

2004 AALS Labor Relations and Employment Law Section Panel: Global Perspectives on Workplace Harassment Law
Tanya K. Hernandez* Conference Remarks: A Comparative Assessment of Racial Harassment in the Americas

I. Introduction to the Legal Concept of Racial Harassment:

Before examining the issue of racial harassment in Latin America and the Caribbean, I would like to briefly discuss the definition of racial harassment in the U.S. context in order to have a baseline for comparison. In the United States, racial harassment is a form of racial discrimination that is a violation of Title VII of the Civil Rights Act of 1964. While claims may also be brought under § 1981 and state tort laws, Title VII is the predominant claim and thus what I will use for purposes of my transnational comparison. Although Title VII does not specifically use the words “racial harassment,” courts have held that racial harassment is racial discrimination and thus violates the law. Title VII specifically prohibits an employment practice where an employer “fails or refuses to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race or color.”¹ EEOC materials define Title VII racial harassment as discriminatory treatment based on race or color that may evidence itself in “ethnic slurs, racial jokes, offensive or derogatory comments, or other verbal or physical conduct based on an individual’s race or color.”² However simple teasing,

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¹ Section 703(a)(1) of Title VII, 42 U.S.C.A. § 2000e-2(a)(1).

² EEOC, Facts About Race/Color Discrimination, at www.eeoc.gov/facts/fs-race.html. (last modified June 28, 2002).

offhand remarks, or isolated incidents that are not extremely severe or frequent do not constitute unlawful harassment because they do not rise to the standard of creating an intimidating, hostile, or offensive working environment that either interferes with the employee's work performance or results in tangible employment action such as hiring, firing, promotion or demotion.

While this is a broad definition, in practice U.S. legal actors seem to view racial harassment as stemming from a very narrow set of cultural references. For instance, in EEOC press release reports that tout the success of their enforcement of racial harassment law, the vast majority of the successes share the factual commonality of being rooted in Jim Crow cultural references. Specifically, these were cases in which coworkers displayed hangman nooses, Ku Klux Klan materials, or graffiti, in addition to using racial epithets. While the cases that the EEOC chooses to litigate, successfully settle and then issue press releases about, cannot be said to be indicative of the universe of racial harassment cases that exist, what is suggestive is the way in which the pattern is also prevalent in many of the recent cases I examined. Indeed, just three years ago the then Chairwoman of the EEOC, Ida Castro, noted that the EEOC had witnessed "a disturbing national trend of increased racial harassment cases involving hangman's nooses in the workplace."³ Nor were the cases confined to a particular geographic region of the country. In Feb. 2002, the EEOC confirmed that noose-related racial harassment cases were continuing to rise.⁴

³ EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention, July 13, 2000, at www.eeoc.gov/press/7-13-00-b.html (last modified July 13, 2000).

⁴ Tonya Root, *Harassment Over Race Up, Officials Say* SUN-NEWS, Feb. 8, 2002, at C1.

The EEOC press releases addressed racial harassment incidents in locations as varied as Missouri, Ohio, Pennsylvania, and Washington. In order to assess the extent to which the EEOC cases might be considered representative, I decided to systematically examine recent cases from a single geographic area. The vast majority of the incidents described in the EEOC press releases were in southern states like Alabama, Florida, Georgia, Louisiana, North Carolina, South Carolina, and Texas. I therefore chose to look at New York federal district court cases, in addition to 2nd Circuit appellate decisions available on the Westlaw and Lexis electronic databases, in order to minimize considerations of the role of “southern culture” in the manifestation of racial harassment.

