Harassment, in a broad sense—*moral and sexual*—and its consequences on labor relations

Although sexual harassment is consistently in the news today, the topic of workplace misconduct is much broader. It encompasses general harassment and other misconduct typically experienced by employees at the hands of their managers, including judges, as well as their peers. Harassment is broadly defined as unwelcome physical, verbal, non-verbal, and psychological behavior that interferes with work performance or the work environment. Examples of harassment include offensive jokes, name-calling, disparaging comments, displaying inappropriate images, unwelcome sexual advances, and inappropriate touching.

Workplace misconduct is a universal problem that causes serious harm to those subjected to it. There is much to be gained by exploring what causes such misconduct to persist, what actions can prevent such misconduct, and what consequences violators should bear. Discussing how to break down barriers to reporting this misconduct, such as limitations on confidentiality, is also paramount.

Questions:

1. Does your country have laws or regulations that cover workplace harassment? Is harassment defined separately or is it incorporated within other provisions of the labor code?
Moral Harassment

The Consolidation of Labor Laws - CLT (1943), equivalent to the Brazilian Labor Code, does not have specific concept or discipline of moral harassment. Moral harassment is not a crime in Brazil, but constitutes an unlawful act. Brazilian federal legislation does not define moral harassment. There are, however, many legal provisions on the subject.

The Constitution of the Republic of Brazil (1988) is founded on the dignity of the human person (art. 1st, III) and establishes the fundamental rights to health (art. 6th) and the protection of privacy, honor and image, ensuring compensation for moral or material damage resulting from its violation and prohibiting degrading treatment (art. 5th, V and X). The Civil Code (2002) guarantees compensation for moral damages (arts. 186 and 927). The Consolidation of Labor Laws, after a recent reform (2017), began to discipline the moral damage: an action or omission that offends the moral or existential sphere of the physical person, being legally protected assets honor, image, freedom of self-esteem, sexuality, health, leisure and physical integrity (arts. 223-A, 223-B, 223-C).

These norms are largely used by judges law to ensure protection against moral harassment in the workplace. The concept of bullying developed by the French researcher Marie-France Hirigoyen is widely used in Brazilian jurisprudence: "any abusive conduct (gesture, word, behavior, attitude ...) that attempts, by its repetition or systematization, against dignity or integrity psychic or physical condition of a person, threatening their employment or degrading the work climate."

Brazilian federal legislation has been progressively addressing harassment (moral and sexual) in sparse provisions:

1) Decree 1973/1996 promulgates the "Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women" (1994), whose art. 2nd considers that violence against women includes physical, sexual and psychological violence and includes, among other forms, "sexual harassment in the workplace", while art. 4th guarantees respect for the physical, moral and mental integrity of the woman. Being a human rights norm, the jurisprudence of the Brazilian Supreme Court would attribute to this law supraregional status.


3) Federal Law 11.948 / 2009 prohibits the granting or renewal of loans or financing by the National Development Bank (BNDES) to private companies whose directors are convicted of "moral or sexual
harassment." Budgetary laws successively established similar fences to official development finance agencies in general.

4) The Federal Law 13.185 / 2015 creates the "Program to Combat Systematic Intimidation (Bullying)." The law defines the concept of bullying and cyberbullying extensively. The program is essentially addressed to promote actions by education agencies.

5) Legislative Decree 172/2017 approves the text of the Convention on Decent Work for Women Workers and Domestic Workers (ILO Convention 189, 2011), whose art. 5th requires the signatories to take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence. The minimum status assured in Brazil to this norm is federal law.

6) Resolution of the Chamber of Deputies 27/2018 establishes the Committee for the Defense of Women against Moral or Sexual Harassment within the Chamber of Deputies.

7) Decree 9.571 / 2018 establishes the National Guidelines on Business and Human Rights. It determines to medium and large companies the responsibility for creating mechanisms to report harassment, among others (art. 10). This decree has infralegal status in Brazil.

There are, finally, municipal and state laws regarding bullying. Some of these laws have extensive lists of acts that configure the illicit, such as in the State of Minas Gerais and in the Municipality of Salvador / Bahia.

**Sexual harassment**

Sexual harassment is a crime in Brazil punished with detention of 1 to 2 years, increased by up to 1/3 if the victim is under 18 years. The art. 216-A of the Brazilian Penal Code defines sexual harassment as "Constrain someone with the purpose of obtaining advantage or sexual favor, prevailing the agent of his condition of hierarchical superior or descent inherent to the exercise of job, position or function". The definition is directly related to the workplace. This criminal definition combined with the rules and principles relating to moral harassment are commonly used in the civil sphere.

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<tr>
<th>Crime</th>
<th>Moral harassment</th>
<th>Sexual harassment</th>
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<tbody>
<tr>
<td>Legal definition</td>
<td>Not in the labor code or in the federal law.</td>
<td>In the criminal law (federal), but also used in civil sphere.</td>
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<tr>
<td>Legal provisions</td>
<td>Federal, state and municipal laws.</td>
<td>Essentially, federal law.</td>
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2. What remedies exist for reporting workplace misconduct? What penalties or ramifications of the offenders face? Do you have examples of court cases / judgments or administrative proceeding involving harassment?

