

# IF ANTI-DISCRIMINATION LAWS ARE ON THE BOOKS, THEN WHY DO WOMEN NOT SUE? A LOOK INTO THE ALMOST ABSENT GENDER DISCRIMINATION LITIGATION IN BRAZIL

*Cesar Zucatti Pritsch\**

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\* Cesar Zucatti Pritsch is a Federal Judge for the labor courts of Brazil—Tribunal Regional do Trabalho da 4a Região. The author would like to thank Professor Kerry Stone, of Florida International University College of Law, for reviewing this article. All Portuguese language terms and materials referenced were freely translated to English by the author.

## I. INTRODUCTION

Despite the great proportion of workplace-related litigation in Brazil,<sup>1</sup> employment discrimination litigation is almost nonexistent, which is in sharp contrast to what happens in the United States. In the United States, employment discrimination cases correspond to 43.6% of all labor and employment litigation in federal trial courts.<sup>2</sup> On the other hand, I have seen very few cases of discrimination throughout my practice as a labor judge in Brazil,<sup>3</sup> and that is the general perception in the Labor courts. Is it because Brazilian law effectively prevents discrimination from happening? Is it because, for some reason, these cases do not even reach the courts? If the latter is true, how can Brazil improve enforcement of anti-discrimination policies?

Through its focus on gender discrimination, this paper argues that, although such discrimination does exist in Brazil, it is not significantly litigated because:

- (A) There are other easier-to-litigate causes of action with satisfactory remedies;
- (B) The lack of more aggressive truth-finding procedures hinders the uncovering of essential evidence;
- (C) Money judgments are proportionally smaller and may not compensate litigating the more complex cases; and
- (D) The current statutory text and the lack of binding precedent limit the litigation possibilities.

This paper also argues that such issues could be partly resolved by adopting a new anti-discrimination bill currently pending in the Brazilian Congress, through an increased focus of prosecutors on gender discrimination and by gender equality information campaigns.<sup>4</sup>

Part II provides some background, summarizing the relevant constitutional and statutory provisions, which shows that Brazil does have

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1. To illustrate the proportion of the litigation in Brazil related to workplace law, the Labor Justice (*Justiça do Trabalho*), segment of the Brazilian Judiciary that has such subject matter jurisdiction, receives 21.3% of the Judiciary's budget and has 20.5% of the 16,429 Brazilian judges. See CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS, 32, 34 (2014) (Braz.) [hereinafter JUSTICE IN NUMBERS]. Although the Labor Justice's pending cases amount to 8.3% (7.8 million) of the national cases in absolute numbers, the labor cases generally join several claims, whereas the other segments of the Judiciary often deal with single claim cases. Thus, it is fair to estimate labor and employment cases in Brazil as roughly one fifth of the actual workload in courts. *Id.* at 35.

2. See *infra* note 70 and accompanying text.

3. Since 2007, acting in the labor courts of a state capital and of several midsize and small cities.

4. Lei No. 6.653, de 15 de Dezembro de 2009, PROJETO DE LEI [P.L.] de 16.12.2009 (Braz.).

laws against gender discrimination. Part III answers the first question above in the negative, finding that gender discrimination in Brazil exists in proportion equal to or superior to that of the United States, despite that such cases are rarely litigated. As to the second question, the answer is affirmative: cases are rarely litigated because there are factors that prevent most of the discrimination victims from suing. Without the intention of exhausting this complex inquiry, Part IV proposes four explanations to the issue.

First, Brazilian legislation grants other easier-to-litigate causes of action and remedies that will otherwise compensate the gender discrimination victim, thereby reducing the focus on gender discrimination theories.<sup>5</sup> Second, the lack of more aggressive evidence gathering procedures such as those present in the United States makes it more difficult to prove discrimination cases in Brazil.<sup>6</sup> Third, the lower damages usually awarded in Brazil do not provide a large enough incentive to litigate discrimination cases, unlike in the United States where the monetary incentives are great.<sup>7</sup> Last, the current anti-discrimination statutory text in Brazil is more limited in scope than American anti-discrimination law.<sup>8</sup> As a possible course of action to address the problem, Part V proposes the passing of a bill that is waiting to be voted on by the Brazilian Congress since 2009.<sup>9</sup> It also proposes an increased focus on gender discrimination by public prosecutors who have special discovery powers not available to private attorneys.<sup>10</sup> Finally, it argues for the promotion of campaigns to increase awareness about workplace gender discrimination among employers and employees.

## II. CONSTITUTIONAL AND STATUTORY PROVISIONS ON GENDER EQUALITY IN BRAZIL

### A. *Gender Equality and the Protection of Motherhood in the Brazilian Constitution*

While the Equal Protection Clause of the United States Constitution limits only state action,<sup>11</sup> the Brazilian Constitution grants equality and

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5. See *infra* notes 99–112 and accompanying text.

6. See *infra* notes 113–26 and accompanying text.

7. See *infra* notes 128–33 and accompanying text.

8. See *infra* Part II, Section B.

9. See *infra* notes 142–48 and accompanying text.

10. See *infra* notes 149–52 and accompanying text.

11. “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

other civil and social rights as causes of action both against the government and private entities.<sup>12</sup> The 1988 Constitution contains an extensive and detailed enumeration of rights.<sup>13</sup> For instance, it grants civil rights and liberties (art. 5), as well as social rights (arts. 6–11), with special attention to employment and labor rights.<sup>14</sup>

As to equality, the Brazilian Constitution forbids discrimination without limitation to an explicit list of protected classes. It states as a “fundamental objective” of the country to “promote the well-being of all, without prejudice as to origin, race, sex, color, age *and any other forms of discrimination.*”<sup>15</sup> It also prescribes that “the law shall punish any discrimination violating fundamental rights and liberties.”<sup>16</sup>

12. Alice Monteiro de Barros, DISCRIMINAÇÃO NO EMPREGO POR MOTIVO DE SEXO [EMPLOYMENT DISCRIMINATION BASED ON GENDER], DISCRIMINAÇÃO [DISCRIMINATION] 59, 66 (RENAULT, VIANA, & CANTELLI eds., 2d ed., 2010) (Braz.). On a historical note, in the 20<sup>th</sup> century, Brazil has adopted five different constitutions—in 1934, 1937, 1946, 1967, and in 1988. *Id.* The Constitutions of 1934, 1946, 1967 and 1988 all forbade different wages for equal work on the basis of sex. *Id.* The 1937 one, despite having an equal protection clause, did not explicitly prohibited gender based wage differences (as the other ones did), which opened the way for the enactment of the presidential “decree-law” 2.548, in 1940. *Id.* Such decree authorized employers to pay women lower wages than men by 10%. *Id.* That is a reminder of why Brazil and other Latin American countries tend to enact long and detailed bill of rights in their Constitutions: to use the harder-to-change Constitution to protect social advancements, such as gender equality, from future attempts to eliminate them.

13. *See generally* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] pmbl. (Braz.). The creation of rights and protections for the citizens spreads through almost half of its 250 articles, along with detailed government structuring, checks and balances. *Id.* The 1988 Constitution was an attempt to reorganize the Brazilian legal system after twenty years of authoritarian military rule, and to make sure that democracy and the respect for civil and social rights would endure. *See generally* C.F. pmbl.; *see also* C.F., translated in BRAZIL’S CONSTITUTION OF 1988 WITH AMENDMENTS THROUGH 2014 (Keith S. Rosenn ed., Constitue Project, 2014). All the transcribed text of the Brazilian constitution hereinafter is quoted from Keith Rosenn’s version in English, except for some eventual different word choices, by the author, based on the original text in Portuguese.

14. C.F. arts. 5, 6–11. Although article 6 lists as social rights “education, health, nutrition, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute,” articles 7 through 11 show a special concern with employment and labor rights. C.F. art. 6–11. Despite the fact that many of these prescribed rights granting provisions could not immediately generate public policy, due to budget limitations, they still went beyond the mere aspirational aspect. According to most accepted Brazilian constitutional scholars, all constitutional provisions have immediate force, at least to command consistent interpretation of present legislation, to repeal inconsistent legislation, and to guide future legislation and policy making. *See, e.g.*, Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 356 (2012).

15. C.F. art. 3, § IV. (emphasis added).

16. C.F. art. 5, § XLI.

There is special attention to gender equality, as “men and women have equal rights and duties under the terms of this Constitution.”<sup>17</sup> However, such attention is not limited to prohibiting discrimination; it also grants some rights specifically to women, attempting to provide for substantive equality.<sup>18</sup> The Constitution grants “maternity leave without loss of job or wages for a period of one hundred and twenty days,” and forbids discharge without cause from the date the pregnancy is confirmed until five months after birth.<sup>19</sup> Finally, the Constitution grants “protection of the job market for women through specific incentives, as provided by law;”<sup>20</sup> and the “prohibition of any difference in pay in performance of duties and in hiring criteria by reason of sex, age, color or marital status.”<sup>21</sup>

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17. C.F. art. 5, § I.

