

**THE PREEMINENCE OF CONSTITUTIONAL PRINCIPLES IN THE
FACE OF EMPLOYER POWER**

**A PREMÊNCIA DOS PRINCÍPIOS CONSTITUCIONAIS FRENTE AO
PODER PATRONAL**

ANA LUISA MEURER RAMOS

Mestre em Ciências Jurídico-Empresariais com menção em Direito do Trabalho pela Faculdade de Direito da Universidade de Coimbra, Portugal. Advogada.

ABSTRACT

Even from the mist of the twentieth century, the HIV virus continued to be part of the current scene, maintaining some mystification about its contagion. This mythology contributes to the discrimination and stigma experienced by HIV patients. This study aimed to outline the legal protection of HIV-positive people in the world of work.

KEYWORDS: HIV; discrimination; worker protection.

RESUMO

Mesmo a partir da névoa do século XX, o vírus HIV continuou a ser parte da cena atual, mantendo certa mistificação sobre o seu contágio. Essa mitologia contribui para a discriminação e o estigma que sofrem os pacientes com HIV. Este estudo teve como objetivo delinear a proteção legal dos portadores de HIV no mundo do trabalho.

PALAVRAS-CHAVE: HIV; discriminação; Proteção dos trabalhadores.

INTRODUCTION

The meaning of the term “work” was not always contemplated in a worthy and protective form in light of the Constitution of the Brazilian Republic¹. In the transition from a severe perspective on the humans who do work to the affirmation of work’s social necessity, the conceptualization of work evolved. In this field, state intervention was required to safeguard inherent rights for the mass of workers who sometimes were forgotten and often sacrificed for production necessities.²

From this angle, labor and employment law arose for the purpose of regulating labor relations and protecting the weaker part of the relationship, that is, the worker. Thus, this protectionist branch of law was always informed by new work relations implemented over the course of history as well as accompanying and adjusting to the modifications imposed by a capitalist model that tends to “forget” the productive masses.

From this perspective, labor and employment jurisprudence came to approach protective regulations for HIV-positive workers in the face of employer discretion as an issue of discharge without just cause. With the purpose of trying to protect HIV-positive workers, courts attempted to regulate matters that had long been present but on the other hand had never been regulated or even demystified in society. Against a background of lasciviousness and prejudice, judicial protection of HIV-positive workers proved necessary while breaching the threshold of discrimination by the free exercise of employer power proved difficult.

1. BRIEF HISTORICAL EXCURSION ABOUT AIDS

The HIV³ virus arose in the 20th century and remains present today, resistant

¹ In this regard, see BARROS, Alice Monteiro de. **Curso de direito do trabalho**. 5 ed. LTR: São Paulo, 2009. Pp. 53-90.

² Important reminds us of the era of the industrial revolution in which, with the discovery of machinery and overproduction, workers were condemned to precarious and inhuman situations of work in return for the need for profit and the emergence of large companies..

³ It is the human immunodeficiency virus that causes acquired immunodeficiency syndrome - AIDS; More popularly known in Portugal as AIDS. This virus has come up with no clinical symptoms, hidden

to the introduction of new technologies and research in the biomedical area and to knowledge of its particularities.⁴ To establish the importance of this issue, we must trace its trajectory.

Labeled an illness of “the four Hs,”⁵ the spread of this pathogen was initially linked to sexuality, drugs, and blood. In the middle of the 1980s, it was diagnosed as a dysfunction of the immune cells that affected almost exclusively a subset of homosexuals. At this stage, the federal epidemiological agency, the Center for Disease Control (CDC) issued medical bulletins that confirmed that a majority of the cases observed affected homosexual residents in New York, San Francisco, and California. Why it attacked this group and whether or not the virus was transmissible were unknowns, facilitating its spread.⁶

The origin of the disease and the groups responsible for its transmission were incessantly sought. At first the virus, called the “the gay disease,” we believed to have emerged in the United States. Later, in the middle of the 1970s, cases of sick non-homosexuals infected after stays in Africa were discovered. At the beginning of 1982, various cases of infected individuals living in Miami were discovered; however, all had one shared trait: they were all Haitian. At this stage, Haitians were declared a “group at risk” and blamed for having imported the disease into the United States.⁷

In light of the large number of people affected and with the purpose of

by other infectious diseases caused by the breakdown of the immune system.