There is significant volume of governmental and civil initiatives to combat the moral and sexual harassment at work in Brazil. Public and private entities, including in collaboration with the International Labor Organization, have specific websites and publish various guidance books against harassment at work.

Within the private sector, complaints can be directed to professional unions, civil entities for human rights and medical councils. Typically they have websites on the Internet, including an anonymous reporting option. In the internal scope of larger companies, it is also possible to report to the occupational health and safety bodies.

In the public sphere, it is possible to report to: Federal Labor Inspection and Safety and Health Services (from the extinct Labor Ministry), Labor Prosecutor’s Office and Committees or Commissions on Human Rights (usually linked to legislative powers). There are usually ways to promote anonymous reporting via the Internet. Complaints can be made directly by the victims or by civil society entities, such as professional unions.

Complaints tend to result in investigation or inspection procedures in the workplace. Entities of the Public Administration usually have Ombudsmen and Internal Comptroller for denunciations, including for acts of harassment. In the judicial sphere, there are successive control bodies: Ombudsmen, Court Comptrollers and also the National Council of Justice, which is responsible for the control of the administrative action of the Judiciary and the fulfillment of the functional duties of Judges. These bodies have various means of denouncing the practice of illicit activities in the judicial sphere. In the case of the crime of sexual harassment, it is also possible to denounce to the police and to the Public Prosecutor's Office. Brazil has Police Stations dedicated to the investigation of crimes against women, known as the Women's Police Stations.

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<th>Sector</th>
<th>Reporting channels</th>
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<td>Private and public</td>
<td>Professional Unions</td>
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<td>Human Rights</td>
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<td>Protecting Entities</td>
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<td>Medical Council</td>
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<td>Company's Internal Bodies of Health and Safety on Work</td>
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**Extrajudicial penalties**

In the private workplace, the victim of harassment can terminate the labor contract and receive labor indemnity in the event of an employer's action or omission, as it is a serious contractual misconduct of the employer (art. 483 CLT). The offending employee can be dismissed with just cause for committing serious misconduct (art. 482 CLT).

In the public domain, the offending public server or the Magistrate may undergo Disciplinary Administrative Procedure (PAD). Administratively, employees may lose their jobs, while Judges may be compulsorily retired (with a proportional pension).

In both cases are also possible minor penalties, such as warnings or contractual suspensions. Usually, given the seriousness of the cases, the penalty is dismissal with just cause (without compensation).

**Judicial penalties**

Judicial measures may involve the civil (labor), administrative and criminal ambits.

In the civil (labor) sphere, the offender loses his job for committing serious misconduct (art. 482 CLT) and is ordered to pay compensation for moral or material damage resulting from moral or sexual harassment. Although it is not usual, the procedural legislation would allow an urgent order of preventive removal of the work of the offender, if there is previous evidence.

In the public (administrative) sphere, the public servant offensor may lose his public position. A Judge may have the compulsory retirement canceled. The Public Administration responds directly to indemnities arising from moral or sexual harassment committed by public officials and Judges. Public servants are subject to subsequent regressive action brought
by the State in case of malice or negligence (art. 37, § 6, Constitution of the Republic). Magistrates may be held liable in the exercise of their functions only in cases of malice or fraud (Art. 49, I, Complementary Law 35/1979 - Organic Law of the National Judiciary). There is a decision of the Superior Court of Justice framing moral harassment as an act of administrative improbity (Law 8.429 / 92), which implies, in addition to fines, suspension of political rights for three to five years (REsp 1.286.466).

In the criminal sphere, sexual harassment may lead to the detention of the offender. Although moral harassment is not a crime in Brazil, the way in which it is practiced may constitute a crime against honor or against individual freedom. There is no knowledge of convictions with this perspective.

Finally, there are state laws setting pecuniary fines for the practice of bullying by public servants.

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<th>Penalties</th>
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<tr>
<td><strong>Extrajudicial</strong></td>
<td>Dismissal with just cause for private sector workers (without labor indemnity)</td>
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<td>Administrative Disciplinary Process with loss of office/position (public servant) or compulsory retirement (Judges)</td>
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<td>Smaller punishments (suspension, warning)</td>
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<tr>
<td><strong>Judicial</strong></td>
<td>Dismissal with just cause (without labor indemnity)</td>
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<td></td>
<td>Loss of office/position (public servant) or compulsory retirement (Judges)</td>
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<tr>
<td></td>
<td>Indemnity for moral damages (private workers) or compensation for indemnity paid by the State (public servants, for malice and negligence, and Judges, for malice or fraud)</td>
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<td>Administrative improbity with fines</td>
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and suspension of political rights (civil servants and public authorities, including Judges)

Arrest for crime of sexual harassment

Examples of Court Cases and Administrative Proceeding

Cases involving moral harassment are quite common in Brazilian Courts, especially in the Labor Courts (competent for the cases of private sector workers).

