. Spread

Nobody knows how many people are actually affected by bullying in Germany. The figures based on calculations and estimate figures vary considerably. If we agree on an

³ Wolmerath, *Mobbing. Rechtshandbuch für die Praxis*, 4. Auflage (fourth edition) Baden-Baden 2013, page 30.

average value, the number is about 1.3 million.⁴ This assumption is supported by a study published in late 2011,⁵ where a figure of 3.5% of total employment is considered. This means that with around 40 million employees in Germany approximately 1.4 million people would be exposed bullying. If we further consider, that there are approximately 3.6 million businesses in Germany, then inevitably it becomes clear that bullying can be found in almost every other company.⁶

Based on the entire working life of an employee numbers show that every fourth to ninth working person in the course of their careers are at least once faced with a bullying situation.⁷

2. Company sizes, sectors and employee groups

Bullying can be found in every business. This applies in the same way in private sector as the public sector. There is evidence that in small and medium sized private companies with up to 249 employees are far more cases of bullying than in large companies with a workforce of 250 or more. This can be explained by the fact that in large firms established occupational safety and participation structures are in place, rather than with small and midsize businesses.⁸

At the start of substantive examination of the bullying problem in the working world, the attention was focused on the clerical workers and civil servants. Blue-collar workers seemed to be spared from bullying. They were added later as an affected group of people due to changed working conditions and organizational structures. Today, the phenomenon of bullying affects all groups of employees, albeit in different and ever-changing dimension. If there was a decrease for civil servants to be exposed to the risk of bullying and an increase for blue-collar workers at the end of 2000,⁹ the trend about 10 years later was exactly the opposite.¹⁰

What has barely changed in these ten years, are the industries and occupations in which there is an increased risk of being confronted with bullying. Those who work in the field of private sector services, the public service and trade, carry a significantly higher risk of bullying than somebody employed as a craftsman.¹¹

3. Gender, age and duration of employment

Some studies suggest that women in particular are affected by bullying. Apparently, about $\frac{2}{3}$ to $\frac{3}{4}$ of all bullying cases happen to women, and the rest (= $\frac{1}{3}$ to $\frac{1}{4}$) are men.¹² Whether these findings reflect the real situation is uncertain. There are two arguments against it: Firstly, women in comparison to men are more willing to take advice and support assistance, on the other hand, many women work in industrial sectors where

⁴ Wolmerath (footnote 3), page 35.

⁵ Eisermann/de Costanzo, Die Erfassung von Mobbing – Eine Konstruktvalidierung aktueller Datenerhebungsverfahren, Dortmund/Berlin/Dresden 2011.

⁶ Wolmerath (footnote 3), page 35.

⁷ Wolmerath (footnote 3), page 35.

⁸ Saßmannshausen/Wessels/Deilmann, Mobbing – Zahlen, Daten und Fakten, in: Wolmerath/Esser, Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz, Frankfurt am Main 2012, page 30.

⁹ Meschkutat/Stackelbeck/Langenhoff, Der Mobbing-Report. Repräsentativstudie für die Bundesrepublik Deutschland, Dortmund/Berlin 2002, page 37.

¹⁰ Saßmannshausen/Wessels/Deilmann (footnote 8), page 31.

¹¹ Meschkutat/Stackelbeck/Langenhoff (footnote 9), page 31; Saßmannshausen/Wessels/Deilmann (footnote 8), page 28.

¹² Wolmerath (footnote 3), page 36.

bullying is more common. There are also fewer women employed in higher professional positions.¹³

In companies, no age group is spared by bullying. In 2012 Saßmannshausen/Wessels/Deilmann¹⁴ reported a higher than average concern among 30 – 49 year olds, in the age groups under 30 and 50 (and over) the numbers were below average. Ten years earlier, according to the findings of Meschkutat/Stackelbeck/Langenhoff¹⁵ these figures were reversed. They had then found the strongest concern with the under 25s and the second strongest vulnerability in the age group 55 and older.

With regard to the duration of employment Zapf¹⁶ stated in the late 1990s, that there is an increased risk of harassment in connection with the arrival of a new job. According to his findings, this is especially the case if from the outset a particular department or work group was against the filling of a position with a particular person; or a person from within a work group had unsuccessfully hoped to fill a vacant position. For about 33% of bullying victims bullying started within the first six months in the new job, for 6 % within the first three months. 12% stated that they have been exposed to bullying from the outset.

