

Protection of HIV-Positive workers: legislative and jurisprudential evolution and jurisprudence in Brazil

Tutela jurídica do trabalhador soropositivo: evolução legislativa e jurisprudencial no Brasil

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Revista Brasileira de Direito, Passo Fundo, vol. 16, n. 1, p. 1-20, Janeiro-Abril, 2020 - ISSN 2238-0604

[Received/Recebido: Março 03, 2020; Accepted/Aceito: Outubro 23, 2020;

Publicado/Published: Dezembro 30, 2020]

DOI: <https://doi.org/10.18256/2238-0604.2020.v16i1.3996>

Como citar este artigo / How to cite item: [clique aqui!/click here!](#)

Abstract

There have been various legislative efforts to prohibit discrimination against HIV-positive workers, including criminalization. Most have not been successful, at least so far. Nonetheless, there are normative instruments in force that can be effective in combating discrimination against HIV-positive workers. The first of these is statute No. 9.029/95 that, applied through analogy, confers important protection for access to employment and prohibition of discrimination. The second, Convention No. 111 of the ILO, which created mechanisms to combat worker discrimination, has already been ratified by Brazil. The third is judicial decisions, through the inversion of the burden of proof in litigation where workers allege discriminatory discharge.

Keywords: AIDS and HIV. Worker. Discrimination. Protection.

Resumo

Várias foram as tentativas legislativas para proibir a discriminação do trabalhador soropositivo, inclusive para criminalizá-lo. A maioria não teve sucesso, ao menos por enquanto. No entanto, existem instrumentos normativos em vigência que podem ser eficazes no combate à discriminação do trabalhador soropositivo. O primeiro deles, é a Lei nº 9.029/95 que, aplicada por analogia, conferiria importante tutela ao acesso ao emprego e a proibição de discriminação. O Segundo é a Convenção nº 111 da OIT que, ratificada pelo Brasil, cria mecanismos de combate à discriminação do trabalhador. O terceiro, é a própria construção jurisprudencial, por meio da inversão do ônus da prova nos processo em que o trabalhador alega discriminação.

Palavras-chave: AIDS/HIV. Trabalhador. Discriminação. Proteção.

1 Introduction

AIDS is a global pandemic that affects more than 40 million people. Of each ten people infected, nine work.¹ These data demonstrate that the illness affects work and the world economy. When someone who lives with HIV fails to work, human capital is also lost since the worker unites a conjunction of knowledge and skills that can be useful to society. That loss of human capital is not only because of the reduction of work capacity or the deaths caused by the illness, but also because of discrimination against the workers.

In Brazil from 1980 until June of 2010, 592,914 cases of AIDS were recorded, with the rate of incidence oscillating around 20 cases per 100 million inhabitants. In 2009 alone 38,538 cases were reported. Another relevant statistic is the age bracket in which AIDS is most likely, between 20 to 59 years of age for both sexes, showing that it significantly affects the population that is most productively participating in the labor market.²

The population of persons who are HIV positive is probably greater still, given that many become aware of the illness only when the principal symptoms manifest themselves. In effect, many people with HIV live for years without presenting symptoms and without developing the disease, but they are able to transmit the virus to others. Without adequate treatment, HIV-positive workers who are economically active will develop AIDS sooner or later, becoming prematurely unable to work and obtain the necessary means of sustenance for themselves and their dependents. Notice, moreover, that the duration of the disease increases the economic burden that weighs on the rest of the work force. Beyond this, the occurrence of AIDS imposes an additional social burden on the sick persons' families who have to support and provide assistance for them. The International Labor Organization (ILO) estimates that globally in 2015 the combined effect of deaths and illnesses attributed to HIV will produce an increase of 1% on the economic burden and of more than 1% on the social burden. Deaths of the sick also occasion the loss of investments in qualifications and acquired experience, making this loss of human capital one of the threats to the elimination of poverty and to reaching a standard of sustainable development.³

Discrimination makes the prevention as well as the early diagnosis of the disease difficult, harming the longer survival of HIV-positive workers. People with

1 INTERNATIONAL LABOUR ORGANIZATION (ILO). The ILO Code of Practice on HIV/AIDS and the Workd of Work. Geneva.2001. Available on: www.ilo.or/aids. Entry on : 07.04. 2011.

2 BRAZIL, MINISTÉRIO DA SAÚDE (MS). Brasília, [2011?] Avilable on: www.aids.gov.br/pagina/aids-no-brasil. Entry by 10/30/2012.

3 INTERNATIONAL LABOUR ORGANIZATION (ILO). The ILO Code of Practice on HIV/AIDS and the Workd of Work. Geneva, 2001. Available on: www.ilo.org/aids/Publications/WCMS_120484/lang-es/index.htm. Entry on: 07.04.2011.

HIV suffer major discrimination, above all in the work world in both hiring and on-going employment, with employer terminations being extremely harmful. As a rule, employers defend these practices by arguing that HIV-positive employees can harm economic activity because of the unwillingness of colleagues to work together or because clients turn their backs on them.

Entrepreneurs themselves are often prejudiced, resulting from ignorance and misinformation in their social world. The ensuing adverse socioeconomic impacts of the pandemic justify non-discriminatory and non-prejudicial attitudes, especially in the realm of work relations. Despite scientific confirmation that the possibilities of contagion are very restricted (basically limited to sexual relations, blood transfusions, and sharing contaminated needles), contact with people with HIV is commonly avoided because of fear of contamination. Beyond this, work is one of most important spheres of social existence. When persons with HIV are denied the possibility of working, they are denied the possibility of social life, besides removing their source of income. So the present research seeks to confront the debate around the effectiveness of existing legal instruments regarding the protection of HIV-positive workers, be it in the access to employment or its maintenance.

