Revista Iberoamericana de Derecho, Cultura y Ambiente

Edición Nº 2. Diciembre de 2022

EMPLOYMENT RELATIONSHIPS AND GENETIC DISCRIMINATION

RELACIONES LABORALES Y DISCRIMINACIÓN GENÉTICA

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ABSTRACT: This scientific article aims at studying the new kind of discrimination that has emerged since the contemporaneous technological advancements, and how it might obstruct access to the labor market. Genetic discrimination, as an obstacle to employment relationships, is an important and current matter in Labor Law. The existence of aggression to the fundamental principles and values consigned in the Brazilian legal system is analyzed. Discrimination may occur due to the misuse of the evaluated genetic material, with the discovery that individuals may suffer, in the future, from a disease pointed in their genetic code. Through genetic tests, employers may not hire candidates for the job, not because of their lack of knowledge or technical skills for the vacancy, but due to a genetic chain considered "flawed" for the current standards and values, entailing genetic

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discrimination in the workplace. Another challenge of this article is to study the legal and ethical aspects of this procedure, and how they influence the physical and mental health of human beings, in the light of the very personal rights embodied in the Brazilian Constitution, such as intimacy, privacy and information, in view of this new kind of discrimination. In this aspect, this article aims at analyzing genetic discrimination in the field of Labor Law from research on the legislation and international treaties and bibliographical and comparative research, which allowed the conclusion that the matter is protected in the Brazilian Constitution through the fundamental principles, even though there is still a lot to legislate on the issue in the infra-constitutional sphere, taking the International Declaration of Human Genetic Data of 1997 as a guideline.

KEYWORDS: Dignity. Genetic Discrimination. Ethics. Right to Privacy. Access to Employment.

INTRODUCTION

Discrimination in the labor market is widely repudiated in society and not well seen in the Brazilian legal system. However, it continues to exist in the practice of the most varied forms, namely discrimination by gender, color, religion, ethnicity, among others. More recently, due to new technologies, the bad practice of genetic discrimination in the labor market, which occurs without respecting the right to privacy and intimacy of the human person, has been discussed.

The problem raised is of major importance, since the result of a simple blood test, when misused, may adversely change the life of a human being.

PROTECTION OF THE PRIVACY OF GENETIC DATA, PROTECTION OF HUMAN DIGNITY AND NON-DISCRIMINATION IN EMPLOYMENT RELATIONSHIPS

Genetic information can be used to identify its carriers, demonstrating their biological traits and those of their family members. Therefore, they deserve the most unrestricted and unlimited protection. The Brazilian legislation is extremely far from the requirements established in the Universal Declaration on the Human

Genome and Human Rights, and in particular, what is established in the International Declaration on Human Genetic Data. The Brazilian legislation does not provide specific infra-constitutional rules on the protection of genetic data of human beings. So, the procedure is the application of rules to the matter in an analogous way.

Article 1, item III, of the Brazilian Constitution, provides on the principle of human dignity as one of the foundations of the democratic state ruled by law, which means that it is ruled by democratic rules, in which public authorities respect individual rights and guarantees. Its purpose, in the capacity of a fundamental principle, is to ensure to men a minimum of rights that must be respected by society and by the government, so as to preserve the valorization of human beings. This way, research related to human genetic material must be guided within the values of the Brazilian Constitution of 1988, grounded in the principle of human dignity.

Human dignity, according to the definition given by Alexandre de Moraes, is a:

> Unity to the fundamental rights and guarantees, and it is inherent to human personalities. This foundation moves away the idea of the predominance of the transpersonalist conception of a State and Nation to the detriment of individual freedom. Dignity is a spiritual and moral value inherent to people, which is uniquely demonstrated in the conscious and responsible self-determination of life itself, and which brings with itself the pretension of respect by other people, being an invulnerable minimum that every legal statute must ensure, so that, only exceptionally, limitations to the exercise of the fundamental rights can be done, but always without underestimating the necessary esteem that all persons deserve as human beings seeking the Right to Happiness. (MORAES, 2015, p. 18). (own translation)

Ingo Wolfgang Sarlet defines the dignity of the human person very well, as:

> [...] the intrinsic and distinctive quality of human beings that makes them deserve the same respect and consideration by the State and by the community, implying, in this regard, a complex of fundamental rights and duties that ensure to people both against every and any act of a degrading and inhumane nature, and the guarantee of the minimum existential conditions for a healthy life, in addition to providing and promoting the co-responsible active participation in the destinies of their own existence and of the life in communion of other human beings. (*SARLET,* 2001, p. 60). (own translation)

Article 5, item X, of the Brazilian Constitution prescribes that “the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured” (Constitution of 1998). This article aims at giving protection to people, safeguarding an insurmountable intimate space from external illicit intrusions and guaranteeing the development of their personality. Additionally, this principle delimits any scientific research concerning human genetic material.

