

SEMINAR ZA PREDSTAVNIKE SUDBENE VLASTI (EC, ERA, PA)

- APPLYING EU ANTI-DISCRIMINATION LAW
- PRIMJENA EUROPSKOG ANTIDISKRIMINACIJSKOG PRAVA



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PROVING DISCRIMINATIONS:  
*the shift of the burden of proof and access to evidence*

Zagreb, 11-12 May 2017

PROVING DISCRIMINATIONS:  
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- **Legal sources of protection against discrimination in the Republic of Croatia**
- Anti-Discrimination Act (Official Gazette, 85/08, etc.)
- Gender Equality Act (Official Gazette, 82/08)
- EU Directives

## PROVING DISCRIMINATIONS: *the shift of the burden of proof and access to evidence*

### REGULATION ON THE PROCEDURE AND REGULATION CONTAINING PROVISIONS ON THE BURDEN OF PROOF

- Labour Code (Official Gazette, 93/14)
  - *Burden of proof in labour disputes*
  - Article 135
  - (1) In case of a labour dispute, the burden of proof lies on the person who is claiming a certain right resulting from the employment relation, or the person who is initiating the dispute, if not otherwise stipulated by this or other law.
  - (2) In case of a dispute where a worker was put in a disadvantageous position because he or she pointed out that there is a reason to believe in possible corruptive activities or filed an application regarding such a possibility to a competent person or state body, and which entailed a breach of a particular employment right, if a worker makes probable that he or she was put in a disadvantageous position resulting in a breach of a particular employment right, the burden of proof shifts to the employer who has to prove that the worker has not been put in a disadvantageous position, that is that his or her employment right has not been breached.
- Civil Procedure Act (Official Gazette, 53/91, etc.)

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### INTERRELATION BETWEEN FORMS OF PROTECTION– THE ADVANTAGE OF THE CIVIL FORM OF PROTECTION

- Initiation of proceedings of their own choice
- Possibility of indemnification/compensation
- Exclusion of intention as a precondition for protection

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- **(individual) Forms of claims in line with the Anti-Discrimination Act:**

- Declaratory, prohibitive, restitutive, reparatory, publication

- **Burden of proof**

Art. 20/1 – If a party to legal or other proceedings claims that his or her right to equal treatment is breached pursuant to the Anti-Discrimination Act, that party is obliged to establish probability of a case of discrimination. In that case, the burden of proof lies on the other party. – *SHIFT OF THE BURDEN OF PROOF*

Art. 20/2 – Exclusion in criminal or infringement proceedings

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- Burden of proof in other circumstances (damage, amount of damage and similar)

- Application of other reference provisions of the Civil Procedure Act (prior procedure, limitations regarding the annulment of first-degree rulings, intervener *sui generis*, etc.)

- Collective court protection

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- Dilemmas regarding expertise:
  - establishment of diagnosis
  - establishment of causal links
  - assessment of the gravity of infringement, i.e. non-material damage
- Orientation criteria for the Croatian Supreme Court
- Other material legal and process issues (statute of limitation, costs, etc.)

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- **Issues regarding the interrelation between the burden of proof and other rights regulated by the EU law**
- CJEU, Patrick Kelly v The National University of Ireland (University College, Dublin) Case C-104/10, 21 July 2011 – Burden of proof vs. Right to privacy

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■ Application of related institutes –

- The Labour Code- *Protection of Workers' Dignity* (Article 134)
- Mobbing
- The Civil Obligations Act (Official Gazette, 35/05, etc.) – the protection of personality rights

■ Concluding remarks:

- Collaboration between state bodies– Ombudsperson, Gender Equality Office
- – The impact of ECHR and CJEU judicature, in the interpretation of EU law
- Use of institutes and proceedings resulting from the "classic" civil law
- Media interest/protection of privacy

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Thank you for your attention!

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