

HIV-POSITIVE WORKERS AND THE PRESUMPTION OF DISCRIMINATORY DISCHARGE: PRECEDENT Nº 443 OF THE BRAZILIAN SUPERIOR LABOR COURT (TST)

TRABALHADOR SOROPOSITIVO E PRESUNÇÃO DE DISPENSA DISCRIMINATÓRIA: SÚMULA Nº 443 DO TRIBUNAL SUPERIOR DO TRABALHO (TST)

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ABSTRACT

Notwithstanding the efforts of international organizations, above all the International Labor Organization (ILO), towards creating mechanisms so that Member-states develop juridical instruments to combat discrimination against HIV-positive workers, there are enormous difficulties in making these mechanisms effective. The reversal of the burden of proof in labor cases is one of the means of implementing Recommendation No. 200 and Convention No. 111. of the ILO, according Precedent nº 443 of the Brazilian Superior Labor Court (TST).

KEYWORDS: Convention nº 111 of the ILO. Burden of proof. Discharge. Discrimination. Precedent nº 443 of the Brazilian Superior Labor Court.

RESUMO

A despeito dos esforços das organizações internacionais, sobretudo da Organização Internacional do Trabalho (OIT), criando mecanismos para que os Estados membros desenvolvam instrumentos jurídicos para combater a discriminação contra trabalhadores HIV positivos, existem enormes dificuldades para tonar eficazes esses mecanismos. A inversão do ônus da prova em casos trabalhistas é um meio de implementar a Recomendação nº 200 e a Convenção nº 111 da OIT, de acordo com a Súmula nº 443 do Tribunal Superior do Trabalho (TST).

PALAVRAS-CHAVE: *Convenção nº 111 da OIT. Ônus da prova. Quitação. Discriminação. Súmula nº 443 do Tribunal Superior do Trabalho.*

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SUMMARY: 1 Introduction. 2 Stance of the ILO on HIV and AIDS and the World of Work. 3 Discrimination against Employees with HIV and its Legal Consequences. 4 The Difficult Question of Burden of Proof: Should/Can the Employee Prove the Dismissal was Discriminatory? 5 Meaning of the Term Presumption and Its Application by the Labor Courts. 6 Final Considerations. References.

1 INTRODUCTION

Brazil's Superior Labor Court (TST) chose an opportune moment to transform the precedent of understanding into an official Precedent (*Súmula*) about the complex problem of discharge of HIV-positive employees. To analyze this issue, it is indispensable to appeal to the extraordinary reservoir of legal documents produced by the International Labor Organization (ILO) over its almost century-long history. Brazilian jurisprudence, now guided by Precedent No. 443 of the TST, ought to move toward a similar orientation, presuming the discharge of HIV-positive employees to be discriminatory. This chapter seeks to explain the course of the debate leading to the publication of this Precedent and to present some reflections about the practical application of this understanding now crystallized by Brazil's highest labor court.

2 POSTURE OF THE ILO ON HIV AND AIDS AND THE WORLD OF WORK

Created in 1919 at the end of the First World War by Part XIII of the Treaty of Versailles, the International Labor Organization (ILO) established itself over the last century as the most important international organism regarding the world of work. Conventions No. 111 and 159 and Recommendation No. 200 are cited to analyze the problems of HIV and AIDS and their solutions. The Practice Manual about HIV and AIDS and its philosophical reflections is also considered.

Two substantive differences between conventions and recommendations can be noted at the outset: conventions constitute a form of international treaty, but not recommendations; conventions can be ratified by member-states, which logically cannot occur

with a recommendation.¹ The value of recommendations is often intrinsic when the norms possess a thoroughly technical character. Recommendations can be useful to national administration, contributing an elaboration of uniform legislation about the matter, while leaving open the possibility of implementing adaptations according to national necessities.² The difference between recommendations and conventions considered most important, however, concerns their relative efficacy. This means that recommendations, contrary to conventions, cannot be objects of international commitments and that states retain the discretion they desire to implement them as they see fit.³

The International Labor Organization in its 99th Meeting of its annual Conference, held in June of 2010, approved Recommendation No. 200 on HIV and AIDS. That recommendation dealt with HIV, the Human Immune-deficiency Virus that attacks the human immunological system, emphasizing that the infection can be prevented by appropriate means. As for the word AIDS, referring to the Acquired Immune Deficiency Syndrome, resulting from advanced stages of infection by HIV, it is characterized by opportunistic infections or cancers related to HIV.⁴ According to Recommendation 200 of the ILO, a person living with HIV means a person infected by HIV. In this document, the term discrimination encompasses any distinction, exclusion, or preference that results in denying or reducing equality of opportunity or treatment in employment or occupation, as referred to in the Convention and Recommendation about Discrimination in Employment and Occupation of 1958. The word stigma is related to the social blemish linked to a person that causes marginalization or presents an obstacle to the full enjoyment of social life by the person infected or affected by HIV.⁵

1 GUNTHER, 2011, p. 52.

2 VALTICOS, 1977, p. 234-236.

3 VALTICOS, 1977, p. 234.

4 Recommendation concerning HIV and AIDS and the World of Work, 2010. (n° 200). International Labour Office, Geneva, 2010, p. 10.

