

AIDS AND ETHICS IN THE WORK ENVIRONMENT: LAW AND CORPORATE CITIZENSHIP IN THE PROTECTION OF MINORITIES

AIDS E ÉTICA NO AMBIENTE DE TRABALHO: LEI E CIDADANIA EMPRESARIAL NA PROTEÇÃO DAS MINORIAS

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ABSTRACT

The present study aimed to highlight the ethical relationships that surround AIDS patients and the work environment, especially the legal protection of these minorities. For that, the methodology was the contextualization of such problems in the present Brazilian scenario and the legal and business responses inherent in such situations. The objective, therefore, was to motivate ethical studies aimed at such an approach and to reflect new themes that involve the inclusion of these minorities, still so disrespected. It was studied about the contagion in the work environment, the cases of discrimination and the appropriate legal responses, corporate responsibility inherent to the rights of these patients. It is concluded that universal ethical principles should

govern codifications, corresponding to the anthropological development of society. Therefore, developing an ethical community is to respect inclusion and social organizations, respecting, not merely the titles and concepts, but the ideals of justice.

KEYWORDS: Ethical Community; Anthropological Development; Discrimination.

RESUMO

O presente estudo teve como objetivo destacar as relações éticas que cercam os pacientes de AIDS eo ambiente de trabalho, especialmente a proteção legal dessas minorias. Para isso, a metodologia foi a contextualização de tais problemas no atual cenário brasileiro e as respostas legais e empresariais inerentes a tais situações. O objetivo, portanto, foi motivar estudos éticos voltados para tal abordagem e refletir novos temas que envolvem a inclusão dessas minorias, ainda tão desrespeitados. Foi estudado o contágio no ambiente de trabalho, os casos de discriminação e as respostas legais adequadas, a responsabilidade corporativa inerente aos direitos desses pacientes. Conclui-se que os princípios éticos universais devem reger as codificações, correspondentes ao desenvolvimento antropológico da sociedade. Portanto, desenvolver uma comunidade ética é respeitar a inclusão e as organizações sociais, respeitando, não apenas os títulos e conceitos, mas os ideais de justiça.

PALAVRAS-CHAVE: Comunidade Ética; Desenvolvimento Antropológico; Discriminação.

INITIAL CONSIDERATIONS

To analyze emerging questions, it is necessary to have a grasp of reality and contextualize it among the elements that concretely constitute life and the manner in which it is actually lived in today's world. Industrial society extols work as the driving force of development, social inclusion, and the necessary condition for social mobility

in mass society. For a long time the commercial firm was characterized by attitudes isolated from the social realm, creating its own conduct and discourse.

Nevertheless, today, investors, entrepreneurs, governments, and other social actors must adapt to situations that pervade the employment relationship so that, because of possible social and economic crises and paradigmatic alterations, stakeholders are not again treated as in earlier epochs, without any ethics or the protection or respect due to human dignity.

Considering that the general or basic principles of ethics are universal, they transcend time and space, are applied to innumerable intended beneficiaries, and reflect the necessity of coexistence, communication, mutual aid, interchange, and tolerance among individuals, peoples, and generations.¹

The purpose of this current work is to open a window on the reality of work with the motive of highlighting the importance of ethics in the treatment of the HIV-positive worker, as much on the part of all the participants in the work environment as well as on the part of employers. Thus, this article seeks to encourage reflection on the essential three topics, AIDS, ethics, and the workplace, on which a foundation for law and the maintenance of minimal conditions of respect for life, for human beings, and especially for HIV-positive workers, must be built.

1. HIV-POSITIVE WORKERS

In Brazil the first cases of HIV appeared at the beginning of the 1980s and the drug cocktail came into use in 1995, but even today almost 40 thousand Brazilians are infected each year. This rate exists without even considering the interests behind the sad reality of an Africa with 25% of its population already infected by HIV and of immigrants who are entering Brazil, principally through the state of Acre, where a state of social alert was officially declared in early 2013. The enormous number of Africans, Haitians, and Bolivians, among others, living there in conditions of total misery, using one common, totally filthy bathroom besides other conditions of total neglect are

¹ In this sense, read: http://www.esdc.com.br/RBDC/RBDC-09/RBDC-09-389-Viviane_Coelho_de_Sellos_Gondim.pdf

exposed to risks of contamination by diseases and possibilities of contracting various others, including AIDS.²

The life of any ill worker is always very difficult; however, workers with HIV have a double emotional burden because usually, in contrast to any other worker, they cannot publicly acknowledge their disease.³

Workers who contract any physical or emotional illness, have incapacitating diseases, or who suffer accidents at work have reduced physical conditions that make them appear to be victims in the eyes of their colleagues. On the other hand, workers who are infected by the HIV virus, for whatever reason, are not viewed sympathetically in the work environment; on the contrary, even well into the 21st century they are met with discrimination, rejection, and humiliation by colleagues and by supervisors.

