

Report on the situation of discrimination for reason of disability in Spanish legislation as of April 2004.

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The Legal Framework

Prohibition of Discrimination

General prohibitions of discrimination

The **Spanish Constitution** (December 27, 1978) (CE) art. 9.2 states that it is the responsibility of public powers to promote conditions so that the liberty and equality of the individual and of the groups in which they integrate are real and effective; to remove the obstacles that impede or make difficult their fulfillment and facilitate the participation of all citizens in political, economical, cultural and social life.

Art. 14 CE is dedicated to the principle of equality, and prohibits discrimination for reason of birth, race, gender, religion, opinion, or any other condition or personal or social circumstance. This prohibition does not include disability expressly. However, the Constitutional Tribunal, in judgment number 269/1994 (First Court) of October 1994, decided that disability is included in the generic clause "any other personal or social circumstance".

Article 49 CE adds that "The public powers will create a policy of welfare, treatment, rehabilitation, and integration of those with physical, sensory or psychological disability, to which they will pay the required specialized attention and will specifically protect them, so that they enjoy the rights that this Title spells out to all citizens".

Penal Code (Organic Law 10/1995, of November 23rd), considers an aggravating circumstance of criminal responsibility, the fact of "committing a crime for racist, anti-semitic, or other class of motives that refers to the ideology, religion, or beliefs of the victim, ethnicity, race, or the nation to which they belong, their gender or sexual orientation, or the illness or disability they suffer from" (art. 22.4).

The mentioned Code, within the crimes against workers, more concretely in its article 314, punishes "Those who commit serious discrimination in the

workplace, public or private, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nation, gender, sexual orientation, family situation, illness or disability, the retaining legal or workers' union representation, relationship with other company workers, or for use of any official languages within the state of Spain, and that do not restore a situation of equality before the law through the administrative requirement or sanction, compensating economic damage caused, will be punished with a prison sentence of six months to two years or a fine of six to twelve months”.

Within the crimes committed of the exercise of fundamental rights and public liberties guaranteed by the Constitution, art. 510 punishes “Those who cause discrimination...”, as those who disseminate injurious information against groups, for racist, anti-semitic, or other motives regarding ideology, religion, beliefs, family situation, belonging to a race or ethnicity, national origin, gender, sexual orientation, illness, or disability.

And finally, art. 515 CP considers illicit associations those that “promote discrimination”, because of distinct causes, among which are illness or disability.

The prohibition of discrimination for reason of disability in general

Since the implementation of law 13/1982 April 7th, of Integration of the Disabled, (LISMI), whose aim is the complete personal fulfillment of the disabled and their total social integration so that the necessary assistance and protection to the seriously disabled, discrimination due to disability is prohibited, and a quota system and other acts in favor of job integration for the disabled are provided, art. 38.2, 3 y 4.

In May 2003, the government submitted to the Congress of Representatives the project “Law of Equal Opportunities, Non-Discrimination, and Universal Access for Persons of Disability”. This project has been approved as Law 51/2003, December 2 (BOE 3/12/03).

In accordance with art. 1.1 of the cited Law 51/2003, “the object of this Law is to establish measures that guarantee and make effective the right of equal opportunities for persons with disability, in accordance with articles 9.2, 10, 14 y 49 of the Constitution”.

Article 3 sets as the field of direct application for this law: telecommunications and the information society; urbanized public spaces, infrastructure and buildings; transportation; goods and services at public disposition; and relations with public administrations. It will be applied only supplementarily to the job and workplace.

With the objective of adopting our legislation of directives 2000/43/CE and 2000/78/CE, Law 62/2003 December 30 of fiscal, administrative, and social order adopts measures necessary to guarantee equality of treatment and non-discrimination for reason on race or ethnicity, religion or convictions, disability,

age or sexual orientation (Title II, chapter III, art. 27 al 45, Law 62/2003), modifying the Statute of Workers (RDL 1/1995, March 24) and the Law of Social Integration of the Disabled (Ley 13/1982, April 7, from now on LISMI).

The prohibition of discrimination in the workplace for reason of disability

Law 62/2003, December 30, of fiscal, administrative, and social order measures, in its article 34.2, prohibits all direct or indirect discrimination in the workplace due to disability.

