MANUAL FOR FIGHT AGAINST DISCRIMINATION AT WORK

INTERNATIONAL STANDARDS, NATIONAL LEGISLATION, COURT PRACTICE

COMMISSIONER FOR PROTECTION OF EQUALITY

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FOR FIGHT AGAINST DISCRIMINATION AT WORK

(INTERNATIONAL STANDARDS, NATIONAL LEGISLATION, COURT PRACTICE)

COMMISSIONER FOR PROTECTION OF EQUALITY

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FOR DIVERSITY
AGAINST DISCRIMINATION

Contents:

PART ONE – **THE CONCEPT OF DISCRIMINATION**

1) WHAT IS DISCRIMINATION AND WHY SHOULD IT BE SUPPRESSED?

THE TERM

The word discrimination is of Latin origin (lat. discriminare) and it means "to separate, to distinct". Over time, in practice, especially in the field of law, the word discrimination obtained the meaning of "unallowed distinction".

WHAT IS DISCRIMINATION ACTUALLY?

Discrimination represents

- unjustified (non-objective and inappropriate)
- unjust and
- unequal treatment of individuals or groups in the society putting them in unequal and disadvantaged position compared to others

WHY IS DISCRIMINATION SOCIALLY UNACCEPTABLE?

Because it represents:

- violation of human rights
- violation of the principle of equality
- violation of social justice
- immoral and unethical treatment

DISCRIMINATION AND WORK

One of the areas where discrimination is the most represented is work and employment. In the sphere of work the unequal and discriminatory treatment of individuals and groups has always existed, and such practice is still widespread in many countries. One of the reasons for the widespread incidence of discrimination in the sphere of work is because labor relations are characterized by the supremacy of the employer over employee, and hierarchical structure of working organizations.

SIDE EFFECTS OF DISCRIMINATION AT WORK

Side effects of discrimination at work undermine the entire economy and democratic system, successfulness of the employer, health and personal life of the employees.

These are negative consequences of discrimination on the society level:

- immoral and unethical treatmentviolation of population equality, as a base of democracy
- decrease of productivity and efficiency in entire economy
- discrimination generates poverty, social inequality and social isolation
- discriminatory treatment encourages other side effects at work (vio lence, abuse, mobbing)
- high expenses of medical treatment of the victims of discrimination

Damages to the company and the employer:

- discrimination undermines human relations, productivity, efficiency, motivation
- causes and encourages conflicts and negative atmosphere within organization
- contributes to absence from work due to illnessn
- the reputation of the company suffers
- court proceedings on protection from discrimination may cause major expenses

Example: Company "Home Depo", due to lawsuits of the female workers who were denied promotion, had to set aside 104 million dollars for compensation. It is mentioned that Allison Shiflin, employee in the company "Morgan Stenley", gained based on settlement 12 out of 54 million dollars which the company paid to the plaintiffs (there was 40 of them) for denied promotion. In the beginning of February 2012, Serbian company "Jat Airways" was required to, due to discrimination and abuse, pay the pilot A. F. (52) over 3.8 million dinars for pecuniary damage, proceedings expenses and interest.. [2]

Negative effects of discrimination on employee and his/her family:

- decrease of motivation, productivity, concentration, efficiency
- violation of identity, stress
- mental and physical diseases or disabilities
- "extended side effect of discrimination" (decreased ability for employ ment and efficiency in future work)
- family conflicts, family violence, divorce, damage to health of family members

Psychological reactions to discrimination:

depression, sadness, pessimism, irritation, lack of energy, sudden changes in mood, impulsiveness, anxiety, fear of losing control, feeling guilty and ashamed, runaway fantasy, compulsive thoughts, anger episodes, lack of self-confidence, lack of concentration, vulnerability, helpless, isolation etc.

Health problems caused by discrimination:

gastroenterological disorders, dizziness, exhaustion, pains, pulse oscillation, weight changes, loss of appetite, slow recovery from illness, sleep disorder, frequent infections

2. Taken from: "Female revange" (transferred from "Politika"), Sindikalni puls, no. 54, February 2007; Ruling of the High Court of Belgrade on January 5, 2012.

2) DISCRIMINATION AS VIOLATION OF THE PRINCIPLE OF EQUALITY

EQUALITY THROUGHOUT THE HISTORY

The struggle for equality began back in ancient times. Greek philosophers (Aristotle, Plato, stoics) advocated equality of all as one of the bases of justice. After that, throughout centuries, equality was advocated by churches (Christianity and other religions), numerous movements (e.g. Enlightenment) and some of the greatest thinkers of Middle Ages (Locke, Rousseau, Kant). The idea of equality is incorporated in basic documents of the American and French Revolution (the American Declaration of Independence from 1776; the French Declaration of the Rights of Man and of the Citizen from 1789). However, until the 19th century it was considered that people are not naturally equal. [3]
The idea of general equality in the world was finally accepted in 1948, when the organization of the United Nations (UN) adopted the Universal Declaration of Human Rights. The principle of equality today is one of the foundations of modern law, and as such is incorporated in all important documents on human rights.

According to the Universal Declaration of Human Rights: "**All human beings are born free and equal in dignity and rights...**" (Art. 1).

DISCRIMINATION AND EQUALITY

Discrimination represents the basic and the most common violation of the principle of equality. The principle of equality envisages that all members of society, in all aspects of life, are treated evenly, that is, equally (parity and equality do not mach entirely) regardless of:

- innate characteristics
- acquired characteristics and
- other personal characteristics or circumstances (for example. sex, race, religion, belief, color, health condition, nationality, ethnic origin, language, social origin or status, sexual orientation, genetic characteristics, political affiliation or opinion, etc .)

3. More on development of the idea of equality throughout history and today's approach: R. Etinski, I. Krstić, EU Law on the Elimination of Discrimination, Faculty of Law – Belgrade, Niš, Novi Sad, Maribor, Maribor/Belgrade, 2009, page 123.

FULL EQUALITY = PLURALIST EQUALITY

In practice, the principle of equality is primarily provided by protection against discrimination, but it does not end there. Full equality in society is a broader concept than formal legal equality.

The idea of equality/parity is expressed through different concepts (social equality, proportional equality, financial equality, substitutive equality, comprehensive equality, full social equality, equal living conditions, equal chances, equal opportunities). All these concepts basically amount to the same aim – to provide equal chances/opportunities to all individuals to enjoy the benefits provided by modern civilization and society.

Social justice requires that the principle of equality is not applied mechanically. The principle of equality should not lead to uniformity, but to pluralism, respect for diversity and individual self-determination.

Pluralist approach to equality envisages the promotion of diversity – for individuals and social groups, present and future generations.

3) THE CONCEPT AND FORMS OF DISCRIMINATION AT WORK

DISCRIMINATION – THE CONCEPT:

Simply put, discrimination is unequal treatment, that is, placing persons in a disadvantaged position based on certain characteristics. If we wanted to present discrimination as a formula, it would look like this: [4]

4. Taken and adapted as the mentioned definition of discrimination from: A. Grgić, Ž. Potočnjak, S. Rodin, G. Selancec, T. ŠimonovićEinwalter, A. Uzelac, ur. T. ŠimonovićEinwalter, Gudebook to the Anti-Discrimination Law, the Office for Human Rights of the Government of the Republic of Croatia, Zagreb, 2009, page 10.

D = (dt + dg) – e

Discrimination = discriminatory treatment + discriminatory ground – exceptions

discrimination form		
direct discrimination	e.g. racial or ethnic	e.g. requirements
indirect discrimination	origin, sex etc.	justified work

GROUNDS OF DISCRIMINATION

Grounds for discrimination are innate and social (acquired) characteristics on which unequal treatment could be based. As new forms of discrimination were emerging, the list of grounds under which discrimination is prohibited expanded over time.

In international documents on human rights, the following grounds of discrimination are mentioned: sex, race, religion, nationality, language, ethnicity, birth, social origin, status, economic status, health condition, disability, gender identity, sexual orientation, appearance, genetic characteristics, political or other opinions, membership in political, trade union and other organizations, marital and family status, etc.

Closed/open clause on discrimination: While some documents explicitly list grounds for discrimination, limiting the effect of prohibition of discrimination only to certain characteristics,[5] some other acts, e.g. the Universal Declaration of the UN or the European Convention on Human Rights of the Council of Europe, contain an "open clause" according to which the number of grounds for discrimination is not limited.

5. E.g. Charter of Fundamental Rights of the European Union from 2000, so-called Charter from Nice, whose Art. 21 says: "Any discrimination based on any ground such as sex, 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 shall be prohibited.." The text of the Charter in Serbian can be seen at:
http://www.projuris.org/konvencije/povelja%20EU_srpski.htm>.

Examples: According to Art. 2. UD: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status " Art. 14. EC is: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. " Our Constitution also contains an "open clause" on discrimination (Art. 21. para. 3): "Any discrimination is prohibited, direct or indirect, on any grounds, especially..."; then, the grounds for discrimination are listed. The "open clause" is also contained in the Labor Law (Art. 18), stipulating that, besides the listed ones, the ground for discrimination may also be "some other personal characteristic." [6]

The open clause is especially necessary in the field of labor relations, where in addition to usual grounds for discrimination many specific reasons for discrimination also occur, e.g. years of service, personal status, performing a function, whether the person has worked for the state or some other employer, martial status (married, divorced, not married), the births out of wedlock, family obligations, (number of children, whether someone is taking care of disabled family members), intention to have offspring, whether the person is smoker or non-smoker, overweight, whether the person has a high blood pressure, membership in an organization or belonging to a movement, place of residence, dressing habits.

Example: Discrimination based on whether the person has worked for local self-government or other employer, Serbia

By the decision of the Constitutional Court of the Republic of Serbia, no.IYo-246/2011, it is determined that provisions from Art. 57. para. 1, it. 1 and 2 of the Special collective agreement for public utility and other public companies of the city of Novi Sad are not in accordance with the Constitution and the law, because that act prescribes a different way for determining the severance pay for redundant employees. Namely, one solution is envisaged for the years of service obtained in public companies whose founder is city of Novi Sad (in this case the severance pay is determined in a much favorable way, according to the Collective agreement), and a different one for the years of service obtained in some other legal entity, whose founder is not the city of Novi Sad (in this case the severance pay is determined by law).

6. The Constitution was published in Off.Gazette RS, no. 98/2006, and Labor Law in Off. Gazette RS no. 24/2005, 61/2005, 54/2009.

DEFININITION OF DISCRIMINATION AT WORK

In relation to discrimination in general, discrimination at work has certain specifics.

Discrimination at work is the action of the employer or a superior worker by which an employee or a group of employees (or the person who seeks employment) are placed in less favorable position than the employee/ employees(or person who seeks employment) who are in a comparable situation, and which is forbidden by legal system.[7]

These are important elements of discrimination at work in the stricter sense:

- the discriminator is usually the employer or a superior worker, i.e. a person who is in a position to decide on future employment, promotion, termination of employment and other rights arising from employment (although this may be another employee or a person involved in the work process);
- placing in a disadvantaged position (by action or omission to do something) in relation to the "parallel" (a person to be compared with / person seeking employment or employee);
- inadmissibility to place at a disadvantaged position (unless in cases which are exceptions of the prohibition of discrimination).[8]

7. Taken, partially shortened and adapted from: I. Grgurev "Discrimination on the grounds not explicitly forbiden by the Labor Law, Labor law (1845–1500) 3 (2007), 3, pg. 42.

8. Ibidem.

WHAT IS NOT DISCRIMINATION

Not every different treatment on the basis of personal characteristics is discrimination. If someone gets an advantage on the grounds of being capable, intelligent, creative, dexterous, educated, then that is not discrimination. The proper application of the principle of equality means that people are sometimes treated differently according to differences that exist between them.

FORMS OF DISCRIMINATION

Since there are many grounds for discrimination, areas where discrimination is manifested and ways in which it is carried out, various aspects of discrimination have been determined.

In practice the most important division of discrimination is by type, that is, by mode of discriminating:

- immediate (direct) discrimination,
- mediate (indirect) discrimination.

There are other types of discrimination too and they are the following:

1) normative and factual discrimination;

2) horizontal (between persons on same level in hierarchy) and vertical discrimination (subordinate/superior);

3) structural discrimination (rooted in social mechanisms);

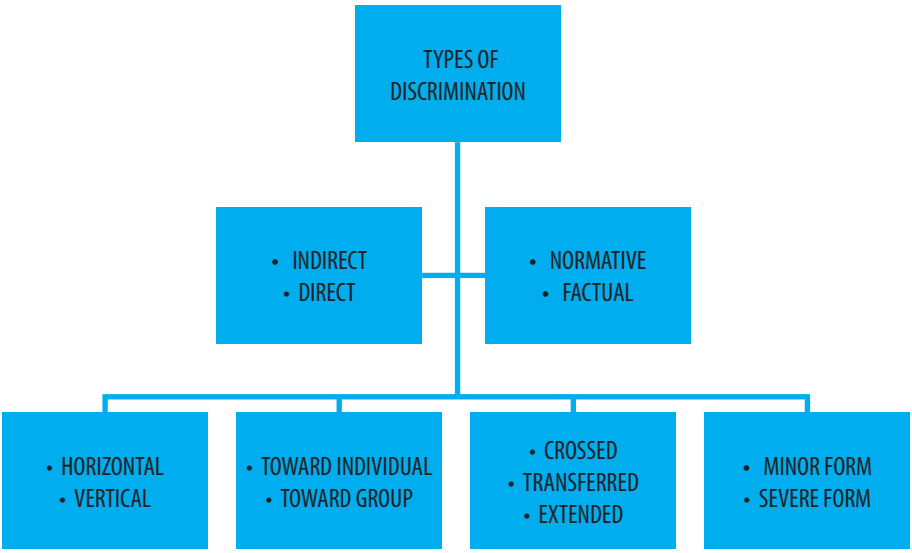
4) crossed (on several grounds);

5) extended (lasting longer);

6) transferred – associative (e.g. when a person is discriminated based on family or other relation with the person who is forbidden to be discriminated);

7) discrimination toward individual and group;

8) minor and severe discrimination.



Example: Transferred discrimination European Court of Justice, Coleman case
In Coleman case, a mother claimed that she was treated unfavorably at work because of her son's disability. Because of that, the mother was late for work and she requested a holiday according to his needs. Her requests were denied, and she was threatened by getting fired, followed by insulting comments on the account of her son's condition. The European Court of Justice accepted as parallels her colleagues who have children on similar job positions and concluded, that, when they requested, they were provided with flexibility regarding leave. The Court also accepted that in this case there was discrimination and harassment based on the child's disability.
ESP, Coleman v. Attridge Law and Steve Law, case C-303/06 [2008.] I-5603, July 17, 2008.[9]

Domestic legislation (example): The Anti-Discrimination Law (2009)[10], Article 13, envisages "severe forms of discrimination," for example, discrimination that is repeated, "extended" discrimination (that lasts) or "crossed" discrimination (on several grounds). The Law on Prevention of Discrimination against Persons with

9. Decisions of the European Court of Human Rights and the European Court of Justice, are adapted to our language and possibly shortened, in the following text we mainly quote from: Handbook of European anti-discriminatory law, European Union Agency for Fundamental Rights, 2010, the Council of Europe, 2010, Luxembourg. We will not emphasise this in the following text, unless some other source is used.

10. .Gazette RS, no. 22/2009.

Disabilities from 2006,[11] prohibits "transferred" discrimination. According to Art. 21 of that law: "1) It is prohibited to commit discrimination based on disability in employment and in the realization of labor rights against: 1. person with disabilities seeking employment; 2. escort of the person with disabilities seeking employment, 3. employed person with disabilities; 4. employed escort of the person with disabilities ... (3) The escort of the persons with disabilities, in terms of this Law, shall be any person, regardless of relationship, that lives in the same household with the person with disabilities and permanently assists him/her in fulfilling everyday needs without any financial or other material remuneration." According to the same law, Art. 26, (on discrimination at work): "Particularly severe form of discrimination based on disability is harassment, insulting and degrading of a disabled employee by the employer or by direct superior person in the work process because of his/her disability."

IMMEDIATE (DIRECT) DISCRIMINATION

Direct discrimination was the first noticed and prohibited form of discrimination.

Direct discrimination exists when a person is openly treated unequally, that is, when he/she is given less rights comparing to the other person in the same or similar situation, and when such behavior is motivated by any ground for discrimination.

Here is an example of the definition from the Labor Law of the European Union (Community law), which is considered as one of the most advanced in the world in terms of protection against discrimination. In Art. 2, of Directive on establishing a general framework for equal treatment in employment and occupation, no.78/2000 from 2000, (which prohibits discrimination based on religion or belief, disability, age or sexual orientation),[12] it is stated: (a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation...".

Examples of this type of discrimination: the denial of entry to a restaurant or a store to persons of a particular race, receiving lower pensions or salaries (women compared to men, persons of black race compared to white), insulting or violence on racial, ethnic or other grounds, or higher/lower age limit for the retirement for men and women, the inability to choose a particular vocation or occupation because of certain characteristics, the ban on wearing religious symbols at work, denial or cancellation of social benefits due to some personal characteristics or features. Today, violations of this type are rare, because this behavior is punishable in most countries.

11. Gazette RS, no. 33/2006.

12. Directive is published in: OfficialJournal (further: OJ), L 303, 02/12/2000.

Example: Direct discrimination, Court of Justice of EU, Feryn case,
A typical example of direct discrimination at work is one case submitted before the European Court of Justice (the Feryn case), where the owner of a Belgian company announced in advertisements and declared orally that no "immigrant" will be hired in his company. This is, on the Court's opinion, a clear example of direct discrimination based on race or ethnicity.
ESP, Centrumvoorgelijkheid van kansenenvoorracismebestrijding v. Company FerynNV, case C-54/07 [2008.] ECR I-5187, July 10, 2008.

MEDIATE (INDIRECT) DISCRIMINATION

The concept of indirect discrimination is more recent and is taken from the American law.[13] At the beginning the protection from discrimination was related only to direct discrimination, but it turned out that such protection is not enough, since in practice many people are discriminated in such a way that the ground for discrimination is not obvious, but is hidden by other, seemingly lawful actions. According to the International Labor Organization (ILO), more and more violations of discriminatory character in the sphere of work are conducted indirectly.[14] This type of discrimination is more common because it is much more difficult to be noticed, proved and sanctioned.

Indirect discrimination refers to situations, rules and practices which, at first glance seem neutral, but in practice lead to disadvantaged position of individuals or social groups.

In indirect discrimination, it is about a situation where certain persons or groups because of their special characteristics should be treated specially, because otherwise they would be in a worse position in relation to others.

13. The idea of the existence of indirect discrimination, which was later accepted by the whole world, the European Court of Justice took over from the U.S. anti-discrimination law (the Supreme Court decision in United States in the case Grigss v. Duke PowerCore-1971), but this idea was eventually rebuilt and refined. From the practice of the European Court of Justice, the concept of indirect discrimination will enter into Community law in 1997, after the adoption of Directive no. 97/80/EC, on the burden of proof in cases of discrimination based on sex (adopted on December 15, 1997, OJ L 14 and OJ L 205, 1998). The concept of indirect discrimination has roots in the International Declaration of the Rights of Man from 1929. See More: B. Hepp & B. Veneziani, The Transformation of Labor Law in Europe, Oxford and Portland, Oregon, 2009, p. 148.

14. Guidance on labor legislation, the International Labor Organisation, Geneva, 2001, p. 344th

Example: Indirect discrimination, ESP, Bilka-KaufhausGmbH
The employees on temporary contract were at a disadvantaged position in accomplishing rights to pension comparing to the employees on indefinite contract. The largest number of the employees on temporary contract was women, and they were, statistically speaking, in a much worse position when it comes to retirement. The court found that that was the case of indirect discrimination.
Bilka-KaufhausGmbH, Case C-170/84.

Indirect discrimination is more subtle than the direct. To determine whether there is indirect discrimination, the European Court of Human Rights is guided by the following:

1) whether there is difference in the procedure (the similar must be com pared to similar),

2) whether the distinction is based on marked characteristic,

3) whether the distinction has a legitimate cause,

4) whether the difference in the procedure is proportional (whether the reasons are sufficient and relevant, necessary in a democratic society, whether it is an urgent need, is there an alternative that would mean less interference in rights, whether the interference in the right is of such char acter that its substance is violated, etc.).

Example: When a different treatment was necessary, the European Court of Human Rights, case Thlimmenos v. Greece
Convicts for criminal offenses in Greece are legally prohibited to access the vocation of certified accountant because the existence of such ruling means that the person is not honest and trustworthy enough to do the job. In the case Thlimmenos v. Greece the applicant was convicted for refusing to wear the uniform during his military service as a member of the Jehovah's Witnesses, a religious group that advocates pacifism. The European Court of Human Rights had the opinion that there is no reason to deny someone access to a profession when his conviction for a crime is not associated with the reliability and honesty, and that the government had acted discriminatory towards the applicant failing to make an exception to the rule for such situations, violating the right to freedom of expression of religious belief in Art. 9. of the EC in combination with the prohibition of discrimination.
Thlimmenos v. Greece [GC] (no. 34369/97), April 6, 2000.

SUBJECTS OF DISCRIMINATION AT WORK

Subjects of discrimination at work may be:

- active (perpetrators of discrimination),
- passive (persons subjected to discrimination).

Active subjects of discrimination, besides perpetrators, are persuaders, helpers, and in some legislations even the persons who conceal discrimination. As a rule, these are employers and directors, but they could also be board members and other persons acting in the name and for the benefit of the employer (representatives, lawyers). Discriminators may be other employees as well.

Passive subjects are persons who protect themselves from discrimination. Primarily these are employees, but also other persons who, on any grounds, perform a job with an employer, even board members or executive directors if they perform their function as if they were employed (under subordination, i.e. under the control of the employer, working certain hours and receiving a salary).

Domestic legislation (example): According to Art. 16, para. 2, of the Anti- Discrimination Law, protection from discrimination is envisaged for the person who is employed, who performs temporary or occasional jobs, or jobs under the service contract, or other contract, person at additional work, person who performs public function, member of the army, person looking for a job, a student and student on practice, person on professional training and specialization without employment, volunteer and any other person who on any grounds participates in work.

ACTIONS BY WHICH DISCRIMINATION IS COMMITTED

Actions by which discrimination is committed may be:

- active (committing),
- passive (omission, failing to do something).

Actions by which discrimination is committed are various and could be very subtle. They are committed in various ways, today often with the help of information technology. The actions by which discrimination is committed are: distinction, exclusion, limitation, denial of rights, preferential treatment, hate speech, segregation.

Hate speech is a form of abuse of freedom of expression, which is done in order to create and promote intolerance and hatred toward various groups (e.g. fascist declarations, advocating Nazism, racism, political intolerance).

Segregation represents separation or segregation of people from an entity based on an unallowed criterion. It is particularly common in the case of racial discrimination. It can be legal and real.

Example: "Roma pupils have attended separate classes for five years" Serbia
In July 2012, a drastic example of discrimination near Novi Pazar came to public attention. For the entire five school years the children of dislocated Roma families from the village Vožegrnci – Blaževo near Novi Pazar have been attending classes in separate classrooms of the primary school "Aleksandar Stojanović Leso", which were formed by the school management exclusively for Roma children, in the premises in a separate building. At the same time, a special class of the preschool facility "Mladost" ("Youth"-int.note), having premises in the same primary school, formed for the second time segregated groups of preparatory preschool program, because one group is attended by Serbian and Bosniak children, while the other is attended exclusively by Roma children. This is one of the most drastic cases of discrimination of children based on their ethnicity, which was reported to the Commissioner for Protection of Equality...[15]
Политика Online,1. avgust 2012, <http://www.politika.rs/rubrike/Drustvo/Romski-djaci-vec-pet-godina-idu-u-izdvojena-odeljenja.lt.html>

DISCRIMINATION IN BROADER SENSE – HARASSMENT AND SEXUAL HARASSMENT

In addition to direct and indirect discrimination, the concept of discrimination has of late included harassment and sexual harassment. These are actions which basically fall into direct discrimination, but because of their danger and recent frequency they are separately regulated, that is prohibited.[16] It is interesting that on the EU level, social partners (trade unions and associations of employers) concluded in 2006 a special collective treaty on this matter – The autonomous framework agreement on harassment and violence at work.

15. As it can be seen, this is discrimination against children which is committed in employement.

16. For example, in all EU directives on discrimination since 2000, after the model of community law and in our anti-discrimination legislation). The first EU document in this area was the "Code of practice to clampdown on sexual harassment at work" from 1992.

STATISTICS – Every tenth worker in the world is the victim of sexual harassment (SrbijaNet/Beta), 2. 8. 2010.
Every tenth worker in the world has been a victim of sexual harassment at work, a joint questionnaire of Reuters and Ipsos company revealed.[17] In the EU it is stated that between 5% and 20% of employees suffer some form of harassment or violence at work.[18]

Harassment

Harassment is a form of discrimination which exists when unwanted behavior related to some of the grounds for discrimination has as a goal or consequence:

- violation of dignity of a person and
- creating intimidating, hostile, degrading, humiliating or offensive sur roundings.[19]

According to the above-mentioned Autonomous framework agreement of the EU, "harassment exists when one ore more employees or executives are frequently abused, harassed, or degraded relating to their circumstances at work".[20]
Harassment at work may be:

- physical,
- psychical,
- verbal and
- sexual.

The measures aimed at preventing and identifying harassment include: the training of employees, executives and employers, raising awareness among employees and managers, not tolerating such behavior, and establishing procedures to support victims of violence and harassment and procedures for the peaceful settlement of such cases, the punishment.

Harassment and violence at work is not only committed by employers and employees, but also by third parties-clients, customers, patients, service recipients, students or their parents, public representatives, service providers. It could be caused

17. See: <http://www.srbijanet.rs/vesti/vesti-iz-sveta/60916-svaki-deseti-radnik-na-svetu-zrtva-seksualnog-uznemiravanja.html>

18. See more in: Workplace Violence and Harassment on the Increase in Europe, EuropeanAgency for Safety and Health at Work, 2010.

19. Definition taken from Art. 2, para. 3 of EU Directive on establishing a general framework for equal treatment in employment and occupation from 2000.

20. Definition taken from part 3 of the Agreement. See measures for clampdown in section 4 of the Agreement.

by mental or other problems of those persons or emotional reasons, personal animosity and prejudice based on some of the grounds for discrimination (sex, race, ethnic origin, religion, sexual orientation, appearance).[21]

Sexual harassment

The term sexual harassment is of a recent date. It was first introduced in American law (the Law on Civil Rights from 1964), but entered in general usage when it was regulated by EU law in 2002 (by amendments to the Directive on equal treatment at work no. 1976/207 from 1976). According to Art. 2, para. 3, of Directive on Gender Equality from 2006, sexual harassment exists in the case of manifestation of any form of unwanted verbal, non-verbal or physical conduct of a sexual nature which has the purpose or effect to violate the dignity of the person and to create an intimidating, hostile, degrading, humiliating or offensive environment.

Examples of sexual harassment:

- verbal harassment (personal remarks, scolding, rude comments about the sex of the employee, about body parts, clothing, telling jokes with sexual content, sexual advices and requirements)
- non-verbal harassment (sexual poses and "positioning", exposure of images of sexual content at workplace, sending messages with such con tent),
- physical harassment (unwanted touching, hugging, kissing).

International standards (example): The revised European Social Charter (1996), Art. 26. ("Right to dignity at work"): "With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organizations: 1) to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct, 2) to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct."[22]

21. Social partners on the EU level adopted in 2010 Guidelines to tackle third-party violence and harassment at work. See more in: Harassment and violence at work, European Foundation for Improvement of Living and Working Conditions, 2011, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/harassmentandviolenceatwork.htm>.

22. Revised European Social Charter was ratified in our country in 2009 (Official Gazette - International Treaties. 42/2009).

DISCRIMINATION AND MOBBING

In relation to discrimination, "mobbing" (harassment at work) has been often mentioned lately. Mobbing is a systematic psychological (and sometimes physical) abuse or humiliation of a person by another individual or group, in order to violate reputation, human dignity and integrity, with the ultimate goal of making the victim quit his/her job.[23]

Unlike discrimination:

- mobbing is a "nonspecific form of harassment" (actions could be very varied –about seventy forms of behavior related to mobbing have been recorded),
- usually it is not based on some of the discriminatory grounds,
- it is performed differently (it represents a more aggressive and often organized form of behavior),
- mobbing has different goals than discrimination (discrediting, threat ening or voluntary resignation).

However, it is not uncommon that mobbing is initiated by some of the grounds for discrimination, and so it is sanctioned in many countries which do not have specific rules on mobbing (in a number of EU member states, as well as in neighboring countries, for example, Bosnia and Herzegovina, Croatia).

Domestic legislation (example): Law on Prevention of Harassment at Work,[24] Art. 6, para. 1: "Harassment, in terms of this Law, is any active or passive behavior towards an employee or group of employees of an employer that is repeated, and which is aimed at, or a represents, a violation of dignity, reputation, personal and professional integrity, health, position of the employee and which causes fear or creates hostile, humiliating or offensive environment, making working conditions worse, or causes the employee to get isolated or to be led to, at his/her own initiative, terminate the employment or employment contract or other agreement." Art. 3: "The provisions of this Law also apply to cases of sexual harassment, in accordance with the law regulating labor relations."

23. Definition of mobbing was taken and partly modified from the European industrial relations dictionary. See at <http://www.eurofound.europa.eu/>.

24. Off. Gazette RS, no. 36/2010.

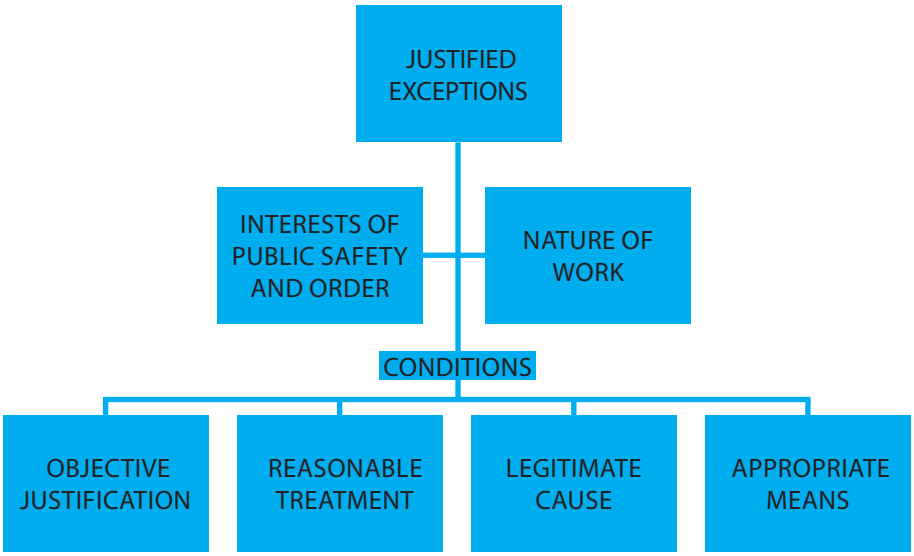
JUSTIFIED EXCEPTIONS FROM PROHIBITION OF DISCRIMINATION

There are situations that justify a different treatment. Those exceptions are particularly elaborated in the EU law and we are going to list them. According to Directive of EU on general framework for regulating prohibition of discrimination (Art. 2, para. 5) from 2000, the prohibition of discrimination shall not apply to measures determined by national legislation which are necessary in democratic society for the protection of public safety, keeping public order, prevention of crime, and for protecting the health and rights and freedoms of others. In accordance with the Directive on Gender Equality from 2006, (Article 2.), discrimination shall not exist "if such a provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary."

In accordance with the practice of European courts (CoE and EU), in order for something to be an exception from discrimination, the distinction must be:

- objectively justified (for example by nature or needs of work),
- reasonable,
- have a legitimate goal (for example, justification based on economic and social policy or employment policy),[25]
- have appropriate means (proportional and necessary; exceptions should be narrowly interpreted in order not to violate generality of pro hibition of discrimination).

25. The Court of Justice is less inclined to accept the economic justification than the goals of social and employment policy. See: The Manual on the European Anti-Discrimination Law, Op. cit.p. 42.



Example: Justified exceptions from prohibition of discrimination

According to the European Commission, the actions when justified exceptions from prohibition of discrimination are made are the following: the setting of special conditions for artistic professions (e.g. when asked to have an exclusively female singer, when looking for a young actor for a role, male or female), when searching for a person of a particular sex and appearance for modeling job, hiring the Chinese in Chinese restaurants for authenticity, hiring solely women in recreational centers for women, employment of men in male prisons (and vice versa)[26]

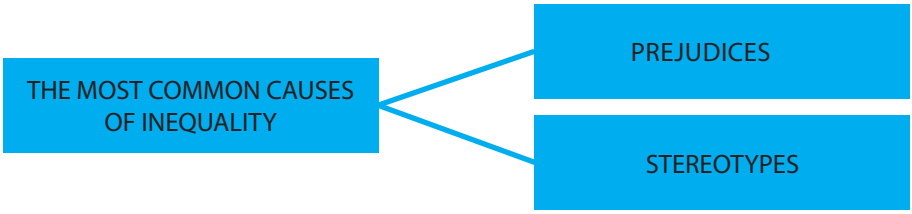
Domestic legislation (example): Labor Law, Art. 22, para. 1: "(1) It is not considered as discrimination if making distinction, exclusion or preferment referring to a certain job, when the nature of that job is such, or the job is performed in such conditions, that the characteristics related to some of the bases from Article 18 of this law represent real and decisive condition for performing the job, and the purpose to be achieved by that is justified."

26. See: The Manual on the European Anti-Discrimination Law, op. cit, p. 46.

4) COMBATING DISCRIMINATION AT WORK

SOCIAL ROOTS OF DISCRIMINATION AT WORK

The successful fight against discrimination includes the understanding and suppression of its roots in society. The roots of unequal treatment and discrimination in society consist of prejudices and stereotypes.



PREJUDICE: biased, often negative attitude formed based on insufficient information, directed at a group of people, and leads to criticism of that group (e.g. sexism, racism).[27]

STEREOTYPE: a set of beliefs, positive or negative, on characteristics or features of a group, which results in a rigid and overgeneralized image on members of that group.

Prejudices, stereotypes and discrimination are associated phenomena, and lead to certain groups and group members be treated with hostility. Prejudices include beliefs containing wrong information about a group of people, wrong expectations about their behavior and negative emotions directed towards this category. Discrimination is a form of manifestation of prejudice and often includes different behavior towards members of different groups. However, discrimination may occur even when there is no prejudice, just as a person can have a prejudice, but does not perform discrimination. Discrimination at individual level is often not a reflection of a desire to harm a person or a group, but it is mostly a result of unconscious psychological processes.

27. Sexism is negative evaluation of other person based on belonging to certain sex.

Unlike prejudices, stereotypes are not an abnormal way of thinking as they represent the natural human tendency to classify information. However, classification becomes problematic and inaccurate at the moment when it becomes rigid (stiff) and too general (e.g. that all members of a certain nation are lazy / hardworking, others are honest, some other are dishonest etc.). Two basic dimensions of stereotypes are liking / disliking and respect / disrespect. [28]

Examples of prejudices and stereotypes in the sphere of work relations, from comparative practice
Stereotypes: refusal to employ women with children because they are considered to be unreliable workers; firing women because men are considered to be breadwinners, so they should be given priority in employment; refusal to employ a former prisoner of western-Indian origin to work in the kitchen because he showed anti-authoritarian arrogance typical for most colored prisoners.[29]
Prejudice: that men are more competent and capable than women; that members of the white race are more capable and responsible than members of the colored race; that members of a certain ethnic group are bad and unreliable workers and that they are inclined to abuses.

FIGHT AGAINST DISCRIMINATION AT WORK – INTEGRAL APPROACH

The experiences of countries that were among the first ones to pass regulations on the prohibition of discrimination (the U.S., UK, EU members) show that suppression of discrimination is an extremely complex and long-term process ,[30] that requires persistence and a comprehensive, integral approach. All aspects of life and work that affect unequal treatment at work must be included in the fight against discrimination, starting with the fields that generate social roots of discrimination (fight against stereotypes and prejudices in society, school, family, workplace) to the adoption of regulations and concrete measures for suppression of discrimination in various areas.

28. Taken, as well as the above-mentioned definitions of prejudices and stereotypes from: A. Hemon-Đerić, „The policy of equal opportunities in the European Union and the autonomous province of Vojvodina-Gender equality in the field of work and employment and discrimination ", University of Novi Sad, master's thesis 2012.

