Working Conditions Contextualized in Workplace Bullying Cases in Brazil

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Abstract (*English*):

There is a gap between the international workplace bullying literature (European and North American) and the challenges faced by many workers in Brazilian workplaces. In this article, I explore this gap through many workplace bullying cases (from the year 2010 to 2012), which I have collected during my doctoral research, that were contextualized through a description of the narrative of workers that were victims of bullying and the judges' interpretation of such cases, and the other legal actors that are part of the judicial field. I have also performed interviews with these legal actors, through which I have assembled the perception from these actors of the depth and relevance of this phenomenon in Brazilian workplaces and the main challenges they face. The ILO itself criticized the fact that they are not enough studies from the Global South about violence in the workplace (Chappell and Di Martino, 2006). Through a qualitative analysis of the data collected during my fieldwork in Brazil, I intend to contribute to a new body of research that tries to develop conceptualizations and policies based on the specific challenges and characteristics that workers in Brazil face and so avoid only applying perspectives that are imported from other contexts.

Keywords: Workplace Bullying litigation in Brazil, access to justice, qualitative research.

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1. Introduction

This article will present an analysis of the recent legal decisions in Brazil concerning workplace bullying and the data collected in the field[2]. The first section of this article will be an analysis of the legal decisions collected and the different issues that they raised within a grounded theory perspective, meaning that the different theoretical issues were developed through an analysis of the data collected on the ground/field. Throughout many of the cases collected in my doctoral research I have noticed that most cases in which the limitation of bathroom is central are cases from workers from telemarketing companies and/or call centers, in which the working conditions are generally precarious[3]. So, my goal in this piece is to shed light on some of the stories that jumped at me during my analysis of legal decisions analyzed during my doctoral research on the regulation of workplace bullying in Brazil.

After so many years of studying workplace bullying, I never expected to find out that one of the main issues that workers face in these cases is the limitation of their fundamental right to use the bathroom. Moreover, in comparison with the international literature on workplace bullying, the recurrence of this issue was completely unexpected, since it appeared to be more related to the working conditions than to the scientific definition of workplace bullying[4].

Thus, I believe that one of the contributions of my doctoral work to the field of workplace bullying research will be to shed light on how in Brazil one of the main issues that many workers that

[2] This part of my dissertation is driven by the data collected in the field and therefore it will be restructured once I finish gathering all the data. Up until today (July 2015) I have collected most of the data (all the legal decisions have been collected and I have already performed about half of the interviews and most of the observations of hearings), but I still have a few interviews to do and also a few observations of hearings.
[3] Here that are several studies specific to these companies and more generally in the sector of telecommunications that were done in Brazil in that last decade and I will add the references later on.
[4] *See* Ståle Einarsen [et al] "Chapter 1: The Concept of Bullying at Work: the European Tradition" in Ståle Einarsen [et al] (eds.) *Bullying and Harassment in the Workplace: Developments in Theory, Research and Practice* (London and New York: CRC Press, 2010) at page 9.

are bullied at work face is the appalling working conditions that exist in many workplaces. So, there is a gap between the international workplace bullying literature (European and North American) and the challenges faced by many workers in Brazilian workplaces. In that sense, I have selected some cases that for one reason or another grabbed my attention and so I thought that a description of the narrative of workers as it was interpreted by judges and the judicial system would be a relevant contribution to this field.

2. Analysis of the legal decisions collected: working conditions and the constitutional protection of human dignity of workers

This section will discuss the different aspects of the relationship between degrading working conditions and the constitutional protection of the human dignity through the analysis of the legal decisions collected during my doctoral research. Thus, it will provide an illustration of the application of the principle of dignity of the human person in concrete cases by discussing relevant examples in the legal decisions that were selected from the period between January of 2010 and December of 2012. In order to give an idea of the context of these decisions, it is relevant to note that for the years 2010 2011 and 2012, I have collected 1637 Superior Labour Court[5] decisions that are related to psychological harassment at work in Brazil. Although I found in total over 3,000 legal decisions that mention "psychological harassment" in the Superior Labour Court since 2008, by restricting those decisions to the years of 2011 and 2012, there are 1263 decisions. I have decided to select only the ones that originated from the Appellate Labour Courts of São Paulo (São Paulo, Second

[5] Here I am referring to the Tribunal Superior do Trabalho (TST), which I have translated as "Superior Labour Court". The superior court is located in the capital of Brasil, Brasília and it is the highest court for labour disputes apart from the Brazilian Supreme Court, which only deals with cases involving Constitutional Law.

Region/Segunda Região), Campinas (Fifteenth Region/Décima quinta Região) and of Rio de Janeiro (Rio de Janeiro, First Region/Primeira Região)[6], which comprise a total of 249 decisions.

The legal frameworks applied in these cases mostly relied on Constitutional provisions. The most prevalent was the violation of *dignity of the human person*[7] and it was raised in almost all cases that have been analyzed. Here it is important to note that *human dignity* is a legal concept and not a factual situation, as previously discussed. However, even though dignity of the human person is a legal concept, it is used by workers as a catch-all term for any human rights violation they might suffer while working, such as psychological humiliation and other conducts that are typical in workplace harassment cases. Moreover, because there is no federal law regulating workplace bullying in Brazil, there is no legal definition of it and so judges are forced to rely on the doctrine and also other cases in order to establish parameters of what constitutes bullying in the workplace.

Thus, because of the influence of the doctrine, Sonia Mascaro Nascimento[8] argues that in order for a violation of the principle of dignity of the human person to be considered a case of psychological harassment at work it has to be a result of a repeated action and not and an isolated conduct[9]. According to Mascaro Nascimento, the practice of moral harassment is characterized by the repetition of gestures, words and conducts that, if considered in isolation could be considered inoffensive. Thus, punctual moral aggression, even if isolated, could reach someone's dignity. It is a conduct that is open, direct and identifiable, but it cannot be confused with the practice of moral harassment as defined in the Brazilian doctrine[10], which in turn is influenced by the international

[6] Just as an illustration, Brazil has 24 Appellate Labour Courts, representing all of its 27 states of the federation, for more information visit http://www.tst.gov.br/, last visited on July 15th.
[7] This is my own translation from the original Portuguese terms I used in the legal search: *"violação da dignidade da pessoa humana"*. I used the term violation of dignity the human person and not just human dignity, because it is reference to the Brazilian constitutional text that specifically uses the term dignity of the human person.
[8] *See* Sonia Mascaro Nascimento, ***Assédio Moral***, São Paulo, Saraiva, 2011.
[9] *See* Mascaro Nascimento, *idem op cit* at note *supra* at page 16.
[10] *See* Mascaro Nscimento, *ibidem op cit* at note 7 at page 17.

doctrine and literature that was already discussed in my earlier chapter that contains my literature review[11].

Because there is no specific federal law governing moral harassment at work, as we have already discussed in the earlier on the evolution of the legal frameworks regulating psychological harassment at work[12], and also because there is no specific legal procedure to claim such violation, the most commonly used procedure is that of seeking moral damages, which is a legal procedure based on legal provisions both from the Constitution as well the Brazilian Civil Code. Moral damages is a legal procedure that one uses to try to receive compensation for an alleged damage/harm suffered. And a moral harm is defined by the doctrine as any sort of harm that is not material or patrimonial[13]. According to article 5, subsection X, moral damages can be claimed on the basis of the harm caused to one's *intimacy, private life, honor and image of the person*.[14] Therefore, moral damages can be claimed if one of the personality rights is violated. Here is the text of the mentioned article:

> *TITLE II*
>
> ***Fundamental Rights and Guarantees***
>
> ***CHAPTER I***
>
> *Individual and Collective Rights and Duties*
>
> *Article 5 All persons are equal before the law, without distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of right to live, to liberty, to equality, to security and to property, on the following terms (CA No. 45, 2004):*
>
> *(…)*
>
> *V - the right to reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for the damages of the image;*
>
> *(…)*

[11] I will later on insert a reference to my earlier chapter on the doctrine and literature review (title will be included as soon as I finalize the referred chapter).
[12] For more detailed description *see* my earlier chapter on *The Evolution of the Legislative Frameworks.*
[13] *See* Marco Aurélio Aguiar Barreto, ***Assédio Moral no Trabalho – responsabilidade do empregador***, São Paulo, LTr, 2007, mainly at pages 66-77.
[14] Translated terms according to the official translation of the Brazilian Constitution, provided by the Brazilian Supreme Court.