18. See C.F. art. 7. One important observation is that this equality is not absolute, being subordinate to the other guidelines prescribed by the Constitution. Among Brazilian scholars and case law it is agreed that the equality here is substantive (*isonomia material*), and not merely formal (*isonomia formal*), thus allowing affirmative actions or reverse discrimination to level the playing field and eliminating effects of past discrimination. Cf. Christopher DiSchino, *Affirmative Action in Brazil: Reverse Discrimination and the Creation of a Constitutionally Protected Color-Line*, 17 U. MIAMI INT'L. & COMP. L. REV. 155, 174 (2010) (citing S.T.J.J., Ap. No. 2003/0151040-1, Relator: Min. Luiz Fux, 10.02.2004, 182, REVISTA DO SUPERIOR TRIBUNAL DE JUSTICA [R.S.T.J.] 120 de 25.02.2004 (Braz.)) (citing decision of the Superior Tribunal of Justice, S.T.J., upholding the constitutionality of a quota system in state universities, reasoning that affirmative action is a “‘legitimate human interest’ in line with the constitutional principle of isonomia, or equality under the law, which mandates compensation for past discrimination that created current racial inequalities”).

19. C.F. art. 7, § XVIII; ATO DAS DISPOSIÇÕES CONSTITUCIONAIS TRANSITÓRIAS [A.D.C.T.] [TRANSITIONAL CONSTITUTIONAL PROVISIONS ACT] art. 10, § II(b) (Braz.). Besides the for cause discharge, the literal text actually creates another exception, a discharge that is not “arbitrary.” *Id.* However, because no statute yet defines what would be a non arbitrary discharge as to pregnant employees, the courts have been ruling that the only exception to this tenure rule is the for cause discharge based on the disciplinary violations in article 482 of the Consolidação das Leis do Trabalho. Decreto No. 5.452, de 1 de Maio de 1943, CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 482 de 1.5.1943 (Braz.); MAURÍCIO GODINHO DELGADO, CURSO DE DIREITO DO TRABALHO 1, 1167 (3d ed. 2004).

20. C.F. art. 7, § XX. This provision not only authorizes affirmative action and other policies to eliminate gender based discrimination, but actually mandates the branches of government to act, legislating or creating programs that will reach such result. *Id.* However, despite some legislative efforts, see *infra* Part II, Section B, the results are clearly insufficient, as Part III below demonstrates.

21. C.F. art. 7, § XXX.

*B. Statutory Provisions Relating to Gender Equality and Protection of Motherhood in Brazil and the United States*

At the statutory level, Law 9.029/95 is the functional equivalent to Title VII of the Civil Rights Act of 1964 (Title VII).<sup>22</sup> It prohibits discriminatory practices restricting “access or maintenance of an employment relationship because of sex, origin, race, color, marital status, family status or age.”<sup>23</sup> Such protected classes are similar to the ones in Title VII, except for the omission of religion and the inclusion of age.<sup>24</sup> Brazilian law considers it a discriminatory practice to require statements or medical exams regarding sterilization, pregnancy status, or to inducement of birth control.<sup>25</sup> Additionally, notwithstanding other available relief, it gives the wrongfully discharged employee the option to be reinstated with back pay, or not to be reinstated and receive doubled back pay.<sup>26</sup>

Further, Law 9.799/99 amends the Consolidation of Labor Laws (C.L.T.) to refine the list of unlawful discriminatory practices, such as prohibiting the use of protected classes when advertising jobs and discharging or refusing employment.<sup>27</sup> The C.L.T allows an exception in cases where the nature of the activity is “notorious and publicly incompatible” with such classes, which is loosely equivalent to a bona fide occupational qualification found in the United States’ own Title VII.<sup>28</sup> Additionally, it defines as unlawful the use of those classes as a determining factor to promote and define compensation and training opportunities.<sup>29</sup> Finally, the statute also clears the way for affirmative action. It allows temporary measures to promote gender equality, to correct

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22. See *infra* notes 28–33 and accompanying text.

23. Lei No. 9.029, de 13 de Abril de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 1 de 17.4.1995 (Braz.).

24. See 42 U.S.C. § 2000e-(2)(a)(1) (2012).

25. Lei No. 9.029 D.O.U. art. 2 (Braz.).

26. *Id.* art. 4.

27. Lei No. 9.799, de 26 de Maio de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.5.1999 (Braz.) (provisions functionally equivalent to Title VII, 42 U.S.C. § 2000e-2(a), (d)); Decreto No. 5.452, de 1 de Maio de 1943 CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 373-A (Braz.).

28. Decreto No. 5.452 C.L.T. art. 373-A, § I (Braz.). According to Title VII, in the United States it is not an unlawful employment practice to make employment decisions on the basis of someone’s religion, sex, or national origin when these are a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e).

29. Decreto No. 5.452 C.L.T. art. 373-A, §§ I–III (Braz.).

the distortions that affect training, access to employment, and working conditions of women.<sup>30</sup>

In the United States, Title VII addresses gender discrimination.<sup>31</sup> Title VII defines several important terms used throughout the Act and clarifies that discrimination “because of sex” or “on the basis of sex” includes but is not limited to discrimination on the basis of pregnancy.<sup>32</sup> It regulates unlawful employment practices, such as to discharge, refuse to hire or otherwise “discriminate against an individual with respect to [...] terms [...] of employment because of this individual’s [...] sex”, or other listed protected class.<sup>33</sup> However, Title VII allows an employer to make employment decisions based on a protected class if it is a “bona fide occupational qualification reasonably necessary to the normal operation of that particular business [...]”.<sup>34</sup> It also regulates disparate impact, where a particular practice causes disparate impact on the basis of a protected class and the respondent fails to demonstrate that such class is a business necessity, or refuses to adopt an alternative practice.<sup>35</sup> Finally, among other important provisions, Title VII forbids retaliation against individuals because they opposed unlawful employment practices, or participated in any proceeding under Title VII.<sup>36</sup>

Though Brazilian legislation forbids gender discrimination, it confers certain benefits to women for their maternal roles, as a means to protect family and to compensate for the disadvantages women suffer in the workplace due to childbearing.<sup>37</sup> For instance, women in Brazil are entitled to paid maternity leave of 120 days.<sup>38</sup> It is a social security benefit, where

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30. *Id.* art. 373-A, *sole para.*

31. 42 U.S.C. § 2000e.

32. *Id.* § 2000e(k).

33. *Id.* § 2000e-2(a).

34. *Id.* § 2000e-2(e)(1).

35. *Id.* § 2000e-2(k).

36. 42 U.S.C. § 2000e-3(a).

37. *See* DELGADO, *supra* note 19, at 781. After the 1988 Constitution, some previous provisions deemed excessively restrictive, paternalistic or discriminatory to women were repealed, while protections related to motherhood remained. *Id.* For instance, Law 7,855/1989 repealed statutory provisions authorizing the father or husband to interfere in an adult woman’s employment contract, demanding that women went through certain medical examinations, and limiting women in certain types of work. *Id.* That followed international trends, where excessive state intervention was regarded as a cause of discrimination by employers and as an obstacle for the progress of women in the labor market. *See* Eduardo Gabriel Saad, *Da Proteção do Trabalho da Mulher [Protection of Women’s Work]*, in CONSOLIDAÇÃO DAS LEIS DO TRABALHO COMENTADA 1, 458 (JOSÉ EDUARDO DUARTE SAAD & ANA MARIA SAAD CASTELO BRANCO eds., 47th ed., 2014) (Braz.).

38. C.F. art. 7, § XVIII; Decreto No. 5.452, de 1 de Maio de 1943, CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 392 de 01.05.1943 (Braz.).

the employer directly pays the usual wages to the employee but compensates the corresponding amount with other social security taxes owed.<sup>39</sup> Additionally, women have tenure from the date the pregnancy is confirmed until five months after birth.<sup>40</sup> This temporary job security allows the returning employee to have her job back, which otherwise would have been likely filled, and at least a month to show her value at work. Women may also benefit from unlimited paid sick days or disability leave.<sup>41</sup> Even though this benefit is also available to men, it proves to be very important for women with pregnancy complications.<sup>42</sup> Finally, without loss of wages and other rights, pregnant women have the right to be accommodated to another position when health conditions so require, as long as they are restored to the previous position after maternity leave.<sup>43</sup>

In contrast, there is no paid maternity leave mandated in the United States at the federal level, and only a few American states have enacted some form of paid maternity leave.<sup>44</sup> The Family and Medical Leave Act (F.M.L.A.) grants an unpaid leave of eighty-four days (twelve weeks).<sup>45</sup> Though the F.M.L.A. does not provide a pregnant woman with job security,

39. Lei No. 8.213, de 24 de julho de 1991, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 71–73 de 25.7.1991 (Braz.). Despite being a great conquest of society on behalf motherhood, paid maternity leave was itself a cause of discrimination. Until the seventies, funding maternity leave was a great burden to the employer. Employers then tried to avoid such burden by not hiring married women, and it was not uncommon for women that got married to hide it from their employers. That only changed with the enactment of Law 6,136/1974, which turned paid maternity leave into a social security benefit. *Id.* art. 71. Thereafter, there was a considerable increase of women participation in the labor market. *See Saad, supra* note 37, at 467.

40. Decreto No. 5.452 C.L.T. art. 391-A (Braz.) (referencing ATO DAS DISPOSIÇÕES CONSTITUCIONAIS TRANSITÓRIAS [A.D.C.T.] art. 10, § II(b) (Braz.)).

