J U D G M E N T

(First Section)

GMLBC/rcr/ad/iz

EMPLOYEE CARRYING THE HIV VIRUS. WRONGFUL TERMINATION. DISCRIMINATORY BEHAVIOR PRESUMED. REINSTATEMENT. 1. This Court's jurisprudence affirms that terminating an employee who carries the HIV virus is presumed to be discriminatory behavior. For this reason, the burden of proof belongs to the employer who must prove that he was not aware of the employee's condition or that the termination was carried out for another lawful reason. 2. The reasoning is in accordance with international norms, specifically Convention No. 111 of 1958, about Workplace and Occupational Discrimination (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 Workplace. 3. In this context, it is improper to switch the burden of proof carried out by the Regional Court by attributing to the employee the burden of providing evidence of discrimination in the employer`s wrongful termination. 4. *Recurso de Revista* process acknowledged and granted.

The case documents relating to *Recurso de Revista* No. **TST-RR-104900-64.2002.5.04.0022,** in which **ADRIANA RICARDO DA ROSA** is the appellant and **SOCIEDADE DE ÔNIBUS PORTO ALEGRENSE LTDA. – SOPAL** is the appellee, were reviewed, summarized and discussed.

The honorable Regional Labor Court of the 4th Region, by way of the ruling noted on pp. 366-371, partly granted the *Recurso Ordinario* brought by the defendant to [1] absolve it from the judgment which would have nullified the termination, with the consequence of reinstating the worker to the workplace, and the payment of salaries due during the leave period until her effective reinstatement, including Christmastime holidays during such period and applicable FGTS fees[1]; [2] to establish that the hours exceeding 8:48 hours daily or 44 hours per week, should be considered as extras and; [3] to reduce the percentage attributed to assistance fees to 15% of the damages amount.

In disagreement, the plaintiff brings the current *Recurso de Revista* claim, by way of the reasoning shown on pp. 373-385. Seeking a reversal of the judgment relating to the theme –employee carrying the HIV virus – wrongful termination – presumed discrimination–, claiming instead a violation of legal doctrine and the Constitution of the Republic, as well as divergence from jurisprudence.

[1] Translator's Note: FGTS is an acronym for the Fundo de Garantia do Tempo de Servico (Fund that Guaranties Time and Service), a federal unemployment and retirement savings program in Brazil that requires companies and employees to contribute a certain amount of money proportionate to salary at each pay period.

The *Recurso de Revista* claim was admitted by way of the decision granted on pp. 387-380.

Counterarguments were presented on pp. 395-400.

The referral of the case to the honorable Attorney General of Labor is dismissed, as there is little public interest to protect.

This is the summary.

O P I N I O N

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I - ACKNOWLEDGEMENT

1 – EXTRINSIC PRE-CONSIDERATIONS REGARDING AMISSIBILITY OF APPEAL.

The claim is timely (Judgment published on Thursday, April 14, 2005, as stated in the published certificate on p. 372, and the appeal's reasoning registered on April 22, 2005 on p. 373). The costs were attributed to the defendant on p. 322. The plaintiff is regularly represented in the documents, according to the claim on p. 10.

2 – INTRINSIC PRE-CONSIDERATIONS REGARING ADMISSIBLITY OF APPEAL.

EMPLOYEE CARRYING HIV VIRUS. WRONGFUL TERMINATION. PRESUMED DISCRIMINATORY BEHAVIOR.

The Regional Court of the 4th Region partly granted the Labor Claim counterclaimed by the defendant to absolve her from the judgment which would have nullified the termination, with the consequent reinstatement of the worker to the workplace, and the payment of salaries due during the leave period, until her effective reinstatement, including Christmastime holidays during such period and applicable FGTS fees. The following commandments were provided on pp. 367-369:

1. NULLIFY THE TERMINATION AND REINSTATE THE TERMINATED EMPLOYEE TO THE WORKPLACE. EMPLOYEE CARRYING AIDS VIRUS. PAYMENT OF SALARIES DUE DURING THE PERIOD OF TERMINATION UNTIL REINSTATEMENT INCLUDING ADDITIONAL ADD-ONS.

