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**HIV, AIDS, AND WORK IN BRAZIL****HIV/AIDS E TRABALHO NO BRASIL****JOAO HILARIO VALENTIM**

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**ABSTRACT**

The present article demonstrated the role of AIDS and HIV in the Brazilian workplace environment. The subject was approached through a bibliographical and historical methodology, analyzing the evolution of the legal norms, especially federal legislation, inherent to AIDS and its manifestation in the legal scenario. The jurisprudential understanding and the action of the labor courts, in conjunction with manifestations of the Ministry of Labor, was brought to light, aiming at worker protection, equity and non-discrimination in the work environment. The professional secrecy of physicians was emphasized, according to the code of medical ethics, which prohibits them from revealing facts that prevent the practice of the profession. It follows that both doctrine and jurisprudence are unison to protect patients from unfairness and arbitrariness.

**KEYWORDS:** Labor Law; Ministry of Labour; Protection of the Worker.

**RESUMO**

O presente artigo demonstrou o papel da AIDS e do HIV no ambiente de trabalho corporativo brasileiro. Abordou-se a temática por intermédio de uma metodologia bibliográfica e histórica, analisando a evolução das normas jurídicas, em especial a legislação federal, inerentes à AIDS e sua manifestação no cenário do Direito. O entendimento jurisprudencial e a ação das cortes trabalhistas, coadunando com manifestações do Ministério do Trabalho, foi trazida à luz, objetivando a proteção do trabalhador, da equidade e da não discriminação no ambiente de trabalho. Ressaltou-se o segredo profissional dos médicos, conforme o código de ética médica, que proíbe os mesmos de revelar fatos que impeçam o exercício da profissão. Conclui-se que tanto doutrina quanto jurisprudência são uníssonos para proteger os pacientes de injustas e arbitrariedades.

**PALAVRAS-CHAVE:** Direito do Trabalho; Ministério do Trabalho; Proteção do Trabalhador.

**INTRODUCTION**

Since the first manifestations of AIDS - Acquired Immunity Deficiency Syndrome<sup>1</sup> in Brazil at the beginning of the 1980s, treatment of the disease has greatly

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<sup>1</sup> AIDS é uma virose que debilita o sistema imunológico do organismo humano. Para que se dê a transmissão, é necessário que ocorra a troca de fluidos corpóreos, em especial o contato de fluídos da pessoa infectada com o sangue de outra pessoa. Por conseguinte, a AIDS ao contrário da propagação da discriminação não é uma doença que se transmita pelo contato, não havendo por que excluir o portador do convívio social. Na atualidade, o uso de modernos medicamentos e tratamentos tem propiciado o adiamento da manifestação de infecções oportunistas ou mesmo da doença, prolongando a vida da pessoa infectada por período de tempo indeterminado. Para uma melhor compreensão da enfermidade, veja VALENTIM, João Hilário. AIDS e relações de trabalho. Rio de Janeiro: Impetus, 2003, pp. 10-52).

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advanced. Besides governmental action<sup>2</sup>, NGOs - non-governmental organizations - have also participated<sup>3</sup>.

In 1985<sup>4</sup>, a ministerial decree was published with guidance for a program to control AIDS, and in 1987 a National Commission for the Control of AIDS was created and began to supervise other national efforts and to respond with a program of prevention. The National Program for the Control of STDs - Sexually Transmitted Diseases and AIDS, however, was not established until 1988<sup>5</sup>.

An agreement reached between the Brazilian government and the World Bank in 1993 and renewed in 1998 decisively marks the national policy of prevention and control of AIDS. Until then, government action had been directed to, beyond the treatment of blood and blood derivatives, disseminating publicity campaigns. After this agreement, the government began to invest heavily in the diffusion of information and education in orientation campaigns and the distribution of condoms, directly as well as through NGO intermediaries, besides the adoption of various other projects and lines of action.

In 1988, Centers for Testing and Counseling were created, today spread throughout the country. Also in 1988, some laws referring to AIDS were issued: statute No. 7.649/88 made compulsory the registration of all blood donors and laboratory examinations to test blood quality, including the anti-AIDS test; statute No. 7.670/88 extended to people with AIDS benefits relevant to time off for health treatments, retirement, military reform, withdrawals from FGTS (Fund to Guarantee Time of Service), etc.; statute No. 7.713/88 excepted people with AIDS from payment of income tax on their proceeds of their pensions.

In 1996, the government made the distribution of medicine necessary for the treatment of AIDS free through the publication of statute No. 9.313 of November 13, 1996. Regarding the furnishing of medicine, it is important to emphasize that Brazil,

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<sup>2</sup> SLAFF, James I., e BRUBAKER, John K. AIDS, a epidemia. São Paulo, abril, 1987, p. 113.

<sup>3</sup> CAMARGO JR., Kenneth Rochel de. "Políticas públicas e prevenção em HIV/AIDS". In PARKER, Richard, GALVÃO, Jane, e BESSA, Marcelo Secron. (Organizadores). Saúde, Desenvolvimento e Política: Respostas frente à AIDS no Brasil. Rio de Janeiro, ABIA, São Paulo, Ed. 34, 1999, p. 232.

<sup>4</sup> A partir de meados da década de 1980, o Estado Brasileiro passou a elaborar uma legislação específica sobre HIV/AIDS.

<sup>5</sup> Camargo Jr., op. cit., p. 233.

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since the publication of statute No. 9.313/96, distributes free, through the Public Health System, all drugs for treating AIDS. Before the this law took effect, Ministerial Decree No. 21 of March 21, 1995, had provided for the distribution of drugs.

The following steps defined medical treatment policy and the production of generic drugs in public laboratories for the treatment of AIDS as a policy to reduce the cost of the drugs. To the federal actions were added others undertaken at state and local levels.

About the epidemic in Brazil, it is still important to emphasize that from the beginning the age group most affected in both sexes always was the age bracket between 20 and 39, which accounted for 70% of the total cases of AIDS registered in Brazil until June, 2000<sup>6</sup>.

The epidemic did not occur evenly throughout the country, and over the years, the profile changed. Earlier, it was concentrated in the Southeast region, with the social group with the greatest incidence being homosexuals. Nowadays, the epidemic has moved to the interior, the transmission involving more heterosexual contacts and manifesting itself increasingly in low income populations, especially among women. Finally progress was achieved in prolonging life for people infected with HIV, who can remain in that condition indefinitely without registering symptoms defining AIDS because of remedial treatments<sup>7</sup>. Nevertheless, the epidemic is still concentrated among adult populations in the richest regions of the country.

The preliminary AIDS-STD Epidemiological Bulletin of 2010, distributed by the Ministry of Health, reported that as of June 2010, 592,914 cases had been registered since 1980 and that although the epidemic was stable (with an average rate of 20 cases of AIDS per 100,000 inhabitants), the trend was toward increases among youth between 17 and 20 years old with less schooling<sup>8</sup>.

The Southeast region still displays the greatest number of cases (58%), although the incidence in the last 10 years to 2009 is falling (from 24.9% to 20.4%),

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<sup>6</sup> Boletim Epidemiológico AIDS-DST 2000, p. 8.

<sup>7</sup> DHALIA, Carmem B., BARREIRA, Draurio, e CASTILHO, Euclides A. A AIDS no Brasil: situação atual e tendências. In *Direitos Humanos, Cidadania e AIDS*. São Paulo, Cortez, 2000, p. 23 (Cadernos ABONG, nº 28).

<sup>8</sup> Boletim Epidemiológico AIDS-DST 2010 – versão preliminar. Brasília, Ministério da Saúde, 2010, p. 3. Disponível em: <http://www.aids.gov.br/publicacao/boletim-epidemiologico-2010>

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contrary to other regions which experienced growth, especially in the Northeast (from 6.4% to 13.9%) and North (from 6.7% to 20.1%). Even today there are more cases of illness among men than women, but this proportion is diminishing. In 1989 the ratio was 6 cases of AIDS in men for 1 case in women. In 2009, the proportion reached 1.6 cases in men for each case in women, except for the age group of 13 to 19, where the number of cases is greater among women since 1998 - 8 men for each 10 young girls. The age range with the greatest incidence in both sexes is from 20 to 59 years old, and the major form of transmission is sexual activity<sup>9</sup>.

Besides the projects already implemented or in execution, government policy to increase activity in the workplace indicates a tendency in progress for a propitious atmosphere for good information and education of the public<sup>10</sup>.

## **1. AIDS IN BRAZIL - EVOLUTION OF LEGAL NORMS**

### **1.1 FEDERAL LEGISLATION ABOUT AIDS**

Here we highlight the norms most relevant and closely related to world of work<sup>11</sup>. The Interministerial Decree No. 3.195 of August 10, 1988, from the Ministries of Health and of Labor and Employment launched the Internal Campaign for the Prevention of AIDS on the national level with the purpose of spreading information and knowledge and stimulating the adoption of preventative measures against AIDS inside firms and all workplaces. The campaigns were supposed to be implemented not only by direct and indirect administrative organs but also by public and private companies.

Statute No. 7.670 of September 8, 1988, gave people with HIV and those sick with AIDS various benefits that were already assured at that time for people ill with other grave illnesses. The law establishes, moreover, the right to leave for health

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<sup>9</sup> Estatísticas da Aids no Brasil em 2010. Disponível em: <http://www.aidshiv.com.br/estatisticas/>

<sup>10</sup> MINISTÉRIO DA SAÚDE – COORDENAÇÃO NACIONAL DE DST E AIDS. Manual de Diretrizes e Técnicas para Elaboração e Implantação de Programas de Prevenção e Assistência das DST/AIDS no Local de Trabalho. Brasília, Ministério da Saúde, 1998, p. 19.