The current art. 4.2.c) on the State of Workers, in the draft given by art. 37 of law 62/2003, recognizes the right of workers not to be discriminated for reason of disability, that competent conditions always exist so that the job or workplace functions as intended.

Art. 17.1 of the cited Statute declares null the regulation precepts, clauses of collectives agreements, individual pacts, and the unilateral decisions of discriminatory employers.

Article 37 of the Law of Social Integration of the Disabled (Law 13/1982, April 7, from now on LISMI, modified by art. 38 of Law 62/2003), pursues the equality of treatment of persons with disability in the ordinary system of work.

Law 56/2003, of the 16th of December, of Employment in its art. 2 indicates as one of the objectives of employment policy, to guarantee effective equality of opportunities and non-discrimination in the access to employment and in the actions towards obtaining it, so that the free choice of professional trade without discrimination prevails.

The prohibition of discrimination in the workplace for other motives

The cited art. 34 of the law 62/2003 and 4.2.c and 17.1 of the Statute of Workers do not only refer to discrimination for reason of disability, but instead also for other motives, such as gender, racial origin or ethnicity, age, within the limits set by the law, social condition, religion or convictions, political ideas, sexual orientation, or affiliation with a union or language, within the state of Spain.

Jurisprudence of the Constitutional Court on the matter of discrimination

The matter of discrimination for reason of gender, which has been developed the most, within the jurisprudence of the Spanish Constitutional

Court can be distinguished in two stages, before sentence 128/1987, of July 16, in which the Tribunal maintains an indifferent position to the differentiation of gender (sex blind) demanding reasonability in the normal differential treatment. A second stage, begun with that sentence, abandons the formal neutral focus of the principal of equality, and presents the situation of marginalization that women have historically suffered. In this second stage, the tribunal confronts cases of direct or indirect discrimination that limit or prohibit women from various jobs (provider jurisprudence) and other inequality of benefits to women, in the work environment or in social security, to those of males, admitting in some cases the positive actions or inverse discrimination (compensator jurisprudence).

On the matter of disability, the TC in the previously cited sentence, 269/1994, has recognized the legality of the reservation of a quota for disabled persons in the selection of employees.

The Normative and conceptual framework

The Notion of Equality under the current law

Art. 1 of the CE recognizes equality as a high value of our judicial organization. In its art. 14 it recognizes before the law, the formal equality of all Spanish citizens, for the following reasons; to prohibit all discrimination for reason of birth, sex, race, religion, opinion, or whatever other condition or personal or social circumstance. Art. 9.2 does not only speak of formal inequality, but also of real inequality, to impose on “public powers to promote conditions so that the liberty and equality of the individual and of the groups in which they integrate are real and effective.

The Constitutional Court interpreting fundamentally art. 14 of our CE has affirmed:

A) That the principle of equality does not mean the prohibition of all unequal treatment, but that the differentiation must be analyzed as to whether it is reasonable or not.

B) That on occasions, and for the application of what is prepared in arts. 1 and 9.2 of the constitutional text, diverse treatment of distinct situations can even be demanded, resulting in the achievement of real and effective equality.

C) That temporary favorable measures can be taken in order to achieve true equality for the disadvantaged group

D) In the case that disability accepts the constitutionality of the quotas, and in general the promotional measures for equal opportunities of the persons affected by diverse forms of disability.

Law 51/2003, art. 1.2, as well as Law 62/2003, art. 28 define the principle of equal opportunities or treatment absent of direct or indirect discrimination, in terms that we will examine later.

In the matter of work, art. 34 of law 62/2003 says that: “The differences based in a characteristic related to any the causes referred to in the previous paragraph (racial origin or ethnicity, religion or convictions, the disability, the age or sexual orientation of a person) do not assume discrimination when, owing to the nature of the specific professional activity that it deals with or the context in which it is carried out, said characteristic constitutes a essential and determinant professional requirement, and that the objective is always legitimate and the requirement proportionate”.

Notion of Discrimination under current law

Legal concept

Art. 28 of Law 62/2003 defines concepts of direct or indirect discrimination as:

Direct Discrimination: when a person is treated less favorably than another in an analogous situation for reason of racial or ethnic origin, religion or convictions, disability, age or sexual orientation.

