This document outlines legislation in France that prohibits racial discrimination in the field of employment.

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I. Legislation

1. French Constitution

   - Summary of Anti-Discrimination Provisions in the French Constitution

Preamble of the Constitution of 1946

Summary: the Preamble to the French Constitution of 1946 states that all human beings without distinction of race, religion or faith, have inalienable and sacred rights. It sets forth a general principle of non-discrimination at work, but its lack of precision makes it difficult to apply.

Original text: "5. Chacun a le devoir de travailler et le droit d'obtenir un emploi. Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances. »

Article 1 of the Constitution dated October 4th, 1958

Summary: the Preamble to the French Constitution of 1946 proclaims that the French Republic ensures equality of all citizens before the law without any distinction of origin, race or religion.

Original text: "La France est une République indivisible, laïque, démocratique et sociale. Elle assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances. Son organisation est décentralisée."

   - Link to the Constitution (in the original language)

http://www.conseil-constitutionnel.fr/textes/p1946.htm
2. Stand-Alone "Anti-Discrimination Law"

- **General Summary on Anti-Discrimination Law**

The French law on racial discrimination enacted on July 1st, 1972 expressly focused on fighting discrimination in the workplace. It also introduced criminal sanctions. This law was amended on August 4, 1982, when Article L.122-45 was added to the French Labor Code.

Article L.122-45 was modified by a succession of French laws, in particular French law n°2001-1066 of November 16, 2001, which transposed the EU directive 2000/43/CE of June 29, 2000. It was also modified more recently by French law n°2006-340 of March 24, 2006.

- **Principle of Racial Non-Discrimination**

Article L.122-45 summarizes all forbidden forms of discrimination in the workplace, anti-union discrimination, discrimination linked to health, based on sex, political and religious discrimination and discrimination linked to the person, which includes racial discrimination.

Most forms of discrimination are related to racism and xenophobia and target immigrant workers or French employees of foreign origin.

Article L.122-45 provides that "no person may be excluded from a recruitment procedure or an internship or a training program; no employee may be sanctioned, dismissed or be subject to a direct or indirect discriminatory measure, in particular as regards compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer or contract renewal, as well as measures of profit-sharing and allocation of shares based on his origin, sex, practices, sexual orientation, age, family situation, genetic characteristics, or based on his/her actual or presumed belonging to an ethnic group, a nation or a race, or based on his/her political opinions, his/her union or labor activities, his/her religious convictions, his/her physical appearance, his/her family name or based on his/her state of health or his/her handicap".

Although Article L.122-45 was originally limited to sanctions and dismissals, it has now been extended in three directions, as to the persons concerned, the measures targeted, and indirect discrimination. As regards the persons concerned, employees and candidates for a job, as well as candidates for an internship and a training program are protected by the law.

The law not only applies to sanctions and to dismissals but also to all discriminatory measures, in particular discrimination in terms of compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer and renewal of contract, as well as profit-sharing and allocation of shares. The use of the expression "in particular" shows that this list is non-exhaustive. All types of relationships between employers and employees may be subject to the law on illegal discrimination.
The law concerns direct and indirect discrimination; discrimination is therefore not necessarily voluntary and intentional. Indirect discrimination may be defined as unfavorable treatment resulting from a measure or practice which leads, without a malicious intent, to creating a category composed in majority of persons from the same racial group.

- **Direct Discrimination**

Article L.122-45 refers to direct discriminatory measures, although the notion is not further defined.

Article 2 § 2 of the EU 2000 Directive defines direct discrimination as a situation where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.

- Article L.122-45 refers to "actual or presumed" belonging to an ethnic group, nation or race;
- reference is made to a comparable situation: the difference in treatment is to be compared, for example, according to a number of factors, such as the nature of the work, training and work conditions (e.g., as regards equal compensation between men and women and the reference to "similar" employment, defined by French case law as employment with the same level of compensation, the same qualification and career advancement perspectives);
- Article L.122-45 cites a number of examples of a less favorable treatment: access to employment, loss of employment, and work conditions. This is not an exhaustive list;
- discriminatory practices appear to be most frequent in recruitment but there is not much relevant case law;
- most of the case law concerns the application of the criteria to determine the reasons for economic dismissals (see hereafter);
- Racial discrimination is often based on the name of the candidate. As a result thereof, discrimination based on family name has been added to the list of prohibited forms of discrimination set out by Article L.122-45;
- Article L.122-45 also refers to access to an internship or a company training program;
- Other prohibited conduct is the refusal to renew a (definite term) contract on the basis of ethnic or national origin or race.