<sup>11</sup> A expressão “legislação” é empregada aqui num sentido amplo, indicando não só as normas elaboradas pelo Poder Legislativo – lei em sentido estrito – como também as normas produzidas pelo Poder Executivo.

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treatment and to retirement for federal civil servants covered by statute No. 1.711/52 and reforms for military personnel and special pensions in terms of statute No. 3.738/60. Civil servants of the national government are now covered by statute No. 8.112/90 that recognizes these rights in Articles 186, Sections 1, and 202 and 206.

As far as workers covered by the labor code (Consolidacao das Leis do Trabalho, CLT), statute No. 7.670/88 assures the receipt of sick pay, retirement, or quarantine aid for anyone who comes to manifest AIDS after being registered with the social security system (Article 1, I, d)<sup>12</sup> as well as access to funds in the Fund for the Guarantee of Service Time (Fundo de Garantia por Tempo de Servico, FGTS) independently of termination of the individual work contract or of any other type of savings or severance pay that the ill person had by right (Article 1, II).

Later, statute No. 7.670/88 repeated the inclusion of rights defined in the current Statute of National Civil Service (statute No. 8.112 of December 11, 1990) and in the new welfare legislation (statute No. 8.213 of July 24, 1991)<sup>13</sup>.

Statute No. 7.713 of December 22, 1988, altered the income tax legislation, with Article 6, XIV<sup>14</sup> exempting the proceeds of retirees or payments received by persons with AIDS because of work accidents or illness.

Statute No. 8.213 of July 24, 1991, instituting the Plan of Benefits of Social Welfare, in Article 151 provided for the concession of sick pay and pension for illness to the insured, independent of need, if they had registered with the General Regime of Social Welfare before being attacked by AIDS, among other illnesses indicated. Though not dealing with work matters, the provision of the law has indisputable impact

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<sup>12</sup> Com a crescente prevalência da AIDS em população de baixa renda, não segurada da Previdência Social, sem condições para o trabalho e com núcleo familiar desestruturado, existe a possibilidade de requerer o benefício de 1 salário mínimo vigente mensal, com base no artigo 203, inciso V, da Constituição Federal, e no art. 20, da Lei no 8.742, de 07/12/93 – Leis Orgânica da Assistência Social (LOAS). Este benefício é fornecido para pessoas com algum tipo de deficiência física e/ou mental ou maiores de 70 anos, que não tenham condições de auto-sustento, nem de tê-las providas por sua família, podendo, portanto, aplicar-se a determinados grupos de doentes de AIDS.

<sup>13</sup> Cortês, Iáris Ramalho. AIDS e o Congresso Nacional. In Seminário Nacional sobre AIDS e o Direito, I, 1991, São Paulo. Anais. São Paulo: [s. no], 1991, p. 1.

<sup>14</sup> Este inciso teve sua redação posteriormente alterada pela Lei nº 8.541, de 23.12.92, art. 45; Lei nº 9.259/95, art. 30 e Instrução Normativa da Secretaria da Receita Federal nº 25, de 29.04.1996, art. 5º, inciso XII.

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on employment relations, since it provides workers with HIV or AIDS support in a moment of hardship.

Interministerial Decree No. 796 of May 29, 1992, of the Ministries of Health and of Education forbids compelling serum tests of students, professors, and/or functionaries as well as divulging diagnoses of infection by HIV or AIDS of any member of the educational community or of the maintenance of special classes or schools for persons with HIV.

Interministerial Decree No. 869 of August 11, 1992, of the Ministries of Health, of Labor, and of Administration prohibited pre-hiring or periodic blood tests of public servants for the detection of HIV. The issuance of the decree contributed to the elimination of the requirement of serum tests for HIV in the hiring procedures of the federal public administration, especially when by public competition, and has served as guidance for the hiring procedures and management of personnel in state and local administration.

The Counsel-Director of the fund of Participation of PIS/PASEP, by means of Resolution PIS/PASEP No. 2, of December 17, 1992, authorized the release at any time of the balances in accounts of PIS - the Program of Social Integration<sup>15</sup> and or PASEP - Program of Savings Formation of Civil Servants<sup>1617</sup>, for non-retired HIV-positive workers or those sick with AIDS<sup>18</sup>.

In March of 1996, the Brazilian government created the Working Group for the Elimination of Discrimination in Employment and Occupation<sup>19</sup> (Grupo de Trabalho para a Eliminacao da Discriminacao no Emprego e Ocupacao, GTEDEO), responsible for defining a national policy for promoting equality and implementing Convention No.

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<sup>15</sup> Instituído pela Lei Complementar nº 7, de 07.09.1970.

<sup>16</sup> Instituído pela Lei Complementar nº 8, de 03.12.1970.

<sup>17</sup> Esses Programas, instituídos pelas LC nºs 7/70 e 8/70, foram posteriormente alterados pela Lei Complementar nº 26, de 11.09.75, dentre outras, e regulamentados pelo Decreto nº 78.276, de 17.08.76.

<sup>18</sup> Revista LTr, 57-01-127-8.

<sup>19</sup> Decreto nº 20, de 20 de março de 1996, publicado em 21 de março de 1996.

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111 of the International Labor Organization on Discrimination in Employment and Occupation<sup>20</sup>, ratified by Brazil on November 26, 1965<sup>21</sup>.

Beginning in the nineties, the federal government increased its activities in the protection and promotion of human rights and, in May of 1996, instituted the National Program of Human Rights (Programa Nacional de Direitos Humanos, PNDH) by means of Decree No. 1.904 of May 13, 1996<sup>22</sup>, now in its third version. This Program, created by the Ministry of Justice, seeks along with diverse organizations of civil society to identify the principle obstacles to the promotion and protection of human rights in Brazil<sup>23</sup>. Among these, HIV and AIDS were considered targets of programs that currently consist of “campaigns of early diagnosis and providing appropriate treatment to people who live with HIV or AIDS to avoid the grave stage of the illness and prevent its spread and dissemination,” besides providing to people “programs of assistance in the sexual and reproductive health sphere.”<sup>24</sup>

In 1996 the Brazilian government, on promulgating statute No. 9.313 in November, even made the distribution of drugs necessary to treat AIDS free through the National Health Service (Sistema Unico de Saude, SUS). Next, a policy of medical treatment and production of generic drugs in public laboratories was instituted, aimed at the treatment of AIDS.

Decree No. 3.717 of the Ministry of Health of October 8, 1998, created the National Business Counsel for the Prevention of HIV/AIDS (Conselho Empresarial Nacional de Prevenção ao HIV/AIDS) that had as its mission to: (a) assist the Ministry of Health in a national response in the face of the AIDS epidemic and make viable actions for awareness, modification, and information about the prevention of AIDS and

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<sup>20</sup> TEIXEIRA, Maria Aparecida Silva Bento. Institucionalização da luta anti-racismo e branquitude. In HERINGER, Rosana (Org.) A cor da desigualdade: desigualdades raciais no mercado de trabalho e ação afirmativa no Brasil. Rio de Janeiro, IERÊ, 1999, pp. 22-23.

<sup>21</sup> SILVA JÚNIOR, Hédio. As políticas de promoção da igualdade no Direito Internacional e na legislação brasileira. In HERINGER, Rosana (Org.), op. cit., pp. 94-5.

<sup>22</sup> Posteriormente revogado pelo Decreto nº 4.229, de 13 de maio de 2002, norma que passou a dispor sobre o Programa Nacional de Direitos Humanos – PNDH.

<sup>23</sup> MINISTÉRIO DO TRABALHO E EMPREGO – Assessoria Internacional. Programa Nacional de Direitos Humanos. Brasil. Gênero e raça: todos pela igualdade de oportunidades: teoria e prática. Brasília, MT, 1998, p. 56.

<sup>24</sup> O PNDH-3 foi instituído pelo Decreto nº 7.037, de 21 de dezembro de 2009, revogando o Decreto nº 4.229/02 (PNDH-2), que revogara o Decreto nº 1.904/96 (PNDH-1).



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the promotion of health; (b) stimulate activities of the Ministry of Health, of the Secretaries of State, of local government, and of other governmental organs and public powers to implement policy directives aimed at the control of the epidemic; (c) aid their clients, workers and the community, in confronting the epidemic; (d) know and exchange relevant experiences among firms, among other activities.

Beginning in 1999, the Ministry of Labor and Employment initiated a policy of creating Centers of Citizenship and Work Against Discrimination in Employment in the states. Founded on the results of the Project of Technical Cooperation developed in partnership with the ILO, that policy was officially instituted by Decree No. 604 of June 1, 2000. These Centers had as their objective the implantation of Convention No. 111 of the ILO. Organized in different states, the Centers also approached issues about HIV and AIDS even though at that time there was no strategy of clearly defined action.

The federal government, by means of Provisional Measure No. 2.164/41 of August of 2001 added Section "XIII" to Article 20 of statute No. 8.036 of May 11, 1990, that dealt with FGST, authorizing the withdrawal of deposits from accounts linked to the Fund also in the case where workers' dependents were HIV positive.

The Ministry of Labor and Employment issued Decree No. 1.246 in May 28, 2010, prohibiting HIV testing of workers whether in direct or indirect forms in medical exams during hiring, change of function, periodic assessment, return to work, discharge, or other situations linked to the employment relationship<sup>25</sup>.