⁴ Curious to think that the technological advance allowed the spread of the disease instead of its extinction. In the presence of a globalized world, facilitated communication between countries has made global transmission of the virus viable, and thus, it is difficult to maintain control.

⁵ “Com uma estranha predileção pelo humor negro, os epidemiologistas americanos chamaram aos grupos particularmente expostos à Sida/HIV <<o clube dos quatro H>>: homossexuais, heroinómanos, haitianos e hemofílicos. Alguns punham em quarto lugar as hookers (putas), fazendo subir de facto para cinco o número dos H fatídicos. Para melhor sossegar o público, não eram incluídos neste <<clube de malditos>> dois grupos perfeitamente <<inocentes>>: os indivíduos que haviam recebido transfusões e os recém-nascidos infectados durante a vida intra-uterina.” GRMEK, Mirko D. *História da Sida*. Relógio d’água: Lisboa, 1994. p. 68.

⁶ In view of the existence of bulletins that at the same time disseminated to society the proliferation of the disease in the group of homosexuals, they were incredulous when they issued that “o cranco gay seria uma invenção de médicos homofóbicos ou, no máximo, o efeito de um factor ambiental não contagioso e sem relação com o coito anal.” GRMEK, Mirko D. Op. Cit. p. 34.

⁷ “Os americanos acusavam, pois, os haitianos, especialmente os imigrantes ilegais, de importarem uma nova peste de um país com condições higiénicas desastrosas para um outro limpo e bem policiado. Atitude esta conforme aos ensinamentos da epidemiologia tradicional, mas que no caso em questão se tornava um grave preconceito científico e moral.” GRMEK, Mirko D. Op. Cit. p. 72.

uncovering its transmission,⁸ it was observed that the acquired immune deficiency syndrome was not restricted to homosexuals but also affected heterosexual relations. It was discovered, moreover, that blood exercised a great importance in the transmission of this infection.

Parallel to these speculations about the origin of the illness, the government failed to appreciate the true extent of devastation caused by the disease - devastation that later would be labeled a pandemic because of its magnitude.⁹ In the context of this history of AIDS, at first it was determined that the disease only occurred among a certain group - the "risk groups - the 4Hs" - which led to a discriminatory conception of the illness as being found in groups viewed by society as marginal. In the original speculation, nothing was known about the origin and form of transmission of the illness, which resulted in great popular disquiet.

And this sea of fear, of the contagion with overwhelming death and of the states's very failure relative to the proportion of people affected, this pathology led to the segregation of groups based on prejudice against possible subpopulations held responsible for the illness that was becoming the evil of the century.

2. THE SOCIAL FUNCTION OF WORK

About 90% of people with HIV fall within the category of the economically productive population, with half of the active population being between 15 and 45.¹⁰

⁸ In order to speed the spread of the disease, GMEK reports that: "Os portadores de germe, que outrora viajam em diligências, passaram mais tarde a fazê-lo em navios de longo curso e em comboios, para, hoje em dia, utilizarem as estradas dos céus; uma doença infecciosa pode assim num só dia atravessar um continente, ou mesmo saltar de um continente a outro. GRMEK, Mirko D. Op. Cit. p. 53.

⁹ "A aparição e as devastações da sida surpreenderam e aterrorizaram tanto os cientistas como o comum dos mortais; todos julgavam que a biotecnologia moderna os tinha posto a salvo de catástrofes deste género. Ora, a investigação histórica mostra que é precisamente aos progressos da tecnologia actual que devemos por um efeito perverso, a eclosão da pandemia da sida." GRMEK, Mirko D. Op. Cit. p. 8.

¹⁰ VICENTE, Joana Nunes; ROUXINOL, Milena Silva. **VIH/SIDA e contrato de trabalho**: Homenagem aos Profs. Doutores A. F. Correia, O. Carvalho e V. L. Xavier. Faculdade de Direito da Universidade de Coimbra: Coimbra editora, 2007. p. 790.

Framed thus, the importance of the workplace¹¹ for HIV-positive workers is apparent. Primarily because they constitute active and capable labor,¹² people with HIV have their self-esteem elevated in the workplace because together with other co-workers it makes social conviviality viable and also makes possible a sense of usefulness. Besides its social importance, the economic importance of the work of HIV-positive workers is evident. Their salary is the essential source of survival that those “stigmatized” have to sustain themselves, and it makes possible the purchase of medicine that prolongs their lives.

