



ON THE JURISPRUDENCE OF WORKPLACE DISCRIMINATION

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Abstract

This article aims to analyze how Brazilian jurisprudence analyzes workplace discrimination and how it maps the Brazilian racial structure into profoundly asymmetrical power relations. It analyzes judgments of the Regional Labor Courts and the Labor Superior Court.

Key Words title

Workplace Discrimination. Jurisprudence. Assymetrical Power Relations.

Resumo

Este artigo pretende analisar como a jurisprudência brasileira analisa a discriminação no local de trabalho e como mapeia a estrutura racial brasileira em relações de poder profundamente assimétricas. Para tanto analisa julgamentos dos Tribunais Regionais do Trabalho e da Corte Superior.

Título Palavras-chave

Discriminação nos Locais de Trabalho. Jurisprudência. Relações Assimétricas de Poder.

INTRODUCTION

Racial discrimination can occur in any part of life: work, abode, shopping, public places, and certainly with friends, family and intimates. It is difficult to bring a complaint to the law about racial discrimination in any of those settings. To admit to have suffered racially discriminatory treatment represents an admission of “being the type of person who might be discriminated against - not only Black, but by association, untrustworthy, stupid and so on - as if it might be their fault that they were discriminated against.” (Wade, 1997) For racial discrimination victims, this subjective use of law represents a break from silence and fear, which requires “recognition of racial belonging, self-esteem around identity, and the exercise of citizenship”. (Oliveira, 2009) Further, a viable allegation requires evidence, generally in the form of testimony. In some of the settings, such as discrimination from a friend or intimate, there may be no witness to the incident. In other settings, there may be witnesses but they may have an ongoing relationship to the complainant or alleged perpetrator, which would affect their participation. Lawyers have reported that the securing of eyewitness testimony tends to be the most exacting aspect of litigating racial discrimination.

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Plaintiff and witness subjectivity are both hindered by inegalitarian social structures that recreate relations of domination. (Honneth, 2004)

Brazilian anti-discrimination law has further complicated litigation against racial discrimination. During the thirty years under the antidiscrimination law of 1989 (7.716/89), racial discrimination complaints have been overwhelmingly treated as *injúria*, an injury to the honor of the complaining party and not racism, and after 1997 as *injuria qualificada*, a personal injury to the race of the individual. Under Brazilian legal classifications, *injúria* is a lesser charge than racism with lesser penalties that must be prosecuted by the individual and not the state. The designation of an allegation as *injúria* effectively curbed or denied a plaintiff's ability to contest discriminatory treatment in the 1990's. The unevenness and unwillingness of the Brazilian judiciary (Santos, 2015; Machado, Lima and Neris, 2016; Lima and Ribeiro, 2016; Becker and Oliveira 2013; Sales, 2006; Zapater, 2015) to apply the anti-discrimination law has been clearly documented. The law, on its part, seems overly focused on segregatory practices in the mode of Brazil's image of the US. (Zapater, 2015; Guimaraes, 1998) That understanding of racism, punished as a non-bailable felony, has effectively focused judicial inquiry on the mind and spirit of the aggressor. As Guimaraes noted in 1998, the judicial interpretation of the law was "inapplicable to the racism existing in Brazil". (Guimaraes, 1998; Lima, Machado and Neris, 2016)

The judiciary tends to decontextualize allegations (Lima and Ribeiro, 2016) by evaluating them without recognition of the repercussions and social contexts of the alleged behavior. (Machado, Lima and Neris 2016) Indeed, insults, viewed by many judges and other criminal justice officials as banal (Santos 2015), serve to reinforce social distance. (Machado, Lima and Neris, 2016; Guimaraes 2003) When defendants succeeded in overturning cases, judges tended to find evidentiary problems in the plaintiff's cases, (Lima and Ribeiro, 2016) which also included a finding that plaintiffs failed to satisfactorily show intent. (Machado, Lima and Neris, 2016) Judges are often unwilling to read intent from words and deeds and require a very high showing of prejudicial intent toward a victim and toward Blacks as a group and served as the causal agent of the aggression. (Racusen, 2002)

Civil cases proceed more fruitfully than criminal cases (Lima and Ribeiro, 2016; Juliao and Carvano, 2010, Racusen, 2003) most likely because of the differences in evidentiary standards and the hyper focus on intent in criminal cases. LAESER found in a study of 273 criminal, civil and labor court decisions issued from 2005 to 2008 that aggressors were more likely than not to prevail and that victims fared better in labor courts (37%) than in civil and criminal courts (33%). (Juliao and Carvano 2010)

Of all potential sites of discrimination, the workplace is perhaps the most socialized site with also the most articulated hierarchy of power. While there are often witnesses of the alleged discrimination in the workplace, those witnesses are highly reticent to testify against a supervisor or even co-worker because of fear of losing employment or other types of retaliation. (RO 00298-2009-038-12-00-1) The viability of a plaintiff's allegation of racial discrimination fully depends upon the citizenship of others – who are under the influence of the aggressor economically and socially.

