

Burden of Proof in Cases of Discrimination Based on Sex

Seminar for Representatives of the Justice System

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1. An issue of equal treatment in employment is governed by Art. 11³, Art. 18^{3a}-18^{3e} of the Polish Labour Code. These provisions have been incorporated into the Labour Code in a version effective as from 1 January 2004 to adjust Polish labour law to the requirements of the European Union that are currently set forth in Art. 13 and Art. 141 of the Treaty on European Union and in Council Directives 75/117/EEC¹, 76/207/EEC², 97/80/EC³, 2000/43/EC, 2000/78/EC, and 2002/73/EC⁴ (the first three of these Directives have been replaced by Directive 2006/54/EC of the European Parliament and of the Council in a recast version). Between 1 January 2002 and 31 December 2003, Chapter IIa of the Polish Labour Code solely referred to equal treatment of men and women in employment. As from 1 January 2004, except for unequal treatment based on sex, the discrimination prohibition provided for in the Labour Code has also covered cases of unequal treatment in terms of other prohibited discriminating criteria. Pursuant to Art. 11³ of the Labour Code, any discrimination in employment, direct or indirect, in particular on the grounds of sex, age, disability, race, religion, nationality, political convictions, trade union membership, ethnic origin, creed, sexual orientation, as well as on the grounds of the terms of employment for a specified or unspecified term or full-time or part-time employment shall be inadmissible. Though the list of the prohibited discriminating criteria is open, cases of discrimination based on sex, age, and disability are the ones that are most frequently seen in the practice of Polish courts. Other criteria – especially those

1 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ L 45 of 19.02.1975, p. 19; OJ EU Polish special edition, Chapter 5, vol. 1, p. 179)

2 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 39 of 14.02.1976, p. 40; OJ EU Polish special edition, Chapter 5, vol. 1, p. 187)

3 Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ L 14 of 20.01.1998, p. 6; OJ EU Polish special edition, Chapter 5, vol. 3, p. 264)

4 Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ L 269 of 05.10.2002, p. 15; OJ EU Polish special edition, Chapter 5, vol. 4, p. 255)

concerning race, religion, nationality, ethnic origin, creed, and sexual orientation – are rather rarely seen in court practice.

It must be stressed that the Polish Labour Code provides for a discrimination prohibition in labour relations, i.e. with regard to employees (Art. 2 of the Labour Code). The prohibition provided for in the Labour Code thus extends only to relations between the employer and the employee, exceptionally also including an employee candidate and the prospective employer (cf. Art. 18^{3b} § 1.1 of the Labour Code concerning refusal to enter into or termination of an employment relation). Left from the scope of the Labour Code is provision of work under self-employment (performance of a non-agriculture activity), under various forms of traineeships and internships and pursuant to civil law agreements, e.g. contracts of mandate, specific task contracts, service agreements that are governed by the provisions on mandate, agency, and other innominate contracts. The discrimination prohibition concerning such legal relations (that have already been established or those that precede their establishment) has been provided for outside the Labour Code.

As from 1 January 2011 the Act on Implementation of Some of the European Union Regulations Concerning Equal Treatment of 3 December 2010 has been effective in the Polish legal system⁵. A necessity of implementing the following acts of the European Union into the Polish legal order has been the underlying reason for adopting that Act:

- 1) Council Directive 86/613/EEC of 11 December 1986 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 (OJ L 359 of 19.12.1986, p. 56; OJ EU Polish special edition, Chapter 5, vol. 1, p. 330);
- 2) Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180 of 19.07.2000, p. 22; OJ EU Polish special edition, Chapter 20, vol. 1, p. 23);
- 3) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 of 2.12.2000, p. 16; OJ EU Polish special edition, Chapter 5, vol. 4, p. 79);
- 4) Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ L 373 of 21.12.2004, p. 37);
- 5) Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on

⁵ Journal of Laws No. 254, item 1700

the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204 of 26.07.2006, p. 23).

The Act on Implementation of Some of the European Union Regulations Concerning Equal Treatment stipulates (in Art. 2.2) that the provisions of Chapter 1 and 2 of the Act shall not apply to employees to the extent that has been provided for in the regulations of the Labour Code. These Chapters contain general provisions, including definitions of various types (expressions) of discrimination and unequal treatment, and also define the scope of adjustment of the Act (Chapter 1) and define the principle of equal treatment, provide for prohibitions of its breach and legal measures for its protection (Chapter 2). It may be assumed that in the sphere of equal treatment (Art. 2 of the Labour Code) employees shall be subject to the provisions of Chapter IIa in the Division One of the Labour Code, while in case of persons performing work pursuant to the basis other than the employment relation (e.g. under self-employment, civil-law agreements) the provisions of the Act of 3 December 2010 shall apply.

