

## **Equal Treatment Authority Advisory Board**

### **Viewpoints 384/3/2008. on Victimization**

The retaliation against those who wish to fight the violators of the principle of equal treatment limits the assertion of right this is why it shall be punished with strict sanctions. The ban on victimization relates to each legal relationship and natural or legal person. Even those people who do not possess protected characteristics as they are set forth in Section 8) of Equal Treatment Act but suffer disadvantages because they have objected to the violation of equal treatment, started procedure or participated in it are inside the scope of protection. Even if the discrimination complaint and its procedure do not bring any result, victimization can be apparent.

The rules of evidence production have to be used according to the characteristics of victimization as it is set forth in Section 19 of Equal Treatment Act. The rules of evidence production shall be used concerted with the requirements of community law and the efficient protection of the applicants.

According to Section 1) 7 of Equal Treatment Act victimization or the instruction to do it are the violation of Equal Treatment Act . The ban on victimization is the assurance of equal treatment, it protects the applicants or his helpers from the retaliation of the respondents. Victimization is a most condemned form of the violation of equal treatment which has to be sanctioned strictly.

The scope of the ban on victimization

Both legal and natural persons can be the targets of victimization. The most common occurrences of it are in employment, education, health service, official proceedings and when social and other services are provided.

Equal Treatment Act is in force even during the probation. The sudden termination of probation is also illegal if it is against a person who objected to discrimination, started a procedure or participated in it.

### **Victimization in Community Law**

Victimization is defined for the first time in Article 7 EU Directive 76/207:

“The member states take the necessary measures against the dismissal of those employees who complained against the violation of equal treatment at work or used legal practices.”

According to Article 9 of EU Directive 2000/43

“Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.”

According to the judgement of in the Coote case even after the termination of an employee's contract he/she has to enjoy protection from victimization for standing against the violation of equal treatment. Here the employer violated the principle of equal treatment when the employee was denied a reference. It shows that victimization can occur even after the termination of one's contract.

## **The idea of victimization in Hungarian law**

According to Section 3) 10 victimization is the act that violates the rights or threatens a person who

- takes exception
- starts procedure
- participates in a procedure

because of the violation of equal treatment.

The ban on victimization aims to give legal remedies against the attitude which causes disadvantages or threaten those people who intervene against discrimination or participate in the proceedings. The legal defence extends to those people who do not possess protected characteristics as it is set forth in Article 8 of Equal Treatment Act but suffer disadvantages because their complaints aimed at enforcing compliance with the principle of equal treatment.

The basis of victimization is a discrimination complaint or its procedure. There is a lapse of time between the complaint of discrimination, the participation in its procedure and the victimization. The victimization is always after the complaint and its procedure or the participation in it in an interrelation with reason – effect. The applicant can find legal remedies against both the discrimination and the victimization following it. The court or the Authority often investigates two sorts of violation: the discrimination complaint and the victimization following it. The applicant shall be informed that the court or the Authority proceeds in the basic discrimination case only at the request of the applicant.

The “formula” of victimization:

**reason + effect = result**

complaint of discrimination + grievance = victimization

proceeding, participation or the danger of damage

The basic complaint of discrimination need not be based or declaratory. The victimization can be stated even if the complaint is baseless or no judgement has been issued yet or the complaint has been refused. If the violation of law is related with the discrimination complaint the victimization can be stated. The malicious and repeated intent of the applicant, however, can limit the declaratory judgement of victimization if it aims to abuse the interests of the respondent.

Victimization is to be done against such a legal person who has intervened against the violation of equal treatment or participated in a procedure against it. Victimization is based on the following forms of intervention:

- taking exception: in the form of written or oral complaint, announcement or observation. E.g. an employee pleads with the employer for his or his colleague's discrimination or harassment.

-starting a procedure: the victimized person enforces his rights at court or the Equal Treatment Authority.