- **Indirect Discrimination**

This notion was introduced and integrated in Article L.122-45 of the Labor Code by a French law of 2001. Examples of indirect discrimination are frequent.

The 2000 Directive (Article 2 § 2 (b)) defines indirect discrimination as occurring where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage when compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Indirect discrimination is identified in a two step process. First, one must identify a neutral measure (provision, criteria or practice), which has the same result as direct discrimination. European case law has elaborated a specific method based on statistics (i.e., Bilka and Danfoss decisions). Recourse to statistics enables to create a suspicion that there is discrimination.

In a second step, the employer must prove that the measure is justified. Indirect discrimination disappears if the employer can prove that the measure is objectively justified by a legitimate objective and the means to carry out this objective are appropriate and necessary. With respect to
racial discrimination, an employer who has required that candidates speak a certain dialect, for example, could try to justify these selection criteria by the need to communicate with certain clients who speak that same dialect.

After conducting the two above-mentioned steps, the judge carries out an analysis of proportionality: could the employer attain his or her objective by using non discriminatory or less discriminatory measures? Were the means used necessary to attain the objective?

- **Link to Anti-Discrimination Law (in the original language)**


- **Translation of Article L.122-45 of the Labor Code**

"No person may be excluded from a recruitment procedure or access to an internship or training program in a company; no employee may be sanctioned, dismissed or subject either to direct or to indirect discrimination, with respect to compensation, training, relocation, assignment, qualification, classification, professional promotion, transfer or contract renewal, profit-sharing and allocation of shares, based on his/her origin, sex, cultural practices, sexual orientation, age, family situation, genetic characteristics, or to his/her actual or presumed belonging to an ethnic group, a nation or a race, his/her political opinions, his/her union or labor activities, his/her religious convictions, his/her physical appearance, his/her family name or his/her state of health or disability.

No employee may be sanctioned, dismissed or subject to any form of discrimination, as referred to in the preceding paragraph, as a result of normally exercising his/her right to strike.

No employee may be sanctioned, dismissed or subject to discrimination for having been a witness to the actions defined in the preceding paragraphs or for having denounced those actions.

In the event of a dispute relating to the application of the preceding paragraphs, the concerned employee or candidate to a job, internship or company training program shall present the facts which gave rise to a suspicion of direct or indirect discrimination. In light of such evidence, the defendant shall have the burden to prove that his/her decision was justified by objective elements and that it was not based on any form of discrimination. The judge shall decide after having ordered, to the extent necessary, any investigative measures he/she deems useful.

Any provision or legal instrument which is contrary to the interests of employees is automatically considered null and void."¹

  - **Protection of Victims against Racial Discrimination**

- **Lawsuits filed on behalf of victims**

**Lawsuits Filed by Unions**

Article L.122-45-1 of the Labor Code provides that representative union organizations may file all lawsuits resulting from Article L.122-45 on behalf of the victim.

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¹ For the original text, please go to: http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006072050&idArticle=LEGIARTI000006646204&dateTexte=20090302. Last access on 2 March 2009.
There are three conditions:
- the victim must be able to act pursuant to Article L.122-45;
- the victim must tacitly approve the lawsuit; and
- the union must be representative at a national level or at the company’s level.

**Lawsuits Filed by Associations**

Since 2001, associations which have been fighting against discrimination for at least five years may present a judicial claim regarding Article L.122-45. Such associations must, however, obtain the victim’s written approval.

- **Link to the Anti-Discrimination Law (in the original language)**
  

- **Translation of Article L.122-45-1 of the Labor Code**
  
  "Representative union organizations at the national, departmental (with regard to French overseas departments), or company level may file lawsuits based on Article L.122-45, as long as the conditions provided in this article are observed. Lawsuits can be brought on behalf of a candidate for a job, internship or company training program or of a company employee without having to obtain a proxy, provided that the victim is notified in writing and does not object within a period of 15 days as from the date on which the union organization notified its intent. The concerned person may always intervene in the lawsuit filed by the union.