In the setting of subordination of employee to employer, the intersubjective importance of work can be viewed as transposed into a social good because of its importance for the community.

Even prior to considerations described above, policies regulating business dictate the parameters of profit and competitiveness.¹³ Many employers thus refuse to hire or keep on their staff HIV-positive workers because they represent a possible diminution of production and are subject to justified absences because of medical treatment. Besides this, the mystification that this disease produces in society and in the work environment is indisputable. Even today, questions linger in society about the means of transmission, with the workplace seen by uninformed eyes as an incubator of contagion. Thus the workplace represents an entree into society and an

¹¹ Article 23 of the Universal Declaration of Human Rights and Article 5, item XIII of the Federal Constitution of 1988, certify that everyone has the right to work.

¹² In this sense, VIEIRA reaffirms the work capacity of seropositives by pointing out that: “O desenvolvimento, nas últimas décadas, de drogas capazes de inibir a multiplicação do vírus HIV promoveu uma transformação profunda no seio da sociedade e nas relações jurídicas de um modo geral. A prescrição destes medicamentos fez aumentar a sobrevivência dos portadores do vírus, possibilitando-lhes o exercício da vida em condições de normalidade. Com isto, os soropositivos podem se inserir no mercado de trabalho e desenvolver normalmente e sem restrições as atividades cotidianas. VIEIRA, Luiz Henrique; SILVA, Leda Maria Messias da. **Discriminação do portador de HIV/AIDS no ambiente de trabalho**: análise jurisprudencial in: << <http://www.cesumar.br/pesquisa/periodicos/index.php/revjuridica/article/viewFile/2012/1254> >>.

¹³ In this context ROUXINOL says that: “..a SIDA representa elevados custos sociais, mas também elevados custos econômicos. Eis-nos, então, num ponto de cruzamento da exigência da solidariedade social com a da salvaguarda da regularidade empresarial. Atingindo, como se referiu, o segmento mais produtivo da mão de obra, o VIH/ SIDA reduz os lucros e aumenta as despesas das empresas, uma vez que afecta a produtividade, aumenta os custos do trabalho e conduz a uma progressiva perda de competência e de experiência. É, portanto, natural que o “local de trabalho (tenha) uma função a desempenhar na luta global contra a propagação e os efeitos da epidemia” e que a doença venha sendo encarada como um “problema de gestão da empresa”. VICENTE, Joana Nunes; ROUXINOL, Milena Silva. Op. Cit. p. 790.

ideal means of diffusing a new conception of this illness.

3. OF EMPLOYER POWER

In Brazil, employers possess the prerogative to unilaterally extinguish work contracts. In light of this managerial prerogative (or directive power¹⁴) of the employer and its socioeconomic influence, an analysis and reflection is required about the legality of the discretion conferred by work legislation upon the employer to effect discharge without just cause, given the existence of a certain inherent “job security” that maintains HIV-positive workers in employment.

4. OF PERSONALITY RIGHTS

Considering employer discretion about discharge in the face of legal protection of people with HIV, it must be recognized that even people who assume the status of workers do not forego their personal dimension; therefore they maintain all of their personal rights in their professional as well as personal aspects.^{15,16} Thus HIV-positive workers cannot have their inherent rights limited because of the state of their health. In light of the principle of equality enshrined in the federal constitution of 1988, as a natural attribute of human beings, the inherent rights of HIV-positive workers will be analyzed as rights not to have their intimacy violated and to non-discrimination, but rather to be treated on an equal footing¹⁷ with other workers.

¹⁴ In the definition of powers in the labor contract, DELGADO, Mauricio Godinho. **Curso de direito do trabalho**. 6 ed. São Paulo: LTR, 2007. Pp: 630-681.

¹⁵ BARREIRA, Vera Patrícia Martins. **O VIH/SIDA: conseqüências sobre a execução do contrato de trabalho**. Dissertação de 2.º ciclo. Coimbra: 2009. p.6.

¹⁶ In this regard PEREIRA, Caio Mário da Silva. **Instituições de direito civil: introdução ao direito civil. Teoria geral de direito civil**. 21 ed. V. I. Editora Forense: Rio de Janeiro, 2006. P. 213-259.

