

AIDS AND DISCRIMINATION, THE DISEASE IN THE CONTEXTUAL LABOUR ENVIRONMENT

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ABSTRACT

This review addresses several political and social issues related to the workplace and Acquired Immune Deficiency Syndrome (AIDS). Herein, we discuss an employer's directive power to arbitrarily dismiss an HIV positive employee. Such actions offend a worker's personal dignity, and the worker is justified in receiving compensation, either through reintegration into the workforce or severance. In our methodology, we searched national databases for relevant literature and then performed a content analysis based on this topic. We found that serum-positive employees can be harmed in their workplace, including harm caused by arbitrary dismissal, and seeking justice is difficult for the discriminated employee. Therefore, justice should be sought not only to reintegrate such individuals but to afford respect to workers as members of an economically active society that values individual dignity, which is explicitly stated in the Brazilian Constitution and the Unified Health System rules.

Keywords: Acquired Immune Deficiency Syndrome. Employee Health. Prejudice. Unified Health System.

INTRODUCTION

Clearly, Acquired Immune Deficiency Syndrome (AIDS) has produced great changes in behavior, which affect public health promotion, lifestyles and public health policies for entire populations worldwide.

Approximately 38 million people worldwide are infected with HIV (Human Immunodeficiency Virus), and predictions suggests that this number will rise to greater than 54 million by 2025 and kill a significant portion of workers during their productive years^(1,2). According to data from the Health Ministry, 592,914 cases have been identified since the disease arrived in Brazil through June 2010; 344,150 were in the Southeast, 115,598 were in the South, 74,364 were in the Northeast, 34,057 were in the Central-west, and 24,7453 were in the North. The disease incidence trend in the South, Southeast and Central-west regions is stabilizing, but in the North and Northeast regions, the AIDS incidence trend is increasing. Based on criteria established by the World Health Organization (WHO), Brazil has a 0.6% HIV infection prevalence for the working population between 15 and 49 years old⁽³⁾.

Even if co-workers are not officially

notified, HIV-positive patients suffer social stigma and discrimination in the workplace. Discrimination is clearly present in society⁽³⁾. Discrimination is often isolated and is not officially described in the health data. However, the legal framework in Brazil emphasizes the fight against discrimination on a national level. Using this political logic, it is relevant to note that non-discrimination in Brazil is explicitly mentioned in Article 5 of the Constitution, heading and paragraph XLI. "Art. 5 – All persons are equal before the law, without any distinction whatsoever, and Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life, liberty, equality, security and property, on the following terms: XLI – the law shall punish any discrimination against fundamental rights and liberties"^(4,24).

Non-discrimination is a direct manifestation of the equality principle and is a universal right; treating a person differently for unjust reasons is prohibited. Therefore, differential treatment through regulations is only compatible with the Brazilian Constitution when a purpose proportional to the desired goal is demonstrated. Thus, the non-discrimination principle is an interpretation for real circumstances that may end unfounded differential treatment⁽⁵⁾. Such concerns directly

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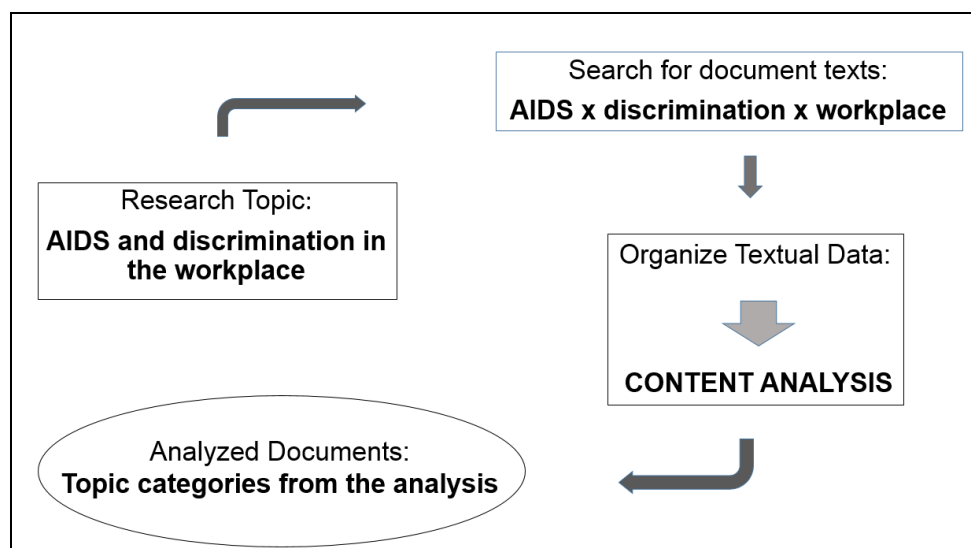
illustrate the need for a new perspective on aiding the HIV-positive population⁽⁶⁾.