In addition to their tremendous economic power, employ can deploy Brazilian racial ideology to their advantage. The Brazilian structure of racial identity offers a

great repertoire of options for an employer or other aggressor in the workplace. For example, if an aggressor were Brown, he possesses a readily available defense for a judicial process claiming that he could not be prejudiced against a Black, and that whatever had occurred was at most a misunderstanding. Even if he were not Brown but had black ancestry, he could cite that in his defense. Lacking this, he might mention a black wife, girlfriend or friend. In the first decade of the implementation of the new anti-discrimination law, judges tended to accept such a defense. (Racusen, 2002) In addition, defendants might compel black employees to testify on behalf of a supervisor and/or company. Such testimony does not address the facts of the allegation but represents character witnesses to influence the interpretation of prejudice.

How do labor courts, often reputed to be more accessible to the problems of ordinary Brazilians, adjudicate allegations of workplace discrimination? This paper situates the processing of workplace allegations of racial discrimination in the context of the tremendous power differential between plaintiff and defendant. First, one might ask – how do courts address such asymmetric power relations? This paper asserts that plaintiff, defendant, and all witnesses recognize their highly differentiated positions in the workplace and inquires how courts recognize the positionality of the participants.

Little is known about this litigation, the focus of this paper. Work certainly provides more opportunities to have witnesses, critical for discrimination cases. Further, labor courts have the reputation of being more accessible to ordinary Brazilians, and the labor judges do need not require prejudicial intent. How do labor courts understand racism and evaluate the competing claims of complainant and defendant? This paper examines the jurisprudence of workplace discrimination, including

- What repertoires do plaintiff and defendant invoke in the alleged discriminatory circumstances?
- How does the law address the highly asymmetric power relations? How efficacious is the law in response to those asymmetries?
- How do labor court judges evaluate testimony, evidence, and especially defendant prejudice in allegations of racial discrimination? Do they recognize the power imbalance of the parties in their evaluation of evidence?
- What rationales do they rely upon to apply the law and to evaluate evidence?

This paper seeks to analyze discriminatory practices, the repertoires of aggressor and victim, and judicial interpretations of the facts of the case and the respective repertoires of aggressor and victim. This paper draws upon appellate labor court decisions for the 12th TRT from the state of Santa Catarina, reputedly one of the more progressive courts in the country. Although the paper is qualitative and exploratory, I claim that some of the findings extend to other courts.

Part II: Methods

Important new empirical research has shown the overall difficulty of pressing cases of racial discrimination and the greater viability of civil rather than criminal cas-

es. This is the first presentation of labor court proceedings on racial discrimination. I selected labor courts because of their reputation to be more balanced than other courts and I selected Santa Catarina because it has reputedly one of the more progressive and democratic judiciaries in the country.

I consulted the site for the 12th Tribunal Regional de Trabalho, which covers Santa Catarina, (<http://www.trt12.jus.br/juris/scripts/form-juris.asp>), June 18, 2018 and searched for the following terms in the ementa (main holding): *racismo*, *racista*, or *racial*. As such, I did not conduct an exhaustive search but simply an illustrative search. I located 34 cases that contained one or more of the search terms in the ementa. In one instance, the case did not contain an allegation of racism but the ementa simply mentioned one of the search terms. Finally, I selected only cases adjudicated since 2002 for the purpose of this analysis and include 31 cases in the study.

Virtually all of the cases were allegations of dano moral (moral damages) caused by racism. From a reading of the highlighted words in the ementas, judges characterized the nature of the act that caused the damages as follows:

TABLE I: CHARACTERIZATION OF THE ALLEGED CRIME, TRT 12, 2002-16

CHARACTERIZATION OF ALLEGED CRIME

OFENSAS VERBAIS	7
DISCRIMINAÇÃO RACIAL	6
ASSÉDIO MORAL	5
RACISMO	5
RACISMO/DISCRIMINAÇÃO	4
INJURIA RACIAL	1
PRECONCEITO E DISCRIMINAÇÃO	1
RACISMO/INJURIA RACIAL	1
TRATAMENTO DISCRIMINATÓRIO	1
TOTAL	31

SOURCE:

WEBSITE FOR THE 12TH TRIBUNAL REGIONAL DO TRABALHO,
[**\(HTTP://WWW.TRT12.JUS.BR/JURIS/SCRIPTS/FORM-JURIS.ASP\)**](http://www.trt12.jus.br/juris/scripts/form-juris.asp)

Since all of the allegations contained a verbal element that included prejudicial commentary, these characterizations emphasize distinctive and overlapping aspects of the circumstance. Racism is a nonbailable felony under the anti-discrimination law of 1989. Injuria racial is a heightened form of injuria in the código penal that punish-

es racial insults. Generally, the differentiation between the two has been thought to reside in whether the insult harms Blacks as a collectivity or an individual black. (Nucci, 2009) Racism in the law is defined as a “crime of prejudice” and there are associated terms above as well. Finally, assedio moral is a distinctive legal characterization that refers to severe, ongoing harassment in the workplace. (Hrirgoyen apud Aguiar) These distinct characterizations also overlap and multiple characterizations have been applied in individual cases.

