

## **Dossier on the Subject of Discrimination due to Chronic Diseases**

The present dossier provides information on the topic of discrimination of people who suffer from chronic diseases. In addition to daily restrictions, people with chronic diseases experience social-exclusion as well. Contrary to disabilities, chronic diseases are not explicitly mentioned in the German General Equal Treatment Act (AGG). In 2013 BUG supported the lawsuit of a HIV-positive person before the Federal Labour Court.

Diseases, chronic diseases and disabilities are conceptualized separately. In certain chronic diseases there is, in addition to permanent health restriction, a risk of stigmatization. In such a case, a chronically ill person is restricted not by the chronic disease itself, but by the stigma attached to this disease regarding social participation.

People with chronic diseases can encounter discrimination in different areas of life, for instance in the workplace, insurance, health care, or in access to housing.

Various legal provisions in national law, European Union law, and international law aim to eliminate and prevent discrimination due to health restrictions and in particular due to chronic diseases.

### **1. Chronic Diseases**

Diseases, chronic diseases, and disabilities should be distinguished from one another. In addition to the lasting health constraints experienced by those suffering from a chronic disease, stigmatization can also become a source of danger. A chronically-sick person may find that their ability to interact with society is restricted – not necessarily as a result of the chronic disease, but rather due to stigmatization of their health problems.

#### **1.1 Distinguishing disease, chronic disease and disability**

Disease, chronic diseases and disability should be viewed differently. The extent to which they differ will be explained in this dossier.

“A narrow understanding of the concept of disabilities excludes people with chronic diseases. Here, the court is called upon to abandon the restrictive definition of disabilities. In case no improvements are made, action should be taken by the legislator.”

(Quote from Christine Lüders, Director of the anti-discrimination office, and Hubert Hüppe, Representative of the Federal Government Commissioner for the interests of people with disabilities (translated from German)).

### 1.1.1 Disease

A disease is a disturbance of the normal physical or mental functions which adversely affects the performance and well-being of those affected. An illness is not permanent and can be completely cured with or without medication. Generally speaking, the patient usually makes a full recovery.

### 1.1.2 Chronic Disease

A chronic disease is a disease that can be improved by medication; as a rule, however cannot be cured. Furthermore, a chronic disease requires constant treatment and medical supervision.

The impairment of social participation is not necessarily a consequence of a chronic disease. The extent to which those who suffer from chronic diseases are impaired in their social participation depends, rather, on the appearance of the chronic disease, the severity, and society's perception.

Some chronic diseases cause little or no health problems and can be treated well. For example, a person infected with HIV or with epilepsy may only be mildly (or not at all) restricted in pursuing their profession or in participating socially.

### 1.1.3 Disability

According to the UN Convention on the Rights of Persons with Disabilities, disability is defined as a long-term physical, mental, intellectual, or sensory impairment which, in interaction with various barriers, may hinder full, effective, and equal participation in society.

The extent to which a person is restricted by their disability is measured by a categorization of the Degree of Disability. For that purpose, a scale of 10 to 100 is used. The higher the Degree of Disability, the more severe the disability and impairment are. The Degree of Disability score is requested and approved by the social security office or the Office of Social Affairs.

The Degree of Disability also measures impairments due to a chronic disease. For example, the Degree of Disability score for a person suffering from diabetes is 40. The Degree of Disability in the case of epilepsy may be, depending on the frequency of epileptic episodes, up to 80. People with HIV always have a Degree of Disability of at least 10.

“Within jurisprudence, disease is defined as an irregular bodily or mental state which requires medical care, or simultaneously or singularly results in an inability to work. One's state is regarded as irregular, when it deviates from the norm - meaning from the model of healthy people.”

- Social Welfare Court Berlin (S 72 KR 667/10), 07.04.2011

The following diseases are covered by the term chronic disease:

HIV infections, vascular diseases of the heart (angina pectoris), hypertension, diabetes mellitus, chronic skin diseases (eczema, psoriasis), rheumatic diseases (rheumatism, gout), chronic bowel disease (Crohn's disease, ulcerative colitis), respiratory diseases (asthma, lung disease), blood vessel disease (atherosclerosis), obesity, cancer, chronic hepatitis B and C, mental illnesses (for example schizophrenia, depression, alcoholism), metabolic disorders, thyroid disease, hormonal disorders, diseases due to weak immune systems (Lyme disease, polio, infectious disease), dementia and Parkinson's.