2. The employer shall be obliged to equal treatment of employees with regard to entering into and terminating of an employment relation, terms of employment, promotion, and access to training for the improvement of professional qualifications (Art. 18^{3a} § 1 of the Labour Code). The employer shall be obliged to oppose discrimination in employment (Art. 94.2b of the Labour Code).

The Act of 3 December 2010 prohibits unequal treatment, among others, with regard to (Art. 8.1):

- 1) professional education, including continuation of education, improvement, change of profession, and professional practices;
- 2) conditions for taking and conducting business or professional activity, including, but not limited to the employment relationship or work under a civil-law contract;
- 3) joining and acting in trade unions, employers' organisations and professional self-governing associations, and also exercising rights to which members of these organisations are entitled;
- 4) access to and conditions of use of labour market instruments and labour market services, specified in the Act on the Promotion of Employment and Labour Market Institutions, Offered by Labour Market Institutions and Labour Market Instruments and Labour Market Services Offered by Other Entities Acting for the Employment, Development of Human Resources and Prevention of Unemployment of 20th April

2004.

There have been no judicial decisions of the court published that concern application of the Act of 3 December 2010 in practice. Cases the basis for which would be provided in the regulations of the Act would be examined by civil courts.

3. According to the Labour Code discrimination involves differentiation of a situation of the employees on the basis of a prohibited criterion. Prohibited criteria have been referred to by way of example only in Art. 11³ of the Labour Code and Art. 18^{3a} § 1 of the Labour Code (also in Art. 94.2b of the Labour Code). The use of the term “in particular” in those provisions expands the notion of discrimination in Polish law when compared with the EU laws in which listing of prohibited differentiating criteria is exhaustive (cf. for example Art. 1 in connection with Art. 2.1 of Directive 2000/78/EC).

In case law of the Supreme Court prohibited criteria of differentiating a situation of employees shall include – besides the criteria directly listed in Art. 11³ of the Labour Code and Art. 18^{3a} § 1 of the Labour Code. – circumstances that are not based on distinctions relating to the type and scope of duties of an employee, the manner of their performance or qualifications of an employee (cf. a Supreme Court judgement of 5 October 2007, II PK 14/07⁶) and personal qualities of an employee, not related to the work performed (cf. a Supreme Court judgement of 4 October 2007, I PK 24/07⁷). Differentiation of a situation of employees on the basis of a permitted criterion is not discrimination (cf. Supreme Court judgements of 28 May 2008, I PK 259/07⁸ and of 3 December 2009, II PK 148/09⁹).¹⁰

A list of premises for a discrimination prohibition provided for in the Act on Implementation of Some of the European Union Regulations Concerning Equal Treatment of 3 December 2010 is a closed one (Art. 1). Among others, it is this aspect of the regulations provided in the Act that significantly differs from the provisions of the Labour Code (given, however, that the Labour Code provides for a better, or broader extent of protection against discrimination in employment). The Act is limited to simple implementation of the solutions offered in directives that do not provide an open catalogue of premises for unequal treatment. From this perspective, solutions adopted in the Labour Code are more advantageous for employees – protection against unequal treatment is

6 OSNP 2008, No. 21-22, item 311

7 OSNP 2008, No. 23-24, item 347

8 OSNP 2009, No. 19-20, item 256

9 LEX No. 1108511

10 E.Maniewska, K.Jaśkowski, Kodeks pracy. Komentarz, electronic version LEX 2011, reasoning of Art. 18^{3a} - 18^{3e} of the Labour Code.

fuller.

An open catalogue of the prohibited discrimination criteria that is provided for in the Labour Code sometimes creates problems for case law, especially when an employee subjectively feels discriminated, but is unable to demonstrate (provide, define) any reason for discrimination that are referred to in Art. 11³ of the Labour Code and in Art. 18^{3a} § 1 of the Labour Code. However, in judicial decisions, the plaintiff is required to actually justify his claim that he has been discriminated which should be done, among others, by defining (indicating) a probable reason for unequal treatment. This is to properly direct the hearing of evidence and allow the responding employer taking defence and demonstrating that he has not applied a discriminating criterion against the employee who has quoted such criterion. In other words, under case law of Polish courts an employee who is the plaintiff is expected to demonstrate (meaning: that he shall substantiate to a high extent) unequal treatment and shall refer to a probable (presumed) reason of such unequal treatment, and only later on shall the responding employer be responsible for the burden of proof to demonstrate (substantiate) that there has been no unequal treatment at all or unequal treatment has been objectively justified (and, in any case, it has been caused by none of the prohibited reasons for discrimination).