¹⁷ The Constitutional principle of equality reveals that faced with the condition of the seropositive, this should not be treated unequally to other workers, and should be considered as such. If the seropositive

4.1. RIGHT TO INTIMACY VS. RIGHT TO PUBLIC HEALTH

In this dichotomy between the right of the worker to preserve his right to intimacy^{18, 19} and the social protection of public health through obtaining knowledge of intimate information about the lives of individuals, the limit of employer rights to access information about the state of health of current employees remains an open question. The advance of medicine confirms that HIV-positive workers have the physical wherewithall to continue performing their work,²⁰ and as established by the World Health Organization (WHO), the forms of contagion of HIV ought to be demystified since the virus is transmitted by sexual means, by contact with blood and other organic fluids, and through the fetus. In conjunction with the WHO in the joint declaration of 1988 about AIDS in the workplace, the International Labor Organization (ILO) explicitly affirmed that work does not produce risks of acquiring or transmitting the virus among workers. Seeing that the forms of contagion are limited to particular means, interfering in workers' privacy or violating the intimate sphere of job candidates justified by claims of protecting the health of third parties is thus inappropriate.²¹ In line with the

is in the stage of development of the disease, it should be treated like any sick worker. In specifying the principle of equality, Silva states that: " Além da base geral em que assenta o princípio da igualdade perante a lei, consistente no tratamento igual a situações iguais e tratamento desigual a situações desiguais, a Constituição veda distinções de qualquer natureza (art. 5º caput). As constituições anteriores enumeravam as razões impeditivas de discrimine: sexo, raça, trabalho, credo religioso e convicções políticas. Esses fatores continuam a ser encarecidos como possíveis fontes de discriminações odiosas e, por isso, desde logo, proibidas expressamente, como consta do art. 3º, IV, onde se dispõe que, entre os objetivos fundamentais da República Federativa do Brasil, está: promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação." SILVA, José Afonso da. **Curso de direito constitucional positivo**. 25 ed. São Paulo: Malheiros editores, 2005. p. 223.

¹⁸ Article 5, item X of the Federal Constitution of 88 - " São invioláveis a intimidade, a vida privada, a honra e a imagem das pessoas, assegurado o direito à indenização pelo dano material ou dano moral decorrente de sua violação."

¹⁹ International Labor Organization Convention 111, ILO, Article XII: "Ninguém será sujeito a interferências na sua vida privada, na sua família, no seu lar ou na sua correspondência, nem a ataques à sua honra e reputação"

²⁰ In this aspect highlights VIEIRA: "De fato, a AIDS, principalmente em seu estado assintomático em nada atrapalha o desenvolvimento da prestação laborativa e tampouco coloca em risco a saúde ou a vida de outros empregados, não interessando a ninguém a revelação da condição de soropositivo do empregado ou candidato ao emprego, que deve ter o direito a decidir a quem e quando revelar a sua doença". Op. Cit. p. 129.

²¹ Interministerial Ordinance No. 869/92, issued by the Ministries of Health and Education, prohibits, within the scope of the Federal Public Service, the requirement for HIV testing in pre-admission examinations and in periodic health examinations; And affirms that the positive serology for the HIV virus

stigmatization of people with HIV, access and possible publication²² of the pathology would result in indisputable psychological and moral difficulties in the work environment and in the social sphere. Certainly in precluding²³ disclosure of their illness, people who are HIV positive want to avoid their social disconnection and separation by the discrimination that often occurs in veiled forms. On this point, Portuguese doctrine defends the “right to lie”; absent danger of contagion in the work sphere and thus lacking effects on public health or danger of transmission to third parties, workers can opt to omit information about the true state of their health when questioned by employers. This right certainly makes viable a protection for the weaker party - workers - to remain in the work force or even obtain a job since the employer’s awareness of their being HIV positive definitively excludes their chances of obtaining employment, given the discriminatory practices we shall examine.

does not imply impairment of the labor capacity of its bearer, and that social and professional living with the virus carriers do not constitute situations of risk of contagion, which can be avoided through correct information and Relevant preventive procedures. SANTIAGO, Mariana Ribeiro. **A AIDS e o direito fundamental ao trabalho**. Article submitted to the teacher Maria Helena Diniz. São Paulo: PUC/SP, 2002. p. 10. in: <http://www.juspodivm.com.br/i/a/%7BB1CBFBB0-C878-4719-837A-ACCAB8A66C76%7D_016.pdf>.