41. Lei No. 8.213 D.O.U. art. 60, § 3 (Braz.). The employer, upon a showing of medical examination documents, pays up to fifteen consecutive days, and the days thereafter are paid as a social security benefit. *Id.* That is not without some friction between employees and employers, who complain that some employees abuse of such right.

42. *Id.*

Art. 60. Paid sick leave [*auxílio-doença*, literally, sickness aid] will be due to the insured employee from the sixteenth day of removal from the activity, and, in the case of other insured persons, from the date of the beginning of the incapacity as long as he remains incapacitated . . . §3 During the first fifteen consecutive days following the departure of the activity due to illness, the company will be responsible for paying the insured employee his full salary. *Id.*

43. Decreto No. 5.452 C.L.T. art. 392, § 4 (Braz.).

44. 29 U.S.C. § 2612(c) (2009); *see* Adrienne Lu, *Paid Family Leave Now Law in N.J.*, THE PHILA. INQUIRER (May 3, 2008), [http://articles.philly.com/2008-05-03/news/24989936\\_1\\_philip-kirschner-paid-family-leave-weeks-of-unpaid-family](http://articles.philly.com/2008-05-03/news/24989936_1_philip-kirschner-paid-family-leave-weeks-of-unpaid-family).

45. 29 U.S.C. § 2612(a)(1)(A).



at least she is entitled to the same position held before taking leave.<sup>46</sup> Additionally, a discharge shortly after an F.M.L.A. leave would raise a strong case of interference with F.M.L.A. rights, entitling the employee to reinstatement, damages, attorney's fees and costs.<sup>47</sup> As to the period prior to the leave, a discharged pregnant woman would have to go through the difficult task of proving employment discrimination in American courts.<sup>48</sup>

### C. *Prospective Anti-Discrimination Legislation*

There is a bill, P.L. 6.653/09, for a more comprehensive anti-discrimination statute waiting to be voted on in the Brazilian House of Representatives (*Câmara dos Deputados*) since 2009.<sup>49</sup> Despite the special attention to gender discrimination, its coverage is broad, expressing a non-exhaustive list of protected classes. It prohibits all discriminatory treatment "between women and men, based on gender, sexual orientation, race, ethnicity, racial origin, age, origin, physical appearance, health status, disability, political opinions, membership of political parties and trade unions, customs, religious beliefs, among others."<sup>50</sup>

P.L. 6.653/09 defines discriminatory practices broadly as any actions based on differential treatment,<sup>51</sup> and defines indirect discrimination (resembling Title VII's definition of disparate impact<sup>52</sup>) as:

an attitude, criteria, provision or policy that, despite apparently neutral, put female or male workers in comparative disadvantage, except for acts justified by the performance of different functions in the company's hierarchy, or as affirmative actions to compensate for an uneven situation and achieve equality of treatment.<sup>53</sup>

P.L. 6.653/09 also mandates affirmative actions to compensate and ensure equality between women and men.<sup>54</sup> It requires policies for sharing and balancing work and family responsibilities, and for establishing training

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46. *Id.* § 2614(a)(1) (2008).

47. *Id.* §§ 2615(a)(1), 2617(a)(1), (3) (2008).

48. *See infra* notes 103–05 and accompanying text.

49. Lei No. 6.653/09, de 15 de Dezembro de 2009, PROJETO DE LEI [P.L.] de 16.12.2009 (Braz.).

50. *Id.* art. 2, § 1.

51. *Id.* art. 4.

52. *See supra* note 35 and accompanying text.

53. Lei No. 6.653/09 P.L. art. 4, *sole para.*

54. *Id.* art. 2, § 3, art. 3.

and grievance procedures related to sexual harassment and bullying.<sup>55</sup> It also attempts to deter discriminatory behavior through the denial of public financing and exposure of employers, who violate those policies, in a publicized list.<sup>56</sup> Additionally, P.L. 6.653/09 defines workplace bullying as “any improper conduct that is repetitive and prolonged, exposing female and male workers to humiliating and embarrassing situations, violating their dignity and psychological integrity, affecting the directly offended person's work and the group's productivity as a result of the deterioration of the working environment.”<sup>57</sup>

Finally, P.L. 6.653/09 innovates by mandating employers to create internal commissions for the promotion of equality, composed equally of employees elected by their peers and employees nominated by the employer.<sup>58</sup> Its members would be tenured for up to one year after finishing their one-year term.<sup>59</sup> Additionally, they would have powers to disseminate equality information, to create an Equality Plan, and to check the employer's compliance with the plan, as well as all pertinent administrative regulations.<sup>60</sup>

### III. DESPITE BEING RARELY LITIGATED IN BRAZIL, GENDER DISCRIMINATION DOES EXIST IN PROPORTIONS EQUIVALENT OR SUPERIOR TO THOSE OF THE UNITED STATES

#### *A. Gender-Based Employment Discrimination in Brazil is Seldom Litigated*

Despite the fact that approximately one-fifth of all litigation in Brazil relates to the workplace,<sup>61</sup> the number of gender-based employment discrimination claims that reach the labor courts is minimal.<sup>62</sup> Although

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55. *Id.* art. 5, arts. 25–26.

56. *Id.* arts. 23–24.

57. *Id.* art. 27.

58. Lei No. 6.653/09 P.L. art. 34.

59. *Id.*

60. *Id.*

61. JUSTICE IN NUMBERS, *supra* note 1, at 35.

62.

The [Brazilian] Judiciary consists of: (I) the Supreme Federal Tribunal [S.T.F.]; (I-A) the National Council of Justice [C.N.J.]; (II) the Superior Tribunal of Justice [S.T.J.]; (III) the Federal Regional Tribunals and the Federal Judges; (IV) the Labor Tribunals and the Labor Judges; (V) the Electoral Tribunals and the Electoral Judges; (VI) the Military Tribunals and the Military Judges; (VII) the Tribunals and Judges of the states, the Federal District and the Territories. C.F. art. 92, §§ I–VII.

there are no statistics specific to such employment discrimination cases, it is possible to arrive at such conclusion looking at the number of cases identified by topics or legal issues where employment discrimination might be contained. An eloquent illustration is the following 2014 data from the highest Brazilian labor court:<sup>63</sup>

| Code  | Issues that might contain employment discrimination causes of action  | T.S.T. Quantity | T.S.T. % |
|-------|---|-----------------|----------|
| 2697  | Salary differences due to equal pay mandate   | 10,706          | 4.0%     |
| 55184 | Salary differences due to denied promotion  | 4,146           | 1.5%     |
| 2656  | Reinstatement, readmission or front pay   | 2,888           | 1.1%     |
| 1723  | Moral damages due to moral harassment   | 2,351           | 0.9%     |
| 2435  | Indirect discharge (fault committed by employer)  | 2,094           | 0.8%     |
| 1978  | Reinstatement, readmission or front pay due to pregnancy job security   | 1,066           | 0.4%     |
| 55028 | Salary differences due to equal pay mandate (bank workers)  | 680             | 0.3%     |
| 55193 | Void discharge  | 502             | 0.2%     |
| 55216 | Collective moral damages  | 446             | 0.2%     |
| 9051  | Moral damages due to void for cause discharge   | 351             | 0.1%     |
| 1966  | Discriminatory discharge (may include retaliation for all employment suits, but not only for employment discrimination) | 339             | 0.1%     |

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The Labor Court System consists of: (I) the Superior Labor Tribunal [situated in the national capital, last instance for issues of workplace law, except for constitutional challenges, when its decisions may be subject of extraordinary appeals to the Supreme Federal Tribunal, S.T.F.]; (II) Regional Labor Tribunals [appellate labor court, usually one per state capital]; (III) Labor Judges. C.F. art. 111, §§ I–III.

In Brazil, labor courts are responsible for adjudging: (I) actions arising from work relations (either employment relations or individual independent contractors working for another enterprise); (II) actions involving the right to strike; (III) actions concerning union representation; (IV) writs of mandamus, *habeas corpus* and *habeas data* (access to information suits) within this subject matter; (V) jurisdictional conflicts among labor courts; (VI) economic or non-economic damage claims stemming from work relations; (VII) claims relating to administrative penalties imposed by labor inspection agencies; (VIII) collection of payroll social contributions and related fines; (IX) other controversies stemming from work relations, as provided by law. C.F. art. 114, §§ I–IX.