Whoever concludes from this result that a long-term employment with the same employer protects against bullying, will be shown differently by Zapf.¹⁷ 26% of bullying victims interviewed by him reported to have been more than five years in their workplace before the bullying began.

4. Persons concerned and persons involved

In the 1990s bullying by superiors seemed to be in the foreground. Around 75% of cases were attributed to this group of people.¹⁸ Taking into account the fact that bullying also exists among the managers, 30% of the cases were attributed to the same level (supervisors ./ supervisors; subordinates ./ subordinates).¹⁹

In 2001 Meschkutat/Stackelbeck/Langenhoff²⁰ noticed a shift. In 51% of cases were due to bullying by superiors or happened with their participation, while in 55.2% of cases work colleagues were involved in bullying incidents. Saßmannshausen/Wessels/Deilmann²¹ reported a new shift in 2012. Then 57.7% of all acts of harassment were carried out by superiors, while 30% were carried out by colleagues. The reasons for the observed shifts are more likely to result from the prevailing economic conditions than to a change of leadership within the companies.

Looking at the past 13 years, in more or less half of all cases bullying is carried out by superiors. The other half would affect a bullying at the same level. Only in very rare cases (1.5 %²² – 2.3 %²³) superiors will be exposed to bullying by their subordinates.

¹³ Wolmerath (footnote 3), page 36; Saßmannshausen/Wessels/Deilmann (footnote 8), page 26.

¹⁴ (footnote 8), page 28.

¹⁵ (footnote 9), page 27.

¹⁶ Zapf, Mobbing in Organisationen – Überblick zum Stand der Forschung, in: Zeitschrift für Arbeits- und Organisationspsychologie, Heft 1/1999, page 4.

¹⁷ (footnote 16), page 4.

¹⁸ Wolmerath (footnote 3), page 38.

¹⁹ Metzner, Mobbingfälle. Bericht und Auswertung der Angaben der Betroffenen aus zwei Jahren Arbeit der Beratungsstelle "No Mobbing" in Berlin, Herausgeber: Deutscher Gewerkschaftsbund, Informationen zur Angestelltenpolitik 01/98, page 7.

²⁰ (footnote 9), page 65.

²¹ (footnote 8), page 33.

²² Metzner (footnote 19), page 7.

²³ Meschkutat/Stackelbeck/Langenhoff (footnote 9), page 66.

The number of participants in a specific bullying situation depends heavily on the party against whom the attacks or acts are directed. If it involves a subordinate, basically a single person is enough to make their life a proverbial hell. It is mostly the superiors who have the authority to take action against a subordinate. The same applies to supervisors and co-workers who can both individually and combined bully one person who is hierarchically equal to them. With bullying from the bottom up, however, the situation is completely different. It usually requires the interaction of several subordinates in order to crowd out a superior from his professional position.

Target of bullying, however, are only individual people, even if several members of a department can be affected by bullying at the same time. In such a situation a number of people are exposed to individual bullying situations in parallel.

Excluded is the bullying of a group. Ultimately, its members can give each other assistance and social support. In addition, there would be a risk for the bully that members of the group form an alliance and turn the tide, say pushing the perpetrator into a victim role.

5. The role of the “Möglichmacher” (Facilitator)

Heinz Leymann has coined the term “Möglichmacher”²⁴ (facilitator). So called are persons who are watching, do not worry about the bullying situation, let the process continue, and look away. If these people intervened in the course of events, the bullying would usually stop quite fast.

Because the “Möglichmacher” (facilitator) allows the bullying, on the one hand, they contribute to a progressive isolation of bullying victims, on the other hand is their behaviour often seen as a sign of solidarity by the bully. Consequently, it can give the impression as if there is an internal consensus so that the bully thinks: “The staff is behind me and my actions” and the one affected by bullying assumes: “They are all against me”. Unfortunately, in a number of cases, such a consensus actually exists.²⁵

Possible “Möglichmacher” (facilitators) are all persons are concerned, which are in contact with the bullying victim. Depending on the work of those people this may include managers, supervisors, co-workers, works council members and contract workers employed in the company and employees of service providers (for example canteen staff, cleaners). If you look at the private life of the person concerned, especially friends, neighbours, family, and the life partner or spouse should be mentioned.