Legal, political and social discourse accept that, in Brazil, the constitutional labor, ethical, professional and administrative provisions and World Labor Organization recommendations explicitly prohibit mandatory HIV testing when hiring an employee or during employment. Such testing is social discrimination, which is sufficiently extreme that it is considered institutional discrimination⁽⁷⁾.

Within epidemiological, labor and social contexts, the central issue herein is discrimination against an HIV-positive or AIDS patient at work. Therefore, we sought to review the current status of discrimination against HIV-positive or AIDS patients and find legal provisions that disrupt discrimination in work-related areas. This study is justified because it uniquely combines a discussion on a social phenomenon (e.g., discrimination) and its legal context (the Brazilian Constitution of 1988) in the public health field. This discursive space should promote discussion between healthcare employees and legal experts.

METHOD

This study is based on document analyses for social discrimination in the workplace, which is a problem. Based on a theoretical reflection, we propose that aspects of the Brazilian Constitution should be jointly used to solve the problems confronted by HIV-positive patients who are discriminated against in the work place and often arbitrarily dismissed. The data were derived by systematically reading legal articles and documents written after the Brazilian Constitution in 1988. These articles were accessed from databases in the public domain through randomly combining the following keywords: AIDS, discrimination and workplace. Twenty-two public documents were downloaded and categorized using content analysis topic categories⁽⁸⁾. Epistemologically, this reflection uses the Brazilian Constitution as its discursive theoretical precept because the Constitution is the charter on which national legal decisions are based. Therefore, this article contains different presentation and discussion sub-sections within the textual rhetoric to illustrate the problem (Panel 1).



Panel 1. Schematic of the HIV and labor discrimination document analysis methodology. Brazil, 2013.

RESULTS AND DISCUSSION

The results include the documents' content analysis categories, and a discussion on the results using the health literature follows.

The discrimination concept

Brazilian law explicitly prohibits any type of discrimination, and the Constitutional Charter/Brazilian Constitution established the fundamental goals for the Republic of Brazil and abolished all types of discrimination in

Article 3, paragraph IV: “to promote the well being of all, without prejudice as to origin, race, gender, color, age and any other forms of discrimination.”^(4,12) Thus, all discriminatory practices are prohibited under Brazilian law, which provides both penal and administrative consequences and authorizes the victim to receive indemnification for emotional harm due to the offense against their dignity⁽⁴⁾. Within a social framework, discrimination against AIDS patients is comparable to other types of social discrimination, including racial and gender discrimination^(2,5).

To qualify as a discriminatory behavior, a specific act must differentiate between persons and is logically accompanied by the victim's moral suffering, which produces inequality. Thus, Convention n.111 of the International Labor Organization is important because it directly addresses employment and professional discrimination⁽⁹⁾. A discriminatory act is an unfavorable distinction based on a given motive with an unlawful nature and is neither reasonable nor rationally justified. Based on this premise, discrimination against a disease carrier in the workplace may yield suffering due to a fear of rejection and privacy violations in the workplace, which leads a laborer to conceal his or her disease at work⁽¹⁰⁾. All distinctions, exclusions or work environments that yield different opportunities in the workplace may be a form of discrimination. This theme is a current discussion topic in legal and labor circles. The phenomenon of discrimination in the workplace has expanded over the last ten years and produced post-traumatic consequences for discriminated workers⁽¹¹⁾. Post-traumatic consequences collectively lead to health problems.

One can effectively define discrimination in work relationships as a failure to treat a given employee or group equally in a harmful manner, including failing to provide labor rights or entitled benefits. Employer conduct may cause such discrimination through preferential criteria based on race, color, gender, religion, political opinion, nationality or social origin that are applied to processes that range from hiring through the end of the work contract.

Specifically in the workplace, the list of basic rights and guarantees ensured by the Brazilian Constitution are relevant and include the rights to liberty and equality, as well as an employment relationship free from arbitrary dismissal or without just cause. Further, the general principles that guide economic activity include a zeal for social justice through the reduction of regional and social inequalities, as well as a search for meaningful work⁽¹⁾.

However, in reality, such basic principles are often entirely disregarded for the workforce, particularly because an employee is subordinate due to their financial dependence on their employer. Often, an employer abuses such power and causes irreparable harm to the employee.

Currently, real workplace conditions are driven by a weak labor market and lack of opportunities, which invariably causes workers to accept the work conditions provided by an employer. Under such conditions, the power of the employer coupled with the employee's weakness stretches the limits of the employer/employee relationship, which can extend such that it becomes a moral offense^(1,4,5).