²² It is important to point out that in certain occupations there are cases of danger of contagion, which legitimize intrusion into the sphere of private life, such as health workers, where there is a dichotomy between the right to privacy and the right to health. In order to avoid contamination of third parties, the latter should prevail. Mister reveals that in the case of medical knowledge about the worker's illness, the doctor must refrain from informing the worker with or without the HIV virus, due to his medical ethics in professional secrecy - Resolution of the Federal Medical Council n . 1997/2012 based on article 11 of the Civil Code of 2002. In this respect, regarding the doctor's duty of secrecy, it is important to highlight the case of the Portuguese cook who aroused great discussion in Portuguese jurisprudence. In 2004, a cook who served the company "Hotel Society of Sete Rios S.A" temporarily left the service. On his return, he undertook medical examinations in the field of occupational medicine and later it was considered that his contract of employment was extinguished by supervening and absolute expiration. The cook filed an action before the Lisbon Court of Appeal and the latter declared the action unfounded. This case gave rise to a great deal of discussion on the need to interfere in the sphere of privacy and breach of professional secrecy, and the Court did not rule on.

²³ In the right to reserve intimacy, VICENTE states that: “ A veiculação de informação e a difusão de uma mensagem antidiscriminatória não devem, a nosso ver, secundarizar o plano de tutela da reserva da vida privada do trabalhador ou candidato a emprego. A incipiência do percurso rumo à aceitação da (irrelevância da) diferença ainda permite que afirmemos que esta se tolera melhor se se desconhecer. Em suma, pela nossa parte, concluímos que as duas perspectivas do problema não se anulam: se é certo que uma correcta acção de formação e informação sobre o VIH/ SIDA desdramatiza o conflito e potencia uma maior aceitação da doença no interior das empresas, nem por isso o acesso a uma informação como esta deve descurar as especiais exigências de tutela da intimidade.” VICENTE, Joana Nunes; ROUXINOL, Milena Silva. Op. Cit. p.793/794.

4.2. PROHIBITIONS AGAINST DISCRIMINATION

The emergence and spread of the AIDS virus has always been accompanied by discriminatory conduct^{24,25} that resulted in segregation of groups and mystification about forms of contagion. This scenario of discriminatory conduct²⁶ in the arena of work has also appeared among co-workers as well as in the sphere of subordination among employers and employees. If employers become aware of employees' condition and eventually discharge them, questions arise about whether or not the dismissal is legal or should be presumed to be rooted in discrimination. It bears emphasizing that the legal system does not guarantee job security to HIV-positive workers discharged without just cause. Notwithstanding the absence of precepts providing greater protection for HIV-positive workers, labor and employment law has come to fill in that legislative lacuna. By means of analogy, statute 9.029/95²⁷ banning discriminatory discharge in the employment relationship has come to apply.

In the face of basic constitutional principles of non-discrimination and equality among citizens requiring that all be treated on the same footing, courts began to ground

²⁴ In order to clarify what constitutes discriminatory conduct, VICENTE explains that “A discriminação é todo comportamento que, assentando em preconceitos infundados associados a marcas distintivas de certas categorias subjetivas – “características físicas ou quase físicas alheias à vontade”, como o sexo, a etnia, ou o estado de soropositividade, bem como “opções básicas de cada um”, designadamente convicções políticas ou religiosas – tem por objectivo ou por efeito afectar de forma menos favorável os membros daquelas categorias diferenciadas. VICENTE, Joana Nunes; ROUXINOL, Milena Silva. Op. Cit. p. 832. Acerca das condutas discriminatórias, vide DELGADO, Mauricio Godinho. **Curso de direito do trabalho**. 6 ed. São Paulo: LTR, 2007. Pp. 774-808.

²⁵ Article 111 of the International Labor Organization (ILO) Convention 111 defines discriminatory conduct in establishing that any distinction, exclusion or preference based on race, color, sex, religion, political opinion, nationality or social Have the effect of destroying or altering equal opportunities or treatment in respect of employment or occupation are regarded as discriminatory conduct. The Federal Constitution of 88 also ensures the prohibition of discriminatory conduct in its art. 5, thus ensuring punishment for any discrimination against fundamental rights and freedoms.