X – the privacy, private life, honour and the image of persons are inviolable and the right to compensation for property or moral harms resulting from its violation is ensured"[15]

The legal standard used to determine whether the harm existed or not is the *reasonable person* standard or the test of *reasonableness*[16]. Thus, any person with a *median* sensibility would have been harmed, so in order for a claim to be granted moral damages this claim has to pass the reasonableness test. This test is frequently used in tort cases to determine liability. However, as it is often pointed out the reasonable person standard is used sometimes by judges as a way to justify their own restrictive interpretation of what constitutes a violation of dignity and workplace bullying and what does not.

Moreover, according to the legal doctrine, moral damages can be described as having both in a strict sense as well as a broad sense[17]. The concept of moral damages in the strict sense refers to the violation of dignity through the violation of one of the personality rights, as it is described in the constitutional provisions above, meaning *intimacy, private life, honor and image of the person*[18]. On the other hand, even if there is no violation of dignity through the infringement of any of these personality rights described in the Constitution, moral damages in a broad sense can refer to other rights, which

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[15] This is the official translation of the original text in Portuguese, which is available at the website of the Brazilian Supreme Court (Supremo Tribunal Federal - STF): http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf, last visited on August 7th, 2014. The original text in Portuguese of Brazilian Constitution is available at the website of the Brazilian Congress. The mentioned text is the following: *"TÍTULO II - Dos Direitos e Garantias Fundamentais: CAPÍTULO I DOS DIREITOS E DEVERES INDIVIDUAIS E COLETIVOS Art. 5º Todos são iguais perante a lei, sem distinção de qualquer natureza, garantindo-se aos brasileiros e aos estrangeiros residentes no País a inviolabilidade do direito à vida, à liberdade, à igualdade, à segurança e à propriedade, nos termos seguintes:(…)V - é assegurado o direito de resposta, proporcional ao agravo, além da indenização por dano material, moral ou à imagem;(…) X - são invioláveis a intimidade, a vida privada, a honra e a imagem das pessoas, assegurado o direito a indenização pelo dano material ou moral decorrente de sua violação" in* Constituição da República Federativa do Brasil at http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm, last visited on August 7th, 2014.

[16] This standard of the reasonable man has its origins in the Roman Law concept of the *bonus pater famillias*. It also has origins in the English Common Law.

[17] For a longer discussion on the topic, see my chapter in which I review the doctrine, but for more specific discussion on the subject *see* Luis Leandro Gomes Ramos and Rodrigo Wasem Galia, ***Assédio Moral no Trabalho*:o abuso do poder diretivo do empregador e a responsabilidade civil pelos danos causados ao empregado – atuação do Ministério do Trabalho**, Livraria do Advogado: Porto Alegre, 2013, mainly at pp. 66-83.

[18] Translated terms according to the official translation of the Brazilian Constitution, provided by the Brazilian Supreme Court.

are referred to by the doctrine as the new personality rights. These rights are described in general by the doctrine as the image, reputation, feelings, emotional relationships, aspirations, habits, political convictions, religious and philosophical beliefs and also copyrights. These rights can be exercised in different levels of life, meaning that they can have a social aspect as well as a personal aspect. In that sense, moral damages are not restricted to the feeling of pain, sadness and suffering, and because of that their protection is extended, as they are all considered *"extremely personal"* rights. What follow is that a violation of dignity that would entail moral damages, could happen both if the personality rights specified in the Constitution are violated, but also if such violation affects these new personality rights.

2.1. The limitation of the use of bathrooms

I will now turn to the issue of the limitation of the use of bathrooms, which was one of the most recurring issues that I have encountered during the data collection of the legal decisions for my doctoral work. The first case that I have chosen to illustrate the application of the principle of dignity of the human person comes from the Labour Court of Appeal First Region in Rio de Janeiro. This is a case of an employee of a customer service call center named José Felipe da Silva in a large cell phone company called CLARO S.A.[19] who claimed to suffer moral harassment at his job through the limitation of his use of the bathroom. The complainant here argued that his dignity was violated by his employer because he was prevented and forbidden from going to bathroom when he needed to go. This was caused by the fact that there were pre-established times to use the restrooms and if one employee needed to go at a different time, it was necessary to ask for an authorization of the

[19] Case number TST-AIRR-7808-51.2010.5.01.000, which started in February of 2010 and the final judgment only was rendered in November of 2012 (parties José Felipe da Silva and CLARO S.A.) that is available at www.tst.gov.br, last visited on November 24th, 2012.

supervisor, who was not flexible at all. Besides that, the complainant claimed that his supervisor not only prevented him from using the bathroom when he needed to, but that he also offended him repeatedly calling him repugnant things such as "stupid", "incompetent", "slow" and "moron", among other things[20], in front of his colleagues and that caused him to feel humiliated and undermined. The main argument of his employer was that in a large call center it is a managerial must to define rules when to use the restrooms in order to avoid chaos and an unnecessary delay in answering the multiple calls that come in everyday.

The Appeal Court agreed with the first instance decision that sided with the employee. The Court said that even though the company could set some limits to use of bathrooms in a large and busy workplace, those limits have to be reasonable and cannot be rigid and fixed, as physiological necessities are not so easy to predict. Moreover, the need to ask for an authorization to use the restrooms is a type of practice that goes back to the time of slavery, when a slave had to ask for permission for master to do anything. Thus, this sort of limitation far surpasses the management rights of the employer and therefore is considered an abuse of power and thus a violation of the employee's dignity. In addition all the derogatory terms used in front of the employee's colleagues was also considered a violation of the dignity of the human person as it demonstrate a failure to comply with the duty to respect one's employee and/or work colleague.

Another case that is a relevant illustration of the application of the principle of dignity of the human person in a concrete case comes from the Labour Appeal Court of the Second Region of São Paulo. This is again a case of a call center employee, named Ana Paulo Souza Coutinho da Silva, against her employers both Brasil Telecom S.A. and its subcontracted firm Teleperformance CRM

[20] This is my own translation of the original terms in Portuguese, which were *"burro", "incompetente", "lerdo"* and *"imbecil"*.

S.A.[21] In this case once again the argument used by the claimant was that the limitation of the use of the bathrooms was a violation of the employee's dignity. And going further with this line of thought, the claimant also argued that because of the gravity of such violation it could justify the conclusion that the employee's resignation met the definition of indirect dismissal.

Contrary to the first case discussed, in this case the Court sided with employer because it argued that employee did not prove that she suffered a clear violation of her dignity. According to the Justices, the "simple" or "normal" limitation of the use of restrooms does not constitute a violation of human dignity and thus is not psychological harassment unless it goes beyond the ordinary and causes a direct offence and creates a vexation to the worker and therefore creating a sentiment of indignation. Once again, the criteria here in order to determine if such violation constituted a harm or not to the dignity of the workers is the standard of the *reasonable person*. In this case, the court found that the limitation of the use of bathrooms was considered normal as it was not unreasonable.

In contrast with the former case discussed, in which the limitation of the use of bathrooms appeared but it was considered/deemed as normal, the next case that will be discussed is mainly about the limitation of the use of bathrooms as a violation of human dignity and so constitutes moral harassment and therefore it causes a moral damages, which can be claimed through legal suit. The case is about a call center worker, named Hugo Pinto Lemos against his employer, Contax S.A., which is a telemarketing company that provides call center services to telecommunications enterprises, such as Net Serviços LTDA, which is a telecommunications (cable and internet) company that outsources

[21] Case number TST-RR-142500-08.2008.5.24.0005, this case lasted for over 4 years, since it started in March of 2008 only in August of 2012 (parties Ana Paula Souza Coutinho da Silva against Brasil Telecom S.A. and Teleperformance CRM) and it is available at www.tst.gov.br, last visited on November 24th, 2012.

its customer services to Contax S.A. Thus, Net Serviços S.A. is listed as second defendant, as it has subsidiary responsibility[22].