Associations which have been regularly constituted for at least five years to fight against discrimination may present lawsuits under Article L.122-45, according to the conditions provided therein on behalf of a candidate for a job, internship or company training program or of a company employee. This rule is subject to validation by a written document signed by the concerned person (victim). She/he may always intervene in the lawsuit filed by the association and bring an end to it at any time."²

- **Protection against Adverse Treatment or Consequences**

**Protection of the Victim**

Article L.122-45-2, established by the Law of November 16, 2001, extends the code’s scope of protection and declares void the dismissal of an employee who has filed a lawsuit or for whom a lawsuit has been filed based on discrimination, when the dismissal lacks a real and serious cause and when it merely constitutes retaliation to the lawsuit. The judge does not need to verify whether there exists a causal link between the lawsuit and the dismissal. Such causal link is presumed if the dismissal lacks sufficient grounds.

Note that the victim is protected only against dismissals, and not with regard to the implementation of the employment agreement (e.g., demotions, assignments).

² See the original text on:
  
• **Link to the Anti-Discrimination Law (in the original language)**


• **Translation of Article L.122-45-2 of the Labor Code**

"The dismissal of an employee following a lawsuit filed by this employee or on his/her behalf on the basis of the provisions of this code regarding discrimination shall be null and void and of no effect, if it is established that the dismissal has no real and serious cause and actually constitutes a measure taken by the employer due to the lawsuit. In this case, the employee shall be reinstated automatically and the employee shall be regarded as having never ceased to hold his/her employment position.

If the employee refuses to fulfill the employment agreement, labor courts shall grant the employee a compensation which may not be less than the amount equivalent to the employee’s salaries in the last six months of employment. Moreover, the employee may also be entitled to the [general] compensation for dismissals, established by Article L.122-9 or by the applicable collective labor agreement, or by the employment agreement. The second paragraph of Article L.122-14-4 shall also apply."

**Protection of Third Parties**

Individuals are protected and cannot be sanctioned, dismissed or subject to discriminatory treatment for having been a witness to discriminatory acts (Article L.122-45 § 3). As opposed to victims, witnesses are also protected against any discriminatory measures, including the refusal to give a promotion, a transfer or to renew a contract.

**Right of Alert of Personnel Delegates**

Personnel delegates\(^4\) must alert the employer of potential violations against individual rights taking place in the company and notably resulting of discriminatory measures in terms of hiring, compensation, training, relocation, qualification, promotion, transfer, renewal of contract, sanction or dismissal (Article L.422-1-1 of the Labor Code).

• **Link to Anti-Discrimination Law (in the original language)**


\(^3\) For the original text, please go to:

\(^4\) A “délégué du personnel” has the task of presenting employees’ claims to the employer. (e. n.)
Translation of Article L.422-1-1 of the Labor Code

"If a personnel delegate notes, in particularly through the denunciation of an employee, that individual rights, employees’ physical and mental health, or individual freedoms have been restrained in the work environment and that this restriction is not justified by the nature of the task to be accomplished or proportioned to the aim sought, she/he shall immediately notify the employer thereof. This violation against the rights of persons, their physical and mental health or individual freedoms may result from discrimination in hiring, compensation, training, relocation, assignment, classification, qualification, professional promotion, transfer, renewal of contract, sanction or dismissal.

The employer or his/her representative must proceed without delay to an investigation with the delegate and take all necessary measures to remediate this situation.

If the employer fails to do so, if there is a disagreement on the existence of a violation, or if the solution given by the employer is flawed, the employee or the personnel delegate, if the concerned employee indicates that she/he is not opposed thereto, may file a complaint before the judgment board of the labor court (bureau de jugement du conseil de prud'hommes) which will decide according to the rules applicable to summary proceedings. The judge may order all measures required to remedy the violation and the payment of a fine [payable if the decision is not complied with]. The fine is to be liquidated in favor of the Treasury."  

Roles of Labor Inspectors

Labor inspectors may report offenses relating to discrimination (Article L.225-1 § 3 and 6 of the Penal Code – refusal of an internship, refusal to hire, sanction, dismissal and Articles L.611-1 and 611-6 of the Labor Code).

They may also have access to any useful documents in a discrimination investigation (Article L.611-9 of the Labor Code).

○ Proof of Racial Discrimination

Burden of Proof

Article L.122-45 of the Labor Code (Law of November 16, 2001) establishes that an employee or a candidate for a job may present the facts from which direct or indirect discrimination can be presumed. The defendant must then prove that his/her decision is justified by objective elements and that it was not discriminatory. The judge decides after having ordered any investigative measures that he/she seems applicable.