2 Legislative Efforts Successful and Unsuccessful

The pandemic of AIDS emerged in the 1990s, when millions of people were infected with HIV, exposing their illness and engendering rejection by the majority of society. The protection of HIV-positive persons became urgent, requiring action on the part of the government, principally the executive and legislative branches. Across two decades in which Brazilian society coped with HIV and AIDS, some important protective measures for people with HIV were implemented through the promulgation of laws recognizing certain rights. Brazilian legislative activity aimed at protecting people who have HIV or AIDS; however, it is insufficient because of legislative omission or because of opposition from the executive branch.

In Brazil the first law referring to HIV was statute No. 9.313 of November 13, 1996, still in force, that provides for the free distribution of medicine to people with HIV or to those who are sick with AIDS. The bill initiated by Senator Jose Sarney passed rapidly through the two houses of the national Congress, being both proposed and approved in 1996.⁴ On March 7, 2003, for example, Senator Serys Shessarenko introduced bill 51/2003 that sought to define crimes resulting from discrimination against people with HIV or those sick with AIDS. Approved by the Senate, it was sent

4 BRAZIL. Law No 9.313, of November 13, 1996. Provides on free distribution of medicines to HIV patients and aids patients. Brasilia, DF, Presidency of the Republic, 1996. Available on: www.senado.gov.br. Entry on 10/15/2012.

to the Chamber of Deputies on October 26, 2005, where in full session on November 19, 2011, it was approved, with modifications. As a result, the bill was returned to the Senate, and it was approved, becoming law on June, 2, 2014. Thus, in Brazil, it is a crime punishable by imprisonment, from 1 to 4 years, and a fine, the following discriminatory conduct against the with HIV and AIDS patient, due to their condition of carrier or patient, when I – refuse, procrastinate, cancel or segregate the registration or prevent you from remaining as a student in a day care center or establishment teaching any course or degree, public or private; II – deny employment or work; III – exonerate or resign from their position or job; IV – segregate in the work or school environment; V – disclose the condition of the HIV carrier or sick person aids, in order to offend his dignity; VI – refuse or delay health care.⁵

Other bills, however, still in limbo in the legislative process of the Chamber of Deputies, like bill 5522, introduced by Deputy Andre de Paula on June 28, 2005, providing for the obligatory implementation of the therapeutic protocol to prevent the vertical transmission of HIV. The bill remained in the national Senate for two years (from November 20, 2007, until December 4, 2009), until approved with modifications. Because of the Senate's modifications, the bill was sent to the Commission on Social Security, where the final report was approved. It remained in the Constitutional Commission on Justice and Citizenship from November 11, 2011, until June, 4, 2014, when it was approved. However, the bill is waiting to be voted on by deputies.⁶

Besides the federal legislation cited, Brazil has other proposals that seek to protect HIV-positive persons. Examples that could be cited include:⁷

- Interministerial Decree No. 869, of August 11, 1992, of the Ministries of Health, Work, and Administration, that “prohibits testing to detect HIV in pre-hiring and periodic health examinations of public servants”;

- Federal District: Decree No. 007, of May 27, 1993, of the Secretary of Health, that “prohibits testing to detect HIV in pre-hiring and periodic health examinations of public servants”;

- Espirito Santo: state statute No. 7.556, November 10, 2003, that “prohibits discrimination against people with HIV or persons with AIDS and provides for other measures”;

- Goias: state statute No. 12.595, January 26, 1995, that “bans and penalizes any

5 BRAZIL. Law No 12.984, of June 2, 2014, define the crime of discrimination of people with human immunodeficiency virus (HIV) and aids patients. Brasilia, DF, Presidency of the Republic, 2014. Available on: www.senado.gov.br. Entry on 11/17/2014.

6 BRAZIL, THE CHAMBER OF DEPUTIES. Bill of Law No 5522, of June, 28, 2005. Provides for the mandatory implementation of a therapeutic protocol for the preventions of vertical transmission of HIV. Brasília, DF, 2005. Available on: www.camara.gov.br. Entry on 11/17/2014.

7 BRAZIL, THE CHAMBER OF DEPUTIES. Opinion of the Representative Regis de Oliveira approved by the Committee on Constitution, Justice and Citizenship of the Chamber of Representatives on 10/27/2009. Available on: www.camara.gov.br. Entry on 10/16/2012.

discriminatory act in relation to persons with HIV or AIDS”;

- Minas Gerais: state statute No. 14.582, January 17, 2003, that “prohibits discrimination, directly or indirectly, against people with the immune deficiency virus, HIV, and persons with the acquired immune deficiency syndrome, AIDS, in state or quasi-state administrative organs and entities, and provides other measures.”

- Parana: state statute no. 14.362, April 19, 2004, that “bans discrimination against persons with HIV or AIDS.”

- Rio de Janeiro: state statute No. 3.559, May 15, 2001, that “establishes penalties for establishments that discriminate against people with HIV, symptomatic or asymptomatic, and provides other measures.”

- Sao Paulo: state statute No. 11.199, July 12, 2002, that “prohibits discrimination against people with HIV or AIDS, and provides other measures.”

- Rio Grande do Norte: state statute no. 8.813, 2006, that “bans discrimination against people with HIV or AIDS.”