5 Recommendation concerning HIV and AIDS and the World of Work, 2010. (n° 200). Internnational Labour Office, Geneva, 2010, p. 10.

Among the most important principles included in Recommendation 200, most notable are those related to the guarantee of human rights in the workplace, the prohibition of discrimination and stigmatization, prevention and treatment, and protection of privacy. Regarding the first principle, the response to HIV and AIDS must be recognized as a contribution to the guarantee of human rights, fundamental liberties, and gender equality for all, including workers, their families and dependents. In relation to the second, HIV and AIDS are recognized and treated as issues pertaining to the workplace, to be included among the essential elements of a national, regional, and international response to the pandemic, with the full participation of organizations of employees and workers. The third bans discrimination and stigmatization of workers, in particular those who seek employment or apply for jobs, on the basis of real or presumed infection by HIV or because of belonging to regions of the world or segments of the population having greater risk or vulnerability to infection by HIV. As far as the fourth principle, it recognizes access of workers, their families and dependents to beneficial services of prevention, treatment, and support related to HIV and AIDS, with the workplace facilitating that access. Concerning the fifth principle, workers, their families, and dependents ought to enjoy the protection of their privacy, including pertaining to HIV and AIDS, in particular regarding their own situation with HIV; and also workers ought not to be obligated to submit to an HIV test nor have to reveal their HIV status.⁶

An essential aspect of combating prejudice, discrimination and stigma relates to sensitivity measures that ought to occur in the firm. It is recommended that these measures emphasize that HIV is not transmitted by simple physical contact and that “the presence of a person who has HIV ought not be considered a threat in the workplace.”⁷ Without a doubt there must be a focus on practical measures of support for behavior change, among which loom large

6 Recommendation concerning HIV and AIDS and the World of Work, 2010. (n° 200). International Labour Office, Geneva, 2010, p. 13-15.

7 Recommendation concerning HIV and AIDS and the World of Work, 2010. (n° 200). International Labour Office, Geneva, 2010, p. 28.

sensible education, early diagnostics and treatment, and strategies to supplement income in the case of women workers with financial difficulties. Workers ought to receive sensitive, precise, and current education about strategies to reduce risks and, if possible, receive male and female condoms. Programs should seek to facilitate early diagnosis and treatment of sexually transmitted diseases and tuberculosis, as well as provide for sterilized needles and exchange of syringes or sharing information about places where these services are provided. Finally, in the case of women workers with financial difficulties, education ought to include strategies to supplement income, for example, offering information about activities generating income, fiscal benefits, and salary subsidies.⁸

Besides Recommendation No. 200, the ILO prepared a Manual of Practical Recommendations about HIV/AIDS and the work world. This document noted that HIV and AIDS are matters of concern in the workplace, “not only because it affects the work force, but also because the role of the workplace is the key to limiting the dissemination of the effects of the epidemic.”⁹ This combination of best practices guides how to deal with the epidemic of HIV and AIDS in the world of work and in the context of the promotion of decent work. In this way, the Manual provides key principles that are especially appropriate for “combating discrimination based on HIV status,” among which the following stand out: recognition of HIV and AIDS as questions concerning the work place; non-discrimination; gender equality; healthy work environment; social dialogue; detection for purposes of exclusion from employment or work; confidentiality; continuation of the employment relationship; prevention; care and support.¹⁰

Concerning the first principle, HIV and AIDS are questions regarding the workplace not only because it affects the workforce but also because the role of the workplace is the key to limiting the

8 An ILO code of practice on HIV/AIDS and the world of work. International Labour Office. Geneva. First Published 2001, p. 29-32.

9 BEAUDONNET, 2009, p. 173.

10 BEAUDONNET, X., 2009, p. 173-174.

dissemination and the effects of the epidemic. Relative to the second, workers should not suffer discrimination or stigmatization based on their situation real or perceived relative to HIV. As far as the third key principle, more egalitarian gender relations and women's empowerment are vital to avoid the dissemination of infection by HIV and to permit women to deal with HIV and AIDS. The fourth key principle stipulates that the work environment will be healthy and secure, adapting to the state of health and capacities of the workers. The fifth asserts the necessity of having cooperation and trust between the employers, workers, and government in order to assure the successful implementation of policies and programs dealing with HIV and AIDS. Relative to the sixth, testing for HIV and AIDS of job candidates or employees must not be required. Regarding the seventh, access to personal data about the HIV status of workers should be limited by rules of confidentiality consistent with the code of practices of the ILO. With respect to the eighth principle, infection by HIV cannot constitute cause to terminate the work relationship. People suffering from illnesses related to HIV must be able to work while they are capable of performing the appropriate functions. Pertaining to the ninth principle, the social partners are held similarly responsible for promoting efforts of prevention, particularly in relation to changes in attitudes and behaviors by means of information and education. Finally, the tenth key principle emphasizes that solidarity, care, and support ought to serve as guides to responses to HIV and AIDS in the workplace. In this sense, all workers have the right to health services within their grasp and to benefits of mandatory programs of social security and the instruments of social provision.¹¹