The complainant in this case argued that his dignity was violated because his employer limited his use of the bathroom on a daily basis. According to him, during his working hours he only had five minutes to go the bathroom and that if he ever took more than five minutes to do so, not only would he receive a written warning but also this would reflect not only on his performance evaluation but also on his whole team quotas. Therefore, the claimant stated that he felt pressured to only use the bathroom for five minutes, which in turn violated his dignity as he sometimes needed to use the bathroom for longer. Moreover, he also claimed that not only his bathroom breaks influenced his performance evaluations, but also that if he took longer bathroom breaks than the stipulated length his performance evaluation would be publicized to his entire team, which was a very humiliating, and it would affect the performance evaluation of the whole group.

As a consequence, this case not only is about the limitation of the use of bathrooms, but also about the ways in which employers go about applying and enforcing such limitations, which many include *vexatory* and *humiliating* practices that violate the human dignity of workers. Furthermore, because the practice in this case linked the bathroom breaks to the performance evaluation of workers and their team quotas, which will be the next issue discussed, it is also a coercion method that creates a hostile work environment.

Despite the fact that the practice of limiting the use of bathroom was well corroborated by the claimant and confirmed by his witness and so it would constitute harassment as it was a clear

[22] TST-AIRR-8100-49.2008.5.01.0247, the Justice rapporteur in this case was Aloysio Côrrea da Veiga, and it started in the first instance in early 2008 and it lasted for over 3 years, having received its final judgement in June of 2011 (parties Hugo Pinto Lemos against Contax S.A. and Net Serviços LTDA), which is available online at www.tst.gov.br, last visited on July 9th, 2014.

violation of the worker's dignity, the first instance judge decided against the claimant. The judge justified the decision by stating that the mere fact that the use of bathrooms was limited was not enough to constitute a violation of dignity and therefore it was not harassment and so the claimant could not be granted moral damages. The criteria used by the first instance judge is the reasonable person test, which I have previously discussed earlier in this chapter, and so according to the first instance judge the limitation of the use of bathroom did not violate the worker's dignity because such limitation was not beyond reasonableness.

The claimant appealed the case to the First Region Appeal's Labour Court (Tribunal Regional da Primeira Região – Rio de Janeiro – TRT 1) and the judges in that court reformed the first instance decision by arguing that just the fact that the employer did limited the use of bathrooms by the complainant was more than enough to constitute harassment, as it was a clear violation of the dignity of workers to prevent them from using the bathroom for as long as they need to and also to humiliate them should they do so for longer than stipulated by managing policies. According to this decision, human dignity is a fundamental principle in the Brazilian Constitution and it is part of its preamble as already discussed[23]. In that sense, it is an overarching principle and it should prevail when it is in conflict with any other rights, such as the employers' management rights over the employees. Thus, the court considered that the management rules concerning the limitation of the time workers could use the bathroom was in direct conflict with the human dignity principle and therefore it constituted an *abuse* of the employers' management rights[24] over their employees. This case was adjudicated in the first instance in early 2008 (March of 2008) and it only reached a final instance judgement in June of 2011, lasting for over 3 years.

[23] Here I will add a reference that I have already written on the section on the legal discussion of the principle of human dignity in Brazilian law.
[24] Translation of the Portuguese term used in the decisions collected in doctoral research *"poder diretivo dos empregadores"*.

Another relevant case that deals with the limitation of the use of bathroom is a case in which the complainant, Giovana de Paula Garcia, a telemarketing operator working at Atento Brasil S.A. - one of the biggest telemarketing companies in Brazil - had appealed a decision that did not recognize the occurrence of moral harassment in the first instance court[25]. In this case, the first instance court found that according to testimonial evidence there was only one occasion, to be more specific a meeting with all the staff from the complainant's team, in which the claimant did experience an *injurious* conduct from her supervisor. In that sense, according to the court this was an isolated event and therefore it would not constitute moral harassment according to the consistent decisions of the Superior Labour Court (Tribunal Superior do Trabalho)[26]. Thus, according to the Court there is no moral harassment if the conduct is not *repetitive*, in the Court's one words "*persistência de comportamento*".

The complainant alleged that the injurious behaviour of her supervisor lasted longer than the meeting, because according to her in the following month when she wanted to use one of her breaks/pauses to use the restroom, her supervisor called her attention and said that if she really needed to go she would have to prove it by bringing back her *"dirty toilet paper"*. Although, these allegations are quite serious, the Court said that she couldn't prove them through her witnesses and the burden of proof was on herself. Even though, this case was introduced in the first instance in June of 2006, it only reached the final instance judgment in the middle of 2011, to be more specific in August of 2011. Thus, this case lasted over 5 years and in the end the worker lost her case.

Once more, there was other cases in which the limitation of the use of bathrooms is deemed as normal. For instance, there is also another case, this time from the 15th Region Appeal's Court (TRT

[25] Case number TST-AIRR-141140-43.2006.5.02.0030, rapporteur Justice Lelio Bentes Correa (parties Giovanna de Paula and Atento Brasil S.A.), this case started in 2006 and was only judged by the last instance in august of 2011. It is available at www.tst.gov.br, last visited on July 9th, 2014.
[26] Here I am referring to the fact that the higher courts had uniformly decided that one incident does not qualify as psychological harassment at work.

15)[27] in which the limitation of the use of bathroom was considered "normal" because the rules in place were not considered abusive. The interesting thing about this case is that the complainant, Eduardo Henrique Rocha Bezerra, won the case in the first instance, because according to the testimony evidence presented in the case not only did the complainant need authorization to use the bathroom, but he had to wait to see if the authorization was granted and sometimes it was not.

Nonetheless when the case reached the second instance, the court came to the conclusion that although the employer did organize the employees' breaks to use the bathroom, this situation did not seem to lead to a violation of the dignity of the workers. Moreover, the Court also found that the conduct of the defendant was generalized against all workers and not only the complainant. Thus, the rationale of the Court was that the conduct of the defendant was not marginalizing and did not targeted either the complainant specifically or a particular group of employees[28]. Here, once more, the criteria used in order to determine whether this limitation of the right to use the bathroom violated the workers' dignity or not, was the standard of *reasonableness*. So, yet again the *reasonable person* principle was used in a restrictive manner. This case lasted almost 3 years to reach the final instance, as it was initiated in early 2010 (February) and only reached the final adjudication in late (December) of 2012.

Through my analysis of the cases from January 2011 to December 2012[29], I was able to observe that even though the limitation of the use of bathrooms was very prevalent in the cases I collected, a significant proportion of these workers were unsuccessful in their claims of workplace bullying based

[27] TST-AIRR-360.83.2010.5.15.0084, Justice rapporteur Maria de Assis Calsing, last judgement on June of 2012 (parties Eduardo Henrique Rocha Bezerra and Atento Brasil S.A.), available at www.tst.gov.br, last visited on July 7th, 2014.
[28] From the original text of the decision, here is the excerpt I am refereeing to *"(…) Releva salientar que a conduta da ré era generalizada, não tendo sido praticada exclusivamente com o Reclamante ou com um grupo específico de funcionários, de maneira que não há falar também em perseguição ou marginalização", see idem* decision at note *supra* at page 3.
[29] In the introduction to this chapter, I will later on add more details about the sample size of legal decisions and give more information about the legal decisions I collected in my doctoral research. In any case, it is important to note that even though the labour courts in Brazil number their cases by when a case is initiated, I have used in my research the date that the case reached the final instance and received a judgement.

on claims of limitation of their right to use the bathroom from their employers. One of the main challenges faced by workers to win their cases was the fact that they have to prove such limitation. Therefore, the burden of proof is on the party that makes the claim, as Article 818 of the Brazilian Labour Code, which states that the party that makes the claim, which in these cases would be the claimant of the workplace harassment, has the burden of proof[30]. This article defines the general principle that the party that makes any claim has the burden of proof. Most of these cases, the main body of evidence was composed of testimonies and the interpretation of the witnesses statement was quite diverse and so I was able to observe a lack of uniformity among the different cases[31]. Moreover, the use of the standard of *reasonable person* has also led to many restrictive interpretations of what constitutes a violation of dignity and what does not.