## 1.2 Stigmatization of chronically ill people

Using the example of various chronic diseases such as HIV infection, mental illness, epilepsy, atopic dermatitis, and obesity, the ways in which social stigma can hinder affected people from participating in society will be shown. Social stigmas often establish the starting point for various forms of social discrimination and social exclusion.

The term stigma is defined in the dictionary of sociology (Schäfers) as, “A physical, psychological or social feature by which a person is distinguished negatively from the other members of a society or group to which it belongs and which excludes this person from full social recognition.”

### 1.2.1 HIV

According to the epidemiological Bulletin no. 44 of the Robert-Koch-Institute from 3 November 2014, approximately 80,000 HIV-positive people live in Germany. In 2013, the number of new HIV infections was estimated at 3,200.

In 2011 and 2012, the German AIDS-Relief conducted a study throughout Germany in order to collect experiences about stigma and discrimination against HIV-positive people. To that end, 1,148 people were asked about their experiences.

For HIV-infection, 42% of all respondents in the year prior to the survey had low self-esteem due to the infection, and 75% felt sad or depressed in the last 12 months.

Negative attitudes towards people with HIV are associated with different lifestyles compared to the civic norms. Although HIV and AIDS are, due to the progress of science, less stigmatized than in the 80s, they are still linked to drug use, sex work, and homosexuality.

Entry restrictions for people with HIV are particularly significant cases of discrimination. Currently, there are 16 countries whose legislation categorically refuses the entry of HIV-positive people. The disclosure of HIV status in the visa application or immigration form results in the prohibition of entry or immediate expulsion.

“Stigma remains the single most important barrier to public action. It is a main reason why too many people are afraid to see a doctor to determine whether they have the disease, or to seek treatment if so. It helps make AIDS the silent killer, because people fear the social disgrace of speaking about it, or taking easily available precautions. Stigma is a chief reason why the AIDS epidemic continues to devastate societies around the world.”

- Quote from Ban Ki-Moon, former Secretary General of the United Nations.

### 1.2.2 Mental disease

The term “mentally ill” is associated with various stereotypes. Studies show that a large part of the population stereotypes mentally ill people as violent, dangerous, irrational, and less intelligent. Many people equate mental illness with schizophrenia whereas mood disorders such as depression, for example, are seen as less severe.

At an international congress for psychiatric epidemiology in Leipzig in 2013, three researchers presented the results of their study. They interviewed 3000 people in 1990 and 2011 in order to

assess the development of attitudes towards people with mental illnesses. It was found that the attitudes of respondents have actually *worsened* in the past 20 years. In 2011, 30% of the respondents refused to have a schizophrenic man as a neighbor or colleague; in 1990 it was only 20% of the respondents.

### 1.2.3 Epilepsy

People suffering from epilepsy are often stigmatized. Between 1967 and 2008, the Emnid Institute conducted six studies nationwide about attitudes toward epilepsy in Germany. It showed that the number of those who had clearly negative attitudes towards people with epilepsy decreased within the investigation period, and that in 2008 this number amounted to only 10%. In the latest survey, 90% of respondents associated epilepsy with uncontrollable seizures. Only 45% of the respondents were aware that epilepsy is treatable.

The German Epilepsy Association (Deutsche Epilepsievereinigung) organizes the annual “Day of Epilepsy.” This takes place every year on October 05.

People with epilepsy experience disadvantages and discrimination in the workplace. Employers often fear accidents or liability claims and, therefore, have reservations about employing a person with epilepsy. According to the German Epilepsy Association, barely half of the people with epilepsy in Germany are employed. As epilepsy is now medically treatable, it may be that people with this chronic disease suffer today more from social consequences of the disease rather than the disease itself.