The characterizations of the allegation matter. Cases characterized as assedio moral or ofensas verbais (which is not a designated crime correspond to higher levels of condemnation at the appellate level. Cases characterized as injuria racial (racial insult), racismo, or racial discrimination corresponded to lower levels of condemnation at the appellate level. “Offensive words”, in this context, is a lesser characterization than the designations of racism, assedio moral, or injuria racial. The higher condemnation rate for ofensas verbais suggests a banalization of the allegations. (Santos, 2015) Because of the low N, further work is needed to confirm if this finding is statistically significant.

Table II: Outcomes of Racial Discrimination Allegations, TRT 12, 2002-16

Characterization of allegation	All	Condenação	
Preconceito e discriminação	1	1	100%
Tratamento discriminatório	1	1	100%
Ofensas verbais	7	6	86%
Assédio moral	5	4	80%
Racismo/discriminação	4	3	75%
Racismo	5	3	60%
Discriminação racial	6	2	33%
Injuria Racial	1		0%
Racismo/injuria racial	1		0%
Total	31	20	65%

Source: website for the 12th tribunal regional do trabalho, (<http://www.trt12.jus.br/juris/scripts/form-juris.asp>)

The paper examines these decisions in qualitative detail, including aspects of the social context, the defendant repertoires, and judicial holdings about context and repertoire, explored in the next section of the paper. This approach enables us to examine the interpretative act of judging and the power dynamics between defendant and plaintiff.

Part III: Selected Findings

This section analyzes defendant repertoires in the workplace and in court, and how judges evaluate those repertoires and supporting evidence. Before examining those repertoires, it must be emphasized that in seven cases, defendants sought to intimidate plaintiffs who complained about racism with explicit threats of retaliation. In four cases, the plaintiff was also dismissed. Thus, the overall set of claims show evidence of high levels of coercion against using the law. In these instances, employers claimed that the dismissal was for just cause, which the judges tended to recognize instead at retaliatory dismissal. Here are a few examples.

For example, in one case, the plaintiff, an employee of eight years who alleged harassment for the entire duration, was fired after filing a complaint. Previously, the aggressor had threatened to fire the plaintiff: “vou ofendê-lo e distratá-lo o quanto me aprouver e, se você reclamar, vai ainda perder o emprego.” (RO 01663-2008-002-12-00-4) In overturning the trial court judge who had upheld this as a dismissal for just cause, the appeal judge held that the firing constituted retaliation for a plaintiff using his rights.

After working for 16 years as a refrigerator production assistant, a complaining worker was fired after two years of alleged harassment by his superior. The worker alleged being called monkey and ‘panela preta’. The worker had asked his supervisor to stop because he was offended. Upon reporting this to human resources, the worker was dismissed. (RO 00232-2007-020-12-00-1)

A worker alleged daily racial harassment from a co-worker and then sought to avoid any social circumstance in which the humiliation could occur. She subsequently reported the harassment to her supervisor, who, as the judge noted, failed to investigate the allegation but instead fired the complaining worker. (RO 0002063-92.2014.5.12.0019)

In court, defendants offered three defenses. The first was to claim that the alleged commentary was part of workplace culture, a culture of joking that was endemic to the workplace. This defense does not dispute the facts but offers a different culturalist interpretation of social dynamics and asserts the significance of humor for Brazilians and their fundamental identity as Brazilians, the formative role of humor in what makes Brazilians Brazilian. This defense was invoked in five cases and in several of which, the complaining worker was also intimidated and/or fired.

A second defense, also culturalist and also invoked in articulations of the Brazilian nation, was the defendant’s personal relationship to blackness. As such, either a black defendant or a defendant with a black spouse could not be racist. This also does not refute the facts of the allegation but pretends to speak to the character of the defendant. This was invoked in three cases.

The third defense, most widely invoked in a total of six cases, involved claims about the presence and quantity of black employees in the workplace. Here, the rationale, when offered, tended to be functionalist, suggesting that a company could have no incentive to discriminate against so many black workers. The defendant would also produce one or more black workers to testify to never having been discriminated against. This again does not directly refute the facts but tries to weaken

the strength of the plaintiff's claim by implicitly and/or explicitly comparing the plaintiff to other black workers. Below are emblematic examples of each.