2.1.1. The lack of breaks during working hours:

The first workplace bullying case that I have selected to discuss is a case concerning a worker from a telecommunications company (Sky Brasil Serviços LTDA), more specifically a satellite and cable company. The worker, Luiz Guilherme de Oliveira, filed a legal complaint[32] alleging that although his job description did not say that he was a telemarketing operator, but rather a *sales associate*[33], he did in fact do the type of work that a *telemarketing operator* does. Telemarketing operators are entitled

[30] This is my own translation of the original text, here is the full text: *"TÍTULO X - DO PROCESSO JUDICIÁRIO DO TRABALHO (…) SEÇÃO IX: DAS PROVAS Art. 818 - A prova das alegações incumbe à parte que as fizer."* Consolidação das Leis do Trabalho, at http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452compilado.htm, last visited on January 10th, 2013.

[31] Here I will add a paragraph about how representative these cases are in the myriad of cases I have collected. But just to give a snippet/idea of the number of cases that were lost based on the interpretation of the testimonial evidence, from the 72 cases (collected in my doctoral research) in which the limitation of the use of bathrooms was a central issue, over 10 cases, to be more precise, 12 cases were lost based on the interpretation of the testimonial evidence presented.

[32] TST-RR-189200-83.2008.5.02.0060, this case started in early 2008 and lasted for over 3 years, having received its final judgement only in July of 2011 (parties Luiz Guilherme de Oliveira and Sky Brasil LTDA), and the Justice rapporteur was Aloysio Côrrea da Veiga. It is available at www.tst.jus.br, last visited on July 16th of 2014.

[33] This is my own translation of the original term in Portuguese *assistente comercial*.

to have the same rights as stipulated in the telemarketing and call center workers' regulatory standard (N. 17)[34], mainly that he would have one break before every 60 minutes of uninterrupted work and also that he would be entitled to a shorter workday of 6 hours instead of 8.

In his complaint, Mr. Oliveira argued that he had to work every day with headphones on and that he also had to constantly type on a computer and even though his tasks where equivalents to those of a telemarketing operator, he only had one break of 15 minutes (to eat and use the bathroom) a day and that he worked 8 hours a day. In addition to that, his main claim was that not only that his workday was too long because of his job description, but also that his honour and dignity were violated and therefore he was harassed by the fact that he could almost never use the bathroom outside his only break during his working hours. According to him, his supervisor had a system of flags on his desks that indicated when the flag was green, operators could ask to leave their posts to go to the bathroom and when the flag was either yellow or red, they could not even ask to use the bathroom as it was forbidden. In theory, according to him, a worker could ask to use the bathroom if it were an emergency and the flag was yellow, but in practice a yellow flag meant the same as a red flag, meaning one could not use the bathroom, without being reprimanded.

In order to corroborate his claims, the complainant brought a witness[35] that substantiated these claims. This first witness was not the only witness presented by the complainant at the first hearing of the case, he actually had another witness enrolled, but at the last minute he decided that his

[34] Regulatory standard is my own translation of the original term in Portuguese *Norma Reguladora*. Here is own excerpt of this standard for reference, *NR. 17: "(…)1.1.1. Entende-se como call center o ambiente de trabalho no qual a principal atividade é conduzida via telefone e/ourádio com utilização simultânea de terminais de computador.",* available at http://portal.mte.gov.br/data/files/FF8080812BE914E6012BEFBAD7064803/nr_17.pdf

[35] The witness was named Narcísio José de Campos Neto, and he was a former work colleague of the claimant and he t confirmed that the complainant did work every day with a headphone and that the tasks that the claimant was performing were of a call center or telemarketing operator and thus he corroborated the claims presented by the plaintiff. Moreover, this witness said that his job title was also *sales associate*, even though he also worked as a *telemarketing operator* such as the complainant. The witness also confirmed the complainant's claims that his dignity was violated by the limitation of the use of bathrooms, as he also stated that they could almost never leave their posts during working hours, except during their breaks and he also stated that the flags on their supervisor's desk was almost always yellow or red.

first witness testimony was enough for him to win his case. The first instance Judge decided that this witness' testimony was enough to corroborate the complainant's claims that he did in fact work as a telemarketing operator and that he did have his dignity violated because he was bullied for not being able to use the bathroom, when he needed to. Thus, the first instance Judge granted the claimant moral damages for the harassment he suffered as well as the overtime he worked as he was indeed a call center worker and therefore he should be granted the same rights as stipulated in the regulatory standard (NR. 17).

The employer/defendant appealed this case at the Second Region Labour Appeal Court (Tribunal Regional do Trabalho da Segunda Região – São Paulo - TRT 2) and the Court once again sided with the complainant. After that, the employer appealed once more to the Superior Labour Court (Tribunal Superior do Trabalho - TST) and lost again as the court sided with the complainant. Moreover, the Superior Court not only sided with the lower court, but it actually extended the scope of the decision, by considering the complainant not only as a telemarketing operator, but also a typist and therefore he should also be granted the rights stipulated in article 72 of the Brazilian Labour Code (Consolidação das Leis Trabalhistas, CLT), in which workers that type constantly should be granted even more breaks as to avoid occupational diseases.

An additional relevant case about a telemarketing operator that also alleged that her dignity was violated at work through the limitation and control of her breaks during her working hours, was the case of the plaintiff Daniela Barcelos Siqueira[36]. She was a telemarketing operator at TNL Contax S.A., who alleged that she was not able to use the breaks guaranteed by the law, the Constitution and

[36] TST-RR-220700-64.2007.5.01.0244, this particular case started in April of 2007 and only reached its final judgment in November of 2011, lasting over 4 years and a half and the Justice rapporteur was João Batista Brito Pereira (parties Daniele Barcelos Siqueira against TNL Contax S.A.). It is available online on at www.tst.gov.br, last visited on July 16th, 2014.

the regulatory standard 17 – N.R. 17, which stipulates that telemarketing operators should receive 10 minutes of break/rest after 50 minutes of work, because of the intensity of their work.

Despite the existence of this legal standard, her employer, TNL Contax S.A., simply ignored this rule and it allegedly proceeded to regulate its employees' breaks in an unlawful manner. The plaintiff alleged that her employer not only did not allow the breaks stipulated by the regulatory standard, but it also exposed workers to a public evaluation in case they used too many breaks and therefore would allegedly be less productive, which in turn would have an impact in the performance evaluation of the whole team. Thus, the plaintiff alleged that not only she could not take advantage of her lawful breaks, but also she was submitted to humiliating evaluations in case she decided to use some of her breaks and so "decrease" her productivity.

The first instance and also the appeal court sided with the plaintiff, because according to them the plaintiff was able to corroborate her claims that her employer proceeded in an irregular manner in its control and limitation of its employees breaks and pauses. Moreover, both courts also found that by making the performance evaluation public, it promoted humiliation and constrained all its workers. More specifically, according to the appeal court the procedures adopted by the employer to control the employees' breaks and pauses and expose them to public negative evaluations had very negative repercussions on the workers causing psychological pressure. Thus, those procedures violated the workers' dignity and therefore characterized the moral harassment of the plaintiff, among other workers.

From analyzing both these cases, an interesting cross-cutting issue is how the imposition of limits to workers' breaks and pauses as a managerial practice not only could affect one specific worker, or as it was in both cases, the plaintiffs that took action in order to exercise their rights, but rather on

all workers in these workplaces, as this type of managerial policy creates a degrading and/or poisonous working environment.

