

Forced out for complaint against discrimination

Austrian Courts: No Protection for Lesbian Employee

Rechtskomitee LAMBDA: "Courts are undermining antidiscrimination legislation"

A lesbian employee complains against discrimination by a colleague and addresses the Chamber of Labour. The shop committee feels outraged and takes the matter to the company's supervisory board. This board instructs the executive directors to take action. The directors then pressure the woman to sign consensual termination of contract, otherwise she would be dismissed. She submits and leaves the company. The Austrian Supreme Court sees no disadvantageous treatment and declares lawful the company's actions ...

The EU-Antidiscrimination-Directive (2000/78/EC) and the Austrian Equal Treatment Act prohibit discrimination in the workplace inter alia on the ground of sexual orientation. And they prohibit also any adverse treatment in reaction to a complaint against discrimination ("victimisation"). Without such protection against victimization there would be no effective protection against discrimination. So the Equal Treatment Act obliges victimizers to pay compensation to the victim.

If executive directors ask an employee to agree to termination of contract such employees usually feel threatened in their job security. Even more so if the driving force behind this pressure turns out to be the shop committee (which should protect the interests of the employee) what produces feelings of particular isolation. And it really gets excessive when the matter is even taken into the supervisory board of the company, gets subjected to outraged discussion there leading to instructions to the directors to take action. Such an order of events usually causes considerable feelings of distress, total isolation and helplessness in almost any employee so affected.

Interest in changing the job deprives of protection?

One could hardly imagine adverse treatment, in reaction to a complaint, worse than this one. Even more so, when the employee gets threatened with dismissal if she won't agree to termination. Termination of contract as the unconditioned sanction for a complaint against discrimination: a classic case of victimisation.

Not so however for the Austrian courts. The Supreme Court has confirmed the judgments by the Regional Court for Civil Affairs of Graz and by the Upper Regional Court of Graz (as appeals court), which dismissed the claim for compensation. The high court judges said that they could not see disadvantageous treatment as the woman, more than two months (!) before the events, had considered to change to another company. Therefore the "consensual" termination of contract could not be considered as other-directed but should be seen as self-determined (OGH 25.10.2011, 9 ObA 113/11z). The Supreme Court judges also sanctioned the reasoning the Upper Regional Court of Graz had provided (26.05.2011, 7 Ra 13/11b), that the voluntary payment of one month salary in addition to the obligatory termination payments would count against non-self-determined termination of contract in this case.

Money makes self-determination?

None of the three courts ever has established that the woman wanted to leave her job at the time she had been pressured into "consensual" termination of contract. When an employee considers changing the job does that mean that she wants to go for sure? And does it say when she would like to do so? And can voluntary (additional) termination payment render a

termination of contract self-determined any more than a later payment could render (sexual harassment consensual)?

Even one of the company's executive directors saw the issue of self-determination different than the courts: "I am fully aware", he testified in court, "that this always is disagreeable for a person so affected".

From the first day in court the presiding judge at the court of first instance has asked the woman if she would not like to withdraw her case. Even if she would get compensation, money could not make good for the things happened ...

„This case is a textbook example of how to undermine a good law“, says the president of Rechtskomitee LAMBDA (RKL) and counsel of the victim, Dr. Helmut Graupner, "The best statutes on the books are futile, if they are not enforced effectively in everyday life of the courts".

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes as prominent members as former Prime Minister Dr. Alfred Gusenbauer, President of Federal Parliament Mag. Barbara Prammer, former Minister of Justice Mag. Karin Gastinger, the Honorary President of the Parliamentary Assembly of the Council of Europe Peter Schieder, Federal Ombudsman Mag. Terezija Stoisits, Senator Marco Schreuder, former Director of Public Security Dr. Erik Buxbaum, the former President of National Judges Association Dr. Barbara Helige, the Chairwoman of the National Judges Association's Working Party on Fundamental Rights Dr. Mia Wittmann-Tiwald, the Vice-President of the Vienna Bar-Association Dr. Elisabeth Rech, the former President of D.A.S.-legal expenses insurance company Dr. Franz Kronsteiner, the President of Weisser Ring Dr. Udo Jesionek, the Secretary General of Amnesty International Austria Mag. Heinz Patzelt, the Vice-Chairperson of the Executive Board of the European Union Agency for Fundamental Rights Univ.-Prof. Dr. Hannes Tretter, and the well-known human-rights experts Dr. Lilian Hofmeister and Univ.-Prof. Dr. Manfred Nowak, the constitutional law professors Univ.-Prof. Dr. Christian Brünner, Univ.-Prof. Dr. Bernd-Christian Funk, Univ.-Prof. Dr. Heinz Mayer and Univ.-Prof. Dr. Ewald Wiederin, famous child- and adolescent psychiatrist Univ.-Prof. Dr. Max Friedrich and the Vienna Child- and Youth-Ombudspersons DSA Monika Pinterits and Dr. Anton Schmid, sexologists Univ.-Prof. Dr. Josef Christian Aigner, Univ.-Prof. Dr. Rotraud Perner and Univ.-Lekt. Mag. Johannes Wahala, Life-Ball-Organisator Gery Keszler and many more. October 2nd, 2006, RKL's 15 years anniversary has been celebrated in historic Ceremonial Act "Against Sexual Apartheid" in the lower chamber of Austrian federal parliament. This first honouring of an lgbt organisation in the plenary session hall of a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics (<http://www.rklambda.at/festakt/index.htm>). Since 2010 RKL is a member of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights (www.fra.europa.eu).

More information: Rechtskomitee LAMBDA, (+43 1 876 30 61, +43 676 309 47 37), office@RKLambda.at; www.RKLambda.at

December 14, 2011