
HIV AND AIDS: PREJUDICE, DISCRIMINATION, AND STIGMA AT WORK

HIV E A AIDS: PRECONCEITO, DISCRIMINAÇÃO E ESTIGMA NO TRABALHO

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ABSTRACT

This article deigns to highlight the stigmas and discrimination that workers with HIV and AIDS suffer during the employment contract. A bibliographical approach was necessary to cross the positions of the doctrinaires directed to the subject matter. For this, it was necessary to define and differentiate discrimination, prejudice and stigma in order to delimit the forms of invasion to the subjectivism of the patient. International Labor Organization conventions 111 and 159 and Recommendation 200 on the code of practice and conduct on HIV and AIDS were discussed. The role of discrimination was assessed at the time of the contract, during the agreement and at the time of contractual resolution. It is concluded that the Brazilian jurisprudential understanding is in line with international positions, emphasizing the dignity of the patient and the effectiveness of their rights, when they are subtracted or ignored.

KEYWORDS: Dignity of human person; Labor Law; Business ethics.

RESUMO

O presente artigo se digna a evidenciar os estigmas e discriminações que trabalhadores, portadores de HIV e AIDS, sofrem no decorrer do contrato de trabalho. Fez-se necessário uma abordagem bibliográfica para se percorrer as posições dos doutrinadores direcionados à temática objeto. Para tanto, necessitou-se definir e diferenciar discriminação, preconceito e estigma a fim de delimitar as formas de invasão ao subjetivismo do paciente. Analisou-se as convenções 111 e 159 da Organização Internacional do Trabalho e a Recomendação número 200 acerca do código de prática e conduta acerca de HIV e AIDS. Avaliou-se o papel da

discriminação no momento do contrato, durante o pacto e no momento de resolução contratual. Conclui-se que o entendimento jurisprudencial brasileiro está coadunado com os posicionamentos internacionais, prezando pela dignidade do paciente e pela eficácia dos direitos destes, quando são subtraídos ou ignorados.

PALAVRAS-CHAVE: Dignidade da Pessoa Humana; Direito do Trabalho; Ética empresarial.

1. DEFINITIONS OF DISCRIMINATION, PREJUDICE, AND STIGMA

To thoroughly know something, it is first necessary to examine the true meaning of the terms involved in the matter. One cannot speak of the issue of HIV and AIDS without understanding the significance of the vocabulary of discrimination, prejudice, and stigma.

The terms discrimination and prejudice have distinct meanings. When the word discrimination is mentioned we ought to take into account subjective and objective aspects. The subjective element relates to the intention to discriminate. On the other hand, the objective element is characterized by the effective preference for someone in detriment to another “without justifiable cause, especially for evident motive.” This behavior reveals “a school of prejudice because of sex, race, color, language, religion, opinion, physical appearance, or other significant factors¹.”

Regarding the timing of the act considered discriminatory, there seems little doubt today in the field of labor and employment law that discriminatory practices can

¹ NASCIMENTO, Amauri Mascaro. **Direito contemporâneo do trabalho**. São Paulo: Saraiva, 2011. p. 405.

occur “in hiring, during the course of the employment relation, and in discharge, when constituting an offense to the dignity of the worker and to the principle of equality².”

The prohibition of discriminatory practices in employment finds its foundation in Paragraph XXX of Article 7 of the Federal Constitution of 1988, in Conventions numbers 111 and 117 of the International Labor Organization (ILO), and in statute Number 9.029/95. In these normative rules, however, state of health is not considered as a base of discrimination. Nonetheless, it is possible through extensive interpretation or analogous application to apply these norms “when the basis of discrimination is the state of health of the employee³.”

The most frequent cases of discrimination because of health occur “in situations of repetitive motion disorders (RMD) and acquired immune deficiency syndrome (AIDS)⁴.”

A prohibition can also be legally grounded in such cases by applying a rule in these cases on the understanding that “the legal enumeration is merely exemplary and not definitive or exhaustive⁵.”

In the pre-contractual phase, it is worth noting that from the moment of the process of selection of candidates for hire, even the analysis of the genetic code of candidates with the object of ascertaining if they have HIV can be characterized as a discriminatory act. Although the legal order of Brazil does not possess “a rule that forbids this employer conduct,” certainly it can be considered “prohibited by force of the ban on discrimination⁶.”

In questions of fundamental rights, the Brazilian legal order has as one of its strongest planks “the prohibition of unjustified discrimination.” In this sense, the discriminatory discharge “of a sufferer from repetitive motion disorders or person with AIDS ought to be sanctioned by declaring the employer action null and by resultant

² NASCIMENTO, Amauri Mascaro. *Op. cit.*, p. 405.

³ ROMITA, Arion Sayão. **Direitos fundamentais nas relações de trabalho**. 4. ed. rev. e aum. São Paulo: LTr, 2012. p. 328.

⁴ ROMITA, Arion Sayão. *Op. cit.*, p. 328.

⁵ ROMITA, Arion Sayão. *Op. cit.*, p. 328.

⁶ ROMITA, Arion Sayão. *Op. cit.*, p. 329.

reinstatement.” That judicial reinstatement is more than justified “by the interpretative rule that gives maximum efficacy to precepts that assure fundamental rights.”⁷

Comparing the worker suffering from RMD (or osteo-muscular disturbances related to work) with persons with HIV or AIDS, Marcus Aurelio Lopes notes how employees affected by illness end up stigmatized in the workplace, since the ill employees are perceived as inept, unproductive and inefficient employees. In these situations, workers with RMD, or HIV, or AIDS can be seen:

To suffer from an invisible pathology that impedes the full development of their professional activities, but does not totally incapacitate them. On the other hand, it results in an alteration of the behavior of the patient, almost always confused with lackluster or lower performance, invariably affecting the performance of the worker. Both illnesses are seen as highly stigmatizing for the worker⁸.

Similarly, Larissa Renata Kloss states that illicit discrimination, unjustified or invidious, “demonstrates rejection of differences, of diversity of characteristics extant in the human condition.” The objective is to use differences “to harm other individuals or less favored minorities,” that is, “persons who do not possess characteristics that correspond to those considered truly strong and advantageous⁹.”

The word stigma has a negative sense, implying a factor of differentiation normally unjustified, and consequently producing social exclusion and invisibility in relation to individual qualities¹⁰.

Stigma, without doubt, produces disrepute relative to individuals, reducing their life chances¹¹.

⁷ ROMITA, Arion Sayão. *Op. cit.*, p. 329.

⁸ LOPES, Marcus Aurélio. **Discriminações nas relações de trabalho**. Dissertação (Mestrado em Direito) – Universidade Estadual de Maringá, Maringá, 2002, p. 267-268.

⁹ KLOSS, Larissa Renata. A tutela inibitória como meio de evitar a discriminação do trabalho da mulher. In GUNTHER, Luiz Eduardo; SANTOS, Willians Franklin Lira dos; GUNTHER, Noeli Gonçalves da Silva (Coord.). **Jurisdição: crise, efetividade e plenitude institucional**. Curitiba: Juruá, 2010. V. III. p. 324.