Therefore, even though these two cases are individual claims, through their analysis it becomes clear how they both have a very important collective aspect, because they are not a result of a single worker being targeted individually, but rather how abusive management practices have important consequences to workers' psychological health. An interesting conclusion that can be drawn from these cases is that adjudicating collective rights and issues as individual cases might be less efficient for changing employers' abusive policies and practices. Consequently, a fragmented sector such as the telecommunications one, where there are only a few unions, and they are relatively new and not as active as in other sectors, such as the public sector, workers might be less organized collectively and therefore less likely to organize themselves in order to pursue a class action. Later on, when we discuss the collective claims found in this research, we will further discuss the relationship and the interactions between individual and collective claims.

2.2. Work organization and management practices

Following the theme of management practices, we will now focus on the work organization and some other forms of management practices that also have important consequences to workers' psychological health and well being.

2.2.1. The imposition of sales, performance and productivity quotas

Among the many legal decisions that I have collected for my doctoral work, one of the main issues that also caught my attention was the managing practice of imposing very high and often

unattainable sales, performance or productivity quotas on workers, mainly in the service sector. Even though I have collected many cases that deal with workers in banking, the specific case that I have decided to focus on here is a case of a worker from a beverage company, because even though this is not a class action case, the court highlighted the fact that not only the complainant was harassed but that the working environment at this company was poisonous and that managing practices violated all workers dignity.

The complainant in this case, Thiago Fernandes Dias, worked as a sales associate in one of the largest beverage companies in Brazil called Ambev Brasil Bebidas LTDA[37]. He alleged that he was harassed by his superior and so his dignity was violated because he was pressured to achieve the sales and performance quotas and when he did not manage to do so, he was subjected to demeaning managing practices that forced him to perform *vexatory* and humiliating actions as a form of compensation for his shortcomings in his sales and/or performance. Some of these humiliating practices included dancing on top of a table to sensual music, as well as being called demeaning slang names[38], which were not only shameful but also homophobic, classist and racist. In addition to that, these *vexatory* practices were enforced not only by the complainant's direct supervisor, but also by higher management that instead of preventing these practices, actually reinforced and acted as they were a form of joke/play that the workers had to take it lightly.

The complainant won the case in first instance, as the judge stated that the moral harassment did in fact occur as the dignity of the worker was clearly violated by these abusive management practices of that imposed abusive sanctions to workers who did not reach their sales/performance

[37] TST-RR-687-39.2010.5.02.0262, this case started in early 2010 and lasted for almost 3 years, having received its final judgement only in December of 2012 (parties Thiago Fernandes Dias and Ambev Brasil Bebidas LTDA), and the Justice rapporteur was João Orestes Dalazan. It is available at www.tst.gov.br, last visited on July 8th, 2014.
[38] Some examples of the demeaning words used by supervisors to humiliate workers that did not achieve their sales quotas were *"tiazinha"* and *"molambento"*.

quotas. The employer appealed to the Second Regional Appeal's Labour Court of São Paulo (Tribunal Regional do Trabalho da Segunda Região – São Paulo – TRT 2) and argued that even though these practices did in fact exist, it cannot be considered moral harassment as it was not directed specifically to the complainant, but rather to all workers and so it could not warrant moral damages. The appeal court accepted the employer's arguments and reformed the first instance decision.

After that, the complainant appealed to the Superior Labour Court (Tribunal Superior do Trabalho - TST) and the judges overturned the appeal court's decision by arguing that even though the abusive management practices were not directed specifically towards the complainant they do constitute moral harassment, because it is a specific form of bullying that is called institutional harassment. According to the court, institutional harassment happens when all workers could be considered victims of the abusive practices and policies implemented by management, which end up creating a hostile working environment. And because these practices violate fundamental rights of workers, such as their dignity and honour, they justify the legal claim for moral damages as form of compensation for the harm committed.

This court found that the legal test necessary in order to determine when a practice is considered institutional harassment or not is the test/standard of reasonableness. Thus, if a *reasonable person* were to analyze these practices he would probably conclude that they were *questionable* and *excessive* and therefore they violate the fundamental rights of workers[39]. As a consequence, the court found that the managerial practices of the employer overcame the limits of reasonableness and therefore they did constitute a violation of dignity and so ensure the plaintiff's right to moral damages as compensation to the harm suffered.

[39] *See* the previous discussion in this chapter on the standard of the *reasonable person* and the moral damages claims on pp. 5-6.

It is relevant to highlight that the rational of the Superior Labour Court (Tribunal Superior do Trabalho) in condemning the employer for institutional harassment of its workers, was based on the fact that not only the performance quotas were unreasonable, but also because if a worker did not reach these quotas, the sanctions were degrading and in direct conflict with the principle of human dignity, which, as we have seen earlier in my thesis, is a founding principle in the Brazilian Constitution and legal system. Here, once again, this case took a very long time to reach a final judgement. Even though, this case was initiated in the first instance in early 2007, it only reached a final instance judgment in November of 2010, so it took almost 4 years to reach its final adjudication.

Once again, as it was the case with the limitation of the use of bathrooms as well as the limitation of pauses and breaks, the cases about the imposition of unreasonable quotas as a management practice that affects workers psychological health are about a collective issue that is being adjudicated individually.

Again, the main problem with the imposition of unreasonable quotas is that it is a managerial practice and not an isolated action against a single employee. Accordingly, the result of a abusive managerial practice is the development of a poisonous working environment in which many workers are subjected to risks to both their psychological as well as their physical health. And so it would have been much more effective to exercise their rights collectively instead of individually, but as we have discussed previously in order for collective claims to be litigated there needs to be collective organization, which is not that easy to achieve. The relationship between individual claims and collective claims will be further discussed in the class action section later on in this chapter.

3. Work organization and workplace bullying: an analysis of the cases of institutional harassment or collective workplace bullying

Workplace bullying is a multifaceted problem that is centered not only on individuals perceptions of their work environment, but also on work itself and likewise on the organization of work and employment. Moreover, even though the question of power relationships and its influence are considered essential in most workplace bullying studies[40], but there is lack of theoretical discussion on the role of power within the workplace bullying phenomenon. Although theorizations about workplace bullying do recognize the importance of the power imbalance in these situations, some authors suggest that there is an *undertheorization* of which role power plays in this phenomenon and also the fluidity of the notion of power itself. The most overt and obvious demonstrations of individual power are included in most theorizations of workplace bullying, while the most subtle forms of power are ignored[41].

In that same token, in my legal decisions research I have found that many complaints of workers who allege they have been bullied are based on a more systematic form of harassment, like for an instance a hostile work environment, in which the working conditions are so degrading and appalling that all workers suffer and feel abused, even if not all of them complain and try to enforce their rights through the courts. One of the most recurring and surprising findings from my research was that the basis for many of the workplace bullying legal complaints has been the systematic limitation of the workers use of bathrooms by their employers. And this type of systematic harassment is based on certain types of managerial policies that are not a result of one specific bad manager or

[40] *See* my earlier chapter with my literature review, which I will provide a title as soon as I finalize the table of contents.
[41] *See* Jacquie Hutchinson, *"Rethinking Workplace Bullying as an Employment Relations Problem" in* ***Journal of Industrial Relations***, number 54, issue 5, 2012, pages 638-639, for a more elaborated explanation.

superior/boss, but rather a strategy used by many organizations to obtain "better" performance from their workers.

This perspective highlights the fact that many workplace bullying cases are a result of a systematic harassment of all workers and not only one specific worker. In those cases, the intervention from labour prosecutors is paramount. The role of labour prosecutors is to represent workers in class action cases and they are active contributors to the protection of workers and their rights. Moreover, according to some of those prosecutors that I have interviewed, when they bring a class action suit to courts, those suits have a double function. Firstly, they work as an enforcement mechanism for the protection of workers' rights and secondly they also work as a pedagogical tool to send a message to employers and therefore prevent similar cases and/or violations.

3.1. Labour prosecutors and union's role in the face of collective violations

Aside from the individual complaints that shed light on the collective oppression like the ones described earlier, there are only 4 cases of collective harassment that I have found in my research. One case from the Labour Appeal's Court 1st Region – Rio de Janeiro, two cases from the Labour Appeal's Court 2nd Region – São Paulo; and one case from the Labour Appeal's Court 15th Region – Campinas. Because there are not many cases of collective harassment being litigated, but at the same time because they are significant in that they represent a class of workers, thus I believe it is paramount to discuss all the cases that I have collected.

