



## Adriana Ricardo da Rosa v. Sociedade de Onibus Porto Alegre

TST-RR-104900-64.2002.5.04.0022

**Country:** Brazil

**Region:** Americas

**Year:** 2011

**Court:** Tribunal Superior do Trabalho, Primeira Turma (Superior Labor Court, 1st Section)

**Health Topics:** Health care and health services, HIV/AIDS

**Human Rights:** Right to health, Right to life, Right to work

### Facts

Plaintiff carrying the HIV virus was wrongfully terminated from her employment at the Sociedade de Onibus Porto Alegre and alleged discriminatory motives, because the employer was aware that the employee carried the HIV virus at the time of termination. The employer asserts that it first became aware of the employee's condition four years prior to her termination and that the employee benefitted from insurance and pension benefits on multiple occasions throughout the employment term. Thus, discrimination was not the motivating factor for the termination.

The first instance labor court ruled in favor of the plaintiff and the employer brought a counterclaim to absolve it from the judgment, which would nullify the termination and the employee's reinstatement to the workplace, as well as the payment of salaries and additional fees due. The appeal was granted and the judgment was reversed. The plaintiff then appealed the decision to the Superior Labor Court claiming divergence in jurisprudence and a violation of the Federal Constitution.

### Decision and Reasoning

The Court found the appeal admissible due to the divergence in jurisprudence in relation to the themes at issue including, employee carrying the HIV virus, wrongful termination, and presumed discrimination. It acknowledged the request to review the decision.

The Court held that the termination was wrongful. Based on international norms and precedents, it determined that in wrongful termination cases, discrimination is presumed. Furthermore, the burden of proof must be attributed to the employer, who must provide sufficient evidence to show that the termination was carried out for other legal motives. The inverted burden of proof is consistent with international human rights principles and public policy because it acknowledges that frequently, employers have access to the relevant evidentiary documents, which are crucial to prove discrimination claims. As the employer had not provided sufficient evidence to show that the termination was carried out for other lawful motives, the Court ruled in favor of the plaintiff.

### Decision Excerpts

“Este Tribunal Superior tem firmado entendimento no sentido de que, não obstante a ausência de legislação que assegure a garantia provisória no emprego do empregado portador do vírus HIV, inequívoco o seu direito à reintegração quando demitido sem justa causa, em face das garantias constitucionais relativas ao direito à vida, ao trabalho e à dignidade da pessoa humana, insculpidos nos artigos 1º, III e IV, 3º, IV, 5º, cabeçça e XLI, 170 e 193 da Constituição da República, além da previsão contida no artigo 7º, I, da Lei Magna, que veda a despedida arbitrária, com conteúdo discriminatório.” (Pages 4-5)

“This appellate Court understands that, in spite of lacking legislation that guarantees employment pension and insurance to an employee carrying the HIV virus, the right to reinstatement when a termination was without cause is undeniable, in light of the constitutional guarantees to life, work and human dignity contained in articles 1, III and IV, 3, IV, 5, header and XLI, 170 and 193 of the Constitution of the Republic, in addition to the provisions contained in articles 7, I, of the Magna Law, that prohibits an arbitrary termination, with discriminatory content.” (Page 5)

â€œNesse contexto, a jurisprudÃancia desta Corte superior firmou-se no sentido de que se presume discriminatÃria a dispensa do empregado portador do vÃrus HIV. Desse modo, recai sobre o empregador o Ãnus de comprovar que nÃo tinha ciÃncia da condiÃÃo do empregado ou que o ato de dispensa tinha outra motivaÃÃo - IÃ-cita.â€• (Page 5)

â€œIn this context, this superior Courtâ€™s jurisprudence holds that the wrongful termination of an employee carrying the HIV virus presumes discriminatory behavior. For this reason, the burden of proof lies with the employer to show that it did not have knowledge of the employeeâ€™s condition or that the termination had other legal justifications.â€• (Page 5)

â€œÃinequÃ-voco que a despedida imotivada do portador do vÃrus HIV culmina por comprometer seriamente o acesso do empregado ao tratamento a que tem direito, com a suspensÃo do contrato de emprego e fruiÃÃo do benefÃcio previdenciÃrio previsto â€!.â€• (Page 6)

â€œIt is undeniable that the wrongful termination of a person carrying the HIV virus is inappropriate because it seriously compromises such employeeâ€™s access to treatment, to which she has a right to access due to the suspension of the work contract, and the enjoyment of insurance benefits â€!.â€• (Page 7)

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