¹⁰ BACILA, Carlos Roberto. **Estigma** – um estudo sobre preconceitos. Rio de Janeiro: Lúmen Júris, 2005. p. 28.

¹¹ GOFFMAN, Erving. **Estigma: notas sobre a manipulação da identidade deteriorada**. 4. ed. Tradução de Márcia Bandeira de Mello Leite Nuns. Rio de Janeiro: Guanabara Koogan, 1998. p. 7.

It is not too much to insist on the affirmation that employees excluded from the labor market bear two types of illness, one of these being the prejudice with which they are treated:

In this discouraging scene, two groups appear to suffer the effects of the lack of employment more than others: workers without qualifications, since the market, because of adoption of new productive technologies, decreasingly requires their presence, and, those who, for various reasons, belong to groups that are jettisoned from the production process. This latter group specifically suffers from a lack of work because of the “illness” that has dogged humanity since the beginning of time: prejudice¹².

Convention No. 111 of the ILO understands discrimination as all “differentiated treatment applied without justification to any person or group of individuals, acting to as a factor reducing opportunities in the social realm.”¹³

Those employees thus become stigmatized, suffering “a systematically differentiated treatment,” becoming “doubly victimized, as much by discrimination aimed at them as by the infirmity that afflicts them¹⁴.”

Discrimination and stigma can manifest themselves in employer practices when workers are candidates for jobs or are already hired. Discrimination can “appear upon entering a job,” a moment in which some firms “seek to certify that job candidates do not have serious or pre-existing illnesses, especially AIDS¹⁵.” When a firm or co-workers become aware “that the employee is ill, the situation worsens.” In this manner, HIV-positive workers suffer “differentiated stigmatization and unjustified segregation,” which occasions “manifest harm to welfare and social peace, essential for a just and fraternal society proclaimed in the Brazilian Constitution¹⁶.”

¹² BRITO FILHO, José Cláudio Monteiro de. **Discriminação no trabalho**. São Paulo: LTr, 2002. p. 15-16.

¹³ ATHANASIO, Lídia Clément Figueira Moutinho. Discriminação no trabalho: o caso dos empregados vítimas de acidentes de trabalho ou doenças ocupacionais. In GUNTHER, Luiz Eduardo. SANTOS, Willians Franklin Lira dos; GUNTHER, Noeli Gonçalves da Silva (Coord.). **Tutela dos direitos da personalidade na atividade empresarial**. Curitiba: Juruá, 2010. V. III. p. 223. ATHANASIO, Lídia Clément Figueira Moutinho. *Op. cit.*, p. 239.

¹⁴ ATHANASIO, Lídia Clément Figueira Moutinho. *Op. cit.*, p. 239.

¹⁵ RIBEIRO, Ana Beatriz Ramalho de Oliveira. BARACAT, Eduardo Milléo. HIV e AIDS e o mercado de trabalho: aplicação da Recomendação 200 da OIT no Brasil. In RAMOS FILHO, Wilson (Coord.). **Trabalho e regulação no Estado constitucional**. Curitiba: Juruá, 2001. p. 35.

¹⁶ RIBEIRO, Ana Beatriz Ramalho de Oliveira. *Op. cit.*, p. 35.

These outlines reveal the extent of discrimination, prejudice, and stigma that affect human beings. These words are always present when issues of HIV and AIDS are examined. The full recognition of the meaning that hides behind these matters is the purpose of this study, not only in the linguistic sense but more in the consequences and reverberations in human life.

2. TERMINOLOGY AND METAPHOR: HISTORICAL, SOCIOLOGICAL, MEDICAL, BIOLOGICAL, AND STATISTICAL ASPECTS

Which words ought to be used to designate people with HIV or AIDS? Which metaphor hides within the understanding of the problem of these diseases? And what biological and medical aspects need to be comprehended? Which historical and statistical information should be examined? And how ought we to address these questions in the fields of sociology and law?

For some time now, fear of contagion encouraged a tenor of Puritanism about the issue, in the 1990s blaming “the tolerance initiated in the 1960s for the current problem of AIDS.” In this sense, for example, not only the moralists but a notable defender of sexual liberty such as the essayist and professor Camille Paglia demonstrated the following sentiment in one of her books:

The sixties tried a return to nature that ended up in disaster. To bathe nude and slide playfully in the mud at Woodstock was a kind of short-lived Rousseauian dream. My generation, inspired by the Dionysian spirit of revolt of rock, tried to make something more radical than anything since the French Revolution. We asked: why must we obey this law? And why mustn't we follow our sexual impulses? And the result was a fall into barbarism.

We suspected grievously that a just society doesn't succeed in really functioning if everyone does what they want. And from the promiscuity of the sixties came AIDS. All of my generation who adhered to free love are

responsible for AIDS. The revolution of the 1960s in the United States collapsed because of its own excesses¹⁷.

Journalist Gay Talese asks about that observation: “But did it really collapse?” And he responds negatively, since in his view, contrary to opinion accumulated through research, he doubts that the United States in the 1990s (with all due respect to the anxiety and fear provoked by AIDS) is being subjected to a new Puritanism “capable of repressing tendencies and privileges that appeared so shocking when they emerged publicly thirty years ago.”

When it is a matter of illness and suffering, workers do not always reveal everything necessary. Medical practice as well as research into health “encounters massive reticence to speak of the disease and suffering”:

When one is sick, one tries to hide the fact from others, including family and neighbors. It is only after long detours that one sometimes arrives at coping with the disease that one confirms with shame: it's enough for an illness to be evoked for it to be followed by numerous justifications, as if an excuse were necessary. It is not a matter of blame in the proper sense that would reflect an individual lifestyle, but rather a collective sense of shame: “It's not on purpose that people are sick¹⁸.”

According to Christophe Dejours, there emerges “a true conception of illness, half our own.” This conception remains notably dominated by the accusation that all disease is in some way voluntary: “if you're sick it's because you're lazy¹⁹.”

The association that traditionally appears between illness and misfeasance is characteristic of this linkage. In this way “a tangible social consensus forms that aims to condemn the sick as well as the sickness²⁰.”

¹⁷ PAGLIA, Camille. Sexo, arte e cultura americana. Publicado no início de 1992, sem página. *Apud* TALESE, Gay. **A mulher do próximo**: uma crônica da permissividade americana antes da era da AIDS. Tradução de Pedro Maria Soares. São Paulo: Companhia das Letras, 2002. p. 8.

¹⁸ DEJOURS, Christophe. **A loucura no trabalho**: estudo de psicopatologia do trabalho. Tradução de Ana Isabel Paraguay e Lúcia Leal Ferreira. 5. ed. ampl. São Paulo: Cortez-Oboré, 1992. p. 29.

¹⁹ DEJOURS, Christophe. *Op. cit.*, p. 29.

²⁰ DEJOURS, Christophe. *Op. cit.*, p. 29-30.

Historically in Brazil, statute No. 7.670/88, Article 1, included SIDA/AIDS²¹ as reason to grant health care and consequently sick pay or retirement, independent of the period of need, for insured persons registered with Social Security who presents symptoms²².