The task of distinguishing private life from intimacy is difficult. Intimacy integrates the person’s sphere, a repository of secrets and particularities of the intimate and moral nature of human beings. The life of human beings comprises two aspects: one turned towards the outside and the other towards the inside. Outside life, which involves people in their social relations and public activities, can be the purpose of research and of disclosure by third parties, because it is public. Inside life, inherent to the same persons, about their family members, about their friends, which integrates the concept of private life, is inviolable according to the Constitution.

It is worth highlighting that the constitutional concepts of intimacy and private life are differentiated by means of a greater expansion of the former, which is in the scope of incidence of the latter. Intimacy is related to subjective relations, and of an intimate nature of people, their relations of families and friends, while private life involves all the other human relationships, including the objective ones, such as commercial, employment, study relationships, and so on. (MORAES, 2015, p. 54).

The Brazilian Constitution pointed out, in the chapter of the Environment, a provision about ecologically balanced environment, saying in its Article 225 that “*all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. Paragraph 1. In order to ensure the effectiveness of this right, it is incumbent upon the Government to: [...] II - preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research and manipulation of genetic material* ".

Discrimination is also addressed in the Brazilian Constitution, in article 3, item IV, determining that the promotion of common well-being, without prejudice or discrimination, is a fundamental purpose of the democratic state ruled by law. The

mention of this legal provision is very important, since many times discrimination is the consequence of acts of invasion of people's privacy. Further on, and in the text of article 5, item XLI, it is prescribed that the law will punish any discrimination against fundamental rights and freedoms.

As a whole, the Brazilian Constitution brings, expressly, guarantees of equal treatment to workers and non-discrimination at work, according to what is extracted from what is prescribed in its articles 5 and 7, items XXX, XXXI and XXXII, *in verbis*: Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: The following are rights of urban and rural workers, among others that aim to improve their social conditions: XXX – prohibition of any difference in wages, in the performance of duties and in hiring criteria by reason of sex, age, color or marital status; XXXI – prohibition of any discrimination with respect to wages and hiring criteria of handicapped workers; Fundamental Rights and Guarantees 19 XXXII – prohibition of any distinction between manual, technical, and intellectual work or among the respective professionals;

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The word discrimination appeared in the Brazilian legal system in 1968 and later on in 1988, in the Brazilian Constitution. Before 1988, the word discrimination was used as a specification or separation, for administrative and tax purposes. In the Brazilian Constitution, the word discrimination is employed with the meaning that is currently being used – of making an unfavorable distinction; as an unequal, harmful treatment, and of an unfair nature against a certain person or group. (LIMA, 2011, p. 20-21).

Discrimination is understood as an aggression to the rights of human persons, in their dignity, in their freedom and in their personality. In Plá Rodriguez's opinion, the principle of non-discrimination is the general guideline which forbids a differentiated treatment to someone due to an unfairly disqualifying factor. Discrimination is the conduct through which someone is denied, due to an unfairly disqualifying factor, a treatment compatible with the legal standard settled for the experienced concrete situation. This principle denies the validity of such a discriminatory conduct. (PLÁ RODRIGUEZ, 2000, p. 445-447).

Francisco Viera Lima Neto conceptualizes genetic discrimination as:

> [...] a different treatment to individuals or their relatives by blood based on their current or presumed genetic difference in relation to other human beings and which arises from the

> fact that they show symptoms of a disease of a genetic origin or that they might present a certain social behavior or an "undesirable" trait (subversion, indolence, excessive or lack of intelligence, homosexuality, obesity, etc.) which derived from the alleged and automatic submission of human beings to commands by genes. (LIMA NETO, 2004, p. 85). (own translation)

Regarding the infra-constitutional legislation, the most significant provision on non-discrimination is Brazilian Law 9.029, of April 13, 1995, which prohibits the adoption of any discriminatory or limiting practice for the purpose of access to the employment relationship, or of its maintenance, due to gender, origin, race, color, marital status, family status, disability, professional rehabilitation, age, among others. When providing the expression "among others", legislators opened the scope to all the possible forms of discriminatory and limiting practices, thus, the list of discriminatory possibilities pointed by its art. 1 is merely illustrative, since it expressly prohibits "any discriminatory or limiting practice".

