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**HIV/AIDS TESTING AS A REQUIREMENT FOR HIRING DOCTORS
(EXAMENES DE VIH/SIDA COMO REQUISITO DE CONTRATACIÓN A MÉDICOS)**

CASE: *Amparo directo 43/2018*

REPORTING JUSTICE: Alberto Pérez Dayán

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: February 6, 2019

TOPICS: right to equal treatment, right to health, right to social security, right to work, reasonable risk, discrimination, doctor, health institution, hiring, HIV/AIDS.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo directo 43/2018*, Second Chamber, Alberto Pérez Dayán, J., decision of February 6, 2019, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-02/AD%2043-2018.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo directo 43/2018*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO* 43/2018

BACKGROUND: A public health institute denied a doctor a job because of his HIV status. Based on that fact, the National Council for the Prevention of Discrimination initiated a proceeding and determined that the health institute was responsible for acts of discrimination against the doctor. The institute filed a suit for nullity of the decision, which was not granted for the purposes it requested. For this reason, the Institute filed an *amparo directo*, which was heard by the Supreme Court of Justice of the Nation (this Court).

ISSUE PRESENTED TO THE COURT: Whether health institutions can carry out HIV/AIDS examinations as a requirement for the hiring of doctors; and whether the protection of the right to health of medical personnel and third parties is reconcilable with the possibility for people with HIV to practice the medical and health profession.

HOLDING: The *amparo* was denied to the health institute, essentially for the following reasons. It was discriminatory for the health institute to establish the application of HIV/AIDS examinations as a requirement for the hiring of medical personnel since it would allow the person to be denied employment simply because of his or her health condition. The requirement of such examinations for applicants is not necessary to protect the health of other people, because the applicants are not part of the medical staff and therefore do not pose a risk to workers or patients. On the other hand, it was considered that it is allowed for health institutions to carry out HIV/AIDS examinations on medical personnel, as long as the obligations established in NOM-010-SSA2-2010 are met, which are: (I) they are carried out after the hiring of the health professional; (II) without resulting in the dismissal of the worker; (III) they are carried out only in the specialties, medical areas or activities in which, in fact, there is a reasonable and objective risk of infection to personnel or patients, according to the nature of the respective medical work and in a general, non-individualized way; and (IV) the results of the examination must be governed by the criteria of informed consent and confidentiality, which implies that, as a general rule, the condition of HIV/AIDS can only be known to persons and workers who are strictly responsible or co-



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responsible for the implementation of the measures necessary for the protection of the health of medical personnel and patients.

VOTE: The Second Chamber decided this case with the unanimous vote of the four justices Alberto Pérez Dayán, Eduardo Medina Mora I., José Fernando Franco González Salas and Javier Laynez Potisek. Justice Margarita Beatriz Luna Ramos was absent.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=245437>

EXTRACT FROM THE *AMPARO DIRECTO* 43/2018

- p.1 Mexico City. The Second Chamber of the Supreme Court of Justice of the Nation (this Court), in session of February 6, 2019, issues the following decision.

BACKGROUND

- p.5 On February 29, 2012, the National Council to Prevent Discrimination (Council) initiated a discrimination procedure, since the Human Rights Commission of the State of Coahuila sent a letter of complaint filed by a doctor, against the Mexican Social Security Institute (the Institute) for acts of discrimination.

On October 6, 2015, it was determined that the Institute referred to was responsible for acts of discrimination against the doctor by denying him employment because of his HIV status.

The Institute filed a nullity lawsuit against the decision.

- p.7 The Federal Court of Administrative Justice issued a decision on May 30, 2017, in which it decided to declare the challenged decision null and void.

- p.1 By submission filed on July 11, 2017, the Institute sought the protection and *amparo* of the Federal Courts against the decision of May 30, 2017.

- p.2 The Institute requested that this Court exercise its power to assert jurisdiction to hear and resolve the *amparo directo* lawsuit.