Indirect discrimination: when a legal or set regulation, a conventional or contractual clause, an individual pact or a unilateral decision, apparently neutral, can cause a particular disadvantage to a person with respect to others for reason of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, provided that it does not objectively correspond to an adequate or necessary legitimate end.

In the field of **disability law 51/2003**, said concepts are defined in similar terms, art. 6. In this way we can say that said law defines:

Direct Discrimination: is understood as all treatment of a disabled person which is less favorable than that of another found in an analogous or comparable situation.

Indirect discrimination: when a legal or set regulation, a conventional or contractual clause, an individual pact, a unilateral decision or a criteria or practice, or also an environment, product or service, apparently neutral, cause a particular disadvantage to a person with respect to others, for reason of disability, provided that it does not objectively correspond to a legitimate end and that the means of securing its end are not adequate or necessary.

Jurisprudence

The first sentence of the Constitutional Court on this matter is sentence 145/91, July 1, according to which, within the prohibition contained in art. 14 CE must also be included “not only the notion of **direct discrimination**, meaning, a prejudiced differential treatment due to gender where gender is the object of direct consideration, but also the notion of **indirect discrimination**, which includes treatment not formally discriminatory from those which they are derived, due to the factual differences that take place among workers of both sexes, prejudiced unequal consequences due to the differentiated and unfavorable impact that formally equal or reasonably unequal treatment have on the workers of one or the other sex due to the difference of sex. (FJ 2^o)

The Tribunal Court considers “discrimination for reason of sex to be understood as those pejorative treatments based not only in the pure and simple verification of the sex of the victim, but also in the concurrence of reasons or circumstances that have a direct and unequivocal connection to the sex of the person. This happens with pregnancy, a differential element or factor, that for obvious reasons, has a bearing on women exclusively (STC 173/1994, June 7, FJ 2 EDJ 1994/14452). The decisions based on pregnancy, which affect women exclusively, constitute, therefore, a discrimination for reason of sex banned by art. 14 CE” (TC 2^a, S 25-02-2002, no. 41/2002, Date BOE 03-04-2002. Pte: Gay Montalvo, Eugeni)

Concrete suppositions of discrimination

In the field of disability art. 4 of law 51/2003 considers discriminatory:

- The harassment of persons with disability
- The failure to comply with the conditions of accessibility
- The failure to comply with the obligation of reasonable adjustment
- The failure to comply with measures of positive action legally anticipated.

Also included within the concept of discrimination are orders to discriminate persons for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, art. 28.2 de la Ley 62/2003.

Reasonable accommodation

This subject is absolutely novel in our legislation, with its general character for persons with disability becoming regulated in art. 7 c of the law 51/2003, and in the matter of employment becoming regulated specifically in art. 37 bis of the law 13/1982 LISMI, modified in this point by the law 62/2003.

Authorized in art. 7 c of law 51/2003, reasonable accommodation is understood as:

“The measures to make adequate the physical, social, and attitudinal environment to the **specific necessities** of persons with disability, that in an

efficient and practical way and without taking on a disproportionate burden, facilitate the accessibility or participation of a person with disability in an equality of conditions to those of other citizens“

Art. 37bis.2 establishes the following:

“Employers are obligated to adopt the adequate measures for the adaptation of the work position and the accessibility to the company, according to the necessities of each specific situation, with the result to permit persons with disability access to the job, carry out their work, progress professionally and access training, excluding those measures that impose an excessive burden on the employer.”

To determine if a burden is or is not disproportionate, art. 7 c) indicated says:

To determine if a burden is or is not proportionate, it must be considered; the costs of the measure, the discriminatory effects assumed by the disabled persons if they are not adopted, the structure and characteristics of the person, the entity, or organization to put it in practice, and the possibility it has of obtaining official funding or any other support.

To this end, the proper Public Administrations can establish a plan of public support to contribute to defray costs derived from the obligation of making reasonable adjustments.

For its part, art 37bis 3 of law 13/1982, establishes that:

To determine if the burden is excessive it must be considered whether the measures, support, or public subsidy for persons with disability are mitigated to a sufficient degree no matter what the financial costs and other type of measures entail for the size, or volume of total business of the organization or company.