The Constitution reflects the values and ethical principles pursued by a people, orienting the restrictive rules of human action in a given territory and assuring its sovereignty in the face of the international community, besides fixing the general rules of conduct for the state itself vis-a-vis other states and peoples.⁴

On the other hand, although the Brazilian constitution mandates that there will not be any form of discrimination, it does not specify sanctions against the veiled discrimination that exist in the everyday life of people who live with AIDS.

The World Health Organization (WHO) has established that the health of workers ought to encompass the full concept of “complete physical, mental, and social well-being, not merely the absence of illness or other injuries.” From this premise it follows that the dignity of workers in the workplace constitutes the achievement of a distinct stage of protection. In effect, a healthy place of work is one where anyone with the intention to work, to perform a specific function, whose work is useful to the firm, following the internal standards and rules, should be able to do so without suffering any discrimination, much less discrimination motivated because of sickness.

² The governor of Acre, Tião Viana, decreed on this date (09/04/2013) a state of emergency in the municipalities of Brasileia and Epitaciolândia. Two cities that border Bolivia and are the two main ports of entry for illegal Haitian immigrants and other nationalities.

³ It presents the Prof. Dr. Eduardo Milléo Baracat: <http://www.anamatra.org.br/artigos/adiscriminacao-ao-worker-with-hiv-aids>

⁴ Read this direction: http://www.conpedi.org.br/manaus/arquivos/anais/recife/trabalho_Justica_viviane_gondim.pdf

2. CONTAGION IN THE WORK ENVIRONMENT

There is, however, another situation regarding contagion at work. The situation described below is one that occurs because of a lack of or inadequate individual protective gear, making it possible to contract the virus in the work environment itself. This occurs generally with workers in laboratories, hospitals, among others, who handle contaminated blood, but it can occur in any work environment.

In these cases the firm's strict liability is usually understood, since it is not necessary to prove that there was negligence by the firm because even if all precautions have been taken, the risk of the economic activity itself is assumed by the firm. This was the case in 2012 in Porto Alegre, when a nurse's aide was contaminated with biological material from an HIV-positive patient while collecting blood.⁵

The Third Panel of the Supreme Labor Court (Tribunal Superior do Trabalho, TST) rejected an appeal by the Hospital das Clínicas of Porto Alegre, ordering it to indemnify the nurse's aide who was contaminated by the AIDS virus in a work accident. The Fourth Regional Labor Court, based on an expert legal investigation, endorsed a decision that fixed the value of indemnification at R\$145 thousand.

The TST Panel affirmed the decision of the Regional Court. To reach any different conclusion, it would have been necessary to reexamine the evidence, which is prohibited by Precedent 126 of the Supreme Labor Court (TST). The investigations conducted after the accident had not indicated contamination, but six months after the event, the nurse's aide tested positively for HIV. The legal examination conducted for the trial court indicated that the illness resulted from the work accident. Based on this exam, the court held the Hospital das Clínicas liable to pay the aide for moral damages. Indignant over the decision, the Hospital appealed to the Regional Labor Court of the state of Rio Grande do Sul, claiming that it provided adequate security measures and protective gear to avoid the accident, which occurred exclusively because of the nurse's aide's fault.

⁵ As already reported: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1983-14472010000400002

The Hospital maintained that it was improbable that the contamination had occurred because of the accident, since the aide only tested positive more than six months after the fact. The Regional Court rejected these assertions, concluding that the activity engaged in by the employee is inherently risky since injury is quite probable. In this case, the employer is strictly liable, being therefore responsible for paying damages independent of fault, according to Article 929 of the civil code. “The right to indemnification does not result from action or omission, rather arising only from the exercise of the risky activity,” emphasized the Regional Court.

On appeal of inspection by the Supreme Labor Court, the Hospital das Clinicas maintained that no evidence of its responsibility for the accident occurring had been produced. It also attacked the value set for the indemnification, claiming that this amount “surpasses the limits of good sense.” The reporting judge, invited judge Maria das Gracas Silvano, explained that the decision of the court was based on the conclusions of the legal investigation that affirmed that the illness was acquired because of the work accident. Despite HIV usually appearing within 40 days after contact, it can manifest itself up to one year later.