- p.3 On June 13, 2018, this Court endorsed the request for the purpose of hearing the *amparo directo* lawsuit.

STUDY OF THE MERITS

I. Analysis of articles 17, section II and 83 of the Federal Law to Prevent and Eliminate Discrimination

- p.13 The Institute argues that the provisions cited in the heading are contrary to the principle of legality, since they give the Council powers to impose administrative measures with

which it may even order an administrative authority to disregard its own regulations, and on this basis to grant rights to those not contemplated by the law.

p.15-16 This Court finds that the Council did not invalidate any norm, nor did it obligate the Institute to cease observing its internal regulations. On the contrary, the Council simply considered that the document: "Procedure for prevention and health promotion services for IMSS workers and Medical-Labor Aptitude Examinations for Applicants to Enter the Mexican Social Security Institute", should not be interpreted in isolation, but systemically and in favor of the person, for which it should be read in the light of the Official Mexican Standard NOM-010-SSA2-2010 (NOM), which prohibits both individuals and authorities from carrying out HIV/AIDS examinations as a hiring requirement.

p.16 In other words, it considered that the internal norm of the Institute does allow applying medical examinations to detect HIV/AIDS, but only those that are strictly necessary to avoid possible contagion to the workers or to prevent a worker from later claiming as an occupational illness, a disease he contracted before being hired; but never as a requirement for hiring, as this would go against the NOM itself and the Federal Law to Prevent and Eliminate Discrimination (Anti-Discrimination Law).

Therefore, the Institute's constitutionality argument is ineffective, since articles 17, section II and 83 of the Anti-Discrimination Law were not applied against it to force it not to observe its internal regulations.

II. Constitutional regularity of articles 6.3.2, 6.3.3 and 6.3.4 of the NOM

p.17 The Institute argues that the provisions cited above which establish the prohibition on requesting HIV/AIDS detection tests as a requirement for obtaining employment are in violation of the human rights to health and social security.

p.24 This is considering that they do not allow the Institute to carry out HIV examinations on medical personnel and, therefore, be able to use the necessary measures to protect both employees and patients from a plausible risk of contagion of that condition.

This Court considers that the NOM can be interpreted most favorably for the person to allow the prevention, on the one hand, of discrimination against people with HIV in the

medical profession and, on the other hand, of this condition of seropositivity of medical personnel generating undue effects on the human right to health and social security.

p.25 It is possible for the Institute or other health institutions to perform HIV/AIDS examinations on medical personnel as long as certain standards provided for in the NOM and interpreted in each case most favorably for the person are upheld.

The first standard for the application of medical examinations for the detection of HIV is that they can never be performed prior to the hiring of medical personnel.

p.25-26 This allows health institutions to fully comply with the NOM, which would avoid direct or indirect discrimination by such health centers, because their ignorance of the HIV status of the person would mean it would not influence the hiring process and decision, and the applicant will be designated in the job based on their merits or other objective reasons, regardless of their status of seropositivity.

p.26 In addition, compliance with the NOM in no way prevents or hinders health institutions from taking the necessary measures to avoid the generation of risks of HIV/AIDS infection, in order to protect both patients and other medical personnel.

This is because health institutions may carry out HIV/AIDS examinations, as long as they are subsequent to hiring – with the periodicity that the institutions themselves deem appropriate – and under the condition that they are applied in a general and non-individualized way to health workers, in order to avoid discrimination or stigmatization of the person.