The defendant requests a review of the judgment that to my understanding nullifies the termination, reintegrates the plaintiff to the workplace, and orders the payment of salaries due, holidays, 13th salary bonus and FGTS, during the period starting at termination and until her effective reinstatement. It is sure that the first instance court Judge, made his decision in light of the fact that the appellant had knowledge that the appellee carried the HIV virus, yet omitted that such knowledge occurred around 1998, 4 years prior to the termination. She affirms that she cannot accept that she discriminated against the appellee, a carrier of the HIV virus, and that to the contrary, after becoming aware of the employee's situation, she kept her employed for 4

years, during which time the employee took various leaves of absence to take advantage of insurance benefits. She sustains that no evidence of discrimination has been presented by the appellee to show a nexus of causation between the termination and the appellee's status as a carrier of the HIV virus. To the contrary, the claim asserts that she obtained such knowledge in the beginning of 1998, continued the work relationship and that the termination occurred like any other, within the limits of Brazilian law, without just cause. She points out that our current legal structure does not guarantee employment for those carrying the HIV virus, or even the referenced disease, making it improper to impose a reinstatement, subject to a violation of the principles contained in item II of article 5 of the Federal Constitution. She notes that Law No. 7.670/88 outlines the rights guaranteed to employees which have Acquired Immune Deficiency Syndrome, and that such law is preventative in nature and that such law only applies when, by the act of the employer, the employee's ample access to the National Health Security System is frustrated, leading to a what could be considered a wrongful termination.

The correct reasoning lies with the defendant.

The first instance court Judge, expressed his understanding that the wrongful termination of an employee carrying the AIDS virus is always presumed to be discriminatory, especially when the employer admits to having knowledge that the employee carried the disease. The Judge reasoned that such termination is not admissible under our jurisprudence because it violates the dispositions and principles included in article 3, paragraph IV, article 5 and article 7, paragraph XXXI, all in Letter of 1998. He ruled in favor of the original complaint, recognizing that the plaintiff was entitled to guaranteed immediate employment at the workplace by way of the dispositions in articles 3 and 7 of the Federal Constitution, calling for her immediate reinstatement to the workplace, as well as payments of salaries due during the leave period until the effective integration, including holidays and an additional Christmastime bonus.

Law No. 7.670/88 discusses workers' rights for those carrying the Acquired Immune Deficiency Syndrome (AIDS), as it relates to pension benefits. Our understanding is that only when the right to ample access to the National System of Social Security or to medical and hospital assistance is frustrated by an act of the employer, is it possible to assert a wrongful termination claim. The referenced law, in article 1, paragraph 1(e), -*guarantees medical assistance and pension benefits, independent of the period of need to the person insured and enrollment in Social Security, once it* (the disease) *manifests itself, as well as pension benefits to his heirs*-.

In accordance with the court documents, the plaintiff began working with the defendant on January 9, 1996 and it is a fact that when she was terminated, on July 24, 2002, she had been working normally.

In reference to the fact that the company had knowledge that the plaintiff was carrying the disease, the employer asserts that she knew that the plaintiff had been carrying the HIV virus since 1998, and that the termination occurred only on July 24, 2002, about 4 years later, and after the employee had taken advantage of insurance benefits in various occasions. The documents gathered by the defense (pp. 136 and pp. 141-150) prove that the plaintiff was absent from work, in various occasions, enjoying insurance benefits, which discredits the allegation that the termination was carried out in a discriminatory manner.

On the other hand it is appropriate to note that when the disease manifests, the plaintiff will have her salary guaranteed by the social security institution (INSS), without charges to the employer, and without a right to job security, as is the case with the termination of a pregnant woman or a leader of CIPA, for example, and such workers who are about to enter into company-sponsored retirement.