63. TRIBUNAL SUPERIOR DO TRABALHO [T.S.T.], COORDENADORIA DE ESTATÍSTICA E PESQUISA DO, ACERVO POR ASSUNTO, de 31.12.2014 (Braz.) [hereinafter T.S.T. STATISTICS].

|       |   |     |      |
|-------|---|-----|------|
| 55214 | Moral damages due to discriminatory action              | 313 | 0.1% |
| 55082 | Women (especially protected worker)                     | 242 | 0.1% |
| 55421 | Moral damages due to body or personal belongings search | 207 | 0.1% |
| 1724  | Moral damages due to sexual harassment                  | 80  | 0.0% |
| 55417 | Moral damages due to restricting the use of restroom    | 63  | 0.0% |
| 8812  | Maternity-leave salary                                  | 30  | 0.0% |
| 55331 | Maternity leave   | 14  | 0.0% |

Out of the 270,424 cases before the T.S.T. in 2014,<sup>64</sup> the cases that actually involve gender-based employment discrimination, might be less than 0.5%.<sup>65</sup> Despite the fact that the sum of the percentages in the table above would nominally reach 9.8% of the total, several claims are usually joined in the same complaint, and none relate exclusively to employment discrimination.<sup>66</sup> Discounting such situations, employment discrimination cases could be estimated at about 1% of the litigation in labor courts.<sup>67</sup> Gender-based discrimination (presumably not more than half of such cases) are likely not more than 0.5% of the labor courts' workload.<sup>68</sup> Therefore, employment discrimination suits correspond to no more than 0.48% of the total federal litigation in Brazil, and gender-based discrimination suits to no more than 0.24%.<sup>69</sup>

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64. See generally Cesar Zucatti Pritsch, *The Brazilian Appellate Procedure Through Common Law Lenses: How American Standards of Review May Help Improve Brazilian Civil Procedure*, 48 U. MIAMI INTER-AM. L. REV. 56 (2017) (discussing the amazing quantity of appeals handled by the Brazilian appellate courts, and possible tools to reduce them)

65. As covered in Title VII, see *supra* notes 31–34 and accompanying text.

66. See *supra* note 64–65 and accompanying text. For instance, “salary differences due to equal pay mandate” might be due to gender or race discrimination, but often they are not. See T.S.T. STATISTICS, *supra* note 63. An employee who has been hired for a certain function at a certain wage, might end up performing more complex activities without receiving the correspondent wage increase. If another employee earns more for equivalent work (despite equivalent seniority), the employer is liable for this salary difference even without the intention to discriminate because of this employee's protected class status. In another example, the denial of a promotion might be unlawful due to discrimination, but it also may stem from a mere violation of a seniority agreements.

67. See *supra* note 63 and accompanying text. Since there is no separate employment discrimination cases statistics in Brazil, the author used his professional experience to break up the available numbers into an estimate of the discrimination cases within such numbers.

68. *Id.*

69. *Id.* In 2013, the labor intermediate appellate courts handled 648,478 appeals while the federal intermediate appellate courts handled 499,244 appeals. CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS 2014 ANO-BASE 2013: JUSTIÇA DO TRABALHO, [THE JUDICIARY IN NUMBERS 2014 BASED ON 2013: LABOR JUSTICE] 108 (2013) (Braz.) [hereinafter JUDICIARY IN NUMBERS 2013];

In sharp contrast, the proportion of employment discrimination cases in the United States is much higher. Employment discrimination amounts to 3.7% of federal litigation (7.6 times more than in Brazil) and 43.6% of all labor and employment federal cases (proportionally 43.6 times more than in Brazil).<sup>70</sup> There are no specific statistics when it comes to gender discrimination claims in the American courts. However, the proportion of the gender discrimination charges to the total of discrimination charges filed with the Equal Employment Opportunity Commission (E.E.O.C.) may provide some insight.<sup>71</sup> Assuming that discrimination complaints are filed in federal courts in similar proportions to those in the E.E.O.C., gender discrimination claims are 30% of the employment discrimination litigation, and 13.8% of the federal labor and employment litigation.<sup>72</sup> Therefore, gender discrimination in the United States is twenty-five times more litigated than in the Brazilian labor courts.

### B. Gender Discrimination in the Labor Market in Brazil

Looking at the very low numbers of employment discrimination litigation in Brazil, one could think that Brazil is free of discrimination, but that is still distant from reality. Women correspond to 76% of male individuals in the labor force (in the United States, women make up 85% of male individuals in the labor force).<sup>73</sup> Despite being more educated than

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CONSELHO NACIONAL DE JUSTIÇA, JUSTIÇA EM NÚMEROS 2014: JUSTIÇA FEDERAL [THE JUDICIARY IN NUMBERS 2014: FEDERAL JUSTICE] 77 (2013) (Braz.) [hereinafter JUDICIARY IN NUMBERS 2014]. Thus, labor appeals were 57% of the total federal litigation at appellate courts. See JUDICIARY IN NUMBERS 2014, *supra* note 69; JUDICIARY IN NUMBERS 2013, *supra* note 69.

70. Considering the total numbers of tables D and C-2, in the fiscal year of 2014 there were a total of 372,542 cases pending at the U.S. District Courts, and the employment discrimination cases are in table C-2 under the labels “Civil Rights: Employment”, and “Civil Rights: ADA-Employment,” which totaled 13,881 cases in the fiscal year 2014. See U.S. COURTS, *Table D. Cases: U.S. Dist. Courts—Criminal Cases Commenced, Terminated, and Pending (Including Transfers) During the 12-Month Periods Ending June 30, 2013 and 2014*, [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D00CJun14.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/D00CJun14.pdf) (last visited Oct. 3, 2017); see U.S. COURTS, *Table C-2. U.S. Dist. Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending June 30, 2013 and 2014*, [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/C02Jun14.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/C02Jun14.pdf) (last visited Oct. 3, 2017) (explaining 13,881 employment discrimination cases out of a total of 31,858 labor and employment cases—“Civil Rights: Employment”, “Civil Rights: ADA-Employment,” and “Labor Laws, Total”).

71. *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2014*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Oct. 3, 2017).

72. *Id.*

73. WORLD ECON. FORUM, *THE GLOBAL COMPETITIVENESS REPORT 497* (Klaus Schwab, ed., 2013). On a comparative note, one would think that a higher participation of women in the labor market

men, women earn less.<sup>74</sup> Women earned only 65% of what men earned in 2000, 68% in 2010, 72.8% in 2012 and 73.7% in 2013.<sup>75</sup> This shows a trend to reduce the gap, but there is still a great disparity.<sup>76</sup> That becomes especially clear in comparison to the United States, where in 2012 women's median weekly earnings were 81% compared to those of men.<sup>77</sup> Curiously, among the better-educated segment, the difference in Brazil is higher.<sup>78</sup>

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is an indicator of a more progressive or developed society, and of better working conditions and wages for women. However, statistics show that a higher ratio is not a good proxy for the development of the country, because there are developed and developing countries which fall above and below the United States and Brazil when it comes to the ratio of women to men in the labor force. *See id.* For instance: Mozambique 1.05; Rwanda 1.02; Norway 0.94; Cambodia 0.93; Kazakhstan and Canada 0.91; Botswana 0.90; China 0.88; Germany 0.86; Zambia 0.85; U.S. 0.86; Angola and Spain 0.82; Peru 0.81; Singapore and Brazil 0.76; Japan 0.74; Greece 0.73; Italy 0.69; Chile 0.66; Mexico 0.56; Turkey 0.40; India 0.36; Egypt 0.32 and Algeria 0.21. *Id.*

74. *See* INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, ESTATÍSTICAS DE GÊNERO: UMA ANÁLISE DOS RESULTADOS DO CENSO DEMOGRÁFICO 2010 [GENDER STATISTICS: AN ANALYSIS OF THE 2010 DEMOGRAPHIC CENSUS RESULTS] 33, Gráfico [Graphic] 28 (2014) (Braz.). In 2010, among Brazilians between 18 and 24 years old, 41.1% of men had dropped out of high school, but only 31.9% of women did the same, and while only 11.3% of men attended college, 15.1% of women did so. *Id.* Among women of 25 years old and above, 12.5% had completed a college education, but only 9.9% of men in such age group did the same. *Id.*

75. *Id.* at Tabela [Table] 26. This illustrates another major type of employment discrimination in Brazil—discrimination based on race. *See id.* Despite the celebrated notion that Brazil is a “racial democracy,” blacks and other dark-skinned citizens usually receive inferior opportunities in life and have limited access to higher paying jobs. *See, e.g.,* Benjamin Hensler, *Não Vale a Pena? (Not Worth the Trouble?) Afro-Brazilian Workers and Brazilian Anti-Discrimination Law*, 30 HASTINGS INT’L & COMP. L. REV. 267, 270 (2007) (arguing that this “racial democracy” ideology has actually been harmful to Afro-Brazilians, both disadvantaging their attempts to challenge discrimination in the courts, and handicapping their collective efforts to develop a broader grass-roots movement for racial equality). INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, PESQUISA NACIONAL POR AMOSTRA DE DOMÍCIOS: SÍNTESE DE INDICADORES 2014 [NATIONAL SURVEY ON HOUSEHOLD SAMPLES: SYNTHESIS OF INDICATORS 2014] 71 (2015) (Braz.).

76. At the lower end of the wage spectrum, for example, only 21.1% of the occupied men earned the Brazilian minimum wage, whereas that rate was 29.8% for women. *Id.*

77. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN LABOR FORCE: A DATABASE REPORT 1049, 2 (2014).

78. Women with up to 8 years of schooling earn 71.4% of men’s wages, but that ratio is 68.7% for 9–11 years of education, and 66.1% for 12 or more years of education. ANA LUCIA SABOIA, CAPACITAÇÃO PARA OS MECANISMOS DE GÊNERO NO GOVERNO FEDERAL [TRAINING FOR GENDER MECHANISMS IN THE FEDERAL GOVERNMENT], LIGUE 180 CENTRAL DE ATENDIMENTO À MULHER [LEAGUE 180 SERVICE CENTER FOR WOMEN] 57 (1st ed., 2014) (Braz.); *see also* LÉA ELISA SILINGOWSKI CALIL, DIREITO DO TRABALHO DA MULHER: A QUESTÃO DA IGUALDADE JURÍDICA ANTI A DESIGUALDADE FÁTICA [WOMEN’S LABOR LAW: THE QUESTION OF LEGAL EQUALITY AGAINST FACIAL INEQUALITY] 110–11 (2007). Such trend does not occur in the United States, where women with less than a high school diploma earn 76% of what men do, but women with a high school diploma or more earned 78% of men’s compensation. U.S. DEP’T OF LABOR, *supra* note 77, at 59–60.

