Revista Jurídica vol. 03, nº. 44, Curitiba, 2016. pp. 77-85
DOI: 10.6084/m9.figshare.4588744

SOCIAL RESPONSIBILITY: BETWEEN THE PROPOSED AND THE THINKABLE

RESPONSABILIDADE SOCIAL: ENTRE O PROPOSTO E O PONDERÁVEL

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ABSTRACT

This article deserves to discuss in both the legal and the corporate world the practices adopted by Brazilian companies that seek to disseminate a more democratic working environment, especially respect for differences and prevention policies directed at HIV-positive workers, with a view to Independence of legal predictions consonant with the jurisprudential understandings materialized in the social dynamics. Methodologically, we sought to interpret extensively the constitutional principles, especially the neoconstitutional current and other devices inherent in the Federal Constitution. It was concluded that there are still shortcomings, mainly, regarding the supervision of work environments, demonstrating, therefore, that the constitutional text is emptied when it should be considered as an instrument of preservation and social construction

KEYWORDS: Labor Law; Constitutional Guarantees; Neo-constitutionalism.

RESUMO

O presente artigo se digna a debater tanto no universo jurídico quanto empresarial, as práticas adotadas pelas empresas brasileiras que procuram disseminar um ambiente de trabalho mais democrático, em especial o respeito às diferenças e as políticas de prevenção direcionada aos trabalhadores portadores de HIV, objetivando a independência de previsões legais consonantes aos entendimentos jurisprudenciais materializados na dinâmica social. Metodologicamente, buscou-se interpretar de forma extensiva dos princípios constitucionais, em especial pela corrente neoconstitucional e dos demais dispositivos inerentes na Constituição Federal. Concluiu-se que ainda há insuficiências, principalmente, no tocante à fiscalização dos ambientes de trabalho, demonstrando, portanto, que o texto constitucional se vê esvaziado quando deveria ser tido como instrumento de preservação e construção social

PALAVRAS-CHAVE: Direito do Trabalho; Garantias Constitucionais; Neoconstitucionalismo.

INICIAL CONSIDERATIONS

Today organizational strategic thinking with an eye toward of social responsibility is a necessary part of survival in the global marketplace. This expediency often spurs the adoption of a notion responsibility that is less precise than utilitarian. From this perspective, firms invest in a series of attitudes identified as engaged,

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seeking to win over the consuming public, attract new investors, and fulfill the requirements of an increasingly competitive market. Nevertheless, some actions seen as innovative and exemplary are in reality more of a political step or an economic imposition, whose guarantees are legally secured in light of contemporary law, and should be viewed as examples of regulated practices.

The analysis that follows seeks to discuss, among the universe of these new practices incorporated by Brazilian firms, only those that seek to disseminate a work environment more diverse and democratic, especially as regards differences and the creation of policies for preventing, communicating, and coping directed to HIV-positive workers. We aim to reinforce the initial argument that, independently of express legal requirement, an understanding shared by international institutions and disseminated by employment courts holds that the responsibility of employers often extends to situations initially not covered by legislation, but consistent with a contemporary and more dynamic ideas of justice.

The extensive interpretation of constitutional principles that attributes normative force to this understanding, defined as neoconstitutionalism, is the starting point for this analysis. The precepts that represent work as one of the pillars of the Brazilian state assure to worker citizens the possibility of persevering with dignity and liberty through the performance of their work, mandating that the workplace should be a secure environment and forbidding different treatment by virtue of disallowed factors, as expressly provided in Sections XXX and XXXI of Article 7 of the constitution prohibiting discrimination in the work environment because of sex, color, age, civil status, or disability. These constitutional precepts are fundamental for understanding the responsibility that results from work relations and for limiting private autonomy on behalf of the collective interest.

In this sense, a firm can only be perceived as socially responsible to the extent that it assures an atmosphere of justice in work relations, deals with its workers as persons worthy of respect and consideration, pays salaries that permit reasonable conditions of life, provides work in teams and solidaristic relationships, and engages in public actions that aim to reinforce the concept of democracy. Any practices different from

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these, besides being contrary to economic, political, and social realities, run the risk of infringing on constitutional norms and international conventions and undermining the pillars of democracy. For many theorists of administration, taking advantage of conventional discourse, these are intractable steps toward failure of the business.

1. BRIEF CONSIDERATIONS ABOUT SOCIAL RESPONSIBILITY AND DECENT WORK

According to the Green Book of the European Commission, social responsibility exists when firms decide voluntarily to contribute to a more just society and a cleaner environment. Based on this supposition, management of firms cannot, and ought not, be oriented only toward achieving the interests of the firms' owners, but instead compatibility with broader interests of all the agents involved, especially workers, local communities, clients, suppliers, public authorities, competitors, and society in general is essential.

Various authors who deal with the issue clarify that the concept of social responsibility ought to be initially understood from two angles: the internal, which is related to the workers, and more generically, to all the interested parties affected by the firm and who, in their turn, can influence its performance; and the external, which takes into account the consequences of the actions of an organization on its external components: the environment, business partners, and governments.