### 1.2.4 Eczema

Eczema is considered the most common skin disease in Western industrialized countries. Affected persons who have eczema on their face or other visible parts of the body suffer especially from the physical consequences of eczema such as intense itching. Eczema can also have many causes and triggers, which makes research of the disease harder.

The Regional Labour Court of Berlin-Brandenburg decided the case of a woman with eczema, who was not employed by the police because of her chronic illness, in 2009.

People with eczema suffer from the stigma that their disease is contagious. This can lead to reduced self-esteem. Moreover, patients suffer from the stigma that they cannot tolerate stress and that their appearance is partly perceived as unhygienic.

### 1.2.5 Obesity

Obesity is classified in the International Classification of Diseases in the field of endocrine, nutritional, and metabolic disease (E66). It does not qualify as a medical illness or mental disorder, but does increase the risk for developing subsequent diseases. The quality of life of obese people is not only affected by their increased weight and any subsequent ailments, but also by the stigmatization and social exclusion which obesity may bring.

According to a publication of the Robert-Koch-Institute from the year 2012, 23% of men and 24% of women in Germany are obese.

A [study](#) by the University of Leipzig revealed that obese people are often stereotyped as lazy, weak-willed, undisciplined, and repulsive. Specifically, the study revealed that a common attitude among respondents was the belief that obese individuals bear the responsibility for their obesity, and could lose weight if they really wanted to. The stigmatization of obese people may cause affected individuals to devalue themselves because of their excess weight.

The study also found that in everyday life, obese people feel especially discriminated against by inappropriate remarks and accusing glances. Those affected explain:

“I was a bank clerk. And whenever I ate I could feel the eyes of colleagues on my back.”

“I still get so many looks and stupid comments that I only leave the house in really important cases. My neighbor usually buys groceries for me and every time I need to do it myself I am full of anxiety. I order clothes from catalogues; I don’t have much money to buy clothes. Except for that, I don’t really have to leave my house that often, and when I do, I’m not happy about it.”

## **2. Discrimination of people with chronic diseases in different areas of life**

Representative data concerning the experiences of those faced with discrimination due to chronic diseases is scarce. However, victims often speak out about their experiences at counseling centers or in special interest groups. These reports demonstrate that people suffering from HIV infection, mental illness, or obesity experience face daily discrimination. Chronically ill people can encounter discrimination everywhere. However, if discrimination takes place in certain scenarios (such as in the workplace, in insurance, education, healthcare, or the housing market for example) it can potentially be countered by legal action.

A study of the national anti-discrimination office showed that specifically people with an obvious chronic disease and/or a stigmatized illness are affected by discrimination, especially in employment and insurance services. Most commonly reported discriminations are those of people with HIV or obesity.

### **2.1 Discrimination in the work place**

Discrimination due to externally perceptible diseases or stigmatized illnesses occurs in the work place. Chronically ill people experience discrimination both in access to, as well as in, employment.

A publication commissioned by the Federal Anti-Discrimination Office examined the access of people with disabilities to the labour market. In this publication, the situation of people with chronic diseases was partly included.

#### **2.1.1 Discrimination in access to employment**

Chronically ill people may encounter discrimination even when applying for a job. For example, an employer who believes in the stigma that obese people are lazy and undisciplined is unlikely to employ an obese individual.

Discrimination on the basis of a chronic disease is possible if the employer knows that the candidate is chronically ill. People with chronic diseases are confronted with the assumption that they are not as efficient and operational as healthy people. This, despite the fact that (due to modern treatments) many chronic diseases cause no such restrictions. Nevertheless, employers fear additional costs in the event they hire a chronically ill person.

As a basic principle, chronically ill people are protected from discrimination in access to work. The employer is not allowed to ask questions about health status (and therefore about chronic diseases). Since questions about chronic diseases are not allowed, the candidate may lie if the employer exceeds the limit of acceptable questioning. As an exception however, the employer may ask questions about a chronic disease if it could create a risk for other employees or the clients. Furthermore, the employer may ask questions if the specific work-duties cannot be carried out because of the chronic disease.