Of particular importance in this context are superiors. They are repeatedly accused of leadership failure in connection with bullying situations that occur, and therefore they carry a certain (joint) blame. In many cases, this accusation is more than justified. At the time of recruitment and promotion of superiors more attention is paid to vocational qualifications and skills rather than their social skills. Many superiors look the other way, feel overwhelmed and allow the bullying free reign, rather than calling on the assistance of other persons and by citing their rights to give instruction without the need for an explanation or justification they could take advantage of their leading position in the company and have clearing talks or moderate discussions and separate the conflicted parties.

²⁴ Leymann, *Mobbing. Psychoterror am Arbeitsplatz und wie man sich dagegen wehren kann*, Reinbek bei Hamburg 1993, page 61.

²⁵ Wolmerath (footnote 3), page 48.

6. Variety of bullying acts

The past 20 years have shown that because of the diversity of the possible actions by the bully, there are no limits. The more intelligent the bully is and the more clandestine and clever he is, the more difficult it will be to attribute actions to him.

Any attempt to make a complete list of possible bullying actions has so far failed. Despite those findings, it is the verbal actions that are in the foreground.²⁶ The reason for this is obvious. On the one hand this can usually be not or extremely difficult to prove, on the other hand the threshold for their perpetration many times lower than it is the case with non-verbal actions. Further, the bully's verbal actions can be easily put into perspective and transfer the responsibility for what happened to the victim. Phrases like "you must have misunderstood me" and "I did not say it that way" are more than capable of invalidating verbal attacks and to clarify to the attacked: "If you had listened to me properly, then you would have understood me correctly."

It is noted again and again, that superiors are misusing their authority to commit acts of bullying.²⁷ Ruberg calls this aptly "schikanöse Weisungen" (instruction to harassment).²⁸

While the Internet is mainly used by young people to commit acts of bullying (so-called cyber-bullying), in the work place it seems to be of minor importance at the moment. Perhaps this is because the users of Facebook & Co. are still relatively young and often just beginning their careers. In addition, the company offers plenty of opportunities to commit acts of bullying. Use of the internet is not required so far.

III. Consequences

Bullying has a variety of implications and risks, which are not limited to the bullying victims. Further mentioned in that regard are:

- the bully,
- the employees in the company concerned,
- the company concerned,
- the society.

1. The person affected by bullying

Without a doubt suffered bullying makes sick – at least in the longer term. Stress resulting from bullying negatively affects the wellbeing and the health of the person concerned. Possible results are: insomnia, reduction of self-esteem, heart and circulatory disorders, head and neck pain, gastrointestinal disorders and depression. In addition to the risk of serious psychological and psychosomatic (and resulting in physical) illness is a risk of abuse of drugs and alcohol. Even suicide or suicide attempt is possible. It is estimated that about 20 % of suicide cases in Germany have suffered bullying. This would amount to about 2,000 cases per year, with about 1,500 suicides in men and around 500 suicides in women.²⁹

²⁶ Meschkutat/Stackelbeck/Lagenhoff (footnote 9), page 42 also Saßmannshausen/Wessels/Deilmann (footnote 8), page 34.

²⁷ Wolmerath (footnote 3), page 35.

²⁸ Ruberg, Schikanöse Weisungen. Psychosoziale Gefährdung am Arbeitsplatz im Blickfeld der Gerichte für Arbeitssachen – nicht nur! – bei "Mobbing", Münster 2004.

²⁹ Wolmerath (footnote 3), page 44.

From a professional view, bullying may also have far-reaching consequences: In addition to the withdrawal of a particular position or transfer to another job is the loss of employment. As the only option to get away from the bullying, many victims only see a solution by leaving their jobs or even their employment – and not only a few in suicide. If no new work is found, the trip to the “Agentur für Arbeit” (employment agency) is inevitable in order to receive unemployment benefits. How long it takes bullying victims, until they find a new job, is not known.

2. The bully

In Germany, we know very little about the bully. The potential impact and consequences of his actions are manageable. The focus is on legal sanctions, even if they are more of a theoretical nature. Bullies who act in secret, or where their actions can not be ascribed to them, hardly have expect sanctions for their behaviour.

Health risks are unlikely in the same way. It is different for the “Angst-Mobber” (fear-bully), who acts according to the principle: “Attack is the best defence” or “rather bullying than being bullied.” For him, the bullying is associated with significant stress, he suffers and gets sick in a similar way as in the case of bullying victims.³⁰

3. The company and its employees

Today there is no longer a doubt about it that bullying has a negative impact on the working environment and the work morale. The loss of motivation among employees is associated with deterioration in the quantity and quality of work, which would usually lead to an increase in costs. This in turn can have an impact on the competitiveness of the company and, at worst, threaten its survival.