29. Rulings on these cases in Great Britain can be seen: R. W. Painterand K. Puttickwith A. Holmes, Employment Rights, Pluto RP Press, London, 2004, page. 218.

30. Although the United States and the United Kingdom passed regulations on prohibition of discrimination more than 40 years ago, discrimination still exists, and in some segments it is even increasing. In the EU, which prescribed the equal pay for both sexes in 1957 when the European Economic Community was established (by the Treaty of Rome on establishing the EEC, Art. 119.), the practice of unequal pay for men and women still persists.

Integral approach

The most important elements of the fight against discrimination at work are: 1) international standards, 2) national legal protection, 3) establishing and implementing measures of "affirmative action", 4) effective measures to implement regulations (the judiciary, inspection services), 5) establishment of special independent bodies for protection from discrimination,[31] 6) the activities of social partners, 7) battle for non-discriminatory work environment and conditions in the workplace (employers and employees), 8) education (school education, promotional campaigns, the development of a culture of tolerance and peaceful conflict resolution, family education), 9) measures for the "reconciliation of professional and family life", 10) encouraging the concept of "socially responsible management" (which entails humane management of human resources), 11) punishment of the perpetrators of discrimination and determination of fair compensation for the violated persons (recompense), 12) protection of personal data at work.

Measures of "positive/affirmative action"

In the fight against "rooted" discrimination, measures of "reverse discrimination", "positive action" or "affirmative action", as they are also called, proved to be very useful. These measures, which are in fact different from the general prohibition of discrimination, are carried out by giving certain concessions to "vulnerable" (threatened) groups in order to provide them not only "formal equality" but the "material" as well.

The forms of positive/affirmative action include several types of measures in the field of employment:

- measures to eliminate practice leading to unfavorable treatment of certain group,
- policy that implies increasing participation of a less represented group in labor relations (e.g. minimal "quota" of employment),
- programs designed to attract candidates from insufficiently repre sented groups,
- measures introducing preferential treatment of a certain category,
- aiming to set criteria for employment, promotion or dismissal more objectively

(to be related more directly to the job performance), so as to reduce the possibility of subjective discrimination.

31. In our country, that is, for example, the Commissioner for Protection of Equality, according to the Law on Prohibition of Discrimination.

However, these measures could be the subject of abuse or exaggeration. According to court practice of the CoE and the EU, in order to be justified and legal, the measures of positive action must be:

- temporary,
- necessary,
- proportional (not being unconditional and automatic),
- directed to cancellation of existing inequality or prevention of imbal ance in the future.

Quotas

Quotas are one of the most widespread measures of affirmative action. Their goal is to moderate and gradually eliminate unequal representation of certain categories at work (e.g. members of particular races, women, the disabled, older employees). Thus, for example, many European countries in certain sectors, especially in the civil service and public enterprises, introduced an obligation that the representation of women has to reach certain percentage in all parts of an organization, in leading positions and management authorities. It is considered that the "critical mass" or minimum participation of the less represented sex that should be provided is at least 30% (up to 40%).[32] However, in most of the countries that have the quota system, that state provides for private employers certain legal options so that they could fulfill these obligations in a different way, for example, by paying a special tax or fee if they are not able to respect the prescribed structures of employees.[33].

32. In Finland, for example, there is a prescribed quota on how many women must be on leading positions, and thanks to that, of total number of companies' bosses 42% are women. Spain also has legal regulations prescribing that by 2015, 40% of the leading positions in companies doing business on the stock market will have to be occupied by women. In France, within six years, not only stock market companies, but also other big companies will have to reserve as many as half of leading positions for women. In Island such law already exists, and Sweden, Belgium and Holland are preparing laws on regulating how many women must be on leading positions. Taken from the above-mentioned text Women in leadership positions..

33. On measures of affirmative action and quotas see: Mario Reljanović, The experience of the Member States of the European Union in the prevention of discrimination in employment, Foreign legal life, the Institute of Comparative Law, no. 3, Belgrade, 2012, p. 79.

Domestic legislation (example): The Labor Law, Art. 22, para. 2: "Provisions of the law, general act and the employment contract related to special protection and assistance to certain categories of employees, especially those on the protection of disabled persons, women during maternity leave and leave for child care, special child care, as well as provisions regarding the special rights of the parents, adoptive parents, guardians and foster parents - are not considered to be discrimination." The Law on Equality of Sexes, Art. 13 ("Plan of measures to eliminate or mitigate the unequal gender representation and report on the implementation"): "(1) Employer who has more than 50 full-time employees is obliged to adopt a plan of measures to eliminate or mitigate the unequal gender representation for every calendar year, no later than January 31. (2) Employer is obliged to make an annual report on conducting the plan of measures from para. 1. of this article no later than January 31 of current year for previous year. (3) The employer shall submit the plan of measures and the report from para. 1 and 2 of this Article to the ministry in charge of gender equality ..." and Art. 14. ("Equal access to jobs and positions"): "If the presence of the less represented sex in each organizational unit, in the leading positions and in the bodies for management and monitoring is less than 30%, public authorities are obliged to implement affirmative measures in accordance with the Law on State Officials and the Law on State Administration. "

PROHIBITON OF "VICTIMIZATION"

One of the conditions for the prohibition of discrimination to come to life in practice is "prohibition of victimization" (retaliation, repression) for starting the proceedings for protection from discrimination or pointing out discrimination. Victims of discrimination that point to unequal treatment in practice are often abused in various ways, "to serve as an example to the others" (which enhances the existing discrimination, colleagues and community abuse the employee, other employees avoid him/her, the victim is transferred to "worse" jobs, the victim is abused so that he/she would resign, is fired on the false basis or is proclaimed to be redundant). Prohibition of victimization was firstly introduced by European Commission documents (Article 11 of Directive 78/2000, Art. 9 of Directive 43/2000, Article 24 of Directive 54/2006),[34] and soon it was included in national legislations as well.

34. E.g. in Article 24 of Directive 54/2006, under the subtitle "Victimization" it is stated: "Member States shall introduce into their national legal systems such measures which are necessary to protect employees, including protection that representatives of the employees are entitled to under national law or practice, from getting fired or other harmful treatment by the employer in response to a request within the company or under other legal procedure aimed at legal protection related to the principle of equal treatment. "

Example: Protection from victimization in Great Britain
British legislation envisages a very wide protection from victimization, which is treated as a special form of discrimination. It protects: a) a person who initiated the proceeding, b) who presented a proof or information on discrimination, c) a person who is, in any way, related to the acts on protection from discrimination, and in relation to discriminator or other person, d) a person who stated that some person committed any kind of action related to the acts on protection from discrimination. There is no protection if allegations of discrimination were false and with bad intention.[35]

Domestic legislation (example): Art. 9 of the Anti-Discrimination Law prescribes "the prohibition of calling to responsibility": "Discrimination exists if a person or group of persons are unjustly treated worse than the others are or would be treated, only or mainly because they requested, or intend to request protection from discrimination or because they provided or intend to provide evidences of discriminatory treatment." According to Art. 8 of the Law on Gender Equality: "No one shall suffer any consequences because as a witness or a victim of gender-based discrimination testified before the competent authority or alerted the public to the case of discrimination." Also, according to Article 20: "The initiation of proceedings by the employee because of discrimination based on sex, harassment, sexual harassment or sexual blackmail cannot be considered as a justified reason for termination of employment or other contractual relationship based on labor, nor can they be reasonable grounds to declare an employee redundant in accordance with the regulations governing labor relations."

PROVING DISCRIMINATION

A major problem in the fight against discrimination in practice is how to prove it. As discrimination is usually not perceived easily, statistical data or other indicators are often used as evidence. Also, the "test cases" or "voluntary examiners" are used (when with the help of volunteers a discriminatory situation is deliberately staged).

In practice, when a case of discrimination occurs, the idea is to prove discriminatory treatment and negative consequences regarding equality of the employees. Sometimes, if misconduct is found, it is considered that discrimination exists automatically - no need to ascertain the consequences (for example, when the occurrence of "hate speech" is determined).

When it comes to proving discrimination, the European courts try to establish a "comparable situation" that is, they look for a so-called parallel-person to whom the victim of discrimination is compared (with whom the victim of discrimination

35. See more: R. W. Painterand K. Puttickwith A. Holmes, op. cit, p. 226.

should be in the same position and have the same treatment). In the field of labor, the "parallel-person" is an employee working at the same level of complexity and responsibility.[36] However, employers avoid this cunningly, by giving different names to the same or very similar jobs, ranking them differently in the hierarchy of tasks, and by determining false (artificial) differences in the job description.

Domestic legislation (example): Art. 46 of the Anti-Discrimination Law states: "(2) A person who knowingly exposed himself/herself to discriminatory treatment, in order to directly verify the application of regulations on prohibition of discrimination in particular case, may file a lawsuit from Article 43 item 1, 2, 3 and item 5 of this law. (3) A person referred to in paragraph 3 of this Article is obliged to inform the Commissioner of the intended action, unless circumstances do not permit it, and to inform the Commissioner on the undertaken action in writing. (4) If the person referred to in paragraph 3 of this article has not filed a lawsuit, the court may hear him/her as a witness ..."

BURDEN OF PROOF

Victims of discrimination can prove discrimination in court with extreme difficulty since it is committed in perfidious way, and discrimination witnesses are reluctant to confirm it. In order to facilitate the proving, the EU influenced by American law introduced "shared burden of proof" or "burden of proof on the employer's side." In 1997 the Directive no. 97/80/EC on the burden of proof in cases of discrimination based on sex was adopted, after which the burden of proof was transferred on the defendant, that is on the employer. This solution was taken over by all latter anti-discrimination documents of the EU,[37] as well as more recent national regulations on prohibition of discrimination influenced by community law. "Divided/shared burden of proof" envisages that the applicant must present the facts that point to the possible discrimination, and after that the burden of proof to deny it is transferred to the offender (this does not apply in criminal proceedings).

Example: Statistical data as the proof of discrimination and burden of proof, ESP, Enderby case
In Enderby case from 1993, the Court of Justice concluded that: "When the statistics point to a significant difference in earnings between the two types of jobs of the same values, for positions of the same values, and one of those jobs are done almost exclusively by women, while others are performed mostly by

36. For example, in the area of equal payment, where it is very difficult to determine whether the persons do the "equal work", it is considered that these are jobs of equal value if employees can replace each other.

37. See for exe. Art. 10, of Directive 78/2000 and Art. 19, of the mentioned Directive from 2006.

men, the European law (Article 119 of the EC Treaty) requires that legislator shows that this difference is based on objectively justified factors that are not related to discrimination based on sex. If the reasonable doubt is determined that the discrimination exists, then the employer must prove that discrimination did not occur." [38]

Domestic legislation (example): Art. 49, of the Law on Gender Equality: "(1) It cannot be proved that direct discrimination on grounds of sex is committed without guilt, if among the parties it is undeniable or the court determined that there is no doubt that the act of direct discrimination has been committed. If in the course of the proceedings the prosecutor made it probable that the act of discrimination based on sex has been committed, the burden of proof that such act did not violate the principle of equality, that is the principle of equal rights and obligations, shall be borne by the defendant." Almost identical is Art. 45 of the Anti-Discrimination Law.

SANCTIONS

A regulation without sanction (penalty) has little chance to come to life. According to the regulations of the EU, sanctions in cases of discrimination at work should be:

- efficient,
- proportional and
- convincing.

The purpose of sanctions is to stop discrimination, to remove or mitigate the negative effects of discriminatory treatment and to dissuade from discrimination. Besides the compensation for damages, which in this area is a common sanction, fines and announcement of the verdict (to provide moral satisfaction to the victims of discrimination), due to the social danger of discrimination, criminal sanctions are also practiced.[39] In addition, some specific ways of sanctioning discrimination have occurred. Some countries deny the opportunity to employers perpetrators of discrimination to get jobs in public works, to get grants from the state, loans, licenses, permits, tax reliefs or reduce their earned benefits.

38. See: S. Bajić, N. Drobnjak, I. Krkeljić, Comment on the Law on Gender Equality, Office for Gender Equality of the Government of Montenegro,Podgorica, 2009.

39. On this see more: N. Petrušić, G. Ilić, M. Reljanović, J. Ćirić, M. Matić, K. Beker, S. Nenadić, V. Trninić, Application of anti-discriminatory legislation and legal protection, Association of public prosecutors and prosecutors' deputies, Belgrade, 2012.

Domestic legislation (example): According to the Anti-Discrimination Law, Art. 43, with a lawsuit regarding discrimination it can be requested: "1. prohibition of an activity that may result in discrimination, prohibition of further discriminatory activity, or repetition of the act of discrimination; 2. determining that the defendant acted discriminatory towards the plaintiff or another person, 3. taking action to redress the consequences of discriminatory treatment; 4. pecuniary and non-pecuniary damage compensation; 5. announcing the verdict reached on some of the lawsuits in items. 1-4. of this Article."; Art. 51: "(1) A fine from 10,000 to 100,000 dinars shall be imposed on a legal entity or entrepreneur if, on the basis of personal characteristics of the person performing temporary and occasional work, person at additional work, the student or the student on practice, person on professional training and development without employment, or volunteer, violates the equal opportunity for employment or entitlement to equal conditions of all rights in the field of labor (Article 16, paragraph 1). (2) A fine from 5,000 to 50,000 dinars shall be imposed for the violation from para. 1 of this article, on the responsible person within the legal entity, or within the public authority, as well as on the individual." The Criminal Code of the Republic of Serbia from 200540prescribes in Art. 137: "(2) Whoever by force, threat or other unauthorized manner causes severe pain or suffering to someone, with the aim to get out of him/her or a third person a confession, statement or other information or to unlawfully intimidate or punish him/her or third party, or to commit it with motivation based on discrimination of any kind, shall be punished with imprisonment from six months to five years."

5) FIELDS OF DISCRIMINATION AT WORK

WIDESPREAD EXISTANCE AND FORMS OF DISCRIMINATION AT WORK IN THE WORLD

Discrimination at work is very extensive and ramified (in terms of form, discriminatory grounds and fields). Forms of discrimination in particular regions of the world are very different. Each region has its own characteristics and forms of discrimination that dominate. Thus, for example, on the American continent the big problem is racial discrimination and discrimination by gender and age, in Asia discrimination against religion, social origin, nationality and race, in Africa racial discrimination and discrimination based on social origin, in Europe discrimination based on gender, ethnicity, nationality, age and disability.

40. Official Gazette of RS, no. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

"OLD" AND "NEW" FORMS OF DISCRIMINATION

According to the ILO, the biggest current problems related to discrimination in the world are: 1) equal treatment of sexes, 2) unequal pay, 3) unequal family burden. Also, it is mentioned that new forms of discrimination are developing constantly. The "old" (traditional) forms of discrimination are cited to be discrimination based on sex, race, religion and discrimination in pay, while the "new" forms are discrimination by age (elderly and young persons), on the basis of disability, genetic predisposition (e.g. propensity to certain diseases), health condition (HIV/AIDS) and on lifestyle (smoking, obesity, hypertension).[41] Moreover, certain forms of discrimination are occasionally intensified under certain circumstances. For example, after the terroristic attacks in the U.S., discrimination on grounds of religion increased noticeably all over the world (the most prominent is the so-called Islamophobia). Also, because of the growing unemployment the discrimination against migrants is on the rise.

FIELDS OF DISCRIMINATION

Discrimination at work is manifested: 1) in searching for job, 2) during employment, 3) related to dismissal, 4) outside or after employment, regarding labor and employment (e.g. in the area of pensions, health insurance, regarding benefits for children and families), 5) related to access to all forms of legal protection. In all of these areas, discrimination on all the grounds mentioned earlier is possible.

When it comes to the employment itself, the most common forms of discrimination are related to: 1) access to employment, recruitment criteria and equal access to jobs, 2) payment, 3) promotion, 4) access to vocational education and advanced training, 5) termination (cancellation) of employment, 6) association of employees and employers, 7) access to social security benefits and social benefits based on employment, 8) access to the protection from discrimination.

Domestic legislation (example): Art. 20 of the Labor Law: "Discrimination under Article 18 of this law is prohibited in relation to: 1) the requirements for the recruitment and selection of candidates for a particular job, 2) work conditions and all employment rights, 3) education, training and advanced training, 4) promotion; 5) termination of work." Art. 16, para. 1 of the Anti-Discrimination Law: "This Law prohibits discrimination in the field of labor, that is, violation of equal opportunities for employment and equal entitlement

41. See more: Equality at work..., op. cit, introduction (h).

to all rights under the equal conditions in the labor field, such as the right to work, to free choice of employment, career advancement, the training and vocational rehabilitation, equal pay for work of equal value, to just and favorable conditions of work, to rest, to education and entry into the union, and to protection against unemployment,."

ACCESS TO EMPLOYMENT

The principle of equal access to jobs is one of the basic principles of modern civil society. This principle, however, is still very often violated. Employment is the most common area of invisible discrimination. Persons interested in employment are discriminated on various grounds, starting from jobs advertising (discriminatory hiring criteria) to choosing employees. "Better jobs" (which means more favorable, easier, and safer working conditions) are usually reserved for the privileged categories (e.g. for domestic workers - the discrimination against immigrants, for men rather than women, for white people compared to people of another races – in the countries where racial discrimination exists, for members of the political party in power - discrimination based on political affiliation). "Worse jobs" (lower paid, "dirty jobs", dangerous jobs) are intended mostly for discriminated categories. Misuse is not committed only by employers, but often by the state, using indiscrimination and misapplication of "affirmative action" measures or cherishing "stereotypes" about which group of people should perform certain jobs. One of the typical mistakes in this area are "gender stereotypes", that is division into typically "feminine" (e.g. nurse, teacher, maid) and typically "male" jobs (e.g. driver, watchman, pilot), with the latter usually being better paid.

Example: ECJ, Abrahamsson case
The Court of Justice was asked to comment on the Swedish scheme of affirmative action which provides giving women an advantage in promotion at the university. The ECJ rejected the scheme. Among other things, the court found that the preferential treatment of female candidates was not based on "clear and unambiguous criteria, e.g. to prevent or eliminate barriers to career development of underrepresented sex." *ECJ, Abrahamsson, C-407/98*

Example: Discrimination of elderly workers regarding jobs accessibility, the Supreme Court, Croatia
The age of the plaintiff should not be a barrier to employment or the justification to employer why the plaintiff was not offered the position. The employer cannot be justified by the fact that he intended certain positions, including sales manager position, although outside the headquarters of the defendant, only for workers of younger age. This discrimination is prohibited by Art. 2, para. 1, of the Labor Law and Art. 1, of the Convention on Discrimination regarding employment and occupation which was ratified by the Republic of Croatia. That is why the plaintiff, as active worker at the age of 51, was entitled to appropriate employment, and that was, in this particular case, the employment in the vacant position of sales manager.
Supreme Court, Revr-459/07, from 25. 9 2007.[42]

PAYMENT

Unequal payment as a basis for direct and hidden discrimination poses a continuing problem in the field of labor. Although many international laws and national regulations provide an obligation to equal remuneration for work of equal value ,[43] this problem is still present today. It is especially prominent when it comes to discrimination based on sex (according to ILO, although women perform 2/3 of total working hours in the world, they earn only 1/10 of world income).[44] It is not uncommon that the bases for unequal payment are also race, nationality, ethnic origin, disability.

A number of court cases in the EU and across the CoE imposed the question of what forms of income are covered by the principle of equal pay. The concept of salary according to the Court of Justice of the EU and the European Court of Human Rights includes not only the wage, but also a wide range of benefits that an employee receives on the basis of employment. According to Art. 157, para. 2, of the Agreement on the Functioning of the EU,[45] it includes all benefits in cash and in kind related to the job which employees receive directly or indirectly.

42. Taken and adapted in our language from: I. Crnić, Labor Law – implementation in practice, Law 67, Zagreb, 2010, pg. 15. From the same opus we quote some more decisions from Croatian practice which are going to be mentioned further, so we are not going to mark that again.

43. In 1951 the International Labor Organization adopted two separate documents about this matter, the Convention no. 100 on equal pay for men and women for work of equal value and the recommendation of the same name. Our country ratified the Convention no. 100 (Official Gazette of the Presidium of the National Assembly FNRY, no. 12/1952). The first of EU directives in the field of labor was precisely the Directive on equal pay for men and women, no. 75/117/EEC from 1975.

44. See more: Gender Equality in the World of Work, ILO Electronic Newsletter, International Labor Organisation, Geneva, No. 4. Jan. –March 2003, (www. ilo.org/public/english/bureau/gender), pg. 25.

45. Published in OJ, C 83 from March 30, 2010.

According to opinions of the courts of the EU and the CoE, the salary includes the following earnings: allowance for trip to work, allowances for working abroad, Christmas gifts, bonuses, occupational pensions, paid vacation and leave, payment according to profits, share in profits, contractual bonus, participation in stocks, subsidized loans for the purchase of real-estate, use of company car or payment of gasoline, telephone defray costs, private medical insurance, life insurance and company pension insurance, free or subsidized housing, discounts for staff and other privileges, child care, benefits from professional pension systems.

Domestic legislation (example): According to Art. 104 of the Labor law, "(2) Employees shall be entitled to equal pay for equal work or work of equal value from the employer. (3) The work of equal value means work which requires the same level of education, the same ability to work, responsibility and physical and intellectual work. (4) The decision of the employer or an agreement with the employees who are not in compliance with paragraph 2 of this article – are null and void. (5) In the case of violation of rights under paragraph 2 of this Article, the employee shall be entitled to compensation."

CLASSIFICATION AND PROMOTION

Promotion is one of the areas where the "invisible" discrimination is present to a large extent. Discriminated groups are mainly employed in lower positions in the hierarchy, and, under various pretexts, the opportunity for advancement is denied to them. In a particular case that is often very difficult to prove, but the statistics clearly indicate that a certain group is "under-represented" in the higher positions in the hierarchy, and that the higher positions are reserved for the favored categories. For example, in the countries in which racial discrimination is prominent, a much smaller number of members of a discriminated race occupies the leading positions. This type of discrimination is particularly acute when it comes to women. Impossibility for women to get promoted is popularly known as the "glass ceiling".[46]

Advancement and family obligations–It is not only the employers' behavior that contributes to more difficult advancement of women. Family obligations are perhaps the greatest obstacle to achieving gender equality in employment and advancement. Due to family obligations women do not have time to look for a job,

46. For example, according to the statistics from 2011, although Germany is one of the most advanced countries in this regarding, women make up for only 3–4% of members of managing boards of 200 large German companies. Taken from: Women in leadership positions!, DeutcheWelle, 30. 3. 2011,
<http://www.dw-world.de/dw/article/0,,6488072,00.html>.

to engage in advanced training, and so they lose the race in the competition for jobs. In order to eliminate discrimination regarding promotion, it must be worked on the harmonization of work and family life (which is mainly performed by the so-called family support measures - "family friendly" measures). The International Labor Organization had observed this and in 1981 adopted Convention no. 156 on workers with family responsibilities, and Recommendation no. 165 under the same name. Today, throughout the world there is abundant legislation on "reconciling work and family life", especially in EU countries.[47]

Example: ECJ, Marschall case
Mister Marschall worked as a teacher on the indefinite contract and applied for promotion. However, a female candidate was elected on that position. He denied the regulation that a female candidate must be appointed to that position when both candidates are equally qualified, although at the time the competition was published there were less women at those positions than men, unless the reasons related to the male individual do not make imbalance in favor of the female candidate. The Court stated the following: "Even when the male and female candidates are equally qualified, there is a tendency to give preference to male candidates over female regarding promotion, particularly because of prejudices and stereotypes concerning the role and capacity of women in employment, for example, for fear that women will frequently interrupt their career, that due to running the household and family responsibilities they will be less flexible regarding working hours or more absent from work because of pregnancy, childbirth and breastfeeding. For these reasons, the fact that male and female candidate are equally qualified does not mean that they will have the same chances." The Court, therefore, upheld the legality of affirmative action in favor of women.
Marschall, Case C-409/95

Example: When impossibility of promotion is not discrimination, Supreme Court, Serbia
It was determined that the plaintiff worked at the position suitable to her qualifications and which was evaluated according to the rules on wages. In the opinion of direct superiors, the plaintiff was not able to perform more demanding tasks, and therefore she was not proposed for job promotion, on which she was informed orally and in writing. It was correctly determined that the described behavior of the employer is neither indirect nor direct discrimination against the plaintiff in the terms of the Labor Law.
Supreme Court, Revr-277/07, from June 5, 2007, Selection 2/07-106.

47. On practice in the world see more: F. Nobutaka, Comparing Family-Friendly Policies in Japan and Europe, Journal of Population and Social Security, Volume 1, 2003, on internet address http://www.ipss.go.jp/webjad/WebJournal.files/population/2003_6/2.Fukuda.pdf/.

Domestic regulation (example): Art. 14 of the Law on Gender Equality (subtitle "Equal access to jobs and positions") provides: "If the presence of the less represented gender in each organizational unit in the leading positions in the management andsupervision bodies is less than 30%, public authorities are required to implement affirmative measures in accordance with the Law on Civil Servants and the Law on State Administration." Article 16 of the same law ("Classification and promotion") provides that belonging to a certain sex cannot be an obstacle for promotion at work. Also, it is determined that the absence from work due to pregnancy and parenting must not be an obstacle for the election to a higher rank, promotion and advanced training (paragraph 2), and that these same conditions must not be a base for classification to inadequate jobs and the termination of employment in accordance with the law regulating labor (para. 3).

ACCESS TO VOCATIONAL EDUCATION AND ADVANCED TRAINING

The inability of education and advanced training is the root of later discrimination in employment and advancement. In fact, one of the reasons for the inability of certain socially "vulnerable" categories to advance to higher positions is insufficient level of education. Even if they get employed, they rarely get the opportunity to participate in professional development and training programs and therefore get promoted with greater difficulty, due to being "less professional", and they are declared redundant more easily.

Example: Tests of knowledge as a source of indirect discrimination, USA, Griggs case
The Griggs case (1971) is known the United States, in which the question was whether IQ tests, based on the knowledge tests, may be the basis for promotion of employees (of the black race). Among other things, the Supreme Court determined that discrimination was present in such cases and that the basic intelligence must be tested in a fair test set, which will not be based on the tests of knowledge. The Court stated that in this method of testing members of the black race have poorer results because they were denied the opportunity to be educated, because they attended schools that provide lower quality education, in segregated schools for black residents.
Griggs v. Duke PowerCo., 401 U.S. 424 (1971)

Domestic legislation (example): Art. 19 of the Law on Gender Equality ("Professional development and training") requires the employer to ensure within each cycle of professional development and training that gender representation reflects to the maximum extent possible the structure of employees at the employer or organizational unit for which the training is for and to report on that in an annual report on gender equality.

TERMINATION OF EMPLOYMENT

The termination of employment is one of the most frequent forms of discrimination. It is not uncommon that employees get fired for racial and other forms of intolerance, or discrimination based on sex (especially because of family responsibilities and pregnancy), sexual orientation, health condition, genetic predisposition or disability. Such dismissals are usually concealed by false (fictitious) reasons, such as lack of discipline, absenteeism, poor work quality, fake redundancies and other. One of the unfounded reasons for termination of employment is also victimization (retaliation) for initiating proceedings concerning discrimination. Besides, workers subject to discrimination get fired more often as redundant. That is why many legal standards provide that race, gender and other characteristics or status of employees cannot be grounds for cancellation. According to the Convention of ILO on termination of employment based on the initiative of the employer from 1982,[48] art. 5, the reasons that are particularly not going to be considered valid for termination of employment include race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Examples: Founded and unfounded dismissal on grounds of religion, Headscarf (Denmark) U. 2000.2350
A Muslim plaintiff, who was wearing a religious headscarf (hijab-religious cover) while working as a clerk in a department store, was fired for wearing the headscarf. The department store stated that it has its dress code, which among other things means that employees should wear "business" and "nice" outfits and that it does not require all employees to dress the same way and allows a certain amount of personal adjustment. The Eastern High Court found that that was a case of discrimination and awarded to the plaintiff a compensation worth 10,000 Danish kroner.

Founded dismissal, the European Commission of Human Rights CoE, Ahmad case (Great Britain)
Mr. Ahmad worked as a school teacher and complained that he was forced to quit his job because he was not allowed to go to the mosque to pray during work hours. He asked the school to change the working hours, so that he could be absent for 45 minutes every Friday afternoon. The European Commission of Human Rights stated that Mr. Ahmad freely entered into an employment relationship with a full-time job that was incompatible with his going to the mosque on Friday afternoons. At the time of starting the employment he did not inform his employer about it, nor has he done it within the next six years. Therefore, the Committee found that Art. 9 of the European Convention on Human Rights (on freedom of religion) was not violated.
Ahmad case (Great Britain) – Ahmad v UK (1981) 4 128 [49]

48. Our country ratified this convention, see: Off. Gazette SFRY, International agreements, no.4/1984. and 7/1991.

49. both examples in: Equality Law in Practice ,A question of faith: Religion and belief in Europe, Equinet, the European Network of Equality Bodies, Brussels, Belgium, 2011, http://www.equineteurope.org/religion_and_belief_report__merged__1.pdf.

Domestic legislation (example): Article 20 of the Law on Gender Equality provides: "The initiation of proceedings by the employee because of gender discrimination, harassment, sexual harassment or sexual blackmail cannot be considered as a justified reason for termination of employment, or termination of labor and other (contractual) relationship based on employment and cannot be a reasonable ground to declare the employee redundant in accordance with labor law regulations."

EMPLOYEES ASSOCIATION

The right to professional (union) organizing is considered as a basic human right and as such is not left out from any of the important international documents on human rights. According to the ILO Convention no. 98 on right to organize and collective bargaining from 1949, Art. 1:[50] „1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.. 2. Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;, (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.."

However, this does not mean absolute freedom of trade unions. Restrictions on trade union activities are allowed if they are necessary in a democratic society in the interest of national security or public order, and protection of the rights and freedoms of others. According to the European Convention on Human Rights, Art. 11, para. 2, these restrictions are made when they are in the interest of public safety, for the sake of prevention of disorder or crime, protection of health or morals, as well as in certain activities (military and police).

Despite proclaiming the right to trade unions' organizing, employers do not look with approval on trade union activities, especially on organizing strikes. Employers discriminate union members, and especially union activists, in all aspects of employment. It is not unusual for unions themselves to discriminate employees for refusing to join a union or for stepping out from it, or for moving to another organization. There are so-called coalition clauses, which condition the employers, signatories of the collective agreement, not to employ people who are not union members, or require them to dismiss the employees who fail to join the trade union within a certain period of time (clauses "closed-shop" - "closed shop" and "union-shop" - "union shop"). Such clauses are particularly present in the U.S. and the UK, but also in some European countries (Denmark, Iceland, Ireland). The European Court of Human Rights considers that such clauses are discriminatory if they are unconditional.

50 Ratified in our country in 1958, see: Off. Gazette FNRY, no. 8/1958.

Example: Clause on obligatory membership as a condition for employment, ECHR, Sørensen&Rasmussen v Denmark case
In these cases the European Court for Human Rights in Strasbourg questioned Danish rules on obligatory membership in the trade union for those seeking employment. The Court determined that two Danish citizens were right when they claimed that in this way their right not to join the union was violated. In the first case, a student was fired from a summer job because he was not member of a certain union, while in the second case, a worker was forced to join a certain union in order to keep the job. Both examples are related to the clause "closed shop", and such agreements between unions and employers are allowed in Denmark and on Iceland..[51]
Slučaj Sørensen & Rasmussen v Denmark (applications nos. 52562/99 and 52620/99).

Example: Harassment and unfavorable treatment based on union membership, ECHR, Danilenkov and others against Russia
In the case Danilenkov and others against Russia, the plaintiffs were victims of harassment and unfavorable treatment of the employer based on union membership. The national court rejected their lawsuit in civil proceedings because discrimination could be determined only in criminal proceedings. But the public prosecutor refused to initiate criminal proceeding because the state due to standards of evidence in that case should have proved „beyond reasonable doubt" that there is an intention of discrimination by one of the company executives. ECHR ruled that due to lack of efficient court protection of freedom to union association in domestic legislation, Article 11 of EC was violated in combination with Art. 14.
ECHR, Danilenkov and others against Russia (no. 67336/01), July 30, 2009.

Domestic legislation (example): According to Art. 183,of the Labor Law: "A justifiable reason for termination of employment, in terms of Article 179 of this Law shall not be considered: ... 4) membership in a political organization, trade union, gender, language, ethnicity, social background, religion, political or other opinion, or any other personal characteristic of the employee, 5) acting as the representative of employees in accordance with this Law, and 6) addressing of an employee to a trade union or bodies responsible for the protection of labor rights in accordance with law, general act and employment contract." and Art. 188: "The employer cannot terminate the employment contract, or in any other way put in a disadvantaged position the representative of the employees during his/her term in office and one year after the end of term in office, if the representative of the employees acts in accordance with the law, general act and the employment contract, namely: 1) to a member of the Council of employees and representative of employees in the

51. See more: European Industrial Relations Observatory Online, ECHR rules against Danish closed-shop agreements od 31. 1. 2006. godine:<http://www.eurofound.europa.eu/eiro/2006/01/feature/dk0601104f.htm>.

managing and supervisory board of the employer, 2) to the President of the union at the employer, 3) to the appointed or elected trade union representative .... (4) the Employer may, with the approval of the ministry, to dismiss a representative of employees under paragraph 1 of this article, if he/she refuses a job offer within the terms of Article 171, Paragraph 1, item 4, of this Law."

ACCESS TO SOCIAL SECURITY RIGHTS AND SOCIAL BENEFITS

Discrimination at work is accompanied by discrimination in areas related to labor relations. Discrimination of employees regarding rights from retirement and health insurance is very widespread, as well as from insurance in case of unemployment. Discrimination regarding the social benefits stemming from employment contract (children and parental allowances, accommodation in nurseries and kindergartens etc..) is also very frequent.[52]

In the Even case the European Court of Justice defined "social benefits" as benefits "that, regardless of whether they are related to the employment contract or not, are usually assigned to domestic workers, especially on the basis of their objective worker status or simply on the basis of their residence within the national territory, and for which, for greater mobility within the Community, it is considered appropriate to be assigned also to workers who are citizens of other member States".[53] As concrete actions that are contrary to the principle of gender equality in the EU in the field of social security, the Court listed unequal opportunity for social insurance, establishment of different rules for men and women, unequal conditions for the realization of benefits and different age requirements for retirement (in occupational systems of social security).[54]

52. In the EU that issue is also regulated by some special directives, e.g. Directive no. 79/7/EEC on the implementation of the principle of equal treatment for men and women in matters of social security from 1979, Directive no. 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes from 1986, and it is regulated also by the Directive no. 2000/43/EC on prohibition of racial discrimination from 2000, and Directive on gender equality no. 2006/54/EC from 2006. According to these directives, protection mostly extends (with some limitations set by those documents) to the systems of protection in the case of illness, disability, old age, injury at work and professional illness, maternity, unemployment, to the area of social aid and social benefits.

53. ECJ, Criminal proceedings against Even, case 207/78 [1979.] ECR 2019, May 31, 1979. Taken from: Manual on European anti-discriminatory law, op. cit, pg. 22.

54. See e.g. Art. 6 of above-mentioned Directive from 1986, as well as Art. 9 of Directive from 2006.

Example: Pensions of the employees with full-time and part-time jobs, ECJ, case Schönheit

In Schönheit case, pensions of employees with part-time jobs were calculated at a different rate to that of pensions of employees with full-time jobs. That different rate was not based on the difference in time spent at work, so the employees with part-time jobs received lower pension than the employees with full-time jobs, considering even different years of service, which resulted in a lower pay for the employees with part-time jobs. This rule of calculating pensions was equally applied to all employees with part-time jobs. Since approximately 88% of the employees with part-time jobs were female, this rule had disproportionally negative effect on women in comparison to men.
ECJ, Hilde Schönheit against city of Frankfurt on Maine and Silvia Becker against the Province of Hessen, joint cases C-4/02 and C-5/02 [2003] ECR I-12575, October 23, 2003

Domestic legislation (example): Law on Gender Equality, Art. 23, para. 1: "Discrimination based on gender during realization and enjoyment of rights from the field of social protection is prohibited, regardless of the subjects that organize and implement this protection." And Art. 24, para. 1: "During realization of the right to health care, discrimination based on sex is prohibited." Law on Prevention of Discrimination against Persons with Disabilities, Art. 17: "(1) A particularly severe case of discrimination based on disability is any discrimination against persons with disabilities during the provision of health services. (2) Discrimination against persons with disabilities during the provision of health services is considered to be: 1. refusal to provide health services to people with disabilities because of their disability; 2. setting special conditions for the provision of health services to people with disabilities if those conditions are not justified by medical reasons, 3. refusal to set a diagnosis and denial of adequate information about the current health condition, the measures taken or intended measures of treatment and rehabilitation of persons with disabilities because of their disability; 4. any harassment, insulting or degrading of disabled people during their stay at the health centre because of their disability."