## **2. ACTION OF THE LABOR COURTS AND OF THE PUBLIC MINISTRY OF LABOR**

### **THE LABOR COURTS**

The labor judiciary began deciding various disputes that involving AIDS in the context of working relations. Notable among these were conflicts resulting from discharge from employment motivated by the fact of being HIV positive or ill with AIDS.

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<sup>25</sup> Siteio do Ministério do Trabalho e Emprego. Disponível em: <http://portal.mte.gov.br/legislacao/resultado-da-busca/query/hiv-1.htm>

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The interpretation of the courts evolved over the years toward assuring employees right to work, prohibiting discriminatory acts. The first decisions of the labor courts declared their lack of jurisdiction to judge these matters.<sup>26</sup>

Besides these individual actions, many collective disputes of an economic<sup>27</sup> nature contained in their list of demands requests for the concession of employment guarantees for workers with HIV or AIDS.

We observe that a great portion of the labor judiciary is sensitive to the needs of HIV-positive workers. It is not rare, however, to have decisions in which the judge does not accede to claims because no legal rules exist, as in the requests for guarantees of employment for HIV-positive workers. There are also disputes in which employees do not succeed in carrying their burden of proof. Moreover, there are certain conflicting interests that rarely reach the labor courts, such as the problems that can occur in the pre-contractual phase. Notice must be taken that even today the labor and employment law system is much more a system of justice for the unemployed than for the employed, because lawsuits will be brought by ex-employees. In this way, various illegalities that happen during the work relation remain beyond the pale of judicial guardianship because workers fail to bring lawsuits for fear of losing their jobs. Notwithstanding such difficulties, access to the labor courts has been of unparalleled importance in the protection of the interests of HIV-positive and workers ill with AIDS.

The decisions of the Supreme Labor Court (Tribunal Superior do Trabalho, TST) in individual suits have generally guaranteed employment to workers with AIDS by declaring terminations abusive, discriminatory, or infringements of rights. For example, the Second Panel of the TST judged Appeal of Revision No. 205.359/95 (Action No. 12.269), characterizing the discharge as arbitrary and discriminatory and ordering the reinstatement of the worker.

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<sup>26</sup> GOMES, Maurício da Costa. Reintegração judicial de trabalhadores soropositivos, dispensados do trabalho de forma discriminatória e/ou preconceituosamente. In Boletim em Direitos Humanos HIV/AIDS. Brasília: Ministério da Saúde – Coordenação Nacional de Doenças Sexualmente Transmissíveis e AIDS, ano 2, no 1, 1999, p. 2.

<sup>27</sup> Processo judicial de natureza coletiva, que tem por finalidade a criação de novas normas jurídicas – novas condições de trabalho – para regulamentação dos contratos individuais do trabalho. Há ainda os dissídios coletivos de natureza jurídica, destinados à interpretação de uma norma preexistente, legal, costumeira ou mesmo oriunda de acordo ou dissídio coletivos. Este processo é regulado pelos artigos 856 a 872 da CLT.

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In another decision in suit ROMS-394.582/997, the D-2 Panel of the Specialized Section for Individual Cases affirmed the decision to immediately reinstate the worker with HIV who had been fired despite a clause in the collective bargaining agreement<sup>28</sup>.

The regional labor courts have also decided various suits involving AIDS. The 2nd Regional Labor Court of Sao Paulo, for example, in various of its decisions recognized and declared the guarantee of employment to HIV-positive workers as occurred in case RO-02.900.168.036 in 1992 when the Second Panel decided to maintain the employment of an HIV-positive worker, applying to the concrete case by equity and analogy, based in Article 8 of the CLT, the provision of statute No. 1.711/52<sup>29</sup>.

## THE PUBLIC MINISTRY OF LABOR

Constitutional changes were felt also in the Public Ministry of Labor (Ministerio Publico do Trabalho, MPT). In its beginnings, the activities of labor advocacy were practically restricted to the activity of an interventionist organ.<sup>30</sup><sup>31</sup>

At the end of the 1980s, the MPT began to act in a more incisive manner as a organ with agency, for this purpose availing itself of statute No. 7.347/85 that regulates Civil Public Actions concerning crimes responsible for harms caused to the environment, to consumers, to goods and rights of artistic, esthetic, historical, touristic, or scenic values. The constitution of 1988 made possible these actions by conferring on the Public Ministry the institutional function of defending the public and social patrimony, the environment, and especially other diffuse and collective interests

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<sup>28</sup> REINTEGRAÇÃO. ESTABILIDADE NO EMPREGO. PREVISÃO EM ACORDO COLETIVO. DEFERIMENTO DE LIMINAR DE REINTEGRAÇÃO EM AÇÃO RECLAMATÓRIA. Sendo o reclamante portador do vírus HIV e tendo sido dispensado, em desrespeito à cláusula de acordo coletivo, diante da sua situação, tem-se que plenamente admissível a sua reintegração imediata, não caracterizando o “periculum in mora”, requisito indispensável para a concessão da segurança. Recurso ordinário não provido. (TST-ROMS nº 394.582/1997, SSEDI-II, T. D2, Ac. no 394.582, decisão de 23.02.1999, Rel. Min. Antônio Maria Thaumaturgo Cortizo, in DJU de 19.03.1999, pg. 00127).

<sup>29</sup> Revista LTr, 57-03/304.

<sup>30</sup> GALVÃO, Claribalte Vilarim de Vasconcelos. Teoria e Prática do Processo Trabalhista. Rio de Janeiro, Aurora, 1956, livro I, p. 68.

<sup>31</sup> FERNANDEZ FILHO, Rogério Rodriguez. O Ministério Público do Trabalho na Constituição de 1988. São Paulo, Faculdade de Direito, 1989 (Dissertação de Mestrado em Direito) – Faculdade de Direito, Universidade de São Paulo, 1997, pp. 24-5.

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(Article 129, III). This constitutional provision corrected the limitation imposed in 1985 on the MPT and other legitimate institutions by the presidential veto of the provisions contained in statute No. 7.347/85, that assured protection of “other diffuse interests.” Later, statute No. 8.078/90 restored the integrity of the text.<sup>32</sup>

To the Public Ministry of Work’s sphere of action falls not only the defense of the judicial order, of the democratic regime, and of essential social and individual interests (Article 127, caption, of the constitution of 1988), but also the defense of collective interests when social rights constitutionally guaranteed are disregarded (Article 83, III, LC 75/93<sup>33</sup>), that is, of the labor and employment law system.

The Public Ministry has distinguished itself in the defense of this legal order, contributing to the rescue of dignity for workers and to the valorization of their humanity, whether acting as *custos legis* (interventionist organ) or as an organ with agency, as much in the extrajudicial as in the judicial sphere. For the execution of its role, as much in the administrative as in the judicial sphere, the MPT takes advantage of various procedural and administrative instruments, for example, Public Civil Actions, Civil Collective Actions, Civil Inquiries, and other judicial actions, public hearings, the power of requisition, the expediency of Recommendations of Conduct Adjustments, of mediation, of arbitration, of signing of Terms of Commitment of Conduct Adjustment, and of conducting investigations<sup>34</sup>.

As far as the Public Ministry’s activities in public civil inquiries related to AIDS, we spotlight one that transpired in the Regional Labor Prosecution of the First Region/Rio de Janeiro in which a worker with asymptomatic HIV infected a work colleague through a romantic relationship. His current companion - also HIV-positive - was pressured into resigning, besides suffering all sorts of unseemly comments on the part of management and co-workers, since his condition was revealed to the other employees.

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<sup>32</sup> Para um conhecimento mais detido deste episódio, veja FIORILLO, Celso Antônio Pacheco. Associação civil e interesses difusos no Direito Processual Civil Brasileiro. São Paulo, Faculdade de Direito, 1989 (Dissertação Mestrado em Direito) – Faculdade de Direito, Pontifícia Universidade Católica de São Paulo, 1989, em especial as pp. 185-223.

<sup>33</sup> A Lei Complementar nº 75, de 20.05.93, dispõe sobre a organização, as atribuições e o estatuto do Ministério Público da União.

<sup>34</sup> Cf. Art. 129 da CF/88, art. 83, da LC nº 75/93 e Lei nº 7.347/85.

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After the intervention of the Public Ministry, not only was the policy of pressuring the employee to resign ended - a fact denied by the firm - but also the comments of the co-workers attenuated. The worker continues at his job<sup>35</sup>.

Besides the activities as *custos legis* (interventionist organ), the Public Ministry has sought partnerships with civil society organizations (and with other governmental organs) to fulfill its duties as mediator of conflicts in the broadest and most efficacious manner, as an agent capable of facilitating the solution of problems, as much influencing the elimination of their causes as dealing with their effects. To that effect, it has participated in diverse events: legal workshops, seminars, forums, centers, and working groups, such as GTEDEO<sup>36</sup>.

## II - THE PROTECTION OF WORK RELATIONS

In Brazil, not all workers enjoy adequate legal protection. As a general rule, workers who labor under orders of their contractor and who fall within the concept of employee, according to the provisions of Article No. 3 of the labor code, CLT<sup>3738</sup>, are supported by the rules defined in the labor code itself, as well as by supplementary legislation. Some types of workers are equated with employees or have the same range of rights<sup>39</sup>, others have some of these rights<sup>40</sup>, and there are yet others who fall at the margin of these legal protections, such as workers in the informal economy or temporary workers or independent contractors.