In the timeframe from 1998 to the present, what is striking is not the prevalence of Jim Crow cultural references in the total number of New York area reported cases, but rather the way in which those cultural references seem to be about the only thing that can save a racial harassment case from being disposed of on summary judgment in favor of the defendant.⁵ To be specific, of the 47 total number of district court cases I reviewed, 36 were disposed of on summary judgment or otherwise dismissed. That is 77% of all cases filed. Of the ten 2nd circuit cases I reviewed only 4 had judgments that vacated a district court judge’s summary dismissal of the racial harassment claim. Thus, 60% of the 2nd circuit appeals affirmed the district court dismissals. These numbers are pretty astounding even in the context of a world in which employment discrimination

⁵ This would make racial harassment part of the larger pattern of judges making employment discrimination law applicable to only the most egregious of fact patterns. See John Valery White, *The Irrational Turn in Employment Discrimination Law: Slouching Toward A Unified Approach to Civil Rights Law*, 53 MERCER L. REV. 709, 756-57 (2002) (illuminating the trend in employment discrimination cases in which only fact patterns which “shock the conscience” trigger liability).

cases are disproportionately disposed of on summary judgment. By way of comparison, it is useful to note that in Theresa Beiner's 1999 article reviewing hostile environment sexual and racial harassment cases,⁶ she found that of 302 such cases reported on Westlaw from 1987-1998, 58% were disposed of on summary judgment in favor of the defendant. Because the majority of the cases Beiner examined were sexual harassment cases, her analysis focused upon the ways in which the huge surge in sexual harassment cases filed in the years since the 1991 Hill-Thomas hearings, has motivated mostly male conservative judges to clear their docket of the "women-issue" cases they have less affinity for.⁷ What was left unexamined was the possibility that a higher rate of dismissal exists for racial harassment cases than for sexual harassment cases, and the distinct reasons for that phenomenon.

While the New York case analysis is obviously a very small snapshot of the entire universe of racial harassment cases litigated in the country over time, it is alarming that so many get dismissed, and that the few that survive summary judgment review have either exhibited repeated uses of the "N" word, or actual displays of nooses or KKK paraphernalia. It is also telling that the principle racial harassment precedent for applying the Meritor standard⁸ in which a single incident of harassment, if sufficiently severe, can form the basis of an actionable legal claim – sets out the following hypothetical scenario to describe what sort of single incident of racial harassment would be sufficiently severe to be actionable:

⁶ Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999).

⁷ *Id.* at 119.

⁸ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986).

“If a Black worker’s colleagues came to work wearing white hoods and robes of the Klan and proceeded to hold a cross-burning on the premises.⁹”

Furthermore, even in the few cases brought by non-Black plaintiffs, ethnically-charged derogatory commentary alone doesn’t seem to meet the judicial view of racial harassment. But when a Pakistani-born Muslim was called “nigger” and “sand nigger” his case survived summary judgment review. As Randall Kennedy, notes in his excavation of the uses of the “N” word, it is a racial insult with a long history of denoting denigrated status, and thus has evolved into “the paradigmatic slur” for generating epithets against non-Black racial group members as well.¹⁰ The term’s explosive use during Jim Crow segregation makes it an especially loaded racial insult.¹¹ But what is particularly ironic about this state of affairs in which only racial harassment which resonates with a picture of our Jim Crow legacy or anti-Black racism is superimposed upon other ethnic groups as well, is that the first legal decision to specifically recognize the claim of racial harassment as creating a hostile work environment, was brought in 1971 by a Latina plaintiff in Texas.¹²

II. Racial Harassment in Latin America

⁹ Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 n.4 (7th Cir. 1991).

¹⁰ RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 5 & 27 (2002).

¹¹ *Id.* at 13-16. “[F]or many blacks the N-word has constituted a major and menacing presence that has sometimes shifted the course of their lives.” *Id.* at 12.

¹² Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (“By the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.”).

After examining the status of racial harassment litigation in Latin America, it is my belief that the U.S. Jim Crow history similarly casts a long shadow across the Americas. Specifically, it is my thesis that Latin American legal actors similarly conceive of racial harassment as principally an engagement of the U.S. Jim Crow legacy and thus are impervious to other manifestations of racial harassment and the need for rigorous enforcement.