In this regard, once the examinations have been carried out on health workers, and where the HIV status of any of them has been detected, they must comply with the prevention measures referred to in the NOM, which imply, among other considerations, that such institutions must carry out specific actions aimed at the health personnel to ensure that the seropositivity status of any of the workers does not present a real risk to the staff or other workers.

p.27 The second standard that health institutions must observe is that any HIV/AIDS examination that may be performed on medical personnel must be strictly so the

institutions can carry out specific or individualized safety measures or protocols that are intended to prevent the HIV condition of the worker from posing a risk to the health of patients and medical personnel.

p.28 The third standard for the application of HIV/AIDS examinations, taking into account the systematic interpretation of the NOM and applying it in favor of the rights of the person, is that the detection of this condition of seropositivity cannot result in the termination of employment.

p.29 HIV/AIDS screening cannot result in termination of employment; hence, if a health worker is dismissed once his or her HIV/AIDS status has been detected, an enhanced suspicion or presumption will arise that the cause of termination of employment was his or her HIV status, which not only implies that the judge must apply strict scrutiny, but also that the health institution must demonstrate that the cause of dismissal was entirely unrelated to the worker's HIV status.

The fourth of the standards to be observed by health institutions is that the application of HIV/AIDS examinations to health personnel cannot be indiscriminate. Thus, they should only be applied for those specialties, medical areas or activities in which there is actually a reasonable and objective risk of infection to staff or patients, considering the inherent characteristics of medical work.

p.30 General examinations may only be applied to the work, areas or specialties of the health sector in which there is a reasonable risk of objective contagion taking into account the causes of transmission of HIV/AIDS specified in the NOM and their relationship or link with the nature of the medical practice in question.

p.30-31 Finally, the fifth standard health institutions must observe is that the results of the examinations should never be published; the HIV/AIDS condition may only be known to the people and workers who are strictly responsible or co-responsible for the implementation of the necessary measures for the protection of the health of medical personnel and patients.

p.33 Having clarified the correct interpretation of the NOM, this Court considers that provisions 6.3.2, 6.3.3 and 6.3.4 of the NOM are not unconstitutional.

These provisions pursue a constitutionally legitimate aim, namely, to prevent health institutions from engaging in discriminatory acts with respect to persons and workers with HIV/AIDS status.

Similarly, such measures are conducive, necessary and suitable to achieve the constitutionally valid purpose pursued, precisely by prohibiting health institutions from: (I) applying HIV/AIDS examinations as a hiring requirement; (II) using the detection of this health condition to affect the human rights of a person, such as the right to work; and (III) using the detection of that disease for purposes other than health protection.

Thus, they are measures to ensure that persons and health personnel with HIV/AIDS are not discriminated against by the institutions to which they provide or intend to provide their services, taking into account their HIV-positive status.

p.34 Finally, the measures are proportionate, since, in pursuing the constitutionally legitimate aim, they do not excessively and unjustifiably affect other constitutional principles or interests, such as the human rights to health and social security.

Hence, the contested articles do not violate the right to health or social security, since they allow HIV/AIDS examinations to be carried out, as long as they are carried out under the standards established in the NOM itself and, based on their results, they obligate health institutions to implement specific actions to ensure that this condition of seropositivity does not result in a risk of HIV/AIDS infection for patients and medical personnel.

Thus, in principle, requiring the HIV examination for access to medical employment would be in total violation of the principle of equal treatment, since it would allow a person to be denied employment simply because of his or her health condition, which would result in an arbitrary distinction.

p.35 Second, because requiring the HIV/AIDS examination for job applicants is not necessary to protect the health of third parties since they are not yet part of those health institutions,

the invasion of the applicants' privacy would not be justified, because at that time they do not represent any risk to workers or patients.

Third, because the protection of the right to health is fulfilled in any case with the possibility of applying the HIV/AIDS examination to people who are already working in specialties, medical areas or activities in which, in fact, there is a reasonable and objective risk of infection to staff or patients – on the understanding that the examination must be applied generally to all personnel of the respective area or specialty and not individualized to a single worker – since this allows the necessary measures to be taken so that the worker's HIV does not affect patients or the staff themselves.