According to a study by the Ministry of Labour and Social Affairs from the year 2013, people with disabilities, severe disabilities or chronic diseases are unemployed more often and longer (25,9 months), than healthy people (15,3 months).

### **2.1.2 Discrimination in employment**

If the chronic disease is known, chronically ill people can also be discriminated against while employed - by colleagues (through exclusion or the spreading of rumours) or by the employer (by assigning a different area of work, such as an activity that does not require contact with customers).

In the anti-discrimination laws of the Netherlands, Portugal, and Romania, disadvantaging those with a chronic disease is considered discrimination.

People with openly-visible and strongly stigmatized illnesses (such as obesity or mental illness) are at risk of losing their jobs. This is also the case for a disease that may impact work performance, such as multiple sclerosis. People with multiple sclerosis are at risk of getting fired due to an inability to work or a reduced capacity for work.

### **2.2 Discrimination in insurance**

People with chronic diseases are discriminated against by private insurance companies. This includes life insurance, disability insurance, and accident insurance. Anyone who wants to take out such insurance must fill out a questionnaire and answer questions about their health. Among other things, it is asked whether the person is suffering from a chronic disease. When the answer to this question is positive, an increase of premiums or refusal by the insurance company to complete a contract usually follows.

Discriminatory practices by insurance companies are allowed under the German anti-discrimination law, provided that risk-assessment tests can validate it. This is considered unjust by many affected people.

## 2.3 Discrimination in education

According to a social survey of the German student association, 60% of disabled and chronically ill students consider their disability or chronic disease to be an impairment in their studies. In 2006, 8% of German students were disabled or chronically ill.

In their [law expertise](#), the Federal Anti-Discrimination Agency reported in 2012 that, “Protection against discrimination on the grounds of chronic diseases,” that people with obesity or multiple sclerosis face discrimination in education or training. For example, people with multiple sclerosis are not accepted for training to work as flight attendants.

In the USA, a discrimination case regarding weight reached the Supreme Court when a student in a nursing school was asked to either sign a contract that obliged her either to lose weight or to quit the school. The contract was declared as invalid.

## 2.4 Discrimination in healthcare sector

Discrimination against chronically ill people also occurs in the healthcare sector; affecting people that are infected by HIV or struggling with obesity in particular.

### 2.4.1 HIV in healthcare

HIV-positive people are commonly refused medical treatment when their infection becomes known. Common reasons for that is the fear of infection on the one hand and the fear of the defamation of their practice on the other. Following complaints, the organization AIDES conducted telephone-tests in France in an attempt to prove whether discrimination in healthcare actually occurs. Particular focus was given to medical areas having the most complaints – in this case gynecology and dentistry – but other areas were included in the test as well. The testers were directed to call and arrange appointments for relatively easy treatments – for example, a vaginal swab or teeth cleaning. Easy treatments were chosen as there would be no need for the callers to be transferred to a specialist.

The study “Positive Voices” conducted by the German AIDS-Relief in 2011 showed that around 20% out of 1,148 surveyed were denied a health care service due to their HIV infection in the last 12 months.

One-third of the doctors denied treatment to HIV-infected people with outright-refusals often being concealed. For example, dentists claimed that they did not have the suitable materials to perform the service, that they did not have adequate knowledge of the pathology, or that the treatment itself was too risky given the circumstances. In the case of the gynaecologists, 7 out of 116 doctors flat-out refused treatment. The survey also revealed that many doctor’s assistants felt uncomfortable with HIV-infected patients. Additionally, some of the testers who did receive an appointment later had it cancelled.

Similar cases in Germany were also made public by the press. Frequently, HIV-positive patients are treated (when they have an appointment) at the end of the office hours. This is justified by a supposedly required special disinfection process following the appointment. In health care, HIV-positive people feel discriminated against when their medical status is visibly marked on the

patient's record. Every person who looks at the patient's records is immediately made aware of the HIV infection.

"I didn't know that you have AIDS. I just read it. I cannot provide you any further treatment. It's too risky for me. I could injure myself and then I'd be infected with AIDS, too." (During a treatment at a dentist's office, source: [TAZ](#))

The [study](#) "Positive Voices" shows that medical confidentiality is not always respected. The information about the HIV status of 28% of women and 17% of men surveyed was passed to other doctors without the consent of the patients.