Regarding protection specifically for HIV-positive workers, the legislative efforts have not achieved success. On April 27, 1999, Senator Lucio Alcantara introduced in the national Senate a bill numbered 267, whose objective was to alter the labor and employment law code to provide for security of employment for HIV-positive employees. The bill made relatively rapid progress through the national Congress. The Senate approved it on September 15, 1999, sending it to the Chamber of Deputies on October 4, 1999. On November 15, 2001, the Chamber of Deputies approved it, sending it forward for presidential approval. On December 7, 2001, the veto of then-President of the Republic, Fernando Henrique Cardoso was published in the Official Journal of the Union.⁸ Another initiative with the same intention, bill 145, was introduced by Senator Roseana Sarney on May 18, 2006. The proposal aimed to confer job security on employees with HIV or hepatitis C. The bill remained awaiting inclusion on the daily calendar from August 1, 2006 until January 14, 2011, having been definitively tabled at the end of the legislative session at that time.⁹

Because of the absence of explicit legal protection, but being faced with the necessity of special juridical protection for HIV-positive employees, it became necessary to consider the possibility of applying through analogy statute No. 9.029/95, which deals with employee discrimination.

8 BRAZIL, THE FEDERAL SENATE. Bill of Law No 267, 1999. Amends the Consolidation of Labor Laws, approved by Decree-Law N° 5452, of May 1, 1943, to provide for the stability of the employee with HIV virus and takes other measures. Vetoed by the President of the Republic. Brasília, DF, 1999. Available on: www.senado.gov.br. Entry on 10/16/2012.

9 BRAZIL, THE FEDERAL SENATE. Bill of Law No 145, 2006. Provides for restrictions on arbitrary or unfair dismissal of the employee with the Acquired Immunodeficiency Syndrome (AIDS), HCV Virus (Hepatitis C) and serious and contagious disease, and takes other measures. Filed at the end of the legislature. Brasília, DF, 2006. Available on: www.senado.gov.br. Entry on 10/16/2012.

3 Discrimination against HIV-Positive Workers: Analogy with Statute No. 9.029/95

Article 8 of the labor and employment code (Consolidação das Leis Trabalhistas, CLT) authorizes judges, in the absence of legal or contractual provisions, to judge cases using analogy. Analogy is the procedure of juridical technique for filling in lacuna in the law, that is, applying to a case without an explicit law the rule provided for in another similarly classified situation.¹⁰ Its legal-philosophical basis is the principle of equality of treatment holding that facts of a similar nature ought to be treated in the same way such that the same norm will apply to similar facts.¹¹ It is actually a matter of applying the principle of equality before the law as a requirement of equalization. In effect, equality before the law presupposes the same treatment of non-coincident circumstances or situations. The absence of absolute congruence between the facts, however, is irrelevant for the recognition of certain rights or for the application of a similar normative regulation, since the aim is to prevent any discriminatory or privileged treatment.¹²

There are three presuppositions for legal analogy. The first is that the fact cannot already be regulated by law. The second is that at least one element of identity between the fact regulated and the fact unregulated must exist. Finally, the identity between the two facts must pertain to the purpose of the law, to its spirit.¹³ Analogy cannot be used, therefore, when the norm is created for a certain exceptional situation and the intent is to apply the norm to a case that does not present the same characteristic.

Statute No. 9.029/95 prohibits discriminatory practices in hiring and employment especially in relation to testing requirements for pregnancy or sterilization, besides establishing certain conduct as criminal and determining the work and administrative consequences of discriminatory discharge. Article 1 of the law states as follows:

It is prohibited to adopt any discriminatory or limiting practice to affect access to employment or its maintenance for motives of sex, origin, race, color, civil status, family situation, or age, except for situations of protection of minors provided for in Section XXXIII of Article 7 of the federal constitution.

Article 2 of statute 9.029/95 provides that the following are crimes:

- I - the requirement of a test, examination, investigation, report, certification, declaration, or any other procedure relative to sterilization or pregnancy;
- II - the adoption of any measures by initiative of the employer that constitute:
 - a) inducement or stigmatization to genetic sterilization;
 - b) promotion of birth control, except offering services or counseling or family

10 AMARAL, Francisco. *Direito Civil. Introdução*. 4. ed. São Paulo: Renovar, 2002, p. 90.

11 AMARAL, Francisco. *Direito Civil. Introdução*. 4. ed. São Paulo: Renovar, 2002, p. 91.

12 LUÑO, Antonio E. P. *Dimensiones de la igualdad*. 2. ed. Dykinson: Madrid, 2007, p. 29.

13 LUÑO, Antonio E. P. *Dimensiones de la igualdad*. 2. ed. Dykinson: Madrid, 2007, p. 29.

planning provided through public or private institutions conforming to the rules of the Unified Health System.

For its part, Article 4 provides:

Besides the right to indemnity for moral damages, terminating the employment relation by discriminatory act prohibited in this statute creates the option for employees to choose among:

I - reinstatement with make-whole compensation for the entire period of separation, by the payment of remunerations owed, corrected monetarily for additions of legal interest;

II - the receipt in double of the remuneration for the period of separation, corrected monetarily and increased by legal interest.

Articles 1 and 4 of the statute therefore deal with situations of discrimination against workers, whether in access to employment or in maintenance of employment, and the corresponding effects. There are, at least, three elements of identity between the fact treated by Article 1 of the statute No. 9.029/95 and the fact “discrimination against HIV-positive workers in the access and maintenance of employment.” The first is the prohibition of discrimination. That is, the spirit of this law is that discrimination - as a violation of the principle of equality, according to which people ought to be treated equally by the law - is odious and ought to be prohibited. The second is that the subjects protected by statute No. 9.029/95 are workers, that is, those who depend on their work for their and their families’ sustenance. And the third similarity is that the protection is directed toward the behavior of the employer, whether related to hiring or during the course of employment.