Therefore, the employer does not show an intention to impede the plaintiff from enjoying insurance benefits that, in any case, are guaranteed under the terms cited in Law No. 7.670/88. The alleged discrimination was also not shown in the court documents, thus is it improper to command the ex-employee's reinstatement.

Furthermore, the fact that the plaintiff carried the HIV virus does not **per se** provide for job security, since the national jurisprudence does not include a rule providing or guaranteeing job security for a person carrying the virus.

As a result of the aforementioned principles, there is no reason to nullify the termination and reinstate the employee to the workplace because reinstating a person carrying the AIDS virus is appropriate when the termination was done maliciously by the employer and when the acquisition of insurance benefits or even the medical assistance used or provided by related in-network entities is frustrated. In this case, there is no evidence in the court documents that such a situation occurred.

The defendant's counterclaim is granted, in order to absolve her of the judgment that invalidated the termination, with the subsequent reinstatement of the plaintiff to the workplace and the payment of wages due during the period of absence, until the effective reinstatement of the plaintiff, and holidays and a Christmastime bonus and FGTS applicable during such pay periods.

The plaintiff argues, in her brief, that the absence of a legal norm that provides job security to a person carrying the HIV virus does not deny that person the right to claim reinstatement; that, by alleging that the termination occurred for operational and administrative reasons, the defendant brought upon herself the burden of providing evidence, which she did not provide, and thus this is the reason why discrimination is presumed in wrongful termination claims; and that because a terminated employee carrying the HIV virus deals with fundamental rights, including the right to life, to health, to work and human dignity, it is reason enough to presume discriminatory behavior, as noted in articles 1, III and IV, 3, I and IV, 5, header, 6, 7, XXXI, and 196 of the Constitution of the Republic and 1 of Law No. 9.029/95. Precedence was reviewed to determine the ruling.

The plaintiff shows divergence in the jurisprudence in the ruling cited on p. 378, originating from the Regional Court of the 15th Region, because it recognizes the rule that –the right to life, to human dignity and to work, carry with them the assumption that any termination without cause of a worker carrying the HIV virus is discriminatory in nature and against the constitutional principles contained in articles 1, III and IV, 3, IV, 5, header, XLI, 170, 193; the worker is entitled to job security while capable of working, thus an arbitrary termination is prohibited *(article 7, paragraph I, of the Federal Constitution)(Interpretation of articles 1 and 4, paragraph I, of Law No. 9.029/95) (line CLT, article 8 c/c CPC, article 126 c/c LICC, article 4);* the risks resulting from the economic activity belong to the employer (CLT, article 2), and the employee's eventual decrease in productivity is irrelevant, since the recession is a problem affecting the entire country-.

The *Recurso de Revista* is **admissible**, due to divergence in jurisprudence.

II - MERITS

EMPLOYEE CARRYING THE HIV VIRUS. WRONGFUL TERMINATION. DISCRIMINATORY BEHAVIOR PRESUMED. REINSTATEMENT.

The question at issue is whether the termination of an employee carrying the HIV virus, where the employer was aware of such fact, constitutes presumed discriminatory behavior.

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.

In this context, this superior Court'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 employee's condition or that the termination had other legal justifications.

In this opinion, the following precedents must be cited:

***RECURSO DE REVISTA*. JOB SECURITY. PERSON CARRYING HIV VIRUS.** This Court's jurisprudence ruled that an employee carrying the HIV virus, in light of the constitutional rights prohibiting discriminatory practices and guaranteeing human dignity, has the right to reinstatement, in spite of the inexistence of legislation that guarantees job security or other employment guarantees provided by the employer, and that such wrongful termination is presumed to be discriminatory. *Recurso de Revista* is hereby granted. (TST-RR 112900-36.2005.5.02.0432, Hon. Min. Kátia Magalhães Arruda, Fifth Section, DEJT on May 6, 2011).