#### **2.4.2 Treatment of obese people at health care centers**

Stigmatization of obese people in the healthcare system is widespread. Common prejudices include the idea that obese individuals are lazy, unwilling to work, unhealthy, or could lose weight if they exercised more self-control. This stigma also affects the interaction of doctors with their patients. Obese patients receive, on average, less treatment than patients with a normal weight. Out of shame, anxiety for discrimination and stigma, obese patients avoid doctor visits. This could be extremely dangerous in the event that the individual has other medical issues which go untreated as a result of this avoidance.

Doctors are the second most common perpetrators of discrimination, according to those suffering from obesity.

#### **2.5 Discrimination at the housing market**

People who suffer from chronic diseases are discriminated against in their search for accommodations. To this effect, individuals with openly visible chronic diseases are especially affected. For example, the external appearance of those who suffer from eczema or obesity negatively impact their ability to secure housing.

The victims of housing discrimination can sue. "Testings" (intentionally trying to catch someone in the act of discrimination) are widely accepted as evidence in such cases.

People who suffer from multiple sclerosis or HIV and AIDS experience frequent discriminatory rejections at the conclusion of rent contracts, provided the landlord becomes of the chronic disease.

### 3. Legal basis

People who suffer from chronic diseases require protection, such as people with disabilities. This is regulated by legal frameworks in Germany, in European Union as well as internationally. The cases in which these standards apply depend mostly on the definition of the term “disability.”

#### 3.1 German legislation

Different standards in German law guarantee protection from discrimination on the grounds of disability, examples being the General Equal Treatment Act, the constitution, and the Law of Equal Treatment of People with Disability.

##### 3.1.1 General Equal Treatment Act

“The act aims to prevent or eliminate discrimination on grounds of racial or ethnic origin, sex, religion or belief, disability, age, or sexual identity.”- Article 1 of the act.

In the General Equal Treatment Act it is clear that discrimination on grounds of disability is to be prevented or eliminated. The term “chronic disease,” however, is not explicitly mentioned. Therefore, it is questionable whether chronic diseases are covered by the term “disability.” According to prevailing opinion, the concept of disability in the Equal Treatment Act is inspired by the ninth book of the Social Code (Rehabilitation and Participation of Disabled People), which states:

“People are disabled when their body function, mental capacity, or psychological health is highly likely to diverge for longer than six months from the typical for-the-age condition, and thus experience an impaired participation in social life. Additionally, individuals may be considered disabled in the case that an impairment is assumed, though perhaps not diagnosed.” Social Code IX, Article 2(1).

In December 2013, the Federal Labour Court ruled that HIV infection falls under the term “disability” of the General Equal Treatment Act, thus strengthening the rights of HIV-positive people in the workplace. The action was supported by BUG.

“‘Chronic disease’ is not an explicit category of German anti-discrimination law; it is a social-legal category in paragraphs 3 and 26(1), number 1 of SGB IX. Therefore, people who were disadvantaged on the grounds of a chronic disease are reliant on either a violation of the Equal Treatment Act and/or corresponding provisions in general private law in order to raise any [legal] complaints.”

- Protection of discrimination because of chronic diseases, federal antidiscrimination agency, [page 5](#).

Chronic diseases are unchangeable personality characteristics that are only protected by the Equal Treatment Act when they are considered a disability. The disease itself is not a ground for discrimination under the Equal Treatment Act. If the chronic disease does not reach the degree of disability, those affected remain unprotected.

### 3.1.1.1 Interpretation of the Federal Labor Court

In 2013, the Federal Labour Court (6 AZR 190/12 ) held that an asymptomatic HIV infection is considered a disability within the definition of § 1 of the General Equal Treatment Act. In this specific case, the employee was dismissed during his work-probationary period after the employer became aware of his asymptomatic HIV infection. Because the employee worked as a chemical-technical assistant in a pharmaceutical company, the employer feared contamination of the medication.