Direct discrimination occurs when it is exercised frontally, as a result of a personal trait (race, color, gender, age, among others); and indirect discrimination is related to the adoption of apparently impersonal and whimsical criteria. (MALLET, 2013, p. 98).

Brazilian Bill 4.610/1998 pending in the Brazilian Congress, currently ready for the agenda in the Full Court of the Chamber of Deputies, announces several concerns about the likely consequences of the disclosure of results of genetic tests. It defines crimes of genetic discrimination and establishes that the performance of tests which predict genetic diseases or which allow the identification of people who hold a gene responsible for a disease or by the susceptibility or genetic predisposition to a disease is only allowed for medical purposes or medical research and after genetic counselling, by a qualified professional. Its most relevant points are: a) concerning the limitation, denial or discontinuation of insurance coverage of any nature after the genetic profile of the insured is analyzed; b) concerning the refusal, denial or prohibition of enrollment of students in public or private educational institutions, among others, based on their genetic information; c) concerning the refusal, denial or prohibition of submission for public contests or any form of selection based on genetic information, or yet, by having this information as a basis, hampering or prohibiting the access to or durability of employment, office or function, either in Public Administration or in a private entity; and d) it is also

concerned about information secrecy, punishing those who release someone's genetic information, unless, of course, there is previous and unquestionable consent.

INTERNATIONAL TREATIES ON THE MATTER

The Convention on Biological Diversity of the United Nations, of 1992, decided on the genetic diversity of humanity. In 1993, the Declaration of Bilbao was edited, as a result from the International Meeting called "Legal Aspects of the Human Genome Project"; it was the first international document that approached the several aspects related to the human genome. Afterwards, in 1998, the Ibero-Latin-American Declaration on Ethics and Genetics, created in 1996, was revised.

In 1997, by means of the 29th Unesco General Conference, the Universal Declaration on the Human Genome and Human Rights was edited, whose aim was the regulation of the matter in an international scope. The declaration is composed of 25 articles that deal with human dignity and human rights, the rights of individuals, research on the human genome, conditions for the exercise of the scientific activity, solidarity and international cooperation, disclosure of the principles established by the declaration and implementation of the declaration. The aim of Unesco, in the Declaration of 1997, was to overcome the difficulties to implement ethical principles and principles of rights in order to establish universal limits to domestic legislations and public policies of sovereign states. In the Declaration, in its articles n. 2. to n. 6., the principle of non-discrimination grounded in individuals' genetic traits is identified, excluding the possibility of any demonstration of eugenics, even because the lack of scientific value had already been proven.

> Article 2 - a) Everyone has a right to respect for their dignity and for their rights regardless of their genetic characteristics. b) That dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.
> Article 6 - No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity. (….). (ECHTERHOFF, 2010, p. 186).

Salvador Dario Bergel cites the social reaction taken up again in Article 7 of

the UNESCO Declaration, when establishing that no one can be the object of discrimination grounded in their genetic traits, whose purpose or effect is an offense to the fundamental rights and freedoms and to the recognition of their dignity. Human beings cannot be reduced to their genetic traits. If this targeted vision persisted, we would fall into a new class of social discrimination. Salvador Dario Berge also understands that:

> En un mundo marcado por la desocupación o la precariedad del empleo como fenômenos ya incorporados a la economía corriente, tal información puede llevar a conformar un nuevo segmento de discriminados, sin horizontes de futuro. (BERGEL, 2017, p. 323).

Last, but not least, the aim of article n.7 of the UNESCO Declaration is to assure that genetic data are not used for abusive and illicit purposes.

> Article 7 - Genetic data associated with an identifiable person and stored or processed for the purposes of research or any other purpose must be held confidential in the conditions set by law.