3.1 - Joking as Workplace Culture

Here are several examples of the defendant repertoire to have been joking and that racial joking was a natural element of workplace culture. In one instance, a worker was subjected to continual jokes and harassment for his entire working career at the firm. He provided numerous material witnesses that he had been called ““negro”, “macaco”, “tição” e “schartz” (em alemão, preto)”, as noted by the appellate judge. Further, these witnesses saw him complain about this treatment with his co-worker and his superiors:

Também foram unânimes em afirmar terem presenciado o autor reclamar com os colegas e com seus superiores imediatos (encarregados de seção) acerca do tratamento discriminatório, sendo que, em relação aos primeiros, de pouco adiantavam as reclamações, visto que as “gozações” continuavam, enquanto que, por parte dos prepostos da ré, nenhuma atitude mais contundente foi tomada, restringindo-se, por exemplo, o sr. Z*** encarregado a aconselhar o autor para “levar na brincadeira”. (RO 00295-2006-015-12-00-1)

Thus, his supervisor counseled him to accept the humiliations. The company challenged the motive of the plaintiff and witnesses in court, alleging them to be opportunists and tendenciosas and denied their allegations. Most pertinently, the company did not stop the racist environment in practice. In this instance, the appellate judge upheld the decision of the trial court in holding the company responsible for the racist humiliations.

In a second case, the trial court judge had accepted the company's arguments about humor and workplace culture. In this case, an employee had endured eight years of humiliation by supervisors, having been the butt of constant jokes. The trial court judge held that the workplace culture of jokes about origin were thoroughly Brazilian, reflecting Brazilian humor and diversity:

É indubitoso que o brasileiro se gaba de ser um povo alegre, festeiro, irreverente, com ótimo humor. . . não há como ignorar este traço sócio-cultural do povo brasileiro.

São feitas piadas – e na maioria das vezes com mau-gosto – sobre deficiências físicas (“ceguinhos”, “surdinhos”, “mudinhos”, anões, corcundas); piadas “enaltecendo” características anatômicas da raça oriental; piadas denegrindo crenças religiosas ou, ao menos, delas fazendo pouco caso; piadas relacionando determinada nacionalidade com ingenuidade ou falta de inteligência, como são comuns as piadas de português; outras, relacionando a inteligência de uma pessoa à cor do seu cabelo (“loiras”). . .

Esta é uma mazela da sociedade brasileira . . .

As piadas com negros, como não poderiam deixar de ser, fazem parte de toda esta horda já narrada. Elas, querendo ou não, fazem parte deste “cotidiano”. Há quem ache graça! Agora, o que não se pode pretender é ver como “racismo” ou discriminação piadas com a raça negra e achar “engraça-

do” piadas com aleijados, albinos, portugueses, loiras, etc. Isto é hipocrisia, e do tipo bem barata! (RO 01663-2008-002-12-00-4)

The trial court advanced a slippery slope argument that this “humor”, characterized as “ótimo humor” characteristic of a “povo alegre” and also “bem barrata”, could not be taken as racism unless all jokes about all Brazilians were taken as racism. Further, the judge later noted, the plaintiff had even participated in the use of nicknames against others, insinuating therefore that the plaintiff had not really been offended. Further, the trial court judge asked - could calling someone by a “nickname”, such as “negão”, be racism? He held that the use of the term, “negao”, would not be racism, only in circumstances that accentuated the term:

Referir-se a uma pessoa de cor negra como “negão”, sem qualquer conotação pejorativas ou difamante, é racismo?? Referir-se a uma pessoa muito branca como “alemão” ou “branquinho” não teria a mesma feição?? Acho que tudo depende da conotação que você quer dar ao tratamento, a maneira como você impõe sua voz e a circunstância do tratamento. Agora, o mero chamamento de uma pessoa pela sua cor ou até característica física (“gordinho”, “baixinho”), por si só, não pode ser tido como tratamento racista ou discriminatório.

According to this judge, racism constitutes segregatory acts that clearly differentiated whites and blacks:

O que me parece ser discriminatório é você contratar ou deixar de fazê-lo pelo simples fato da pessoa ser branca ou negro. Você deixar de atender determinada pessoa ou fazê-lo de forma diferente no comércio ou em uma repartição pública por ser a pessoa “branca” ou “negra”. Isto é racismo. E pode se dar de um lado e de outro.

As we’ll see, the judge introduced these arguments about racism and racist insults in a holding in which he granted significance to elements such as the defendant’s personal relationship to blackness and the number of black employees at the firm. In this case, the defendant used all three rationales mentioned above, arguing as well to have a black wife and not be racist, and that the firm employs too many black employees to be racist. The other rationales will be treated below.