Although the statutory catalogue of discriminating reasons is open, there are arguments in case law that seem to support a view that the Supreme Court treats such catalogue as closed.

In its judgement of 3 September 2010, I PK 72/10¹¹, the Supreme Court assumed that discrimination within the meaning of Art. 18^{3a} § 1 of the Labour Code involves unequal treatment in employment due to reasons provided for in that regulation; however, it does not suffice when an employee refers to some vague “discriminatory background”.

In its decision of 24 May 2005, II PK 33/05¹², the Supreme Court stated that “an interested employee is responsible for demonstrating that his status has differently developed so that the employer could next argue that such differentiation has not been discriminatory. The employer cannot be seriously required to challenge a subjective feeling of any discrimination, even though completely imaginary, and to demonstrate in advance, to any employee, including the one that is troubled by an over-exaggerated self-worth on the labour market that he has not committed any discriminatory act against such employee. Despite being so requested by the Court, the plaintiff, however, did not demonstrate what discriminatory actions on the part of the employer would involve.”

11 LEX No. 653657, OSNP 2012, Nos. 1-2, item 4

12 LEX No. 184961

The non-discrimination principle in employment is breached only when differentiation of a situation of the employees is caused only when the employer has applied a criterion that is prohibited by law (cf. a Supreme Court judgement of 28 May 2008, I PK 259/07¹³). In its last judgement, the Supreme Court has concluded that discrimination is a qualified form of unequal treatment, thus denoting worse treatment of an employee that is not justified by objective reasons because of the qualities or features that refer to him personally, for example those mentioned in Art. 18^{3a} § 1 of the Labour Code, or because of employment for a specified or unspecified term or full-time or part-time employment. Inadmissible differentiation of a legal situation of employees in terms of negative or prohibited criteria shall be considered as discrimination in employment. Inequality caused by reasons recognised as discriminating shall not be considered as discrimination even if the employer may be charged with the breach of the principle of equal treatment (rights) of employees as provided for in Art. 11² of the Labour Code. (cf., among others, Supreme Court judgements of 12 December 2001, I PKN 182/01¹⁴; of 23 January 2002, I PKN 816/00¹⁵; of 17 February 2004, I PK 386/03¹⁶; of 5 May 2005, III PK 14/05¹⁷; of 10 October 2006, I PK 92/06¹⁸, and of 9 January 2007, II PK 180/06¹⁹). If the employee makes a charge of the breach of the provisions relating to discrimination, he shall – pursuant to Art. 18^{3b} § 1 of the Labour Code. – indicate a reason (criterion) because of which he has been or is discriminated. In the case under review the plaintiff did not indicate any reason of discrimination, seemingly being of an opinion that any inequality in treatment of employees per se would justify the charge of discrimination. Nonetheless, in the Supreme Court's opinion violation of the principle of non-discrimination in employment may occur only when differentiation of a situation of employees is caused only when the employer has applied a criterion that is prohibited by law. This, simultaneously, means that differentiation of employee rights because of their differentiating qualities not regarded as discriminating does not constitute discrimination.

If the employee is unable to substantiate unequal treatment (e.g. by comparing his situation with that of other employees) or he does not provide (refer) to any prohibited criterion as a presumed reason for unequal treatment, it is not possible to assume (under a civil law procedure) that discrimination has actually occurred. The employee is

13 OSNP 2009, No. 19-20, item 256

14 OSNP, 2003 No. 23, item 571

15 OSNP, 2004 No. 2, item 32

16 OSNP 2005, No. 1, item 6

17 OSNP 2005, No. 23, item 376

18 LEX No. 201171

19 OSNP 2008, Nos. 3-4, item 36

responsible for substantiating circumstances out of which presumed existence of discrimination may be inferred. That would then define the framework of the hearing of evidence. Difficulties concerning evidence (relating, for example, to the fact of demonstrating sexual harassment when there are no witnesses of illegal behaviour perpetrated by the molesting person or of demonstrating unjustified differences in the remuneration amount when information on remuneration of peer employees cannot be obtained), may pose a barrier in seeking protection of their rights by the discriminated employee.