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<sup>35</sup> Procedimento Preparatório nº 255/00.

<sup>36</sup> Criado pelo Decreto Presidencial de 20 de março de 1996.

<sup>37</sup> Aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943 e alterado por vasta legislação posterior.

<sup>38</sup> Cf. dispõe o art. 3º, da CLT, considera-se empregado toda pessoa física que presta serviços de natureza não eventual a empregador, sob a dependência deste e mediante salário. Ainda, segundo a CLT – art. 2º – empregador é a empresa, individual ou coletiva, que, assumindo os riscos da atividade econômica, admite, assalaria e dirige a prestação pessoal de serviços. Para os efeitos da relação de emprego, equipara-se ao empregador os profissionais liberais, as instituições beneficentes, as associações recreativas ou outras, sem fins lucrativos, que admitirem trabalhadores como empregados.

<sup>39</sup> O trabalhador avulso tem igualdade de direitos com o trabalhador com vínculo permanente, por força do disposto no art. 7º, XXXIV, da Constituição. O empregado público também tem os direitos iguais aos do empregado comum – art. 1º da

<sup>40</sup> O empregado doméstico, além do contido em legislação específica – Lei nº 5.859/72 e Decreto nº 71.885/72 – tem parte dos direitos constitucionais assegurados ao empregado, cf. art. 7º, parágrafo único, da Constituição.

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## **EQUALITY AND NON-DISCRIMINATION IN MATTERS OF EMPLOYMENT**

The constitution of 1988 defines citizenship, the dignity of the person, and the social value of work as foundations of the Republic (Article 1, II, III, and IV). It establishes that the social order has as its base the primacy of work, with the objective of social welfare and justice (Article 193, caption) and that economic activity is founded in the validation of human work (Article 170, caption). Further, it announces work as a fundamental social right, protecting the employment relationship against arbitrary discharge or termination without just cause (Articles 6 and 7, I). Among the fundamental objectives of the Brazilian state promoting the good of all, without prejudices of origin, race, sex, color, age, or whatever other forms of discrimination (Article 3, IV). Its international relations are guided, among other principles, by the prevalence of human rights (Article 4, II).

The constitution assures equality of treatment for all persons residing in the country, not granting distinctions of any nature (Article 5, caption). Equality of treatment is reinforced by the constitutional principle of non-discrimination (Article 3, IV) and invigorated by innumerable other norms inscribed in the constitutional text, for example, norms of equality among men and women (Article 5, I), of the prohibition of differences in salaries, in the exercise of functions, and in criteria for hiring by motive of sex, age, color, or civil status (Article 7, XXX), of the prohibition any discrimination in regards to salary or criteria of hiring of workers with disabilities (Article 7, XXXI), of the prohibition of distinctions among manual, technical, and intellectual workers, or among various professionals (Article 7, XXXII), of equality of rights of urban and rural workers (Article 7, caption), of equality of rights among workers with permanent employment ties and temporary workers (Article 7, XXXIV), among others.

The constitution guarantees the right to life (Article 5, caption), the right to health (Article 196), and an environment ecologically balanced and sound (Article 225), in which the work environment is included. In this sense, it guarantees to the worker the reduction of risks inherent in work by means of norms of health, hygiene, and security (Article 7, XXI). It also recognizes the dignity of the human person as a foundation of the Republic (Article 1, III) and defines as inviolable intimacy, private life, honor, and

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the image of persons, assuring the right to indemnification for material or moral harms resulting from their violation (Article 5, Section X).

Besides these and other worker rights expressly mentioned in the constitution, and those established by infra-constitutional laws, those rights contained in international treaties of which Brazil is a signatory also enter into the positive law of Brazil (Article 5, Section 2 of the federal constitution of 1988). Concerning international norms about human rights, there prevails in doctrine the understanding that once ratified and as long as they do not contradict a constitutional precept, they acquire a constitutional status<sup>41</sup>, notwithstanding that such an understanding has not yet been wholly adopted by the Supreme Constitutional Court<sup>42</sup> (Supremo Tribunal Federal, STF).

International treaties, especially the conventions adopted within the ambit of the International Labor Organization, have influenced work relations in the country<sup>43</sup>.

About discrimination in work relations, for example, Brazil ratified Convention No. 111 of 1958 about Discrimination in Matters of Employment and Profession. This convention, besides reaffirming that discrimination constitutes a violation of human rights enumerated in the Universal Declaration and establishing that the member-states of the ILO that ratify it are obligated to commit themselves to adopt a policy of promoting equality of opportunity and of treatment in matters of employment and profession (Article 2), presents a definitions of the term “discrimination” (Article 1) that has been extremely useful in Brazil, where there was not a legal concept for that expression<sup>44</sup>, notwithstanding diverse laws defining practices or behaviors as discriminatory.

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<sup>41</sup> SUSSEKIND, Arnaldo. *Direito Constitucional do Trabalho*. 2a ed. Rio de Janeiro: Renovar. 2001, p. 32. Dentre outros, compartilham deste entendimento: PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional Internacional*. São Paulo: Max Limonad, 1997, p.59; TRINDADE, Antônio Augusto Cançado. *A proteção internacional dos direitos humanos*. São Paulo: Saraiva, 1991, p.631.

<sup>42</sup> *Idem*, p. 72.

<sup>43</sup> Promulgada no Brasil pelo Decreto nº 62.150/1968.

<sup>44</sup> “Discriminação compreende toda a distinção, exclusão ou preferência, com base em raça, cor, sexo, religião, opinião pública, nacionalidade ou origem social, que tenha por efeito anular ou reduzir a igualdade de oportunidade ou de tratamento no emprego ou trabalho”.

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These constitutional principles serve as initial foundations for reflection and legal analysis of persons living with HIV, especially in the world of work, to which other norms can be added.

## **2. ACCESS TO EMPLOYMENT AND ANTI-HIV TESTS**

Concerning access to employment, we can affirm that the fact that persons are HIV-positive or ill with AIDS does not incapacitate them for work, for which reason they cannot be passed over in the hiring process nor discharged. If employers employ such practices, they will be discriminating because of health, which is prohibited<sup>45</sup>.

Moreover, employers may not require that employees submit to anti-HIV tests whether in the hiring process, in the course of working, or on the occasion of discharge, since the risk of transmission is not eliminated by testing. Employees can be infected at any time, including after being hired. In addition, there is a lapse in time, called the “immunological window,” in which the virus is not detectable by current tests, but the person with HIV can already have potential to transmit it to other people. In this way, notwithstanding employers being obligated to give tests at hiring, periodically thereafter, and at discharge, among other times (Article 168 of the CLT and NR-7<sup>46</sup>), these tests cannot include serological screens, given the lack of incapacity of HIV-positive workers to do the work.

About these tests, although there exists no national law respecting this issue, the Federal Council of Medicine, Conselho Federal de Medicina, CFM), in the consultative litigation No. 18/89, emphasized that there was not technical or scientific justification to indiscriminately administer serological exams: . . . there is no reason the people who are HIV positive should be discriminated against professionally. Later, the CFM, through Resolution No. 1.359/92, that regulated services for patients having HIV, decided to ban the administration of any compulsory tests including those given pre-

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<sup>45</sup> Acerca deste nosso entendimento, veja VALENTIM, João Hilário. AIDS e relações de trabalho. Rio de Janeiro: Impetus, 2003, pp. 92-99 e 324-327).

<sup>46</sup> Cf. Norma Regulamentadora nº 7, aprovada pela Portaria de nº 3.214, do MT/GM, de 08.06.1978, e alterações posteriores, que dispõem sobre o Programa de Controle Médico de Saúde Ocupacional – PCMSO. A Portaria nº 3.214/78 aprovou diversas outras Normas Regulamentadoras, que dispõem sobre várias matérias.



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hiring or periodically thereafter. Article 4 of Resolution No. 1.359/92 of the CFM bans the compulsory administration of serological screens for HIV, provides especially as a necessary condition for hospital admissions, pre-operation or pre-admission or periodical tests, even in institutions of imprisonment.

Also noteworthy is Consultative Report No. 726/99 - PC/CFM/No. 05/89, approved in the Plenary Session of the CFM on February 18, 1989, that, discussing testing for indications of AIDS in workers, it concluded that (a) any medical information about employees ought to be restricted to the fitness or not of the worker; (b) the administration of serological tests for AIDS by employers does not have technical, scientific, or ethical support; (c) giving these tests in these circumstances violates the rights of workers, assails the CLT, and beyond this contributes to employees' marginalization as citizens. Similarly, the Regional Council of Medicine of Rio de Janeiro published Resolution No. 35/91<sup>47</sup>. Resolutions and reports such as these have oriented and anchored the approach to the issue in various contexts in the world of work.

Implementing tests that do not determine the fitness of job candidates nor protect other employees or clients is entirely unnecessary, and requiring them can only be understood as discriminatory and limiting of access to employment. As such, it is prohibited by the constitution and by application, or analogy, by the provisions in Article 1 of statute No. 9.029/95<sup>48</sup>.

### **3. PROFESSIONAL SECRECY**

This issue, no less important, is related to responsible professions who care for the health of workers and their aides, whether linked through specialized services in Work Security and Medicine or through medical agreements. It is a matter of keeping

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<sup>47</sup> Dispõe o art. 5º da Resolução nº 35/91 (que versa sobre a responsabilidade ética das instituições e dos profissionais médicos na prevenção, no controle e nos tratamentos de pacientes com AIDS) que em nenhum caso exames de rastreamento do vírus podem ser praticados compulsoriamente.