The appeal judge rejected and overturned the trial court decision. He contextualized the culture of the workplace and held that the three witnesses for the defense did not negate the allegation but sought to justify the joking:

As três testemunhas da ré tentaram descaracterizar a personalidade das ofensas, falando que se faziam piadas também sobre portugueses, loiras etc. e que o próprio autor delas participava e que nunca reclamou. A primeira testemunha se declarou “negro” (fls. 295-7).

Ora, o fato de serem contadas piadas outras que não racistas, não torna lícito ou aceitável a formulação de chistes de tal jaez, principalmente na presença do autor, porque daí, além da ofensa à sua etnia, há um componente pessoal agravante.

A subordinação e a necessidade do emprego podem até ter feito o autor se calar, diante das ofensas, mas não se pode perder de vista que, caberia ao empregador refrear e mesmo eliminar essa prática nefasta e não ao empre-

gado. Tivesse o autor oferecido oposição, principalmente diante do superior hierárquico e sua platéia, teria sido dispensado ou perseguido. (RO 01663-2008-002-12-00-4)

Thus, the judge held that jokes about nationality and appearance did not justify racist jokes. Further, he reinterpreted the plaintiff's response to the workplace arguing that the plaintiff's conduct in the context of the racist, hostile environment could not be used to argue that he accepted the racism.

Finally the judge held the company responsible for the environment, not only because of the supervisor's participation:

Piadas e provocações podem até residir na idiosincrasia da população brasileira, mas, o mínimo que se pode exigir é que, em ambientes institucionais sejam observado um padrão civilizatório mínimo, que impede a proliferação do racismo, do preconceito, da respeito à dignidade humana.

He countered the defense here as well in holding the company responsible for the behavior of its employees.

3.2 - Defendant's personal relationship to blackness

In three cases, defendants emphasized their personal relationship to blackness as indicative of non-discriminatory intent and behavior. In one case in which a supervisor allegedly referred to a employee of two years as "negrona" and other perjorative names in front of co-workers and customers, the defendant emphasized his marriage as evidence that he could not commit a discriminatory act. The appeal judge upheld the trial court decision and did not accept that defense:

Para deixar claro, o fato de o sr. E*** ser casado com alguém mais morena que a autora e ter ajudado a mesma em momento de dificuldade, não afasta, por si só e de forma automática, eventual prática de ato discriminatório. Talvez para redimir-se, purgar culpa ou seja lá o que for. (RO 00904-2008-054-12-00-7)

The judge held that his marriage and alleged act of friendship toward the plaintiff did not materially address the facts of the case and indeed suggested other motives for the behavior touted as inherently anti-discriminatory.

In another case, a plaintiff alleged continual racist harassment working as kitchen help which was supported by two material witnesses. The judge found discrepancies in their testimony, which did not in fact diminish the allegation but which the judge used to declare doubt. The judge declared that if the defendant had the same identity as the plaintiff, that the evidence had to be robust:

Entretanto, o direito deve servir a tornar a vida em sociedade possível e não impossível, de forma que, não se pode presumir discriminação racial, principalmente por parte de quem possui a mesma origem racial do ofendido e em razão dela. Ainda que seja possível, em tese, discriminação racial por integrante da própria minoria, esta deve restar provada, ainda mais robustamente.

The judge emphasized discrepancies in the witness accounts about the position of the witnesses within the workplace while the alleged insults were communicated

and also whether the insult was “só pode ser serviço de negro!” ou “para ela fazer serviço de branco e não de negro”. Further, the judge held that a black defendant could not have discriminatory intent because she belonged to the group she was deprecating:

não se pode olvidar que a pretensa ofensora possui origem afroascendência pelo lado materno, o que colocaria em dúvida a própria intenção discriminatória.

É verdade que, para discriminar o pretense discriminador pode estar inserido na mesma situação da pretensa vítima, ainda que isso cause espécie (ao ofender, estará também se ofendendo); isso se dá seja porque, por algum desvio, o ofensor pode estar querendo dissociar-se do grupo discriminado, seja porque, por alguma razão, não se considere seu integrante, mas, o ordinário se presume, o extraordinário deve ser provado.

Se A*** disse, efetivamente, que os afrodescendentes são menos capazes que os caucasianos para executar tarefas e que a autora, inserindo-se naquele grupo, seria menos capaz, por via oblíqua criticou sua própria capacidade, porquanto, ela e a demandante, possuem a mesma origem racial (a família da mãe de A*** é de negros), daí porque, a prova de uma tese tão estapúrdia deveria ser demonstrada. (RO 0004574-81.2011.5.12.0047)

The judge makes several arguments to be able to dismiss the evidence against the defendant. One is the view about the significance of the defendant’s background that someone could not discriminate against herself. Further, the understanding of discrimination as an act of disassociation also supports the claim that this defendant could not commit a discriminatory act. And in a case with some evidentiary doubts, he held that the court should rely on the trial judge, who directly heard the evidence.