The failure on the part of the company to comply with its obligation to make necessary reasonable adjustments constitutes an indirect discrimination, as established in art. 37bis 3 of LISMI, that can only be justified if it constitutes a disproportionate burden. When a person with disability is in condition to work or access a determined training, the absence of these adjustments can never be justified by a company decision that involves unfavorable treatment of a disabled worker. This decision would be discriminatory, except for the said case of disproportionate burden.

The Notion of Positive Action Under Current Law

Law 51/2003 distinguishes among measures against discrimination, measures of positive action and promotional measures to achieve equal opportunities for persons of disability.

Art. 6 defines measures against discrimination:

Measures against discrimination are considered as those that result in the prevention or correction of the treatment of a person of disability that is directly or indirectly less favorable than that of another in an analogous or comparable situation.

In particular measures against discrimination are considered:

Measures against discrimination may consist of prohibition of discriminatory conduct and harassment, demands for accessibility, and demands for the elimination of obstacles, and making reasonable adjustment.

Art. 8 defines measures of positive action as:

Measures of positive action are considered as those supports of specific character which are aimed at preventing or compensating disadvantages or special difficulties that disabled persons have in the incorporation and full participation in political, economical, cultural and social environments, giving importance to different types and grades of disability.

In accordance with art. 9 of the Law of Equal Opportunities, measures of positive action can consist of:

- Additional supports
 - o Economic supports
 - o Technical supports
 - o Personal assistance
 - o Specialized services
 - o Special supports and services for communication
- Rules, criteria, or more favorable practices

Finally, the law anticipates promotional measures of equality, together with measures of positive action, that have as an aim a policy of comparison, and among those cited are:

- Measures of sensibility training
- Measures to ensure that administrative programs are of a quality that contemplates the situation of the disabled.
- Measures of innovation and technical development.
- The participation of the organization of persons with disability
- Plans and programs of accessibility and non-discrimination

Workplace Integration

The LISMI anticipates three systems of workplace integration for disabled persons: a) The integration in the ordinary work system, seeing that the system is preferential; b) the occupation in Special Work Centers, when the worker exceeds a certain grade of disability (disability above 33%); and c) occupational centers, when owing to the degree of disability, they can not access either one of the others.

In integration into the ordinary system of work, there is support for diverse measures, which we can describe as positive actions or assumptions of reverse discrimination:

1. A quota system.
2. Incentives
 - a. Indefinite Contracts (RD 1451/1983)
 - i. Subversion
 - ii. Bonuses in the Social Security quota
 - iii. Supports for professional training
 - iv. Bonuses to adapt work positions
 - v. Fiscal measures
 - b. Temporary contracts
 - i. Reduction in the Social Security business quota

The **Special Employment Centers** are those that firstly, are for those of more that 70% disability, and secondly that have as objectives: a) productive work, participating regularly in market operations; b) to assure disabled workers paid work, such as rehabilitation services and social integration; and c) to integrate the largest number possible of disabled into the normal work routine.

Workers that can be integrated through these centers are those that have a disability equal or superior to 33%, that means, that they have a limited work capacity in this same percentage.

The objective of the **Occupational Centers** is the social and personal integration of persons with disability whose capacity remains below the limits that permit integration using the formula of the Special Work Centers (art. 53 LISMI).

It is difficult to distinguish between measures of positive equalization and measures of positive action. The first provide the necessary support to the disabled to integrate into society, the second, to not be discriminated when they are objectively in equal conditions with a disabled person. The first, due to the very nature of the disability, are treated with measures of a permanent character, while the second, the positive actions, are only justified while a real unequal condition exists.

For example, the quota referred to, applies to persons who can not carry out their functions 100%, as well as persons who suffer a disability that does not impede them from carrying out their work to full performance.

Positive actions are considered as a demand by the social and democratic state, to achieve as a goal values such as justice and equality, resulting in the correction of the situation of certain groups that traditionally have been discriminated (STC 128/1987).