Part two – **INTERNATIONAL STANDARDS IN THE AREA OF LABOR DISCRIMINATION**

1) STANDARDS ON DISCRIMINATION OF THE UNITED NATIONS

The United Nations underlined the significance of the equality among people in its Charter. In the Preamble of the Charter it is emphasized: "We, the peoples of the United Nations are determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.". One of the four basic goals of the UN is to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion (Article 1, Paragraph 3). The significance of the equality among people in the UN Charter is also emphasized through the listing of the activities that should be undertaken: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples". One of the listed activities is improvement of the universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Article 55).

Considering the foundations laid by the UN Charter for the international regulation of Human Rights, on December 10, 1948 the General Assembly of United Nations, proclaimed with its own resolution p the Universal Declaration on Human Rights.[55] The Declaration contains a total of 30 articles which create a framework of human rights, but the most important principles are considered to be the following: the right to life, liberty and security of person; the right to education; the right to employment, periodic holidays with pay; protection from unemployment and social security; right to freely participate in cultural life; freedom from torture or cruel, inhuman and degrading treatment or punishment; freedom of thought, conscience and religion; freedom of opinion and expression.

55. Declaration is not an international contract and as such is not subject to ratification. The date when the Declaration was adopted is celebrated as the International Human Rights Day. It is interesting to note that Yugoslavia was reserved during the voting for Declaration (along with seven other states).

As stipulated in the Declaration, all human beings are born free and equal in dignity and rights, while rights and obligations set forth in the Declaration belong to everyone, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In the spirit of the Declaration, it is prohibited to make a distinction based on political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty (Articles 2. and 3).

The right to equality is stipulated and stressed in several different sections of the Declaration of Human Rights. Therefore, all are equal before the law and are entitled without any discrimination to equal protection of the law.. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. (Article 7). The equality of fully aged men and women is also emphasized vis-à-vis marriage, as well as access to public services in their countries (Articles 16 and 21 Paragraph 2). For the area of employment, Article 23, Paragraph 2 of the Declaration is especially important, which points out that "everyone, without any discrimination, has the right to equal pay for equal work" which can be observed as a certain preparation for the Equal Remuneration Convention (No. 100) of the International Labor Organization which was adopted three years later.

Documents of United Nations significant for the prohibition of discrimination:

- United Nations Charter (1945)
- Universal Declaration of Human Rights (1948)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Covenant on Civil and Political Rights (1966)
- Declaration on the Elimination of All Forms of Racial Discrimination (1963)
- International Convention on the Elimination of all Forms of Racial Dis crimination (1965)
- Convention on the Elimination of all Forms of Discrimination against Women (1979)[56]

The United Nations adopted two other documents significant for the prohibition of discrimination .

56. We have ratified the majority of these documents. The most important documents in this area that were adopted by UN can be see under: Human Rights, A Compilation of International Instruments, UN, New York, 1988. Iv.Todorović, Human freedoms and rights, International Treaties, Belgrade, 2000, page 207 ("Right to Equality").

The General Assembly of the United Nations adopted on December 19, 1966 the International Covenant on Economic, Social and Cultural Right. Unlike the Universal Declaration of Human Rights, this Covenant is subject to ratification. This means that the country which is ratifying it also has the obligation to honor its stipulations.[57] The Covenant (in the Preamble) draws on the principles stipulated in the United Nations Charter and the Universal Declaration of Human Rights. The prohibition of discrimination is emphasized as one of the leading principles in the accomplishment of the ideal of a free human being. States are committing themselves to enable the full realization of all rights stipulated in the Covenant without any discrimination based on race, color, gender, language, religion, political or any other opinion, national or social origin, financial status, birth or any other characteristic. Provision of the equality for men and women is one of the basic obligations of the States that sign the Covenant. Men and women must enjoy all economic, social and cultural rights that are stipulated in the Covenant.

In order to accomplish the equality, each of the States Parties to the Covenant is obliged to recognize the right of every person to equal working conditions. These conditions must be provided, so that, among other things, all workers get fair wages and equal remuneration for work of equal value without distinction of any kind. Apart from the guarantees that are related to all workers, the equality of women in the labor area is particularly stressed, which means that women must have a guarantee that their conditions of work won't be inferior to those enjoyed by men and that they shall receive equal wages for equal work (Article 7).

The International Covenant on Civil and Political Rights also contains legally binding stipulations (pertinent only to those states that ratify it). It was adopted on December 19, 1966 and it entered into force on March 23, 1976 (after the required 35 ratifications).[58] This Covenant, same as the previous one, is also based on the provisions of the United Nations Charter and the Universal Declaration of Human Rights.

The states which access the Covenant are obliged to honor and guarantee to all persons on their territory and under their jurisdiction all rights recognized by the Covenant, without distinction of any kind based on race, color, gender, language, religion, political or any other opinion, national or social origin, property, birth or any other circumstance. Same as with economic, social and cultural rights, civil and political rights formulated in the Covenant are obliging the state party to the Covenant to ensure equal rights for men and women and their enjoyment (Articles 2 and 3). The right to equality is stipulated in several other Articles. The provision of Article 25 should be especially underlined, which stipulates that every citizen

57. In our country it was ratified in 1971 and published in the Official Gazette of SFRY No. 7/71. The Federal Republic of Yugoslavia gave a successor statement in the United Nations on March 12, 2001 which among other things referred to the re-joining to the International Covenant on Economic, Social and Cultural Rights.

58. This covenant was ratified in our country in 1971 (Official Gazette of SFRY, No. 7/71). The successor's statement of SRY made on March 12, 2001 refers to the accession to this Covenant. Along with the covenant, two Optional Protocols were adopted. The first came into force on March 25, 1976 and the second on July 11, 1991. Both Protocols were also ratified in our country.

has the right and the opportunity, without any discrimination and unreasonable restrictions, to be admitted , under equal general conditions, in the public service of his/her state.

The Declaration on the Elimination of All Forms of Racial Discrimination was adopted on November 23, 1963 by the United Nations General Assembly. Its structure follows the structure of the Universal Declaration of Human Rights and it consists of a Preamble and 11 articles. In Article 3, the Declaration calls for special efforts to eradicate racial discrimination in the area of civil rights, including employment and education. The Declaration presented an important foundation for the International Convention on the Elimination of All Forms of Racial Discrimination,[59] which was adopted on December 21, 1965 and came into force on January 4, 1969. The provisions significant for the prohibition of discrimination in the area of employment are contained in Article 5, Paragraph 1e and they refer to the obligation of the States Parties to prohibit and abolish racial discrimination in all its forms and to guarantee to everyone the equality before the law, without distinction as to race, color, or national or ethnic origin. This obligation particularly refers to economic, social and cultural rights, specifically to: a) right to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration; b) right to form and join trade unions ,c) right to housing ,d) right to public health, medical care, social security and social services; e) right to education and vocational training and f) right to equal participation in cultural activities.

The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly, during the Second World Conference on Women in Copenhagen on July 17, 1980. It came into effect on September 3, 1981. The Operational Protocol was adopted, along with the Convention, on October 6, 1999 in New York, which came into force on December 22, 2000.[60] Article 11 stipulates the obligation of the States Parties to undertake all of the necessary measures in order to eliminate the discrimination against women in the field of employment and based on equality between men and women provide equal rights, in particular: (a) the right to work as an inalienable right of all human beings, (b) the right to the same employment opportunities, including the application of the same criteria in the selection of job candidates, (c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training, (d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work, (e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave and (f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

59. Official Gazette of SFRY, No 31/67.

60. Official Gazette of SFRY, International contracts, No. 11/1981. The Republic of Serbia, based on succession, is a party to the Convention since 2001 and to the Optional Protocol since 2002. (Official Gazette of SFRY, International contracts, No. 13/2002.

2) STANDARDS ON DISCRIMINATION OF THE INTERNATIONAL LABOR ORGANIZATION

One of the most significant issues that the International Labor Organization (ILO) is dealing with since its foundation is the elimination of the discrimination based on employment and occupation. At its General Conference that took place in 1938, ILO called on its member states to "adopt the principle of equal treatment of all employees who reside in their territory and to eliminate all indicators of exclusion that could especially lead to discrimination towards the workers which belong to certain races or confessions in regard to access to public or private services".

The Declaration concerning the Aims and Purposes of the International Labor Organization which was adopted in 1944 (so-called Declaration of Philadelphia)[61] stipulates: "All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."

The Declaration on Fundamental Principles and Rights at Work (1998) also accentuates the significance of the elimination of discrimination in its Preamble. It declares that all members of ILO are obliged, even if they haven't ratified the basic conventions, based on the membership in ILO, to respect, promote and create, in good faith and in accordance with the Constitution, the fundamental principles which are stipulated in those conventions, among other things the elimination of discrimination in respect of employment and occupation .

However, the most significant instruments of the International Labor Organization which refer to the prohibition of discrimination in respect of employment and occupation are its conventions, first and foremost Convention Number 111 on Discrimination (employment and occupation) from 1958 and Convention Number 100 regarding equal remuneration from 1951. These two conventions are part of the eight basic ILO conventions. At the same time, they are classified as ILO conventions which have been ratified by most states.[62]

"Basic Conventions"" of the International Labor Organization:

- Convention No 87: Freedom of Association and Protection of the Right to Organize (1948)
- Convention No. 98: Right to Organize and Collective Bargaining (1949)

61. Has the character of an Annex to the Constitution of the International Labor Organization.

62. Out of 185 member states of ILO, convention Number 100 was ratified by 169 and Convention Number 111 was ratified by a total of 170 states (up to September 2012).

- Convention No. 29: Forced Labor Prohibition (1930)
- Convention No. 105: Abolition of Forced Labor (1957)
- Convention No. 138: On the Minimum Age for Admission to Employ ment (1973)
- Convention No. 182 Worst Forms of Child Labor (1999)
- Convention No. 111 on Discrimination (Employment and Occupation) (1958)
- Convention No. 100 Equal Remuneration (1951)

What is discrimination according to ILO?

Definition of discrimination by the International Labor Organization is given in *Convention No. 111 on Discrimination (Employment and Occupation)*. For the purpose of this Convention, the term "discrimination" includes **"any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin (among other characteristics), which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation". Also "discrimination" is "such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies".**

This definition of discrimination served as the model to many national legislations, including our Labor Law. The terms "employment" and "occupation" are used in a very broad sense. They encompass the access to vocational training, access to employment and certain occupations, as well as conditions of employment and labor, which shows the intention to protect against discrimination as many individuals as possible.

What is not discrimination?

The Convention also envisages certain exceptions from what can be considered as discrimination in several articles. First and foremost, it won't be considered as discrimination "**any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof**" (Article 1, Paragraph 2). In other words, the genuine professional qualification represents a permitted cause for differentiation, in spite of the general prohibition of discrimination. This exception is most frequently made when looking for "an individual of a relevant gender". However, same as with all legal exceptions, this one has to be interpreted restrictively; otherwise the basic goal of the convention would be undermined.

The next exception is related to the measures which are undertaken vis-à-vis **"justifiably suspicious acts"** (Article 4). Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.

In the spirit of Convention Number 111, "**special measures of protection** or **assistance"** provided for in other Conventions or recommendations adopted by the ILO Conference shall not be deemed to be discrimination. Special measures shall not be deemed as discrimination if they are designed to meet the particular requirements of people who due to the particular reasons are generally accepted to demand positive action, especially due to reasons such as sex, age, disablement, family responsibilities or social or cultural status (Article 5). Positive action in many ILO conventions is referring to women as well, in particular in the area of motherhood[63], professional safety and health protection[64], night work[65] and working conditions.[66]

Based on the research of ILO, many countries adopted special measures which prescribe undertaking of affirmative action toward the persons from various categories which were unequal. The reason for this is the awareness that legal prohibition of discrimination in itself is frequently not enough to eliminate the *de facto* practice. All those measures have a time limitation, because once the injustice is eliminated, there is no further justification for them. Laws on affirmative action, apart from women, are also targeting some special groups that would benefit from those measures, for instance linguistic and ethnic minorities and disabled persons. [67]

Convention Number 100 on Equal Remuneration (1951) is dedicated to elimination of discrimination related to remuneration for the work of equal value performed by men and women. In the sense of Convention, the term **"remuneration"** includes ordinary, basic or minimal wage or salary and any additional emoluments what-

63. Convention No. 3 on Maternity Protection (1919), Convention No. 103 on Maternity Protection (revised) (1952), Convention No. 183 on Maternity Protection (2000).

64. Recommendation No. 4 on Lead Poisoning (of women and children) (1919), Convention No. 13 on White Lead (Painting) (1921), Recommendation No. 114 on Protection from Radiation (1960), Convention No. 127 on Maximum Weight (1967) and Recommendation No. 128 on Maximum Weight, Convention No. 136 on Benzene (1971) and Recommendation No. 177, Convention No. 170 on Chemicals (1990) and Recommendation No. 177.

65. Convention No. 89 on Night Work (Women) (revised) (1948) and Protocol from 1990, Convention No. 171 on Night Work (1990) and Recommendation No. 178.

66. Convention No 45 on Underground Work (women) (1935), Recommendation No. 102 on Welfare Facilities (1956), Recommendation No.116 on Reduction of Hours of Work (1962) and Convention No. 140 on Paid Educational Leave (1974).

67. See: International Labor Organization, Labor Legislation Guidelines (in Serbian), Geneva, 2001, pages. 299–301.

soever payable directly or indirectly, whether in cash or in kind, by the employer to the worker based on employment. The term **"equal remuneration for men and women workers for work of equal value"** refers to rates of remuneration established without discrimination based on sex. The basic obligation of the states which ratify this convention is to promote and ensure the application of the principle of equal remuneration for men and women workers for work of equal value. The principle of equal remuneration for men and women workers for work of equal value shall be applied through national legislation, any other system for determination of remuneration, through collective agreements between employers and workers and through a combination of these.

The two conventions mentioned above are the foundation for combating discrimination. Besides these two, there is a large number of special provisions in several conventions and recommendations that are related to certain aspects of employment or certain categories of workers. These are:

- Convention No. 118 on Equality of Treatment (Social Security) (1962),[68]
- Recommendation No. 146 on Minimum Age for Employment (1973),
- Convention No. 140 on Paid Educational Leave (1974),[69]
- Convention No. 141 on Professional Orientation and Vocational Training in the Area of Development of Human Resources (1975),[70]
- Convention No. 143 on Migrant Workers (Supplementary Provisions) (1975),
- Convention No. 151 Labor Relations (Public Service) (1978),
- Recommendation No. 156 on Older Workers (1980),
- Convention No. 156 on Workers with Family Responsibilities (1981),[71]
- Convention No. 158 on Termination of Employment at the Initiative of the Employer (1982),[72]

68. This convention prescribes equal treatment of nationals and non-nationals in the social security area.

69. It stipulates that the right on this type of leave cannot be abolished based on race, color, gender, religion, political affiliation, national or social origin.

70. The policies and programs of professional orientation and training must be incited and must be available to all persons on equal basis, without discrimination of any individual, for the purpose of development of their capacities for work.

71. It is stressed that the goal of the convention is to create equal possibilities and treatment for men and women workers who have family obligations, as well as between them and the rest of the workers.

72. It lists which foundations cannot present a valid basis for the termination of employment which includes race, color, gender, marital status, family obligations, pregnancy, religion, political opinion, national orientation, and social origin.

- Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons) (1983),[73]
- Recommendation No. 169 on Employment Policy (1984),
- Convention No. 169 on Indigenous and Tribal Peoples (1989).[74]

3) PROTECTION AGAINST DISCRIMINATION IN THE EUROPEAN UNION

A special attention has been dedicated to the principle of equality in the European Union from the very creation of the communities from which the Union emerged (the European Economic Community and others). It can be freely said that the EU is the most advanced region of the world vis-à-vis the legislation and practice concerning the protection of the equality of citizens. In communitarian legislation, a special place is occupied by documents on equality in employment area, which make up for one half of the total social and labor legislation of the EU, with the acts regarding gender equality being dominant. Anti-discriminatory communitarian documents represent a sort of code of law on employment equality and they became a model for the creation of other acts on prohibition of discrimination in the EU.[75]

The concept of the protection of equality of citizens in the EU developed gradually and today there is the ideal of comprehensive equality that should secure full equality in everyday life and not only on paper.

Evolution of the idea regarding equality in the EU:

- FORMAL EQUALITY (protection from direct discrimination)
- STUCURAL EQUALITY (provision of "equal chances" – protection is extended in cases of indirect discrimination)
- TRANSFORMATIONAL–COMPREHENSIVE EQUALITY (provision of "equal opportunities" – elimination of systemic inequality in the entire society and in all social mechanisms that are causing the inequality of outcomes)

73. It requests that the policymaking is based on the principle of equal opportunities for the disabled persons and workers in general.

74. More about this in: L. Betten, International Labor Law, Kluwer, 1993, pages 159–161.

75. Modeled after the Directive on equal treatment in employment and occupation from 2000 which has proven to be a successful document, in 2008 a draft was made of the analogue Directive on protection of the equality which would be applied in the other areas of life.

The provisions on equality are embedded in both Constitutional acts of the Union; The Treaty on European Union from 2010 and the Treaty on the Functioning of the European Union also from 2010 (document which replaced the Treaty on establishment of European Community).[76] The Treaty on European Union stipulates that equality, along with liberty, democracy and rule of law, presents one of the universal values inspired by the European legacy (Paragraph 3 of the Preamble) and is one of the fundamental values on which the EU is based (Article 2). According to Article 3, the task of the EU is to promote peace and well being of all, and ways to accomplish this are combat against social exclusion and discrimination, provision of gender equality, etc. Article 9 stipulates that one of the basic democratic principles is the respect of the equality of all citizens by European Union's institutions and bodies. The Treaty on Functioning of the European Union prescribes in Article 8 that in all its activities, the Union shall aim to promote equality, particularly between men and women. Article 10 stipulates that in defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. According to Article 153, in order to accomplish social policies, the EU shall among other things, deal with equality between men and women with regard to labor market opportunities and treatment at work.[77]

According to the *Charter of Fundamental Rights of European Union* from the year 2000 (Charter of Nice), which is the binding document regarding human rights in the EU, equality is one of the fundamental principles of the EU, along with human dignity, liberty and solidarity and the entire Chapter III is dedicated to equality (Articles 20-26) Among the rights stipulated in this chapter are "Equality before the Law" (Article 20), "Non-discrimination" (Article 21) and "Equality between men and women" (Article 23). Along with the Charter of Nice, equality is also mentioned in the *Community Charter of the Fundamental Social Rights of Workers from 1989 (*Article 16, "Equal treatment for men and women").

By following these principles, starting from the seventies of the last century, the European Union (former European Community) has adopted a number of special documents regarding the prohibition of labor discrimination, among which the directives are the most significant ones (or guidelines which is another name for these documents).

Directives of the EU regarding employment equality: 1) Directive No. 75/117/EEC on the principle of equal pay for men and women (1975), 2) Directive No. 76/207/EEC regarding the application of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (1976), 3) Directive No. 79/7/EEC on the application of principle of equal treatment in the social security area (1979), 4) Directive No. 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security

76. Published in: OJ, C 83, on March 30, 2010.

77. Also see Article 157, paragraphs 1–3 (equal pay for work for both genders) and 4 (affirmative measures in provision of the gender equality) of this Treaty.

schemes (1986), 5) Directive No. 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (1986), 6) Directive No. 96/34/EC on parental leave (replaced with Directive No. 2010/18/EU from 2010), 7) Directive No. 2000/78/EC on establishment of a general framework for equal treatment in employment and occupation (2000), 8) Directive No. 2000/43/EC on racial equality (2000), 9) Directive No. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (which integrated certain above mentioned directives) (2006).[78]

For the area of labor, Directive No. 2004/113 EC from 2004, regarding the "implementation of the principle of equal treatment between men and women in the access to and supply of goods and services" is indirectly significant, since it prohibits the discrimination of the customers and clients by the employees.[79] The following EU documents are also significant: *EU Code of Practice on Measures to Combat Sexual Harassment at work* (1992), EU Code of Practice on equal pay for the work of equal value for men and women (1996), Resolution on balanced participation of men and women in family and working life (2000), Resolution on harassment at the workplace (2001), Autonomous Framework agreement on harassment and violence at work (2006), European Treaty on Gender Equality (2006), Roadmap for accomplishment of equality between men and women (2006–2010), Strategy for equality of men and women (2010–2015), Women's Charter (2010).

In brief, these documents regulate in detail the prohibition of discrimination based on gender, race or ethnicity, disability, age, religious affiliation and sexual orientation in the areas of employment and occupation, social security, provision of services and education (where all of the documents cover the area of labor and employment), but not in the other areas (see the table below). Protection against discrimination encompasses the prohibition of *direct and indirect discrimination as well as the harassment and sexual harassment*. The obligation of equal treatment refers to all employees in public and private sectors as well as to self-employed persons, and it includes: a) conditions and availability of the employment, self-employment/entrepreneurship and occupations including the criteria for selection and conditions for recruitment and promotions, regardless of the type of work and at all levels of professional hierarchy; b) availability of all kinds and all levels of professional orientation, professional trainings, higher degrees of vocational

78. The mentioned documents are, according to the above mentioned order, published in: 1) OJ, L 45, 19/02/1975;2) OJ L 039, 14/02/1976, with amendments in OJ, L 269/15, 5/10/2002; 3) OJ L 6, 10/1/1978, 4) OJ L 225, 12/08/1986 (including the changes from 1996 – Directive 96/97 EC); 5) OJ L 359 , 19/12/1986; 6) OJ L145, 19/06/1996; OJL 68/13, 18/03/2010; 7) OJ L 303, 02/12/2000; 8) OJ L 180, 19/07/2000, 9) Directive No. 2006/53 (OJ 204/23, 05/7/2006) unifies the directives No. 75/117/EEC, 76/207/EEC and 2002/73/EC, 86/378/EEC, 96/97/EC, 97/80/EC, 98/52/EC).

79. Official Journal 373/37.

trainings and professional rehabilitation, including practical working experience; c) conditions of employment and working conditions, termination of employment and payments; d) membership in the workers' or employers' organizations, or rather membership in all organizations whose members belong to certain professions and participation in the work of such organizations.[80] Apart from that, the mentioned documents are thoroughly regulating exceptions in certain areas, possibility of introduction of affirmative measures, burden of evidence (up to the employer), prohibition of victimization, sanctions, compensation for damages and implementation of the legislation. It is worth noting that this is an extremely advanced legislation, which presents a role model for the regulation of this area in all of the countries in the world, including our country. Our anti-discriminatory legislation, in regard to basic notions and concepts, is in fact a copy of the EU legislation.

Comprehensiveness of the basic anti-discriminatory legislation of the EU is illustrated in the following table:[81]

ANTI-DISCRIMINATORY LAW OF THE EU – ACCORDING TO THE BASIS FOR DISCRIMINATION

Title and the issues regulated by the Document	**Race/Ethnicity** Directive 2000/43	**Gender** Directive 2006/54 Directive 2004/113	**Sexual Orientation** Directive 2000/78	**Age** Directive 2000/78	**Disability** Directive 2000/78	**Religious affiliation** Directive 2000/78
Employment and occupation	■	■	■	■	■	■
Social insurance	■	■				
Services	■	■				
Education	■					

■ Regulatory area of the application of a concrete directive

When it comes to the implementation of the specified legislation, the role of two bodies is especially important:

- The European Commission and
- The Court of Justice of the European Union.

80. As an example, see Article 3 of Directive No. 78/2000 and items 1 and 6 of Directive No 54/2006.

81. Retrieved and adopted to our language: A. Grgić, Ž. Potočnjak and others, op. quotation, page 24.

The European Commission is dealing with the implementation of the EU legislation on equality, it supervises its application in the member states and it conducts the research of concrete violations of the principle of equality by member states.

European Commission's (EC) procedure related to discrimination
If it observes the irregularities, EC sends to a member state a "Letter of formal notice" in which it explains what the inadequate application of a specific directive consists of. If the answer is not satisfactory, the Commission proceeds to the next step and sends a "Reasoned Opinion" which contains detailed legal arguments regarding the infringement of communitarian law. A member state has two months to reply (same as in the previous step), and if the explanation is not appropriate, the EC shall refer the case to the Court of Justice. The Court shall adjudicate on whether the member state fulfills its obligations related to the communitarian law in a complete and appropriate manner.

The Court of Justice of the EU (formerly European Court of Justice) has a special role in the communitarian law, which surpasses the common function of courts in national legal systems. Due to the interpretations of the Court, many member states of the EU have improved their legislation, and in accordance with the opinions of the Court many communitarian documents have been amended. The Court, for instance, helped the development and broadening of the term discrimination (introduced the notion of indirect discrimination), influenced broadening of the effect of the directives on equality (member states and private entities-employers and employees are obliged to directly implement them),[82] helped shift the burden of proof to employer in cases of discrimination, clarify the term employee, define the disabled person, ensure consistent application of the principle of gender equality in professional pension systems and helped that the equality in paying is extended to all allowances and material benefits for employees.

4) THE COUNCIL OF EUROPE AND PROTECTION FROM DISCRIMINATION

Along with the European Union, the Council of Europe also has a significant role in the development of the rights on equality (which is an organization formed for the protection of human rights). The basic document of the Council of Europe is the European Convention for the Protection of Human Rights and Fundamental Freedoms (EC) from 1950 and in Article 14 it states that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Along with the Convention, in the year 2000 the Protocol No. 12

82. For instance in the case of Barber v. Guardina Royal Exchange Assurance Group (262/88),the Court of Justice of the EU took a stand that the European Union Law shall be dominant, or rather obligatory with regard to national in the area of gender based discrimination.

was adopted, which, among other things, has extended the prohibition of discrimination stipulated in the Convention to all rights guaranteed under the national legislation of the member states.[83] Protection against discrimination based on the Protocol No. 12 is indeed very broad, and the fact that prohibition of discrimination refers equally to states and individuals (outside of the strictly personal context) contributes to its comprehensiveness.

Discrimination of employees is also prohibited by the European Social Charter, a Council of Europe treaty adopted in 1961 (revised in 1996) that was ratified by our country.[84] The revised European Social Charter stipulates in Article 20 "the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex". The Charter guarantees equal rights to migrants (Article 19, Paragraph 1) while in Article 26 it prescribes "the right of all workers to protection of their dignity at work" (protection from harassment and sexual harassment) and Article 27 stipulates the "right of workers with family responsibilities to equal opportunities and equal treatment". Also in the Part V of the Charter, Article E prescribes that "a differential treatment based on an objective and reasonable justification shall not be deemed discriminatory".

Prohibition of discrimination is prescribed by some other CoE conventions, such as: the Framework convention for Protection of National Minorities (Articles 4, 6, 9), Convention on Action against Trafficking in Human (Article 2), Convention on Access to Official Documents, the Protocol to the Convention on Cybercrime.

The European Court of Human Rights, as a permanent organ of the CoE whose seat is in Strasbourg, is in charge of protection under the stipulations of European conventions (the European Social Charter has its own control mechanisms).[85] Since 2003, our country has also been under its jurisdiction (the year we joined the CoE and ratified the European Convention and Additional Protocols).[86] The role of the European Court of Human Rights in this area can be freely compared with the role of the Court of Justice of the EU. The Court has influenced the practice of the member states with its decisions, or more specifically, it contributed to the elimination of discrimination and the development of the term of discrimination. It is interesting to note the mutual respect between the European Court of Human Rights and the Court of Justice of the EU, and permeation of their practice in both ways.[87]

83. The fact that only 17 out of 47 member- states of the CoE have accessed the Protocol presents a small problem.

84. The Revised European Social Charter was ratified in our country in 2009 (OG of RS, International treaties, No. 42/2009).

85. Regarding the CoE protection of human rights and protection against discrimination see more in: the Handbook on European Anti-Discriminatory Legislation, quote; Council of Europe and Protection of Human Rights, Directorate General of Human Rights, Council of Europe, Strasbourg, 2001; Protection from Discrimination, Council of Europe, PowerPoint presentation, available at the internet address: http://www.coehelp.org/mod/resource/view.php?id=579.

86. See: Official Gazette of SRY, International treaties, No. 9/2003.

87. For instance, in the case of D. H. versus the Czech Republic, the European Court of Human Rights developed a concept of "indirect discrimination", modeled after the practice of the Court of Justice of the EU, while in the case of Stec vs. the United Kingdom it took the stance on the gender based discrimination in the pension system by paying attention to the fact that the same issue was already deliberated upon by the Court of Justice of the EU. Equal recognition exists on the other side. See more in: Ž. Potočnjak, A. Grgić, op. quoted, page 47.

Part three – **NORMATIVE FRAMEWORK OF PROHIBITION OF DISCRIMINATION IN SERBIA**

1) CONSTITUTIONAL AND LEGAL PROTECTION AGAINST DISCRIMINATION

The Constitution of the Republic of Serbia[88] deals with the prohibition of discrimination in general in the Second part under the title "Human and Minority Rights and Freedoms". Article 21 is prescribing the explicit prohibition of discrimination. According to the stipulations of this Article, all are equal before the Constitution and Law. Equality therefore includes the right to equal legal protection, without any discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability are prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed as discrimination.

Apart from the stipulations of the above-mentioned article, the Constitution refers to, directly and indirectly, equality and prohibition of discrimination. Article 48 stipulates ("Promotion of respect of diversity") that the Republic of Serbia shall promote understanding, recognition and respect for diversity arising from specific ethnic, cultural, linguistic or religious identity of its citizens through measures applied in education, culture and public information. Article 53 (Right to participate in management of public affairs) declares the right of citizens to take part in the management of public affairs and to assume public service and functions under equal conditions. By guaranteeing the right to labor (Article 60, Paragraph 3), the Constitution guarantees to all, under equal conditions, **the availability of all work places.** In the end, members of national minorities are guaranteed equality before the law and equal legal protection. Any discrimination on the grounds of affiliation to a national minority is prohibited. The measures of affirmative actions are being pointed out here as well, and therefore specific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural

88. "Official Gazette of the Republic of Serbia ", No. 98/2006

and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavorable living conditions which particularly affect them (Article 76).

2) Law on prohibition of discrimination

The Law on Prohibition of Discrimination[89] represents the most general regulation in this area in the Republic of Serbia. Discrimination is determined in the spirit of the most significant international documents, with a broadly set foundation for the prohibition of discrimination. Therefore the terms "discrimination" and "discriminatory treatment" are used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics.

Discrimination in the sphere of labor is prohibited; or rather it is proscribed to violate the principle of equal opportunity for gaining employment or equal conditions for enjoying all the rights pertaining to the sphere of labor, such as the right to employment, free choice of employment, promotion, professional training and professional rehabilitation, equal pay for work of equal value, fair and satisfactory working conditions, paid vacation, joining a trade union and protection from unemployment. Other than that, the Law on the Prohibition of Discrimination determines in a very comprehensive way the circle of persons who enjoy protection. These are, apart from persons who are employed, persons doing temporary or occasional work, or working on the basis of a service contract or some other kind of contract, persons doing additional work, persons performing a public function, army members, persons seeking employment, students or pupils doing work practice and undergoing training without concluding a contract of employment, persons undergoing vocational training and advanced training without concluding a contract of employment, volunteers or any other persons who work on any grounds whatsoever.

Along with the formulation of the general prohibition of discrimination, the basis for discrimination and circle of persons who enjoy protection, the Law on the Prohibition of Discrimination is harmonized with the general documents of ILO and the EU in the area of labor and employment. In the same spirit it is determined what is not considered to be discrimination in the area of labor and employment (Article 16, Paragraph 3). It is any diverse treatment, exclusion or giving priority on account of the specific character of a job, for which an individual's personal characteristic constitutes a genuine and decisive precondition for performing the said job, if the objective to be achieved is justified, the undertaking of protective measures to-

89. "Official Gazette of the Republic of Serbia", No. 22/09.

wards certain categories of persons (women, pregnant women, women who have recently given birth, parents, underage persons, disabled persons and the like).

Special value of this Law represents the establishment of an independent body-the Commissioner for the Protection of Equality.

3) Labor Law

The Labor Law of the Republic of Serbia[90] deals most concretely with the prohibition of discrimination in the area of labor and employment. It basically contains all of the classical provisions related to the prohibition of discrimination in this area, following the principles set by the International Labor Organization (primarily in Convention No. 111) and basic EU anti-discrimination acts.

Both direct and indirect discriminations are prohibited against persons seeking employment and employees in respect to their gender, origin, language, race, color of skin, age, pregnancy, health status or disability, nationality, religion, marital status, family commitments, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions or any other personal characteristic.

Direct discrimination is any action caused by some of the grounds stipulated in the Law that puts a person seeking employment or employee in a less favorable situation than other persons in the same or similar situation.

Indirect discrimination, as a form of the discrimination that is harder to be recognized (and therefore harder to be prevented), exists when an apparently neutral provision, criterion or practice puts or would put a person seeking employment or employee in a less favorable situation than other persons, due to a certain quality, status, belief or position of such person listed above.

The Labor Law prohibits the discrimination related to:

- employment conditions and selection of candidates for a certain job,
- working conditions and all rights resulting from the labor relationship,
- education, vocational training and advanced training,
- promotion at work,
- termination of the labor contract.

90. "Official Gazette of the Republic of Serbia", No. 24/2005, 61/2005 and 54/09

4) Gender Equality Act

A special place in the group of anti-discriminatory laws of the Republic of Serbia belongs to the Gender Equality Act.[91] Although it deals with only one basis for discrimination-gender, this law is significant because it regulates the prohibition of discrimination in a very complex manner. Prohibition of discrimination in the sphere of employment, social and healthcare protection is the first area in its systematics. According to the Law, the employer is obliged to provide equal opportunities to the employees, regardless of their gender, and equal treatment related to the exercising of the labor and employment rights. In the spirit of international sources, the following shall not be deemed discrimination or a violation of the principle of equal opportunities:

- Special measures for increasing employment and possibilities to hire the less employed gender,
- Special measures for boosting the participation of the underrepre sented gender in the vocational training and provision of equal opportu nities for advancement,
- Other specific measures, in accordance with the legislation.

The employer is obliged to keep the records regarding the gender structure of employees and to disclose the information in the records to the labor inspection and to a body in charge of the gender equality. If there are more than 50 permanent employees, the employer is obliged to adopt a plan of measures for elimination or mitigation of unequal gender representation for each calendar year.[92]

It is not permitted to make a distinction based on gender when publically announcing a job vacancy, terms of reference and making a selection among the persons seeking employment (employment and other forms of work engagement), unless there are justified reasons, in accordance with the law. It should be highlighted that this provision is particularly referring to job vacancies for which the law stipulates the obligation of public announcement. The Labor Law does not contain such provision.

Gender affiliation must not present an obstacle for the career advancement, absence from work on the grounds of pregnancy and parenthood. This cannot serve as grounds for the assignment of inappropriate tasks and for termination of employment.

91. Official Gazette of the Republic of Serbia ", No. 104/2009.

92. Public institutions are obliged to implement the measures of affirmative action in accordance with the provisions of Article 14 of the Law, if the percentage of the participation of the underrepresented gender in each organizational unit, at leading positions and in managerial and inspection bodies is less than 30%.

The Gender Equality Act guarantees to all employees equal wages for the equal work or work of equal value, irrespective of their gender and it prohibits any harassment including the sexual harassment and sexual blackmail. In each cycle of the professional advancement or vocational and professional training the employer is obliged to pay due attention that the provisions regarding gender representation are reflected in the structure of employees to the greatest extent possible. The basis for the termination of the employment or cessation of the employment and any other contracted relationship will not be considered as justified, if it is based on the launching of the lawsuit by the employee due to the gender based discrimination, harassment, sexual harassment and sexual blackmail.

The minimal participation of the underrepresented gender is 30% and it is mandatory for the forming of the board for the negotiations while the employment organization (the National Employment Service) is obliged to provide equal availability of jobs and equality in the employment procedure for both genders.