Explanations for the wage gap in Brazil are not clear. Common sense would suggest that cheap child-care and paid pregnancy leave would reduce the disadvantages of Brazilian women in the workplace, thereby reducing the wage gap.<sup>79</sup> However, the smaller wage difference in United States—where such benefits are not mandated by law—negates such an assumption.<sup>80</sup> While examining “family life” variables, a commentator found that maternity or marriage, by itself, was not as determinant as the hours actually spent performing domestic tasks, which disproportionately burden women and greatly affect income.<sup>81</sup> In 2003, Brazilian women dedicated a weekly average of 24 hours to domestic tasks—while men, only 10 hours.<sup>82</sup> In 2012, this burden was slightly smaller, with 21 weekly hours for women and the same 10 hours for men.<sup>83</sup> Those hours reflect the gender roles perpetuated in Brazilian culture, where it is often the woman’s duty to care for children and the elderly.<sup>84</sup> Even for upper-class women, who generally hire someone else to perform these tasks, this lesser-paid domestic work is performed by another woman, contributing to the wage gap.<sup>85</sup>

Another possible explanation for the wage gap is a horizontal differentiation of work based on the notion of “masculine” or “feminine” jobs in Brazilian culture.<sup>86</sup> Taking college majors as an illustration of such gender-specific job choices, women were 91.3% of the total enrollments in Pedagogy, 82.9% in Nursing, and 80% in Languages—all lesser-paid areas

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79. See *supra* notes 37–38 and accompanying text.

80. See *supra* notes 44–45 and accompanying text..

81. Simone Wajzman, *Gender Roles in Family and Earnings Differences in Brazil*, in INTERNATIONAL POPULATION CONFERENCE 7–8 (2013).

82. *Id.*

83. Maira Covre Sussai Soares & Jadir Soares Junior, *Divisão do Trabalho Doméstico nas Famílias Brasileiras: Influências de Fatores Individuais e das Políticas Públicas* [Division of Domestic Work in Brazilian Families: Influences of Individual Factors and Public Policies], in CONFERENCE: NATIONAL MEETING OF POPULATION STUDIES 5 (2014).

84. See, e.g., Ancelmo Gois & Cláudio Duarte, *Cuidar de Idosos Tira a Mulher do Trabalho* [Caring for the Elderly Takes a Woman Away from Work], O GLOBO (Nov. 15, 2014) (reviewing ANA AMÉLIA CAMARANO, NOVO REGIME DEMOGRÁFICO: UMA NOVA RELAÇÃO ENTRE POPULAÇÃO E DESENVOLVIMENTO? [NEW DEMOGRAPHIC REGIME: A NEW RELATIONSHIP BETWEEN POPULATION AND DEVELOPMENT?]) (2014) (noting that young children, especially up to two years are still a great barrier for women at the labor market, but that the aging of the population adds a new barrier: who will stay home and take care of the elderly, for instance, with Parkinson or Alzheimer).

85. CALIL, *supra* note 78, at 111–12.

86. *Id.* at 108–09.

in Brazil.<sup>87</sup> In contrast, Engineering and Computer Science, usually better-paid areas, proved to be very “masculine,” with only 20.3% and 18.8% of women enrollment in Brazil.<sup>88</sup> Additionally, domestic workers, the least paid workers in Brazil, are almost exclusively women.<sup>89</sup> While 15.5% of workingwomen are domestic workers, only 0.9% of workingmen perform such jobs.<sup>90</sup>

Finally, within the same career or industry there is clearly a vertical wage differential, or the so-called “glass ceiling.” A survey of the 500 largest corporations in Brazil reveals that women do not usually reach the highest positions.<sup>91</sup> At the executive level, only 13.7% are women.<sup>92</sup> That is similar to the United States, where women hold only 14.6% of executive positions at Fortune 500 companies.<sup>93</sup> The survey in Brazil also shows that there is no consistent trend of inclusion for women yet. Although executive level female participation in Brazil rose from 6% (2001) to 13.7% (2010), at the supervision level women fell from 28% (2003) to 26.8% (2010).<sup>94</sup> Finally, the survey shows that there is either a lack of willingness or lack of management awareness about how to deal with such inequality. Though 55% of the surveyed companies’ presidents acknowledged insufficient proportion of women in the executive staff, only 4% of them had policies to incentivize women’s participation.<sup>95</sup> Some presidents credited the low participation of women to the company’s lack of knowledge on how to handle the matter (49%).<sup>96</sup> Others attributed it to the female candidates’

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87. *Id.* In the middle of the spectrum are Social Communication (Journalism and Public Relations), Accounting, Business and Law, these proportions were respectively 56.6%, 50.7%, 49.2% and 41.3% of the numbers of men enrolled. *Id.*

88. *Id.* “Occupational segregation” as to men and women performing different jobs also occurs in the United States. For instance, over 90% of receptionists, dietitians, nutritionists, registered nurses, pre-school and kindergarten teachers are female, and over 90% of electrical and mechanical engineers, firefighters, mechanics, and pest exterminators are male. Kingsley R. Browne, *Mind Which Gap? The Selective Concern over Statistical Sex Disparities*, 8 FIU L. REV. 271, 281 (2013).

89. CALIL, *see supra* note 78, at 108–09.

90. *Id.*

91. INSTITUTO ETHOS [ETHOS INSTITUTE], SOCIAL, RACIAL AND GENDER PROFILE OF THE 500 BRAZILIAN LARGEST COMPANIES AND THEIR AFFIRMATIVE ACTIONS I, 8 (2010).

92. *Id.* at 11.

93. *The 2013 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners*, CATALYST (Dec. 10, 2013), <http://www.catalyst.org/knowledge/2013-catalyst-census-fortune-500-women-executive-officers-and-top-earners>.

94. INSTITUTO ETHOS, *supra* note 91, at 12.

95. *Id.* at 26, 30.

96. *Id.* at 30.



lack of professional qualification for the position (42%) and to women's lack of interest for the positions (9%).<sup>97</sup>

Therefore, gender-based employment discrimination in Brazil, despite not being significantly litigated, occurs in proportions equivalent or superior to those of the United States. Then, why is it that these cases do not even reach the courts? Part IV will take a closer look.

#### IV. WHY ARE ANTI-DISCRIMINATION LAWS RARELY LITIGATED?

Part III negatively answered the question as to whether Brazilian law effectively prevents discrimination from happening. Although rarely litigated, gender discrimination does exist in numbers equivalent or superior to those of the United States. If this is the case why are gender discrimination cases rarely litigated in Brazil? Though the answer is not clear, this paper argues four possible explanations for the issue:

- (A) There are other easier-to-litigate causes of action with satisfactory remedies;
- (B) The lack of more aggressive truth-finding procedures hinders the uncovering of essential evidence;
- (C) Money judgments are proportionally smaller than in the United States and may not compensate litigating the more complex cases; and
- (D) The current statutory text and the lack of binding precedent limit the litigation possibilities.

##### *A. Brazilian Legislation Grants Other Easier-to-Litigate Causes of Action with Reasonable Remedies, Thereby Reducing the Incentives for Filing a More Complex Claim of Gender Discrimination*

While some cases in the United States would be litigated as employment discrimination claims, the same cases in Brazil may be brought under other more straightforward causes of action, without having discriminatory intent. This subsection uses sexual harassment due to the abusive environment and the discriminatory discharge of a pregnant woman as examples.

In the United States, in order for a plaintiff to succeed in a sexual harassment suit due to an abusive work environment there must be a sufficiently severe or pervasive conduct which offends a reasonable person, and the conduct was actually perceived as abusive by the plaintiff, affecting

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97. *Id.*

her terms of employment because of her sex.<sup>98</sup> In Brazil, abusive environment harassment does not have to be necessarily because of sex but can be brought under a “moral harassment” claim.<sup>99</sup> This claim has been defined as systematic and frequent psychological violence where someone tends to isolate the victim through humiliation, undermining his or her reputation and confidence.<sup>100</sup> It does not only involve action by superiors, but even among colleagues, and the goal is usually to compel the victim to resign, retire, take a sick leave or ask for a transfer.<sup>101</sup> Because it is a broader and easier to establish cause of action, “moral harassment” has been litigated in Brazil nine times more than discriminatory discharge, and thirty times more than sexual harassment.<sup>102</sup>

As to the discriminatory discharge of a pregnant woman, in the United States there is no job security during pregnancy and relief depends on the ability to prove discriminatory intent.<sup>103</sup> Proving discriminatory intent in the United States may be a daunting task. Many of the plaintiffs fail in summary judgment, where courts often ignore evidence of explicit bias, or “search for explicitly discriminatory policies and rogue actors [...],” which is a rare paradigm in the twenty-first century.<sup>104</sup> Evidence that an action was taken “because of” gender bias is usually circumstantial.<sup>105</sup>

On the other hand, in Brazil there is almost an automatic win without the need to go through the intricacies of discriminatory intent.<sup>106</sup> A pregnant woman may not be discharged without cause from the date that

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98. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); *but see* David C. Yamada, *The Phenomenon of Workplace Bullying and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000) (explaining the harms of workplace harassment in general and proposing a status-blind ban).