Already in 2004 Conventions 111 and 159 of the ILO served as a foundation for an important decision issued by the Second Panel of Brazil's 9th Regional Labor Court that recognized the right to reinstatement of a worker with the HIV virus.¹² The analysis here has entailed a comprehensive understanding of how the ILO

11 BEAUDONNET, 2009, p. 173-174.

12 Brazil's 9th Regional Labor Review, n° 53, july-decembre 2014, p. 327-328.

deals with HIV and AIDS and its proposals for confronting these problems, as was reflected in the judgment of the 9th Regional Court.

3 DISCRIMINATION AGAINST HIV POSITIVE WORKERS: EVOLUTION OF BRAZILIAN LEGAL DOCTRINE AND JURISPRUDENCE

Workers with HIV or AIDS suffer profound discrimination. Brazilian legal doctrine, faced with the absence of a specific law banning discharge based on HIV status, has proved to be divided, above all on the issue of reinstatement in the job. For the Full Professor of the Law School of the University of São Paulo, Sergio Pinto Martins, it is not abusive for the employer to fire an employee sick with AIDS since it would be exercising its constitutional right to discharge the employee as long as severance is paid. In this jurist's understanding, Convention No. 111 of the ILO, ratified by Brazil, forbids acts of discrimination in access to professional training, in hiring and in the conditions of work for reasons of race, color, sex, religion, political opinion, national or social origin (Article 1), but it does not deal specifically with the reinstatement of employees discharged because of illness, especially AIDS.¹³ For the former Professor of the Law School of the University of Minas Gerais, Alice Monteiro de Barros, however, although there is no law recognizing that the HIV-positive workers have provisional job security, based on Convention No. 111 of the ILO and on constitutional principles it is possible to declare null the discharge of HIV-positive workers and order their reinstatement in employment.¹⁴

For the judge of the Brazil's 1st Regional Labor Court, at Rio de Janeiro, Volia Bomfim Cassar, the issue of AIDS by asserting that the gravamen of the problem is discrimination and not the supposed job security; "thus, when the employer discharges an HIV-positive worker, according to the TST, he ought to prove (employer burden) that the procedure was not discriminatory". In that author's opinion,

13 MARTINS, 2012, p. 443.

14 BARROS, 2012, p. 37.

it is possible for “a collective or employer’s internal norm to create this right for employees with AIDS or other illnesses.”¹⁵

The Director of the Department of International Norms of the International Labor Organization (ILO), Cleopatra Doumbia-Henry, asserted that “people ought to use the rights that they have to protect themselves, such as not telling (the employer) that they AIDS.” According to this ILO Director, the objective is “to deal with the stigma, to fight against it. This stigma is in society and even government. It is necessary to change thinking, to change minds.” In her view, who decides to speak about the matter contributes to the change. The problem of discrimination has appeared frequently because the silence is ending: “AIDS is an illness like any other and it ought not be used to discriminate against anyone.”¹⁶

In a dissertation presented to the Masters Post-graduate Program, *strito sensu*, in Business Law and Citizenship of the University Center of Curitiba - Unicuritiba, Fabio Luiz de Queiroz Telles indicates that the situation most confronted by the courts concerning this issue regards “the analysis of nullifying any discharge having a basis in the fact of the employee having HIV and of reinstating the employee.” Another common situation involves prohibiting discharge of HIV positive employees because discharge is judged to hinder the right “to access to social security benefits, to medical treatment, and to retirement, and ordering reintegration of employees to their functions.” Judicial reasoning holds indispensable the principle of human dignity, considering that “AIDS cannot be seen as punishment, divine castigation owing to human iniquity.” Because of this thinking, the labor courts “upon inhibiting prejudice and discrimination, annulling arbitrary discharges, without just cause” provide for the population the understanding that AIDS is not a myth “but a disease like any other and that despite medicine not having found a cure yet, that does not transform sufferers into pariahs nor condemn them immediately to death.” This humane understanding the problems of HIV and AIDS affirms that “people

15 CASSAR, 2009, p. 357.

16 http://www.agenciaaids.com.br/clipping/Aids_01072011.htm, accessed 19 September 2017.