In order to address this type of collective issues, the Office of the Labour Prosecutor has an essential role in defending the collective rights of workers according to Complementary Law 75/93, article 83, subsection III. The Office of Labour Prosecutors has the duty to defend the collective rights of workers in the cases in which a constitutional social right is violated. There are many ways in which

Labour Prosecutors perform this duty, including by initiating judicial and extra-judicial actions. In terms of the judicial measures that the Labour Prosecutors have the duty to perform they have to represent the group/collectivity of workers that had their rights violated[42]. Besides this, Labour Prosecutors also work alongside Labour Inspectors with extra-judicial measures to prevent violations of collective rights.

The first case[43], Volkswagen do Brasil Ltda and Ministério Público do Trabalho da 2ª Região. In this case, workers from Volkswagen Brazil, who had sued their employer for violation of any labour right, were afterwards pursued and discriminated against by the employer and were also denied benefits such as promotions and scholarships.

This case contains a lot of legal discussions about the nature of common/public and collective rights[44] and as to who would be a legitimate party to represent such workers: their union or the Labour Prosecutor's Office/Bureau. By using previous legal decisions (case law) to substantiate the case that the Labour Prosecutor's Office/Bureau is legitimate in these cases – class actions/ação civil pública – but also the union would have the legitimacy to represent these workers.

This case was successful and the moral damages that were won will be applied to fund to support other workers, more specifically they will be applied to the Fundo de Amparo ao Trabalhador (FAT)[45]. It is relevant to note that as in other class action or collective harassment cases, the monetary value that is won is frequently destined to *non-profit* organizations that support workers to sponsor campaigns that promote awareness campaigns about gross violations of workers' rights and collective and/or institutional harassment.

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[42] It is important to note that Labour Prosecutors do not have exclusivity in their duty to represent workers in collective cases, a legitimate organization that represent these workers, including but exclusively unions, also has the right to represent a group of workers in these cases.
[43] TST-RR-162000-51.2005.5.02.0046, available at www.tst.gov.br, Justice rapporteur João Batista Brito Pereira, started in 2005 and the last judgement came only in February of 2011 (parties Volkswagen do Brasil and Ministério Público do Trabalho da 2a Região, São Paulo), last visited on July 7th, 2014.
[44] This is my own translation of the Portuguese expression *"direitos difusos"*, which literally means *"widespread rights"*.
[45] This is fund that supports workers that might be out of work and may need training and other services.

In the next case[46] a professors' union, called the Associação dos Docentes da Universidade Metodista de Piracicaba (ADUNIMEP), sued their employer, Instituto Educacional Piracicabano (UNIMEP). This is about a professors' union that sued their university for collectively harassing them through the use of late payments and the retention of benefits. The first instance judge found that the fact that employer was late with some of its payments and also paid some benefits in installments did not constitute harassment, even if these actions had impacted negatively the workers.

As in so many other harassment cases, the court found that the violation of dignity was not corroborated by the evidence in the case. Thus, once more, the interpretation of the evidence was again the main reason why the plaintiffs were not successful in their claims. I believe that in this case the interpretation of the courts was too restrictive, making the standard of proof too unattainable for many workers.

Finally, the last case of collective harassment is a case[47] that involves both systematic harassment and also illegal outsourcing of main activity of banking institution – data processing. This case was also very pertinent since it related to both collective harassment and also to degrading working conditions through the *precarization* of jobs that is usually present in subcontracting cases. This case was once more litigated by the Labour Prosecutor's Office/Bureau against both PROSERVI – Banco de Serviços LTDA and the Banco ABN AMRO REAL S.A[48].

In this case, the plaintiffs represented by the Labour Prosecutor's Office/Bureau won both in the first instance as well as in the Labour Appeal's Court of the First Region of Rio de Janeiro. In both cases, the judges considered that there was enough evidence that the outsourcing company provided

[46] TST-AIRR-62441-12.2006.5.15.0051, available at www.tst.gov.br, last visited on July 9th, 2014. This case had Justice Renato Lacerda de Paiva, as a rapporteur and it started in 2006 and it was judged only in December of 2012, the parties of the case are ADUNIMEP and UNIMEP.
[47] TST-AIRR-117640-71.2002.5.01.0011, Justice rapporteur Walmir Oliveira Costa, and it started in 2002 and the final judgment only in February of 2011 (parties Banco AMRO Real and Banco PROSERV and Ministério Público do trbalho da 1a Região). It is available at www.tst.gov.br, last visited on July 8th, 2014
[48] The name of both these banks roughly translates, respectively, as Limited Service Bank and ABN AMRO Real Bank S.A.

a much worse working conditions and so that the bank workers that were at the outsourced had a precarious[49] work environment and therefore they were collectively harassed. Moreover, because those bank workers were basically doing data processing, which a primordial activity for any banking institution, such activity cannot be subcontracted according to Brazilian law. Therefore, the subcontracting was also considered to be illegal and the main bank was condemned to pay 50,000 reais to be invested, yet again, in the FAT – Fundo de Amparo ao Trabalhador[50].

3.2. Class action and individual claims – procedural differences and possible similarities and interactions

In many workplace bullying cases the violation of dignity was not directed towards only one worker, but rather it was a consequence of abusive managerial practices and/or degrading working conditions that affected a group or collectivity of workers. Class actions are usually the more effective legal tool to deal with these types of situations. Because class actions involve a collectivity, there are procedural difference between these types of claims and individual ones. It is important to note that although collective cases have a different procedure than individual cases, as we have already discussed, many issues raised by individual cases have a strong collective aspect and collective cases can have an influence on individual claims.

In addition, there were a few cases in which an individual claim was put forward by one worker/one individual, but it actually described a situation of collective/institutional harassment, meaning that it was an individual situation, but caused by a managerial policy that creates a poisonous working environment for all workers. Thus, even though only one worker complained, probably many more individuals were affected. I believe it is also a question of legal mobilization and role of unions,

[49] The word precarious is employed here to be faithful to the term used in the case and not make reference to the literature on precarious employment.
[50] This, once again, is fund that supports workers that might be out of work and may need training and other services.

in sector with less present or active union what would be more likely to happen, as it was the case of the telemarketing and communications sector. In this sector, as we already discussed, there were many individual complaints, but very few collective actions[51], even though the main issues in these cases were systematic and so collective, mainly abusive managerial practices and degrading working conditions. I believe that less unionized sectors, such as the telecommunication sector, there is less likelihood of collective/class actions.

4. Workplace bullying and discrimination: an analysis of the cases that directly mention discrimination

In regards to the cases that directly mention discrimination, I have collected 9 cases that stood out in my legal decision research. There are four cases from Labour Appeal's Court 1st Region – Rio de Janeiro, four cases from the Labour Appeal's Court 2nd Region – São Paulo; and one case from the Labour Appeal's Court 15th Region – Campinas.

An interesting aspect to explore and develop, that arises from this discovery that only 9 cases from my sample directly mention discrimination, is that why are there so few cases on discrimination as oppose to the other recurring themes, such as the limitation of the use of bathrooms and the imposition of unreasonable productivity quotas?

When I first started my legal decisions research, I had expected to find a considerable/relevant number of workplace bullying cases that would mention/deal with discrimination. However, to my surprise I only found 18 cases in which the word discrimination was mentioned. I thought this result was quite interesting, because during my interviews, more than one of my informants had mentioned that one of main reasons for the development of workplace bullying cases was the fact that the worker

[51] I did not discuss these few cases of collective cases involving telemarketing workers, because the cases that I did found were not from the jurisdictions of my study.

was considered to be "different" or to stand out, meaning that he or she were part of a minority. Following the same line of thought, I also had expected that discrimination would play an important role in the development of bullying in workplaces. It is relevant to notice that we could not infer that workers are not being discriminated against from the fact that I have not found not so many cases in the courts that I am analyzing that mention discrimination. In fact, many of the cases that I have collected when the violation of dignity is being discussed, most of the times such violation of dignity is composed of a mix between *vexatory* and humiliating slurs with another element, such as the limitation of the use of bathrooms and/or breaks or the imposition of unreasonable quotas. And this type of slurring and/or name calling is impregnated with racialized, gendered, homophobic and classist content. In that sense, even if a case is not explicitly dealing with discrimination, very often they are implicitly about discrimination.