This Declaration materialized the move of Bioethics to Biolaw, calling upon bioethics principles. Barreto teaches us that the UNESCO Declaration is:

> [...] one more stage in the process of insertion of moral values in the construction of a legal order, since it establishes bioethical principles and biolaw rules, which the states adhered to, and which will serve as an ethical-legal standard of research and of technology of contemporaneous Biology. (BARRETO, 1998). (own translation)

According to Gisele Echterhoff:

> For the theme proposed now, the importance of lifting the value/principle of the dignity of the human person as the foundation of this international declaration of Bioethics and Biolaw is confirmed. As previously mentioned, the principle of dignity of the human person is currently considered to be the general clause of personality, the guidance to the other rights of personality expressly established in the Brazilian legislation, such as, for instance, the right to privacy.
> Therefore, it is from the dignity of the human person and of the human rights that it can be extracted from the Declaration that all the matters pertaining the Human Genome must be interpreted, always aiming at the free development of the personality, without forgetting about the respect to its diversity. (ECHTERHOFF, 2010, p. 185). (own translation)

In the 32nd UNESCO General Conference, of October 2004, the International Declaration on Human Genetic Data, composed of 27 articles, was approved. The

aim of the Declaration was to guarantee the respect to human dignity and the protection of human rights and fundamental freedoms in terms of collection, treatment, use and maintenance of human genetic data, in conformity with the imperatives of equality, justice and solidarity, knowing that they might cause risks to the exercise and observance of the human rights and of the fundamental freedoms, and to the exercise of human dignity, observing that individuals' interest and well-being must prioritize over the rights and interests of society and of the investigation.

The adoption of the International Declaration of 2004 by the signatory countries in their internal rules results in unrestrained acceptance of the principles of the Universal Declaration on the Human Genome and Human Rights, which are already settled in the Brazilian Constitution in the principle of the dignity of the human person.

Article 3 of the Declaration of 2004 prescribes that human beings have their genetic identity, highlighting that *"a person's identity should not be reduced to genetic characteristics, since it involves complex educational, environmental and personal factors and emotional, social, spiritual and cultural bonds with others and implies a dimension of freedom."* Therefore, the interaction with the environment with its most varied aspects is a fundamental factor of phenotype formation. Human personality is much more complex and greater than only genetic interactions.

Item "b" of article 4 provides about the sensitive nature of genetic information, imposing the adoption of appropriate means of protection.

Article 5 addresses the subject of the ethical and legal limits established in the Universal Declaration, with regard to the purpose of the collection and use of human genetic data.

Finally, article 7, of a very important character for this work, provides on non-discrimination:

> *Article 7 - Non-discrimination and non-stigmatization:*
> *(a) Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group or communities.*
>
> *(b) n this regard, appropriate attention should be paid to the findings of population-based genetic studies and behavioral genetic studies and their interpretations.*

Article 14 also deals with the access to genetic information with regard to private life and confidentiality. Particularly important in the study at issue, item “b” provides on the inappropriate access to genetic information by third parties, when explicitly citing employers and insurance companies:

> Article 14 – Private Life and Confidentiality
>
> *(a)* States should endeavor to protect the privacy of individuals and the confidentiality of human genetic data linked to an identifiable person, a family or, where appropriate, a group, in accordance with domestic law consistent with the international law of human rights.
>
> *(b)* Human genetic data, human proteomic data and biological samples linked to an identifiable person should not be disclosed or made accessible to third parties, in particular, employers, insurance companies, educational institutions and the family, except for an important public interest reason in cases restrictively provided for by domestic law consistent with the international law of human rights or where the prior, free, informed and express consent of the person concerned has been obtained provided that such consent is in accordance with domestic law and the international law of human rights. The privacy of an individual participating in a study using human genetic data, human proteomic data or biological samples should be protected and the data should be treated as confidential.

GENETIC INFORMATION AND EMPLOYMENT RELATIONSHIPS

From hiring to dismissing workers, companies are obliged to carry out a series of medical examinations in their employees in order to verify their health condition and diagnose if they have any kind of disease, occupational or not, or any clinical condition that may trigger a disease. These examinations are part of the Brazilian Medical Control Programme for Occupational Health (Brazilian acronym PCMSO) and have the character of preventing and making an early diagnosis of the damage to health related to employment, and verifying the existence of occupational diseases or irreversible damage to workers’ health. If there is an indication of triggering factors of diseases, occupational or not, the medical services that carry out the examinations have to establish to companies the adoption of suitable measures for risk control in the workplace and send workers for treatment.

These are examinations related to employment relationships: pre-admission physical examination, periodical examination, return to work, change of office and physical examination on discharge.

Through genetic tests or screening, information on the diagnosis of diseases and identification of individuals is obtained, and their biological traits and the ones of their families are established. The genetic test is the most important practical application of knowledge on the human genome to know about the details of each person's genetic code. (ECHTERHOFF, 2010, p. 78). Genetic tests can detect genes with a predisposition to a disease, but which depend on the influence of other conditions of external factors, such as the environmental ones.