It is amply justifiable to apply through analogy Articles 1 and 4 of statute No. 9.029/95, which prohibit the adoption of discriminatory and limiting practices and establish pecuniary penalties, to protect access to and maintenance of employment for HIV-positive workers. Brazilian jurisprudence broadly accepts the application through analogy of Articles 1 and 4 of statute No. 9.029/95 to situations of prohibiting discrimination in access to and maintenance of employment for HIV-positive workers.¹⁴

14 “RETEGRATION. HIV VIRUS CARRIER EMPLOYEE. FAREWELL NOT ARBITRARY. FAILURE. It is true that the constitutional principles of human dignity and equality (Articles 1, III, 3, IV, and 5, caput), as well as Law No. 9.029/95, Prevent the employee HIV positive or who have manifested the disease - AIDS - is dismissed arbitrarily, that comes in the wake of the Courts deciding patriotic and defending national doctrine. However, evidence of the alleged arbitrariness committed by the employer to the worker fits in the style of arts. CLT 818 and 333 of the CPC, is impossible when the request for reinstatement missed cited devices”. TRT15. RECURSO ORDINÁRIO: RO 40751 SP 040751/2000, Rel. Luís Carlos Cândido Martins Sotero da Silva, DJ: 06/11/2000. JusBrasil, 2000. Available on: <https://trt-15.jusbrasil.com.br/jurisprudencia/19167040/recurso-ordinario-ro-40751-sp-040751-2000/inteiro-teor-104270699>. Entry on: 31/10/2012. “BEARER OF ACQUIRED IMMUNE DEFICIENCY SYNDROME - AIDS - INDEMNIFICATION.

Yet there are contrary opinions. Alice Monteiro de Barros argues that “statute 9.029 may not be applied to HIV-positive workers since its precepts are penal in nature, not susceptible to interpretation by analogy or extension.”¹⁵ She maintains that having criminal provisions in the statute completely impedes its application to HIV-positive workers, even though a major part of the law contains provisions of an employment or administrative law character.¹⁶

There is no obstacle, however, to the application of only one article of a law by analogy, especially if the law, taken as a whole, contains rules of a different content. Notwithstanding that Article 2 of statute No. 9.029/95 classifies certain conduct as criminal, Articles 1 and 4 exclusively regulate employment matters, creating a patent identity with discrimination against HIV-positive workers. Thus there is justification for the application of Articles 1 and 4 of statute No. 9.029/95 by analogy to the situation of workers with HIV.¹⁷

Since the company is aware that the employee was affected by the HIV virus, and which there was no proof of cause for disciplinary, financial or economic for the exoneration, And attitude of employers to make employment available to a HIV-positive person, since been aware of the very serious infectious and contagious worker, has for its arbitrary and discriminatory dismissal, whose compensation is limited to that in precept inc. II of art. 4 of Law No. 9.029/95”. TRT12. RECURSO ORDINÁRIO: RO-V 03957-2002-036-12-00-2, Rel. Dilnei Ângelo Biléssimo, DJ/SC 13/01/2003. JusBrasil, 2003, Available on: <https://www.jusbrasil.com.br/jurisprudencia/busca?q+=Dilnei+Angelo+HIV&idtopico=T10000582>. Entry on 31/10/2012.

15 BARROS, Alice Monteiro de. *AIDS no local de trabalho. Um enfoque de direito internacional e comparado*. Curitiba, 2012. Available on http://www.apej.com.br/artigos_doutrina_amb_01.asp. Entry on: 15/10/2012.

16 The author argues: “If the ordinary law 9029, April 1995, which prohibits the adoption of discriminatory practices and limiting access to employment relationship or continued had included health status, alongside the grounds of sex , origin, race, color, marital status, family status or age, which related, there would be no difficulty in interpretation and consequent approval of the reinstatement of the HIV on the job because the law provides that, although with technical inaccuracy make mention of readmission but with the right wages” BARROS, Alice Monteiro de. *AIDS no local de trabalho. Um enfoque de direito internacional e comparado*. Curitiba, 2012. Available on http://www.apej.com.br/artigos_doutrina_amb_01.asp. Entry on: 15/10/2012).

17 “HIV VIRUS CARRIER - EXEMPTION DISCRIMINATORY - ASSUMPTION - RIGHT TO REINSTATEMENT - ILO CONVENTION 159 - VOCATIONAL REHABILITATION AND REDEPLOYMENT. 1. Protection against discrimination charges interpreter “exegesis proactive” which effectively implies the operator on the right of the legal feasibility concrete persecuted. In the event of the HIV virus, protection against discrimination that worker, both within the company, as in the establishment, can be reached from the presumption of discriminatory dismissal, when there is no motivation technical, economic, disciplinary or financial, to say goodbye, unless strong evidence to the contrary Intelligence Articles 1. and 4th. item I of Law. 9.029/95. 2. The veiled discrimination, unconscious and even involuntary is a phenomenon that must be fought, but it is a reality that can not simply be ignored by the judiciary. Rereading the institute of retraining, particularly in light of the perspective opened up by Article 1. ILO Convention 159, is one of the weighting of goods brought into legal confrontation on difficult and sensitive issue, that involves the integration of HIV carrier in social enterprise”. TRT3. RECURSO ORDINÁRIO: RO 906702 01836-2001-044-03-00-9, Rel. Jose

Consideration of the legal effects of discriminatory discharge of HIV positive-employees is not exhausted by the examination of the norms discussed so far. That discussion is only incidental to a even larger debate, above all encompassing international norms, especially Convention 111 of the ILO.

4 Convention No. 111 of the ILO: The Basis of Brazilian Jurisprudence Concerning Discriminatory Treatment of HIV-Positive Workers

Convention 111 of the ILO deals with “Discrimination in Matters of Employment and Occupation.” Of the 183 conventions of the ILO issued until 2001, this convention was considered worthy of belonging to the category of fundamental conventions, along with only seven others attaining that same status.¹⁸ According to Alice Monteiro de Barros, the international norm considered here had its inspiration in the Declaration of Philadelphia and in the Universal Declarations of Human Rights. These declarations consecrated the principle of equality of rights and liberty among all human beings.¹⁹ Being of this nature, Convention 111 goes well beyond being merely an employment norm, since its content embodies human rights.