In periods of leave, the work contract will be suspended. In the event of the death of the employee, a pension for the employee's dependents is assured. In line with welfare benefits, Article 1, Section II, of the same statute permits the employee with SIDA/AIDS to access severance pay funds (Fundo da Garantia do Tempo de Serviço, FGTS), regardless of whether the work contract was dissolved²³.

Two foreign cases cited by Dejours confirm the protective stance toward people with HIV. In the United States, a worker was not hired, although approved by physical and intellectual exams relevant to his job, because he revealed to the future employer that he had HIV. The Court of Appeals of the District of Columbia, in a decision handed down January 7, 1992, ordered that the worker be hired and paid retroactively, and that he be paid damages for his suffering and mental anguish "as well as be provided a declaration acknowledging the illegality of this type of discrimination²⁴."

The Human Rights Court of Canada, on the other hand, authorized the indirect rescission of the work contract of an employee, a restaurant cook, who admitted having HIV. As this confidential information was spread among co-workers, the supervisor refused to test the food, warning the restaurant's management that it would not be possible to restrain the other employees if they decided to attack the cook. The Court concluded that the firm failed to furnish clear instructions about AIDS in the workplace, which produced this situation because of existing prejudices. It thus condemned the firm to pay the cook damages for his lost salary and for the harm to his reputation, as well as sending him an apology letter²⁵.

²¹ Segundo a UNAIDS (<http://www.unaids.org.br/>), Programa Conjunto das Nações Unidas sobre HIV/AIDS, a terminologia AIDS (*Acquired Immunodeficiency Syndrome*) é adotada no Brasil, enquanto SIDA (Síndrome da Imunodeficiência Adquirida) é utilizada em outros países de língua portuguesa.

²² TURNES, Cassiane Terezinha. **Trabalhador portador do vírus HIV: quem é o responsável?** Monografia (Especialização em Direito do Trabalho) – UNICURITIBA, Curitiba, 2003. p. 19.

²³ TURNES, Cassiane Terezinha. *Op. cit.*, p. 19.

²⁴ TURNES, Cassiane Terezinha. *Op. cit.*, p. 21.

²⁵

Among stories about people with HIV, the film “Philadelphia” is one of the most important. It is a cinematic contribution to the study of law. The work is based in actual fact, telling the story of an associate attorney in a large law firm who is discharged because his partners discover his homosexuality and, moreover, that he has contracted HIV. The lawyer files a lawsuit for damages, and in the trial court’s judgment he receives a money award, just before dying. The message of the film is the immorality and illegality of prejudice against homosexuals as well as discrimination against patients with illnesses associated with HIV. The portrayal of characters is accurate, constructed through well-constructed portraits. The movie is an extremely sensitive and instructive work about the issues discussed here²⁶.

How should we characterize people with HIV? Following Marina Ribeiro Santiago, professionals who deal with the disease and its specialized literature “disregard the utilization of the term “aidéticos” (“people with AIDS”) because it conjures up negative implications about the disease, reflecting prejudice and giving impetus to social exclusion²⁷.

A terminology more conducive to the human dignity of the ill person ought to be observed, according to that author. In this sense, expressions that should be favored for people who have the virus but who still have not developed the illness are “persons testing positive,” asymptomatic bearers,” or “people with HIV.” For those in whom the disease has already manifested itself, the most appropriate expressions are “ill with AIDS” or “person with AIDS²⁸.”

Aristotle, in his Poetics, offers the oldest and most succinct definition about the meaning of the word metaphor, saying: “a metaphor consists in giving one thing the name of another²⁹.”

²⁶ LACERDA, Gabriel. **O direito no cinema**: relato de uma experiência didática no campo do direito. Rio de Janeiro: Editora FGV, 2007. p. 71-82.

²⁷ SANTIAGO, Mariana Ribeiro. A AIDS e o direito fundamental ao trabalho. **Revista de Direito do Trabalho**, ano 29, outubro-dezembro de 2003. São Paulo: Revista dos Tribunais, 2003. p. 211.

²⁸ SANTIAGO, Mariana Ribeiro. *Op. cit.*, p. 211.

²⁹ ARISTÓTELES, Poética. *Apud* SONTAG, Susan. **Doença como metáfora, AIDS e suas metáforas**. Tradução de Rubens Figueiredo e Paulo Henriques Britto. São Paulo: Companhia das Letras, 2007. p. 81.

The term AIDS - Acquired Immune Deficiency Syndrome - does not designate an illness but rather a clinical state “that has as a consequence a whole spectrum of illnesses³⁰.” The very definition of AIDS requires the presence of other illnesses, the so-called opportunistic infections and malignancies, in contrast to syphilis or cancer “that furnish prototypes for the majority of images and metaphors associated with AIDS³¹.”

AIDS is often hidden, like so many other illnesses that provoke feelings of shame. In the case of cancer, for example, “the family frequently does not reveal the diagnosis; as with AIDS, typically patients do not disclose the fact to their families³².”

When the spread of the disease is affirmed, it becomes necessary to understand that “it is one thing to emphasize the threat that the illness represents to all,” and quite another thing to affirm “that sooner or later everyone will be affected by it, directly or indirectly³³.”

In the first case (threat), it is a matter of inciting fear and confirming prejudices, while in the second case (affirming that everyone will be affected) the point is to diminish prejudices and reduce stigma³⁴.

Eduardo Milleo Baracat considers an exclusively ethical or moral analysis of discrimination against workers with HIV or AIDS inadequate. He cites statistic showing that from 1980 until June, 2010, 592,914 cases of AIDS were registered, revealing a rate of incidence that hovers around twenty cases per 100,000 persons. He also points out that the age bracket in which AIDS most occurs was, “in both sexes, between 20 and 59 years of age, demonstrating that it significantly affects the most productive sector of the labor market³⁵.”

In October, 2012, Luciane Aparecida Conceição, age 24, considered a symbol of the fight against AIDS for having been the first child to receive the cocktail against

³⁰ SONTAG, Susan. **Doença como metáfora, AIDS e suas metáforas**. Tradução de Rubens Figueiredo e Paulo Henriques Britto. São Paulo: Companhia das Letras, 2007. p. 81.

³¹ SONTAG, Susan. *Op. cit.*, p. 90.

³² SONTAG, Susan. *Op. cit.*, p. 90.

³³ SONTAG, Susan. *Op. cit.*, p. 127.

³⁴ SONTAG, Susan. *Op. cit.*, p. 127.

³⁵ BARACAT, Eduardo Milléo. A discriminação ao trabalhador com HIV/AIDS. **Jornal Gazeta do Povo**. 15.06.2011.

AIDS, died in Sorocaba, Sao Paulo. Having ceased to take medicine, she died of complications resulting from the effects of HIV. She had made a personal decision to stop treatment. According to reports of her case, she acquired HIV at birth because “her mother was infected in the eighth month of pregnancy by receiving contaminated blood³⁶.”