99. *See, e.g.*, TRT-3 [Tribunal Regional do Trabalho da 3ª Região] [Regional Tribunal of Labour of the 3rd Region], RO 01292.2003,057.03.00.3, Relatora: Des. Alice Monteiro de Barros, DIÁRIO DA JUSTIÇA DE MINAS GERAIS [D.J.M.G.] [Journal of Justice of Minas Gerais] 13 de 11.08.2004 (Braz.).

100. *Id.*

101. *Id.*

102. *See supra* note 63 and accompanying table.

103. *See supra* note 48 and accompanying text; 42 U.S.C. § 2000e(k) (establishing that discrimination “because of sex” includes because of “pregnancy, childbirth or related medical condition . . .”). To establish a *prima facie* case of discrimination, a pregnant woman must show that: “(1) she is a member of a protected class; (2) she was satisfactorily performing her job; (3) she was discharged; and (4) similarly situated persons not in her protected class were treated more favorably or that her position was filled by a person who was not pregnant.” *See, e.g.*, Fulkerson v. AmeriTitle, Inc., 64 F. App’x. 63, 65 (9th Cir. 2003) (citing McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

104. Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 111–12 (2012).

105. *Id.* at 112.

106. *See supra* note 102 and accompanying text..

the pregnancy is confirmed until five months after the birth.<sup>107</sup> If fired at any point during this tenure period, she has the right to reinstatement and back pay.<sup>108</sup> Additionally, if litigation causes such distress that would render reinstatement ill-advised, the employee may waive reinstatement and receive the wages and benefits of the tenure period.<sup>109</sup> As opposed to discrimination litigation, here the employer would not be able to assert a legitimate non-discriminatory reason as a defense.<sup>110</sup> The employer can only defeat such a claim by showing that the firing was based on a serious disciplinary violation, as defined in the law.<sup>111</sup> This may help explain why plaintiffs are four times more likely to sue for reinstatement or front pay based on pregnancy tenure than on discriminatory discharge, even though the discriminatory discharge theory allows for doubled back pay.<sup>112</sup>

*B. The Lack of Aggressive Evidence Gathering Procedures Such as the Ones in the United States Makes It Much More Difficult to Prove Certain Discrimination Claims in Brazil*

Differences as to the evidence gathering process in Brazil and the United States may explain in part why, unless there is a “smoking gun” piece of evidence, discrimination cases are rarely litigated in Brazil. As will be explained, Brazil’s civil procedure provides fewer means to uncover circumstantial evidence, which is sometimes the only kind of evidence available in an employment discrimination case.

In the United States, there are aggressive discovery procedures for the request of documents,<sup>113</sup> of written answers to interrogatories,<sup>114</sup> as well as

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107. ATO DAS DISPOSIÇÕES CONSTITUCIONAIS TRANSITÓRIAS [A.D.C.T.] art. 10, § II(b) (Braz.); Decreto No. 5.452, de 1 de Maio de 1943, CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 391-A de 01.05.1943 (Braz.); *see also supra* note 38.

108. TRIBUNAL SUPERIOR DO TRABALHO [T.S.T], Súmula [Precedent] No. 244, Resolução [Decision] 185/2012, 14.09.2012, DIÁRIO ELETRÔNICO DA JUSTIÇA DO TRABALHO [D.E.J.T.] [Online Journal of Labour Justice] de 27.09.2012 (Braz.).

109. Decreto No. 5.452 C.L.T. art. 496 (Braz.).

110. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803 (1973).

111. Decreto No. 5.452 C.L.T. art. 482 (Braz.) (explaining those violations are: (a) acts of dishonesty; (b) incontinence of conduct or wrongdoing; (c) unfair competition against the employer; (d) criminal conviction; (e) negligence; (f) habitual intoxication or intoxication during working hours; (g) violation of trade secrets; (h) indiscipline or insubordination; (i) job abandonment; (j-k) verbal or physical offenses, except in self-defense or defense of others; (l) constant gambling).

112. *See supra* note 63 and accompanying table; Lei No. 9.029, de 13 de Abril de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 4, § II de 17.4.1995 (Braz.).

113. At the federal level, *see* FED. R. CIV. P. 33.

114. *See id.* Although not very suitable for truth finding, interrogatories may be useful to narrow down factual disputes, saving time and focusing discovery.

long attorney-led depositions.<sup>115</sup> All of these discovery methods increase the likelihood of uncovering the truth. They are enforced by possibly harsh procedural sanctions, including contempt of court, disciplinary procedures prosecuted by the Bar before the courts, and perjury prosecutions.<sup>116</sup> Thus, there are strong incentives to comply with discovery requests, to turn over to the other party even the most damaging documents, and to tell the truth in interrogatories or depositions.

In Brazil, there is less enforcement of this truth-finding process. Successful perjury convictions are rare, as police departments' and prosecutors' scarce resources are not prioritized for the prosecution of perjury, and courts have developed lenient precedents as to perjury to manage overburdened dockets.<sup>117</sup> Parties in Brazil are not considered witnesses, and thus cannot even be prosecuted for perjury.<sup>118</sup> There is also no imprisonment for contempt of court.<sup>119</sup> Parties that lie might be fined as bad-faith litigants, but even these procedural sanctions are not sufficiently high<sup>120</sup> and they are often reversed in the appellate courts, which review them *de novo*.<sup>121</sup> Such features cause a low level of deterrence, allowing an undesirable lack of candor. Additionally, there are no pre-trial out-of-court attorney-led depositions, but only much shorter inquiries by the judge at trial.<sup>122</sup> This process may be useful to prove a party's case, but rarely uncovers previously unknown information. Finally, it is unusual for

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115. See *id.* 30(d)(1) ("a deposition is limited to 1 day of 7 hours"). In hours of inquiry, exploring contradictions the witness and her fear of committing perjury, an American attorney may discover substantial information that would not surface otherwise.

116. See FED. R. CIV. P. 11, 37; see, e.g., Brian D. Burgoon, *The Bar's Procedure for Investigating and Prosecuting Disciplinary Complaints*, FLA. BAR NEWS (Feb. 1, 2014), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/cb53e80c8fabd49d85256b5900678f6c/aed382f8abe1ac7385257c670048bb12!OpenDocument>.

117. Observations based on anecdotal experience, as a Judge in Brazil.

118. CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 447, § 2, II de 3.2016 (Braz.).

119. See generally C.P.C.; see also [C.F.] [CONSTITUTION] art. 5, LXVII (Braz.) ("there shall be no civil imprisonment for debt, except for a person who voluntarily and inexcusably defaults on a support obligation").

120. C.P.C. art. 81 (Braz.) (a fine between 1 and 10% of the amount in controversy, plus proven damages and attorney's fees incurred by the other party, costs that, in Brazil, are usually not high enough to deter bad-faith litigation).

121. C.P.C. arts. 1012–13; see also Pritsch, *supra* note 64 at 60.

122. C.P.C. arts. 450–53. In the labor courts' procedure, parties may hear three witnesses each, in a schedule that usually will contain three to five trials in a same afternoon. *Id.*; Decreto No. 5.452, de 1 de Maio de 1943, CONSOLIDAÇÃO DAS LEIS DO TRABALHO [C.L.T.] art. 821 de 01.05.1943 (Braz.) Thus, witnesses may be heard in as little as five minutes or up to an hour in extreme cases. This system, thus, does not allow attorneys to use witnesses to uncover new information, but only to present to the judge evidence to support their case. See C.P.C. arts. 450–53.

attorneys to be sanctioned for litigation misconduct directly by the respective judge, who may report it to the Bar.<sup>123</sup>

Considering these differences in the truth-finding process in both countries, one may understand why Brazil has not yet had many gender discrimination cases, where evidence is usually scarce and in the employer's possession. For instance, it is unlikely that a sex-based stereotyping case as *Price Waterhouse v. Hopkins*<sup>124</sup> would be successfully litigated in Brazil. In *Hopkins*, remarks of the employer's partners—that the plaintiff had to take “a course at charm school,” or to dress femininely and wear makeup—were key to the courts.<sup>125</sup> Similar were the partners' evaluations describing her as “macho” or suggesting that she was “overcompensated for being a woman.”<sup>126</sup> In Brazil, relying on probable impunity, employers would likely withhold or deny the existence of documents containing such damaging statements.