(...) EMPLOYEE CARRYING THE HIV VIRUS. WRONGFUL TERMINATION. RELATIVE PRESUMPTION OF DISCRIMINATION. Federal law prohibits discrimination, where the decision to terminate is of questionable legality, and thus calls for its nullification. The right to terminate a work contract has its limits, in the case of a discriminatory act, due to a violation of public policy (article 170, III e IV of the Federal Constitution) personal human dignity and social employment values. This superior Court's jurisprudence has evolved towards presuming discrimination in a termination where the employer has knowledge that the employee carried the HIV virus, with the consequential reversal of the burden of proof (*praesumptio juris tantum*). (...) (TST-RR-721340-83.2006.5.12.0035, Hon. Min. Rosa Maria Weber, Third Section, DEJT on October 22, 2010).

(...) DISCRIMINATORY TERMINATION. EMPLOYEE CARRYING THE HIV VIRUS. REINSTATEMENT. This Court has ruled that the wrongful termination of a person carrying the HIV virus, when the employer was aware of the disease, presumes discrimination.

Precedents. Claim acknowledged and not granted. (TST-AIRR195740-92.2008.5.02.0434, Hon. Min. Alberto Luiz Bresciani de Fontan Pereira, Third Section, DEJT September 3, 2010).

CLAIMANT *RECURSO DE REVISTA*. REINSTATEMENT. EMPLOYEE CARRYING THE AIDS VIRUS. TERMINATION PRESUMED DISCRIMINATORY. This Labor Appeals Court's jurisprudence, in discussing an employee carrying the HIV virus, understands that the employee's termination is presumed discriminatory and that the burden of proof lies with the Claimant to show that the act had another root cause. (...) **(**TST-RR - 9951200-06.2006.5.09.0025, Hon. Min. Maria de Assis Calsing, Fourth Section DEJT on Nmarch 19, 2010).

APPEAL FOR REVIEW IN *RECURSO DE REVISTA*. EMPLOYEE CARRYING HIV VIRUS. TERMINATION CAUSED BY DISCRIMINATION. RELATIVE PRESUMPTION. REINSTATEMENT. Federal law prohibits discrimination, where the decision to terminate is of questionable legality, and thus calls for its nullification. The right to terminate a work contract has its limits, in the case of a discriminatory act, due to a violation of public policy (article 170, III e IV of the Federal Constitution) personal human dignity and social employment values. This superior Court's jurisprudence has evolved towards presuming discrimination in a termination where the employer has knowledge that the employee carried the HIV virus, and did not show that the act was attributed to another cause. Appeal for review not granted. (TST-E-ED-RR 76089/2003-900-02-00; Ac. SBDI-1; Hon. Min. Rosa Maria Weber Candiota da Rosa, DJU on November 30, 2007).

REINSTATEMENT. EMPLOYEE CARRYING THE HIV VIRUS. DISCRIMINATORY TERMINATION. 1. Characterizes, by technicality, a Company's act is discriminatory when it terminates an employee carrying the HIV virus without just cause and with knowledge, at the time, of such employee's current health status. 2. Repudiating discriminatory acts, an objective principle of the Federal Republic of Brazil (article 3, paragraph IV), and the right to human dignity, a basic principle of the Democratic State Law (article 1, paragraph III), supersede the inexistence of a legal instrument that guarantees job security to a worker that carries the HIV virus. 3. Conflicts with articles 1, paragraph of III, 5, *header* and paragraph II, and 7, paragraph I, of the Federal Constitution which were not recognized in the opinion issued by the Superior Court of Labor that decided for the reinstatement of the Claimant to the workplace. 4. Appeal not granted. (TST-ERR-439.041/1998, Hon. Min. João Oreste Dalazen, SBDI-I, DJU on May 23, 2003).

It is important to note that this legal analysis affirms the international norm postulated both in Recommendation No. 200 of the International Labour Organization, about HIV and AIDS and the Workplace, adopted in 2010, and Convention No. 111 of the same international agency, ratified by Brazil on November 26, 1965 and promulgated through Decree No. 62.150 on January 19, 1968.