To alter such a decision, it would have been necessary to reexamine the facts and evidence, which is prohibited by Precedent Number 126 of the TST. The reporting judge concluded by saying that the value set for indemnification for moral damages took into consideration not only the injury suffered by the employee but also the pedagogic character of the penalty (Case RR-135200-72.2008.5.04.0030).⁶

3. DISCRIMINATION

Discrimination specifically directed at those infected by HIV or AIDS is related to the way it emerged historically, namely in a context after the sexual revolution in the West and being originally concentrated in narrow, already socially stigmatized

⁶ SOCIAL COMMUNICATION SECRETARY OF THE SUPERIOR COURT OF JOB. Available in [Http://applicacao5.tst.jus.br/unitedconsultation2/inteiroTeor.do?action=printInteiroTeor&highligHt=true&numeroFormatado=RR%20-%2020135200-72.2008.5.04.0030&base=accordion&numProcInt=224877&anoProclnt=2010&dataPublicacao=22/06/2012%2007:00:00&query=](http://applicacao5.tst.jus.br/unitedconsultation2/inteiroTeor.do?action=printInteiroTeor&highligHt=true&numeroFormatado=RR%20-%2020135200-72.2008.5.04.0030&base=accordion&numProcInt=224877&anoProclnt=2010&dataPublicacao=22/06/2012%2007:00:00&query=). Acesso em: 15/12/2016.

populations, such as homosexuals. These groups were initially classified as “populations at risk,” a concept now antiquated by the spread of the virus throughout the population.

The jurisprudence of the TST, based on Article 1, sections III and IV, of the federal constitution of 1988, statute 9.029/1995, and Convention 111 of the International Labor Organization (ILO) that forbid discriminatory practices in hiring or employment, has been guided by the understanding that except in situations of just cause, all discharges without reason of employees who carry the HIV virus, by employers aware of the illness, are presumed discriminatory and arbitrary.

Arbitrary terminations are presumed discriminatory when a justifiable motive is not proven, given the circumstances of physical debility caused by AIDS and the reality that even today discrimination and prejudice against people with HIV can be seen deeply rooted in society’s core.

On this matter, we must question the specter of material progress that appears boundless and the technological revolution that introduced an alteration of huge consequences for human relations into society⁷, especially since new human behaviors are needed to confront a crises that fundamentally expresses the disintegration of the foundations of a development model that is at risk.

In this form, the contemporary world is contending with the urgency of revising concepts, notions, and realities that are linked to the world of work and its environment, the productive forces, the conditions of protection that they produce, and, as a question of survival in the market, a new mentality that requires from firms a more humane posture, a responsible attitude towards its clients and consumers, in each and every line of activity.

3.1 STATE LAWS

In Espirito Santo, state statute 7.556, 10 November 2003, prohibits discrimination against bearers of HIV virus or persons with AIDS; in Goias, state statute 2.595, 26 January 1995, forbids and penalizes any discriminatory act against persons

⁷ Noteworthy is the: <https://jus.com.br/artigos/7989/responsabilidade-social-da-empresa>

with HIV or AIDS; in Minas Gerais, state statute 14.582, 17 January, 2003, prohibits discrimination against people with HIV and people with AIDS in state or quasi-state organs and entities; in Parana, state statute 14.262, of 19 April 2004, forbids discrimination against HIV-positive or persons with AIDS; in Rio de Janeiro, state statute 3.559, 15 May 2001, sets penalties for establishments that discriminate against people with the HIV virus, symptomatic or not; and in Sao Paulo, state statute 11.199, 12 July 2002, prohibits discrimination against persons with HIV or AIDS.

4. RESPONSIBLE SOCIAL ENVIRONMENT

A firm's bylaws do not exclusively concern the owners or the niche that the company occupies; instead they belong to a chain of relations, as much from the social point of view concerning the use of resources and, more deeply, as issues pertaining to its postures in a social context.

The socially constituted firm plays a role affecting the structures, values, and behaviors of new generations, and it has become very clear that if it expects much more of everyone, they also require much more whatever the differences are in its *modus vivendi*. That is, humanity is arriving to the conclusion that time, leisure and health are more important than simply working hours, and thus the inclusion at work of HIV-positive workers is increasingly critical.