-participation in the procedure: The Equal Treatment Act protects those people who participate in a procedure for violating the principle of equal treatment.

## **The idea of infringement**

The idea of infringement has to be interpreted in a broad sense as victimization can be stated even if the respondent did not violate a rule. Each attitude, provision, condition instruction, default or practice which hurts human dignity is arbitrary or malicious. Its retaliation aims to protect individuals from any adverse treatment as a reaction to a complaint or enforcing compliance with the principle of equal treatment. Harassment, for instance, is infringement.

Abusing law (Article 5 Civil Code) or malfeasance (Article 4 Labour Code) can result in victimization. *“According to Article 4 of the Labour Code rights and obligations shall be practised as earmarked. This direction means that a right based on the Labour Code cannot be practised in a way that contradicts the aim of that right. The employer’s right of notice can also be illegal if it is practised incompatible with its aim to harm, revenge or harass. In this case the employer’s notice is illegal as it is set forth in Section 1) 100 of the Labour Code*

*It can be stated if the employer abuses his right of notice against an employee who expresses lawful dislike of his or others’ employment and he is seemingly rightfully dismissed. In this case if the court is convinced that the employee’s contract has been terminated because he expressed his disapproval, the dismissal has to be declared unlawful. The employer does not have the right to terminate a person’s contract to ban his freedom of opinion.”*

The disciplinary proceedings or the transfer because of a discrimination complaint can also be deemed as the violation of law. The transfer itself cannot be deemed as the violation of law, but it still is if it is done unreasonably. It can mean the reduction of salary, worse circumstances, exclusion from bonuses and the denial of discretionary rights.

### **The Rules of Evidence**

The rules of evidence can be applied according to Section 19) of the Equal Treatment Act regarding the features of victimization. The solution has to comply with the requirement of community law and efficiently protects the applicants. It is based on the split obligation of evidence production:

1.
  - a. The applicant has to render the grievance he has suffered probable
  - b. He takes exception to the respondent’s violation of the principle of equal treatment, starts procedure or participates in it.

applicant, however, does not have to render that direct discrimination is probable. Neither does he have to prove that he started a procedure because he had suffered a basic form of discrimination.

2. Evidence imputed to the respondent: if the facts above seem probable, the respondent has to prove that

- a. the circumstances the applicant’s allegations did not exist or he was not the rightful claimant
- b. the applicant abode by the requirements of equal treatment or he was not bound to do so.

a. *The circumstances did not exist.* The victimization cannot be ascertained if the respondent proves that the applicant did not complain, did not start a procedure of discrimination or did not participate in it

or

the respondent did not violate the rights of the applicant or he did not threaten to do so.

b. *He observed the principle of equal treatment or he was not bound to do so.*

Victimization cannot be stated if the respondent proves that the applicant’s right was not violated because of the discrimination complaint of the applicant, its procedure or the participation in its procedure or the violation of the applicant’s right, the respondent threatening attitude are entirely independent of the complaint. his excuse is on legal grounds

During the exculpation the relevant rules of the Equal Treatment Act shall be applied. If it is

impossible in that particular field, the general rules of exculpation shall be used. As victimization is a most contemptible way of discrimination, the above rules of exculpation are to be applied strictly.

### **The ways of legal remedy**

Victimization can be remedied in the following ways:

a) Labour suit:

The violation of the equal treatment has to be properly remedied which cannot be accompanied with the violation of the rights of another employee (Section 2 ) Article 5 of the Equal Treatment Act), the employee can initiate a legal dispute to enforce his claim at employment.

b) Civil Action

The employee can start civil action at court for the violation of his personality rights.

c) The administrative procedure of the Equal Treatment Authority

It is based on the rules of the Equal treatment Act.

February 2008

Dr. Lilla Farkas  
Dr. Jozsef Karpati

Dr. Maria Herczog  
Dr. Benadette Somody

Dr. Tamás Gyulavari  
Dr. Gyorgy Szigeti