### *C. Smaller Judgment Awards in Brazil May Not Outweigh the Litigation Costs of the More Complex Discrimination Cases*

Another factor that might contribute to the low numbers of gender discrimination litigation in Brazil is the lower amount of judgment awards in comparison to the United States. These lower judgments provide lesser incentives to litigate the more complex discrimination cases. For instance, in RR 11184048.2007.5.05.0020, the court voided the for-cause discharge of an employee with pregnancy complications, which had been harassed because of her condition and later discharged based on pre-textual

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123. There is a trend, based on the language of the C.P.C. enacted in 2016, art. 77, paragraph 6 (parties and attorneys have a duty to faithfully comply with judicial orders and to not create obstacles to compliance) to make attorneys jointly liable to pay for bad-faith litigation fines. C.P.C. art. 77. However, attorney discipline in Brazil is still a question to be treated exclusively by the Bar. *Id.*

124. Plaintiff Ann Hopkins was a senior manager at Price Waterhouse accounting partnership when she was considered for partnership, in 1982. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989). Because her candidacy was put on hold for reconsideration, and because in the following year she was not reconsidered for partnership, she sued under Title VII charging that she had been discriminated against on the basis of sex. *Id.* The District Court found for the plaintiff, reasoning that the employer made such decisions consciously giving effect to partners' evaluations based on sex stereotyping, and the Court of Appeals affirmed. *Id.* The Supreme Court held that that when a plaintiff proves that gender was a motivating factor of the decision, defendant may avoid liability by showing by a preponderance of the evidence it would make the same decision irrespective of the plaintiff's gender. *Id.* at 260. The Court reversed and remanded only because the lower courts had decided that defendant had to make such proof by clear and convincing evidence. *Id.*

125. *Price Waterhouse*, 490 U.S. at 233, 256.

126. *Id.* at 233.

negligence.<sup>127</sup> The appellate court found that the employer's harassment was intended to coerce her to waive pregnancy tenure by resignation, and awarded her \$50,000 in damages and back pay.<sup>128</sup> The highest labor court (T.S.T.) doubled the back pay, recognizing that her discharge was discriminatory.<sup>129</sup> While statistics as to the judgment and settlement awards for gender discrimination in Brazil are not available, this author's own experience shows that this case is on the higher end of the spectrum.

In contrast, in the United States, such an award would be on the lower end. According to the search engine Westlaw Next, there were 430 sexual harassment cases with judgments or settlements up to \$50,000.<sup>130</sup> However, such search engine listed 1,389 cases which had judgments or settlements above that amount, including 105 cases between \$1–2 million, 78 cases between \$2–5 million, and 44 cases over \$5 million.<sup>131</sup> For instance, in *Ingraham v. UBS Fin. Servs.*, the company retaliated against an employee and eventually discharged her after she complained about being sexually harassed by her superior.<sup>132</sup> The jury awarded her \$350,000 damages on the sexual harassment claim, \$242,000 damages on the retaliation claim, as well as an additional \$10,000,000 in punitive damages on the retaliation claim.<sup>133</sup>

#### *D. Limitations of the Current Statutory Text and the Lack of Binding Precedent in Brazil*

In Brazil, another factor that hinders the development of gender discrimination litigation might be its more limited statutory protection in relation to the United States, and the lack of binding effect of case law. In comparing the anti-discrimination statutory provisions in Brazil and the United States, one may notice that the Brazilian legislation provides a

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127. RR 11184048.2007.5.05.0020, Relator: Min. Alexandre Agra Belmonte, TRIBUNAL SUPERIOR DO TRABALHO JURISPRUDÊNCIA [T.S.T.J.] de 13.11.2013 (Braz.), <https://consultortrabalhista.com/decisoes-trabalhistas/tst-embargos-de-declaracao-em-recurso-de-revista-empregada-gestantedispensa-discriminatoria-percepca/>.

128. *Id.*

129. *Id.*; Lei 9.029, de 13 de Abril de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 4 de 13.4.1995 (Braz.) (citing Brazilian law awards doubled back pay when an unlawful discharge results from discrimination); see Labor & Employment Jury Verdicts & Settlements, WESTLAW NEXT (Apr. 18, 2015).

130. Labor & Employment Jury Verdicts & Settlements, see *supra* note 129.

131. *Id.*

132. See generally Verdict and Settlement Summary, *Ingraham v. UBS Fin. Servs.*, 2011 WL 232381 (Mo. Cir.).

133. *Id.*

narrower scope of protection, even though it does not limit the protected classes to the expressly listed ones.<sup>134</sup> The Brazilian statutes on point are less detailed than Title VII and do not expressly mention any equivalent to a disparate impact theory of employment discrimination.<sup>135</sup> That might be the reason why the cases that reach the Brazilian courts are either the ones literally covered in some statutory provision (often not requiring discriminatory intent), or the ones involving obvious discrimination.<sup>136</sup>

Additionally, even though Brazilian judges may interpret and apply the existing provisions in creative manners, as the circumstances require,<sup>137</sup> such decisions have had a smaller reach because they were usually not binding on lower courts.<sup>138</sup> In contrast, the United States' judicial decisions have a strong impact on shaping social behavior, as they bind lower judges for future cases, advising society of what is legal and what is not. These decisions receive significant public attention and sometimes even provoke the intervention of the legislator.<sup>139</sup> Employment discrimination case law has added many layers to the Title VII provisions, to the point that

134. See *supra* note 136–43 and accompanying text.

135. See *supra* Part II, Section B.

136. See *supra* notes 106–12 and accompanying text. For example, in RR 106240071.2005.5.09.0005, the T.S.T. affirmed the regional decision finding that the discharge of an employee because of her family responsibilities with her young child, was discriminatory. RR No. 106240071.2005.5.09.0005, Relator: Min. Fernando Eizo Ono, TRIBUNAL SUPERIOR DO TRABALHO JURISPRUDÊNCIA [T.S.T.J.] de 30.11.2011, <https://consultortrabalhista.com/decisoes-trabalhistas/tst-embargos-de-declaracao-em-recurso-de-revista-empregada-gestante-dispensa-discriminatoria-percepca/> (reasoning that the employer dismissed the complaint based on the unsupported assumption that her performance could be compromised by motherhood, unfairly withdrawing her means of support in the moment most needed). The court affirmed the reinstatement of the employee even though the period of job security due to pregnancy had already lapsed, finding that the real issue was the discriminatory motivation of the discharge based on her family status. *Id.* Family status is an expressly protected class. See Lei No. 9.029, de 13 de Abril de 1995, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 1, 17.4.1995 (Braz.).

137. “[I]n Brazil it is not possible to find entire bodies of law created by judges in the vacuum of statutory rules, such as in the common law countries.” See Pritsch, *supra* note 64 at 91. However, “[t]he French Revolution’s dogma that the Judiciary branch should only apply—and not interpret—the law designed by the Legislative branch has long been proven impracticable and abandoned. *Id.* “[J]udges are expected to ensure full normative force to the constitutional principles, using them to fill statutory gaps, to interpret the existing statutes, or to find those statutes unconstitutional. *Id.* (citing Barroso, *supra* note 14, at 356).

138. Pritsch, *supra* note 64 at 85. That has traditionally been the rule in Brazil. However, to reduce the massive overburden on the courts, judicial reforms in the last years have progressively introduced binding precedents. Such trend may dramatically increase after 2016, when a new Code of Civil procedure came into effect, attributing binding effect to *en banc* decisions and to some other important types of precedents. *Id.* All panel decided cases, however, remain as merely persuasive precedent. See *id.*

139. See, e.g., THE CIV. RIGHTS ACT of 1991.

employment discrimination outgrew employment law, being offered as a separate course at law schools and earning separate casebooks.<sup>140</sup>

This richness of information in American employment discrimination law likely provides better guidance about the law and litigation perspectives to employers, employees and legal professionals, in sharp contrast to the course this type of law has been taking in Brazil. Part of this situation may change due to the new Brazilian Code of Civil Procedure, effective in March 2016, which has introduced in the Brazilian legal system a binding effect to some types of appellate decisions.<sup>141</sup> As it happens in the United States, with time, the judicial resolution of concrete cases tends to enrich the existing law, offering added guidance to prospective parties and legal professionals. Nevertheless, more has to be done to reduce gender discrimination in Brazil, as this paper discusses in Part V.

#### V. WHAT TO DO ABOUT IT? NEW LEGISLATION, PUBLIC PROSECUTORS' INVESTIGATIONS, AND INFORMATION CAMPAIGNS

In light of the shortcomings described above, this article proposes three actions to help reduce gender discrimination in Brazil using the corresponding judicial remedies: the enactment of new legislation, the increased use of the public prosecutors' investigatory powers, and information campaigns.

As to statutory change, the prospective legislation mentioned in Part II-C could be a good alternative. It provides more detailed and complete treatment of workplace discrimination, including an equivalent to the disparate impact theory<sup>142</sup> and workplace bullying,<sup>143</sup> affirmative actions,<sup>144</sup> and policies for balanced family responsibilities.<sup>145</sup> It also deters discrimination by the denial of public financing and publication of a discriminatory employer's list,<sup>146</sup> and creates equality commissions within each mid-size and large employer.<sup>147</sup> Such statutory scheme, along with the forthcoming introduction of binding precedents in Brazil would create tools to litigate gender discrimination more akin to the ones available in the

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140. See generally 42 U.S.C. § 2000e-2 (2012).

141. CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 489, § 1, VI, art. 927 de 16.3.2015 (Braz).

142. Lei No. 6.653, de 15 de Dezembro de 2009, PROJETO DE LEI [P.L.] art. 4. de 16.12.2009 (Braz.)

143. *Id.* art. 27.

144. *Id.* art. 2, ¶ 3, art. 3.

145. *Id.* art. 5.

146. *Id.* arts. 23–24.

147. Lei No. 6.653, P.L. art. 34 (Braz.).



American legal system.<sup>148</sup> That could increase the numbers and efficacy of gender discrimination litigation in Brazil.