5) Other legal standards related to gender

5. 1. Law on the Prevention of Discrimination of the Persons with Disabilities

The Law on the Prevention of Discrimination of the Persons with Disabilities[93] is dedicated, as its name indicates, to the prohibition of discrimination based on disability. After the provisions that are pertinent for the general prohibition of discrimination, the Law stipulates the special cases of discrimination. One such case is the discrimination related to labor and employment (Articles 21–26).

In the employment procedure and realization of the labor and employment rights, it is prohibited to perform the discrimination based on disability against: 1) person with disability seeking employment,[94] 2) individual accompanying the person with disability who is seeking employment, 3) employed person with disability, 4) employed companion of the person with disability.

Discrimination based on disability in the sphere of labor and employment is considered to be:

- Failure to employ the disabled person or the companion of the person with disability due to the disability or due to the characteristic of the companion of the disabled person;

93. "Official Gazette of the Republic of Serbia", No. 33/2006.

94. "Person seeking employment", in the sense of this law is a person duly registered by the employment service in accordance with the law regulating employment. "Individual accompanying the disabled person" is any individual, regardless of the family relation, who lives in a joint household with the disabled person and is permanently assisting the person with disability to meet everyday needs without monetary or other material compensation.

- Setting special health preconditions for the employment of the person with disability, unless the special health conditions for performance of certain jobs are established in accordance with the law;

- Previous checkups of the psychological and physical condition which are not directly related to the workload of the announced jobs;

- Refusal to perform technical adaptation of the workplace, which is enabling the efficient workplace performance of the person with disability, if the costs of adaptation are not borne by the employer or if they are not disproportional to the profit, which the employer gains by employing the person with disability.

The following does not represent discrimination of a person with disability:

- Selection of candidates who are not disabled and who have the best results of the previous checkups of the psychological and physical conditions if it is directly related to the workplace requirements;

- Undertaking affirmative measures for the faster employment of the persons with disabilities, in accordance with the law that regulates the employment of the persons with disabilities.

Apart from regulating the cases of discrimination based on disability in the sphere of employment, the Law also prescribes what can be considered discrimination in the sphere of labor rights. This can be:

- Payment of lower wages due to the disability of an employee, irrespective of his/her workplace performance;

- Setting the special work conditions for the employee with disability, unless these conditions are stemming from the terms of reference for the particular position;

- Setting the special work conditions for the employee with disability for the enjoyment of labor rights that belong to any employee.

The Law stipulates that harassment, insulting, and debasing of an employee with disability by the employer or by a person directly superior in the workplace due to the employee's disability is to be considered as a particularly severe form of discrimination based on disability.

5. 2. Law on prohibition of harassment at work

This regulation represents a novelty in our labor legislation.[95] Apart from the general prohibition of the harassment at workplace (in comparative practice:" mobbing") it explicitly prohibits any sexual harassment at work (Article 3), and indirectly it pro-

95. Official Gazette of the Republic of Serbia ", No. 36/2010.

hibits discrimination as one of the potential ways of mobbing of employees. In defining the harassment at work, in Article 6 (which was mentioned before) the Law prohibits the violation of dignity, violation of personal and professional integrity of the employee, or any behavior that instills fear or creates a hostile, humiliating and insulting environment, deteriorates working conditions and leads toward the isolation of an employee, where the discriminatory treatment can also be recognized (including harassment).

In order to protect the parties in the proceedings for the protection against harassment, the legislator has explicitly stipulated (Article 27) that filing a complaint for the protection against harassment and participation in the litigation proceedings cannot be the basis for: placement of the employee in a less favorable position in regard to the enjoyment of rights and obligations in the sphere of labor, filing a motion for establishing disciplinary, material and other responsibilities of the employee, termination of the contract, or termination of the employment and any other contractual working relation and proclamation that the employee is redundant. This protection does not apply to an employee who has abused the right on protection against harassment.

5. 3. Law on employment and unemployment insurance

Prohibition of discrimination related to the employment in Serbia is regulated by the Law on Employment and Unemployment Insurance.[96] The prohibition of discrimination is one of the basic founding principles of this Law (Article 5). Apart form that, it establishes the obligation of the employer to ensure the equal treatment of the persons who have applied for the announced vacancy and who are to be interviewed for the job (Article 35).

5. 4. Law on civil servants

The Law on Civil Servants regulates the special regime of employment in the Republic of Serbia. [97] The law prohibits preference of denial of the civil servant's rights and duties, especially due to racial, religious, gender/sexual, national or political affiliation or any other personal characteristic (Article 4). Upon the employment in a state institution, all jobs are available to candidates **under equal conditions** (Article 9). These conditions are stipulated in Article 45 of this Law and are different from the conditions in the general employment regime. Those are: legal age, citizenship of the Republic of Serbia, required professional qualifications, that the potential candidate has not been dismissed from public service for a grave breach of labor obligations and that the job candidate has never been convicted to a prison sentence of at least six months.

Besides, a university degree of at least four years is required for the work at an appointed civil service position and 9 years of relevant experience.

96. "Official Gazette of the Republic of Serbia", No. 36/2009

97. "Official Gazette of the Republic of Serbia", No. 79/2005; 81/2005; 64/2007; 67/2007; 116/2008 and 104/2009.

The Law on Civil Servants guarantees that all civil servants shall be equal when making a decision on promotion, rewarding and achievement of their legal protection (Article 11).

6) Judicial Protection

Persons who have been subjected to workplace discrimination have the right to judicial protection in litigation proceedings (civil legal protection) and in criminal proceedings (criminal justice protection).

6. 1. CIVIL LEGAL PROTECTION

Civil legal protection before the court related to the workplace discrimination is realized in accordance with the provisions of the Civil Procedure Law (CPL)[98] and anti-discriminatory laws (the Law on the Prohibition of Discrimination against the Persons with Disabilities,[99] Law on the Prohibition of Discrimination[100] and the Gender Equality Act [101]) which contain special procedural and legal provisions for this type of litigation. According to the legal principle that a special rule derogates from a general one, in the lawsuits for protection against workplace discrimination the application of procedural rules from the mentioned anti-discriminatory laws is primary for the issues they are regulating with regard to related rules in the Civil Procedure Law. This means that if the mentioned laws contain special rules regarding, for instance the territorial jurisdiction or burden of evidence, those rules shall be applied, and not the ones stipulated in the Civil Procedure Law.

Although the Labor Law[102] is a general and a main law for the sphere of labor, neither this Law, nor the others related to the certain categories of the employees (public servants, education workers and others) contain the procedural (judicial) rules. The provisions of the Labor Law (Articles 18–23) related to the prohibition of discrimination are material and legal and not procedural in their nature.

Procedural rules are the ones determining the course of the judicial proceedings, and all participants in the proceedings (court, parties, witnesses, expert witnesses and others) are obliged to respect them, and they are regulating all phases of the court proceedings (the first and second instance proceedings and extraordinary legal remedies).

Court jurisdiction

A person intending to seek judicial protection for labor discrimination has to know the rules related to the subject-matter and territorial jurisdiction of courts, in order to know from which court to seek protection by pressing charges.

98. Official Gazette of the Republic of Serbia", No. 72/2011.

99. "Official Gazette of the Republic of Serbia", No. 33/2006.

100. Official Gazette of the Republic of Serbia", No. 22/2009.

101. Official Gazette of the Republic of Serbia", No. 104/2009.

102. "Official Gazette of the Republic of Serbia", No. 24/2005 and 61/2005.

The jurisdiction of the court or judiciary jurisdiction represents the scope of the court's tasks and its authorization to act in certain legal matters. Traditionally, the court jurisdiction is divided into absolute and a relative one. Absolute jurisdiction of the court indentifies its jurisdiction in regard to all other institutions, e.g. administrative bodies, while the relative jurisdiction earmarks its jurisdiction within the existing courts in the judicial system.

The Law on Organization of Courts[103] contains rules on the jurisdiction of courts which determine which court acts in a specific legal matter.

Subject-matter jurisdiction of courts

The subject-matter jurisdiction distinguishes the competences between various types of courts within a unified judicial system,[104] for instance between a commercial court and basic court, as well as the competences between courts of different instances within the same type of courts, e.g. between a basic and appellate court.

In a lawsuit for the protection against workplace discrimination the subject-matter jurisdiction lies with the basic court. The Law on Organization of the Courts does not stipulate explicitly that the basic court or some other court hears such cases, but there are stipulations which prescribe in which legal matters the basic court adjudicates and there is a rule that the basic court in the first instance adjudicates in civil lawsuits unless it falls under jurisdiction of another court. It is precisely this specific phrasing "unless it falls under jurisdiction of another court" which determines the jurisdiction of the basic courts in litigations for protection against workplace discrimination.

Wrong choice of court with subject-matter jurisdiction

In the course of the entire first instance proceedings, the court shall ex officio take due care of the subject-matter jurisdiction, and if ascertains that a specific case does not fall under its subject-matter jurisdiction (relative incompetence of the court), the court shall declare that it has no subject-matter jurisdiction for the specific case and shall refer it to a competent court.

In a lawsuit for protection against employment discrimination it is possible that the plaintiff submits a complaint to a court which is not competent for the subject matter, but the plaintiff shall not suffer harmful consequences for it, apart from the time lost which is needed for a court to pass the ruling and for it to come into effect, because the court to which the case has been referred to shall continue with the proceedings the same way as if the complaint was submitted to this court from the beginning.

103. Official Gazette of the Republic of Serbia", No. 116/2008.

104. According to the Law on Organization of Courts, there are courts of general jurisdiction (basic, higher, appellate and Supreme Court of Cassation) and courts of specialized jurisdiction (Commercial Court, Commercial Appellate Court, Misdemeanor Court, Higher Misdemeanor Court and Administrative Court).

Territorial jurisdiction of courts

The rules on territorial jurisdiction distinguish territorial jurisdiction among the courts with subject-matter jurisdiction of the same type and same degree, e.g. among basic courts. Considering that the basic court is competent to adjudicate in the litigation for protection against the workplace discrimination, the rules on the territorial jurisdiction determine which of the existing basic courts should adjudicate in the concrete lawsuit.

For the court proceedings for the protection against discrimination, including the workplace discrimination, there is a special rule regarding the territorial jurisdiction (Article 41 of the Law on the Prohibition of Discrimination against the Persons with Disabilities, Article 42 of the Law on the Prohibition of Discrimination and Article 46 of Gender Equality Act) which determines the elective (optional) territorial jurisdiction, because apart from the court that has the general territorial jurisdiction, a court located in the territory where the person seeking protection from the court has a registered residence or a seat also has a territorial jurisdiction. This special territorial jurisdiction was established in favor of the persons seeking protection against discrimination for the purpose of easier exercising of this right. Apart from this, Article 59 of the Civil Procedure Law establishes a special territorial jurisdiction for the labor-related disputes and stipulates that if the plaintiff in a labor-related dispute is an employee, the jurisdiction shall also, in addition to the court of general territorial jurisdiction for the respondent, lie with the court on whose territory the work is being performed or was performed. This means that in the case of a workplace discrimination of an employee, this person can file a lawsuit to the court based on the place of employment.

Having in mind the general and special rules on the territorial jurisdiction, the person seeking judicial protection against workplace discrimination can choose the court to which to file a lawsuit: 1) to the court of his/her permanent or temporary residence, or 2) to the court that has general territorial jurisdiction, which means based on a registered or temporary residence or a seat of the defendant, or 3) to the court on whose territory the work is being performed or was performed (only for the employees or former employees). Therefore, in the proceedings for protection against workplace discrimination, the employee has the right to choose between two courts with territorial jurisdiction, and he/she decides to which court to submit the complaint, but once the plaintiff chooses the court and files a complaint, the territorial jurisdiction is established and cannot be changed.

General territorial jurisdiction

The general territorial competence of a court means that any complaint may be submitted against a person to this court. For the natural persons, general territorial jurisdiction of the court is determined on the grounds[105] of permanent or temporary residence of the defendant. In civil disputes against the Republic of Serbia, Autonomous Province, local authorities and their bodies, the general territorial jurisdiction lies with the court on whose territory the assembly of the relevant territorial

105. The Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutor's Offices ("Official Gazette of the Republic of Serbia" No. 116/2008) determines the seats and territorial jurisdiction of the courts in their area of competence, while the Law on Territorial Organization of the Republic of Serbia ("Official Gazette of the Republic of Serbia", No. 129/2007) determines the inhabited settlements that are entering the composition of the territorial units (municipality, city, the City of Belgrade).

organization is located, while for adjudication in disputes against legal entities, the general territorial jurisdiction lies with the court on whose territory the registered seat of a legal entity is located, according the Serbian Business Registries Agency.

Wrong choice of court with territorial jurisdiction

In the lawsuits for the protection against workplace discrimination, the court does not pay due attention to territorial jurisdiction ex officio, because the exclusive territorial jurisdiction[106] is not prescribed for such cases. The court shall ex officio pay due attention solely to the exclusive territorial jurisdiction while the court shall pay due attention to the special territorial jurisdiction in a lawsuit for the protection against workplace discrimination only if the defendant is making an objection and contesting the territorial jurisdiction. In this case, the court must decide within eight days from the day it receives the objection claim (situation when the complaint is submitted for response). In a situation where the complaint is not submitted for response, the defendant may make this objection at the preliminary hearing at the latest or at the first hearing of the main trial and in such cases the court must decide within eight days from the day the preliminary hearing was held or the first hearing of the main trial.

Considering that territorial jurisdiction is prescribed in the lawsuits for protection against discrimination, or rather jurisdiction of several basic courts, it is possible that the plaintiff does not file a complaint to any of the courts with territorial jurisdiction. In this case the court shall (based on the objection of the defendant) declare itself lacking the necessary territorial jurisdiction and shall refer the case to a competent court. However, precisely because there are multiple courts with territorial jurisdiction, the court cannot select on its own to which of the courts to refer the case, so it is obliged to consult the plaintiff, and if the plaintiff does not respond within three days time, the court shall refer the case to a court with general territorial jurisdiction.

Active legitimation

People seeking employment and an employed individual, if they are subjected to discrimination, have an active legitimation for filing the lawsuit for protection against workplace discrimination. These persons have the status of a plaintiff in a lawsuit proceedings, because their subjective right (right to equality) is violated and they are participants in the relationship (for instance employment) from which the contentious relation was derived, (discrimination), which court must settle. Contrary to active is the passive legitimation which concerns the defendant, and in such lawsuits any entity (natural or legal) is passively legitimized and therefore can be sued, if the plaintiff considers that this entity has committed the act of workplace discrimination and therefore he/she is filing a lawsuit against the entity. In a nutshell, having active legitimating means to have the right to file a lawsuit, to be a plaintiff in the proceedings, while passive legitimating means to be the respondent in a lawsuit due to the relationship with the plaintiff, from which according to the plaintiffs clam's the discrimination arises.

106. For instance, exclusive territorial jurisdiction is stipulated in Article 50. of CPL for disputes over property rights and other rights on real property in disputes over trespassing on real estate and disputes arising from lease relations on real property, and in such cases, the jurisdiction lies exclusively with the court on whose territory the real property is located.

According to the Law on the Prevention of Discrimination of the Persons with Disabilities, active procedural legitimation, in the lawsuits for the protection against workplace discrimination on the grounds of disability, belongs only to the discriminated person because his/her right was violated and this person has the status of a party (plaintiff) even when the lawsuit is filed by his/her legal representative[107] According to the provisions of this law, a person accompanying the disabled person has the active legitimation, but only if he/she were discriminated against in the sphere of employment and exercising of the labor rights.

Lawsuits of other persons

According to the Law on the Prohibition of Discrimination and the Gender Equality Act, lawsuit for the protection against discrimination in general and workplace discrimination, can be filed by other subjects, other persons, who were given such rights by the explicit stipulations of these laws.

According to the Law on the Prohibition of Discrimination, a lawsuit for the protection against discrimination can be filed by other subjects: the Commissioner for the Protection of Equality, organizations for the protection of human rights, and a person who voluntarily subjected himself or herself to the discrimination in order to directly examine the application of the legislation regarding the prohibition of discrimination (so-called volunteer examiner of the discrimination, tester). In the litigation proceedings, these subjects have the capacity of a party-plaintiff. Legal provisions prescribe the limitations pertinent to the type of the protection these subjects may seek, by excluding the possibility for them to make a claim for compensation.

Besides that, if the Commissioner for the Protection of Equality and organizations for the protection of human rights are filing a lawsuit against the discrimination which is related to a specific individual, they must have a written consent of this person (written consent), while a person who voluntarily subjected himself or herself to the discrimination in order to directly examine the application of the legislation regarding the prohibition of discrimination, can file a lawsuit only related to the concrete case in which he/she was an examiner (Article 46 of the Law on Prohibition of Discrimination).

According to the Gender Equality Act, the discriminated person has the active legitimation to file a lawsuit and he/she retains its status of the party (plaintiff) even when other persons on his/her behalf file the lawsuit with his/her written consent. These other persons can be a union or associations, whose goals and activities are linked with the promotion of gender equality. If they have not filed a lawsuit, these persons may be involved in the litigation on the side of the plaintiff (discriminated person) as interveners.

A trade union or associations have an active procedural legitimation and they can be the parties (plaintiffs) in a litigation when they are filing a lawsuit before the court on their own behalf in case of the violation of the rights of larger number of people, and in this case the person whose right was violated can join them as an

107. According to Article 75, Paragraph 1 of CPL, the party holding full disclosing capacities shall be permitted to undertake actions in the proceedings (litigation capacity), while Article 76 of CPL stipulates that a party without litigation capacity is presented by the legal representative.

intervener. As a rule, the union and associations have the status of the legal entity[108], but if they do not, with the special provision (Article 43, Paragraph 3 of the Gender Equality Act) their capacity to be a party is recognized.[109] The exact number of people that is needed so that we may be referring to "a larger number" is not specifically determined, but considering the object of the protection or the nature of the protected right (right to equality), this number for instance is more than five.

Access of other injured parties, unions and associations into an ongoing litigation is possible on the grounds of a public invitation of the union or the association which filed a lawsuit, while they (other injured parties, unions, associations) can join the existing plaintiff as interveners or co-litigants (Article 43, Paragraph 4 of the Gender Equality Act).

Considering the provisions of the Civil Procedure Law regarding the interveners and co-litigants, the mentioned special provisions of the Gender Equality Act (Article 43, paragraphs 3 and 4) can possibly open up an issue of their collision. Namely, the Civil Procedure Law stipulates rules regarding co-litigants and prescribes the conditions for a submission of the single claim by several persons, also these provisions regulate co-litigants and unified co-litigants, participation of the interveners in a litigation where the main condition for gaining the status of the intervener is that this person has a legal interest to support the plaintiff and is benefiting from the successful lawsuit. Since the stipulations of the Gender Equality Act prescribe that a discriminated person can have either the role of the plaintiff or an intervener in a lawsuit and that unions and associations can file a lawsuit on behalf of the discriminated person or on their own behalf (larger number of persons) or they can be the interveners, this raises the question whether this is determined under the conditions stipulated in the Civil Procedure Law or under the special stipulations of the Gender Equality Act which enable these subjects to choose their role in a litigation, without the court's deliberation on whether the conditions for such participation have been met. The answer to this question is that in a lawsuit for the protection against discrimination based on gender or sex (at work), general provisions on this matter of the Civil Procedure Law do not apply due to special procedural rules, which take precedence.

In the sphere of employment, the employers are frequently announcing vacancies with special requirements, which are discriminatory. For instance, when an employer delivers a vacancy announcement to the employment service, requiring a male candidate, which is not justified by the workplace prerequisites, and when the employment service accepts this requirement and sends only male candidates to the employer, the discrimination based on gender was committed, because of discrimination of the female candidates which meet other requirements of the announcement. Under such circumstances, there would be grounds for filing a lawsuit not only by the discriminated persons, but also by the persons who have the right under the provisions of the Law on Prohibition of Discrimination or the Gender Equality Act (the Commissioner for the Protection of Equality, organizations for protection of human rights, unions, associations dealing with promotion of gender equality). The employer and the employment service could both be defendants in

108. See Article 238 of the Labor Law ("Official Gazette of the Republic of Serbia", No. 24/05 and 61/05) and Article 4 of the Law on the Associations ("Official Gazette of the Republic of Serbia", No. 51/09 and 99/11).

109. See Article 74 of CPL.

this case, while the court in such instances does not have to establish the identity of the discriminated persons and therefore the proceedings can take place without their participation.

Complaint

The court proceedings for the protection against discrimination are initiated by filing a complaint. When a plaintiff files a complaint he is opting to seek protection of the court and this is his/her primary action related to free disposal. The principle pertaining to the parties' free disposal of the complaints filed in the proceedings is one of the basic principles of the litigation and therefore during the proceedings the plaintiff freely disposes with the complaint filed and may decide to waive or modify the complaint or decide to undertake other procedural actions.

Content of complaint

The complaint is a document submitted to the court and therefore it must contain all of the elements stipulated in the Civil Procedure Law and these are: the designation of the court, name and surname, name of the company, permanent or temporary residence of the parties, or of the registered seat of the entity, their legal representatives or attorneys, if any, the subject of dispute, the content of the declaration and the signature of the submitting party.

A complaint must contain a specific claim regarding the merits and accessory claims (the main claim), the facts on which the plaintiff founds the claim, evidence to support these facts, value of the subject of dispute (if the jurisdiction, composition of the court, the right to request review on points of law, depends on the value of the subject of the dispute, and the subject of the claim is not pecuniary amount, the plaintiff is obliged to dully indicate the value of the subject of dispute in the complaint).

A complaint in the litigation for the protection against employment discrimination must contain all of the elements stipulated by the general civil litigation legislation, with one exception related to the obligatory indication of the value of the subject of the dispute. The value of the subject of the litigation is relevant both for the subject matter jurisdiction of the court and for the right to a revision. In such lawsuits revision is always permitted according to the stipulations of Article 41 of the Law on the Prohibition of Discrimination, while the competence of the basic court is determined by the legislation and therefore the indication of the values of the subject of the litigation is not necessary.

When it comes to the elements of the complaint, which are determined by the general procedural rules, in the lawsuits for the protection against discrimination including the workplace discrimination, there are special stipulations only for the subject of the main claim (Article 43 of the Law on the Prevention of Discrimination against Persons with Disabilities, Article 43 of the Law on Prohibition of Discrimination and Article 43 of the Gender Equality Act) which prescribe what a plaintiff may demand through the lawsuit or what may be the subject of the claim, which indicates further the type of the lawsuit at the disposal of the plaintiff.

Types of complaints

The plaintiff may file a declaratory complaint or a lawsuit for the establishment in which he/she shall ask for the establishment of the discriminatory behavior and

actions of the defendant towards the plaintiff or someone else; then a condemnation lawsuit or a complaint for the condemnation of actions, in which the plaintiff is asking the court to order the defendant to perform actions which shall eliminate the consequences of the discriminatory actions or to order pecuniary and non-material compensation for the damage; and also the plaintiff can request imposing of the ban on an activity that poses a threat of discrimination, a ban on proceeding with the discriminatory activity or a ban on repeating a discriminatory activity and finally the plaintiff may request that the judgment rendered on any of the lawsuits listed above is made public.

Determination of claim

In the context of the subject of the claim, the question of its determination arises, or how to formulate a claim, so that it fulfils the conditions for the regularity of the complaint and conditions for the rendering of a judgment. By the order of things, if the plaintiff is demanding through a lawsuit the imposing of the ban on an activity that poses a threat of discrimination, a ban on a proceeding with a discriminatory activity, or a ban on repeating of the discriminatory activity, or the plaintiff is demanding from the court to order the defendant to take steps to redress the consequences of discrimination, such actions must be determined concretely (place, time and manner of execution) and it must be stated what the respondent is specifically being banned or ordered to do.

The same provisions apply for the lawsuit for the establishment, whereas the specific stipulations of Article 194, Paragraph 3, of the Civil Procedure Law prescribes that through such complaint the court is asked to establish whether the fact in question exists or does not exist, provided this is prescribed by the law or other regulations. It is precisely the lawsuit for the establishment filed in a lawsuit for the protection against discrimination that is in a correlation with the rule that through such claim establishment of the facts can be sought, because facts establish the discriminatory action which the defendant committed in plaintiff's or someone else's case.

Filing of the lawsuit for the protection against employment discrimination is not bound to a certain timeframe, but when it comes to the claim for the compensation of damage (material and non-material) the rules stipulated in the Law on Contract and Torts apply, even those related to the statute of limitations in claims for awarding of the damages.[110]

Examples of claims filed

The Law on Prohibition of Discrimination has been in force for just over three years and there is not enough judicial practice in this sphere that would serve as a guideline to parties for such lawsuits, and therefore lawsuits filed to the courts regarding the workplace discrimination contained the claims for the purpose of:

1. "Awarding a non-material damage (total of RSD 450,000.) of which RSD 150,000 for the mental anguish suffered due to bullying, discrimination and a degrading position in which the plaintiff was placed by the defendants, RSD 150,000 for having sustained a great fear caused by constant pressures in the professional envi-

110. According to Article 376 of the Law on Contracts and Torts "A claim for damages caused shall expire three years after the party sustaining damage became aware of the damage and of the tort-feasor. In any event, the statute of limitations for this claim is five years after the occurrence of damage.

ronment that was directly reflected in the private life and RSD 150,000 for a low intensity fear sustained which is present even today, caused by a direct attack on the existence and business status of the plaintiff."[111]

Comment: the request for awarding of damages in case of the workplace discrimination has to be in a correlation with the Law on Contracts and Torts, so when it comes to awarding a non-material damage, one has to bare in mind the provisions of Article 200 of the said Law which prescribes: for physical pains sustained, for mental anguish sustained due to reduction of life activities, for defamation, for offence of reputation, honor, freedom or rights of personality, for death of a close person, as well as for a fear sustained, the court shall, after finding that the circumstances of the case and particularly the intensity of pains and fear, and their duration, provide a corresponding ground thereof – award equitable damages, independently of redressing the property damage, even if the latter is not awarded. This means that the claim for awarding non-material damage can be accepted in the court proceedings only for the type of the non-material damage that the said Law recognizes as such, and not for any non-material damage; that is the reason they have been listed in a systematic way as forms of non-material damage rather than examples.

In the example above of the submitted claim, the problem lies precisely in identification of the legally recognized form of non-material damage. Apart from that, in the claim for awarding non-material damages, there is no place for formulations such as "for the mental anguish suffered due to bullying, discrimination and a degrading position in which the plaintiff was placed by the defendants"; awarding non-material damages can be sought on the grounds of fear suffered, but not in the manner presented in this example. To put it simply, pecuniary compensation in the certain amount of money is sought by the claim and nothing else is stated in the claim, whereas the established facts regarding the intensity and duration of fear shall be part of the reasoning of the judgment. Therefore in the example of the claim, statements such as "the great fear caused by constant pressures in the professional environment that was directly reflected in the private life" and "for a low intensity fear sustained which is present even today, caused by a direct attack on the existence and business status of the plaintiff" are redundant and unnecessary.

2. "The decision of the defendant's Director not to choose a candidate for the advertised vacancy for the permanent position of the teacher of practical training for the subject "stage makeup" with a workload of 60% of standard lessons is being annulled and the court is being asked to adjudicate that the plaintiff as the only candidate who satisfies all of the conditions is employed at the permanent position of the teacher of practical training for the subject of "stage makeup" with a workload of 60% of standard lessons, which the respondent is obliged to decide upon, otherwise the ruling of the court shall replace such a decision."[112]

Comment: The formulation of this claim is correct, but the principle question here is whether the court can decide about the claim that was put forward for determination, but that is not an issue. In this case, the plaintiff argues that the decision regarding selection was not made due to the discrimination of the employer against him (personal characteristic-sexual orientation) and in this case the issue of the existence of discrimination can serve as a basis for ascertaining the lawfulness of the director's decision, which is permitted.

111. Case P.1 1321/08 of the Basic Court in Novi Sad.

112. Case P.1 1729/10 of the Basic Court in Novi Sad.

3. "Awarding non-material damage, as follows: the defendant is obliged to provide just compensation for non-material damages to the primary plaintiff due to the mental anguish suffered because of the violation of honor and reputation and personal rights caused by the discriminatory and offensive treatment by the employees of the respondent in the amount of RSD 500,000; for the violation of equality caused by discriminatory treatment by the employees of the defendant to pay the amount of RSD 200,000; for the violation of human dignity to pay the amount of RSD 150,000; for violation of equality and possibility of employment to pay the amount of RSD 100,000 and for the reduction of general life activities to pay RSD 200,000 (total amount of RSD 1,150,000), and also to prohibit the defendant and all of his employees to make statements and perform actions which are damaging the integrity, honor and reputation of the plaintiff, as well as any other discriminatory treatment.[113]

Comment: This is a distinctive case because the plaintiff is a natural person (discriminated person) and the defendant is an organization dealing with the rights of gay population, which is in accordance with Article 46 of the Law on the Prohibition of Discrimination and the claim was properly formulated for the compensation of the damages to the primary plaintiff, because the secondary plaintiff has no right to awarding of the damages, but the part of the claim related to the prohibition of the discrimination refers also to the secondary plaintiff, because for this part of the claim secondary plaintiff possesses active legitimating. However, the types of non-material damage that were described in the first example above, are also applicable here, because this claim is not correlated with the provisions of Article 200 of the Law on Contracts and Torts regarding the types of non-material damage, and this is a frequent problem in the lawsuits for the protection against discrimination at work.

4. "Establishing the workplace discrimination and compensation of the material damage, or to respectively determine that the plaintiff was discriminated against by the defendant in such a way, that she decided to unjustly alter the decision regarding the job assignment in order to decrease plaintiff's salary which prevented the plaintiff's further career advancement, for the reasons because she proposed an experts opinion on working capacity performed by another health institution, and the plaintiff is asking that the respondent is ordered to pay the damage caused by the loss of profit that occurred as a consequence of a workplace discrimination and to award the amount of RSD 300,000."[114]

Comment: У In the claim there is no place for the use of adverbs "that is..." (Serbian version of the claim), the explanation "to decrease her salary" is redundant as well as "for the reasons because..." or "as a consequence of a workplace discrimination," the altered decision on the work assignment is not identified by the number and date, it is suggested that the issue is the change of a workplace or the salary or both and that the plaintiff believes that she is discriminated against without stating the personal characteristic as the grounds for the alleged discrimination.

5. "It is established that the defendant does not fulfill the contractual obligations from the employment contract, because he does not assign the contracted work to the plaintiffs, that the defendant discriminates the plaintiffs in regard to other employees in such

113. Case P.1 2619/10 of the Basic Court in Novi Sad.

114. Case P.1 11061/10 of the Basic Court in Novi Sad.

a way he is not honoring the contractual obligations by not assigning to the plaintiffs the contracted work and he must commit himself to enable the plaintiffs to do the jobs described in the employment contract and he must pay to them the unpaid salaries along with the allowance for the transportation and meals (board wages)…"[115]

Comment: Such claim is generalized, undefined in the part related to the failure to honor the contractual obligations, because it does not specify the jobs in question (perhaps all), and furthermore this claim is cumulated with the claim for payment, but not as awarding of damages, which is especially problematic.

The given examples most certainly do not represent the examples of perfect or properly defined (formulated) claims, but the courts did adjudicate on the grounds of such claims, because the courts did not consider the deficiencies in the formulation of the claims to be an obstacle in carrying out the judicial proceedings, because it was clear from the content of the claim (factual representation) that the subject of the claim was protection against workplace discrimination.

Namely, there is no procedural rule or a firm judicial standard regarding the determination of the claim, because it depends on the type of the protection, which is sought, but in any case the claim must be specific (defined and formulated) and also clear, brief (as much as it is possible) and unburdened with explanations. This is especially important for a anti-discriminatory claim (the future order of judgment), which contains an act of violation: facts related to this action must be reduced to a reasonable amount sufficient to give brief and clear answers to the following questions – who, when, what, how, and in regard of the factual basis it should be contained in the factual condition, as an obligatory element of the order of judgment.

Objective accumulation (putting forward several claims in a single complaint)

The rule on the objective accumulation - putting forward several claims in a single complaint is stipulated in Article 191 of the Civil Procedure Law: a plaintiff may put forward several claims against a single defendant in a single complaint when these claims stand related by the equivalent factual and legal grounds. If the claims are not related by the equivalent factual and legal grounds they may be put forward in a single complaint against the single defendant only provided that one court has subject-matter jurisdiction for each of these claims, and if the identical form of the proceedings is prescribed for all of the claims.

In the procedural provisions of the anti-discriminatory legislation there is no special stipulation regarding the objective accumulation, which means that a stated general rule applies. Due to discrimination (as a legal basis) and discriminatory actions (as a factual basis), several claims can already be put forward in the lawsuit, and at the later stage a new claim can be subsequently put forward, along with the previous one (alteration of a lawsuit). The plaintiff decides which claim would be put forward in a lawsuit for the protection against discrimination, one or several or all, and he/she would combine them depending of the goal he/she is aiming to achieve, except the claim for publishing of the judgment,[116] which cannot be put

115. Case P.1 6946/10 of the Basic Court in Novi Sad.

116. In the claim for the announcement/publication of the judgment the following must be concretely specified: where the judgment shall be published, for instance in which daily paper and that the publication is to be made at the expense of the respondent

forward independently, but only in junction with a claim regarding the establishment or the omission or condemnation of actions.

The restriction for the plaintiff in choosing or combining the claims stem from the life's event and related circumstances: if the discriminatory actions are ongoing, there is room for the claim for ban on proceeding with the discriminatory activity or a ban on repeating a discriminatory activity, if there are consequences of the discriminatory actions the plaintiff may submit a claim for the elimination of the consequences, if there is damage, claim for the awarding of damages can be submitted, etc.

Putting forward anti-discriminatory claims with other claims

For the plaintiff and the court mutual accumulation of the anti-discriminatory claims in the court proceedings should not cause difficulties, but there are possible procedural problems when such claims are accumulated with other types of claims.

Article 45 of the Gender Equality Act stipulates that the litigation proceedings for the realization of the civil legal protection against discrimination based on gender can be launched even before the finalization of the proceedings for the protection of labor and employment rights before the competent body.

Namely, the Gender Equality Act in the part II (employment, social and healthcare protection) contains a number of provisions related to the employers, employees and unions, therefore it is possible for an individual to seek judicial protection related to employment, as well as against workplace discrimination based on gender. In this sense Article 17 of this Law promotes a principle: equal pay for the same work or work of the same value, regardless of gender in accordance with the law regulating labor. The stipulation in Article 104, Paragraph 2 of the Labor Law prescribes that all employees shall be granted the equal salary for the same work or the work of same value performed for the employer.

If an employee submits a complaint to the court requesting the payment of the salary differences based on Article 104, Paragraph 2 of the Labor Law, he/she can seek judicial protection against the employer due to the workplace discrimination based on gender in view of Article 17 of the Gender Equality Act. In this case there would be two proceedings between same parties, whereas in the first proceeding (labor dispute) the crucial issue would be whether there was a violation of the stipulated labor right of the employee, and in the second case it would be crucial whether the principle was violated due to the gender of the employee.

In a case[117] that is currently in the court proceedings, the following claim was put forward: "It is established that S.J. an employee of the defendant, in the period from July 2011 to 12.03.2012 performed workplace harassment of the plaintiff as his superior, which consisted of addressing the plaintiff alone or in presence of co-workers by shouting, threatening him and belittling him... he was unjustly throwing the plaintiff out from meetings and was insulting the plaintiff on a racial grounds in the presence of other employees ... S.J., an employee of the defendant is prohibited to behave towards the plaintiff in a way that presents a workplace harassment and is insulting in any way, especially on the racial grounds ..Subsequently the respondent is ordered to prevent the employee S.J. in further behaving towards the plaintiff in a manner which constitutes workplace harassment ... The

117. Case P.1 1738/12 of the Basic Court in Novi Sad.

defendant is obliged to pay to the plaintiff RSD 7,500,000 for non-material damage, of which RSD 3,750,000 for the mental anguish sustained due to damaging of the reputation, violation of dignity and personal rights, belittling, humiliation and racial discrimination and RDS 3,750,000 for non-material damage due to the fear sustained by the plaintiff for his health and the existence of himself and his family... The judgment shall be made public upon its effectiveness."

From the above-presented claim, and from the extensive narrative of the claim, it can be deduced that the court protection is sought due to the workplace harassment (mobbing) and the discrimination in the sphere of labor due to the racial affiliation (the plaintiff is a black person). The Law on the Prevention of Workplace Harassment[118] prohibits any form of workplace harassment whereas the Law on the Prevention of Discrimination prohibits the discrimination in the sphere of labor on the grounds of any personal characteristic. Both laws contain procedural provisions for the judicial protection proceedings, which are very similar, even identical in, for instance, the provisions related to the burden of evidence, but according to the specific provision of the Law on the Prevention of Workplace Harassment, the dispute for the protection against workplace discrimination is a labor dispute in which the sole defendant is the employer.