The LISMI anticipates the obligation of companies, public and private, or more than 50 workers of which 2% are disabled. However, its reiterated failure to comply, has resulted in the publication of the RD Royal Decree 27/2000, of January 14, of **Alternative measures for the compliance with the quota in favor of disabled workers**. This rule anticipates two types of substitute measures for the mentioned quotes: a) The possibility of contracts of supplies and services with Special Work Centers; b) donations in cash to foundations

and public use associations that have as an objective, among others, the promotion of the work integration of disabled persons.

This quota of employment of disabled persons is equally applicable to Public Administrations, in the 19th DA of Law 39/1984, of August 2 (modified Law 53/2003, of December 10, about public employment of the disabled), establishes that “In offers of public employment a quota will be applied of not less than five percent of vacancies to be covered by persons with disability whose degree of disability is equal to or superior to 33 percent, by which, two percent of the effective totals of the State Administration will be reached progressively, whenever they pass the selective tests and that, at that time, they will assign an indicated grade of disability and compatibility with the performance of tasks and corresponding functions, thus determining them in a regulatory way”.

The law does not anticipate special subsidies for low performance of a disabled worker with an integrated disability in the ordinary work system, but will anticipate a subsidy of 50% of the Minimum Wage in the case of the Special Work Centers.

Currently other experiences with the Employment with Support are being tried, that at the moment lack state legislation, and the Agreement has arisen between the Department of Employment and Social Matters and the Spanish Committee of Representatives for the Disabled (Cermi) for the Promotion of Employment of Disabled Persons. The isolated IV.9 anticipates “The Government, with the result of favoring the integration of the disabled in the ordinary work market. In the context of new manners of contracting, derived from the Interconfederate Agreement for the stability of employment, the establishment of a semi-protected employment was undertaken with the following characteristics, among others: economic incentives, work preparation that supports the transition process, limitation of its utilization according to staff, plan of contracting and possibility of return to the C.E.E., etc.”.

Personal and Material Scope of Current Law

Definition of person with disability under current Law

With a general character art. 7 of LISMI defines a person with disability “as any person whose possibilities of educational, work, or social integration are found to be diminished as a consequence of a deficiency, foreseen as permanent, of a congenital character or not, in their physical, psychological, or sensory capacities”.

Art. 1.2 of law 51/2003, within the sphere of the law of equal opportunities, establishes that:

“To the effect of this Law, persons with disability equal to or superior to 33 percent will be considered. In any case, those affected by a disability equal to or superior to 33 percent will be considered pensioners of Social Security that

have a permanent incapacity to a complete degree, absolute or great incapacity, and pensioners of a passive class that are entitled to a retirement pension or retirement due to permanent incapacity”.

Acknowledgement of this situation must be made by the appropriate administrative bodies, according to the procedure regulated in RD 1971/1999, December 23, about recognition, declaration, and qualification of the degree of Disability, a decision that can be brought before the courts.

The person must suffer permanent physical or sensory deficiency, that makes difficult to some degree his education, social, or work integration. The recognition of the deficiency of the disabled implies, first the assessment of the deficiency, and then the consequences of the disability in the family surroundings, the work, educational and cultural situation, in such a way that the degree of disability is determined.

Concrete illnesses are not included within this definition unless demanded, so that the disabled person can obtain the benefits outlined in the law and that they obtain the recognition of this condition by the appropriate administrative services.

Therefore, in concept, the person must suffer a permanent physical or sensory deficiency, that makes difficult to some degree his education, social, or work integration. The recognition of the condition of disability implies, first the assessment of the deficiency, and then the consequences of the disability in the family surroundings, the work, educational and cultural situation, in such a way that the degree of disability is determined.

According to Law 24/2001, December 27, of Fiscal, Administrative, and Social Measures, additional regulation 6 (modified by law 51/2003), the minimum grade necessary to entitle rights to benefits established in the promotional measures in favor of employment must be equal or superior to 33 percent, with a decrease in work capacity to greater than or equal to said percentage.

In principle, only deficiencies foreseen as permanent are included within the concept of disability, not those which are temporary.

At this precise moment characteristics that do not affect a person's functioning are not included within the concept of disability, without detriment to those characteristics that could produce some psychological problem that must be evaluated.