Under the title “Defeated by AIDS,” the newspaper Folha de Sao Paulo reported that Luciane Conceicao was the first child in Brazil and one of the first in the world to receive the cocktail against AIDS. After five years, according to the story, she decided that she wanted to die and stopped taking the medicine. She did not want to continue living with AIDS. Having been abandoned by her mother at birth, she was adopted when she was two. She obtained a judicial decision to begin the treatment hitherto restricted to adults. The use of medicine reduced the presence of AIDS by 98.6% and before receiving it, she was already in the terminal phase. Sixteen years after the decision of the court permitting Luciana to take the anti-retroviral treatment, “the situation of children born with HIV is very different.” Advances in the care of children infected by HIV have led to changes in the progression of the disease and less mortality. Luciane Conceicao opened the doors for many children. In 2008 Luciana had a daughter, Vitoria, who was born without the AIDS virus³⁷.

Luiz Otavio Linhares Renault remarks that “some activities can be continued,” subject to greater medical/scientific care “from the moment of contracting HIV,” but other activities must be prohibited or beyond reach. “Cooking in a school, in a restaurant providing meals for its employees or subcontractors, being a nurse, a bricklayer, etc³⁸.” are examples of such activities.

Another important aspect to emphasize is the possibility of patients working and being useful to society without the danger of contagion. As Luiz Otavio Linhares Renault stresses, workers in this situation do not always remain without possibilities of

³⁶ Morre a mulher que foi o 1º bebê a tomar coquetel anti-HIV. **Jornal Gazeta do Povo**. Caderno Vida e Cidadania. 06.10.2012, p. 7.

³⁷ VERSOLATO, Mariana. Vencida pela AIDS. **Jornal Folha de São Paulo**. Caderno Ciência + Saúde. 06.10.2012. p. 7.

³⁸ RENAULT, Luiz Otávio Linhares. Proteção ao portador do vírus HIV e ao aidético: enfoque trabalhista a um projeto de lei. In VIANNA, Márcio Túlio; RENAULT, Luiz Otávio Linhares (Coord.). **Discriminação: estudos**. São Paulo: LTr, 2000. p. 130.

serving. They must be permitted to have jobs that do not present any risk to their co-workers or to society. Judicial reinstatement orders, thus, are justifiable in situations of discriminatory discharges of HIV-positive³⁹ workers.

In an interview with the newspaper Gazeta do Povo of Curitiba, the public health doctor Rita Esmanhoto mentioned that in the beginning of the 1990s, when she went to work for the AIDS/STDs (Sexually Transmitted Diseases) clinic at the Hospital das Clínicas, “no one wanted to work there. There was a lot of fear and prejudice.” According to her, “AIDS is an extraordinary illness from the social point of view.” When the first cases occurred in the United States, the scientific community itself labeled AIDS as the “gay plague,” rendering “the greatest disservice by treating a problem that pertained to all humanity with prejudice⁴⁰.”

The possibility of workers being contaminated by HIV in the exercise of their functions exists, although that possibility is remote. To prevent this, the World Health Organization and International Labor Organization recommend that “necessary care be taken to avoid the danger of transmission of infected blood.” In some situations, special precautions are necessary, providing special protective clothing and equipment “without any burden on employees, informing them about the risks by means of scientific information, and furnishing them adequate professional training⁴¹.”

When it is impossible to take these special precautions, employees can “refrain from performing activities in the sector, awaiting appropriate measures, or assert constructive discharge, in the face of manifest danger of considerable harm” (Article 483 of the labor code, *Consolidacao das Leis Trabalhistas*, CLT⁴²).

In 2010, in the state of Sao Paulo alone, “AIDS killed almost nine people per day.” Campaigns and recognition of the pervasiveness of the illness that is chronic today are lacking. An effective campaign would have to acknowledge “that a miracle does not exist outside of prevention.” Therefore, “the fight against AIDS has to be across the boards, in all forms, if we want to really end this disease⁴³.”

³⁹ RENAULT, Luiz Otávio Linhares. *Op. cit.*, p. 129.

⁴⁰ ESMANHOTO, Rita. Entrevista. *Jornal Gazeta do Povo*, 04.09.2011. p. 9.

⁴¹ BARROS, Alice Monteiro de. **Curso de direito do trabalho**. 6. ed. São Paulo: LTr, 2010.

⁴² BARROS, Alice Monteiro de. *Op. cit.*, p. 953.

⁴³ SUPLICY, Marta. Prova de amor. *Jornal Folha de São Paulo*. 03.12.2011. p. 42.

An investigation of AIDS in the United States registered the consequences of reductions in public expenditures. According to this study, more than 29,000 children were born with HIV because of the elimination of programs to prevent transmission from mothers to children; 403,000 people with AIDS failed to receive treatment; 44,000 persons failed to be treated for tuberculosis; 1.1 million children failed to receive scheduled vaccinations; 419,000 children failed to receive other help, such as education and food that are fundamental in the struggle against AIDS⁴⁴. These numbers demonstrate that even in the United States, the richest country in the world, there exist immense challenges in dealing with this issue.

Doctors Caio Rosenthal (epidemiologist) and Mario Schefer (public health) affirm that “it is possible to defeat AIDS,” but they warn: “Either Brazil eliminates prejudice, in order to end transmission, or the realistic dream of defeating AIDS will recede⁴⁵.”

These professionals report that “in Brazil alone, each year there are more than 12 thousand deaths, 35 thousand new cases of disease, and countless infections.” But they note optimistic news, solid evidence that the anti-AIDS treatment, “begun at the right moment and followed correctly by the patient, practically blocks the transmission of HIV to sexual partners.” In this way, besides the individual benefits, treatment comes to contribute “decisively to collective prevention⁴⁶.”

Newspaper reports at the end of 2011 affirm that “AIDS is more lethal in the south of the country.” In 2010, 11,965 people died as a result of HIV. Rio Grande do Sul, Santa Catarina, and Parana together recorded nine HIV deaths for each 100,000 inhabitants in 2010 versus 6.3 for the rest of the country, according to the Ministry of Health. In Parana in 2010, 559 persons died as a result of HIV, yielding a daily average of 1.5 persons. The number was 2.3% higher than recorded in 2009, when 546 AIDS patients lost their lives. From 1980 (when the first instances of the disease were

⁴⁴ GIACOSA, Guillermo. **Jornal Perú 21**. 23.11.2011. p. 17.

⁴⁵ ROSENTHAL, Caio. SCHEFFER, Mário. É possível derrotar a AIDS. **Jornal Folha de São Paulo**. 01.12.2011. p. A3.

⁴⁶ ROSENTHAL, Caio. SCHEFFER, Mário. É possível derrotar a AIDS. **Jornal Folha de São Paulo**. 01.12.2011. p. A3.

reported in Brazil) until the year 2010, 9,219 persons died because of AIDS in Parana. But what could be the explanation of these statistics⁴⁷?

According to Mario Angelo Silva, Professor at the University of Brasilia, this preponderance of cases in the south is explained “by the greater access to tests for detecting HIV in the public network⁴⁸.” The states in other regions are less structured for these exams.

The Ministry of Health offers a different explanation, which has only hypotheses to explain the high number of infections in the south, namely, “the large presence of injected drugs in the region for some years⁴⁹.”