That being said, there are a few cases in which the complainants explicitly argue that their dignity was violated because they were discriminated against at work and therefore it is important that we discuss such cases. I have selected a few of those cases that I believe will serve as an illustration of the challenges that workers face when arguing such cases within the Brazilian Labour courts.

4.1 Discrimination cases based on race/ethnicity, gender, social class and sexual orientation:

In the cases involving discriminatory harassment, the main challenge was to prove such discrimination. It is important to note here that the burden of proof is on the party that makes the claim, as Article 818 of the Brazilian Labour Code, which states that the party that makes the claim, which in these cases would be the claim of harassment, has the burden of proof[52]. This article defines

[52] This is my own translation of the original text, here is the full text: *"TÍTULO X - DO PROCESSO JUDICIÁRIO DO TRABALHO (…) SEÇÃO IX: DAS PROVAS Art. 818 - A prova das alegações incumbe à parte que as fizer."* Consolidação

the general principle that the party that makes any claim has the burden of proof. In most of these cases, the main body of evidence was composed of testimony and the interpretation of the witnesses' statements was quite diverse and so I was still able to observe a lack of uniformity in the interpretation of the evidence among the different cases. And once again, in order to prove that the discrimination was a violation of dignity that would justify granting moral damages this violation would have to pass the test of the *reasonable person*, which as we have seen in other cases might be subject to restrictive interpretations by judges.

The first relevant case[53] involved an assistant nurse, named Larissa Amélia Balduíno, that worked at Hospital São Lucas, which is located in the city of Campinas. The claimant argued that her supervising nurse treated her differently than her colleagues because of her race.

According to the plaintiff, her supervisor frequently would make vexatory comments based on her race, calling her often *"crazy black woman"*[54] and asking her to dance samba, which is a Brazilian popular music, which is stereotypically associated with being better danced by Brazilians of African descent, because samba was originated by mixing African rhythms with Europeans ones and forming a distinctively Brazilian sound. Moreover, samba is very popular music throughout Brazil and many people love to dance to it, independently of their race/ethnicity.

This case was once again based mainly on testimonial evidence, more specifically the plaintiff brought two witnesses and gave her own testimonial. However, both witnesses that were brought by the plaintiff did not corroborate the plaintiff's argument that she was racially discriminated against by her supervisor. According to the witnesses the plaintiff supervisor was only strict in order to demand

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das Leis do Trabalho, at http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452compilado.htm, last visited on January 10th, 2013.

[53] Case number TST-RR-159400-63.2007.5.15.0066, the Justice rapporteur in this case was Maria de Assis Calsing and it started in the first instance in April of 2007 and it lasted for over 4 years, having received its final judgement in May of 2011(parties Larissa Amélia Balduíno and Hospital São Lucas S.A.). It is available online at www.tst.gov.br, last visited on July 7th, 2014.

[54] This is my own translation of the Brazilian term *"nega maluca"*.

a more professional conduct and better work ethic. And if there were a few remarks about the plaintiff's "appearance", such remarks were only made through jokes in playful environment.

Moreover, in the supervisor's testimonial, she also argued that she was only strict with the plaintiff about her work and that was only perform her managerial rights of controlling and monitoring the work of her supervised nurses in order to assure professionalism, which according are paramount in a high stress environment such as a hospital. In addition, the supervisor also argued that the few times that she actually joked with the plaintiff about her appearance, those moments were reserved for breaks and socializing time, in which the plaintiff would also joke around by calling the supervisor *"Barbie"* or *"Spice Girl"*.

In the first instance, the plaintiff was successful in her claim that her dignity was violated at work because of the *vexatory* and humiliating comments about her race/ethnicity made by her supervisor. According to first instance decision, the supervisor could use her managerial rights to monitor the work that was being done by the plaintiff but she could not abuse of such rights and morally offend the claimant. Thus, the hospital lost the case and it was ordered by the court to pay moral damages to their employee, the plaintiff.

After this, the hospital appealed the decision to the Fifteenth Region Labour Appeal's Court (Campinas)[55] by arguing that the claim that the plaintiff was morally offended based on here race/ethnicity was not corroborated by the testimonial evidence and therefore the violation of dignity was not demonstrated and that the supervisor was only strict in order to maintain the high standards a hospital must operate under. The judges at the appeal's court agreed with the arguments raised by the defendant, the hospital, and overturned the decision of the first instance judge and concluded that

[55] My own translation of the court's name that is Tribunal Regional do Trabalho da 15ª Região – Campinas.

the supervisor did not abuse her managerial rights as the *vexatory* and discriminatory offenses were not substantiated by the witnesses testimonials.

Unreconciled to such decision, the plaintiff appealed to the Superior Labour Court[56] on the basis that she was morally harassed at work because her constitutional right to dignity was violated by her supervisor racist comments/offenses and therefore she deserved moral damages. Because the superior courts cannot re-examine factual situations, and revoking the appeal's court decision would require a re-examination of the facts of the case, the court sided with the second instance and agreed that because the discrimination was not substantiated by the testimonial evidence, and therefore the violation of dignity was not demonstrated.

Even though, I was not able to observe the hearings of this case, as they happen before I had started my fieldwork, I believe it would have been quite interesting to be able to be there and hear the testimony, as by only reading them they were already quite intriguing. If we look at the how the testimonial evidence was interpreted is clear that there are some contradictions. On one side, the comments made towards the plaintiff were considered to be *offensive*, *discriminatory* and *vexatory* by herself. But on the other hand, the same comments were considered to be *playful* by the supervisor as well as both the witnesses and also the second instance judges.

I believe this is a relevant case to be discussed and analyzed because is not only about race, but is also about gender. In fact, what makes this case relevant is that synthesize how the intersection of race and gender and also social class can act as a serious disadvantage and even worse is a pernicious vulnerability factor for being harassed at work.

4.2. Exercising rights at work and reprisals of rights

[56] Once again, my own translation of the court's name, which is Tribunal Superior do Trabalho (TST).

Another relevant case[57] that I collected is a case in which the plaintiff argued that he suffered discriminatory harassment because he became a union representative. In that sense, this was the only case in which the plaintiff was discriminated against not based on his race, gender, sexual orientation, social class or age, but rather because he was a union representative. The plaintiff, Vagner Erondi da Cruz Silva, worked at the Fundação Antônio Prudente, which is a foundation that controls an important cancer hospital in the city of São Paulo (A.C. Camargo Cancer Center). In his claim, Mr. Cruz Silva argued that he started being harassed right after he was appointed as a union representative. According to the plaintiff's testimonial, the first consequence of the discriminatory harassment was that he could not get any more shifts or overtime. Later on, the claimant stated that right after he was denied shifts and overtime, he also started to be overtly discriminated against, just because he was working as a union representative.

Furthermore, according to the other evidence in the case, meaning the testimony from the witnesses, the work environment at this foundation was full of anti-union attitudes and therefore the environment could be described as hostile to unions. In that sense, this defendant/employer lost both in the first instance and also the second instance and therefore the plaintiff was successful in his claims.

Another related workplace bullying case[58] that touched upon the relationship between discrimination, subsidiary responsibility in cases of illegal subcontracting and also the use of decision against the defendant in collective harassment influencing the individual harassment claim. In this case, the plaintiff, Anderson Gonzaga Machado, was working on paper for UTC Engenharia S.A., which is subcontracted engineer firm that provides services and consultation for Petróleo Brasileiro

[57] TST-AIRR-101140-46.2007.5.02.0036, the Justice rapporteur in this case was Aloysio Côrrea da Veiga and it started in the first instance in May of 2007 and it lasted for over 5 years, having received its final judgement in August of 2011(parties Vagner Erondi da Cruz Silva and Fundação Antônio Prudente), which is available online at www.tst.gov.br, last visited on July 7th, 2014.