Looking at social responsibility from this perspective presumes the existence utilization of decent work. In the International Labor Organization's (ILO's) definition, decent work is the point of convergence of four strategic objectives of the organization: freedom of association and effective recognition of the right to collective bargaining; elimination of all forms of forced labor; effective abolition of child labor; and elimination of all forms of discrimination concerning employment and occupation, with the promotion of productive and quality employment, the extension of social protections, and the strengthening of social dialogue.

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Nevertheless, it is apparent that the realization of decent work in Brazil confronts historical obstacles, as confirmed by statistics that indicate the persistence of unequal treatment among men and women in the same jobs, the reality that more than half of the population receives less than the minimum wage, and the ineffectualness in eradicating slave and child labor. This reality highlights that the creation of decent labor, and therefore a posture of firm responsibility, is intertwined with the tangible realization of the idea that "men and women aspire to productive work in conditions of liberty, equality, security, and dignity."

2. LEGAL PROTECTION FOR HIV-POSITIVE WORKERS

To begin analyzing the quality of protection assured to Brazilian workers by the constitution of 1988 one must focus on the essential terms in this foundational document. The national "contract" signed by the National Constituent Assembly of 1988 constituted a transitional moment for the Brazilian state, a pivot when the country eclipsed a period of arbitrariness and took its first steps in the direction of modern democracy. Situated in this historic epoch, the constitution of 1988 is ambivalent, as much permanently linked to and influenced by the past, constructing a strong web of rights and constitutional guarantees serving as barriers to the repetition of the former dictatorial errors, as projecting toward the future, intended like all constitutions to be a perennial document. Because of this we have a lengthy and rigid constitution.[1]

Dealing with this theme, it is important to emphasize that constitutional protections for workers with HIV or AIDS are not different from those for average workers. But realization of the protection and the institutional discussion about the question involves other non-legal factors, such as prejudice, religious fundamentalism,

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[1] It proacts by detailing, reinforcing in its special titles, which would be the guiding principles of the Brazilian State, determining the form and the system of government, the mode of acquisition and exercise of power, its institutional structure, limits of action, fundamental rights ensured by that State and its respective guarantees. It is rigid because it only allows changes in its content through solemn and special procedures and procedures

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and lack of adequate information about health, prevention and contagion, among others. That is, protecting workers with HIV essentially permeates issues of the full effectuation and realization of the universal constitutional rights and guarantees of workers, and not only classic and immediate employment and social welfare rights. To deal with the question and all the dilemmas that accompany this project is to stir a debate permitting progress in this context.

The 1988 constitution lists among the constituitive elements of the national state, among others: **citizenship**, **dignity of the human person**, and **the social value of work**. That is, the Brazilian state is based on respect for citizenship, in the search for, access to, and respect for dignity for any and all humans, without any type of distinction including endemic aspects, and the social value of work, that is, not only in the bare relationship of employers and employees, in which one provides his capacity to work and the other compensates with remuneration, but in the socio-humanistic value of work, that currently can be captured by the concept of decent work. The constitutional text corroborates this socio-humanistic aspect of work by listing it as one of the social rights defined in the constitution. Every time one of these priorities are violated or threatened, the Brazilian democratic state is called into question.

Also in the document are commitments to regulate inter-state relations giving **primacy to human rights** and affirmations that the fundamental guarantees listed prominently in Article 5 do not exclude others, resulting from treaties and international conventions, among other sources. And these treaties and conventions, when they deal with human rights and are internalized by the legislative act of constitutional amendment, will have the force of a constitutional norm. That is, despite the firmness of its general intent, on the subject of human rights the Brazilian constitution acts like a sponge that gradually absorbs innovations and new rights, ratifying the primacy given to the guarantee of dignity and of the rights of humans and citizens - and to the priority coverage of the rights of workers with HIV, inasmuch as non-discrimination is one of the most basic human postulates.

In this vein, Article 7, Section I, of the federal constitution is emblematic, dealing with the protection of work and workers in the face of unmotivated discharge with the

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original text of 1988. Here lies a connection between constitutional law and international law. The text of Article 7 interfaces with Convention 158 of the International Labor Organization, dating from 1982 and ratified by the Brazilian Congress in 1995 - seven years after the constitution enshrined what the convention had specified six years earlier. In sum, both the convention and the constitutional text shield workers from unmotivated discharge, or without “just” cause, that characterizes arbitrary and often abusive termination by employers lacking the necessary justification for their actions.

Brazilian workers do not enjoy the protection provided by the convention, however, because in 1996, at the height of the neoliberal agenda and the minimal state established by the administration of President Fernando Henrique Cardoso, Convention 158 of the ILO was renounced by Brazil, that is, Brazil failed to apply and submit to it. Left only with Article 7 and the interpretative constructions rendered by the Supreme Labor Court (Tribunal Superior do Trabalho, TST) about the text of the law as the basis of security from the free discretion of employers, jurisprudence interprets Article 7 as follows: it divides cases into those involving discriminatory discharge, to which in the absence of regulation courts apply provisions of Articles 8 and 9 of the labor and employment code (Consolidacao das Leis Trabalhistas, CLT) versus cases of discharge prohibited by law, that is, those that separate workers from the exercise of their work capacity, impeding their access to worker and social welfare rights and in the last instance to the enjoyment of the social value of their labor.