Given such situation the reversal of the burden of proof substantially facilitates and warrants effective seeking protection against unequal treatment and discrimination.

4. Facilitation of evidence for the employee who seeks protection against unequal treatment has been first worked out in case-law of the European Court of Justice (currently the Court of Justice of the European Union), and subsequently developed in directives.

A different distribution of the burden of proof is provided for in all "equal treatment" directives. For example:

In Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Art. 10 provides that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination (par. 1). This, however, shall not apply to criminal procedures (par. 3), nor to proceedings in which it is for the court or competent body to investigate the facts of the case (par. 5).

In Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Art. 8 provides that Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment (par.1).

Finally, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of

men and women in matters of employment and occupation (recast) in Art. 19 contains the most extensive provisions governing the burden of proof, according to which, among others, the members states Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment – it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

Provisions of the Directives on the distribution of the burden of proof has been properly implemented into the Polish legal order both in the Labour Code (Art. 18^{3b} § 1 *in fine* of the Labour Code), and in the Act of 3 December 2010 (Art. 14.2 and 14.3). Based on these regulations it seems that a person who makes a charge of breaching the principle of equal treatment shall substantiate the fact of its breach, and when the breach of the principle of equal treatment has been substantiated the person who has been charged with the breach of such principle shall be obliged to demonstrate that he has not committed its breach.

In the Supreme Court's case law there are direct references to the provision concerning the distribution of the burden of proof. In its judgement of 3 September 2010, I PK 72/10²⁰, the Supreme Court concluded that the employee should indicate the circumstances substantiating the charge of unequal treatment in employment, and then the burden of proof would pass onto the employer that he had been guided by objective reasons (Art. 18^{3b} § 1 of the Labour Code and Art. 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).²¹

5. The distribution of the burden of proof, generally provided for in Art. 6 of the Civil Code, shall change in cases of discrimination as a result of the structure of shifting the burden of proof onto the employer as adopted in Art. 18^{3b} § 1 *in fine* of the Labour Code. Pursuant to Art. 6 of the Civil Code, the burden of proof of a fact shall be for the person that derives legal consequences from such fact. The rule indicates to whose disadvantage doubts should be resolved when the hearing of evidence fails to explain in full all relevant

20 LEX No. 653657

21 Similar in a Supreme Court judgement of 9 June 2006, III PK 30/06, OSNP 2007, Nos. 11-12, item 160

elements of the facts of the case. However, Art. 18^{3b} § 1 *in fine* of the Labour Code relieves the employee from a necessity of proving the fact of his discrimination as a qualified form of the breach of the principle of equal treatment. The employee shall be charged only with the burden of substantiating unequal treatment (provided that it should be remembered that not each instance of unequal treatment is discrimination, therefore the employee should yet determine/define a presumed reason for unequal treatment). By wishing to become relieved from liability (primarily for damages – Art. 18^{3d} of the Labour Code), the employer must in turn prove that he does not discriminate the employee – or that he does not treat him differently than other employees (thus, there is no place of unequal treatment), or that other (unequal) treatment of the employee is justified by objective circumstances that do not have the nature of applying an inadmissible differentiating criterion that is discriminating (e.g. the employee receives lower remuneration because he has smaller professional experience, lower qualifications, is less efficient, and not because of his sex, age, disability, ethnic origin, sexual orientation, etc.). It is the employer that is charged with the burden of an obligation to demonstrate that he for example has refused to employ or terminated an employment relation due to other (justified) reasons other than ones discriminating for the employee.

The employer may relieve himself from the charge of discriminating the employee in employment, if he demonstrates that while making decisions concerning matters referred to in Art. 18^{3b} § 1 of the Labour Code (refusal to enter into or termination of an employment relation, unfavourable terms of remuneration for work or other terms of employment or overlooking an employee in promotion or granting other work-related benefits, overlooking an employee in the selection of participants in training for the improvement of professional qualifications) he has been guided by other reasons than legally prohibited criteria of differentiating employees and persons seeking employment. A discrimination charge shall be found groundless, if the employer demonstrates that by differentiating employees he has been guided by objective reasons. The structure of reversing the burden of proof shall relieve the employee from a necessity of proving the fact of his discrimination as a qualified form of unequal treatment. Under applicable laws, it is the employer who – defending himself against a discrimination charge and wishing to be relieved from liability (primarily for damages) – shall have to prove that he does not discriminate the employee, and any differentiation of the situation of employees has been objectively justified.²² Nonetheless, it is still for the employee to prove (or at least substantiate - using factual

22 A.Świątkowski, Kodeks pracy. Komentarz, electronic version Legalis 2010, reasoning of Art. 18^{3b} of the Labour Code.

presumptions to Art. 231 of the Code of Civil Procedure) unequal treatment. In general, it is performed by comparing his situation with that of other employees. However, if there are no other comparable employees (e.g. the only candidate who has responded to the vacancy advertisement has faced refusal of employment), or discrimination is indirect, which makes application of a direct comparison of the situation of a discriminated employee with a non-discriminated employee difficult, then proving unequal treatment may be performed with the use of any available evidence, e.g. statistical data or situation testing²³.