In fact, there is very little legal discourse at all about the concept of racial harassment within Latin American legal contexts. Unlike the claim of sexual harassment, which is generally incorporated into Latin American labor codes or penal code provisions, and has become an increasingly popular subject of Latin American legislation,¹³ racial harassment is not specifically part of the elaborated legal canon. As I have argued elsewhere, the general legal structure for combating racial discrimination within the Latin American context is woefully inadequate.¹⁴ This is due in part from the longstanding myth that there is no racism in Latin America, and the cultural belief that focusing on race in anyway itself fosters racism. Similarly, the conviction that racism does not exist in Latin America is rooted in the historical comparison with the United States publicized Jim Crow violence and the lack of de jure segregation in Latin America. These perspectives all come to bear on racial harassment in interesting ways.

¹³ See Gaby Oré-Aguilar, *Sexual Harassment and Human Rights in Latin America*, 66 *FORDHAM L. REV.* 631, 635 (1997).

¹⁴ See Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 *CORNELL L. REV.* 1093, 1132 (2002).

III. The Brazil Case Example

In order to be more concrete in the elaboration of my thesis, I will focus on Brazil's experience with racial harassment. I have chosen Brazil because it is the Latin American country with perhaps the most published literature regarding issues of race and the deployment of legal strategies in a racial justice movement.¹⁵ And thus any weaknesses of the Brazilian anti-discrimination framework that are revealed, will only be more extreme in other Latin American countries with more nascent racial justice movements. For instance, as of 1985, Brazil is one of the few Latin American countries with a Public Minister authorized to investigate and defend group-based collective interests such as race-based group interests.¹⁶ And in a parallel fashion to the EEOC, the Public Minister's investigation and prosecution is publicly funded and therefore more accessible a venue for racial minorities to have their legal issues litigated.

From the outset it is important to note that Brazilian law, like most Latin American contexts that do address racial discrimination, centers its enforcement of anti-discrimination within the penal code. The penal code focuses on the refusal of access to public or private establishments as a practice of racism, and imposes a range of imprisonment from one to five years depending on the kind of establishment.¹⁷ A separate provision permits victims of race crimes to seek

¹⁵ Hernández, *supra* note 14, at 1163 (“Brazil is the country in Latin America with probably the most articulated racial justice movement today.”) (citations omitted).

¹⁶ Brazil Law No. 7.347/85, Lei da Acao Civil Publica (known as the Public Interest Law).

¹⁷ Brazil Law No. 7716/89; Brazil Law No. 1390/51.

monetary damages.¹⁸ In addition, the penal code also makes it a misdemeanor to malign someone's honor using racial insults, and the penalty is imprisonment of one to three years and a fine. What these provisions fail to do is directly address the racial harassment that exists in the labor market.

The general concept of moral harassment (“assédio moral”) that harms an individual's dignity or honour is thought to encompass harassment based on gender and race. Yet despite the existence of the concept of moral harassment, legislators in 2001 enacted a specific sexual harassment provision into the penal code in order to further the prosecution of quid pro quo sexual harassment.¹⁹ Hostile work environment sexual harassment was not addressed by the law. So it is not so surprising that nothing was specifically legislated for racial harassment.

In fact, in the one published racial harassment decision that I could locate, none of these provisions is relied upon nor upon the general discrimination law enacted in 1989, which prohibits the “practice of discrimination.”²⁰ Instead the judge supported her condemnation of racial harassment with the general equality principles located in the Brazilian Constitution.²¹ The Constitution provides that one of its basic objectives is the diminishment of social inequality along with promoting the common good free from any prejudices regarding origin, race and color.²² And its equality provision states that “all persons are equal before the

¹⁸ Brazil Civ. Code Art. 159.

¹⁹ Brazil Law No. 10.224/01.

²⁰ Brazil Law No. 7.716/89.

²¹ Mylene Pereira Ramos v. McDonald's, Sao Paulo Labor Court District 31, Case No. 562/02, Nov. 27, 2002. See Débora Pinho, *McDonald's E Condenado a Indenizar Ex-Funcionária por Discriminacao*, CONSULTOR JURÍDICO, Dec. 4, 2002, at www.conjur.uol.com.br. (visited Dec. 18, 2003).