It is estimated that the non-productive time of bullying victims and the underperformance of bullies together with the loss of working time because superiors and human resources departments need to deal with the bullying case, amount to a cost of about €15,000 up to €50,000 a year. The costs arising from the resignation of an employee are estimated between €7,500 (for a warehouse worker) and approximately €20,000 (for a manager with an annual salary in the amount of approximately €60,000). It is thought that absenteeism caused by bullying amounts to costs of around € 15 billion a year. This figure refers only to the business costs.³¹

4. The Society

Finally, the society itself suffers from bullying. As some of the implications and consequences mentioned are the loss of social values and an increasing decay in interpersonal skills. The ability and willingness to engage in open, fair and constructive resolution of conflicts decreases in the same way as mutual respect and solidarity is lost. The loss of social skills and verbal communication is offset by the increase in verbal and non-verbal violence.³²

The cost to society caused by bullying is not known. According to estimates from the 1990s the treatment cost for bullying cases was between € 50,000 and € 65,000 per patient. The total economic costs of all absence due to illness were estimated to be around € 2.5 billion a year for every 1 % of sick leave, which referred only to the calculation of the “old”

³⁰ Wolmerath (footnote 3), page 45.

³¹ Wolmerath (footnote 3), page 46.

³² Wolmerath (footnote 3), page 47.

federal states. The estimated costs to the statutory pension because of early retirement due to bullying were 1.5 to 3 billion €, which was calculated on 12,000 to 25,000 premature retirements per annum.

IV. Background and reasons

The reasons for the bullying of a particular person are highly individualized and based on the specific case. They range from envy and resentment over poor conflict resolution skills and the fear of losing one's own job to strategically planned job cuts by the employer. On top of that bullying is a form of conflict resolution, which follows the point of view: "You are the problem – when you're gone, the problem is solved."³³

In each specific case the bullying can have several reasons, which does not make the situation easier for the bullying victims. Also, one should be aware that some of the motifs are influenced by the current economic situation of the company. Bullying among employees or superiors is more in the interest of the employer when the company in a tense economic situation, rather than in times of full order books and staff shortages. It might even be profitable for an employer if employees are reduced by means of bullying.

In the late 1990s Zapf³⁴ and Gleichmann³⁵ independently from each other created a catalogue of possible causes which give their synopsis of a very extensive and reliable overview of the possible causes of bullying. In spite of different expressions both have arrived at similar results.

Possible causes of bullying³⁶

(1) Causes in the environment

- Under or over challenge in the workplace
- Poor working environment, social norms
- Lack of work organization
- Error in leadership behaviour
- Unclear authority rules
- External working conditions
- Fear of job loss

(2) Causes in the social system

- Social composition of the group
- Hostility, resentment
- Envy
- Peer pressure
- Scapegoat Syndrome

(3) Causes in the personal system

- Ethical standard
- Balanced personality
- Possibility of stigmatisation
- Qualification
- Social Skills

³³ Wolmerath (footnote 3), page 29.

³⁴ (footnote 16), page 12.

³⁵ Gleichmann, Mobbing – Psychoterror am Arbeitsplatz. Schulleitung und Schulentwicklung, Stuttgart 1997, page 3.

³⁶ Wolmerath (footnote 3), page 41.

(4) Causes in the person of the bully

- Coping and self-esteem problems
- Sociopathic personality
- Personal goals and motives
- Possible fears

(5) Causes in the person of bullying victims

- Few social skills
- Performance issues
- Sociopathic personality
- Distinctive outer appearance
- Diseases/illnesses

V. Current legislation

As I already mentioned earlier, there is no specific legislation on bullying issues in Germany. For this reason, the general statutory provisions for the legal processing of bullying must be used. This is in part quite a chore, but is facilitated by the fact that the regulations are applied in a general-abstract form.

Although special legislation and even a special anti-bullying law is unlikely to bring bullying to a quick end, the legislature would make a point that this phenomenon is no longer acceptable in Germany but is outlawed in a general social sense. Such a signal, which unfortunately does not exist, would be more than desirable and would clarify to the bullying victim that society does not condone the actions of the bully. What has happened in connection with stalking by the creation of paragraph 238 of the penal code (§ 238 StGB) in 2007, should finally be transferred and applied to the problem of bullying.