The legislation on Social Security has two definitions of disability: a) In a contributing manner, the “situation of the worker that, after having been submitted to prescribed treatment and having been given high medication, anatomic reductions or grave reductions of function present themselves, susceptible to objective determination and predictable definitives, that diminish or annul their work capacity” (art. 136.1 LGSS); b) in its non-contributive manner, are “the deficiencies foreseen as permanent, of a physical or

psychological character, congenital or not, that annul or modify the physical, psychological, or sensorial capacity of which they suffer”.

The definition of disabled of the LISMI is much more extensive, in that it refers to the consequences that the deficiency causes, about the integration of the disabled, not only in his work efforts, but in others such as the educational or social efforts.

The obtaining of social security benefits, does not deprive the disabled from protection by anti-discrimination rules, to the contrary, the rules about discrimination consider the disabled persons entitled to determined disability benefits by Social Security, art. 1.2 Law 51/2003.

Definition of Employment, Occupation and training under current law.

Work integration for the disabled is pursued in three ways, the first promoting his employment in the ordinary system of work, the second, through contract in special work centers, and the third through occupational centers, as we have said.

In the first two cases, the disabled, maintain ordinary work relations with the company or special employment center, in the first case ordinary and special in the second case.

This work relationship, assumes that the worker lends their services voluntarily which are paid to an account and are within the sphere of organization and direction of another person, physical or judicial, designated employer or business (art. 1 ET).

The Occupational Centers are aimed at assuring occupational therapy, as a personal and social adjustment, to the disabled who cannot integrate in the work system using the previous manners.

Within anti-discrimination there is no special definition for training.

The LISMI attempts to integrate the disabled into “the ordinary system of general education, receiving, in this case, the support and resource programs that the Law recognizes”. A Special Education system is anticipated that will be provisional or definite, to those disabled for whom the ordinary educational system is impossible”, one of whose aim is professional training.

The Statute of Workers recognizes professional training as one of its rights, (art. 4), recognizing as a right the same conditions for disabled workers as for any other worker.

The Treatment of Medical Examinations under Current Law

It is necessary to start with art. 7 of the Law 41/2002, November 14, regulator of the autonomy of the patient and rights and obligations in the matter of clinical information and documentation, provides that:

“all persons have the right to confidentiality of information referring to health, and that no one can access it without previous authorization protected by Law”.

The Law of **Prevention of Risk in the Workplace** (Law 31/1995, November 8) imposes on the employer the obligation of protecting the health of workers through the entitlement to periodical medical examination, according to the risk of the work position (art. 22). However the entitlement is, in general, voluntary, except in some cases, and prohibits the information from the examination to be used in any discriminatory way, in general, for them to cause damage.

This same law, in its art. 25, provides that “The employers will guarantee in a specific manner, protection of the workers that, by its own personal characteristics or known biological state, including those workers that have a recognized physical, psychological or sensory disability, are especially sensitive to risks in the workplace. To this end, said aspects must be considered in the evaluation of risks and according to these, **necessary protective and preventative measures must be adopted**. Workers will not be employed in those work positions in which, due to their personal characteristics, biological state or recognized physical, psychological or sensory disability, nor other workers or other persons related to the company put in a dangerous situation or, in general, where they may find themselves in a state or temporary situation that does not correspond to the physiological demands of the respective job position.”

The employer has a right to demand the medical examination of the worker when he has justified his failure of attendance for health reasons (art. 20.4 Statute of Workers).

The law does not explicitly demand that the worker suffer some type of disability, and of course, that will not become obligated, if this circumstance does not influence in his performance. However, in the case that it may influence performance, it must be declared. Art. 52 of the Statute of Workers provides the possibility of dismissal of the worker for known ineptitude after the effective positioning in the company.

Vicarious Liability of the Employer for Discrimination. Harassment under current Law

There is no legal provision for responsibility of the principal company for acts of discrimination that the subcontractor may commit.

Law 51/2003, as well as law 62/2003 tipify harassment as a form of discrimination. Law 62/2003 defines the general character of harassment as:

“all undesired conduct with relation to racial or ethnic origin, religion or convictions, disability, age, or sexual orientation of a person, which has as an

objective or consequence an attack against his dignity and to create a intimidating, humiliating, or offensive environment”.

Remedies, Enforcement and Sanctions against discrimination under current non-discrimination law

The law of equal opportunities, law 51/2003, refers to those matters in the name of defense measures. Art. 17 anticipates the installation of the **voluntary system of arbitration** to solve conflicts that may arise in matters of equal opportunities and discrimination.