On the other hand, deaths from AIDS and new cases of the illness fell worldwide. Taking into account the estimate of infected people in Brazil, treatment reached between 69 and 79% of the total. Between 250 and 300 thousand people have the virus without knowing it. Keeping in mind the increase in survival, 34 million people with HIV exist on the planet. Nonetheless, fewer and fewer people die of AIDS worldwide thanks to greater access to medicine and the reduction of new cases. A fall of 21% in new infections by HIV has occurred since the peak registered in 1997. The apex of annual deaths by AIDS occurred in 2005, and since then there has been a decline of 18%⁵⁰.

Psychology professor Mario Angelo Silva of the University of Brasilia warns that the virus advances among young homosexuals between 15 and 24. Because of this the campaign launched in 2011 in the struggle against the illness had as its motto: “AIDS isn’t prejudiced. Protect yourself.” The principal targets of this campaign were young men and women aged 13 to 19. According to the professor, since there was a lot of prejudice about health in schools, families, and society in general, adolescents and young homosexuals have less self-esteem, “which makes them less careful.” For the director of the Health Information Center of the city government of Curitiba, Raquel Cubas, “the great challenge is to invest in early diagnosis of AIDS.”

⁴⁷ ROSENTHAL, Caio; SCHEFFER, Mário. *Op. cit.*, p. 73.

⁴⁸ AIDS é mais mortal no sul do país. **Jornal Gazeta do Povo**. Caderno Vida e Cidadania. 29.11.2011, p. 4.

⁴⁹ NUBLAT, Johanna. Sul mantém taxas altas de novos casos e mortes pro AIDS. **Jornal Folha de São Paulo**. Caderno Saúde, 29.11.2011, p. C8.

⁵⁰ NUBLAT, Johanna. *Op. cit.*, p. C8.

Before examining the complex issues of HIV and AIDS, some relevant considerations about historic and sociological aspects were introduced. The analysis of better terminology and the presentation of the term as a metaphor, as well as some of its biological and medical senses, were reported, presenting relevant statistical indicators⁵¹.

A backdrop was painted in order to present the juridical question, initially from the perspective of the International Labor Organization (ILO).

3. CONVENTIONS NUMBERS 111 AND 159 OF THE ILO, RECOMMENDATION NUMBER 200, AND THE CODE OF PRACTICE ABOUT HIV AND AIDS

Created in 1919 at the end of the First World War by the Versailles Treaty, the International Labor Organization established itself in the twentieth century as the most important international organization most important with respect to the world of work. Conventions Number 111 and 159 of the ILO and Recommendation Number 200 are discussed for the investigation of the problems and solutions of HIV and AIDS.

The Code of Practice about HIV and AIDS and its principal questions is also analyzed. Finally, judgments applying these conventions' rules are considered.

The International Labor Organization, in its 99th Meeting of its annual Conference, held in June of 2010, approved Recommendation Number 200, which dealt with HIV and AIDS. That recommendation considered HIV, the Human Immunodeficiency Virus that damages the human immune system, emphasizing that the infection can be prevented by appropriate means.

Referring to the term AIDS, it was the designation for Acquired Immune Deficiency Syndrome resulting from the advanced stages of infection by HIV and characterized by opportunistic infections or cancers related to HIV⁵².

⁵¹ AIDS é mais mortal no sul do país. **Jornal Gazeta do Povo**. Caderno Vida e Cidadania. 29.11.2011. p. 4.

⁵² **RECOMENDAÇÃO SOBRE O HIV E A AIDS E O MUNDO DO TRABALHO**. Genebra: OIT, 2010. p. 10.

For Recommendation 200 of the ILO, persons who live with HIV signifies persons infected by HIV. In this document, the term discrimination means any distinction, exclusion, or preference that results in annulling or reducing equality of opportunities or treatment in employment or occupation, as referred to in the Convention and in the Recommendation about Discrimination in Employment and Occupation of 1958.

The word stigma is related to the social stamp linked to a person that causes marginalization or signifies an obstacle to the full enjoyment of social life by persons infected or affected by HIV⁵³.

Standing out among the most important general principles are those related to the guarantee of human rights; to the workplace; the prohibition on discrimination and stigmatization; prevention and treatment; and protection of privacy. Regarding the first of these principles, the response to HIV and AIDS ought to be recognized as contributing to the guarantee of human rights, of fundamental liberties, and of gender equality for all, including workers, their families, and dependents. Regarding the second principle, HIV and AIDS ought to be recognized and treated as an issue relevant to the workplace, to be included among the essential elements of national, regional, and international responses to the pandemic, with the full participation of organizations of employers or workers. As far as the third principle, no discrimination whatsoever nor any stigmatization ought to be practiced against workers, in particular those who seek employment or who apply for jobs, on the pretext of actual or presumed infection by HIV, or by virtue of the fact of belonging to regions of the world or segments of the population with greater risk or vulnerability to infection by AIDS. With regards to the fourth principle, workers, their families, and dependents ought to have access to services for the prevention, treatment, care, and support benefiting them related to HIV and AIDS, and the workplace ought to contribute to facilitating that access. Regarding the fifth principle, workers, their families, and dependents ought to enjoy the protection of their privacy, including that related to HIV and AIDS, in particular in respect to their

⁵³ RECOMENDAÇÃO SOBRE O HIV E A AIDS E O MUNDO DO TRABALHO. *Op. cit.*, p. 10.

own situation relative to HIV, and also no workers ought to be obligated to submit to an HIV test or reveal their sociological situation⁵⁴.

One essential aspect of the struggle against prejudice, discrimination, and stigma involves sensitizing measures that ought to occur especially in the work sphere. These measures ought to emphasize that HIV is not transmitted by simple physical contact and that “the presence of a person who lives with HIV ought not to be considered a threat in the workplace⁵⁵.”

Without doubt, practical measures of support for changing behavior need to be born in mind, among which loom largest sensitive education, early diagnostics and treatment, and strategies to supplement income in the case of female workers with financial difficulties. Thus, workers ought to receive sensitive, clear, and current education about strategies for the reduction of risk and, if possible, condoms should be available for men and women.

Early diagnosis and treatment for STDs (sexually transmitted diseases) and tuberculosis as well as programs for sterilized needles and syringe swaps ought to be provided wherever possible or information given about places where these services can be obtained. Finally, in the case of female workers with financial difficulties, education ought to include strategies to supplement income, for example, by offering information about income generating activities, financial benefits, and salary subsidies⁵⁶.

Two substantial differences between the convention and the recommendation can be immediately noted: the convention constitutes a form of international treaty, while the recommendation does not; the convention can be the object of ratification by the corresponding member-states, which logically, cannot occur with a recommendation⁵⁷.

The value of the recommendation is often intrinsic, when its norms have a detailed technical character. This can be useful to national administrations,

⁵⁴ **RECOMENDAÇÃO SOBRE O HIV E A AIDS E O MUNDO DO TRABALHO.** *Op. cit.*, p. 13-15.

⁵⁵ **RECOMENDAÇÃO SOBRE O HIV E A AIDS E O MUNDO DO TRABALHO.** *Op. cit.*, p. 28.

⁵⁶ **REPERTÓRIO DE RECOMENDAÇÕES PRÁTICAS DA OIT SOBRE O HIV/AIDS E O MUNDO DO TRABALHO/Organização Internacional do Trabalho.** Programa sobre HIV/AIDS e o Mundo do Trabalho. 3. ed. Brasília: OIT, 2010. p. 62.