3.3 - on the Number of Black Employees in the Company

Employers asserted that the number of black employees in a company mattered and that a company with a majority of black employees could not discriminate. In these cases, the company secured black witnesses to testify to not having been discriminated against and also to emphasize the number of black employees in the workplace, as if both were badges against discriminatory behavior. Judges uphold such arguments in several cases or acknowledged the strength of the claim even in instances of finding discrimination.

In one case of alleged racial discrimination, the holding that the number of black employees undermined an allegation of racial discrimination was offered without any explanation:

Assim, com relação à discriminação racial, em contraponto ao aspecto abordado pelo trabalhador, uma testemunha foi categórica ao apontar que “a maioria dos empregados da ré eram de cor mais escura”, situação incompatível com a atitude atribuída à ré na inicial.

Essa constatação ganha ainda mais força quando se observa que o contrato mantido entre as partes perdurou por quase cinco anos. Portanto, a toda evidência, não há falar em discriminação pela cor por parte da ré, sendo indevido o pagamento de indenização por dano moral pleiteado.

Both assertions, that having a workplace comprised of a majority of Afro Brazilians and that having worked at the company for five years, as being incompatible with allegations of racism, were fully unsupported. The premises for these assertions surely reside in the understanding of racial discrimination as a “crime of prejudice” and a notion that having black employees was a badge against having racial prejudice. Nonetheless, this judge acknowledged that a racial insult had been committed:

Ainda que o fato de ter a maioria dos empregados de cor negra não permita caracterizar a discriminação racial imputada ao empregador, sofre prejuízo moral o empregado que por seu representante é chamado por apelido ofensivo em alusão à sua cor. (9106/2007) RO 01541-2006-025-12-00-0

Thus, this judge held that “offensive words” had been uttered, a holding which must be considered lesser than racial injuria. This holding resonates with the argument that many judges tend to treat racism as something banal. (Santos, 2015)

In another case, a worker alleged racial discrimination over an unspecified period of time. The only aspect of the allegation that was described is that the worker was called “macaquito” by his supervisor. The eyewitness testimony provided was not discussed substantively but dismissed as “pouco convincente” because it came from someone who had worked only two months on the job. Further, the judge claimed that a witness for the plaintiff was disproven by the presence of black workers and the company’s non-discrimination policy:

Além disso, a prova oral demonstra a existência de outros empregados negros na empresa (fl. 124) e a documental comprova que ela adotava políticas impeditivas de qualquer discriminação, conforme está evidenciado pela cartilha de princípios éticos e pelos documentos relativos à política de portas abertas, os quais o demandante em depoimento confirmou ter recebido.

Com efeito, a prova da prática de “racismo” deve ser robusta, máxime quando a empresa demonstra a existência de políticas impeditivas de discriminação. (RO 00236-2007-018-12-00-3)

Thus, we see evidence dismissed for the complaint and that defendant repertoires about the number of black employees, supported by a documented non discrimination policy, as undermining the claim. Thus, conditions that are not material to the allegation can be used to deny evidence as well as to require more robust evidence.

Finally to return to the case discussed previously about racial joking in the workplace, the appellate judge overturned the trial court holding for the defendant, that the race of the witnesses, all Black, undermined the allegation. The first instance judge had held that a company with so many black workers would not discriminate against them:

Ora, se a empresa adota o racismo como prática usual por que contrataria tantos negros? Apenas para poder humilhá-los posteriormente.

This functionalist argument which presumes that a company would not behave irrationally ignores the reality that racism has been shown to not be “rational” and certainly to occur in companies with many black employees. Indeed, racism, as a repertoire of domination, is highly functional in such companies.

Further, the trial court judge also noted that a black witness for the defendant had worked at the company for many years and not perceived discrimination:

empresto às afirmações da testemunha A*** o maior valor dentre todos os depoimentos, posto que, além de ex-empregado trazido pela ré, era negro. (RO 01663-2008-002-12-00-4)

Of course, this does not speak to the material facts of the allegation, but instead creates a doubt that the plaintiff spoke accurately. In overturning the trial court decision, this appellate judge did not treat the argument about the number of black employees because the evidence about the racial nature of the “joking” in the workplace was so compelling.

Discussion

Judicial holdings and judicial evaluation of evidence draw upon stated and unstated assumptions about Brazilians and the nature of racial discrimination. Several judges, trial and appellate, denied or diminished the value of evidence based upon a notion of discrimination as segregation and also functionalist claims about the irrationality of a company discriminating against its black employees, especially if they comprise a majority of the workforce. Judges who invoked or presumed Brazilian racial ideology and a particular understanding of racism as segregation narrowly read and routinely denied material evidence for their plaintiff.