The environment is undergoing a profound change in its conception.⁸ Human life is established vicereally by the means in which it is constituted. All human relations, all of its determinants, all of its causes and social effects are linked directly to the environment. All social formations, all life styles, and the human condition, with their activity transforming the world through material and symbolic production, are encompassed in the environment. Work is a condition of human socialization; all forms of action on nature in the sense of transforming it into a product for use and exchange can only be realized in a social sphere.⁹ Since it is in and with society that the relations

⁸ SÉLLOS, Viviane (Org.); DARCANCHY, M. V. (Org.). **Cidadania, ética e responsabilidade social**. Rio de Janeiro: Editora Clássica, 2012. v. 01.

⁹ SÉLLOS, Viviane. **A ressocialização do encarcerado**: uma questão de cidadania e responsabilidade

of consumption, exchange, and production are generally established, even if a single individual is responsible for making a specific product, at any moment this process is diffused throughout the context of a certain collectivity.

Thus, work ought to mean that there should be, beyond a guarantee of income and access to the maintenance of consumption and survival, a sense of belonging, social support and engagement, and a source of pleasure and personal satisfaction for individuals.¹⁰ Work ideally, therefore, signifies one of the most important fulfillments of human beings.

That being so, work as a social formation is intimately connected to the environment; they are inseparable elements, without which the full realization of a human being as a whole is impossible. This requires that those who address the problem of the work environment have an understanding of the fact that the process of human activity cannot ever be severed from the idea of preserving an environment consistent with human work, even if this is associated with the logic of the capitalist market.

The concept of the working environment has undergone a progression in its original conception and has been amplified as social consciousness about the term has acquired new forms, including other elements that compose the formation of the world of the firm. During a considerable period firms were linked to the idea of preserving the environment by means of its exploitation. At some level, this conception was shaped by the predatory practices of industry, that in large measure devastated the planet in search of resources to support the industrial process.

It was evident that industrial society had the world of natural resources available for its benefit, as expressed by market society. However, society slowly acquired a consciousness that this process ought to undergo some control on the part of civil and official organizations. The impact of regulation inevitably affected the predatory practices of industrial society and spread through all the relations of production and work.

social. 01. ed. Rio de Janeiro: Editora Clássica, 2012. v. 01.

¹⁰ DARCANCHY, M. V. . O Dano Existencial e o Direito Fundamental ao Trabalho Decente na OIT. **Direito e Justiça** (URI), v. 12, p. 149-164, 2012.

The notion of an environment that would be, in the last instance, properly balanced between living humans and their relations, the physical space and the symbolic creation processed in this space, came to be a fundamental theme for development of a healthy and controlled environment, to guarantee, beyond all else, conditions for the quality of life expressed not only in the commercial products but, above all, in the very existence of individuals who compose the social process of production..

In this sense, one observes that the mentality is expanded in the sense of reaching new objectives, as activities of every type. Work places underwent profound modifications owing to the addition of new sources of technology and new techniques of professional activities, which required better preparation and adjustments of firms.¹¹

Thus, social responsibility coincides with the the purpose of offering better conditions of work. To a great extent, social responsibility is the historic reconciliation of the entrepreneurial world with its social context in all its dimensions.¹²

The diversity and fragmentation that now characterizes contemporary society also places on the agenda a series of demands that formerly were not part of social relations. With the notion that firms along with the state are responsible for part of the social blemishes, an idea of expecting social responsibility was gradually formulated; in other words, it came to be expected that the firm would assume its responsibility for broadly defined social interests.

At the national level, the concern for the work environment has intensified efforts to guarantee better conditions for workers in general; the federal constitution proclaims that “all have the right to an ecologically balanced environment, available for the common use of the public and essential to a healthy quality of life” (Article 225, caption).

The constitution thus provides for “the protection of the environment, and more directly, the protection of the work environment,” and so the firm comes to have

DARCANHY, M. V. Responsabilidade social da empresa e a Constituição. **Revista de Direito Constitucional e Internacional**, v. 63, p. 24-56, 2008.

¹² SÉLLOS, Viviane (Org.) ; GUNTHER, L. E. (Org.) . Cidadania empresarial, dignidade humana e desenvolvimento sustentável. 01. ed. RIO DE JANEIRO: EDITORA CLÁSSICA, 2012. v. 01.

responsibility not only for the environment in which employees work, but notably for the integrity of its own members, that is, for the people engaged in the productive process.

In this form, it is not a matter only of contemplating some positive action by firms. The maintenance of the work environment comes to compose a task together with other agents of the social process of work, since the final product of any firm is destined for the collective, that is, assumes a social aspect because the goods, services, and merchandise have a purpose in the social sphere. It is in this form that the the world of the market is realized and not in some abstract character.