Considering that the Civil Procedure Law prescribes that the accumulation of claims which are not related by the equivalent factual and legal grounds is possible only when the same court has subject-matter jurisdiction for each of these claims, and when the identical form of the proceedings is prescribed for all of the claims, the question is whether the accumulation of claims is permissible in the given example. Because the legal grounds are not the same (mobbing and discrimination), nor the same type of proceeding is prescribed for the claims based on mobbing and claims based on discrimination, while the same court has the subject-matter jurisdiction (the basic court) and the factual basis is the same for both claims. Therefore, it can be concluded that in the concrete case the accumulation of claims is impermissible, which opens up the question of court's action in such situation.

Reasons of efficiency and expediency might lead toward a conclusion that it is better to settle the entire dispute between parties in a single lawsuit, especially because the disputes stem from the same factual basis. However, these reasons cannot take precedence over a procedural rule which determines the conditions for objective accumulation of the claims, and in the above mentioned example, the condition regarding the same type of proceedings was not fulfilled. Therefore the court should, regardless of whether the defendant submitted a statement regarding this matter, based on the stipulations of Article 328, Para 2 of the Civil Procedure Law, separate the hearings on a claim for the workplace harassment from the hearings regarding the claim related to discrimination in the sphere of labor, and there will not be any harmful consequences to the plaintiff, other than having two separate court proceedings instead of one.

The Law on the Prohibition of Discrimination does not contain a rule vis-à-vis accumulation of the anti-discriminatory claims with other claims, and that is its deficiency, and there is a need to regulate this issue in such a way so that the discriminated person, especially in cases of workplace discrimination of employees, can in a single lawsuit

118. "Official Gazette of the Republic of Serbia " No. 36/2010

achieve a comprehensive protection against the violation of the subjective right.[119]

Response to complaint

In the proceedings for protection against discrimination at work, the defendant is obliged, in the sense of Article 297 of the Civil Procedure Law to submit a response to a complaint within 30 days. This deadline starts from the day the defendant received the complaint. Upon serving of the complaint, the court shall warn the defendant about the consequences of failure to submit a reply (default judgment), about the obligation to appoint an authorized recipient of the submissions and notifications and about the change of address.

The defendant is obliged to point out in his/her response to the claim all of the potential procedural objections and he/she must state whether he/she recognizes or is contesting the claim. The reply must contain facts on which his/her allegations are founded as well as the evidence to supporting such facts.

The defendant, who has a permanent or temporary residence or a seat in a foreign country, shall appoint a person authorized to receive communications of the court. If the defendant fails to do so in addition to his/her response to the claim, the court shall appoint him/her with an attorney and shall inform the defendant about it.

If a reply to the complaint contains deficiencies, precluding a court to proceed upon it, the court shall deem that the defendant failed to submit its reply to the complaint.

If the defendant fails to submit a reply to the claim within 30 days or submits a deficient reply to a claim, as a consequence the court can reach a default judgment and grant the claim (Article 350 of the Civil Procedure Law).

The serving of the claim to the defendant for reply or rather the obligation to respond to a claim is prescribed by the Civil Procedure Law, however there is an exception to this rule that stipulates that if the circumstances of a particular case so require, and especially if it is necessary to rule on a motion for ordering provisional measures, the court may immediately schedule a hearing and order that a copy of the complaint is served upon the defendant (Article 299). Considering that the court proceedings for the protection against discrimination at work are urgent, the court can simultaneously schedule a hearing and serve the defendant with the claim, and in this case the defendant must bare in mind that if he/she does not attend the hearing, it may lead to the rendering of a default judgment and granting of the claim (Article 351 of the Civil Procedure Law).

119. In Croatia the Anti-Discrimination Act which is in force ("Official Gazette", No. 85/2008) contains a specific provision stipulated in Article 17, Paragraph 3. related to the cumulation of the antidiscrimination claims with the claims for protection of other rights. The claims referred to in Paragraph 1 of this Article may be brought before the court together with claims for the protection of other rights to be decided upon in legal proceedings if all the claims are interrelated and if the same court has the subject-matter jurisdiction over them, irrespective of whether these claims are prescribed to be settled in regular or special legal proceedings, except in cases of trespass litigations. In such cases, regulations relevant for the type of litigation in question shall apply, unless otherwise provided by this Act".

In case the judicial protection is sought due to the workplace discrimination based on gender, therefore based on the provisions of the Gender Equality Act, the court ought to proceed in the sense of the stipulations of Article 299 of the Civil Procedure Law which means it ought to simultaneously schedule a hearing and serve the defendant with the claim, because Article 47, Para 2 of the Gender Equality Act prescribes that the first hearing must take place within 15 days from the day claim was received, while the deadline for the counter-complaint is 8 days. In this regard it should be pointed out that if the court proceeds in accordance with this provision and first serves the defendant with the complaint for a reply (deadline is 8 days), and then it schedules (holds) a hearing (deadline is 15 days), almost certainly it will violate the rule of CPL that the hearing summons is delivered not later than 8 days before the hearing (Article 303, Para 3 and Article 309, Para 6). Considering that the court must honor the Civil Procedure Law and the rule prescribed in the Para 2 of Article 47 of the Gender Equality Act (separate regulation), the way out of this situation is precisely in the application of the Article 299 of CPL, in order to meet the deadlines prescribed in both laws.

Preliminary hearing

The rule of the Civil Procedure Law stipulated in Article 308 regarding the so-called precluding of the presented facts and proposed evidence is very significant for the parties in the proceedings related to the discrimination at work, because the preliminary hearing or the first hearing of the main trial in case the preliminary hearing is not obligatory, is determined as the latest phase in the proceedings for presenting the facts and proposing the evidence and for arguing of the merits of the case and evidence presented by the opposite party as well as for proposing of the time frame.

At the preliminary hearing, or the trial hearing respectively if the preliminary hearing is not mandatory, the court establishes which facts are uncontested, or rather which are commonly known and which are continuous, and it identifies the legal matters which are to be deliberated. Then the court decides about the evidence that shall be presented in the main hearing, determines the timeframe for conduct of the proceedings, and rejects the proposals for presentation of evidence, which it deems irrelevant for the rendering of judgment.

Preliminary hearing or the trial hearing respectively if the preliminary hearing is not mandatory is a very demanding phase in the proceedings both for the court as and for the parties. It is the moment for the parties to finalize their claims, make a definitive stance regarding the contentions and evidence of the opposing side and to propose evidence, otherwise the so-called preclusion will take place which means they will not have the opportunity to unconditionally propose evidence at the later stage, while the court must formulate the undisputable facts, recognize among the presented disputable facts which are relevant for the adjudication (relevant for the application of the material law), in order to asses properly what evidence will be presented and which proposals it will rejected.

Proving and means of evidence

According to the provisions of the Civil Procedure Law, the court examines and determines only the facts presented by the parties and proposes only the evidence presented by the parties, unless otherwise stipulated (Article 7, Para 2), which along with the rule stipulated in Paragraph 1 of this article that the parties are required

to present all the facts on which they base their claims and to propose evidence in support of such facts points out to the conclusion that the principle of the hearing is the dominant principle in the litigation procedure. The authority of the court to ascertain the facts and to determine the evidence independently is not entirely excluded; the court does posses the authority to do so only in exceptional instances prescribed by the law. The means of evidence are: investigation, identification documents, witnesses, expert witnesses and hearing of the parties.

In the court proceedings for the protection against discrimination at work there is no special rule regarding the authority of the court to determines and presents the evidence ex officio.

Rule on the burden of evidence

The Civil Procedure Law establishes a trial principle pertinent for the establishment of the facts and therefore it is equally binding for the parties vis-à-vis the burden of evidence (Article 231). However, the Law on the Prohibition of Discrimination in Article 45 contains a special procedural rule regarding the burden of evidence that significantly differentiates from the general rule stipulated in CPL because it primarily establishes the assumption of guilt of the respondent (Paragraph 1), and then the rule regarding the shared or reversed burden of evidence (Paragraph 2). The same rule is stipulated in Article 49 of the Gender Equality Act.

In Para 1 of Article 45 of the Law for the Prohibition of Discrimination it is stipulated that if the court establishes that a direct act of discrimination has been committed, or if that fact is undisputed by the parties to the lawsuit, the defendant may not be relieved of responsibility by supplying evidence that he/she is not guilty. This means that the defendant who committed the act of direct discrimination is responsible in any case or that no cause (basis) cannot exclude his/her responsibility, because the legal provision is establishing an irrefutable assumption of his/her guilt.

Paragraph 2 of Article 45 of the Law for the Prohibition of Discrimination prescribes that if the plaintiff proves the likelihood of the defendant's having committed an act of discrimination, the burden of proving that no violation of the principle of equality or the principle of equal rights and obligations has occurred shall fall on the defendant. This means that in the court proceedings for protection against discrimination at work, the plaintiff is obliged to offer the evidence as basis for determination of the facts relevant for the ascertaining the likelihood of the discrimination taking place, which will establish the assumption of discrimination, and than the burden of evidence is transferred to the respondent which will have to refute the assumption by proving that there was no discrimination, and if the respondent fails to do so, the court shall order the protection (granting the claim) based on the established assumption that the discrimination was committed.

Special rule regarding the burden of evidence has a special significance for the persons seeking protection against the discrimination at work, because they are, as plaintiffs, placed in a privileged position in the court proceedings, which is fully justified because the discrimination is hard to prove, especially when it stems from the way of thinking or personal attitudes of the subject who is committing the act of discrimination.

Considering the special rule regarding the burden of evidence, an issue related to the presentation of evidence which is already in the European anti-discrimination

legislation set as a standard, should be pointed out, and that is the use of statistical data in the lawsuits for protection against discrimination, which enables the plaintiff to establish his presumption of discrimination more solidly. Processing of the statistical data works in the combination with the transfer of the burden of evidence: in a case when the data is indicating that one social group is in a particularly adverse position, the discriminator must present a compelling explanation of such indicators.[120] In the lawsuits for the protection against the discrimination at work, statistical data referring to one employer and for instance advancement of men and women with equal professional qualifications over a period of several years, might be offered to the court in case of proving, for instance, a claim stating that this employer is discriminating women in regard to professional advancement.

Trial hearing

Trial hearing is the most important, central phase of the civil proceedings, because the evidence is presented at the trial hearing, facts relevant for the deliberation are established, and once the court decides that the case was debated, the main hearing is concluded. The Civil Procedure Law has modernized to a certain extent the significance of the trial hearing by establishing the rule on the so-called preclusion of the facts and evidence in the preliminary hearing or the trial hearing if the preliminary hearing was not held (Article 308).

Namely, in the phase of the trial hearing parties can, in their submissions or at subsequent hearings, until the conclusion of the trial hearing, present new facts and propose new evidence only if they can make a credible allegation that they were not able to present them through no fault of their own or to propose them at the preliminary hearing or the first hearing of the main trial if the preliminary hearing was not held. The court will not examine the facts and evidence which were not presented or proposed contrary to the Paragraph 1 of this Article (Article 314 of the CPL).

The rule stipulated in Article 314 of the Civil Procedure Law regarding the presentation of new facts and proposal of new evidence during the trial hearing implies the assumption that a party is responsible for not presenting them before; a party must refute this assumption by making a credible allegation (making it probable) that they were not able to present them through no fault of their own (in the sense of Article 308). However, since the evidence is presented at the trial hearing, the following question can be made: what if, after certain evidence is presented, for instance, hearing the testimony of a witness, a party presents a new fact and proposes a new evidence related to testimony-under such circumstances is the party even obliged to convince the court of the probability of the lack of guilt for not presenting those facts sooner. Although the rule stipulated in Article 314 of new CPL is inadequate for the first instance proceedings, because it neglects the relevance of the newly presented facts and evidence pertinent for the deliberation of the claim, it must be honored in the court proceedings, even in the proceedings for the protection against the workplace harassment.

Temporary measure

Temporary measure is an instrument of securing the claim that put forward or which will be put forward in the court proceedings. It is a subject of the provisions

120. Handbook on European anti-discrimination law (2011), European Union Agency for Fundamental Freedoms, Council of Europe, 2010, Luxembourg: Office for Official Publications of EU, 2011

of the Law on Enforcement Procedure.[121] Article 285 of this Law prescribes that a temporary measure may be ordered by the court and enforced by the court or by an enforcer, before or in the course of court or administrative proceedings, as well as after the termination of such proceedings, until enforcement is conducted (Paragraph 1); the decision on the temporary measure has the legal effect of an enforcement decision (Paragraph 2).

Persons authorized to set in motion the proceedings for the protection against workplace discrimination can submit to the competent court a motion for the temporary measure even before the lawsuit is launched, and in case the proceedings (civil) are launched, they can also ask for a prohibition of the discriminatory treatment.

The conditions for ordering the temporary measure are to make it probable that there is a concrete danger of violation of a right due to the discriminatory treatment and therefore the temporary measure is necessary to eliminate this danger or to prevent the use of force or to eliminate the danger of violence or creation (of bigger) material and non-material damage, which is likely to happen without the temporary measure. When such conditions may occur is a factual issue, and they depend upon the significance of a violated right, degree of violation, an act of violation that may present a concrete danger on its own or which may lead to occurrence of a concrete danger, facts that are pointing toward the subsequent damage, etc.

According to the Law on the Prohibition of Discrimination a motion of a party is necessary for the ordering of a temporary measure, but according to the Gender Equality Act, the court may ex officio order a temporary measure under the same conditions.

Appeal

Once the trial hearing is concluded in the first instance court proceedings for the protection against workplace discrimination, the court shall render a judgment and decide on the claim. A party that failed in the proceedings has always the right to an appeal against the ruling of the first instance court, because the right to an appeal is a constitutional right.

An appeal is a regular legal remedy. The deadline for the submission of an appeal is 15 days, counting from the day the transcript of the ruling is received, however the day the ruling was received does not count, the following day is marked as day one. It is important to comply with the deadline for the submission of an appeal, because the court shall reject the untimely appeal that was submitted after the deadline expired.

According to the Gender Equality Act, the deadline for submission of an appeal against the ruling in proceedings for the realization of the civil legal protection against discrimination based on gender is eight days and the second instance court is obliged to render a ruling on an appeal within 3 months, counting from the day of submission (Article 47, Para 5).

The first instance ruling can be refuted in an appeal based on significant violation of the provisions for litigation proceedings, erroneous or incomplete established factual condition and incorrect application of the substantive law.

121. Official Gazette of the Republic of Serbia", No. 31/2011.

Appellate (second instance) court is deliberating an appeal.

Considering that an appeal is a regular legal remedy, the boundaries for examination of the first instance ruling by the second instance court are determined more broadly, so that the second instance court is examining ex officio whether some of the major violations of the procedure occurred: Article 374, Para 1 of CPL (composition of the court), Para 2 (absolute incompetence of the court), Para 3 (time limit for a submission), Para 5 (impermissible disposal of the parties), Para 7 (right of a party to argue before the court) and Para 9 (litigation capacity of a party, representation, authorized representation). Apart from these, the second instance court pays due attention about the proper application of the substantive law. The second instance court shall pay due attention to other significant violations stipulated in the Article 374 paragraphs 4, 6, 8, 10, 11 and 12 of CPL, as well as to factual condition, only if the appellant has indicated them in an appeal.

When deliberating on an appeal, the second instance court may confirm or alter the first instance ruling or annul it and return the case the to the first instance court for a retrial.

Revision

According to the Civil Procedure Law the extraordinary legal remedies are revision, motion for writ certiorari and retrial.

From the viewpoint of the litigation proceedings for the protection against labor and employment discrimination, it is extremely significant that in these proceedings the revision is always permitted according to the special rule stipulated in Article 41 of the Law on the Prohibition of Discrimination. Article 403, Para 2 of the Civil Procedure Law prescribes that revision is always permitted if specified by a special law. The Law on the Prohibition of Discrimination is precisely this special law and the rule regarding the permissiveness of revision was established for the benefit of the persons seeking protection against discrimination including labor and employment discrimination, or for the benefit of the parties in the proceedings respectively, because revision is an extraordinary legal remedy and it is not permitted in all types of lawsuits.

Parties may file a motion for review of an effective second instance judgment within time limit of 30 days from the date of effected service of a transcript of the judgment. From this provision it stems that the revision is sought for the second instance ruling and therefore the revision is preceded by an appeals procedure. The rules regulating the deadline for revision and time limits are the same as the rules for an appeal.

When it comes to permissiveness of revision, all parties, including those in the procedure for the protection against workplace discrimination, have to take into account the provisions of Article 84, Para 3 of the Civil Procedure Law which stipulates that a legal representative or an attorney must represent a party in the extraordinary proceedings. Therefore motion for revision in the proceedings for the protection against labor and employment discrimination, which is always permitted, must be submitter by an authorized attorney on behalf of the party so that the court of revision may deliberate the merits (essence) of the refuted second instance ruling. If anyone else other than legal representative submits a motion, revision will not be permitted.

A second degree ruling can be refuted by a revision due to significant violations of the provisions pertinent to litigation that were made in first or second instance proceedings and for the inaccurate application of the substantial law.

A general rule of the Civil Procedure Law stipulates that the motion for the review cannot be sought on the grounds of incomplete or incorrect factual representation; however there is an exception to this rule when the motion for revision can be filed even on the grounds on incomplete or incorrect factual representation (Article 407, Para 2 of CPL). This are the proceedings in which the revision is permissible according to the special law (Article 403, Para 2 of CPL), therefore those are precisely the cases which are in accordance with the provisions of the Law for the Prohibition of Discrimination, which means that the party in a lawsuit for protection against the discrimination at work can contest the factual presentation in the revision proceedings.

The Supreme Court of Cassation shall adjudicate on a motion for revision (court of revision).

The boundaries for the examination of the second instance ruling are narrowed, because the revision is an extraordinary legal remedy, and therefore the court of revision shall pay due attention ex officio to establish whether there was a significant infringement of the litigation proceedings prescribed by Article 374, Para 2 of CPL (jurisdiction of the court), to the appropriate application of the substantive law and the court shall pay due attention to all other reasons that can serve as a basis for the motion for revision (other significant infringements of the procedure, establishment of facts), only if the party filing a motion for the review has indicated them in the motion.

When adjudicating the motion for the revision, the court may reject the motion or alter the contested judgment or annul the judgment and refer the case to the first or second instance court for a retrial.

6. 2. CRIMINAL JUSTICE PROTECTION

Any person seeking employment and an employee, if exposed to discrimination at work, are entitled to the criminal justice protection before the court in criminal proceedings.

However, there are no specific criminal procedural rules that would, , provide specific protection to discriminated persons in criminal proceedings, but the general rules of the Code on Criminal Procedure are applied in everything, so that individuals who are exposed to discrimination at work (the person seeking employment and employee) may achieve substantive legal criminal justice protection through prosecution of criminal offenses that contain discriminatory elements. Here are listed some of these offenses in the Criminal Code (CC)[122] in which could be established discrimination at work as a point that connects them:

1. Violation of Equality from a group of criminal offenses against the rights and freedoms of man and citizen - Article 128 of CC:

122. Off. gazette RS, no.85/05, 88/05, 107/05, 72/09 and 111/09.

(1) Anyone who due to national or ethnic origin, race or religion or because of the absence of such affiliation or because of differences in political or other opinion, sex, language, education, social status, social origin, financial status or other personal characteristic, denies or limits to another person the rights of man and of citizen determined by the Constitution, laws or other regulations or general acts or ratified international treaties, or gives to that person privileges or benefits on the basis of these differences, shall be punished with imprisonment of up to three years.

(2) If the offense specified in paragraph 1 is committed by a public official within the performance of duty, shall be punished with imprisonment of three months to five years.

This is a common crime in the field of anti-discriminatory criminal justice protection, because it protects the right to equality of the people determined by the Constitution, and other laws, which, among other things, determine the prohibition of discrimination on any grounds. It is important to mention that many personal characteristics are listed in the regulation, but the list is not closed, because there is a determinant "any other personal characteristic" which means that such criminal offense might occur if a personal characteristic determined in the court proceedings exists.

The action of a criminal offense may consist of denying or restricting, or granting privileges or benefits, and a more severe form exists when the action is committed by an official in the performance of duty.

2. The abuse and torture from the group of criminal offenses against the rights and freedoms of man and citizen - Article 137 of CC:

(1) Anyone who abuses or treats someone in a way that offends human dignity, shall be punished by imprisonment of up to one year.

(2) Anyone who by force, threat or other illegal manner, causes severe pain or suffering to another person in order to get out of him/her or a third person a confession, statement or other information or to intimidate or illegally punish him/her or the third person, or commit it from some other reason based on discrimination of any kind, shall be punished with imprisonment from six months to five years.

(3) If the offense specified in paragraph 1 and 2 is committed by a public official in the performance of duty, shall be punished for the offense under paragraph 1, by imprisonment of three months to three years, and for the offense referred to in paragraph 2, by imprisonment of one to eight years.

The act of committing the basic form of this crime is abuse, or conduct that offends human dignity. The prohibition of harassment at work (mobbing) is subject to regulations of the special law, and human dignity of a person against whom the harassment at work is committed is always violated, or against whom the discrimination at work is committed due to any personal characteristic. It seems that this crime in the basic form corresponds the most with the theme of discrimination at

work. It is noticed that the act of committing - abusing, acting –- is defined with a continuous verb, which means that the offense was committed if the act was done once or several times.

3. Violation of labor rights and social security rights from the group of criminal offenses against labor rights - Article 163 of CC:

(1) Anyone who consciously fails to comply with laws or regulations, collective agreements and other acts on the rights of labor and the special protection at work of youth, women and the disabled, or the rights to social security and by that limit or deny to someone the right they are entitled to, shall be punished by paying a fine or by imprisonment of up to two years.

Labor rights and social security rights are contained in various legal documents-laws, collective agreements, general regulations, for example, at one employer, and everyone is required to stick to their provisions. Also, those and other regulations include rules on special protection of youth, women and the disabled, for example, the fulltime work of an employee under 18 years of age cannot be longer than 35 hours a week, must not work overtime, a working woman for the last eight weeks of pregnancy cannot work overtime and at night, a disabled employee has the right to perform the work according to the remaining abilities etc.

The act of committing is a non-compliance, denial (complete deprivation of entitled rights) or restriction (partial deprivation of entitled rights).

4. Violation of rights upon employment and during the unemployment from the group of criminal offenses against labor rights - Article 164 of CC:

(1) Anyone who knowingly violates the regulations, or in any other illegal manner denies or limits the right of citizens to free employment on the territory of Serbia under equal conditions, shall be punished by a fine or imprisonment of up to one year.

(2) The penalty under paragraph 1 of this Article shall be prescribed for anyone who knowingly fails to comply with laws or regulations or by-laws on the rights of citizens during a time of unemployment and by that denies or restricts to the unemployed person a right that belongs to him/her.

According to Article 60, Paragraph 3, of the Constitution of the Republic of Serbia, everyone has access to all jobs under equal conditions. This constitutional principle is concretized in the legal acts of lower legal force, which must be respected by all in the hiring procedures, so the right to free employment under the same conditions and rights during unemployment is protected.

Regarding this criminal offense, victims may only be persons seeking employment or the unemployed.

The act of committing is a violation or other unlawful manner or non-compliance or denial (complete deprivation of entitled rights) or restriction (partial deprivation of entitled rights).

All these offenses have in common that they require premeditation as a form of guilt. The offense was committed with premeditation when the perpetrator was aware of his act and wanted its execution or when the offender was aware that he might commit the act, and he agreed to it. For any of the above-mentioned offenses to be linked to discrimination at work, it is necessary that the perpetrator acted with premeditation against a person seeking employment, or against an employee due to some of his/her personal characteristics. Precisely that is a big obstacle which prevents discriminated persons to achieve legal protection. Namely, the civil liability is broader than the criminal, and in proceedings of legal civil protection discrimination at work is difficult to prove, which is why special rules for this type of procedure in the area of proof are set, because the standard rules for this were not effective. In the proceedings of criminal protection such special rules do not exist, so there is almost no prosecution of perpetrators of discrimination in the labor field.

Part four – **DISCRIMINATION AT WORK IN PRACTICE**

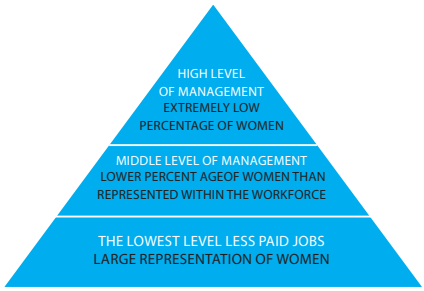
1) DISCRIMINATION AT WORK BY GENDER

Although in most countries women have been formally equal to men for a long time, they are still in subordinate position in most spheres of life and work. Although they constitute more than a half of the world population, only 40% of women[123] are employed. Knowledge and skills of women at work are generally underestimated. The higher level of decision making in the labor hierarchy is, the lower representation of women is (see the figure below). Women more often perform much lower paid jobs and on average are paid less for work of equal value, even when working at managerial positions. Even in the developed EU countries, men are still better paid than women by 15%to 18%, while in Serbia it is estimated that the difference in pay is between 3.5% and 8.5%[124]. Due to family responsibilities for women it is much more difficult to advance, they rarely have an opportunity to improve professionally, and often get fired. Women in the labor market are in a worse position because of a large number of "hidden" jobs (work without a contract), for more an more unpaid overtime, involuntary part-time work and jobs on temporary contract (which, otherwise, are less paid) than men. Besides, women are discriminated at work on several grounds (e.g. gender/disability, gender/race, gender/family responsibilities, gender/ethnicity). Sexual harassment and abuse of women is also very often.

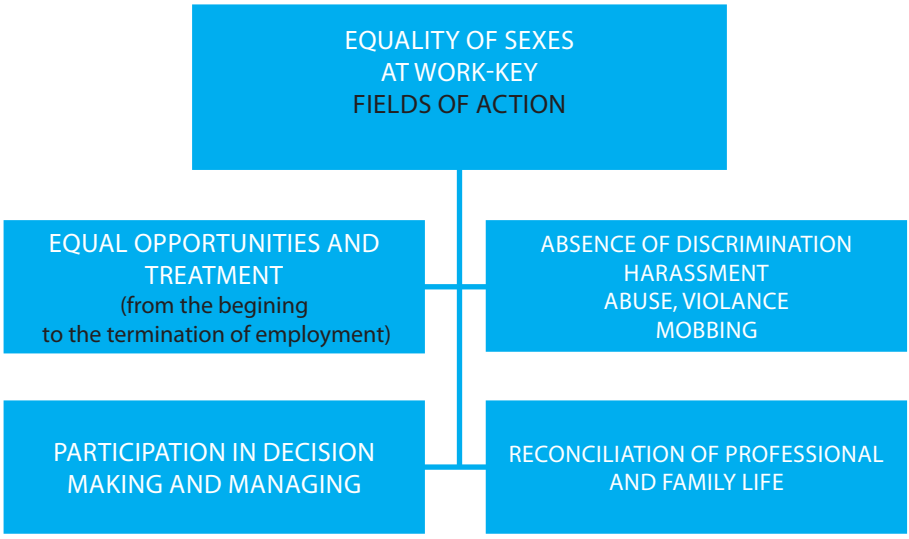
123. See more: Gender Equality in the World of Work, ILO Electronic Newsletter, International Labor Organization, Geneva, No. 4. Jan. - March 2003, (www. ilo.org/public/english/bureau/gender), pg. 25

124. For other European countries see: B92 Online 4. 3. 2012, daily journal „Blic" from 7. 4. 2012, pg. 8. On situation in Serbia see: V. Nikolić-Ristanović, S. Ćopić, J. Nikolić, B. Šaćiri, Discrimination of women on the labor market in Serbia, Victimology Society of Serbia and Prometeus, Belgrade, 2012, pgs. 58, 80, 114, 121.

"Pyramid of inequality"



Improving the equality of men and women at work entails a wide range of activities, particularly in legislation and justice, political, civic and cultural life, the economy, in employment, in education, social services and social security, family life and the media. In order to eradicate gender inequality at work, action must be taken in all aspects of labor and employment. For example, EU regulation on gender equality covers the following issues: 1) payment, 2) access to employment, vocational training, promotion and working conditions, 3) social security rights, 4) occupational systems of social security, 5) engaging in self-employment and self-employed status of women during pregnancy and maternity, 6) parental leave. However, research shows that within the EU there are still gender inequalities in almost all areas.[125]



125. See more: Roadmap for acheiving gender equality (2006–2010); New Directions for Equality between Women and Men, Equinet, European Network of Equality Bodies, Brusells, 2009; Report on Equality between Women and Men (2010),{SEC(2009)1706}/* COM/2009/0694 final/.

In practice, discrimination by gender is extremely difficult to detect, because it is rooted and hidden in many of the mechanisms at work. The best indicators of inequality are statistical data, so it is important to provide on the level of the whole country the necessary data on the gender representation in certain segments of work.

Example: Statistic and other indicators of discrimination by gender, ILO
According to ILO, the following indicators point to the inequality of sexes in practice: 1) participation in workforce, 2) the employment and unemployment rate by gender, 3) participation of women in non-agricultural and paid professions, 4) percent of women by status (unpaid, self-employed and employed), 5) participation of women in legislative and leading positions, 6) difference in pay between men and women.[126]

Domestic legislation (example): According to the Rulebook on the content and manner of submission of the Plan of measures to eliminate or mitigate unequal gender representation and the annual report on its implementation,[127] Art. 5 of the Report contains the following information: "1) the procedures carried out and measures taken by the employer during the reporting period in order to eliminate or mitigate the unequal gender representation of employees, 2) data on the changes in the gender structure of employees in the previous calendar year, 3) data on changes in the number of managerial and executive positions, in accordance with the general act of the employer, according to the gender structure of employees, 4) data on changes in the number of identical jobs, according to the general act of the employer, with a different net income that is paid to an full-time employee according to the gender structure of employees; 5) data on changes in the total number of employees sent to advanced training, by gender structure of employment, 6) data on changes in the number of job positions, according to the general act of the employer, for which there is a justified need for making a difference by sex, in accordance with the labor law. "

Women are more affected by discrimination a work, but it is not uncommon for men to be discriminated, particularly when measures of "affirmative action. " go too far

126. Equality at work, op. cit, pg. 16

127. Off. Gazette RS, no. 89/2010.

Example: ECJ, Barber case
Mr. Barber's complaint referred to the disadvantaged position of men in the pension systems. Namely, at the age of 52 he was fired from work due to organizational changes in the company he used to work at. The occupational pension system provided that men retire at 55 and women at 50. Mr. Barber's female colleagues who were his age were already retired, while he still was not entitled to a pension. The court found that the claim of Mr. Barber is justified as the pension system in question, in general, provides higher payments from pension funds for women, which is contrary to the principle of equal remuneration. Advocating the principle of complete equality of men and women in rights, the Court declared all occupational pension systems that provide different conditions for retirement discriminatory and demanded their correction.[128]
Case 262/88, Barber v. Guardian Royal Exchange Assurance Group

Example: ECJ, case Jenkins v. Kingsgate Ltd
The litigation was about the differences in the wages per hour for part-time workers and full-time workers. The problem consisted in the fact that one working hour of a person who worked full time was 10% more expensive than the hour of those who worked part-time. The case was associated with discrimination on grounds of sex because mostly women worked part-time, and full-time employees were mostly men. The Court held that it is a case of discrimination based on sex.
Case 96/80, Jenkins v. Kingsgate Ltd

Measures to improve gender equality in pay-Code of practice for the application of the principle of equal pay for work of equal value (EU) - 1996.
Measures to improve equality: 1) merging similar tasks that were separated in pay by gender, so as to apply the price of work received by men, 2) to harmonize payment systems and remove obstacles between certain kinds of jobs (e.g. office and production), 3) redefinition and reassessment of formal qualifications and skills for the jobs considered to be more "feminine", 4) reorganization of the work in the way of increasing the employment opportunities of women in typically male jobs that are better paid, 5) providing training to enable access for persons of under-represented sex, where one sex dominates…[129]

128. ECHR for example, considers that language, religion, nationality and culture are often unseparable from race.

129. The Code is published in: Office for official publication of the European Communities, L 2985, Luxembourg.

2) DISCRIMINATION BASED ON RACE, COLOR, ORIGIN, CITIZENSHIP, NATIONALITY, ETHNICITY, LANGUAGE

In all these grounds for discrimination it is basically about a group of characteristics of employees which are treated jointly in practice and where unequal treatment is based on racial discrimination and discrimination by ethnic/national origin[130]. In the area of employment, discrimination on these grounds is manifested by the fact that these persons find job with greater difficulty, are treated unfavorably regarding working conditions (working on the hardest jobs, are paid less, work more overtime, their progress and professional development is more difficult, are separated from their families) and the exploitation at work of children from these groups is also very pronounced. . It was noted that unequal treatment at work of these categories encourages poverty, social isolation, that unemployment[131] is much higher in discriminated groups , that there is a larger number of suicides, frauds, higher level of crime, a larger number of diseases, and child mortality is higher.

The UN Convention on the Elimination of Racial Discrimination from 1965,[132] determines that racial discrimination includes "race, skin color, origin, nationality or ethnicity." The term "racial discrimination" refers to any distinction, exclusion, restriction or preference based on race, color, origin, nationality or ethnicity which has for the purpose or effect the violation or endangering the recognition, entitlement or performance, under equal conditions, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere of public life (Article 1). Racial discrimination includes "segregation" (separation of people based on race). Although racial discrimination should have been eradicated long time ago, it still exists, for example, in the U.S, South America, Asia, and as of recently, because of the economic crisis and increased competition in the labor market, it has been on the increase.

130. ECHR for example, considers that language, religion, nationality and culture are often unseparable from race.

131. E.g. in some city areas in the U.S. where colored population live, unemployment is three times higher than among white people. On health and other effects of racial discrimination see more: W. A. Darity, Employment Discrimination, Segregation, and Helath, American Journal of Public Health, February 2003, Vol 93, No. 2, pg. 226, 229.

132. Ratified in our country, see: Official Gazette SFRY, International agreements, no. 31/1967.

Race/ethnicity? The European Court of Human Rights gave the following definition of race and ethnicity:

"Ethnicity and race are related concepts that overlap. While the term of race is based on the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, ethnicity has origin in the idea of social groups labeled by common nationality, tribal affiliation, religious belief, shared language, or cultural and traditional origins and environment."[133]

Example: Racial discrimination, Bulgaria

The Sofia District Court reached on November 16, 2005, the verdict in favor of a man of Roma origin based on the Bulgarian Law on Protection from Discrimination. The plaintiff saw a job ad in 2003 at a food manufacturing company. He was told over the phone that the only requirement is to be a man under the age of 30, but also that Roma cannot apply. The offer was repeated in 2004, and he applied for the job, and when he was invited to an interview he did not mention that he is Roma. At the interview the manager pointed out that he should not expect to be employed, which he found out a few weeks later. In the court proceeding the company defended itself saying that the plaintiff was not accepted due to lack of qualifications, which it could not prove. Therefore, the Court found that the refusal of employment was related to the ethnic origin of Mr. Asen and that it was a direct employment discrimination.