Eduardo Resende Chaves Jr. DJMG 05/10/2002, JusBrasil, 2002. Available on: <https://trt-3.jusbrasil.com.br/jurisprudencia/129327639/recurso-ordinario-trabalhista-ro-906702-01836-2001-044-03-00-9/inteiro-teor-129327649>. Entry on 10/31/2012.

“FEATURE MAGAZINE. HIV VIRUS CARRIER EMPLOYEE. ASSUMPTION OF FAREWELL DISCRIMINATORY. REINTEGRATION. 1. The national legal system and internationally (CF, art. 1, III and IV, and Law No. 9.029/95; Convention 111 of the International Labour Organization) includes rules that prohibit discriminatory practices for the purpose of admission and maintenance of legal employment relationship . 2. In line with this regiment, the jurisprudence of the Superior Labor Court is tight in the sense that, aware that the employee is HIV positive, it is presumed discriminatory and arbitrary exercise of the right potestative waiver by the employer, unless the assumption motivated resolution of the labor contract 3. In this case evidenced that the employer abused his right to dismiss employee stricken with serious illness, the act is annulled and determines to reinstate the complainant in employment, allowing it to maintain decent personal and family survival, at the same time that it discourages fired only motivated by prejudice, and not a disciplinary reason, technical, economic or financial”. TST. RECURSO DE REVISTA: RR- 2815409220055020014, Rel. Walmir Oliveira da Costa, DJ 21/09/2012. JusBrasil, 2012. Available on: <https://tst.jusbrasil.com.br/jurisprudencia/929883871/recurso-de-revista-rr-2815409220055020014/inteiro-teor-929883960>. Entry on: 31/10/2012.

18 MOUTINHO, Lídia Clément Figueira. *Discriminação, Preconceito e Estigma do Empregado Acidentado: análise dos mecanismos jurídicos de defesa do trabalhador em face da empresa*.

Dissertation (Master of Law). Programa de Mestrado em Direito do Centro Universitário Curitiba (UNICURITIBA), Curitiba. 2010. Available on file:///C:/Documents%20and%20Settings/USUARIO/Meus%20documentos/Downloads/UNICURITIBA_-_LIDIA_CL%3%88MENT-FIGUEIRA_MOUTINHO_-_disserta%3%A7%C3%A3%C2%BF.pdf. Entry on: 15/07/2011.

19 BARROS, Alice Monteiro de. *AIDS no local de trabalho. Um enfoque de direito internacional e comparado*. Curitiba, 2012. Available on http://www.apej.com.br/artigos_doutrina_amb_01.asp. Entry on: 15/10/2012.

In Brazil, it was approved by legislative decree on November 24, 1964 and ratified on November 26, 1965, entering into force on November 26, 1966.²⁰ According to the classification adopted by the Supreme Constitutional Court,²¹ such convention has the status of a supra-legal rule - it is below the constitution but above any other statute in Brazilian law since it is an international treaty that deals with human rights ratified before constitutional amendment 45/2004. From this amendment that included the third paragraph to the fifth article of the Constitution, international treaties that deal with human rights and be approved with the specific quorum shall be equivalent to constitutional amendments.²²

This convention contains a concept of discrimination similar to that already analyzed here:

a) any distinction, exclusion, or preference based on race, color, sex, religion, political opinion, national descent, or social origin that has an effect of destroying or altering equality of opportunity or treatment in employment or profession;

b) any other distinction, exclusion, or preference that has an effect of destroying or altering equality of opportunities or treatment in employment or profession that can be specified by interested member states after consultations with representative organizations of employers and workers, when these exist, and other appropriate organs.²³

Besides excepting some practices as non-discriminatory - for example, “special protective measures or assistance provided for in other conventions or recommendations adopted by the International Work Conference”²⁴ - the convention proffers that states ought to act to revoke any type of law or administrative practice of a discriminatory character.

Convention No. 111 of the ILO also possesses broad and open concepts not only in the sections that define discrimination, but also in the text as a whole. This leaves space both for legislatures as well as courts to act when they confront cases that involve possible applications. Despite not expressly providing for the exclusion of HIV-positive workers as a form of discrimination, extensive interpretation in this vein is possible, given the vague wording of its provisions. Alice Monteiro de Barros notes, upon quoting the definition of discrimination in Convention 111 with the typical margin of interpretive freedom associated with this type of norm, that the state of health of

20 SUSSEKIND, Arnaldo. *Convenções da OIT*, SP: LTr, 1994, p. 243.

21 DELGADO, Maurício G. *Curso de Direito do Trabalho*. 10ª ed. SP. LTr, 2011, p. 153.

22 BRAZIL, {Constitution (1988)}. 1988 Constitution of the Federative Republic of Brazil. Brasília, DF: Presidency of the Republic, 1988. Available on: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Entry on: 11/23/2011.

23 INTERNATIONAL LABOUR ORGANIZATION (ILO). *The ILO Code of Practice on HIV/AIDS and the Workd of Work*. Geneva, 2001. Available on: <http://www.ilo.org>. Entry on: 11/23/2011.