Prior to 1 January 2011 Art. 18^{3b} § 1 *in fine* of the Labour Code could be applied (by means of the *iuris* analogy) in matters not provided for by labour law – e.g. to employment relations outside the contract of labour. Currently, the same principle of the distribution of the burden of proof is governed by Art. 14.2 and Art. 14.3 of the Act on Implementation of the Equal Treatment Directives of 3 December 2010. Prior to the last provision becoming effective to certain situations qualified as discrimination the structure of the reversed burden of proof provided for in the first sentence of Art. 24 § 1 of the Civil Code could have been applied. In general, discrimination involves violating someone's dignity treated as a personality right (Art. 23 of the Civil Code), and thus application of the distribution of the burden of proof appropriate for cases of protection of personality rights shall be fully justified.

According to A. Świątkowski²⁴ reasonableness of the charge of breaching the principle equal treatment in employment shall depend on failure to attain an objective desired by persons who consider themselves discriminated because of legally prohibited differentiation criteria. In the event of refusal to enter into an employment relation, refusal to extend employment, unfavourable terms of remuneration for work or other terms of employment, overlooking an employee in promotion or granting other work-related benefits, overlooking a candidate employee in the selection of participants in training for the improvement of professional qualifications, a candidate employee or an employee shall charge the employer that the negative decision has been taken because of the prohibited criteria, and not because of objective reasons. Therefore, for example, a charge of discrimination based on sex as a legally prohibited criterion of differentiating employees may be raised only when the employer employs, extends employment, grants a pay rise, provides more favourable terms of employment, grants other work-related benefits, selects

23 Cf. Katarzyna Wencel, Owoc zatrutego drzewa? Situation testing jako dowód w sprawach o dyskryminację, *Studia Prawnicze* 2010, No. 3-4, p. 273-299

24 A.Świątkowski, *Kodeks pracy. Komentarz*, electronic version Legalis 2010, reasoning of Art. 18^{3b} of the Labour Code.

for training for the improvement of professional qualifications a person of another sex than the one that has made a discrimination charge. Only in case of discrimination based on pregnancy, it shall not be necessary to compare a situation of a discriminated female employee with another male employee, since discrimination based on pregnancy shall always be discrimination based on the criterion of sex. Also, in case of harassment or sexual harassment, it shall not be necessary to compare the situation of a discriminated employee with a situation of other non-harassed employees (harassment is always discrimination, even when it concerns, to the same extent, all employees of the same employer).

A necessity of indicating a presumed discrimination criterion sometimes causes difficulties for employees. If one of the employees receives a pay rise, and the other one does not receive it, then it shall not be possible to refer to it as discrimination without identifying/diagnosing the reason for such differentiation as inadmissible. If both employees are of the same sex, in the same age, have the same sexual orientation, nationality, ethnic origin, etc., identification of an inadmissible reason for differentiating their situation may be difficult, or even impossible (since it is not known what the employer has been guided by when making such differentiation).

The employee who charges the employer with discrimination based on one of the prohibited criteria of differentiation is not under an obligation established in the provision of Art. 18^{3b} § 1 of the Labour Code to substantiate that while undertaking the disputable action the employer has been guided by such specific criterion of differentiation of employees that is prohibited by law. However, it is assumed in case law that the employee who seeks protection before the labour court further to unequal treatment by the employer shall not only substantiate the fact of unequal treatment, but also indicate (refer) to an alleged (probable) inadmissible criterion of differentiating his own situation and that of another employee (other employees). It is especially desired when the reason for discrimination is not obvious, e.g. it is not explicitly (visibly) determined by sex, age, disability, race, or ethnic origin, etc. of the discriminated employee.