<sup>48</sup> Dispõe o art. 1º da Lei nº 9.029, de 13.04.95, que fica proibida a adoção de qualquer prática discriminatória e limitativa para efeito de acesso à relação de emprego, ou sua manutenção, por motivo de sexo, origem, raça, cor, estado civil, situação familiar ou idade, ressalvadas, neste caso, as hipóteses de proteção ao previstas no inciso XXXIII do art. 7º da Constituição Federal.

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in inadequate form or of divulgence of information of the state of health of workers who are attended, failing to consider the duty to maintain the required professional secrecy about this information. It still happens that medical information with respect to employees is not adequately guarded and thus different people have access to such secret information.

The medical ethics code<sup>49</sup> (Codigo de Etica Medica, CEM ) prohibits doctors from revealing facts about which they have knowledge by virtue of the exercise of their profession, even if it is public knowledge, or if the patient has died, or when they are deposed as witnesses, except for just cause, legal duty, or express authorization by the patient (Article 102). It also prohibits revealing information obtained when workers are medically examined, including when required by management, except if silence puts in risk the health of other workers or the community (Article 105). According to the CEM, it is a professional duty of doctors not only to respect secrecy but also to be responsible for securely guarding information and documents about the state of health of workers attended by them - medical manuals and files, results of examinations, drug prescriptions, etc. (Articles 11 and 108); that obligation extends to all professionals who work with doctors and especially to nursing personnel<sup>50</sup>. Doctors must orient their staff about keeping documents secret and about the necessity to respect professional secrets (Article 107). Other employees who by chance have access to this kind of information by virtue of their functions also must maintain secrecy and must be oriented about this duty and the consequences of failing to comply.

In the medical ethics code there are other provisions no less important that we note here: (a) Article 11 - Doctors must maintain secret any confidential information that they have knowledge of because of the performance of their functions. The same injunction applies to work in firms, except in cases in which their silence would harm or put at risk the health of workers or the community. (b) Article 12 - Doctors must

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<sup>49</sup> Aprovado pela Resolução CFM, de nº 1.246/88.

<sup>50</sup> Veja o Código de Ética dos Profissionais de Enfermagem – CEPE (aprovado pela Res. COFEN nº 240/00), em especial os artigos 3º, 28 e 29. Quanto aos odontólogos, veja o Código de Ética Odontológica – CEO (aprovado pela Res. CFO nº 179, de 19.12.91), em especial os artigos 3º, II, 4º, IV e VI e 9º, I e II.

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seek the best solution for the workers as human beings and the elimination of control of risks inherent in work (. . .).

Moreover, employers and their agents have the duty of respecting the inviolability of intimacy and private lives of employees. The work contract does not authorize nor legitimate employers interfering with the person of their employees, who not only ought to have their intimacy preserved but also their dignity.

#### **4. HEALTH AND WORK ENVIRONMENT**

As provided in the labor code (CLT), employers have the duty to comply with the work medical and safety rules, whether they emanate from the government or arise from collective bargaining agreements; to inform their employees about these rules; to facilitate the monitoring of work; to maintain specialized services in work medicine and safety and to adopt measures that were determined by the appropriate administrative authority (Articles 154 and 157 of the CLT and NR-4<sup>51</sup>); to maintain specialized services in work safety and medicine (Article 162); to establish in their establishments Internal Commissions to Prevent Accidents (Comissoes Internas de Prevencao de Acidentes, CIPAs) (Article 163 and NR-5<sup>52</sup>); to furnish free equipment for individual and collective protection (Article 166 of CLT and NR-6, 8, 9<sup>53</sup>, among others); to conduct medical exams, whether at hiring, at discharge, or periodically (Article 168 of CLT and NR-7); to keep the work environment healthy and safe; and to conduct internal campaigns for the prevention of AIDS (Decree No. 3.195/88), among others.

Concerning health and environment of work, the national legislation is aligned with the principles announced by Convention No. 155 of the ILO of 1981 about

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<sup>51</sup> A NR-4 dispõe sobre os Serviços Especializados em Engenharia de Segurança e Medicina do Trabalho.

<sup>52</sup> A NR-5 regulamenta as Comissões Internas de Prevenção de Acidentes – CIPA.

<sup>53</sup> As NR-6, 8 e 9 dispõem, respectivamente, sobre Equipamento de Proteção Individual – EPI, Edificações e Programa de Prevenção de Riscos Ambientais – PPRA.

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Security, Health of Workers, and the Work Environment<sup>54</sup> and with Convention No. 161 of 1985 about Health Services at Work, both ratified by Brazil<sup>55</sup>.

Convention No. 155 declares that it is incumbent on the state to elaborate and execute coherent national policies about the health and safety of workers and the work environment and to institute a system of inspection to control and apply legislation and the adopted policies. Moreover, the state's action ought to encompass the orientation of employees and employers, the implementation of means to prevent work accidents and occupational illnesses, attention to decisions about safety and hygiene as well as information about the utilization of machines, materials, and substances, besides recommending the inclusion of these materials in training programs at every level. It assures workers the right to leave the workplace anytime for just reasons, without incurring unjustifiable consequences such as warnings, suspensions, or discharges, if they believe that their lives or health could be threatened by a grave and imminent danger.

As for firms, they ought to ensure the elimination of risks and furnish protective clothes and equipment when necessary and provide what is needed to deal with urgent situations and accidents. Convention No. 161 establishes the obligations of member-states of the ILO to encourage health at work by preventative and multidisciplinary services (substituting the name "Service of Work Health" for the older "Service of Work Medicine"), such service having an essentially preventative and assistance function for employers, workers, and their respective representatives in the firm. The Convention defines as objectives the preservation of a safe and sound environment, one that favors the best physical and mental health in relation to work and that has a policy of adapting work to the capacity of workers relative to their state of physical and mental health. As such, the services ought to identify and assess the risks to health in the workplace; to exercise vigilance in relation to factors and practices susceptible to strike at health; and to assess the organization of tasks, the design of workplaces, and the selection and maintenance of machines and equipment.

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<sup>54</sup> Promulgada no Brasil pelo Decreto nº 1.254, de 29.09.94, e aprovada pelo Congresso Nacional pelo Decreto Legislativo nº 2, de 17.03.1992.

<sup>55</sup> Promulgada no Brasil pelo Decreto no 127, de 22.05.91, e aprovada pelo Congresso Nacional pelo Decreto Legislativo nº 86, de 14.12.89.

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On the other hand, it is necessary that universal rules of biosecurity<sup>56</sup> be publicized and implemented, that their observation be required, and that the equipment necessary for the protection of workers be furnished. Everyone should be bound by this, especially employers.

## 5. PROTECTION AGAINST UNJUST OR ARBITRARY DISCHARGE

The constitution states that all workers will have their employment relations protected against discharge that is arbitrary or without just cause as defined by complementary law (Article 7, I). That complementary provision was never passed, however, and workers contracted under the egis of the labor code (CLT) - with the exception of those who acquired the right to job security before this constitution<sup>57</sup> or those entitled to provisional job guarantees<sup>58</sup> - do not have job security, and employers may fire them without any motive, as long as they pay the termination funds increased by 40% of the value of employees' deposits in the FGTS<sup>59</sup>.

Doctrine and the labor courts, however, have understood that HIV-positive workers or those ill with AIDS cannot be discharged unjustly or arbitrarily. In this way, discharges recognized and declared as discriminatory and counter to law have been annulled by labor courts and these employees maintained in their jobs.

Two legal theories prevail in the decisions of the courts: The first - discriminatory discharge - considers null any discharge that has as its basis the fact that the employees are HIV positive or ill with AIDS. As a rule, the court orders their return to work, often declaring them to have job security. In the absence of a legal rule that

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<sup>56</sup> Normas da Organização Mundial de Saúde – OMS, que dispõem sobre o atendimento e o tratamento das pessoas portadoras do vírus HIV. Neste sentido, veja ainda as Diretrizes sobre AIDS e primeiros socorros no local de trabalho, da OIT e da OMS, a Resolução CREMERJ nº 35/91, e CHÁVEZ, Víctor H. Alvarez, e DAVI, Héctor Carlos, op. cit., pp. 87-144 e 170-6.

<sup>57</sup> Cf. os termos definidos nos artigos 492 a 500, da CLT.

<sup>58</sup> No Brasil, são portadores de garantia provisória de emprego: (a) o dirigente sindical (art. 8ºVIII, CF e art. 543, § 3º, da CLT), (b) a empregada gestante (art. 10, II, “b”, do ADCT, da CF), (c) o membro da Comissão Interna de Prevenção de Acidentes – CIPA representante dos empregados (art. 10, II, “a”, do ADCT, da CF, art. 165, da CLT e Enunciado nº 339 do TST), (d) o empregado acidentado no trabalho (art. 118, da Lei nº 8.213/91), (e) o membro representante dos empregados na Comissão de Conciliação Prévia – CCP instituída no âmbito da empresa (art. 625-B, da CLT, dispositivo incluído pela Lei nº 9.958/2000), entre outros.

<sup>59</sup> Cf. art. 10, I, do ADCT, da CF e art. 18, § 1º, da Lei nº 8.036/1990.