Art. 18 refers to the **right of effective judicial care of persons with disability**. It begins with a declaration that I believe is unnecessary, that means, in its first part, that:

The judicial care of the right to equal opportunities for persons with disability will include the adoption of all necessary measures to end the violation of the right and prevent ulterior violations, thus re-establishing to the victim the full exercise of this right.

Recognizes expressly the wide margin of performance of the Courts to end or avoid a discriminatory situation.

Recognizes the obligation of compensation for **moral damage**, even when no real economic harm has existed, art. 18.2, and imposes on the Courts the adoption of necessary measures, without saying which they may be, to protect the person physically as well as legally from negative consequences derived from a claim on this matter, definitively, to prevent **reprisals**.

Finally, art. 19 recognizes the **legitimacy of the judicial person** legally equipped for the defense of the rights and interests of the individual disabled person and to obtain reparation for this individual person.

Those workers who suffer whatever type of discrimination can access the courts of labor jurisdiction, and follow a special and urgent procedure, provided in the Law of Labor Procedure, (art. 181 Royal Legislative Decree 2/1995, April 7, modified by law 62/2003).

The taking of this action is conditional, firstly, to the presentation of the period of prescription or predicted expiration for the acts and conducts with which the discrimination deals. Secondly, to express with clarity the constituent facts of the discrimination. It is not necessary that the proof come with any special expense to take the steps of the demand.

Equally, the worker considered the victim or labor discrimination, can make a claim in the criminal courts.

In the administrative field, the discrimination is sanctioned as very serious conduct (art. 8 Royal Legislative Decree 5/2000, August 4, by which the revised text is proven by Law on Infractions and Fines in the Social Order, modified by art. 41 of law 62/2003), sanctioned by a fine of from 3005,07 euros to 90,151.82 euros. The failure to comply with the quotas or the alternative measures for the promotion of persons with disabilities (art. 15 Royal Legislative Decree 5/2000, of August 4, is sanctioned with a fine of 300,52 euros to 3005,06 euros.

The degree of the fine is done with consideration of the following factors: negligence and intention of the subjected offender, fraud or collusion, failure of previous warning and requirements of the Inspection, **figures of the business of the company**, number of workers or beneficiaries affected in the case, harm caused and quantity defrauded, as circumstances that can aggravate or moderate the degree to apply to the infraction committed (art. 39 Royal Legislative Decree 5/2000, August 4, by which the revised text is proven by Law on Infractions and Fines in the Social Order).

The processing of the expedient correspond to the Inspection of Work, and could begin in court through a claim (art. 52 Royal Legislative Decree 5/2000, August 4, by which the revised text is proven by Law on Infractions and Fines in the Social Order)

In our rights no provision exists so that the indemnity, due to an act of discrimination, is obtained by a fine. The indemnities are always corrective and not fined.

The burden of proof

With the general character of this subject, on one hand, art. 20 of law 51/2003, and arts. 32 and 36 of law 62/3003, is in similar terms to the foreseen specifically in the subject of employment, for the civil procedures and administrative dispute. Art. 20 cited expressly excludes its application to the criminal procedures or administrative dispute interposed against fines.

The burden of proof on this matter is regulated in art. 96 of the LPL, edited by law 62/2003:

“in those processes in which allegations, on the part of the acting party, exist of indications which are founded in discrimination for reason of sex, racial origen or ethnicity, religion or convictions, disability, age or sexual orientation, and correspond to the demanded contribution of an objective justification, sufficiently proven, of the adopted measures and their proportionality”.

Now, in order to use this rule of distribution for the burden of proof, it is necessary, that the actor accredit “the existence of an indication that generates a reasonable suspicion, appearance or presumption in favor of similar affirmation; it is necessary on the part of the actor to contribute “realistic proof” (STC 207/2001, October 22, FJ 5 EDJ 2001/38145) or “principle of proof” revealing the existence of a general discriminatory panorama or of facts that the

vehement suspicion appears for reason of sex, with sufficient affirmative merit of discrimination (for all, STC 308/2000, December 18, FJ 3 EDJ 2000/46409)".