And fourth, if it were permitted for job applicants in the medical sector to undergo the HIV/AIDS examinations – even if it were prohibited to refuse hiring based on HIV/AIDS status – there would be a risk that health institutions, knowing the HIV status of the job applicants, could deny them the job, under the pretext that the denial was based on other reasons supposedly unrelated to the health condition – especially since the recruiting agents have a certain flexibility and deference in deciding which candidate or candidates they consider should occupy a certain position within the institution.

p.36 This Court considers that proscribing or seeking to prohibit the exercise of the medical profession to a person merely because of their HIV status is a prototypical example of a disproportionate limitation on the human right to work under conditions of equality. Although the measure prohibiting the recruitment of health workers with HIV could be regarded as serving a constitutionally prevailing purpose, such as health protection, such a measure does not pass the proportionality test, since it disproportionately and unnecessarily affects the human right to work.

p.38 This measure precludes an assessment in each specific case to determine whether or not the medical practice of the person with HIV, in fact, brings an immanent risk to third parties, since it could not be examined whether the respective area, specialty or health activity poses a risk or danger of contagion. In this regard, the measure in question is not proportionate to the interest that must be protected, since it does not allow an assessment of whether the HIV status of the medical worker actually entails an objective and

reasonable risk for patients and staff; on the contrary, it presumes that this health condition is a "danger" in all cases and with respect to any medical exercise, without taking into account whether there is a link between the respective medical work and the forms of transmission of such a disease.

- p.39 In this regard, less harmful measures should and can be taken to allow the medical practice of people with HIV/AIDS, while protecting the health of others. It is reasonable for people with seropositivity to be able to practice the medical profession, under certain specific preventive measures that accompany this work, already generic, already individualized.
- p.40 To accept categorically that people with HIV are prohibited from the practice of the medical profession would not only unduly and unnecessarily affect the life project of such people; it would also deprive the State and the community of the benefits and talents that such people could bring to the health sector, thereby affecting society as a whole.

III. Discrimination by the Institute in requesting HIV/AIDS examinations

- p.42 The Institute's action, in establishing the practice of requesting HIV/AIDS examinations as a condition for obtaining employment, is discriminatory in and of itself – and in violation of the NOM, since there is no doubt that such conduct is in outright violation of the human right to equal treatment, in that it restricts and denies employment to the individual, simply because of his or her health condition, which constitutes an arbitrary distinction.
- p.44 The fact that the Institute intends to establish, as a requirement for recruitment, that candidates be tested for HIV/AIDS, not only entails discriminatory treatment of persons, but may contribute to the formation or reinforcement of prejudices and stereotypes about persons with this health condition; in other words, it is likely to generate the perception that such persons are "different", "dangerous" and "unfit to work", which consequently has a stigmatizing effect - the creation of a division between "us" and "them" - which is contrary to the obligations that the Mexican State has undertaken with respect to the human right of equality and non-discrimination.

IV. Consistency of the appealed decision.

- p.45 The fact that the Institute is prohibited from conducting HIV/AIDS examinations for the recruitment of medical personnel does not contradict its obligation to protect the right to health of its staff and third parties.
- p.46 The protection of the right to health is entirely reconcilable with the possibility for people with HIV to practice the medical and health profession, since this condition of seropositivity only means that health institutions must adopt prevention measures and good practices that prevent the risk of infection of such a condition.

V. Analysis of the overall effects of the Council's determination

- p.47 In the opinion of this Court, it is untrue that the Council's determination gives "generality" to the prohibition on the Institute of applying HIV examinations as a hiring requirement; on the contrary, the only thing the Council did was to inform the Institute of the need to comply with a general rule that, precisely, prohibits it from performing such acts.
- p. 48-49 In this regard, the "generality" that the Institute argues does not result, in reality, from the decision of the Council, but from the obligation of the aforementioned Institute to observe the NOM that is general in nature and that is applicable nationally and for all personnel working in public sector, social and private health service units of the National Health System.

DECISION

- p.49 The Institute is denied the *amparo*.