with HIV have full capacity to develop projects and perform their functions like any other worker.” For this reason, exclusion from their functions and work cannot be permitted, “since maintaining themselves working can improve treatment, being able to give meaning to life.” For those who are HIV positive, work represents not only stimulus to continue struggling against the virus, “but also represents the only means of survival and a means of defraying the cost of acquiring drugs necessary for the treatment and daily maintenance of the virus’s burden.”¹⁷

Jurisprudence, despite some ups and downs, is showing less vacillation in relation to this question. In the Brazilian state of Parana, on June 17, 1994, Titular Judge of the 16th District Labor Court of Curitiba, Marlene T. Fuverki Suguimatsu, issued an opinion recognizing as illegal the discharge of an HIV-positive worker. In 1995 the decision was amended by the Parana Regional Labor Court in a ruling on the grounds that it lacked backing in current legislation; that the conditions of provisional job security were uniquely those provided for in statutes; that ruling HIV infection to be justification for job security would constitute discrimination against workers with other equally grave illnesses; and finally, that according to Article 5 of the constitution, no one is obligated to do or not do anything without legal authorization and here there was no law obligating the employer to maintain the employee in the job under the circumstances. In 1997, in an opinion drafted by Minister Valdir Righetto, the 2nd Panel of the Superior Labor Court (TST) overturned the opinion of the regional court, reinstating the district court’s judgment.¹⁸

Although some regional courts still decide, based on the absence of a statute, that HIV-positive workers do not deserve special juridical protection when discharged without motive, the jurisprudence of the Superior Labor Court (TST) has been consolidated. In September, 2012, the TST settled its case law in official Precedent No. 443, with the following rationale:

17 TELLES, 2012, p. 90-91.

18 SUGUIMATSU, 2013, p. 161-165.

DISCRIMINATORY DISCHARGE. PRESUMPTION. WORKERS WITH GRAVE ILLNESSES. STIGMA OR PREJUDICE. RIGHT TO REINSTATEMENT. The discharge of workers with HIV or other grave illness that arouses stigma or prejudice is presumed discriminatory. The act being invalid, the employee has the right to reinstatement in employment.¹⁹

For a long time the TST has affirmed its understanding that “the unmotivated discharge of HIV-positive workers is presumably discriminatory, unless it is proved that the act occurred for a different motive.” The decisions of the TST demonstrate that “even in the absence of evidence of a causal connection” a presumption arises that the unmotivated discharge of HIV-positive workers is a discriminatory act, “permitting, however, evidence to the contrary.”²⁰

The opinion drafted by Minister Lelio Bentes Correa is paradigmatic, demonstrating a significant contribution of the ILO in its understanding. According to this decision, the jurisprudence of the TST is consonant with international norms, especially Convention No. 111 of 1958, about Discrimination in Matters of Employment and Occupation (ratified by Brazil on November 26, 1965, and promulgated through Decree No. 62.150 on January 19, 1968), and Recommendation No. 200, of 2010, about HIV and AIDS and the World of Work.²¹

Equality of opportunities and treatment, to be guaranteed, depend not only on offering legal protections, but also, always, on the existence of effective judicial procedures “that can be invoked by people who believe that they have been the target of discrimination.” Often, the applicable rules of procedure require the plaintiff to prove the existence of discrimination, posing an obstacle to resolving such cases. With the goal of overcoming such 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 legal systems, the rule consists of inquiring

19 BRAZIL, 2012, p. 132-133.

20 BRAZIL. Superior Labor Court (TST). RR-124.400-43.2004.5.02.0074. Judge José Pedro de Camargo Rodrigues de Souza, 25 April 2012.

21 BRAZIL. Superior Labor Court (TST). RR-104900-64.2002.5.04.0022. Judge Lelio Bentes Correa, 2 September 2011.

whether the complainant can make out a prima facie case. If this is not possible, the burden of proof ought to be shifted to the defendant “who then has to demonstrate that the difference in treatment is based in objective considerations not related to any discriminatory motive.”²²

Regarding the instruments of the ILO that deal with the burden of proof, the Committee on Free Organizing as well as the Commission of Investigation consider the inversion of the burden of proof in cases of discrimination “an important measure to assure the effective protection against discrimination in employment and occupation, as the Conventions of the ILO on equality and freedom to organize require.”²³ In this area, there is almost a consensus that, in the absence of specific legislation, the courts ought to take the initiative to “invert the burden of proof in cases of alleged discrimination in employment and occupation.” Consistent with this thinking, the analysis of the matter is linked to an understanding of the issues of HIV and AIDS by the Brazilian judiciary, especially the labor courts. The recent official statement of precedent published by the TST appears to have resolved the serious question of burden of proof, adopting the presumption of discrimination in discharges of HIV-positive workers because of stigma or prejudice. Since the act of discharge is invalid, naturally the employee ought to be reinstated to the job.²⁴