Recommendation No. 200 prohibits the discrimination of workers carrying the HIV virus or diagnosed with Acquired Immune Deficiency Syndrome - AIDS and establishes, among other obligations of the ILO Member States, that workers carrying the HIV virus, have the right to not be discriminated against or stigmatized due to their status - real or alleged - (article 3, *c*). Even if the condition serves as a base for discriminatory actions that impede the recruitment or continuation of the work (article 10) or result in the termination of the work relationship (article 11). ILO recommends, further, that the

Member States promote and maintain the employment and hiring of those that live with the HIV virus (article 22), as well as guarantee access and enjoyment, for all employees and their families, to prevention, treatment, attention and support services in relation to HIV and AIDS, salient that the workplace (read as the employer) **-should aim to facilitate access to such services-** (article 3, *e*).

It is undeniable that the wrongful termination of a person carrying the HIV virus is inappropriate because it seriously compromises such employee'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 described in articles 24 and in accordance with Law No. 3.807 dated August 26, 1960 (Lei Orgânica da Previdência Social).

Recommendation No. 200 of the ILO further requires Member States, to consider the possibility of offering equal protection as established in the Convention regarding workplace and occupational discrimination (Convention No. 111 of 1958), with the aim to stop all discrimination, real or alleged, based on the condition of persons carrying HIV (article 9).

Convention No. 111 (incorporated in 1965 and recognized as legal doctrine), establishes the obligation for all ratified Member States to **-formulate and apply** a national policy that has as a goal to promote, through adequate methods to local circumstances and uses, equal access to treatment in relation to employment and occupation, with the objective of eliminating all discrimination of this kind- (article 2). Also, it requires them among other measures, -to revoke all legal instruments and modify all administrative instruments or practices that are incompatible with such referenced policy- (article 3, *c).*

The Committee of Experts on the Application of ILO Conventions and Recommendations, the agency responsible for monitoring the implementing international labor norms (together with the ILO Conference Committee of Norms (Comissão de Normas da Conferência da ILO and the Union Liberty Committee (Comitê de Liberdade Sindical)), calls attention to the fact that certain administrative practices and procedural rules may create serious hurdles to the proper implementation of the National Policy, and also, the fight against discrimination. Among these hurdles, the Committee of Experts notes, in its General Report on Convention No. 111, of 1998, the question relating to the burden of proof, stressing the necessity to treat human rights violation claims with flexibility in relation to the production of evidence. The Commission of Experts asserts: (items in parenthesis were added):

One of the more important procedural problems that arises when a person alleges workplace or occupational discrimination refers to the frequency in which the burden of proof to show evidence of a discriminatory motive over the alleged act is attributed to the plaintiff. This may constitute an insurmountable obstacle to the reparation of damages suffered. At the same time, the evidential elements may be collected without much difficulty (when it relates, for example, to published job openings of a discriminatory nature, where such discrimination is manifested).

More frequently, the discrimination is an action or an activity that is more subtle and less evident and thus difficult to show especially in indirect or systematic discrimination, and even more so with regards to information and archives that may be used to serve as evidence and that are largely in the hands of the person charged with such discrimination. As a result, in some countries the legislation or the jurisprudence sometimes inverts the burden of proof, or at least, allows a certain flexibility to the plaintiff's burden of proof. The Canadian Government has signaled that the courts and other competent authorities should demonstrate flexibility with respect to admissibility of evidence. It has indicated that, with regards to human rights, when the initial evidence is more favorable to the plaintiff, meaning that the defendant is unable to pose a satisfactory response to a claim, it may be reasonably deduced that discrimination occurred. In certain countries the person that alleges discrimination should first of all show the unequal treatment or unequal opportunity coincided with inequality of race, sex, religion, political beliefs, union activity, etc. If such evidence is shown, the burden of proof shall be applied to the employer, who must demonstrate that a legitimate non-discriminatory reason existed. When workers who have exercised their right to denounce unequal treatment are terminated or have modified work conditions, certain countries' legislation provide that the employer must administer evidence that the denouncement was not the only or the principal motive for the modification in such employee's work conditions. 1