Source: European Roma Rights Centre (ERRC): Bulgarian court fines employer for denying access to employment to Roma, 16 Nov. 2005, <www.errc.org>.[134]

According to the opinion of the ECHR, different treatment based exclusively or mostly on ethnicity of the persons cannot be objectively justified in contemporary democratic society based on principles of pluralism and respect of other cultures. Discrimination based on national or ethnic origin (and racism) is always associated with poverty and stereotypes, for example, that members of other nation or race are "lazy, dishonest, unreliable, violent." This form of discrimination is often used against native-born and tribal population (e.g. in Vietnam, Latin America, Nepal), in some countries there is discrimination against people from former colonies (e.g. in Japan against the Chinese and Koreans), in Russia against individuals from former Soviet Union countries.[135] In the European Union, migrants and members of ethnic minorities are mainly exposed to this form of discrimination. Specifically, these are three groups of people: 1) "colonial immigration" (created mainly right after World War II), 2) foreign work-

133. From the verdict of ECHR, Timishev against Russia (no. 55762/00 i 55974/00), 2005, taken from: Handbook on European anti-discriminatory law, op. cit, pg. 101

134. Taken from: Equality at work..., op. cit, pg. 27.

135. See more: Equality at work..., op. cit, pg. 26.

ers (mostly from European countries that are not EU members), 3) minorities.[136] After the enlargement of the EU, the problem of the Roma population is particularly acute as it is very numerous.[137]

It is similar in Serbia. According to the report of European Commission against Racism and Intolerance (ECRI)[138] for 2011, Roma in Serbia are among the most vulnerable groups. Within the Roma population high rates of unemployment are recorded, a low level of economic activity and almost complete exclusion from the public sector. There are almost no Roma in public and state-owned enterprises , which indicates the discrimination as a regular occurrence. The ECRI report has allegations on cases of Roma who came to a job interview and were informed that the job was already taken, and some cases of discriminatory job advertisements. Most of the Roma are outside the employment system, not legally economically active and most are registered as unemployed. When employed, they perform quite difficult and dangerous jobs for low pay. Most Roma households depend on low income acquired mostly by seasonal jobs, e.g. in agriculture or construction business, or by collecting metal waste for recycling. It is stated that employed Roma earn 48% less money than the majority population. Social discrimination additionally reduces employment prospects of the Roma population, while the lack of formal education is the dominant obstacle for gaining full employment. Although the National Employment Strategy (2005-2010) and the National Employment Action Plan (2006-2008) have programs specifically designed for Roma, there has been little progress in this aspect, and Roma are still the group most affected by poverty in Serbia.

According to the ECRI report, members of the Albanian and Bosniak minorities in Serbia face significantly higher unemployment rates than the majority population and are under-represented in government jobs. Representatives of these communities feel that this is a structural problem that results from the combination of discrimination in education and employment.

Due to the economic crisis and rising nationalism, "**xenophobia**" (hatred of foreigners) is also increasing, making the position of foreign workers more difficult. Immigrants constitute 10% of the workforce in Western Europe, and as much as 50% in Africa, Asia, America. This category is characterized by a low level of education, which is why they are forced to do the "dirty" and hard-work jobs (so-called 3D jobs - "dirty/dangerous/degrading" jobs). In addition to unequal treatment at

136. See more: B. Hepple& B. Veneziani, op. cit, pg. 144.

137. In order to improve the Roma position within EU, and there is 10 and 12 million of Roma, it is proclamed „A Decade of Roma 2005–2015."

138 European Commission against Racism and Intolerance (ECRI) was founded by the Council of Europe. Commission is independant authority for monitoring state of human rights, which is specialized for issues of rasizm i intolerance. See: Report of ECRI on Serbia, Directorate General of Human Rights and Legal Affairs Council of Europe, 2011; available at website <http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/serbia/SRB-CbC-IV-2011-021-SRB.pdf>.

work, the greatest resistance when it comes to migrants occurs in the domain of equalization of benefits from Social Security. Other forms of discrimination typical for this category are also discrimination regarding taxation and administration, bureaucratic difficulties associated with achieving rights, nonrecognition of diplomas, set of various restrictions in employment (e.g. regional restrictions on residence and employment, quotas, employment abuses by licensing), double discrimination against migrant women.[139]

Obstacles for employment of ethnic minorities

The Group for social integration of ethnic minorities and their full participation in the labor market (the EU), which was established in 2006, determined 14 obstacles which ethnic minorities are faced with when it comes to employment: lack of education and training, lack of knowledge of language, lack of formal qualifications, difficult access to occupations, lack of citizenship, lack of integration policy, stereotypes, prejudices and negative attitudes towards minorities, industrial changes, unequal treatment in social security systems, discrimination, lack of information, unfair competition in the labor market and the illegal work.[140]

Example: Discrimination based on nationality in Europe

These are some of the examples from the court practice and practices of anti-discrimination bodies: in Latvia a person was denied the right to include the time spent working in the Soviet Union in the total years of service; the Austrian government did not want to pay unemployment support to a person of Turkish nationality, although possessing a permit for permanent residence; in France there was a case when the government refused to pay support for the disabled because the person was not of, and there are also the cases of denying pension rights and other social benefits to migrants.[141]

Domestic legislation (example): The Anti- Discrimination Law ("Discrimination against national minorities"), Art. 24: "Discrimination of ethnic minorities and their members on the basis of national origin, ethnicity, religious beliefs and language is prohibited." Art. 2, para 2 of the Law on Protection of Rights and Freedoms of National Minorities:[142] "A national minority is every group of citizens of the Republic of Serbia, which is sufficiently representative in number, although it is a minority in the territory of the Republic of Serbia, but belongs to a group of residents with a lasting and firm connection with the Republic of Serbia and possess features such as language, culture, nationality or ethnicity, origin or religion that are different

139. See more: Equality at work..., op. cit, pg. 30, 32.

140. See more: EU action against discrimination, Activity report 2007–08, pg. 14.

141. See more: Handbook on European anti-discriminatory law, op. cit, pg. 105;

142. Off. Gazette SRY, no. 11/2002, 57/2002, Off. Gazette RS, no. 72/2009.

from the majority of the population, and whose members are distinguished by their common concern over preservation of their common identity, including their culture, traditions, language or religion. "

Discrimination on the basis of language is closely associated with discrimination on grounds of nationality and ethnic origin. It exists when a person or group of persons are treated unequally because of their native language. It involves the denial of the rights in the proceedings before public authorities in the provision of services and the use of public facilities and areas, and the denial of the right to information in their native language, in daily communication and at work. According to the Constitution of the Republic of Serbia, the Serbian language and the Cyrillic alphabet is in the official use in Serbia (Article 10). The use of the Latin alphabet is regulated by the Law on official use of languages and alphabets.[143] On the territory of the Republic of Serbia inhabited by ethnic minorities both the Serbian language and the language and alphabets of national minorities are in the official use are, in the manner established by the law. "The official use of languages and alphabets" involves the use of languages and alphabets in the work of state authorities, authorities of autonomous provinces, cities and municipalities, institutions, enterprises and other organizations when performing public authority; the use of languages and alphabets in the work of public enterprises and public services, as well as the work of other organizations when performing duties prescribed by this law"(Article 2 of this law).[144] The official use of languages and alphabets includes the rights, duties and responsibilities of employees in the field of labor. (Article 3 of this Law). One of the forms of discrimination on this basis is discrimination in education, which subsequently generates indirect discrimination against minority groups upon employment (not knowing the language is often the reason for the refusal of employment and a denial of advancement).

Example: Discriminatory treatment at work based on nationality – language, Serbia
The ruling of the Municipal Court in Zrenjanin, no. P.567/10 of June 17, 2010 determined that the defendant employed in the Municipal Assembly of Echka acted discriminatory towards members of the Hungarian, Romanian and Slovak minority, since on the building of the Centre of Culture of Echka he wrote the name "Centre of Culture of Echka" on the board in the languages and alphabets of national minorities in smaller letters and in a different form than the inscription in Serbian.

International standards (example): Our country ratified the European Charter on Regional or Minority Languages, which entered into force on March 1, 1998. Art. 13, para. 1, of the Charter provides that, regarding economic and social activities, states shall undertake obligations on the territory of the entire country to: a) eliminate from their legislation any provision prohibiting or limiting, without justifiable reasons, the use of regional or minority languages in documents relating to economic or social life, particularly contracts on employment, and in technical

143. Off. Gazette RS, no.45/1991, 101/2005, 30/2010.

144. One of the examples of this type of discrimination is when a seller refuses to serve a customer who does not speak "his/her" language.

documents ..., b) prohibit the insertion in internal legal regulations of companies and private documents of all provisions which could prevent or restrict the use of regional or minority languages, at least among users of the language. According to para. 2, states are obliged to: "b) in the economic and social sectors directly under their control (public sector), organize activities to promote the use of regional or minority languages; c) ensure that all Social Security benefits, such as hospitals, homes for the accommodation of the elderly and so on, offer such possibilities for accommodation and treatment in their own language to persons using a regional or minority language and who are in need of proper care due to ill health, old age or other reasons. "

3) DISCRIMINATION BASED ON RELIGIOUS BELIEFS (RELIGION)

In the verdict *R. Eilliamson v Secretary of State for Education and Skills* (2005) in Great Britain, judge Lord Nichols points out: "Religion and other beliefs are part of every person's identity. They are integral part of his/her personality and individuality. In civilized society individuals respect religious beliefs of the others. That makes it possible for them to live in harmony."[145]

Religion or beliefs are one of the most common grounds for discrimination around the world. These forms of discrimination are particularly prevalent in countries where there are several religious communities, which are sometimes in conflict for centuries. Despite the broad prohibition of discrimination in international and national legislations, this form of discrimination has increased lately ("Islamophobia" in Western countries, discrimination against Christians and other religious communities in some Asian and African countries, the wars in the former Yugoslavia which, among other causes, also had religious roots). In the EU, for example, discrimination due to incompatibility of dress codes at work and religious ways of dressing has become frequent recently. Discrimination in employment and in relation to the rights and safety of members of other religion is very common in India, Saudi Arabia, Iran, Senegal, Sudan (where for example the Christians are required to change the religion to be hired), Egypt (Copts, Christian minority, are discriminated). This type of discrimination is often "crossed" with discrimination against migrants and discrimination by gender.

Regarding religious discrimination the European Union and the Council of Europe have a highly developed practice. According to the European Court of Human Rights

145. Equality Law in Practice, A question of faith: Religion and belief in Europe, Equinet, the European Network of Equality Bodies, Brussels, Belgium, 2011, <http://www.equineteurope.org/religion_and_belief_report__merged__1.pdf>,str. 6.

man Rights (case of Kokkinakis v. Greece), the freedom of thought, conscience and religion from Art. 9 of the EC is one of the foundations of a democratic society and it is essential not only for the formation of the identity of believers and their life concepts, but also for atheists, agnostics, skeptics and religiously unconcerned. Pluralism in a democratic society depends from respect for this freedom. In fact, religion does not necessarily apply only to institutionally regulated religion, but also includes new religions or forms of belief, such as Jehovah's Witnesses, Scientologists, Druids, the Moon sect.[146] Not only is the right to practice religion protected, but also to not-practicing religion. In the fight against religious discrimination as important factors stand out education on the harmful effects of religious discrimination and on religious tolerance, adaptation of expressing religion or belief to organizations' operating conditions, the need for public and private bodies to remain secular (separate from religion and religious organizations) or neutral.

Since religious teachings have a special significance and a thousands of years long tradition, certain exemptions are allowed in favor of religious organizations in order to align the request for the prohibition of discrimination with religious beliefs and expression of faith. According to Directive no. 78/2000 of the EU on general framework for prohibition of discrimination in the EU (art. 4, para. 2) it is allowed that the organizations based on faith or belief impose special conditions to their employees. Also, a different treatment based on religion or belief shall not constitute discrimination where due to the nature of these activities or of the context in which they take place, religion or belief of a person is a genuine, legitimate and justified request, considering the teachings of that organization. It is likely that the churches or other public or private organizations whose teaching is based on religion or belief might require from persons working for them to act in good faith and loyalty in accordance with the teachings of the organization. In practice, these include: 1) the requirements regarding behavior (in accordance with the teachings), 2) loyalty to the teaching, 3) actual employment criteria may be associated with the religious teachings of the organization (for example, that women cannot be pastors, priests, religious officials).

There are reasons when it is justified to limit the freedom of religion in the workplace, for example, to prevent injury or illness, for reasons of security, ensuring the efficient functioning of the organization of work, the best interests of children in education. In such situations, employers' actions must be proportionate.

Example: Case before the Commission for equal treatment in Austria – wearing scarf at work
A Muslim women who wore a headscarf (hijab) applied for a job as a dressmaker in a textile factory. She was selected for the job under the condition

146. See more: Handbook on European anti-discriminatory law, op. cit, pg. 108; Željko Potočnjak, Andrea Grgić, Importance of the European Court for Human Rights practice and European Court of Justice for development of Croatian anti-discriminatory law, 47. Meeting of jurists, Opatia, 2009, Barbić, Jakša; Giunio, Miljenko (ur.), Zagreb: Croatian Union of Associations of Lawyers in the economy, 2009, pg. 64.

that she does not wear the headscarf at work. She refused the job and complained to the Ombudsman for Equal Treatment. The Ombudsman found that it could be a case of direct or indirect discrimination. The company stated that the headscarf is banned for security reasons and that there is a risk that the mechanism of some machines catch a scarf and injure the employee. There were similar cases in practice and that's why in the company is prohibited in general to wear loose clothing, and is required tying hair and wearing clothes tight to the body. The opinion of Ombudsman was that a complete ban on the headscarf is not appropriate and necessary, but it may be asked to have scarf tied in a special way so that there would be no risk of the machine mechanism catching it. Commission for discrimination considered that it is justified limitation, only for security reasons.
Case of wearing scarf 1 (Austria), GawII/8/2007, GKBII/27/07 [147]

Example: Municipal Council Islington in London against Ladele
In this case the Appeal Court considered whether the applicant, the registrar, had been discriminated on the basis of religious belief when a disciplinary action was initiated against her because she refused to perform the civil marriage of same-sex couples. Her refusal was based on the Christian belief. The Appeal Court determined that this was not a case of direct religious discrimination, because unfavorable treatment towards her was not caused by her religious beliefs, but by her refusal to perform a work task. The argument that this was indirect discrimination was also rejected by the Appeal Court, stating that it was a segment of tendency of the Council to encourage equality and diversity, so such policy did not violate the right of the plaintiff to religious belief. The Appeal Court also maintained that opposite conclusion would lead to discrimination on other basis, basis of sexual orientation, accepting that the right of an individual to protection from discrimination must be measured in relation to some other right of the same kind.
Appeal Court of Great Britain , *Municipal Council Islington in London against Ladele (intervener in litigation Liberty) [2009.] EWCACiv 1357, February 12, 2010.*

Example: Work on Saturdays - Adventist case, the Czech Republic, the Public Attorney for the protection of rights
Two sisters, members of the Adventist church, had worked for social services since 1991. Before they signed the contract with the employer they had agreed with him not to have to work on Saturdays because of their religious beliefs, and to instead work on Sundays. In July 2010, the mode of work of the sisters was changed and they were ordered to work on Saturdays. They refused and were dismissed. After that, they complained about discrimination based on religion and the violation of the constitutional right to freedom of

147. Equality Law in Practice ,A question of faith: Religion and belief in Europe, op. cit, pg. 12.

religion. The Public Attorney for the protection of rights initiated the proceedings where the employer explained that the sisters had to change the mode of work because the other employees complained that sisters had a more favorable treatment at work, at the expense of others, and that the shift schedule was adapted to the sisters. The Public Attorney held that there was no direct discrimination on grounds of religion and belief of the sisters, because the dismissal was not based on religion or belief, but on their repeated absence from work. Second, there was no indirect discrimination, although the sisters were brought in a disadvantaged position, because the measures implemented by the employer were proportionate, in order to ensure that the help service operates effectively.[148]
176/201/DIS/JKV

4)DISCRIMINATION BASED ON POLITICAL AND OTHER BELIEFS, MEMBERSHIP IN POLITICAL, TRADE UNION AND OTHER ORGANIZATIONS

Political belief and organization in many countries causes many conflicts, and thus encourages discrimination at work (for example, in countries belonging to the former "socialist bloc" is not uncommon to discriminate members of the former regime,[149] in many countries, when the government is changed, members of the previous political team are discriminated, as well as employees who criticize government policies or propagate "non-regime" policy). It is not rare either to persecute and discriminate members of groups that propagate beliefs that are not strictly political (social movements and non-governmental organizations), especially if their ideas are not generally accepted or desirable in that society (e.g. anti-globalists, pacifists, environmentalists, anti-nuclear movement, feminist movement, vegans).

Major conflict in the area of labor and employment discrimination are traditionally caused by union activities and organization. Besides prohibition of

148. Taken from the brochure mentioned above Equinet, pg. 15.

149. See for e.g. verdict of ECHR regarding unfounded prohibition of employment of former KGB officers in private sector, The verdict Sidabras and Jiautas against Litvania, July 27, 2004. Published in the magazine: Human Rights, Belgrade, Octobae, no. 5, 2004, pg. 8.

discrimination[150], members and leaders of the unions are discriminated on various basis, even by the very unions. Employers discriminate members, especially union activists, because of their union activity (organizing employees, insisting on collective negotiation, organizing collective actions-strikes, boycotts, protests) or criticism they consider contrary to their business interests. In contrast, successful employers encourage trade unions and employees to get organized because institutional social dialogue with these organizations cherishes lasting social peace and positive "work environment" within the company.

The issue of non-discriminatory entitlement to these freedoms at the employer is closely related to freedom of expression and represents one of the conditions for the general democratic functioning of a society. Of course, political and trade union activities, as well as any other action, should not be at the expense of the quality of the work process, or rather the work area must not be a "testing ground" for the expression and dissemination of ideas that would lead impair successful organization of work at the employer and its smooth functioning. In this sense, for example, regulations on strike often prohibit political strike and any political action at the employer, which is not closely related to the protection of the professional and economic interests of employees.

Example: Unequal position of employees in achieving active and passive electoral right in a process of election to union authorities, Serbia
By the Decision of the Constitutional Court, no. IUo211/2008 of February 18, 2010, it was determined that the provision of Article 4, Paragraph 2, Section A of the Election rules of the Union organization of the Directorate RB "K ..." Ltd. Lazarevac of November 3, 2008, is not in accordance with the Constitution, because the challenged provisions regulate different rules for union members in the process of election into bodies of a single trade union organization, by which the members of trade union who are employed in different parts of the organization at the same employer are put in an unequal position. The disputed provision of the Electoral Rules provides, as a special condition for a person to be elected president, or union board member, a union membership of at least six months prior to the decision on calling elections. The requirement applies only to members of the trade union organizations of the Directorate RB "K ..." and not to the members of the Branch "P ...". Accordingly, the Court affirmed that determination of different conditions in the process of election for unions bodies, depending on the organizational part of the company they are employed in, puts members at a disadvantage, violating the constitutional principle of non-discrimination under Article. 21, Paragraph 3.

150. We will mention the most important standards of the ILO, ratified by Serbia too, which are particularly important in this field: Convention no. 87 on Union Freedoms and Protection of Union Rights from 1948, Convention no. 98 on the right to organize and collective negotiation from 1949, Convention no. 135 on Workers' Representatives from 1971 and Recommendation no. 143 on Workers' Representatives from 1971. These conventions are published in the Official Gazette of FNRY, no. 8/1958, and Addition to Off. Gazette no. 14/1982.

Example: Unequal treatment of employees based on union membership, Croatia
On the basis of the prohibition of discrimination, an employee who is not a member of a union which is party to a collective agreement, can achieve rights that the employer is obliged to provide to union members with whom he/she made a (new) collective agreement.
The Constitutional Court of Croatia, U-III-1458/2008, of 30. 6. 2009.[151]

Example: Discrimination (and mobbing) at work on the basis of political affiliation, Serbia
Based on the decision of the Municipal Court (upheld by the Appeal Court in Novi Sad, except regarding the amount of the award) the defendant, a public company from Novi Sad, was obliged to finally pay to the plaintiff, because of discrimination and for compensation and compensation for non-pecuniary damages, for mental suffering as a result of violated honor and reputation, freedom and personal rights, the sum of 100,000 and court fees. The plaintiff said that after the change in management, after some time (December 2004), he was assigned to less favorable (lower) activities, and afterwards fired in October 2005. During this period he stated that he was harassed and subjected to daily pressures and roll calls, addressed by the "yellow" (referring to the plaintiff's political orientation, i.e. membership in the party) and he was told that as a "yellow" he cannot stay at that job. All this caused mental and other health problems to the plaintiff (he was on a sick leave from March to September 2005, constantly anxious, afraid that he will lose his job, and he stated that his family suffered as well). After the evidence procedure the Court found that the plaintiff's allegations were accurate and reached the above-mentioned verdict.
The Municipal Court of Novi Sad, no. P-1-6/2011, since 8. 4. 2011; The Appeal Court GZ. 1-1406/11, of 9. 11. 2011.

Example no. 3: Fired for political activity, Serbia
In this case it was not discrimination, nor is a dismissal a punishment for political activity of the plaintiff. The defendant has the right as the employer to require an employee to refrain, during the working hours, from carrying out other activities, just as the employee is entitled to a political opinion However, the plaintiff has no right to violate working requirements and to perform during working hours, using his/her employer's means, some private activity (in this case, to paste promotional material of a political party that third parties may correlate with the employer). Acting in that way, the plaintiff committed a severe violation of employment obligation, so the defendant justifiably fired him.
Supreme Court, revr-251/07 of 13. 6. 2007.

151. From: I. Crnić, op. cit, pg. 13.

Domestic legislation (example): The Constitution, Art. 55: "(1) The Constitution guarantees freedom of political, trade union or any other association and the right to stay outside any association ... (4) The Constitutional Court may ban only association which is aimed at the violent demolition of the constitutional order, violation of guaranteed human or minority rights, inciting racial, national or religious hatred." The Anti- Discrimination Law ("Discrimination based on political or trade union membership "), Art. 25: "(1) The Law prohibits discrimination based on political convictions of persons or group of persons, or for belonging or not belonging to a political party or trade union. (2) It shall not be considered discrimination from paragraph 1 of this Article the restrictions related to performers of certain state functions, nor the restrictions necessary to prevent advocating and pursuing fascist, Nazi and racist activities, as prescribed by law." Art. 188 of the Labor Law: "(1) An employer cannot terminate the employment contract, nor in any other way put in a disadvantaged position a representative of the employees during his term in office and one year after termination of his term in office, if the representative of the employees acts according to the law, general act and the employment contract, as follows: 1) to member of the Council of employees and employees' representative in the executive or supervisory boards at the employer, 2) to the president of the trade union at the employer, 3) to the appointed or elected trade union representative. (2) If the representative of the employees under paragraph 1 of this Article do not act in accordance with the law, general act and the employment contract, the employer may terminate his/her contract of employment ... (4) The employer may, with the approval of the ministry, cancel the contract to the representative of employees under paragraph 1 of this Article, if he/she refuses a job offer within the terms of Article 171, Paragraph 1, item 4, of this Law. "

5)DISCRIMINATION BASED ON GENDER IDENTITY, SEXUAL ORIENTATION AND APPEARANCE

Relatively recent grounds for discrimination at work field include gender identity, sexual orientation (affiliation) and appearance. Discrimination on these grounds is prohibited by many documents and recent national laws. These concepts partly overlap and are associated with sex (gender).

Sexual (gender) identity does not necessarily match with the natural gender. It considers "a deep inner and personal sexual experience of any person which may, but does not have to depend on the gender attributed at birth, and includes a personal understanding of the body (which may include a freely elected change of physical appearance or function by medical, surgical or other means), and other

gender characteristics such as dressing, speech and behavior".[152] People whose sex by birth does not match with their sexual identity, or is inconsistent with their body structure are called "transsexuals."

Sexual orientation (affiliation) is related to the ability of each person for profound emotional, love and sexual attraction or having intimate and sexual relations with persons of the opposite (hetero) or the same sex (homosexuality), or with persons of both sexes (bisexuality).

Discrimination based on appearance is usually related to the way of dressing and other elements of physical appearance which are beyond common conventions and standards, that is the dressing typical for the opposite sex.

According to EU Directive 78/2000 on the general framework for prohibition of discrimination (Article 1 and 2), persons of different sexual orientation should not suffer any form of direct or indirect discrimination or abuse and harassment, both in access to employment (which includes the procedure of selection of employees), and during the employment. In our Anti-Discrimination Law (Art. 13, para 1) discrimination based on gender identity and sexual orientation is one of the severe forms of discrimination. In practice, most often cases are the refusal of employment on the basis of gender or sexual orientation, as well as dismissals motivated by this reason explained by other (false) motifs. There are four categories of people discriminated on this basis: 1) people of homosexual orientation 2) persons of transsexual orientation, 3) persons of bisexual orientation, and 4) individuals who do not follow the usual conventions of dressing in relation to gender. Many of these cases were the subject of dispute before the European Court of Justice and the European Court of Human Rights, and owing to their decisions, the status of this population has improved to a great degree recently[153].

Example: Change of gender, ECJ, Richards case
In Richards case, the claim was submitted by a person who underwent sex-change operation from male to female. The person wanted to submit the claim for pension at her 60th birthday, that is, at the age when women realize their right to pensions in the UK. The authorities rejected this person's claim stating

152. This definition is taken from the „Principles of Yogyakarte on application of International Law on human rights regarding sexual orientation and gender identitety", 2007, available at www.yogyakartaprinciples.org/principles_en.htm. The principles were accepted by indipendant body of experts on International Law on human rights . Taken from: Handbook on European anti-discriminatory law, op. cit, pg. 88.

153. See for e.g. cases P v S and Carnwell Country Council – ECJ (unjustified dismissal of transsexual manager), R v Ministry of Defence, ex p Smith – ECJ (dismissal of homosexual members of British army based on direct discrimination) and Smith v Safewayplc – ECJ (dismissal because of sexual orientation) in: R. Wintemute, Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes, The Modern Law Review, Blackwell Publishing, Vol. 60, No. 3 (May, 1997), str. 334–359.

that the applicant was not treated more unfavorably than other persons in the similar situation. The authorities claimed that in this case, the true parallel is "man", because the applicant spent most of her lifetime as a man. The Court of Justice decided that the true parallel should be "woman", because the change of gender is enabled by domestic legislation. Therefore, the applicant was treated more unfavorably than other women, because she was imposed a higher age limit for pension.
ECJ, Richards against the Ministry of Labor and Pension Insurance, case C-423/04 [2006.] ECR I-3585, April 27, 2006.

Example: Rejecting employment of a person based on sexual orientation, Sweden
In the case referred to the Swedish Ombudsman against discrimination based on sexual orientation ("homO"), a heterosexual woman filed a complaint on discrimination based on sexual orientation, because she was refused for a job at the position of staff for information on safe sex at the Swedish National Association for Lesbian Rights , Gay and Transgender Persons. In the institution she was told that they wanted to hire a self-indentified homosexual or bisexual men in order to facilitate equal communication with users. It was found that, for that job, she cannot require to be compared with homosexual or bisexual men (and thus she cannot prove less privileged treatment), and that in any case discrimination can be justified on the basis of specific conditions of employment.
HomO (Sweden), decision from August 21, 2006, file no. 262/06.

Example: Dismissal due to sexual orientation, the Sunders case, Great Britain
An employee who worked in maintenance at a children's camp was fired when the employer found out that he was gay. He complained because he thought he was able to keep his private life separate from work, and a psychiatrist confirmed that his sexual orientation would not cause a jeopardy to children. The court, however, upheld the legality of the employer's decision, because the majority of employers would pay attention to that when it comes to children.[154]
Case Sunders v. Scottish National Camps Ltd (1980), IRLR 174

154. Authors of the work from which we overtook this decision consider this decision an example of stereotypes and we believe the court opinion would be different today. See more: R. W. Painterand K. Puttickwith A. Holmes, op. cit, pg. 240.

Example: Rejection of changing the documents in the case of change of gender, Serbia

Constitutional Court decision no. UŽ - 3238/2011 approved a constitutional complaint X and determines that Management of the municipality Z, by passing the conclusion on the lack of subject-matter jurisdiction, failed to decide on the request of the complainant to change the data on sex and thus violated his right to dignity and the free development of personality (Art. 23 of the Constitution and Art. 8 of EK), and the principle of non-discrimination under Article 21 of the Constitution. The applicant states that he was born in 1949, as a person with a pseudo-hermaphroditism, that is, the physical characteristics of the female, but the male gender identity. He was diagnosed with gender identity disorder, and in December 2010,he had the surgery of gender adjustment. In March 2011, he submitted to registrar's office a request "for sex correction in birth certificate," which was rejected because of the lack of subject-matter jurisdiction. The Constitutional Court stated that the essence of the constitutional complaint allegations on violation of the prohibition of discrimination is in the fact that the applicant is not legally recognized a change of gender, because after the sex-change operation it was not possible to carry out the change of data on gender in the civil register of births. Such a disharmony between the factual and legal state of affairs leads to a series of negative consequences on the life of the person. They are expressed in the applicant's inability to regulate his own status (to obtain official documents with the new sex determination), to live his life in accordance with his gender identity and accomplish all rights that the legal system of the Republic of Serbia recognizes on the basis of gender. These are situations when the gender is legally important, that is, when the difference is made between men and women in accomplishing certain rights (such as conditions for age pension and other rights from health, pension and disability insurance, getting married and all family-law relations), thus violating his human dignity and the right to free development of personality.

Constitutional Court decision no. Už - 3238/2011

Domestic legislation (example): The Anti-Discrimination Law, Art. 21("Discrimination based on sexual orientation"): "(1) Sexual orientation is a private matter and no one can be asked to publicly declare themselves on their sexual orientation. (2) Everyone has the right to declare themselves on their sexual orientation, and discriminatory treatment because of such declaration is forbidden. "

6) DISCRIMINATION BASED ON SOCIAL ORIGIN, BIRTH, STATUS, AND FINANCIAL STATUS

For this group of discriminatory grounds it is about the status of an individual assigned based on the inherited, social or financial ground (either based on belonging to a particular caste, poor social class, tribe or group of people with common features that are treated as less valuable) or by birth (whether born in or out of wedlock, or adopted, discrimination based on ancestry, for example, because of being convicted or political affiliation of ancestors). This type of discrimination is generally intersected with discrimination based on race and ethnicity.[155] Although such discrimination is prohibited, some of these characteristics of individuals and groups in many countries still represent the dominant factor based on which their economic, social and employment status is defined. Prejudice and institutional barriers hinder their employment, social and geographical mobility. The population in this category is often illiterate and has low education, so that discrimination at work is always followed by the impossibility of acquiring quality, or education of any kind. The fight against such forms of discrimination is led primarily through the elimination of prejudices and stereotypes in society.

This form of discrimination is mainly present in underdeveloped communities, but it exists in developed ones, when the discrimination is done indirectly, in a less visible way. Discrimination by social origin and birth is particularly prevalent in Asia (India, Nepal), Africa (Kenya, Somalia, Ethiopia, Nigeria), Middle East (e.g. Yemen). For example, in India the caste of "untouchables" are discriminated by allowing them to perform only heavy, dirty and poorly paid jobs. In Nepal, the discriminated group are Dalits (who make up 13% of the population). They are unacceptable for any work that involves water or food, because they are considered dirty and cannot enter houses that do not belong to Dalits. In China, the treatment of the rural population is problematic, for whom it is very difficult to move from a village to town (due to residence registration system "Hukou", which has been applied since 1958), and even when that happens, this class of people is discriminated regarding choice of jobs and working conditions. Out of approximately 150 million people from rural areas, only 40% have a permanent or temporary permission to stay and work in the city, due to which the rest of people, who are called "floating population", work illegally, and perform the most difficult jobs (95% of them work illegally).[156] In Nigeria, the inhabitants are still called "nobility" and "non-nobility", "masters

155. See more: Handbook on European Anti-DiscriminatoryLaw, op. cit, pg. 110; Equality at Work, op. cit, pg. 34.

156. See more: Equality at Work, op. cit, pgs. 34–36.

and slaves", so it could be said that slavery in a way still exists ("active" and "passive" form of slavery is noticed – active considers direct, and passive indirect discrimination).[157]

Those belonging to certain poor classes in our country have the treatment similar to these social groups, especially if they come from certain ethnic groups (e.g. Roma) – for them it is very difficult to find employment, and if they are employed, these are tough jobs, where they have the "second-class "treatment. Special attention should be paid to eradication of this form of discrimination (fight against prejudice, education, active employment policy), because it is deeply rooted and often transmitted from generation to generation. It should be noted that in Serbia there used to be discrimination based on ancestry. For a long time, a less favorable treatment regarding employment and promotion was given t to descendants of the "bourgeoisie" from before the Second World War, or descendants of those who were assisting the occupying forces, as well as to politically undesirable persons (e.g. children of "Information Bureau officers"). Although this type of discrimination is largely eradicated, it should be taken care that it does not come back in a new form.

7)DISCRIMINATION BASED ON AGE, MEDICAL CONDITION, GENETIC CHARACTERISTICS

AGE

The group of more recent, and more spread forms of discrimination includes discrimination based on age. Discrimination based on age exists when a person or group of persons is treated unequally or is denied certain right only because of personal characteristic - age. This type of discrimination is related to two categories: 1) young workers (who are most discriminated upon employment) and 2) older persons (discrimination in employment, promotion, training, dismissal, retirement).[158] This is a type of discrimination which is not easy to detect and is even more difficult to eliminate. The roots of this form of discrimination in society are getting stronger because of increased unemployment (which imposes the growing competitive-

157. See more: Equality at Work, op. cit, pgs. 34–37

158. As one of the examples regarding pensions, it is mentioned that discrimination against older people in achieving the general right to retirement, due to their places of residence is common (if they worked in one sttate and live in another), which is why a large number of elderly people live in extreme poverty. Examples of discrimination based on age see in: Dynamic Interpretation European Anti-Discrimination in Practice IV, Equinet, Europeannetwork of equalitybodies, Brusells, 2009, pg. 31, and DynamicInterpretationEuropean Anti-Discrimination in Practice III, Equinet, European network of equality bodies, Brusells, 2008.

ness of the workforce), the struggle for competitiveness in a globalized economy and the "aging" of the population.[159] Because of the massive prevalence of this discrimination a special name for it appeared - "ageism" (from the English word "age"). According to the narrow definition, this phenomenon involves discrimination against older people based on age. By general definition, it refers not only to the elderly but also to the young, and implies the existence of the stereotype that people's biological characteristics change with age. This stereotype encourages individuals and organizations to a particular behavior toward these people - someone is "too young" for the job (not competent enough, has less expertise, lacks working experience), whereas someone is "too old" to work (inefficient, slow, makes more errors, is less motivated and interested in working and learning, is inflexible, opposes changes, too demanding regarding working conditions).[160]

Older workers

Older workers, who are not yet at the age when they can retire, are more and more faced with the problem of keeping the existing and finding a new job. In a number of countries, , participation of older workers in the labor force has been declining in recent years. That is the result of an early exit of older people from the labor market due to: 1) the mass dismissal of redundancy workers, 2) premature and early retirement, 3) health problems of older population, 4) discrimination at work against older workers. Reasons for this state of affairs are multiple, partly objective, but more often are subjective and unjustified. Society generally views the elderly as less capable for work, without assessing their individual skills (stereotypes). The economic reasons for the "ageism" include the fact that the older workforce costs employers more (bonuses for seniority, pension and health insurance). Also, recently a business policy has been introduced which points out high productivity, and therefore avoids older workers, who are considered to be less efficient. Sometimes there is a problem of an objective nature, because over time it comes to the "burning out" of older workers due to stress, which adversely affects their abilities and causes frequent absences from work.

Still, discrimination against older workers is inhumane (older people have the right to a decent live and dignified living conditions),[161] economically non-expedient (as it overburdens the state social funds) and often unjustified. Chronological age does not always match the actual (biological) age, so age groups are not homogeneous. Disregarding particularity leads to discrimination. It is often forgotten that

159. According to projections of the Serbian Statistical Offices, the life expectancy in Serbia will rise for men from 70.5 to 78.5 years and for women from 75.7 to 82.8 years during the period 2047-2052

160. Malcolm Lewis Johnson, Vern L. Bengtson, Peter G. Coleman, T. B. L. Kirkwood, The Cambridge Handbook Of Age And Ageing, 2005, pg. 338 and 339

161. See more: UN Commitee on Economic, Social and Cultural Rights, General comment no. 6: Economic, social and cultural rights of older people, 1995, document no. E/1996/22.

for certain jobs experience is necessary, so that the work cannot be carried out successfully without the older and more experienced workers. Older workers cherish "corporate knowledge" and a balance of youth and experience is important for corporate success (the so-called age-balanced workforce).[162] That is why many successful companies recognize the need to retain a highly trained senior staff, which is not created overnight.

Age discrimination in Serbia

According to the research of the foundation Centre for Democracy (publication "Older workers - some at work and some without either work or pension"), age discrimination is the third by frequency, behind racial discrimination and discrimination by sex: out of one million unemployed people in Serbia, over 190,000 is older than 50, and over 120,000 are unemployed women in their fifties. The generation of people aged between 40 and 50 carried the biggest burden of transition and economic shocks; they constitute more than a half of people fired. Over 90% of people aged between 50 and 60 gave up looking for work, 37% of unemployed would do anything, while 83% of older unemployed is not interested in advanced training. All divorced persons, participants in the project, stated the job loss as a main reason for divorce. [163]

According to statistical projections, by 2050, 60% of the labor force in Serbia will be older than 65. In half a century, the share of young people will be literally halved. [164]

Measures for combating discrimination by age include: 1) the fight for equal treatment of older persons at work and in the entire society, as well as of young workers (campaigns, anti-discrimination legislation) and 2) the measures for respect for age at work (adaptation of older employees to new conditions, adaptation of conditions to older and younger workers, professional development of older workers and "refreshments of knowledge" in order to accomplish proper performance, measures to encourage the employment of older and younger workers). One of the measures applied in the world is to financially discourage employers regarding early retirement of workers.