4 THE TORTUOUS QUESTION OF BURDEN OF PROOF: MUST/CAN EMPLOYEES PROVE THAT THEIR DISCHARGE WAS DISCRIMINATORY?

In speaking of discriminatory firing, generally the existence of unjustified discharge is implied, that is, the celebrated concept of “discharge without just cause.” That would render the work contract futile, removing any necessity for justification. It often

22 BEAUDONNET, 2009, p. 161.

23 BEAUDONNET, 2009, p. 162.

24 BEAUDONNET, 2009, p. 163.

happens nonetheless that the apparent discharge without motive conceals a discriminatory discharge. From this perspective, doctrine formulated the concepts of indirect discriminatory discharge (or by disproportional impact) and concealed discrimination. Indirect discrimination does not affect “the burden of proof directly, but rather the structure itself of injury in the law, altering thereby the facts that have to be proved.”²⁵ In this situation, motivation will be excluded from the scope of the investigation of the relevant facts, requiring a focus on “the effects of conduct.” In this way, “neither is it appropriate nor required that the employer prove that it did not consciously and subjectively discriminate,” but rather it has to “demonstrate that the criterion used, despite their effects, are justifiable.” In the case of concealed discrimination, “the prohibited but not admitted motive is really determinant, though disguised under the cover of another reason.” These discriminations are distinguished because while concealed discrimination presupposes motive, this presumption does not occur with indirect discharge.²⁶

Convention No. 111 of the ILO, that deals with discrimination in matters of employment and occupation, is clear with respect to discriminatory acts. For that international treaty, the term discrimination encompasses (Article 1, a):

*Any distinction, exclusion, or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.*²⁷

It is not an overstatement to note that, according to doctrine, “to require the employee to communicate to the employer the fact of having HIV runs counter to the fundamental right to intimacy secured in Article 5, X, of the federal constitution.”²⁸ On the other hand, “to require evidence of discrimination or of intention

25 WANDELLI, 2004, p. 405.

26 WANDELLI, 2004, p. 406.

27 <http://www.ilo.org> (emphasis added; accessed 19 September 2017).

28 WANDELLI, 2004, p. 415.

to discriminate makes inviable the recognition of equality of opportunities and treatment in employment.”²⁹ Bearing in mind the extraordinary difficulty concerning the evidence to be produced, and considering the greater ability of employers to produce it, workers “do not have to produce full proof of the constitutive facts, it being sufficient to present circumstances or indications” by which it would be possible “to presume the existence of alleged discriminatory criteria or motivation.” It is not required, as it appears at first glance, that the employer “produce outlandish evidence negating the discriminatory motivation of the act,” but only “confirmation of actually existing criteria and motivations such as to demonstrate its justification.”³⁰

Studying the indicative evidence and the plurality of causation of discharge, Antonio Baylos Grau and Joaquim Perez Rey theorize two initial possibilities. In the first situation workers bring to the case evidence of discrimination or of injury to a right produced by discharge. In this case, “the mechanism of indicative evidence does not result from application, and the only conclusion possible is the nullity of the discharge.” Once the injury to a fundamental right by an act of the employer is proved, any additional justification is unnecessary, creating an impediment to mentioning other causes, since “there is only one cause and this one is invalid to provoke the definitive breach of the work contract.”³¹ In the second case, however, it cannot be fully established that “discharge caused constitutional injury,” with “only contributory indications” existing. In that situation, “the employer’s counter-proof can take, theoretically, the following forms”: non-existent cause; cause existent but insufficient; cause existent and sufficient. In the first situation, when the firm does not present any evidence justifying the discharge, it ought to result in the nullity of the discharge. Absent proof, it is worth noting, it is insufficient to justify the discharge by granting “definitive validity to the indications.”

29 BARROS, 2000, p. 41.

30 WANDELLI, 2004, p. 413-414.

31 BAYLOS GRAU; PEREZ REY, 2009, p.118.

In the second situation, checking the evidence brought by the worker, the firm “points to credible evidence of fact imputed to the worker”; if the evidence of the facts is insufficient it follows that “the suspicion that the worker managed to create by means of indications remains intact.” In the third and last of these situations, “faced with indications, the firm presents full justification of its decision to fire the worker,” that defeats the allegation, refuting the evidence presented. It should be emphasized that the firm cannot “eliminate the suspicion of injury to a fundamental right.”³² It does not advance things that the employer “proves the existence of alleged facts as the cause of discharge,” whether disciplinary or objective. Proof must always be such “to create in the judge the conviction that the discharge is absolutely outside of conduct related to the exercise of a fundamental right.”³³ It can be supposed that this is not a matter of job security. The issue raised is about nullification by discrimination. If the discharge is ruled null, the restoration of the facts to the status quo ante implies reinstatement.