24 INTERNATIONAL LABOUR ORGANIZATION (ILO). *The ILO Code of Practice on HIV/AIDS and the Workd of Work*. Geneva, 2001, Available on: <http://www.ilo.org>. Entry on: 11/23/2011.

the HIV-positive workers can be included within “other forms of discrimination.” Barros observes that the function of international norms that address human rights is to integrate their values into reality. This convention was created in 1958, an epoch in which AIDS was still unknown, so that it would be impossible for the text to expressly treat the exclusion of HIV-positive workers as a form of discrimination. The wide margin of interpretation allowed for international law, however, allows for the possibility of interpretation in this manner, as explained by the illustrious professor.²⁵ Brazilian jurisprudence broadly accepts Convention No. 111 of the ILO as a foundation for forbidding discriminatory discharge of HIV-positive workers.²⁶

5 Jurisprudential Treatment of the Discharge of HIV-Positive Workers

An immense difficulty in dealing with discriminatory discharge in Brazil is presented by the predominant understanding that discharging employees without just cause is a unilateral right of employers, requiring no motives. With employers not having to have a motive to discharge employees for just cause, regulation of discrimination against HIV-positive workers, in theory, becomes impossible or very difficult. In this context, workers will have the burden of proving that the act of discharge had a discriminatory motive, that is, that the employer acted with fault. This understanding results from the application of Articles 818 of the labor and employment code and 333, I, of the civil procedure code, according to which the plaintiff in the litigation bears the burden of proving the facts constitutive of the right

25 BARROS, Alice Monteiro de. *AIDS no local de trabalho. Um enfoque de direito internacional e comparado*. Curitiba, 2012. Available on http://www.apej.com.br/artigos_doutrina_amb_01.asp. Entry on: 15/10/2012.

26 “WARRANT SECURITY - REINSTATEMENT TO WORK - HIV VIRUS CARRIER - ANTICIPATION OF THE EFFECTS OF PROTECTION - FAREWELL DISCRIMINATORY - PRESUMPTION - Presumably the discriminatory dismissal without just cause employee with the Acquired Immunodeficiency Syndrome (AIDS). There are legal and constitutional, that by a systematic interpretation, ensure the approval of anticipating the effects of guardianship for reinstatement to employment, such as Articles 1 (II, III and IV), 5 (X and XLI), 6, 170 (III) and 193 of the Federal Constitution and Decree No. 62150/1968, which introduced into our legislation the Convention 111 of the ILO (concerning discrimination in employment and occupation). Irreparable, so the court decision that, based on the documentary evidence gathered in labor claim, considered the present requirements in art. 273 of the CPC to grant early effects of merit tutelage. The periculum in arrears, in turn, remains characterized by the simple fact that the claimant suffered deletion of their source of income, by an act presumably discriminatory, which certainly compromises their own livelihood with dignity (Article 1, III of the Constitution). Writ of mandamus seeking reinstatement away, which rejects. TRT9. RECURSO ORDINÁRIO: RO 5402010909905 PR 540-2010-909-9-0-5, Rel. Luiz Eduardo Gunther, DJ 07/12/2010. JusBrasil, 2010. Available on: <https://trt-9.jusbrasil.com.br/jurisprudencia/18886501/5402010909905-pr-540-2010-909-9-0-5-trt-9>. Entry on: 31/10/2012.

claimed. This classical theory of the burden of proof is also known as the static theory of the burden of proof. According to this theory, if workers allege that they were discriminated against, they must produce the evidence to support the allegation. The jurisprudence of the regional labor courts accepts this understanding.²⁷ This obviously constitutes “diabolic proof,” that is, evidence which is impossible to produce. In effect, in a context in which discharge without just cause, without motivation, is legal, the demonstration that the motivation of the contractual breach was a discriminatory act is practically impossible, equivalent to lacking any rights. It supposes an investigation of the intention of the employer at the time of discharge, which implies a subjective and infeasible analysis.

Based on the insight that the distribution of the burden of proof according to the static theory, when that is absolutely unworkable, equates to a lack of rights, an alternative theory based on capacity-to-prove was developed. In accordance with this theory, proof ought to be produced by the party that has it or has access to it, when it is inaccessible to the other party. The jurisprudence of the Supreme Labor Court (Tribunal Superior do Trabalho, TST) accepts this theory, chiefly in regard to cases of discharge of HIV-positive workers.

There are two questions that need to be addressed. The first is the scientific proof that the employee was ill at the time of discharge. The second is the lack of facts linking the illness to the motive for discharge. Initially, the employer must prove that it had no knowledge of the employee’s illness, seeing that if at the time of discharge it knew of that fact, it is presumed that this knowledge provided the discriminatory motivation.²⁸

27 “CARRIER EMPLOYEE OF THE AIDS VIRUS. ABSENCE OF DISCRIMINATION. The HIV virus and AIDS disease resulting from it, as it is known has caused great impact on mankind and leprosy patients suffer undoubtedly discrimination and difficulties often even to survive. However, when the employee alleges discrimination by their state of health by the employer, must make the relevant evidence”. TRT9. RECURSO ORDINÁRIO: RO 307200571901 PR 307-2005-71-9-0-1, Rel. Claudia Cristina Pereira Pinto de Almeida, DJ 25/11/2005. JusBrasil, 2005. Available: <https://trt-9.jusbrasil.com.br/jurisprudencia/18997910/307200571901-pr-307-2005-71-9-0-1-trt-9>. Entry on 10/31/2012.

28 “HIV VIRUS CARRIER EMPLOYEE. WAIVER UNMOTIVATED. PRESUMED DISCRIMINATORY ATTITUDE. REINTEGRATION. 1 The jurisprudence of this Court has established itself in the sense that it assumes a discriminatory dismissal of an employee carrying the HIV virus. Thus falls on the employer the burden of proving that the condition was not aware of the employee or the act of dismissal had another motivation - lawful. 2. Understanding line with international norms, especially the Convention n. No. 111 of 1958 on Discrimination in Respect of Employment and Occupation (ratified by Brazil on 26.11.1965 and promulgated by Decree n. ° 62,150, of 19.01.1968), and Recommendation. # 200, 2010 on HIV and AIDS and the World of Work. 3. In this context, it is improper to reverse the burden of proof carried out by the Regional Court, in giving the employee the burden of demonstrating the discriminatory character of the act of dismissal sponsored by the employer. 4. Magazine feature known and provided”. TST. RECURSO DE REVISTA: RR-1049006420025040022, Rel. Lélío Bentes Correa, DJ 02/09/2011, JusBrasil, 2011. Available on: <https://tst.jusbrasil.com.br/jurisprudencia/939196215/recurso-de-revista-rr-1049006420025040022/inteiro-teor-939196534>. Entry: 31/10/2012.