Feeling discriminated against due to his chronic illness, the employee decided to sue. At first, the action was dismissed by the both the Labour Court of Berlin, as well as the Regional Labour Court of Berlin. The Federal Labour Court eventually decided on December 19, 2013 that an asymptomatic HIV infection falls under the disability concept of the General Equal Treatment Act. The BUG supported this lawsuit.

In the UK, an employer was convicted of disability based discrimination. He was ordered to pay £18,000 for unjustly terminating an HIV-infected employee.

### 3.1.2 Constitution of the Federal Republic of Germany

Following the amendment of the Constitution on October 27, 1994, the constitution outlaws discrimination on the grounds of disability. Article 3(3) of the constitution states: “No one shall be discriminated against because of his disability.” This is a right to equality which, should there be unequal treatment, is violated provided that there is no constitutional justification for the difference in treatment.

Chronic diseases, however, are not explicitly mentioned in the constitution. Therefore, the scope of what is intended by the term ‘disability’ must be analyzed within the context of article 3(3) of the constitution in order to ascertain if chronic diseases should be included.

In accordance with article 3(3) of the constitution, a ‘disability’ is defined as a permanent deviation from the ideal type of healthy person, and which affects the ability of the person concerned to participate in society. As individuals with chronic diseases fit this criteria, the prohibition of discrimination provided in the aforementioned article of the constitution must also be applied to them.

Article 3(3) of the Constitution:

“No person shall be favoured or disfavoured because of sex, descent, race, language, homeland and origin, his faith, his religious or political opinions. No one may be discriminated because of his disability.”

### 3.1.3 German Equal Opportunities for People with Disabilities Act

The German Equal Opportunities for People with Disabilities Act also took the definition of Disability from the ninth social security statute. The German Equal Opportunities for People with Disabilities Act presents new rules on accessibility. New government buildings must be accessible and barrier-free. Public authorities have to adapt their websites to the needs of people with disabilities in order to allow access to all the information that they provide. The Act also acknowledges that women with disabilities face often double discrimination – due to their

disability and gender- and therefore specific measures must be taken to remedy these disadvantages. But even in the Act people with chronic diseases are not explicitly mentioned.

In particular, at the urging of disability self-help organizations and the state working group “Help for disabled in Bayern,” the lawmaker included a ban on discrimination for chronically ill and disabled people in both articles 3 of the Federal Constitution and 127 of the Bavarian Constitution.

The constitutions can formulate only general standards and it must be pointed out again that the use of civil rights for chronically ill and disabled people can only be realized if there is a clear legal regulation, meaning equality laws in the Federation and in the countries.

“Chronically ill and disabled people are not just passive objects within a well-developed system of assistance, but they are actively acting subjects, citizens of this society, who want to lead, as much as possible, a self-determined, independent life.”

- Self-help LAG Bayern.

## 3.2 European law

Different provisions of EU law guarantee protection against discrimination on grounds of disability. This is the case with the EU Charter of Fundamental Rights, the Employment Equality Directive, as well as the jurisprudence of the European Court of Justice (ECJ).

### 3.2.1 EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights became legally binding for all EU Member States following the implementation of the Lisbon Treaty. Article 21 of the Charter of Fundamental Rights contains prohibitions of discrimination on the grounds of sex, the “race,” color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation.

The term “chronic disease“ is not explicitly listed in the EU Charter of Fundamental Rights, but the ground of discrimination “genetic characteristics” shows that the protection against discrimination due to a predisposition to disease is guaranteed.

### 3.2.2 Employment Equality Directive (2000/78/EC)

The Directive 2000/78/EC was adopted by the EU Council on November 27, 2000. The Directive aims to establish a general framework for equal treatment in employment and occupation.

The Directive does not give a definition of “disability,” but, following the decision in the Chacon Navas case, it must be interpreted as “autonomous and uniform.” A disability, according to the ECJ, is a restriction – in particular because of physical, mental or psychological impairments - which constitutes “an obstacle to the participation of the person in professional life.” A disease may fall into the scope of this definition, as it meets the criterion of duration of the impairment.