⁵⁷ GUNTHER, Luiz Eduardo. **A OIT e o direito do trabalho no Brasil.** Curitiba: Juruá, 2011. p. 52.

contributing to the elaboration of uniform legislation about the matter, leaving, nonetheless, the possibility of implementing adaptations according to the necessity of the countries⁵⁸.

The difference considered most important, however, between the recommendation and conventions involves an aspect related to efficiency. This means that a recommendation cannot (contrary to the convention) be the object of international commitments and that the states possess the discretion that they desire to give them the effect that they judge propitious⁵⁹.

Besides Recommendation Number 200, the ILO promulgated a Code of Practice about HIV and AIDS and the world of work. In this document it affirms that HIV and AIDS are issues with respect to the workplace “not only because they affect the workforce but also because the role of the workplace is the key to limiting the dissemination and the effects of the epidemic⁶⁰.”

This collection of best practices establishes guidelines for dealing with the epidemic of HIV and AIDS in the world of work and in the context of promoting decent work. Some fundamental principles defined in the code are especially appropriate to “combat discrimination based on the situation relative to HIV,” among which the following stand out: recognition of HIV and AIDS as matters respecting the workplace; non-discrimination; gender equality; healthy work environment; social dialogue; detection for purposes of exclusion from jobs and employment; confidentiality; continuation of the employment relation; prevention; care and support⁶¹.

Regarding the first principle, HIV and AIDS are questions concerning the workplace not only because they affect the work force, but also because the role of the workplace is the key to limiting the dissemination and the effects of the epidemic. Relative to the second principle, workers should not suffer discrimination or

⁵⁸ VALTICOS, Nicolas. *Derecho internacional del trabajo*. Tradução de Maria José Triviño. Madrid: Tecnos, 1977. p. 234-236.

⁵⁹ *Idem, ibidem*. p. 234-236.

⁶⁰ BEAUDONNET, Xavier. *Direito internacional do trabalho e direito interno*: manual de formação para juizes, juristas e docentes em direito. Turim: Centro Internacional de Formação da OIT, 2011. p. 173.

⁶¹ BEAUDONNET, Xavier. *Direito internacional do trabalho e direito interno*: manual de formação para juizes, juristas e docentes em direito. Turim: Centro Internacional de Formação da OIT, 2011. p. 173-174.

stigmatization based on their real or perceived situation relative to HIV. Concerning the third principle, more egalitarian gender relations and the empowerment of women are vital to avoid dissemination of infection by HIV and permit women to deal with HIV and AIDS. The fourth principle stipulates that the work environment should be safe and healthy, adapted to the state of health and capacities of the workers.

In respect to the fifth principle, it is necessary that there be cooperation and trust between employers, workers, and the government in order to assure the successful implementation of policies and programs concerning HIV and AIDS. Relative to the sixth principle, testing of job applicants or employees should not be required. As far as the seventh principle, access to personal information related to the situation of workers in terms of HIV should be limited by rules of confidentiality consistent with the code of practices of the ILO. Concerning the eighth principle, infection by HIV should not be a cause to terminate the employment relationship. People with illnesses related to HIV should be able to work while they are capable of performing appropriate functions. Relative to the ninth principle, social partners are in a singular position to promote efforts of prevention, especially in relation to changing attitudes and behaviors by means of information and education. Finally, the tenth principle emphasizes that solidarity, care, and support ought to serve guide responses to HIV and AIDS in the workplace. Along these lines, all workers have a right to the full range of health services and to the benefits of mandatory programs of social security and the instruments of social welfare⁶².

The 9th Regional Labor Court, for its part, also recognized the right of employees with HIV to reinstatement, grounded in two ILO conventions, Number 111 and Number 159. The amendment to this judgment, drafted by Judge Marlene T. F. Suguimatsu, contained the following ruling:

REINTEGRATION. EMPLOYEE WITH AIDS. PRESUMED DISCRIMINATION. CONSTITUTIONAL PRINCIPLES. CONVENTIONS 111 AND 159 OF THE ILO. The discharge of an HIV-positive employee by an employer who has knowledge of these circumstances when communicating the rescission is discriminatory. Proof of any other discriminatory attitude is

⁶² *Idem, ibidem*. p. 173-174.

not required, since the impossibility of reviewing the intention of the discharge creates the presumption that the act of discharge entailed discrimination. Reinstatement to employment is the measure that is imposed as the means to assure respect to human dignity and the social value of work, fundamental to the democratic rule of law and mandatory constitutional principles. In the same way, weight is given to Convention 111 of the ILO, ratified by Brazil, that contains the commitment to abolish any practice tending to destroy or alter equality of opportunity or treatment in regards to work or profession. The employee who has HIV is considered within the definition of disability in the application of Convention 159 of the ILO, likewise directed to the elimination of inequalities regarding employment⁶³.

With the analysis above, this article sought to translate the analytic understanding of how the ILO comprehends the phenomenon of HIV and AIDS and the measures for confronting it, such as was done by the court decision presented above.

4. Discrimination at the Time of Contracting and During the Connection, Annulment of Discharge, and Constructive Discharge. The Presumption of Discriminatory Discharge. Reinstatement. Judgments.

Workers who cope with problems of HIV or AIDS suffer profound discrimination. How is this situation confronted by Brazilian law at the time of hiring of the employee and during the course of the employment contract? The possibility of annulling discharge, obtaining reinstatement, and the presumption of discriminatory discharge constitute part of this analysis, citing judgments and the recent Precedent (sumula) of the Supreme Labor Court (Tribunal Superior do Trabalho, TST) about these matters.

Innumerable judgments examining the situation of workers with AIDS, but one of the most illuminating decisions offered by the Supreme Labor Court was drafted by Invited Judge Andre Luis Moraes de Oliveira, presenting the following theory:

⁶³ PARANÁ. Tribunal Regional do Trabalho da 9ª Região. Acórdão 2ª Turma, s.n. Rel. Des. Marlene T. Fuverki Suguimatsu. **Revista Tribunal Regional do Trabalho da 9ª Região**. Curitiba, a. 29, n. 53, jul.-dez. 2004. p. 327-328.

REINTEGRATION. WORKER WITH AIDS. CHARACTERIZATION OF ARBITRARY DISCHARGE. Although there is no legal precept that guarantees security to employees with Acquired Immune Deficiency Syndrome, the task of honoring general legal principles is incumbent on the magistrate, as well as resolving conflicts or disputes before the court by analogy and customs. Merely the simple allegation that the national legal order does not assure the victim of AIDS (*in verbis*) the right to remain in employment is not sufficient to support an highly discriminatory and arbitrary attitude that, without a shadow of a doubt, directly harms the principle of equality inscribed in the Constitution of the Federal Republic of Brazil. Appeal recognized and approved⁶⁴.

A decision pronounced by a labor judge in Parana analyzed with perspicacity the reality that abounds in the business world. In that particular case, the employee was fired exclusively because she was ill with AIDS. The company defended itself by alleging that the discharge only occurred six months after it learned of this fact, which did not have “the effect of erasing the discriminatory practice,” according to the judge. The judge also rejected the employer’s claim that reinstatement in the firm for employees with AIDS was impossible.