Evidence must be directed toward proving that in the circumstances of the evolving employment contract, it would have been absolutely impossible for the employer to know until the termination of the employment contract that the employee was positive for HIV. If there exists the least possibility of presuming that the employer knew of this fact, discriminatory discharge is presumed.

Not being able to prove a lack of knowledge of the employee's illness, the employer still can prove that the motivation of the discharge resulted from some factor unrelated to the illness, such as the necessity of a reduction of personnel for economic or financial reasons. It is important to emphasize that poor performance by the employee, when related to the illness, is not a valid motivation to discharge the employee, exactly because, being linked to the illness, it is thus a discriminatory reason.²⁹

The basis of this interpretation is, to reiterate, that if the proof falls to HIV-positive employees, the struggle against discrimination will not be viable since they will not succeed in proving discrimination for lack of having means to that end.

The dynamic theory of the burden of proof renders this line of thinking judicially viable. For that theory, "proof encumbers the party who has the best means of producing it in light of the circumstances of the concrete case. In other words, the one who can prove must prove."³⁰ The defenders of this theory emphasize that its application is for cases that are out of the ordinary, for which application of the classical theory will undermine basic principles of procedural law and the very rule of law as well as access to justice and parity among the parties.

Beyond the application of the dynamic theory of the burden of proof, the burden of proof can be reversed using Article 373, § 1º, of civil procedure (Codigo de Processo Civil, CPC) that provides that in view of the peculiarities of the case related to the impossibility or the excessive difficulty of fulfilling the task under the caput or to the greater ease of obtaining proof of the contrary fact, the judge may assign the burden of proof differently, provided that he does so by decision reasoned, in which case it should give the party the opportunity to discharge the burden assigned to it.³¹

29 In this sense: "Reintegration - HIV positive - farewell discriminatory - drowsiness - sloth.

Discriminatory dismissal is the employee of the HIV virus, which was in service drowsiness effect of the drugs he was taking. Argument "negligence" by the employer and who knows the facts only reveals high degree of misunderstanding and insensitivity within which, in practice, rather than justify, only exacerbates discrimination. Recognized right to return". TRT9. RECURSO ORDINÁRIO: RO 307200571901 PR 307-2005-71-9-0-1, Rel. Claudia Cristina Pereira Pinto de Almeida, DJ 25/11/2005. JusBrasil, 2005. Available: <https://trt-9.jusbrasil.com.br/jurisprudencia/18997910/307200571901-pr-307-2005-71-9-0-1-trt-9>. Entry on 10/31/2012.

30 CHEHAB, Gustavo Carvalho. *O Princípio da Não-Discriminação e o ônus da Prova*. Brasília, 2012. Available on http://www.3.tst.jus.br/Ssedoc/PaginadaBiblioteca/revistadotst/Rev_76/Rev_76_3/art2_gustavochehab.pdf. Entry on: 10/31/2012.

31 BRAZIL, [Código de Processo Civil (2015)] Brasília, DF: Presidência da República, 2015. Available on http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm, Entry on: 10/30/2015.

Beginning with the concepts of discrimination, prejudice, and stigma, it is appropriate to analyze why, according to current jurisprudence and doctrine, there can be a reversal of the burden of proof when HIV-positive employees are fired without just cause with based on the dynamic theory of the allocation of burdens of proof and on Article 373, § 1º, of the CPC. Imagine a business person who is prejudiced against HIV-positive people and who discovers an employee in this situation, firing him or her without just cause. According to this analysis, the labor and employment law of Brazil does not require motivation for such a discharge. In this example, the only way to prove that the termination was discriminatory would be to prove the prejudice of the employer. The problem is that prejudice is a psychological phenomenon, meaning that the employee would have to prove the thinking of his ex-boss in firing him or her. According to current doctrine and jurisprudence, the judge ought to reverse the burden of proof since - besides the employee not having means to produce evidence (dynamic theory of the distribution of proof) - the case brings a peculiar concrete situation for which the judicial system still does not offer proper rules (Article 373, § 1º, CPC).

The application of Article 373, § 1º, of the CPC, however, means only that the judge ought to validate the “rules of experience of what ordinarily happens” to judge the case, since shifting the burden of proof depends on something more. That something more is the conclusion that the discriminatory discharge of employees in that situation (HIV-positive) is something that ordinarily happens, in the face of stigma that afflicts it. In case the inversion of the burden of proof is permitted, it is also necessary to analyze, again in a succinct manner, when this recourse should be used.

Kazuo Watanabe maintains that, as a rule of judging, the judge only ought to make the ruling after instructions are made, since “to announce it at an earlier moment would be the same as proceeding to the pre-judgment of the cause, which is totally impermissible.”³² Nonetheless, there is resistance to this tendency. For the contrary part of doctrine, parties ought to be previously alerted with respect to the inversion, in order that they will not be “taken by surprise,” under pain of undermining “the constitutional principles of confrontation and of full defense and, in the last analysis, of legal due process.”³³ Despite expecting that the litigants will always try to prove their allegations in the most concrete and definitive manner possible, it is elemental that a party who expects the judge to follow the general rule on burden of proof proposed by Article 333 of the CPC will wind up not endeavoring (at least not as much as it would endeavor if it knew beforehand that the burden of proof would be inverted) to prove the falsity of the allegation of the plaintiff, since it would be incumbent on the plaintiff

32 SILVA, José Antônio Ribeiro de Oliveira. *O ônus da prova e sua inversão no processo do trabalho*. Brasília, DF, 2012. Available on http://bdjur.stj.gov.br/xmlui/bitstream/handle/2011/18561/O_%D4nus_da_Prova_e_sua_Invers%E3o.pdf?sequence=2. Entry on: 02/26/2012.