### 3.2.3 Jurisprudence of the ECJ

For the definition of the disability concept, two judgements of the ECJ are particularly important, “Chacon Navas,” and “Rs. Ring Skouboe tows,” which are explained in this dossier.

#### 3.2.3.1 Legal case “Chacon Navas”

In April 2013, the European Court of Justice (ECJ) strengthened the right to support in the workplace for chronically ill patients with its ruling in the “Chacon Navas” case.

The case originally resulted after a Spanish worker became ill and was terminated by her employer, without explanation, following an eight-month sick leave. As a result, the ECJ needed to determine whether protection against discrimination on the grounds of disability (as it pertains to the definition of Directive 2000/78/EC) also extends to termination due to chronic illness.

In July 2006, the ECJ issued its very first interpretation of the term “disability” within the scope of Directive 2000/78/EC. A disability, the ECJ ruled, belongs in the category of restrictions which leads to physical, mental, or psychological impairments and/or forms a barrier to participation in professional life. Additionally, any restrictions will only be considered a “disability” if they last for an extended period of time.

#### 3.2.3.2 Legal case “Rs. Ring Skouboe Werge”

The case “Rs. Ring and Skouboe Werge,” from April 11, 2013 (C-335-11 and C-337-11) is relevant as a further development of the “Chacon Navas” case regarding the definition of the term “disability.” The ECJ noted the UN CRPD to supplement the definition of disability.

The basis of the ruling were two Danish law suits from 2006. Both cases were in regards to compensation for discrimination on the grounds of illness in the workplace. The Danish union, HK/Denmark, filed a lawsuit on behalf the two applicants – in particular on the grounds that the possibility of shortening the dismissal-notice period constitutes discrimination on grounds of disability.

Ms. Ring was working in a large, Danish property management. Between June and November 2005, she was unable to work more than 120 days because she suffered from chronic back pain and “osteoarthritis changes” in the lumbar vertebrae. In order for her to work without limitation, it would have been necessary to introduce part-time work as well as to provide a height-adjustable desk. Not only were these two possible actions not offered to her, but she was also dismissed on short-notice.

Mrs. Skouboe Werge was working as an administrative assistant. After a traffic accident, she suffered from whiplash and was first partially and then fully on sick leave. She was also terminated on short-notice.

According to a ruling in April 2013 long sick employees, for example people with disabilities, can enjoy a dismissal or demand appropriate aid. In that judgment, the judges have expanded the concept of disability and thus the protection against discrimination. A disease that attracts physical, mental or psychological limitations by itself, therefore, can be equated with a disability. Employers should provide to their employees who are ill with, for example, multiple sclerosis, HIV, or cancer, the aid that is provided for by the German law for people with disabilities.

The Danish court suspended the proceedings and addressed a preliminary ruling with questions to the ECJ asking for clarification of the Directive 2000/78 / EC. It was deemed important to determine how the concept of 'disability' should be interpreted within European Law.

On April 11, 2013, the ECJ released its judgement of the term 'disability' after taking into account Article 1 of the UN CRPD (this also included the term 'chronic diseases'). As a result of this ruling, the ECJ considers an individual disabled if he or she is, due to illness, prevented from the "full and effective participation in professional life on equal terms to the other workers."

### 3.3 International law

Various provisions of international law guarantee protection against discrimination on the grounds of disability. This is the case, for example, in the standards of the UN and the Council of Europe, as well as in the case law of other states.

Similar to Germany, chronic diseases are implicitly recognized under the term "disability" in various laws and prohibited as a basis for discrimination in some countries such as Switzerland, France, and Great Britain. In addition, the "chronic disease" discrimination dimension is explicitly covered in certain decrees in Belgium, the United Kingdom, the Netherlands, and Portugal, or specific diseases are specifically mentioned. Another solution is the introduction of the "health status" or "health" dimension in decrees in France, Hungary, and Slovakia.

An expertise commissioned by the Federal Anti-Discrimination Agency of Germany (ADS) compared the legal protection against discrimination of people with chronic diseases in different countries. Further information regarding international law can be found here (only available in German).