[58] TST-ARR-74900-30.2009.5.15.0087, the Justice rapporteur in this case was Maria de Assis Calsing and it started in the first instance in June of 2009 and it lasted for over 3 years, having received its final judgement in August of 2012 (parties Anderson Gonzaga Machado and UTC Engenharia S.A. and Petrobrás S.A.), which is available online at www.tst.gov.br, last visited on July 8th, 2014.

S.A.- Petrobrás, which the biggest oil company in Brazil, whose main stock holder is the Brazilian government[59]. The main basis for the plaintiff's harassment case is that he started suffering discrimination against after he suffered an accident at work.

According to the testimonial of Mr. Gonzaga, he suffered his accident, in which he broke one of his fingers of his left hand, and then he went to the hospital and the doctor told him that he should take two weeks off to recuperate. Then, after that his employer required him to get a second opinion, so he had to see a specialist doctor, an orthopedist, who was referred to him by the his union and this second doctor told him that conservatively he would have to rest for at least 8 weeks. In light of that, his employer was not happy with such a diagnostic and required him to once more see another doctor to settle the discrepancy between the two previous opinions. So he had to, once again, see a third doctor, this time he had to go the work compensation office and that third doctor said that he would have to rest for 21 days or three weeks, after which his benefit was extended for 30 days more. After about five weeks of rest, he went back to work and that was the moment in which harassment started. In his testimonial, he stated that right after he came back from his accident he was ostracized and isolated and he had to work in a different room, isolated from his colleagues and peers.

The first instance judge found that the plaintiff's claims were substantiated by the evidence presented, meaning the expert evidence from the doctors' notices and testimonials and also the testimonial from the plaintiff himself clearly showed that he suffered discriminatory treatment and was harassed because he had an accident at work and had to take some time off work. In addition to that, the claimant was also able to prove that more than discrimination against himself for having suffered an work accident, he also demonstrated that this discriminatory treatment was a policy within

[59] Nowadays Petrobrás is a publicly traded company, with stocks sold at the Bovespa Stock Exchange, which is the biggest stock exchange in Brazil, which is located in downtown São Paulo, but it used to be a state owned company before it became a "mixed" company with both public and private funding.

Petrobrás, even if it was enforced by UTC Engenharia S.A., the policy came from Petróleo Brasileiro – Petrobrás. Thus, the plaintiff was successful in his claims and won the case in the first instance.

After that, the subsidiary employer/defendant, meaning Petróleo Brasiliero - Petrobrás, appealed the case to the Labour Appeal's Court of the 15th Region - Campinas[60] arguing that the alleged harassment of the plaintiff was not demonstrated by the evidence of the case. Nonetheless, the panel of judges at the appeal's court decided that not only the claims of discriminatory harassment were fully demonstrated but also that one of the defendants, Petrobrás, had a specific policy of discriminating against employees that had accidents and wanted to use their work compensation and after that go back to work. The appeals' court went even further and stated that along with existence of such policies, the same company was currently being sued by the Labour Prosecutor's Bureau/Office for collectively harassing of their workers and creating a union hostile environment, and actually had just being order to pay 2,000,000 reais by a first instance judge[61].

Therefore, in light of such a grave violation of workers' rights, one could infer that the claims from the plaintiff had a very high chance to be truthful, meaning that if a company has an overtly hostile to union environment, it is very likely that they could also discriminate and harass on other basis, such as having suffered an accident, among other things. In that sense, I thought this case was unique as it is an individual harassment case in which the appeal court based part of their decision on the fact that the defendant was already being sued for collective harassment and anti-union practices. Thus, it is a case in which a class action/collective harassment case had a direct influence on an individual harassment claim.

[60] Tribunal Regional do Trabalho da 15ª Região – Campinas.
[61] An estimate of conversion of this amount to dollars would be about 1,000,000. Because this case is from May of 2012, by that time the other case mention was still in the first instance, but now in January of this year 2014, Petrobrás was once again condemned to pay an even larger sum to the workers by the Labour Appeal's Court of the First Region – Rio de Janeiro, the moral damages were increased to 5,000,000 reais, which amounts to about 2,500,000 dollars.

5. Conclusion

I believe that one of the contributions of my doctoral work to the field of workplace bullying research is to shed light on how in Brazil one of the main issues that many workers that are bullied at work face is the appalling working conditions that exist in many workplaces. So, there is a gap between the international workplace bullying literature (European and North American) and the challenges faced by many workers in Brazilian workplaces. In that sense, during my doctoral research I have collected legal cases that deal with workplace bullying and through a description of the narrative of workers that were victims of bullying and the judges' interpretation of such cases, and the other legal actors that are part of the judicial system, I have shown that the main challenge is the degrading working conditions that many workers face.

Although I did perform observation of hearings of the cases in which I am analyzing their final outcomes, when I was performing an ethnographic observations of conciliation week at the main Labour Court in the city of São Paulo, one of the things that impressed me the most was how disappointed and unsatisfied the workers that were leaving the hearings looked. Even though I did not interview these workers, I could not stop myself from noticing how scared these workers looked before the hearings and how dissatisfied they looked afterwards. Thus, I could not stop myself from wondering why these workers looked so disappointed and trying to put myself in their shoes. As it is possible to observe from the cases just discussed in this chapter workplace bullying take at least three years to be judged by the final instance and even if the worker is successful in his claim, the decision comes too late and maybe it is not enough to make it up for the difficulties in reaching this point. This is especially relevant, since the monetary compensation is very low, because it is proportional to the workers' salaries and many of the workers that go to courts complaining of moral harassment are in jobs that do not pay well. There are often workers in the service sector, such as telemarketing operators and call center workers and also sales workers.

This finding as to sectors where bullying complainants are frequent was confirmed by some of my other interviewees/informants, had stated that they have encountered many cases of workplace bullying and that it is a growing problem in Brazil and around the world. They also mentioned that it is a problem of abusive performance and sales quotas and they said that they are especially relevant for workers from the banking sector and telemarketing sector, as we could observe through the analysis of the cases discussed on the limitation of the use of bathrooms and the application of the principle of the violation of dignity, as stated in the Brazilian Constitution.

However, a few of my informants mentioned that generally workers that are bullied are usually workers that are different from their colleagues, meaning that they are either women in a male environment, or they are more competent than their colleagues.

Finally, one of the most important conclusions of my study is that even though most workplace bullying cases in Brazil are litigated as individual cases, many of the issues raised by these cases are collectives ones. Through my analysis of the most prevalent and recurring themes in the cases collected in my research, it is possible to observe that one of the main problems faced by bullied workers in Brazil are appalling working conditions combined with predatory management practices, that limit their basic human rights, such as their right to use the bathrooms, take their mandatory breaks during their work day. There are also required to meet unattainable performance and productivity quotas. Even though these issues are collectively pernicious to all workers, most complaints that reach the courts systems are individual and therefore do not address the systematic aspect of this type of harassment.

The consequence of adjudicating collective rights cases as individual ones in matters that are usually collective, is that the decision of these cases would be less effective in promoting a solution. As previously discussed workplace bullying is a multifaceted problem that involve various aspects and

is more often than not a consequence of the work organization and therefore it is collective and not individual issue.

In the specific case of Brazil, as I was able to observe through my research, the appalling working conditions that affect most workers in my study is a collective issue that does affect only one specific/individual worker. This type of "systematic harassment" is more subtle and difficult to observe and specially prove in litigation, as I was able to observe this in the various cases that I have analyzed. Thus, even with efforts of the Labour Prosecutors Office in Brazil as well as other work organizations, such as unions, to litigate class actions in workplaces where the managerial practices are predatory and the working conditions are so degrading, most of the litigation on workplace bullying in Brazil is still based on individual complaints through compensation for moral damages. And because moral damages is civil litigation procedure, as previously discussed in this article, it is a highly bureaucratic and slow procedure that has many legal requirements and that will always be subject to the *reasonable person* standard, which by its own turn is more often than not interpreted very restrictively.