It should be emphasized that a fundamental goal for the Brazilian Constitution was to build a free, just and united society without discrimination of any kind and where all have the right to integrated and universal health through the Unified Health System/UHS^(4,5,12).

Within this conceptual framework, discrimination is defined as any unequal treatment and includes treatment that creates “disfavor” for the worker, denies the worker the opportunity for growth and, especially, to exercise their rights. Negative discrimination comprises discrimination that excludes a person from society, which is common for HIV-positive (when known) and/or AIDS patients. Such discrimination causes social inequality for AIDS patients and leads to a perceived social discrimination⁽¹³⁾. Positive discrimination, which is also known as affirmative action, is also a way to address differences and ensure equal opportunities based on public healthcare policies for persons or groups in unfavorable situations and correct inequalities in society^(12,13). In this context, reducing

prejudices from the disease stigma and creating a healthy environments in the workplace is essential to reducing a patient's stress⁽¹⁴⁾.

Positive discrimination includes policies that favor those who receive unequal treatment due to negative discrimination. Therefore, such policies should create reasonable exceptions to protect such individuals⁽¹¹⁾. The UHS is an important ally for non-discrimination because the principles underlying equality/positive discrimination converge at this paradigm⁽¹²⁾. Moreover, the State does not simply prohibit discrimination, it actively adopts positions that promote positive action through favoring individuals who encounter difficulties or are victimized by discriminatory practices⁽¹¹⁾.

Discrimination in the workplace: an ongoing problem

It is undisputed that HIV-positive individuals are common workers with equal potential, especially when the disease has not manifested, and they are not a risk for infecting their coworkers in the workplace. Although they do not transmit the disease in the workplace, AIDS patients often have weak bodies that lack natural defenses; thus, certain medical care practices are necessary to protect the patient from opportunistic diseases. However, if correctly treated, such patients can have a normal and active life.

To maintain a dignified life, an HIV-positive individual or an individual with active disease should not be prevented from living in society and participating in the workforce. Therefore, due to known societal prejudices, such individuals must be assisted by differential legal protections. The cultural prejudice against AIDS is worldwide, and people are often nervous when they know a patient's serological condition, which extends to work relationships between employees, employers and the workplace⁽¹¹⁾.

It is extremely important for such patients' rights and public health to treat and care for HIV patients in the workplace because the motivation is not limited to the economic aspects related to a loss in productive workers but extends to the social responsibility to prevent the spread of this disease and limit discrimination against such workers⁽⁷⁾. An HIV-

positive person can be victimized by such discrimination before the hiring process, such as when a company requests an HIV test before hiring. The individual interviewing for the job-opening becomes uncomfortable. Furthermore, hiring tests are only used to evaluate a worker's ability to complete specific tasks for the job that they will perform throughout their employment. Employers do not have a right to invade a job candidate's privacy. Such practices are similar to requiring a woman to take a pregnancy test, which is prohibited by law⁽¹⁵⁾.

Finally, it is appropriate in a reflexive process to emphasize that the key form of discrimination against HIV-positive individuals is arbitrary dismissal because the employer knows that they are HIV-positive, and HIV is not transmitted in the workplace. Employers take such actions even though the employee is correctly performing his or her work duties; an HIV-positive individual can suddenly be unemployed and feels helpless in a society that has excluded them.

Strategies for fighting such offenses to honor and human dignity.

Moral harm can be compensated through damages and is independent of eventual reintegration or indemnification for a temporary loss in stability. Based on the updates to the Civil Code in 2002 and the doctrinal and legal advances, moral harm is any unjust aggression against immaterial goods towards a physical person, legal person or collective that cannot be monetarily quantified but is undeniable. Indemnification is used to satisfy victims and change an offender's thinking; it is a pedagogical tool to demonstrate to the offender and society that individuals who disrespect the basic rules for human cohabitation may be punished^(15,16).

In addition to discrimination, dismissing an HIV-positive employee is so violent towards an individual who is already physically and psychologically fragile that it can cause deep wounds in the worker's intimate sphere (their personal rights), which yields moral damage^(17,18). Discrimination against HIV-positive individuals is abusive and arbitrary, primarily because such acts attack the right to

life guaranteed to all Brazilians and foreigners living in Brazil⁽⁴⁾.

In the case of discrimination, moral harm is clearly evident, and the offense to the discriminated individual's honor is direct. However, the employee must prove that their dismissal was outside the employer's regular behavior and that the employer abused their power. Furthermore, in an employment relationship, the parties are not equal; the employee is subordinate, and the employer has a clear advantage⁽¹⁹⁾. Therefore, if the parties are not equal, the principle of protection should prevail to support the weaker party and avoid limiting their right to justice.