VI. National policies

Politically speaking, there really seems to be no bullying. Although there is a quite new bill from the ranks of the Piratenpartei (pirate party)³⁷ it is possibly going to be ignored.

In March 1997, the then parliamentary group PDS, from which today's Die Linke (the left) is originated, experienced the same. Their introduced bill was so poorly drafted that it did not go beyond the stage of a public hearing of experts in the Bundestag (Lower House of the German Parliament). A promised review of the expert consultation on the draft law has not been carried out yet.

Regarding to the Federal Government, it must be referred to the reply dated 25.07.2007,³⁸ on a request from the ranks of the parliamentary party Die Linke. There the question of whether the government had the intention to create a legal definition of bullying and harassment and explicitly criminalize it, was answered as follows: Because of the many forms of bullying a creation of a specific regulatory framework to target and combat harassment seems futile. It is the goal of the Bundesregierung (Federal Government)³⁹ to specifically take preventative measures in advance. This view is also

³⁷ http://wiki.piratenpartei.de/AG_Anti-Mobbing-Gesetz

³⁸ Deutscher Bundestag, 16. Wahlperiode, Drucksache 16/6139.

³⁹ Remark: Chancellor at this time was Angela Merkel.

confirmed by the BAuA-study of bullying.⁴⁰ Instead of new law making, personal and organizational managers in enterprises are specially requested to take appropriate measures, so that everyday conflicts in the workplace do not develop into bullying cases.

To put it succinctly, if with a little anger, it seems that bullying is not to be an issue that enjoys the attention of the Federal Government. It was the same under the chancellorship of Gerhard Schröder. There are just (always) more important issues that need to be addressed and dealt with – such as the current financial situation of the member states of the European Union.

Overall, since the beginning of the discussion in the early 1990s the impression is, that there will be legislative action only if Germany is encouraged by the European Union. We can only hope that the mills in Brussels grind faster than those in Berlin.

VII. Importance of the judiciary

On 07.01.2013 in the legal database www.juris.de 1,189,370 court decisions were documented. Of these 1,111 decisions were filed under the keyword “Mobbing” (bullying) and 923 with the search filter “AGG” (general equal treatment act). These figures demonstrate that the German courts deal only rarely and more on the periphery with workplace bullying and harassment. If one focuses on the issues in dispute, it is clear that the claim of the plaintiffs in these cases was focussed on obtaining damages for pain and suffering. Success has always been modest. Only very few complaints have so far been successful. Problems of accountability and proof of acts of bullying were and are the main reasons, if the existence of bullying was not negated by the court beforehand.

Going to court seems generally to be less suitable for dealing with bullying. As a rule, it is only an option, when termination of employment is sought and in order to receive payment of the highest possible compensation. However, this requires the willingness of both sides – both the plaintiff and the defendant. If an amicable settlement fails, there is inevitably a decision of the court, which – as stated before – is usually negative for the bullying victims.

The most serious reason why bringing an action for bullying to court does usually not help is, that the court is not a means of resolving conflict. Courts dispense judgements, so they judge the dispute in question. They do no more, they also do no less. If one, however, seeks to deal with a conflict situation, this should be tried outside the court by using moderated discussions. If and in which way the Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung⁴¹ (law for promotion of mediation and other methods of alternative dispute resolution) which came into force on 26.07.2012 may help to overcome specific bullying situations, must be seen. According to the directive in force, since that day the new provisions of paragraph 54a section 1 of the labour court act (§ 54a Abs. 1 ArbGG [Arbeitsgerichtsgesetz]), the labour court can propose to the litigants mediation or other methods of alternative dispute resolution. According to paragraph 54 section 6 (§ 54 Abs. 6) ArbGG the presiding judge may direct the parties for the conciliation process and its continuation to a non-decision making judge for that purpose. This Güterichter (benevolence judge) can use all methods of conflict resolution, including mediation.

⁴⁰ Remark: BAuA ist the abbreviation of “Bundesanstalt für Arbeitsschutz und Arbeitsmedizin”. The authors of the study were Meschkutat/Stackelbeck/Langenhoff (footnote 9).

⁴¹ Bundesgesetzblatt 2012 Teil I Nr. 35 vom 25.07.2012, page 1577 (www.bundesgesetzblatt.de).