Another possible course of action could be the increased focus of public prosecutors in the area of gender discrimination. The Brazilian law grants prosecutors, even in civil matters, special investigatory powers not held by private attorneys.<sup>149</sup> Public prosecutors' requests for documents are equivalent to a court order, subjecting a noncompliant party to prosecution for criminal contempt.<sup>150</sup> Additionally, prosecutors may subpoena a witness for an out-of-court deposition under oath, a power also not held by private attorneys in Brazil.<sup>151</sup> Therefore, the odds of uncovering a specific employer's acts or policies showing a disparate impact, as well as obtaining any damaging documents, are much greater through public prosecutors. Possessing such information, prosecutors may have leverage to enter into a consent decree with such employer or to prosecute a successful class action.<sup>152</sup>

Finally, educational campaigns reaching employees and employers could improve awareness about what constitutes gender discrimination and its legal consequences. The rarity of litigation, despite considerable gender discrimination in Brazil, shows the limitations of the current system. The mere existence of anti-discrimination law has not been enough to change the workplace culture. It has not placed possible plaintiff-employees on notice of all forms of discrimination. These employees might not even recognize some forms of discrimination, such as seeing as acceptable the discretionary promotion of men at much higher rates than those of women.<sup>153</sup> Additionally, the mere existence of the current anti-discrimination legislation has not been sufficient to change employers' attitudes towards gender discrimination. Most employers do not even know how to deal with the issue of gender discrimination.<sup>154</sup>

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148. *See id.* art. 5.

149. Lei Complementar No. 75, de 20 de Maio de 1993, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] art. 8, II, IV, § 3, de 21.5.1995 (Braz.).

150. *Id.* art. 8, II, IV, § 3.

151. *Id.* art. 8, I, IX, § 3.

152. Sérgio P. Marçal & Lucas Pinto Simão, *Brazil: The Class Actions Law Review – Edition 1*, L. REVS. (May 2017), <http://thelawreviews.co.uk/edition/the-class-actions-law-review-edition-1/1141375/brazil> (explaining that Brazilian class actions may not be filed by individual class representatives, but only by associations, unions, public defender's office, government or prosecutors).

153. Telephone Interview with Fabiano Holz Beserra, then Chief-Prosecutor of the Procuradoria Regional do Trabalho da 4ª Região [Labor Prosecutors' Office for the 4th Region] (Mar. 9, 2015).

154. *See supra* Part III, Section B.

Gender equality could be improved through education. Campaigns about the promotion of gender equality and the corresponding legal tools to enforce it could be promoted by the Brazilian Ministry of Labor, the Prosecutor's Office, the Judiciary, unions, and all organizations and agencies involved in the promotion of equality in the workplace. This could disseminate and increase the information about gender discrimination as well as contribute decisively to the enforcement of anti-discrimination laws in Brazil.

## VI. CONCLUSION

Even though workplace rights in Brazil have prominence, employment discrimination litigation is almost nonexistent, in sharp contrast to what happens in the United States. Why is that so? The problem of gender discrimination in Brazil does exist, despite its anti-discrimination laws. Brazil does have constitutional and statutory provisions that promote equality and explicitly outlaw discrimination at the workplace, including gender discrimination. However, employment discrimination claims in Brazilian federal courts are eight times less than in the United States, and gender discrimination claims are twenty-five times less than in the United States.<sup>155</sup> That does not mean that, in Brazil, discrimination on the basis of gender is less of a problem than in the United States. Women in Brazil earn only 73.7% compared to men, despite being more educated than men.<sup>156</sup> In the United States, that ratio is 81%.<sup>157</sup> Within this scenario, this paper proposes four explanations for the relatively lower numbers of gender discrimination suits in Brazil.

First, cases in the United States that would be litigated as employment discrimination claims may be brought in Brazil under more straightforward causes of action, without the daunting task of showing discriminatory intent. For example, in the United States, sexual harassment due to an abusive work environment must be "severe or pervasive" from an objective and subjective standpoint.<sup>158</sup> Additionally, it must affect the conditions of employment because of the plaintiff's sex.<sup>159</sup> In Brazil, abusive work environment harassment is illegal *per se*, regardless of the relation to the victim's gender.<sup>160</sup> In addition, a Brazilian pregnant woman has tenure until five months after birth or else she will be entitled to choose

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155. See *supra* notes 64–72 and accompanying text.

156. See *supra* notes 74–78 and accompanying text.

157. See *supra* note 77 and accompanying text.

158. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

159. *Id.*

160. See *supra* note 99–102 and accompanying text.

reinstatement and back pay, or the wages and benefits of the entire tenure period.<sup>161</sup> Even though the proof of discriminatory intent to the discharge may double the back pay amount, it is not essential to prove it, as it is in the United States.<sup>162</sup>

Second, the lack of more aggressive truth-finding procedures such as those available in the United States makes it more difficult to prove discrimination cases in Brazil. As a result, unless there is a “smoking gun” piece of evidence, discrimination cases are rarely litigated. In the United States, discovery procedures for the request of documents, interrogatories, and depositions are enforceable by harsh procedural sanctions, contempt of court, perjury prosecutions, and by attorney disciplinary procedures prosecuted by the Bar before the courts.<sup>163</sup> In Brazil, there is less enforcement of the truth-finding process, as successful perjury convictions of witnesses are rare, and there is no imprisonment for contempt of court.<sup>164</sup> Sanctions are lower than in the United States, and Brazilian judges may not directly apply them to attorneys, whose exclusive disciplinary forum is the Bar, without supervision by the courts.<sup>165</sup> All of this lowers deterrence and allows for an undesirable lack of candor or withholding of damaging documents. Further, because there are no depositions, but only shorter testimonies heard at trial, they are less likely to uncover all of the necessary facts.<sup>166</sup>

Third, another factor that might contribute to the low numbers of gender discrimination litigation in Brazil is the significantly lower value of judgment awards in relation to the United States.<sup>167</sup> This likely provides insufficient incentives to litigate the more complex gender discrimination cases in Brazil. For instance, while a \$50,000 judgment for gender discrimination in Brazil would be at the higher end of the spectrum, in the United States such an award would be in the lower end. Most of the judgments or settlements in such cases exceed \$50,000, and many surpass \$2–5 million.<sup>168</sup>

Fourth, the more limited statutory protection in Brazil, compared to the United States, and the lack of binding effect of case law, hinder the development of gender discrimination litigation. The Brazilian legislation provides a narrower scope of protection, despite its non-exhaustive

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161. See *supra* notes 37–40 and accompanying text.

162. See *supra* note 112, 136 and accompanying text.

163. See *supra* note 116 and accompanying text.

164. See *supra* notes 117–20 and accompanying text.

165. See *supra* note 123 and accompanying text.

166. See *supra* note 122 and accompanying text.

167. See *supra* notes 127–33 and accompanying text.

168. See *supra* notes 130–33 and accompanying text.

protected class list.<sup>169</sup> The Brazilian provisions are less detailed than Title VII, and do not expressly outlaw disparate impact discrimination.<sup>170</sup> Additionally, judicial decisions in Brazil are usually not binding on lower courts.<sup>171</sup> Therefore, they do not add new layers to anti-discrimination provisions in the way that the United States Supreme Court's decisions have done for the past few decades.<sup>172</sup> As a result, the American employment discrimination law likely provides better guidance about the law and litigation perspectives to employers, employees and legal professionals. That may change, in part, when the new Brazilian Code of Civil Procedure became effective, after March 2016, introducing into the Brazilian legal system a binding effect to all appellate case law.<sup>173</sup>

As possible courses of action to address such problems, this paper proposes the enactment of new legislation, the increased use of the Brazilian public prosecutors' special investigatory powers, and information campaigns.

There is a bill waiting to be voted on at the Brazilian Congress since 2009, which could be a good alternative. It provides a more comprehensive treatment of workplace discrimination, regulating in some detail disparate impact, workplace bullying, affirmative actions and family responsibilities policies, and creating equality commissions within each mid-size and large employer.<sup>174</sup> Along with binding precedents recently introduced into Brazilian law, the enactment of such bill could provide a better legal support for gender discrimination litigation in Brazil.

As to public prosecutors, the Brazilian law grants them special investigatory powers not held by private attorneys—they may order the production of documents and subpoena witnesses for an out-of-court deposition under oath.<sup>175</sup> Their likelihood of uncovering, for example, a specific employer's acts or policies that generate disparate impact, or of obtaining key documents held by the employer, is much greater than that of private attorneys. Therefore, the focus of public prosecutors in gender discrimination claims could be very useful to increase gender equality in Brazil.

Finally, the educational campaigns reaching employees and employers could improve awareness about what constitutes gender discrimination and its legal consequences. The mere existence of the anti-discrimination law

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169. *See supra* note 134 and accompanying text.

170. *See supra* note 135 and accompanying text.

171. *See Pritsch supra* note 64, at 85 and accompanying text.

172. *See supra* note 137–40 and accompanying text.

173. *See Pritsch supra* note 64, at 85 and accompanying text.

174. *See supra* notes 142–48 and accompanying text.

175. *See supra* notes 149–52 and accompanying text.

has not been enough to change the workplace culture. Employees often do not recognize some forms of gender discrimination, and most employers do not even know how to deal with the issue. Campaigns about the promotion of gender equality and the corresponding legal tools to enforce it could disseminate and increase the relevant information and contribute decisively to the enforcement of the anti-discrimination laws in Brazil.