Each firm, consequently, acts with a condition that differentiates it, by product, by its own publicity, by substantial capacity of remaining in the market and relating to its competitors: responsibility is attributed to the firm to form and construct the very foundation of social relations, meaning that the firm is no longer considered an element separated from the environment, but rather becomes one of the parameters that sustains the very organization of the social environment.

From this perspective the current conclusion is derived that the firm also makes up the environmental scenario, an environment that involves all and to which all belong, including an ethical work environment in which HIV-positive workers will be treated with respect and dignity.

5. RIGHTS OF HIV/POSITIVE WORKERS

Having seen the necessity of differentiated support for HIV-positive workers, some rights aiming to protect these workers in relation to activities of the firm are cataloged here.

5.1 CONFIDENTIALITY AT WORK

HIV/positive workers have the right to maintain the confidentiality of their medical condition at work, including examinations administered at hiring, periodically during employment, or upon discharge. No one is obligated to reveal HIV status,

except by virtue of the law. The law, for its part, only requires testing in cases of illness affecting blood, organs, or sperm. Requiring examinations for the purpose of testing for HIV for hiring, continuing employment, or discharging is illegal and constitutes a discriminatory practice. Cases of discrimination at work by private firms should be registered with the closest government labor office.

5.2 SICK BENEFITS

This benefit is granted to every Brazilian citizen who is insured (and who is up-to-date in their premium payments) and who because of illness or accident cannot work for more than 15 consecutive days. People living with HIV or AIDS or serious hepatitis are required to complete the minimum period of contribution because of the insurance feature of the benefit. Sick pay ceases when the insured recovers capacity and returns to work or when the benefit is converted into retirement resulting from illness. In these cases, the payment of sick pay occurs after proof of incapacity through a medical examination by the government social security system.¹³

5.3 DISABILITY RETIREMENT

People who live with HIV or AIDS or with serious hepatitis have the right to this benefit, but they must take a medical examination every two years or the benefit is suspended. Retirement pensions cease when the insured recovers capacity and returns to work. In order to have a right to the benefit, the worker must contribute to the social security system for a minimum of 12 months in the case of illness. For accidents, this period of need is not required, but it is necessary to register with the social security system. There is no right to disability retirement for persons who have already registered with the social security system as having an illness or injury that would generate benefits, unless the incapacity results from an aggravation of the

¹³ The entire administrative procedure related to the benefit is governed by articles 274 to 287 of the Normative Instruction INSS / PRES nº 45 of August 6, 2010.

previous infirmity.

5.4 CONTINUED SERVICE BENEFITS

A minimum wage is guaranteed as a monthly benefit for incapacitated people to have an independent life and work as well as for the elderly (65 years old or over) who prove that they do not possess the means to provide for themselves or their family. This benefit is independent of contributions to the social security system. In order to receive it, one must go to the closest government social security office and prove one's situation. This proof can be made by the presentation of an Assessment Report (a medical examination by the social security office or a multidisciplinary team of the Unified Health System). Family income and lack of remunerated activity must be declared by persons requiring the benefit.

FINAL CONSIDERATIONS

Beginning with the initial premise of the idea that ethics is a combination of rules that transcend time and space, affecting the entire human community as a foundation necessity for existence, the desire to realize ethics in a society is reflected in the constitutive power, original or derived, as well as in the interpretation of its constitutional norms. Ethics is also understood to inspire the codification of rights, in order that no one is given the right to allege their ignorance and so that what is permitted, prohibited, or required will apply to all. Ethics corresponds to prioritized conduct and is oriented to the development of anthropology, or better, it is based on values and is aimed at the evolution of individuals for the benefit of the human species.

Ethics in firms is associated, in this way, with commercial and social ethics. Firms appear to be increasingly aware that they need to change their posture in the face of society that is, in the last analysis, gives institutional legitimacy to the life of the firm and of its health regarding the market, since the market exists in society and it is society that buys, produces, commercializes, distributes, etc.

An ethical society is a just society; these characteristics correlate. And this is justified because the individual/society/species are not only inseparable, but co-

producers, each contributing to the development of one another. Thus, human dignity acquires new contours in the social panorama. Human life, gradually, comes to be a concept that includes all the spheres of firm conduct. It is, possibly, a road of no return, that has appropriately affected the shape of the framework of labor and employment law in all of the levels of social organization.

Law has increasingly addressed, in the sense of giving adequate responses to, the changes in the social order, to the changes that put human life, its work environment, and respect for the personal conditions and the dignity of workers at risk. Starting to call workers associates instead of employees will not suffice; altered vocabulary cannot change the sense that life requires a right to justice above all.

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