As noted above, these cases primarily rely upon eyewitness testimony, evidence that is less weighted than evidence such as an object that might document an allegation. Some judges carefully analyzed the inconsistencies in testimony to determine whether these also weakened the evidence for the allegation:

A análise dos depoimentos revela, isto sim, fragilidades e inconsistências. . . . Não se pode esperar que diante de uma situação de repentino impacto, presenciada em plena via pública, conseguissem estas testemunhas, que são mãe e filha, descrever o incidente de forma idêntica em todos seus detalhes, suscitando aí sim suspeitas. Importa verdadeiramente, que restou plenamente configurada a prática de racismo e a ofensa à honra da demandante. (RO 02392-2008-038-12-00-4)

Others used any inconsistencies to dismiss the allegation even though the inconsistencies did not undermine the alleged facts. (RO 0004574-81.2011.5.12.0047)

Some judges carefully analyzed the positionality and interests of witnesses in their assessment of the value of their testimony:

as três testemunhas da ré ainda são seus empregados, sendo presumível o temor reverencial vigente a lhes enfraquecer o valor dos depoimentos. (RO 00298-2009-038-12-00-1)

Some judges also differentiated between material and non-material witnesses:

A prova carreada para os autos revela que o recorrente fora repetidas vezes tratado em público por seu superior hierárquico de forma pejorativa e preconceituosa, com o emprego das expressões negro vadio e negro preguiçoso, comportamento que foi presenciado pelas testemunhas O*** e C*** (fls. 127/128). As testemunhas de defesa não negaram o acontecido, informando

apenas não terem presenciado ou ouvido nenhuma discussão. (RO-V 00357-2003-024-12-00-3)

Some judges treat evidence as equivalent without analyzing whether the witnesses were material and also the potential interests and positionality of the witnesses. This approach in treating testimony as equivalent generally led to dismissing plaintiff testimony in what might be described as a “he said she said” approach.

This paper has identified defendant repertoires in the workplace and in court, victim repertoire in the workplace, and judicial holdings about these repertoires and their supporting evidence:

1. Defendant repertoires in the workplace. Most defendants exercise tremendous power in their respective workplaces and openly intimidate and threaten plaintiffs. In a number of cases, intense daily harassment extended to between five and ten years. Plaintiffs who reported the incidents in the workplace tended to be fired. This intimidation occurred in workplaces in which defendants asserted the culture of racial joking, indicating both joking as a tool of domination and also a presumption of impunity, that such repertoires might be accepted in court.
2. Defendant repertoires in court. As suggested above, defendants relied upon three defenses in court: the role of humor in the culture of the workplace, a defendant’s personal relationship to blackness, and the number of black employees in the company, which represent elements of the racial democracy and other culturalist discourses. For the most part, these discourses do not require material witnesses but can be sustained by non material witnesses. Companies often deployed black employees to articulate these discourses. While these articulations would not speak to the material facts of the allegation, the deployment of black employees as articulators is a strategic part of the domination within the workplace.
3. Plaintiff repertoire in the workplace. Plaintiffs do protest the discriminatory behavior within the workplace and faced severe consequences when they did.
4. Judicial holdings about these repertoires. Of the three defendant repertoires, judges articulated the most support for the rationale about the number of black employees in the firm based explicitly or implicitly on a functionalist argument about the irrationality of hiring black employees and then discriminating against them. Despite this assertion, it can certainly be rational for a firm to hire many black workers and to deploy racist repertoires within the workplace as mechanisms of control. Perhaps judicial acceptance of this repertoire is partially explained by the region which is whiter than other parts of Brazil but more importantly it accepts racial democracy’s claims about what is and is not racial discrimination.

Conclusion

Workplace discrimination maps the Brazilian racial structure onto profoundly asymmetric power relations. As such, a black employee wishing to contest racial discrimination depends upon the consciousness of co-workers as well as their ability and willingness to challenge to the economic status-quo to be able to sustain being a wit-

ness. As indicated by the deployment of black employees as witnesses against complainants, co-workers will encounter employer coercion if they testify for a plaintiff.

These cases of the TRT 12 show the possibility of prevailing when two or more material witnesses are able to provide and sustain testimony in front of the labor court judges of Santa Catarina. These cases also reveal the fragility of justice (Machado, Lima and Neris, 2016) because many judges still deploy racial democracy and other culturalist understandings of racist workplace relations. These cases generally provided evidence of racist communication by supervisors and by co-workers, which judges evaluated through multiple interpretative lenses as indicated above. In some general way, the cases also revealed a banalization of the offenses (Santos, 2015) as judges were more likely to condemn a defendant for “offensive words” than for “racism” or “racial injuria”. While several of the cases involved larger fines, most awards were of a minor nature, and companies were fined a similar modest amount that an individual might receive. Since fines are supposed to take into account, among other factors, the ability of a defendant to pay, these modest awards are indicative of an overall diminishing of the allegations. This diminishing is accomplished step by step through the evaluation of each piece of evidence.