Statistics of the National Council of Justice shows that, in year 2018, there were a total of 115,905 lawsuits concerning compensation for moral damages for moral harassment, 4.146 of compensation for moral damages by sexual harassment, 1.712 of sexual harassment crimes and 159 of acts of sexual harassment committed by persons under the age of 18.

There are, therefore, thousands of court cases dealing with the matter. Convictions in the labor branch usually involve moral damages.

Examples of cases judged by the Labor Courts with convictions for damages for moral or sexual harassment [1]:

1) Moral harassment of employee required to attend morning meetings to raise goals, in which prostitutes were present;
2) Moral harassment for being called "worthless";
3) Sexual harassment practiced by salon owner who praised and promoted insinuating comments on the manicure;
4) Sexual harassment is an employee victim of lascivious compliments and invitations to leave promoted by her superior, who started to commit harassment for being rejected;
5) Moral harassment for homophobic offenses practiced against cook by religious chief [2];
6) Racial harassment committed by a colleague, communicated to superiors, who did not take action [3];
7) Sophisticated academic harassment against doctoral teacher [4]: "Every illicit practice tends to adapt to the social environment in which it occurs. It is evident that the instruments of harassment, in an environment of the highest intellectual level, would be adapted to it."

Examples of cases judged by the Common Justice (involving public servants) [5]:
1) Moral harassment for revenge. Practiced against municipal public servant, after complaint made by her of irregularities practiced by the Mayor. She was held in the boardroom for four days, had a month-long forced vacation and had the job threatened. The Mayor was convicted for administrative improbity, with fine and suspension of political rights.

2) Public school teacher sentenced to lose position for sexual harassment of students in exchange for good grades; Proof of sexual harassment is hard to produce, as it usually does not occur in public. For this reason, Labor Judge Ben-Hur Silveira Claus developed the technique of determining psychological expertise to elucidate cases [6]. Judicial practice shows that conciliations often occur before or after the outcome of the judicial examination.

Finally, there are also cases of administrative procedures for moral and sexual harassment by servants, including convictions for loss of office [7]. Normally there is great publicity of the cases of administrative procedures for moral or sexual harassment involving Judges. In judicial and administrative cases, especially in cases of sexual harassment, there may be confidentiality to protect the privacy of victims.

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<th>Harassment cases</th>
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<td>Court judgments</td>
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<td>Administrative cases</td>
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3. Do you have examples of judicial misconduct related to harassment or bullying?

There are cases of administrative and judicial convictions of Judges for moral and sexual harassment. The cases are often ostensibly publicized, including the name of the Judge involved.

Some examples:
1) The National Council of Justice, in administrative disciplinary procedure, temporarily removed from the functions Judge accused of practicing moral and sexual harassment, in denunciation of the Servants' Union. One of the charges was that the judge would have asked for a “bikini photo of the trainee”, using WhatsApp [8].

2) The Court of Justice of Bahía, in administrative disciplinary procedure, temporarily removed from office a Judge accused of asking the servant to kiss him and not respecting servants, lawyers and members of the Public Prosecutor's Office [9].
3) The Court of Justice of Pernambuco compulsorily retired, in administrative disciplinary procedure, a Judge accused of shouting and punishing servants, besides intimidating them with his firearm [10].


4. Does the judiciary have rules, ethics codes, or legislation relating to harassment by judges and judicial staff? What are the procedures for reporting misconduct and enforcing the rules? What sanctions can be imposed against a judge?

Brazil has an Organic Law of the Magistrates (Law 35/79 - LOMAN) and a Code of Ethics of the Judiciary (edited by the National Council of Justice in 2008), as well as legislation regulating the activity of the federal servants (Law 8.112 / 90). Theses laws do not have specific rules for moral or sexual harassment. However, they have general rules of conduct applicable to such cases. The federal public servant has a duty to attend people with civility (article 116, XI, Law 8.112 / 90).

It is the duty of the Magistrate dealing with parts and staff with courtesy and maintain irreproachable conduct in public and private life (art. 35, IV and VIII, LOMAN) and behave with personal and professional integrity, courtesy, honor and dignity (arts. 1, 15, 22 and 37 of the Code of Ethics of the National Magistracy).

The denunciation procedure may follow the same normal channels (union, public prosecutor, etc). The Ombudsmen and, especially, the Court Comptrollers are very active in the investigation of cases of harassment.

Judges can face, accordingly to Law, theses penalties: a) by a final court decision, after two years of magistracy: the loss of the position; b) by administrative procedure: proportional compulsory retirement, function removal with proportional salaries, compulsory removal (displacement to another jurisdiction0, censorship or warning (LOMAN and Constitution of the Republic).

In theory, any of these penalties could be applied to the Judge in cases of moral or sexual harassment, depending on the seriousness of the facts.

The Judge may also be regressively sentenced to reimburse any indemnities to which the State has been convicted (Constitution of the Republic), could have suspended his political rights and could have to pay fines (Law of Improbity). Finally, could also be detained for crime of sexual harassment (Penal Code).
[3] http://www.tst.jus.br/noticias/-/asset_publisher/89Dk/content/id/24286719