The judge considered perverse the argument that conceding reinstatement to that employee could be extended to others with grave illnesses such as cancer and leprosy, following a “logic of selectivity in employment and of social exclusion of ill or disabled workers still with the capacity to work.” He argued that this contention violated constitutional principles, “inverting the logic of protection of all workers who were discriminated against because of illness or disability.” The decision concluded that the reinstatement of an employee discriminated against in employment “does not result from job security conceded by law, but from the nullification of discriminatory discharge⁶⁵.”

In a dissertation presented to the Program of Post-Graduation *strito senso* - Masters in Business Law and Citizenship at the University Center of Curitiba (Unicuritiba), Fabio Luiz de Queiroz Telles stressed that the situation most encountered by the courts concerning this issue involves “all discharges that have as

⁶⁴ BRASIL. Tribunal Superior do Trabalho. Ac. 2ª T. Proc. RR 217791/95.3, j. 10.9.2003, Rel. Juiz Conv. André Luis Moraes de Oliveira, **Revista LTr**, São Paulo, 67-10/1249, out. 2003.

⁶⁵ PARANÁ. Tribunal Regional do Trabalho da 9ª Região. RT 3511/2002, Juiz Maurício Mazur. **Revista do Tribunal Regional do Trabalho da 9ª Região**, Curitiba, 29, n. 53, jul.-dez. 2004. p. 479-495.

a basis the fact that the employee is HIV positive, analyzed as being null, and ordering the reinstatement of the employee.” Another situation linked to the prohibition of the discharge of HIV-positive employees arises when discrimination is considered obstructive to the law “of access to welfare benefits, to medical treatment, and to retirement, deciding on the reinstatement of the employee to his functions⁶⁶.”

Concerning this issue, it is essential to remember that “AIDS cannot be seen as an affliction, a divine punishment because of human iniquity.” In light of this reasoning, labor courts, “by inhibiting prejudice and discrimination, annulling discharges that are arbitrary or without just cause,” provide an understanding for the public that AIDS is not a myth but “an illness like any other and that despite medicine not having yet found a cure, one that does not transform its victims into pariahs and neither are they condemned immediately to death⁶⁷.”

This humane comprehension of the problems of HIV and AIDS affirms that “people with HIV have the full capacity to develop projects and fulfill their functions like any other worker.” Separation from work functions cannot be allowed “since maintaining them in employment can be favorable to treatment, being capable of giving meaning to life.” For people with HIV, work represents not only stimulation to continue struggling for life “but also represents the only means of survival and defrayal of the expenses of acquiring medicine necessary to treat and maintain the daily burdens of illness⁶⁸.”

The analysis of issues involving persons with AIDS merited commentary by Volia Bomfim Cassar who argued that the touchstone is discrimination and not a supposed guaranteed job security. “Thus, when the employer discharges an HIV-positive employee, according to the Supreme Labor Court, the employer must prove (with the burden of proof on the employer) that the procedure was not discriminatory⁶⁹.”

⁶⁶ TELLES, Fábio Luiz de Queiroz. **O portador do vírus da síndrome da imunodeficiência adquirida (HIV) como trabalhador e sua relação com a empresa**: uma análise sob a perspectiva da Organização Internacional do Trabalho (OIT) e dos direitos da personalidade. 25.10.2012. Dissertação (Mestrado em Direito Empresarial e Cidadania), Centro Universitário Curitiba, Curitiba, 2012. p. 90-91.

⁶⁷ *Idem, ibidem*. p. 92.

⁶⁸ *Idem, ibidem*. p. 93.

⁶⁹ CASSAR, Vólia Bomfim. **Direito do trabalho**. 3. ed. rev. e atual. Niterói: Impetus, 2009. p. 357.

In the author's opinion, it would be possible for "the collective bargaining agreement or internal company regulation to create this right for employees with AIDS or other illnesses⁷⁰."

Referring to patients with illnesses associated with HIV, Sergio Pinto Martins asserts that they have the right to sick aid or retirement, as long as the illness becomes manifest after the patients have affiliated with the social security system. He notes, nonetheless, that while the illness is not manifest, there is no right to any social benefit⁷¹.

This author considers there to be harm to HIV-positive workers only if the firm prevents them from qualifying for social security benefits. An act by the employer discharging a worker ill with AIDS is not abusive, however, if the employer is merely exercising his constitutional right to discharge the employee, owing him only the payment of severance pay⁷².

In the opinion of this theorist, Convention No. 111 of the ILO, ratified by Brazil, forbids acts of discrimination in access to professional training, to hiring, and to conditions of work, motivated by race, color, sex, religion, political opinion, national origin, or ethnicity (Article 1). But it does not specifically deal with the reinstatement of the employee because of illness, especially AIDS⁷³.

The Director of the Department of International Norms of the International Labor Organization (ILO), Cleopatra Doumbia-Henry, asserts that "people ought to use the rights that they have to protect themselves, such as not telling (their employer) that they have AIDS⁷⁴."

According to this ILO Director, the objective is "to deal with the stigma, to struggle against it, even though the stigma is in society and even in government. It is necessary to change thinking, to change minds." From her viewpoint, who decides to talk about the matter contributes to change. The problem of discrimination has

⁷⁰ *Idem, ibidem*. p. 357.

⁷¹ MARTINS, Sergio Pinto. **Direito do trabalho**. 28. ed. São Paulo: Atlas, 2012. p. 443.

⁷² *Idem, ibidem*. p. 443-444.

⁷³ *Idem, ibidem*. p. 444.

⁷⁴ SGARBE, Vinícius. **Veículo G1**, circulação nacional, p. 30.06.2011.

appeared frequently because the silence is ending: “AIDS is a disease like others and ought not to be used to discriminate against anyone.”

The employment lawyer Leandra Campagnolo considers that “the law does not obligate anyone to do anything, especially when it is a matter of a discriminatory question.” In this sense, it is not possible to require an examination for AIDS any more than one can require one for pregnancy.” These decisions can “produce moral harm in the case of discharge and can be rendered without effect by reinstatement by judicial order⁷⁵.”

According to Leandra Campagnolo, the current understanding of the courts in Brazil concludes that it falls “to the firm to produce evidence that a discharge, for example, was not motivated by discrimination.” This means that if an employee who feels discriminated against denounces the firm, it falls “to that employer to prove the legality of the discharge and not to the employee, as the law requires in the majority of cases.” Whatever the argument about whether legal job security exists or not, it does not exist for someone who quits or is discharged, but there are ILO norms, nevertheless, directed to protecting workers with AIDS⁷⁶.

HIV-positive individuals, in the phrasing of Mariana Ribeiro Santiago, must not be discriminated against in hiring nor in the exercise of work activities since they do not lose their rights of personality by virtue of illness. It can happen that work might not be recommended when, given the illness’s stage, “individuals cannot no longer demonstrate technical capacity to exercise their functions, in which case, if employed, retirement benefits would be appropriate⁷⁷.”