How might these findings project for the rest of the country? Certainly, there might be different defendant rationales offered elsewhere. It could be more difficult to sustain the significance of the number of black employees in a company for an allegation of racial discrimination in the northeast, where most companies would have a majority of black employees. The fact, however, that racial democracy and culturalist discourses have so much salience in a labor court in a state with a reputedly progressive judiciary suggests that such discourses are likely to be even more prevalent elsewhere, with all of the resultant impacts on the evaluation of evidence. That claim must be viewed as a hypothesis which merits testing in the labor court jurisprudence elsewhere in Brazil.

REFERENCES

Aguiar, Maria Rita Manzarra Garcia de, “Assédio moral: problema antigo, interesse recente”, published online: BuscaLegis.ccj.ufsc.br.

Almeida, Carlos Alberto Lima de, (2015) “Racismo: Percepções e Representações do Campo Jurídico, na Doutrina e na Jurisprudência do Estado do Rio De Janeiro”, *Legis Augustus*, 6:2, Julho/Dezembro, 37 - 49.

Becker, Simone and Deborah Guimãraes Oliveira, (2013) “Análise sobre a (não) caracterização do crime de racismo no Tribunal de Justiça de São Paulo”, *Estud. hist. (Rio J.)* 26: 52, 451-470.

Fagundes, Maria Cristina de Freitas e Marcus Vinicius Spolle, (2014) “Da vontade de verdade à democracia racial: um estudo de caso sobre racismo e injúria qualificada no Tribunal de Justiça do Rio Grande do Sul”, *Áskesis*, 3:2, Julho/Dezembro, 57-90.

Guimaraes, Antônio Sérgio (1998), *Preconceito e discriminação: queixas de ofensas e tratamento desigual dos negros no Brasil*. Salvador, Bahia, Programa A Cor da Bahia

Guimarães, Antônio Sérgio (2004), *Preconceito e discriminação: queixas de ofensa e tratamento desigual dos negros no Brasil*. São Paulo: Editora 3A.

Honneth, Axel, "Recognition and Justice: Outline of a Plural Theory of Justice", *Acta Sociologica* 2004, 47:4, December, 351-364.

Julião, Cleber Lázaro e Luiz Marcelo Carvano, (2010) "Resultados de julgamento sobre os casos de racismo nos Tribunais de Justiça e nos Tribunais Regionais do Trabalho", em Marcelo Paixão, Irene Rossetto, Fabiana Montovanele, e Luiz Marcelo Carvano (orgs), *Relatório Anual das Desigualdades Raciais no Brasil; 2009-2010*, Editora Garamond Ltda.

Lima e Silva, Andrea Franco and Ludmila Mendonça Lopes Ribeiro (2016), "Racismo ou injúria racial? Como o Tribunal de Justiça de Minas Gerais se posiciona diante dos conflitos raciais", *Revista de Estudos Empíricos em Direito*, 3:1.

Machado, Marta Rodriguez de Assis, Márcia Lima, and Natália Neris (2016) "Racismo e Insulto Racial Na Sociedade Brasileira: Dinâmicas de reconhecimento e invisibilização a partir do direito", *Novos Estudos CEBRAP*, 106, Novembro, 11-28.

Monteiro, Fabiano Dias. (2003) "Retratos em branco e preto, retratos sem nenhuma cor: a experiência do Disque-Racismo da Secretaria de Segurança Pública do Estado do Rio de Janeiro", (Dissertação de mestrado em Sociologia, Universidade Federal do Rio de Janeiro.)

Nucci, Guilherme de Souza (2009), *Código Penal Comentado*, 9th Edition, Editora Revista dos Tribunais.

Oliveira, Maria Luisa Pereira de, et al, "Modos de Subjetivacao de Mulheres Negras: Efeitos da Discriminacao Racial", *Psicol. Soc.* [online]. 2009, vol.21, n.2, pp.266-274.

Racusen, Seth (2002) "A Mulato cannot be prejudiced": the legal construction of racial discrimination in contemporary Brazil", (Thesis, Ph.D.-Massachusetts Institute of Technology, Dept. of Political Science.)

Sales Jr, Ronaldo. (2006). "Democracia racial: o não-dito racista". *Tempo social, revista de sociologia da USP*, São Paulo, SP, 18: 2, Novembro, 229-258.

Santos, Gislene Aparecida dos. (2015) "Nem crime, nem castigo: o racismo na percepção do judiciário e das vítimas de atos de discriminação", *Revista do Instituto de Estudos Brasileiros*, 62, Dezembro, 184-207.

Wade, P. (1997). *Race and ethnicity in Latin America*. London; Chicago, Ill., Pluto Press.

Zapater, Maíra Cardoso (2015), "O Haiti ainda é aqui: a Lei 7.716/89 e o 'racismo à brasileira'", *ARACÊ – Direitos Humanos em Revista*, 2:2, Maio.