²⁶ In the words of Dr. Leal Amado: “Importa vincar o real significado do princípio da igualdade e da proibição de discriminação. Nas certas palavras de JORGE LEITE, com o princípio da igualdade pretende-se que seja tratado de modo igual o que é igual e de modo diferente o que é desigual na proporção da respectiva diferença. Já, porém, com o princípio da não discriminação o que se pretende é que se trate de modo igual o que é diferente, por se entender que a diferença é totalmente irrelevante para os efeitos tido em conta.” AMADO, João Leal. **Contrato de trabalho**. 3 ed. Coimbra: Coimbra editora, 2011. p.230-231.

²⁷ Law 9,029 published on April 13, 1995 prohibits discriminatory behavior, but does not expressly refer to discriminatory behavior towards those with HIV in the workplace. In this way, we seek in this way the will of the legislator, which consists in prohibiting “any discriminatory conduct”.

their decisions by affirming the necessity of protecting people with HIV even absent specific statutory protection. Thus framed, when employers are aware that employees have the HIV virus, their discharge must be a priori considered arbitrary and discriminatory since employers bear the burden of proving the contrary. In presuming discriminatory discharge, employers are required to reinstate workers to employment in conformity with Precedent No. 443 of the Supreme Labor Court.²⁸ To illustrate this point, there follow several decisions rendered by the courts:

Appeal of Modification. HIV-Positive Employee. Discriminatory Discharge. Presumption. Reinstatement. Compensatory Indemnification.

The jurisprudence of this Supreme Labor Court understands as presumptive discrimination the discharge of an employee whenever the employer is aware that the worker has HIV and cannot prove that his action was motivated by another cause. Application and interpretation of Articles 3, Section IV, 5, Section XLI, and 7, Section I, of the Federal Constitution, of Convention No. 111 of the International Labor Organization (ILO), of Articles 1 and 4 of Law No. 9.029/95 and Articles 8 and 9 of the Labor and Employment Law Code (Consolidação das Leis do Trabalho, CLT). Appeal denied. (Case: E-ED-RR-2438/2001-069-09-00.3. Date of decision: 11/6/2008, Reporting Justice: Vantuil Abdala, Subsection I Specialized in Individual Litigation, Date of Publication: DJ 11/14/2008).

. . . It is not too much to emphasize that the employer is responsible for actions practiced by his employees and agents in the performance of work within their jurisdictions (Civil Code, Article 932, III). As for the significance of the absence in our legal order of a rule barring the discharge of HIV positive employees, I join with the understanding expounded by the imminent Justice Joao Oreste Dalazen, mentioned by the plaintiff in his initial complaint, in his reasoning that “the repudiation of discriminatory stances, fundamental objective of the Federative Republic of Brazil (Article 3, IV, Constitution of 1988 (CF/88) and respect for the dignity of human beings in itself, a basic foundation of the democratic rule of law (Article 1, III, also of the CF/88), overrides the inexistence of a legal provision assuring the HIV-positive worker security in employment. Invoked also as reasons to decide by analogy are the terms of Law No. 9.029/95 that prohibit the adoption of any limiting and discriminatory practices that affect access to the employment relation or its maintenance, and that assure, in the cases mentioned, the reinstatement of the employee discriminated against, with full compensation for the entire period of separation through the payment of owed remuneration (00395-2006-007-10-00-4 RO, Published in DEJT EM 1/115/2010).

HIV Positive. Discriminatory Discharge. Presumption. Right to Reinstatement. Convention ILO 159. Professional Readjustment and Rehabilitation.

1. Protection against discrimination requires proactive exegetical

²⁸ Súmula n.º443 do TST: “ Presume-se discriminatória a despedida do empregado portador do vírus do HIV ou de outra doença grave que suscite estigma ou preconceito. Inválido o ato, o empregado tem direito à reintegração no emprego.

interpretation that effectively implicates the jurist in making the legal end pursued concretely viable. In the situation of a person with the HIV virus, this worker's protection against discrimination in the firm and the workplace can be reached based on the presumption of discriminatory discharge when technical, economic, disciplinary, or financial motives for the discharge are lacking, unless there is robust evidence to the contrary. Reference is to Articles 1 and 4, Section I, of Law no. 9.029/95.