The special importance of the law in connection with workplace bullying and harassment lies in the field of legal education. As far as the problem of bullying is concerned, the eighth penal of the Bundesarbeitsgericht (Federal Labour Court), by its judgment of 25.10.2007⁴² did just that. In its decision the Panel emphasizes that the German legislator with the definition of “Belästigung” (harassment) in paragraph 3 section 3 (§ 3 Abs. 3) ArbGG ultimately circumscribed bullying – albeit in connection with those listed in paragraph 1 (§ 1) AGG discrimination of race, ethnic origin, gender, religion or philosophy of life, disability, age and sexual identity. In paragraph 3 section 3 (§ 3 Abs. 3) AGG the circumscribed word bullying can be transferred beyond paragraph 1 (§ 1) AGG, to cover all cases of discrimination. As a consequence, this means that the rules of the Allgemeines Gleichbehandlungsgesetz (general equal treatment act) in the context of a specific bullying case can be applied – directly, where features of paragraph 1 (§ 1) AGG are affected, or indirectly (analogue), provided that the characteristics of paragraph 1 (§ 1) AGG are not touched.⁴³

Since that decision in 2007, the eighth penal of the Federal Labour Court has unfortunately not had the opportunity to expand the trodden path any further. If and when this will be the case is uncertain. This requires a corresponding revision.

VIII. Intervention and prevention in companies

The intervention and prevention of bullying in Germany takes place at business or company level. Trade unions and employers organizations are not directly involved. They rather train and advise their members. There are no specific collectively agreed provisions for bullying. Such provisions are only conceivable in company specific agreements.

In Germany there are two ways of workplace representation on an operational level. In the private sector, the Betriebsverfassungsrecht (works council law) is applied; in the public sector, it is the Personalvertretungsrecht (staff representation law). Both are different in many ways, so I will only refer to the works council law from here on.

Representation at the operational level is made by the Betriebsrat (works council). This body is the result of democratic elections and it depends on the number of employed workers in the organisation. The establishment of workplace representation is carried out on a voluntary basis by the employees. These elect from their ranks the people they want to represent their interests towards the employer. Works council members are elected for a term of four years. The works council mandate is an honorary post, for which there is an exemption from professional activities.

If an organisation has several works councils – hence several companies – it has to establish a Gesamtbetriebsrat (joint works council) where each of the works councils appoints up to three members. While the work of the works council is limited to the establishment concerned, the joint works council takes care of those matters that affect the entire organisation.

The Betriebsparteien (operating parties = works council or joint works council on the one hand and the employers on the other side) have the opportunity for a wide range of cooperation in the workplace in form of agreement on rules and regulations and copperfasten them by written agreement. Such an Betriebsvereinbarung (operational agreement)

⁴² 8 AZR 592/06 (www.bundesarbeitsgericht.de).

⁴³ Meaning and consequences of the decision: Wolmerath (footnote 45, Festschrift für Kunishige Sumida), page 271.

applies directly and is compulsory for employees of the company. In Germany, operational agreements concerning bullying and harassment are not discussed any more. In this regard, the main question is not “if” but rather “how.” Similarly, agreements are possible on a corporate level. These are called *Gesamtbetriebsvereinbarung* (general agreement). Even on a corporate level it is possible to have a *Konzernbetriebsvereinbarung* (group agreement) for bullying and harassment.

While early operational agreements tackled bullying as singular manageable problem, it is now common knowledge that a comprehensive rulebook is necessary, to establish a comprehensive regulatory framework for all forms of psychosocial stress in the workplace. Going a step further is the approach of the *Allgemeines Gleichbehandlungsgesetz* (general equal treatment act) to use the *betriebliche Beschwerdestelle* (company complaints board)⁴⁴ which is mentioned in the law and extend it by addition of bullying and other forms of psychosocial stress.⁴⁵

Regular content of a company agreement on bullying issues are both intervention and prevention, where prevention is of particular importance. Anyone who succeeds in withdrawing breeding ground for bullying will rarely find themselves in a situation where intervention is necessary.

The intervention, the taking of action in an acute bullying situation, is determined by the provision of tools for conflict resolution. Many operating agreements tread a particular procedural path, as for example do the Ford plants in Germany.⁴⁶ Usually, the aim is to achieve a win-win situation.