Based on the above considerations, interpersonal relationships (including employer/employee relationships) constantly change as our society changes. In the workplace, we must constantly strive for better working conditions, access to work and a recognition of employment relationships.

Currently, labor relationships forego social values and only profit the employer, which is clear when employees are not always treated as the heart of a company. However, without workers, companies are not productive, and if workers are considered lower, we offend the fundamental principles of humans, which are widely debated, and the worker is treated as a mere commodity.

FINAL CONSIDERATIONS

To address discrimination against HIV-positive and AIDS patients, one should

consider the sociocultural context and that they should be treated with honor and dignity. In Brazil, virus carriers or AIDS patients have a right to healthcare similar to any Brazilian, and health is a complex process that encompasses social and work quality of life.

Legally, conditions for AIDS patients are complicated, and such patients must contend with global prejudices and moral pain, which should at least be recognized by reintegrating such patients into the workforce or through indemnification when they are dismissed without cause. In addition, HIV-positive individuals who do not have the active disease undeniably suffer great societal prejudice and discrimination, especially by less educated individuals who do not know the means of transmission. Thus, we must undeniably ensure regulation for at least personal dignity in individuals who live with such prejudice and discrimination.

In conclusion, one of the major fundamental rights of an employee is non-discrimination, which is closely linked to the principles of equality, humanization and fairness based on the Unified Health System guidelines and tenets. However, no laws address this type of discrimination in the workplace nor regulate the right to work for such workers.

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AIDS E DISCRIMINAÇÃO, A ENFERMIDADE NO AMBIENTE LABORAL

RESUMO

A presente reflexão aborda algumas questões políticas e sociais relacionando o ambiente laboral e a Síndrome da Imunodeficiência Adquirida (AIDS). O objetivo deste estudo é refletir sobre o uso do poder diretivo do empregador ao despedir arbitrariamente um empregado portador do HIV. Tal fato ofende a dignidade da pessoa, motivo pelo qual referido trabalhador faz jus a uma recompensa seja ela reintegração ao labor ou indenização. Metodologicamente, foram feitas buscas bibliográficas em bancos de dados nacionais e análise de seus conteúdos, traçado uma linha de reflexão sobre a temática. Como resultado observou-se que o dano moral, que o empregado soropositivo pode sofrer no decorrer do contrato laboral, inclusive pela própria despedida arbitrária, leva à observância do caminho tortuoso em busca de justiça pelo qual passa o empregado que sofre discriminação. Desse modo considera-se, que a busca não é pelo dever de reintegração pelo fato de ser portador de determinado vírus, mas o respeito ao trabalhador capaz de integrar a sociedade economicamente ativa, valorizando inclusive a sua dignidade como pessoa, fato este explícito na Constituição da República bem como nas premissas do Sistema Único de Saúde.

Palavras-chave: Síndrome de Imunodeficiência Adquirida. Saúde do Trabalhador. Preconceito. Sistema Único de Saúde.

SIDA Y LA DISCRIMINACIÓN, LA ENFERMEDAD EN EL MEDIO AMBIENTE DEL TRABAJO

RESUMEN

Esta reflexión aborda algunas cuestiones políticas y sociales relacionando el ambiente laboral y la Síndrome de la Inmunodeficiencia Adquirida (SIDA). El objetivo de este estudio es reflexionar sobre el uso del poder directivo del empleador al despedir arbitrariamente a un empleado portador del VIH. Tal hecho ofende la dignidad de la persona, motivo por el cual tal trabajador tiene derecho a una recompensa sea ella reintegración al trabajo o indemnización. Metodológicamente, se realizaron búsquedas bibliográficas en banco de datos nacionales y análisis de sus contenidos, trazando una línea de reflexión sobre el tema. Como resultados se observó que el daño moral, que el empleado seropositivo puede sufrir en el transcurso del contrato laboral, inclusive por la propia despedida arbitraria, lleva a la observancia del camino tortuoso en la busca de justicia por el cual pasa el empleado que sufre discriminación. De este modo se considera que la busca no es por el deber de reintegración por cuenta de ser portador de determinado virus, sino por el respeto al trabajador capaz de integrarse a la sociedad económicamente activa, valorando inclusive su dignidad como persona, hecho este explícito en la Constitución de la República, así como en las premisas del Sistema Único de Salud.

Palabras clave: Síndrome de la Inmunodeficiencia Adquirida. Salud del Trabajador. Prejuicio. Sistema Único de Salud.

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