In this latter case, in dealing with HIV-positive workers the obstacle to access to these rights yields very dramatic contours given the fragile situation. The labor law considers this type of discharge totally null, as the Second Regional Labor Court (Sao Paulo) declared in a session of ordinary appeal[2]. The worker was included among those endowed with special job security, assuring reinstatement to the prior job. This narrative clarifies the critical defense of workers, namely the incorporation of neoconstitutionalism in the oversight of work and employment law. Article 7 goes beyond unmotivated discharge, however, banning the practice of discrimination in

[2] RO-02.920.254.140

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hiring, setting of salaries, and treatment because of the race, sex, age, civil status, or disability of workers. And this is where a delicate point in the lives of HIV-positive workers appears: compulsory hiring tests that can serve as a subterfuge for refusing to hire, even when the justification remains veiled (which in fact occurs in the majority of cases, since the firm does not need to justify the results of their selection). We can adamantly affirm that such measures are flagrantly unconstitutional, wounding the dignity of human beings, the parameters of equal opportunity hiring, and the right to privacy that all citizens possess.

Finally, Articles 170 and 193 of the constitution, dealing with the economic and social order, list work among the most elevated premises of the state as well as the means of achieving social justice and welfare. Being such, the labor market ought to manifest itself as a more fraternal, healthy, equitable, balanced, and pluralistic social nucleus of human coexistence, without injury to its economic and financial aspects. The observance and construction of new and modern practices on the part of employers, guided by this constitutional framework forming a guardianship of work, are embryos of a new society. Nonetheless, as the data that follow illustrate, these aspirations appear somewhat utopian initially.

3. BY NEW BUSINESS PRACTICES

According to a study by the National Business Council for the Prevention of HIV/AIDS (CenAids) in partnership with the Department of Sexually Transmitted Diseases, AIDS, and Viral Hepatitis of the Secretary of Health Surveillance in the Ministry of Health and the Joint Program of the United Nations on HIV/AIDS, in 2012, of 2,486 firms evaluated throughout Brazil, 8% claimed that they made donations in the last three years to causes related to AIDS, and 14.2% claimed to have taken some type of preventative action in the work sphere in the last 12 months, usually assuming the form of lectures with the themes most discussed being: modes of transmission and prevention, incentives for the use of condoms, support for counseling and voluntary

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testing. The study also indicated very relevant data for the protection and reduction of stigma and discrimination for HIV-positive workers, with 88.2% of the participating firms assuring the maintenance of such workers when clinically appropriate, offering counseling (80.2%), prohibiting discrimination by co-workers by disciplinary measures (71.8%), furnishing health plans (69.3%), and banning testing and certification of HIV or AIDS status requirements of job candidates or employees. The firms that demonstrated less concern with the matter were small, with a noticeable tendency for firms in areas of greatest incidence of AIDS in the population to present a more active profile, having recognized the impact that the problem has on profit and growth of the firm over the long and medium terms.

Nevertheless, data collected by the Ministry of Health from 2,440 small or medium sized firms with respect to their stance in light of the progression of the illness revealed generalized ignorance regarding attitudes displayed in the private market. Of 85.5% of the firms that vetoed internal programs of prevention, the most common justifications alleged the civil state and sexual orientation of their employees as armor against the occurrence of AIDS. The information is partial and was publicized during the Brazilian Congress on the Prevention of STDs and AIDS, held in Sao Paulo at the beginning of 2013.

To counter prejudice, CenAids recently convened 17 firms of various sectors in Brazil and acted in partnership with the federal government to introduce prevention of the disease into the work sphere. The measure is timely, as 90% of people with HIV in Brazil are in their productive years, between 18 and 45, which led the ILO to issue directives so that employers would adopt preventative measures. The directives were included in ordinary legislation and the statute that required the creation of the Internal Commission for Prevention of Accidents (Commissoes Internais de Prevencao de Acidentes, CIPA) by firms; these directives provide that, at least once per year, internal campaigns will be implemented to prevent AIDS in the work sphere.

CONCLUSION

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The legal measure is emblematic but clearly insufficient when greater problems, in terms of the oversight of the fundamental guarantees that apply to all Brazilian workers and especially to HIV-positive employees, demonstrate that legal expansion does not guarantee the reality of more just work. Paraphrasing Jose Afonso da Silva, "there is no immutable constitution in the face of the changing social reality since it is not only an instrument of order, but it also ought to be one of social progress."[3] This being the case, there is no way to believe that the legal value of a constitution that affirms the "citizen" and introduces various precepts extending citizenship into the work sphere would constitute an end point, but rather more intrinsically an inestimable instrument for the provocation of struggle, and who knows, perhaps a beautiful beginning.

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[3] SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. São Paulo: Malheiros, 2012, p. 42.