Means of Proof

The Law of March 31, 2006 on Equality of Opportunities legalized the "testing" practice consisting of random verifications in order to constitute proof of possible discrimination in penal proceedings (Article 225-3-1 of the Penal Code).

5 For the original text, please go to: 
3. Other Laws, Codes, Decrees

French law n°2004-1486 of December 30, 2004 created a High Authority for Equality and for Fighting Against Discrimination (so-called "HALTE"), an independent administrative authority. Its mission is to fight against any forms of discrimination prohibited by law, supply general information, accompany victims, identify and promote good practices. The HALDE also has the power to propose a settlement to the perpetrator, provided that she/he is not subject to investigation or penal proceedings. This settlement must be approved by the Public Prosecutor.

III. Case Law

• Access to Employment: Limited Case law

Even though most forms of racial discrimination are found in the field of employment, there are very few judicial cases on the subject, because of the difficulty of finding evidence and the disproportion of sanctions.

Since there are only a few cases, one may refer to case law on discrimination based on grounds other than race which would also apply to racial discrimination cases.

Cour de Cassation, Labor Section, dated June 4, 1969

Link

http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX1969X06X02X00183X000

Facts

A employee with a contract for definite term was stricken off from the list of employees likely to be hired in the following year as a result of his excessive union activity, biased articles published in the local press and subversive action within the company.

Decision

The judge recognized that an employer who would not renew an employment contract for a definite term would have committed a violation, giving rise to damages, if the employee, member of a union, had not made calumnious accusations, published inexact information, or created a climate of agitation within the company.
Merits

This is the first case regarding discrimination based on union membership, resulting from the refusal to renew an employment contract for a definite term. Employers cannot take into account the union activity of an employee to make decisions regarding hiring and dismissal.

The holding in this case was integrated in Article L.122-45, according to which the refusal to renew a contract was added to the list of prohibited discriminatory treatments.

- Loss of Employment: Nullity of Dismissals Based on Racial Discrimination

Most decisions concern the criteria for collective dismissals.

Cour de Cassation, Labor Section, February 10, 1998

Category

Racial discrimination, discrimination based on origin


Link


Facts

An employee, following the liquidation of the company for which he worked, was dismissed on economic grounds and opted for a relocation agreement. He filed proceedings before the Labor Court to contest the criteria which determined the order for the dismissals. He asked for damages on grounds of discrimination.

The Court of Appeals considered that the adherence to a relocation agreement prevented him from contesting the order for the dismissals.

Merits

It is possible to contest the order of dismissals based on racial discrimination, even if one has opted for a relocation agreement.

Decision

The Supreme Court partially overruled the decision of the Court of Appeals and stated that the judge should have checked whether or not the employee had been dismissed because of his foreign nationality and whether the employer had complied with the legal norms for setting criteria to determine the order of dismissals.

Cour de Cassation, Labor Section, May 23, 2001

Category
Racial discrimination


Link


Facts

An employee was hired as a telecommunications manager of the postal office on the islands of Wallis and Futuna (New Caledonia). Following a strike of the employees of the post office who refused the hiring of a person who did not belong to the Walissan ethnic group, the employee was allegedly dismissed for absence of assignments and budgetary difficulties.

The first instance court, acting as an appeal jurisdiction, rejected the employee’s claim for moral damages and damages resulting from her career loss.

Merits

Racial discrimination cannot serve as justification for dismissals. Any person, who is a victim of racial discrimination, is deemed to have suffered moral damage, which must be compensated.

Decision

The employer was found guilty of racial discrimination which resulted in the loss of opportunity to have a career in the activity for which the employee was recruited, and the employer was ordered to pay a compensation for the damages suffered.

This decision not only applied a sanction due to a dismissal based on racial discrimination, but it also prohibited certain practices in the execution of employment contracts.

• During the Execution of the Contract: Disciplinary Sanctions and Racial Discrimination

Cour de Cassation, Labor Section, May 15, 1991

Category


Link


Facts
An employee was dismissed for serious grounds for having committed fraud. The employee was accused of unduly receiving payment for overtime. Other employees had, however, committed exactly the same offense but were penalized by a mere temporary suspension of their contract.

The Court of Appeals rejected the employee's appeal.

**Merits**

It is possible to individualize disciplinary sanctions based on the employees' behavior.

**Decision**

The Supreme Court rejected the employee's claim by stating that while it was forbidden for the employer to discriminate, it could individualize disciplinary measures and penalize employees who committed the same fault differently, if it were in the best interest of the company. In the present case, this more severe sanction was justified by a different behavior than that of the other employees.