In the doctrine – according to which it is necessary for the employee (plaintiff in proceedings) to refer to a specific inadmissible differentiating criterion, because of which discrimination occurs – the above case law is questioned, or even challenged. The doctrine states that substantiation of unequal treatment by the employee as such shall result in a factual presumption that such differentiation is a consequence of discrimination. It is the employer who is charged with an obligation to refute such presumption. However, presumption of discrimination as such must be strong enough for the labour court not to

dismiss the action (e.g. for damages – Art. 18^{3d} of the Labour Code) forthwith, by quoting its obvious groundlessness. In a case concerning discrimination, those provisions of the Code of Civil Procedure must be applied that allow recognising as established those facts that are of material importance for the case, if such conclusion may be derived from other established facts (the so-called factual presumptions – Art. 231 of the Code of Civil Procedure). It is a rule that is applied to *prima facie* evidence with the transfer of the burden of proof onto the respondent to demonstrate that there has been no discrimination.²⁵

A charge of employee discrimination because of an inadmissible criterion of differentiation shall depend on the time when the employer has demonstrated that by undertaking the challenged actions he has been guided by objective reasons. Only demonstration of objective reasons underlying the actions undertaken by the employer other than those prohibited by Art. 18^{3a} § 1 of the Labour Code shall provide for effective defence against a discrimination charge. Summarising, it must be said that Art. 18^{3b} § 1 *in fine* of the Labour Code expresses a presumption that if the employer fails to prove that he has been guided by objective reasons, then differentiation of employees by the employer due to reasons set forth in Art. 18^{3a} § 1 of the Labour Code shall be considered as a breach of the principle of equal treatment in employment. Further to Art. 6 of the Civil Code it shall be the transfer of the burden of proof onto the employer – for the purpose of implementing the principle of protection of employee rights.²⁶ If the situation of the employee has been differentiated against other persons, then it shall be presumed that the principle of equal treatment has been breached, and the burden of refuting such presumption shall be transferred upon the employer.²⁷

As far as the distribution of the burden of proof is concerned, a similar regulation is included in the Act on Implementation of Some of the European Union Regulations Concerning Equal Treatment. Pursuant to Art. 14 of this Act everyone who accuses of the violation of the principle of equal treatment, makes the fact of its violation probable (par. 2). In the case the violation of the principle of equal treatment has been made probable, the person who is accused of the violation of this principle, is obliged to prove that they have not violated this principle (par. 3). Similar, like in case of the employee-employer relation that is governed by the Labour Code, but also pursuant to Art. 14 of the Act of 3 December 2010 a person against whom a discrimination prohibition has been

25 M. Wandzel, Kodeks pracy. Komentarz (ed. B. Wagner), 2004, p. 81-82

26 A. Sobczyk, Z problematyki równego traktowania w sferze wynagrodzeń, Studia z Prawa Pracy i Polityki Społecznej 2006, No. 1, p. 65.

27 P. Czarnecki, Rozkład ciężaru dowodu w sprawach na tle dyskryminacji, PiZS 2006, No. 3, p. 11

breached shall only be charged with the burden of substantiating the fact of unequal treatment. An obligation of demonstrating that there has been no breach of the principle of equal treatment (discrimination prohibition) shall be on that person who has been charged with its breach.

A person against whom a discrimination prohibition has been breached shall deserve special protection, since proving discrimination (e.g. the fact of harassment or sexual harassment) shall be usually difficult, and sometime even impossible. The transfer of the burden of proof onto the opposite party in such situation shall result in having it obliged to prove lack of circumstances that could be treated as one of the forms of discrimination (e.g. harassment or sexual harassment).

A principle concerning the distribution of the burden of proof has been implemented into Polish normative acts from Art. 10 of Council Directive 2000/78/EC and Art. 8 of Council Directive 2000/43/EC. Pursuant to Art. 4.1 of Directive 97/80 – that is a model for this regulation – a person who considers themselves discriminated shall present facts before a court from which it may be presumed that there has been direct or indirect discrimination. It shall be for the respondent to prove that the principle of equal treatment has not been breached.

The Act on Implementation of Some of the European Union Regulations Concerning Equal Treatment of 3 December 2010 is so new that it has not been construed in case law of the Supreme Court yet. However, to its Art. 14.2 and Art. 14.3 views expressed by the Supreme Court may apply that concern the distribution of the burden of proof in cases relating to labour law involving breach of the principle of equal treatment in employment (or court interpretation of Art. 18^{3b} § 1 *in fine* of the Labour Code and in Art. 10 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

All the rules that govern the distribution of the burden of proof are applied in cases of unequal treatment based on sex which are the cases of discrimination in employment that are most frequently examined by Polish courts.