2. Veiled discrimination, unconscious and even involuntary, is a phenomenon that ought to be combated, but a reality that cannot be simply ignored by the judiciary. The rereading of the institute of professional readjustment, especially in light of the perspective initiated by Article 1 of ILO Convention 159, is a way to consider the conflicting judicial values evoked in the difficult and delicate question involved in the integration of workers with HIV in the social life of the firm.

(TRT 3rd R#T RO/9067/02 Reporting Judge Jose Eduardo de Resende Chaves Junior DJMG 10/05/2002 P.06)

FINAL NOTES

In the wise words of Norberto Bobbio, “what is important isn't to ground human rights, but to protect them.²⁹” In this way, no doubts remain about the necessity of work law to put an end to this veiled discrimination and ensure the rights of this part of the workforce suffering stigmatization in the eyes of society.

These discriminatory practices are not restricted to those who suffer from the conduct, but affect all of society, marginalizing and withholding true knowledge about this illness regarded as an epochal evil. It is not notably different in the work place, where contact with other workers is routine and where the subordination characterizing this sphere facilitates employers' discriminatory conduct by firing workers.

Here lies the importance of work in seeking to demystify this disease and raise awareness among other workers about the necessity of inclusion for HIV-positive workers in the work sphere. It must be remembered that work, besides leading to significant social inclusion, represents the indispensable source of sustenance for workers.

Aware of the social neglect and history of pain that HIV-positive workers live

²⁹ BOBBIO, Norberto. **A era dos direitos**. Rio de Janeiro, RJ: Campus, 1992.

with, jurisprudence thus assumes a stance of protection for this less powerful class that fights for non-discriminatory space in society.

REFERENCES

AMADO, João Leal. **Contrato de trabalho**. 3 ed. Coimbra: Coimbra editora, 2011.

AMADO, João Leal. VIH/ SIDA e proibição de discriminação dos trabalhadores: *entre a tensão para a transparência e o direito a opacidade*. **Revista de Legislação e de Jurisprudência**. Coimbra: Coimbra editora, 2010.

BARREIRA, Vera Patrícia Martins. **O VIH/SIDA: conseqüências sobre a execução do contrato de trabalho**. Dissertação de 2.º ciclo. Coimbra: 2009.

BARROS, Alice Monteiro de. **Curso de direito do trabalho**. 5 ed. LTR: São Paulo, 2009.

BOBBIO, Norberto. **A era dos direitos**. Rio de Janeiro, RJ: Campus, 1992.

DELGADO, Mauricio Godinho. **Curso de direito do trabalho**. 6 ed. São Paulo: LTR, 2007.

DINIZ, Maria Helena. **O estado atual do biodireito**. 3 ed. São Paulo: Saraiva, 2006.

GRMEK, Mirko D. **História da Sida**. Relógio d'água: Lisboa, 1994.

PEREIRA, André Dias. Lex Medicinæ: **Revista Portuguesa de Direito a saúde**. Coimbra: Coimbra editora, 2007.

PEREIRA Caio Mário da Silva. **Instituições de direito civil: introdução ao direito civil.** Teoria geral de direito civil. 21 ed. V. I. Editora Forense: Rio de Janeiro, 2006.

SANTIAGO, Mariana Ribeiro. **A AIDS e o direito fundamental ao trabalho.** Artigo apresentado à professora Maria Helena Diniz. São Paulo: PUC/SP, 2002. p. 10. in: <http://www.juspodivm.com.br/i/a/%7BB1CBFBB0-C878-4719-837A-ACCAB8A66C76%7D_016.pdf>.

SILVA, José Afonso da. **Curso de direito constitucional positivo.** 25 ed. São Paulo: Malheiros editores, 2005.

TUTELA JURÍDICA DO TRABALHADOR SOROPOSITIVO VICENTE, Joana Nunes; ROUXINOL, Milena Silva. VIH/SIDA e contrato de trabalho: *Homenagem aos Profs. Doutores A. F. Correia, O. Carvalho e V. L. Xavier*. Faculdade de Direito da Universidade de Coimbra: Coimbra editora, 2007.

VIEIRA, Luiz Henrique; SILVA, Leda Maria Messias da. Discriminação do portador de HIV/AIDS no ambiente de trabalho: análise jurisprudencial in: << <http://www.cesumar.br/pesquisa/periodicos/index.php/revjuridica/article/viewFile/2012/1254> >>.