It is thus possible to differentiate sanctions, if the differentiation is justified by objective reasons. There is discrimination only if the difference in treatment has no objective justification.

*Cour de Cassation, Labor Section, September 29, 2004*

**Category**


**Link**


**Facts**

An employee argued that she had been victim of racial discrimination during her career advancement and access to training leaves. She had also received constant criticism and vexatious racial insults.

The Court of Appeals ruled in favor of the employee because the employer had not used any objective criteria to address the employee’s career advancement or access to training leaves.

**Merits**

Racial discrimination is prohibited with respect to career advancement.

**Decision**

The Supreme Court condemned the employer for racial discrimination with regard to the employee’s career advancement.

- Protection of the Victim Against Adverse Treatment or the Consequences of Adverse Treatment
**Cour de Cassation, Labor Section, November 28, 2000**

**Category**

Sexual discrimination, reference to Article L.123-5, § 1 of the Labor Code (whose provisions exist for racial discrimination). The holding in this case could probably also be applied to cases of racial discrimination.

**Link**


**Facts**

An employee, victim of sexual discrimination, filed a lawsuit before the labor courts on December 17, 1992 requesting equality of treatment in the payment of her salaries. On June 21, 1993, she was dismissed for professional inefficiency.

The Court of Appeals declared the dismissal as lacking a real and serious cause and asked for an expertise to verify the veracity of the salary discrimination. It rejected the employee's claims.

**Merits**

The judge established a presumption and found that when a woman files a claim in court aimed at compliance with the principle of equality of treatment between men and women, her dismissal is null if it lacks a real and serious cause.

This decision could be applicable to cases of racial discrimination.

**Decision**

The Supreme Court found that the dismissal which followed the employee’s lawsuit for equal treatment had no real and serious cause. It was thus null and void.

- **Burden of Proof: New Case Law**

The rules regarding the burden of proof were modified first by case law, and then by the legislator. The two following cases affected this evolution.

**Cour de cassation, Labor Section, November 23, 1999**

**Category**

Sexual discrimination, but one should apply the holding in these cases to all types of discrimination by analogy.

**Link**

Facts

An employee was subject to sexual discrimination during the advancement of her career. The Court of Appeals accepted her claim.

Merits

The employer has the burden to prove that the alleged discriminatory measure was justified by objective criteria.

Decision

The Supreme Court found that the employee had the burden of proof to advance the elements of fact likely to characterize sexual discrimination but that the employer had to establish that the disparity of the situation was justified by objective criteria, independent of any discrimination based on sex.

Cour de Cassation, Labor Section, March 28, 2000

Category

Discrimination based on union membership, but the holding in fact extends to all types of discrimination.

Reference to Article L.412-2 of the Labor Code

Link

http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=XCXAX2000X03X05X00126X000

Facts

Two unionized employees were subject to delayed advancement of their careers.

The Court of Appeals rejected the claims of the employees as they had not proven that they had been subject to discrimination based on their union membership.

Merits

The victims must submit the elements of fact likely to characterize discrimination but the defendant must prove that the measure is justified by objective criteria.

The judge must examine the conditions of career advancement of the employees. The judge’s decision cannot, however, replace the employer’s judgment regarding the professional qualifications of his/her employees.

As a result of these two cases, the legislator added Article L.122-45 § 4 to the Labor Code.
Decision

The Supreme Court stated that the victims had to submit to the judge the elements of fact likely to characterize discrimination and the employer had to prove that the disparity in the situation is justified by objective criteria, independent of any form of discrimination.

- Means of Proof

*Cour de Cassation, Criminal Section, September 12, 2000*

**Category**

Racial discrimination case regarding admission into a night club.

**Link**


**Facts**

In the present case, three persons of North African origin, a bailiff and two journalists decided to test whether a particular night club was denying admission to customers on the basis of race. The three persons of North African origin were barred from entering the night club under the allegation that they were not usual customers. However, the two journalists were able to enter the night club, in spite of the fact that they were not usual customers.

**Decision**

The Criminal Section of the Supreme Court admitted "testing" as a means of proof for the first time.

**Merits**

The Law on Equality of Opportunities of March 31, 2006 legalized the "testing" practice (Article 225-3-1 of the Penal Code). This measure will only become effective after the government adopts a Decree, defining how the law should be applied. This has not yet been done.