²² Brazil Const. Art. III.

law” and have the right to equality.²³ But interestingly enough, the judicial opinion spends less time elaborating how racial harassment is racial discrimination prohibited by Brazilian law, and more time lambasting the defendant for tolerating racism that would not be tolerated in the United States.²⁴

The facts of the case are fascinating for the connections it makes between the United States and globalization. The plaintiff was an Afro-Brazilian female employee of a McDonald’s franchise in the cosmopolitan city of Sao Paulo. The plaintiff’s female supervisor (race not specified) was found to have called the plaintiff “a smelly black woman” (“preta fedida”) in addition to having had occasion to sniff around her to emphasize the characterization. The supervisor also stated that she did not like black people (pretos) and poor people. When the plaintiff asked her supervisor what the problem was with her work performance, the supervisor pointed to her arm to indicate her skin color. When plaintiff made an internal complaint about the matter no corporate action was taken.

While the actions of the supervisor are certainly distasteful and race specific, I suspect many U.S. judges would not find they met the severity standard of a hostile work environment. And in a Latin American context commentary about Blacks and foul smells related to animals is commonplace.

²³ Brazil Cons. Art. V.

²⁴ Because Brazil is a civil code jurisdiction that incorporates a framework for stare decisis, it would not have been incompatible with Brazilian law for the judge to elaborate upon her own analytical understanding of racial harassment in the interpretation of Brazilian discrimination law. See THOMAS H. REYNOLDS & ARTURO FLORES, FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, VOL. I THE WESTERN HEMISPHERE (LATIN AMERICA, THE CARIBBEAN AND CANADA) (1989) (11/95 update) Brazil § at 5 (“Case law plays a much greater role in the evolutionary process of legal development in Brazil than elsewhere in the civil law world. It has recognized the possibility of stare decisis in the application of the Sumula, a unique quasi-precedential device.”). Furthermore, the Brazilian “Lei de Boa Razao” (Law of Good Sense) encourages “judges and lawyers to look to common sense, custom, comparative legislation and the spirit of the law as the basis for decision.” *Id.*

Why then, the judicial outrage throughout the opinion? It would seem to be the outrage against a U.S. based company and symbol of U.S. culture abroad (or lack thereof) that would tolerate mistreatment of an employee in Brazil that it presumably would not tolerate in the U.S. The judge specifically states that:

globalization does not dispense with the equality of employment practices in the different countries in which the company does business. The high standards for the company's employees in the business's country of origin, should also be applied to its other employees throughout the world, lest a discrimination amongst employees be practiced by the company. The danger of social dumping, a condition in which multinational companies exploit the labor of developing countries to guarantee larger profits with the cheapening of the worker, is totally unacceptable.

Thus the most extensive judicial commentary is reserved for what the judge views as the hypocritical stance of a U.S. company having a general corporate policy against racial discrimination, while tolerating its existence outside of the U.S. borders. Indeed, even though the judge imposes a damages award of 12,000 reais for the breach of Brazilian laws, for support she makes reference to Title VII, the EEOC, NAFTA, and even Paul Brest's article "In Defense of the Antidiscrimination Principle." In short, the focus of the one published opinion specifically employing the racial harassment concept in Brazil, is not racial harassment in Brazil, but the disparate treatment of Brazilian workers by foreign multinational businesses that come from Jim Crow contexts that know what "real racism" looks like.

This may also help explain why those Brazilian cases which effectively describe what is racial harassment, do not employ the concept of racial harassment – when done by Brazilians within the Brazilian context it is not