33 SILVA, José Antônio Ribeiro de Oliveira. *O ônus da prova e sua inversão no processo do trabalho*. Available on http://bdjur.stj.gov.br/xmlui/bitstream/handle/2011/18561/O_%D4nus_da_Prova_e_sua_Invers%E3o.pdf?sequence=2. Entry on: 02/26/2012.

to demonstrate the truthfulness of its allegation.

Finally, it is interesting to emphasize that the school of thought that defends the inversion of the burden of proof is today dominant in the Supreme Labor Court (TST). The effect of burden shifting, especially in extraordinary situations, is to reinstate the workers. That is, beyond resuming employment, they receive all the remuneration for the period in which they remained separated because of the discriminatory attitude. In other cases, however, in which the reinstatement is inadvisable (because of an animosity between the parties, for example), workers will merely receive the back pay owed, without, however, returning to their former jobs.

In this sense, it is also the Precedent 443 of TST, according to which “the dismissal of an employee with the HIV virus or other serious illness that causes stigma or prejudice is discriminatory”, and when “the act is invalid, the employee has the right to reintegrate into employment”.³⁴

As far as the timing of the inversion of the burden of proof, in decisions proffered by the TST the understanding of the Court is that the shift should occur at the time of the final decision. This understanding is implicit. Despite failing to be expressly manifest, in decisions in which they opt for an inversion of the burden of proof, courts end up reinstating the workers.

6 Conclusion

Prejudice is an inherent characteristic of human beings, and therefore, discrimination also. In the context of employment relations, whose principal characteristic is subordination, - not only legal but also economic, since workers depend on salaries for their own and their families' sustenance - there is fertile territory for prejudice to manifest itself in discriminatory acts. The national system of labor and employment law, in which employers are permitted to discharge employees without motivation, aggravates this situation. Indisputably, employers of labor often use this prerogative to discharge employees for reasons prohibited by law. The proof of this is that workers have difficulty in demanding their rights while still within the employment relationship, which explains why labor and employment law is called, sadly, “the justice of the unemployed.”

In this context, application of Convention 158 of the ILO, according to which all discharges ought to be motivated, would be extremely useful, since employers would have to explain their motives for terminations, making discriminatory discharges more difficult. It should be emphasized that this treaty does not institute “general job tenure.” On the contrary, terminations outside of the cases provided for in law (for economic

34 BRAZIL. Supreme Labor Court (TST). Precedent 443. Brasília, DF, 2012. Available on: http://www3.tst.jus.br/jurisprudencia/Sumulas_com_indice/Sumulas_Ind_401_450.html#SUM-443. Entry on: 10/30/2012.

motives, for example) would be fully possible, as long as these motives were explained. Regrettably, Convention 158 of the ILO is still not in effect in Brazil.

As far as the general effects of discriminatory discharge of HIV-positive employees, there is no doubt that they are negative, such as social exclusion, economic burdens on society, especially through the social security system, and loss of investments in the HIV-positive workers, as much on the part of the firm as by the state.

In the legal sphere, there is a certain discussion with respect to the possibility of specific protection for workers who live with HIV. Some maintain that not having a specific law compromises legal security. Nevertheless, statute No. 9-029/95, by regulating situations of discrimination in hiring and maintaining employment, can be applied by analogy to the case of discriminatory discharge of HIV-positive workers, as is recognized in Brazilian jurisprudence. Even if it were not, despite not having a specific law, the special protection of HIV-positives is compatible with the constitutional provisions (principles of equality and non-discrimination) and with Convention 111 of the ILO that deals with discrimination against workers. It would appear that, even permitting unmotivated discharges as a general rule, the national legal order rejects the use of this measure as a form of exclusion. In this vein, inversion of the burden of proof serves to make the law of non-discrimination against workers effective. Proof of discrimination is very difficult, so-called “diabolical proof.” That is to say, in these cases, without inverting this onus, it would amount to negating the very right to non-discrimination. The other aspect that weighs in favor of the presumption of discrimination when HIV-positive employees are fired refers to the reality of stigmatization, that is, that such workers are part of a group that is frequently discriminated against by society (as supposedly suffering from “a disease of homosexuals and prostitutes”). This framework reveals a strong indication that terminations of HIV-positive workers are, as a rule, discriminatory.

As if this were not enough, employers have better capacities to prove matters relative to the employment relationship, seeing that they have managerial prerogatives over work activity. Besides this, it is the best way to harmonize the right of free enterprise with the right of equality, since the employer will be able to discharge workers, it being sufficient that when it involves HIV-positive employees, the discharge be motivated. On the other hand, the right of employees to equality and non-discrimination will be respected, since they will only be able to be discharged when the employer demonstrates that the termination of the contract is not based on prejudice.

Therefore the legal effect of discriminatory discharge of HIV-positive workers cannot be anything other than reinstatement of the workers, with employers having the burden of proving that the discharge happened for other motives. This is the dominant strain of jurisprudence in the Supreme Labor Court (TST). Such legal effect, besides being perfectly consistent with national legislation, also serves to impede the already mentioned socioeconomic harms that affect not only employees but all of society.

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