The requirement of pre-admission and on discharge medical reports that reveal a person's working capacity for certain kinds of activities will have to go through a study in order to refrain the tendency that will certainly be installed in the request of genetic information and in the evaluation of sensitive data, which reveal aspects of the person's personality and intimacy, legal assets that must be protected not only in a repressive, but in a preventive way. (NASSIF, 2017).

Genetic tests can be carried out in periodic evaluations regarding changes in genetic material due to external factors. There are advantages for the employment contract in this procedure, allowing the delimitation of areas for the evaluation of safety and health practices in the workplace, as well as the detection of risks of exposure to potentially dangerous substances and unknown risks. Tests can also be carried out through a broad analysis of workers' hereditary traits, or of those who have applied for a job (genetic selection). In this case, the tests aim at verifying the presence of genetic traits that indicate the predisposition to a disease when individuals are exposed to a factor or substance present at the workplace, as well as at analyzing hereditary conditions which are not associated with the workplace, but which may influence the provision of services. (VIANA, 2014, p. 25-26).

Gisele Echterhoff made an important comment about the use of genetic information, which may lead to benefits when well used, but which may also lead to discrimination because of its misuse. The consequences of inappropriate and abusive use of genetic data may be enormous, since they will be used to identify and make judgments of human beings, and maybe cause discrimination against their holders, their stigmatization, bringing consequences to the family, professional and social spheres. In the field of the labor market, which is the purpose of this research, once again it is highlighted that it may lead to the exclusion of the

employee or to the non-hiring of candidates that are likely to develop the disease, many times only in a remote future and under certain environmental conditions. (ECHTERHOFF, 2010, p. 82-83).

Carlos María Romeo Casabona clarifies that employers' aims in applying tests, which would only fulfill their own interests in detriment to the investigated individuals, would be: (a) to carry out a negative selection, whose purpose is not to hire candidates who have been diagnosed with diseases of a potential later manifestation or those of predisposition of a multi-factorial origin, that is, in which several factors would influence the development of the disease (polygenetic illnesses, such as, for instance those of the cardiopulmonary system, cancer), among them the environment, whether it is or it is not related to the working conditions; (b) to carry out a positive selection, whose purpose is to choose more able workers to do a certain job determined "according to their genetic traits (greater physical resistance to sleeping, to certain carcinogenic toxic agents, etc). Thus, employers would be selecting the most appropriate candidate and would be reducing costs with the adoption of preventive measures for the reduction of risks for health derived from the productive activity itself. (CASABONA, 1999, p. 74).

Workers' genetic discrimination, that is, the use of their genetic information as a discrimination factor, may take place in the most diverse stages of the employment contract. Such a discriminatory practice may occur in the pre-contractual stage, with the use of such information to decide, for example, if workers will or will not be hired; it can also occur during the employment relationship (for example, for the purpose of granting or not, to employees, a promotion or rise in the office), and, in addition, genetic data can be used in an illegal discriminatory way, even at the moment of a decision on workers' dismissal. What is supported now is that employers should be prohibited to intend to violate the intimacy of the intended employee, by means of asking questions which are not related to the office of the desired job; it is imperative to conclude that such a prohibition includes the issue of workers' genetic intimacy, and so companies should not investigate workers' genetic data aiming at verifying workers' likely future illnesses or health conditions, but only the current situations they are in, aiming at evaluating, at present, if employees have conditions to develop the intended job. (ASSIS JÚNIOR, 2009, p. 31).

Genetic discrimination is more present between the negotiations and the delivery of employment contracts when, after getting to know and selecting candidates, they are required to deliver medical information, usually from clinical

and laboratorial examinations. It is worth mentioning that, commonly, there are always more candidates than vacancies, allowing several options of choice for employers. (ALVARENGA, 2013, p. 147).

Under the terms of Article 422 of the Brazilian Civil Code, objective good faith is applied at the termination and performance of the contract. Consequently, the principle could not be applied to what occurs before the delivery of the contract and after its termination.

Caio Mário da Silva Pereira understands that:

> [...] the contracting parties are obliged to guard, both, in the termination and in the performance of the contract, the principles of honesty and good faith. Legislators forgot to expressly include, in the formula of art. 422, the pre and post contractual periods, within which the principle of good faith has a fundamental importance for the creation of legal duties for the parties, given the inexistence of obligations to be fulfilled in these phases. This omission does not imply the denial of the application of the rule of good faith for these previous and subsequent phases of the contract, on the contrary, as here it fits the extensive interpretation of the rule to also comprise the non-expressly referred situations, but contained in their spirit. (PEREIRA, 2014. p.18). (own translation)

Undoubtedly, there is a space of freedom to be preserved for discontinuance by the contracting parties, due to negotiating private autonomy. The risk of discontinuance is inherent to the business before the delivery of the contract. However, there is another protected space due to the fundamental principles, of good faith, of appearance, of trust, which are generators of general duties of conduct for the contracting parties. (LOBO, 2012, p. 86).

