

# Stigmatized diseases and discriminatory dismissal

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In 2012, the Superior Labor Appeals Court (TST – Tribunal Superior do Trabalho) issued Restatement of Precedents no. 443, which provides that the dismissal of any employee who is HIV-positive or who has a disease that is stigmatized or subject to prejudice will be presumed to be discriminatory. In such cases, the dismissal is deemed to be invalid, and the employee is entitled to reinstatement in employment.

Although Restatement no. 443 has been criticized over the years, in practice Brazilian labor courts have not only applied it, but they have also extended the list of diseases that can be considered stigmatized or subject to prejudice. In the absence of a clear definition, the number of diseases that can fall under the scope of the Restatement is essentially infinite. To put it another way, the broad wording of the Restatement has defeated efforts by courts, attorneys and legal scholars to determine precisely which diseases attract protection.

This makes for a complex situation from the employer's point of view, since the presumption imposes the excessively heavy burden of producing negative proof – i.e. proof that there was no discrimination or prejudice in the decision to terminate employment, without cause, of an employee affected by a serious illness, even if the disease was contracted years before the dismissal. In addition, Restatement no. 443 fails to establish any time limit on the protection it provides, and thus creates a type of job tenure for an indefinite period, since employers can be compelled to reinstate employees by reason of a serious illnesses, without knowing when the employees can lawfully be let go.

In other words, the courts' precedents establish a right that is much broader than any constitutional or legal guarantee; one that is so broad that it violates the right of employers to dismiss employees, without cause, upon the payment of severance amounts owed by law.

In January 2020, the National Confederation of Industries brought a constitutional challenge (ADPF no. 648) before the Supreme Federal Court (STF – *Supremo Tribunal Federal*), arguing that the Restatement of Precedents cannot create, on its own and without any basis in the legislation, a general procedural rule that reverses the burden of proof, contrary to the principle of due legal process. Furthermore, the Confederation contends that the TST does not have the power to create rules of material law, given that expressions like "serious disease", "stigmatized" and "prejudice" cover a vast range of diseases, which means that the Labor Judges have essentially unlimited discretion in applying them. A third point is that the Restatement does not seek to fill a gap where the legislation is silent, but instead arrogates to itself a legislative function, contrary to the principle of the separation of powers and the rule of law.

In January 2021, the Federal Public Prosecution Service (*PGR – Procuradoria-Geral da República*) submitted a brief in which it takes the position that Restatement no. 443 does violate the principle of due legal process in presuming that employers act in a discriminatory way when terminating the employment of someone who suffers from a serious, stigmatized disease. The PGR believes that cancelling the Restatement will ensure that each case is decided on its merits, and do away with a situation in which an employer must produce negative proof (which is sometimes impossible) in order to defeat the allegation that it acted arbitrarily in letting the employee go. The brief also suggests that all judgments based exclusively on the Restatement that have not yet become final and unappealable should be invalidated, without need for individual review.

Judgment of the ADPF has not yet been scheduled, but even if the Restatement is found to be unconstitutional, the right it protects will not disappear, and discriminatory termination of employment will still be prohibited. What could happen is that, following the STF's decision, the courts will have to look at the facts of each case and decide, based on an appropriate distribution of the burden of proof – without any presumption – whether the employee has been the target of discrimination and is therefore entitled to the protection provided for by law, such as Law 9209/1995 and Law 12.984/2014, which prohibit discriminatory practices in labor relations.

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