In Conclusion, the Committee of Experts states:

> The requirement that the person charged with discrimination bear the burden of proving that the motivating cause of the action does not relate to the claim constitutes a supplementary protection to the discriminated person, providing at the same time a dissuasive effect.[2]

In discussing, specifically, the efficacy of such protection against discrimination and the possibility of wrongfully terminated work contracts, the Committee of Experts noted, in the General Study of 1996:

> Concerning the efficacy of sanctions that may be adopted by quasi-judicial organs, such sanctions should benefit the person that has fallen victim to discrimination by providing adequate compensation and, at the same time, a dissuasive effect on the persons that may feel tempted to discriminate. It must also be noted that, by turning to this type of procedure, a worker faces material as well as moral risks. For example, legislation that contains protective clauses but in practice permits the employer to terminate the employment contract without paying any indemnity to the employee does not constitute adequate protection. With regards to the efficacy of the discrimination's recourse method, it is also important that the suit is resolved quickly to avoid that the legal process prolongs itself unnecessarily, which would negatively affect the result of the judgment.[3]

As a result, the appellate decision dissented from the common interpretation of this superior Court's jurisprudence and from international doctrine and norms. The Regional Court, relying on the understanding that the employee bears the burden to prove that the employer acted in a discriminatory manner, improperly applied the burden of proof. Consequently, it rejected the claimant's request for reinstatement to the workplace, in spite of the presumption that favors her and the appellate judgment did not contain an opinion regarding the inverted burden of proof requiring the employee to produce evidence.

With that said, **I grant** the *Recurso de Revista* claim to reestablish the judgment that nullified the termination and

called for the reinstatement of the worker to the workplace, as well as the payment of salaries due during the leave period until the worker's effective reinstatement, including holidays, additional holiday bonus and 13th salary, and FGTS proportionate to the salary installments deferred. Based on article 461 and its paragraphs, of the Civil Procedure Code, I demand immediate compliance with such obligations to be implemented within a maximum period of 48 hours as of the time this decision is published, subject to daily fines corresponding to 1/30 of the plaintiff's remuneration.

WITH THAT SAID

The Ministers of the First Section of the Superior Labor Court, unanimously **AGREE** to acknowledge the *Recurso de Revista* claim due to divergence of jurisprudence and, on the merits, reestablish the sentence that nullifies the termination and reinstates the worker to the workplace, as well as the payment of salaries due during the leave period until the worker's effective reinstatement, and holidays, additional holiday bonus and 13th salary during such period, and FGTS over the deferred salary installments. Based on article 461 and its paragraphs, the Civil Procedure Code, I demand immediate compliance with such obligations to be implemented within a maximum period of 48 hours as of the time this decision is published, subject to daily fines corresponding to 1/30 of the plaintiff's remuneration. Additional expenses and fees to be paid on behalf of the plaintiff equal to R$200.00 (two-hundred reais), added to the R$10,000.00 (ten thousand reais), to be added to this award.

Brasília, August 3, 2011.

Digitally signed (MP 2.200-2/2001)

Lelio Bentes Corrêa

Ministro Relator

1 http://www.ilo.org/ilolex/spanish/index.htm, Estudo Geral de 1988, sobre Igualdade no Emprego e Ocupação, Informe III, Parte 4 B, Parágrafo 224, 75ª Sessão da Conferência Internacional do Trabalho.

2 Idem

3 http://www.ilo.org/ilolex/spanish/index.htm, Estudo Geral de 1996, sobre Igualdade no Emprego e Ocupação, Informe III, Parte 4 B, Parágrafo 233, 83ª Sessão da Conferência Internacional do Trabalho.