recognized as related to a Jim Crow past, the true face of racism. For example, in a typical employment discrimination case in which a Black woman was allegedly fired after the employer's contractor threatened to cancel the contract if "that little Black woman" (neguinha) continued to be employed, the public prosecutor dropped the case after the defendant claimed to be using the term "neguinha" affectionately as is often done in Brazil.²⁵ As one expert on Brazilian discrimination cases observes, those defendants who effectively show the "Brazilianness" of their conduct, are successful in disputing allegations of discrimination.²⁶ Thus the use of racialized terms in the workplace is only relevant when viewed as un-Brazilian. This is what makes the McDonald's case particularly peculiar – it is so common for Brazilian racial jokes to equate Blacks as stinking like animals that it pervades popular music.²⁷ What made the McDonald's racial commentary un-Brazilian was that it emanated from a U.S. company representative. An underlying comparison to U.S. racism, also influences the conduct of other legal actors. The police officers and prosecutors who log the complaints of discrimination, often classify workplace discrimination as simply an injury to honor ("injuria") that use racial insults, thereby obviating an analysis of the racial discrimination manifested to exclude a person of color from the workplace.²⁸

²⁵ Seth Racusen, Contesting Brazilian Racial Democracy Through Law, Latin American Studies Association 2000 Congress paper at 25 (unpublished manuscript on file with author).

²⁶ *Id.* at 32.

²⁷ Rosemary Gund, *Racism and Discrimination Brazilian Style*, BRAZZIL (October 1996) available at www.brazzil.com/pl16oct96.htm, (visited Dec. 17, 2003) (describing the racially offensive popular songs such as one regarding a Black woman who "stinks like a skunk").

²⁸ Antonio Sergio Alfredo Guimaraes, *Measures to Combat Discrimination and Racial Inequality in Brazil*, in FROM INDIFFERENCE TO INEQUALITY: RACE IN CONTEMPORARY BRAZIL 139, 140 (Rebecca Reichmann ed. 1999).

Furthermore, the absence of a judicial analysis of racial harassment in Brazil, is mirrored in the Afro-Brazilian social movement's lack of focus on the issue of racial harassment. It may very well be that the extreme racial segmentation in the Brazilian labor market and overwhelming social exclusion of Afro-Brazilians from the arenas of politics, higher education and the like,²⁹ relegates the issue of racial harassment to a later time. Moreover, it is the racial segmentation of the labor market that may also contribute to the dearth of racial harassment litigation. In other words, because the social racial hierarchy is so effective at limiting the opportunities of Afro-Brazilians, there may be fewer occasions to use what Vicki Schultz terms "competence-undermining harassment" to drive Afro-Brazilians away.³⁰ Simply put, Afro-Brazilians haven't been integrated enough into the service industry or skilled-labor market to threaten many other employees and thereby motivate harassing conduct as a tool of exclusion. Afro-Brazilians are already effectively excluded from all but the most menial job tasks, by such hiring screens as "boa aparência," that is "good appearance" requirements that are universally understood as requiring a white or light color appearance, but which employers perceive as a "cultural preference" rather than being discriminatory.³¹ In addition, when accused of bias, employers

²⁹ See Nadya Araujo Castro & Antonio Sérgio Alfredo Guimaraes, *Racial Inequalities in the Labor Market and the Workplace*, in FROM INDIFFERENCE TO INEQUALITY: RACE IN CONTEMPORARY BRAZIL 83, 83-92 (Rebecca Reichmann ed. 1999).

³⁰ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998) (articulating a new account of hostile work environment harassment through a "competence-centered paradigm, for it understands harassment as a means to reclaim favored lines of work and work competence as masculine-identified turf – in the face of a threat posed by the presence of women (or lesser men) who seek to claim these prerogatives as their own.").

³¹ Castro & Guimaraes, *supra* note 29.

successfully use a “Moreno/pardo” defense of being racially mixed and thus impervious to racial bias.³²

Conclusion:

In short, Brazilians like the majority of Latin Americans, do not perceive their racially-specific mechanisms of social exclusion, like racial harassment, to be discriminatory when it does not fit their preconceived vision of discrimination as solely related to Jim Crow violence. Yet it will be difficult to reform such a narrow vision of discrimination in Latin America as long as legal actors in the United States also continue to be held captive to the same perspective on what is actionable racial harassment. This is an area in which both regions will need to mutually work towards modernizing the legal understanding of racial harassment to transcend the focus on the extremes of the history Jim Crow discrimination.

³² Racusen, *supra* note 25.