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assures security to employees, the courts using the provisions of Articles 8 and 9 of the CLT<sup>60</sup> have validated their decisions by analogy, by equity, by principles and general rules of law, by comparative law, or by use of customs and usages. The Supreme Labor Court (TST) decided this way when judging suit TST-RR No. 0.217.791/1995<sup>61</sup>.

The second - discharge counter to rights - prohibits the discharge of employees with AIDS, considering this a contravention of the right to access to social welfare benefits and to medical treatment for health and retirement, with courts ordering employees reinstated to their functions. The Regional Labor Court (TRT) of the Second Region/Sao Paulo decided case RO-02.920.254.140<sup>62</sup> on this theory.

These theories have oriented the solution of the majority of work law cases that deal with the discharge of HIV-positive or workers with AIDS. Cases of this nature can

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<sup>60</sup> Art. 8º As autoridades administrativas e a Justiça do Trabalho, na falta de disposições legais ou contratuais, decidirão, conforme o caso, pela jurisprudência, por analogia, por equidade e outros princípios e normas gerais de direito, principalmente do Direito do Trabalho, e ainda de acordo com os usos e costumes e o Direito Comparado, mas sempre de maneira que nenhum interesse de classe ou particular prevaleça sobre o interesse público.

Parágrafo único. O direito comum será fonte subsidiária do direito do trabalho naquilo em que não for incompatível com os princípios fundamentais deste.

Art. 9º Serão nulos de pleno direito os atos praticados com o objetivo de desvirtuar ou fraudar a aplicação dos preceitos contidos na presente Consolidação.

<sup>61</sup> REINTEGRAÇÃO – EMPREGADO PORTADOR DO VÍRUS DA AIDS – “Caracterização de despedida arbitrária. Muito embora não haja preceito legal que garanta a estabilidade ao empregado portador da AIDS, ao magistrado incumbe a tarefa de valer-se dos princípios gerais do direito, da analogia e dos costumes para solucionar os conflitos ou as lides a ele submetidas. A simples e mera alegação de que o ordenamento jurídico nacional não assegura ao afetado o direito de permanecer no emprego não é suficiente para amparar uma atitude altamente discriminatória e arbitrária que sem sombra de dúvida lesiona de maneira frontal o princípio da isonomia insculpido na Constituição da República Federativa do Brasil. Revista conhecida e provida.” (PROC: TST-RR nº 0.217.791/1995, Acórdão nº: 0003.473, ano: 1997, data: 14-05-97, Rel. Min. Valdir Righetto). Recurso de revista conhecido em parte e desprovido. (PROC: TST-RR nº: 205.359/1995, 2ª T, Acórdão nº: 12269, decisão: 05.11.1997, Rel. Min. José Luciano de Castilho Pereira, in DJU de: 19.12.1997, pg: 67927).

<sup>62</sup> AIDS – DOENÇA MANIFESTA – Quando o empregado já não é simplesmente um portador do vírus HIV, ou seja, quando a doença denominada AIDS já se manifestou, a dispensa sem justo motivo, mesmo não comprovada a discriminação pela doença letal, é vedada, pois se caracteriza como obstativa ao percebimento do direito previdenciário contido na Lei nº 7.670 de 08 de setembro de 1988. É sobejamente sabido que o empregado gravemente enfermo, com doença letal em desenvolvimento, não poderá ser demitido: o art. 476 da Consolidação das Leis do Trabalho é claro ao informar que o empregado que está em auxílio-doença ou auxílio-enfermidade é considerado em licença não remunerada, durante o prazo desse benefício, não se pondere no sentido de que o autor não estava em seguro-doença, ou auxílio-enfermidade, uma vez que a reclamada impediu-lhe a obtenção desse benefício quando o demitiu. Não pode a reclamada obstar o reclamante de perceber o benefício previdenciário e talvez a aposentadoria. (TRT 2ª RG, RO-02.920.254.140, Ac. 7ª T. no 35.453/94, Rel. Juíza Rosa Maria Zuccaro, DOE de 08.09.94, Revista Synthesis 21/95, p. 228; cf. BARROS, Alice Monteiro de. Proteção à intimidade do empregado. São Paulo: LTR. 1997, pp. 98-9).

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be processed under judicial confidentiality, if the interested party presents the necessary application<sup>63</sup>.

Beyond national law, some judicial decisions have adopted international norms as some of their bases, for example, ILO Conventions. This reliance on international norms occurred in the decision in case TST-E-RR No. 0.217.791/1995, when the TST declared null the discharge motivated by the fact that the employee was HIV positive, recognizing the discriminatory attitude of the company to be indisputable, and ordering the reinstatement of the worker to the job. In his vote, Minister Vantuil Abdala used as a basis, among others, the ILO's international Conventions No. 111/58, 117/62, the joint Declaration of the World Health Organization and ILO about AIDS in 1988, integrated into national law by Article 8 of the CLT<sup>64</sup>.

### **III - AIDS AND THE ILO**

The first official manifestation by the ILO about HIV and AIDS happened at the "Consultative Meeting about AIDS in the Workplace" held together with the World Health Organization (WHO) between 27 and 29 of June, 1988, in Geneva<sup>65</sup>.

As a result of this meeting, the ILO and the WHO approved the "Declaration of the Consultative Meeting ILO/WHO about AIDS in the Workplace<sup>66</sup>." In this document, the organizations presented their stances about dealing with this issue. The declaration defined the policy principles that ought to orient action against AIDS in the workplace, emphasizing that : (a) protection of dignity and human rights of people infected by HIV and sick with AIDS is essential to prevent and fight HIV and AIDS; (b) infected workers who lack symptoms as well as those who have developed AIDS or some illness related to it ought to be treated exactly like any other employee.

The organizations defined still other principles that were elaborated and grouped in two basic sets. The first group referred to people who are seeking

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<sup>63</sup> Cf. art. 781, § 1º, da CLT e art. 155, do CPC.

<sup>64</sup> Processo TST-E-RR nº 0.217.791/1995, SSEDI-1, ano: 2000, decisão de 07.02.2000, Rel. Min. Vantuil Abdala.

<sup>65</sup> Os textos da OIT mencionados neste capítulo podem ser encontrados no site [www.ilo.org](http://www.ilo.org).

<sup>66</sup> Statement from the Consultation on AIDS and the Workplace, Genebra, junho 1988.

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employment, and the other related to people who are working. People seeking employment ought not be restricted, not should they be required in the hiring process to comply with any procedures for prior detection of HIV or AIDS, since in practice these can constitute discrimination. Regarding people already working, they declared that: (a) there should not be required exams to detect HIV or AIDS whether by direct or indirect methods; (b) the confidential character of all medical information should be respected; (c) employees ought not be obligated to inform their employers of their situation related to HIV and AIDS and ought to be protected from all types of discrimination or stigmatization, to have the right to maintain their employment and to change the conditions of work when necessary, since infection by HIV or AIDS does not produce, in and of itself, any limitation on the capacity to work. If employees experience debilitation, however, measures ought to be taken to promote necessary and reasonable accommodations to these conditions, such as to make possible the continued performance of duties; (d) when certain situations require first aid in the workplace, measures should be adopted to reduce the danger of any blood infection.

The ILO, WHO, and the League of Red Cross Societies together published another document called “Guidance about AIDS and First Aid in the Workplace<sup>67</sup>” that detailed precautions that should be taken in mouth-to-mouth resuscitation of workers who suffer hemorrhages, who are splattered with blood, who contact blood in rendering first aid, etc.

Later, in Windhoek, Namibia, Africa, from October 11 to 13, 1999, the ILO held the “Regional Tripartite Seminar on Strategies to Approach the Social and Work Implications of HIV/AIDS<sup>68</sup>.” The conference approved the “Platform for Action about HIV/AIDS in the Context of the World of Work in Africa,” and defined the common values that ought to guide future programs and policies to be implemented and their goals.

The Platform for Action was approved unanimously by the African Ministers of Labor present at the 9th African Regional Meeting of the ILO, held in Abidjan between

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<sup>67</sup> CHAVEZ, Victor H. Alvares, e DAVI, Héctor Carlos. Sida en la empresa. Buenos Aires, EPE, 1991, pp. 172-6.

<sup>68</sup> Regional tripartite workshop on strategies to tackle the social and labour implications of HIV/AIDS, Windhoek, October 1999



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December 8 and 11, 1999<sup>69</sup>. At this meeting, “Resolution about HIV and AIDS in the Context of the World of Work in Africa” was also approved. These documents, although focused on the working realities of Africa<sup>70</sup>, can serve as guidance to implement actions in Brazil.

The 88th International Conference on Work, held in Geneva in June, 2000, approved the “Resolution About HIV/AIDS and the World of Work,” presented by the Council of Administration of the ILO. The resolution exhorted the governments of the member-states and the organizations of employees and employers to: (a) broaden national awareness, especially in the area of work, with the aim of eliminating stigma and discrimination about HIV and AIDS and combating the culture of segregation; (b) reinforce systems of security and health at work; among other actions<sup>71</sup>.

During the Conference, the “Special High Level Meeting about HIV/AIDS and the world of Work<sup>72</sup>” was held during which an appreciation of a global report about the issue issued by the Secretary of the ILO<sup>73</sup> was passed. The document emphasized the important role that the ILO ought to perform in this context, contributing to the establishment of a world alliance with a view toward a global solution for workers with HIV or AIDS; promoting worldwide initiatives; and supporting initiatives at the national and firm levels. To this effect, on this occasion the Worldwide Program of the ILO on HIV/AIDS in the World of Work was created - a program of technical cooperation of the ILO that had as its objective to implement the resolution and the actions of the ILO

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<sup>69</sup> INTERNATIONAL LABOUR OFFICE. HIV/AIDS in Africa: The impact on de world of work. Geneva, ILO, 2000, p. 25.