162. E.g. in 1999 in Great Britain was made"The Code of practice on age diversification at work". See more: ColinDuncan, Assessing Anti-ageism Routes to Older Worker Re-engagement, Work Employment&Society,March 2003, vol. 17 no. 1, pgs. 101, 111.

163. Taken from the text: Hopelessness of unemployed Serbian workers, Mena Konsalting, April 20, 2012 from website <http://www.mena.rs/>. Quoted study see: Srećko Mihajlović, Vojislav Mihajlović, Older workers – some at work, some without work and pension, Center for democracy, at the website <http://www.centaronline.org/postavljen/60/Stariji_radnici_brosura.pdf>,pg. 39, 79.

164. Večernje novosti Online, Discrimination: Old age suffering, July 2, 2012, <http://www.novosti.rs/>.

The European Union was among the first to detect and prohibit age discrimination at work (Directive no. 78/2000), and in 2012, declared the "European Year for Active Ageing and Solidarity Between Generations".[165] However, sometimes age cannot be ignored. According to Art. 6, para 1 of this directive, differential treatment based on age does not necessarily constitute discrimination if it is justified by a legitimate aim, for example, by advancement of employment and vocational training, if the means for achieving those goals are appropriate and necessary. Such treatment, according to Art. 6, para. 2 may be related to: a) establishment of special conditions for the availability of employment and vocational training, employment positions and occupation, including dismissal and payment terms, for young or older workers in order to promote their vocational integration or protection, b) determination of minimum requirements regarding age, professional experience or seniority in service as conditions for employment or giving certain benefits related to employment, c) determination of the minimum age for recruitment based on requirements for the work position or based on the need for appropriate period of employment before retirement. Certain age limits are allowed when it comes to the right to a pension or disability pension. For example, making a difference regarding age of employees is allowed in order to protect the health and safety of minors or elderly workers, maintenance of the planned level of employment, if there is a requirement regarding training for a specific job (if it is a long-term training, it justifies a request for employment of younger workers) if there is a need for a reasonable period of work before retirement (that would justify refusal of employment of people close to retirement), if there are real needs of the employer and economic work factors (e.g. requirements of efficiency and type of work), if the costs of non-discrimination are too high, if the market demands require so (a shortage of certain profile of workers).[166]

Example: Required retirement age, ECJ, Palacios de la Villa case
In this case, the European Court of Justice for the first time got a chance to consider the area that is governed by Article 6 of the above-mentioned Directive, examining its application in the context of the required retirement age. Concluding that the required retirement age is under the effect of Article 6 of the Directive, the ECJ considered whether it can be objectively justified. Thereby it realized the following important facts: first, the original measure had been introduced in order to open opportunities in the labor market in the economic conditions of high unemployment; second, transitional mea-

165. See more: Tackling Ageism and Discrimination, Equinet, the European Network of Equality Bodies, Brussels, Belgium, 2011, <http://www.equineteurope.org/age_perspective__merged____equinet_en.pdf>.

166. Ivana Grgurev, Discrimination based on age in employment – analysis of Croatian legislation and law practice acquis of EU, Collected Works of international scientific conference "Social work and the fight against poverty and social exclusion - professional orientation to the protection and promotion of human rights, Faculty of Mostar, B and H, 2010, publ. in Zagreb 2011, pgs. 32, 40.

sures were obviously introduced at the initiative of trade unions and employers' organizations for better generational division of labor; third, in cooperation with trade unions and employers' organizations the Law 14/2005 was re-enacted which now expressly requires that the measure be "linked to goals according with the employment policies stated in the collective agreement"; fourth, the clause of the collective agreement on the required retirement age was introduced "in the interest of stimulating employment." After considering these facts, the ECJ found that "in the context in which it was established, ... the goal of the transitional provision was to regulate the local labor market, primarily to control unemployment." Based on this, the ECJ decided that the collective agreement meets the legitimate aim. Accepting the existence of a legitimate aim, it yet remained to examine whether the measure was "appropriate and necessary" to achieve that goal.
ECJ, Palacios de la Villa against Cortefiel Servicios SA, case C-411/05 [2007.] ECR I-8531, October 16, 2007.

Example: Unequal severance pay, MacCulloch case, Great Britain
In the case MacCulloch, the Court examined the pension retirement system, i.e. the amount of severance pays that were related to age and years of service. The system gave to older employees with more years of service the right to much higher severance pay compared to younger, newer employees. The British Appeal Court for labor litigations generally accepted that it could be objectively justified as a way of remuneration of older workers' loyalty. They received higher severance pay in view of the lack of opportunities for them at the labor market, and as a stimulus to make way to younger colleagues. In this case the issue of objective justification was examined and proportionality of measures in favor of one or the other age group.
British Appeal Court for labor litigations (United Kingdom), MacCulloch against Imperial Chemical Industries plc [2008.] IRLR 846, July 22, 2008.

Example: Employment discrimination on the basis of age, Serbia
In the proceedings before the Commissioner for Protection of Equality, by the complaint of LJ.B.S. against "CHC-Clinic" regarding employment discrimination on the basis of age (op. no. 110/2011. from 12. 9. 2011), the Commissioner gave the opinion that the ad of "CHC – Clinic" made a violation of equal opportunity for employment to persons over 35 years of age, which made a direct discrimination on grounds of age in the field of labor, prohibited by articles 6, 16 and 23 of the Anti-Discrimination Law. On June 28, 2011 the complainant submitted a complaint to the Commissioner in which she alleged that she was discriminated in the recruitment process for the employer K ... based on age. According to the allegations, the complainant was orally informed by the National Employment Service that the Clinic seeks several nurses as a replacement, aged up to 35 years of age. The complainant came to the interview with

the employer and she was presented a condition relating to the age limit, because the complainant was about to turn 42. Although she left a very positive impression, she did not get the job. The complainant, under other conditions of the competition could be highly ranked, because her average grade point was 4.81 (and 3.5 was required in the ad), had passed the professional exam and had 10 years of work experience. In its response the Clinic stated that it was looking for staff that would work in the toughest section, with patients in the severe treatment, and that through years of practice they noticed that younger people carry out their duties more easily and effectively. Such treatment, in the opinion of the Commissioner, violated the principle of equal opportunities for employment and violated the principle of non-discrimination of persons seeking employment from Art. 18 of the Labor Law.

Example: Justification of not sending worker to advanced training, Croatia

The court found that a complaint of a worker on discrimination regarding age was unfounded, because sending the plaintiff to education and training for work on other jobs did not have a purpose. The plaintiff, who was 59 years old and had 36 years of service, was denied further education. The Croatian Supreme Court considered that the decision was made on the basis of a realistic evaluation of results of a possible advanced training. [167]
The Supreme Court of Croatia, Revr.-90/06 of 4. 7. 2006.

Domestic legislation (example): The Anti-Discrimination Law, Art. 23("Discrimination on the basis of age"): "It is forbidden to discriminate a person on grounds of age. The elderly have the right to dignified living conditions, without discrimination, in particular the right to equal access and protection from neglect and harassment in the health care and other public services."

HEALTH CONDITION AND GENETIC CHARACTERISTICS

Health status and genetic characteristics (e.g. predisposition for the occurrence of certain diseases) are among the atypical, but not so rare grounds for discrimination, whose number in recent years, according to ILO reports, has been growing. In many countries, employees are discriminated regarding access to employment and even at work because of certain diseases (especially infectious diseases, HIV/AIDS and mental illness) or pregnancy. In this domain, discrimination is often committed by asking the employee during the employment interview about possible hereditary and other diseases and pregnancy, or persons who applied for work or the

167. From: Ivica Crnić, op. cit, pg. 13.

employees are referred to obligatory blood tests and other medical examinations. When a disease is detected, medical anomalies or pregnancy or when the employee begins to have frequent absence from work due to health issues, discrimination and dismissal are starting.[168] In Great Britain, according to the report of the Commission for equal opportunities from 2003, 30, 000 women per year lose their job due to pregnancy.[169] For all these, these forms of discrimination are prohibited by many legislations and international standards. According to the ILO Convention on termination of employment at the initiative of the employer no. 158, Art. 5, para.1, a l. d), absence from work due to maternity leave will not be considered as a good cause for termination of employment. Also, temporary absence from work due to illness or injury is not a valid reason for termination of employment (Art. 6, para 1). Lately, many countries have started to prohibit medical testing of employees when it is not conditioned by the needs of job and testing by the health features that have no connection with the performance of a job (for example, in the U.S., testing for HIV/AIDS is prohibited in many states).

Example: Discrimination based on health condition upon employment, Cyprus
In the case brought before the Cypriot body for improvement of equality, the applicant, a person with a visual impairment (male) applied to do the entrance exam for the civil service. He asked for additional time to complete the exam, so he was given an extra 30 minutes, but that time was deducted for him from the recess everyone was entitled to. The Body for improvement of equality held that there was no standardized procedure to determine when candidates with special needs should be provided "reasonable accommodation" and that in this case it was not done enough to create the conditions in which the particular candidate might justly be competitive with the others. The same body recommended that the state should establish a team of experts to consider cases that require appropriate adjustment of circumstances to individual cases.
Body for improvement of equality (Cyprus), ref. A.K.I. 37/2008, October 8, 2008.

Domestic legislation (example): The Labor Law, Art. 26, para 3: "An employer must not condition the employment by the test for pregnancy, except in the case of work for which there is a substantial risk to the health of women and a child, determined by a competent medical authority." And Art. 183: "A justifiable reason for termination of employment, in terms of Article 179 of this Act shall not be considered: 1) temporary absence from work due to illness, accident at work or occupational disease; 2) maternity leave, leave for child care and leave for special child care ... ". The Anti-Discrimination Law, Art. 27 ("Discrimination on the grounds of health"): "Discrimination of persons or groups of persons with regard to their

168. On this forms of discrimination in USA see: R. W. Painterand K. Puttickwith A. Holmes, op. cit, pg. 240

169. Equal Opportunities Comission: Pregnancy Discrimination: EOC investigation, www.eoc.org.uk, to: Equality at Work, op. cit, pg. 9.

health, as well as of their families is prohibited. Discrimination from the paragraph 1 of this article, exists particularly if a person or group of persons because of their personal characteristics are unjustifiably refused to be provided medical services, are set special conditions for the provision of health services which are not justified by medical reasons, is rejected the diagnosis and is withheld information about the current state of health, the measures taken or intended for treatment or rehabilitation, as well as harassment, insults and humiliation during their stay in a medical institution. "

8)DISCRIMINATION BASED ON DISABILITY

Persons with disabilities are among the most vulnerable categories in society and often suffer discrimination, sometimes on several grounds (e.g. on the basis of disability and old age, disability and gender, disability and ethnicity). Discrimination against disabled people is basically discrimination based on health status, but this kind of unequal treatment eventually got special treatment because of the large number of this category, their "vulnerability" and centuries of discrimination. The United Nations estimates that there are more than 500 million people with disabilities in the world, of whom 70% have no access to the services they need.[170]

Even the name used for this group of people (disabled, handicapped persons, persons with handicap) may in itself contain hidden discrimination. So, as of lately, it has been considered that the most appropriate expression is person with disability, which highlights that the characteristic of disability does not apply to the whole person.[171]

The concept of discrimination against persons with disabilities
"Discrimination on the basis of disability" means any distinction, exclusion or restriction made on the basis of disability which has the purpose or effect of limiting or nullifying the recognition of, entitlement to, or implementation of, on equal basis with others, all human rights and fundamental freedoms in the sphere of politics, economy, society, culture, civil rights, or some other sphere. It includes all forms of discrimination, including denial of reasonable accommodation." (UN Convention on the Rights of Persons with Disabilities, 2006, Art. 2).[172]

170. See more: Committee on Economic, Social and Cultural Rights, General Comment no 5, Persons with disabilities (Eleventh session, 1994), UN, New York, 1995, Doc. E/ 1994/22, available at website adress http://www1.umn.edu/humanrts/gencomm/epcomm5e.htm/, стр. 3.

171. This term entered in wider application after addoption of Standard rules on equation of opportunities for people with disabilities, UN, 1993.

"Discrimination based on disability is any distinction or unequal treatment, or omission (exclusion, restriction or preference) in relation to individuals or group, as well as members of their families or persons close to them, openly or hidden, that is based on the grounds of disability or in connection with it. "(Law on Prohibition of Discrimination Against Persons With disabilities, Art. 3, para 2).

Modern approach to this population implies a tendency for position of persons with disabilities not to be based on compassion and mercy, but to allow them so-called social integration - to lead a normal and active life as all other members of society. In this sense, according to Art. 1, para. 2 of the UN Convention on the Rights of Persons with Disabilities, persons with disabilities are defined as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers might hinder their full and effective participation in society on an equal basis with others." In this definition it was applied so-called social approach to the definition of persons with disabilities, which includes along with health elements, the elements of social integration. Unlike the previous , "medical approach", which was a bit discriminatory towards disabled people with minor health impairments (many of them had difficulties in functioning, but were not considered disabled), the social approach is focused on removing the "obstacles" which people with disabilities face in their daily lives.

In order to achieve social integration and avoid discrimination of people with disabilities, it is very important for these persons to be exposed to unlike and unequal treatment regarding employment and work. The existing forms of discrimination at work based on disability are very varied, and include, for e.g. refusal of hiring people with disabilities or persons who take care of the person with disabilities, setting conditions for employment so as to deny people with disabilities, although the objective needs of work do not require that, setting lower income for person with disabilities regardless of performance, discrimination in promotion, refusal to adapt the workplace etc.

People with disabilities often cannot find job under regular conditions. In order to facilitate their access to employment, the state is expected to implement measures encouraging employers to hire people with disabilities in the ordinary working environment and if necessary to adjust the working conditions to the needs of people with disabilities.[173] Encouraging employment of people with disabilities in many countries is implemented by measures of affirmative action (e.g. employment quotas, tax and other incentives for employers to hire people with disabilities). These measures were developed for the first time precisely in this area (in the U.S.). Besides, some measures must be taken outside of working relationships in order to eliminate the obstacles in communi-

172. Ratified in: Off. gazette RS, International agreements, no. 42/09.

173. See e.g. art. 15, of Revised European Social Charter

cation and mobility of persons with disabilities (e.g. to allow them access to buildings, transport, housing, cultural, sports, educational and other activities).

The EU has advanced the most in the protection against discrimination in this area too. The prohibition of discrimination at work of people with disabilities in the EU is regulated by the mentioned Framework Directive no. 78/2000. This Directive Art. 5, subtitle "Fulfilling the needs of people with disabilities") requires member states to ensure adequate fulfillment of needs of people with disabilities. It means that employers are going to take appropriate measures to make it possible for people with disabilities to have jobs available, to participate in training, to be promoted etc. Article 7, para 2 of the Directive stipulates that the principle of equal treatment shall not prevent Member States to implement or adopt provisions on the protection of health and safety at work, or measures designed for better integration of people with disabilities into the work environment (affirmative action and proper adjustment of the workplace). In practice there were uncertainties about what "proper adjustment" of the workplace means. According to the Court of Justice, interpreting the community standards amounts to the tendency to provide for a disabled person in a particular situation adequate, accessible, working conditions, if that is not going to cause to the employer a disproportionate burden, i.e. excessive costs (so-called reasonable accommodation).[174]

Example: The concept of person with disability, ECJ, ChaconNavas case, Spain

In this case, the Court defined the term person with disability, as that term was not defined by Directive no. 78/2000. For the implementation of the Directive on equality in employment, disability is defined as a "limitation arising in particular from physical, mental or psychological impairments and which hinders the participation of the person in his/her professional life." Applying this definition to Mrs. Navas, the court found that she was not disabled at the time of filing the complaint to Spanish courts for discrimination based on disability, after being fired for absence from work due to illness for a period of eight months. The ECJ held that there is a clear distinction between disease and disability, where the disease is not included in the Directive's protection area. The duration of a disease of 8 months is not considered a disability because, according to the Court, the disability is expected to be "a state, likely to be prolonged."

ECJ, SoniaChacónNavas v EurestColectividades, SA Case C-13/05, July 11, 2006

174. See more: Disability and Non-Discrimination Law in the European Union, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Brussels, 2009, str. 8. i 37

Example: Discrimination regarding employment, France
The applicant using a wheelchair submitted a complaint to the French court against the Ministry of Education for non-appointment to the position. His job application was ranked third on the list of candidates. When the first two candidates turned down the job offer, job was offered to a fourth candidate, and not to the applicant. Instead, he was offered a position in another department with customized access for wheelchairs. The state justified this decision by stating that it was not in the public interest to invest funds in the modification of a space in order to meet the requirement for "reasonable accommodation job." The court decided that the Ministry of Education failed to fulfill its duty of reasonable accommodation of a disabled person.
Administrative Court in Ruan (France), Boutheiller v. Ministère de l'éducation, verdict no. 0500526-3, June 24, 2008.

In order to protect this category from discrimination, the Serbian government passed a special regulation in 2006, the Law on Prevention of Discrimination against Persons with Disabilities. The protection of people with disabilities is also envisaged by the Law on Prohibition of Discrimination (Article 26), according to which a special judicial procedure adapted to discriminatory cases is applied to the cases of discrimination of people with disabilities , governed by that law. The Law on Vocational Rehabilitation and Employment of Persons with Disabilities from 2009 should also contribute to the elimination of problems in the area of employment of persons with disabilities .[175] According to this law people with disabilities can be employed under special conditions that apply to employment at the employer along with adaptation of the job or the workplace. An important new element is the obligation of employers to hire persons with disabilities (Article 24), according to which every employer with at least 20 employees must have in employment a certain number of people with disabilities. If not, the employer pays a penalty equal to a triple minimum wage determined in accordance with the work rules for each person with a disability that he/she did not hire.

Situation in Serbia
In this area, the situation is far from satisfactory. In Serbia persons with disabilities constitute about 6.5% of the population (according to some research, there are about 700, 000). Of these, 300,000-330,000 are of working age (between 15-65 years of age), but only around 13% of them are employed. This is three times less than in the EU (where 49% of women and 61% of men with disabilities are employed). Since the adoption of the Law on Professional Rehabilitation, 5,290 people found job and 2,507 employers paid the penalty for failure to fulfill the obligation to employ people with disabilities. Besides, according to the data, only 1% of persons with disabilities have their own place, and 70% are poor. Close to 85% of children with disabilities is outside the educational system, which means that in the future it is going to be difficult for them to achieve the right to employment. [177]

175. Off. gazette RS, no. 36/2009.

176. See more: http://ec.europa.eu/eurostat (2010).

177. See more: The Ombudsman – Report for 2007, and also Report for 2008 (pgs. 15 and 48), 2012 (pg. 108). Reports are published in Off. Gazette RS, and could also be found on the internet.

Domestic legislation (example): The Law on Prevention of Discrimination against Persons with Disabilities, Art. 6: "(1) The forms of discrimination are direct and indirect discrimination as well as violations of the principle of equal rights and obligations." Art. 22: "Disability discrimination in employment is considered to be: 1. Failure to employ disabled person or the companion of person with disabilities because of a disability, or because of the characteristics of the companion of person with disabilities; 2. arranging special medical conditions for employing people with disabilities, unless special health conditions to perform certain tasks are determined in accordance with the law, 3 previous psychophysical verification of capabilities that are not directly related to the activities the employment is based on; 4. refusal to make technical adaptations to the workplace that enables efficient work of persons with disabilities, if adaptation costs are not borne by the employer and not excessive in relation to the profits realized by the employer employing people with disabilities." Art. 23: "Disability discrimination in employment does not include: ... 2. taking incentive measures for faster employment of persons with disabilities in accordance with the law governing the employment of people with disabilities." Art. 24: "Disability discrimination in the achievement of labor rights is considered to be:1. determination of lower earnings due to disability of the employee, regardless of performance; 2. the setting of special working conditions to employees with disabilities, if these conditions are not directly derived from the requirements of the job; 3. the setting of special conditions to employee with a disability for using other rights stemming from employment that belong to every employee. " Art. 25: "Disability discrimination in the achievement of labor rights is not considered to be rewarding an employee according to work performance."

9) DISCRIMINATION BASED ON OTHER ACTUAL OR ASSUMED PERSONAL CHARACTERISTICS

As already mentioned, the area of work is characterized by immense diversity when it comes to the motives and forms of discrimination. In addition to the usual grounds for discrimination, cases of new and atypical reasons for discrimination are constantly occurring at work such as seniority, personal status, performing the function (or military rank), whether the person worked for the state or private employer, criminal record, marital status (or common law marriage), out-of-wedlock births (paternity), family obligations, the intention to have offspring, whether the person is a smoker or not,[178] obesity, whether suffering from high blood pressure or high cholesterol, alcohol

178. Among other things, many companies lately are refusing to hire smokers or charge them higher premiums for health insurance. Companies justify that by higher costs. In fact, research in the U.S. has shown that smokers cost employers more in 1714 dollars annually. Also, smokers are more frequently absent from work due to illness and make more breaks than non-smokers. It is also alleged harmful effects of smoking on passive smoking.Vidi više u: UrsulaFuri-Perry, Butting In: Employers Penalize Smokers and Overweight Workers, 8. Nov 2004, Employer#Crossing,<http://www.lawcrossing.com/article/416/Butting-In-Employers-Penalize-Smokers-and-Overweight-Workers/#>.

consumption, residence, specific habits related to dressing..[179] Often these cases broadly may be subsumed under some of the standard grounds for discrimination, but sometimes they extend beyond that, due to combination of specific motives and circumstances at work. In order to avoid discrimination at work, such situations must be treated separately. There is a tendency not to consider such cases as discrimination, since they cannot be directly associated with conventional prohibited grounds for discrimination, in which process it is forgotten that most legislations prohibit discrimination related to "other features," "other personal characteristics", "on any grounds" (open discrimination clause). Such a narrow understanding of the effects of prohibition of discrimination is wrong and counterproductive. These, atypical cases should be based on assessment of the following circumstances: 1) if there is unequal treatment of employees on any basis, and 2) whether such treatment unjustifiably puts a person at a disadvantage compared to other employees. If this is determined to be true, then that is discrimination, and it must be eliminated and prevented.

Learning from these examples, some countries have in recent years introduced a ban on employers to discriminate employees on the basis of "lifestyle" or other similar features (e.g. Argentina prohibits discrimination on the basis of diabetes, France prohibits discrimination on the basis of "lifestyle", in Netherlands discrimination on the basis of "life principles" is prohibited, some federal states in the United States - New Jersey, California, Maine, New Mexico, New Hampshire and Kentucky - prohibit discrimination on the basis of "lifestyle", including smoking, obesity, alcohol consumption, etc.).[180]

Example: Discrimination based on lifestyle, practice in USA
Company "Weyco", which deals with medical rights and services from Michigan, drew the attention of the public in 2005, when it dismissed employees who refused to give up smoking (previously they had a deadline of 15 months to decide whether they will quit smoking). That was just the beginning. After that, the company began to force its employees even more strongly to take greater care of themselves. Since 2006, the employees who refuse to undergo to obligatory medical testing and medical physical analysis were forced to pay $65 more for a higher premium for health insurance. The following year, it was expected that their insurance costs would rise by another $1000 if they continued to oppose the company's instructions. The explanation of the founder and president of the company was: "The cost of health care frustrates us all and we at Weyco believe that our first duty is to take care of our own health... We feel it is of highest importance."

179. On atypical grounds of discrimination see: Equality at work, op. cit, 15, 45–53; S. Zuparević, Ban of wearing scarfs and discrimination in European law, Work corpus of Faculty of Law in Splitu, god. 47, no. 3, 2010, pg. 693; Handbook on European anti-discriminatory law, op. cit, pg. 112; Ivana Grgurev, Discrimination on the grounds not explicitly prohibited under Labor Law, Labor Law (1845-1500) 3 (2007), 3, pg. 42

180. World wide Guide to Termination, Employment, Discrimination, and Workplace Harassment Laws, Baker&McKenzie, Chicago, USA, 2006, pgs. 14, 99, 174; Ursula Furi-Perry, op. cit.

The example of "Blue Cross/Blue Shield" from North Carolina is also stated, which automatically fired the employees whose health insurance costs(normally borne by the company), due to health reasons, for example obesity, exceed $480 a year, unless they accepted to participate in the cost of insurance.
Because of these examples the public posed a question of what the price of such behavior is. Should bosses worry about whether their employees perform annual checkups at the dentist's, eat healthy food or jog regularly? Or the employees should have the basic right to live their lives without interference? "The color of your eyes, the car you drive, your weight and everything else sounds like a private matter. But in many states in the U.S. employers may take into account these and many other facts when deciding whether to hire or fire you." [181]

Example: Discrimination based on membership in certain authority, Serbia
By the decision of the Constitutional Court of the Republic of Serbia, the procedure on evaluation of the compliance of the provisions of Art. 56 of the Law on the High Judicial Council (2008) with the Constitution and the ratified international agreement was suspended. This law gave to the member of the first composition of the High Judicial Council from among the judges (there are six persons) the opportunity to continue to perform judicial functions in a higher court in relation to the court in which this judge held a judicial office until that moment, because these judges are not eligible to apply for appointment to judicial office during their term in office in the Council (by which they are actually deprived). The Constitutional Court found that this solution has an objective and reasonable justification (note of the author – that this is a measure of affirmative action), and dismissed the case. However, the Constitutional Court judges were not unanimous, but one of the judges singled the opinion. In this opinion, the judge stated that it is a case of discrimination that has no basis in the Constitution and that the listed persons are unjustifiably put in a privileged position.[182]
Decision of the Constitutional Court of Republic of Serbia, no. IYo-44/2009

Example: Discrimination as a result of harassment at work based on personal animosity, Serbia
By the decision of the Appeal Court in Novi Sad from March 30, 2011, it was found that the defendant acted discriminatory toward the plaintiff, violating the plaintiff's basic rights at work and work-related rights, that due to the discriminatory behavior the plaintiff suffered non-pecuniary damage, which

181. Listed examples and quotation are taken from: RandyDotinga, Can boss insist on healthy habits?,Christian Science Monitor, January 11, 2006 edition – available at website <http://www.csmonitor.com/2006/0111/p15s01-ussc.html/>

182. This decision and singled opinion can be seen in Off. Gazette RS, no. 54/2012, pg. 133.

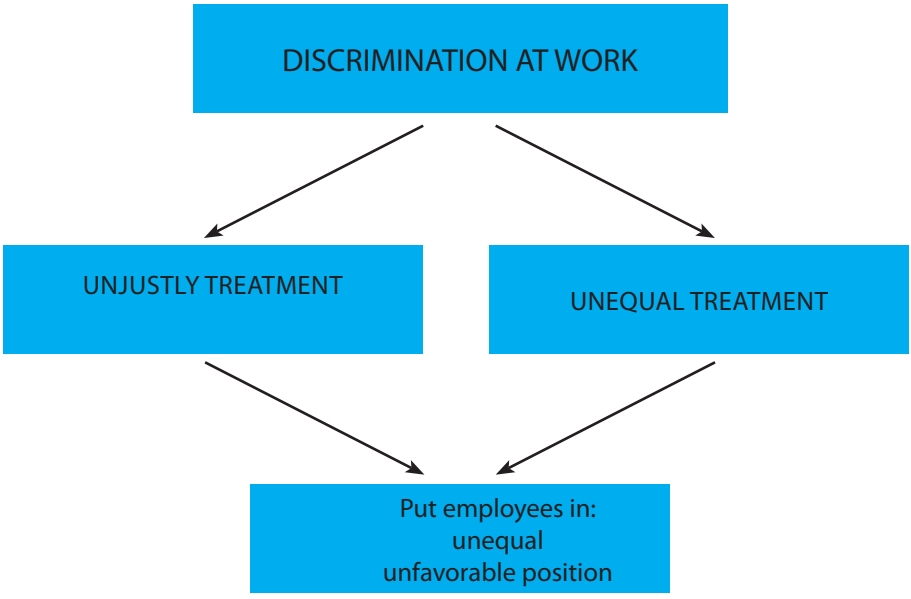
was awarded to her by the judgment of the Court. The defendant, superior, created a humiliating and offensive environment by inappropriate behavior, unallowed conduct in the work environment, , by which he violated the legal obligation to provide the employee the ability to work in a safe and risk-free environment. Specifically, the defendant behaved toward the plaintiff incorrectly, in an offensive way, both in front of the fellow colleagues and in front of patients, with contempt, humiliation, exclusion from work, specifying a larger volume of work than required by law (the plaintiff worked in part-time jobs), which threatened her own integrity and family life. Such defendant's conduct violated the rights of personality, reputation and honor of the plaintiff, led to the stressful consequences, mental health problems in the form of fear and insomnia, as confirmed by the opinion of a competent medical specialist, which resulted in the resignation by the plaintiff.
Decision of the Appeal Court in Novi Sad, no. Gž1.226/11, from 30.3.2011.

Example: Discrimination based on marriage/common-law marriage in the field of pensions, Serbia
The decision of the Constitutional Court of Serbia rejected the initiative for establishing the unconstitutionality of art. 28, 29, 30 and 34 of the Law on Pension and Disability Insurance (Official Gazette RS, no. 34/03, 64/04, 84/04, 85/05, 101/05) regarding discrimination of persons living in a common-law marriage in relation to the legal marriage. The initiative challenges the constitutionality and compliance with the provisions of ratified international treaties because they discriminate persons living in common-law marriage in accomplishing the right to family pension. Namely, according to the articles listed above, the person who was not married to the insured person that deceased is not recognized the status of a family member, nor the entitlement to family pension on the basis of common law. The Constitutional Court found that the initiator does not claim that the disputed provisions are inconsistent with the Constitution because of those people who are able to accomplish their right to a family pension, but essentially because those provisions do not determine the common-law spouse as the beneficiary of the right to a family pension , considering that Article 62, Paragraph 5 of the Constitution equated legal marriage with the common-law marriage. Since the Constitution states in the same article that the equalization of legal marriage and common-law marriage is to be done "in accordance with the law" (meaning it must be prescribed by the law), the opinion of the Constitutional Court is that the Constitution was not formally violated. However, the court decided to address a letter to the National Assembly which will indicate the need for the challenged provisions of the Law on Pension and Disability Insurance to regulate the rights of the common-law spouse (common-law marriage widows and widowers). .
Decision of Constitutional Court of Serbia, no. IUz-90/2008

Part five – **EQUALITY AT WORK A GUIDE FOR EMPLOYERS AND EMPLOYEES**

Discrimination at work is acting of an employer or a superior, i.e. some other employed person or other person involved in the work process, by which:

- worker/employee or group of workers/employees (or a person seeking for employment)
- is/are put in unfavorable position (due to personal characteristic)
- comparing to workers/employees (person seeking for employment) who are in comparable situation,
- and which is prohibited by legal order.



1) FORMS OF DISCRIMINATION

DIRECT DISCRIMINATION exists when some person, due to his/her personal characteristics, is openly treated unequally in relation to some other person in the same or similar situation.

INDIRECT DISCRIMINATION exists when certain situation, rules and practice only seem neutral, but in practice lead to or might lead to unfavorable position of a person seeking employment, as well as an employee, because of a certain characteristic, status, affiliation or belief.

2) DISCRIMINATION AT WORK INCLUDES HARASSMENT AND SEXUAL HARASSMENT, WHICH IS BASED ON SOME PERSONAL CHARACTERISTIC

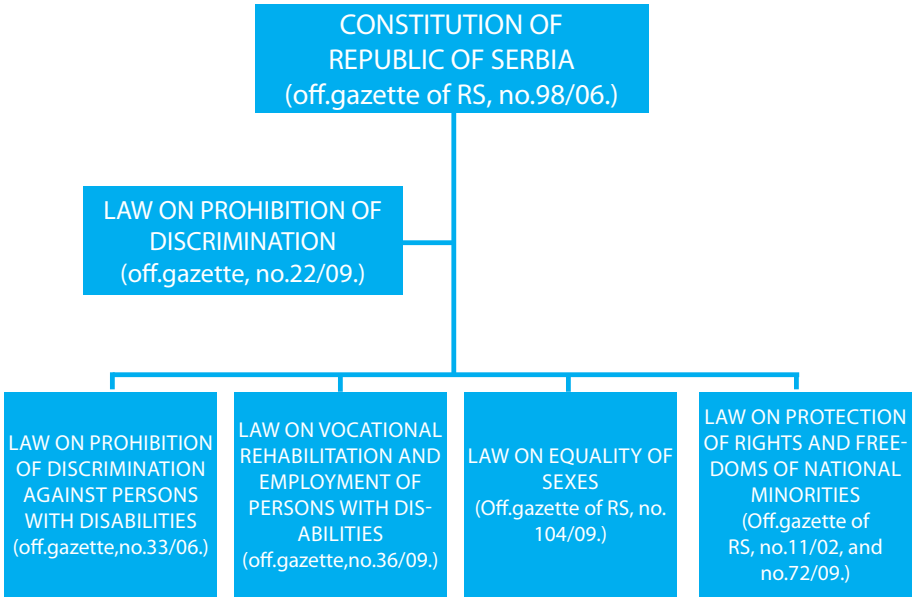
HARASSMENT is any unwanted behavior caused by any of the grounds for discrimination that has as a purpose or represents a violation of the dignity of a person seeking employment, as well as of an employee, and which causes fear or creates a hostile, humiliating or offensive envi ronment (the Labor Law, Art. 21, para. 2).

SEXUAL HARASSMENT is any verbal, non-verbal or physical conduct that has as a purpose or represents a violation of the dignity of a person seeking employment, as well as of an employee, in the sphere of sexual life, and which causes fear or creates a hostile, humiliating or offensive environment (the Labor Law, Art.. 21para.3).

3) GENERAL PROHIBITION OF DISCRIMINATION AT WORK IN SERBIA

The Constitution, the Labor Law and other laws prohibit any form of discrimination at work.

ANTI-DISCRIMINATION REGULATIONS IN THE REPUBLIC OF SERBIA



DISCRIMINATION IN THE SPHERE OF WORK IS PROHIBITED REGARDING:

- EMPLOYMENT CONDITIONS AND SELECTION OF CANDIDATES FOR A PARTICULAR JOB
- WORKING CONDITIONS AND ALL RIGHTS ARISING FROM EMPLOYMENT
- EDUCATION, TRAINING AND DEVELOPMENT

- PROMOTION AT WORK
- TERMINATION OF EMPLOYMENT (LABOR LAW, ART. 20)

labor contract establishing discrimination on some of the discriminatory grounds are null and void (the Labor Law, Art. 20).

4) SUBJECTS THAT PROHIBITION OF DISCRIMINATION IS REFERRED TO

PROHIBITION OF COMMITTING discrimination includes **ALL EMPLOYERS** i.e., state authorities, private companies and entrepreneurs that by their actions or omission may violate the prohibition of discrimination.
Everyone has the right to protection from all forms of **unallowed discrimination** (Art.3, para.1 of the Law on Prohibition of Discrimination).

EVERY PERSON EMPLOYED IS ENTITLED To PROTECTION from discrimination at work , as well as person performing temporary and occasional jobs or jobs by contract or other agreement, a person on the additional work, a person who performs a public function, a member of the army, a person looking for a job, a student and student on practice, a person on the training and specialization without employment, volunteer and every other person on any grounds involved in the work (Article 16, para. 2 of the Law on Prohibition of Discrimination).

5) ACT OF DISCRIMINATION - UNEQUAL TREATMENT

ACT of discrimination at work could be unequal attitude, unequal treatment, exclusion, omission, preference, accountability mechanisms, hate speech etc. Discrimination can be committed in various ways- by action, omission, adoption of a legal act, saying the words, gestures and other.

DISCRIMINATION IS ALSO COMMITTED WHEN PERSONS WHO ARE IN UNEQUAL POSITION ARE TREATED EQUALLY.

6) GROUND OF DISCRIMINATION

Discrimination at work can be based on the following personal characteristics, status or other features:
-ethnicity, or national origin - ancestor- languages - birth- race and skin color - age - disability - sex - gender identity - sexual orientation - marital and family status - religious and political beliefs - membership in political and other organizations - financial status – health condition
- Personal appearance - citizenship - genetic characteristics - being convicted - other real or perceived personal characteristics of employees and other persons at work

Motives for unequal, less favorable treatment of a person or group are not relevant, consequences and effects of this treatment are important.