It does not seem possible, therefore, to rescind the contract of workers with HIV or other grave illnesses and merely consider the discharge normal and levy moral damages. The consequence of a discriminatory action ought to be nullity. When judges decide or make rulings they are always upholding values. To claim that judges ought not to defend one of the parties but merely apply the law is one option, but it presents a static option, trapped mute in the technicalities and letter of the law. This position fails to recognize the normative basis of principles and even of the Conventions of the ILO, even those incorporated into Brazilian law. In that case, the judge upholds values seem in economic activity as more important than the value of persons, under the guise of “not defending one of the parties but rather applying the law.” From our perspective, there is no doubt that to uphold values judges will always “defend” one of the parties. The central question is to know which one.

32 BAYLOS GRAU; PÉREZ REY, 2009, p. 118.

33 BAYLOS GRAU; PÉREZ REY, 2009, p. 114.

For exactly these reasons the burden of proof in these cases possesses another dimension, a dimension more collective and broad rather than merely individual and restricted. When thinking only in the individual dimension (as most frequently done) the conclusion reached is the false idea of proving a “negative fact.” On the contrary, however, if we think about the generic dimension, of race or of sexual orientation, it is worth saying that collectively, the burden does not refer to a negative fact but rather a concrete fact, that is, whether the firm hires women, people of color, and homosexuals. In these situations, in truth, the proof is established through statistical data, very similarly to evidence in cases of quotas for workers with disabilities.

This question is not easily resolved. It rests on the recognition that our society discriminates against women, people of color, and homosexuals. It is not possible to rely on the personal argument that some employers do not discharge people of color or non-heterosexuals, etc. Statistics permit comprehension of the overall magnitude of discrimination. The relevant research of Brazil’s census bureau (IBGE) cannot be simply laid aside. Statistics can be used to analyze the incidence of discrimination. What, for example, is the proportion of unemployed who are women? Persons of color? Homosexuals? There can be no doubt about the power of labor law, up to and including the modification of contracting policies of large firms, beginning with the requirement of proving non-discrimination by showing that they have among their staff women, people of color, and homosexuals. Besides these types of discrimination, illness is without doubt a factor of exclusion, not only with respect to the labor market “but in all social relations, principally when external characteristics differentiate individuals from the usual pattern.”³⁴

Society is often prejudiced, “whether ridding itself of sick people, whether removing them from social interaction, pretending that they do not exist.” This exclusion also occurs within firms. Before having a chance to adapt themselves to their limitations, or

34 SILVA; SALADINI, 2010, p. 247.

to recover from the shock of being afflicted by an illness, ill workers are often “discharged from their functions by discriminatory acts that remove that “blemish” from the functional staff.”³⁵ For this prejudice to be eradicated it is necessary to consider that we live, according to the constitution of Brazil (Articles 1, 3, and 4), in a democratic and pluralistic republic that aims to prioritize human rights and the values of “dignity of the human person,” of “solidarity,” and of the promotion of the welfare of all without any form of discrimination.

5 THE MEANINGS OF PRESUMPTION AND ITS APPLICABILITY BY THE LABOR COURTS

According to the Brazilian civil code, juridical facts can be proved, unless the proof is imposed in special forms through: I - confession; II - documentation; III - testimony; IV - presumption; V - official reports (Article 212). Presumption is “the inference drawn from a known fact to demonstrate another unknown [fact].” It is the consequence “that the law or judge draws, having as a point of departure the known fact in order to arrive at one unknown.”³⁶ The unique paragraph of Article 8 of the CLT provides that “the common law shall be a subsidiary of labor and employment law in that which is not incompatible with its principles.” Common law is “both commercial and civil law.” The norms of these branches of law, therefore, are “sources to fill gaps in the law of labor and employment.” For subsidiary application two requirements are necessary: that there is no incompatibility with labor and employment law and that there is a normative lacuna in this law.”³⁷ Doctrine, nevertheless, appears to incline to considering that “presumption is not a means of proof, nor a source of that.” Not being a means of proof, rules regulating the application of presumptions will not be accepted “since being a mechanism of the intelligence of the magistrate, the rule of law that authorizes or prohibits the judge to

35 SILVA; SALADINI, 2010, p. 247.

36 DINIZ, 2008, p. 188 e 190.

37 MARTINS, 2004, p. 58 e 60.

think in terms of presumptions becomes superfluous.”³⁸ We can say, however, that if normative language is to be saved, “the legislature expressly authorized circumstantial evidence.” In a broad sense, it can be affirmed “that circumstance is a means of proof since from that is deduced judicial presumption.”³⁹