Regarding the health of the work connection, Alice Monteiro de Barros clarifies that “infection by HIV does not constitute just cause nor justifiable motive for severing the work contract⁷⁸.”

This author also reminds us that Recommendation No. 169 (1984), complementary to Convention No. 122/64 of the ILO, with respect to employment

⁷⁵ *Idem, ibidem.*

⁷⁶ SGARBE, Vinícius. *Op. cit.*

⁷⁷ *Idem, ibidem.*

⁷⁸ SANTIAGO, Mariana Ribeiro. A AIDS e o direito fundamental ao trabalho. **Revista de Direito do Trabalho**, a. 29, out.-dez.2003. São Paulo: Revista dos Tribunais, 2003. p. 218.

policy, after recommending that any form of discrimination be eliminated, suggests further measures that satisfy “the necessities of persons who frequently have difficulty in finding lasting work, including people with HIV or AIDS⁷⁹.”

The Regional Labor Court of Sao Paulo, the largest in Brazil in number of labor cases, held that the discharge of HIV-positive employees was founded in a discriminatory motive, since the “power of the employer” to terminate the employment relation in such cases “is limited because of guarantees of employment and especially by the constitutional principle of human dignity⁸⁰.”

The action of the firm will not only have violated constitutional principles, but it will also have infringed the right of the employee to receive “beneficial treatment conferred on people with HIV by statute 7.670/88, the first light to shine in the juridical constellation protecting them⁸¹,” invoking thus the situation contemplated in law 9.029/95.

The Supreme Labor Court published Precedent no. 443 based in its predominant jurisprudence with the following theory:

DISCRIMINATORY DISCHARGE. PRESUMPTION. EMPLOYEE SUFFERING FROM SERIOUS ILLNESS. STIGMA OR PREJUDICE. RIGHT TO REINSTATEMENT. The discharge of an employee with HIV or of other serious illness that arouses stigma or prejudice is presumed discriminatory. The action is invalid, and the employee has the right to reinstatement in the firm⁸².

For a long time the Court has affirmed the understanding that “unmotivated discharge of HIV-positive employees is presumptively discriminatory, except upon proof that the action resulted from some other motive⁸³.”

⁷⁹ BARROS, Alice Monteiro de. **Curso de direito do trabalho**. 6. ed. São Paulo: LTr, 2010. p. 1202.

⁸⁰ BARROS, Alice Monteiro de. *Op cit.*, p. 1202.

⁸¹ SÃO PAULO. **Tribunal Regional do Trabalho da 2ª Região**. RO 01760200000702006-SP. *Op cit.*

⁸² BRASIL. **Tribunal Superior do Trabalho**. Resolução nº 185 de 14.09.2012. DEJT – TST nº 1.071, de 25.09.2012, p. 132-133.

⁸³ BRASIL. **Tribunal Superior do Trabalho**. RR-124.400-43.2004.5.02.0074. Relator José Pedro de Camargo Rodrigues de Souza, julgado em 25.04.2012. Disponível em: <www.tst.gov.br>. Acesso em: 28.out.2012.

This opinion states that “even in the absence of evidence of a causal connection,” the Court recognizes the presumption of a discriminatory action in the unmotivated discharge of an HIV-positive employee, “permitting, however, contrary proof.” When investigation established a lack of evidence of what motivated discharge, except that it happened six years after the discovery of the clinical diagnosis of the employee and that other discharges had occurred in the same period, those facts would be insufficient “to defeat the presumption of discrimination in the unmotivated discharge of the complainant.” The decision insisted that the principle of human dignity, in addition to the social value of work (Article 1, III and IV of the federal constitution of 1988), requires “monitoring for the protection of the labor market in an extremely discriminatory society.” If this were not so, said the opinion, “it would not be prohibited to impose hiring exams testing for HIV in candidates for jobs⁸⁴.”

There is a paradigmatic opinion of the Supreme Labor Court (TST), drafted by Minister Lelio Bentes Correa, that relies on the significant contribution of the ILO for its reasoning:

HIV-POSITIVE EMPLOYEE. UNMOTIVATED DISCHARGE. DISCRIMINATORY ANIMUS PRESUMED. REINSTATEMENT. 1. The jurisprudence of this Court is grounded in the perspective that discharge of an employee who is HIV-positive is presumed discriminatory. In this way, the employer bears the burden of proving that it did not know of the condition of the employee or that the discharge had another illicit motive. 2. This reasoning is consistent with international norms, especially Convention No. 111, of 1958, about Discrimination In Matters of Employment and Occupation (ratified by Brazil on November 26, 1968), and Recommendation No. 200, of 2010, about HIV and AIDS and the World of Work. 3.3. In this context, the inversion of the burden of proof undertaken by the Regional Court, assigning to the employee the burden of demonstrating the discriminatory character of the discharge executed by the employer, is improper. 4. Appeal of review recognized and proved⁸⁵.

Equality of opportunity and treatment, to be guaranteed, does not depend only on the legal protection offered, but also always depends on the existence of effective judicial procedures “that can be invoked by people who believe themselves to have

⁸⁴ BRASIL. **Tribunal Superior do Trabalho**. RR – 124.400-43.2004.5.02.0074. *Op. cit.*

⁸⁵ BRASIL. **Tribunal Superior do Trabalho**. RR-104900-64.2002.5.04.0022. Rel. Ministro Lélío Bentes Corrêa, 1ª T, DEJT de 02.09.2011.

been the targets of discrimination.” Often, the applicable rules of procedure require that the person alleging discrimination prove the existence of discrimination, posing an obstacle to resolving these cases. With the objective of overcoming these difficulties, many countries introduce rules of procedure that invert the burden of proof to permit the victims of discrimination to effectively assert their rights. For some judicial systems, the rule consists in ascertaining whether the complainant is capable of proving a *prima facie* case. If this is not possible, the burden of proof ought to be shifted to the defendant “who then will have to demonstrate that the difference in treatment was based on objective considerations unrelated to any discriminatory motive⁸⁶.”

Regarding ILO instruments that deal with the burden of proof, the Committee on Freedom to Organize as well as the Committee of Investigation consider inversion in cases of discrimination “an important measure to assure effective protection against discrimination in employment and occupation, as required by the conventions of the ILO about equality and freedom to organize.⁸⁷”

In this area, there is almost a consensus that in the absence of specific legislation, courts ought to take the initiative in “shifting the burden of proof in cases of alleged discrimination in employment and occupation⁸⁸.”

The understanding regarding issues of HIV and AIDS adopted by the Brazilian judiciary, specifically the labor courts, is consistent with this position.

The recent Precedent published by the TST appears to have resolved the crucial question of burden of proof, aligning the Court with the presumption of discrimination in the discharge of employees with HIV who are targets of stigma or prejudice. Of course the employee ought to be reinstated in the job immediately after being discharged.

⁸⁶ BEAUDONNET, Xavier. **Direito internacional do trabalho e direito interno**: manual de formação para juízes, juristas e docentes em direito. Turim: Centro Internacional de Formação da OIT, 2011. p. 161.

⁸⁷ BEAUDONNET, Xavier. *Op. cit.*, p. 162.

⁸⁸ BEAUDONNET, Xavier. *Op. cit.*, p. 163.

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