<sup>70</sup> Para conhecimento mais detalhado da atual realidade dos países africanos em relação aos problemas decorrentes do HIV/AIDS e de seus reflexos no mundo do trabalho, veja: El SIDA en el mundo del trabajo: cuando la información no es suficiente. In Revista de la OIT, no 35, pp. 8-9 e 32, jul. 2000, e BUREAU INTERNATIONAL DU TRAVAIL. Action contre le HIV et le SIDA en Afrique. Genève, BIT, 2000, pp. 1-27.

<sup>71</sup> ORGANIZACIÓN INTERNACIONAL DEL TRABAJO. Resolución Relativa al VIH/SIDA y el Mundo del Trabajo.

<sup>72</sup> OFICINA INTERNACIONAL DEL TRABAJO. Reunión Especial de Alto Nivel sobre el HIV/SIDA y el Mundo del Trabajo: resumen de las labores del grupo especial técnico tripartito. Ginebra, OIT, 2000, p. 16.

<sup>73</sup> OFICINA INTERNACIONAL DEL TRABAJO. VIH/SIDA: Una Amenaza para el Trabajo Decente, la Productividad y el Desarrollo. Ginebra, OIT, 2000, pp. 1-2.

about HIV and AIDS<sup>74</sup>. Also, an agreement of cooperation was signed between the ILO and UNAIDS - the Joint Program of the United Nations on HIV/AIDS.

In May of 2001, at the headquarters of the ILO in Geneva an international technical meeting was held that included the participation of representatives of governments and organizations of employers and employees<sup>75</sup>. This meeting approved the “Repertoire of Practical Recommendations about HIV/AIDS and the World of Work.”<sup>76</sup>, That document was officially issued by the Director-General of the ILO in June, 2001, on the occasion of the Special Session of the General Assembly of the United Nations about HIV and AIDS (UNGASS-AIDS), held in New York between June 25 and 27, 2001<sup>78</sup>.

The repertoire is a complementary instrument to the conventions and recommendations of the ILO<sup>79</sup>. Since its creation in 1919, the ILO and its tripartite structures have constructed a system of international norms in the form of conventions and recommendations<sup>80</sup>.

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<sup>74</sup> OFICINA INTERNACIONAL DEL TRABAJO – Consejo de Administración. Curso que há de darse a la resolución relativa al VIH/SIDA y el mundo del trabajo, adaptada por la Conferência Internacional del Trabajo em su 88ª Reunión (2000). Ginebra, OIT, 2000, pp. 1-6.

<sup>75</sup> AGUIAR, Paulo Junqueira (Assessor Técnico – Unidade de Prevenção da Coordenação Nacional de DST e AIDS – Ministério da Saúde) Informes.

<sup>76</sup> ORGANIZACION INTERNACIONAL DEL TRABAJO. Repertorio de Recomendaciones Prácticas de la OIT sobre el VIH/AIDS y el Mundo del Trabajo. Ginebra: OIT. 2001. 58 pp.

<sup>77</sup> Para conhecimento mais detalhado da Recomendação veja VALENTIM, João Hilário. “Legislação Nacional sobre HIV/AIDS no Mundo do Trabalho”. In CUNHA, Maria Beatriz (Coord.). HIV/AIDS no Mundo do Trabalho: As ações e a Legislação Brasileira. Brasília: OIT, 2002, p.76-79.

<sup>78</sup> A UNGASS-AIDS teve por finalidade discutir e adotar uma estratégia global de luta contra o HIV/AIDS. Durante a reunião, os Países-membros das Nações Unidas adotaram a “Declaração de Compromisso sobre HIV/AIDS”, que estabelece uma série de acordos com relação ao combate ao HIV/AIDS. Alguns trechos do documento referem-se à questão da discriminação dos portadores de HIV/AIDS:

Preâmbulo – o cumprimento efetivo dos direitos humanos e das liberdades fundamentais para todos é um elemento essencial na resposta global à pandemia do HIV/AIDS, assim como reduz a vulnerabilidade ao HIV/AIDS e previne o estigma e a respectiva discriminação contra pessoas vivendo com, ou com risco do HIV/AIDS.

Parágrafo 37 – garantia de desenvolvimento e implementação, até 2003, de estratégias nacionais multisetoriais para (sic) confrontar o estigma, o silêncio e a negação; eliminar a discriminação e marginalização.

Parágrafo 58 – criação, fortalecimento e aplicação de legislação, regulamentos e outras medidas de eliminação de todas as formas de discriminação.

<sup>79</sup> Ver Apêndice IV, V e VI do Repertório de Recomendações Práticas sobre o HIV/AIDS e o Mundo do Trabalho. OIT/MS/SESI; Brasília, 2002.

<sup>80</sup> A OIT tem como órgão máximo a Conferência Geral dos Estados-Membros, que pronuncia-se sobre a aceitação dos temas à ela submetidos através de dois instrumentos, as convenções e as recomendações. As Convenções são tratados internacionais sujeitos à ratificação pelos Países-

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The Portuguese version of the repertoire was released in Sao Paulo on May 14, 2002, when the “National Seminar on HIV/AIDS and the World of Work” was held, sponsored by the ILO-Brazil and by the Ministry of Health.

The repertoire establishes guidelines for confronting HIV and AIDS in the workplace, promoting decent work and the elimination of discrimination on account of AIDS<sup>81</sup>.

The orientations on which the repertoire is based are: (a) prevention of HIV and AIDS; (b) management and reduction of the effects of HIV and AIDS in the workplace; (c) assistance and support for workers infected by HIV or sick with AIDS; and (d) eradication of prejudice and of discrimination against persons with or supposedly infected by HIV.

The repertoire applies to all employers and workers in the public and private sectors, including people who are seeking employment and all the forms of formal and informal work<sup>82</sup>; it defines the fundamental principles that ought to guide action against AIDS in workplaces; it motivates the organization of programs for information and education in workplaces as means prevention of the spread of the disease, and the implementation of training programs targeted and adopted to the necessities of different groups toward which they are aimed<sup>83</sup>; and it establishes a list of rights and responsibilities of governments, employers, workers, and their respective representatives.

Regarding tests to detect HIV, the repertoire provides that they should not be administered in the workplace, except in certain discrete situations<sup>84</sup>; it affirms that

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Membros. As Recomendações, não são passíveis de ratificação, porém orientam o estabelecimento de políticas e de ações nacionais, estando os Estados-membros da Organização obrigados a submetê-las às autoridades nacionais competentes pela matéria, dentro do prazo de um ano, contados do encerramento da Conferência, a fim de que estas as transformem em leis ou adotem outras medidas de outra natureza, conforme disposto nos art. 2 e 19, da Constituição da OIT. Disponível em: <http://www.oitbrasil.org.br/inst/fund/docs/index.php>.

<sup>81</sup> ORGANIZACION INTERNACIONAL DEL TRABAJO, op. cit. p. 1.

<sup>82</sup> Idem, pp.1-3.

<sup>83</sup> ORGANIZACION INTERNACIONAL DEL TRABAJO, op. cit. pp. 14-17.

<sup>84</sup> Três são as exceções que o Repertório faz em relação aos testes de detecção do vírus: (1) os realizados pela vigilância epidemiológica, (2) os voluntários e (3) nos casos de suspeita de contaminação, em razão da exposição a um risco profissional, a exemplo dos estabelecimentos nos quais o empregado esteja sujeito ao contato com sangue humano, tecidos ou líquidos corporais. Nestes estabelecimentos ou empresas, diga-se, o Repertório sugere que deve haver a previsão de procedimentos tendentes a reduzir ou eliminar o perigo de infecção e de acidentes do trabalho.

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such tests are not necessary because they put at risk the human rights and dignity of the workers.

As can be observed, this document is extremely thorough and advanced about the confrontation of HIV and AIDS in the workplace, urging responsibility and participation of all the interested parties in combating the epidemic in the workplace.

The 99th International Conference of Work, held in Geneva on June 2, 2010, made history by approving, by 439 votes in favor, 4 against, and 11 abstentions, the “Recommendation No. 200 About HIV and AIDS and the World of Work,” the first international norms<sup>85</sup> about HIV and AIDS and the world of work. The recommendation applies to all workers, independent of the modality or location of work; whether they have a job or occupation, are or are not in the process of training, including interns and apprentices, in voluntary work, in search of employment or participating in the hiring process; and whether their work contracts are in force or suspended or interrupted.

It establishes the general principles that ought to be observed in national actions for the treatment of HIV and AIDS, among which these stand out: (a) the recognition of the contribution of guarantees of human rights, fundamental liberties, and gender equality for all; (b) the recognition and treatment of the issue as permanent within the workplace, counting on the full participation of organizations of employers and workers; (c) the elimination of discrimination or stigmatization of workers; (d) prevention as a fundamental priority; (e) the assurance to workers, their families and dependents of access to services of prevention, treatment, attention, and support in relation to HIV and AIDS; (f) the enjoyment of privacy protections.

It defines guidance to be adopted by national programs for treating HIV and AIDS, especially dealing with discrimination and the promotion of equality of opportunities and treatment; prevention; treatment; support; diagnosis, privacy, and secrecy; security and health at work; treatment for children and youths. It also discusses forms of implementation for national programs, encouraging the participation of organizations of employees and of employers, besides the state; social

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<sup>85</sup> Ver nota n. 80.

dialogue; education, training, information, and consultation; and international cooperation, among others<sup>86</sup>.