7) NOT EVERY UNEQUAL TREATMENT AT WORK IS DISCRIMINATION

It is not considered as discrimination:

- distinction, exclusion or preference due to the features of a specific job
- in the situation where personal characteristic of a person is a real and decisive condition for job performance
- if the purpose to be achieved is justified,
- as well as undertaking the protection measures towards certain categories of people (women, pregnant women, new mothers, parents, minors, persons with disabilities and others).

8) SPECIAL MEASURES (AFFIRMATIVE ACTION MEASURES) ARE NOT DISCRIMINATION

Provisions of the law, general law and the employment contract relating to special protection and assistance to certain categories of employees, especially those on the protection of disabled persons, women during maternity leave and leave for child care, special child care, as well as provisions regarding the special rights of the parents, adoptive parents, foster parents and guardians - are not considered to be discrimination (the Labor Law, Art. 22, para. 2)

SPECIAL MEASURE (affirmative action measure): Implies the measure based on more favorable treatment; these are protection measures which the state undertakes to eliminate a disadvantage of certain categories of persons, particularly women, pregnant women, mothers, youth, persons with disabilities and others. (so-called vulnerable categories, because their circumstances make them unequal compared to the rest of the population).

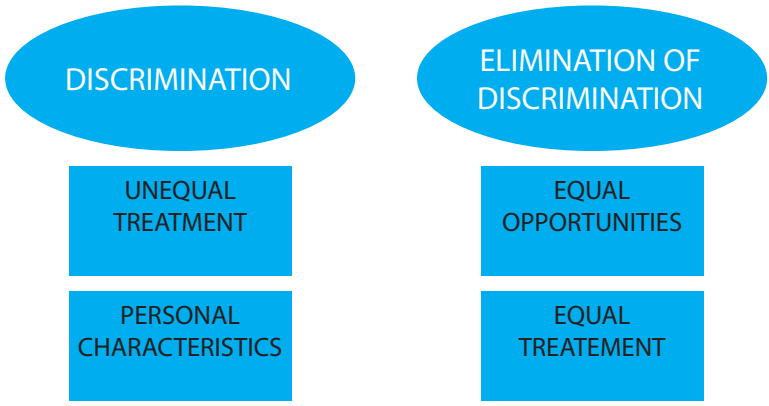
WHAT IS, AND WHAT IS NOT DISCRIMINATION AT WORK?

UNEQUAL TREATMENT OF PERSONS IN EQUAL POSITION	UNEQUAL TRETMENT IS NOT DISCRIMINATION
UNEQUAL TREATMENT	WHEN PERSONS ARE IN UNEQUAL POSITION
DISTINCTION	"AFFIRMATIVE ACTION" (more favorable treatment of vulnerable population
BRINGING INTO UNFAVORABLE POSITION	JOB PECULARITIES (e.g. pregnant woman cannot work on jobs where there is harmful radiation)
UNEQUAL OPPORTUNITIES	PERSONAL CHARACTERISTIC RELEVANT FOR WORK CONDITIONS
EXCLUSION	PERSONAL CHARACTERISTIC RELEVANT FOR THE NATURE OF WORK
PREFERENCE	PERSONAL CHARACTERISTIC AS REAL AND DECISIVE CONDITION FOR JOB PERFOFMANCE (e.g. citizenship– for work in state authority)
BECAUSE OF PERSONAL CHARACTERISTIC	IF THE PURPOSE IS JUSTIFIED

9) WHY WE SHOULD FIGHT AGAINST DISCRIMINATION AT WORK?

Workplace is the **starting strategic point for eradication of discrimination** in society in general, mostly because the work and employment are the areas where discrimination is represented the most.

When workplace/work environment brings together workers of different nationalities, race, gender, age, religion, etc.., and all are treated the same/equally, this would help to create a sense of community and a quality, supportive and productive work environment.

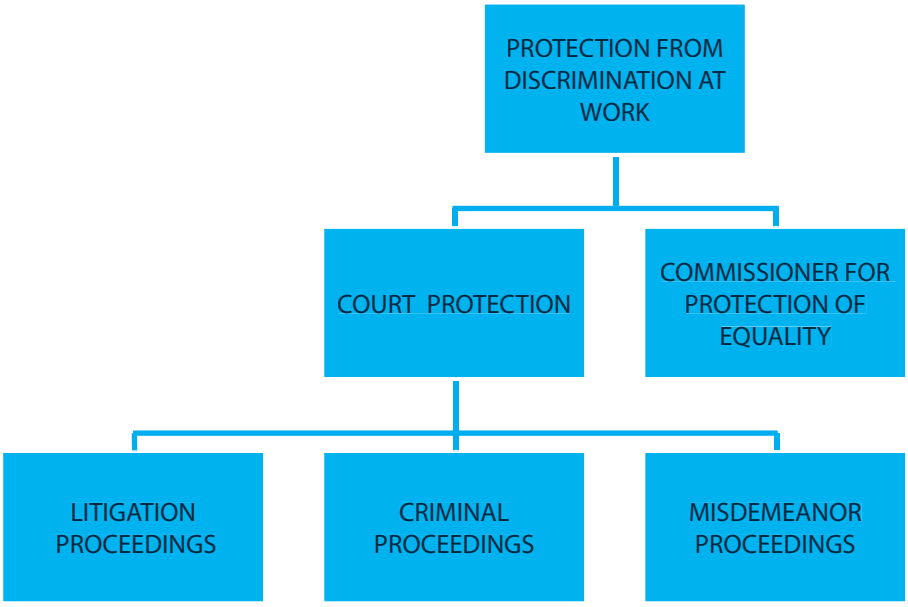


IN ORDER TO SUPRESS DISCRIMINATION AND DISCRIMINATORY ACTIONS AT WORK, THE COOPERATION BETWEEN THE STATE AND THE ORGANIZATIONS OF EMPLOYERS AND EMPLOYEES IS NECESSARY.

10) PROTECTION FROM DISCRIMINATION AT WORK

The person who considers to be affected by discrimination has the right to require the protection from discrimination. According to the **Anti-Discrimination Law (Art. 35)** such person may require:

- PROTECTION BEFORE THE COMMISSIONER FOR PROTECTION OF EQUALITY
- COURT PROTECTION



THE COMMISSIONER FOR PROTECTION OF EQUALITY

The Commissioner in acting upon the **complaint** of a person who deems to have suffered discrimination **expresses opinion** and **gives recommendation** and **imposes measures** determined by law.

WHO SUBMITS A COMPLAINT

- Every person who deems to have suffered discrimination

FORM OF THE COMPLAINT

- Writing or orally on the record

Complaint submission is not charged

CONTENT OF COMPLAINT

- Who commits discrimination, and how

Evidences on the discrimination act
Complaint must be signed

HEADQUARTERS OF THE COMMISIONER for PROTECTION of EQUALITY IS IN BELGRADE

- Address: Beogradska no.70, 11000 BELGRADE
- E-mail: poverenik@ravnopravnost.gov.rs

COURT PROTECTION

COMPLAINT MAY BE SUBMITED BY:

- anyone who considers to be affected by discrimination
- Commissioner for Protection of Equality
- organization dedicated to the protection of human rights
- "voluntary researcher of discrimination"

REPUBLIC OF SERBIA

COMMISSIONER FOR PROTECTION OF EQUALITY

COMPLAINT

IMPORTANT: **The Complaint will be copied and sent to the natural and/or legal body or authority against which the compliant has been submitted.**

PERSONAL INFORMATION

1. **FIRST NAME:** _____
2. **LAST NAME:** _____
3. **TITLE** _____**(if the complaint appellant is a legal body)**
4. **ARE YOU SUBMITTING THE COMPLAINT ON BEHALF OF ANOTHER PERSON:** _____ **(answer with YES or NO)**
5. **IF THE ANSWER TO PREVIOUS QUESTION IS 'YES', WRITE ON WHOSE BEHALF YOU ARE SUBMITTING THE COMPLAINT::** _____
6. **DO YOU HAVE AUTHORISATION OF THE PERSON ON WHOSE BEHALF YOU ARE SUBMITTING THE COMPLAINT::** _____ **(answer with YES or NO and annex the authorization, if you have it)**
7. **ADDRESS:** _____
8. **PHONE NUMBER:** _____
9. **E-mail:** _____
10. **DATE OF BIRTH:**_____ **(not mandatory)**

REPUBLIC OF SERBIA

COMMISSIONER FOR PROTECTION OF EQUALITY

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7. **ADDRESS:** _____
8. **PHONE NUMBER:** _____
9. **E-mail:** _____
10. **DATE OF BIRTH:**_____ **(not mandatory)**

INFORMATION ABOUT THE LEGAL OR PHYSICAL SUBJECT OR AUTHORITY THAT YOU ARE SUBMITTING THE COMPLAINT AGAINST

A) IF THE COMPLAINT IS AGAINST LEGAL BODY/AUTHORITY

1. **THE NAME OF THE LEGAL BODY/AUTHORITY** _____
2. **SEAT AND ADDRESS** _____
3. **PHONE NUMBER** _____
4. **ARE YOU EMPLOYED THERE?** _____ **(answer with YES or NO)**

B) IF THE COMPLAINT IS AGAINST NATURAL BODY

1. **FIRST AND LAST NAME** _____
2. **ADDRESS** _____
3. **PHONE NUMBER** _____
4. **HAVE THE PERSON YOU ARE CLAIMING DISCRIMINATED AGAINST YOU COMMITTED THE ACT AT THE WORKING PLACE / DURING WORKING ASSIGNMENTS**
5. _____ **(answer with YES or NO)**
6. **IF THE ANSWER TO PREVIOUS QUESTION IS 'YES' THAN WRITE WHERE THE PERSON IS EMPLOYED**

   _____

   _____

   _____

(name of the company/institutions/organization; address, phone number, position/working post of the person)

IMPORTANT: If there are more than one legal or physical bodies or authorities against whom the complaint is submitted, please, use separate complaint application for each.

THE GROUND OF DISCRIMINATION

Circle one or more grounds (personal characteristics) that you think are grounds of discrimination.

1. **Race**
2. **Color**
3. **Ancestors**
4. **Citizenship**
5. **Nationality or ethnic origin**
6. **Language**
7. **Religious or political beliefs**
8. **Sex**
9. **Gender**
10. **Sexual orientation**
11. **Material condition and property**
12. **Birth**
13. **Genetic characteristics**
14. **Health condition**
15. **Disability**
16. **Marital and family status**
17. **Prior criminal convictions**
18. **Age**
19. **Appearance**
20. **.Membership in political, union or other organizations**
21. **something else _____ _____(please, state)**

Please, explain why the given personal characteristic has been a ground for discrimination

_____

_____

_____

_____

WHERE DID THE EVENT ON WHICH YOU ARE SUBMITTING COMPLAINT HAPPEN?

1. **PROCEDURE BEFORE THE PUBLIC AUTHORITIES (court, municipality hall, ministry, commissions etc)**
2. **IN THE PROCESS OF FINDGING EMPLOYMENT OR AT THE WORKING PLACE**
3. **IN THE PROCESS OF PROVIDING PUBLIC SERVICES OR USING OBJECTS AND PLACES**
4. **WHILE REALIZING RELIGIOUS RIGHTS**
5. **EDUCATION AND PROFESSIONAL TRAINING**
6. **WHILE REALIZING MINORITY RIGHTS**
7. **HEALTH SERVICE**
8. **SOMETHING ELSE _____ (please list)**

THE DESCRIPTION OF THE EVENT – please, describe in detail the event for which you are submitting the complaint, including information about the time, place, persons present etc.

_____

_____

_____

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_____

IMPORTANT: **If you need more space for writing, use additional paper.**

PROOFS: Please, list the evidences you are submitting with the complaint.

1. _____
2. _____
3. _____

1. **HAVE YOU INITIATED A COURT PROCEEDING _____ (answer with YES or NO)**
2. **IF YES, NAME THE COURT AND DATE _____**
   _____
   (please, submit the photocopy of the court complaint)

Date	**Signature**

THE FORM FOR THE COMPLAINT ON DISCRIMINATION IS AVAILABLE ON THE WEBSITE OF THE COMMISSIONER FOR PROTECTION OF EQUALITY

e-mail: poverenik@ravnopravnost.gov.rs

Annex – **JURISPRUDENCE IN SERBIA** [183]

Example No. 1: **Discrimination based on whether the person worked for local self-government or other employer**

By the decision of the Constitutional Court of the Republic of Serbia, no. IYo-246/2011, it was determined that provisions of Art. 57, para. 1, item 1 and 2 of the Special collective agreement for public utility and other public companies of Novi Sad are not in accordance with the law, because that act prescribes a different way for determining the severance pay for redundant employees. Specifically, one solution is envisaged for the years of service obtained in public enterprises founded by the city of Novi Sad (in this case the severance pay for redundancy is determined in a much more favorable way, in accordance with the Collective agreement), and a different one for the years of service obtained in some other legal entity not founded by the city of Novi Sad (in this case severance pay is determined by the law).

Example No. 2: **Discrimination against people with disabilities**

The decision of the Appeal Court in Novi Sad, no. Gž. 245/11 of February 1, 2012 reversed the trial court decision of the Municipal Court, no. 449/09, which determined the right of the plaintiff to compensation of non-pecuniary damages for emotional distress suffered by the violation of individual rights, because as a disabled worker is put at a disadvantage compared to the disabled military veterans of the same category (since it was determined that he lost working ability, he was recognized the entitlement to a pension for people with disabilities, disability allowance, reimbursement for care and assistance by another person, and the allowance for care and assistance, realized in accordance with regulations on social security). In fact, according to the existing legal provisions, disabled civilians realize their rights in accordance with the provisions of the Law on Social Protection and by that are put at a disadvantage in relation to disabled veterans who realize their rights in accordance with provisions of the Law on fundamental rights of veterans, disabled veterans and families of fallen soldiers. The provisions of the challenged laws in different ways and to a different extent regulate the rights of persons with

183. Quoted court decisions are summarized by the authors of this Manuel.

disabilities, where disabled veterans rights and benefits are prescribed on a larger scale in relation to the regulations prescribing the realization of disabled civilian rights. In this way, according to the complainant, by the act of public authority - the law – disabled civilians are placed at a disadvantage related to disabled veterans, even though their needs are the same, which leads to discrimination against the people with disabilities regarding categories and degree of disability.

The Appeal Court with decision no. Gž.245/11 reversed an earlier decision considering that discrimination had not been committed by providing a different range of rights in various regulations to various categories of persons with disabilities, because special measures, which the Republic of Serbia may introduce to achieve full equality of persons or groups of persons who are in substantially unequal position compared to other citizens, are not considered to be discrimination. The state is authorized, it is further stated in the decision of the Appeal Court, within its capabilities and the estimated needs of certain categories of persons, to provide to these categories of persons an adequate level of social protection, which is a feature of its sovereignty.

Example 3: **Discrimination and abuse as a result of personal animosity**

By the decision of the Appeal Court in Novi Sad, no. Gž1.226/11 of 30.3.2011, it was found that the defendant acted discriminatory toward the plaintiff, violating the rights of the plaintiff at work and work-related rights, that due to discriminatory behavior the plaintiff suffered non-pecuniary damage, which by the decision of the Court was awarded to her. The defendant, superior, created a humiliating or offensive environment by inappropriate behavior, improper conduct in the work environment, , which violated a legal obligation to provide the employee the ability to work in a safe and risk-free environment. Specifically, the defendant acted toward the plaintiff incorrectly, in an offensive way, both in front of the fellow colleagues and in front of patients, with contempt, humiliation, exclusion from work, specifying a larger volume of work than required by law (the plaintiff worked in part-time jobs), which threatened her own integrity and family life. Such defendant's conduct violated the rights of personality, reputation and honor of the plaintiff, led to the stressful consequences, mental health problems in the form of fear and insomnia, as confirmed by the opinion of a competent medical specialist, which resulted in the resignation by the plaintiff.

Example 4: **Discrimination based on sex**

By the decision of the First Basic Court in Belgrade, no. P. 24416/11 of 12.05.2012, in a litigation initiated by the Commissioner for Protection of Equality, it was determined that the defendant, the Football Association of Serbia (FAS), discriminated women's soccer teams based on sex of their players by prescribing the rules of Article 79 of the Rulebook on Registration, Status and Transfer of Players of the Football Association of Serbia (Official Gazette "Football" from 20 June 2012.). By the provisions of the challenged Rulebook the reimbursement of expenses for training and development of soccer players, paid by the women's soccer club for the transfer of a football player, is lower than fees paid by the men's soccer club. In fact, all of

the provisions on compensation for the costs invested in the training and development of players under the same conditions are valid for all football clubs, except for the provisions of Article 79 of the Rulebook on the manner of determining the amount of compensation.

The disputed provision prescribes an exception to the rule on how to determine the amount of compensation providing that, "if the club from which the player leaves is the club of women's football" total compensation is determined in the amount of 15% of the fees paid by the club of men's football for the player's transfer. The Football Association of Serbia is a unique organization, i.e. the members of FAS are the clubs of both women's and men's soccer, and consequently regulations cannot be applied selectively.

Example 5: **Discrimination based on ethnicity –l language**

The decision of the Basic Court in Zrenjanin, no. P.567/10 of June 17, 2010, determined that the defendant employed in the Municipal Assembly of "Ečka» acted discriminatory towards members of the Hungarian, Romanian and Slovak minority, since on the building of the Centre of Culture Ečka he wrote the name «Centre of Culture of Ečka" on the board « in the languages and scripts of national minorities in smaller letters and in a different form than the text in Serbian. The defendant placed on the Centre of Culture on June 20, 2009, the inscription "Centre of Culture Ečka" in the length of 5.50 cm and height 37 cm, printed only in Serbian, and during July 2009, he set the name on the panel of the length of 70 cm and a width of 50 cm written in the Serbian language and in the languages of national minorities which are in the official use in the city of Zrenjanin.

Example 6: **Discrimination based on property**

By the decision of the Constitutional Court of Serbia, no. IUz - 61/2009, it was determined that the provision of Article 14°, para. 1, item 2 of the Income Tax Law (Official Gazette RS no. 24/01, 65/06) is not in accordance with the Constitution and the provisions on the prohibition of discrimination, as the specified legislation in challenged provisions "persons with earnings from the budget" are placed in a different position than other employees because they have a different tax treatment.

According to challenged provisions of Article 14, Paragraph 1, item 2, benefits of non-payment of rent to the market price, on the location where a residential building or apartment is used, are not included "for persons with earnings from the budget" in their taxable income, as required for all other employees whose benefit of free housing is included in income and is taxed.

Such provisions discriminate employees - "persons with earnings from the budget" because it provides different tax position regarding the same benefits and earnings, just depending on whether they are employed in the field of public or private property, which is contrary to Art. 82, Paragraph 1 of the Constitution determining equality of private and other forms of property.

The deviation from the principle of equal treatment of all before the law and the Constitution in the challenged legal provisions has no objective and reasonable justification or legitimate aim reaching in the area of tax policy, and they are incompatible with the Constitution and discriminatory.

Example 7: **Discrimination based on marriage / common law marriage**

The decision of the Constitutional Court of Serbia, no. IUz-90/2008 rejected the initiative for establishing the unconstitutionality of art. 28, 29, 30 and 34, of the Law on Pension and Disability Insurance (Off. Gazette RS, no.34/03, 63/06) regarding discrimination against common law marriage.

The initiative challenging the constitutionality and accordance with ratified international agreements of mentioned provisions of the Law on Pension and Disability Insurance (Articles 28, 29, 30 and 34) states, inter alia, that the challenged provisions discriminate persons living in common-law marriage in accomplishing the right to family pension. The challenged provisions of the above-listed articles (Articles 28, 29, 30 and 34) determine who is considered to be a member of the close or distant family of the insured deceased person. The person who was not married to the insured deceased or beneficiary is not recognized the status of a family member of the insured deceased, nor the entitlement to family pension on the basis of common law marriage with an insured deceased person or beneficiary.

Appreciating the initiative allegations, the Constitutional Court found that the initiator challenging provisions of Art. 28, 29, 30 and 34, of the Law does not claim that the challenged provisions were incompatible with the Constitution because of those individuals who are indentified by challenged provisions as the persons who may, under certain circumstances, accomplish their right to family pension, but essentially because those provisions do not determine the common-law spouse as the beneficiary of the right to a family pension, considering that the provision of Article 62, Paragraph 5, of the Constitution equated the common-law marriage with the legal marriage. The opinion of the Constitutional Court is that even an eventual determining decision of the Constitutional Court in relation to the disputed provisions of the Act would not result in the elimination of inequality between legal and common law marriage regarding accomplishment of the right to a family pension, but would lead to an unreasonable and unconstitutional abolition of the right to family pension to the persons determined by the disputed provisions, who are undoubtedly entitled to that right.

The Constitutional Court of Serbia, based on the provisions of the Constitution (Art.62, para.5) establishing that the common law marriage is equated with legal marriage, decided to send a letter to the National Assembly which will point to the need for the challenged provisions of the Law on Pension and Disability Insurance governing the right to a family pension, which is recognized by these provisions to a spouse of an insured deceased person or beneficiary, to regulate common-law marriage rights (of extra-marital widow and extra-marital widower).

Example 8: **Discrimination - rejection to change documents in the case of sex change**

Constitutional Court decision no. UŽ - 3238/2011 approved a constitutional complaint X and determines that Management of the municipality Z, by passing the conclusion on the lack of subject-matter jurisdiction, failed to decide on the request of the complainant to change the data on sex and thus violated his right to dignity and the free development of personality (Art. 23 of the Constitution), to the right of respecting private life ensured by Art. 8 of the European Convention on Human Rights and Freedoms, and the principle of non-discrimination under Article. 21 of the Constitution. The applicant states that he was born in 1949, as a person with a pseudo-hermaphroditism, i.e., the physical characteristics of the female, but the male gender identity. He was diagnosed with gender identity disorder, and in December 2010, he had the surgery of gender adjustment. In March 2011, he submitted to registrar's office a request "for sex correction in birth certificate," which was rejected because of the lack of subject-matter jurisdiction. The Constitutional Court stated that the essence of the constitutional complaint allegations on violation of the prohibition of discrimination under Art.21 of the Constitution, is in the fact that the applicant has not been legally recognized a change of gender, because after the sex-change operation it was not possible to carry out the change of data on gender in the civil register of births. Such a disharmony between the factual and legal state of affairs leads to a host of negative consequences on the life of the person. They are expressed in the applicant's inability to regulate his own status (to obtain official documents with the new sex determination), to live his life in accordance with his gender identity and accomplish all rights that the legal system of the Republic of Serbia recognizes on the basis of gender.

These are situations where the sex is legally important, or when the difference is made between men and women in accomplishing certain rights (such as the conditions for retirement and other rights from health, pension and disability insurance, getting married and all of family-law relations), thus violating his human dignity and the right to free development of personality.

Example 9: **Discrimination based on nationality**

The decision of the High Court in Belgrade from 5.1.2012. (Note: the website of the Belgrade High Court did not give the number of the decision) determined that the airline that had been sued committed a severe form of discrimination – extended discrimination under Article 13, item 6 of the Anti-Discrimination Law.

In the litigation of the plaintiff Alexander Pfeiffer, against the defendant, public company for air transportation JAT AIRWAYS, Inc. Novi Beograd, asking for protection from discrimination and harassment at work, it was stated, among other things, that the plaintiff was subjected to continuous harassment and discrimination at work for a long period of time by the management of the defendant airline company where he is employed as a captain of Boeing 737. Discriminatory treatment was conducted in a way that the management company ceased all normal means of communication with the plaintiff, did not answer the plaintiff's written remonstrance, he was officially called by the management to the interviews, who

later refused to hold them, prevented the plaintiff to enter with his attorneys in the defendant's offices, gave illegal warning before termination of employment, acted toward the plaintiff with harassment, humiliation, naming plaintiff by derogatory and offensive names ("Schwab" because the plaintiff was of German nationality, of the Catholic religion), because the management of the defendant company ceased to orderly notify the plaintiff about his flight schedule when he requested court protection from discrimination. Such unjust treatment, according to plaintiff, placed him at a disadvantage in relation to other employed pilots, by which the defendant has violated the plaintiff's working rights.

The decision of the High Court in Belgrade obliges the defendant airlines to refrain from any further acts of discrimination against the plaintiff in the future, under threat of fines, and imposed the obligation on the defendant to pay redress for discrimination to the plaintiff on the name of compensation (pecuniary and non-pecuniary). The court in its judgment ordered the publication of the court decision within 8 days of its coming into force , at the expense of the defendant public company for air transportation JAT AIRWAYS.

Example 10: **Discrimination against employees based on union affiliation**

By the decision of the Constitutional Court, no. IUo211/2008 of February 18, 2010, it was determined that the provision of Article 4 Paragraph 2 point A, of the Election Rules of the union organization of the Directorate of MB "Kolubara" doo Lazarevac of November 3, 2008, is not in accordance with the Constitution, because the challenged provisions prescribe different rules for election of union members in trade union bodies, by which the members of trade unions who are employed in various organizational units of the same employer are placed in an unequal position. The disputed provision of the Election Rules prescribes specific requirement for accomplishing the right of a person to be elected as president and board member of the union organization. This special condition is the duration of membership of six months prior to the decision to call elections and applies only to members of the trade union organization of the Directorate MB "Kolubara", and not to the members of the branch "The Project". Accordingly, the Court affirmed that setting different conditions in the process of elections for the bodies of the union organization, depending on the part of the company in which workers are employed places union members at a disadvantage, violating the constitutional principle on prohibition of discrimination under Art.21, para. 3.

Example 11: **Discrimination in employment based on age**

In the proceedings before the Commissioner for Protection of Equality, by the complaint of LJ.B.S. against "CHC-Clinic" regarding employment discrimination on the basis of age (op. no. 110/2011. from 12. 9. 2011.), the Commissioner gave the opinion that the ad of "CHC – Clinic" made a violation of equal opportunity for employment to persons older over 35 years of age, which made a direct discrimination on grounds of age in the field of labor, prohibited by articles 6, 16 and 23 of the Anti-Discrimination Law. On June 28, 2011 the complainant, submitted a

complaint to the Commissioner in which she alleged that she was discriminated in the recruitment process for the employer K ... based on age. According to the allegations, the complainant was orally informed that the Clinic seeks several nurses as a replacement, up to 35 years of age. The complainant came to the interview with the employer and she was presented a condition relating to the age limit, because the complainant was about to turn 42. Although she left a very positive impression, she did not get the job. The complainant, under other conditions of the competition could be highly ranked, because her average grade point was 4.81 (the ad required 3.5), had passed the professional exam and had 10 years of working experience. In its response, the Clinic stated that it was looking for staff that would work in the toughest section, with patients in the severe treatment, and that through the years of practice they noticed that younger people carry out the entrusted tasks more easily and more effectively. Such treatment, in the opinion of the Commissioner, violated the principle of equal opportunities for employment and violated the principle of non-discrimination of persons seeking employment from Art. 18 of the Labor Law.

Example 12: **Discrimination based on disability**

The judgment of the Supreme Cassation Court of Rev.99/11 of 10.2.2011. dismissed as unfounded the plaintiff's revision stated against the verdict of the Appeal Court in Novi Sad (Gž 3962/10 of 23.9.2010.). The verdict of the Appeal Court rejected the claim of the plaintiff as unfounded, asking that the City of Novi Sad which the plaintiff sued, should be obligated to pay financial compensation on the basis of suffered physical and mental pain due to discrimination against people with disabilities. As stated in the claim, the plaintiff was diagnosed with the first degree of physical impairment, because due to severe injuries that caused the paralysis of the lower limbs he was diagnosed with paraplegia and that is why he was using a wheelchair. The plaintiff was employed and was going to work by car. He stated that when moving in a wheelchair, he was unable to always pass over the curbs, and was forced to use alternative routes, to move to places where there were downed curbs or on roads where there were traffic, that walkways and sidewalks were full of bumps and holes, which required him much more time and effort to come to a certain place.

The Supreme Court of Cassation determined that the defendant City of Novi Sad took all measures in order to contribute to the equalization of opportunities for persons with disabilities at the city level. In that sense, at the city level there are programs of working engagement of people with disabilities and the transportation of persons with disabilities on a daily route of 52 kilometers, which is financed from the budget of the city of Novi Sad, the project "Taxi transportation service for people with disabilities" was carried out, and all in order to increase their mobility and quality of life. Accordingly, appreciating the plaintiff's allegations and the objective state of affairs, the Supreme Court of Cassation found that the plaintiff had not suffered discrimination by the actions of the defendants. In other words, the failure to adjust all curbs in the city and remove the damages on pavements is not aimed at discrimination against persons with disabilities, but there are objective and reasonable reasons to remove all physical obstacles in the city. That is a long-term process determined by material resources of the community.

Example 13: **Discrimination on the basis of other characteristics**

Decision of the Constitutional Court no.Už-262/2009 rejected a constitutional complaint of the appellants "Ltd. Company for production..." and M.N. as an authorized person from XX submitted against the decision of the Ministry of Finance of the Republic of Serbia, the Tax Administration - Regional Centre Belgrade no. ... In the constitutional complaint the appellants state that the disputed decision rejected as unfounded their appeal submitted against their trial court decision of the Ministry of Finance of the Republic of Serbia, Tax Administration, Office NN no. ..., which found the appellants of the constitutional complaint to be guilty for the offense based on not paying fees for their employees for required social security within legal deadlines, i.e. for the delayed payment. This treatment, according to the complainants, violated the constitutional principle of non-discrimination under Article 21 of the Constitution, which provides that everyone is equal before the Constitution and that everyone has the right to equal legal protection without discrimination. The appellants referred to the provisions of the Law on the rest and debt relief based on contributions to health insurance and the Law on write-off of interest on obligations based on certain taxes and contributions for required social insurance, based on which the unsettled obligations are suspended in the future period and that after the expiration of that period it is considered that the debt did not exist at all and that no charges will be pressed against those persons. As stated by the appellants, this is the act of discrimination because "for the same failure, omission, ones are punished, while others are not." Specifically, individuals who fit into the provisions of the mentioned law therefore do not suffer the consequences which are suffered by the persons who, as well as the appellant, could not, due to different circumstances, insolvency in this case, settle their obligations within the time limits prescribed by the law.

The Constitutional Court found that the disputed decision of the Ministry of Finance of the Republic of Serbia, Tax Administration XX, correctly confirmed the trial court decision which found the appellants guilty of an offense under the provisions of the Law on Compulsory Social Security, because they did not pay within the prescribed deadline the contributions for social insurance for their employees. The Court believes that the reasons for the delay are not the circumstances under which the defendants could be acquitted of misdemeanor charges. Accordingly, the Constitutional Court confirmed that such treatment is not an act of discrimination against the appellants, regulated by the provisions of Article 21, para. 1 and 2 of the Constitution according to which everyone is equal before the Constitution and the law, and that everyone has the right to equal legal protection without discrimination, because these regulations are the rights of an accessory nature that a person may invoke only regarding a violation of some of the human rights and freedoms guaranteed by the Constitution (e.g. the right to a fair trial). The appellant in the constitutional complaint did not refer to any violation of human rights or freedoms. Also, protection against violation of the principle of non-discrimination under Article 21 of the Constitution is guaranteed the exclusively to an individual or group of individuals who are discriminated, so it does not refer to a legal entity in this case.

Example 14: **Discrimination against common law marriage of the same sex**

Decision of the Constitutional Court, no. IU-347/2005 of July 22, 2011, refused the proposal of determining unconstitutionality and disharmony with the ratified international agreements under Article 4, Paragraph 1 of the Family Law (Official Gazette of RS, no.18/05) on the grounds of discrimination against common law marriage of same sex. In the initiative for assessing the constitutionality, the proponent states that by guaranteeing the rights of common law marriage only to lasting unions of people of different sexes, as required by Article 4, Paragraph 1 of the Family law, similar economic and emotional unions of persons of the same sex are put in a much worse position. The proponent's opinion is that the common law marriage of same sex should be granted the same rights as individuals in common law marriage of different sex (right to subsistence, the family pension, the joint adoption of a child, and the acquisition of joint property, etc.).

Appreciating the proponent's allegations, the Serbian Constitutional Court found that the challenged provisions of the Family Law did not constitute discrimination based on sexual orientation of a common law marriage regarding the right to privacy and respect of private life, because for discrimination to exist , it is necessary that the different treatment led to an inability to achieve a right that is guaranteed and recognized by regulations, and the Serbian Constitution does not guarantee the right to a marriage or common-law marriage to persons of the same sex. Specifically, accordingly to art. 62, para.5 of the Constitution, which provides that a common-law marriage is equal to legal marriage, the court concluded that the determination of the essential elements needed for the formation of common law marriage is related by analogy to the same elements required for the formation of a marriage. According to the Constitution of Serbia (Art. 62, para. 2,) one of the constituent elements of the marriage is the difference in sexes of the consenting persons (the same is stated in Article 12 of the European Convention on Human Rights and Article 23 of the International Covenant on Civil and Political Rights), and it follows that the constitutional concept of common law marriage considers a man and a woman.

A reasonable justification, according to the opinion of the Constitutional Court, is in protection of families and family relationships based on the traditional concept of marriage as the union of a man and a woman. The European Court in the case Shalki Koff against Austria stated that the issue of legal recognition of the life community of the persons of same sex belongs to the rights where the state is entitled to free evaluation whether and when it is going to legally regulate that issue.

Example 15: **The abuse is not discrimination**

Decision of Appeal Court in Novi Sad, no.Gž1.1308/1 of 13.7.2011, accepted the defendant's appeal and reversed the judgment of the Municipal Court in Novi Sad no. ..., upholding the claim of the plaintiff and determined that the defendant acted discriminatory towards the plaintiff SS in the workplace, obliged the defendant not to commit discriminatory actions in the future and obliged the defendant to pay to the plaintiff funds for non-pecuniary damages for emotional distress due to the

violation of individual rights (honor, reputation ...) and because of the fear suffered. According to the factual allegations of the complaint, plaintiff SS at X faculty had the employment contract for a limited term of three years as an assistant professor. The plaintiff said that his teacher and mentor, here the defendant, incurred him damage by the discriminatory treatment because the defendant forbade him to attend exams, although that was his right and duty as the defendant's assistant, that he was sending him SMS messages humiliating and offending him, and the defendant behaved in the same way at Faculty's meetings, he prevented his education and advancement in the way that he had initially agreed to be the mentor for the plaintiff's doctorate, then gave up making pressure on other colleagues who would accept to be the mentors of the plaintiff . This led to the fact that two applicants of the plaintiff for his doctorate at the University X o in Novi Sad were not accepted. The defendant did not timely initiate the procedure for re-election of the plaintiff's assistant position, due to which the plaintiff's employment was terminated when the period to which he had employment contract expired.

The Appeal Court, appreciating the plaintiff's allegations during the trial procedure, as well as the expert's conclusion that the plaintiff was a victim of mobbing, accepted the appeal of the defendant on misapplication of the substantive law due to which the trial court made an erroneous conclusion that the defendant's action includes discriminatory treatment. The Appeal Court confirmed that between the plaintiff and the defendant there were obvious problems in communication, determining that the defendant was expressing inappropriate and hostile behavior in communication with other employees too, which the court considered to be against the rules. Therefore, according to the opinion of the Appeal Court, it is not clear and it is not determined that such behavior of the defendant by which the plaintiff was put in a disadvantage in relation to other persons in the same or similar situation is linked to some personal characteristic of the plaintiff, which is the condition for existence of discrimination. The court reversed the trial court verdict appreciating the provisions of the Law on Prohibition of Harassment at Work (Off. Gazette RS, no. 36/10) in accordance to the Rulebook on rules of employer's and employees' conduct regarding the prevention and protection from harassment at work (Art.13, Para.1, item 5), which provides that the harassment at work is not every unjustified distinction or unequal treatment of an employee on any grounds of discrimination, which is prohibited and for which the protection is provided by a special law, i.e. in accordance with the Anti-Discrimination Law.

ACRONYMS:

- The United Nations - UN
- The International Labor Organization - ILO
- The Council of Europe- CoE
- The European Union - EU
- The Universal Declaration of Human Rights UN - UD
- The European Convention on Human Rights of the Council of Europe - EC
- The Charter of Fundamental Rights of the European Union - Treaty of Nice
- The European Court of Human Rights CE- ECHR
- The Court of Justice of the European Union - EUCJ (before the European Court of Justice - ECJ)
- The Official Journal of the EU - OJ
- The Official Gazette of the Republic of Serbia-Off. Gazette

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