LABOR AND EMPLOYMENT

THE POSSIBILITY OF PERFORMING PREGNANCY TEST ON THE DEMISSIONAL EXAMINATION

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AUTHORS

FERNANDO LIMA BOSI
LAWYER / SÃO PAULO

BEATRIZ AMORIM FRANCHI
LAWYER / SÃO PAULO

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The discussion on the possibility of the employer requesting the examination of pregnancy at dismissal has already been the subject of major discussions in the Labor Court, since there is divergence between those who support the measure, as a way to guarantee the right to the parties involved and bring greater legal certainty to the end of the employment contract , and those who understand that such a practice would be an offense to the intimacy of the worker.

In recent decision, the Third Class of the TST rejected the appeal of former employee who requested the payment of compensation for moral damages, because the company had required the performance of pregnancy examination in the commission. The winning thesis stipulated that the conduct was not discriminatory or violated the worker's intimacy, since it aimed to provide legal certainty at the end of the employment contract.

The legislation on the subject (Law No. 9,029/95) and Article 373a, item IV, of the CLT prevent the application of pregnancy testing only for the admission or maintenance of employment, since the conduct is considered discriminatory because it hinders women's access to the labor market. In other words, there is no legal provision that prohibits, or expressly permits, the employer's performance of pregnancy testing in the commission.

The case-law is strictly applying Law No. 9,029/95 and Article 373a, item IV, of the CLT, in the sense that the prohibition is restricted only to cases of admission or maintenance of employment. Some decisions also provide that the request for pregnancy testing in the demissional examination, in addition to not being sealed by legislation, is a beneficial practice for offering legal certainty to the parties, since it guarantees the right of the pregnant woman to maintain employment, upholds the right of the unborn child and anticipates any harm caused to the employer in the face of future legal action.

This understanding, however, is not unanimous. For a divergent minority jurisprudential current, the requirement of the pregnancy test on dismissal is a procedure that violates the intimacy and privacy of the employee and constitutes an intervention within the personality of the woman. This was the position of Minister Maurício Godinho Delgado in the most recent decision of the TST mentioned above.

Thus, it is concluded that the request for pregnancy test on the demission alexameno has no legal seal, being a lawful practice and considerably well received by the majority jurisprudential current. However, out of caution, it is recommended that the company take some care, such as:

- lack of obligation in relation to the performance of the pregnancy test;
- registration of refusal in relation to the performance of the examination, in case of disagreement of the employee;
- confidentiality of the pregnancy test result;
- request for pregnancy examination as an indiscriminate measure to all employees with the terminated employment contract, to avoid the characterization of a discriminatory act; and
- inclusion of specific forecast, at the end of the examination, indicating the desired legal purposes and the commitment of the company in the processing of the data obtained exclusively for this purpose.

It is proceeding in the National Congress the Bill No. 6.074/16, which aims to add a paragraph in Article 373- A of the CLT, regulating the requirement of pregnancy testing in the dismissal exams and, thus, pacifying the issue and enabling greater legal certainty for the parties. The project meets with the rapporteur of the HRC (Commission on Human Rights and Participatory Legislation), Senator Zenaide Maia, for the issuance of a report since February 2020.

The legal pacification of the theme would bring benefits to companies, as it would reduce spending on labor actions that would be avoided, but it is important to mention that legal discussions about pregnancy have social implications that go far beyond the legal sphere. Among the reasons pointed out by experts for the gender pay gap, in addition to the numerical disparity of women in leadership positions, are issues involving the maternity and the time spent on household duties. Therefore, measures aimed at standardizing understanding on the subject should be seen as beneficial, as they guarantee legal certainty and contribute to reducing social and economic disparities between men and women.