Presumptions are classified as: a) simple, common, *de hominem* or *hominis*, and b) legal, which can be absolute, peremptory or *juris et de jure*, or conditional, relative, disputable, or *juris tantum*. Simple presumptions result from the reasoning of judges who establish them. It is worth noting that “they form in the consciousness of the magistrate: the circumstance being known, the reasoning develops and establishes the presumption.” By its very nature simple presumptions “matter because of the power of conviction that they plant in the judge.” Legal presumptions, however, result from the reasoning of the legislature that enshrine them in legal texts. These presumptions establish as truth the presumed facts, “making evidence of them irrelevant.” Absolute legal presumptions, or *juris et de jure*, cannot be defeated by contrary evidence, that is, “the conclusion extracted by law is taken to be indisputable truth.” Relative legal presumptions, or *juris tantum*, are those “that the law establishes as truth barring contrary evidence.” That means that “the fact is held to have occurred until the contrary is proved.”⁴⁰

Presumption actually is much closer “to judicial reasoning than to proof,” understood in its traditional sense as “the means to demonstrate the truth of a fact.” Although presumption rests on circumstance and circumstantial proof, “it does not exist without judicial reasoning.” In this way, judicial reasoning remains far from being “able to constitute the means of proof.” When judges reason, however, beginning with circumstantial evidence, “to arrive at a conclusion that is a presumption, it is also necessary to distinguish presumptive reasoning and a presumption.” Thus, if a presumption is the result of reasoning and “not a mechanism that admits it,” and

38 DIDIER JÚNIOR; BRAGA; OLIVEIRA, 2009, v. 2, p. 57.

39 DIDIER JÚNIOR; BRAGA; OLIVEIRA, 2009, p. 57.

40 DIDIER JÚNIOR; BRAGA; OLIVEIRA, 2009, p. 59-62.

this includes judicial reasoning, “that mechanism can only be the source of the presumption and not the presumption in itself.” The concept of presumption, in this way, results “from the reasoning formed beginning with circumstance and judicial proof.” It cannot be confused, nonetheless, with “the judgment with respect to the merits or lack thereof of the request.” Presumption is an element for the formation of the judgment, besides which “other presumptions or even direct proof of facts” can exist.⁴¹

The basic elements of presumption are facts, “whether known or unknown, and the causal nexus established between them.” Generally, judges seek knowledge of the facts themselves as alleged by the parties in the suit. While one of the ways is direct knowledge of the event itself another form consists in arriving at a fact by means of another known situation, typically through mediated knowledge.⁴²

Consumer law presents a similar situation. It is noteworthy that when proof is impossible or very difficult for the consumer, but possible or easier for the producer or supplier, “the inversion of the burden of proof is intended to give the defense the opportunity to produce proof that, according to the rule of Article 333 of the Code of Civil Procedure (Codigo de Procedimento Civil, CPC) is incumbent on the plaintiff.” It is not a matter of reversing the burden of proof to legitimate in the ruling “the incompleteness or impossibility of proof, but of transferring from the plaintiff to the defendant the burden of producing it - which ought to be done in the preliminary hearing.” It must be stressed, however, that only the difficulty of the production of proof “characterized by the peculiar position of the consumer (or the dependent party) can provide a basis for the inversion of the burden of proof in the preliminary hearing.”⁴³

Besides these subjective dimensions, the principle of equality also possesses an objective dimension, that is, it serves

41 MARINONI; ARENHART, 2009, p. 102-103.

42 PAULA, 2010, p. 68.

43 MARINONI; ARENHART, 2009, p. 196-197.

as a juridical principle informing all the juridical-constitutional order.” Juxtaposed with this principle, the problem of knowing becomes “relevance among the particulars.” Related to this question is another in the “problematic spectrum,” that of the “efficacy of fundamental rights in the private order.” Associated with the principle of social non-discrimination, the objective dimension of the principle of equality gained in recent years (the end of the twentieth and beginning of the twenty-first centuries) new content. This sense situates the problem of knowing if “in the name of combating transmissible (e.g., AIDS) or contagious (e.g., tuberculosis, hepatitis) diseases testing can be made compulsory or not.” In case the response is affirmative, the question arises of determining the constitutionally appropriate criteria: “the criterion of universality or the criterion of selectivity.” According to J. J. Gomes Canotilho, “only the criterion of universality guarantees that a simple test is not transformed into a first stage of discrimination and violation of the principle of equality.” This jurist considers that the test for AIDS, in practical terms, can and ought to be given, by way of example, “to all who enter a hospital, recruited for the Armed Forces, or attend educational institutions.” Naturally, in this situation, “the identification of those affected ought to be surrounded by constitutional guarantees regarding the confidentiality of privacy and the treatment of personal data.”⁴⁴