It is important, finally, to point out that there are other norms of the ILO that, although not dealing specifically with HIV or AIDS in the world of work, apply to the question. These include the following conventions and recommendations of the ILO:

Convention No. 87, 1948, on Freedom to Organize and the Protection of the Right of Association<sup>87</sup>;

Convention No. 97, 1949, about Migrant Workers (Revised), ratified in June 18, 1965;

Convention No. 98, 1949, about the Right to Unionize and to Collective Bargaining, ratified by Brazil on November 18, 1952;<sup>8889</sup>

Convention No. 102, 1952, about Social Security (Minimum Norms);

Convention No. 111, 1958, about Discrimination in Matters of Employment and Occupation, ratified by Brazil on November 26, 1965<sup>90</sup>;

Convention No. 117, 1962, about Social Policies (Basic Norms and Objectives), ratified by Brazil on March 24, 1969;

Convention No. 121, 1964, about Beneficiaries of Work Accidents;

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<sup>86</sup> ORGANIZAÇÃO INTERNACIONAL DO TRABALHO – Escritório no Brasil. Recomendação 200 sobre o HIV e a AIDS e o Mundo do Trabalho: OIT-BR. 2010. 39 pp. Disponível em: <http://www.oitbrasil.org.br/info/downloadfile.php?fileId=492> e <http://www.oit.org/ilolex/spanish/index.htm>

<sup>87</sup> O Brasil ainda não ratificou a Convenção nº 87 da OIT. Em 29 de agosto de 1984, a Câmara dos Deputados aprovou o projeto de decreto legislativo referente à ratificação da Convenção, que foi encaminhado ao Senado Federal para apreciação, cf. CORDOVA, Efrén. A organização sindical brasileira e a Convenção 87 da OIT. 2.ed. São Paulo: IBRART. 1986. p.9. Importa destacar, entretanto, que o Brasil é signatário da Declaração da OIT sobre os Princípios e Direitos Fundamentais no Trabalho e seu Segmento, adotada em junho de 1998. A Organização definiu quatro princípios relativos aos direitos fundamentais, a saber: a liberdade sindical e o reconhecimento efetivo do direito de negociação coletiva, a eliminação de todas as formas de trabalho forçado ou obrigatório, a abolição efetiva do trabalho infantil e a eliminação da discriminação em matéria de emprego e ocupação. As Convenções Internacionais da OIT, que definem os princípios e os direitos fundamentais no trabalho, são as Convenções nº 87/1948, sobre liberdade sindical, nº 98/1949, sobre negociação coletiva, nº 29/1930, sobre trabalho forçado, nº 105/1957, sobre abolição do trabalho forçado, nº 138/1973, sobre idade mínima para o trabalho, nº 182/1999, sobre piores formas de trabalho infantil, nº 100/1951, sobre igualdade de remuneração, e a nº 111/1958, sobre discriminação no emprego e profissão. Registre-se que o Brasil já ratificou sete destas Convenções, faltando para ser ratificada apenas a de nº 87. Sobre o tema, veja ORGANIZAÇÃO INTERNACIONAL DO TRABALHO. Declaração da OIT sobre os Princípios e Direitos Fundamentais no Trabalho e seu Segmento. Genebra, OIT, 1998, pp. 7-15, e TAPIOLA, Kari. Empresas Multinacionais e os desafios sociais do século XXI. Genebra, OIT, 1999, pp. 14-15.

<sup>88</sup> Ratificada em 18.11.1952; cf. OFICINA INTERNACIONAL DEL TRABAJO. ILOLEX.

<sup>89</sup> A Convenção nº 98 é complementada pela de nº 154, de 1981, que dispõe especialmente sobre a promoção da negociação coletiva; também pela de nº 141, de 1975, sobre organizações de trabalhadores rurais, e da nº 151, de 1978, que trata do direito de sindicalização e de negociação coletiva dos servidores públicos; cf. SUSSEKIND, Arnaldo. Direito internacional do trabalho. 3a ed. São Paulo: LTr, 2000, p. 345. (As Convenções nº 141 e 154 também foram ratificadas pelo Brasil)

<sup>90</sup> Aprovada pelo Congresso Nacional, pelo Decreto Legislativo nº 104, de 1964, e promulgada no Brasil pelo Decreto nº 62.150, de 19.01.1968.

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Convention No. 143, 1975, about Migrant workers (Supplementary Provisions);  
Convention No. 149, 1977, about Nursing Staff;  
Convention No. 154, 1981, about Collective Bargaining, ratified by Brazil on July 10, 1992;  
Convention No. 155 and Recommendation No. 164, 1981, about Security, Health of Workers and the Work Environment, ratified by Brazil on May 18, 1992<sup>91</sup>;  
Convention No. 158 and Recommendation No. 166, of 1982, about the Termination of Contracts<sup>92,93</sup>;  
Convention No. 159, of 1983, about Occupational Rehabilitation and Employment (Physically Disabled), ratified by Brazil on May 18, 1990<sup>94</sup>;  
Convention No. 161 and Recommendation No. 171, of 1985, about Health Services at Work, ratified by Brazil on May 18, 1990<sup>95</sup>;  
Convention No. 175, of 1994, about Part-time Workers;  
Convention No. 181, of 1997, about Private Employment Agencies;  
Convention No 182 and Recommendation No. 190, of 1999, about the Worst Forms of Child Labor, ratified on February 2, 2002.

Besides these two official forms, the International Conference on work and all the organs that form the ILO frequently approve other documents, such as Repertoires of Practical Recommendations, Resolutions and Declarations. The documents below apply to the question of HIV/AIDS and the world of work:

Repertoire of Recommendations about Management of Questions Relative to Alcohol and Drugs in the Workplace, 1996;  
Repertoire of Practical Recommendations about Protection of Personal Information of Workers, 1997;  
Technical and Ethical Guidelines for Monitoring the Health of Workers, 1998;  
Repertoire of Practical Recommendations about the Management of Disabilities in the Workplace, 2001.

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<sup>91</sup> Aprovada pelo Congresso Nacional, pelo Decreto Legislativo nº 2, de 17.03.1992, e promulgada no Brasil pelo Decreto nº 1.254, de 29.09.1994.

<sup>92</sup> Aprovada pelo Congresso Nacional, pelo Decreto Legislativo nº 68, de 29.08.1992, promulgada no Brasil pelo Decreto nº 1.855, de 10.04.1996 (DOU 11.04.96 e retif. DOU 26.09.1996) e denunciada pelo Poder Executivo através do Decreto nº 2.100, de 20.12.1996.

<sup>93</sup> Observe-se que não é pacífico na doutrina nacional o entendimento acerca da perda da vigência da Convenção 158 da OIT. Alguns autores consideram que a Convenção ainda vige. Este é o entendimento de Jorge Luiz Souto maior; cf. SOUTO MAIOR, Jorge Luiz. O Direito do Trabalho como instrumento de justiça social. São Paulo: LTr, 2000, p.331-9.

<sup>94</sup> Aprovada pelo Congresso Nacional, pelo Decreto Legislativo nº 51, de 25.08.1989 (DOU 28.08.1989), e promulgada no Brasil pelo Decreto nº 129, de 22.05.1991 (DOU 23.05.1991).

<sup>95</sup> Aprovada pelo Congresso Nacional, pelo Decreto Legislativo nº 86, de 14.12.1989, e promulgada no Brasil pelo Decreto no 127, de 22.05.1991 (DOU 23.05.1991).

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The ILO appears headed toward adopting an international convention on the issue that will constitute a great advance in the treatment of HIV and AIDS in the world of work.

## **CONCLUSION**

Being infected by HIV, whether in a condition of being asymptomatic or manifesting disease, does not incapacitate or impede work, since it does not bring about harm to employees' work capacities nor offer risk to working together professionally with colleagues as long as adequate preventative and protective measures are adopted. HIV-positive employees have rights to assured work, just as any other employee, and must not be disadvantaged, stigmatized, or discriminated against, whether it be when applying for jobs, or during the course of employment, or if fired for this motive.

Work can be one of the elements of stabilization during the illness. To be working can afford people the necessary condition to provide their sustenance and nourishment, which is as important as their treatment. Nevertheless, not any work, rendered in any mode or form. It is necessary that the environment be healthy, physically, psychologically, and mentally, besides being sensitive and welcoming to the necessities of HIV-positive people rather than the source of social exclusion of the ill. It ought to contribute to staunching prejudice, improving life conditions, including socially, and realizing a foundation of values of justice, solidarity, protection of workers and their fundamental rights such as the respect of life, health, dignity, equality, citizenship, and social welfare, among others. Lacking these conditions and values, work can be a contributing co-factor for the manifestation and/or aggravation of illness or for the increased individual susceptibility to infection.

Unfortunately in our society HIV-positive people still are stigmatized and discriminated against, requiring special legal protections to assure their effective rights and eliminate by efficacious means all aggression or attempts to imply disrespect to their persons or their rights.

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Despite constituting an excellent source of information about preventing and fighting the disease, the workplace as of yet is not fully taken advantage of for this end. The specific problems of AIDS in this context still are not adequately treated. This reality needs to be confronted and changed. We have advanced far in this direction, it is true, and the norms highlighted here mark the way well, but there is still a long road to be traveled.

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