From this understanding of objective good faith, employment contracts must be ruled in accordance with this principle. Thus, to carry out genetic tests, workers have to give their clear consent and have express and written information of what will be analyzed from their blood sample, that is, the entire process must be transparent for the individuals.

When reflecting on the matter of discrimination originated from the access to genetic information, discrimination does not occur at a specific moment of the legal relationship, since both in the pre and post contractual phases, or even at the end of the contract, the release of certain acquired information may be harmful to the person. Information about the possibility of developing a disease as a result of a genetic trait might hold back contracting parties from hiring candidates if the information had been acquired before the contract was delivered; it may cause a

harmful situation even after the contract is terminated, as long as the information is spread, causing an obstacle for the application to a new job. There might also be an obstacle for the continuance of the contract if the harmful information emerges during the execution of the contract. (MORAES JUNIOR, 2016, p. 124).

On the other hand, there is also the possibility of legitimate discrimination in the scope of employment relationships and, therefore, non-offensive to the right to equality, when the criterion of differentiation adopted is fully justified by the factual situation. There are procedures, in the employment relationship, in which permissive circumstances of the use of workers' genetic data by companies do not slide towards illegitimacy such as, for instance, in the situation in which a genetic examination was carried out and the probability that the employee might suffer from leukopenia in the future, which is a disease related to the reduction of leukocytes in the blood, was verified. If the company whose activity is bound to the chemical field where benzene is used in the production process or as a raw material, it is absolutely legal for the company to move away the worker from any contact with that substance because of the high probability for the employee to contract the disease. The examination is grounded in statistical and scientific data which prove, objectively, that there is an undeniable correlation between the exposure to benzene and the reduction of white blood cells. (SILVA NETO, 2009. p. 242).

This way, even though here the relevance of the non-discrimination of workers is defended and highlighted, as well as the adequacy of the companies to their employees' needs, including those regarding fewer hazards in the workplace, the fact is that there is no way to deny the existence of situations in which workers, in fact, do not have conditions to hold a work position. Such a situation occurs, for example, when it is verified that the genetic propensity and the workplace, in combination, determine the onset of the disease, so that the imposition to hire that worker would entail the need to fulfill so many demands that they would end up making the activity to be developed unviable or even make the business itself unviable; in such an event, the use of genetic data would serve to the protection of workers themselves and of workers' collectivity, which depend on jobs generated by that enterprise. The results of such analyses cannot be used for the exclusion of workers or candidates. The fear is the trivialization of the use of genetic data that could occur only exceptionally, since if there was no control of this genetic discrimination, employers would certainly be tempted to always carry out these genetic tests instead of seeking to invest in safety and quality in the workplace, especially to reduce the costs that such investments represent. (SILVA, 2011, p.

86).

CONCLUSION

Human beings have the right to employment, as their main means of subsistence, and through it become worthy and able to provide for their home. The existing bond between the right to employment and the principle of dignity of the human person is very strong, and it is directly linked to the integrity of human beings and their right to a worthy and safe job, which gives them support to fulfill all their needs and the needs of their families.

The professional capacity of human beings and their aptitude to a certain job cannot, in any event, be shadowed by genetic predisposition to a disease and a discriminatory factor of human beings in the labor market, causing a serious offense to the dignity of the human person and to the principle of equality. This discriminatory act is a step backwards in the journey of the human rights, besides denying the own efforts of the science to combat diseases in the future. The research on genes still needs a lot of improvement and, currently, it can be said that these genetic predispositions are merely therapeutic predictions that individuals may come to have. It is not an absolute certainty. It will depend on factors of each individual, such as environmental, family, social, educational and cultural ones.

The matter is protected by the Brazilian Constitution through the fundamental principles, but there is still a lot to legislate about the subject in the infra-constitutional sphere, taking the International Declaration on Human Genetic Data of 1997 as a guideline.

Genetic discrimination is a threat to workers' moral and psychic integrity, calling for the establishment of a specific legislation on the matter in order to discipline the admission of genetic tests in Brazil, protecting, this way, workers' fundamental rights.

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