Discussing the issue of moral harassment (a theme very close to that of discrimination against people with HIV), Alice Monteiro de Barros emphasizes the difficulty of proof. As proof of some types of conduct constituting moral harassment is very difficult, it falls “to the victim to present indications that lead to a reasonable suspicion, appearance, or presumption of the issue in question.” For its part, the defendant “assumes the burden of demonstrating that its conduct was reasonable, that is, not injurious to any fundamental right.” According to Barros, this guidance orients the recent French legislation on this issue (Article 122-52 of the Worker Code). Experience shows, she notes, that if an appropriate

44 CANOTILHO, 1999, p. 405.

allocation of the burden of proof does not exist, “the norms with respect to this issue will not become effective and will remain in the realm of a mere declaration of good intentions.”⁴⁵ Bearing in mind the difficulty for the harassed party to prove the discriminatory treatment suffered, which can undermine the effectiveness of the principle of non-discrimination, the doctrine of shifting this burden (the principle of ability to prove) emerges in the codification of labor and employment law in South America.⁴⁶

Foreign law confirms the meaning of the term presumption. The Italian civil code considers as presumptions “the consequences that the law or the judge deduces from a known fact, to resolve an unknown fact” (Article 2.788). The Portuguese civil code recognizes as presumptions “the inferences that the law or the judge draws from a known fact to confirm an unknown fact” (Article 349). For Sergio Pinto Martins, presumption is not a means of proof but rather a species of logical reasoning. In a presumption, one moves “from a known fact to another unknown through inductive reasoning.” An identical situation presents itself in Portuguese law when it is understood that “the burden of proof falls to the party that is found in the better situation to produce it.” This approach constitutes “a stimulus for evidence to be produced by the party that best can aid in the discovery of truth.”⁴⁷

Making explicit the significance of presumptions contained in the official Precedents (sumulas) of the TST, Manoel Antonio Teixeira Filho asserts that they can be classified as “legal or simple.” When the Precedent, in theory, is limited to repeating the legal command, varying only literally, it is indisputable “that the express presumption in it ought to be classified as legal,” since in that case “the Precedent constitutes merely a transparent membrane supported by the legal text.” This author nonetheless considers that the labor and employment Precedents, dealing with substantive as well as procedural law, “derive from interpretations of legal norms

45 BARROS, 2012, p. 743.

46 SANTONI, 1996, p. 184.

47 MARTINS, 2012, p. 359.

corresponding to the material they treat.” For that reason, “they reflect simple presumptions,” since they do not possess a legal nature, but rather “result from uniform jurisprudence.” The Precedents of the TST have therefore “an aspect of common presumptions,” since they arise from “the reasoning of the judges,” who, beginning with known facts, “induce the existence or veracity of other facts, unknown or in doubt.” The judge can “refuse to apply the Precedent in specific concrete cases” when it conflicts with “the presumption that it leads to.” It can be seen that this will not be permitted “if it is a matter of a presumption established by law.” When the judge decides in consonance “with the orientation contained in Precedence, the presumption that results does not cease to be that of the judge, that is, simple.” As known, not having a Precedent of the TST effectively constraining the discretion of the judge “results unequivocally in the decision being the product of his rational liberty.” Teixeira Filho indicates some Precedents of the TST that deal with presumptions, such as numbers 12, 16, 20, 26, and 43.⁴⁸

There was a strong jurisprudential current, before the publication of Precedents by the TST, that leaned toward presuming it “discriminatory and arbitrary to discharge workers with HIV, even if asymptomatic.”⁴⁹ The crystallization of the understanding of the TST about the issue will serve as an important parameter to balance the employee-firm relationship. Equally, it will orient the labor and employment judges in the permanent struggle against discriminatory acts, especially when they result from workers’ illnesses.

6 FINAL CONSIDERATIONS

Along with the epidemic of HIV and AIDS came an enormous burden of prejudice and discrimination related to the characteristics of persons who were most contaminated by the virus in the beginning of the decade of the 1980s: men who had sex with men, prostitutes, and users of injected drugs. Prejudice and discrimination arrived in the workplace, causing many HIV-positive workers to be fired

48 TEIXEIRA FILHO, 2003, p. 431.

49 BARROS, 2012, p. 951.

for having the virus or for developing the disease. The peculiarity of the Brazilian juridical system in considering discharge without licit just cause created difficulties in verifying when, effectively, the discharge was discriminatory. The absence of a specific law prohibiting discriminatory discharge of HIV-positive workers at first created hermeneutical difficulties reflected in doctrine. The legislative vacuum was filled by international treaties, above all by Convention No. 111 of the ILO, and by the capacity of Brazilian jurisprudence to show itself receptive to a universal right to work. Recommendation No. 200 of the ILO plays a relevant role in this hermeneutic trajectory since it shaped important principles that underpin the decisions of the Brazilian labor and employment courts. Precedent No. 443 of the TST enshrines, with rare felicity, the evolution of jurisprudence, but principally of labor and employment law itself, since it locates human beings as central to its major focus.

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