#### 3.3.1 UN Standards

The UN General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) in December 2006. In Germany, in addition to national regulations, the UN CRPD has formed the legal basis for people with disabilities since 2009. The CRPD calls for more participation and self-determination of people with disabilities.

The aim of the UN CRPD under Article 1 is "to promote the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, to protect and to ensure and promote respect for their inherent dignity."

According to the BRK, the concept of disability is broad and widely interpreted. However, the term within the meaning of BRK is understood as: "people with long-term physical, mental, intellectual, or sensory damage that, in interaction with various barriers, can prevent individuals from participating equally and without limitation in society."

An important point here is the disruption of individual's participation in society. This implies that the BRK also includes those who are restricted in their ability to freely participate in society due to a chronic illness.

### 3.3.2 Standards of the Council of Europe

The standards of the Council of Europe include the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.

Additional information concerning the standards of the Council of Europe in relation to chronic diseases can be found in an expert-report commissioned by the Federal Anti-Discrimination Agency of Germany (only available in German).

#### 3.3.2.1 European Convention on Human Rights

The European Convention on Human Rights (ECHR) contains civil and political rights such as the right to life, the prohibition of torture, slavery and forced labor, the right to liberty and security, the right to a fair trial, the principle of “no punishment without law,” the respect of private and family life, freedom of thought, conscience and religion, freedom of expression, the freedom of gatherings and associations, and the right to marry. Additional Protocols guarantee rights such as the protection of property and the right to education.

Article 14 of the Convention:

“The enjoyment of the forth in this Convention rights and freedoms is guaranteed without discrimination on grounds of sex, race, skin colour, language, religion, political or other opinion, national or social origin, association to a national minority, property, birth, or other status.”

In accordance with Article 14 of the Convention, these rights need to be guaranteed to all people without discrimination on the grounds of gender, “race,” colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Certain grounds of discrimination are covered in Article 14, but not discrimination due to chronic disease. However, as the list is not exhaustive, discrimination of people with chronic illness can be included under the term “other status.” This was confirmed by the jurisprudence of the European Court of Human Rights.

#### 3.3.2.2 European Court of Human Rights

The European Court of Human Rights broadly defines the concept of “other status.” In its 2009 ruling during “Pretty v. The United Kingdom” (2346/62), the Court recognized that a disease could fall under the scope of “other status” as it is expressed in Article 14 of the Convention. In this specific case though, no discrimination was found.

“Accordingly, the Court considers that a distinction made on account of an individual’s health status, including such conditions as HIV infection, should be covered – either as a disability or a form thereof – by the term “other status” in the text of Article 14 of the Convention.”

Following its 2009 ruling in “Glor v. Switzerland,” the Court of Justice found that, under Article 14, the claimant was discriminated against due to his diabetes status.

- § 57 the decision Kiyutin against Russia.

According to the ruling in “Kiyutin v. Russia” (2700/10) from October 2011, chronic diseases fall under Article 14. The Court held that although Article 14 does not explicitly describe a health status or medical condition as grounds for discrimination, physical disability and various health effects do fall under the context of that provision.

In this specific case the residence permit of an Uzbek man was refused by the Russian authorities because of his HIV infection. The ECHR noted that the list for grounds of discrimination in Article 14 of the Convention is quite wide and that an HIV infection could also fall into that category.

### **3.3.3 Case-law of other states**

The 2010 “Equality Act” in the UK explicitly recognizes some chronic illnesses as disabilities. For this reason, people with chronic diseases must be protected just as well as people with a disability. This is the case with cancer, multiple sclerosis, and HIV-infection. British court has expanded the list by recognizing both hepatitis C and chronic respiratory disease as chronic diseases.

“Cancer, HIV infection and multiple sclerosis are each a disability.”

- Schedule 1 – Part 1: Determination of disability of the Equality Act 2010.

In Canada, the “Ontario Human Rights Code” contains a list of various chronic diseases which are defined as disabilities - including diabetes and epilepsy. Any degree of physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness is to be understood under the term “disability.”

## **4. Further information**

For more material on the subject of discrimination due to chronic diseases, we recommend that you check the online version of this dossier.