Independently hereof, the employer can sanction a bully for his actions from a (employment) contractual point of view. This can be done by means of a warning, a transfer or in the worst case: a dismissal. This, however, requires appropriate action by the employer, such as a hearing of the works council before the actual transfer or dismissal. The bully, in turn, can have his dismissal checked for its validity by the labour court.

IX. Role and functions of voluntary organizations

From the outset, the discussion about the bullying problem has been carried out by NGOs. Trade unions as well as religious institutions also took part. Health insurances also recognized very quickly, that action was required. Representatives of these groups set up bullying helplines, where those who were bullied could turn. These are a first port of call, but unfortunately, they do not exist everywhere in Germany. At this point should be mentioned as exemplary the “*Mobbing-Hotline Baden-Württemberg*” (bullying hotline Baden-Württemberg)⁴⁷ and the “*MobbingLine Nordrhein-Westfalen*” (bullying line North Rhine-Westphalia).⁴⁸ The latter celebrated its tenth anniversary in November 2012 with a

⁴⁴ Paragraph 13 section 1 (§ 13 Abs. 1) AGG.

⁴⁵ For further details: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, pages 62 – 64. Fundamentally: Wolmerath, *Mobbing und Allgemeines Gleichbehandlungsgesetz*, in: *Festschrift für Kunishige Sumida zum 70. Geburtstag*, Studien zum Persönlichkeitsrecht des Arbeitnehmers, Band II, Tokyo 2011, page 271.

⁴⁶ Footnote 45.

⁴⁷ Zahner, *Überbetriebliche Beratung und Unterstützung durch die Katholische Betriebsseelsorge*, in: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, page 122 (130).

⁴⁸ Wessels/Deilmann/Saßmannshausen, *Die MobbingLine Nordrhein-Westfalen – eine bewährte Anlaufstelle für Mobbingbetroffene*, in: Wolmerath/Esser, *Werkbuch Mobbing. Offensive Methoden gegen psychische Gewalt am Arbeitsplatz*, Frankfurt am Main 2012, page 154.

symposium titled: “Mobbing vermeiden – Faire Arbeit fördern” (avoiding bullying – promoting fair working) and was organized by the North-Rhine-Westphalian Federal Department of Labour, Integration and Social Affairs. As much as the department’s commitment to the bullying hotline is commendable, as much it became clear at the symposium, that when it comes to bullying, the “MobbingLine Nordrhein-Westfalen” (bullying line North Rhine-Westphalia) is the only activity the state government is involved in.

Many of those affected by bullying took their own experience as an opportunity and started self-help groups. Some of these have been around for several years; others were disbanded after a short time. A network or an association of self-help groups or an umbrella organisation for self-help groups does not exist. Everyone is plodding along, the motives and goals are highly variable. Some institutions offer their support and assistance free of charge, others charge and promote legal protection insurance.⁴⁹ There are also supposed to be support groups that are acting as a cover for sects.

In specific cases, when nothing else helps, the “TelefonSeelsorge” (crisis helpline) is an indispensable aid. It is a charitable institution that is represented nationwide and free to access both over the phone and via the Internet. About 8,000 specially trained volunteers can be reached around the clock every day of the year. The crises helpline is often the last contact if there is no one (anymore) who is willing to talk to the bullying victims.

X. Future prospects

When I look to the future, then, in spite of the currently sobering reality, I look at it with optimistic hope that in the next few years bullying will be eradicated. This hope is not carried by politics and the German legislator. It is based on the development towards an aging society, in which the active workforce is becoming increasingly scarce and therefore more valuable. This will inevitably mean that employees will gain more appreciation and respect. The first signs are already visible in those companies, that recognized this trend and who have taken measures, which lead to a better work-life balance. In the foreseeable future, people-friendly working conditions, employee benefits and a good working and operational climate will be the criteria when employees have to decide between two or more companies.

Until then, it will be up to the works councils and employers to decide and agree operational rules that help to stop bullying and other manifestations of psychosocial stressors. Therefore, it is clear, who the losers are going to be. It will be especially those workers in companies where there is no or no functioning employee representation. They will have no choice but turn their eyes to Brussels in the hope that the European Union will give directives for anti-bullying policies to the German legislator, which will have to be implemented into national law within a given time frame.

⁴⁹ www.mobbing-zentrale.de charges 60 €/hour for consulting services and recommends the legal costs insurance “DAS.”